

Equal Status Act 2000
Equality Officer Decisions
DEC-S2002-002/003

Kathleen & Joanne O'Brien
(Represented by Augustus Cullen &
Son, Solicitors)

V

The Canada House Shop
Shankill

File Ref *ES/2001/170&171*

Date Of Issue *31/01/2002*

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

3 Clonmel Street
Dublin 2.

Phone: 353 -1- 4774100
Fax: 353-1- 4774150

E-mail: info@odei.ie
Website: www.odei.ie

Equal Status Act 2000

EQUALITY OFFICER'S DECISIONS: DEC-S2002-002/003

**Kathleen & Joanne O'Brien
(Represented by Augustus Cullen & Son , Solicitors)**

V

**The Canada House Shop
Shankill**

File No. ES/2001/170 &171

Date of Issue 31/01/2002

Table of Contents

Summary	4
Dispute	5
Summary of Complainant's Case	5
Summary of Respondent's Case	5
Evidence of Complainant	6
Evidence of Respondent	7
Evidence of Garda Witness	8
Matters for Consideration	9
Conclusions of the Equality Officer	9
Decision	12

Equal Status Act 2000

Summary of Decisions DEC-S2002-002/003

Kathleen & Joanne O'Brien
(Represented by Augustus Cullen & Son , Solicitors)
V
The Canada House Shop
Shankill

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) - Admission to shop - Establishment of a prima facie case - Hypothetical comparator

Dispute

This dispute concerns complaints by Kathleen and Joanne O'Brien that they were discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by the staff of Canada House, Shankill Shopping Centre on the grounds of their membership of the Traveller community. The complainants maintain that they were discriminated against in not being allowed avail of a service which is generally available to the public contrary to Section 5(1) of the Act.

Background

The complainants maintain that, on entering the Canada House shop on 21 February 2001, one assistant locked the door behind them and that they were then surrounded by three assistants who acted in an intimidatory manner towards them. The complainants maintain that the respondents acted in this manner because they recognized the complainants as members of the Traveller community.

The respondents deny this allegation and state that the complainants were treated in the same manner as all their customers.

Decision

The Equality Officer found that the respondents were probably taken by surprise when the complainants gained unexpected access to the shop, through the front door which is usually locked. The Equality Officer formed the view that, on recognising that they were Travellers, the Canada House staff reacted differently, and more importantly, less favourably than they would have done if non-Travellers had been involved.

The Equality Officer found that the actions of the Canada House staff were, therefore, discriminatory and ordered that the complainants be paid 600 Euros each for the distress and humiliation suffered by them.

Equal Status Act 2000

DEC-S2002-002/003

Kathleen and Joanne O' Brien
(Represented by Augustus Cullen & Son , Solicitors)

v

Catherine O' Dowd, Canada House

1. Dispute

1.1 This dispute concerns a complaint by Kathleen and Joanne O' Brien that they were discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by the staff of Canada House, Shankill Shopping Centre on the grounds of their membership of the Traveller community.

The complainants maintain that they were 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 they were 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 complainants maintain that, on entering the Canada House shop on 21 February 2001, one assistant locked the door behind them and that they were then surrounded by three assistants who acted in an intimidatory manner towards them. The complainants maintain that the respondents acted in this manner because they recognized the complainants as members of the Traveller community. The respondents deny this allegation and state that the complainants were treated in the same manner as all their customers.

3. Summary of the Complainant's Case

3.1 The complainants maintain that, on entering the shop on 21 February 2001, they were identified as Travellers by the staff in the Canada House shop. They state that one assistant then took a key from behind the counter and locked the shop door. The complainants state that three shop assistants then intimidated them by approaching them as a group and surrounding them. The complainants maintain that the respondents acted in this manner because they recognized the complainants as members of the Traveller community.

The complainants state that, at their insistence, the Gardai were called to the shop.

4. Summary of Respondent's Case

The respondents maintain that the complainants were treated in the same manner as all their other customers, They state that the door key is always left in the door and that it is their policy to keep the door locked when customers are in the shop. The respondents say that there is a sign on the door informing customers to ring the bell to gain admission.

The respondents claim that no discriminatory treatment was involved.

5 Evidence of Parties

5.1 Complainants' Evidence

- The complainants are sisters who often go shopping together
- Neither complainant was ever in the Canada House before
- Neither complainant was involved in incidents in shops before
- Joanne O' Brien had a three year old child with her
- Complainants enjoyed shopping for children's' clothes
- Door to Canada House was open when they sought entry
- Only one other customer in shop at time
- Three staff in shop on 21 February - Ms O'Dowd, Christine Kane and Ms X
- While dealing with another customer, Ms O'Dowd indicated to a staff member that door was to be locked
- Complainants not given the opportunity to browse
- Joanne O' Brien approached by Ms X and asked whether she could assist her
- Having indicated that she wanted to browse first, Joanne O' Brien then approached by Christine Kane with an offer of assistance
- Ms O' Dowd, while dealing with another customer, called to Kathleen O' Brien at back of shop, asking if she could help her
- Door was locked behind them by Ms X, almost immediately after they entered

- Ms X refused to give explanation for locking door as she said that she was not on duty at the time
- Complainants unsure as to whether key was in door or behind counter
- Kathleen O'Brien rejoined her sister when she heard conversation with Ms X
- Complainants demanded to see the manager
- When the other customer left, Ms O'Dowd approached complainants
- Complaint made to Ms O'Dowd about door being locked behind them
- Ms O'Dowd accused of locking door because the complainants were Travellers
- Ms O'Dowd stated that she had "trouble with your kind before"
- Complainants asked for Gardai to be called
- Child began crying and Kathleen O'Brien brought it outside before Gardai arrived
- Ms X opened door for her and locked it after her
- Complainants referred to the fact that no reference was made in original submission as to why door was unlocked when complainants arrived
- Complainants referred to the fact that no reference was made in original submission to Ms X's involvement on the day
- Complainants were unaware of provisions of Equal Status Act 2000 and only subsequently sought advice from their solicitor as to whether they could do anything about the incident on 21 February

6.1 Respondents' Evidence

- Ms O' Dowd, owner/manager, running Canada House for almost 4 years
- Shop sells children's clothes - mid-market prices
- Shop door normally locked - customers must ring bell for admission
- The respondents supplied photographs of the signs on their front door, informing potential customers of these arrangements
- Security was in place on account of previous incidents

- If suspicious of a customer, policy is to offer them assistance and to accompany them around shop
- Not aware of any other shops in Shopping Centre with similar security policy
- Previous incidents involved both settled and Traveller community
- Gardai called in Summer 2000 when Travellers stole some clothes
- Two Traveller families are regular customers
- Respondents admit that the door was inadvertently left open by a staff member on 21 February 2001
- Complainants were able to enter shop unhindered on 21 February 2001
- Ms O'Dowd, while dealing with a customer, noticed complainants entering and made a sign to Ms Kane that door was unlocked
- Ms Kane states that she locked door on Ms O'Dowd's instruction
- Complainants were allowed browse for 2/3 minutes
- Ms X, who worked part-time on Saturdays, was present in shop at the time but off-duty
- Ms X no longer employed in shop
- Christine Kane on duty on shop floor but dealing with new stock
- Ms X approached Joanne O' Brien and asked if she could help her
- Christine Kane never spoke to complainants that afternoon
- Ms O'Dowd only identified complainants as Travellers when she heard Joanne O'Brien speak to Ms X
- Ms O'Dowd let other customer out and relocked door
- Ms O' Dowd then explained her "locked door" policy to complainants - policy applied to both settled and Traveller communities
- Ms O'Dowd called Gardai at Joanne O'Briens request
- Ms X left before Gardai arrived
- Ms O'Dowd had only a vague knowledge about equality legislation at the time

- Christine Kane's written statement only prepared recently, when she rejoined the shop as an employee

7.1 Evidence of Garda Witness

- Garda Vincent O' Leary, from Shankill Garda Station appeared as a witness
- He was in a patrol car when asked to go to Canada House to deal with "an argument on the premises"
- Garda O'Leary recalls that door was locked
- He was aware of Canada House security measures as he had responded to a larceny incident at the shop the previous summer
- He asked Joanne O' Brien to wait with her sister outside while he heard respondents version of events
- No suggestion of any unlawful activity on the complainants part, was made by Ms O'Dowd
- He then spoke to complainants and explained that he was aware of shop's door policy
- He had never met the complainants prior to that day
- He recalls the complainants being annoyed over an alleged remark made by Ms O' Dowd about Travellers being different and claiming that they had been "singled out"
- He confirmed that the respondents had signs of their front door, informing potential customers to ring the bell
- He did not make any notes of the incident but gave his name to both parties
- He has no recollection of anyone referring to the Equal Status Act, discrimination or equality legislation

8 Matters for Consideration

8.1 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 complainants claim that they were 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 service in the Canada House shop on 21 February 2001.

8.2 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 his case, must show that his actions were driven by factors which were non-discriminatory.

9 Conclusions of the Equality Officer

9.1 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.

9.2 With regard to (a) above, the complainants have satisfied me that they are members of the Traveller community. To determine whether a prima facie case exists, I must, therefore, consider whether the treatment afforded the complainants on 21 February 2001 was less favourable than the treatment a non-Traveller would have received, in similar circumstances.

9.3 In defence of their actions, the respondents pointed to the security procedures which had been put in place two years previously, whereby the door was always kept locked and customers had to ring a bell to gain admission. The respondents supplied photographs of the signs of their front door, informing potential customers of these arrangements.

However, the respondents failed to mention, in any of their earlier correspondence, that this policy had not been followed on 21 February 2001, and that the door of the shop was unlocked when the complainants arrived. This was only admitted at the Hearing.

9.4 The fact that the door was unlocked on the complainants' arrival is a major factor in this case. In order to fully consider whether discrimination did occur, I believe that it is necessary to compare the treatment afforded the complainants with the treatment that a non-Traveller would probably have received on gaining admission in similar circumstances.

I note, however, that in this particular case, no reference has been made to previous situations where a non-Traveller had gained unexpected admission to the shop. It is difficult, therefore, based on the

facts available, to compare the treatment afforded to the complainants with the treatment normally afforded to non-Travellers in similar situations.

9.5 In order to properly evaluate the complainants' case, I believe, therefore, that it is necessary to introduce a hypothetical comparator at this point. The Equal Status Act 2000 provides for the use of a hypothetical comparator in Section 3(1)(a) where it states that discrimination shall be taken to occur where a person is treated less favourably than another person is, has been or would be treated.

Hypothetical comparators have been introduced in a number of other equal status and employment equality cases in recent years where an actual comparator did not exist. For example, discriminatory questioning was an issue in the case of *Fleming v. Dr J Maloney, Blackrock Clinic (EE04/1996)*, where the only actual comparators were other married women. During the course of the interview for a part-time secretary position, the claimant was asked about child-minding arrangements for her children. In that case, the Equality Officer found that, although no males applied for that post, a hypothetical male or single female comparator could be used in deciding whether the questions put to the candidate were discriminatory. The Equality Officer stated that "*I accept that there were probably no male or single female applicants for the post, however, I consider that the respondent discriminated against the claimant when she asked her or allowed her to be asked questions which would not be asked of a male or single female.*"

More recently in the case of *Conroy v Carney's Bar (DEC-S2001-002)*, the Equality Officer used a hypothetical comparator to establish whether a publican would have adopted a different stance if he was faced with a situation which involved a non-Traveller as opposed to a similar situation involving a member of the Traveller community. In that case the Equality Officer found that the publican would most likely have treated the non-Traveller more favourably and that, therefore, he had discriminated unlawfully against the complainant who was a Traveller.

Also in the case of *McDonagh v Tesco (DEC-S2001-016)*, the Equality Officer found that a member of the Traveller community, who was forcibly removed from a supermarket, was less favourably treated than a non-Traveller would have been treated in similar circumstances.

9.6 As stated earlier, no reference has been made to previous situations where a non-Traveller had gained unexpected admission to the shop. I believe, therefore, that it is necessary to introduce a hypothetical comparator at this point and ask the question as to whether the respondents would have adopted a different stance if the incident on 21 February 2001 had involved a non-Traveller customer who, like the complainants, had never been in the shop before.

Having considered this question in some depth, I believe that if a non-Traveller was involved, it is reasonable to expect that the respondents would at least have let them browse for a few minutes, particularly when both on-duty staff members were busy at the time - Ms O'Dowd was dealing with another customer while Ms Kane was arranging new stock. . By so doing, the respondents would have afforded themselves the time to lock the door without drawing attention to themselves, while also allowing themselves the opportunity of monitoring the person's activities.

9.7 The most compelling evidence I have to indicate that this did not happen, is the respondents' admission that the off-duty member of staff, Ms X, was the one who first approached the complainants. If the complainants had been allowed the usual customary 2 or 3 minutes to browse then one would have expected Ms Kane to approach them. Even Ms O' Dowd herself should have been free by that stage, as she has stated that she was finished with the other customer within a few minutes of the complainants arriving in the shop.

Another important point of note is the fact that, at no time, have the respondents made any suggestion of unlawful activity by the complainants. Yet, from the actions of the respondents, it would appear that the O'Brien sisters were viewed with suspicion from the moment they entered the shop.

9.8 Having considered all the evidence before me, I have reached the conclusion that on 21 February 2001, the respondents were taken by surprise when the two complainants came through the door. From the evidence before me, I am satisfied that the respondents would have immediately identified the complainants as Travellers on seeing them.

Having considered all the evidence presented to me, I have formed the opinion that a combination of two factors - the door being unlocked and the fact that it was Travellers that had unexpectedly gained admission to the shop - that prompted the respondents to react in a manner they would not have done, if the unexpected customers were non-Travellers.

I believe that it was the sudden realisation that Travellers had unexpectedly gained admission to the shop that prompted Ms X to immediately approach them and also prompted Ms O'Dowd to immediately signal that the door should be locked. By so doing, I believe that the complainants were treated less favourably than non-Travellers would have been treated in a similar situation.

9.9 I am, therefore satisfied that the complainants have established a prima facie case of discrimination and that the respondents have failed to rebut the allegation that the complainants received less favourable treatment than non-Travellers would have received in a similar situation.

10 Decision

10.1 In this particular situation, I believe that the complainants were clearly identifiable as members of the Traveller community on arriving unexpectedly in the Canada House shop and that this led to them receiving less favourable treatment than a non-Traveller would have received in similar circumstances.

For this reason I find that the complainants were discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by the respondents on the grounds of their membership of the Traveller community.

10.2 I, therefore, order that the Canada House pay each of the complainants 600 Euro each for the distress and humiliation suffered by them on 21 February 2001.

Brian O' Byrne
Equality Officer
31 January 2002