

**Equal Status Act 2000**  
**Equality Officer Decision**  
**DEC-S2001-016**

**Ann McDonagh**

**V**

**Tesco Ireland Limited**  
**Waterford**

*File Ref*            *ES/2001/143*

*Date Of Issue*      *23/11/2001*

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## **Equal Status Act 2000**

### **Summary of Decision DEC-S2001-016**

**Ms Ann McDonagh**

**v**

**Tesco Ireland Ltd**

#### **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 a Supermarket/Shop - Establishment of a prima facie case - Allegation of shoplifting - Functions of security personnel - Hypothetical comparator

#### **Dispute**

This dispute concerns a complaint by Ms Ann McDonagh that she was discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by Tesco Ireland Ltd, Lisduggan Branch, Waterford 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 denied a service which is generally available to the public contrary to Section 5(1) of the Act.

#### **Background**

The complainant maintains that, while shopping in Tescos, Waterford on 27 February 2001, she was approached by a floor manager and asked to leave the premises. She believes that this was on the grounds of her membership of the Traveller community. The respondents deny this allegation and state that the complainant was asked to leave because she had been barred previously from the store.

#### **Decision**

The Equality Officer found that the complainant has established a prima facie case of discrimination on the Traveller community ground and that the respondents failed to provide sufficient evidence to rebut the claim that they discriminated against the complainant.

The Equality Officer ordered that Tesco Ireland Ltd provide the complainant with free shopping in their Waterford stores to the value of £1000 (EURO 1270). He also ordered that Tesco Ireland Ltd pay the complainant a further £1500 (EURO 1905) for the embarrassment and humiliation suffered by her on 27 February 2001 and for the loss of amenity suffered by her since then.

## **Equal Status Act 2000**

### **Decision DEC-S2001-016**

**Ms Ann McDonagh**

**v**

**Tesco Ireland Ltd**

#### **1. Dispute**

1.1 This dispute concerns a complaint by Ms Ann McDonagh that she was discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by Tesco Ireland Ltd, Lisduggan Branch, Waterford 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 denied 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, while shopping in Tesco's, Waterford on 27 February 2001, she was approached by a floor manager and asked to leave the premises. She believes that this was on the grounds of her membership of the Traveller community. The respondents deny this allegation and state that the complainant was asked to leave because she had been barred previously from the store.

#### **3. Summary of the Complainant's Case**

3.1 Ms McDonagh states that, while shopping for goods in Tesco, a floor manager approached her in the store on 27 February 2001 and took the goods she had intended buying from her. She says that he then stated that she was barred and asked her to leave. She says that he refused to say why or when she had been barred and also refused to call the Gardai at her request.

#### **4. Summary of Respondent's Case**

The respondents maintain that the complainant was asked to leave because of a previous incident where she was discovered attempting to remove goods from the store without payment.

#### **5 Evidence of Parties**

**5.1** A Hearing of this case was held on 27 September 2001. The evidence provided by the parties is as follows:

##### **Respondents**

- Mr Sean Doyle, Store Manager, provided details of how floor staff were trained to be security conscious, and to have an awareness of what was going on around them. Where incidents of shoplifting were detected, staff would inform a floor manager. The manager would watch the individual and wait until the person tried to leave the store. If they believed that goods had been concealed, they would then apprehend the individual outside the store and ask them to return to the store.
- In situations where a case of shoplifting was confirmed, the Gardai would be summoned to arrest the individual. The Manager would then write an incident report for Head Office.
- When asked how staff identify shoplifters from previous occasions, it was stated that staff would normally remember them from having seen the Gardai escort them from the premises.
- On 27 February 2001, Ms Helen Power, Senior Check-out Manager with Tesco, was working at the Customer Service Desk when she noticed Ms McDonagh in the store. Ms Power believed that she recognised the complainant as someone who had been barred 2/3 years previously for shoplifting. She could not recall the specific incident but said that she remembered the complainant's face from that time. She then informed Mr Jim Farnan, Assistant Manager, who went to investigate.
- Mr Farnan states that when he saw the woman in question, he immediately recognised her as having been involved in a shoplifting incident in the store 2/3 years earlier. Mr Farnan said that he then approached Ms McDonagh and informed her that her "invitation to trade has been withdrawn" and that she would have to leave the store.
- He then took the goods she was holding (two litres of milk) from her. After having "caused a scene" for a short while, he says that she then left. He says that he did not offer her any explanation for his actions. He recalls that Ms McDonagh asked for the Gardai to be called but that he refused to call them for her.

- Mr Farnan stated that he would have expected an incident report relating to the previous shoplifting incident to be available. However, when he checked with their Head Office, no incident reports relating to Ms Ann McDonagh could be traced.
- It was also confirmed that the store had not contacted the Gardai since Ms McDonagh's discrimination complaint was made, to check whether the Gardai held a report of the alleged shoplifting incident from a few years earlier. In addition, no evidence was produced to show that the complainant had been convicted of any previous offence.
- Neither Mr Farnan nor Ms Power recall having seen Ms McDonagh in the store in recent years.
- There are no video recordings of either incident currently available.
- According to the respondents, Tesco do not discriminate against Travellers. The company also maintain that a number of Travellers regularly shop in the Lisduggan store and they are always made welcome. They say that the store does not differentiate between Travellers and non-Travellers.
- The respondents state that Ms McDonagh's membership of the Traveller community was not referred to by her on 27 February 2001.

## **5.2 Complainant:**

- The complainant regards herself as a settled Traveller. She has lived in the same house for the past six years. Her children go to the local school and she herself is waiting to start a FAS course.
- The complainant was quite adamant that she had never been involved in a shoplifting incident in Tesco's Lisduggan store. In saying that she had been arrested some years previously, the complainant accused Tesco staff of making serious allegations against her without any evidence to support them..
- Ms McDonagh claimed that, in the six years prior to 27 February 2001, she had always done her main weekly shopping in Tesco's Lisduggan Store in Waterford. Up until the date of the alleged discrimination on 27 February 2001, she said that she also used to do a smaller shopping every Monday or Tuesday in the store.
- Since being barred from the Lisduggan store on 27 February 2001, she says that she has shopped weekly at Tesco's other store in Poleberry, Waterford
- Ms McDonagh states that she was confronted by Mr Farnan on 27 February who informed her she was "barred". She denies that Mr Farnan used the words "invitation to trade was being withdrawn".

- The complainant states that she then went to pay for the milk but that Mr Farnan came from behind her and "snapped" the two milk cartons from her hand.
- When she sought an explanation as to why she was barred, she says that she was given none.
- Ms McDonagh says that she asked for the Gardai to be called but the staff refused her request. She left the shop and rang the Gardai herself. She says they refused to come as no criminal offence had been committed.
- She returned to the store, asked another staff member for Mr Farnan's name and, on receiving it, left the premises.
- The complainant states that Mr Farnan's face is known to her from regularly seeing him in the store. Ms Power is also known to Ms McDonagh, who commented that Ms Power was usually to be seen on check-out duty every second week. Ms Power confirmed that this was the case.

## 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 her 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 Tesco's store on 27 February 2001.

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

## 7 Conclusions of the Equality Officer

**7.1** Neither party has given any indication that Ms McDonagh's membership of the Traveller community was raised on 27 February 2001. However, from the evidence before me, I am satisfied that both Mr Farnan and Ms Power, on seeing Ms McDonagh in the store, recognised her as a member of the Traveller community.

**7.2** 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 a non-Traveller would have been treated in the same manner by Tesco staff as Ms McDonagh was treated on 27 February 2001.

In this case, the outline facts have been agreed: Ms McDonagh was approached in the shop by a member of staff, her goods were taken from her and she was asked to leave. The complainant claims that this action was taken by Tesco on the grounds of her membership of the Traveller community. The respondents deny that any discrimination was involved and maintain that the complainant was asked to leave because of a previous incident in the store.

**7.3** The first point I must consider is whether the respondents' actions were in fact discriminatory. In order to do so, I must consider whether the treatment afforded the complainant would have been any different from the treatment afforded a non-Traveller who was suspected of having shoplifted in the past. In other words, I must consider whether, in being asked to leave the store in the manner that Ms McDonagh was asked, the complainant was treated less favourably than a non-Traveller would have been treated in similar relevant circumstances. In order to decide whether this was the case, some form of comparator is required.

I, therefore, believe that, in order to properly evaluate this case, 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.

**7.4** Hypothetical comparators have been introduced in a number of 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.*"

A hypothetical comparator was also used in the recent Equal Status case of *Coffey, Quilligan and McCarthy v The Blasket Public House (DEC-2001-010)* where the Equality Officer found that the Manager of a pub, on recognising a group of potential customers as Travellers, acted in a more forceful manner in refusing them access, than he would have acted if a group of non-Travellers had been involved.

**7.5** In my view, the principal facts of the case are as follows:

- The respondents have provided details of how floor staff are trained to be security conscious, and to have an awareness of what is going on around them. Where there is a suspicion about a customer, staff are required to inform a floor manager, whose duty is to monitor that person's activities and, where shoplifting is suspected, to approach the individual only when they try to leave the store.
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- In this case, both Tesco staff members state that they recall the complainant being involved in a shoplifting incident some 2/3 years previously, but neither can remember specific details of the alleged incident. Yet on the basis of this recollection, Mr Farnan decided to confront the complainant in the store and to inform her that she was barred.
- When Ms McDonagh asked for an explanation, Mr Farnan refused to give her one. When she attempted to pay for the goods she was carrying, he physically removed the goods from her possession. He then insisted that she leave the store and refused to give her his name.
- Also, it is worth noting that, while both members of Tesco's staff state that they did not recognise the complainant as a regular shopper in Tesco's, Ms McDonagh, by contrast, was able to identify the staff concerned and, indeed, correctly stated that Ms Power was only employed on check-out duty every second week.

**7.6** Another important factor in this case is that both Ms Power and Mr Farnan state that they recognised the complainant as "someone who had been barred 2/3 years previously" yet neither were able to recall specific details of the alleged incident. When one considers that incidents of shoplifting regularly occur in big stores, it is hard to accept that staff, who were not directly involved in the original incident, would still have a clear picture in their mind of the shoplifter concerned, several years later. Yet, based solely on the personal recollection of two Tesco staff, a customer was challenged and then removed from the store without explanation.

**7.7** I have also noted that the respondents have failed to produce any evidence from their own sources, or from the Gardai, to prove that the complainant had previously being involved in a shoplifting incident in the store. In the absence of hard evidence, I believe that it is reasonable to conclude that, on the balance of probabilities, no previous incident of shoplifting involving Ms McDonagh occurred in Tesco's store.

Another factor which has had a bearing on my decision, is that Ms McDonagh has displayed a familiarity with the Tesco store and its staff, which would indicate that she has shopped there regularly in recent years. It would also appear that, despite the events of 27 February 2001, Ms McDonagh's customer loyalty to Tesco has continued, as, she says, she simply switched to Tesco's other Waterford branch for her weekly shopping.

**7.8** Having considered all the evidence before me, I simply cannot accept that a non-Traveller, in similar circumstances, would have been treated in the same manner as the complainant was treated on 27 February 2001. If a non-Traveller had been involved, I believe that the staff, with no clear evidence to hand and relying only on memory, would have given the customer the benefit of the doubt, and would have simply monitored that individual's movements throughout the store.

To me, this approach would have been consistent with the training that the Store Manager described, whereby staff are trained to be security conscious, to have an awareness of what is going on around them and to watch individuals they are suspicious of, rather than confront them.

**7.9** In considering all of the above points, the only conclusion that I can arrive at, with regard to Ms McDonagh's treatment by staff and her eviction from the store, is that it was based on a bias against members of the Traveller community amounting to discrimination under the Equal Status Act.

I, therefore, find that the complainant has established a prima facie case of discrimination on the Traveller community ground, resulting in the burden of proof shifting to the respondents and, having considered all the evidence before me, I find that the respondents have failed to provide sufficient evidence to rebut the claim that they discriminated against the complainant.

## **8 Decision**

**8.1** In this particular situation, I believe that Ms McDonald was clearly identifiable as a member of the Traveller community and this, I believe, swung the balance in favour of taking immediate action against her instead of monitoring her movements in the store.

**8.2** With the benefit of hindsight, I am sure that the Tesco staff would agree that monitoring Ms McDonagh's movements would have been the best option in the circumstances, particularly as subsequent enquiries have failed to link Ms McDonagh with any previous incident in the store.

However, without explanation, on 27 February 2001, Ms McDonagh was confronted in Tesco's store and asked to leave. I do not believe that a non-Traveller would have received the same treatment in the same situation. For this reason I find that the complainant was discriminated against, contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act 2000, by Tesco Ireland Ltd, on the grounds of her membership of the Traveller community.

In an effort to ensure that similar situations do not arise in the future, I direct that Tesco Ireland Ltd review their staff training to ensure that staff are aware of the need to base security decisions on reasonable evidence, to guard against undue reliance on assumptions, and to apply consistent rules irrespective of customer background.

**8.3** In considering the form of redress which would be most appropriate in this case, I am cognisant of the fact, that the complainant's shopping loyalties apparently still lie with Tesco. I, therefore, order that Tesco Ireland Ltd facilitate Ms McDonagh by providing her with free shopping in whichever of their Waterford stores she chooses, to the value of £1000 (Euro 1270). This arrangement to be put in place, within 42 days of the date of this decision, either through the setting up of a personalised account for Ms McDonagh or through the provision of shopping vouchers to the value of £1000 (Euro 1270).

I also order that Tesco Ireland Ltd pay Ms McDonagh a further £1500 (Euro 1905) for the embarrassment and humiliation suffered by her on 27 February 2001 and for the loss of amenity suffered by her since then.

**Brian O' Byrne**  
**Equality Officer**  
**23 November 2001**