

NEWS REPORT

Date:	10 November 2011
Expert:	Rikki Holtmaat
Title:	Dismissal of a homosexual teacher in a Protestant school
Country:	The Netherlands
Context	
Issue at stake:	Court declares dismissal of homosexual teacher at protestant school unlawful
Ground of discrimination:	Sexual orientation
Source:	National court decision: Judgement of Cantonal Court The Hague 2-11-2011 BU3104, Sector Kanton Rechtbank 's-Gravenhage , 1108007 \ EJ VERZ 11-83676
Field:	Employment
Legislative provisions:	Article 5(2) General Equal Treatment Act

Content

The case concerned a homosexual teacher who was dismissed by a (fundamentalist) protestant school after he had left his wife and children to live together with his new male partner. The Cantonal Court of the Hague confirmed that any educational institution that is based on a religious denomination has the right to require from staff members that they subscribe to the particular religious convictions and that they contribute to maintaining the specific religious identity of the school (the Court called such persons 'identity bearers'). This right is laid down in Article 5(2) of the GETA by way of an exception to the non-discrimination principle. However, the exception-clause provides that requirements that are necessary for the fulfilment of a function may not lead to unequal treatment, which is then based on the sole fact that someone is (inter alia) a homosexual. Additional circumstances must lead to the conclusion that the person in question is not able to maintain / is in fact not maintaining the institution's religious ethos.

¹ A lot of discussion has been going on in The Netherlands regarding what would constitute 'additional circumstances'. In the discussion with

¹ Eerste Kamer, 1992-1993, 22 014, nr. 212c, p. 10-11.

Parliament at the time of the adoption of the GETA (1990-1994), the government held that the fact that someone is living together with a person of the same sex is not a sufficient 'additional circumstances'. The government explained that it could be any 'behaviour' inside and outside school from which it is apparent that the teacher did not subscribe to the particular religious belief or on the contrary openly contests this belief.²

The Directive's wording in Article 4(2) seems not to permit that 'additional circumstances' play any substantive role *unless* such circumstances coincide with the organisation's religion or belief.

All examples given by the government during the parliamentary discussions of the GETA and ETC-Opinions regarding 'additional circumstances' concern behaviour or circumstances that have a close relationship with the religious ethos of the organisation. Therefore, this 'sole fact construction' seems to be in conformity with the Directive.

In the letter in which the European Commission started an infringement procedure against the Netherlands, Article 5(2) GETA was discussed, but in the end the Commission did not ask the government to change this provision.³ Nevertheless, the government, after a lot of lobbying conducted by some parliamentarians who held that this 'sole fact' provision was too vague and left too much space for discrimination against homosexuals by religious schools, announced (in 2009) that it wanted to change this provision in order to bring it more in line with EU law.⁴ So far, concrete proposals have not been made. Therefore, Members of Parliament of the Liberal Democrat Party (D66) and Green Party (Groen Links) have initiated a bill (in 2010) according to which the GETA will be amended in such a way that the words 'sole fact' are erased from the wording of Article 5(2).⁵

In the present case a Dutch court had for the first time to decide whether the particular circumstances included such 'additional circumstances' or that in fact the teacher was dismissed on the basis of the sole fact that he was living together with a male partner / i.e. being a homosexual. The judge concluded that the school had not really investigated whether the fact that

² Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 18-19. See also ETC Opinion 1996-39 and 1999-38.

³ Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444.

⁴ See Letter of the Ministry of Interior and Kingdom Affairs dd 29-09-2009, Tweede Kamer 2009-2010, 28 481, nr. 7.

⁵ Tweede Kamer 2009-2010, 32 476, nr 1.

the teacher had started to live together with a man meant that he could no longer function as an 'identity bearer'. It appeared that the sole fact that he had done so was enough for the school board to dismiss the teacher. The fact that the teacher had discussed his homosexual relationship with parents and pupils and that he made his dismissal public could not count as 'additional circumstances'. The same facts also could not lead to the conclusion that the working relations between the school board and the teacher were seriously disturbed and that the teacher had to be dismissed for that reason. The judgment established that the school's decision to dismiss the teacher was invalid; therefore the teacher was entitled to go back to work.

Internet link source and additional information:

<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BU3104>

(accessed on 10 November 2011)