



THE EQUAL RIGHTS TRUST

1 Hammersmith Grove
London W6 0NB
United Kingdom

Tel.: +44 (0) 20 3178 4113
info@equalrightstrust.org
www.equalrightstrust.org

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in England. Company
number 5559173.
It is also a registered
charity, number 1113288.

London, Tuesday 15th July 2008

Discrimination without an actual victim in ECJ judgment

On 10 July 2008, the European Court of Justice handed down the judgment in the case of *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* (Case C-54/07). The judgment interprets the meaning of direct discrimination based on Article 2 (2) (a) of Council Directive 2000/43/EC of 29 June 2000 relating to the principle of equal treatment between persons irrespective of racial or ethnic origin.

The case involved an application by the Belgian national equality body, the Centre for Equal Opportunities and Opposition to Racism (*Centrum voor gelijkheid van kansen en voor racismebestrijding*), which claimed that *Feryn*, a Belgian sales and installation company, had applied a discriminatory recruitment policy, following public statements made by its director regarding the recruitment of immigrants.

The President of the Labour Court of Brussels (*Voorzitter van de arbeidsrechtbank te Brussel*) dismissed the case on the grounds 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 Labour Court of Brussels (*Arbeidshof te Brussel*), which stayed the proceedings and referred six questions to the European Court of Justice seeking clarification on issues including the concept of direct discrimination and the burden of proof within Council Directive 2000/43/EC of 29 June 2000.

In its judgment the Court set out that under Council Directive 2000/43/EC direct discrimination could be found on the basis of statements made by an employer and that it was not necessary for there to be a victim *per se*. It 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."

The Court then went on to address the issue of burden of proof under Article 8(1) of the Directive, providing 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. The Court held that statements by an employer indicating he will not employ persons of an ethnic origin create a presumption of discrimination.

The judgment clarifies the concept of direct discrimination under Article 2 (2)(a) of Council Directive 2000/43/EC.