



NEWS REPORT

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| Date: | 2 November 2010 |
| Expert: | Emmanuelle Bribosia |
| Title: | The former Prime Minister and Equal Opportunity Federal Minister convicted of negligence for failure to organise situation testing. |
| Country: | Belgium |
| <u>Context</u> | |
| Issue at stake: | The former Prime Minister, M. Guy Verhofstadt, and the former Equal Opportunity Minister, M/ Christian Dupont, were convicted of negligence, on appeal, for failure to implement Belgian anti-discrimination law regarding situation testing. |
| Ground of discrimination: | All grounds. |
| Source: | Ruling of the Court of Appeal (Brussels) October 2010 |
| Field: | All fields |
| Legislative provisions: | Former Federal Anti-discrimination act of 25 February 2003. |

Content

Case: Abdel Ani Sarrokh, a man of Moroccan origin living in Ghent, was refused entry to a Ghent nightclub three times, whereas his white-skinned girlfriend could enter the nightclub without any problem. In this respect, the former Federal Anti-discrimination Act of 25 February 2003 provided for situation testing as means for proving the existence of discrimination. However, the Belgian Government had never adopted the implementing regulation aiming at defining the conditions of admissibility for situation tests in the context of discrimination actions. Meanwhile situation testing was removed from the new anti-discrimination act of 10 May 2007¹, but

¹ The words “situation testing” became so problematical that they were deleted in the 2007 Acts replacing the 2003 Federal Anti-discrimination Act. As examples of facts leading to a presumption of direct discrimination, the new statutes list (1) factors revealing a certain recurrence of unequal treatment, among which, repeated isolated complaints to the equality body and (2) factors revealing that the situation of the alleged victim is comparable to that of the individual of reference (Article 28 of the General Anti-discrimination Federal Act; Article 29 of the Racial Equality Federal Act. See also Article 33 of the Gender



between 2003 and 2007, an executive regulation implementing situation test was required and should nonetheless have been adopted.

Equality Federal Act). These so-called “recurrence tests” (*test de récurrence*) and “comparability test” (*test de comparabilité*) are not easy to grasp. They seem to be the two sides of the coin of the situation test. What is sure is that, under current law, situation testing remains a legitimate way to reverse the burden of proof, whatever the ground of discrimination concerned, and as long as it is carried out with proper methodology and does not amount to provocation.

Decision of the Court: Three years ago, a Civil Court in Brussels acquitted the Prime Minister for failure to execute the law and convicted the Equal Opportunity Minister to pay one symbolic Euro for damages. Nevertheless, on appeal before a civil chamber of the Brussels' Court of Appeal, the former Prime Minister and the former Federal Equal Opportunity Minister were both convicted to pay 3.000 Euros in damages to the plaintiff. Furthermore, the Court of Appeal of Brussels also sentenced the Belgian State to bear 3.074 Euros as legal costs and 1.300 Euros as procedural compensation (indemnity). The Appeal Court held that the Federal Government should have adopted executive regulation to recognise situation testing in Belgium. Failing in doing so, the Government infringed Article 108 of the Constitution which provides for Government's enforcement powers. According to the plaintiff's lawyer, the fact that the Prime Minister has been convicted as Head of the Government sets up a precedent.