

Opinion – 2010-175

A university has committed prohibited discrimination on the grounds of gender by refusing to provide a man, who is a transsexual, with a new certificate with his current male first names.

Summary

A man, who is a transsexual (from female to male), passed a *Doctoraal* examination at a university. In connection with this, the university issued a degree certificate (diploma) to him with his former female first names. Afterwards, the man underwent gender transition, which was confirmed by court decision, just like the change of his first names.

The man requested the university to issue a new certificate to him with his current male first names. The university refused this, because they issue a certificate only once. The university had never made an exception to this. The university did provide him with a statement of graduation with his current initials. The man has argued that a statement of graduation always raised questions during a job interview. He then has the choice to either tell the truth or to tell a lie. He considers this a violation of his privacy. By telling the truth, he also runs the risk of being discriminated against by the potential employer. He is of the opinion that, by refusing to issue a new certificate to him with his current first names, the university has discriminated against him on the grounds of gender. The Commission held that - by issuing the certificate only once - the university indirectly discriminated against the man on the grounds of gender. As a result of this, transsexuals are hit in particular, as they are unable to integrate the change of gender fully in their personal life or business life.

The defence put forward by the university – i.e. that it ensues from the law that a certificate may be issued only once – does not constitute a justification for the indirect discrimination. The Commission held that it cannot be read into the law that a university is prohibited to issue a new certificate under specific circumstances. The other defence put forward by the university as well – i.e. that a certificate is issued only once to reduce fraud – does not constitute a justification for the indirect discrimination. The Commission held that there were other possibilities to reduce fraud, which the university had not investigated. The Commission was also of the opinion that the man's interest to receive a new certificate carried more weight than the university's interest to reduce the risk of fraud with certificates.

Opinion

2010-175

Date: 30 November 2010

File number: 2010-0061

Opinion in the matter of

....
residing in ..., petitioner

against

University
established in ..., respondent

1 Course of the proceedings

- 1.1** By petition of 22 February 2010, which was received on 2 March 2010, the petitioner requested the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*, hereinafter referred to as 'the Commission') to investigate whether the respondent had discriminated against him on the grounds of gender by refusing to issue a new degree certificate to him with his current male first names.
- 1.2** The following documents were subsequently exchanged:
 - a letter from the petitioner dated 3 May 2010;
 - a letter from the respondent dated 28 May 2010;
- 1.3** The Commission dealt with the matter at the hearing on 5 October 2010, where the petitioner appeared, accompanied by ..., co-ordinator from Transvisie, and ..., policy officer from..... The respondent, who was represented by ..., Head of Legal Affairs, and accompanied by ..., legal expert, also appeared.

2 Facts

- 2.1** The petitioner, born in Germany, is a transsexual (female to male). The Amtsgericht Schöneberg in Germany has pronounced the judgement that the petitioner is permitted to bear the first names: This judgment took effect on 4 May 2004. The petitioner's gender transition from female to male was

subsequently confirmed by court decision. The petitioner has lived in the United States for several years.

- 2.2 On 28 June 2001, the petitioner received the *Doctoraal* Degree in Political Science from the respondent, a university in the Netherlands. Upon his graduation, the respondent issued a certificate (the degree certificate, or diploma) to the petitioner, with the petitioner's former female first names.
- 2.3 On 21 December 2007, the petitioner appealed to the respondent with the request to issue a new degree certificate to him in connection with the fact that his first names and gender had changed.
- 2.4 On 10 March 2008, the respondent issued a statement of graduation in the Dutch language and in the English language with the petitioner's current initials, stating that he had passed the final examination of his degree programme. The respondent also provided him with a list of his marks in the English language.
- 2.5 The respondent refused to provide the petitioner with a new degree certificate with the petitioner's current male first names.

3 Assessment of the petition

- 3.1 The question submitted for assessment is whether the respondent discriminated against the petitioner on the grounds of gender by refusing to provide him a new certificate with his current first names following his change of gender and change of first names.

The legal framework

- 3.2 Section 7(1)(c) of the Dutch Equal Treatment Act (*Algemene Wet gelijke behandeling*) (AWGB), in conjunction with Section 1 of the AWGB, provides that discrimination on the grounds of gender is prohibited upon the provision of goods or services by institutions that operate in the area of education.
- 3.3 Section 1 of the AWGB provides that the term 'discrimination' includes both direct discrimination and indirect discrimination. The term 'direct discrimination' relates to discrimination that refers directly to or is directly based on one of the grounds protected by the AWGB, including gender. The term 'indirect discrimination' relates to discrimination that is the result of an apparent neutral provision, criterion, or action affecting individuals with a personal characteristic that is protected by the AWGB.
- 3.4 Section 7.11(2) of the Dutch Higher Education and Research Act (*Wet op het hoger onderwijs en wetenschappelijk onderzoek*) (WHW) provides the following regarding the issue of a certificate:

"In evidence of the fact that [the candidate] has passed the examination, the examination board issues a certificate."

Section 7.11(2) of the WHW also provides what must be stated on the certificate. Section 7.11(3) of the WHW provides that the examination board is to attach a supplement to the certificate, the purpose of which is to provide insight into the nature and content of the study programme completed, also with a view to international recognisability of the study programmes.

- 3.5** The respondent is a university which provides its services in the form of the provision of study programmes. This includes the issue of a certificate when an examination has been passed. The issue of a certificate by a university consequently falls within the scope of Section 7(1)(c) of the AWGB. This also applies to the refusal to provide a certificate, as is currently under discussion.
- 3.6** The Court of Justice of the European Communities decided in 1996 that transsexuality is covered by the criterion 'gender' (ECJ, 30 April 1996, case C-13/94 (*P./S. and Cornwall County Council*), *Rep.* 1996 p. I-2143, *NJ* 1997, 182, *NJCM-Bulletin* 1997, p. 291, with notes from G.J.J. Heerma van Voss, *TVVS* 1996, II, p. 326.
See also ECJ 7 January 2004, case C-117/01 (*K.B.*), *Rep.* 2004, p. I-541, *NJ* 2004, 36, with notes from M.R. Mok, *ECHR* 2004, no. 10, with notes from J. van der Velde, *JAR* 2004, 69). This line was adopted by the Commission, including in its cases CGB, 17 February 1998, 1998-12; CGB 23 December 1999, 1999-107; CGB 17 June 2004, 2004-73 and CGB 22 January 2008, 2008-6.

The Commission is of the opinion that, given the fact that transsexuality falls under the grounds of gender, the request may be tested against Section 7(1)(c) of the AWGB, in conjunction with Section 1 of the AWGB.

The interests of the petitioner

- 3.7** The petitioner argued that his interest in this petition is the fact that in the United States, it is very important to show one's certificates and to hang them on the wall in one's office. This is associated with social status, but also to assure that you are the person you say you are and the person who obtained the certificates. The statement of graduation of 10 March 2008, in which the respondent stated that the petitioner passed the final examination of his degree programme, is not appropriate for this purpose. The petitioner also argued that some employers request a copy of the official degree certificate (diploma), and that a statement of graduation always raises questions. He would then have the choice to either tell the truth, by which he would be running the risk of being discriminated against, or to tell a lie. The petitioner stated that he considered telling the truth a violation of his privacy. The petitioner furthermore stated that he had experienced several times that, as a result of his stating that he was a transsexual, he was rejected for a position, including the position of a teacher of German in the Netherlands.
- 3.8** The respondent contested the fact that the petitioner had an interest in his petition. The respondent argued that the circumstance of possible discrimination by a future employer was insufficient to assume that the petitioner had an interest. At least, the possible discrimination of a future employer could not be attributed to the respondent.

- 3.9** The Commission considered it conceivable that the petitioner, due to the respondent's refusal to provide him with a new certificate, was running the risk of his privacy being violated and of being discriminated against by a potential employer, as argued by the petitioner. This consideration is supported by the fact that the petitioner stated that he had been rejected for a position several times as a result of his statement that he was a transsexual. A change of the petitioner's first names on the certificate, by the respondent, might reduce this risk. On these grounds, the Commission arrived at the opinion that the petitioner had an interest in his petition to the Commission. On these grounds, the Commission held that the petitioner's petition was admissible.

Discrimination on the grounds of gender

- 3.10** The petitioner argued that the respondent has discriminated against him on the grounds of gender by refusing to issue a new degree certificate to him with his current first names. The petitioner pointed to the fact that all his official documents, such as his passport, driving licence, and the secondary school certificate obtained in Germany, had been adjusted by then. Only the adjustment of the degree certificate issued by the respondent had caused problems. The petitioner pointed to the "Issue Paper Gender Identity and Human Rights" of the Commissioner for Human Rights of the Council of Europe of 29 July 2009 (CommDH/Issue Paper (2009)2). In this Issue Paper, the Member States are called upon to change the first names and gender on certificates of transgenders.
- 3.11** The respondent contested that it discriminated against the petitioner on the grounds of gender. The respondent argued that the issue of a certificate was based on Section 7.11(2) of the WHW. A certificate is only issued once. There was not a single exception to this rule. Not in the case of loss of the certificate, for instance, as a result of theft or fire, nor in the situation that a name had changed. If the circumstances constituted a reason for this, the relevant institution could issue a statement of graduation to the former student. This document was to contain the same information as stated on the certificate. The respondent issued such a statement of graduation on 10 March 2008.
- 3.12** The respondent stated that is prohibited by law to issue a new certificate. At the hearing, the respondent argued that, although the WHW does not include any demonstrable prohibitory provision, the WHW also does not include a provision giving it the possibility to issue a new certificate under specific circumstances. If the respondent had learned from the Ministry of Education, Culture and Science that it would have been permitted under specific circumstances to issue a new certificate, it would certainly have done so. In explanation of its procedure, which is followed by all Dutch universities according to the respondent, the respondent also referred to the rules that apply to the issue of certificates in secondary education. Article 54 of the VWO-HAVO-MAVO-VBO Leaving Examinations Decree provides that duplicates of certificates will not be issued. The respondent also pointed to the fact that the Ministry of Education, Culture and Science was currently preparing a national register of certificates. With respect to this register, the rule will apply that only the Minister of Education, Culture and

Science will have the power to make a provision for the replacement of the original certificate, also in respect of certificates obtained in higher education.

Direct or indirect discrimination?

Direct discrimination

- 3.13** The respondent stated that it had applied the rule that a certificate will be issued only once. There is not a single exception to this rule. The Commission was of the opinion that, by applying this rule, the respondent did not discriminate directly on the grounds of gender, because this rule applies to everyone.

Indirect discrimination

- 3.14** The Commission was of the opinion that by applying the rule that a certificate will be issued only once, to which rule there is no exception, the respondent discriminated indirectly against the petitioner on the grounds of gender. The application of this rule, after all, affects transsexuals in particular, including the petitioner. By not allowing them an exception to this rule, they are unable to fully integrate the change of gender into their personal life or business life. Non-transsexuals do not have this disadvantage.
- 3.15** Pursuant to the foregoing, the Commission held that the respondent indirectly discriminated against the petitioner on the grounds of gender by refusing to issue a new degree certificate to him with his current first names.

Objective test of justification

- 3.16** It follows from Section 2(1) of the AWGB that the prohibition of indirect discrimination does not apply if the discrimination is objectively justified by a legitimate purpose, and the means to attain this purpose is appropriate and necessary. As far as this exception is concerned, the party that allegedly committed the discrimination must adduce facts in justification hereof. Whether - in a concrete case - objective justification exists, as referred to in Section 2(1) of the AWGB, must be tested on the basis of an assessment of the purpose of the discrimination and the means that was used to attain this purpose.
- 3.17** The purpose must be legitimate in the sense that it must be sufficiently important or that it meets an actual need. A legitimate purpose furthermore requires that there is no discriminatory intention. The means used must be appropriate and necessary. A means is appropriate if it is suitable to attain the purpose. The means is necessary if the purpose cannot be attained by a means that does not result in discrimination, or is at least less objectionable, and the means is proportionate to the purpose. Only if all these conditions have been met is the discrimination deemed not in conflict with the AWGB.
- 3.18** The respondent adduced two purposes for the indirect discrimination. The first purpose was to comply with the law, in the sense that it is contrary to the law to change a certificate obtained in connection with circumstances that occurred afterwards. The second purpose was to counter fraud.

The Commission will assess the two purposes and the means used to attain these purposes separately below.

The first purpose; compliance with the law

- 3.19** The respondent considered it contrary to the law to change, in retrospect, a certificate that had already been obtained, on the basis of circumstances that had occurred afterwards. In order to substantiate this purpose, the respondent argued that it was applying the rule that a certificate will only be issued once, because a certificate is a document by which a degree is awarded to an individual pursuant to the law. This changes the legal position of the individual concerned. The respondent must use the details by which the student was known in the Municipal Administration (*GBA*) at the time the certificate was issued. The Commission is of the opinion that the purpose is legitimate, in the sense that it meets an actual need of the respondent. It has not become evident that the purpose was discriminatory.

- 3.20** The means used by the respondent to attain its purpose is the once-only issue of a certificate. Apart from the question of whether the means is appropriate to attain this purpose, the Commission considers the means not necessary, for the respondent did not argue convincingly that a prohibitory provision ensues from the law by which it is prohibited to issue a second certificate. The means therefore exceeds that which is required by the purpose.

The Commission cannot read into Section 7.11(2) of the WHW, nor in any other legislation applicable to the respondent, that the respondent would not be permitted to issue a new certificate under specific circumstances. At the hearing, the respondent acknowledged the fact that such a specific prohibitory provision does not exist. It can also not be read into the Explanatory Memorandum to the WHW that it was the legislator's intention to prohibit the issue of a second certificate.

The Commission concludes from this that the respondent has a discretionary power in this area. The respondent has exercised its power such that it will never issue a new certificate irrespective of the reason for which a new certificate is requested. The Commission is of the opinion that a statutory obligation to exercise this policy does not exist. Contrary to the respondent, the Commission is of the opinion that the legal position of an individual who has already received a certificate is not altered by the issue of a new certificate. The certificate was after all issued to the petitioner at the time, irrespective of whether he was a man or a woman.

Finally, the Commission points to the fact that – in other parts of the Dutch Civil Code of Law – the law has provided for the possibility to change personal details afterwards in a document that has already been issued. For example, Sections 28 and 28b of Book I of the Dutch Civil Code of Law provide an individual who has changed his/her gender with the possibility of having the gender and the first names in the birth certificate adjusted following this change. The Commission

therefore fails to see why the respondent interpreted the WHW in such a manner that a prohibitory provision was assumed to be stated in this Act.

On the basis of the foregoing, the Commission finds that the means is not necessary to realise the purpose attained by the respondent. The means exceeds that which is prescribed to the respondent by law. The defence that the Ministry of Education, Culture and Science is currently preparing a national register of certificates, which will include the provision that only the Minister of Education, Culture and Science will have the power to make an arrangement for the replacement of the original certificate, does not alter the above, as such an arrangement does not yet exist, and it is not yet clear which regulations will be applicable to the respondent. This implies that this means is not necessary and that it can consequently not serve as an objective justification for the indirect discrimination on the grounds of gender established in 3.15.

The second purpose: to reduce fraud

- 3.21** As far as this purpose is concerned, the respondent argued that, as a result of refined techniques, it is possible nowadays to make scans of a certificate that cannot be distinguished, if at all, from the original certificate. If there are two certificates of one individual in circulation, the risk of this form of fraud will increase, because it is possible to make scans of both certificates. This problem cannot be overcome entirely by the obligation to return the old certificate. The Commission is of the opinion that this purpose meets an actual need of the respondent and that there is no discriminatory intention. The purpose is consequently legitimate.
- 3.22** The means used by the respondent to attain its purpose is the once-only issue of a certificate. Apart from the question of whether the means to attain this purpose is appropriate, the Commission considers the means not necessary. The Commission is of the opinion that the respondent did not investigate whether alternatives exist that are less discriminatory in nature and which may also reduce the risk of fraud. At the hearing, several alternatives which the respondent could use to counter fraud with certificates came up for discussion. The respondent acknowledged at the hearing, that taking back the original certificate, for instance, would reduce the risk of fraud. In addition, the respondent explained at the hearing that it maintained an examination register with an examination sheet for each graduate. The respondent confirmed at the hearing that this register was not updated by any entries concerning information such as loss or theft of a certificate or the issue of a statement of graduation. Updating this register would enable the respondent to check whether an allegedly lost certificate or a scan of it was being used fraudulently. The Commission sees a possibility in this for the respondent to counter fraud with certificates. The respondent did not investigate this possibility. The Commission is furthermore of the opinion that the means is disproportional. The petitioner's interest in a new certificate, as described in 3.7, carries more weight than the respondent's interest to reduce the risk of fraud with certificates by issuing a certificate only once. The group of transsexuals to which the petitioner belongs and to whom the respondent was to issue a new certificate is, after all, very small. The argument that the respondent would then also be compelled to issue

a new certificate to individuals who had lost the certificate – for instance, due to fire – does not hold, as those individuals cannot invoke protection from equal treatment legislation on that ground.

On the basis of the foregoing, the Commission finds that the means is not necessary to reduce the risk of fraud. This purpose, in conjunction with the means, can consequently not result in an objective justification for the respondent's indirect discrimination on the grounds of gender.

- 3.23** The Commission finds that, by refusing to issue a new degree certificate to the petitioner with his current first names, the respondent's actions towards the petitioner were contrary to the provisions of Section 7(1)(c) of the AWGB, in conjunction with Section 1 AWGB.
- 3.24** Finally, the Commission has included in its considerations the fact that the respondent stated at the hearing that - within the context of the establishment of a national register of certificates - it had consulted with the Ministry of Education, Culture and Science about the possibility to change a certificate in the case of transsexuality. The Ministry of Education, Culture and Science will consider this. The Commission gives the respondent the advice to continue these consultations and to also include the "Issue Paper Gender Identity and Human Rights" of the Commissioner for Human Rights of the Council of Europe of 29 July 2009, as referred to under 3.10. The conclusion in this Issue Paper is that educational institutions should be obliged to change the first names and gender on certificates of transgenders. This will ensure that transgenders will be able to continue to enjoy the advantages of the education received. At the same time, this will enable them to apply for work that – given their professional qualifications - is suitable, instead of having to deny that they had enjoyed a particular education. In relation to this, the Council of Europe issued a recommendation to the Member States (Recommendation 3) to develop accelerated and transparent procedures to change the first names and gender of transgenders on birth certificates, identity cards, passports, certificates, and similar documents.

4 Opinion

The opinion given by the Equal Treatment Commission is that the University . . . discriminated against . . . on the grounds of gender by refusing to issue a new degree certificate to him with his current first names.

Given in Utrecht on 30 November 2010 by *mr.* C.A. Goudsmit, President, *mr.* D. Ghidei and *dr.* L.P.M. Klijn, members of the Equal Treatment Commission, in the presence of B.H.M. Werker, secretary.

5 Recommendation

The Commission recommends that the respondent continue its consultations with the Ministry of Education, Culture and Science about changing certificates of transsexuals, and that the report of the Council of Europe referred to above should be taken into consideration in these consultations.

mr. C.A. Goudsmit
On his behalf,
mr. drs. P.H.A. van Geel

mr. B.H.M. Werker