

ODEI - the equality tribunal

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

3 Clonmel Street
Dublin 2.

Phone: 353 -1- 4774100
Fax: 353-1- 4774150

E-mail: info@odei.ie
Website: www.odei.ie

Equal Status Act 2000

EQUALITY OFFICER'S DECISION NOs: DEC-S2002- 134/135

Jean Browne & Terisita Devers
(represented by Tuohy & Co, Solicitors)

V

Joyce's Stores
(represented by MacHales, Solicitors)

Date of Issue 13/12/2002

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Equal Status Act 2000

Summary of Decisions DEC-S2002-134/135

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Key words

Equal Status Act 2000 - Direct discrimination, section 3(1)(a) - Membership of a particular family - Interpretation of definition of "family status", section 2(1) - Family status ground, section 3(2)(c) - Marital status ground, section 3(2)(b) - Supply of goods and services, section 5(1) - Refusal of admission to shop

Dispute

The complainants state that, within a matter of days in September 2001, they were both refused admission to Joyce's Stores by the manager. They maintain that this action was because the manager recognised them as members of the same family who lived in a depressed area of Ballina, and that the manager's action, therefore, constituted discrimination on the grounds of their family status.

The respondents totally reject that they operate a discriminatory policy against anyone. They maintain that members of the complainants' family were abusive to staff previously and that all members of the family were barred as a result.

Decision

The Equality Officer found that the complainants' interpretation of "family status" was not in accordance with the definition contained in the Equal Status Act 2000. As a result, the Equality Officer found that a prima facie case of discrimination has not been made by the complainants in establishing that they were discriminated against on the family status ground in terms of section 3(2)(c) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act. The Equality Officer also found that the complainants had failed to establish a prima facie case on the marital status ground in terms of section 3(2)(b).

Accordingly, he found in favour of the respondents in the matter.

Equal Status Act 2000
Decision DEC-2002-134/135

Jean Browne & Terisita Devers
(represented by Tuohy & Co, Solicitors)

Joyce's Stores
(represented by MacHales, Solicitors)

1. Dispute

1.1 This dispute concerns a complaint by Terisita Devers and Jean Browne that they were discriminated against, contrary to the Equal Status Act 2000, by the management of Joyces Stores, Ballina.

The complainants maintain that they were discriminated against on the family status and marital status grounds in terms of sections 3(1), 3(2)(b) and 3(2)(c) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

2. Summary of the Complainant's Case

2.1 The complainants state that, within a matter of days in September 2001, they were both refused admission to Joyce's Stores by the manager. They maintain that this action was because the manager recognised them as members of the same family who lived in a depressed area of Ballina, and that the manager's action, therefore, constituted discrimination on the grounds of their family status.

3.. Summary of Respondent's Case

3.1 The respondents totally reject that they operate a discriminatory policy against anyone. They maintain that members of the complainants' family were abusive to staff previously and that all members of the family were barred as a result.

4 Delegation under the Equal Status Act, 2000

4.1 These complaints were referred to the Director of Equality Investigations under the Equal Status Act 2000. In accordance with her powers under section 75 of the Employment Equality Act 1998 and under the Equal Status Act 2000, the Director has delegated these complaints to myself, Brian O'Byrne, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part III of the Equal Status Act, 2000.

5.1 Complainants' Evidence

- The complainants are members of a large family.
- Two of the Devers sisters, Jean Browne and Terisita Devers are complainants in this case while two others, Jackie Langden and Shareen Morrell, appeared as witnesses.

- Terisita Devers returned from Scotland in 1999 and regularly bought goods in Joyces Stores up until Oct 2000.
- Neither the complainants nor their sisters have ever been involved in trouble in Joyces
- One day in Oct 2000, Terisita Devers said that she went to Joyces to give rent money to a female acquaintance who worked there, Ms A.
- When she went in, Ms A informed her that she could not talk to her in the shop as she was now barred.
- Her sister, Shareen, then arrived in the shop with her baby in a pram and was told she was also barred.
- The ladies asked for the manager and Mr McElvanna spoke to them saying that he “didn’t like your sort” and that he did not want to serve them.
- Terisita Devers returned to the shop on 3 Sept 2001 and was again told by Mr McElvanna that she could not come in. He did not give her a reason.
- Terisita Devers immediately visited her solicitor, Mr Joe Tuohy, who instructed her to return to the shop to establish whether there may be a case of mistaken identity.
- She did so and was again told by Mr McElvanna that she was barred. No reason was offered.
- Ms Devers phoned the Gardai. On arrival, they listened to her account of events, spoke to Mr McElvanna and informed her that, as it appeared to be a civil matter, that she should contact her solicitor.
- Jean Browne regularly bought goods in Joyces Store for 8 years up until 2001.
- Jean Browne visited Joyces Store on Saturday 1 September 2001 with her sister Jackie Langden.
- She chose a few goods to purchase but when she went to pay for them, Mr McElvanna told her that “he did not want her type” and to “get out”
- She went to Mr Tuohy, her solicitor, immediately who suggested she return to the shop. Mr Tuohy followed behind.
- On her return, Mr McElvanna again told her to get out and said that all her family were barred. Mr Tuohy heard what went on but did not intervene.
- Mr Tuohy himself was not available to attend the Hearing to give evidence, due to a medical appointment in Dublin.

5.2 The complainants state that they believe that they were discriminated against on the family status ground because the manager recognised them as members of the same large

family who lived in a depressed area of Ballina, and that the shop's action, therefore, constituted discrimination on the grounds of their family status.

At the Hearing, the complainants also referred to the fact that they were both separated and stated that their marital status was also likely to have been a factor in Mr McElvannas decision to bar them, as he would probably have known their marital status from his employee, Ms A.

5.3 Respondents' Evidence

- Joyces Discount Store has operated in Ballina for 10 years as a family business. Mr Tommy Joyce has owned the shop for past two years.
- The shop sells a variety of goods and operates on a low profit/high turnover basis.
- Mr Brendan McElvanna has managed the shop since 1994.
- Mr McElvanna knows the four Devers sisters from seeing them come into the shop over the years, either with each other or in the company of their late mother, Mary Devers.
- Mr McElvanna said that he had become uneasy about the family over a number of years as they often "intimidated" staff in the shop.
- He has never seen either of the complainants in his shop accompanied by children.
- Mr McElvanna had no knowledge of either of the complainants marital status and was unaware that either of them was separated.
- Mr McElvanna said that, on a day in October 2000, the complainants' mother became very abusive towards him in the shop and threatened to "burst his face" if he did not stop looking at her.
- She was accompanied by her daughter, Sharleen Morrell, that day, who also abused him.
- Based on that episode, he decided that day to bar all of Mary Devers family from the shop in future.
- Mr McElvanna denied that he knew the complainants were both separated and stated that, even if he had known, that it would have had no bearing on his decision.

5.4 Garda evidence

- Gardai O'Hara and Garda McGowan gave evidence at the Hearing that they were called to Joyces Stores on 3 September 2001.
- On arrival, they met Terisita Devers who complained to them that she had been asked to leave the shop. Ms Devers was very upset and appeared genuine in making her complaint

- They spoke to Mr McElvanna who informed them that Ms Devers had been barred arising from an incident in Oct 2000.
- The Gardai advised Ms Devers that, as it was a civil matter, that she should contact her solicitor

6 Matters for Consideration

6.1 Section 3(1) of the Equal Status Act 2000 states that discrimination shall be taken to occur where, on any of the grounds specified in the Act, a person is treated less favourably than another person is, has been or would be treated. Section 3(2)(b) of the Act specifies marital status as one of the grounds covered by the Act while Section 3(2)(c) of the Act specifies family status as one of the grounds. Under Section 5(1) of the Act it is unlawful to discriminate against an individual in the provision of a service which is generally available to the public.

In this particular instance, the complainants claim that they were discriminated against on the grounds of their marital and family status contrary to Sections 3(1), 3(2)(b), 3(2)(c) and 5(1) of the Equal Status Act, 2000 in the manner in which they were barred from Joyce's Stores in September 2001.

6.2 In cases such as this, the burden of proof lies with the complainant who is required to demonstrate that a prima facie case of discrimination exists. If established, the burden of proof then shifts to the respondent who, in order to successfully defend his case, must show that his actions were driven by factors which were non-discriminatory.

6.3 In considering the approach to be taken with regard to the shifting of the burden of proof, I have been guided by the manner in which this issue has been dealt with previously at High Court and Supreme Court level and I can see no obvious reason why the principle of shifting the burden of proof should be limited to employment discrimination or to the gender ground (see references in **Collins, Dinneen & McDonagh V Drogheda Lodge Pub DEC-S2002-097/100**)

7 Conclusions of the Equality Officer

7.1 Prima facie case

At the outset, I must first consider whether the existence of a prima facie case has been established by the complainants.

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 family status or marital status ground)
- (b) Evidence of specific treatment by the respondent
- (c) Evidence that the treatment received by the complainant was less favourable than the treatment someone, not covered by that ground, would have received in similar circumstances.

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

7.2 What constitutes “prima facie evidence” and how a “prima facie case” is established has been documented and considered in previous cases such as **Sweeney v Equinox Nightclub DEC-S2002-031**.

7.3 With regard to (a) above, the complainants have based their complaint on the grounds of family status, claiming that the decision to bar them was taken **because they all belonged to the same family**. They claim, therefore, that Mr McElvanna’s decision to bar them constituted discrimination on the family status ground under the Equal Status Act 2000.

7.4 In order to decide whether the complaint is covered by the provisions of the Equal Status Act 2002, I must first consider how the term “family status” is defined in the Act and whether I consider the complainants’ case is covered by this ground.

Section 2(1) of the Equal Status Act 2000 defines “family status” as follows:

“family status” means being pregnant or having responsibility-

(a) as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years, or

(b) as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis.

Section 3 (1) of the Equal Status Act 2000 states 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”

Section 3 (2)(c) of the Equal Status Act 2000 identifies “family status” as one of the discriminatory grounds and describes it as follows:

“that one has family status and the other has not or that one has a different family status from the other”

7.5 Having considered the above definition, it appears clear to me that the term “family status”, as defined in the Equal Status Act 2000, relates specifically to having responsibility for children under 18 or for a person with a disability. Therefore, for a person to claim that they were discriminated against on the “family status” ground, it must be shown that the treatment afforded them was directly attributable to the fact that that person was responsible for children under 18 or for a person with a disability.

7.6 The evidence before me in this case indicates that both complainants were refused service at a time when they were unaccompanied by children or by a person with a disability. (I note that on 3 September 2001, Ms Dever's sister arrived in the shop with her baby, but only after Terisita Devers had been told she was barred).

I am, therefore, satisfied that Mr McElvanna's decision to bar the complainants had nothing whatsoever to do with them having responsibility for children or for a person with a disability.

7.7 The complainants also make the case that the size of their family, and the fact that their family came from "a depressed area", were factors in their refusal. Once again, on considering the definition of "family status" in the Act, I cannot accept that this is a correct interpretation of the "family status" ground. Accordingly, I find that the incidents complained of cannot be attributed to discrimination on the "family status" ground

7.8 During the course of the Hearing, when the definition of "family status" was being discussed, the complainants also made reference to their "marital status" (they are both separated) and suggested that this also may have been a factor in Mr McElvanna's decision to bar them. In this regard, they say that an employee of the shop, Ms A, would have been aware of this fact and would probably have communicated it to Mr McElvanna.

On considering this point, I note that Mr McElvanna states that he had no knowledge of the complainants' marital status at the time they were barred and that, even if he did, that it would not have made any difference to his decision. On considering this point, I am satisfied that the complainants' marital status had no bearing on Mr McElvanna's decision as it appears clear that the decision to bar the complainants stemmed directly from their relationship with their mother and the incident she herself was involved in, in the shop in October 2000.

7.9 I, therefore, find that the complainants have failed to establish a prima facie case of discrimination on either the family status or marital status grounds.

8 Decision

8.1 I find that a prima facie case of discrimination has not been made by the complainants in establishing that they were discriminated against on the marital status and family status grounds in terms of section 3(2)(b) and 3(2)(c) of the Equal Status Act 2000 in not being provided with a service which is generally available to the public contrary to Section 5(1) of the Act.

8.2 In considering the background to this case and particularly the reason behind the original decision to bar the complainants from the shop, I note that circumstances have changed since September 2001, with the death of the complainants' mother.

Considering that the complainants were regular customers of Joyce's Stores in the past, I would suggest that, while it is not binding under the Act, that perhaps now might be an appropriate time for the respondents to review their position in relation to the bar on the remaining members of the Devers family.

**Brian O'Byrne
Equality Officer
13 December 2002**