

ADJ-00011948

**ADJUDICATION OFFICER
DECISION/RECOMMENDATION**

Adjudication Reference: ADJ-00011948

Parties:

	Complainant	Respondent
Parties	Lee McLoughlin	Paula Smith Charlies Barbers

Representatives	Orlaith Traynor Gill Traynor Solicitors	David Powderly David Powderly Solicitors
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Complaint(s):

Act	Complaint/Dispute Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under Section 21 Equal Status Act, 2000	CA-00015914-001	21/11/2017

Date of Adjudication Hearing: 01/05/2018

Workplace Relations Commission Adjudication Officer: Gerard McMahon

Procedure:

In accordance with **Section 25 of the Equal Status Act, 2000**, following the referral of the complaint(s)/dispute(s) to me by the Director General, I inquired into the complaint(s)/dispute(s) and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaint(s)/dispute(s).

Background:

The complainant is a transgender man who attended the respondent's barbers on 24th September 2017. The respondent's barbers were busy when the complainant arrived at 1.05pm and he proceeded to take a seat in the queue along with a number of other men. As the complainant waited, a number of other men joined the queue inside and outside the barbers. In or around 1.30pm, the complainant's turn to get his hair cut arrived and he went to sit in the barber's chair. As the complainant sat down, he was informed by the barber: 'I don't cut ladies hair.' The complainant replied saying that he just wanted a 'short back and sides.' The barber repeated, 'we don't cut ladies hair, I'm sorry.' The complainant (allegedly then) informed the barber that he was transgender and a trans man. The barber proceeded to shake his head and stated, 'I am sorry, we can't cut ladies hair. It's a contract that we have with another hairdresser around the corner, so if we cut a woman's hair we will be fined.' The comments by the barber were uttered in front of a number of customers and caused huge embarrassment and distress to the complainant who left the premises in shock. The incident has greatly affected the complainant and caused him stress, shame and embarrassment.

In summary, it is alleged that the complainant – who is a transgender male - suffered discrimination on the grounds of gender, when the respondent refused to provide him with a haircut, breaching the Equal Status Acts. Hence, it is submitted that the complainant was treated less favourably (because of his gender) by the respondent, than someone else would be treated in the same circumstances.

Summary of Complainant's Case:

As outlined above, the complainant is a transgender man who attended the respondent's barbers on 24th September 2017. The respondent's barbers were busy when the complainant arrived at 1.05pm and he proceeded to take a seat in the queue along with a number of other men. As the complainant waited, a number of other men joined the queue inside and outside the barbers. In or around 1.30pm, the complainant's turn to get his hair cut arrived and he went to sit in the barber's chair. As the complainant sat down, he was informed by the barber: 'I don't cut ladies hair.' The complainant replied saying that he just wanted a 'short back and sides.' The

barber repeated, 'we don't cut ladies hair, I'm sorry.' The complainant (allegedly then) informed the barber that he was transgender and a trans man. The barber proceeded to shake his head and stated, 'I am sorry, we can't cut ladies hair. It's a contract that we have with another hairdresser around the corner, so if we cut a woman's hair we will be fined.' The comments by the barber were uttered in front of a number of customers and caused huge embarrassment and distress to the complainant who left the premises in shock. The incident has greatly affected the complainant and caused him stress, shame and embarrassment. As a result, it is alleged that the complainant – who is a transgender male - suffered discrimination on the grounds of gender, when the respondent refused to provide him with a haircut, breaching the Equal Status Acts. Hence, it is submitted that the complainant was treated less favourably (because of his gender) by the respondent, than someone else would be treated in the same circumstances. In support of same the complainant drew the Commission's attention to what is adjudged to be relevant legislation and to the argument that the burden of proof resides with the respondent. In summary, the complainant contends that he suffered discrimination on the grounds of gender by the respondent on Sept. 24th, 2017 and that he has made a prima facie case that unlawful discrimination occurred at the hands of the respondent.

Summary of Respondent's Case:

The respondent contends that the relevant barber does not recollect the complainant saying that he was transgender and a trans man until the complainant was leaving the premises. It is also relevant that the barber in question had no training in cutting ladies' hair and had never done so before. Furthermore, the barber was instructed on commencement of his employment of the term in the lease that prohibited the respondent barber from cutting women's hair. The barber in question did not mean to offend the complainant and believed that he was performing his role correctly and protecting his employer. It is also contended that a 'one off mistake' does not amount to discrimination. Furthermore, the respondent has put in place a policy to prevent same from happening again. Related thereto, the barber in question did not intend to treat the complainant in a less favourable manner, as he would treat all women in the same manner. That is, his misunderstanding or misperception of the gender identity of the complainant was an honest belief. It is also argued that the respondent is exempt

from the (non-discrimination) provision at Section 5.1 of the Equal Status Acts, as Section 5.2 states that Section 5.1 does not apply in respect of ‘differences in the treatment of persons on the gender ground in relation to services of an aesthetic, cosmetic or similar nature, where the services require physical contact between the service provider and the recipient’.

Findings and Conclusions:

The Equal Status Acts prohibit discrimination on nine grounds, including the ground of gender. Section 3(1) thereof, as amended by the Equality Act 2004, provides that discrimination shall be taken to occur 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 specified discriminatory grounds. The Acts prohibit discrimination in connection with the provision of goods and services to which the public or a section thereof has access. Section 5(1) of the aforementioned Acts prohibits gender discrimination in the disposal of goods or the provision of services, either to the public generally or to a section thereof. ‘Service’ is defined as ‘a service or facility of any nature which is available to the public generally or a section of the public’.

With regard to the ‘burden of proof’, the legal position in respect of same is set out in Article 10 of the Framework Directive (Council Directive 2000/78/EEC) which states that member states

shall take such: ‘measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’ Further to same, Section 38A of the Equality Act 2004 deals with the burden of proof in discrimination complaints, holding that: ‘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.’ On the basis of the evidence presented at hearing, it is apparent that a prima facie case of discrimination has been demonstrated (by the complainant) and the burden of proof shifts to the respondent (to rebut this claim on the balance of probabilities).

With reference to case precedent, it is held that discrimination against transgender people was rendered unlawful by the Court of Justice of the European Union (CJEU) in *P v S and Cornwall County Council* (Case C-13/94) [1996] ICR 795, where the court considered the question as to whether discrimination connected to gender reassignment fell within the scope of what was then the Equal Treatment Directive (now the Recast Directive 2006/54/EC). The case concerned a male employee who proposed to undergo gender reassignment. The CJEU held that the Equal Treatment Directive provided protection against discrimination in such circumstances. In the view of the CJEU, the purpose of the Equal Treatment Directive extended protection against discrimination arising from gender reassignment because to: ‘tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard.’ Recital 3 of the Recast Directive 2006/54/EC holds that: ‘The Court of Justice has held that the scope of the principle of equal treatment ... also applies to discrimination arising from the gender reassignment of a person.’

Transgender discrimination was first given consideration in this jurisdiction in the employment case of *Hannon v First Direct Logistics Ltd* [2011] ELR 215. The complainant therein was diagnosed with gender-identity disorder and identified as a transgender female. The Equality Officer held at paragraph 4.3 of her decision that: ‘It is well established in law that the gender ground protects transgender persons from sex discrimination, that is, discrimination arising essentially if not exclusively on the sex of the person concerned. Such an approach was approved by the European Courts of Justice in *P v S and Cornwall County Council* [1996] I.R.L.R. 347.’

The Equality Tribunal decision of *Deirdre O’Byrne –v- AIB*, DEC-S2013-015 is also of some relevance. This case concerned a complainant who is a transgender woman. The complainant had changed her name by deed poll and in accordance with the

declarations given in the deed poll, she also changed her name on other identifying documents, including her passport. Arising from her complaint against the bank, the Equality Officer held that the complainant had been discriminated against and that the respondent had failed to rebut the *prima facie* case of discriminatory treatment on the gender ground raised by the complainant when the respondent refused to allow her change the name on her bank account. The respondent was ordered to pay to the complainant €5,000 to compensate her for the effects of the discriminatory treatment.

Arguably the most pertinent precedent is that set by the Equality Tribunal in *Carroll v Gruaig Barber* (DEC-S2015-005). The complainant asserted that she was discriminated against by the respondent when she was refused a haircut due to the fact that she was a woman. The complainant claimed that she went to the respondent barber shop and asked a female barber for ‘an undercut’ (to shave the side of her head). The complainant submitted that the barber informed her that she could not provide this service to her as she was female. That is, she was not allowed to cut women’s hair and she would get into trouble if her boss saw her doing this on camera. The complainant also submitted that the respondent advised her that they could not cut her hair for insurance reasons. The respondent submitted that they operated their business as a barber shop and that this was a service provided to male customers. They submitted that their staff members were not trained or qualified as hairdressers and were specifically employed to cut men’s hair and to provide services in a men’s barber shop. The respondent further stated that the premises and business was insured as a barber shop with insurance specifically covering the cutting of men’s hair. Related thereto, the premises were leased from the owners of the shopping centre for specific use as a barber shop. The respondent submitted that the service provided by the barber shop is a service of aesthetic, cosmetic or similar nature which is provided for in Section 5(2) of the Acts (see above).

The key question before the Equality Tribunal in this case was whether or not the respondent discriminated against the complainant on grounds of gender in their refusal to provide her with a haircut. In reaching a decision, the Tribunal had to consider Sections 3(2) and (2) (a) of the Equal Status Acts. The Tribunal was satisfied that the complainant had established sufficient corroborating evidence to support a case of discrimination on the grounds of gender, which the respondent was required to

rebut. The Tribunal noted the respondent's evidence, that all its staff were trained as barbers and would not be able to cut women's hair. Furthermore, the respondent advised that under the terms of its lease it was only permitted to provide a 'barber shop service'. The respondent added that when it had bought the lease for the premises it wished to include ladies' haircuts but was not permitted to do so under the terms of the lease. As noted above, the premises had no insurance to cover women's hairdressing. The respondent submitted that the aforementioned exemption under Section 5(2) of the Acts applied.

The Tribunal was satisfied that the cumulative effect of the defences advanced by the respondent in this case both justified and explained the respondent's refusal to provide the complainant with a haircut. The Tribunal was also satisfied that the respondent had rebutted the inference of discrimination raised by the complainant, was constrained by the terms of its lease agreement and was entitled to rely on the exemption provided under Section 5(2). However, given this decision it should be noted that there is a key difference between the *Carroll v Gruaig Barber* case and the case now before the Commission. In this case the complainant is a transgender man who sought to have his hair cut at the respondent's barbers which caters to men (and not to women). Hence, it can be argued that the respondent cannot rely on the *Carroll v Gruaig Barber* case, given that the complainant in this case under consideration is a transgender man (and not a woman).

In the specifics of the case under consideration, the Adjudication Officer also notes that the relevant barber did not attend the Commission's hearing. Hence, the suggestion that the complainant revealed his transgender status on departing the premises cannot be verified (i.e. 'hearsay evidence'). When questioned as what might have led the barber to take the stance that he did, the complainant responded that he was 'not sure' as he 'was dressed as a male' and 'was trying my best to appear male'. Furthermore, in the course of the hearing, the respondent 'fully accepted' that the *Carroll v Gruaig Barber* case 'is a different situation as the comparator is a man'. On the matter of the impact of the incident on the complainant, he explained that it was upsetting and necessitated an emergency counselling session. However, no consequential link was made between the incident and the complainant's health.

When asked about redress, the complainant responded that the case ‘was not about money’. That is, it was about the principle and the precedent on behalf of those who might find themselves in a similar scenario in the future. The respondent apologised for the incident and noted that action had been taken to prevent a recurrence. Hence, on the balance of the evidence presented and taking into account the cases referred to I conclude that the complainant was treated differently, because he was transgender when he was refused a haircut by the respondent. This amounts to discrimination on the grounds of gender.

Decision:

Section 25 of the Equal Status Acts, 2000 – 2015 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under section 27 of that Act.

The claim is upheld and is deemed just and equitable having regard to all of the circumstances. The claimant is awarded €5,000.

Dated: 12th July, 2018

Workplace Relations Commission Adjudication Officer: Gerard McMahon