



European network of legal experts in gender equality and non-discrimination

FLASH REPORT

Country:	Netherlands
Title:	Equality Body considers the positive action policy of the Technical University Eindhoven to be unlawful
Date:	05 October 2020
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Update of flash report:	The Netherlands - Technical University Eindhoven Law will open up job vacancies to women only (PDF 72 kB)
<u>Context</u>	
Issue at stake:	Decision by the Equality Body on the policy of University Eindhoven to appoint more women in academic positions
Grounds of discrimination:	Gender, Sex
Field of application:	Employment
Source:	National equality body
Applicable law:	Equal Treatment Act

Content

Decision of the national equality body: In order to increase the number of female professors, associate professors and university lecturers at the Technical University of Eindhoven (TU), from 01 July 2019, job vacancies for permanent academic staff were only open to women during a period of six months. If no suitable female candidate would be found within these six months, the vacancy would be opened up to men as well. This policy would be applied for the coming six years. An exception was made for exceptionally qualified male applicants, or for talented male partners of female candidates who were selected on the basis of the programme. An anti-discrimination bureau (Radar), who received several complaints from men about the programme, asked the Netherlands Institute for Human Rights (NIHR = the Dutch national equality body) for an opinion about the lawfulness of the programme.

On 2 July 2020, the NIHR ruled that the TU acted in breach of equality legislation. The NIHR took the view that the positive action programme has a legitimate aim, being the elimination or reduction of factual inequalities between men and women. At the TU, women are seriously underrepresented in scientific positions in relation to the available supply of staff with relevant expertise. However, the TU's policy does not meet the required standard of care, because the exceptions to the priority for women are so marginal that in fact female candidates are given absolute and unconditional priority. This is contrary to the case law of the European Court of Justice (ECJ). Furthermore, the TU's policy does not meet the proportionality requirement, as less far-reaching measures appear to be possible. Measures taken at the department and research group level to reach a gender balance have not been sufficiently successful because they did not impose binding measures. It could not be proven that the TU has tried to take more binding measures in this respect, for example by introducing financial consequences for the departments who fail to meet the objectives. Therefore, at this moment, the TU's policy is in breach of the law, according to the NIHR.

Key points of analysis: It is relevant to note that the decision by the NIHR is not legally binding. Nevertheless, the TU announced that it will review her policy in order to comply with the NIHR's decision.

The decision by the NIHR appears to be in line with the case law of the ECJ. This case law leaves little room for prioritising women. If the ECJ would revoke its case law or if the EU would overrule this case law with new legislation, this would make it easier for institutions in the Netherlands to take positive discrimination measures. At present, EU law hampers the improvement of the position of women in the Netherlands, even though the relevant ECJ case law is already 20 years old.

From a legal point of view the NIHR's decision is understandable. Nevertheless the question remains if the NIHR could not have applied the objective justification test less strictly in view of the extent to which women are underrepresented at the TU, compared to other universities in the Netherlands.

Internet link source: <https://mensenrechten.nl/nl/oordeel/2020-53>.