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NEWS REPORT

Country:	The Netherlands
Title:	Employer makes a forbidden distinction by rejecting an applicant with a foreign-sounding name, while subsequently inviting a (similar) applicant with a Dutch-sounding name
Date:	12 June 2015
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<u>Context</u>	
Issue at stake:	Discriminatory rejection of job application.
Ground of discrimination:	Race/ethnic origin
Source:	National equality body
Field:	Employment
Applicable law:	General Equal Treatment Act, Articles 5 and 10

Content

Case: The Dutch equality body Netherlands Institute for Human Rights (NIHR) has recently rendered an interesting decision in a case concerning a job applicant who held that he was refused for a job because of his foreign-sounding name. After this person had applied for a job as a dishwasher, he received a reply that all positions were filled. One day later, a friend with similar work experience and a Dutch-sounding name applied at the same restaurant, and he by contrast did receive a reply inviting him for an interview. The rejected applicant issued a complaint of discrimination at the local anti-discrimination bureau, and this bureau subsequently sent a letter to the employer informing him of the complaint. The employer's outright denial that a discriminatory distinction on the ground of race or ethnic origin had been made led the anti-discrimination bureau to bring the case to the NIHR.

Decision of the equality body: The NIHR, in the decision, put a heavy burden on the employer to prove that no forbidden distinction was made. The fact that a distinction was made is derived *prima facie* from the circumstance that a second applicant, with a Dutch-sounding name, was invited for an interview, and this means that the employer has to rebut the presumption of a distinction. The employer thereto has to prove persuasively that no distinction was made – and previous case-law of the NIHR makes clear that the body is not easily persuaded thereof.

In order to meet his burden of proof, the employer *inter alia* argued that applications are not systematically registered, and that the first applicant was just unlucky, because exactly the night between his application and the application of his friend, a dishwasher (who then worked for the employer) announced to quit his job. This argument was rejected by the NIHR, because emails showed that the employer had already received a termination notice from the previous employee two weeks earlier.

A second argument, purporting that the current workforce of the employer, which for almost one fourth consists of employees with a foreign-sounding name, proves that no distinction on race or ethnic origin is made is also rejected. The NIHR holds that this

overall, general situation is not relevant for this individual case – in other words, employers cannot rely on evidence proving that *previously* no distinction was made to show that in a new situation no distinction is made. The NIHR, by rejecting all arguments brought forward by the employer, finds that a forbidden distinction was made.

Interestingly, the NIHR also discusses the obligation of the employer to investigate complaints of discrimination. The positive duty to comply with equal treatment legislation, according to the NIHR, also implies that employers must carefully consider such complaints (as the body previously also held in Decision 2013-85). In the current case, the employer, by rejecting the complaint without proper investigation, has not met this obligation, and the NIHR therefore finds that a forbidden distinction was also made in the way the complaint has been handled.

Key points of analysis: This case is interesting for two reasons. Firstly, it makes clear that the NIHR, as regards the *negative* obligation not to make a distinction based on race or ethnic origin, puts a heavy burden on the employer to prove that no such distinction was made. Secondly, the case reaffirms that the *positive* obligation on employers to take measures ensuring compliance with the equal treatment legislation also includes the duty to properly investigate complaints purporting discrimination.

Internet link source: NIHR-decision 2015-44 may be retrieved via <https://mensenrechten.nl/publicaties/oordelen/2015-44/detail>