



DISCRIMINATION LAW ASSOCIATION

Briefings

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An inspirational lead in fighting for equality and social justice

This edition of *Briefings* is complemented by reports of legal reform and judgments in discrimination cases from across these islands. *CT & FE v Dunnes Stores* is the first Irish court judgment in a case brought by Roma service users who were discriminated against on the grounds of their ethnic origin. As such complaints are often settled, and it is not clear whether there have been any such judgments in the UK, it is a step forward to have a court decision which can be published and used to educate and improve practice among those providing services to this particularly marginalised group. Without the support of the Free Legal Advice Centres, the complainants would have been unable to access justice, or the equality law to be enforced.

The Scottish legislature also features; first, in Robin Moira White's account of the debate and arguments around the Gender Recognition Reform Bill, in two major Court of Session judgments with significant impact and also in the interesting Sheriff Court's decision following a complaint by the Billy Graham Evangelistic Association.

In *Jasim v Scottish Ministers* (Students Award Agency Scotland), the Court of Session upheld a medical student's complaint in relation to support allowances for university students, the residency requirements of which discriminated against her on the basis of her immigration status. In the *Petition of For Women Scotland Ltd*, Lady Haldane confirmed that the definition of 'sex' in the Equality Act 2010 is not limited to biological or birth sex, but includes those in possession of a GRC stating their acquired gender, and thus their sex. This latter decision is subject to appeal so the debate about this definition will continue.

Earlier last month, the DLA was devastated to learn of the sudden death of Barbara Cohen. Many tributes to her professionalism, legal expertise, drafting and training skills, as well as her accessibility, kindness, generosity and joy have poured in from across the world as friends and family learned of her death.

Barbara played a hugely significant role in the development of discrimination law in the UK and across Europe. Passionately believing in equality, she was one of the inspirational founder members of the DLA and she supported the association and *Briefings* throughout her career and long after her resignation from the executive committee. In the words of Catherine Rayner who chaired the DLA committee between January 2015 and February 2019, 'she worked with great energy, wit and determination, to improve and promote the policy and practice of discrimination law for the benefit of those who suffer discrimination'. Barbara's legal career included

providing advice and support to some of the most significant events of recent decades ranging from Greenham Common, the Wapping printers' dispute, the Stephen Lawrence Inquiry, campaigns which led to the Race Relations (Amendment) Act 2000 which extended its reach to the police and implemented the new race equality duty, or the development of the EU Race and Framework Directives, to name just a few. Her clarity in explaining discrimination law is legendary and her extensive training in the UK, Europe and Kenya has left a lasting legacy of trained and committed discrimination experts.

Renowned for 'doing life at 101%', Barbara devoted her astonishing energy, tenacity and fierce determination to the fight for equality and social justice. She was described by Ulele Burnham, chair of the DLA from 2009 to 2012, as acting 'as the backbone of the DLA ... [making] sure that we keep our eyes firmly fixed on the objectives that brought the organisation into being'. Gay Moon's tribute to her reflects her enormous contribution to the DLA as well as her warmth and generosity.

When *Briefings* celebrated the DLA's 20th anniversary in 2015, Barbara was asked about what she thought was the greatest challenge to discrimination protection. Aware that there is 'no real protection if anti-discrimination law is not enforced', she reflected on the irony that, although the law in Great Britain was possibly the strongest anti-discrimination legislation in the world, government decisions and actions had 'undermined both the law and the means of enforcing the law so that actual protections are possibly weaker than in previous decades'. She highlighted swingeing cuts to legal aid, the removal of funding for law centres and advice centres as well as laws and policies, especially in the immigration or security fields, 'based on false fears created by politicians and stirred up by the media, which induce or encourage discrimination'.

Aware that current government policy continues to contribute to such false fears or proposes to undermine protection of fundamental human rights, it is vital that we follow Barbara's inspirational lead in fighting to ensure access to justice and protection against discrimination.

Movement and action were the essence of Barbara; life is smaller without her. The DLA offers sincere condolences to all her family and friends.

Geraldine Scullion
Editor, *Briefings*

First Irish judgment finding race discrimination against Roma in goods and services

CT & FE v Dunnes Stores Company Unlimited [2023] IECC 4; May 18, 2023

Implications for practitioners

This case establishes that mistaken identity related to a complainant's ethnicity (or actions taken on foot of such mistaken identification) may constitute unlawful discrimination.

The court's engagement with the evidence of previous incidents involving the complainants (or the lack of such evidence), of the systems/processes for the recording of such incidents and in relation to the training of staff is also notable. The case illustrates that relevant documentary evidence may be sought prior to hearing through discovery processes or under data protection legislation – and that the failure or inability of the respondent to provide such evidence may be a relevant consideration in deciding the complaint.

Finally, the case may suggest that there are benefits to complainants who are engaging with the tribunal via an interpreter (and where there are conflicts of evidence) for proceedings to be conducted in-person, rather than via a remote hearing, where possible.

Facts

CT was expelled from a city-centre supermarket by a security officer as she attempted to pay for her groceries. Dunnes Stores asserted that she was removed from the shop because she had been previously barred for begging. Her niece, FE (who was a minor at the time of the incident) was present with CT and unable to complete her purchase at the shop in light of the security officer's actions towards her aunt. Both women wear traditional Roma attire in expression of their ethnic identity and were doing so at the time of the incident.

CT denied that she had ever been barred from the shop and subsequently made a data access request to the respondent pursuant to the General Data Protection Regulation for any records pertaining to her. One of the records provided by the respondent on foot of that request was a report in relation to a prior incident (where FE and CT were not present) involving different women who were also of Roma ethnicity.

Law

The Equal Status Acts 2000 to 2018 (ESA) give effect (in part) to Council Directive 2000/43/EC of June 29, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive) in Irish law. The ESA prohibit discrimination, including direct discrimination, on the ground of '*race, colour, nationality or ethnic or national origins*' in the provision of goods and services.

S38A(1) ESA provides that '*[w]here in any proceedings facts are established by or on behalf of a person from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary.*'

Most complaints under the ESA are heard by the Workplace Relations Commission (WRC) at first instance.

Workplace Relations Commission

CT and FE made complaints of race discrimination under the ESA against Dunnes Stores. The complainants gave evidence via an interpreter at a remote WRC adjudication hearing.

The complainants' representatives referred to the fact that, in response to being notified of the discrimination complaints, the respondent had made reference to (and provided incident reports in relation to) a wholly separate prior incident at the shop (involving different Roma women). They also highlighted that the respondent had no formal system for recording persons who are barred from the shop, and had provided no evidence that staff members at the store had received any form of equality or anti-discrimination training. It was therefore submitted that CT had been mistakenly identified as a person who was barred from the store on the basis of her Roma ethnicity and that she and FE were subject to less favourable treatment contrary to the ESA as a result.

... the complainants had established that they had been subject to treatment which 'was different to how other shoppers would have been treated' contrary to the ESA.

However, the WRC adjudication officer concluded that the evidence (including oral evidence provided by the security officer) supported a finding that CT 'had been barred' from the shop previously. In dismissing the complaints, she stated that she found *'the testimony of the complainants, at times, incoherent and inconsistent'* and that *'the respondent's testimony relating to the matter was more cogent and persuasive'*.

Circuit Court

Both decisions of the WRC were appealed to the Circuit Court. On foot of a fresh, in-person hearing, Judge John O'Connor issued judgment in favour of the appellants. Judge O'Connor held that the complainants had established that they had been subject to treatment which *'was different to how other shoppers would have been treated'* contrary to the ESA.

He noted that *'[d]iscrimination has to be objectively assessed to uphold the rule of law'* and made the following findings in his assessment of the evidence:

- although the security officer believed that he had *'not engaged in discrimination... he made this assumption from his own subjective point of view'*;
- the security officer's testimony to the effect that he was *'adequately trained'* was *'questionable'*;
- *'there was a failure [on the part of the respondent] to properly record the previous alleged incidents'*;
- *'Significantly there was a mix up in the discovery documentation disclosed which related to a different person and a different incident. The only commonality with the discovery of the different person and CT, one of the appellants, was the ethnic origin of both persons.'*

CT was awarded €4000 in compensation for the effects of the discrimination and her niece FE was awarded €2000.

Judge O'Connor included in his judgment a list of recommendations applicable to providers of goods and services for *'avoiding or at least mitigating'* incidents of mistaken identity which may be discriminatory or give rise to discrimination contrary to the ESA:

1. *Security officers should avoid making assumptions and relying on instinct or memory alone when an alleged previous incident(s) occurred. A time lag of an alleged previous incident is also a relevant factor in this consideration.*

...there should be some awareness of the challenges and obstacles that a minority ethnic person can endure in shopping.

2. *There should if possible be a record of previous incidents (if any). There should also [sic] an awareness of the problem that identity is frequently a genuine issue. We all have been in situations where we have embarrassed ourselves in thinking we recognise a particular person to only find it is a mistaken identity. In these circumstances there is also an added possibility of potentially stereotyping someone from an ethnic minority.*
3. *Sometimes discrimination is not recognised even though in retrospect it might seem obvious. To overcome this, it is useful to combine a degree of empathy with objectivity. In other words, there should be some awareness of the challenges and obstacles that a minority ethnic person can endure in shopping. There may in fact be more than one way to communicate a policy concern. In this regard it is important to recognise that a person from an ethnic minority may have cultural concerns in regard to some forms of communication. This can be addressed by adequate training, and not just [sic] employee shadowing another employee. This policy can be reinforced by an employee user manual.*
4. *In some circumstances where a shopper feels they have been discriminated against it would be beneficial to have an internal objectively based complaint handling mechanism option. In doing so it can facilitate the complaint being handled confidentially and carefully.*
5. *An apology in appropriate circumstances can go a long way to mitigate any potential damage.*

Comment

The judgment of the Circuit Court is the first decision of the Irish courts upholding a race discrimination complaint by a Roma person in relation to the provision of goods and services under the ESA. Free Legal Advice Centres (FLAC¹) the independent law centre which acted for the complainants and which has provided dedicated legal services for Roma since 2017, noted that the case is:

... one in a long series of discrimination complaints taken by FLAC on behalf of clients of our Roma Legal Clinic against providers of goods and services. Those cases often settle on confidential terms... This form of discrimination ... particularly impacts Roma women, such as FLAC's clients, who wear traditional Roma attire as part of their ethnic identity.

The judgment may provide useful guidance to practitioners dealing with similar discrimination cases and could – through its dissuasive effect – have particular benefits for Roma and other groups who may be subject to stereotyping and stigmatisation in seeking to access goods and services.

By contrast to the decisions of the WRC, the judgment of the Circuit Court displays a marked sensitivity to *'the challenges and obstacles that a minority ethnic person can endure in shopping'* and significantly more scrutiny of the respondent's evidence. In this regard, it is worth highlighting that the case was heard remotely by the WRC – at a time when such an approach was necessitated by the prevailing public health guidance. However, pursuant to legislation that was introduced as a pandemic response-measure, the WRC continues to operate on the basis of a policy which provides that:

¹ FLAC is an Irish independent human rights and equality organisation which exists to promote equal access to justice. It operates a telephone information and referral line and a nationwide network of legal advice clinics where volunteer lawyers provide free legal advice. As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year and operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic. FLAC makes policy recommendations based on the learning and experience of its case work. See: www.flac.ie

- *Unless it appears to the WRC that conducting proceedings via remote hearing could be unfair to any of the parties involved in a particular complaint or would otherwise be contrary to the interests of justice, the WRC will schedule the case as a remote hearing*
- *All cases will be considered amenable to remote hearing, unless the parties can demonstrate how holding a remote hearing might not be in the interests of justice or would breach fair procedures, both of which are subject to a high threshold.*

This policy, and its potential adverse impact on members of marginalised and disadvantaged groups who may already be engaging with the tribunal via an interpreter in cases where there are conflicts of evidence (and in circumstances where civil legal aid is not available for proceedings before the WRC), is a cause of significant concern. Of similar concern, is the absence of any publicly available research in relation to the impact of remote hearings on the fairness of discrimination proceedings in Ireland and the outcomes in such proceedings.

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