

Equal Status Act 2000

Equality Officer Decisions

DEC-S2002-041 / 044

**Eileen Delaney, Hannah Carthy,
Cathleen O'Reilly and Margaret
O'Reilly**
(represented by Ms Carmel O'Connor)

V

Biddy Earlys, Kilkenny
(represented by James Cody & Sons,
Solicitors)

File Refs
ES/2001/378, 385, 392 & 399

Date Of Issue **31/05/2002**

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Equal Status Act 2000

Summary of Decisions DEC-S2002-041/044

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(represented by Ms Carmel O'Connor)**

v

**Biddy Earlys, Kilkenny
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Key words

Equal Status Act 2000 - Direct discrimination, section 3(1)(a) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, section 5(1) - Refusal of admission to pub - Burden of Proof - Dress Code

Dispute

This dispute concerns a complaint by Eileen Delaney, Hannah Carthy, Cathleen O'Reilly and Margaret O'Reilly that they were discriminated against, contrary to the Equal Status Act 2000, by the proprietors of Biddy Earlys pub, Kilkenny.

The complainants maintain that they were discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

Summary of Case

The complainants state that when they approached Biddy Earlys pub on 19 January 2001, they were refused admission by two doormen. The complainants claim that they were refused service on the grounds of their membership of the Traveller community. The respondents deny that they operate a discriminatory policy against Travellers. They maintain that the complainants were refused because their dress did not comply with the pub's dress code.

Decision

The Equality Officer found that the complainants had established a prima facie case of discrimination on the Traveller community ground. The Equality Officer found that the respondents had failed to inform the complainants about their dress code and had not given them a reason for the refusal. The Equality Officer also found that reference had been made to the complainants' Traveller identity in refusing them admission. On the basis of the above, the Equality Officer concluded that discrimination had occurred on the night in question.

The Equality Officer ordered that Biddy Earlys pay each of the complainants the sum of €400 for the humiliation and loss of amenity suffered by them on 19 January 2001.

Equal Status Act 2000**Decisions DEC-S2002-041/044**

**Eileen Delaney, Hannah Carthy, Cathleen O'Reilly and Margaret O'Reilly
(represented by Ms Carmel O'Connor)**

v

**Biddy Earlys, Kilkenny
(represented by James Cody & Sons)**

1. Dispute

1.1 This dispute concerns a complaint by Eileen Delaney, Hannah Carthy, Cathleen O'Reilly and Margaret O'Reilly that they were discriminated against, contrary to the Equal Status Act 2000, by the proprietors of Biddy Earlys pub, Kilkenny.

The complainants maintain that they were discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

2. Summary of the Complainants' Case

2.1 The complainants state that when they approached Biddy Earlys pub on 19 January 2001, they were refused admission by two doormen. The complainants claim that they were refused service on the grounds of their membership of the Traveller community.

3. Summary of Respondent's Case

3.1 The respondents deny that they operate a discriminatory policy against Travellers. They maintain that the complainants were refused because their dress did not comply with the pub's dress code.

4 Delegation under the Equal Status Act, 2000

4.1 These complaints were referred to the Director of Equality Investigations 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 has delegated these complaints to myself, Brian O'Byrne, 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.

5. Background to Complaints

5.1 In June 2001, a total of 28 complaints of discrimination were submitted to the Office of the Director of Equality Investigations relating to a series of incidents which occurred on the night of Friday 19 January 2001 in Kilkenny City.

The complaints were submitted by four female Traveller women who claimed that they were discriminated against in being refused service in seven different pubs in Kilkenny that night. Each complainant submitted a separate complaint against each of the pubs, resulting in a total of 28 complaints being received.

5.2 Ms Carmel O'Connor, a Visiting Teacher for Travellers in the Carlow/Kilkenny area for 5 years, acted as the complainants' representative in these seven cases. At the Hearing of these cases on 20 and 26 February 2002, Ms O'Connor described how she had come to know the complainants over a number of years through her job and how, in that time, she had come to admire their honesty, integrity and warmth.

Ms O'Connor stated that she had been unaware of the extent to which Travellers were apparently discriminated against until some of the Traveller women told her of an anti-discrimination play that they had performed in Kilkenny Castle which dealt with the difficulties Travellers had in obtaining service in pubs. When Ms O'Connor expressed surprise that discrimination might exist on such a scale, it was suggested that she come out with them some night to see for herself.

5.3 On Friday 19 January 2001, Ms O'Connor stated that she decided to call to visit the women at their homes in Hebron Road with a view to seeing if anyone was available to go for a drink. Ms O'Connor explained that she was looking forward to the night as, apart from giving her an opportunity to see how the Traveller women were treated, it would also give her a rare chance to talk to them in a comfortable non-working environment.

Ms O'Connor says that she called to Hebron Road at around 8pm on 19 January 2001, and, having asked a number of the women to go out with her, eventually found four who were interested. At the Hearing, the complainants described how two of them got dressed up before going out while the other two, who were pregnant at the time, chose to wear loose-fitting casual clothes. Ms O'Connor then drove the party into Kilkenny where they parked in a carpark in the city centre.

The complainants state that they had no pre-determined list of pubs to visit on the night in question and that, on leaving the carpark, they visited pubs as they came to them. Ms O'Connor explained that she decided to let the complainants go ahead of her on arrival at a pub, so that she could observe what took place.

Matters for Consideration

5.4 It is clear from the evidence before me, that Ms O'Connor played a significant role in encouraging the complainants to test their rights on 19 January 2001 and, because of this, suggestions have been made at the Hearings, that the events of 19 January 2001 were an orchestrated attempt to use the Equal Status Act to extract money from publicans.

5.5 In considering this point, I note that the long title of the Equal Status Act 2000 states that the Act was passed "to promote equality and prohibit discrimination". It is, therefore, the law of the land and as such it should be respected and observed. Any person who considers that their rights have not been respected, is, therefore, entitled under the Act to refer a complaint to the Director of Equality Investigations for investigation and there is nothing to prohibit them from asserting their rights if they so wish.

However, if there is evidence to indicate that complainants had been encouraged to goad or trick the respondents into discrimination, or were acting in bad faith, then I consider that the circumstances of the complaints would need to be examined very carefully and due consideration given to this particular aspect of the case.

5.6 With this in mind, I have considered at length the role played by Ms Carmel O'Connor in organising the visit to Kilkenny and her participation in the events of the night. The first point to be noted is that there is no suggestion made by either party that Ms O'Connor had any *personal interest in the outcome*. There is, therefore, a major difference between the situation in this case and a situation that might arise to suggest that a particular individual instigated complaints by Travellers in return for a cut of any potential compensation.

Having deliberated on Ms O'Connor's role that night, I find that there is no evidence to indicate that Ms O'Connor became involved for the purpose of self-gain. From the evidence available to me, I am also satisfied that, in all cases, Ms O'Connor simply acted as an onlooker until after the respondents had made a decision on whether to admit or serve the complainants. I, therefore, consider that there is no evidence to show that Ms O'Connor actually influenced any of the respondents' decisions that night.

5.7 I have also given consideration to whether there is any evidence to indicate that the complainants themselves had tried to goad or trick the respondents into discrimination. In this regard, I have noted that when the complainants were eventually served in a pub (the third one they tried, Langtons), they were happy to have two drinks each and spend 50 minutes consuming these drinks. The reason the complainants say that they decided to leave Langtons was that they wanted to go to a music bar. If the complainants were seriously intent on "testing their rights", I consider that they would have left Langtons much sooner than they did.

I cannot, therefore, accept the argument that the complainants deliberately set out on 19 January 2001 with the intention of provoking or manipulating publicans into discrimination.

5.8 In considering how to handle these complaints, I was conscious of the need to keep in perspective the close proximity of each of these incidents and the possibility that treatment received at a particular pub may have impacted on the manner in which the complainants addressed the respondent's staff on reaching the next pub. In considering the complaints

against the pubs visited later on in the evening, I have also borne in mind the fact that the complainants had two drinks each in Langtons early on in the night, and that this may have been reflected in the manner that they addressed the respondents' staff later on that night.

5.9 In dealing with these seven complaints, separate Hearings were held in respect of each of the pubs. Where pubs had engaged the same representatives, these Hearings were held on the same day for the sake of convenience.

As already stated, the complainants visited eight different pubs on the night of Friday 19 January 2001. Only in one of these (Langtons) were they afforded service. The complainants itinerary on the night was as follows (Decision Nos are in brackets):

8.30pm	Kilford Arms	(DEC-S2002-033/036)
8.40pm	Shems Bar	(DEC-S2002-037/040)
8.50pm	Langton's Pub	<i>Service provided</i>
9.40pm	Biddy Earlys	(DEC-S2002-041/044)
9.45pm	Quays Bar (River Court Hotel)	(DEC-S2002-045/048)
9.50pm	Matt the Millars	(DEC-S2002-049/052)
10.00pm	The Harp	(DEC-S2002-053/056)
10.10pm	Paris Texas	(DEC-S2002-057/060)

Decisions DEC-S2002-041/044 - Biddy Earlys

6 Evidence of Parties

6.1 Agreed Facts

- There were two doormen on the door at the time of the incident, one of whom (Mr X) has since left the employment of the pub.
- Mr X informed the complainants that they were not being admitted.
- No explanation was given to the complainants for their refusal.
- The pub's dress code was not brought to the complainants' attention
- The two complainants, who met the dress requirements, were not given the option of going in.
- Complainants asked to speak to the Manager but were told he was not available
- At no time did the doormen act in an aggressive manner towards the complainants.

6.2 Complainant's Evidence

- Notification Form ODEI 5, which was sent to respondents, incorrectly stated that the doorman had said that the pub had a policy not to admit members of the Travelling community.
- The complainants spent from 8.50 pm until 9.40 pm in Langtons Pub where they had 2 drinks each. On Margaret O'Reilly's initiative, they decided to leave to see whether they could find a pub providing musical entertainment.
- None of the complainants were ever in Biddy Earlys before.
- At the time they were being refused admission, Mr X referred to the fact that he was married to a Traveller and made a comment to the effect that "he knew what it was like". The complainants took this as referring to Travellers being refused entry to pubs.
- Complainants accept that the doormen did not say that the proprietor had a policy not to admit Travellers.
- While the doormen acted in a courteous manner, Margaret O'Reilly felt that they were laughing at them behind their backs.
- All the complainants felt hurt and humiliated by the treatment afforded them.

6.3 Respondents' Evidence

- Biddy Earlys has been under the same management for over 20 years.
- The pub does not operate a policy of discrimination against any group of individuals.
- The pub has a strict policy on not serving people known to have an involvement in drugs or who have caused trouble previously.
- The pub has a number of regular Traveller customers.
- Individuals who are unknown to the doormen are asked for ID.
- The pub has a dress code in place. No tracksuits or trainers are permitted on the premises.
- The doormen recognised the complainants as Travellers on their arrival.
- Two of the complainants were seen to be wearing tracksuit bottoms.
- Complainants were refused admission but no reason was given.
- Damian Dowling, who states that he was on duty that night, recalls Mr X saying to the complainants that he was married to a Traveller woman.
- Mr Dowling recalls that Ms O'Connor identified herself as a "Social Worker" and asked to see the manager.
- On asking for the manager, the complainants were told he was not available. The Manager was on the premises but was busy arranging food for a party inside.
- Mr Dowling states that customers who are being refused would usually be given a reason.
- Incidents, other than minor ones, are reported to the manager as they occur.
- Mr Dowling watched the complainants walk across the road to the Quays Bar where he noticed that they did not gain entry.
- Mr Dowling reported the incident to Mr Jim Rafferty about ten minutes after the complainants left.
- Jim Rafferty recalls Mr Dowling reporting the incident to him and referring to a "Social Worker" asking for the manager. He recalls Mr Dowling telling him that the women had been refused because they were not appropriately dressed.
- Mr Rafferty states that he then went outside himself "to see what was going on" but the women were no longer to be seen.

7 Matters for Consideration

7.1 Section 3(1) of the Equal Status Act 2000 states that discrimination shall be taken to occur where, on any of the grounds specified in the Act, a person is treated less favourably than another person is, has been or would be treated. Section 3(2)(i) of the Act specifies the Traveller community ground as one of the grounds covered by the Act.

In this particular instance, the complainants claim that they were discriminated against on the grounds of their membership of the Traveller community contrary to Sections 3(1) and 3(2)(i) of the Equal Status Act, 2000 in being denied admission to Biddy Early's Bar on 19 January 2001.

7.2 In cases such as this, the burden of proof lies with the complainant who is required to demonstrate that a *prima facie* case of discrimination exists. If established, the burden of proof then shifts to the respondent who, in order to successfully defend his case, must show that his actions were driven by factors which were non-discriminatory.

7.3 In considering the approach to be taken with regard to the shifting of the burden of proof, I have been guided by the manner in which this issue has been dealt with previously at High Court and Supreme Court level.

In this regard, it is important to note that a shift in the burden of proof was applied as a matter of law in Irish discrimination cases long before European Community law developed the idea, so this practice is not dependent on EC discrimination law applying in the context of the Equal Status Act 2000.

7.4 Both the Labour Court and Equality Officers applied the practice of shifting the burden of proof in discrimination cases, long before any European Community caselaw required them to do so. This practice was adopted as far back as 1983 (*Baileborough Community School v Carroll, DEE 4/1983 Labour Court*) and 1986 (*Dublin Corporation v Gibney, EE 5/1986 Equality Officer*), and was a consistent practice across a spectrum of cases (see *Curtin, Irish Employment Equality Law, 1989 p. 222 et seq.*)

European Court of Justice caselaw did not address the issue of the shift in the burden of proof for the first time till *Danfoss (Case no C-109/88, 1989)* and *Enderby (Enderby v Frenchay Health Authority and Sec of State for Health, C-127/92, 1993)*. The shift in the burden of proof would, therefore, seem to have been an indigenous development in Irish discrimination law, which was in advance of Community law.

7.5 The practice of shifting the burden of proof in discrimination cases, although this time following European Community caselaw, was also applied in very clear terms by the **Supreme Court** in *Nathan v Bailey Gibson 1998 2 IR 162* and by the **High Court** in *Conlon v University of Limerick 1999 2 ILRM 131*. While these were both indirect discrimination cases, it seems that the principle should by logical extension apply to direct discrimination cases if it applies to indirect discrimination cases.

It was also very clearly stated by the **Northern Ireland Court of Appeal**, again as a matter of first principles in discrimination cases, in *Wallace v SE Education and Library Board, 1980 NI 38*, as far back as 1980. That case was not following EC law.

On the basis of the foregoing, I can see no obvious reason why the principle of shifting the burden of proof should be limited to employment discrimination or to the gender ground.

8 Conclusions of the Equality Officer

8.1 At the outset, I must first consider whether the existence of a prima facie case has been established by the complainant.

There are three key elements which need to be established to show that a prima facie case exists. These are:

- (a) Membership of a discriminatory ground (e.g. the Traveller community ground)
- (b) Evidence of specific treatment by the respondent
- (c) Evidence that the treatment received by the complainant was less favourable than the treatment someone, not covered by that ground, would have received in similar circumstances.

If and when those elements are established, the burden of proof shifts, meaning that the difference in treatment is assumed to be discriminatory on the relevant ground. In such cases the claimant does not need to prove that there is a link between the difference and the membership of the ground, instead the respondent has to prove that there is not.

8.2 In considering what constitutes a prima facie case, I have examined definitions from other sources. In **Dublin Corporation v Gibney (EE5/1986)** prima facie evidence is defined as: *"evidence which in the absence of any convincing contradictory evidence by the employer would lead any reasonable person to conclude that discrimination had occurred."*

In article 4 of the **EC Burden of Proof Directive (Council Directive 97/80/EC)** the following definition appears: *"when persons who consider themselves wronged..... establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination"*.

In **Teresa Mitchell v Southern Health Board, (DEE011, 15.02.01)**, the Labour Court interpreted article 4 of the EC Burden of Proof Directive as follows: *" This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if those primary facts are established to the satisfaction of the Court , and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment. Applied to the present case, this approach means that the appellant must first prove as fact one or more of the assertions on which her complaint of discrimination is based. "*

8.2 With regard to (a) above, the complainants have satisfied me that they are members of the Traveller community. To determine whether a prima facie case exists, I must, therefore, consider whether the treatment afforded the complainants on 19 January 2001 was less favourable than the treatment non-Travellers would have received, in similar circumstances.

8.3 In this case, the respondents have stated that they have a strict admissions policy and that the doormen are employed to ensure that individuals who have been barred previously are not allowed on the premises. These include people who are known to be involved in drugs or who have caused trouble previously.

The respondents have also stated that they operate a strict dress code and that individuals wearing tracksuits and/or trainers are not admitted to the premises. When asked how he would normally deal with someone he had decided not to admit because of inappropriate dress, Mr Dowling explained that he would speak to them and explain the pubs dress code to them.

It appears, however, that this did not happen on 19 January 2001 as Mr Dowling and all four complainants have stated that no mention of a dress code was made.

8.4 Of interest here is the fact that, if the dress code had been referred to, then the obvious next step would have been to offer the complainants the option of whether the two acceptably attired women wished to enter the premises. All parties agree, however, that this option was never raised which would seem to reaffirm that the issue of dress code was not discussed.

I am satisfied, therefore, that the complainants were not given any reason for their refusal on 19 January 2001 and that this was contrary to the manner in which Mr Dowling states that he would normally deal with a customer who was being refused.

8.5 Another point of interest is the fact that there is general agreement on both sides that, in speaking to the complainants, Mr X made reference to the fact that his wife was a Traveller.

On considering this piece of evidence, the only obvious conclusion I can arrive at is that Mr X's comments were made in a sympathetic manner because he recognised that, while no reason was given to the complainants, that their membership of the Traveller community was a contributing factor in their refusal. If this was not the case, then I can see no reason why Mr X saw fit to identify himself as being married to a Traveller.

8.6 I am, therefore, satisfied from the evidence before me that the complainants were treated less favourably than a non-Traveller would have been treated in similar circumstances and that this action constituted discrimination on the Traveller community ground under the Equal Status Act 2000.

9 Decisions Biddy Earlys

9.1 I find that the complainants have established a prima facie case of discrimination in establishing that they were discriminated against on the Traveller community ground in terms of sections 3(1) and 3(2)(i) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act. I also find that the respondents have failed to rebut the allegation of discrimination.

9.2 In considering the level of address to award, I am conscious of the fact that the Equal Status Act 2000 states that redress should be awarded "for the effects of the discrimination". In considering this point, I believe that it is worthwhile to try and set down what I consider to be the most important effects of discrimination. To me these are as follows:

- ***social/personal impact:*** humiliation, upset, anger, stress, and where discrimination is severe or repeated, a contribution to an overall lessening of self-esteem/empowerment, increased exclusion from the mainstream social and economic currents, and a loss of confidence in the fairness and legitimacy of the society in which a person lives or works. This is the human rights aspect of discrimination: that it is an affront to the dignity of the human person.
- ***practical impact:*** (eg loss of amenity): this would vary depending on the nature of the goods or services which have been refused to the individual. For instance, the non-provision of a drink would be considered less serious than not being able to get accommodation, being sacked from a job or being physically harassed.
- ***financial impact:*** this would include loss of earnings, the cost of travelling further to obtain accommodation or to get served in a pub, not being admitted to an event for which tickets had been purchased, or having to pay higher rent for alternative accommodation because the accommodation sought was refused for discriminatory reasons.

Other factors which I consider to be relevant in determining the level of redress would include:

- whether there is evidence of a general discriminatory policy
- whether discrimination was acknowledged afterwards and a sincere apology offered
- whether the respondent had taken genuine measures to try to comply with the Equal Status Act subsequent to the act of discrimination

9.3 In considering what level of redress would be most appropriate in this case, I have given the above points much consideration. In particular, I am mindful of the humiliation and distress that the complainants must have felt in not being given a reason for their refusal and to them being clearly identified as members of the Traveller community by the doormen.

9.4 I, therefore, consider that this incident would have had a damaging effect on the self-esteem of the complainants at the time, resulting in them feeling increasingly excluded from mainstream social activities on account of their membership of the Traveller community. The discrimination would have had a negative effect on the complainants from a social/personal perspective more so than from a practical or financial perspective.

Accordingly, I order that Biddy Earlys pay each of the complainants the sum of €400 for the distress, humiliation, loss of amenity and other effects of the discrimination, suffered on 19 January 2001.

Brian O'Byrne
Equality Officer
31 May 2002