



Commissie Gelijke Behandeling

To the Members of the CEDAW Committee

Subject

45th Session-CEDAW

Date

December 15th, 2009

Our reference

2009/0239/LK/KdJ

Dear Members of the CEDAW Committee,

On January 30th 2009 the Dutch Equal Treatment Commission (ETC) has sent it's comments on the 5th Dutch report on the implementation of the Convention on the elimination of all forms of discrimination against women to the pre-sessional working group of CEDAW (CGB advisory opinion 2009/01). In light of the 45th CEDAW session in January 2010 the ETC would like to take the opportunity to add information concerning discrimination of trans-genders in the Netherlands.

In the past years the ETC has received several complaints about discrimination from trans-genders (five in the last two years). One of these complaints concerned a woman who was in the process of a sex change from female to male. The complainant was being educated to become a teacher and was obliged follow a traineeship. The school however refused to organize the traineeship, until the sex change was formalized in the complainant's passport. The ETC judged that the school discriminated because of sex. Another case was about an organization that made use of criteria to determine the sex of trans-genders, in order to register trans-genders for a sporting and cultural event. Because these criteria were not necessary or relevant for participating in the event, the ETC judged that the organization discriminated because of gender.

The latest opinions of the ETC (of 16 November 2009, see appendix) concerned the question whether an health care insurer discriminated against two trans-sexual women on the grounds of sex by not reimbursing the costs of artificial breast implants as part of a sex change from male to female (whereas the amputation of breasts as part of a sex change from female to male was reimbursed). In these judgments the ETC concluded that the regulations in the law lead to indirect discrimination. The health care insurer however did not unlawfully discriminate against the trans-sexual women, because it

had to comply with the regulations. The indirect discrimination by the health insurer therefore was objectively justified.

Because the regulations in the law lead to indirect discrimination, the ETC recently has asked the Minister of Health to look into these regulations critically in light of the equal treatment legislation. The ETC has not yet received a response to this request. Abovementioned cases illustrate the kind of discrimination trans-genders experience because of their sex. In the 5th Dutch report the government does not mention the position of trans-genders and what measures the government has taken or will take to protect this group against discrimination. Therefore the ETC would like to suggest that you ask the Dutch government what measures it will take in this respect, in particular concerning the law regulations concerning costs of sex change.

If you have any questions for the ETC concerning this subject or others subjects in the comments it has sent to you before, I will be present at the 45th session (together with my colleague ms. M. Graven) to provide you with answers or explanations.

Kind regards,

A handwritten signature in black ink, appearing to read 'L.J.L. Koster', with a long horizontal line extending to the right.

L.J.L. Koster
chair

Appendix: English translation of ETC opinion 2009-107

Appendix: English translation of ETC opinion 2009-107

Opinion 2009-107

Date: 16 November, 2009

File number: 2009-0046

on the application of **29 January 2009** of

....
residing in, Petitioner

against

....
located in, Respondent

represented by, Head of the Legal Affairs Department

1 Course of the proceedings

- 1.1** In the application referred to above the Petitioner requested the Equal Treatment Commission, hereinafter: the Commission, to investigate whether the Defendant discriminated against her on the grounds of sex and to pronounce its judgment on that.
- 1.2** On 18 February 2009, the Petitioner provided the Commission with further information on request.
- 1.3** On 9 April 2009, the Respondent put forward a written defence.
- 1.4** The Commission called upon the Parties to explain their position orally during the hearing of 8 June 2009. The Parties appeared at the hearing.

2 The Facts

- 2.1** The Petitioner is a transsexual (male to female) and is being treated by the Gender Team of the Medical Centre of the Free University of Amsterdam. In the municipal personal records database the Petitioner is registered as a woman.
- 2.2** The Defendant is a healthcare insurer within the meaning of the Care Insurance Act (Zvw).

- 2.3** The Petitioner has medical insurance with the Respondent under the Zvw. It concerns the “*Zorg en Zeker*” policy, hereinafter the: basic health insurance. In addition, the Petitioner took out a supplementary insurance with the Respondent, the so-called “*Gemeente Standaard*” insurance, hereinafter the: supplementary insurance.
- 2.4** By email of 28 December 2008 the Petitioner asked the Respondent whether the costs of placing artificial breast implants are reimbursed. The Respondent informed the Petitioner by email of 15 January 2009 that these costs are not covered by the basic health insurance and are not reimbursed.

3 Assessment of the application

- 3.1** The dispute concerns the question of whether Respondent discriminated against Petitioner on the grounds of sex by not reimbursing the costs of placing artificial breast implants as part of the male to female sex change.

Competence of the Commission

- 3.2** Pursuant to article 7, first paragraph under a) of the Equal Treatment Act (AWGB) discrimination on the grounds of sex is prohibited, among other things, when offering or granting access to goods or services and when concluding, executing or terminating agreements in that connection, if this is done in the course of a profession or a business.

The first question that needs to be answered is whether it concerns the commercial exchange of goods and services as meant in article 7 AWGB or a unilateral government action that the Commission is not competent to judge. The question of whether the grounds of sex is at issue will be pursued by the Commission under 3.18 below.

- 3.3** The Respondent argues that concerning the basic health insurance, the Commission is not competent to judge this question, because the Respondent only complies with obligations of the government laid down in the Healthcare Insurance Regulations (Rzv) adopted under the Zvw. This means that it concerns a unilateral government action the Commission is not competent to judge, according to the Respondent.
- 3.4** Concerning the question of whether or not the basic health insurance is a matter of unilateral action on the part of the government, the Commission finds as follows: Until 1 January 2006 health insurance funds and health insurers that were admitted in accordance with article 33 of the Exceptional Medical Expenses Act (Awbz) were designated as implementing bodies as meant in the Compulsory Health Insurance Act (Zfw). The decisions of these implementing bodies were based on compulsory applicable regulations. Appeal and objection related to a right to a provision or compensation under the Zfw was possible, subject to the General Administrative Law Act (Awb). In this context the Commission ruled at the time that it had no jurisdiction to judge claims under the Zfw and the resulting regulations, because of unilateral government action that fell outside the scope of article 7 AWGB (also see CGB 17 June 2004, 2002-72).
- 3.5** In the Statement of Defence (EK, 2004-2005, 29 763, page 29 et seq.) the following was argued concerning the nature of the insurance under the Zvw: “As explained in the further report the Government prefers a private-law form of the

compulsory health insurance with strong public guarantees to facilitate the optimum combination of social safeguards on the one hand and room and incentives for people's own responsibility, freedom of choice and competition on the other. (...) The choice for the private-law insurance variation entails that the legal relationships in the triangle health insurer – care provider – insured will all have a private-law nature again." Also in view of the above, the District Court of Arnhem, administrative law section, found in a case of an insured party against an health insurer concerning the refusal to reimburse the costs of some medication, that this does not concern a decision within the meaning of the Awb and that it is not competent to rule in the dispute (DC of Arnhem, 2 March 2007, AWB 06/3148, LJN: BA0940).

- 3.6** Now that the relationship between the health insurer and the insurance taker has a private-law nature, not only concerning the basic health insurance, but also concerning the supplementary insurances, there is no unilateral government action. This does not alter the fact that the Respondent is bound by strict laws and regulations concerning the basic health insurance.
- 3.7** The decision not to reimburse the costs of placing artificial breast implants is a decision related to the commercial exchange of goods and services. This is in line with the previous considerations of the Commission concerning a decision about a supplementary insurance in CGB 17 June 2004, 2004-73.
- 3.8** In view of this, the application of the Petitioner comes under the scope of article 7, first paragraph under a) AWGB. Therefore, the Commission is competent to test the actions of the Respondent against the AWGB, both concerning the basic health insurance and the supplementary insurance. The Commission will now judge whether the Respondent discriminated against the Petitioner on the grounds of sex by not reimbursing the costs of placing artificial breast implants as part of the male to female sex change.

Legal framework

- 3.9** Article 1 of the AWGB provides that discrimination includes both direct and indirect discrimination. The concept of direct discrimination includes discrimination that directly refers to or is directly based on one of the grounds protected by the AWGB, including sex. By indirect discrimination is meant discrimination resulting from a seemingly neutral criterion, regulation or action that affects certain people in particular because of a person-related feature protected by the AWGB.
- 3.10** Pursuant to article I, heading and under d) Zvw, a health care insurance is a non-life insurance concluded between a healthcare insurer and an insurance taker for someone required to be insured, which complies with the regulations laid down by or pursuant to this act and the coverage of which does not exceed the limits laid down by or pursuant to this Act.
- 3.11** Article 2.4, first paragraph, heading and under b) Healthcare Insurance Decree (Bzv) provides that the medical care to be reimbursed includes, as far as relevant, treatments of a plastic-surgical nature, if these are necessary for the correction of:
 - 1° abnormalities in appearance combined with demonstrable physical impairments;
 - 2° mutilations resulting from a disease, accident or medical treatment;
 - 3° (...);
 - 4° (...);
 - 5° primary sexual characteristics of established transsexualism.

3.12 Article 2.1 of the Health Insurance Regulations (Rzv) provides, as far as relevant, that the care as meant in article 2.4 Bzv does not include:
(...)
c. the surgical placement and the surgical replacement of an artificial breast implant, unless a part of the breast or the whole breast was removed;
d. the surgical removal of an artificial breast implant without medical necessity;
(...).

3.13 The Respondent reproduced the above provisions verbatim in article 6.4 of its policy conditions for the basic health insurance. As far as relevant, this article stipulates the following:

With due observance of the above paragraphs, we reimburse the costs of treatments of a plastic-surgical nature, if these are necessary for the correction of:
- abnormalities in appearance combined with demonstrable physical impairments;
- mutilations resulting from a disease, accident or medical treatment;
- (...);
- (...);
- (...);
- primary sexual characteristics of established transsexualism.

3.14 Furthermore, article 6.4 of the policy conditions provides, as far as relevant, that the insured has no right to reimbursement of the costs of treatments of a plastic-surgical nature, if they concern:

(...)
3. The surgical placement and the surgical replacement of an artificial breast implant, unless a part of the breast or the whole breast was removed;
4. The surgical removal of an artificial breast implant without medical necessity;
(...).

3.15 The Commission will first examine whether the Respondent discriminated against the Petitioner on the grounds of sex relating to the basic health insurance, After that, the Commission will judge whether the Respondent discriminated against the Petitioner on the grounds of sex relating to the supplementary insurance.

Discrimination on the grounds of sex under the basic health insurance?

3.16 The Petitioner argued that the Respondent discriminated against her on the grounds of sex by refusing to pay the costs of placing artificial breast implants in connection with the male to female sex change, whereas the Respondent does reimburse the costs of a breast amputation (mastectomy) in connection with a female to male sex change. Both operations serve the same purpose, according to the Petitioner, namely the correction of the breast size. Therefore, the Petitioner does not rely on a distinction between transsexuals and non-transsexuals, between men and women or between men and men or women and women, but on a distinction made between two groups of transsexuals, namely male to female transsexuals and female to male transsexuals.

3.17 Before discussing the question of whether a distinction is made between two groups of transsexuals, the question whether such a distinction comes under the scope of the AWGB needs to be answered. In 1996 the European Court of Justice ruled that transsexualism is covered by the 'sex' criterion (CoJ EG 30 April 1996, case C-13/94 (P./S. and Cornwall County Council), *Jur.* 1996, p. I-2143, *NJ* 1997, 182, *NJCM-Bulletin* 1997, p. 291 w.c.f. G.J.J. Heerma

van Voss, TVVS 1996, II, p. 326. Also see HvJ EG 7 January 2004, case C-117/01 (K.B.), *Jur.* 2004, p. I-541, *NJ* 2004, 36 (w.c.f. M.R. Mok), EHCR 2004, no. 10 (w.c.f. J. van der Velde) JAR 2004, 69).

This view was adopted by the Commission in for instance the 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. This does not make it unambiguously clear, however, which normative person – as far as necessary - is indicated, especially in the transformation phase. The Commission is of the opinion that since transsexualism comes under the grounds of 'sex' there is no objection whatsoever to test the distinction between two groups of transsexuals, namely the male to female and the female to male groups, against the AWGB.

- 3.18** The Respondent argued that placing artificial breast implants in connection with male to female sex changes is excluded pursuant to article 6.4 of the policy conditions of the insurance coverage. Reimbursement of placing artificial breast implants is only possible after the part or whole removal of a breast. Therefore, placing and replacing artificial breast implants in connection with transsexualism is not covered. In view of the provisions of the insurance policy the Respondent simply cannot reimburse the costs of placing artificial breast implants in connection with the male to female sex change.
- 3.19** Pursuant to article 6.4 of the policy conditions the correction of secondary sexual characteristics of established transsexualism, as far as it concerns the correction (amputation) of the breasts as part of the female to male sex change, does in general belong to the benefits to be insured. In this connection the Respondent points out that for males a mastectomy (breast amputation) to correct gynaecomastia (breast development in males) does in general qualify for reimbursement, if it concerns mammary gland tissue and if this gynaecomastia exists for more than 12 months. This concerns breast development showing a clear feminization of the breast, comparable to a Tanner stage M4 or higher. This also applies to transsexuals. If these conditions are met, the treatment does qualify as a benefit to be insured under the basic health insurance. In most cases the female to male sex change concerns a female breast with a Tanner stage M4 or higher. The Respondent has no knowledge of cases where the reimbursement of the costs of mastectomy in female to male transsexuals was refused.
- 3.20** The Commission expressly points out that if a healthcare insurer decides to include a certain type of care in a policy contract, he should not make any forbidden distinctions on one of the grounds protected by the equal treatment legislation, including sex.
- 3.21** The Commission is of the opinion that in the case of transsexualism the placement of artificial breast implants on the one hand and mastectomy on the other is comparable. It is true that from a medical and possibly also financial point of view the operations are not the same, but in both cases it essentially concerns corrections of the breast size as a secondary sex characteristic.
- 3.22** The Commission concludes that pursuant to article 6.4 of the policy conditions of the Respondent there is no right to compensation for the surgical placement of artificial breast implants, unless the breast was partly or wholly removed, and that this article is applied in such a way that the coverage does include the reimbursement of the costs of a mastectomy. The surgical placement and replacement of artificial breast implants, other than after a mastectomy, is not only for females and transsexuals wanting to change from female to male; artificial breast implants can also be placed in males. This not only occurs after a

mastectomy, for instance in the case of breast cancer, but also to make the chest look fuller and well-muscled, according to websites of plastic surgery clinics offering such a treatment. Therefore, the provision is neutral. Therefore, the application of article 6.4 of the policy conditions does not make a direct distinction on the grounds of sex.

- 3.23** However, applying this provision does affect females in particular, since the placement of artificial breast implants, other than after the partial or full removal of the breast, is much more uncommon for males than for females. Of the transsexuals it especially affects persons who have a male to female sex change, because the correction of the breasts is not reimbursed in those cases, whereas under this provision mastectomy in the case of a female to male sex change is reimbursed. Therefore, the Commission concludes that in this connection the provision as laid down in article 6.4 of the policy conditions does make an indirect distinction between transsexuals having a male to female sex change and transsexuals having a female to male sex change. In conclusion, the Petitioner who is undergoing a male to female sex change is indeed indirectly discriminated against on the grounds of sex.

Objective justification of the distinction in the basic health insurance?

- 3.24** Under certain circumstances indirect discrimination can be justified. Pursuant to article 2, first paragraph, of the AWGB the prohibition of discrimination does not apply to indirect discrimination which is objectively justified because of a legitimate goal, whereas the means for achieving that goal are appropriate and necessary. Concerning this exception, the party making the distinction should put forward facts that justify the distinction.
- 3.25** The Respondent argued that by its reimbursement policy concerning breast removals and the surgical placement of artificial breast implants the company is only implementing statutory regulations relating to the benefits to be insured pursuant to the Zvw and the resulting legislation. The Respondent expressly points out that in accordance with the Zvw the company does not have the possibility of reimbursing the Petitioner for the costs of placing artificial breast implants on the basis of the basic health insurance.
- 3.26** The Commission endorses the position of the Respondent concerning the basic health insurance. Pursuant to article 1, heading and under d), of the Zvw the insured benefits of a healthcare insurance may not exceed what the Zvw provides for. If the policy conditions do not match the provisions of or pursuant to the Zvw, the policy contract does not qualify as a healthcare insurance within the meaning of the Zvw. The provisions of the Zvw and the resulting regulations, as included under 3.11, 3.12 and 3.13, offer no room for including the reimbursement of placing artificial breast implants in the basic health insurance.
- 3.27** Based on the above, the Commission concludes that the Defendant did not unlawfully discriminate against the Petitioner on the grounds of sex by rejecting the reimbursement of the costs of placing artificial breast implants under the basic health insurance.
- 3.28** The Commission finds that article 2.1 Rvw, on which the policy conditions concerned have been based, makes an indirect distinction. That is why the Commission will use its authority to inform the responsible Minister of this decision. In this connection, the Commission notes that it does not fully

understand the ratio of article 2.1 Rvw., which reads that the surgical placement of an artificial breast implant other than after the partial or full removal of the breast, is not reimbursed, whereas pursuant to article 2.4, first paragraph, heading and under b), of the Bzv the insured is entitled to reimbursement of the costs of a mastectomy.

Discrimination on the grounds of sex under the supplementary insurance?

- 3.29** Concerning the supplementary insurance the Respondent stated that its supplementary insurance policies contain no provisions whatsoever that would provide coverage for medical care for the correction of secondary sex characteristics, such as the breasts in male to female sex changes or female to male sex changes.
- 3.30** The Commission concludes that the supplementary insurance of the Respondent does not contain any provisions on the basis of which reimbursement of medical care for the correction of the breasts as secondary sex characteristics in male to female sex changes or female to male sex changes can be claimed. Therefore, the supplementary insurance contracts of the Respondent currently do not include any provision that leads to (direct or indirect) discrimination on the grounds of sex in this connection.
In addition, the Respondent cannot be expected to include the reimbursement of the costs of placing artificial breast implants in its supplementary insurance policies only because of the fact that the legislator excluded these in the Zvw. The Respondent has freedom of contract in this respect, provided that the restrictions imposed by the equal treatment legislation are observed. It has not become evident that the Respondent has acted contrary to the equal treatment legislation in this respect.
- 3.31** Based on the above, the Commission concludes that the Respondent did not unlawfully discriminate against the Petitioner by rejecting the reimbursement of the costs of placing artificial breast implants under the supplementary insurance.

4 Opinion

The Equal Treatment Commission finds that did not unlawfully discriminate against on the grounds of sex by refusing to reimburse the costs of placing artificial breast implants, both under the basic health insurance and under the supplementary insurance.

Passed in Utrecht on 16 November 2009 by *mr* C.A. Goudsmit, Chairman, *mr* Ch.M. van der Bas and *mr* R.A.A. Böcker, members of the Equal Treatment Commission, in the presence of *mr* N. Günes, Secretary.

mr C.A. Goudsmit

mr N. Günes