

# Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV (Case C-54/07)

## 1) Reference Details

Jurisdiction: European Court of Justice (Second Chamber)

Date of Decision: 10 July 2008

Case Status: Concluded

Link to full case:

[http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$docrequire=alldocs&numaff=C-54/07&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-54/07&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

## 2) Facts

The applicant, the Centre for Equal Opportunities and Opposition to Racism (*Centrum voor gelijkheid van kansen en voor racismebestrijding*), brought the case claiming that *Firma Feryn NV* (*Feryn*), a Belgium sales and installation company, applied a discriminatory recruitment policy.

The applicant acted on the basis of public statements made by the director of *Feryn* to the effect that his undertaking was looking to recruit fitters, but that it could not employ 'immigrants' because its customers were reluctant to give them access to their private residences for the period of the works.

On 26 June 2006 the President of the Labour Court of Brussels (*Voorzitter van de arbeidsrechtbank te Brussel*) dismissed the applicant's claim stating that there was no proof nor was there a presumption that a person had applied for a job and had not been employed as a result of his ethnic origin. The applicant appealed to the higher court (*Arbeidshof te Brussel*), which stayed the proceedings and referred the following six questions to the European Court of Justice:

1. Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC where an employer, after putting up a conspicuous job vacancy notice, publicly states:

'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? - I must do it the way the customer wants it done!'

2. Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies directly discriminatory selection criteria?
3. For the purpose of establishing that there is direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC, may account be taken of the recruitment of exclusively indigenous persons by an affiliated company of the employer in assessing whether that employer's recruitment policy is discriminatory?

4. What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of Directive 2004/43?
5. How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43/EC has been raised?
6. What is to be understood by an 'effective, proportionate and dissuasive' sanction, as provided for in Article 15 of Directive 2000/43/EC?

### **3) Law**

#### *EU Law*

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, including:

- Article 2(2)(a) (prohibition of direct discrimination).
- Article 3(1)(a) (scope of directive which covers 'conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions').
- Article 7 (Defence of Rights).
- Article 8(1) (Burden of Proof).
- Article 13(1) of Directive (Member States to designate a body or bodies for the promotion of equal treatment).
- Article 15 (Sanctions)

#### *National legislation*

- Article 2 of the Law of 25 February 2003 on combating discrimination and amending the Law of 15 February 1993 establishing a Centre for Equal Opportunities and Combating Racism (*Moniteur belge* of 17 March 2003, p. 12844) (prohibition of direct or indirect discrimination concerning the conditions of access to employed activity)

### **4) Legal Arguments**

#### *Acting as Agents: Ireland and the United Kingdom*

In regard to the first and second questions Ireland and the United Kingdom argued that it was not possible for there to be direct discrimination within the meaning of Directive 2000/43/EC. They argued that the Directive was inapplicable where the alleged discrimination resulted from public statements made by an employer concerning its recruitment policy and where there has been no identifiable complainant contending that he has been the victim of that discrimination.

### **5) Decision**

#### *First and Second Question*

The Court accepted that whilst it was true that, as Ireland and the United Kingdom contended, Article 2(2)(a) of Directive 2000/43/EC defines direct discrimination as a situation in which one person 'is treated' less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin, it could not be inferred from this that the lack of an identifiable complainant led to the conclusion that there is no direct discrimination within the meaning of Directive 2000/43/EC.

Recalling that recital 8 of that Directive's preamble set out that its objective was to foster conditions for a socially inclusive labour market, the Court stated:

"The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim."

Furthermore, the Court explained that Article 7 does not preclude Member States from laying down in national law the right of associations with a legitimate interest in ensuring the compliance of the Directive to bring legal or administrative proceedings.

#### *Third, Fourth and Fifth Question*

The court explained that these questions concerned the application of the rule relating to the reversal of the burden of proof laid down by Article 8 (1) of the Directive. It held that where there are established facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant to prove there has been no breach of the principle of equal treatment.

On this basis the Court stated that the answer to questions three to five must be:

"[T]hat public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43."

The Court then set out that if no breach to the principle of equal treatment was to be found, it was for the employer to establish that the actual recruitment policy did not correspond to the statements made.

#### *Sixth Question*

In respect to the sixth question the Court set out that Article 15 of Directive 2000/43/EC requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.