

**THE CIRCUIT COURT  
AN CHÚIRT CHUARDA**

**[2023] IECC 4**

**DUBLIN CIRCUIT**

**COUNTY OF THE CITY  
OF DUBLIN**

**IN THE MATTER OF THE EQUAL STATUS ACT 2000, AS AMENDED  
AND  
IN THE MATTER OF SECTION 28 OF THE EQUAL STATUS ACT 2000, AS AMENDED**

**Record No. 2022/01198**

**Between:**

**C.T.**

**APPELLANT**

**AND**

**DUNNES STORES UNLIMITED COMPANY**

**RESPONDENT**

**Between:**

**Record No.  
2022/01197**

**F.E.**

**APPELLANT**

**AND**

**DUNNES STORES UNLIMITED COMPANY**

**RESPONDENT**

**Judgment of His Honour Judge John O'Connor delivered on the 18th day of May, 2023**

**1. Introduction**

1.1 This decision addresses both the proceedings of CT and FE against the common respondent, Dunnes Stores Unlimited Company. The alleged discrimination arises out the same event, therefore it is expeditious to address both appeals in the same judgment. The appellants seek to appeal a determination of the Workplace Relations Commission pursuant to a complaint made under Section 21 of the Equal Status Act, 2000 as amended. The appellants claim they were discriminated against on the grounds of race and ethnicity by the respondent in the provision of goods and services at the respondent's store. The respondent denies that the appellants were discriminated against by the respondent pursuant to the Equal Status Act 2000, as amended.

**1.2** The first appellant, CT, is the aunt of the second appellant, FE. At the time of the incident the second appellant was a teenager. The first appellant was an adult over 21 years of age. Both appellants are members of a minority ethnic group.

## **2. The Appellants' Evidence**

**2.1** At the hearing before this Court, CT gave evidence that on the 2<sup>nd</sup> of November 2019 she was present at the respondent's store, accompanied by FE. At the time of the alleged incident, both appellants were dressed in their traditional attire and were accordingly identifiable as being members of a specific ethnic group. CT attended the store to purchase food for her children. She requested a cooked chicken at the delicatessen counter and picked up some vegetables at the vegetable section of the store. When she went to the cashier to pay for the goods, she gave evidence that a man identified in Court as the security officer for the store approached her and took the food items from her. According to CT's evidence, the security officer verbally abused her and used a profanity. This is emphatically denied by the security officer. However, the security officer did not let her purchase the food items. According to her testimony he said she engages in begging and makes other people pay for her food. CT stated she was upset and ashamed as people were looking at her.

**2.2** FE in her evidence to the court stated that she was a teenager at the time of the incident. She gave evidence that she was with CT in the store at the time. She alleges that she was asked to leave the store by the security officer. FE stated she queried the security officer as to why they were asked to leave. The security officer identified them as being members of an ethnic minority, and said they stole from the store. This, FE stated, caused significant upset.

## **3. The Security Officer's Evidence**

**3.1** The security officer, an employee of the respondent, also gave evidence in court. In his evidence, he stated that he previously barred CT from the store, as she was approaching customers asking them to buy food for her. On the day in question, he approached her and

asked her to leave. When asked why, he replied because she was begging. She refused to leave, and he stated she was verbally abusive towards him. The security officer phoned An Garda Síochana and CT left the store before the Gardaí arrived. In relation to FE, the security officer gave evidence that he had no interaction with her, and he did not refuse her services or goods.

**3.2** When questioned on the procedures in place for barring individuals from the store, the security officer gave evidence that there were no formal procedures in place. At the time of the incident, there were three security officers employed in that store. In circumstances where an individual is barred from the store, the security officer stated that he would inform the other security officers, either by pointing the individual out to them or identifying the individual on CCTV footage. The only form of identifying a barred individual on a subsequent visit to the store was by way of memory. An Incident Report Form is only drawn up after a complaint is received, which may not be contemporaneous with the incident. The shortcomings of such informal procedures were evident in that there was an issue of mistaken identity relating to the Incident Report forms submitted by the respondent in response to the claim, which will be addressed later in this decision.

#### **4. Determination of the Adjudication Officer**

**4.1** By way of decision dated the 21<sup>st</sup> of February 2022, the Workplace Relations Commission made a finding that the complainants (the appellants herein) were not discriminated against on the grounds of race or ethnicity contrary to the provisions of the Equal Status Acts.

**4.2** The Adjudication Officer found that CT was not served as she had been barred a number of months earlier for begging customers in the store to buy her food. In addition, FE was not denied access to purchase goods within the store and the evidence of the security officer was accepted in this regard. Overall, the Adjudication Officer found that the testimony of the

complainants was inconsistent and incoherent, whereas the evidence put forward on behalf of the respondent was more cogent and persuasive.

## **5. The Appellant's Submissions to this Court**

**5.1** With regard to the vicarious liability of the respondent, the appellants rely on section 42(2) of the Equal Status Act as amended, which provides:

“Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that other person.”

The appellants submit that the security officer employed by the respondent was at all material times working as an agent of the respondent and therefore the respondent is vicariously liable for the actions of the security officer. The respondent accepts the legal basis outlined.

**5.2** Turning to the burden of proof, the appellants submit that it is for the appellants to establish a prima facie case of discrimination. Once a prima facie case is established, the burden of proof shifts to the respondent to prove that there has been no unlawful discrimination, pursuant to section 38A of the Equal Status Acts as amended.

**5.3** In this respect, the appellants rely on the recent Supreme Court decision of *Donnelly v. The Minister for Social Protection* [2022] IESC 31, wherein the Supreme Court, at paragraph 187, provides guidance on what is meant by a “prima facie” case:

“In the sense in which the term is normally used, a prima facie case is made out where the evidence and arguments put forward by a party are sufficient to justify a ruling in his or her favour, in the absence of rebutting evidence and argument from the opposing party.”

**5.4** The appellants submit they meet the definition of a prima facie case as set out in *Donnelly*, in that:

i. Both appellants are members of a minority ethnic group who at all material times were wearing what is widely known as their traditional attire and were thus easily identifiable as members of said community. Further, the first appellant was identified and described as a member of the ethnic group in the incident reports compiled by the respondent.

ii. There is clear evidence of less favourable treatment in respect of the first appellant, CT, in that it is not disputed that she was asked to leave the store on the day in question by an agent of the respondent when no other person in the store, other than the second appellant, was witnessed to be asked to leave by the security officer.

iii. It is the second appellant's evidence that she was also asked to leave the store on the day in question by an agent of the respondent and that the respondent failed to record this in their incident report form. It is noted that the incident report form was not written contemporaneously and is dated the 1st of February 2020, months after the incident the subject matter of the proceedings. The second appellant also relied on her own oral evidence and also the evidence of (her mother), who as a witness to fact stated that the second appellant was also present with the first appellant on the day of the incident.

iv. The treatment received by the appellants was less favourable than the treatment others, not covered by the ground of race, received in similar circumstances in that they were the only parties asked to leave the store at the time of the incident.

**5.5** Therefore, the appellant submits that the burden of proof shifts to the respondent to prove that there has been no unlawful discrimination. The appellants also submits that the respondent failed to discharge the burden of proof for the following reasons:

- i. When requested by way of data access request for all records pertaining to the appellants held by the respondents, the minimal records provided demonstrates a lack of any or any sufficient system by which to keep track of members of the public who are allegedly barred and thus prevent misidentification.
- ii. The lack of documentation demonstrates that the respondent has no record of the appellants and thus had no sufficient mechanisms in place by which to discharge the burden of proof.
- iii. An Incident Report form which was provided on foot of this request was erroneously provided and does not relate to either of the appellants but relates to entirely different women, who are members of the same community. The appellants submit that it may be reasonably inferred that the respondent was unable to distinguish the appellants from the women that are referred to in that Incident Report Form. The shared characteristics across the subject of these incident report forms is that all parties are members of the same ethnic community and are identifiable as such.
- iv. No system has been shown by the respondent to be in place in respect of recording what persons are barred from the premises at any given time and the respondent has demonstrated a failure to distinguish the appellants from other females of the same race/ethnicity.
- v. The failure of the respondent store to adequately maintain a system of who was barred at any given time appears to have contributed to a situation where two women, by virtue of their ethnicity, were barred from accessing the respondent's goods and services.
- vi. The failure of the respondent in this respect therefore resulted in the unfair and less favourable treatment of the first and second appellants and was contrary to Section 5(1) of the Equal Status Act 2000 as amended.

vii. Furthermore, the respondent store has not provided any information or documents relating to the training provided to staff members about the legal entitlement of members of the public to access goods and services in accordance with the provisions of the Equal Status Acts 2000 –2015.

## **6. The Respondent’s Submissions to this Court**

**6.1** The respondent accepts the test set out in section 38A of the Equal Status Acts, as amended in that it requires a complainant, in the first instance, to establish a prima facie case of discrimination. Should a complainant be successful in establishing a prima facie case of discrimination, the respondent accepts that the burden of proof then shifts to the respondent to rebut the inference of discrimination raised by the complainant.

**6.2** It is the respondent’s case that the appellants have failed to establish a prima facie case of discrimination.

**6.3** Section 3(1) of the Equal Status Acts as amended states:

*1) For the purposes of this Act discrimination shall be taken to occur—*

*(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation [on any of the grounds specified in subsection (2) or, if appropriate, subsection (3B),] (in this Act referred to as the ‘discriminatory grounds’) which—*

*(i) exists,*

*(ii) existed but no longer exists,*

*(iii) may exist in the future, or*

*(iv) is imputed to the person concerned,*

*(b) where a person who is associated with another person—*

*(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and*

*(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination,*

*or*

*(c) where an apparently neutral provision [would put a person] referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*

**6.4** The respondent also relies on section 5(1) of the Equal Status Acts as amended which provides ‘*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*’.

**6.5** In a decision of Mr. Justice Simons in the High Court, *Smith v. Office of the Ombudsman*, [2020] IEHC 51, the Court considered section 5 of the Equal Status Act 2000 as amended, which prohibits discrimination in the disposal of goods and provision of services. The case arose from a decision of the legal aid board to refuse the appellant a legal aid certificate. Mr. Justice Simons in dismissing the appeal applied the following test: ‘*the question for determination upon a claim for racial discrimination - As opposed to, for example, an application for judicial review - is not whether the procedure..... is subjectively fair, but rather whether the procedure applied to [the Appellant] differed from the approach applied to other complainants generally*’.



**6.6** The Court held that the appellant had *'misunderstood the concept of a comparator'* under the Equal Status Act and held that *'the correct comparison is not as between the Complainant and the person providing the service, but rather as between the Complainant and another service recipient'*. The Court held that Section 5 is *'not a stand-alone provision'* and *'must be read in conjunction with Section 3 (general discrimination) and/or Section 4 (discrimination on disability grounds)'*. The relevant comparator for a claim of discrimination on the grounds of race is defined as follows at section 3(2)(h):

(2) As between any two persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are:

(h) that they are of different race, colour, nationality or ethnic or national origins (the "ground of race").

**6.7** The respondent submits that the appellants are obliged to firstly established the facts upon which they rely and thereafter to satisfy the court that those facts are of sufficient significance to raise an inference of discrimination.

**6.8** It is also submitted on behalf of the respondent that the appellants have not satisfied either requirement in the circumstances.

**6.9** It is submitted that the respondent has established in evidence the actual reason why the appellant was requested to leave the store on the said date. The request for her to leave the premises was not as a result of the alleged or any discrimination on the part of the respondent, its servants or agents as alleged. CT was asked to leave the store by the security officer, for the sole reason that she was barred from the store. Furthermore, they submit that it is clear from the evidence of the security officer that the second named appellant, FE, was not requested to leave the store nor was she told that she was barred from the store as alleged by the appellants.

**6.10** The respondent also submits that this is not a case of mistaken identity as alleged by the appellants. The security officer has at all material times being very clear that he had

previously barred CT from the store and this appellant was present in the store on the 2nd of November 2019 despite previous instruction not to attend at the said premises.

**6.11** The respondent submits that the said security officer gave evidence at the Commission that he is fully trained and experienced in respect of equality issues. The relevant policies and procedures in respect of equality issues were at all material times hereto in place by the respondent in respect of the removal of patrons from the said premises. He had undertaken training by the respondent which included information on equality matters.

**6.12** The respondent draws the court's attention to what they perceive are the inconsistencies in the accounts of the appellants. In her complaint made to the Commission, it is alleged by the appellant CT that the said security officer told the appellant that she was barred and when CT asked why she was barred, he gave no reason. However, in the appellant's submissions to this court in respect of the Appeal herein, it is provided that when CT asked why she was being asked to leave the store, the security officer stated that it was because she was begging and asking people to buy her food.

## **7. Summary of the Court's Assessment of the Evidence and Recommendations**

**7.1** I am satisfied the security officer felt he was doing his job to the best of his ability and genuinely believed he was not engaged in discrimination. However, he made this assumption from his own subjective point of view, notwithstanding that he believed he was adequately trained. In the court's view, that view is questionable and there was a failure 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.

**7.2** I accept the law is as set out by Mr. Justice Simons in *Smith v. Office of the Ombudsman*, that being whether the procedure applied to the complainant differs from the

approach applied to others in a similar situation. However, in reality a failure to recognise discrimination is a frequent occurrence in society. Discrimination has to be objectively assessed to uphold the rule of law. In doing so it is necessary to go beyond mere tolerance and recognise that inclusion and diversity are important in their own sake.

**7.3** By way of general comment, I suggest a number of recommendations to assist in setting up a system that if addressed by the respondent may assist in avoiding or at least mitigating a similar reoccurrence of an incident such as occurred in this case.

**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.

**2.** There should if possible be a record of previous incidents [if any]. There should also be 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 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.

## **8. Decision**

**8.1** There is a direct conflict of evidence between the security officer and the appellants. I accept the security officer believed he acted correctly and that he was adequately trained in equality legislation. However, on the balance of probabilities, I also accept that notwithstanding some inconsistencies by CT in her evidence, an incident whereby she was prevented from paying for groceries in the store did occur on the 2<sup>nd</sup> of November 2019, that it was different to how other shoppers would have been treated and that the incident did affect CT. However, I do not accept that the security officer grabbed her arm or mishandled her or used foul language as she alleged in her evidence to this court. I note both appellants waited outside the store for the gardaí to arrive, that they were genuinely upset and that overall, their actions were consistent with persons who honestly felt aggrieved that they had been treated unfairly and that the complaint falls within the Equals Status Acts.

**8.2** FE was a teenager at the time. She felt that she could not continue with her purchase and on the balance of probabilities I accept her evidence in this regard and that it was a reasonable assumption to make.

**8.3** Therefore, I award a sum of four thousand euros to CT and a sum of two thousand euros to her niece, FE.

**8.4** I invite the parties to address me on the question of costs.