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Equal Status Act 2000

EQUALITY OFFICER'S DECISION NO: DEC-S2002-005

**Ms K McDonagh
(Represented by the Equality Authority)**

V

**Penneys, Mary Street
(Represented by Hayes & Sons, Solicitors)**

File No. ES/2001/158

Date of Issue 22/02/2002

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Equal Status Act 2000

Summary of Decision DEC-S2002-005

Ms K McDonagh

(Represented by the Equality Authority)

v

Penneys, Mary Street

(Represented by Hayes & Sons, 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 shops - Refusal of admission - Establishment of a prima facie case - Authenticity of evidence

Dispute

This dispute concerns a complaint by Ms K McDonagh that she was discriminated against, contrary to the Equal Status Act 2000, by Penneys of Mary Street, Dublin.

The complainant maintains that she was discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

Background

The complainant claims that she was refused admission to Penneys on 12 November 2000 because she was recognised by security staff as a member of the Traveller community.

The respondents totally reject that they operate a discriminatory policy against Travellers and deny the allegations made by the complainant. The respondents state that the complainant was refused admission because she had been discovered begging inside the store the previous day.

Decision

Despite inconsistencies in the respondents' written evidence, the Equality Officer found that the oral testimony provided by witnesses was sufficient to show that other non-discriminatory reasons existed for the complainant being refused admission on 12 November 2000.

The Equality Officer found, therefore, that a prima facie case had not been established, and found in favour of the respondents.

Equal Status Act 2000**DEC-S2002-005****Ms K McDonagh****(Represented by the Equality Authority)****v****Penneys, Mary Street****(Represented by Hayes & Sons, Solicitors)****1. Dispute**

1.1 This dispute concerns a complaint by Ms K McDonagh that she was discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by Primark t/a Penneys of Mary Street on the grounds of her membership of the Traveller community.

The complainant maintains that she was discriminated against on the Traveller community ground in terms of sections 3(1) 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 the Act.

2. Background

2.1 The complainant maintains that she was refused admission to Penneys of Mary Street, Dublin on Sunday 12 November 2000 on the grounds of her membership of the Traveller community. The respondents deny this allegation and state that the complainant was refused admission because she was seen begging from customers in the store the previous day.

3. Summary of the Complainant's Case

3.1 Ms McDonagh states that security staff refused her and a friend admission to Penneys Store in Mary's Street on the afternoon of Sunday 12 November 2000. She claims that the security men refused to identify themselves and also refused to give her a reason for not allowing her access.

The complainant states that a Garda was called at her request but that he simply confirmed that Penneys had a right to refuse admission.

4. Summary of Respondent's Case

The respondents maintain that the complainant was refused admission on 12 November on account of her behaviour in the store the previous day. They claim that on Saturday 11 November 2000, Ms McDonagh had been seen by a security guard approaching customers in the store and asking for money. When asked to leave voluntarily, they claim that Ms McDonagh became abusive and used foul language towards the security man. On account of her behaviour, the respondents

state that she was informed on 11 November 2000 that, in the future, she would not be permitted into the store.

The respondents state that when Ms McDonagh sought to gain entry to the store the following day, 12 November, she was refused entry. The respondents claim that they were entitled to refuse admission to the complainant because of her previous behaviour on the premises and that their action had nothing whatsoever to do with her membership of the Traveller community.

5. Evidence of Parties

5.1 At the Hearing on 4 September 2001, the respondents described how security is organised for the Penneys Store in Mary Street. They said that a security person is constantly stationed at each of their three main doors during opening hours. Two of the doors, Gents Fashions and Ladies Fashions, are in Mary Street while the other is at the back of the shop. Two backup security personnel are also available to stand in when the others are on leave. In addition a Store Detective is employed to patrol inside the store. All security staff are equipped with radio communication equipment while on duty.

The respondents explained that all security staff are employees of Federal Security Services who contract them out to Penneys. They explained that all the staff receive induction training from Federal before being assigned to Penneys where further training is then arranged.

5.2 The duties of the door staff are to watch for customers who are known to them as having caused trouble in the shop before or people who appear to have drink or drugs taken. In such cases, the respondents state that staff have been instructed to refuse entry on the grounds that the Management has the right to refuse admission. The respondents state that staff are also advised not to give a reason for the refusal nor to identify themselves by name. They explained that this was for reasons of staff protection. While the respondents acknowledged that they had not developed a written policy in this area, Mr Stephen Mullen, General Manager of Penneys, Mary Street confirmed at the Hearing that this policy was in place.

The respondents also outlined the duties of the Store Detective which are to watch for people acting suspiciously. In a situation where a person is seen "bagging" an item, the Store Detective is under instruction to alert the security staff at the doors by radio and to follow the individual concerned. As someone cannot be accused of shoplifting until they have tried to leave the premises, the respondents said that the Store Detective is required to follow the person until they are about to leave. At that point they are approached and asked to return with the Store Detective to the Office. The respondents state that, only on a few occasions would there be a need to physically restrain a suspected shoplifter from trying to leave the premises.

5.3 At the Hearing, the complainant, Ms K McDonagh, said that she would not regard herself as a regular Penneys shopper. She said that, on average, she would buy goods in Penneys of Mary Street three or four times a year.

She then described how it was usual for her and a friend to travel into the City Centre to beg on the streets. She explained that she regularly operated a "circuit" around Henry Street, Mary Street and

Bachelor's Walk. She stated that it was her custom to move within this area for a few hours a day begging from people in the street.

Saturday 11 November 2000

5.4 The alleged events of Saturday 11 November 2000 were first explored at the Hearing. Firstly, Michael Hand, who was in uniform and on security duty at the Ladies Fashions door, states that, on the afternoon of 11 November, a customer who was leaving the shop informed him that there was a lady begging inside the store. He said that he immediately radioed Kevin Murtagh, who was stationed at the Gents Fashions door, to tell him of the remark and to ask him to cover both doors while he investigated the matter.

Mr Hand then described how he went into the store and, having looked in several directions, spotted a lady with a plastic/polystyrene cup in her hand approaching customers who were standing towards the end of a checkout queue. He says that, as he approached the lady, she moved away from the queue. He said that he then asked her to leave at which point she asked for a reason. He said he replied that the Management reserve the right of admission. He claimed that she then became very abusive towards him and stated that "she knew what time he got off at". He says that he then escorted her off the premises at which point he said he told her that she would not be allowed in again. At the Hearing, Mr Hand identified the complainant, Ms K McDonagh as the lady in question.

5.5 Mr Kevin Murtagh then recalled the events of 11 November. He described himself as the Security Supervisor with responsibility for the other security staff. He remembers receiving a call from Mr Hand to the effect that he was about to investigate a report that a lady was begging in the store and asking Mr Murtagh to cover both doors. Mr Murtagh explained that he did this by stepping out into the street so that he could see both entrances. He also said that, from his position, he was able to see Mr Hand escorting a lady from the store. Mr Murtagh stated that he got a good view of the lady as she came out of the shop and that there was no doubt in his mind that that lady was the complainant.

Sunday 12 November 2000

5.6 Ms Antoinette Osborne gave evidence at the Hearing that she was stationed at the Ladies Fashions door on Sunday 12 November 2000. She states that early in the afternoon, Mr Kevin Murtagh, who was on the other door, radioed her and identified to her a woman on the street, who he claimed had been begging in the store the previous day. Ms Osborne said that Mr Murtagh gave her a full description of the woman's clothes, hair colour etc from which she says she had no difficulty in identifying the woman in question.

5.7 Mr Murtagh stated that on Sunday 12 November 2000, he was manning the same door as the previous day. He says that the street wasn't too busy that afternoon. During the afternoon, he claims that he recognised the woman who had been escorted from Penneys the previous day. He states that, on several occasions that afternoon, he saw her begging from people in the street outside

the shop. He confirmed that he radioed Ms Osborne, told her what had happened the previous day and clearly identified the woman to her.

Ms Osborne then described how at approximately 4.45pm the woman identified by Mr Murtagh approached her door. She says that she saw her put a plastic cup into her pocket as she approached the door. She says that she immediately stepped in front of her and informed her that "she couldn't let her in". When an explanation was sought, Ms Osborne says that she responded that "the management reserved the right to refuse admission". She says that she then summoned Mr Murtagh to the door. At the Hearing, Ms Osborne identified the complainant, Ms K McDonagh as the lady she stopped at the door.

Mr Murtagh said that when he arrived, there were two women at the door, one of whom he recognised as the lady who had been escorted from the premises the day before. He says that she appeared agitated and was calling to customers to witness what was happening.

5.8 Ms Osborne recalled how the complainant then asked for the manager and made reference to some new discrimination law that had been passed. Ms Osborne stated that she also heard the complainant state that they "wouldn't get away with it" and that she would "get some money out of it". Ms Osborne stated that she then left to look for someone on the Management side. She said that she went inside and saw Mr John Clifford, Assistant Manager, standing near the escalator. She approached him and told him what was happening. At that point, she said that Mr Murtagh called her on the radio from the door and that she responded that she was returning with Mr Clifford.

5.9 Mr Clifford gave evidence at the Hearing to the effect that, on being approached by Ms Osborne, he returned with her to the front door. He says that he took Mr Murtagh aside and asked him what was going on. He says that Mr Murtagh recounted to him the events of that day and the previous day. On listening to Mr Murtagh, he said he made a decision that the complainant should not be admitted to the store. Mr Clifford stated that he was standing no more than 15 feet from the complainant at this point, and that he heard Mr Murtagh conveying his decision to the complainant. Mr Clifford stated that he then left the area and went back to his other duties.

5.10 Ms McDonagh stated at the Hearing that she had absolutely no recollection of having been in Penneys store in Mary Street on Saturday 11 November 2000. She also absolutely denied that she had ever begged inside Penneys or in any other store. She said that no reference whatsoever was made by the security staff on 12 November to the fact that she had allegedly been begging in Penneys the day before. She said that it was only in March 2001 that she learned from the Equality Authority that this allegation had been made against her. For this reason, she was unable to remember what she was actually doing on Saturday 11 November 2000. However, she said that she was certain that she was not begging in Penneys that day.

Ms McDonagh then outlined the events of 12 November 2000. She says that she remembers the day very well as it was her anniversary and she had gone into town with her friend with a view to raising some money from begging in order to buy her husband a present of a new shirt. She says that she begged for a few hours around Henry St and Mary St and raised between £20 and £30.

5.11 She says that around 4.45 pm she and her friend decided to go into Penneys to buy her husband a new shirt. She says that when she got to the door she was stopped by a security man not by a woman. While she says that a blonde lady arrived at the scene shortly afterwards, she says that she is certain that that it was a man and, as far as she can recall, that man was Mr Kevin Murtagh. She says she did not recall seeing Antoinette Osborne that day.

She recalled how Mr Murtagh stopped her at the door, saying that she was not being let in. She says that she referred to the new equality legislation and accused the store of discriminating against her. She says that she then asked for a manager and heard Mr Murtagh calling "Tony" on the radio. She says that a man arrived and spoke to Mr Murtagh who then informed her again that she was not being allowed in. The complainant states that it was at this point that her friend decided to leave.

Ms McDonagh states that she remained and demanded that the Gardai be called. At that point, she says that she saw a Garda on the beat in Mary Street and called him over to the shop. She says that she asked him to witness the fact that she was being discriminated against and obtained his name, Garda Stephen Foley, from him.

5.12 Ms McDonagh states that on several occasions she asked the security people for their names but that all refused to give them, stating that there was no obligation on them to disclose their identities.. The complainant denied using threatening or abusive language towards any of the security staff and says that she left peacefully having spoken to the Garda. She also totally denied making any reference to making "a few quid" out of the situation.

5.13 Mr Murtagh recalled calling "Tony" on the radio and explained that "Tony" was Antoinette. He also says that, at Ms McDonagh's request, he made a call to Store Street Garda Station. He was not sure whether this call was responded to as the complainant found a Garda herself almost immediately.

Mr Murtagh also explained that it was the policy of his employer, Federal Services, that staff did not identify themselves personally to customers for staff safety reasons. The General Manager of Penneys, Mary Street stated that it was also his company's policy that employees did not identify themselves personally. He said that customers seeking staff details were advised to write directly to the company if such information was required. He stated, however, that even where such written requests were made, that, for reasons of staff security, names would probably not be disclosed.

5.14 Ms Maura Healy, Customer Relations Manager with Penneys explained that she was responsible for investigating written complaints from customers against staff. She explained that, in such instances, her practice was to interview the staff concerned, take statements, compile a report and respond to the customer or their representative. She confirmed that it was company policy not to release the names of staff working on the front-line.

She recalled dealing with the notification form ODEI 5 received from the complainant in November 2000. She says that she investigated this matter by referring to the written statements made by the staff concerned about the incident. She says that her response was sent to the complainant by recorded post on 11 December 2000. In this document, the company informed the complainant that

the reason for her refusal on 12 November 2000 was because of her conduct in the store the previous day.

In reply, the complainants stated that this document had not been received by the complainant in December and that it was only in March 2001, when the Equality Authority received a copy from Penneys, that Ms McDonagh learned of the accusation that she had been asked to leave Penneys on 11 November 2000 for allegedly begging inside the store.

5.15 At the Hearing, the Equality Officer enquired as to whether copies of the statements made by security staff were available. The respondents stated that they were, but said that, because the witnesses themselves had attended the Hearing, the original statements had not been brought. In reply, the complainants made the point that it would be helpful to see contemporaneous reports of the incidents and asked how these reports were retained and stored. Ms Healy explained that security staff were required to record, in a written statement, all incidents of this nature that occurred while they were on duty and that the reports were the property of Federal Security Services. She said that the original statements were retained by Federal Security Services and copies given to the Store, as required.

She said that she had copies of the witnesses statements and that she would arrange for copies to be forwarded to the Equality Officer for transmission to the complainants. Ms Healy also promised to ask Federal Services to provide details of the system they use to record and store statements made by their employees.

5.16 Garda Stephen Foley was called as a witness by the complainants. Garda Foley stated that he recalled being approached by Ms McDonagh in Mary Street on Sunday 12 November 2000. He says that he had never met Ms McDonagh before nor had he personally seen her begging on the street. He recalls being asked by her to witness the fact that she was being refused admission to Penneys.

Garda Foley states that he then accompanied her over to where some security staff were standing at the door into Penneys. He said that he explained to her that, under the law, a store is within its rights to refuse admission, if it chooses. He does not recall anyone offering her a reason for the refusal. He recalls that she appeared upset at the time but does not recall her referring to any equality legislation. He says that their conversation only lasted a few seconds during which time he gave her his name

Garda Foley states that he then asked Mr Murtagh what the incident was about. He recalls Mr Murtagh mentioning something about the complainant begging on the street and also referring to some other incident involving the complainant. Garda Foley explained that he had not made any notes of the incident and, as a result, was not in a position to provide specific details of what happened.

5.17 The complainants then referred to the respondents reply to Form ODEI 5 dated 11 December 2000, and in particular to page 2 where it states that "As you were informed at the time, the reason for the refusal to admit you was because of your conduct in the store the previous day". When put to the respondents that this statement did not tally with the evidence being provided at the

Hearing, the respondents accepted that the statement was "probably inaccurate" and that it would appear that no reason was communicated to the complainant on 12 November 2000.

The complainants then questioned Mr Murtagh and Ms Osborne as to how exactly the complainant was "pointed out" to Ms Osborne. They maintained that the street must have been busy as the incident occurred in the run-up to Christmas and, therefore, it would have been difficult to physically "point out" the complainant. Both the above parties denied that it was busy that afternoon and Ms Osborne again stated that she had no difficulty in identifying the woman referred to by Mr Murtagh through radio contact.

5.18 The complainants then referred to the fact that Ms McDonagh's friend was also refused entry to Penneys and claimed that she also had been discriminated against. The respondents replied by saying that, at no time, had her friend sought access for herself to the store and they said that, if she had, she would have been allowed in. The complainant confirmed that her friend had not planned to purchase goods herself in Penneys and, for this reason, had not sought access herself independently of the complainant.

When asked why her friend had not been called as a witness, the complainant stated that she had not been able to persuade her to come as her friend believed that no purpose would be served by her attending.

5.19 The complainants then introduced an Expert Witness, Mr Fintan Farrell, a Director of the Irish Traveller Movement with an involvement in many other organisations dealing with Traveller and Racism issues.

Mr Farrell provided the Hearing with a detailed and informative insight into Traveller characteristics and Traveller culture. He described how Travellers regarded begging as an acceptable means of raising money to support themselves and their families. He said that this was a strong custom among Travellers going back over the years. He stated, however, that it would be out of character for Travellers to beg inside shops and stores as this form of activity would not be considered a part of their traditional culture. For this reason, Mr Farrell called into question the respondents' allegations that the complainant had been discovered begging inside the store.

Mr Farrell also explained that parents always accompanied their children when begging and on the few occasions that children were seen begging by themselves, he said it was because they came from broken homes.

He then described the types of discrimination that Travellers have been subjected to on an ongoing basis. These included access to education, accommodation and access to goods and services. Mr Farrell then described the level of discrimination that Travellers had to suffer. He stated that 7 out of 10 Travellers had complained of having been refused service in shops while 9 out of 10 had complained of having been refused service in pubs. In the vast majority of these cases, he said that a reason for refusal was not given.

5.20 The complainant's representative then challenged the respondents as to why people, allegedly found begging in the store, were treated less favourably than suspected shoplifters. The

representative claimed that approaching a suspected beggar, while they were still in the store, was less favourable treatment than that afforded to suspected shoplifters, who were only approached as they tried to leave the shop.

The respondents replied that this should not be interpreted as beggars receiving less favourable treatment than shoplifters. They said that the reason for this was simply because, under law, a person cannot be accused of shoplifting until such time as they try to leave the premises.

The complainants also accused the respondents of less favourable treatment to Travellers, in that non-Travellers were less likely to be approached in the store, if suspected of begging. The respondents replied that members of the Traveller community are treated in the same manner as any other individual, found begging on the premises. The respondents stated that begging was not the exclusive preserve of Travellers and referred to other incidents where people of other nationalities or ethnic origin, as well as members of the homeless community, had been escorted from the premises, having been found begging in the store. The respondents stated that this activity occurred regularly in the store with an average of 2 incidents per week, most noticeably in the run-up to Christmas.

The respondents argued that they did not discriminate against Travellers. They said that they had a large Traveller customer base and that they valued their custom.

5.21 The Hearing concluded with agreement that the respondents would forward copies of the security staff's statements of 11 and 12 November 2000 and that Federal Security Services would be approached for details on how they file and store statements from their security staff.

This information was subsequently submitted and the complainants were afforded an opportunity to comment on same.

6 Matters for Consideration

6.1 Section 3(1) of the Equal Status Act 2000 states that discrimination shall be taken to occur where, on any of the grounds specified in the Act, a person is treated less favourably than another person is, has been or would be treated. Section 3(2)(i) of the Act specifies the Traveller community ground as one of the grounds covered by the Act.

In this particular instance, the complainant claims that she was discriminated against on the grounds of their membership of the Traveller community contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act, 2000 in being denied access to Penneys on 12 November 2000.

6.2 In cases such as this, the burden of proof lies with the complainant who is required to demonstrate that a prima facie case of discrimination exists. If established, the burden of proof then shifts to the respondent who, in order to successfully defend their case, must show that their actions were driven by factors which were non-discriminatory.

7 Conclusions of the Equality Officer

7.1 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 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.

7.2 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 convincing 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. "*

7.3 In this particular case, with regard to (a) above, the complainant has satisfied me that she is a member of the Traveller community. With regard to (b) above, the respondents have admitted that the complainant was refused admission to their premises. To decide whether a prima facie case has been established, I must, therefore, consider whether the treatment received by the complainant on 12 November 2000 was less favourable than the treatment someone, not covered by that ground, would have received **in similar circumstances**.

7.4 Section 3(1) of the Equal Status Act 2000 states that discrimination shall be taken to occur where, on any of the grounds specified in the Act, a person is treated less favourably than another person is, has been or would be treated. In this particular case, I must, therefore, decide whether

the respondents have produced sufficient evidence to show that the refusal to admit the complainant on 12 November 2000 was not on the grounds of her membership of the Traveller community but that other reasons existed for her non-admittance.

The respondents' argument in this case is that the complainant was refused admission on 12 November 2000 on account of the fact that she had to be removed from the premises the previous day, having been caught begging inside the store. If it can be shown that this was, in fact, the case, then it would seem that the respondents had a valid non-discriminatory reason for refusing admission to the complainant on 12 November and their actions, therefore, were not discriminatory under the Equal Status Act 2000.

In order to reach a decision in this case, I must, therefore, decide whether sufficient evidence has been produced to prove that, on the balance of probabilities, Ms McDonagh was escorted from the premises on 11 November 2000 for begging in the store.

7.5 Having considered all the evidence provided, I have identified the following as the principal factors relating to this aspect of the case:

- Two of the security staff on duty on 11 November, Mr Hand and Mr Murtagh have provided written and oral evidence that the complainant was asked to leave the store on 11 November. The complainant herself totally denies that this happened and states that she has never begged inside any store in her life.
- In support of their case, the respondents supplied me with the personal notebooks of both Mr Hand and Mr Murtagh. The respondents explained in their submission that these notebooks are used by security staff to document incidents as they occur while they are on duty. The respondents state that the more serious of these incidents are later recorded in a Statement Book on the day in question. The Statement Book for the period July 2000 to March 2001 was also supplied in evidence by the respondents.
- Examination of Mr Hand's notebook shows a very high level of inconsistency in recording the dates of particular incidents. Practically every entry in the notebook has the original date crossed out and a different date inserted. For example, the entry for 11 November 2000 was originally dated 4 November 2000.
- Mr Murtagh's notebook, in comparison, seemed to accurately reflect the time and dates of incidents.
- Mr Hand's notebook entry for 11 November 2000 records 2 incidents. The first refers to escorting two females from the store and seemingly recovering £96 worth of goods. The second entry reads as follows:

“Escorted out female for begging on shop floor. See Statement Book “

- Mr Hand's notebook states that he went home sick at lunch time on 12 November 2000.

- Mr Murtagh's notebook contains no reference to any specific incident on 11 November. For 12 November 2000, reference is made to a female being refused at the main door and to an entry in the Statement Book. Garda Foley's name is also recorded in connection with that incident.
- Examination of the Statement Book shows the following

Page 72 - Entry by Michael Hand relating to the incident on 11 November 2000. Statement initially dated 15 November but changed to 11 November.
Pages 73 to 75 - Entry by Kevin Murtagh relating to the incident on 12 November. Statement dated 12 November.
Page 76 - Page missing completely
Pages 77 to 78 - Entry by Antoinette Osborne relating to the incident on 12 November. Statement dated 12 November.

- The entry by Michael Hand for 11 November, coupled with other entries in his notebook, raise serious questions as to the accuracy of the dates on which the incidents were actually recorded and whether entries were actually made on the dates stated.

In an attempt to explore this matter further, I examined other entries in the Statement Book made by Mr Hand. This examination revealed that on 9 January 2001, Mr Hand recorded a Statement (Page 80) about an incident on 3 January 2001 involving two females. This entry was followed immediately (Page 81) by a Statement dated 9 January 2001 from another Security Guard indicating that he had received a complaint about an incident involving Mr Hand on 3 January 2001. On considering these statements, I am drawn to the conclusion that Mr Hand was prompted to record a Statement on 9 January 2001 on learning that a complaint had been made against him about an incident on 3 January 2001.

I also note from the Statement Book that Mr Hand only recorded a report of an incident which happened on 9 March 2001, on 11 March 2001 two days after the event.

All of the above points would seem to support the view that reports are not recorded contemporaneously in the Statement Book, as claimed by the respondents.

7.6 Another piece of evidence which leads me to believe that Statements are not recorded contemporaneously is the fact mentioned earlier, that two incidents on 11 November 2000 were noted in Mr Hand's notebook. Only one of these, however, was recorded in the Statement Book. When one considers that the first incident related to an apparent attempt to steal goods and the second to an accusation of begging in the store, it is hard to understand why Mr Hand decided that only the second incident, which I would consider the less-serious of the two, was worthy of recording in the Statement Book.

7.7 On considering all the above evidence, I simply cannot accept, on the balance of probabilities, the respondent's claim that Security Staff always record details of incidents in the Statement Book contemporaneously. Indeed, it appears to me, from the evidence available, that the recording of Statements is used more as a protective measure in reaction to complaints about previous incidents. This is borne out by the fact that Mr Hand's notebook documents many

apparently serious incidents of attempted larceny, none of which appear to be deemed worthy of recording in Statements.

7.8 In summary, there are a number of key pieces of evidence which lead me to believe that the recording of the incidents on 11 and 12 November 2001 by Security Staff in Penneys did not occur contemporaneously. These are:

- The many alterations to dates in Mr Hands notebook.
- The altered date in Mr Hand's Statement dated 11 November (changed from 15 November)
- The missing Page 76 from the Statement Book
- Mr Hand's Statements in January and March 2001 relating to incidents some days previously.
- Mr Hands failure to record a Statement relating to an apparently more serious incident which occurred on 11 November
- The inconsistencies in some of the Statements as to whether one or two females were escorted off the premises on 11 November

7.9 The actual dates that entries were made, particularly in the Statement Book, are particularly significant in this case. Evidence shows that the complainant notified the respondents of her intention to seek redress in a form ODEI 5 sent on 13 November 2000, which one would assume was received by the respondents on 14 November 2000. This would mean that on 15 November 2000, the original date on Mr Hand's statement, the respondents would have been aware that a possible claim of discrimination was pending.

7.10 There are distinct similarities between the above scenario and that which occurred on 9 January 2001 when, apparently in response to a complaint, Mr Hand recorded a Statement about an incident on 3 January 2001.

Bearing the January incident in mind, I find that I have not been supplied with sufficient evidence to convince me that the same did not occur in relation to the events of 11 and 12 November. I cannot, therefore, rule out the possibility that it was not until the complainant's ODEI 5 was received that Penneys requested staff to complete Statements relating to the incidents on 11 and 12 November.

7.11 Having considered all of the above points, I find that the respondents have not satisfied me that the Statements supplied were written on the dates in question. On the contrary, I have formed the opinion that, on the balance of probabilities, the Statements relating to the incidents on 11 and 12 November 2000 were composed, in consultation, subsequent to that date, in the knowledge that they would probably be used in evidence if the complainant proceeded with her complaint of discrimination.

I cannot, therefore, accept that the Statements in question were prepared in good faith and are true and fair reflections of what actually occurred on the dates in question. I am, therefore, not prepared to accept the respondents written statements as evidence. Instead, I propose to base my findings solely on the oral evidence provided at the Hearing.

7.12 In relation to Saturday 11 November 2000, the complainant states that she cannot remember whether she was in the vicinity of Mary Street on that day. She insists, however, that she has never begged inside Penneys or indeed inside any other store.

The respondents, for their part, produced two witnesses at the Hearing who identified Ms McDonagh as the person who was escorted from the store on 11 November for begging.

While the above evidence was given by witnesses who were directly involved on 11 November 2000, it is the evidence of a witness that was not on duty on 11 November that I find most persuasive.

7.13 Antoinette Osborne has stated that, prior to the complainant seeking admission to the store, Mr Murtagh identified her on the street as the person who had been removed the previous day for begging. If Ms McDonagh had not been in Penneys the previous day, I can see no reason whatsoever why Mr Murtagh would have made that statement to Ms Osborne. Ms Osborne's statement, therefore, would appear to confirm that Mr Murtagh had prior concerns about Ms McDonagh before she sought to enter the store on 12 November 2000, and these concerns arose from the fact that she had been caught begging on the premises the previous day.

Ms Osborne has since left the employ of Penneys and, therefore, has nothing to gain or lose from making false or misleading statements. I am, therefore, satisfied that Ms McDonagh was identified to her as an undesirable customer, prior to Ms McDonagh seeking to gain admission to the store.

7.14 Another piece of evidence which would seem to indicate that Ms McDonagh was on the premises the previous day, is Garda Foley's recollection that Mr Murtagh had made reference on 12 November to the complainant having been involved in a previous incident on the premises.

I have, therefore, formed the view that, on the balance of probabilities, Ms McDonagh was escorted from Penneys on Saturday 11 November 2000 for attempting to beg from customers which is sufficient to satisfy me that the respondents were within their rights to refuse her admission to the store the following day. I am, therefore, satisfied that on 12 November 2000, Ms McDonagh was not treated less favourably than a non-Traveller would have been treated in similar circumstances.

7.15 I am satisfied, therefore, that a prima facie case of discrimination has not been established in this case.

8 Decision

8.1 Having considered the oral evidence of the parties, I am satisfied, on the balance of probabilities, that the respondents had an acceptable non-discriminatory reason for refusing admission to the complainant on 12 November 2000.

I, therefore, find that the complainant has not established a prima facie case of discrimination against Penneys of Mary Street.

8.2 This case has highlighted the need for businesses in the services sector to keep proper records of incidents involving customers and clients. In this case, the authenticity of the written statements provided in evidence was called into question by the manner in which they were completed, resulting in the Equality Officer eliminating them from his deliberations.

While the oral evidence in this case was deemed sufficient to rebut the allegation of discrimination against Penneys, it has highlighted the need to maintain properly documented evidence of all incidents involving security personnel.

I would, therefore, strongly recommend that all service providers, particularly shops and pubs, train security personnel to adopt a consistent structured approach to recording security incidents, particularly where customers are involved.

Brian O' Byrne
Equality Officer
22 February 2002