

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

3 Clonmel Street
Dublin 2.

Phone: 353 -1- 4774100
Fax: 353-1- 4774141

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

Equal Status Act 2000

EQUALITY OFFICER DECISION NO: DEC - S2001-019

**Mr Paddy Collins,
(Represented by Northside Traveller Support Group)**

-v-

**Mr Jerry Kyle, Kyles Pub
(Represented by Michael J. Kennedy & Co., Solicitors)**

**File Ref: ES/2001/088
Date of Issue: 13th December, 2001**

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Summary of Decision DEC-S2001-019

Mr Paddy Collins
(Represented by Northside Traveller Support Group)

-v-

Mr Jerry Kyle, Kyles Pub
(Represented by Michael J. Kennedy & Co. Solicitors)

Headnotes

Equal Status Act 2000 - direct discrimination - section 3(1)(a) - membership of the Traveller community - section 5(1) - refusal of service in a pub - burden of proof on complainant to present prima facie evidence of discrimination - no prima facie evidence presented.

Background

Mr Paddy Collins claimed that he entered Kyles Pub at 5 o'clock on 9th December, 2000, and was served two pints with a friend of his named Mr Martin Collins, who also claims to be a member of the Traveller community. He claimed that when they sought a third pint each they were refused service by Mr Kyle. Mr Collins claimed that the reason for his refusal was based on his membership of the Traveller community.

Mr Jerry Kyle is the owner of Kyles Pub and claimed that he did not refuse service to the complainant because he is a member of the Traveller community. He claimed that he was not on duty when the complainant and Mr Martin Collins were first served. He claimed that when he came on duty at 6 o'clock that day he refused further service to Mr Martin Collins because he had barred him from the pub previously. He claimed that he refused service to the complainant because he was drinking in the company of someone who was barred and it was clear to him that he was involved in a scheme to obtain drink for someone who was barred.

Conclusions of Equality Officer

The Equality Officer was satisfied that the complainant did not succeed in establishing prima facie evidence of discrimination. Accordingly, the question of the respondent rebutting an inference of discrimination did not arise.

Decision

The Equality Officer found that Mr Jerry Kyle, Kyles Pub, did not discriminate against Mr Paddy Collins, on the basis of his membership of the Traveller community on 9th December, 2000.

Equality Officer Decision DEC-S2001-019
Complaint under the Equal Status Act 2000

Mr Paddy Collins
(Represented by Northside Traveller Support Group)

-v-

Mr Jerry Kyle, Kyles Pub
(Represented by Michael J. Kennedy & Co., Solicitors)

1. **DISPUTE**

This dispute concerns a claim by Mr Paddy Collins, represented by Northside Traveller Support Group, that Mr Jerry Kyle, Kyles Pub, represented by Michael J. Kennedy & Co., Solicitors, discriminated against him on 9th December, 2000, on the basis of his membership of the Traveller community contrary to the Equal Status Act, 2000.

2. **BACKGROUND**

Mr Paddy Collins claimed that he entered Kyles Pub at 5 o'clock on 9th December, 2000, and was served two pints with a friend of his named Mr Martin Collins, who also claims to be a member of the Traveller community. He claimed that when they sought a third pint each they were refused service by Mr Kyle. Mr Collins claimed that the reason for his refusal was based on his membership of the Traveller community.

Mr Jerry Kyle is the owner of Kyles Pub and claimed that he did not refuse service to the complainant because he is a member of the Traveller community. He claimed that he was not on duty when the complainant and Mr Martin Collins were first served. He claimed that when he came on duty at 6 o'clock that day he refused further service to Mr Martin Collins because he had barred him from the pub previously. He claimed that he refused service to the complainant because he was drinking in the company of someone who was barred and it was clear to him that he was involved in a scheme to obtain drink for someone who was barred.

ISSUES FOR CONSIDERATION

3. Section 3(1)(a) of the Equal Status Act, 2000, provides, inter alia, that discrimination shall be taken to occur where -

“on any of the grounds specified in subsection (2) A person is treated less favourably than another person is, has been or would be treated”.

Section 3(2) provides that the discriminatory grounds include the membership of the Traveller community ground.

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”.

The issue for consideration in this complaint is whether or not Mr Jerry Kyle of Kyles Pub discriminated against Mr Paddy Collins on the basis of his membership of the Traveller community, in terms of section 3(1)(a) and contrary to section 5(1) of the Equal Status Act, 2000, on 9th December, 2000. Both parties supplied written material in relation to this complaint and two oral hearings were held. The first hearing was held on 22nd May, 2001, and the second oral hearing was held on 18th June, 2001. In reaching my decision I have taken account of all of the submissions, both oral and written, made to me by both parties.

ALLEGATIONS OF INTIMIDATION

4. At the first oral hearing Mr Collins claimed that three men had called to his home early the previous day and told him not to turn up for the court case, which he understood to mean the oral hearing scheduled for this complaint. Mr Collins claimed that because of what the three men had said he felt afraid and intimidated. Mr Collins claimed that he believed Mr Kyle had organised the three men to call to his home to intimidate him into withdrawing this complaint.

Mr Kyle rejected any inference that he organised three men to intimidate Mr Collins to get him to withdraw the complaint. Mr Kyle claimed that Mr Collins and Mr Paddy McDonagh of Northside Traveller Support Group called to his pub at about 6.00 p.m. the previous day and told him that this complaint was being withdrawn. Mr Kyle claimed that despite this he decided to attend the scheduled hearing because he had not been notified formally through the appropriate channels that the complaint was withdrawn.

Mr Collins accepted that he informed Mr Kyle that he was going to withdraw the complaint but claimed that he changed his mind afterwards when he reported the alleged intimidation to the Gardai and they advised him not to withdraw the complaint. He also claimed that the Gardai told him that they would tell Mr Kyle later that night that he had changed his mind about withdrawing the complaint.

The first oral hearing was adjourned to provide Mr Collins with an opportunity to back up his claim of intimidation. The hearing was also adjourned to provide Mr Kyle with an opportunity to bring a witness to support his case. Mr Kyle claimed that he did not bring the witness to the first hearing because he was not sure whether the hearing was going to go ahead or not.

When the second hearing commenced Mr Collins provided no further evidence of the intimidation alleged. I would like to put on record that I consider Mr Collins's allegations of intimidation have not been substantiated and Mr Kyle's good name and reputation should not be considered to have been tarnished in any way because of Mr Collins's uncorroborated allegations of intimidation.

SUMMARY OF COMPLAINANT'S EVIDENCE

5. The complainant claimed that on 9th December, 2000, he had about 5 pints in a pub called the Sheaf O'Wheat with Mr Martin Collins. The Sheaf O Wheat is located a few doors away from Kyles Pub. At about 5 o'clock they decided to go into Kyles Pub for a drink but on the way Mr Martin Collins met some friends and engaged in conversation with them. It was agreed that the complainant would go into Kyles Pub on his own and that Mr Martin Collins would follow him in when the conversation with his friends finished. The complainant went into Kyles Pub on his own and ordered two pints from a barman. He thought the barman was a brother of Mr Jerry Kyle as he looked like him. Mr Martin Collins arrived in the pub about 5 minutes later and joined the complainant.

The complainant was served a further two pints by the same barman when he and Mr Martin Collins had finished their first drinks. Mr Martin Collins then sought further service but was refused by the respondent. The respondent told Mr Martin Collins that the reason he was not being served was because he was barred about two years previously.

The complainant then sought further service and was also refused but no reason was given. The complainant then asked that the Gardai be called but he was not abusive in any way towards the respondent. When the Gardai arrived the respondent told them that he wanted the complainant and Mr Martin Collins to leave. At first the respondent claimed that Mr Martin Collins was barred two years ago, then he claimed it was three years ago and then he said that he could not remember exactly when he barred Mr Collins. The complainant and Mr Martin Collins then left. They told the Gardai that they thought the reason they were refused was based on their membership of the Traveller community.

The complainant claimed that he received less favourable treatment than a non Traveller would have received in the same circumstances. He claimed that a non Traveller in the company of a barred person would have been given the opportunity to stay in the pub provided the barred person left.

The complainant claimed that the respondent would have identified him and Mr Martin Collins as Travellers from their appearance. He claimed that the respondent would also have recognised Mr Martin Collins as a Traveller from an incident which took place in the pub about 10 years ago involving Travellers and non Travellers. However, the complainant claims that he did not know Mr Martin Collins was previously barred from the pub and does not know whether Mr Martin Collins accepts that he was previously barred from the pub before either.

The complainant also claimed that the respondent has a discriminatory policy not to serve Travellers.

SUMMARY OF RESPONDENT'S EVIDENCE

6. Mr Kyle is the owner of the pub. He claimed that he has worked in the pub for the last 40 years and that either he or his brother are there every day.

Mr Kyle claimed that on 9th December, 2000, he came on duty at about 6 o'clock and saw the complainant and Mr Martin Collins drinking in the pub. He did not know the complainant but remembered that Mr Martin Collins was involved in an incident in the pub about 10 years previously involving a fight between Travellers and non Travellers and that one of his staff was injured during it. He also remembered that the next time Mr Martin Collins sought service in the pub was 2-3 years before the incident complained of occurred and that he told Mr Martin Collins on that occasion that he was barred.

Mr Kyle produced a letter from the Gardai stating that Mr Martin Collins was arrested for the offences of Breach of the Peace and Drunk and Disorderly on 29th May, 1989, and that he was fined in Dublin District Court on 20th May, 1989. Mr Kyle claimed that this conviction arose from the incident in the pub.

Mr Kyle claimed that he did not know the complainant was a Traveller when the refusal took place and that he only became aware of this fact when he received the from ODEI5. He also claimed that although he was aware that Travellers and non Travellers were involved in the incident in which Mr Martin Collins was involved previously that he did not know Mr Martin Collins was a Traveller either although he had an idea that he was.

Mr Kyle claimed that shortly after he came on duty Mr Martin Collins ordered two further drinks. He claims that he refused him service because he had previously been barred from the premises. He claimed that shortly afterwards the complainant sought two further drinks. Mr Kyle claims that the reason he refused the complainant service was because he was drinking in the company of someone who was barred. Mr Kyle claimed that it is a well known ploy in the bar trade for someone who is barred to get someone who is not barred to buy drink for them. Mr Kyle also claimed that it was clear to him that the complainant was involved in a scheme to obtain drink for someone he knew or ought to have known was barred from the premises. Mr Kyle claimed that in refusing the complainant service he treated him the same as he would have treated a non Traveller in the same circumstances.

Mr Kyle claimed that after he refused the complainant further service, that the complainant said to him that he was "pissing him off", that "he would not always be behind the bar" and that he wanted the Gardai called. In response to a question Mr Kyle claimed that he did not get a chance to inform the complainant that he could be served if Mr Martin Collins left because of the abuse which he received. Mr Kyle claimed that because of the abuse which he received he decided that the complainant would not be served any more even if Mr Martin Collins left. Mr Kyle claimed that he then called the Gardai, who arrived shortly afterwards and escorted the complainant and Mr Martin Collins off the premises.

Mr Kyle claimed that after the complainant had left the pub he discovered that before he came on duty the complainant had been served by a barman named Mr Paul Counihan. Mr Kyle claimed that Mr Counihan had not worked for him very long and would not have

known that Mr Martin Collins was barred from the pub. Mr Kyle said that he did not know when he refused the complainant service if he had purchased drink for Mr Martin Collins. Mr Kyle said that he only discovered this afterwards when Mr Counihan told him.

Mr Kyle claimed that a number of Travellers drink in his pub regularly and that he does not have a discriminatory policy towards Travellers. He claimed that people are barred for life for violence or drug related issues. Other than that he uses his own discretion. For example, if someone is drunk and is a bit of a nuisance they might be given a second chance. He claimed that about 20-25 Travellers are barred but that a lot more non Travellers are also barred.

MEMBERSHIP OF THE TRAVELLER COMMUNITY

7. The complainant has claimed that he was discriminated against on the basis of his membership of the Traveller community. Section 2(1) of the Act states that “Traveller community” means:

“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.

At the oral hearing the complainant stated that although he does not lead a nomadic lifestyle at the moment he did so in the past. He said that he has always considered himself to be a member of the Traveller community and that he lives in group housing scheme for members of the Traveller community. I am satisfied that the complainant is a member of the Traveller community within the meaning defined in the Act.

CONCLUSIONS OF EQUALITY OFFICER

8. It was brought to my attention during the oral hearing that Mr Martin Collins had also made a complaint to the Director of Equality Investigations arising from the respondent’s decision to refuse him further service on 9th December, 2000. At the time of the oral hearing in this case the Equality Officer’s decision in relation to Mr Martin Collins’s complaint had not issued. However, it did issue on 2nd July, 2001, - Equality Officer Decision DEC-S2001-005, refers.

To establish why the complainant in this case was refused service and whether he was discriminated against I believe it is necessary to consider the Equality Officer’s decision in relation to Mr Martin Collins’s complaint. In this regard I have noted that the Equality Officer was satisfied that the reason Mr Martin Collins was asked to leave the pub on 9th December, 2000 “*was because he was barred on the basis of his former conduct*”. I have also noted that the Equality Officer found that Mr Martin Collins was not discriminated against when he was refused further service by the respondent.

- 8.1 I consider that the Equality Officer’s decision in relation to Mr Martin Collins’s complaint is significant in the context of the complaint in hand. In view of the Equality Officer’s decision I am satisfied that:
- Mr Martin Collins had been previously barred from the pub,

- the reason Mr Martin Collins was asked to leave the pub was because he was previously barred and was not based on his membership of the Traveller community.

I consider that the respondent's decision to refuse further service to the complainant in this case has to be considered in context. In this case the complainant was drinking in the company of someone who was barred from the premises because of his previous conduct.

For the complainant's claim to be upheld he has to establish prima facie evidence to show that he was treated less favourably than someone in the same circumstances who is not covered by the membership of the Traveller community ground. In other words, the complainant has to show that a non Traveller drinking in the company of someone who was barred would have received more favourable treatment than the treatment which he received. If he 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 complaint in hand under the Equal Status Act, 2000, but I consider that the Directive has persuasive effect in discrimination law. Also, I note that the Labour Court has been following this approach for many years in cases which have been taken under employment equality legislation.

- 8.2 To establish what a prima facie case is I have examined definitions from sources which are persuasive. 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.*"
- 8.3 In article 4 of the EC Burden of Proof Directive itself 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*".
- 8.4 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.*"
- 8.5 In some equality cases in the past, complainants have found it difficult to produce convincing proof that a prima facie case existed, primarily because independent corroboration was not available. The question then arose as to whether the circumstances of the case gave rise to

any inference of discrimination or whether discrimination could be presumed, and whether these inferences constituted evidence of a prima facie case.

- 8.6 In *Gleeson v The Rotunda Hospital (DEE003/2000)*, the Labour Court decided that a prima facie case existed only after considering all of the hard evidence and combining it with the inferences of discrimination that could be drawn from the circumstances of the case.
- 8.7 I now have to now establish whether the complainant has produced sufficient hard evidence which, in the absence of convincing contradictory evidence, would lead a reasonable person to believe that the respondent discriminated against him on the basis of his membership of the Traveller community. If he has succeeded in producing sufficient hard evidence then the burden of proof shifts to the respondent to show that he did not act in a discriminatory manner. In the absence of sufficient hard evidence any inferences of discrimination which might in themselves contribute to a prima facie case also have to be considered. However, if the complainant fails to produce sufficient hard evidence or inferences of discrimination to establish prima facie evidence, the burden does not shift to the respondent to show that he did not act in a discriminatory manner.
- 8.8 In this case both parties agree that the complainant was served two drinks and that he was then refused a third drink. Both parties also agree that the complainant was in the company of Mr Martin Collins when he was refused service. The respondent claimed that he treated the complainant the same as he would have treated anyone else when he refused him service. He claimed that it is his policy not to serve anyone who is in the company of a person who is barred or anyone who buys drink for a person who is barred.

The complainant claimed that a non Traveller would have been given the option to remain in the pub on condition that the barred person left but I note that he did not provide any direct supporting evidence to this effect. Accordingly, I have to examine whether there are any inferences which can be taken which when added together would establish prima facie evidence of discrimination

The first issue which I need to examine is whether the respondent knew the complainant was a Traveller when he refused him service as the parties disagree on this point.

- 8.9 The complainant claimed that the respondent has an underlying policy of discrimination against Travellers and that the respondent would have known him and Mr Martin Collins to be Travellers from their appearance. The respondent denied having a general policy to refuse service to Travellers and claimed that a number of Travellers are regulars in his pub. The respondent also denied knowing that the complainant and Mr Martin Collins were Travellers. He claimed that he only learnt that the complainant is a Traveller after he had refused him service when he received the ODE15 form. The respondent also claimed that although he had an idea that Mr Martin Collins was a Traveller because of his previous knowledge of him, he did not know this for certain until he received an ODE15 form from him also. I believe in some cases it will be obvious whether someone is covered by a ground covered by the Act. For example, I consider it will normally be obvious whether someone is male or female. However, having said this I accept that there are circumstances

where respondents may have some difficulty identifying people who claim to be covered by the membership of the Traveller community ground.

- 8.10 I have noted that the Equality Officer's decision in relation to Mr Martin Collins's complaint was silent as to whether the respondent identified Mr Martin Collins as a Traveller and no direct evidence to show that the respondent knew him to be a Traveller was presented during the course of my investigation. I have also noted that the respondent was aware that the incident Mr Martin Collins was involved in previously was between Travellers and non Travellers. Mr Kyle claimed at the oral hearing that he had an idea that Mr Collins was a Traveller but that he was not certain of this. On the balance of probabilities I am satisfied that the respondent did know that Mr Martin Collins was a Traveller through his previous knowledge of him. I am also satisfied that although the respondent did not know for certain that the complainant was a Traveller that he would have associated him with the Traveller community because he was drinking in the company of Mr Martin Collins.

Section 3(1)(b) of the Equal Status Act 2000 states, inter alia, that discrimination shall be taken to occur where:

"(i) a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated,"

Having established that the respondent associated the complainant with the Traveller community I now have to examine whether any inferences can be taken that the complainant was treated less favourably because of his association with the Traveller community compared to someone who the respondent would not have associated with that community.

- 8.11 I believe the fact that the complainant and Mr Martin Collins were served two pints each contributes towards the credibility of the respondent's case that he does not have a general policy to discriminate against Travellers. Although the respondent was not on duty when the complainant was served I consider that if a publican had a policy to discriminate against Travellers that he would have told his staff about it. If the respondent had a policy to discriminate against Travellers, and if the complainant and Mr Martin Collins can be identified as Travellers from their appearance, as claimed by the complainant, then I would have to wonder why the complainant and Mr Martin Collins were served by he respondent's staff on 9th December, 2000. In considering this point I have also noted that the complainant claimed at the hearing that he used to drink in the pub occasionally about 9 years ago with members of a local GAA club. I realise that 9 years ago is a long time but the fact that the complainant was served then also weakens the claim that the respondent has a discriminatory policy. I have noted that the complainant has not produced any other direct evidence of a discriminatory policy towards Travellers. Accordingly, on the balance of probabilities I have no reason to conclude that the respondent has a policy to discriminate against Travellers.
- 8.12 As mentioned previously the respondent claimed that the reasons the complainant was refused a third drink were that:

1. he was in the company of someone he knew, or ought to have known to be barred, and
2. it was clear that he was involved in a scheme to obtain drink for someone he knew, or ought to have known to be barred.

- 8.13 I note that these reasons are not exactly the same as the reasons the respondent mentioned in the statement which he supplied in reply to the ODEI5 wherein he only referred to 2 above as being a reason for refusing service to the complainant.
- 8.14 The complainant accepts that he was in the company of Mr Martin Collins and that he purchased drink for him. However, he claimed that he did not know Mr Martin Collins was barred and that it is unreasonable for anyone to expect him to have known this. The complainant claims that it was particularly unreasonable for the respondent to expect him to have known Mr Martin Collins was barred because, by his own admission the respondent did not know the complainant when he made his decision to refuse him service. I have noted that no direct evidence was presented by the respondent to show that the complainant knew Mr Martin Collins was barred. However, he did state that in his 40 years of experience in the bar trade he has learnt that it is a well known ploy for someone who is barred to get someone who is not barred to buy drink for them.
- 8.15 I have also noted from the Equality Officer's decision in relation to Mr Martin Collins's complaint that Mr Martin Collins "*said he knew he might not be served in the pub as a result of his behaviour*". Although this does not necessarily mean for certain that Mr Martin Collins told this to the complainant, on the balance of probabilities, I consider it is likely that the complainant was aware that Mr Martin Collins may not have been served. I have noted that the complainant strenuously denies knowing that Mr Martin Collins was barred and claimed that he would not have left the Sheaf O'Wheat if he had thought he would not be served in Kyles Pub. However, I have taken into account that the complainant went into the pub on his own first, that he purchased two pints and that Mr Martin Collins then followed him in. While I believe this is not an uncommon practice, I consider on the balance of probabilities that it lends credence towards the credibility of the respondent's case that the complainant was aware that Mr Martin Collins was barred and that the two separated as part of a ploy to ensure that Mr Martin Collins was able to drink in Kyles Pub.
- 8.16 I also noted that during the oral hearing the respondent claimed that he only came on duty at 6 o'clock on 9th December, 2000. He claimed that was when he first observed the complainant and Mr Martin Collins drinking together. The respondent stated he only became aware that the complainant had purchased drink for Mr Martin Collins after he decided to refuse further service to the complainant when he was discussing the incident with his staff. Accordingly, I am satisfied that at the time when the respondent made his decision to refuse further service to the complainant that he did not know that the complainant had purchased drink for Mr Martin Collins. I am satisfied that the respondent in fact assumed that the complainant had purchased drink for Mr Martin Collins because he saw the two of them sitting together in the pub with drinks in front of them. The respondent only found out that his assumption was correct when he subsequently discussed the incident with his staff.

- 8.17 The respondent claimed that he did not get the chance to give the complainant the option to remain in the pub because he became abusive when told that he could not be served any more because he was with Mr Martin Collins. I have noted that the complainant denies being abusive and there is clearly a conflict in evidence on this point. Neither the complainant nor the respondent had any witnesses to support their versions and I consider that the evidence is inconclusive as to whether the complainant was abusive or not.
- 8.18 However, there is no doubt that when the respondent decided to refuse service that he was clear in his mind that the complainant was in the company of someone who was barred. As such I consider that he was acting in accordance with his stated policy to refuse service until the barred person left. On the balance of probabilities I consider that this shows the respondent was not treating the complainant less favourably than someone who he did not associate with the Traveller community.
- 8.19 Having considered fully the evidence provided by the complainant, including any inferences of discrimination which can be drawn from the circumstances of the case, I am satisfied that the complainant has not succeeded in establishing prima facie evidence of discrimination. Accordingly, the question of the respondent rebutting an inference of discrimination does not arise.

DECISION

9. I find on the basis of the evidence presented that Mr Jerry Kyle, Kyles Pub, did not discriminate against Mr Paddy Collins, on the basis of his membership of the Traveller community on 9th December, 2000.

Anthony Cummins
Equality Officer
13 December, 2001