

# **ODEI-equality tribunal**

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### **Equal Status Act 2000**

### **Equality Officer Decision DEC-S2002-102**

**Mr. Myles Delaney**

**V**

**Jamesons Hotel**

**(represented by Mr Michael Molloy, Blake and Kenny Solicitors)**

File Ref: ES/2001/569

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**Summary of Decision DEC-S2002-102**

**Mr. Myles Delaney**

**Jamesons Hotel**  
(represented by Mr Michael Molloy, Blake and Kenny Solicitors)

**Key words**

Equal Status Act, 2000 - Direct discrimination, section 3(1) - Membership of the Traveller community, section 3(2)(i) - Supply of goods and services, Section 5(1) - service in a pub - Mistaken identity - Action taken in good faith, section 15(2)- prima facie case, burden of proof.

**1. Dispute**

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

Jamesons Hotel on the Traveller community ground in terms of Sections 3(1)(a), and 3(2) (i) of the Equal Status Act, 2000 and contrary to Section 5(1) of that Act when he was refused service and asked to leave 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 service in the respondent's bar on 13 May, 2001 and asked to leave the pub. The complainant contends this occurred because he is a member of the Traveller community. The respondent submitted that the complainant was not discriminated against on the grounds that he is a Traveller, but was refused service because the bar manager genuinely believed that the complainant had been involved in a violent incident in the bar on Christmas Eve 2000.

**3. Conclusions of the Equality Officer**

**3.1** The Equality Officer found that the complainant established a prima facie case of discrimination which the respondent failed to rebut. She found that there was an inconsistency in the respondent's evidence, and that the respondent failed to exercise due care and consideration before identifying the complainant as the person involved in the violent incident. For these reasons she held that the respondent had not acted in

“good faith” and that his actions were motivated by a discriminatory reason connected to the complainant’s membership of the Traveller community.

#### **4 Decision**

- 4.1** The Equality Officer found that the complainant was discriminated against in terms of Sections 3(1)(a) and 3(2)(i) of the Equal Status Act and contrary to Section 5 of that Act. She awarded him €750 to compensate him for the distress and embarrassment suffered, as well as the loss of the amenity to him on the night.

**Decision DEC-S2002-102**

**Mr. Myles Delaney**

**V**

**Jamesons Hotel**

**(represented by Mr Michael Molloy, Blake and Kenny Solicitors)**

**Delegation under Equal Status Act, 2000**

The complainant referred a claim to the Director of Equality Investigations on 25 April, 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 me, Marian Duffy, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act, 2000.

## **1. Dispute**

- 1.1** The dispute concerns a claim by Mr. Myles Delaney that he was discriminated against by Jamesons Hotel on the grounds that he is a member of the Traveller Community. The complainant alleges that the respondent discriminated against him in terms of Sections 3(1)(a), and 3(2)(i) of the Equal Status Act, 2000, contrary to Section 5(1) of that Act.

## **2 Background**

- 2.1** The complainant's case is that he entered the respondent's hotel bar at about 6:30pm on 13 May 2001 with his wife and two friends. The complainant went to the bar to order drink but was refused service by the barman and was given no reason. He believes that the refusal of service was due to the fact that he is a member of the Traveller community. The respondent submitted that the complainant was not discriminated against on the grounds that he is a Traveller, but was refused service because the manager of the bar genuinely believed that the complainant had been involved in a violent incident in the bar on Christmas Eve 2000.

## **3 Summary of the Complainant's Case**

- 3.1** The complainant stated the following:
- that he is a member of the Traveller community living in a halting site in Salthill in Galway for 6 years. On 13 May, 2001 he visited the hotel with his wife and two friends, Mr. Tom Barrett and Mrs. Caroline Barrett. They were celebrating the confirmation of Mr. and Mrs. Barrett's daughter. It was the complainant's first time in the hotel bar.

- The complainant went to the counter to order the drink and his wife and two colleagues sat down at a table. The barman proceeded to fill the drinks but as he was doing so he was continuously watching the table where the complainant's wife and friends were sitting. The barman stopped filling the drinks and went to the back of the bar out of the complainant's sight. The complainant could hear the barman having a discussion with another person.
- The barman returned and told the complainant that he was not serving him or his three friends. He asked for a reason but the barman refused to give him one. The complainant returned to his friends and told them what had happened.
- The complainant said that there was a large crowd of customers in the respondent's premises, some of whom also had children who had made their confirmation. They were the only members of the Traveller community in the hotel bar. He said it was a humiliating experience and he was deeply upset and embarrassed by the incident as he felt the other customers knew they were asked to leave.
- The complainant went to the hotel next day to seek an explanation for what had happened. The receptionist made an appointment for him to meet the manager at 6pm but the manager was unavailable to meet him. The complainant said that the manager failed to keep two further appointments made by the receptionist to meet him. The complainant also left his telephone number and asked that the manager telephone him, but the manager did not do so.
- The complainant submitted that he was refused service because he is a Traveller. He disputes the respondent's contention that he was genuinely mistaken for a person who had been previously involved in a violent incident in the pub.
- Mr. Tom Barrett, who is a Traveller and who was with the complainant in the hotel, submitted that in general that there is persistent discrimination against Travellers in getting service in pubs. He stated he does not drink alcohol and he still has difficulty in getting served. He believes that the person involved in the Christmas Eve incident in the respondent's premises was over six foot tall, much taller than Mr. Delaney, and that there could be no question that Mr. Delaney could be mistaken for him.

#### **4 Summary of the Respondent's Case**

- 4.1** The respondent's case is that the complainant was mistaken for a person who was involved in a disturbance in the hotel bar on Christmas Eve 2000.

- Mr. Jonathan Powell Manager stated that he was in an office in the hotel bar on 13 May 2000 and he looked out and saw the complainant at the bar counter. He thought he was the same person who had caused trouble in the hotel bar on Christmas Eve 2000. He called the barman and instructed him not to serve the complainant. He did not see the other people in the complainant's company.
- Mr. Powell said that he did not have much contact with the two people on Christmas Eve as he spent about 20 minutes on the telephone to the Gardaí.
- Mr. Powell said that he was about 45 feet away from the complainant on 13 May but he believed he was one of the people involved in the violent incident. He said that he had a clear view of the complainant and he believed that he was the same height and build.
- Mr. Powell said that following the notification of the complaint by the complainant he learned from the Gardaí that the complainant was not the person involved in the incident.
- Ms Elaine Boyle, Managing Director, said that she was on duty with Mr. Powell on Christmas Eve 2000 when two Travellers came into the bar looking for service. They were drunk and were refused drink. As a result they started shouting and refused to leave. One of them had a broken bottle behind his back.
- Mr. Powell called the Gardaí. Ms. Boyle said that the two people were very violent and the Gardaí had to use batons to remove them from the premises. The Gardaí informed the respondent at a later date that they were Delaneys from Salthill.
- Ms. Boyle said that she had been present throughout the fracas and would not have mistaken the complainant for any of the people involved. She was not on duty when the complainant was refused service on 13 May.
- The respondent's representative submitted that Mr. Powell was convinced that the complainant was the person involved in the incident and he feared there would be a similar incident. The people involved in the fracas would not be allowed back into the pub again and, as Mr. Powell believed at the time that the complainant was one of the people involved, he was refused service for this reason and was asked to leave.

## **5 Conclusions of the Equality Officer**

### **5.1 The matter referred for investigation turns upon whether or not the complainant was**

directly discriminated against contrary to Section 3(1)(a) and 3(2)(i) of the Equal Status Act and in terms of Section 5 (1) of that Act. In reaching my decision I have taken into account all the submissions, both oral and written, made to me by the parties in the course of my investigation into the complaint.

Section 3(1)(a) provides, inter alia, that discrimination shall be taken to occur where:

*“On any of the grounds specified... (in this case the Traveller community ground)....*

*A person is treated less favourably than another person is, has been or would be*

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

*that one is a member of the Traveller community and the other is not”.*

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.”*

- 5.2** A person making an allegation of discrimination under the Equal Status Act, 2000 must first demonstrate that a *prima facie* case of discrimination exists.

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 discriminatory ground? ( in this case is he a member of the Traveller community?)**
- in what circumstances was the complainant refused service by the respondent on 13 May, 2000.**
- evidence that the treatment received by the complainant was less favourable than the treatment someone, not covered by that discriminatory ground, would have received in similar circumstances.**

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



instead the respondent has to prove that there is not. If the complainant succeed in establishing prima facie evidence, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

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 caselaw required them to do so (as far back as 1983 (*Bailieborough Community School v Carroll*, DEE 4/1983 Labour Court) and in 1986 (Equality Officer: *Gibney v Dublin Corporation EE5/1986*), and that this was a consistent practice across a spectrum of cases<sup>1</sup>. The European Court of Justice caselaw did not address the issue of the shift in the burden of proof for the first time until the *Danfoss*<sup>2</sup> and *Enderby*<sup>3</sup> cases so this was not a practice operated purely to implement 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*<sup>4</sup> and referred to by the High Court in *Conlon v University of Limerick*.<sup>5</sup> 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*

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<sup>1</sup> Curtin, Deirdre, *Irish Employment Equality Law*, 1989, P. 222 et seq.

<sup>2</sup> *Danfoss* Case no. C-109/88

<sup>3</sup> *Enderby v Frenchay Health Authority and Secretary of State for Health* C-127/92

<sup>4</sup> *Nathan v. Bailey Gibson* [1998] 2 I.R. 162

<sup>5</sup> *Conlon v. University of Limerick* [1999] ILRM 131

*based on objectively verifiable factors which have no relation to the complainant's sex. ”*

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.

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."*

The Northern Ireland Court of Appeal, in an employment discrimination case, stated that:

*“Once the evidential burden has shifted ....., the question then is whether there is any evidence to justify the conclusion that the evidential burden has been discharged by the respondent.”*<sup>6</sup>

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. "*

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<sup>6</sup> *Wallace v. South Eastern Education and Library Board (NI Court of Appeal) 1980 IRLR 193*

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

### **5.3 Issue of Traveller Identity**

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

*“means the community of people who are commonly called Travellers and who are identified (both by themselves and others ) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland”.*

I am satisfied that the complainant is a Traveller as defined by the Act. I am also satisfied on the facts that the complainant’s Traveller identity was known to the respondent.

### **5.4** It was accepted by both the complainant and the respondent that service was refused but

the reason for the refusal is in dispute. The complainant’s case is that he was refused service for no good reason and he believes this occurred because he is a member of the Traveller community. He submitted that this was his first time in the respondent’s premises and he could not understand why he would not be served. He submitted that the behaviour of the barmen indicated to him that service was being refused because he and his friends are Travellers. He does not believe that Mr Power confused him with one of the people involved in the fracas. The complainant said that he did not know the person involved in the fracas, but has since learned that he may be a distant relation of his. His friend Mr. Tom Barrett stated that he believed that the person involved in the fracas was over 6 foot tall and much taller than the complainant. The respondent’s case is that the complainant was mistaken for a person who had been involved in a violent incident in the bar on Christmas Eve 2000 and that for this reason he was entitled to refuse service.

### **Circumstances of the Refusal of Service**

### **5.5** The respondent’s representative submitted that it was a genuine mistake by Mr. Powell.

Because of the severity of the fracas on Christmas Eve Mr. Powell feared a similar incident would occur if the complainant was served and decided and as soon as he

saw him to instruct the barman to refuse service. He also submitted that as soon as the respondent established from the Gardaí that a mistake had been made a letter of apology issued to the complainant and he was invited back into the hotel bar.

### **Action Taken in Good Faith**

- 5.6** I am now going to examine the evidence to see if Mr. Powell was genuinely mistaken about the complainant's identity and if the action taken by him on 13 May, 2001 was taken in *good faith*. The licensing laws requires publicans to keep an orderly house and Section 15 (2) of the Equal Status Act, 2000 provides 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 provisions of the Licensing Acts, 1833 to 1999, shall not constitute discrimination."*

In considering the meaning of "good faith" I have examined a number of definitions.

**Murdoch's Dictionary of Irish Law, Revised 3rd Edition** states : *"In relation to contract for the sale of goods, 'good faith' means done honestly, whether negligent or not"*. **In Words and Phrases legally defined Third Edition Volume 2** *"good faith"* is defined as *"a claim is made "in good faith" when it is made honestly and with no ulterior motive"*. In the **New Shorter Oxford English Dictionary** *"good faith"* is defined as *"honesty of intention, sincerity"*.

I am now going to examine the evidence to see if the decision of Mr. Power was *"honestly"* made or made *"with no ulterior motive"*.

- 5.7** There was a conflict of evidence in relation to what happened on the night. The complainants evidence was that he did not see Mr. Powell and submitted that the barman identified himself, his wife and two friends as Travellers. The complainant contended that the barman consulted another person out of sight and on his return refused service. Mr. Powell's evidence was that when he saw the complainant, he identified him as the person involved in the fracas, and he called the barman to his office to instruct him to refuse service. It would have been helpful to my investigation if the barman had called by the respondent to give evidence in relation to this point.

In examining the evidence I note that the evidence of Mr. Powell in relation to the identification of the complainant was inconsistent. In response to questions at the hearing he stated that he recognised the two people involved in the fracas as Travellers but he also stated he did not recognise the complainant as a Traveller. I find that this is clearly inconsistent with recognising the complainant as one of the people involved in the fracas.

- 5.9** On Mr. Powell's own evidence he said that he had little contact with the two people involved in the incident as he was about 20 minutes on the telephone to the Gardaí, but five months later on the 13 May he was able to identify the complainant from a distance of about 45 feet. I believe that a more satisfactory identification could have been made, if Mr. Powell had moved more closely to the complainant, to ascertain whether the identity of the complainant matched that of the person involved in the fracas, before deciding to refuse him service. It would not be enough in my opinion to look at him from a distance of about 45 feet to make a positive identification, particularly given that there was no question of disorderly behaviour on the complainant's behalf on the night of 13th May, and on Mr. Powell's own evidence he had little contact with the people involved in the fracas. Ms Boyle's evidence was that she would not have mistaken the complainant for the person involved in the violent incident. It was agreed by the parties at the hearing that I could seek information from the Gardaí concerning the Christmas Eve incident. The Gardaí confirmed to me that the name of the person involved in the fracas matched that of the complainant. The complainant also visited Salthill Garda Station and spoke to Garda Sands who attended to the Christmas Eve incident. In response to my written enquiry Garda Sands stated that the complainant "*was definitely not the person he had dealt with on that night*". However despite the evidence of Ms. Boyle and Garda Sands I would have accepted that Mr. Powell could have been genuinely mistaken about the complainant's identity if it were not for the fact that Mr. Powell's own evidence was inconsistent, and the offhand manner in which he identified the complainant as the person involved in the fracas. I note that Mr. Powell could not have known the complainant's name on the night of 13 May. In the circumstances, I am satisfied that having the same name as the person involved in the fracas was purely coincidental and could not have influenced Mr. Powell's decision making.

**5.10** I note that the complainant was not given a reason why service was refused on the night

nor was he given an opportunity subsequently, when he made three appointments to meet management, to establish that he was not the person involved in the fracas. It was 4 months after the refusal of service before the complainant was given the reason. The complainant infers from the treatment he received that the reason service was refused was connected to the fact the he is a member of the Traveller community.

**5.11** I find that Mr. Powell did not convince me that he made an honest mistake and that his

decision was taken with “*no ulterior motive*”. As I have found above Mr. Powell gave conflicting evidence in relation to the complainant’s Traveller identity, and he failed to exercise due care and consideration during the identification process, I am satisfied therefore that the decision of Mr. Powell to refuse service to the complainant was not taken in *good faith*. It seems to me that as soon as Mr. Powell saw the complainant he recognised him as a Traveller and immediately associated him, because of his Traveller identity, with the behaviour of other Travellers on Christmas Eve. In order to take an action in “*good faith*” the action must be free from any discriminatory motivation. For the above reasons I am not convinced that Mr. Powell’s action in refusing the complainant was free from a discriminatory motivation. Accordingly I find that the complainant was treated less favourably than a non-Traveller customer would have been treated in similar circumstances.

I accept that the behaviour of the two Travellers on Christmas Eve was a frightening experience for the respondent, but this negative experience with particular Travellers cannot be used as an excuse to discriminate against other Travellers who behave in an orderly manner when seeking service in the bar.

**5.12** The respondent’s representative submitted that the respondent does not discriminate against Travellers, and Travellers are frequently served. Furthermore the hotel has employed Travellers, and the complainant’s own niece did work experience in the hotel. While I accept that the respondent does not generally operate a discriminatory

policy against Travellers, I am of the opinion on this occasion that the only reason the complainant was refused service was because he is a Traveller and this decision was influenced by the violent disturbance caused by Travellers on Christmas Eve.

**5.13** I find therefore, on the balance of probabilities, that the only reason the complainant was

refused service was because he is a Traveller. I find that the respondent has failed to rebut the prima facie case of discrimination raised by the complainant and that the respondent did unlawfully discriminate against him on 13 May, 2001, when the complainant was refused service and asked to leave the premises.

## **6. Decision**

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

*“the types of redress for which a decision of the Director under section 25 may provide are either or both of the following as may be appropriate in the circumstances:*

*(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.”*

Under the above Section the maximum amount of compensation I can award is €6,349. Taking into account the respondent's subsequently apology and the fact that the respondent did write to the complainant inviting him back to the hotel, I have accordingly reduced the amount of compensation that I would have otherwise considered appropriate to the circumstances. I therefore order Jamesons Hotel, to pay to the complainant, Mr. Myles Delaney, the sum of €750 to compensate him for the distress and embarrassment suffered, as well as the loss of the amenity to him on the night.

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Marian Duffy  
Equality Officer  
13 September, 2002