

ODEI - the equality tribunal

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Equal Status Act 2000

EQUALITY OFFICER'S DECISION NO: DEC-S2002-103-104

Kathleen and Jerry O'Sullivan

V

Henry O'Connor, Proprietor, The Beer Garden Bar, Cork

**File No. ES/2001/193 & 202
Date of Issue 18/09/2002**

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Summary of Decisions DEC-S2002-103-104

Kathleen and Jerry O’Sullivan

-v-

Henry O’Connor, Proprietor, The Beer Garden Bar

Headnotes

Equal Status Act, 2000 - Direct discrimination, section 3(1)(a) - Membership of the Traveller community, Section 3(2)(i) - Disposal of goods and supply of services, Section 5(1) - Refusal of service in a pub.

Background

This dispute concerns claims by Kathleen and Jerry O'Sullivan that they were discriminated against by the respondent, contrary to the Equal Status Act, 2000, on the grounds that they are members of the Traveller community, when they were refused service in the respondent's premises on 2 December, 2000. The respondent denies that discrimination occurred and states that the only reason service was refused on 2 December 2000 was because the complainants had been involved in a potentially violent incident the previous week.

Conclusions of the Equality Officer

The Equality Officer found that the complainants had established a prima facie case of discrimination that they were refused service because they are members of the Traveller community and that the respondent had failed to provide evidence of a non-discriminatory reason for the refusal of service and had therefore failed to rebut the inference of discrimination.

Decision

The Equality Officer found that each of the complainants was discriminated against on the Traveller community ground contrary to Section 3(1)(a) and 3(2)(i) of the Equal Status Act 2000 in terms of Section 5(1) of that Act and ordered that €1000 be paid by the respondent to each of the complainants as compensation for the effects of the discrimination.

Complaint under the Equal Status Act 2000

DEC-S2002-103-104

Kathleen and Jerry O'Sullivan

V

Henry O'Connor, Proprietor, The Beer Garden Bar, Cork

Each of the complainants referred a claim 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 then delegated the cases to me, Dolores Kavanagh, 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.

1. Dispute

1.1 This dispute concerns claims by Kathleen and Jerry O'Sullivan that they were discriminated against by the respondent, contrary to the Equal Status Act, 2000, on the grounds that they are members of the Traveller community in that on 2 December, 2000, they were refused service in the respondent's premises. The respondent denies that discrimination occurred.

2 Summary of Complainant's Case.

2.1 The complainants had attended at the respondent's premises on a regular basis prior to 2 December, 2000. On 2 December, 2000 Mr. O'Sullivan went to the bar to order a drink for himself and his wife. The barman refused service on the basis that he and his wife had caused trouble the previous week on the premises. The complainants state that they had not caused any trouble on the premises at any time. The complainants believe that they were refused service because some of their relatives had begun to socialise at the respondent's premises and the respondent wished to restrict the number of Travellers socialising on his premises.

3. Summary of Respondent's Case

3.1 The respondent submits that the complainants were refused service on 2 December 2000 because they had been involved in a potentially violent incident the previous week .

4. Evidence of the Parties

4.1. Complainants' Evidence

Ms. Kathleen O'Sullivan, Complainant

Ms. O'Sullivan stated that:-

- She and her husband had been socialising in the Beer Garden Bar on a regular basis for a period of 6-7 months up to 2 December, 2000.
- On 2 December 2000 they went, as usual, to the premises. Her husband went to the bar to order a drink and came back a short while later and told her that he was not being served as the barman had said that they caused trouble in the bar the previous week. Her husband was extremely ashamed and embarrassed because of the refusal and left the premises immediately.
- A week before the alleged trouble was supposed to have occurred i.e two weeks before the complainants were refused service, Ms. O'Sullivan's daughter, Ms. Noreen O'Brien, her brother and two companions had gone to the bar in the Beer Garden to order a drink. Ms. O'Brien and her brother were told by the barman on that occasion that if they and their companions did not leave the premises that their parents, Mr. and Mrs. O'Sullivan would be barred from the premises.
- Ms. O'Sullivan recalled that a group of approximately three people, two women and one man, had been very drunk and had been carrying on a bit on a night a week before her husband had been refused service. These people were not in their company and neither she nor her husband had been involved in any trouble.
- On 19 December, 2000 Ms. O'Sullivan wrote to the owner/manager of the Beer Garden Bar outlining the way in which her husband had been refused service and stating that they intended to return to the premises on 26 December, 2000. In doing so, they were offering the owner/manager the opportunity to provide service to them on the same basis as service was provided to other patrons. The letter also stated that it was Ms. O'Sullivan's belief that the only reason that service had been refused was because she and her husband are Travellers.
- Ms. O'Sullivan and her husband returned to the premises on 26 December, 2000. Ms. O'Sullivan ordered a bottle of minerals from the barwoman. Another member of staff tipped the barwoman and said "sorry, that lady is barred by the manager". Service was again refused.

- Ms. O’Sullivan and her husband have been attending the premises regularly on Saturday nights since Summer 2001 as the bar is under new ownership since March, 2001. They have also attended a number of parties, in the same period, on the premises.
- Neither she nor her husband had ever been refused service before 2 December and they had been happy with the service provided in the Beer Garden Bar until two weeks before the refusal, when their son and daughter had been told to leave the premises or they, and their parents, would be refused service.
- Ms. O’Sullivan believes that the presence of her son and daughter on the premises two weeks before her husband was refused service was the cause of the refusal, as the number of Travellers drinking on the premises increased with their presence and the owner of the pub wanted to restrict the number of Travellers on his premises.

Mr. Jerry O’Sullivan, Complainant

Mr. O’Sullivan stated that:-

- On the evening of Saturday, 2 December, 2000 he and his wife went to the Beer Garden Bar, as was their custom.
- He went to the bar to order drinks while his wife went and sat down.
- The barman told him that he could not serve him as he (Mr. O’Sullivan) had caused trouble in the bar the week before.
- He had told the barman that this was not true, but the barman insisted that it was true and that he would not serve him.
- Mr. O’Sullivan could recall that there had been an incident of sorts the previous week whereby a group of people, comprising mainly non-Travellers and most of whom were not known to Mr. O’Sullivan, had been loud and noisy, but to the best of his knowledge none of those involved had been barred.

Ms. Noreen O’Brien, witness for the complainants

Ms. O’Brien stated that:-

- She is the daughter of the complainants, Mr. and Ms. O’Sullivan.
- Two weeks before her father was refused service she went to the Beer Garden Bar with her parents, her brother and his wife. Her brother went to the bar to order drinks. He returned to the group and said that the barman had stated that he would not serve them as

two blonde girls had caused trouble in the bar the previous week and that Ms. O'Brien's brother was with the girls in question at the time.

- Ms. O'Brien and her brother, in turn, went to speak to the barman and pointed out that Ms. O'Brien's brother couldn't have been involved in any such incident as he had never been to the bar before.
- In the course of conversation with the barman the latter pointed to Mr. and Ms. O'Sullivan and stated that if Ms. O'Brien or her brother approached him again he would bar "the old couple" i.e. their parents. Eventually, the barman accepted that he might be mistaken and served the entire group for the evening.
- On the evening when her father was refused service Ms. O'Brien was sitting in the bar, at another table, with her sister. Her mother told them that the barman had refused service and they left the premises shortly after their parents left.
- They met their parents the following morning and were told what the barman had said.
- Neither Ms. O'Brien nor any of her companions who were in the bar the previous week had seen or heard any noise or witnessed any incident. They had been sitting near to the area where music was playing, with their backs turned to Mr. and Ms O'Sullivan.

Ms. Mary O'Brien, witness for the complainants

Ms. O'Brien stated that:-

- The evidence given by her sister in relation to the night on which Mr. O'Sullivan was refused service was correct.
- She had not been there the previous week, i.e. on the evening when her father was accused of having caused trouble, and could not therefore give any evidence about that evening.

Mr. David McCarthy, representative for the complainants.

Mr. McCarthy summarised on behalf of the complainants stating that:-

- The complainants had not been involved in any trouble as alleged.
- The complainants believed that the refusal was a direct result of family members joining them on the respondent's premises and the respondent did not want more Travellers on his premises.
- The refusal of service was out of proportion to all information available and the grounds for refusal were unacceptable

- The respondent had failed to respond to the complainants or the Equality Officer in the matter
- The refusal of service had caused a great deal of humiliation to the complainants

4.2 Respondent's Evidence

Mr. Henry O'Connor, Respondent

Mr. O'Connor stated that:-

- He was the owner of the Beer Garden Bar at the time the complainants were refused service.
- He had witnessed the trouble in which the complainants had been involved the week prior to the refusal.
- A group of 7-8 people, including the complainants, had been seated at a particular table. The group had been loud and aggressive.
- He was not familiar with the group of people in question.
- He had gone over to the group and asked them to calm down.
- He stayed close to the group and watched them closely for approximately half an hour.
- One male member of the group had calmed the others down temporarily but they had become loud and aggressive again after a few minutes.
- He had approached the group 3-4 times in total but had not at any time told them not to return to the Bar.
- Two or three days later in the course of a discussion with one of the barmen, the barman had told Mr. O'Connor that there had been previous incidents involving the same group of people.
- Mr. O'Connor had subsequently told the bar manager that the group, including the complainants, was not to be served again in the premises.
- Mr. O'Connor had not experienced any violence or abuse from the group in question but had seen members of the group standing and pointing at each other in a threatening way, and their tone had been loud and aggressive, although he had not heard what they were saying.
- The Bar had never had a policy of refusing or limiting service to Travellers.
- Mr. O'Connor knew the complainants were regulars in the Bar. They would usually arrive in the Bar unaccompanied and would then join a group of people who were there.

- On the night on which the trouble occurred, i.e one week before the complainants were refused service, the group had come into the Bar together at around 9.30 p.m. There was entertainment on in the Bar that night.
- The complainants' names were unknown to Mr. O'Connor as he ran the Bar from a distance i.e. he had a bar manager who ran the bar for him. The names of two members of the group in question, a married couple, are known to Mr. O'Connor (names supplied). Neither were barred from the bar as the husband had made it clear to a member of staff that they were not involved in the trouble and did not approve of it.
- The Bar had a rigid policy on noisy and/or boisterous behaviour. Patrons would be barred for such behaviour. Not all members of a group would be barred if some members of the group were behaving in an unacceptable manner. Those behaving in an unacceptable manner would be barred.

Adrian Foley, Barman, witness for the Respondent

Mr. Foley stated that:-

- At the time the complainants were refused service he had been working in the Beer Garden Bar for approximately 2 years.
- He remembers the complainants well and he had never had any trouble from them.
- He remembers the fracas that took place as described by Mr. O'Connor. He thinks he saw the complainants arguing but he could not be certain of this.
- He could not recall the make-up of the group involved in the fracas.
- He was the barman with whom Mr. O'Connor, the respondent had spoken, and who had told Mr. O'Connor about previous trouble from the same group. He could "nearly" say that the complainants were present when the earlier trouble which he related to Mr. O'Connor had happened, but he wasn't certain of this.
- One of the group who were involved in the trouble as witnessed by Mr. O'Connor had apologised to one of the barmen and explained that he did not approve of the behaviour of the rest of the group. This person was not barred. Mr. Foley did not know which barman had been spoken to by this person.
- The complainants had never given any trouble in the bar prior to the night in question.

Mr. Liam O'Connell, Bar Manager, witness for the Respondent

Mr. O'Connell stated that:-

- He was the person who refused service to Mr. O'Sullivan on 2 December, 2000.

- He had been told by Mr. O'Connor that service was to be refused to all members of the group who had been involved in trouble the previous week.
- Mr. O'Connor had described the members of the group to Mr. O'Connell. The latter had recognised the group in question by the description given by Mr. O'Connor. Mr. O'Connor had described the complainants and "the group that come in with them".
- Mr. O'Connell would serve, and probably had served, other members of the group since the incident as only the complainants were well known to him.
- On 2 December Mr. O'Sullivan had approached the bar and ordered a drink. Mr. O'Connell had explained to him that he could not be served and why.
- Mr. O'Sullivan had been upset at the refusal.
- Mr. O'Connell recalled initially refusing the complainants' son in the week preceding the night on which the trouble involving the complainants occurred i.e. circa 25 November, 2000 because he recognised him as one of a group of four who had caused trouble in the bar on 18 November. There were two women in the group of four who had been shouting and screaming at each other.
- On 25 November, Mr. O'Connell had stated to the complainants' daughter, Ms. Noreen O'Brien, that he would stop serving her parents if she and her brother did not stop coming up to the bar to argue with him for refusing her brother. The latter had persisted in stating that he had never been to the premises before, so Mr. O'Connell had relented and served him. He had continued to serve him for the night.
- Mr. O'Connell had never had any difficulty with the complainants and did not recall them ever being troublesome or abusive. The only reason he refused them service was because he had been informed that they had been involved in trouble on the premises.

Mr. Tom Simpson, Customer, witness for the Respondent

Mr. Simpson stated that:-

- He is a regular customer in the Beer Garden Bar.
- He witnessed the trouble on 25 November, 2000 as described by Mr. O'Connor, the bar owner.
- He heard shouting and a commotion at one end of the bar. He was seated at the opposite end.
- He had previously worked in the licensed bar trade and was aware of the difficulties associated with the trade. He approached Mr. O'Connor at the other end of the bar and asked him if he needed any help.

- He saw Mr. O'Connor approach some people at a table and speak to them.
- Some people were standing up and shouting. It looked like a row was about to break out. He only saw this happen once.
- The fracas was the topic of discussion in Mr. Simpson's group for a while.
- There were about a half dozen people seated at a table and Mr. O'Sullivan, complainant was among them. Mr. Simpson did not see Mr. O'Sullivan stand up or hear him shout and could not recall whether Ms. O'Sullivan was seated or standing. There were some pillars in the bar which partially obstructed his view. The tables in the bar were small round tables which seat four persons at most but he was almost sure that some of the tables were grouped together in the area where the complainants would have been seated.
- Mr. Simpson knew Mr. O'Sullivan to see at the time. He was aware that the "Traveller group" always came into the bar.
- Mr. Simpson could not recall other Travellers coming into the bar, but he would not recognise them to see anyway.
- He was aware that one big man (not the complainant) sitting at the table with the group was a Traveller, as was his wife. (The respondent clarified that the man in question is not a Traveller, but his wife is)
- Mr. Simpson did not recall any women shouting on the night in question.
- The group was seated at a number of round tables grouped together. It was unlikely that they were not drinking together as a group.
- Mr. Simpson could not recall the complainants ever causing trouble or being abusive.
- On the night in question Mr. Simpson and his girlfriend would have started the evening with some drinks in the Beer Garden and perhaps travelled on elsewhere for a while and then returned to the Beer Garden.
- Mr. Simpson was aware that Travellers had been served on the premises before and after the trouble but was unsure how he would recognise that they were Travellers.

Ms. Colette McCarthy, Solicitor, representing the respondent

Ms. McCarthy summarised on behalf of her clients, stating that -

- The refusal of service to the complainants was not based on their membership of the Traveller community.
- Her client was clear in his reason for refusing service and this was because the complainants had been involved in an incident on her client's premises.

- The decision to refuse service was not made lightly. This was a lawful refusal and the reasons for taking the decision to refuse service were very serious.
- The complainants themselves had stated that there had been ongoing service to them prior to the incident. Travellers are welcome on her client's premises.

5 Matters for consideration

5.1 The matter referred for investigation turns upon whether or not the complainants were discriminated against contrary to Section 3 (1)(a) and 3 (2)(i) of the Equal Status Act 2000 in terms of Section 5 (1) of that Act.

5.2 Section 3 (1)(a) provides that discrimination shall be taken to occur where:
"On any of the grounds specified.....a person is treated less favourably than another person is, has been or would be treated".

5.3 Section 3 (2) 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."

5.4 Section 5 (1) states that *"a person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public "*.

5.5 Section 15(1) of the Equal Status Act 2000 provides that *"nothing in the Act prohibiting discrimination, shall be construed as requiring a person to provide services to another person in circumstances which would lead a reasonable individual, having the responsibility, knowledge and experience of the person, to the belief, on grounds other than discriminatory grounds, that the provision of services to the customer would produce a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place in which the services are sought".*

Section 15(2) of the Equal Status Act 2000 states that “*Action taken in good faith by or on behalf of the holder of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the Licensing Acts, 1833 to 1999, shall not constitute discrimination*”.

5.6 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 of the complainants by the respondent
- (c) Evidence that the treatment received by the complainants was less favourable than the treatment someone, not covered by that ground, received or 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. If they succeed in establishing prima facie evidence, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

5.7 Essentially this is the approach provided for in the Burden of Proof Directive (Council Directive 97/80/EC). In adopting this approach I am conscious that the Directive is not directly applicable to the complaint in hand under the Equal Status Act, 2000, but I consider that the Directive has persuasive effect in discrimination law. It is notable that the Labour Court and Equality Officers applied the practice of shifting the burden of proof in discrimination cases long before any European Community case law required them to do so (as far back as 1983 (*Bailieborough Community School v Carroll*, DEE 4/1983 Labour Court) and 1986 (Equality Officer:

Gibney), and that this was a consistent practice across a spectrum of cases ¹. European Court of Justice case law did not address the issue of the shift in the burden of proof for the first time until the *Danfoss*² and *Enderby* ³ cases so this was not done purely in implementation of Community law. It seems to represent an indigenous development in Irish discrimination law, which was in advance of Community law. There is no reason why it should be limited to employment discrimination or to the gender ground.

The practice of shifting the burden of proof in discrimination cases was also applied in very clear terms by the Supreme Court in *Nathan v Bailey Gibson* ⁴ and by the High Court in *Conlon v University of Limerick* ⁵. While these were both indirect discrimination cases, it seem that the principle should by logical extension apply to direct discrimination cases if it applies to indirect discrimination cases.

5.8 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 credible 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*".

1In *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*

¹ *Curtin, Deirdre, Irish Employment Equality Law, 1989, P. 222 et seq.*

² *Case no. C-109/88*

³ *Enderby v Frenchay Health Authority and Sec. Of State for Health, C-127/92*

⁴ *1998 2IR 162*

⁵ *1999 2 ILRM 131*

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. "

6. Conclusions of the Equality Officer

6.1 In this particular case the complainants claim that they were discriminated against on the basis of their membership of the Traveller community when they sought and were refused service on 2 December, 2001.

6.2 I am satisfied that the complainants are members of the Traveller community in accordance with (a) at 5.6 above. The complainants have provided written and oral evidence of refusal of service to them by a member of the respondent's staff, on the respondent's instructions, which has been confirmed by the respondent, and this fulfils (b) at 5.6 above.

6.3 In relation to key element (c) at 5.6 above I must now consider whether the refusal of service was such that a non-Traveller in the same circumstances would be treated more favourably.

The evidence provided shows that the complainants were recognised as, and almost always referred to on the respondent's premises as, Travellers. In the course of the Hearing one of the witnesses for the respondent referred to the group with whom the complainants socialised as "the Traveller group", although the same witness was not aware of the identities or background of any of the other members of the group.

The evidence also shows that few, if any, of the other members of the group, some of whom were alleged to have caused trouble on the respondent's premises, were clearly identified to the bar staff, or subsequently barred. The bar staff were keenly aware of the complainants' presence on the premises but were either unaware, or only very vaguely aware, of the identities of the other members of the group that were to be barred. Given the stated previous ongoing exemplary behaviour of the complainants I find this unusual and puzzling and I can only conclude that the complainants' membership of the Traveller community drew unusual attention upon them from the

respondent and his staff. I am satisfied that this close scrutiny of the complainants of itself is treatment of a kind as to be different to and less favourable than, the attention that would be given to exemplary non-Traveller patrons.

The bar manager also stated in evidence that he had not refused service to other members of the same group as they were not known to him but the complainants were refused as they were known to him. The fact that the complainants seem to have had unusual attention given to them, despite the fact that they were exemplary regulars, apart from being unusual, also resulted directly in less favourable treatment of them than the treatment afforded the remainder of their drinking group. This entirely contradicts the respondent's statement that he would not bar all members of a group where only some of the group were causing trouble, but that he would bar/refuse service to only those causing trouble. Of a group of people, some of whom were alleged to have caused trouble and most of whom have not been positively identified, there is no evidence against the complainants, and yet it appears that they were the only members of the group refused service following the alleged trouble.

Based on the foregoing I am satisfied that the complainants were treated in a manner which was less favourable than other members of the group. While the specific make up of this group i.e Traveller/non-Traveller, was not stated by the respondent or any of the witnesses on his behalf, the respondent was able to specify in the course of giving evidence that the complainants and one other in the group were Travellers. I am satisfied that the respondent was aware of the identity of the Travellers, three in total, in the group. The balance, approximately six people or more, must therefore be non-Travellers, or at least be regarded by the respondent as non-Travellers. The third Traveller in the group was not barred because the respondent stated that she was "a settled Traveller" and that her husband, a non-Traveller, had "made it clear to a member of staff (not identified, as the precise member of staff was not known to the respondent or his witnesses) that he had nothing to do with the trouble".

The complainants also made it clear that they had nothing to do with the alleged trouble. They wrote to the respondent to that effect and attempted to discuss the matter with the bar staff to no avail, despite the fact that there is no direct evidence of any involvement in the alleged trouble on their part. I am satisfied that this

constitutes less favourable treatment of the complainants than the other members of the group, particularly the non-Traveller who also stated that he had nothing to do with the trouble and who, according to the respondent and his staff, was served on a continuous basis.

In the absence of any credible contradictory evidence a presumption of discrimination arises and the onus of proof that discrimination did not take place shifts to the respondent.

6.4 The respondent and witnesses on his behalf provided evidence that, a week before the complainants were refused service, an incident had arisen on the premises which was potentially violent, but had not given rise to actual violence. In the course of a conversation later in the same week the respondent had learned from a member of staff that the “same group” had previously caused trouble. On foot of this information the respondent had instructed staff that the complainants and the group associated with them were to be refused service. The member of staff who informed the respondent of previous unacceptable behaviour from the “same group” stated in evidence at the Hearing that the identities of the individual members of the group in question were unknown to him. It is difficult to understand therefore how he could tell the respondent that he had experienced trouble from the same group previously. In order to do so he would have to know the identities of the members of both groups.

The respondent issued an instruction to his staff that the entire group was to be refused service. This contradicts his own statement in the course of the Hearing that he would only bar/refuse service to those in a group who were actually causing trouble, and not the other members of the group. Following this instruction it appears that the complainants were the only members of the group that were actually refused service.

Taking all of the evidence into consideration, I am satisfied that, on the balance of probabilities, the complainants were discriminated against because of their membership of the Traveller community. Given the stated exemplary behaviour of the complainants I am satisfied that this occurred because certain members of their family had, at the time the discrimination occurred, recently begun to socialise in the

same premises and the respondent wished to restrict the number of Travellers socialising on his premises. This is supported by the fact that the complainants' son and daughter were initially refused service on the first occasion they attended at the premises, which was only some two weeks before the complainants were refused service. The reason given to them on that occasion mirrors the reason given to the complainants for the refusal of service to them i.e. that they had been involved in trouble on the premises previously.

Were it not for the fact that they, the complainants' son and daughter, challenged the refusal I am satisfied that they would have been refused service and excluded from the premises. While I support the right of any service provider to exclude proven troublemakers from their premises, I would stress that nothing was proven on either occasion in the instant case and the barman, when challenged on the first occasion, conceded that he could be mistaken. I am also mindful of the fact that the bar manager threatened on that occasion to bar the complainants from the premises, despite the fact that they had been exemplary customers and were not alleged to have been involved in any trouble whatsoever at that time.

I find that the respondent has produced no evidence that the complainants have ever acted in a manner such as to permit the respondent to avail of the defence provided by Section 15 (1) of the Equal Status Act 2000. In order for Section 15 (2) of the Equal Status Act to apply in this matter requires that the action taken by the respondent was *in good faith* for *the sole purpose* of ensuring *compliance with the Licensing Acts*. In relation to the Equal Status Act 2000, I am satisfied that while the good faith test is primarily subjective it is qualified with the more objective tests of *sole purpose* and *ensuring compliance with the Licensing Acts*. It is not necessary that a respondent act reasonably to be acting in good faith. It is necessary that he is acting honestly which must, in the context of this Act, mean without discriminatory motive. It is also necessary in terms of section 15 (2) of the Equal Status Act that his actions be for the sole purpose of ensuring compliance with the Licensing Acts.

I find that the respondent did not act towards the complainants in a manner that was free from discriminatory motive, as is required by Section 15 (2) of the Act, and that he did not therefore act in good faith in refusing service to the complainants.

6.5 In the absence of any other plausible, non-discriminatory reason for the refusal of service to the complainants I find that the respondent has not rebutted the presumption of discrimination by him against the complainants.

7 Decision

7.1 I find that the complainants were discriminated against on the Traveller community ground contrary to Section 3(1) and 3(2)(i) of the Equal Status Act and in terms of Section 5(1) of that Act.

8 Vicarious Liability

8.1 While the action which constituted discrimination is directly attributable to the barman who refused service to the complainants section 42(1) of the Equal Status Act, 2000 provides that:

“Anything done by a person in the course of his or her employment shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that person’s employer, whether or not it was done with the employer’s knowledge or approval”

As the barman was clearly acting on the respondent’s instructions and within the scope of his employment in the course of the refusal I find that the barman’s employer, Mr. Henry O’Connor, trading as The Beer Garden Bar, is vicariously liable for his actions in accordance with section 42(1) of the Equal Status Act.

9 Redress

9.1 Under section 25(4) of the Equal Status Act, 2000 redress shall be ordered where a finding is in favour of the complainant in accordance with section 27. 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:

(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.”

9.2 I hereby order that €1000 be paid to each of the complainants by the respondent for the effects of the discrimination. In making this award I have taken into consideration

- (i) the needless anxiety caused to the complainant for a long period of time by the respondent's failure to respond to their requests for a full explanation for the refusal of service
- (ii) the embarrassment and distress caused to the complainants by the refusal of service, and
- (iii) the loss of amenity to the complainants on the evening on which service was refused and subsequently.

Dolores Kavanagh

Equality Officer

18 September, 2002