

The impact of the Racial Equality Directive: a survey of trade unions and employers in the Member States of the European Union

Netherlands

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1. Demographic Background

According to the most recent *Statistical Yearbook* in 2009 the population of the Netherlands was 16.5m, of whom 80 per cent are of Dutch origin. The principal minorities originating from outside the EU are Moroccan, Indonesian, Turkish, Surinamese and from the West Indies, together with others making a total of approximately 1.8m. An additional 1.5m residents are non-nationals from other EU countries, primarily from Germany, Belgium, Poland, and Britain and most recently from Bulgaria and Romania. Although the overall population is still growing, from 15.8m in 2000 to 16.5m in 2009, the population is ageing steadily.

2. Industrial Relations Background

In the Netherlands, trade union federations and employers' organisations have a long tradition of social dialogue through consultation and cooperation, the so-called 'Polder-model'. The two main Dutch national consultative and advisory bodies in which employers' organisations and trade union federations are united are the Star, the Labour Foundation (Stichting van de Arbeid, 1945) and the SER, the Social Economic Council (Sociaal-Economische Raad, 1950). Membership of both bodies consists of the three main trade union federations (FNV, CNV and MHP) and the three main employers' associations (VNO-NCW, MKB, LTO) in the Netherlands. All major social and economic issues are discussed in these bodies and result in advice to the government or recommendations to social partners or general declarations. The Dutch system of industrial relations can be best described as organised decentralisation in which the main social partners and the government set up the national framework agreements. The social partners at decentralised levels are then free to bargain bearing those framework agreements in mind. Collective bargaining coverage is high: only 19 per cent of the employees are not covered by collective agreements. In 2008, the total of national and company collective labour agreements was 1125. Although employer representativeness appears relatively stable, trade union density has been falling for several years, and is now around 20 per cent of all employees, although nearly twice that level in the public sector.

As far back as March 1994, a General Equal Treatment Act (GETA) was adopted in the Netherlands prohibiting discrimination on the grounds of race, gender, nationality, marital status, religion or belief, sexual orientation and political orientation in employment. In February 2004, this Act was amended and complemented by an EC Implementation Act implementing Directive 2000/43/EC and Directive 2000/78/EC. This included amendments such as definitions of harassment and victimisation, and shifted the burden of proof.

Respondents from the main trade union and employers' association confirmed that they had participated in consultations about the GETA amendment Act, through the SER or the Star. Most union labour market policy on labour market participation of ethnic minorities and migrants is a result of consultation and cooperation between the main social partners in the bipartite Star, and of social partners and government in the tripartite SER. Since the early 1980s, these national institutions have issued many reports, declarations and recommendations on the labour participation of ethnic minorities and, much later, on diversity policy. The SER has published advice

to the government on several occasions. Examples of such publications are SER Advice 2000, "Taking Chances Creating Chances", stimulating the labour market participation of ethnic minorities, and SER advice 2007, "Not your descent, but the future", on improving the labour market position of ethnic minority youths. In this way, the social partners have significant influence on government labour market policy.

3. Trade union and employer awareness

3.1 Trade unions

Only one of the trade union federations, FNV, stated it was directly consulted on the transposition of the Racial Equality Directive through the SER and Star. During these consultations, FNV pleaded for an expansion of the protection against discrimination. It was disappointed however, that the Dutch Equal Treatment Commission (ETC) was not allocated more powers. The other unions were not consulted directly, but presumed their federation was through the SER or Star. Half of the union interviewees expressed a high level of awareness of the Directive. Some unions believe it is vital to have the Directive; as an NPB trade unionist stressed:

'If we didn't have any anti-discrimination legislation or directives, I am convinced things would definitely go wrong'.

Other unions believed it was important, too, because the new law permitted them to describe truths in relation to discrimination that the employers often preferred to deny:

'Every employer is keen to present the public image that everything has been taken care of and that there are no problems whatsoever, but the unions are being confronted with everyday reality and that often paints a different picture than the one the employers paint.'

The remainder have either no or very low awareness. As an interviewee of De Unie put it *'If you ask anyone within the union specifically about the directive, no one will know of it'*. The unions with a lower awareness of the Directive generally had a low proportion of ethnic minorities or migrant members.

3.2 Employers

One employer, VNO-NCW, stated it was directly involved in the negotiations of the Directive through the Ministry of Social Affairs and Employment as well as its Brussels office. This involvement consisted of lobbying, consultation with the European Parliament and contacts with officials of the European Commission. VNO-NCW finds the current approach to discrimination by the Directive too legalistic since it does not reflect nor address the underlying problems of discrimination or exclusion. The other respondents were not consulted directly, but thought that if there was any consultation it would have been indirectly through their employers' organisation (VNO-NCW, LTO or MKB) in the SER or Star.

Four out of six employer respondents showed a very high awareness of the Directive and anti-discrimination legislation. This was mostly because their personnel or clients were very ethnically diverse which had stimulated the organisation to raise its awareness. As an AWWN respondent put it;

'I think that the implementation of the directive in the Netherlands has led to it becoming an official act, but it was already a directive. According to me that hasn't had a great impact on the right (to equal treatment). And it hasn't changed awareness because that had already changed long before. I don't believe that in 2000 there were still employers who thought it was alright to discriminate. I don't think that it has changed awareness greatly.'

One of these employers was a deputy member of the Equal Treatment Commission. Only two organisations had a very low awareness of the Directive mainly because few members of ethnic minorities were working in those particular sectors.

Although the general awareness of the Directive amongst employers is high, the overall feeling of employers is that they do not need laws to develop active non-discrimination or diversity policy. Employers' policies and activities on this matter are mostly the result of their business interests; personnel shortages in certain sectors increase the need to recruit more diverse staff and managing that increasingly diverse pool of employees or simply because it wishes to increase its market by marketing its products or services to a more diverse clientele. At the same time employers admit it does help to set standards and the Directive stressed and renewed the need for specific action.

4. Comments on the Equality Body

Although complaints on racial or ethnic discrimination to the Equal Treatment Commission (ETC) are still high, none of the unions recalls supporting a member in a case before the ETC. Most unions believe that fear of victimisation makes employees reluctant to complain about discrimination. The CNV interviewee confirmed:

'I think that the dependent relationship between employee and employer will prevent employees who feel they have been discriminated against going to the Equal Treatment Commission.'

Even if cases get to the ETC, not all unions are positive about that institution. The FNV respondent believed that it does not have enough legal power. ETC can only issue non-binding opinions and is attributed limited powers to sanction perpetrators. Five unions stated they had contacts with the Dutch Equal Treatment Commission (ETC), which varied from occasional contacts (two unions) to close and regular contact (three unions). In one case an employee of a union was also a deputy member of the ETC. Another union has regular contacts with NGOs on discrimination issues and also with Art.1, the Dutch expert centre on discrimination.

Most employers have regular contact with either the ETC or Art.1, the Dutch expert centre on discrimination. VNG has contacts with Art.1 and Amnesty International. One of the employers suggested that good internal diversity policy, rules on conduct, confidentiality and complaints procedures should enable them to deal with complaints about discrimination internally, and they prefer to work actively on this then having to appear before the ETC. Only LTO has had no contact whatsoever with the ETC.

5. Trade union and employers policies and measures

5.1 Trade union policies and measures

Dutch law has prohibited racial or ethnic discrimination in employment relations since 1994. This means that anti-discrimination has been a concern for unions and their members for fifteen years now. All unions stated that creating equal opportunities and diversity, and combating discrimination have high importance for them. For those unions that have long had a diverse membership, anti-discrimination has thus been a topic of concern for nearly twenty years, so the impact of the Directive on union policies varied partly because of this. FNV, NPB and AFMP have written and structural diversity policies including a vision and recommendations. An NPB interviewee stressed:

'I am very pleased to say that the importance of these issues runs through the veins of our union officers. First of all, we believe that it is a right thing to do, we have put the Universal Declaration of Human Rights in our Statutes, and secondly, because it helps the organisation to become a better organisation.'

FNV annually publishes a Collective Negotiations Handbook for its board members and active members who are involved in collective negotiations. Almost all unions have legal departments that can deal with complaints about discrimination. FNV specially trains its help desk officers to recognise complaints about discrimination and organises an annual National Day for ethnic minority union members. NPB and FNV reported having internal ethnic minority advisory boards that inform and advise the union board and council on issues related to racial and ethnic discrimination and diversity. In their fight against racial and ethnic discrimination on the work floor, FNV, NPB and De Unie have set up special training courses on respect for diversity for union members and/or companies or employees in general. Incidents of harassment, and subsequent internal research, in both the police force and the army have led the NPB (Code Blue) and AFMP to (co) develop and monitor codes of conduct.

NU'91 and CNV have not dealt as much with anti-discrimination or diversity issues since their members are mostly white, older and male. But recent labour market shortages have pushed both them and the employers in their sectors towards trying to attract more ethnic minority workers, so they are making a start with diversity statements in their policy plans. Unions do recognise that combating discrimination does not stop at formulating policy. Some unions are more active than others, but even the AFMP which has an active anti-discrimination policy believes that:

'The maximum effort has not been made yet; I think that we can still improve a lot there. You see that people stop at formulating all kinds of decent rules on conduct, but fail to enforce those.'

One effect of the Directive, therefore, is that in the last few years more attention has been given to procedures to enable trade union members and employees to complain about discrimination. Codes of conduct have been established along with complaints procedures and commissions. Several unions have included anti-discrimination clauses in collective labour agreements (CLA's) negotiated with the employers, although there was a certain scepticism about their effectiveness:

'In CLA's we can write down, "you shouldn't discriminate on the grounds of ..." whatever, but in the end I have to write something down that the parties can enforce and then I have to leave the enforcement to some one else who is up

to his ears in re-organising, mergers and keeping the organisation from falling apart. The enforcement then, of course, will never happen.'

When looking at the unions who have had a long history of anti-discrimination policy, the focus now is more on stimulating and raising awareness of the need for and advantages of diversity in personnel in general and respect for all individuals rather than focusing on one specific discrimination ground. This is combined with individual support in cases of discrimination.

Nonetheless, there is a low level of complaints of racial discrimination, and the interviewees do not know of cases that have gone to the ETC. This could be because the union lawyers have dealt with cases confidentially, but the respondents think it is linked to avoidance of recognition of the issue at the shop floor. One interviewee argued:

'I think that lot of discrimination occurs at the work floor, but what happens is that it turns into an employment conflict where other arguments are made up as to why an employee would not function well enough. I don't know. I can suspect, but I can never prove it.'

Another contextualized the risk of taking a racism case:

'When complaining of racism you place yourself outside the work force. You are different, you don't belong. So you decide not to complain.'

As a result, some unions say they do not get any complaints from their members and conclude discrimination is not an issue for them. Other unions think members do not complain because of fear of victimisation, including loss of jobs. Also, they are aware that the discrimination that takes place often occurs indirectly, which is difficult to prove.

5.2 Employer policies and measures

Four of the employers' organisations interviewed, the AWWN, VNO-NCW, AH and LECD, have structural diversity policies in place. AH, LECD and VNO-NCW have had such policies for almost twenty years. The main points in these policies are attracting and recruiting more ethnic minorities and keeping them in the jobs as well as stimulating their promotion into higher positions. They argue that these policies predated the Directive:

'It is nice to have such a directive, but what's more important are the underlying causes (of discrimination and exclusion). That's what one has to focus on.'

LTO, still in the process of researching possibilities of recruiting ethnic minorities, however, recognised the role of the law:

'I think the law stresses the importance of non-discrimination. This is how the subject ended up on the agenda of employers and organisation. That's why I think a law is very important. It was now seen as an issue you had to deal with, had to think about, had to actively do something about, which you just couldn't

ignore, you had to make policy on, and if necessary should take action against.'

Some employers' associations have not as yet developed such formal policies, but still see the business case for diversity as increasingly important. As an LTO respondent put it:

'I think that policy is slowly changing because of the directive. One is slowly recognising that discrimination is not done, not accepted. But, it is something that is slowly coming through. It is not something that changes overnight.'

All employer interviewees have been or are currently recruiting more ethnic minorities. Their activities in this field vary from investigating the possibilities to advising members to recruiting from a more diverse pool. They are developing neutral selection criteria and training all employees who are involved in selecting new employees on these new selection methods. The focus of employers is currently on neutral and non-discriminatory selection and raising awareness of prejudice in recruitment. A VNO-NCW respondent feels that:

'Recruitment is a crucial moment in contact between an ethnic minority and the company. Now we focus more on 'diversity pays' because various cultures come together, contributing 'added value' and 'creativity'. Another pointed out that 'the law had helped put the subject of discrimination on the agenda.'

6. Views on how to tackle discrimination better

The unions' main suggestion is to improve the implementation and enforcement of the Directive. An EARN interviewee said:

'We have all these laws, but these laws in practice are still not working to the benefit of the people they should be protecting, not really.'

Interviewees suggested that the general provisions of the Directive and the GETA should be translated into concrete measures to implement non-discrimination and diversity at both national and company level. The use of quotas should be permitted, and would be more effective in stimulating labour market participation. Successful implementation required cooperation between all relevant parties, social partners, government, local Chambers of Commerce, branches and employers. According to the NU'91 interviewee:

'There is a directive. Full stop. And with it nothing has changed yet. You make a law, which then has to be implemented and enforced and there has to be policy behind it, and a certain vision and has to have the support of the whole field. As long as we don't have that support, we can write down what we want, be it in Brussels or The Hague. If that's it, then nothing will change.'

Unions also think that the government should do more on the dissemination of information on non-discrimination rights to employees and give more attention to discrimination in education. One trade unionist argued:

'The problem exists, I will absolutely not underestimate it, and I think that unions and employers' organisations are working on it, but I think that the problem arises at an earlier stage, before people start working. In education, in stimulating ethnic minorities to do what they actually want and not let themselves be put off by the language and 'you are not up for it.'

Besides the process of implementation, unions think the enforcement of the laws should be improved. There are not enough effective legal remedies. Another important issue is that there is not enough protection against victimisation. Although art. 8a GETA includes protection against victimisation, art. 7:685 of the Civil Code appears to impede the effective enforcement of that protection. Employees are in a dependent relationship and will not risk losing their jobs and income security by complaining of discrimination. Dutch labour law should be adjusted to make protection through procedures and remedies against victimisation in anti-discrimination laws more effective.

The employers who have had anti-discrimination and diversity policy for many years all stated they did not need the Directive or GETA to develop an anti-discrimination or diversity policy. They do have some suggestions for the government and other employers to make their policies in this area more effective. The first is that the government should highlight the advantages of a diversity policy for employers; if they want to change behavioural patterns, they should point out that employers can gain from such a diversity policy. As a private sector employer pointed out:

'What works better is that employers benefit from a diversity policy. First of all, there is no benefit in being sanctioned because of breaking the rules. Secondly, employers also benefit from having as large a pool of potential employees as possible, or clients for that matter. Integrate diversity in your image.'

Another suggestion was that quotas should be set for certain ethnic minority groups. The government should also initiate more public campaigns and devote more attention to the subject, thereby raising public awareness. LTO admits this might take some time:

'You have to raise awareness. This will not happen overnight. It has to become something of the heart and not only of the mind.'

The employers' main suggestion for an effective anti-discrimination policy is to take a decentralised and problem-based approach. The focus in projects should be on underlying problems rather than on personal characteristics: low literacy, quality of education, and language barriers. This integrated approach asks for cooperation between and across ministries which employers feel is currently lacking.

Their advice to other employers is that they should set good examples. See it as a business case, as part of their image. This way they will reach more clients and recruit from a more diverse pool of staff. Employers interviewed believed it was also very effective to introduce tailor made codes of conduct and complaints commissions in companies. The employer interviewees also felt that there should be clearer advantages in implementing diversity policies. They also believed there should be many more public campaigns. LECD stressed 'What does always help are public campaigns, to raise awareness of discrimination. This could be a great incentive.' Better education within society as a whole was also viewed as important by both trade unionists and employers. The employers stressed the need to improve literacy and educational and linguistic achievements.