

JUDGMENT OF THE COURT (Second Chamber)

10 July 2008\*

In Case C-54/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeidshof te Brussel (Belgium), made by decision of 24 January 2007, received at the Court on 6 February 2007, in the proceedings

**Centrum voor gelijkheid van kansen en voor racismebestrijding**

v

**Firma Feryn NV,**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk and J.-C. Bonichot (Rapporteur), Judges,

\* Language of the case: Dutch.

Advocate General: M. Poiares Maduro,  
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on  
28 November 2007,

after considering the observations submitted on behalf of:

- Centrum voor gelijkheid van kansen en voor racismebestrijding, by C. Bayart,  
advocaat,
  
- the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents,
  
- Ireland, by D. O'Hagan and P. McGarry, acting as Agents,
  
- the United Kingdom Government, by T. Harris, acting as Agent, and by T. Ward,  
barrister, and J. Eady, solicitor,
  
- the Commission of the European Communities, by M. van Beek and J. Enegren,  
acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2008,

gives the following

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).
  
- 2 The reference has been made in the course of proceedings between Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism), applicant in the main proceedings, and Firma Feryn NV ('Feryn'), defendant in the main proceedings, following the remarks of one of its directors publicly confirming that his company did not wish to recruit 'immigrants'.

## Legal context

### *Community legislation*

- 3 According to Article 1 of Directive 2000/43, 'the purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment'.

4 Under Article 2(2)(a) of that directive:

‘direct discrimination shall be taken to occur where 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.’

5 Article 3(1)(a) of the Directive states that it covers ‘conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion’. By contrast, according to Article 3(2) thereof, that directive does not cover ‘difference of treatment based on nationality’.

6 Under Article 6(1) of Directive 2000/43:

‘Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.’

7 Article 7 of that directive states that:

‘1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

...'

8 Article 8(1) of the Directive lays down, in addition, 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.'

9 Article 13(1) of Directive 2000/43 requires Member States to designate a body or bodies for the promotion of equal treatment. Under Article 13(2) of that directive:

'Member States shall ensure that the competences of these bodies include:

— without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

...'

- 10 Lastly, Article 15 of the Directive confers on Member States responsibility for determining the rules on sanctions applicable and specifies that those sanctions may comprise the payment of compensation to the victim and that they must be 'effective, proportionate and dissuasive'.

*National legislation*

- 11 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), as amended by the Law of 20 July 2006 on various provisions (*Moniteur belge* of 28 July 2006, p. 36940, 'the Law of 25 February 2003'), seeks to transpose Directive 2000/43 into Belgian law.
- 12 Article 2 of the Law of 25 February 2003 prohibits any direct or indirect discrimination concerning the conditions of access to employed activity. Article 19 of that law is intended to transpose Article 8 of Directive 2000/43 relating to the burden of proof.
- 13 The Law of 25 February 2003 also authorises criminal or civil proceedings against discrimination. The court may, pursuant to Article 19 of that Law, order cessation of the act of discrimination (Article 19(1)) and publication of its decision (Article 19(2)) or, pursuant to Article 20 of the Law, it may impose a fine.
- 14 The Belgian legislature granted Centrum voor gelijkheid van kansen en voor racismebestrijding the possibility of being a party to judicial proceedings where discrimination exists or could exist, without a prior complaint being necessary in that regard.

## **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 15 Centrum voor gelijkheid van kansen en voor racismebestrijding, which is a Belgian body designated, pursuant to Article 13 of Directive 2000/43, to promote equal treatment, applied to the Belgian labour courts for a finding that Feryn, which specialises in the sale and installation of up-and-over and sectional doors, applied a discriminatory recruitment policy.
- 16 Centrum voor gelijkheid van kansen en voor racismebestrijding is acting on the basis of the public statements of 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.
- 17 By order of 26 June 2006, the Voorzitter van de arbeidsrechtbank te Brussel (the President of the Labour Court, Brussels) dismissed Centrum voor gelijkheid van kansen en voor racismebestrijding’s application, stating, in particular, 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.
- 18 Against that background, the Arbeidshof te Brussel (Labour Court, Brussels), to which Centrum voor gelijkheid van kansen en voor racismebestrijding had appealed, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 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 fitters 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? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?
  - (a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of [Directive 2000/43]?
  
  - (b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the



facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: ‘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!’[?]

- (c) Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?
  
- (d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?
  
- (e) Is one fact sufficient in order to raise a presumption of discrimination?
  
- (f) Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?
  
- (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 has been raised? Can a presumption of

discrimination within the meaning of Article 8(1) of Directive 2000/43 ... be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?

- (6) What is to be understood by an ‘effective, proportionate and dissuasive’ sanction, as provided for in Article 15 of Directive 2000/43 ...? Having regard to the facts in the main proceedings, does the abovementioned requirement of Article 15 of Directive 2000/43 permit the national court merely to declare that there has been direct discrimination? Or does it, on the contrary, also require the national court to grant a prohibitory injunction, as provided for in national law? Having regard to the facts in the main proceedings, to what extent is the national court further required to order the publication of the forthcoming judgment as an effective, proportionate and dissuasive sanction?’

### **The questions referred for a preliminary ruling**

- <sup>19</sup> It should be noted, at the outset, that Article 234 EC does not empower the Court to apply rules of Community law to a particular case, but only to rule on the interpretation of the EC Treaty and of acts adopted by European Community institutions (see, *inter alia*, Case 100/63 *van der Veen* [1964] ECR 565, 572, and Case C-203/99 *Veedfald* [2001] ECR I-3569, paragraph 31). The Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of one or other of its provisions (Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 5, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 22).

20 The national court has requested the Court to interpret the provisions of Directive 2000/43 for the purpose, essentially, of assessing the scope of the concept of direct discrimination in the light of the public statements made by an employer in the course of a recruitment procedure (first and second questions), the conditions in which the rule of the reversal of the burden of proof laid down in that directive can be applied (third to fifth questions) and what penalties may be considered appropriate in a case such as that in the main proceedings (sixth question).

*The first and second questions*

21 With regard to the first and second questions, Ireland and the United Kingdom of Great Britain and Northern Ireland maintain that it is not possible for there to be direct discrimination within the meaning of Directive 2000/43, so that the directive is inapplicable where the alleged discrimination results from public statements made by an employer concerning its recruitment policy but there is no identifiable complainant contending that he has been the victim of that discrimination.

22 It is true that, as those two Member States contend, Article 2(2) of Directive 2000/43 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. Likewise, Article 7 of that directive requires Member States to ensure that judicial procedures are available to 'all persons who consider themselves wronged by failure to apply the principle of equal treatment to them' and to public interest bodies bringing judicial proceedings 'on behalf or in support of the complainant'.

23 Nevertheless, it cannot be inferred from this that the lack of an identifiable complainant leads to the conclusion that there is no direct discrimination within the meaning of Directive 2000/43. The aim of that directive, as stated in recital 8 of its preamble, is 'to foster conditions for a socially inclusive labour market'. For that

purpose, Article 3(1)(a) states that the directive covers, inter alia, selection criteria and recruitment conditions.

- 24 The objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer.
- 25 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.
- 26 The question of what constitutes direct discrimination within the meaning of Directive 2000/43 must be distinguished from that of the legal procedures provided for in Article 7 of that directive for a finding of failure to comply with the principle of equal treatment and the imposition of sanctions in that regard. Those legal procedures must, in accordance with the provisions of that article, be available to persons who consider that they have suffered discrimination. However, the requirements of Article 7 of Directive 2000/43 are, as stated in Article 6 thereof, only minimum requirements and the Directive does not preclude Member States from introducing or maintaining provisions which are more favourable to the protection of the principle of equal treatment.
- 27 Consequently, Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific

complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility.

28 In the light of the foregoing, the answer to the first and second questions must be that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

*The third to fifth questions*

29 The third to fifth questions concern the application of the rule of the reversal of the burden of proof laid down in Article 8(1) of Directive 2000/43 to a situation in which the existence of a discriminatory recruitment policy is alleged by reference to remarks made publicly by an employer concerning its recruitment policy.

30 Article 8 of Directive 2000/43 states in that regard that, where there are facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant to prove that there has been no breach of the principle of equal treatment. The precondition of the obligation to adduce evidence in rebuttal which thus arises for the alleged perpetrator of the discrimination is a simple finding that a presumption of discrimination has arisen on the basis of established facts.

31 Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy.

32 It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements.

33 It is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.

34 Consequently, the answer to the third to fifth questions must be that 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. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.

### *The sixth question*

35 The sixth question asks, essentially, what sanctions may be considered to be appropriate for employment discrimination established on the basis of the employer's public statements.

36 Article 15 of Directive 2000/43 confers on Member States responsibility for determining the rules on sanctions for breaches of national provisions adopted pursuant to that directive. Article 15 specifies that those sanctions must be effective, propor-

tionate and dissuasive and that they may comprise the payment of compensation to the victim.

- 37 Article 15 of Directive 2000/43 thus imposes on Member States the obligation to introduce into their national legal systems measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts in order that judicial protection will be real and effective. Directive 2000/43 does not, however, prescribe a specific sanction, but leaves Member States free to choose between the different solutions suitable for achieving its objective.
- 38 In a case such as that referred by the national court, where there is no direct victim of discrimination but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the sanctions which Article 15 of Directive 2000/43 requires to be laid down in national law must also be effective, proportionate and dissuasive.
- 39 If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.
- 40 The answer to the sixth question must therefore be that Article 15 of Directive 2000/43 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.

## Costs

- <sup>41</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

- 1. The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.**
- 2. 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. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those**



**statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.**

- 3. Article 15 of Directive 2000/43 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.**

[Signatures]