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Equal Status Act 2000

EQUALITY OFFICER'S DECISION NO: DEC-S2002-017

**Edward O'Reilly
(Represented by Tallaght Traveller CDP)**

V

The Dragon Inn Pub, Tallaght, Dublin

**File No. ES/2001/407
Date of Issue 11/03/2002**

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Summary of Decision DEC-S2002-017

**Mr. Edward O'Reilly
(represented by Tallaght Traveller CDP)**

The Dragon Inn Pub, Tallaght, 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 - refused because of previous conduct - Activities not discrimination, section 15 (1) and 15 (2)

Background

This dispute concerns a claim by Mr. Edward O'Reilly that he was discriminated against by a member of staff of the Dragon Inn Pub contrary to the Equal Status Act, 2000, on the grounds that he is a member of the Traveller community. The complainant alleges that he was discriminated against on the Traveller community ground by the respondent when he was refused service in the pub on a date in January, 2001. The respondent denies that Mr. O'Reilly was discriminated against and states that the only reason service was refused in January, 2001 was because the barman considered that Mr. O'Reilly had enough drink taken and because of a previous, potentially violent, incident involving the complainant.

Conclusions of the Equality Officer

The Equality Officer found that the complainant had not established a *prima facie* case of discrimination and that he was not refused service because he was a member of the Traveller community. The Equality Officer found that he was refused service because in the opinion of the barman he had enough drink already taken and that the respondent and his staff were entitled to refuse service in the circumstances in order to ensure compliance with the Licensing Acts, 1833 to 1999. In accordance with Section 15 (2) of the Equal Status Act 2000 this does not constitute discrimination.

Decision

The Equality Officer found that the complainant was not 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-S2002-017

Edward O'Reilly
(Represented by Tallaght Traveller CDP)
v
The Dragon Inn Pub, Tallaght, Dublin, Dublin

1. Dispute

1.1 This dispute concerns a claim by Mr. Edward O'Reilly that he was discriminated against by a member of staff of The Dragon Inn Pub, Tallaght, contrary to the Equal Status Act, 2000, on the grounds that he is a member of the Traveller community in that, on a date in January, 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 20 July, 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 Dragon Inn pub in Tallaght at or about 8.25 p.m. on Saturday 22 January, 2001. He ordered a drink which the barman was about to serve him when a second barman approached and told the complainant that he could not be served. When the complainant asked why he could not be served he was told it was because he was not a "regular". The complainant asked to speak to the manager. The barman went away and returned after a few minutes and informed the complainant that the manager would not be available until Sunday. The complainant again asked why he was not being served and the barman replied that he believed the complainant "appeared to have enough drink taken already".

2.2 It is the complainant's belief that he was not served because he is a Traveller.

2.3 It was further submitted on behalf of the complainant that the Traveller community is recognised as being different by the settled community because of Travellers' appearance, accent and pronunciation. It was also stated that there is bias against Travellers by service providers, and that some service providers only permit Travellers to be served at off-peak times but deny them service otherwise. It was submitted that the fact that the complainant is a Traveller was a factor in the decision to refuse him service.

3. Summary of Respondent's Case

3.1 The respondent submitted that the complainant was a customer of the public house on a Saturday, which is the pub's busiest day, in 1999, and had been drinking there all afternoon and into the evening. The complainant left the pub circa 7.00 -7.30 p.m. and returned some hours later. An incident had followed in which the complainant was involved, and in the course of which the complainant had become aggressive and abusive. It caused the staff and customers to be fearful of the complainant's conduct. On a date in January, 2001 the respondent was approached by one of his barmen who pointed out the complainant to him and stated that he was not serving him as, in his opinion, he appeared to have enough drink taken. The respondent told the barman that this was in order and also stated that the complainant had caused trouble in the pub previously. (The barman had approached the proprietor as the manager was not on duty at the time).

4. Evidence of the Parties

4.1. Complainant's Evidence

Written evidence submitted prior to hearing

On Saturday, 22 January circa 8.25p.m. The complainant went into the Dragon Inn and ordered a drink. While one barman was pouring same a second barman told him

that he couldn't be served as it was "regulars only". He asked to see the manager and the barman left, came back a few minutes later and told him that the manager wasn't available until Sunday. He asked the barman again why he wasn't being served and was told that the barman felt that he had enough drink taken already. The complainant then left the Dragon Inn.

Oral evidence given by the complainant at the Hearing

Mr. O'Reilly stated that he is a settled member of the Traveller community. His family were, in the past, nomadic and practised the traditions and customs of the Traveller community. They have a distinctive style of dress, a distinctive accent and recognisable pronunciation. He also stated that:-

- He lives half a mile from the Dragon Inn pub
- He has lived in the same place for three years
- He normally drinks in Molloys, "the Foxes Covert", in Tallaght village
- In relation to his previous visit to the Dragon Inn in 1999, he went there following a funeral in Co. Meath as some friends at the funeral had asked him to go for a drink.
- He drank there for several hours (three to four) with his son, daughter-in-law and his wife, then left for a short while (about twenty minutes) to say goodbye to his son outside, as his son was travelling abroad that evening.
- When he tried to go back into the Dragon Inn he was stopped at the door and refused service.
- He could not recall the names of any of his son's friends but stated that his son-in-law was among them
- He had not returned to the Dragon Inn since 1999 because he did not feel that he would be welcome there.
- He had returned to the Dragon Inn in January, 2001 because he forgot that he was not welcome there
- He has never caused trouble in any pub nor has he ever been barred from any pub

4.2 Respondent's Evidence

No written evidence was submitted by the Respondent.

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

Mr. Murphy, proprietor of the Dragon Inn

- On his previous visit to the Dragon Inn in 1999 Mr. O'Reilly, who had been drinking there for several hours, left circa 7-7.30 p.m.
- At around 9.00 - 9.30 p.m. Mr. Murphy was called down from his office to the bar by one of the barmen on duty who informed him that "there was going to be trouble" as one of the customers was causing problems.
- He rushed down to the bar and saw Mr. O'Reilly at the bar. Mr. O'Reilly was clearly drunk and unsteady on his feet and was very loud and was speaking in an aggressive tone of voice.
- He was told by the barman that Mr. O'Reilly had been refused service as he was very drunk and that Mr. O'Reilly had responded aggressively(verbally) and the bar around him had cleared of customers and the barman had stepped back away from the bar.
- He spoke with Mr. O'Reilly for approximately thirty minutes in the course of which Mr. O'Reilly threatened to smash up the bar if he wasn't served.
- Mr. O'Reilly had eventually calmed down, taken Mr. Murphy's name and left.
- He explained that he did not call the Gardai immediately because he was concerned that the Tallaght Gardai are extremely busy and, if called regularly by publicans for every incident arising on their premises, could then object to the pub license being renewed.
- He confirmed that he had called the Gardai in situations where it was clear that trouble could not be avoided, and would have no hesitation in doing so in those circumstances.
- He explained that he had not told Mr. O'Reilly that he was barred on the night in question because he felt this would only make matters worse and his aim was to "talk him out the door without any trouble"
- When Mr. O'Reilly entered the Dragon Inn in January, 2001 "Philip" the barman approached Mr Murphy and told him that he was refusing service to Mr. O'Reilly because he appeared to have enough drink taken already. This was standard practice.

- Mr. Murphy looked around the bar and when he saw Mr. O'Reilly he told the barman to carry on as he intended, and that the man in question had caused trouble before on the premises.
- A record of incidents arising in the Dragon Inn are now kept on the premises but were not kept prior to the introduction of the Equal Status Act, therefore the incident in 1999 was not recorded anywhere.
- Barmen are fully occupied behind the bar at all times and never go out on the floor unless it is necessary to do so to collect glasses etc. Therefore no patron is ever, or has ever been, stopped at the door of the pub. "Bouncers" have never been employed in the Dragon Inn.
- The Dragon Inn does not have a policy of refusing service to Travellers, and Mr. O'Reilly would not be recognised as a Traveller by the staff as he does not "stand out" in any way from other patrons.
- The only reason for refusing him service was because the barman, Philip, who had no prior knowledge of Mr. O'Reilly, and had not been employed in the pub in 1999, had believed that Mr. O'Reilly already had enough drink taken.
- Travellers had been served on the premises before and since the incident in 1999.

- Mr. Murphy was able to recognise Travellers some years ago because of their distinctive dress and the manner in which they spoke, but he would find it difficult to recognise them now as he felt that their manner of dress had changed. Some phrases used by Travellers would identify them to him such as "boss" which other patrons don't tend to use. However, they had never been refused service and the fact that Mr. O'Reilly had been served on the first occasion for several hours before he left, on a very busy Saturday afternoon, was evidence that they were served in the pub.

Mr. McGorty, Barman

- Mr. McGorty confirmed that he was on duty in 1999 when Mr. O'Reilly allegedly caused trouble there.

- He stated that when Mr. O'Reilly was refused service because he was clearly drunk, his tone became extremely aggressive and he had verbally abused him.
- Mr. O'Reilly, who is of large build, had leaned over the bar and began to turn on the beer taps and demand service, or else he would "smash the place up".
- A number of customers, frightened by Mr. O'Reilly's behaviour, cleared away from the bar and he, Mr. McGorty, had had to step back away from the bar for fear of Mr. O'Reilly.
- The owner, Mr. Murphy had been sent for and when he came down he had spoken to Mr. O'Reilly and after about half an hour Mr. O'Reilly had left
- He, Mr. McGorty, had served Travellers in the past, but could not say how he knew them to be Travellers.

Mr. McGrath, Barman

- Mr. McGrath was on duty in 1999 when Mr. O'Reilly had become aggressive.
- He stated that Mr. O'Reilly had been in earlier that day and had been drinking for several hours. He had left the pub and returned some time later. He appeared to be very drunk and was therefore refused service.
- Mr. O'Reilly, when refused service, became very abusive towards Mr. McGorty and himself, and the owner was called down to deal with him. The owner, Mr. Murphy, had spoken with Mr. O'Reilly and after about half an hour Mr. O'Reilly left the pub.
- Mr. McGrath had felt threatened and intimidated by Mr. O'Reilly and not in control of the situation
- Mr. McGrath had served Travellers in the past but could not say how he knew them to be Travellers

Mr. Philip Doyle, Barman

- Mr. Doyle explained that he was not employed in the Dragon Inn at the time of the first incident in 1999.
- In January of 2001 he was collecting glasses out on the floor in the pub when Mr. O'Reilly entered. He noticed that Mr. O'Reilly was unsteady on his feet as he went to the bar. He went behind the bar and told Mr. O'Reilly that he couldn't be served as he appeared to have had enough drink.

- When Mr. O'Reilly asked for the manager, Mr. Doyle went to the owner, as the manager wasn't on duty. He told Mr. Murphy that he was refusing service as Mr. O'Reilly appeared to have had enough drink taken already. Mr. Murphy told him that that was in order. He did not recall Mr. Murphy saying anything else to him.
- He did not say at any time that Mr. O'Reilly was being refused because it was "regulars only"
- He had served Travellers in the past but could not say how he had identified them as Travellers

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)(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 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 (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 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 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

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*

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, a Traveller, claims that he was discriminated against on the basis of his membership of the Traveller community. He sought and was refused service on a date in January, 2001. I must now consider whether the refusal of service was such that a non-Traveller in the same circumstances would be treated more favourably.

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.

However, in relation to key element (c) at 5.6 above it is clear from the complainant's own written and oral evidence that he did already have drink taken when he went to the respondent's premises on the date in question. The only remaining question which

arises is whether it was reasonable for the barman to refuse service to the complainant on this basis.

The complainant states that he had only two drinks taken while the respondent states that it appeared to the barman that the complainant had “enough drink taken”. In the circumstances the only person in a position to make a judgement on this issue at the time when it arose was the barman in question. Given the difficulties which can arise in situations where patrons are served alcohol when a judgement is made to the effect that they already have sufficient drink taken I am satisfied that the actions of the barman in refusing the complainant service was reasonable and that similar judgements are made by publicans and their staff in relation to Travellers and non-Travellers alike. I find that the barman’s actions in refusing service to the complainant were not therefore discriminatory.

6.3 The complainant also gave oral evidence to the effect that on an earlier date in 1999 he had gone to the respondent’s premises at the invitation of friends, following a funeral. He made no further reference to these friends in the course of his evidence, but was, instead, adamant that he was drinking exclusively with his wife, son and daughter-in-law. He also stated that when he later left the pub to say goodbye to his son, the latter met up with several friends outside the Dragon Inn who had arrived to also say goodbye, yet the complainant was unable to name any of his son’s friends.

6.4 In relation to the alleged incident of discrimination in January, 2001 the complainant claims that this occurred on Saturday, 22 January. The 22 January 2001 was not a Saturday. While I accept that wrong dates of themselves cannot be regarded as particularly significant for a number of reasons, I note that the notification to the respondent, quoting the wrong date was filled in just over a week later, and that the inaccuracy, combined with the other factors set out above and below, cast doubt on the accuracy, and therefore credibility, of the complainant’s evidence.

6.5 The complainant went on to say that he had made no attempt to go back to the Dragon Inn following the alleged incident in 1999 because he did not feel that he would be welcome there. Instead he passed by the respondent’s premises on his way

from where he lives to drink in a different pub. Then on some date in January 2001 in “a spur of the moment thing” he “forgot that he was not welcome” in the Dragon Inn.

6.6 I find it highly implausible that the complainant simply forgot something that he had been keenly aware of for over a year. This, combined with the other inconsistencies in his account of the previous incident in 1999 and the evidence given by witnesses for the respondent, leads me to conclude that, on the balance of probabilities, the incident involving the complainant took place on the respondent’s premises in 1999, following which the complainant was aware that he would not be welcome back in the premises and most likely would not be served. I am satisfied that it was on this basis that he entered the respondent’s premises in January, 2001, shortly after the Equal Status Act 2000 had come into force, was refused service and subsequently lodged his complaint of discrimination.

6.7 Prior to and during the Hearing the complainant did not produce any written or oral evidence on his own behalf from witnesses in relation to the 1999 incident, where he stated that there were many, including several members of his immediate family.

6.7 The respondent, on the other hand gave strong evidence, backed up by a number of witnesses, that there was an incident in 1999 in which the complainant was involved and during which he became aggressive and abusive towards members of staff in the Dragon Inn. While this would be reason enough to refuse service to any customer, whether they were a Traveller or non-Traveller, I am satisfied that this was not the actual reason for the refusal of service to the complainant in 2001. The barman who actually refused service in January 2001 was not witness to the 1999 incident and stated at the Hearing that he had no recollection of the proprietor saying anything to him in 2001 about the previous incident. The complainant was not known to the barman in question.

6.8 Taking all of the foregoing into consideration I am satisfied that the complainant was refused service in January, 2001 on the basis that the barman regarded him as having had enough drink taken, and that the barman could and can refuse service on this basis to any customer, whether they are a Traveller or non-Traveller, in order to ensure compliance with the provisions of the Licensing Acts , 1833 to 1999. In terms of section 15 (2) of the Equal Status Act this does not constitute discrimination. I am satisfied that the complainant has not, therefore, established a *prima facie* case of discrimination.

Decision

I find that the complainant was not 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.

Dolores Kavanagh

Equality Officer

11 March, 2002