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Equal Pay in the Netherlands: Action Needed

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Abstract:

The Netherlands has no good score in the field of equal pay. According to Eurostat the unadjusted gender pay gap amounted to 15,2% in 2017.¹ This is close to average of the EU-countries. There is a statutory prohibition on unequal pay, but it is up to individual employees to try to enforce their right to equal pay. There is no pay transparency and Recommendation 2014/124/EU has not been implemented. On 7 March 2019, a law proposal was submitted to Parliament, which aims to improve the situation. This proposal deserves to be adopted, at least large parts of it. The law proposal is partly modelled after the Icelandic model, which makes it interesting to hear about the Icelandic measures in more detail.

1. Relevant country context

1.1 The extent of the gender pay gap in the Netherlands

According to Eurostat figures the unadjusted gender pay gap in the Netherlands amounted to 15,2% in 2017.² The Dutch Central Statistics Bureau found an unadjusted gender pay gap in the public sector of 16% in 2008 and 8% in 2016 and of 22% in 2008 and 19% in 2016 in the private sector. The gender pay gap is thus becoming a bit smaller, but at a very slow pace. The adjusted gender pay gap was, according to the Central Statistics Bureau, 5% in the public sector in 2008 and 7% in the market sector.³

There is not only a gender pay gap between male and female employees, but also between male and female self-employed. In the Netherlands, there are approximately 1 million self-employed workers without personnel, i.e. sole contractors/free-lancers and this number is still increasing.⁴ About one third of them is female. The average hourly income of this group was in 2015 € 60 - for men and € 49 - for women. 55% of the female self-employed earned in 2015 less than € 25.000 - per year with their work, compared to 18% of the men.⁵

¹ https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics

² https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics

³ <https://www.cbs.nl/nl-nl/maatwerk/2018/47/monitor-loonverschillen-mannen-en-vrouwen-2016>

⁴ CBS, Statline,

<https://opendata.cbs.nl/statline/#/CBS/nl/dataset/82309NED/table?ts=1536920549163>

⁵ <https://www.panteia.nl/nieuws/vrouw-steeds-vaker-parttime-zzper#.VP2iDPyG9SL>

1.2 Legal provisions and policy context

Dutch law prohibits unequal pay for equal work or work of equal value. This prohibition is laid down in Article 7:646(1) of the Dutch Civil Code and Article 7 of the Act on Equal Treatment of Men and Women (hereafter: ETA = Equal Treatment Act). Article 8 ETA stipulates that work must be valued on the basis of a sound system of job evaluation and Article 9 ETA adds that the pay of men and women must be calculated on the basis of equivalent standards.

This is basically all we have in the Netherlands. Equal pay is considered to be a civil matter, not a public one, which means that parties themselves – employees, workers – will have to undertake judicial steps if they want to claim equal pay. The government sees no role for the Labour Inspectorate. The Labour Inspectorate may check with employers whether they have an anti-discrimination policy, but to assess if an employer actually discriminates in individual cases is not seen as their task. The Labour Inspectorate has no role either with respect to pay, with the exception of monitoring if an employer complies with the minimum wage legislation. For the rest matters of pay are considered to be civil matters.⁶

It is therefore up to employees themselves to start a case on equal pay if they notice they are not paid equally to colleagues who do the same work or work of equal value. This is not easy. The first obstacle is to find a comparator. As there is no pay transparency in the Netherlands, employees often do not know what their colleagues earn. It is not clear if an employer is obliged to provide information in this respect. There has been one court case on this question in which the court obliged an employer to provide information about a person's salary, but this was a case by a lower court, so it is not the standard (yet).⁷

In this respect, it is worth noting that the Dutch legislator has taken no steps to implement Recommendation 2014/124/EU on pay transparency. Not a single measure mentioned in this Recommendation has been implemented in Dutch law. Therefore, there is an almost complete lack of transparency.

If an employee has found a comparator, the next obstacle – in the case her employer does not allow her claim – is to establish that she performs equal work or work of equal value to this comparator. It is not entirely clear who carries the burden of proof in this respect. There is a reversal of the burden of proof once facts have been established that create an assumption of discrimination, but as long as it is not clear if jobs can be compared, there is no discrimination yet. Apart from this, debates on the comparability of work may be very complex. If employees perform different tasks, it is hard to assess whether their work is of equal value. Besides the employer may

⁶ This also follows from the parliamentary history of the change of the Act on Working Conditions 2009 (the year in which it was added to the Act on Working Conditions that employers should have a policy against discrimination).

⁷ District Court of Amsterdam, 12 May 2012, ECLI:NL:RBAMS:2012:BW6701.

raise arguments, such as that indeed the comparator did earn more, but this was only because he was demoted or because he was ill and they did not want to decrease his salary as a good employer, etc.⁸ Which means there is no comparator anymore and therefore no equal pay claim.

Equal pay claims are thus very technical and complex and this also makes them costly. One needs an attorney and they are usually expensive. Together with the lack of transparency and the fear of victimisation, the result hereof is that there are hardly any cases on equal pay in the Netherlands. In the last five years there have been two or three court cases and only a few cases before the Equality Body (which gives non-binding rulings).

2. Policy debate (law proposal)

The rather sad situation in the Netherlands in the area of equal pay has fortunately not gone unnoticed, for on 7 March 2019 four opposition parties submitted a law proposal that aims to improve the situation.⁹ It is not the first proposal on equal pay. An earlier proposal was withdrawn after a change of government. The contents of the present proposal are the following:

- Reversal of the burden of proof. Employers with 50 or more employees will have to apply for a certificate, which shows that they apply the standard for equal pay. If they do not have such a certificate and an employee states that he or she is not paid equally, the assumption is that this is indeed the case. The employer may try to refute this assumption.
- The employer with 50 or more employees will have to provide information in its annual report about differences in pay between employees who carry out work of (almost) equal value. If unequal pay exists, this must be reported in the annual report together with information on the way in which these differences will be eliminated.
- The Labour Inspectorate will be given the task of monitoring the application of the law and of imposing fines in case of non-compliance.
- Employees in companies with 50 or more employees will get the right to ask for information about the salary of colleagues who do the same work or work of (almost) equal value.

The proposal is partly modelled after the Icelandic example, so it will be interesting to hear about the experiences in Iceland. However, it is uncertain whether the proposal will indeed be adopted. It has been submitted by opposition parties and it is not clear yet if and to what extent the governing parties will support it. Two of the more right wing governing parties might be critical, especially as employers' organisations have

⁸ In this way one of the few court cases on unequal pay was lost: The Hague Appeal Court, 21 December 2010, JAR 2011/71, ECLI:NL:GHSGR:2010:BP3748.

⁹ <https://zoek.officielebekendmakingen.nl/kst-35157-2.html>

objected against the proposal, mainly because they fear financial expenditure and bureaucracy. The proposal is now awaiting advice from the Council of State.

3. Good practices

Worth mentioning is that the trade unions do their best to put equal pay on the agenda, especially the largest Dutch trade union, FNV. FNV made equal pay part of their agenda for collective bargaining in 2019. However, the success so far is relatively small: until now, only two employers have been willing to take concrete steps in this respect.¹⁰ But this is nevertheless a good practice that is worth following.

Job evaluation systems in the Netherlands are generally seen as gender neutral. In the past, especially around 2000/2001, an instrument was developed in order to create gender-neutral job evaluation and classification systems: “de weegschaal gewogen” (“the scale weighted”).¹¹ All systems that were acknowledged by the trade unions have been tested on gender neutrality and have been found neutral. Approximately 75% of all Dutch employees are covered by one of these systems. The present debate mainly focuses on the incorrect use of job classification systems and on granting extra benefits outside of the systems. The Equality Body carried out research in general hospitals, universities of applied sciences and insurance companies into equal pay and it found considerable pay gaps. It concluded that these gaps were to a large extent due to factors as attaching insufficient weight to previous work experience, determining the salary on the last-earned salary elsewhere, basing the salary on negotiations, granting extra benefits because an employee had reached the maximum of his/her scale or granting a higher salary because of shortage in the labour market. Thus, the job evaluation system in itself was not the problem, but deviations from the system to the disadvantage of women.¹² The research by the Equality Body is important because it sheds light on the causes of unequal pay, especially with respect to the undeclared part of the gender pay gap.

Another good practice is the role of the Equality Body in individual cases. If an employee submits a claim on equal pay to the Equality Body, the Equality Body has the right to request pay data from the employer. This can help the employee in acquiring sufficient evidence. In addition, the Equality Body may engage a specialist in job classification and evaluation in order to examine the way in which the job of the employee involved and her comparator(s) is graded and the causes of the pay difference between them. Such research can be very useful and can, because of the

¹⁰ One of these two is insurer Aegon. Aegon has carried out research into equal pay in her company and has announced that it will develop policies to place more women in higher positions so as to diminish the gender pay gap: <https://www.infinance.nl/artikel/gelijke-belonging-bij-aegon/>.

¹¹ Letter by the Secretary of State to Parliament of 11 April 2001, no. 27099, no. 3 with annexes. See: <https://zoek.officielebekendmakingen.nl/kst-27099-3.html>.

¹² The reports by the Equality Body can be found at its website: <https://www.mensenrechten.nl/nl/publicatie/9994>, <https://www.mensenrechten.nl/nl/publicatie/36318> and <https://www.mensenrechten.nl/nl/publicatie/38165>.

costs and because of its technical nature, not easily be carried out by employees themselves.

The Foundation for Labour (Stichting van de Arbeid) is in the process of updating their checklist for equal pay, which originates from 2001. This checklist is meant for those who create, apply and evaluation systems for the payment of employees, thus trade unions, employers' organisations, employers, HR managers and Works Councils. It is not obligatory to use the checklist. It is a tool.¹³

For the rest the focus, especially from the side of the government, is very much on awareness raising. E.g. an NGO with the name Women Inc. receives subsidy for a campaign on equal pay with the title 'Where is my € 300.000,-?'¹⁴ This campaign receives quite some attention.

4. Transferability aspects

4.1. From Iceland to the Netherlands

The Icelandic system can be a model for the Netherlands. This is very necessary, because the Dutch government in my view needs to work seriously on eliminating the gender pay gap.

In the law proposal on equal pay, that was submitted to Parliament on 7 March 2019 (see paragraph 2), the Icelandic model has been one of the starting points. The initiators of the law proposal want to introduce an obligation for companies to obtain certification in the same way as in Iceland. The difference is that the Dutch law proposal wants to make this obligatory only for companies and institutions with 50 or more employees instead of 25 as in Iceland. I think it would be good if also in Dutch law the starting point would be 25 employees, as otherwise many smaller companies will fall outside of the scope of the law.

The law proposal also wants to establish a certification body, which can issue the certificates. The idea is that, different from Iceland, the standard used will be made public. That appears to be a good idea in view of the criticism mentioned by the Icelandic expert in her paper.

It would also be very good if Dutch employers will conduct an audit into equal pay in their companies. Research by the Equality Body (see section 3) shows that the job evaluation systems in themselves usually work correctly, but that pay differences arise because of deviations from the system. Therefore, unequal pay can only really be traced by reviewing individual files. This is a lot of work, but the only real remedy.

¹³ <https://www.stvda.nl/nl/publicaties/brochure/20010719.aspx>

¹⁴ <https://www.womeninc.nl/thema/loonkloof/>. The € 300.000,- refers to the average difference in income over the entire working life between a man and a woman.

The idea in the Dutch law proposal is that if an employer does not have a certificate, it cannot be assumed that men and women are paid equally. This will have consequences in individual cases and it may lead to sanctions (fines) by the Labour Inspectorate. It is not clear how this works in the Icelandic situation. There will be a fine when employers do not have a certificate, but what does this mean for the employees individually?

Dutch employers are afraid of costs and bureaucracy and Icelandic employers complain about these aspects as well. These worries are not unfounded, but there seems to be no other effective way to get rid of the gender pay gap. Hopefully, these types of measures will be temporary and no longer necessary once the gender pay gap will have been closed.

4.2. From the Netherlands to Iceland

As Iceland appears to have more measures against unequal pay than the Netherlands, there is not much to transfer from the Netherlands to Iceland.

Worth mentioning is perhaps that the Dutch Equality Body takes a very active stance, both in individual cases and in research into unequal pay. That is, in my view, an example worth following.

In addition, it is worth noting that the Dutch law proposal also contains provisions on reporting obligations and about the right of employees to information about the pay of other workers in the company who perform equal work or work of equal value. Apparently, Icelandic law does not contain such provisions or they are not mentioned in the discussion paper. It might be good to discuss what works best: a certification system, reporting obligations or transparency rights. Or is it best if all three types of measures apply at the same time?

5. Conclusions and recommendations

At the national level in the Netherlands, various measures need to be taken:

- Adoption of the present law proposal;
- Implementation as yet of Recommendation 2014/124/EU on pay transparency.

If the law proposal will not be adopted in the present form, it is important that at least some measures are taken. Either a certification system with a reversal of the burden of proof or reporting obligations or more transparency about salaries. In my view, it is also important that the Recommendation of the European Commission will be implemented as yet, because pay transparency is almost completely absent in the Netherlands and there are no audit- or reporting obligations. The government mainly focuses on awareness raising, but in my opinion, stricter measures are needed.

At EU-level it is perhaps possible to upgrade the level of (part of) the Recommendation of pay transparency to the level of a Directive or to exert more pressure on Member States to implement it. It is very easy at present not to give any follow-up to a Recommendation.

In addition, the EU could perhaps give some guidelines on privacy. In my opinion, too much value is given to keeping salary details private. Salary data are no personal data like ethnic background, health, etc. If too much emphasis is placed on privacy, this will stand in the way of equal pay, because employers can then say they do not want to disclose pay information because of privacy. Therefore, it would be better to put the value of privacy about salaries in perspective rather than to invent complicated structures to provide anonymised information.

Finally, it might be interesting to discuss at some stage the level of pay of sole contractors/free-lancers, because also here there appears to be a gender pay gap. This is a more difficult matter of course, because in principle, there are no standards on the pay of contractors, but perhaps it is possible to develop a framework through which the pay of sole-contractors/free-lancers (who often are bogus self-employed workers) can be compared with the pay of employees within the hiring company.