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Political developments

Abolition of positive action policies

The Coalition Agreement that was concluded in 2010 between the two political parties participating in the new Dutch Government, i.e. the Liberals (*VVD*) and the Christian Democrats (*CDA*), explicitly provides that the Government will terminate all activities and programmes concerning positive action and diversity policies on the grounds of race/ethnicity and gender. Selection of personnel has to take place on the basis of the quality of the candidates.¹⁵⁹ This promise is also included in the so-called ‘*Gedoogakkoord*’ (the agreement to support the Government) which was concluded between the coalition partners, who have a minority in Parliament, and the Party for Freedom (*PVV*) of Mr Wilders.¹⁶⁰

Under equal treatment legislation, the exception that there is no discrimination if the unequal treatment is the result of positive action programmes only applies in the case of race/ethnicity, gender and disability. It is unclear whether the Government intends to amend this legislation and remove this exception, at least in the case of gender and race/ethnicity (the Coalition Agreement does not mention disability). It has become rather doubtful whether the wish, inter alia of the Equal Treatment Commission and many legal experts, to extend this exception to all other grounds, will be honoured by this Government. This change of policy will probably have the effect that in the filling of vacancies for public servants, policies explicitly inviting women and people from minorities to respond and giving them preference if they are underrepresented, provided that they are qualified for the job, will be abolished. In the private sector, such programmes and policies are scarce anyway.

The new Government is a minority government, and for its political survival depends on the Freedom Party (*PVV*). The leader of this party, Mr Wilders, has frequently stated that he is fiercely opposed to the application of Article 1 of the Dutch Constitution (the general equal treatment and non-discrimination clause) and that he is not in favour of the Equal Treatment Commission. Although the agreement between the coalition of *CDA/VVD* and the *PVV* does not mention this issue, it is to be expected that this Government will not be much in favour of any extension of the protection against discrimination on any ground.

Prohibition of face-covering veils and prohibition against wearing a headscarf in police and judiciary

In the same document, the new Government promises to propose a bill prohibiting face-covering veils and prohibiting wearing a headscarf in the police and the judiciary.

This promise is also included in the so-called ‘*Gedoogakkoord*’ (the agreement to support the Government) between the coalition partners and the Party for Freedom (*PVV*).¹⁶¹ Until now, no concrete proposals to this end have been submitted to

¹⁵⁹ The clause in the agreement is (in Dutch): ‘*Het kabinet beëindigt het diversiteits/voorkeursbeleid op basis van geslacht en etnische herkomst. Selectie moet plaatsvinden op basis van kwaliteit*’. See ‘*Regeerakkoord*’, p. 26, under the heading ‘*integratie*’ (integration). The text may be found on: <http://www.rijksoverheid.nl/regering/het-kabinet/regeerakkoord/immigratie>, accessed 18 October 2010.

¹⁶⁰ ‘*Gedoogakkoord*’, p. 9. Published on: <http://www.kabinetsformatie2010.nl/dsc?c=getobject&s=obj&objectid=127492>, accessed 13 May 2011.

¹⁶¹ ‘*Gedoogakkoord*’, p. 9. Published on: <http://www.kabinetsformatie2010.nl/dsc?c=getobject&s=obj&objectid=127492>, accessed 13 May 2011.

Parliament by the new Government. In fact, the police and the judiciary already have their own dress codes which prohibit explicit signs of any kind of ‘conviction’. It is difficult to see what a prohibition against wearing the Islamic headscarf would add to this. Earlier proposals by the *PVV* and the *VVD* to prohibit the burqa have raised a lot of discussion, but have not led to legislation.¹⁶² In 2008, it was announced by the Government that they wanted to prohibit face-covering materials in public transport and education.¹⁶³ The difference between earlier proposals and the announcement of the Government in the Coalition Agreement is that they now want a general prohibition of face-covering veils and that they explicitly mention the burqa as an example. Most probably, such a general prohibition would run against international non-discrimination standards and the freedom of religion.

Extension of paternal leave for fathers of newborn babies

In the Netherlands, fathers of newborn babies have the legal right to stay at home for two days after the birth. Employers have to pay their full salary for those two days. In some collective agreements this right is extended by a couple of days. On average, fathers have a right to take three days of paid ‘paternal leave’. In 2007, Members of Parliament from the Green Left Party (*GroenLinks*) initiated a Bill in which they proposed to extend this leave to two weeks of paid leave for all ‘partners’ of the mother (including married, registered or lesbian partners).¹⁶⁴ The leave would have to be taken within the first four weeks after the baby arrives home from the hospital or birth centre. Employers were supposed to pay for this parental leave. After extensive discussions in Parliament¹⁶⁵ and after strong opposition from the (then) Minister of Social Affairs, the Bill was rejected in February 2010, mainly because this extension was considered to be too costly at a time of economic crisis.¹⁶⁶ On 25 February 2011, the Green Left Party again published a proposal for paid paternal leave for ‘fathers’ of newborn babies (‘fathers’ here including married, registered or lesbian partners).¹⁶⁷ The new proposal suggested only one week of paid leave. As regards payment, it is proposed to give fathers a right to a social security benefit (of 100 % of their salary for this week) which will be paid from unemployment benefits funds. The costs for the employers will decrease (they no longer have to pay for the average three days’ leave), and although the burden on the unemployment benefits fund will increase, only when these funds run out of resources, a slight increase in the premiums (0.009 %) would have to be paid (to be shared between employers and employees). The Explanatory Memorandum to the Bill mentions the amount of EUR 60 000 000 as a net annual increase in the costs of paternal leave. The new proposal offers less paid leave (only one week), but it is more likely that it will be accepted, since the costs for employers will not considerably increase.

¹⁶² See *Kamerstukken II* 2006-2007, 31 108, Nos 1-4 (proposal by Mr Wilders and Mr Fritsma, *PVV*); *Kamerstukken II* 2007-2008, 31 331, Nos 1-3 (proposal by Mr Kamp, *VVD*).

¹⁶³ *Kamerstukken II* 2007-2008, 31200, No. 4 (response of the Government)

¹⁶⁴ See *Kamerstukken II* 2006-2007, 31 071, Nos 1-3.

¹⁶⁵ See *Handelingen Tweede Kamer*, 24 June and 26 June 2008 (page TK 100-7133 and page TK 102-7314) and *Handelingen Tweede Kamer* 17 February 2010 (page TK 56-5088).

¹⁶⁶ See *Handelingen Tweede Kamer*, 18 February 2010, page TK 57-5239.

¹⁶⁷ The Bill was sent to the Council of State (*Raad van State*), which is a first stage of submitting a Bill to Parliament. The text of the new Bill is available on the website of the Green Left Party: <http://standpunten.groenlinks.nl/vaderschapverlof>, accessed 16 March 2011.

The proposal is in line with the wishes of the European Parliament, who voted on 20 October 2010 in favour of extending the paternal leave for fathers of newborn babies to two weeks of paid leave.¹⁶⁸

Case law of national courts / Equality body decisions/opinions

In the last months of 2010 and the first quarter of 2011, several interesting cases have been decided by the courts and the Equal Treatment Commission (ETC).¹⁶⁹ We here describe some of the most exceptional ones.

KLM stewardess dismissed because of close-cropped hair¹⁷⁰

The Cantonal Court of Haarlem decided that Dutch airline company KLM could lawfully dismiss a stewardess because she (inter alia) wore her hair in a very close-cropped style. Apart from this, the stewardess was also required to take off her abundant jewellery, to remove her ear piercing and to cover a tattoo on her hand. Over the past years the stewardess was asked several times to conform to the KLM dress code in all respects. She had not obeyed these rules just as many times.

The Court stated that an employer has the right to impose a uniform dress code, including requirements as regards the physical appearance of their personnel, provided that these requirements stay within a certain limit of what can reasonably and fairly be asked of employees. In that regard fundamental norms as regards individual personal freedoms must also be taken into account. In this case, there was no breach of any such norms, since the stewardess knew in advance that working for KLM would imply that she could not dress the way she liked. It is in the KLM's interest to employ personnel that make a reliable and solid impression on their customers. As for the hairstyle code, the stewardess complained that men working as KLM stewards could shave their heads, while she was not allowed to do so. In this regard, the Court stated that 'although the requirement to wear her hair longer than one centimetre may have consequences for her in her free time, for women to shave their heads is not generally accepted or usual enough in society not to see this hairstyle as extravagant.' In other words: since few women cut their hair this short, the practice may be seen as extravagant and therefore be prohibited by KLM. The case relates to many other court cases concerning dress codes which are imposed by employers and – when not observed by the employee – may lead to sanctions, or even to a dismissal. Often, this has something to do with religion (headscarves, crosses), but as can be seen from this case, such codes can also have consequences for people who are seen as 'different' from what is considered 'normal' in mainstream society. Although the 'unequal treatment argument' was presented by the stewardess, the Court did not really deal with that aspect and decided the case on other labour law provisions.

¹⁶⁸ See Press Release EP 20-10-2010, to be downloaded from <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/509>, accessed 16 March 2011.

¹⁶⁹ To be found on the website of the Equal Treatment Commission: <http://www.cgb.nl>, accessed 26 May 2011.

¹⁷⁰ *Kantongerecht Haarlem* 24-09-2010 (published on 28 October 2010); LJN BO2066; to be found on: <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=nl&querypage=../zoeken/zoeken.asp&searchtype=ljn&ljn=BO2066>, accessed 12 November 2010.

Men not allowed to wear shorts in tax office¹⁷¹

A male (civil servant) employee of a provincial Tax Office complained to the Equal Treatment Commission (ETC) that, contrary to his female colleagues, he was not allowed to wear knee-length trousers on warm days. He stated that this was direct discrimination on the ground of sex. His employer defended this policy by stating that employees need to be dressed in a 'presentable' way. Although the claimant does not have a position in which he is in contact with the general public, he could encounter 'third parties' in the staff restaurant during breaks. This organization has no official regulations to clarify exactly what kind of clothes may be worn at work. A female employee may be allowed to wear knee-length trousers, provided that the management feels she looks presentable.

The ETC considers that equal treatment legislation leaves a certain margin of appreciation to employers as to what is considered to be 'a presentable clothing style' in a certain organization. In this regard, an employer to a certain degree may take social conventions into account. The equal treatment norm does not necessarily mean that men and women always need to be able to wear the same clothing. However, the law does prohibit that the rules can be interpreted and applied differently for both sexes. The Equal Treatment Act has a closed system of justification grounds. It was decided by the ETC that none of the accepted grounds was applicable in this case. Therefore, it concluded that the management of the Tax Office had indeed discriminated on the ground of sex.

University obliged to issue new diploma to transsexual person¹⁷²

A university student who obtained his Master's degree in political science, after having had a gender reassignment operation (female to male), requested a new diploma with his new male first name on it. The university refused to give him a new diploma, but instead issued a 'declaration of graduation' and a new list of his grades containing his new male first names. The applicant stated that this was not sufficient. The fact that there are female first names on his diploma creates confusion and a suspicion of fraud. As a consequence, he needs to explain time and again that he is a transsexual. This leads to a violation of his right to privacy and subsequently he also experiences a great deal of prejudice and discrimination. The university argued that, according to Dutch higher education laws, it was not allowed to award a second 'original' diploma and that it never, under no circumstances, violated those rules (even if a former student had lost the diploma in a fire, for example). The ETC first concluded that the policy of the university amounts to indirect sex discrimination because transsexual people are more often disadvantaged by this rule than others. Second, it found that the applicable legal norms did leave room for a less strict interpretation and left some discretionary power to the university to act otherwise. Therefore, strictly obeying these rules could not offer an objective justification for the refusal to issue a new diploma. Also, the goal of preventing diploma fraud, although legitimate in itself, could be attained with other less detrimental means. Therefore, the university had indirectly discriminated against the applicant. The ETC further recommended the Ministry of Education to change the rules in such a way that they expressly state that this type of case allows the issuing of a new diploma.

¹⁷¹ Opinion of the ETC of 5 October 2010, 2010-147.

¹⁷² Equal Treatment Commission, Opinion 2010-175, 30 November 2010.

Refusal to hire pregnant woman and failure to apply a complaints procedure¹⁷³

A pregnant woman applied for a job through a recruitment agency and was denied the job because of her pregnancy, especially because she would have a right to pregnancy leave after six months of working for the organisation concerned. After having made a complaint about this, the woman had another experience where she did not get a job because of her pregnancy or future right to pregnancy leave. The Equal Treatment Commission (ETC) found that both instances were clear cases of discrimination on the ground of pregnancy, which, according to equal treatment legislation, must be equated with direct discrimination on the ground of sex. None of the possible legal grounds for justification were applicable in this case. The ETC very explicitly stated that a recruitment agency cannot use the excuse that organisations to whom the agency sends its personnel do not want to have pregnant women who, within a short period of time, will have the right to pregnancy leave. Commercial reasons and financial gain are not an excuse for discrimination on the ground of sex.

The second part of the Opinion concerns the fact that the recruitment agency did not deal with the pregnant woman's complaint in an appropriate way. The Commission stressed that any complaint about discrimination must be taken very seriously and dealt with in a procedurally proper and timely fashion. An employer who fails to do so does not sufficiently guarantee that the working environment and the working conditions are free from any kind of discrimination. Therefore, the agency also discriminated against the applicant by not dealing with her complaint in a proper way.

A hijab constitutes a safety and hygienic risk¹⁷⁴

The complainant in this case was an Islamic woman who received a social benefit from her local government. The social assistance bureau asked a mediation agency to find a suitable job for this woman in the cleaning sector. On the ground of her religious belief, the woman wore a hijab. During work, she wore a shorter version, consisting of a long and wide headscarf that covered her hair, neck and shoulders and her back and chest. The mediation agency went with her to a prospective employer, who made it clear that this type of headscarf could not be worn at work because of rules concerning safety and hygiene that apply everywhere in the cleaning sector. These rules are ultimately based on the Working Conditions Act (*Arbeidsomstandighedenwet*), regulating health and safety issues at the national level. After having contacted various other employers in the same sector, after having suggested to the woman that she should wear her headscarf under a wide t-shirt, and after having tried to persuade her to work in another sector, the agency halted the mediation process.

The ETC first observed that the complainant had stated enough facts to presume that the mediation agency had made a direct distinction on the ground of religion because it was not the (neutral) safety and hygienic rules as such that provided the reason to stop mediating on her behalf, but the fact that she wore this particular long and wide headscarf on the ground of her religion. Next, the agency was given the opportunity to prove that the reason to stop mediating on this woman's behalf was not her religion, but that other reasons made them do so. The Commission then concluded that the mediation agency had done everything possible to mediate on the woman's behalf in finding a job. Everywhere safety and hygienic rules prevented the employers from offering her a job. This cannot be blamed on the mediation agency, which did not therefore make a direct distinction on the ground of religion but made this decision on

¹⁷³ Equal Treatment Commission, Opinion 2011-12, 25 January 2011.

¹⁷⁴ Equal Treatment Commission, Opinion 2011-19, 4 February 2011.

the basis of its experience in finding that the woman was ‘non-employable’. Therefore, the conclusion of the ETC was that the agency did not make an unlawful distinction (discrimination) on the ground of religion by terminating the mediation process.

This Opinion of the ETC is remarkable in a number of ways. First, the ETC did not consider the possibility that there may (also) be a case of direct or indirect discrimination on the ground of sex. In that way, the possible intersectionality between these two grounds remains invisible. Second, it is remarkable that the ETC first concludes that there is a *prima facie* case of direct discrimination on the ground of religion and then finds that – although health and safety is not included in the law as a possible justification ground for direct discrimination on the ground of religion – the fact that several potential employers refused the woman for that reason justifies the decision of the agency to no longer mediate on her behalf.

Unequal pay caused by using (inter alia) the market position as a standard¹⁷⁵

A female doctor, working as a social psychiatrist complained about unequal pay as compared to a male comparator (in Dutch ‘*maatman*’), who essentially had the same function and performed the same duties as she did in the same psychiatric institution. This male doctor had been employed by this institution 12 days before her, but from the very beginning (in 2003) had enjoyed a higher salary in a different (higher) functional pay scale. Also, in 2008, he had enjoyed a considerable increase in his salary, while she had already reached the top of her salary scale in that same year. After having established that the work that the two doctors did was comparable and/or of comparable value, the ETC investigated the pay criteria (or ‘*beloningsmaatstaven*’) used by the employer to justify the unequal pay. To begin with, the ETC stated clearly that according to the Dutch Equal Treatment Law it is up to the employer to prove that the pay criteria that are used are equal (‘*gelijkwaardig*’) and sound (‘*deugdelijk*’).

The employer stated that the higher salary of the male doctor was due to five different factors that are used in this institution to place someone in a certain function group and/or pay scale.

1. *The situation on the labour market*, where at the time of the appointment of the male doctor there was a scarcity of social psychiatrists. This argument was rejected by the ETC because the female doctor was appointed only 12 days after the male doctor and in her case this argument had not led to placing her in a higher pay scale than was usual for this particular function group. Therefore this pay criterion was not applied equally to both of them.
2. *Heavier functional tasks* to be performed by the male doctor. Although it was discussed at the time of the appointment that the male doctor might have to perform heavier tasks within his function as a social psychiatrist, it was established during the investigation by the ETC that he in fact had never performed those tasks, and was also never asked to perform them. Therefore, this criterion could not be called sound.
3. *Last-earned salary* of the male doctor. According to the ETC (also in earlier Opinions¹⁷⁶), this criterion may easily lead to a continuation of pay differences between men and women. When this earlier salary is not directly related to the value of the (new) function, this is not a sound criterion and must therefore be rejected. In the case at hand, the employer had not proven that the earlier salary of the male doctor indeed justified the pay difference.

¹⁷⁵ Equal Treatment Commission Opinion 2011-25, 21 February 2011.

¹⁷⁶ See e.g. ETC Opinion 2010-44, reported in Newsflash 2010 no. 2.

4. *Experience.* Relevant job experience may be used as a sound criterion that can justify unequal pay. However, in this case the (said) wider experience of the male doctor was used as an argument to place him in a (higher) pay scale/function group that was not usually applied to social psychiatrists working for this institution. This led to a structural difference in pay, which could never be ‘made up’ by the female doctor. The male doctor was in fact paid for a function group that has a higher value than is normal for his actual function. Therefore, this criterion was applied unjustly in this case.
5. *Better pay negotiations* of the male doctor in the application procedure. The employer stated that a better position in the pay negotiations could objectively justify better/higher pay. Here the ETC answered that this is not a relevant criterion, since capacities or capabilities to negotiate are not functional assets for the job at hand. Also, the employer cannot refer to the *lesser or worse position* of the female doctor to negotiate her pay, since such a criterion cannot be applied in an objective way and is therefore not a sound criterion. Putting someone in a particular (higher than usual) pay scale, as a result of (good or sharp) negotiations, results in a non-transparent pay system that runs the risk of being arbitrary). It is feasible that deeply-rooted prejudices about presumed differences between men and women play a role in such decisions. In addition, the ETC emphasised that the equal treatment legislation puts a duty on employers to pay an equal salary to men and women, and therefore it is not justified to leave it to individual women to negotiate more strongly to achieve equal pay.

The conclusion of the ETC was that the employer had breached the equal pay norm. These five different reasons for the unequal pay of the female doctor all sound very familiar to experts in this field. Most of these arguments have been previously subjected to investigation by the ETC. The one that has emerged least often (at least so openly¹⁷⁷) is the fifth, where the employer in fact blames the pay difference on the female doctor herself: she should have negotiated more strongly for a higher salary. It is a good thing that the ETC very extensively and sharply rejected this argument.

¹⁷⁷ See also ETC Opinion 2008-23.

¹⁷⁸ <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2010/likestilling-for-likelonn.html?id=626450>, accessed 5 April 2011. <http://www.regjeringen.no/nb/dep/bld/dok/regpubl/stmeld/2010-2011/meld-st-6-20102011.html?id=625636>, accessed 5 April 2011.