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ADJ-00018849

ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00018849



Parties:

	Complainant	Respondent
Parties	James McCarthy	Cork City Council



Representatives	Cathal Malone, Thomas Coughlan & Co. Solicitors	Legal Dept, Cork City Council
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Complaint:

Act	Complaint Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under Section 21 Equal Status Act, 2000	CA-00024126-001	13/12/2018

Date of Adjudication Hearing: 31 July 2019 and 30 October 2019

Workplace Relations Commission Adjudication Officer: Patsy Doyle

Procedure:

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

Background:

On 13 December 2018, the complainant submitted a complaint of discrimination on gender and membership of the travelling community grounds. This was predated by the earlier submission of an ES1 form on 8 November 2018.

The respondent in the case denied discrimination and had outlined a detailed response to the ES1 on 11 December 2018.

The case came for hearing on 31 July and proceeded on that day. The hearing was adjourned to facilitate the attendance of a witness for the respondent. Both parties were represented legally.

I also had cause to request several documents from both parties to assist my investigation.

- Record of houses allocated during the life span of the complainant’s presence on the housing list
- Record of applications disturbed by anti-social behaviour
- Medical review of submitted medical reports
- Policy on Housing Allocation
- Details of the bids made by the complainant.

The final part of that request, the medical review was received from the respondent in early March 2020 and had been copied to the complainants Solicitor.

In November 2019, the respondent wrote to me and advised that following a successful engagement with the parties, the complainant had received an allocated dwelling from the Council.

There were no further submissions from the complainant’s representative and this decision follows a careful consideration of the submissions raised on both hearing dates in July and October 2019 in tandem with witness evidence.

The respondent raised a preliminary issue at the outset of the case.



Summary of Complainant’s Case:

Preliminary issue:

The complainant’s representative acknowledged the time limit raised by the respondent but requested a relaxation of the time limits considering the ongoing nature of the complaint.

Substantive Case:

The complainant’s representative gave an outline of the case. The complainant is a single separated man and member of the travelling community. He has care of two children. On behalf of the complainant, he submitted that he had been discriminated against on grounds of gender and travelling community grounds in relation to his seeking allocation of a council property for residential purposes.

The complainant had by the date of hearing been on the housing list for 22 years and 10 months. He was also subject to a very complex medical history, details of which were provided.

The Respondent had changed to a new system of housing allocation called Choice based letting (CBL). The complainant had not succeeded in securing a residence through this system which lacked transparency. He continued to reside in substandard accommodation, while holding an urgent need for housing for him and his family.

The Complainant representative went on to point to a “lack of draw down “of €276,000 allocated centrally for this purpose and gave a chronology in a shortfall of allocation of funds leading to a large funding cohort left unclaimed for housing 2015 to 2018. This had sparked political interest.

The complainant was in urgent humanitarian need of housing and his medical issues were pressing. He had been denied a housing opportunity in the face of available funds.

In responding to the respondent submission on the chronology of the complainant’s presence in seeking a house. The complainant’s representative submitted that some confusion had followed in the years of 2013-2016. There were some occasions where he did not have availability to attend the city council to engage.

During the most recent application process, July 2018, the complainant had been informed that the alleged anti-social behaviour of his 12-year-old son had prevented his being considered for a house he was viewing ion CBL. On inquiry, he was unable to secure details of this objection attributed to a Garda source.

Evidence of the Complainant:

The complainant submitted that he was currently living in wholly inadequate accommodation in a damaged caravan on a halting site. His pressing medical issues made life extremely difficult and he had an urgent housing need after 23 years on the Housing List.

He recalled that he had met respondent representatives MS A and Ms B, Traveller Advocacy in May 2018. He understood he had a 99% chance of securing an identified property in his desired area.

He met with respondent representatives on 6 September 2018, to be told by Mr A, that he would not receive an allocation to that property. On inquiry, he was informed that his son with special needs had engaged in anti-social behaviour which negated his application. He was not aware of the reported behaviour, nor did he believe it and no evidence of same was produced. He believed that he had been badly treated as he had been given false hope of securing a much needed property. He submitted that had he been female or a member of a settled family he would not have been left on the housing list for 23 years.

The complainant lost the property but sought to appeal for details of the obstruction through freedom of information.

In response to the respondent's questions, the complainant denied that he had not called for housing documentation in 2013. He was unsure about his level of engagement in 2016 and emphasised that he had been ill on occasion.

He agreed to continue to engage with the Council.

The complainant's representative drew attention to an earlier Formal Review of the Housing Allocation decision dated 22 January 2019 and submitted with a written submission to the WRC in February 2019. The review had been requested by the complainant's advocate.

This document confirmed that the decision not to proceed with "the consideration for the offer of this property was valid and in line with the usual pre-allocation processes in use by the respondent"

Following a review of the Garda information by the Executive Housing Officer and the Area Manager, it was agreed not to proceed with the offer of this decision as explained to you at a meeting held in X on 6 September 2018. At the time you were also advised that this decision would not preclude you from bidding on, and being considered for, further properties via the CBL website and would not impact your application in anyway

In conclusion, the complainant representative submitted that Protected Categories under the Act were not provided for in the CBL scheme and it was not Equality proofed.

The Complainant had been wrongly refused a copy of the Garda Report which had led to him losing out on a firm offer of housing.

He contended that his client had met the burden of proof required in the case and re-affirmed that meetings were not minuted or documents generated before or after the offer of social housing was managed.



Summary of Respondent's Case:

The respondent has rejected all claims of discrimination in relation to provision of goods and services.

Preliminary Issue:

The respondent representative outlined that the instant complaint was out of time. The meeting referred to by the complainant in relation to property A has taken place on 6 September 2018. The ES1 was lodged outside the statutory time limit provided in S21 of the Act.

Substantive Case:

The complainant had been on the list for housing supports from August 1996. He indicated two areas of interest which limited the respondent in finding a suitable property.

The Respondent denied any knowledge of the national issue referred to by the complainant. They exhibited the 1,874 number of units allocated by Cork City Council 2015 -2019 (September).

The respondent outlined the basis of how properties were allocated based on family composition the complainant's former partner had been allocated a social house in February 1998.

The respondent went on to highlight significant gaps in the complainant's application for housing. The complainant had wanted specific accommodation and had been considered for several properties in 2013 and 2018. He had been passed as eligible for a 3 bedded property.

The respondent had changed to CBL (choice based letting) in November 2015, which consisted of a log in bidding basis for social housing. Elderly and persons of reduced mobility were not allocated social housing through this system. The complainant delayed in his engagement with this new scheme until 2017 and had since been offered one property, that of July 2018. Custody confirmation was also delayed and only received by the respondent by affidavit in September 2017.

The respondent had sought to engage with the complainant in December 2016. There was an administrative lag until September 2017. Overall, he had submitted 15 listed expressions of interest on CBL to July 30, 2019.

By the end of February 2019, 5 houses had become available and generated 650 expression of interest.

The complainant was considered for a three bedroomed house in July 2018, there were 387 other bidders.

As part of the standard pre-allocation process of offer, an interview took place followed by a Garda check in July 2018. This process highlighted anti-social behaviour by the complainant's son.

The Respondent representative outlined its powers under section 14 of the Housing (misc. provisions) Act 1997. The provisions allow a housing authority to refuse to make or defer the making of an allocation of a dwelling to a household where the authority considers that the allocation would not be in the interests of good estates management

The Traveller Liaison officer outlined the function of support for the complainant at the respondent office. She assisted in the decision making for this unique function in support of the Travelling community. She told the hearing that she had recommended the complainant for housing based on his longevity on the list and declared medical grounds. She also wanted the complainant to engage with her office.

Evidence of Ms A, Allocations officer

Ms A worked as an Allocation Officer and submitted that the complainant was supported by the respondent in his application for housing. Ms A had received training in equality.

A dedicated Traveller Liaison Officer represented his interests and made representations for access to a social house based on medical grounds. The complainant had been approved for a three-bed home and he was unsuccessful in seeking the first three bed that came up in June 2019.

On 18 July 2019, the second property came up and the complainant was deemed the best candidate and offered the property, pending Garda checks. Ms A understood that the complainant attended for interview on 30 July with the respondent representatives to follow through.

Ms A had reassured the complainant that the process of allocation was in train. The Gardai subsequently advised that there was a problem and the matter was placed at Area Manager level. The complainant was not allocated the property.

In response to the complainant's representative questions, Ms A confirmed that the transition was an offer and not a defined allocation of a social house.

She clarified that priority is given to elderly in the case of vacant units. The application form was of a general basis and offers were managed by estate management who held the supreme authority

Ms A concluded by confirming that the complainant had not been medically assessed by the council.

Evidence of Mr B, Housing Officer

Mr B has been with the Council for 17 years. He undertook a standard interview with the complainant with a set list of questions. His objective was to be satisfied that the house identified could be allocated to the complainant. Background checks occurred as a follow up of that process.

His attention was drawn to a list to the name of the complainant's younger child. Mr B covered part of the complainant's desired area and the complainant's son's name featured as someone who was causing problems of an anti-social nature.

Following the interview, he raised his concerns and was advised to contact the Gardai. The information indicated that the complainant's son had acted in an intimidatory fashion in stone throwing on an estate.

Mr B submitted that good estate management indicated that an offer of housing should be made outside the area where the problem behaviour had occurred.

He met with the complainant in early September and explained the process. He clarified that the complainant was not refused housing nor was his place on the list deferred. He recalled that the complainant did not agree with his pronouncements and was very upset.

In response to the complainant's representatives' questions, he confirmed that this information had been communicated via email. There were no criminal charges actioned against the complainant's son. He understood that multiple complaints had been received by the Gardai from their patrols in 2014. He regarded the multiple complaints as the standard of proof he relied on. There was no record of intervention or reportage.

Mr B emphasised that he held discretion in the matter and could change his mind. His authority was devolved from the higher level of management. The complainant was encouraged to continue bidding on CBL.



He confirmed that he had consulted with broader management, but this was not reflected in a written report, nor was there a copy or record of the exchange with the complainant.

Mr B was not aware if any of the other children present with the complainants’ son were housing applicants.

In conclusion, the respondent representative submitted that the CBL scheme was blind to categories and therefore it was impossible to discriminate against the complainant. The respondent could not break down bidders by category.

The respondent had acted on the representations of the Traveller Liaison Officer in support of the complainant.

The criteria for allocation, rested on time spent on the Housing List and Medical details before the file goes to the Housing Officer who then inquires if all is well with the offer. If not, the respondent may apply a refusal/deferral on anti-social behaviour grounds not greater than 2 years. Garda checks are a component of the process.

A formal offer and despatch of keys follows a satisfactory conclusion of all this.

The respondent contended that Section 14 of the Housing (Miscellaneous Provisions) Act, 1997 should bind the Adjudicator in the case as the objection had issued as a communication of “mayhem” from a Garda source. A balancing exercise followed and there was no presumption of discrimination.

The complainant was requested to submit proof of custody as is applicable to all applicants.

All applicants are subject to pre-allocation interviews and Garda checks prior to formal offer of tenancy. The respondent did not have consent to release this Garda documentation. The information was given in confidence to enable the respondent to conduct good estate management.

The respondent affirmed that they had operated within the Housing Allocation Scheme and the legislation.

The Housing Allocation scheme is a Statutory scheme adopted by the elected members of the respondent and made in accordance with Section 22 of the Housing (Miscellaneous Provisions) 2009

The respondent undertook to furnish the requested Medical report in due course and to furnish any details on the house offer currently in contemplation by the respondent.



Findings and Conclusions:

The Equal Status Acts 2000-2015 prohibits discrimination in the provision of goods and services on 10 grounds.

Before making a complaint regarding perceived discrimination, unlawful treatment or prohibited conduct, the complainant is obliged to first send a notification in writing to the respondent. In accordance with Section 21 of the act, this notification must contain specific information concerning the alleged discrimination and must be received by the respondent within 2 months after the occurrence of the event in question

Source: Guidelines from WRC Equal Status Acts

Preliminary Argument:

The respondent has argued that the complainant has not complied with the express terms of Section 21 of the Act as ES 1 was submitted to the Respondent on 8 November 2018 which veered outside the Statutory time limit. They maintained that the complaint arose following the occurrence of a meeting between the complainant and respondent dated September 6, 2018.

The complainant asked for an accommodation of the reference to 2 months to 4 months. I have exercised my discretion and granted a short extension of time in line with the reasonable cause clause in S21(3)(I) and find that S21(2)(a) has effect in this case for a period not exceeding 4 months.

(2A) For the purposes of subsection (2) the date of notification is the date on which the notification is sent, unless it is shown that the notification was not received by the respondent.

(3) (a) On application by a complainant the Director of the Workplace Relations Commission or 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,

I have identified the date of notification as 8 November 2018 from the record of postage. The respondent has not suffered detriment as they were on notice of the claim and responded by means of ES 2 on 7 December 2018.

I find for the complainant on the Preliminary Issue.

Substantive Case:

I have considered both parties oral and written submissions. I have also had regard to the information I requested and received from the parties in my letter dated August 9, 2019.

This is a complaint of prohibited conduct on Gender and Travelling community grounds. The complainant made application for a social house and declared that he was a male member of the Travelling community.

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.

Section 3(1) of the Act provides that discrimination shall occur where

(a) Where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in sub section 2 which exists, existed but no longer exists but no longer exists or may exist in the future or is imputed to the person concerned.

Section 5 prohibits discrimination in disposing of goods to the public generally or a section of the public or in providing a service

Section 6(1) prohibits discrimination in

- (a) Disposing of any estate or interest in premises
- (b) Terminating any tenancy or other interest in premises or
- (c) Any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities

And S. 1(c) is without prejudice to (a) any enactment or rule of law regulating the provision of accommodation.

(6) Nothing in subsection (1) shall be construed as prohibiting—

(a) a housing authority, pursuant to its functions under the Housing Acts, 1966 to 1998, or

(b) a body approved under section 6 of the Housing (Miscellaneous Provisions) Act, 1992,

from providing, in relation to housing accommodation, different treatment to persons based on family size, family status, marital status, disability, age or membership of the Traveller community.

This permits a Housing Authority to consider factors such as family size and membership of the Traveller community.

On a careful analysis of the facts of the case, I found large gaps in the complainant’s purported commitment to relocating from his base at the halting site. Neither party could produce a complete record of the attempts made by the complainant to secure a house. I secured a record of his 15 bids December 2016 to February 2019, some of which were for larger sized properties.

It seems that the September 2017 Affidavit copper fastened the complainant’s application in terms of paper work on family size required.

Section 38 A (1) defines the burden of proof rests with the complainant in the case

Where in any proceeding’s facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him, it is for the respondent to prove the contrary

The Courts have considered applications for social housing under a judicial deference to the Housing Legislation. In **O Donoghue V Clare county Council at the Supreme court, 2003**, the court held that

“It is first the Housing Authority to consider and assess priorities in light of duties and resources ”

In **Elizabeth and Barbara Mulhare and Cork County Council [2018] IECA 206** at Court of Appeal the Court considered an appeal for housing to address a particular need:

“... but the council must perform its statutory function in accordance with the Housing priorities ...

And preached some caution that a Court should not direct how that Policy is applied.

“unless a clear error in the decision-making process is established by a disappointed applicant the courts may not intervene to quash the decision that led to that disappointment ”

I have been asked to adjudicate on a claim of discrimination on grounds of gender and traveller community status in relation to the complainants attempts to source social housing in his chosen area.

My first attention was drawn to the document **Allocation Scheme**, effective 24 April 2017.



This defines anti-social behaviour as provided in Section 1 of the Housing Act 1997 as amended. The purpose of the scheme is to provide a means for determining the order of priority to be given in the allocation of dwellings and includes

(b) Travellers

(c) Living in accommodation that is unfit for human habitation

(g) medical reasons

(I) enduring physical, sensory, mental health needs

The general criteria provide that an applicant must be 18 on or before allocation and have a legal right to reside in the state.

Section 3.3 permits the respondent to "reserve and designate for particular categories "several dwellings for elderly, persons with physical, sensory, mental health or intellectual impairment, persons in need of accommodation for medical or compassionate reasons or through discretion, any other class or classes of person the respondent judges prudent to house.

Priority is determined by:

Waiting time

Stated preference area

Family size and type of dwelling required

The final decision in allocation is obliged to have regard to all information furnished by the household in support of his application together with all other information relevant thereto known to the Director of service or any other person so delegated including

Waiting time

Transfer waiting list

Preferred area

Family size and dwelling required

This does not specifically mention that Garda clearance is necessary of Garda Intelligence on the household movements will be elicited during the allocation process.

In Section 13, the applicant is obliging to notify of any change in circumstances either family or medical "following which the housing application will be reviewed "The respondent is mandated to obtain necessary information from another housing authority, approved housing body or an HSE.

The Policy goes on to outline Estate Management and specifically the interface with Section 14 of the Housing Act 1997. The respondent is permitted to refuse to make or defer the making of an allocation of a dwelling to a person where the respondent that an allocation would not be in the interests of good estate management.

A prospective tenant may be required as a precondition of grant of tenancy, to attend and participate in a pre-tenancy course

Engagement in Anti-Social behaviour is also identified as grounds to defer the making of an allocation of a dwelling.

I then reviewed the complainants submitted documentation which unequivocally declared a medical need for him to be relocated from the halting site on medical and physical grounds. The report dated 18 May 2018 is illustrative of that need. I note that the respondent did seem to support the complainants desired relocation at that point through a number of advocate emails from the Liaison Officer .However, given the centrality of medical grounds to being permitted an earlier allocation of housing , I am at a loss to understand just why the respondent did not commission a medical review of the complainants medical reports prior to my request at hearing . ?

The Medical review which I received in March 2020 was a more desk top review than a participative and contemporaneous review. I note by this omission, the respondent did not act within its schemes letting priorities to address medical, psychiatric and compassionate grounds for housing.

In addition, I had difficulty in securing a traceability on documents pertaining to the application for social housing. The respondent referred to the presence of a file in evidence but did not exhibit a record of or minutes of meetings at any level of the respondent enterprise held with or concerning the complainant on the offered property in July and September 2018. I drew inferences from this omission.

I found this lack of transparency worrying and I was particularly struck by Mr Bs expressed view that he held an unfettered discretion on turning the offer into a defined allocation in September 2018.He clearly submitted that he could have changed his mind but gave no reason for not doing so.

This caused me to review the legislative provisions relied on by the respondent , namely Section 14 Letting and sale of local authority housing in Housing (Miscellaneous Provisions) Act 1997 .The respondent requested that I consider myself bound by this provision and while noting the higher courts



words of wisdom in relation to a review of a statutory body's decision in this case, I have reflected that I have been asked to investigate the events complained of to assess whether or not I can infer discrimination occurred ? In this I have considered the social reality which applied here.

I was unsettled by the lack of traceability of the Garda Siochana report on the complainant's sons alleged engagement in anti-social behaviour to a reported level to disturb the complainants offer of a house in his desired area. I took from his evidence that his endorsement of a continuation of bidding on CBL should continue was to ensure that the complainant would be allocated an area separate to the area where the stones were allegedly thrown. While , the complainant could not be guaranteed housing in his desired area , I found that the canvas to continue bidding in the face of a real time offer in his preferred area to amount to less favourable treatment directly related not his gender but to his imputed traveller status .The respondent did not demonstrate any threads of inquiry , intervention or prosecution in the stone throwing incident. The report was not validated and placed before the complainant for his response. Neither was it submitted to this investigation. For me this constitutes a defined error on behalf of the respondent.

I found this shroud of secrecy in the face of a clear denial from the complainant to be tainted with discrimination and not remedied by the augmentation of the formal review undertaken by the respondent in January 2019.

I note that the respondent has relied on the overarching section 15 of the Act in their securing information from a Garda as a "specified person" for the purposes of the Act. I refer again to O **Donoghue and Mulhare**, where decision making is to be based on duties and resources.

I find that the respondent had a duty of candour towards the complainant who by September 2018 had established independent medical evidence that his life expectancy was projected as linked to his chances of being rehoused from the halting site. These facts were in the possession of the respondent. I did not understand why the respondent chose to communicate the withdrawal of the offer of allocation orally without collateral written script. I viewed this as an error also.

I find that the withholding of the email purportedly linked to anti-social behaviour by the complainant's son constituted less favourable treatment on traveller community grounds as the complainant was treated less favourably than a settled person would have been treated.

In O **Brien v Iarnrod Eireann, DEC-S2003-029**, Judy Walshe in the book Equal Status Acts, assessed the facts of a case where a Traveller was accused of stealing a bag on a train. Passengers implicated the complainant and the Gardai were called without interviewing the witnesses .The complainant had her luggage searched in full view of other travellers and was allowed back on the train when nothing was found , but did not receive an apology .The Equality Officer concluded that discrimination had occurred as had a non-Traveller been accused of theft , it was reasonable to contend that the witnesses would have been interviewed prior to Garda and the complainant would have been appraised of the allegations and received an apology .

In the instant case, the complainant lost the offer of allocation that he had been virtually guaranteed some 6 weeks previously before getting a chance to counter the facts. This amounted to a 14-month delay in his securing adequate housing. The Allocations Scheme does not reference Police checks in its application sequence.

I cannot accept that the CBL is blind to discrimination as the complainant clearly applied for housing as a male member of the Travelling Community. His application was subject to the positive action measures of Section 6(6) of the Act. I am not satisfied that the CBL is Equality proofed.

I note the positive contribution by the Traveller Liaison Officer in advocating for an offer of accommodation in 2018 a 2019. However, I noted a disconnect when this Office was not participant when issues were identified by another division of the enterprise.

In conclusion, I have found that the complainant has satisfied the burden of proof in accordance with Section 38 A of the Act and the Respondent has not successfully rebutted the inference of discrimination on Section 2(i)Travelling community grounds.

The complainant was discriminated against contrary to section 5 and section 6 of the Equal status Acts.

I have found that the complainant has not made out a case of discrimination on Section 2(a), gender grounds.

I find the complaint to be partially well founded.



Decision:

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

I have completed my investigation into the facts of the case and I note that the respondent has since allocated a property to the complainant in November 2019.

I have found that the complaint of discrimination on Traveller community grounds has succeeded and is well founded.

I have found the complaint on gender grounds has not met the prime facia test and is not well founded.

In accordance with my powers permitted under Section 27 of the Act, I make the following orders of redress.

I order the respondent to pay the complainant €8,000 in compensation for the effects of the prohibited conduct.

I order the respondent to engage in a review of CBL scheme to achieve Equality Proofing within 3 months of this decision and to implement any recommendations which may follow this review within 6 months of their pronouncement.



Dated: 2nd July 2020

Workplace Relations Commission Adjudication Officer: Patsy Doyle

Key Words:

Discrimination on gender and travelling community



The Labour Court