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DEC-S2004-017 Full Case Report

Mr. Martin McDonagh, Complainant (Represented by Murphy Coady & Company, Solicitors) V Navan Hire Limited
Delegation under Equal Status Act, 2000

The complainant referred a claim to the Director of Equality Investigations on 4 October, 2001 under the Equal Status Act, 2000. In accordance with her powers under section 75 of the Employment Equality Act, 1998 and under the Equal Status Act, 2000, the Director then delegated the case to Marian Duffy, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act, 2000.



1. Dispute

1.1 The dispute concerns a claim by Mr. Martin McDonagh that he was discriminated against by Navan Hire Ltd on the ground that he is a member of the Traveller Community. The complainant alleges that the respondent discriminated against him in terms of Sections 3(1)(a), and 3(2)(i) of the Equal



2 Background

2.1 The complainant's case is that the respondent refused to hire out a sander to him on 1 August 2001. He believes that the refusal of service was due to the fact that he is a member of the Traveller community. The respondent submitted that the complainant was not discriminated against on the ground that he is a Traveller. He was unable to hire the sander to the complainant on the day in question because the mechanic, having checked out the machine, discovered a fault and the other sanders in the shop had been pre-booked by other customers. The complainant was advised to hire a sander elsewhere or to come back the following day and a sander would be available. The respondent also submitted that the company has a policy of not hiring to customers who have not got a permanent address. He does not regard a halting site as a permanent address and for that reason he would not hire to a customer living on a halting site.



3 Summary of the Complainant's Case

3.1 The complainant stated the following:

- That he is a member of the Traveller community and was living in Navan on a halting site on 1 August, 2001. He had purchased a new house in Mullingar and he was decorating the house prior to moving in to live there. He wanted to hire a sander to sand the wooden floors.
- At about 10:30 am on 1 August, 2001 he went to Navan Hire Ltd to hire the sander which he intended to take to Mullingar to do the job. He spoke to the shop assistant (Mr. Chris Baxter) and explained that he had a three bedroom house and intended to sand the floors. Mr. Baxter came from behind the counter and showed him 4 sanders on the floor and recommended the type of sander that he needed.
- The sander would not fit into the complainant's car. The complainant left the shop and returned later with a jeep.
- The complainant said that on his return to the shop Mr. Baxter remembered him. He came from behind the counter and picked out one of the sanders from the floor and enquired of the complainant if he ever worked one before. Mr. Baxter showed the complainant the controls, how to adjust the handles and how to attach the sanding disks. He then plugged in and turned on the sander and showed the complainant how to use it. The sander was working at that stage.
- Mr. Baxter then unplugged the machine and the complainant understood it was then ready for him to hire. Mr. Baxter went back behind the counter and started to fill out hire form. He asked the complainant for his name and telephone number. The complainant gave his land line, a mobile telephone number and his address at the halting site. The complainant said that Mr. Baxter hesitated and did not write down his address at first. He eventually wrote down the address and asked if that was the address the sander was going to and the complainant then explained that he had a house in Mullingar and gave him the address of that house also.
- The complainant said that Mr. Baxter was then called by a woman from behind a door which was ajar behind the counter and was asked to take a telephone call from a woman who wished to hire something. Mr. Baxter went through the door and closed it. He returned in a few seconds through another door and went straight on to the floor of the shop and removed the sander he was about to hire and brought it behind the counter.
- Mr. Baxter told the complainant that the sander was not working and he was going to have a mechanic look at it. He then took the sander through the door behind the counter and when he returned he said

that the machine was broken and a mechanic was going to look at it.

- The mechanic then came out to the complainant and told him that he tested the machine and that it required a part which he needed to order. The complainant indicated to the three other machines on the floor and the mechanic said he could not have any of them as they were hired out. Mr. Baxter confirmed to the complainant that these sanders were already reserved.
- The complainant said that he was not told when the sanding machine would be fixed. He was not advised to come back the following day.
- The complainant said that it was quiet clear that once he gave his address that the sander would not be hired out to him. He said that his address, which is an official halting site, is about a mile from the town of Navan and it is well known to non-Travellers as a halting site. The complainant said that he has lived on the site, which was awarded to him by the Council, for 3 years.

4 Summary of the Respondent's Case

4.1 Mr. Brendan Donegan proprietor of Navan Hire denied that the complainant was discriminated against on the Traveller community ground and submitted the following evidence:

- Mr. Donegan said that he hires machines to everyone who meets the criteria for hiring. They are required to give the registered number of the vehicle they are driving, a permanent address and a land line telephone number. If a person is not a regular customer the respondent would usually ask for a photograph. He also only hires to people living in the locality and he would not hire to someone outside the locality without first checking them out.
- Mr. Donegan said that he would not hire to anyone living in a halting site as his understanding is that a halting site is not a permanent address. He said that he had never hired to anyone living on this particular site where the complainant lived.
- He submitted that when the complainant sought to hire the sander it was broken. The fault was discovered by the mechanic who checks the machines before they are allowed out for hire.
- Mr. Donegan said that he has video evidence which would show that the complainant' version of events was incorrect.
- I adjourned the hearing to allow Mr. Donegan to provide the video evidence and any other documentary evidence in relation to hire of sander and to give Mr. Baxter an opportunity to give evidence. Mr. Donegan was not present in the shop on the day in question.
- At the resumed hearing Mr. Donegan showed the security video and also brought along a diary. Mr. Baxter has left the employment and was not available to give evidence.



5. Video and Diary Evidence

5.1 I observed the following:

- The video showed the complainant entering the shop at about 10:30am and after speaking to Mr. Baxt he left. The complainant returned at 12:39 and again had a conversation with Mr. Baxter at the counter. Then Mr. Baxter came from behind the counter and showed the complainant a sanding machine on the floor. Mr. Baxter appeared to show the complainant how to use the machine and attach sanding disks to same. Mr. Baxter than brought the machine towards the counter and disappeared off the camera, it appears he may have taken the machine off the shop floor. The video shows the complainant standing at the counter but Mr. Baxter at this stage is not shown on the tape and there is no indication that he is filling out any form. The video camera then switches to the door and the video shows the complainant leaving the premises about 7 minutes later. Two other sanders were visible on the floor of the shop after Mr. Baxter took away the other sander.
- The diary which contained entries concerning the hire of machines showed that one sander was hired out for 11 am and another was hired out for 1:20pm.

6. Conclusions of the Equality Officer

6.1 The matter referred for investigation turns upon whether or not the complainant was discriminated against contrary to Section 3(1)(a), 3(1)(c) and 3(2)(i) of the Equal Status Act and in terms of Section 5 (1) of that Act. In reaching my decision I have taken into account all the submissions, both oral and written, made to me by the parties in the course of my investigation into the complaint. Section 3(1)(a) provides, inter alia, 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 3(2)(i) provides that: as between any two persons, the discriminatory grounds ... are ... that one is a member of the Traveller community and the other is not."

6.2 A person making an allegation of discrimination under the Equal Status Act, 2000 must first demonstrate that a prima facie case of discrimination exists. Prima facie evidence has been described by an Equality Officer as: "Evidence which in the absence of any convincing contradictory evidence by the employer would lead any reasonable person to conclude that discrimination had probably occurred."¹ Once a prima facie case of discrimination has been established by the complainant, the burden of proof then shifts to the respondent to rebut the presumption of discrimination. In more recent employment discrimination cases the Labour Court has applied the test and stated: "The first question the Court has to decide is whether the claimant has established a prima facie case of discrimination".² 1Dublin Corporation v. Gibney EE5/1986 And in another case stated:

"...the claimant must first prove as a fact one or more of the assertions on which her complaint of discrimination is based. A prima facie case of discrimination can only arise if the claimant succeeds in discharging that evidential burden. If she does, the respondent must prove that she was not discriminated against on grounds of her sex. If she does not, her case cannot succeed."³

6.3 I have identified the key issues for decision as follows:

- (i) is the complainants covered by the discriminatory ground? (in this case is he a member of the Traveller community?)
- (ii) was the complainant refused a service by the respondent on 1, August, 2001?
- (iii) is there evidence that the treatment received by the complainant was less favourable than the treatment someone, not covered by the discriminatory ground, would have received in similar circumstances?

6.4 I am now going to examine issues I have identified above and consider whether the complainant has established a prima facie case. If those elements are established, the burden of proof shifts to the respondent, meaning that the difference in treatment is assumed to be discriminatory on the relevant ground. In such cases it is not necessary for the complainant to prove that there is a link between the difference in treatment and the membership of the ground, instead the respondent has to prove that there is not. If the complainant succeeds in establishing prima facie case, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

6.5 Issue of Traveller Identity

In the Equal Status Act, 2000 the Traveller community ground is defined as follows:

"the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, 2The Rotunda Hospital v. Noreen Gleeson DEE003/2000 3Dr. Teresa Mitchell v. Southern Health Board (Cork University Hospital) DEE011 culture and traditions including, historically, a nomadic way of life on the island of Ireland".

I am satisfied that the complainant is a member of the Traveller community as defined by the Act.

6.6 It was accepted by both the complainant and the respondent that service was refused, although the reason for the refusal is in dispute, so the second element of the test has been established.

6.7 I am now going to examine the third element of the test to see if the complainant has produced sufficient hard evidence which, in the absence of any convincing contradictory evidence by the respondent, would lead a reasonable person to conclude that discrimination had occurred. The complainant's case is that the respondent refused to hire him a sander and he believes this occurred because he is a member of the Traveller community. The respondent's case is that the sander was faulty and the other sanders in the shop had been pre-booked and could not be hired to the complainant. The complainant in evidence stated that Mr Baxter took the sander into the back of the shop after he filled out the hire agreement form and after he discovered the complainant's address and it was then he claimed the sander was faulty. The video evidence in my view does not support this version of events. The video camera showed Mr. Baxter taking the sander towards the counter and then Mr. Baxter went out of view. The complainant was standing at the counter apparently waiting for his return. However, the video camera then changed the angle of the picture and from the alternative view of events, it may well be that Mr. Baxter commenced filling the form shortly afterwards.

6.8 The sander which Mr. Baxter showed to the complainant may have been broken, but from the video it is clear that there were other sanders on display and that the complainant left the shop without hiring a sander. I note that Mr. Baxter did not attend the hearing and that evidence provided by the respondent must be considered as hearsay in relation to the interactions between the complainant and Mr. Baxter. I also note from the diary entry that there were two sanders booked to go out, one at 11 am and the other at 1.20 pm. Likewise I note that the complainant stated he was in the shop at 10:30, that Mr. Baxter knew he wished to hire a sander at that time and Mr. Baxter gave no indication that one would not be available when he returned with the jeep. There has been no evidence to show that the other bookings in the diary were made prior to the complainant coming to the shop. Logic would suggest that the sander which was booked for 11am would have already been hired out at 12:45 when the complainant left the shop without a sander. Therefore, it would seem that only one of the sanders visible in the video on the shop floor was pre-booked at the time the complainant sought to hire a sander. If the original sander which Mr. Baxter showed the complainant was faulty, I am still satisfied that there was a sander available on the shop floor which could have been hired out to the complainant. As I have stated above, the only direct evidence available to me regarding the availability of a sander for hire in the shop was the evidence provided by the complainant. I conclude therefore that there was a sander in working order available which was not hired to the complainant and I am satisfied if the complainant was not a member of the Traveller community he would not have been refused. I find therefore, that the complainant was treated less favourably than non-Traveller customer would have been treated in similar circumstances. The complainant therefore has established a prima facie case of direct discrimination which the respondent has failed to rebut.

7. Indirect Discrimination

7.1 The respondent Mr. Donegan stated during the course of the hearing that the company has a policy of not hiring to customers who do not have a permanent address and he considers that a halting site is not a permanent address and he would not hire to such an address. It is necessary for me to consider if the requirement to have a permanent address is indirectly discriminatory under the Act. Section 3(1)(c) provides: "For the purposes of this Act, discrimination shall be taken to occur where- 12 "

- (i) a person is in a category of persons who share a common characteristic by reason of which discrimination may, by virtue of paragraph (a), occur in respect of those persons,
- (ii) the person is obliged by the provider of a service (within the meaning of section 4(6) to comply with a condition (whether in the nature of a requirement, practice or otherwise) but is unable to do so,



(iii) substantially more people outside the category than within it are able to comply with the condition, and
(iv) the obligation to comply with the condition cannot be justified as being reasonable in all the circumstances of the case."

7.2 In my view this case should be considered within the above section as the respondent imposed a condition (that is being able to provide a permanent address which is not a halting site address) which substantially fewer Travellers than non-Travellers would be able to satisfy. While the complainant has not produced any statistical evidence to support this contention it is obvious that halting sites are specifically designed for Travellers and that Travellers are substantially more likely to live on halting sites than non-Travellers. In considering this point concerning statistical evidence, I have referred to the Labour Court decision in an employment case, *NBK Designs Ltd v Inoue* ED/02/34 Determination No. 0212. In this Decision, the Labour Court held that an expert tribunal like the Labour Court could take account, even in the absence of specific evidence, matters such as risk of disparate impact on a protected ground under the Act which are well established and are obvious from its specialist experience. In *Inoue*, the Labour Court held that it was obvious that measures impacting on part-time workers, or on those caring for small children, would impact disproportionately on women. It would be reasonable therefore to infer from this rationale that an expert tribunal, such as the Equality Tribunal, can similarly take account of matters such as the number of Travellers living on halting sites in comparison to the number of non-Travellers, matters which are obvious from the Tribunal's specialist experience.

7.3 It seems reasonable to accept on the basis that it is obvious, and need not be proved statistically, that Travellers are far more likely than non-Travellers to live on halting sites. The complaint was obliged to comply with the condition (live in permanent accommodation) but was unable to do so to the respondent's satisfaction. I find that this satisfies the requirements of Section 3(1)(c) and establishes a prima facie case of indirect discrimination.

7.4 The Supreme Court in the case of *Nathan v. Bailey Gibson & Others*⁴ set out the tests to be applied in considering cases of indirect discrimination. This was a case under the Employment Equality Act, 1977 concerning indirect discrimination on the grounds of sex and marital status. The Supreme Court stated the following principle which were followed by the High Court in the case of *Conlon v University of Limerick*⁵ "In such a case the worker is not required, in the first instance, to prove a casual connection between the practice complained of and the sex of the complainant. It is sufficient for him or her to show that the practice complained of bears significantly more heavily on members of the complainant's sex than on members of the other sex. At that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the plaintiff's sex."

7.5 Therefore the next question to be addressed is whether the respondent provided a valid defence by showing that the condition was justified as being "reasonable in all the circumstances of the case." As required by Section 3(1)(c)(iv) of the Equal Status Act, 2000. I agree that it is reasonable within the meaning of Section 3(1)(c)(iv) for a service provider hiring out equipment to require adequate security. However, the condition imposed by the respondent in this case was applied broadly. It is undisputed that the complainant in fact had bought a house and was willing to provide that address as security for the hire of the sander, as well as to provide other 4Breda *Nathan v. Bailey Gibson & Others* [1996] ELR vol 7 5Conlon v University of Limerick [1999] ELR vol 10 information requested by the respondent. In the circumstances the respondent's reasonable requirement for adequate security was satisfied by the complainant. Even with the guarantees the complainant was unable to hire the sander. I conclude that the condition imposed was not only to have a permanent address but also not to live or to have lived on a halting site and this condition "cannot be justified as reasonable in the circumstances of the case."

7.6 In considering the unreasonable condition imposed I have considered the Supreme Court Decision in the case of *An Blascaod Mór Teoranta (& Others) v Commissioner of Public Works (& Others)*⁶. In that case the Supreme Court in upholding the High Court's Decision in interpreting the validity of an Act introduced by the Oireachtas to compulsory purchase lands from a particular class of landowner held that the Act was unconstitutional

because it breached the Constitutional equality guarantee. The Act distinguished between landowners who purchased land on the Blasket Island after 1953 and landowners who themselves owned land or were descendants of landowners prior to 1953. The Supreme Court stated that: "In the present case, the classification appears to be at once too narrow and too wide. It is hard to see what legitimate legislative function it fulfils. It is based on a principle - that of pedigree - which appears to have no place, (outside the law of succession), in a democratic society committed to the principle of equality. This fact alone makes the classification suspect. The Court agrees with the learned trial judge that a Constitution should be pedigree blind just as it should be colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose. This Court can see no legitimate legislative purpose in the present case and has no doubt but that the plaintiffs are being treated unfairly...."

7.7 In applying this principle to the case in hand, I am satisfied that the decision to refuse to hire the sander to the complainant was based on where the complainant resided which identified him as a member of the Traveller 6An Blascaod Mór Teo v. Commissioners of Public Works (No.3) [2000] I IR community. The criterion imposed by the respondent was applied so broadly that it indirectly discriminated against members of the



Traveller community and departs from the principle of equality laid down by the Supreme Court in the above Decision. I find therefore that the respondent has failed to rebut the prima facie case of indirect discrimination established by the complainant.

8. Decision

8.1 On the basis of the foregoing I find that the respondent did unlawfully discriminate against the complainant on the Traveller community ground contrary to Section 3(1)(a), 3(1)(c) and 3(2)(i) of the Equal Status Act, 2000 and in terms of Section 5(1) of that Act.

8.2 Under section 27(1) of the Equal Status Act, 2000 redress may be ordered where a finding is in favour of the complainant. Section 27(1) provides that: "the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances: 1 (a) an order for compensation for the effects of the discrimination; or (b) an order that a person or persons specified in the order take a course of action which is so specified."

8.3 Under the above Section the maximum amount of compensation I can award is €6,349 but the maximum award would not be appropriate in this case. In considering the amount of compensation which would be appropriate, I have taken into account the effects the discrimination had on the complainant. I order Navan Hire Limited to pay the complainant Mr. Mr. Martin McDonagh the sum of €1,500 to compensate him for the distress, and inconvenience caused to him by the discriminatory treatment.

8.4 I also order the respondent under Section 27(1)(b) to revise his hiring conditions within 3 months of the date of this Decision to ensure that they do not indirectly discriminate against members of the Traveller community. If necessary the respondent should seek advice from the Equality Authority or consult with Traveller representative groups.

Marian Duffy
Equality Officer
6 February, 2004



The Labour Court

