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ADJ-00012145



ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00012145

Parties:

| | Complainant | Respondent |
|---------|--------------|---------------------------------------|
| Parties | Ethel Brooks | The Commissioner of An Garda Síochána |



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|-----------------|---|--|
| Representatives | Siobhan Phelan SC instructed by Free Legal Advice Centres | Conor Quinn BL instructed by the Chief State Solicitors Office |
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Complaint(s):

| Act | Complaint/Dispute Reference No. | Date of Receipt |
|--|---------------------------------|-----------------|
| Complaint seeking adjudication by the Workplace Relations Commission under Section 21 Equal Status Act, 2000 | CA-00016067-001 | 30/11/2017 |

Date of Adjudication Hearing: 15/04/2019

Workplace Relations Commission Adjudication Officer: Orla Jones

Procedure:

In accordance with Section 41 of the Workplace Relations Act, 2015 and Section 25 of the Equal Status Act, 2000, following the referral of the complaints to me by the Director General, I inquired into the complaints and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints.

Background:

The complainant referred a complaint on the ground of race under the Equal Status Acts, 2000-2015 to the WRC on the 30th of November 2017.

The complaint refers to a claim that the complainant was discriminated against and harassed on the ground of membership of the traveller community and/or race by an Immigration Officer which occurred at Dublin airport following her arrival in Ireland on 1st of August 2017.

In accordance with his powers under section 75 of the Employment Equality Acts, 1998-2015 and under the Equal Status Acts, 2000-2015, the Director delegated the case to me Orla Jones, Adjudicator/ Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under III of the Equal Status Acts, 2000-2015. Written submissions were received from both parties. As required by Section 25(1) and as part of my investigation, I proceeded to a Hearing on the 15th of April 2019.



Summary of Complainant’s Case:

The Complainant submits that

She is a US citizen and a member of the Romany Community,

She is also a Romany activist and Associate Professor of Women’s and Gender Studies and Sociology at Rutgers State University in New Jersey,

She complains about an incident of discrimination and harassment by an Immigration Officer which occurred at Dublin airport following her arrival in the State in August 2017 to attend the Roma Holocaust Memorial Day ceremony at the Mansion House in Ireland organised by Pavee Point Traveller and Roma Centre and funded and supported by the Department of Justice and Equality and the US Embassy,

Upon learning that the Complainant was visiting Ireland to take part in the commemoration of the Romani Holocaust, the Immigration Officer delayed her passage through immigration control and subjected her to the racial insults. His speech was full of stereotypes against Roma. He told the Complainant that Roma are people “who steal and beg in the streets” in cities such as Dublin or Milan, and that she should watch her handbag while staying in Dublin. Moreover, he said “...and now they have got minority status and they are going to be taking social benefits and doing all sorts of things...”. He went on: “it’s really just about people’s actions . . . It’s really about the ways in which you can’t really live beside them”,

The Complainant contends in this complaint that passengers who are not Roma or are without a perceived connection to Romani and Traveller communities would not be delayed in this manner or subjected to this abuse,

The Complainant was targeted for less favourable treatment and unwanted conduct because of the Immigration Officer’s perception that the Complainant was associated with Romani and Traveller communities.



Summary of Respondent’s Case:

The respondent submits that

the WRC does not have jurisdiction to hear and adjudicate upon the Complaint because the notification requirements under section 21 of the 2000 Act have not been complied with and the Complainant has not advanced any justification for this failure that could satisfy the WRC that reasonable cause for this failure exists.

the WRC does not have jurisdiction to hear and adjudicate upon the Complaint because the alleged actions of the Immigration official related to the carrying out of a controlling function of AGS, namely and not to the provision of a service, as required under section 5 of the 2000 Act,

the WRC does not have jurisdiction to hear and adjudicate upon the Complaint because the alleged actions of the AGS member in question relate to the carrying out of a statutory function and accordingly is protected from scrutiny pursuant to section 14 of the 2000 Act. The conversation between the official involved and the Complainant involved the performance of his statutory functions under section 7 of the 2005 Act and under immigration law.

Findings and Conclusions:

Preliminary issue in respect of Respondent name

The complainant in her complaint form lodged the complaint against the Irish Naturalisation and Immigration Service (INIS). Prior to the hearing the WRC were notified that correspondence in respect of this matter had been forwarded by the named respondent INIS to the Commissioner of An Garda Síochána.

The respondent at the hearing was represented by the Chief State Solicitor acting for the Commissioner of An Garda Síochána. The hearing was advised that the Commissioner of An Garda Síochána was the correct respondent to this claim due to the fact that at the relevant time, the Immigration Control facility at Dublin Airport Terminal 2 was operated by members of An Garda Síochána (“AGS”) attached to the GNIB, and not by the named Respondent INIS. The hearing was further advised that in the circumstances, AGS had agreed to take responsibility for the defence of this Complaint and the submissions were prepared on behalf of AGS.

Following a discussion of these matters at the hearing both parties agreed that the name of the respondent be changed to The Commissioner of An Garda Síochána. I am satisfied that the respondent name can be changed by agreement of the parties to The Commissioner of An Garda Síochána.

Preliminary issue in respect of notification requirements

The Respondent raised number of preliminary matters, the first being that the complainant failed to comply with the notification requirement within the statutory time limit, a preliminary objection in relation to the jurisdiction of the Director General of the WRC to investigate the instant complaint was made on the grounds that it does not comply with the notification requirements under section 21 of the 2000 Act and that the Complainant has not advanced any justification for this failure that could satisfy the WRC that reasonable cause for this failure exists.

Section 21 of the Equal Status Acts make provision for the relevant time limits for the notification and referral of complaints by a person who intends to seek redress under the Acts in relation to an alleged incident(s) of prohibited conduct.

Section 21 (2)(a) of the Equal Status Acts, 2000 - 2015, states that

"Before seeking redress under this section, the complainant-

(a) shall, within 2 months after the prohibited conduct is alleged to have occurred, or, where more than one incident of prohibited conduct is alleged to have occurred, within 2 months after the last such occurrence, notify the respondent in writing of-

(i) the nature of the allegation,

(ii) the complainant's intention, if not satisfied with the respondent's response to the allegation, to seek redress under this Act."

It is submitted on behalf of the complainant that Solicitors only came on record for the Complainant for the first time in April 2019 and that she was not legally represented at any time up to the notification and referral of her complaint. It is further submitted that the complainant is a non-national, non-resident in the State and that this impacted on her ability to access information in relation to securing a remedy in respect of the discriminatory effects of the less favourable treatment and unwanted conduct to which she was subjected.

The complainant’s solicitors wrote to the WRC by letter dated the 12th of April 2019 with reference to the notification requirements under the Act and signalling that, if necessary, an application would be made for directions under section 21(3) of the Act in this case.

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In relation to notification, the Complainant relies on the fact that the complaint was formally notified in writing to the Immigration Services on the 6th of November 2017 using their on-line complaint form. This was just over three months after the treatment of which the complaint is made. In this on-line complaint form, the Complainant sought, inter alia, the name of the guard responsible so that she could consider what further action to take. There has never been a response, other than an acknowledgment, to the online complaint submitted to the respondent by the complainant.

It is further submitted that the on-line complaint made on the 6th of November, 2017 was not the first notice that the Immigration Services and/or GNIB received because the matter had been reported in the media on 3rd of August, 2017 and so it is considered that the matter had been notified to the respondent within the two months notification period in this context.

In addition, it is submitted that despite the fact that the Complainant requested confirmation of the identity of the Immigration Officer in the on-line complaint form to Immigration Services of 6th of November 2017, the first confirmation of his identity was in written submissions on behalf of An Garda Síochána just before the scheduled investigation hearing.

It is submitted therefore by the complainant that the complaint herein was notified to the respondent within the 2 month prescribed period due to the fact that the Complainant gave an interview in the national press within two days of the incident in which particulars of the incident were given and it is apparent from the face of the article published in the Irish Times on 3rd of August 2017 that GNIB had been advised of the complaint and invited to respond by the press. The newspaper coverage confirms that the matter was being investigated. It is submitted that the details published in the national press of the Complainant's complaint that she had been subject to racist abuse is sufficient notification for the purpose of section 21 of the 2000 Act.

In considering whether the complainant has met the requirement to notify the respondent within two months of the incident I must examine whether the article of 3 August 2017 satisfies the notification requirement under Section 21(2), I must be satisfied that it sets out:

(i) the nature of the allegation, and

(ii) the complainant's intention, if not satisfied with the respondent's response to the allegation, to seek redress under this Act." (emphasis added)

The respondent at the hearing submitted that the nature of the allegation is not set out in the newspaper article as it does not state that a complaint of discrimination and harassment on the ground of race and membership of the Traveller Community is being made. In addition, there is no mention of any intention by the complainant to seek redress under the Equal Status Act or to refer the matter to the WRC.

At the hearing an argument was also advanced on behalf of the complainant, that the newspaper article of the 3rd of August 2017 makes reference to the complainant having contemplated making a complaint but that she did not do so at the time for fear that she would not be left into the country. It is clear however that this reference, is to making some form of complaint there and then while at the airport either to or about the Garda in question given that the reason she states for not making such complaint is that she was "terrified she might not be allowed into the country". I am therefore not satisfied that this reference to a complaint can be construed as a notification issued to the respondent notifying them of an intention to submit a complaint to the WRC under the Equal Status Acts.

In examining the newspaper article of 3rd of August 2017 it does set out details of the incident but does not specify that what is at issue here is a complaint of discrimination and harassment on the grounds of race and membership of the traveller community. In addition, I note that the newspaper article does not set out or make any reference to the Equal Status Act or to "the complainant's intention if not satisfied with the respondent's response to the allegation, to seek redress under this Act."

Accordingly, having considered this matter I conclude that the newspaper article of 3rd of August 2018 does not satisfy the notification requirement under Section 21(2).

The complainant at the hearing also submitted that she had made a complaint to INIS via an online complaint form and that this was submitted on the 6th of November 2017. This online complaint form was also submitted outside of the 2-month time period for notification and so any consideration as to whether this meets the notification requirements or qualifies as a valid notification could only be considered in circumstances where an extension of time to four months is granted or where a decision has been made to dispense with the notification requirement entirely.

The complainant in her submission has requested that in the event of a finding that she has not met the notification requirements under Section 21(2) she is seeking a direction under section 21(3)(a) of the Act providing either that the 2 months period be extended to four months and/or dispensing with the requirement for notification under section 21 in the circumstances of the case.

Section 21(3) allows for this in the following terms:

(3) (a) On application by a complainant the Director of the Workplace Relations Commission or, as the case may be, the Circuit Court may —

(i) for reasonable cause, direct that in relation to the complainant subsection (2) shall have effect as if for the reference to 2 months there were substituted a reference to such period not exceeding 4 months as is specified in the direction, or



(ii) exceptionally, where satisfied that it is fair and reasonable in the particular circumstance of the case to do so direct that subsection (2) shall not apply in relation to the complainant to the extent specified in the direction,

and, where such a direction is given, this Part shall have effect accordingly.

(b) In deciding whether to give a direction under paragraph (a)(ii) the Director of the Workplace Relations Commission or, as the case may be,

the Circuit Court shall have regard to all the relevant circumstances,

including —

(i) the extent to which the respondent is, or is likely to be, aware of the circumstances in which the prohibited conduct occurred, and

(ii) the extent of any risk of prejudice to the respondent's ability to deal adequately with the complaint."

The complainant submits that in circumstances where the complaint was notified through a media interview in respect of which an opportunity to comment was provided and it was confirmed in response that the matter was under investigation, that the respondent was aware of the circumstances in which the prohibited conduct occurred and is not prejudiced by reason of a lack of a formal notification in writing in an ability to deal adequately with the complaint. I have already made a finding that this newspaper article of 3rd of August 2017 does not meet the notification requirement.

It is further submitted that there are circumstances personal to the complainant which make it reasonable and fair for a direction to be made under section 21(3) in relation to time limit issues. The complainant seeks to rely on the nationality of the complainant and the fact that she was in Ireland for a short period of time. In this regard it is submitted that as a non-resident complainant, it was necessary for the complainant to inform herself remotely in relation to the steps available to her to make a complaint and that she did not enjoy the same access to information and services that a person living in Ireland would have. She seeks to further rely on the fact that the Complainant was not legally represented.

In addition, it is submitted that the referral of the complaint was made within 6 months from the date of the occurrence of the prohibited conduct to which the case relates and that no extension of time is required in this regard.

The Complainant relies on the following in seeking a direction under section 21(3):

- i. The Complainant is non-national;
- ii. The Complainant was present in the State for days only at the time of the prohibited conduct alleged;
- iii. The Complainant was not legally represented;
- iv. The Respondent was aware of the nature of the complaint from the newspaper article of 3rd of August 2017 and the fact that it was considered serious;
- v. The Respondent did not respond to the Complainant's request for information on the 6th of November 2017 following an investigation and/or the identity of the officer in question so that she might consider what options were available to her;
- vi. The complaint was referred within six months;
- vii. The Respondent does not identify any prejudice arising from a technical failure to notify.

The respondent in its submissions on the time limits issue submit that it is clear that compliance with the requirements in relation to time limits is not simply a procedural matter but is a question that determines the jurisdiction of the WRC to hear a complaint. The respondent in this regard cites the case of *Borsca v Bank of Ireland* ADJ-00010452 (4th September 2018), in which the Adjudicator stated, "*My jurisdiction in this case rests on compliance with section 21(2)*". The respondent goes on to state that it is well established that ignorance of the law is not an excuse, both in general terms and in the specific context of compliance with the notification requirements in section 21 of the Equal Status Act.

The respondent submits that *Borsca v Bank of Ireland* makes it clear that compliance with section 21(2) is to be strictly interpreted by the WRC, in those circumstances where notification of the WRC complaint took place 3 months after the incident complained of, the Adjudicator found as follows (even though the Complainant had previously notified the Respondent by way of an internal complaint procedure within the 2 month period):

"However, there are strict notification requirements, and these have not been satisfied in their entirety in this case. I appreciate that the Complainant referenced the Equal Status Act in her complaint but there is a clear variance in the statutory notification requirement.

The purpose of the ES1 form is to allow the Respondent some time to engage with the complainant with a view to seeking to resolve the matter. Provision is made for Information sharing if same is requested by the complainant.



The Complainant did not place the Respondent on notice of her intention to refer the case to the WRC if dissatisfied with the response received by the respondent. I appreciate that there was a clear duplication in the initiation of the complaints which culminated in confusion. However, I am required to ensure that all aspects of Section 21 of the Act have been met. On this occasion, I have found a shortfall which in my opinion has not been sufficiently explained or reasoned by the complainant.

This omission has prevented my jurisdiction in the case, and I must deny jurisdiction”.

The respondent submits that in applying these provisions to the facts of this case, the delay in question is almost 4 months. The alleged incident in question occurred on 1st August 2017, and the ES.1 form was submitted on 30th November 2017 i.e. the last day on which it could be submitted if an extension to 4 months was granted.

I note that the notifications on which the complainant seeks to rely in this case i.e. the newspaper article of 3rd of August 2017 and the online complaint form to INIS falls short of the notification referred to in the ‘Borsca’ case in that neither of these purported notifications refer to the Equal Status Acts or to any intention to refer the matter to the WRC.

The respondent advised the hearing that it also notes that the Complainant in this case has not addressed the issue of the delay in providing the Form ES.1 either within that Form or in her WRC Complaint Form.

It is further noted that in an email sent to the GNIB dated 30th November accompanying the ES.1 Form that Complainant provided the following justification for the delay:

“Whilst I passed the initial 2-month deadline for submission, I am submitting my complaint within the 4-month extension period. I needed the extended time because I am a US citizen who lives in the US, and therefore am unfamiliar with the complaint process and immigration system of Ireland. I humbly request that you grant me the extension due to these circumstances”.

The respondent submits that this is clearly an explanation based on ignorance of the law, which as outlined previously cannot provide an excuse.

The respondent goes on to state that ignorance of the law as a possible excuse for the purposes of section 3(a), cannot apply on the facts of this case for the following reasons:

The Complainant in her complaint form has stated that she is supported in making this Complaint by Pavee Point Traveller and Roma Centre, who are an Irish human rights and equality organisation focused on the rights of the Traveller and Roma communities, and who have significant experience of supporting Complainants in complaints under the Equal Status Act to the WRC and its predecessor the Equality Tribunal.

It is also submitted that the facts of the case as outlined by the Complainant indicate that the day after the occurrence of the incident complained of in this case, she attended an event organised by Pavee Point Traveller and Roma Centre, and it is clear that she was discussing the alleged incident complained of in this case with people at this event, as one such discussion at that event with a journalist led to the publication of an article in the Irish Times dated 3rd August 2017.

The respondent goes on to state that the delay in submitting the complaint disadvantaged the respondent as it could have relied on CCTV footage of the incident if the complaint had been notified to them shortly after the incident but stated that CCTV footage is not retained for a period as long as four months after the incident. The complaint enclosing the ES 1 form was only sent to them on 30th of November 2017, almost four months after the alleged incident which took place on 1st of August 2017. The respondent added that the purpose of the ES1 form is to allow the respondent to engage with the complainant and to give them a chance to reply to the issues notified before the complainant proceeds to lodge a complaint with the WRC. The respondent told the hearing that it had received the notification and the complaint referral form on the same date thus giving them no time to deal with or reply to the issues raise in the notification before a complaint was referred to the WRC.

On the basis of all the foregoing the respondent states that it is clear that from the immediate aftermath of the incident the Complainant had access to expert support and advice on the mechanisms and procedures of making a complaint and as such she cannot succeed in satisfying the WRC that ignorance of the law explains her failure to comply with the notification requirements.

The respondent advised the hearing that the Complainant cannot fulfil the test contained in section 21(3) of the Act for providing an extension of time for the submission of the Form ES.1, and as such the WRC has no jurisdiction to hear and determine the Complaint. The respondent submits that it is clear in factual and evidential terms from the complainants email dated 30th November 2017 that the reason for the delay is that she was unfamiliar with the relevant rules, and it is clear from the statutory provisions and from recent authority that ignorance of the law is not a justification that can provide the basis for an extension of time under section 21(3). Accordingly, the WRC does not have jurisdiction and must refuse to hear this Complaint.

In examining the arguments put forward by the parties I must bear in mind the leading Decision on the question of whether or not reasonable cause has been shown is the Labour Court Decision in Cementation Skanska -v- A Worker DWT0425 & Department of Finance -v- Impact:



“It is the Court's view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression reasonable cause appears in the statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant’s failure to present the claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time. The length of the delay should be taken into account. A short delay may require only a slight explanation whereas a long delay may require more cogent reasons. Where reasonable cause is shown the Court must still consider if it is appropriate in the circumstances to exercise its discretion in favour of granting an extension of time. Here the Court should consider if the respondent has suffered prejudice by the delay and should also consider if the claimant has a good arguable case”. (emphasis added).

At the hearing it was submitted that the complainant did not have access to Irish legal representation until a week before the hearing. An argument was also advanced that the newspaper article of the 3rd of August 2017 makes reference to the complainant having contemplated making a complaint but that she did not do so at the time for fear that she would not be left into the country. I am not satisfied that this reference to a complaint can be construed as referring to an intention to submit a complaint to the WRC under the Equal Status Acts.

When questioned at the hearing as to why she did not submit her complaint earlier the complainant stated “I knew coming out of the airport that I could file a complaint, but I knew I had to do what I came here to do and help families. I went to Irish radio and talked about the Holocaust”. The complainant went on to state that Journalists were there, and it was the first time the Irish Government recognised the Roma Holocaust. The complainant told the hearing that one of the journalists had asked her how she liked Ireland and it was following on from that that she told the journalist that the Border Guard at the airport had said racist things about Roma and Travellers, this led to the newspaper article of 3rd of August 2017. The complainant advised the hearing that she had spoken to people from Pavee point sometime in September 2017 and she had referred to the fact that she had not heard anything following from the newspaper article of 3rd of August and a comment made by a GNIB spokesperson that the matter was being investigated. The complainant told the hearing that a representative of Pavee point then told her that she needed to file a complaint and that she could do it online. The complainant stated that she had then began looking up websites but found it confusing as she didn’t know which was the right one to which she should submit her complaint.

The respondent at the hearing argued that it is not believable that a person of the complainant’s education and standing would not know or would not be able to find out how to initiate a complaint under the Equal Status Acts within the two-month notification period. The respondent also referred to the fact that the complainant had spoken to a journalist about the incident within a day or two of it happening and also that she had also discussed it with members of Pavee point on her visit in August 2017. The complainant herself stated that it was only after going home and thinking about the incident for a while that she decided to pursue a claim under the Equal Status Act.

The complainant in this case is a Professor, she was in Ireland to speak on behalf of the Roma Community at the Roma Holocaust Memorial service. The complainant on the occasion of her visit and within a day or two of the alleged incident spoke to a reporter about the incident and she advised the hearing that the reporter in question published an article on the incident on 3rd of August 2017. In addition, the complainant told the hearing that she had discussed the incident with members of Pavee point during the Holocaust memorial event which was organised in conjunction with Pavee Point.

Having regard to the totality of the evidence adduced and having considered the circumstances of this case, I find that I cannot justify extending the notification requirement in the circumstances of the instant case. I am satisfied that the Complainant has not provided reasonable cause which both justifies and explains the delay in complying with the notification requirements.

I am, therefore, not empowered under the Acts to extend or dispense with the two-month notification requirement. Furthermore, I am satisfied that the notification requirements set out in Section 21(2) of the Acts, were not complied with, and accordingly, I find that I do not have jurisdiction to investigate the within complaint.

Decision:

Section 25 of the Equal Status Acts, 2000 – 2015 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under section 27 of that Act.

Having investigated the above complaint, I hereby make the following decision in accordance with Section 25 of the Equal Status Acts.

I find that the Complainant has failed to comply with the notification requirements set out in Section 21 of the Acts. Accordingly, I find that I do not have jurisdiction to investigate the within complaint.



Dated: 30/09/19

Workplace Relations Commission Adjudication Officer: Orla Jones

Key Words:

Notification requirements, extend, dispense with, jurisdiction, correct respondent.



The Labour Court



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