The FERYN case

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Intro

I'm going to explain why this case is important. It's not only important because of the decision of the ECJ, but also for the Equality Body I'm working for and the influence of this case on our daily job.

Who is Feryn?

Firma Feryn is not any company; it is *a very well known* firm in the Flemish part of Belgium. Well known for its sectional doors, as everyone knows since the ECJ decision, but certainly for its annual bicycle race, song festival, participation in Paris-Dakar and so on. When on a sunny Sunday you're riding in Flanders country you'll see dozens of cyclists with a Feryn T- shirt…

Consequence:

A very tough opponent, who never gives up and whose barrister is ready to look for every small mistake in procedures your Equality Body could make. Thanks to him and his tenacity, we learned a lot and even improved our internal procedures and the legislation the Centre is ruled by.

Why choosing a procedure rather than a mediation?

April 28th 2005.

Feryn is a firm specialized in sale and installation of up-and-over and sectional doors. It was seeking to recruit fitters to install doors at its customers' houses. This recruitment didn't seem easy at all and therefore the company placed a large 'vacancies' sign alongside a highway between Antwerp and Brussels. It's one of the most travelled roads in Belgium.

A journalist sees the sign and is astonished: No fitters at all? So he phoned with one of the managers and the answer was: Yes, we have applicants, but our customers don't want them. I cannot recruit people of Moroccan origin, customers don't want them to come into their home.

Several newspapers and TV reported on this item. In several instances and in different interviews the firm's spokesperson reiterates this opinion.

Consequence:

All the journalists are waiting for your reaction. If it's a moderate one, for example mediation, NGO's will be very critical on your Equality Body; if it's a radical one, the general public will not understand. As an Equality Body your image is important. If you wish to raise your credibility in the eyes of victims of all kinds of different discrimination grounds, you have to be very careful and cautious with your announcements in the media. They will be used during litigation.

April 29th, 2005.

The Centre for equal opportunities and opposition to racism invited the firm for a constructive meeting, if possible with the presence of an organization defending the interests of middle average-sized firms (UNIZO).

Result of:

Before the implementation of the EU directives, Belgium only disposed of a criminal law fighting against racism. So we were used to make a complaint and then let the barrister do the work. Our new director didn't believe, and still doesn't, that condemning people is the only way to combat racism. So, mediation was a new challenge.

May 27th, 2005.

Nearly a month later the meeting took place. The director of the Centre, a manager of the firm and UNIZO are present. The location of the meeting was the office of the firm's counselor. After the meeting a shared press release was written. It contains the following message:

"Mister Feryn has confirmed, during our conversation, that in the future no suitable candidate will be rejected because of his origin. He has taken some actions and will assure equal opportunities for every candidate. The firm will involve specialized organizations for its human resources management and will participate on special programs developed by UNIZO. Mister Feryn and the Director of the Centre made some effective appointments to implement all these propositions."

Mister Feryn will also involve the VDAB, a Flemish organization which helps jobseekers to obtain a job, by informing them of job opportunities within his firm.

December 2005.

1. The VDAB was never informed about job opportunities.
2. The diversity plan of the firm was rejected by the Social Economical Board of the region. This board consists of representatives of both employees and firms. The training was refused.

January 27th, 2006.

The Centre requests information and tries to start a new mediation.

February 1st, 2006.

Feryn answers that he made up his mind: he will not introduce a new demand for an approval of his diversity plan.

It was clear that mediation was no longer an option. It was also clear that the Centre had to undertake action. But what kind of action would have the best result?

Legally the Centre had two possibilities:

- A procedure based on criminal law (July 30th, 1981) because an employer stated publicly his intention to discriminate. But a similar disposition, in the Law against all kinds of discrimination of February 25th, 2003, was cancelled by the Constitutional Court. So it was rather risky to initiate a file on this ground, because judge would not be persuaded to apply a disposition that no longer exists in a similar law.
- A procedure based on civil law, as the possibility was introduced by the Law of February 25th, 2003. A new procedure that was not applied yet and was introduced to Belgian law to transpose the European Directive 2000/78.

A difficult choice…

As mentioned above we were used to the criminal procedure and had nearly no experience with the civil one. The few we had were not good at all. The year before we choose a criminal procedure against a local politician who made public his intention to discriminate: no people of foreign origin should be allowed to attend some parks because their youngsters caused troubles. And to deny them entrance it's not difficult because you recognize them easily… He was condemned last month. A similar case but now we used a different strategy, essentially to prove the efficiency of the directives as transposed in Belgium law.

March 31st, 2006.

The Centre brought proceedings against Feryn before the President of the Labour Tribunal.
Not for not respecting the promises made concerning trainings, information about job opportunities at VDAB or diversity plan: these are issues belonging to the competencies of the Flemish Region and the Centre is a federal institution. So we can only start procedure based on federal law.
And so we did.

Important!

This shows how important it is for an Equality Body to go to Court or, at least to help organizations doing so. Without a victim and by lack of an organization, this case would never be submitted to the Court.

June 26th, 2006.

The Centre was claiming, inter alia, that the court should declare that Feryn had infringed the Law Against Discrimination and should order Feryn to end its discriminatory recruitment policy. However, the President of the Tribunal held that the public statements in question did not constitute **acts** of discrimination; rather, they were merely evidence of potential discrimination, insofar as they indicated that individuals from a certain ethnic origin would not be recruited by Feryn in the event they should decide to apply. The Centre had neither claimed nor demonstrated that Feryn had ever actually turned down a job application on the grounds of the applicant's ethnic origin. For those reasons, the forms of order sought by Centre were denied by order of 26 June 2006. The CGKR brought an appeal against that order before the Labor Court of Brussels, which has made the present reference to the European Court of Justice for a preliminary ruling.

January 24th, 2007.

The Labor Court (Arbeidshof) of Brussels asks a number of very precise questions related to the Directive and to the specific circumstances that are at issue in the main proceedings. These questions essentially concern the concept of direct discrimination (first and second questions), the burden of proof (third, fourth and fifth questions) and the issue of appropriate solutions (sixth question).

A suggestion…

You can call this "strategic litigation". It was completely new for us, but it opened our eyes and made us understand that in every file where an important doubt about interpretation exists we should try to formulate questions about it. If you see the number of questions concerning age discrimination and as I see the various interpretations of our own national courts concerning discrimination matters, sometimes I can really name them mistakes, we must think on the possibility of obtaining clarification from the ECJ court. It must be a kind of habit in our daily work and please don't let the decisions of ECJ court be just used by some specialized lawyers. In discrimination problems the Equality Bodies are the real specialists.

Conclusion of the Advocate General in Luxemburg on 12 March 2008:

1) A public statement made by an employer in the context of a recruitment fair, to the effect that applications from people of a certain ethnic origin will be turned down, constitutes 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 individuals irrespective of racial or ethnic origin.

Because:

- the directive includes selection criteria and recruitment conditions;

- the Centre may start a legal action even if it's not acting on behalf of a specific complainant , such as authorized by Member State law;

- the scope of the Directive is not limited to cases in which there are identifiable victim-complainants otherwise the effectiveness of the principle of equal treatment in the employment sector would be undermined; the statement has an effect that is anything but hypothetical.

2) Once a prima facie case of discrimination based on racial or ethnic origin has been established, it is for the respondent to prove that the principle of equal treatment has not been infringed.

3) When a national court finds that there has been a breach of the principle of equal treatment, it must grant decisions that are effective, proportionate and dissuasive.

Meanwhile...

Feryn had introduced a procedure against the decision of Labor Court at the Court of Cassation of Belgium. This Court can decide of a cancellation when the interpretation of the law was not correct or when some formalities were not respected.

The Court of Cassation rejected his petition on June 16th 2008.

On 10 July 2008 the Court 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 people irrespective of racial or ethnic origin. Such statements are likely to strongly dissuade certain candidates from submitting their application and, accordingly, to hinder their access to the labor market.

2. Public statements by which an employer declares that under its recruitment policy he 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 actual recruitment practice in place does not correspond to those statements. It is the national court's task 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 when there is no identifiable victim.

Three types of questions because…

The first response is innovating, but the other two are, in our opinion, really necessary to confirm the mechanism created by the directives in our national jurisprudential arsenal.

Even after this decision we can see that judges are struggling with those principles. It is the task of every Equality Body to search contact with the instances that can bring them to trainings designed for judges. It will take time, as we saw in Belgium it took about 15 years to introduce properly criminal legislation to combat racism and to create a jurisprudential background.

And now…

On European level the case is closed. On Belgian level nothing is finished yet. We are still waiting for Labor Court's decision as the, case came before Court last week. On national level, until a few months ago procedure was only focused on formalities tackled by the Centre. The case can really start now!