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ADJ-00026062

ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00026062



Parties:

	Complainant	Respondent
Parties	Bridget Power	Atlantic Troy Limited Charleville Park Hotel & Leisure Club



Representatives	Fergus Feeney Fergus A Feeney Solicitors	Tom Kelly James O'Brien & Co. Solicitors
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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-00033141-001	16/12/2019

Date of Adjudication Hearing: 30/04/2021 and 01/10/2021

Workplace Relations Commission Adjudication Officer: Janet Hughes

Procedure:

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.

At the hearing on April 30th, 2021, a serious conflict in evidence was identified, and the parties agreed that the hearing should be adjourned to allow for the legislation to provide for oaths to be administered and for submissions which were not provided prior to the hearing.

Background:

This complaint is concerned with a refusal to provide accommodation owing to the method of payment required by a hotel. The Complainant (and two others) were booked into the hotel operated by the Respondent for 9 September 2019. The booking was made by one of the three-the Complainant in ADJ-00026060. On arriving at the hotel, the Complainant (and others) were refused accommodation on the basis that they could not pay by credit card. The contention on behalf of the Complainant (and others) is that she was discriminated against as a member of the Traveller Community-a discriminatory ground under the Equal Status Act. It is the defence of the Respondent that the policy requiring a payment by a credit card is hotel policy applied to all potential customers and as such it is not discriminatory against members of the Travelling Community as claimed. The requirement to pay by credit card was notified online at the time of booking. Evidence under oath was given by Annalise Power who made the booking and Mr Taylor gave evidence on behalf of the Respondent.

The parties and witnesses are named in the Decision and otherwise only as necessary in the remaining text.

ADJ 26051 60 and 62 contain the decisions in respect of the three complainants in relation to the same matters.

Form ES1 was served on the Respondent on 16 October 2020. The Respondent replied on February 19th, 2021.

Note: most of the text of this document mirrors that of ADJ-00026060. The evidence and arguments presented in both cases was the same. The main differences in this text relate to describing the relationship between the family connection between the Complainants in both cases, their different economic status and crucially, the basis on which discrimination is decided by reference to the Equal Status Act at Section 3 of that Act.

The Complainant in this case is the daughter of the person who made the booking.



Summary of Complainant's Case:

While the Complainant representative again failed to provide a written submission setting out the basis of the case in advance, the hearing proceeded on the basis that his clients had waited two years for a hearing including experiencing an adjournment in April 2021 while legislation was awaited to allow evidence to be taken under oath or affirmation.

There were three Complainants associated with this complaint. It is common case that Annalise Power booked two rooms through booking.com to stay at the Charleville Park Hotel in Charleville County Cork on Monday 9 September 2019. It was explained that the Complainants travelled from Longford to attend a surprise sixtieth birthday party. On arrival at the Hotel at approximately 4.00pm Annalise Power went into the Hotel to check the party in at reception. When she went to the Hotel reception, she was told by a staff member at reception that she was short the total cost of the stay. She went to the car to get the extra money needed to cover the total cost of the stay. When she returned to reception, she was told that she needed a credit card to stay at the Hotel. She had used a debit card to make the booking online. When she asked why this was, she was told it was Hotel policy and asked to be shown this policy. She now accepts that she was shown a document where it said that payment must be made at the hotel by credit card. In the initial statement of case, it was said that despite neither booking.com nor the Hotel's own website stating that a credit card is required to stay at the Hotel they were refused accommodation. Asked when the policy came into effect, they could not be told. She asked was it in place in April 2019 when they had attended a funeral and stayed at the hotel. On the occasion in April 2019, they were attending a funeral and they were dressed quite sombrely and so in their view as they were dressed somewhat differently in September 2019-with Ms Annalise Power wearing shorts and had rollers in her hair and they believed that it was known that they were members of the travelling community by their dress. [This point made in the complaint form was not pursued at the hearing.]

Having asked to speak to the Hotel Manager he eventually came to speak to them and offered the same explanation as the other staff members and offered them phone numbers for other hotels in the locality. They asked for compassion for their grandmother who was one of the parties of three, and he said there was nothing he could do. This dispute went on for approximately thirty minutes and all the

while people were passing through the Hotel lobby within earshot and it was apparent what was going on. In their written submission the Complainants said that the grandmother was left standing in the lobby despite her ill health and that she felt completely unwanted and shamed while watching this encounter between staff members, her daughter and granddaughter. It is contended that the requirement for a credit card was an excuse and was used to prevent them from staying in the Hotel. They feel that they were discriminated against based solely on their membership of the Travelling Community. This is the summary of the statement as set out in the Complaint form.

Precedents on behalf of the Complainants

The Complainant representative submitted three WRC adjudication decisions as precedents on the same issues, i.e., the refusal to provide accommodation to members of the Travelling Community: ADJ-00016257/17894/17902.

Supplementary Arguments

Prior to the resumed hearing, the Complainant representative provided a copy of the Census of Population 2016 - Profile 8 Irish Travellers, Ethnicity and Religion. That report provided statistics regarding the level of education of Travellers together with their economic status including workforce participation (unemployment). It was submitted on behalf of the Complainants that this was a case where accommodation had been refused because of membership of the Travelling Community in September 2019 despite having a confirmation booking with the Hotel. The representative submitted that this was selective use of the policy; that the existence of the policy was not made clear at the time of booking; and that even if it was and it was accepted by the adjudication officer that the policy was made clear, this was an invalid policy. That policy is discriminatory in nature, and this is supported by the social demographics in the Census of Population 2016. Asked which section of the Equal Status Act applied to this case, the Complainant representative indicated section 3(1)(c) referring to an apparently neutral provision:

"3.— (1) For the purposes of this Act discrimination shall be taken to occur —

(c) where an apparently neutral provision would put a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

Responding to the arguments made on behalf of the Respondent regarding the rationale for the policy, it was submitted that there were options available other than to refuse the booking. A hold could have been placed on the Visa debit card and this was not an option offered to his client. The hotel could have a policy which allowed members of the Traveller Community to be identified and then pay by other means. When the level of unemployment among the Travelling Community is examined, at eighty percent, the option of having a credit card was very limited among that community and therefore the effect of the policy was discriminatory. There were alternatives open to the Respondent in cases where there was damage done to a hotel - through legal proceedings or other means. This policy was not neutral in the case of the overwhelming majority of members of the Travelling Community.

Annalise Power gave evidence that she and her members of her family had stayed in the Hotel the previous April. On that occasion they had paid with cash having made the booking on the same debit card through booking.com. She has no credit card and none of her family have one. When told that she needed a credit card she offered cash but was told this was not enough, that she needed a credit card. She said she had a debit card. She was told they would not accept it. In her testimony she accepted that she was shown a document with terms and conditions by one of the managers on the day. In response to the Respondent, she said that when she made the booking on booking.com she does not recall whether she read the terms and conditions, she was ticking the boxes. Asked would she accept that the condition that she was required to have a credit card was there, she replied no, she did not read the detail. The witness did say that she became annoyed on the day because of what was happening at the time.

Summary of Respondent’s Case:

The Respondent representative addressed two main issues.

Firstly, the reason for introducing a policy that all accommodation must be paid for by a credit card. This is a policy in place in many countries and hotels across the world. While the booking can be made on a debit card or equivalent, payment for the booking at the Hotel must be by way of a credit card. The policy was enforced from June 2019 following a number of significant financial losses suffered by the Hotel arising out of damage caused to hotel property by guests. Photographs were provided showing significant damage to the Hotel caused by guests in 2018. There were he said numerous incidents of residents emptying the fridge in their room of its contents and leaving without paying for them. Arising out of these (and other) incidents, the Respondent held management meetings during 2018/19 at which the concerns about losses through damage and unpaid bills were discussed. Ultimately in June 2019 it was decided to enforce strict compliance in all their hotels with the requirement to produce ID and credit card when booking into any of their hotels. Thereafter this policy was strictly enforced in relation to all guests wanting to book into the Hotel. This policy was not



discriminatory and did not represent discrimination in the case of the Complainants. It was simply a case where the policy decided upon was implemented in respect of everyone wanting to stay at the hotel.

The second main argument related to the booking made on behalf of the three Complainants. When they attended at the Hotel reception, they were advised of the requirement to produce photo ID and a credit card. The terms and conditions which specified the requirement to produce photo ID and a credit card were shown to Annalise Power on the day and there is CCTV evidence to support this statement. In relation to the specific booking the terms and conditions are clearly set out on the booking form. It is clearly stated that production of a credit card and photo ID are necessary when booking in at the Hotel. Annalise Power ticked the appropriate box when making the booking to acknowledge that she had accepted the terms and conditions and a copy of those terms and conditions was provided to the hearing. The policy was further clarified in that a credit card allowed the Hotel to put a hold on at least some funding for any damage or financial losses incurred by the Hotel. This facility was not available through a debit card. The Complainants were refused accommodation in Charleville Park Hotel because they were not in a position to comply with the Hotel policy on credit cards and for no other reason.

The law

Reference was made to section 3(1)(a) which provides that discrimination shall be taken to occur where: *"on any of the grounds specified... [in this case the Traveller Community ground] ... a person is treated less favourably than another person is, has been or would be treated."* Section 2(b) provides that: *"As between any two persons, the discriminatory grounds... are... (i) that one is a member of the Traveller community and the other is not (the "Traveller community ground")"*. It was submitted that there is no evidence that the Complainants were treated any differently than any other patrons of the Hotel. The very fact that they stayed in the Hotel previously, *'when our policy in relation to credit cards was not enforced should be ample evidence that the Hotel showed no prejudice against them'*. It is submitted that no prima facie case has been established by the Complainants herein as is required by section 38A of the Equal Status Acts. It is submitted that on the facts outlined the Complainants cannot assert that prohibited conduct has occurred in relation to them and that the facts do not support the claims made by the Complainants that they were discriminated against contrary to section 3(1)(a) and 3(2)(i) and in terms of section 5(1) of that Act. Members of the travelling community have stayed at the hotel since the policy was introduced in June 2020.

In response to the Complainant representative, it was submitted that any implementation of the policy which allowed for identification of customers as members of the Travelling Community to prevent this situation was unworkable and could not be applied. Responding to the legal precedents provided to the hearing, it was stated that the circumstances in the current case were not at all the same as in those other cases. The Respondent had offered to provide contact details of other places in the area and tried to assist them. Reference was made to one precedent where the door was closed, and the respondent refused to open the door; where a complainant made two phone calls and the respondent did not engage. In this case the Respondent did engage, did explain and did attempt to provide assistance in securing alternative accommodation.

Mr Taylor, Operations Manager, gave evidence regarding the events of 9 September 2019 and his engagement with Annalise Power on that day. He had been advised by the reception supervisor that Ms Power could not provide a credit card when checking in. He explained to Ms Power that the Company policy is to ask for a credit card upon checking in and that the credit card was required to run a preauthorisation on the card to complete the check in procedure. The Complainant kept questioning the need of the credit card and mentioned that she had stayed before at the Hotel. She offered to pay in cash and was informed that she could pay in cash, but a credit card was required to secure the stay and that the policy had changed since her last stay at the Hotel. He explained that the policy can be found online and that by completing the reservation all guests must agree to the policy. The General Manager provided Ms Power with a printed copy of the Company policy. He spoke to her about it being standard procedure and nothing unusual and that he had been living and working in Germany where this had been the policy for many years. At that point Ms Power became abusive towards him personally based on his nationality.

Mr Taylor said that while the policy was in place for some time it had not been always applied but the damage by one group of €12,000 prompted the decision to enforce the policy. The principle behind the policy is that it would allow that a hold could be placed on credit cards for damages or losses. This would not have covered the €12,000 in damage, but in ninety percent of the cases the losses were less and could be charged to the credit card. On the bottom left-hand side of the form on the Booking.com website the box must be ticked to say that the person had read the terms and conditions which allowed that they must have a credit card at the Hotel. Asked if it was known that she was a member of the Travelling Community, Mr Taylor said that she mentioned it in her first discussion with staff and it was said to him that she was saying this when he was asked to meet with her. Asked if others had been turned away owing to this policy, his recollection would be that while he worked at the hotel there were ten to fifteen people turned away from the Hotel because of the policy, but he would not be sure of exactly how many or he would not be sure if any of them were Travellers. Asked if the group meeting where the policy was decided had recognised that there could be an exclusion of some people on economic grounds, he said that this was all discussed and he thought it was recognised that some groups would be disadvantaged. Asked was this policy in writing that people would be turned away, he said no. Asked if any group of people known to be Travellers had stayed in the Hotel since the policy was enacted, he said he recalled four lads, a group from the North, who were Travellers and who had stayed at the Hotel and one of them had a credit card. He stated that he is now working with another hotel group and the policy regarding the credit card is the same in that hotel group.



Findings and Conclusions:

What follows is a lengthy extract from the Findings and Conclusions in AD-00026060 which were applied in that case in arriving at a Decision that the Complainant, the person who made the booking was discriminated against by the Respondent.

“The Legislation and related matters of fact which provide context

ThePurpose of the Equal Status Act is '*An Actto promote equality and prohibit certain types of discrimination, harassment and related behaviour in connection with the provision of services, property and other opportunities to which the public generally or a section of the public has access.*'

The hearing was provided with little by way of arguments on behalf of the Complainants in relation to the services provided by the Respondent related to the complaint.

Nonetheless it seems relevant to examine the statutory provisions under which the service provider operates.

For the purposes of this case, hotel accommodation is a service available to the public generally.

The provision of hotel accommodation to the public comes under the domain of the hospitality industry as it is now commonly described including by representatives of that sector.

The word hospitality is defined as:

'The friendly and generous reception and entertainment of guests, visitors and strangers.' Those who stay in a hotel are generally described by such establishments as guests-who may also be strangers.'

In Ireland, Hotels are regulated under the 1963 Hotel Proprietors Act. Section 3-(1) of that Act (for which any update or amendment of its terms was not found) and which states:

'The proprietor of a hotel is under a duty to receive at the hotel as guests all persons who, whether or not under special contract, present themselves and require sleeping accommodation, food or drink and to provide them therewith, unless he has reasonable grounds of refusal.'

The following extract from the Dail debates from 1962 at the Second Stage of the Seanad debate 6th February 1963 is interesting and, it might be said, as relevant today as it was then:

It has been argued that in modern times the duty to receive all comers is an anachronism and ought to be abolished. I am unable to accept that point of view. It seems to me that, if a proprietor of a premises holds himself out as prepared to cater for all and sundry, it is only reasonable that he should be bound to receive every person who is fit to be received and who is willing to pay for the services and the facilities of the hotel. I am sure the House will agree with me that it would not be in the public interest of the tourist industry that hotels should be able to reserve their hospitality for selected guests.

[Emphasis added]

In the case under consideration, there is no question but that the Complainant was in a fit state and that she was willing to pay for the services and facilities of the hotel.

The use of the word 'duty' in the 1963 Act is significant and implies an obligation on those who choose to establish themselves as purveyors of a hotel service to provide their service to all and sundry if their would-be guests can meet the terms 'fit' and demonstrate a willingness to 'pay.'

The term 'reasonable' in the 1963 Act is noted but it is difficult to see how refusing a person who is fit and willing and able to pay and who, as in this case, having stayed previously at the hotel without any reported incident, and who has pre-booked the accommodation would comply with the terms 'reasonable' given the totality of the section of the Act and the clear intent of the legislators.

Acknowledging that this is not a case under the Act of 1963, nonetheless both the terms of the legislation and the fact that the complainant had previously stayed at the hotel without incident and was willing and able to pay for her accommodation leads to the out incident and was willing and able to pay for her accommodation leads to the conclusion that a refusal of accommodation by the Respondent on grounds of insisting on a particular form of electronic payment does not appear to be in any way consistent with the terms of the 1963 Act in accordance with which the Respondent offers a particular service to the public.



The Complainants solicitor spoke of his own experience, both before and after this incident occurred of never being refused accommodation on the basis that he did not present a credit card for payment. Adjudication Officers do not live in a box and real-world factual experience can be relevant to a case to be decided. As someone who has travelled extensively in Ireland, mainly on business over many years, my experience would be the same as the Complainants solicitor. Recognising that the modes of payment and the use of electronic payments has drastically altered since 1963, the key issue which one usually encounter is an ability to pay or to be able to demonstrate an ability to pay, sometimes in advance. Taking a hold on a card by way of a preauthorisation so that additional items can be charged to the card would be a regular occurrence. Or where a debit card and not a credit card is offered for payment then the full balance is deducted at the time of check in. That said, payment online is often made in advance and also by credit card on check in and so the question of having to pay by credit card as a matter of policy would not arise.

In circumstances where the overarching legislation of 1963 applies to the establishment providing the service, where the 'would be' guest was willing and able to pay and, in this instance, the Complainant made it clear to the hotel manager that she is a member of the traveller community, who are a protected group under the Equal Status Act, examination of the basis of the Respondents defence is required. It is necessary to examine the booking condition as a neutral term which places the person who is a person with a protected characteristic at no disadvantage compared to a person who does not have that characteristic.

Section (2) (i) provides the grounds which apply to consideration of this case:

'That one is a member of the travelling community, and one is not'

As the complainant is a member of the travelling community, she is covered by that protected ground in section (2) (i) of the Act.

In defining discrimination, Section 3(1) (c) applies in this case.

'Where an apparently neutral provision would put a person referred to in any paragraph of section 3(2) at a particular disadvantage compared to other persons unless the provision is objectively justified by a legitimate aim and the means of achieving that aim is proportionate and necessary'

As can be seen, whereas the Act of 1963 provides the terms reasonable for the refusal of accommodation, under EU Legislation any neutral provision must satisfy a three-part objective test-a higher bar than the Act of 1963. The question or test is whether the seemingly neutral measure is in fact neutral when applied to members of the Traveller Community in Ireland or whether it is in a measure which indirectly discriminates against members of that Community. This is the issue to be examined in the case of this Complainant as the person who made the booking. (Section 3(1)(b) features in the related cases.

The neutral provision in this case is the Hotel Policy which through the booking site booking.com in this case notifies any person making a booking and who is to pay at the hotel that the method of payment accepted by the hotel is a credit card.

The full terms related to payment contained on booking form were as follows:

Page 2: *'You'll pay when you stay at Charleville Park Hotel & Leisure Club'*

Page 3: Under the heading Is everything correct? *Update credit card*

Page 4: *Prepayment You don't need to prepay. However, the property may take a deposit from the card you booked with. This is a routine procedure to verify that it is valid and hasn't been lost or stolen. The hold is temporary, and the amount will be returned to you in full.'*

Page 5: Payment: *You have now confirmed and guaranteed your reservation by credit card. All payments are made at the property during your stay unless otherwise stated in the policies.*

This accommodation provider accepts the following forms of payment:

American Express, Visa, Euro/Master card.

The hotel points to the following text in the confirmation email. It is understood that this wording was shown to the Complainant at the hotel on the basis that she had agreed to the term when ticking the box to accept the Ts and Cs of booking.

'Credit cards accepted are American Express, Visa, Euro/Mastercard. Guests must present a card under their own name on check-in.'

The Complainant had made the booking using a debit and not a credit card.

There is nothing in the detailed confirmation online which informs the person who has made the booking that the failure to present a credit card will result in a refusal to provide accommodation even if another form of payment is offered i.e., cash or debit card. That information was only conveyed at the hotel. There may be a serious question as to whether a person can rely on a measure which does not fully reveal the consequences of failing to meet the terms, but as said by the Complainant Solicitor, this not a case of contract law but of alleged discrimination and it is against the terms Equal Status Act that the complaint is to be decided.

The Defence of the Neutral Measure or Provision.



The first test under section 3(1) (c) is met by the presence of the neutral provision in that the policy applies to all who want to stay at the hotel.

The second test to be considered is whether that neutral provision would place a member of the Traveller Community at a particular disadvantage compared to other persons.

The Supreme Court in *Stokes v Christian Brothers High School [2015] 26 ELR 113* held that in considering whether particular disadvantage had been established, the Director of Equality Investigations or a court were required to carry out an analysis of the extent of any disadvantage experienced by a protected group by reason of the ostensibly neutral measure in order to determine whether that level of disadvantage was significant or appreciable.

The question of disadvantage was to be considered by comparing the differential effect of the measure on members of the Traveller Community compared with those who members of the Traveller community were not (*R. v Secretary of State for Employment ex parte Seymour Smith (no 2) [2000] 1 W.L.R 435 considered*).

It was a matter for the decision maker, within the bounds of rationality, to identify the relevant group of persons for the purposes of conducting a comparative analysis of the differential effect of the impugned provision on members of the Traveller community.

In *R v Secretary of State for Employment* the House of Lords applying a preliminary ruling of the CJEU, held that indirect discrimination cases disadvantage can best be established by a statistical analysis of a pool of those who can comply with a PCP compared to those who do not.

Following the lead set by the Supreme Court in *Stokes* it is necessary to compare the differential effect of the neutral provision or measure on members of the Traveller Community. The wider group for the purposes of comparison is the wider population of Ireland in terms of holding credit cards and the wider populations of Ireland in terms of economic status is so far as this is measurable. The most readily available statistic in terms of economic activity and therefore access to measurable income is the level of unemployment in the total population and among Travellers.

The Respondent did not provide any statistical or factual objective information which would support their claim that the neutral provision would not discriminate against members of the Traveller Community compared to others. The economic status of the other people, up to fifteen who were also turned away in accordance with the hotel policy is unknown. The testimony of the hotel manager that this group of people included Travellers was not supported by any evidence. Reference was made to a man who was able to provide a credit card when four men believed to be travellers booked into the hotel after the policy was enforced. I am satisfied from the testimony of the manager to the hearings, that when management in the hotel or hotel group decided to enforce the measure, they did so knowing that some people would not be able to obtain and therefore provide credit cards for economic reasons.

In support of the complaint, Mr Feeney, solicitor, provided a study entitled Irish Travellers -Socio Economic Aspects and Housing-CSO-Central Statistics Office-Research conducted for the St Stephens Green Trust

Relevant extracts are as follows:

There were 10653 travellers in the labour force in 2016 and of these 8541 were unemployed, giving an unemployed rate of 80.2 per cent. 2112 persons were at work in 2016.

The labour force participation rate among travellers was 57% compared with 61.1 percent for the general population.

Among females 972 were at work while 2938 were looking after the home, representing 30.4 per cent of Traveller women aged 15 or over.

20% of the traveller community households own their own home compared with 67.6% of the general population.

Information regarding the employment status of travellers seems to be available only from the Census, as used in the above report.

In response to information requested post the hearing on the employment status of the Complainants-their representative replied as follows:

Person A was unemployed and in receipt of Job Seekers benefit at the time of making the booking and attendance at the hotel.

Person B -the Complainant in this case held two part-time jobs being 1 HSE primary Health Care Worker with the Traveller Community and a shop assistant.

Person C was an old age pensioner and in receipt of the Department of Social Welfare Pension. This is the Complainant in this case.

From this information 66% of the three women refused accommodation by the Hotel in this case were unemployed or retired and 33% was an active member of the labour force.

Consistent with the requirements set by the Supreme Court in the *Stokes Case* I felt obliged to conduct some basic analysis of the type of information regarding the use of credit cards in Ireland and the usual terms on which credit cards are provided by the main financial institutions. The following and any other information cited by way of information is readily available online:



Credit card figures in the Republic of Ireland reached around 1.7 million in 2017 a number comparable to previous years. They made up roughly 25 per cent of payment cards. Debit cards were found more often in the country as that year there were more than 5 million of these cards. (Statista)

The adult population of Ireland in 2020 was 3.6-3.7 million

There is nothing which indicates a significant change in the number of credit card holders since 2017. Allowing that some credit cards will be used by a household or a couple, these figures suggest, at a minimum, between 46 and 47% of the adult population have immediate access to a credit card. The actual number who have indirect access to a credit card through another person in the same household is likely to be higher than these percentages.

Bonkers.ie provides information on the terms required across various providers for those seeking or holding a credit card:

What do I need to apply for a credit card?

To apply for a credit card, you must be over 18 and have an annual income over a certain amount usually in the region of at least €16000 a year. You'll need to have a good credit history too, which means well-managed finances and not too many other loans and debt. You may also need to provide proof of identification and proof of address during the application process.

Child benefit is generally not regarded as a form of income.

It is reasonable to conclude from these figures that at least 46% of the adult population have the visible financial means to be approved for a credit card.

None of the three women refused accommodation have credit cards.

Whereas the total number of unemployed in Ireland in 2017 was of the order of 10% of the population aged 15-65, the census information from 2016 gives an unemployment rate among travellers of 80%. The number of unemployed adults as a percentage of the adult population in 2019 stood at 11% There is nothing which would suggest that the proportion of unemployed travellers fell to such an extent that the huge disparity in the relative rates of unemployment reduced significantly.

The Complainant was unemployed in September 2019.

Based on the statistical information on economic and unemployment status provided on behalf of the Complainant, combined with her own economic status and the basic information sourced regarding the general use of and terms for credit cards in Ireland is there a sufficient basis to conclude that the neutral provision would place a member of the travelling community at a particular disadvantage compared to other adults in Ireland? And so, to decide this question, what is to be made of the available information.

One means for establishing what is known as disparate impact is to identify a pool of individuals who are potentially impacted by the disputed measure. This is usually used and available in a workplace setting. In a society this is more difficult. The neutral provision may have more impact in certain types of hotels. It is not unreasonable to conclude for example that those seeking to stay in a five star or luxury hotel would be able to provide a credit card if essential for accommodation. The ideal pool in this case would have been an analysis of others who obtained accommodation at the hotel since the policy was enforced compared with those who were turned away and, if it could be established, how many of each group were members of the Travelling Community. But this type of information would not be available and indeed gathering such data could be a dubious endeavour in terms of identifying people with a particular protected characteristic. The suggestion of the Complainants solicitor in this regard to the effect that some means of identifying or self-identifying as a Traveller could be utilised, was surprising.

In the absence of an easily measurable pool therefore the question remains whether the impugned PCP constitutes an obstacle in the way of protected persons having the protected characteristic. See *Grundy v British Airways PLC*.

The wider pool of people that is the population of Ireland and the financial basis for access to credit cards remain the only viable statistical information on which to ground the Decision to conclude whether or not the neutral measure is an obstacle to members of the Traveller Community in obtaining the service provided by the Respondent and/or whether that policy places them at a particular disadvantage compared to others who are not members of the Traveller Community.

In the absence of any other information provided by the Respondent or any real challenge by them to the statistics provided by the Complainant those statistics combined with what is public information suggest that at least 80% of the Traveller Community would have difficulty meeting the requirements of reputable financial institution to obtain a credit card based on their employment status which is a sound measure of their visible and demonstrable income.

Based on the unemployment statistic, some 90% of the adult population would have been at work and therefore much more likely to have been able to satisfy the same institutions and to obtain a credit card.

Using the same yardstick, it is reasonable to conclude that while 46% of the adult population have credit cards that a higher number have indirect access and that members of the Traveller Community would not be able to obtain credit cards to anything like the same extent.

Choice is a factor for people who are and are not members of the Traveller Community and so while there will be people in both categories who will decide not to seek a credit card even though they would qualify for one in financial terms, it is not possible to factor this into the equation. However, the conclusion



remains consistent, that the proportion of people who could exercise this choice in the Traveller Community having regard to their economic and employment status will be much smaller than in the population as a whole.

The finding from the available statistical information is that the neutral measure enforced by the Hotel in this case has a disparate effect on the Complainant as a member of the Traveller Community compared to other adults who are not members of that Community.

Undoubtedly it can be said there are many economically disadvantaged groups in Ireland defined by location, disability, race and long-term unemployment, poor education and personal history. Some of these are protected characteristics, others are not. But it is not unreasonable to conclude that of those adults who seek to stay in hotels, members of Traveller Community as a protected group under the Equal Status Act would have a disproportionate difficulty in meeting the terms of the neutral provision to obtain and to hold a credit card. And the Complainant is a case in point.

Based on the established facts, it is found that, in accordance with Section 38A of the Equal Status Act, it may be presumed that the policy of the hotel in refusing accommodation to the Complainant on the basis of her not being able to provide a credit card was an act of discrimination against her as a member of the Traveller Community.

There remain certain arguments made on behalf of the Respondent which must be considered.

The remaining test which must be applied in a case where there is a neutral provision is the test of whether the measure is such that it is objectively justifiable unrelated to a protected ground.

In the first instance it is to be noted that no reason for the policy was given to the Complainant when she was refused accommodation. A statement that this is policy is not a reason. No document existed at the time which set out the reasons for the policy. This was decision made at management meetings and then enforced by hotel management. The 'policy' was the requirement to pay with a credit card. The absence of a reason and a written policy are important. This led the Complainant not unreasonably, to conclude that it was because she was identified and, as the manager said in his evidence, had identified herself as a Traveller on the day. And at that point any person in his position should have realised that she was a person who might have significant difficulty meeting the terms of the unwritten, unexplained policy. And she was being blamed for agreeing to a term which neither stated that she would be refused accommodation for failing to produce a credit card or explained any intent of the proprietor if she failed to comply with their policy. Even if she had read the entire form before she ticked the box, nothing would have told her the consequences of not being able to provide a credit card at check in. The Respondent cannot legitimately rely on the ticking of the box by the Complainant on the booking form as a defence in the circumstances.

In terms of legislation, Article 2(2)(b)(i) of Directive 200/78/EC provides that an indirectly discriminatory PCP is unlawful unless:

"That provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

The Burden of Proof Directive 97/80/EC at Article 2(2) states\.

"For the purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of members of one sex unless that provision criterion or practice is appropriate and necessary and can be justified by objective reasons unrelated to bias."

The very absence of a written policy or an objective reason given to the Complainant at any stage, could lead to the conclusion that the Respondent cannot rely on any objective grounds not provided to her at the time of the refusal to accommodate her at the hotel. Neither was this ground put forward in the ES2 form when returned to the Complainant:

"It is hotel policy that a credit card be produced at reception when booking into the Hotel. This is a standard requirement in all of our hotels and believe this to be the case in all Hotels in the country. The Complainant did not produce a credit card in compliance with the policy."

Despite the complete absence of anything resembling a reason for the policy set out in the to the Complainant at the time of booking, when she attended at the hotel and in the ES2 reply, the reasoning put forward by the Respondent as an objective ground is fully considered in arriving at a Decision. That reason provided at the hearing- a concern stemming previous damages or failures to pay for goods meant the measure was introduced so that the hotel could make a charge against the credit card which it was contended they could not do against a debit card.

Objectively the hotel is entitled to protect themselves as much as possible against unpaid bills and damages. This is a legitimate aim.

However, any legitimate objective must be proportionate most commonly known as the *Bilke-Kaufhaus GmbH v Weber Von Hartztests: a legitimate aim and the means of achieving the aim are appropriate and necessary.*

The Respondent has met the first of the tests established by *Bilke*.

Moving to the test of means and whether they were appropriate and necessary, the hotel manager admitted that not all damages could be covered by insisting on a credit card. For example, the hotel damage of €12000 which significantly contributed to the decision to enforce the policy could not be



covered in this way. Neither was it entirely clear if a payment could only be taken against a credit card and then every credit card and not against a debit card. Whether an advance payment could be made in cash or by way of a reasonable cash deposit at check in or if an advance refundable payment could be taken from a debit card were not options open to the Complainant. Providing access to the minibar/fridge only to those holding a credit card or requiring a deposit for use of the minibar were not made available as options. While accepting that the manager is familiar with this policy based on his experience in other hotels and in Germany does not render it objective and proportionate especially when many hotels do not operate the same policy and presumably many of them have the same experiences with guests, losses and damage.

Even if another hotel in Ireland or hotels in other countries operate the same practice, does not render that practice lawful under the Equal Status Act.

Members of the Travelling Community are a group in Ireland who have protected status to prevent discrimination against them on that ground under the Equal Status Act.

The blanket insistence on a credit card cannot be accepted in circumstances where the failure to provide that card is then used as the means of turning away a person from the hotel-one who is and was known to be a member of a protected category and who, because of their poor economic status which is well known and understood in Ireland, is more likely than not to be at a disadvantage compared to others in the adult community as a whole in terms of fulfilling the condition imposed by the Hotel. And when other means of achieving the legitimate aim could have been offered to the Complainant but were not.

The application of the policy of refusing accommodation based on a failure to present a credit card is not found to be appropriate and proportionate. The Respondent has failed to meet the three-tier test in the case of a neutral measure on objective grounds.

The complaint of discrimination on grounds of membership of the Traveller Community succeeds.

This finding takes account of the overriding nature of the business operated by the Respondent which cannot be overlooked or disregarded as unimportant. And all businesses carry a degree of risk. The decision to refuse accommodation to the Complainant meant that by default she was being held responsible for the actions of others and the business took no risk. There were no reasonable grounds for the application of the policy in her case.

The overall finding in this case is that the policy introduced by the Hotel of refusing accommodation to a person who could not provide a credit card and applying it to the Complainant Anne Marie Power discriminated against her as a member of the Traveller Community. The Complainant has established a prima facie case of discrimination which the Respondent has been unable to rebut based on objective grounds which were appropriate and proportionate as a means of achieving a legitimate aim.”

The forgoing is a lengthy extract from the related Complaint ADJ-00026060 which is concerned with the person who made the booking. Essentially the arguments and the evidence presented was the same in both cases. The exception came when the Complainant solicitor provided the economic status of each Complainant in response to a query from the undersigned. This Complainant was in employment in September 2019.

On behalf of the Complainants, it was contended that Section 3(1) (c) applies. No distinction was made regarding the application of this Section and subsection to the Complainants. Certainly, all three are members of the Traveller Community. It is accepted that none of the three have credit cards. However, when the ‘particular disadvantage’ element found in the case of the Complainant in ADJ 26060 is an essential part of that finding related to the comparison between the members of the Traveller Community and the Population as a whole on the unemployment ground related to visible mean of income necessary to apply for a credit card do not apply in the case of this Complainant, it is difficult to see how the contention that Section 3(1) (c) applies in the case of this Complainant can be sustained.

The Complainants solicitors presented a set of statistics concerning members of the Traveller Community. However, it would be virtually impossible and unsound to attempt to extrapolate that wide-ranging analysis out into an automatic connection with the ability of members of the Traveller Community to obtain a credit card. Such an approach runs the risk of running foul of the Supreme Court in *Stokes*. While common sense says that a person whose abode is on the side of the road or at least is not fixed and who suffers from ill health and is poorly educated will have considerable difficulty in obtaining a credit card, it is the factor of unemployment related to visible income among the members of the Community and which applies to that Complainant which is the main determining factor in AD-00026060. That factor does not apply to the Complainant in this Decision.

What is significant in the case of this Complainant is that she did not make the booking. That was made on her behalf by a person who had before her the terms and conditions. Aside from the fact that those conditions did not express the meaning or intent of the Respondents policy regarding the requirement to have a credit card-the Complainant in this case was associated with the booking and by extension the terms under which the Respondent operated. Those terms or policy were found to be discriminatory when applied to the Complainant who made the booking.

Section 3(1) (b) of the Equal Status Act applies in this case:

For the purposes of this Act discrimination shall be taken to occur -

(b) where a person who is associated with another person –



(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, or has been or would be treated in a comparable situation, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination

The Complainant in this case had no role in making the booking. She was excluded from the hotel because the person and who made the booking and with whom she was associated as part of that booking was the subject of discrimination on grounds of her traveller status. By virtue of that association the Complainant in this case was treated less favourably than any person who is not a member of the Traveller Community and who would not be placed at a particular disadvantage by the terms of the neutral provision, the existence of which discriminated against the person with whom she was associated.

Compensation in this case takes account of the fact that, while it is found she was discriminated against by association with a person who is a Traveller, the economic argument which applied to that person i.e., a Traveller who was unemployed and therefore the comparative levels of disadvantage on that basis did not apply in the case of this Complainant as she was employed at the time. The booking policy could have allowed her to provide a credit card in her own name. Nonetheless she was discriminated against by association with a person who was the subject of discrimination through the enforcement of a discriminatory policy against that other person.

The compensation in this case is intended as a deterrent designed to motivate the Respondent to review their policy in light of this Decision. This award takes account of the inconvenience and embarrassment caused to this Complainant by the actions of the Hotel on 9 September 2019.

€4500 is considered an appropriate level of compensation in the circumstances.



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.

The complaint of discrimination brought by Bridget Power against the Respondent Atlantic Troy T/A Charleville Park Hotel is well founded. The Respondent is to pay Bridget Power the sum of €4500 compensation.



Dated: 19-01-2022

Workplace Relations Commission Adjudication Officer: Janet Hughes

Key Words:

Equal Status Traveller Ground-Hotel accommodation-payment policy.



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