

Equal Status Act 2000

Equality Officer Decisions

DEC-S2002-033 / 036

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

V

**Kilford Arms, Kilkenny
(represented by Michael Lanigan & Co,
Solicitors)**

File Refs

ES/2001/377, 384, 391 & 398

Date Of Issue 31/05/2002

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Equal Status Act 2000

Summary of Decisions DEC-S2002-033/036

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

v

**Kilford Arms, Kilkenny
(represented by Michael Lanigan & Co, Solicitors)**

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 service in a pub - One complainant barred previously, section 15(1) - Burden of Proof

Dispute

This dispute concerns a complaint by Eileen Delaney, Hannah Carthy, Cathleen O'Reilly and Margaret O'Reilly that they were discriminated against by the proprietors of the Kilford Arms pub, Kilkenny 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.

The complainants state that when they entered the Kilford Arms on 19 January 2001, they were refused service by the manager. The complainants claim that they were refused service on the grounds of their membership of the Traveller community.

The respondents totally reject that they operate a discriminatory policy against Travellers. They maintain that service was refused because one of the complainants had been barred previously.

Decision

The Equality Officer found that a prima facie case of discrimination had been made by Margaret O'Reilly, Eileen Delaney and Cathleen O'Reilly and that the respondents had failed to rebut the allegation. With regard to Hannah Carthy, he found that the respondents had a justifiable non-discriminatory reason for not wanting to provide her with service and, as a result, a prima facie case had not been established in her case.

In considering the level of address to award, the Equality Officer said that he was mindful of the fact that the Kilford Arms does cater for Traveller customers and has hosted Traveller weddings in the past. This has been borne out by the complainants themselves who all admitted to having been served in the Kilford Arms on other occasions. The Equality Officer ordered that the respondents pay Margaret O'Reilly, Eileen Delaney and Cathleen O'Reilly the sum of €250 each for the humiliation and loss of amenity suffered on 19 January 2001.

Equal Status Act 2000**Decisions DEC-S2002-033/036**

Eileen Delaney, Hannah Carthy, Cathleen O'Reilly and Margaret O'Reilly

v

The Kilford Arms, Kilkenny

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 management of The Kilford Arms, 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 entered the Kilford Arms on 19 January 2001, they were refused service by the manager. 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 totally reject that they operate a discriminatory policy against Travellers. They maintain that service was refused because one of the complainants had been barred previously.

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 Early's	(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-S2002-033/036 - Kilford Arms

6 Evidence of Parties

6.1 Agreed Facts

- Complainants have all been served in the Kilford Arms on different occasions
- Complainants have attended Traveller weddings in the Kilford Arms.

6.2 Complainants Evidence

- Complainants have only been served in the Kilford Arms before when they were part of a Women's Group comprising Travellers and non-Travellers.
- The four complainants entered the Kilford Arms on 19 January 2001 together at 8.30 pm. Carmel O'Connor followed a minute later.
- In the original notification to the respondent on 2 February 2001, the complainants stated that the barman informed them that it was the policy of the owner not to serve members of the Traveller community. At the Hearing, Margaret O'Reilly explained that this statement was not entirely accurate.
- Margaret O'Reilly went to the bar to order two lemonades but was left waiting for several minutes.
- Margaret O'Reilly stated that she was waiting a few minutes at the bar before the bar manager, Mr Don Devlin, eventually approached her and informed her that he was not serving her because "some of your people had me in court before", which she took as a reference to Travellers.
- Margaret O'Reilly returned to the group and made the comment "He won't serve us". The other complainants and Ms O'Connor state that this is the only comment they recall Ms O'Reilly making on her return from the bar.
- Ms O'Connor stated that she had heard Mr Devlin stating that he would not serve them and this shocked her. She said that she could see from Mr Devlin's attitude and stance that he was giving the women no option but to leave.
- The complainants felt embarrassed and humiliated and left quietly.

6.3 Respondents Evidence

- No policy of discrimination against Travellers exists.

- The respondents currently have a Traveller working for them.
- Mr Devlin, the Manager, recognised some of the complainants when they arrived on 19 January, from having been in previously with husbands or other women.
- Mr Devlin recognised Hannah Carthy as someone who the owner, Mr Pius Phelan, had barred a year before.
- Mr Pius Phelan gave evidence of one occasion where Mrs Carthy's husband had caused trouble on being refused access to the premises and another occasion when he had caused trouble while on the premises. Mr Phelan stated that Mrs Carthy was with her husband on both occasions and had been abusive to him both times. For this reason, he had informed staff that both were barred from the premises. At the Hearing, Mrs Carthy said that she recalled an incident outside the premises, such as described, but insisted that it was not Mr Phelan who was involved.
- Mr Devlin states that he informed Margaret O'Reilly on 19 January 2002 that he would not serve her because "the girl with the black hair was barred before", referring to Mrs Carthy.
- He said that he did not give Margaret O'Reilly the option of being served if Mrs Carthy left the premises.
- With regard to Margaret O'Reilly's reference to an alleged comment by Mr Devlin regarding "being up in court before", the respondents stated that the Kilford Arms had no previous convictions, had never had a civil action taken against them and had never had their publican's licence challenged in the District Court.

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 service in the Kilford Arms 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 (*Bailieborough 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. "*

8.3 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.

There is general agreement that Mr Devlin informed Margaret O'Reilly that he was not serving her group. Ms O'Reilly claims that Mr Devlin's stated reason was that "some of your people had me in court before" which she took to mean Travellers. For his part, Mr Devlin says that he informed Ms O'Reilly that service was being refused because Mrs Carthy had been barred previously.

If Ms O'Reilly's statement is accurate, then a possible case of discrimination would appear to exist. If Mr Devlin's statement is true, then it would seem that he had justification for not serving at least one of the complainants.

8.4 As this aspect of the case is central to the outcome, I believe that these two statements need to be considered further in order to decide, on the balance of probabilities, which is likely to be the more accurate. I consider that the best way to approach this is to consider what the most likely reaction of Ms O'Reilly and the complainants would have been in each case.

Firstly, if Ms O'Reilly's account of what Mr Devlin said was true, then I consider that her reaction would have been to deduce that her membership of the Traveller community was the reason for the refusal. This version would support the other complainants' statement that, on her return from the bar, Ms O'Reilly's only comment was "he won't serve us".

On the other hand, if Mr Devlin's account was true, then I consider that the obvious response from Margaret O'Reilly would have been to inform the group that they were not been served because Mrs Carthy had been barred previously. However, all of the complainants and Ms O'Connor agree that this comment was not relayed to them by Ms O'Reilly, which would seem to support Ms O'Reilly's claim that Mr Devlin made no reference whatsoever to a member of her party having been barred before.

8.5 Having considered all the evidence before me, I have formed the view that Mr Devlin recognised the complainants as Travellers when they entered the Kilford Arms and also recognised Ms Carthy as someone who had been barred previously. I also consider that, instead of focusing his attention on the person who had been barred, Mr Devlin then took a decision not to serve any of the group.

8.6 I have also concluded, on the basis of the evidence before me, that, while Mr Devlin considered that he had a valid reason not to provide Mrs Carthy with service, that he did not communicate this reason to Margaret O'Reilly.

If this reason had been communicated to Ms O'Reilly, I consider that the next logical step would have been to discuss with Ms O'Reilly the options open to her and perhaps suggest to her that she and her other colleagues would be served, if Ms Carthy left the premises. Mr Devlin has conceded that this option was not put to Ms O'Reilly.

I am, therefore, of the opinion that Mr Devlin, on recognising Mrs Carthy as someone who had been barred previously, decided to refuse service to both herself and her colleagues without explaining the real reason for his decision.

8.7 In order to establish whether Mr Devlin's actions constituted discrimination under the Equal Status Act 2000, I must now consider whether or not the treatment afforded the complainants would have been the same for non-Travellers in similar circumstances.

On considering the events of 19 January 2001 in the Kilford Arms, I cannot accept that Mr Devlin would have adopted the same attitude in a situation where non-Travellers were involved. Of major significance here is the fact that Mr Devlin has admitted that all three other complainants had drank in the pub before 19 January 2001 without causing any trouble. In a similar situation involving non-Travellers, I believe that the logical approach would have been to ask the person who was barred to leave and for the other regular customers to be given the option as to whether they wished to stay.

In not adopting this approach, I consider that Mr Devlin treated the complainants less favourably than he would normally treat a group of non-Travellers in similar circumstances and this action, in my opinion, constituted discrimination under section 3(1)(a) of the Equal Status Act 2000.

9 Decision - Kilford Arms

9.1 I find that a prima facie case of discrimination has been made by Margaret O'Reilly, Eileen Delaney and Cathleen O'Reilly and that the respondents have failed to rebut this allegation. With regard to Hannah Carthy, I find that the respondents had a justifiable

non-discriminatory reason for not wanting to provide her with service and, as a result, a prima facie case has not been established in her case. I, therefore find that only Margaret O'Reilly, Eileen Delaney and Cathleen O'Reilly suffered discrimination at the hands of Mr Devlin on 19 January 2001.

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 fact that the Kilford Arms does cater for Traveller customers and has hosted Traveller weddings in the past. This has been borne out by the complainants themselves who all agree that they have been served in the Kilford Arms on other occasions. I, therefore, accept that the Kilford Arms does not have a general policy of discrimination against Travellers. However, I do consider that discrimination did occur on 19 January 2001 and that it would have had a negative effect on the complainants from a social/personal perspective more so than from a practical or financial perspective. .

9.4 Having found that discrimination did occur in this instance, I order that the respondents pay Margaret O'Reilly, Eileen Delaney and Cathleen O'Reilly the sum of €250 each 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