

ODEI-equality tribunal

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Equal Status Act 2000

Equality Officer Decision DEC-S2002-132

Mr. Finnian Gallagher

V

The Kazbar

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

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Summary of Decision DEC-S2002-132

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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, footwear

Dispute

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

The Kazbar, 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 5th May, 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 trainers, which was 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 produced insufficient evidence to establish a prima facie case of discrimination. She found that the complainant did not establish that he was treated less favourably on the gender ground than a female would have been treated in similar circumstances, in that if a female had been wearing similar footwear that she would not have gained access to the pub either.

Decision

The Equality Officer found that the Kazbar did not unlawfully discriminate against Mr Finnian Gallagher on 5 May, 2001 in terms of Sections 3(1)(a), and 3(2)(a) and contrary to Section 5(1) of the Equal Status Act.

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Delegation under Equal Status Act, 2000

The complainant referred a claim to the Director of Equality Investigations on 30 July, 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

- 11.1** The dispute concerns a claim by the above named that he was discriminated against by The Kazbar 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 service in the respondent's bar on the 5th May, 2001. The complainant submitted that he was not allowed into the respondent's premises because of his footwear. The complainant contends that he was discriminated against 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 trainers which were in breach of the dress code and consequently he was denied access to the premises.

3 Summary of the Complainant's Case

- 3.1** The complainant stated the following:
- that he had a meal with his family to celebrate his engagement and afterwards his fiancée and five other members of his family went to the Kazbar to have a drink. The complainant submitted that all the party were admitted to the pub except himself.

- The doorman stopped complainant and did not allow him to enter. The doorman told him he would not admit him because he was wearing white soled trainer footwear and that this was in breach of the dress code.
- The complainant denied that he wearing trainers and he showed the shoes he was wearing at the hearing. He described the shoes as soft casual shoes and under no circumstances would he wear them for sports activities. He said that his fiancée, Ms. Amy Ní Mhurchú, and his sister were wearing similar shoes to the shoes he was wearing and they were admitted without any difficulty. The shoes Ms. Ní Mhurchú was wearing were also shown at the hearing.
- The complainant submitted that he was in the Kazbar on a previous occasion late in the evening with the same shoes.

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. Mr. Chris Kavanagh one of the owners of the pub stated the following:

- A dress code is in operation in the pub from about 6p.m. onwards and people wearing leisure gear of any kind are not allowed in. 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 pub. An exception is made to the rule if the pub is showing a match. The code is applied equally to both male and female customers.
- At the time the dress code was not displayed on the premises, but all the doormen were made aware of its contents. Since the complainant made his complaint the code is clearly displayed at the entrance to the pub.
- Mr. Kavanagh submitted that he would classify the complainants footwear as trainers and that the doorman was correct in denying him entry. He would not deem Ms. Ní Mhurchú shoes as trainers and therefore there was no reason to stop her getting into the pub.
- Mr. Kavanagh said that customers wearing all types of casual shoes regardless of colour are allowed in and the only footwear banned are trainers or runners.
- The respondent's representative submitted that management is entitled to operate a dress code and to impose rules and standards which he considers conducive to a well run pub. The complainant was not refused entry on the gender ground but because

his footwear was in breach of the dress code. The representative also submitted that the complaint was a trivial matter and not a bona fide grievance which deserved the protection of the Equal Status Act, 2000, and that the complainant was using the legislation for ulterior purposes.

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)(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 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.”

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

- 5.3** I have identified the three key elements which need to be established to show that a

¹Dublin Corporation v. Gibney EE5/1986

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 5 May, 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, 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 the 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.

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

5.4 The respondents case is that the complainant was not discriminated against on the gender

ground, he is misusing the legislation for ulterior purposes by seeking to make a complaint about dress code come within the scope of the legislation. The respondent also contended that the complainant is complaining about a trivial matter which is not covered by the legislation which I dealt with at paragraph **5.8** below. I am satisfied from the evidence that the complainant is complaining about less favourable treatment on the gender ground. Gender is one of the nine discriminatory grounds included in the Equal Status Act, 2000. In order to take a case, a complainant has to be in a position to claim less favourable treatment in accordance with Section 3(2)1 of the Act. The complainant is male and he is comparing his treatment to the treatment a female received on the night in question. He is alleging that he was denied access to a pub because of his footwear and a female wearing similar type footwear was allowed to enter. I am therefore satisfied that the complainant is covered by the legislation, that his complaint about discriminatory treatment in relation to the provision of a service which is generally available to the public and that it comes within the scope of Section 5 (1) of the Act.

- 5.5** The complainant has also established that he was refused entry to the premises and therefore the second key element mentioned above has been satisfied. I am now going to examine the third key element of the test to establish if the complainant was treated less favourably by the respondent than a female would have been treated in similar circumstances.
- 5.6** The complainant submitted that, if the respondent had a dress code, it was not applied equally to male and female customers and that he was treated less favourably by the respondent on the grounds of gender. He submitted that his fiancée Ms Ní Mhurchú and his sister had no difficulty in getting into the respondent's premises despite the fact that they were both wearing similar footwear to his. The respondent case is that he operates a dress code and that the complainant's footwear was in breach of that code. In deciding this case, I had the benefit of viewing the footwear the complainant and Ms. Ní Mhurchú were wearing on the night. The complainant's shoes were flat with dark navy suede like uppers, synthetic or rubber soles and a white band extending from the soles on to the upper. His girlfriend's shoes were dark suede like and could be described as closed sandals with dark synthetic soles. The complainant submitted that his sister who was in his company was wearing identical shoes to his, except that they did not have the white band extending from the sole to the upper, was admitted to the pub without any difficulty.
- 5.7** I am satisfied that the respondent is entitled to operate a dress code provided it is applied equally to both male and female customers and I have examined the evidence to see if this was the case. I find from the evidence that the shoes the complainant and Ms. Ní Mhurchú were wearing were not similar in style. I am also satisfied from the complainant's evidence that his sister, who was successful in gaining entry to the pub, was wearing shoes which had a different features to his shoes. I am of the opinion that the complainant's shoes were not in breach of the dress code operated by the respondent, but I believe that the complainant's shoes could have been mistakenly identified by the doorman as either runners or trainers, because of the white band which extended from the sole to the upper. I am also satisfied that if a female customer came to the door of the pub with similar shoes to the shoes the complainant

was wearing, she would have been refused entry. I find therefore that the complainant has not established that he was treated less favourably than a female customer would have been treated in similar circumstances. For the foregoing reasons, I find that the complainant has failed to establish a *prima facie* case of discrimination.

5.8 I am now going to deal with the contention by the respondent that the complaint about

the operation of a dress code is trivial and not a bona fide grievance which should be protected by the legislation. Section 22 of the Equal Status Act, 2000 provides that:

“The Director may dismiss a claim at any stage in the investigation if he or she is of the opinion that the claim has been made in bad faith or is frivolous or vexatious or relates to a trivial matter.”

In this case the Director did not dismiss the case in accordance with Section 22 and referred the complaint to me for investigation. For the reasons stated above I am satisfied that the complaint in relation to the application of dress code comes within the scope of the legislation as the complainant was seeking to show that the dress code was applied to his detriment. I am satisfied that the issues raised by the complainant are important issues in relation to the application of dress codes by service providers and cannot be regarded as a trivial matter. I am also satisfied that there was no evidence to support the contention that the complaint was not a bona fide complaint.

6. Decision

6.1 I find for the foregoing reasons, that the Kazbar did not unlawfully discriminate against

Mr Finnian Gallagher on 5 May, 2001 in terms of Sections 3(1)(a), and 3(2)(a) and contrary to Section 5(1) of the Equal Status Act.

Marian Duffy
Equality Officer
6 December, 2002