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Equality, Action against Discrimination: Legal Questions

THE NETHERLANDS – *Rikki Holtmaat*

Policy developments

Debate on under-representation of women in leading positions in business

In the autumn of 2009, a renewed debate arose about the under-representation of women in leading positions in business. The discussion was initiated by a petition

¹⁴⁹ Last accessed on 1 April 2010.

¹⁵⁰ See the website of the National Council of Women of Malta, on www.ncwmalta.com, last accessed on 30 April 2010.

which was signed by about 200 women in leading positions in the Netherlands, and was printed by the *Volkskrant*,¹⁵¹ one of the major newspapers in the country. The petition pleads for quotas, as all soft-law measures that have been applied until now do not seem to be very effective. According to the authors, the number of women in leading positions in all companies now amounts to 6 %, and will only be 12 % in 2035 in the most positive scenario. However, the official target of the Dutch Parliament is to reach 30 %. Ad Scheepbouwer, President of the executive board of the Dutch multinational KPN, joined the discussion by stating publicly that KPN will make certain high positions only available to female applicants in the future. Right after that, the *Commissie Gelijke Behandeling* (Equal Treatment Commission (ETC): the national equality body) published a press communication in which they repeat the principles derived from case law of the European Court of Justice. The ETC says that positive measures may be justified, but that a personal and individual assessment of each candidate for a post remains obligatory. Meanwhile, a majority of the Second Chamber of the Dutch Parliament has passed an amendment which obliges large companies (> 250 employees and an annual turnover of > EUR 35 000 000) to establish a share of women in leading positions of at least 30 %. If a company does not reach this target, this must be explained in the annual report, accompanied by an introduction of new measures which will be applied by the company in order to reach the target.¹⁵² This concerns an amendment to an article of the Dutch Civil Code that contains regulation concerning the monitoring of the executive board of large companies in general. This amendment is not yet in force, as the First Chamber still has to decide on it.

It will be very interesting to see how a quota system such as the one that KPN is planning to apply will be assessed by the ETC and by the Courts, as it does not seem to comply with the requirements of EU law in this respect.

Equality body decisions/opinions

In the last quarter of 2009 and the first 4 months of 2010, several interesting cases have been decided by the Equal Treatment Commission (ETC).¹⁵³

*University discriminates against female researcher by not giving her a chance to be appointed as lecturer*¹⁵⁴

It is a well-known fact that in the Netherlands, the percentage of female lecturers and (assistant and full) professors at the universities lags far behind when compared to the percentage of female students and PhD candidates.¹⁵⁵ A woman who was a well-respected and successful researcher (working on various temporary contracts) at one of the main universities in the country, applied for a position as lecturer (in a permanent job), but was not even invited for a job interview. Although there was no direct

¹⁵¹ http://extra.volkskrant.nl/opinie/artikel/show/id/4215/Vrouwen:_geduld_en_tijd_zijn_op, last accessed on 29 April 2010.

¹⁵² *Kamerstukken II*, 2009-2010, 31763 no. 14, <http://www.geencommentaar.nl/parlando/index.php?vars=/cgi/showdoc/session=anonymous@3A5095179133/action=bib/query=1/pos=0>, last accessed on 6 April 2010.

¹⁵³ To be found on the website of the Equal Treatment Commission: <http://www.cgb.nl>, last accessed on 6 April 2010.

¹⁵⁴ ETC Opinion 2009-96, 30 October 2009, <http://www.cgb.nl/node/14960/volledig>, last accessed on 17 March 2010.

¹⁵⁵ See the *Monitor Female Professors in the Netherlands*, published by the Network of Female Professors (LNVH), to be downloaded from <http://www.lnvh.nl/files/downloads/125.pdf>, last accessed on 23 April 2010.

evidence that her sex had played a role in this decision, the ETC concluded that, on the basis of statistical evidence about the low percentage of female lecturers and professors at the particular faculty of this university, it was possible that the university had discriminated against her. It then scrutinized the selection procedures, and found that these were not transparent, and that the criteria for the job had been changed during the procedure. The ETC concluded that these circumstances contributed to the suspicion that the woman had been discriminated against on the ground of her sex. The university did not succeed in proving that no discrimination had taken place (shifting of the burden of proof!). This case is a good example of how the systemic disadvantaged position of women in certain jobs (especially above the glass ceiling) should be taken into account when investigating an individual case of (alleged) discrimination on the ground of sex.

Physical test for army fire brigade personnel not discriminatory on the ground of sex¹⁵⁶

Dutch army personnel working in the fire brigade is regularly required to meet a physical condition test in which a norm is set for the amount of oxygen that the body can absorb within a minute. A female fire fighter at an army airport had failed this test on several subsequent occasions and was not permitted to work in that position any longer; she was reassigned to another position.

The Equal Treatment Commission (ETC) found that the applied test is indirectly discriminatory for women, because generally speaking women (especially above the age of 25) are less able to meet the required value. However, the ETC accepted an objective justification for setting this requirement. It concerns positions in which army personnel is subjected to an extreme physical burden, even more so when the army is involved in peace-keeping operations abroad. The Ministry of Defence has stated that it has the policy that all personnel of a fire brigade unit, male and female alike, must be able to perform the same work, in order to guarantee the safety of the victims of a fire as well as the co-workers. The test is used as a predicting factor of the actual performance of the fire brigade personnel in extreme circumstances. This is an example of multiple indirect discrimination (on the grounds of age and sex). However, the ETC did not treat it as such, but chose to concentrate on indirect sex discrimination. The ETC accepts the validity of scientific reports in which the applied standard is considered as a proper and solid way of establishing a person's physical condition and rejects the claimant's statements that other ways of testing are available.

Employer harasses victim of sexual harassment¹⁵⁷

A woman working at an IT company complained about sexual harassment by one of her colleagues, as well as about sex discrimination and harassment by two members of the management team of the company. The ETC found that the first fact was proven; the second fact was not substantiated with enough evidence to make a shift of the burden of proof possible. However, an employer is obliged to investigate (internally) any complaint about (sexual) harassment and sex discrimination in due time and thoroughly/correctly, and has to take adequate measures when harassment/discrimination appears to be involved. When failing to fulfil these obligations, the employer can be held responsible for not offering a working environment safe from harassment/discrimination; i.e. for that reason, the employer can be held guilty of

¹⁵⁶ ETC Opinion 2009-128, 30 December 2009, <http://www.cgb.nl/node/15011/volledig>, last accessed on 6 February 2010.

¹⁵⁷ ETC Opinion 2010-12, issued on 30 September 2009 and published on 1 February 2010, <http://www.cgb.nl/oordeel/2010-12>, last accessed on 26 February 2010.

discrimination. In the case at hand, these obligations were violated in many ways. In addition to this, in the case of the sexual harassment by the colleague, the employer issued a measure (by means of an e-mail message) in which it was ordered that the victim and the perpetrator had to take coffee and lunch breaks separately and in which both were summoned to avoid all contact with each other. Especially the tone of this last message was very intimidating for the victim, suggesting that both parties were equally responsible for the situation of sexual harassment and threatening that she would be sanctioned if she did not comply with these rules of non-contact. The ETC held that this message in itself was intimidating and formed a violation of the non-discrimination norm in the equal treatment legislation.

It is remarkable that the ETC found that the employer himself was guilty of harassing the victim in the way that the (disciplinary) measures were announced to her. This means that the employer, in addition to being accountable and liable for not offering a safe working environment in this respect (which norm had been violated in this case), can also violate the non-discrimination (i.e. the non-harassment) norm himself when the responses to such claims and the measures taken are 'intimidating' in themselves. However, the definition of harassment (in Dutch *intimidatie*; intimidation) requires that there is a link with the discrimination ground of sex. This link was found by the ETC in the fact that the original sexual harassment – which caused the intimidating measure – was indeed linked to the sex of the victim. Both the way in which the harassment clause was applied to the employer and the way in which the link with sex discrimination was constructed are a novel way of interpreting the norms concerning harassment in Dutch equal treatment legislation.

Access to party/discotheque only for men who are accompanied by a woman or for women who are not accompanied by a man¹⁵⁸

In two recent cases, the ETC decided that there was (unjustifiable) direct discrimination on the ground of sex where women who were not accompanied by a man got easier access to a party or discotheque than men (either or not accompanied by a woman), or where men who were not accompanied by a woman were denied access.

The first case concerned a complaint about a discothèque in Amsterdam, where several men and women had observed a difference in treatment on the ground of race (or ethnic origin) and sex. The ETC found no proof of racial discrimination, but concluded that the policy that women who were not accompanied by a man had easy access while a woman who was accompanied by a man was denied access constituted discrimination on the ground of sex (against men). Since this was considered a case of direct sex discrimination, no (objective) justification grounds were examined by the ETC in this case.

In the second case, the claimants stated that the policy not to allow men without a female partner into a beach club was discrimination on the ground of sex and/or sexual orientation. The ETC concluded that the contested rule makes a direct distinction on the ground of sex. For this direct discrimination no (legally accepted) justification ground could be brought forward. As for the claim that this (also) constitutes indirect discrimination on the ground of sexual orientation, the ETC concluded that indeed the particular house rule (negatively) affects homosexual men, because they cannot visit the club with their partner, while heterosexual men can. The beach club had given as an objective justification that the house rule contributed to the good atmosphere and to

¹⁵⁸ ETC Opinion, ETC 2010-17 of 11 February 2010 and ETC 2010-19 of the same date, <http://www.cgb.nl/node/15047/volledig> and <http://cgb.nl/node/15048/volledig>, last accessed on 29 April 2010.

avoiding aggressive behaviour on the side of the (male) visitors. Since the club did not strictly apply the rule and since other means of achieving the goal of a good atmosphere are possible, this defence was not accepted by the ETC. Therefore, the beach club had also discriminated indirectly on the ground of sexual orientation.

Both cases demonstrate that the ETC has little sympathy for bars, discos or clubs that want to maintain a certain 'gender balance' in their public. Especially the second case demonstrates that the arguments that were brought forward by the owner of the club (maintaining a good atmosphere/avoiding male 'aggressiveness') are not seen as a valid reason for such a policy. The ETC might have elaborated a bit more on the gender stereotypes that form the basis for such policies. Men are seen as aggressive/fight-seekers, unless they are accompanied by 'appeasing' women.

The second case is an example of intersectionality of discrimination grounds. One and the same rule can have detrimental/exclusionary effects for individuals, although it is not clear whether the discrimination is on the ground of sex or sexual orientation. However, the ETC did not treat it as such, but discussed the grounds separately.

***Access to a women-only hammam denied to a man*¹⁵⁹**

A man requested to have a complete body massage in a women-only *hammam* (bathhouse) and was refused this service. Subsequently, he filed a complaint with the ETC, stating that this refusal constituted discrimination on the ground of sex in the area of goods and services. The General Equal Treatment Act makes an exception for making distinctions in cases where sex is a determining factor. In a special Decree on Equal Treatment (*Besluit gelijke behandeling*, of 1994) it is clarified in which situations this may be the case. Article 1, sub i of this Decree mentions the situation when a particular service can be provided only to men or to women: e.g. beauty salons or hairdressers that offer services only for women or only for men, or pregnancy gymnastics. In this case, it concerns a hammam, which offers special services that are only for women, including a total body massage by a female masseuse. Decisive for this kind of massage is that it is an intensive, physically intimate massage, which is done by women in a setting where there are only women present. The ETC takes into consideration that the Memorandum of Explanation to the Decree mentions that the exception mentioned in Article 1, sub i of the Decree not only pertains to situations where the physical differences between the sexes play a decisive role, but (with a view to the protection of private life) also to situations where personal views or emotions of the persons involved play a role, e.g. in situations where bodily contact is involved, such as nursing and bodily care for persons. Feelings of shame may play an important role in such cases. The ETC concludes that the total package of services that the hammam provides to its female clients is determined by bodily contact between their clients and between clients and staff in an intimate setting. This means that the hammam falls under the exception mentioned in the Decree.

The case is interesting from the point of view that men-only or women-only services are often seen as a form of discrimination that cannot easily be excused. Here we see a case where the (explicitly legal) exception to this rule is being applied.

***Using 'previously earned pay' as a standard may result in unequal pay*¹⁶⁰**

A female teacher complained about unequal pay as compared to a male colleague. It concerned work of equal value. Nevertheless, the male teacher got a much higher salary

¹⁵⁹ ETC 2010-49 of 23 March 2010, <http://www.cgb.nl/node/15094/volledig>, last accessed on 6 April 2010.

¹⁶⁰ ETC Opinion 2010-44, <http://cgb.nl/node/15089/volledig>, last accessed on 23 March 2010.

which was not solely explicable by factors that had nothing to do with sex discrimination (e.g. the number of years of work experience as a teacher). Decisive factors for determining the right step on the pay scale was *inter alia* the salary that was earned in the job previous to the job in which one is about to be appointed. It appeared that according to these criteria, the female teacher (by her previous and her current employer) had been put in the right step of the pay scale. However, her male colleague had obtained a much higher initial step when he started working as a teacher because before that time he used to have a job as an ITC specialist. According to the ETC, the criterion ‘previously earned salary’ may cause neglecting relevant work experience of an applicant or (positively) taking into consideration non-relevant factors. In this case, the school had not discriminated against the female teacher in this respect. It appeared that the discrepancy between her pay and that of her male colleague may have been caused by the fact that in his case, when he started to work as a teacher, non-relevant work experience had led to a relatively high salary. Now that the school had not properly investigated whether his relatively high salary was indeed justified by relevant job experience or job performance, it failed to prove that the discrepancy in salary had nothing to do with pay discrimination against the female employee. From this case it appears that the criterion ‘previously earned salary’ can cause pay discrimination because the male comparator has often had a relatively high salary in a previous job. By (also) looking at this side of the pay difference, the ETC has shown to have an open eye for the multiple and often difficult procedure to establish causes of unequal pay of women.

Miscellaneous

Report on victimisation by Equal Treatment Commission

In January 2010 a study into the issue of victimisation was published by the Equal Treatment Commission (ETC).¹⁶¹ It concerns the first *large-scale* research into this topic in the Netherlands. Previous smaller studies in 1985, 1999 and 2006, had shown that victimisation is indeed a problem. Not only does complaining about discrimination often lead to serious negative consequences for the victims, but many victims also choose not to make official complaints out of fear of victimisation. The new research confirms these findings. The research consisted of 4 different empirical studies among different ‘target groups’. The general outcome of these studies is that in a considerable number of cases people are victimised as a consequence of (in-officially or officially) complaining about discrimination. Also, a great number of people choose not to make any complaints out of fear of negative consequences. Out of the 824 employees taking part in one of the studies, 14 % had experiences with discrimination; 60 % of them in the end did not succeed in what they hoped to achieve with their complaints; and 19 % experienced outright negative consequences of making complaints about discrimination, varying from maltreatment to dismissal. Of the persons who had filed a complaint with the ETC, 90 % said to be happy to have been engaged in this procedure. However, only one third of these persons stated that they had not experienced any kind of victimisation. The qualitative research (in-depth interviews and questionnaires with professionals) revealed that a number of factors determine the seriousness and the

¹⁶¹ Marieke van Genugten & Jörgen Svensson *Dubbel de dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen* (Twice the victim? Study into negative consequences for employees who have raised issues concerning unequal treatment) University of Twente/CGB, 2010. To be downloaded from http://cgb.nl/webfm_send/506 (in Dutch), last accessed on 6 February 2010.

prevalence of victimisation. These are most importantly the (long) time it takes to deal with a complaint and the route of a formal complaints procedure. The researchers found that serious forms of victimisation most often occurred in case of discrimination on the ground of race, sex or disablement, where it concerned a case of discriminatory treatment at work by colleagues and direct supervisors, and where the claimant was in an isolated position at work.

The report shows that it is certainly not enough to have a prohibition of victimisation in place, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors at work who can confidentially deal with complaints, and giving training to persons working for personnel departments and managers.