

ODEI-equality tribunal

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Equal Status Act 2000

Equality Officer Decision DEC-S2002-133

Mr. Finnian Gallagher

V

Merlin's Night Club
(represented by M.W. Keller & Son Solicitors)

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Summary of Decision DEC-S2002-133

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Key words

Equal Status Act, 2000 - Direct discrimination, section 3(1) - gender discrimination, Section 3(2)(a) - Supply of goods and services, Section 5(1) - service in a pub, dress code - males wearing sandals to a night club, prima facie case.

Dispute

The dispute concerns a claim by the above named that he was discriminated against by

Merlins Night Club, on the gender ground, in terms of Sections 3(1)(a), and 3(2) (a) of the Equal Status Act, 2000, and contrary to Section 5(1) of that Act, when he was refused access to a service which is generally available to the public in the respondent's premises.

Background

The complainant alleges that he was discriminated against by the respondent contrary to the Equal Status Act, 2000 when he was refused access to a service in the respondent's bar on the 1 July, 2001. The complainant was not allowed into the respondent's premises because of his footwear. The complainant contends this was discrimination on the gender ground, in that a woman with similar footwear was allowed into the pub without any difficulty. The respondent submitted that he operates a dress code policy and that the complainant was wearing sandals which were in breach of the dress code and consequently he was denied access to the premises.

Conclusions of the Equality Officer

The Equality Officer concluded that the complainant establish a prima facie case of discrimination on the gender ground. She found that, in the operation of the dress code policy, the respondent did discriminate against the complainant in refusing him access to the night club because he was wearing sandals. She concluded that he was treated less favourably, on the gender ground, than a female was treated in similar circumstances.

Decision

The Equality Officer found that the Merlin Night Club did unlawfully discriminate against Mr Finnian Gallagher on 1 July 2001, on the gender ground, contrary to the Equal Status Act, 2000. She awarded the complainant €1,000 compensation.

Equal Status Act, 2000

Decision DEC-S2002-133

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Merlin's Night Club

(represented by M.W. Keller & Son Solicitors)

Delegation under Equal Status Act, 2000

The complainant referred a claim to the Director of Equality Investigations on 15 October, 2001 under the Equal Status Act, 2000. In accordance with her powers under section 75 of the Employment Equality Act, 1998 and under the Equal Status Act, 2000, the Director then delegated the case to Marian Duffy, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act, 2000.

1. Dispute

- 1.1** The dispute concerns a claim by the above named that he was discriminated against by Merlin's Night Club, on the gender ground, in terms of Sections 3(1)(a), and 3(2) (a) of the Equal Status Act, 2000 and contrary to Section 5(1) of that Act, in that he was refused access to a service which is generally available to the public in the respondent's premises.

2 Background

- 2.1** The complainant alleges that he was discriminated against by the respondent contrary to the Equal Status Act, 2000 when he was refused access to a night club in the respondent's premises on the 1 July, 2001. The complainant submitted that he was not allowed into the respondent's night club because he was wearing sandals. The complainant contends that he was discriminated against on the gender ground, in that two women with similar footwear to his were allowed into the night club without any difficulty. The respondent submitted that he operates a dress code policy and that the complainant was wearing sandals which was in breach of that code for male customers and consequently he was denied access to the premises.

3 Summary of the Complainant's Case

- 3.1** The complainant stated the following:
- At about 11:40 pm on the night of 1 July, 2001 he was out with a number of friends, four females and three males, and they decided to go to the respondent's night club. The complainant submitted that all the party were admitted to the night club except himself.

- The doorman stopped complainant and did not allow him to enter. The complainant queried the decision and was told by the doorman he could not admit him because he was wearing sandals.
- The complainant informed the doorman it was discrimination on the gender ground not to allow him into the night club as his fiancée, Ms. Amy Ní Mhurchú and another female in the group, who were wearing similar sandals to his sandals, were admitted without any difficulty.
- The doorman explained women were allowed to wear sandals to the night club but males were not allowed. He stated that it was management policy and if he didn't like it he should take it up with management.
- The complainant and Ms. Ní Mhurchú were both wearing a similar style of open-toed flat sandals.
- Ms. Ní Mhurchú gave evidence that she had no problem getting into the night club and submitted that the sandals she was wearing were almost identical to the complainant's sandals.
- The complainant submitted that women were not subjected to the same dress code as men and he believes this is discriminatory on the gender ground. He also submitted that the type of sandals he was wearing are common to both sexes, and he believes that the only reason he was not allowed in, is that the respondent operates a discriminatory dress code policy for male customers.
- In response to the respondent's case the complainant denied that he had any ulterior motive in going to the night club wearing sandals. The complainant said that he had been in the night club on several occasions and this was the first time he was refused entry, but it was also the first time he wore sandals to the club. He said that the reason he had sandals on was because it was a warm evening and he was out walking with Ms. Ní Mhurchú. He had not expected to be going to a night club. They met some friends and it was only then they all decided to go to the night club.
- The complainant submitted that the respondent, in drawing a distinction between the type of footwear a man and woman can wear to the night club, operates a discriminatory dress code policy. He said that the dress code policy in night clubs in seaside resorts such as Dunmore and Tramore are not so strict, as these venues are catering for tourists, and it would not be good business practice to operate such a strict policy as that operated by the respondent.

4 Summary of the Respondent's Case

4.1 The respondent denied that the complainant was discriminated against on the gender ground in relation to access to his premises. The respondent stated the following:

- Mr. Chris Kavanagh, partner in Merlin's Night Club said that he is also a partner in the Kazbar (**DEC-S2002-132**). He said at the time the complainant complained about both premises the business were only connected by some partners who were common to both business, but now he jointly owns both businesses.
- Mr. Kavanagh said that the complainant was not discriminated against by Merlin's Night Club, nor does the management operate a policy which specifically discriminates against males. The club operates the same dress code policy as that operated in the Kazbar and all the doormen are familiar with the policy.
- Mr. Kavanagh said that the footwear the complainant was wearing on the night in question did not meet the requirements of the dress code. Men are not allowed to wear sandals to the night club.
- Customers wearing gear such as track suits, football tops, trainers or black boots with steel attachments either on the toes or heels are not allowed into the night club. He said that the dress code policy is on display in the night club. The policy did not mention that men wearing sandals are also excluded.
- Mr. Kavanagh said that the reason he has this policy was because, in a previous pub he operated before opening Merlin's Night Club, he allowed males to wear sandals, and there were a number of altercations when men stepped on other mens toes. He believes that men did this deliberately to other men. Also he believes that men are more likely to get involved in physical retaliation than women. He said that he would also like to stop women wearing sandals, because he had a number of incidents where women suffered injuries from having their toes stood on, or where they were cut with a broken glass.
- Mr. Kavanagh said that sandals are a fashion item for women and he considers that he could not impose a ban on women wearing them. Mr. Kavanagh contends that sandals are not an acceptable item of fashion when worn by men.
- When he opened Merlin's Night Club he decided to implement a policy banning men from wearing sandals. He said that he has a dress code policy displayed inside the premises, but it makes no mention of mens' sandals as one of the items of prohibited dress. However since the complainant took the case Mr. Kavanagh has put

up a notice stating that open-toed sandals worn by males are not a permitted item of footwear.

- Mr. Kavanagh accepted that dress code policies may not be as strictly enforced in tourists areas such as Dunmore or Tramore.
- The respondent's representative submitted that most night clubs operate a dress code and the reason is to maintain high standards of behaviour within the premises. It is hoped that if the customers are required to "dress up" in order to enter the premises that they will appreciate that a certain level of propriety and behaviour will be required on the premises. The respondent believes that they are entitled to run the night club in a manner which they consider most conducive to an orderly and well run night club.
- The respondent's solicitor submitted that in order for the complainant's argument to be valid it would mean that a blanket dress code has to be operated by him, which does not distinguish between the types of attire worn by male and females. They submitted that this is an incorrect interpretation of the Equal Status Act, 2002, and that service providers are entitled to distinguish between the sexes where there is a legitimate reason for doing so. It is accepted that men and women wear different types of clothing and footwear and to operate a dress code fairly a service provider is required to distinguish between the sexes to cater for this difference.
- The respondent further stated that if a service provider is not allowed to operate a dress code, which distinguishes between what is acceptable for a male to wear, and what is acceptable for a female to wear, then a service provider would be obliged to allow males into a night club whilst wearing high heeled stiletto type shoes or a mini skirt.
- The only reason the complainant was refused entry to the premises is that he failed to comply with a legitimate dress code policy operated by the respondent. The management of Merlin's Night Club submits that open-toed footwear is acceptable footwear for females, but it is not acceptable footwear for males.
- The respondent's representative further submitted that the complainant is seeking to manipulate the provisions of the Equal Status Act, by turning a dress code issue, which is not covered by the legislation, into a gender issue which is covered by the legislation. They further submitted that the complainant's behaviour was mischievous and ulterior in intent, in that he knew if he wore sandals to the night club he would not be admitted. He persisted in wearing sandals because the object of

his exercise was to make a point. If he wished to avail of a service in Merlin's night club he would have dressed in a way which would have permitted his admittance.

5 Conclusions of the Equality Officer

5.1 The matter referred for investigation turns upon whether or not the complainant was discriminated against contrary to Section 3(1)(a) and 3(2)(a) of the Equal Status Act and in terms of Section 5 (1) of that Act. In reaching my decision I have taken into account all the submissions, both oral and written, made to me by the parties in the course of my investigation into the complaint.

Matters for consideration

- (i) Is the complainant covered by the Equal Status Act?
- (ii) Is the complaint a matter which can be investigated by an Equality Officer?
- (iii) In view of the fact that the complainant has taken a similar complaint against the Kazbar bar, which is also owned by the respondent, is his case genuine or is there an element of provocation as suggested by the respondent?
- (iv) Has the complainant established a prima facie case of discrimination?

5.2 The first issue I am going to address is whether the complaint is covered by the legislation? The respondent's case is that the complaint is not covered by the legislation, and that the complainant is seeking to circumvent the legislation by claiming, that a dress code operated by the respondent was discriminatory on the grounds of gender. The respondent contends that the legislature did not intend to have issues such as dress code covered by the legislation. In considering this point I have examined the Equal Status Act, 2000, and I note in the long title to the Act which states inter alia "*An Act to promote equality and prohibit types of discriminationin the connection with the provision of services, property and other opportunities to which the public generally ... has access,*" The Act states that a "service" means "*a service or facility of any nature which is available to the public generally or a section of the public, and,includes*
(a) access to and the use of any place,"
Section 3(1)(a) provides, inter alia, that discrimination shall be taken to occur where: "*On any of the grounds specified... (in this case the gender ground).... A person is treated less favourably than another person is, has been or would be treated.* Section

3(2)(i) provides that: *as between any two persons, the discriminatory grounds ... are*

...

that one is male and the other is female (the “gender ground”),

Section 5(1) provides inter alia 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.”

5.3 Firstly I am satisfied that the night club is a service which comes within the definition of

“service” as defined by the Act. In this case the complainant is alleging he was discriminated against on the gender ground, in that he was denied access to the night club, because he was wearing sandals while a woman wearing similar sandals to his was admitted. The Act states that a person shall not discriminate in providing a service, and discrimination occurs, where a person is treated less favourably than another person not covered by the discriminatory ground. Accordingly, I am satisfied that any person refused a service who is covered by the discriminatory grounds, in this case the gender ground, is entitled to refer a complaint for investigation to the Director of Equality Investigations, if they believe that their rights have been infringed by a service provider under the Act. I am satisfied that the complainant is covered by the legislation, and that his complaint about discriminatory treatment, in relation to the provision of a service which is generally available to the public, comes within the scope of Section 5 (1) of the Act for investigation and decision by an Equality Officer. Consequently I find therefore that both the complainant and the matter complained about is covered by the Equal Status Act, 2000.

5.4 The next issue is whether the complaint is a bona fide complaint or is there an element of

provocation by the complainant? The complainant in his submission stated that the **Kazbar (DEC-S2002-132)** and Merlin’s are owned by the one company that the same discriminatory door policy is operated by management in both establishments. The complainant denied that he had any ulterior motive in wearing sandals on the

night. He stated that he was wearing sandals because it was a warm day and had not expected to be going to the night club. He was in a pub with Ms Ní Mhurchú and met some friends who invited them to go to the night club. He said that he was in the club on a number of occasions and did not think he would have any difficulty in gaining admittance.

5.5 The respondent submitted that the complainant was seeking to provoke the respondent into refusing him entry by calling to Merlin's wearing sandals. They submitted that the complainant would have known, once he was refused entry to the Kazbar on 5 May, 2001, because his footwear was in breach of the dress code, that wearing sandals to Merlin's would have also caused him a difficulty in gaining entry. The respondent further argued that there was an element of "felon setting", and that the complaint was not a bona-fide complaint, but it was part of a campaign by the complainant against the operation of a dress code policy by the Kazbar and Merlin's Night Club.

5.6 In considering the respondent's point I note the complainant was wearing different footwear on both occasions when the refusal of entry to the Kazbar took place on 5 May and to Merlin's on 1 July. I note that in relation to the Kazbar, the respondent stated that the dress code policy was not displayed until the complainant took his case, and in relation to Merlin's a notice, stating that males wearing open-toed sandals are not allowed into the club, was only displayed after the complainant took this case. The complainant's evidence in relation to the Kazbar was that he had been in the pub on a number of occasions wearing the same footwear. Likewise I note that sandals were not mentioned as one of the items prohibited under the dress code for Merlin's at the time the complainant was refused entry. I also note the complainant was in two pubs and had no difficulty in gaining entry before he went to Merlin's and his evidence that he did not intend to go to the night club until he was persuaded otherwise by his friends.

5.7 I am satisfied from the evidence that the complainant could not have known on either occasions that his footwear was in breach of the dress code policy, because on the first occasion, the policy was not displayed, and on the second occasion sandals were not mentioned as a prohibited item of footwear for men. Secondly the complainant

was in two other pubs on the night of 1 July 2001 before he went to Merlin's, and his evidence was that his footwear presented no problem in gaining entry. I am therefore satisfied the complainant would have no reason to believe that his footwear would have presented him with a problem at the Merlin Night Club. I can find no evidence to support the respondent's contention that the complainant deliberately set out on 1 July, 2001 to provoke a refusal of service so that he could claim discrimination under the Act.

Prima Facie Case

- 5.8** A person making an allegation of discrimination under the Equal Status Act, 2000 must first demonstrate that a *prima facie* case of discrimination exists. Prima facie evidence has been described by an Equality Officer as:

*“Evidence which in the absence of any convincing contradicting evidence by the employer would lead any reasonable person to conclude that discrimination had probably occurred.”*¹

The practice of shifting the burden of proof in discrimination cases was applied in very

clear terms by the Supreme Court in *Nathan v Bailey Gibson*² and referred to by the High Court in *Conlon v University of Limerick*.³ In *Nathan v Bailey Gibson* the Supreme Court stated:

“In such a case the worker is not required, in the first instance, to prove a causal connection between the practice complained of and the sex of the complainant. It is sufficient for him or her to show that the practice complained of bears significantly more heavily on members of the complainant's sex than on members of the other sex. At that stage the complainant has established a prima facie case of discrimination and the onus of proof shifts to the employer to show that the practice complained of is based on objectively verifiable factors which have no relation to the complainant's sex.”

¹Dublin Corporation v. Gibney EE5/1986

²*Nathan v. Bailey Gibson* [1998] 2 I.R. 162

³*Conlon v. University of Limerick* [1999] 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.

5.9 I have identified the three key elements which need to be established to show that a *prima facie* case exists as follows:

- is the complainant covered by the ground?

-in what circumstances was the complainant refused service by the respondent on the 1st July 2001.

-evidence that the treatment received by the complainant was less favourable than the treatment a female would have received in similar circumstances.

If and when those elements are established, the burden of proof shifts to the respondent, and failing satisfactory rebuttal, the difference in treatment is assumed to be discriminatory by the respondent on the relevant ground. In such cases it is not necessary for the complainant to prove that there is a link between the difference in treatment and the membership of the ground, instead the respondent has to prove that there is not.

I am now going to examine the issues I have identified above and consider whether the complainants have established a *prima facie* case.

5.10 The first two elements have already been established at paragraph nos. **5.2 - 5.3** above.

The next issue for consideration is whether the complainant was treated less favourably by the respondent than another person (i.e. a female) would have been treated in similar circumstances.

5.11 The respondent's case is that the complainant was not discriminated against on the gender

ground, in that the complainant was wearing sandals which was in breach of the dress code operated by the respondent. The respondent further submitted that he is entitled to operate a dress code policy which applies different criteria to both men and women. The complainant submitted that the dress code should be applied equally to both male and female customers and that as a consequence of the respondent's policy he was treated less favourably by the respondent on the grounds of gender.

5.12 I note that the complainant and Ms Ní Mhurchú were wearing similar sandals, and she

had no difficulty in getting into the respondent's premises. The complainant on the other hand was not allowed in because he was wearing sandals, and the policy is not to allow males wearing sandals into the night club. I am therefore satisfied that the complainant has indeed established that he was treated less favourably than a female customer was treated in similar circumstances.

5.13 The respondent's case is that he does not allow males to wear sandals to the night club as

there is a danger that their toes would be stood on. He believes that men would deliberately stand on other mens toes, and in his experience men are more likely to become involved in physical violence than women, if their toes were stood on.

5.14 The respondent certainly has a duty under the Licensing Acts to conduct an orderly house,

and is entitled to invoke the specific defence under Section 15 (1) of the Equal Status Act, 2000 to ensure compliance with the law. I am now going to examine the evidence in the context of this section of the Act.

Section 15(1) provides that:

“nothing in this Act prohibiting discrimination shall be construed as requiring a person to provide services in circumstances which would lead a reasonable individual having the responsibility, knowledge and experience of the person to the belief, on grounds other than the discriminatory grounds, that the provision of the 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.”

5.15 To invoke this Section the respondent must show that there was a substantial risk of criminal or disorderly conduct or behaviour if the complainant were to be admitted to the night club wearing sandals. I note that the complainant had been in the night club on several occasions, although not wearing sandals, and the respondent has provided no evidence that he misbehaved in any way. Given the complainants previous good

behaviour in the night club, I believe there was no reason to believe he would behave any differently on this occasion. There is no evidence that there would have been a risk of disorderly conduct on this occasion if the complainant was admitted wearing sandals.

- 5.16** The respondents contention that male customers wearing open-toed sandals are more likely to react violently if their toes are stood on, without corroborative evidence, is in my view, a very general statement subject to dispute and contrary opinion. The respondent evidence is that women wearing sandals are similarly likely to have their toes stood on, and suffer consequential toe injuries. But the respondent holds that such women were unlikely to react in the same way as a man. It is logical in my view that in a crowded night club both men and women are equally at risk of having their toes stood on. However, I am not satisfied that the wearing of sandals by males would be a primary cause of disorderly conduct in the respondent's night club. There are many reasons why acts of physical violence occur in places of entertainment, but I do not believe the occurrence of physical violence can be primarily attached to the individual dress code of a customer, in this instance open toe sandals.

I can therefore find no evidence to support a contention that there was *substantial risk of criminal or disorderly conduct or behaviour* if the complainant was admitted to the night club wearing sandals, or that an entitlement to refuse service under Section 15(1) of the Equal Status Act has been established.

- 5.17** I note that the respondent's dress code, which he stated was displayed in the foyer of the nightclub, did not state that men were precluded from wearing sandals on 1 July, 2001, the night the complainant sought to enter the night club. I believe that if the respondent had a genuine fear of physical violence resulting from the wearing of sandals by male customers he would have specifically included this in the night club's dress code policy.

- 5.18** The respondent in evidence stated that sandals are not an acceptable item of footwear for

men, it is not illegal to impose a dress code policy which differentiates between the dress of men and women and that the dress code of males and females are intrinsically different. However, it seems to me that the main reason males are not allowed to wear sandals in the night club is based upon the respondent's opinion that sandals are not an acceptable form of footwear for males.

5.19 Although sandals may not have been traditionally accepted as formal wear for males, I am

satisfied that they are now a common item of footwear for both males and females in today's Irish society. The respondent's reasoning for imposing a requirement, for patrons to dress up in order to enter the premises, so that they appreciate that a certain level of propriety and behavior is required, is acceptable, provided that it does not amount to discriminatory treatment and is applied equally to male and female customers. However in the present case this obligation concerning the dress code was not equally applied. I am of the view that no reliance can be placed upon fashion stereotyping, as fashion is constantly changing for both males and females. Items of fashion which in the past would have been considered the sole prerogative of one gender may now be worn by both. In considering this case, I have looked at a decision of the Labour Court⁴ in an employment equality case under the Employment Equality Act, 1977. This case concerned a company policy which restricted the length a male employee could wear his hair while no similar restriction applied to female employees. In rejecting the Company's argument that they were entitled to set different standards and in holding that the policy discriminated against males the Court stated:

"While the requirements for such standards should be the same for male and female employees they may differ in some respects between men and women for business reasons allied to public perception. These differences do not necessarily retain their justification over time. Fashions of dress and appearance and their public acceptability are constantly changing; for example, the wearing of trousers by women would not have been acceptable in past timesthe court considers that the styles and length of mens hair is another changing fashion and

⁴Pantry Franchise Ireland Limited and a Worker Order No EEO793

that, in these circumstances the company insistence on different hair lengths for its male and female employees has little commercial justification...”

5.20 This reasoning was also followed by an Equality Officer in another employment case⁵ concerning a company policy which prohibited male employees wearing earrings and no such prohibition applied to female employees. In that case the Equality Officer held that the policy discriminated against male employees.

While the cases cited above related to the employment area, I consider that the same rationale can be applied to the case in hand. For the foregoing reasons I am therefore satisfied that the dress code policy operated by the respondent which precludes males wearing sandals in the night club is discriminatory. I find that the complainant has established a prima facie case of discrimination which the respondent has failed to rebutt

5.21 I note that the respondent argued that if a service provider was not allowed to operate a

dress code which distinguishes between what is acceptable fashion for a male and female, a service provider would be obliged to allow males into the night club wearing high heeled stiletto shoes or a mini skirt. I am of the view if such a scenario were to arise any resulting case would have to be decided upon its own merits and in the context of the discriminatory grounds under the Equal Status Act, 2000.

6. Decision

6.1 I find for the foregoing reasons that the complainant was unlawfully discriminated against, when he was refused entry to the respondent's night club, contrary to the provisions of Section 3(1), and 3(2)(a) of the Equal Status Act, 2000 and in terms of section 5(1) of that Act.

6.2 Under section 27(1) of the Equal Status Act, 2000 redress may be ordered where a finding is in favour of the complainant. Section 27(1) provides that:

⁵3 Male Employees and Power Supermarkets Limited EE 09/1994

“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.”

6.3 I consider that an award of compensation would be appropriate in respect of the discriminatory treatment. Under Section 27 above the maximum amount of compensation I can award is €6,349 . Taking into account the inconvenience the complainant suffered on the night because he didn't get into the night club, I order the respondent Merlin's Night Club to pay to the complainant, Mr. Finnian Gallagher the sum of €1,000 to compensate him for the distress, embarrassment and loss of amenity to him on the night.

6.4 Under Section 27(1)(b) of the Act I also order the respondent to revise his written dress code policy to ensure it applies equally to both male and female customer and to immediately remove the signs which prohibit male customers wearing sandals in the night club.

Marian Duffy

Equality Officer

6 December, 2002