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1<sup>st</sup> Chamber

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## **LABOUR COURT OF BRUSSELS**

### **JUDGMENT**

EXTRAORDINARY PUBLIC HEARING HELD ON 28 AUGUST 2009,

Summary proceedings

After hearing both parties

Definitive

In the case of

**CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR  
RACISMEBESTRIJDING** (Centre for Equal Opportunities and Opposition to  
Racism), public institution, with registered seat at Koningsstraat, 138 B, 1000  
Brussels;

Appellant, defendant in the cross-appeal,

represented by C. Bayart and C. Deiteren, lawyers in Antwerp;

Versus:

N.V. Firma FERYN, with registered seat at Mechelseweg 87, 1880 Kappelle-op-den  
Bos, KBO no.0412.899.603;

Defendant, appellant in the cross-appeal,

represented by J. Dumon and D. Lindemans, lawyers in Brussels;

Following deliberations, the Labour Court in Brussels delivered the following ruling:

After considering the documents in the judicial report, and in particular:

- the ruling in summary proceedings delivered after hearing both parties by the President of the Labour Court, Brussels on 26 June 2006;
- the petition on appeal received by the clerk of the court of the Labour Court in Brussels on 27 July 2007;
- the concluding statements of the parties and the defence statements of the defendant;
- the authentic copy of the ruling of the Labour Court in Brussels on 24 January 2007;
- the statements of the parties following the interim ruling of the Labour Court in Brussels on 24 January 2007;
- the authentic copy of the ruling of the Court of Cassation on 16 June 2008;
- the authentic copy of the ruling of the European Court of Justice on 10 July 2008;
- the written recommendation lodged by the Public Prosecutor with the clerk of the court of the Labour Court in Brussels on 10 July 2009;
- the statements of reply of the parties to this written recommendation, received by the clerk of the court on 3 August 2009;
- the documents submitted by the parties;

After hearing the legal grounds and arguments of the parties at the public hearing held on 22 June 2009, after which the discussions were closed and the court deliberated on the case.

## **1. THE FACTS AND PROCEEDINGS.**

In a ruling delivered by the Labour Court of Brussels on 24 January 2007 in summary proceedings and after hearing both parties, the appeal was declared admissible, the cross-appeal was declared admissible but unfounded, and a number of preliminary questions were put to the European Court of Justice.

The court requested the ECJ 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 the 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 ECJ replied to this in its ruling on 10 July 2008 as follows:

1. The fact that an employer publicly declares he 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 Article 2(2)(a) of Directive 2000/43.
2. Public statements by which an employer lets it be known that 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. It is, thus, for that employer to adduce evidence that he has not breached the principle of equal treatment, which it can do by showing that the actual recruitment practice of the undertaking 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 he has not breached the principle of equal treatment.
3. Where there is no direct victim of discrimination, those sanctions may, where necessary, include a finding of discrimination by the court in conjunction with an adequate level of publicity, the costs of which are to be borne by the defendant. They may also take the form of a prohibitory injunction ordering the employer to cease the discriminatory practices, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.

The Court of Cassation, in its ruling on 16 June 2008, rejected the appeal in cassation lodged by the Feryn company. The appeal judges were able to rule in accordance with the law on the basis of the determinations in the interim ruling that the internal rules of the Centrum voor Gelijkheid van Kansen (hereinafter abbreviated to 'the Centre') do not concern the generality of citizens given that they do not create obligations for third parties, but are only intended to ensure the proper and effective functioning of the internal management. For this reason, the internal rules do not need to be published in their entirety in the Belgian Official Gazette.

**Public statements made by Pascal Feryn, director of N.V. Firma Feryn.**

On the basis of Article 870 Judicial Code, each party is obliged to demonstrate the facts in support of its contentions (and which are contested by the other party).

Proof can be provided by all legal means, by serious, specific and consistent presumptions.

Factual presumptions are consequences a court or tribunal draws from a known fact to an unknown fact under the conditions laid down by Articles 1349 to 1353 of the Civil Code. The court has the final decision on the existence of facts on which the court bases its reasoning and the consequences it infers from these as regards presumptions are left to the court's wisdom (see H. Buysens in Rigaux, *Actuele problemen van het arbeidsrecht* [Current problems in labour law] 4, 230).

The proof that the public statements made by Feryn in connection with its recruitment

policy for fitters, that it would not recruit any employees of a certain ethnic or racial origin because customers do not want a foreign fitter on their premises, is provided by the following:

- Feryn does not deny that, following a fruitless media recruitment campaign which did not provide a single potential fitter, a large notice was placed by the side of the A12 motorway with the announcement: *'workers needed'* (conclusion following interim ruling, document 46, procedural documents, p.4, point 3),
- Feryn does not deny that, following the conversation with the journalist from De Standaard newspaper, there were discussions about the recruitment of fitters at Feryn and 'filling vacancies with foreigners', to which Pascal Feryn made the comment that *this* (filling vacancies with foreigners) would not solve the problem because some of Feryn's customers made it known when they ordered a door that they did not want any 'foreign installers' on their premises (see Feryn's summary conclusions following interim ruling, p.4, point 4). The court of appeal does *not* take into consideration that which Feryn in fact disputes in its concluding statements, namely that 20 Moroccans applied and that they were all rejected, and that they were honestly told why there were not welcome. Feryn also acknowledges in its statements that the Feryn/Novoferm company, which is the sister company of NV Feryn and also installs sectional doors, which is registered at the same address *'would therefore find itself in difficulties if it were to send a foreign employee to a site'* (see same summary conclusions, p.5 point 4). These facts also appear from the article in the De Standaard, which Feryn did not deny, or only denied much later.
- On the same day as the publication of the article in De Standaard, there was an interview in *'Terzake'* with Mr Pascal Feryn on the VRT [TV channel] where he stated in reply to the following question: *'You do not treat people from foreign and indigenous backgrounds in the same way as an employer. So you are actually a bit racist?' 'I have to comply with my customers' demands. 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'm going to send those people anyway', then you will say 'I don't want that door'. Then I'm putting myself out of business. We must meet the customers' demands. 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 have to do it the way the customer wants it done!'*
- In a joint press release on 27 May 2005, Feryn acknowledges that the cited statements were rather unfortunate, to say the least. Feryn confirmed in the same press release that **for future vacancies** he did not want to exclude any qualified candidates on the grounds of their origin. From this one can implicitly infer that things were different in the past and that the statements do indeed relate to the recruitment policy of the Feryn/Novoferm company. Thus Feryn does not deny the scope of the statements that he made in the press release and only states: *'that it was not my intention to make negative statements about a population group because of their origin'*.

- Pascal Feryn does not deny the content and scope of the statements he made, be it those reproduced in the printed press (which he could have done on the same day immediately after the interview with '*Terzake*'), or the statements presented in '*Terzake*' (which he could have done in the subsequent days). Feryn also altered its press release on 27 May 2005 and consequently Pascal Feryn could have withdrawn his statements here as well, which he did not do.
- Feryn accepted during the hearing that the reply given during '*Terzake*' reproduced above did indeed follow on from the question asked above.

This set of facts taken together, which are sufficiently serious and consistent with each other and convincing, constitutes proof that the Feryn/Novoferm company in April 2005 in connection with its recruitment policy for fitters declared in public that it would not recruit any employees of a certain ethnic or racial origin, because its customers did not want a foreign fitter on their premises.

Such statements have been proven and constitute an infringement of the laws at the time, namely the Law of 25 February 2003 combating discrimination and the Law of 30 July 1981 punishing certain actions inspired by racism and xenophobia, as amended by the Law of 10 May 2007.

The ECJ in its ruling on 10 July 2008, point 28 of the ruling, replied very clearly that 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 Article 2(2)(a) of Directive 2000/43 EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Consequently, the aforementioned public statements made by Feryn constitute direct discrimination in respect of recruitment on the grounds of race or ethnic origin.

**Do the events of April 2005 and afterwards constitute a presumption of continued discrimination in the recruitment policy of Feryn/Novoferm?**

The ECJ in its ruling on 10 July 2008 confirmed that public statements (such as the statement by Pascal Feryn during the broadcast of '*Terzake*' in April 2005) are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory. It is, thus, for that employer to adduce evidence, among other things, that the actual recruitment practice of the undertaking does not correspond to those statements.

The interpretation by the ECJ of the Race Directive therefore applies both to the identical principle of the distribution of the burden of proof included in the earlier anti-discrimination law and that included in the later racism law.

The events of April and after April 2005 (such as Feryn's lack of a constructive attitude with regard to the entry-into-work diversity plan and towards the VDAB [the

Flemish Public Employment Service]) are sufficient for a presumption of a directly discriminatory recruitment policy after April 2005.

It is for the Labour Court 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 recruitment policy of the two sister companies is correctly viewed as a single whole for the provision of contrary evidence, given that the two undertakings collaborate in full, their activities are comparable, they are registered at the same address, they are owned by the same persons, and Mr Pascal Feryn is the director of both NV Feryn and of NV Novoferm. The defendants' concluding statements on appeal point in the same direction in the recital of the facts.

**Has Feryn provided a rebuttal of the presumption of direct discrimination, namely by showing that the undertaking's actual recruitment practice does not correspond to those statements?**

Feryn first states that the principle of the division of the burden of proof breaches the principle of equality in the Constitution, as well as the right to a fair hearing and the presumption of innocence when the Centre relies on this.

As the Advocate General J.J. André has stated in his written opinion (p.9), it is possible to establish from legal consideration B 83 in the ruling of the Constitutional Court of 6 October 2004 (ruling no.157/2004) that no distinction is made concerning the alleged breach of the equality principle with regard to the 'reversal' of the burden of proof laid down in the Law of 25 February 2003, depending on whether the victim of the discrimination is the individual himself or the groupings envisaged by the law (such as the Centre) which adduce facts that could lead one to presume the existence of discrimination. Thus the Constitutional Court, in its aforementioned ruling, regularly talks of 'the complainant', without making any distinction.

The Advocate-General also added the following: *'the weak position of the party which invokes discrimination is indeed also similarly evident where this concerns someone who is the direct victim of discrimination or one of the groupings referred to in Article 31 of the Law of 25 February 2003 or Article 20 of the Law of 10 May 2007'*.

Nor is it possible to deduce the distinction depending on whether the victim is an individual or a Centre appointed and established by the law for that purpose from the ruling by the Constitutional Court of 12 February 2009 (ruling no.17/2009), or from legal consideration B 93.3 in this ruling. Feryn does not provide further details for its argument why this should implicitly be the case in its statements, so that the Court cannot give Feryn a detailed answer to this question. Thus the Constitutional Court directly considers the individual victim and the Centre to be fully equivalent in its legal consideration B 93.4 when assessing the evidential value of acts of discrimination.

The preliminary questions are not relevant. The Constitutional Court already issued a negative opinion in 2004 and 2009 and there is no inequality and no manifest unreasonableness involved, and fundamental rights have not been breached.

Moreover the Centre has an even more important task when it comes to lodging complaints of discrimination against a category of employees, such as the recruitment of foreign fitters by Feryn/Novoferm, given that this is socially far more important and relevant.

The ECJ in its ruling on 10 July 2008 made it very clear that it is up to the national court 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 contrary evidence can therefore be provided by means of all possible facts and elements. Feryn also incorrectly argues that proof can only be provided by recruiting superfluous foreign employees or dismissing other employees. The preliminary questions and the comparison with the category of employers who are compelled to recruit certain workers are not relevant.

The Centre also correctly argues that the contrary evidence could be provided in numerous ways, in particular by demonstrating 1. that the recruitment procedure has been applied thoroughly and effectively and that this corrective action is also monitored in practice; 2. that external opinions have been obtained and implemented in relation to adjustments to the recruitment policy; 3. that employees are involved in the recruitment process and receive training and instruction (where according to the Labour Court the management should also be involved in this training, given that they are an example for the undertaking); 4. that the company has a diversity policy; 5. that recruitment and selection channels are used, as a result of which all candidates, regardless of their race or ethnic origin, have the opportunity to apply; 6. that effective transparency and objective selection criteria and selection procedures are used.

Feryn claims that it is a SME of limited size, where there is no continual recruitment of workers. A SME is required to observe the principle of equal treatment between indigenous and foreign candidates even if it recruits fewer workers.

Every employer, large or small, which respects itself and wishes to be respected, also has a social role to play, alongside the pure pursuit of profit, and social integration is achieved by means of work and employment provision for men and women, whether they are indigenous or foreign.

As its second rebuttal, Feryn states that it has taken a constructive attitude as regards the entry-into-work diversity plan.

This is refuted by the documents in the bundle. At the outset, Feryn submitted an almost blank entry-into-work diversity proposal. Subsequently Feryn still did not complete the plan in detail, even after having made corrections to it (for this see the letter from Feryn 5 October 2005). Thus points 2.1.3 and 2.1.4 do not provide for any entry/throughput of foreign employees. Point 2.15 is also vague. Feryn states in the entry-into-work diversity plan that it objects to the dissemination of the plan to projects of social partners, disadvantaged groups' own organisations, and the VDAB's Jobcoaches (see below). Feryn has still not given the names of the top management (although the Resoc consultant made it clear that two people from the management also have to follow the training course, because *'how can you motivate employees if you don't take part yourself?'*) Pascal Feryn is nowhere to be seen on this list. Nor has

Feryn made any commitment regarding who is going to follow the training (see letter from Feryn dated 5 October 2005: '*we will look at the situation shortly before the training course to determine who is going to go on the training course*'). Feryn reduced the proposal from having three groups of approximately ten people to just ten people, and Feryn considered the costs to be too expensive and that the supervisor was not objective, but did not make any counter-proposal and suddenly ended any further communication or consultation (see letter from Feryn dated 7 November 2005).

Feryn claims (concluding statements on appeal p.22) that the Feryn company has not hired anyone since 2001. As a result they cannot argue in rebuttal that they have in the meanwhile recruited foreign members of staff. Also in the case of Novoferm, the company has only recruited five employees since April 2005, including two foreign employees.

This assertion was immediately disproved by the statement made by Pascal Feryn in the article that appeared in De Morgen [newspaper] in December 2005, in which he states that the company had continued to look for fitters after the events of April 2005 for a period of eight months.

This assertion was also immediately disproved by the findings of the VDAB on 12 January 2006 whereby Feryn's website states that Feryn is still hiring fitters (Feryn then informed the VDAB that the vacancy had long since been filled and that it would be removed from Feryn's site).

As a third element in its rebuttal, to show that it does not discriminate against foreign workers when hiring fitters, Feryn cites an article in De Morgen in which Pascal Feryn states that foreign fitters are welcome. This unilateral declaration of intent is not sufficient to constitute a rebuttal, namely that Feryn's actual recruitment practice does not correspond to its public statements, that is '*foreign fitters are not welcome because our customers don't want them*'.

There is, however, more to this, as shown by the documents.

Feryn gave a unilateral undertaking in a letter from its legal advisor dated 4 May 2005 that it '*would cooperate with the VDAB with regard to future vacancies*'. The press release implicitly states this: '*The Feryn company will allow itself to be guided by specialised agencies in this regard*'. Sometimes Feryn states that all vacancies have been filled, in order to placate the media. In 2005 the VDAB did not receive a single vacancy from Feryn (document 16, Centre); then the VDAB noticed again in January 2006 that Feryn was looking for fitters on its website. When the VDAB raised this matter with Pascal Feryn, then the vacancy was suddenly filled and was removed from the website. A few days after the VDAB sent the letter to Feryn on 13 March 2006 (which is not denied by Feryn) the latter announced a vacancy on 16 March 2006.

The list with recruited employees, filed by Feryn itself in the proceedings, for the year 2005-early 2006 (concluding statements lodged by Feryn and inventory document 8 procedural documents), shows that A.N. was hired as a fitter on 17 May 2005; A.S. on 14 June 2005; D.B. on 21 February 2006; P.J. and D.M.R. on 17 May 2005; and K. as

a blue-collar worker on 3 October 2005; S.J. on 10 April 2006 and Van I. and Van K. on 30 May 2005 and 3 October 2005 respectively.

In 2009 Feryn no longer made any distinction between blue-collar workers and fitters in the personnel list which it drew up and updated, but there are nevertheless five new 'blue-collar workers' who have been hired on the list.

The two foreign employees who were hired after April 2005, namely the cleaning woman of Tunisian origin and the paintshop worker of Rwandan origin, are not relevant to assessing discrimination against a category of blue-collar workers/fitters, and cannot constitute evidence rebutting the presumption of discrimination when recruiting foreign fitters.

There remains only one essential assertion by Feryn for which it provides no proof either. Feryn does not prove that its customers do not want any foreign fitters. Is Feryn not underestimating customers, who are also aware that work is the best way to integrate everybody into society?

It is clear from this set of arguments that Feryn has not proven that its recruitment policy was modified and that at this time foreign fitters have an equal chance when applying for available positions.

It is precisely for these reasons – as stated above – that it is necessary to order Feryn to abandon its discriminatory recruitment policy as regards fitters. This injunction does not restrict Feryn's contractual freedom, given that the equal opportunities that are imposed during recruitment only concern available positions. Feryn is required to handle every open vacancy without making a distinction regarding nationality or origin.

### **Publication.**

Article 19.2 last paragraph of the former discrimination law, which has been taken over into Article 20.3 of the Law of 10 May 2007, provides for a publication of the judgment at the offender's expense if publication can contribute to ensuring that the action *or its effects* which have been challenged *no longer continue*.

It is necessary to order publication of the ruling in order to enhance the effectiveness of the injunction.

The multicultural society is a reality, and society needs to learn to deal with this, with mutual respect for everybody and the possibility for everybody to work for wages. Publication of this ruling is important for every citizen, so they can know what their rights are and ensure that they are respected. It is necessary to forcefully combat prejudices and biases that have no basis (Labour Court of Ghent, summary proceedings 26/03/2007, Soc.Kron. 2008,01).

The Labour Court considers that this ruling should be published at the offender's expense in four newspapers with a national distribution, namely De Morgen, De Standaard, Het Laatste Nieuws and De Tijd.

Publication is also necessary because this makes it fundamentally possible to reach customers, which can influence Feryn's attitude and its recruitment policy.

Publication is in any case necessary given that Feryn has frequently demanded a right of reply, as a result of which there is uncertainty in the public mind regarding the real basis of this case.

Publication is intended to have a discouraging effect, so that every citizen is aware that the anti-discrimination law and the anti-racism law are not just a dead letter, which will also have an effect on the impact of the action that has been challenged (summary proceedings Ghent 26/3/2007, cited above).

Under these circumstances, the counterclaim by Feryn in the event of a favourable ruling, is admissible but unfounded.

### **Compensation on the grounds of incorrect reporting by the Centre in the Feryn case.**

Feryn has lodged a claim for payment of compensation of EUR 10,000 in its concluding statements.

The Centre cannot, however, be held liable for the media interest which Feryn has attracted with its own utterances. The Centre was in fact made aware of the situation by this media interest.

Feryn has not proven the Centre's retaliatory intentions. The Centre is not liable, even if it partially cooperated with the media, which was entirely necessary, which is also what Feryn attempted to do with the newspaper article in De Morgen in December 2005.

The Centre conducted amicable discussions and acted as a discreet intermediary between the VDAB, Resoc and Feryn between 2005 and February 2006, until the time that Feryn failed to fulfil its commitments, after which it issued a writ. The Centre has not committed any mistakes, and Feryn could have avoided losses if it had cooperated constructively.

What is more, the reporting by the Centre always stated that the Labour Court in Brussels still had to give a definitive judgment.

### **The procedural indemnity**

The Centre is requesting the maximum amount in procedural indemnity of EUR 10,000 on account of the complexity of the case.

This case concerns a complex file with infringements of the anti-discrimination law, a law that was later partially amended in connection with direct and indirect discrimination, a presumption of division of the burden of proof, the posing of preliminary questions to the ECJ, and the appeal in cassation, and the jurisprudence in this case by the Constitutional Court. Detailed conclusions were presented and these were complex proceedings.

On the grounds of Article 1022, para.3, indent 2 of the Judicial Code, and on the grounds of Article 3 of the Royal Decree of 26 October 2007, the procedural indemnity has been fixed at EUR 10,000.

The appeal is therefore to that extent well founded.

**FOR THESE REASONS,**

**THE LABOUR COURT,**

Having regard to the Law of 15 June 1935 relating to the use of languages in court proceedings;

Having regard to the partially identical written opinion of the Advocate-General J.J. André, lodged with the clerk of the court on 10 July 2009, to which the parties have replied;

The appeal is therefore to that extent well founded.

The Court therefore sets aside – for the sake of certainty – the decision of the President of the Labour Court of Brussels delivered on 26 June 2006, except for the admissibility of the main claims and the counterclaim, and the lack of basis for the counterclaim, and the legal costs, and in a new ruling:

Dismisses the requests of N.V. Firma Feryn to put preliminary questions to the Constitutional Court;

Determines that the statements made by Pascal Feryn, given that the set of chronological facts taken together immediately before or after the broadcast in the television programme ‘*Terzake*’ are proven and entail that Feryn stated publicly in April 2005 in connection with its recruitment policy for fitters that it would not recruit any employees of a certain ethnic or racial origin, because its customers did not want a foreign fitter on their premises.

Determines that the NV Firma Feryn, contrary to the Law of 25 February 2003, the Law of 10 May 2007 and 30 July 1981, conducted a directly discriminatory recruitment policy in April 2005 by stating publicly that during the recruitment of fitters it took account of their race, origin, nationality or ethnic origin, and that it therefore made these selection criteria public.

Determines that NV Firma Feryn still conducts this discriminatory policy, given that it has failed in adducing evidence to the contrary.

Orders NV Firma Feryn to cease its discriminatory recruitment policy where during the selection of fitters account is taken of their supposed race, origin, nationality or ethnic origin.

Orders the publication for one day, at the expense of NV Firma Feryn, of the present ruling in the newspapers De Morgen, De Standaard, De Tijd and Het Laatste Nieuws, in a font that is as large as the font used for editorial articles in the newspaper, and within one month of the service of the ruling to be issued, on pain of forfeiture of a financial penalty of EUR 250.00 (two-hundred and fifty euros) for every day of delay.

Dismisses the counterclaims of the NV Firma Feryn as admissible, but unfounded.

Orders NV Firma Feryn to bear the costs of the proceedings, including the procedural indemnity set at EUR 10,000 (ten thousand euros) for the appellant and at EUR 1,200 for the defendant (one thousand two hundred euros).

Ruled and pronounced in public at the extraordinary public hearing of the First Chamber of the Labour Court of Brussels on 28 August 2009.

Mrs B. CEULEMANS, First President,

Mr C. LAURIERS, Counsellor for social matters - Employer

Mr P. MANS, Counsellor for social matters – Employee-Worker

Mr L. COEN, Clerk of the Court

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L. COEN

[signature]

B. CEULEMANS

[signature]

C. LAURIERS

[signature]

P. MANS