

**THE EQUALITY AND ANTI-DISCRIMINATION TRIBUNAL**

P.O. Box 8049 Dep

N-0031 Oslo

Tel. 95 19 68 00/01

email: [post@diskrimineringsnemnda.no](mailto:post@diskrimineringsnemnda.no)

website: [www.diskrimineringsnemnda.no](http://www.diskrimineringsnemnda.no)

**Case no. 23/2008**

**Parties to the case:**

**A. Harstad Municipality**

**B. and C. (charge nurses)**

**Decision of 14 November 2008**

**Composition of the Equality and Anti-Discrimination Tribunal:**

**Aslak Syse, Chair**

**Gudrun Holgersen, Deputy Chair**

**Thom Arne Hellerslia**

**Abid Q. Raja**

**Britt Elin Strand**

### **The case concerns:**

A claim for equal pay for work of equal value pursuant to section 5 of the Gender Equality Act (see also section 3). Comparison of two charge nurses and four technical coordinators employed by Harstad Municipality.

### **The facts of the case**

Harstad Municipality (the municipality) is a “two-level” municipality consisting of 46 units organised under the Chief Municipal Executive. Four of these units are nursing home X, nursing home Y, the Land Use and Building Matters Service (ABY), and the Operations and Physical Development Service (DRU). Each unit is headed by a unit manager. The unit managers are responsible for results, i.e. for technical, financial and personnel-related matters relating to each unit. The unit managers report to the Chief Municipal Executive. The nursing homes are split into departments, each of which is headed by a charge nurse, who is responsible for the department’s day-to-day running. In the ABY and DRU units, the departments are headed by technical coordinators. Both the charge nurses and the technical coordinators are subordinate to the unit managers.

B is a charge nurse at nursing home Y. In B’s department, there are 12 residents with varying diagnoses, including dementia and psychiatric problems. The department encompasses a total of 13 positions, distributed among 21 employees. B acted as the unit manager’s deputy during parts of the period October 2006 to September 2007, but this was not the defining feature of the position. The department budget was NOK 4,032,258 in 2006.

At the time the case was brought before the Tribunal, B had an annual salary of NOK 367,575.

B has the following education and work experience:

- Three-year university college nursing education. Officially authorised nurse in 1992.
- Basic university course in psychology plus *ex. phil* and *ex. fac*, 23 credits, completed 1997
- Further education studies in psychiatric nursing, 20 credits, completed 2002
  
- Worked as a charge nurse since 13 December 2005
- Worked for the municipality as a nurse since 11 May 1998
- Worked at NN hospital from 23 March 1993 to 15 December 1995
- Worked for the municipality as a nurse 1992–1993
- Worked for the municipality as a part-time assistant/enrolled nurse 1988–1989.

C is a charge nurse at nursing home X. There are eight residents with varying diagnoses in C’s department. There are 11 positions in total in the department. C has acted as deputy unit manager in the unit manager’s absence. The department budget was NOK 4,160,807 in 2006.

At the time the case was submitted to the Tribunal, C had an annual salary of NOK 367,575.

C has the following education and work experience:

- Three-year university college nursing education. Officially authorised nurse 1994.

- Two-year decentralised further education studies in administration and management at a university college, completed spring 2008
- Worked as a charge nurse since 24 June 2002
- Worked for the municipality as a nurse since 1994

The formal qualification requirements for employment as a charge nurse by Harstad Municipality are: authorised nurse/social educator, further education management studies (e.g. health and social welfare management), and relevant work experience.

The charge nurses are directly subordinate to the unit managers. They are responsible, in cooperation with the unit managers, for ensuring that the service is run in a proper manner as regards both quality and professional standards pursuant to acts, regulations, adopted procedures and the department's objective. The charge nurses are responsible for, among other things, ensuring that the personnel resources are administered in a manner that safeguards professional, human and financial considerations. The budget responsibility formally lies with the unit managers, but responsibility has been delegated to the charge nurses for, among other things, sick leave, temporary staff, medicines and the food budget.

The ABY unit is responsible for land use planning in the municipality. The building matters department and the surveying department are part of this unit. There are a total of four technical coordinators in the ABY.

D is the head of the municipality's building matters department. He coordinates, among other things, the day-to-day work on building matters. D's department encompasses a total of six positions. D has been the unit manager's permanent deputy since 2001. The department's budget is NOK 2,350,000. The technical coordinator is also responsible for fee revenues.

At the time the case was submitted to the Tribunal, D had an annual salary of NOK 409,000.

D has the following education and work experience:

- Engineering college, construction track, graduated in 1981.
- Engineering college, basic course 1979.
- Employed as head engineer/manager of the building matters section 24 January 1995. Has coordinated the day-to-day work on building matters since 1993.
- Employed by the building matters office of the municipality from 1985.
- Technical draughtsman, private firm, 1982–1985
- Assistant engineer, private firm, 1981–1982

E is the head of the municipality's surveying department. He coordinates the surveying work. E's department encompasses eight positions in total, filled by nine persons. The department budget is NOK 4,200,000. The technical coordinator is also responsible for fee revenues.

At the time the case was submitted to the Tribunal, E had an annual salary of NOK 408,000.

E has the following education and work experience:

- One-year extension in land surveying from an engineering college, 1982
- One year land consolidation school, 1980
- One-year agronomy course from an agricultural college, 1978

- Appointed to the position of head engineer in the Land Use and Building Matters Department as of 6 March 2002. Has coordinated the surveying work since 2001
- Employed by the municipality as a department engineer 1989–2001
- 1982–1989: engineer in XX municipality; department engineer in the surveying department
- 1980–1981: land consolidation technician, Land Consolidation Agency's mapping office in ZZ

The DRU unit is responsible for, among other things, the development, operation and maintenance of the municipal water supply and sewerage system (VA system). The unit consists of, among others, the Water Supply and Sewerage Projects department and the Water Supply and Sewerage Operations department. There are five technical coordinators in total in the DRU.

F is a technical coordinator in the Water Supply and Sewerage Projects department. His responsibilities include all of the municipality's water supply and sewerage projects, with an annual budget of approximately NOK 30,000,000. F's department encompasses four positions in total, in addition to a varying number of hired-in consultants.

At the time the case was submitted to the Tribunal, F had an annual salary of NOK 409,000.

F has the following education and work experience:

- NKI (distance learning) engineering college, environmental and municipal engineering, graduated in 1978.
- Since January 2002: technical coordinator, Water Supply and Sewerage Development
- From January 1996: section manager, Water, Sewage and Waste Disposal (VAR) section
- Employed by the municipality as a head engineer/section manager for field development from January 1987
- Previously employed as a department engineer by a firm for one year, by a county municipality as a department engineer for two-and-a-half years, as a consultant in a private firm for one year, by a municipality as a department engineer for one-and-a-half years, and by the same municipality as acting technical head for one-and-a-half years.

G was a technical coordinator in the Water Supply and Sewerage Operations department. His responsibilities included all water supply and sewerage operations, with an annual budget of approximately NOK 25,000,000. There are four positions in total in the department. The position also requires close contact with the implementing personnel (a total of 10 positions), and routine contact with a varying number of hired-in consultants.

At the time the case was submitted to the Tribunal, G had an annual salary of NOK 392,000.

G has the following education and work experience:

- NKI (distance learning) engineering college, environmental and municipal engineering track, exam in 1979.

- January 2002 – 1 September 2007: technical coordinator, Water Supply and Sewerage Operations
- Engaged as department engineer in the operations and physical development office, VAR section, 10 October 1997.
- Employed by Harstad Municipality, VAR section, as a department engineer from 1 November 1994
- Previously employed by a private developer as a construction manager for 13 years, and as an engineer in a private firm for one year

H took over G's position on 1 September 2007. Her annual salary at that time was NOK 405,000. She was engaged by the municipality as an engineer in 1997.

The formal qualification requirements for the technical coordinator positions in the building matters department and the surveying department are (preferably) an education from the Norwegian University of Science and Technology (NTNU), the Norwegian University of Life Sciences, or a corresponding qualification, and that the applicants have worked with the exercise of public authority directly conveyed by the Public Administration Act. The technical coordinator positions in the water supply and sewerage departments in question require (preferably) a graduate-level engineering qualification plus work experience in the specialist fields. However, a university-college-level education is sufficient for all of the technical coordinator positions in question, as the municipality has difficulty recruiting persons educated at a higher level.

The technical coordinators, along with the unit manager, bear the supreme technical responsibility within their specialist areas. They manage the day-to-day work tasks within their specialist areas. This involves, among other things, coordinating personnel. They also carry out routine tasks themselves, such as dealing with enquiries by the public and dealing with assigned administrative tasks relating to the specialist area. In addition, the technical coordinator positions in the building matters department and the surveying department carry authority to make decisions under the Planning and Building Act and Land Subdivision Act. The technical coordinators are also responsible for the department's budget, which among other things involves implementing purchases in accordance with the regulations relating to public procurements, preparing the contractual framework, and following up on technical and financial matters in the contracts in cooperation with the unit managers.

The charge nurses' pay is set pursuant to chapter 4b of the Main Wage Agreement (HTA) with the Norwegian Association of Local and Regional Authorities, which primarily involves central wage setting, although the central parties are permitted to provide in a main settlement that a smaller percentage of the framework amount is to be distributed following local negotiations. The HTA is a minimum wage agreement that does not impose any upper limit on the permitted pay grade of an employee in the position of charge nurse.

The pay of the engineers is set exclusively through local negotiations pursuant to chapter 5 of the HTA.

All of the 23 charge nurses employed by the municipality are women. In the technical sector, the municipality has a total of 13 middle-management-level positions that correspond to the technical coordinators. Two women are currently employed/remunerated in such positions, and two of the positions are currently vacant.

At the Tribunal meeting, the parties reported that local negotiations were taking place concerning the pay for the relevant positions. The municipality reported that it was offering B a new annual salary of NOK 410,000, effective from 1 May 2008. C was temporarily appointed to the position of unit manager at nursing home X on 13 August 2007. In this position, she has an annual salary of NOK 466,000. The municipality is offering a new annual salary of NOK 440,000, effective from 1 May 2008, to the technical coordinators in the departments in question.

### **Hearing by the Equality and Anti-Discrimination Ombud and further proceedings**

On 27 November 2006, the Norwegian Union of Municipal and General Employees, Harstad contacted the Equality and Anti-Discrimination Ombud and requested an assessment of whether the differential remuneration of two specific charge nurses and four specific engineers employed by Harstad Municipality contravened section 5 of the Gender Equality Act.

The Equality and Anti-Discrimination Ombud (the Ombud) issued an opinion in the case on 26 March 2008. The Ombud concluded that Harstad Municipality contravened section 5 (see also section 3), of the Gender Equality Act in paying the two charge nurses less than the four specified engineers employed by the municipality.

The Ombud concluded that the charge nurses carry out work that is of equal value to that carried out by the engineers. The Ombud further concluded that the settlement of pay in Harstad Municipality has the effect of putting women in a worse position than men, and that indirect differential treatment therefore occurs (see section 3, third paragraph, of the Gender Equality Act). The Ombud concluded that the pay differences were based on market considerations, and that pay was a suitable and necessary instrument for retaining the technical coordinators in question. However, the Ombud concluded that maintaining the pay differences between the nurses and the engineers is a disproportionate intervention in relation to the objective of the pay settlement. Accordingly, the exception in section 3, fourth paragraph, of the Gender Equality Act did not apply.

By letter dated 2 May 2008, the Norwegian Association of Local and Regional Authorities (KS) appealed on behalf of Harstad Municipality against the Ombud's opinion.

The Ombud reviewed the case, but did not alter its conclusion in the case.

The case was sent to the Equality and Anti-Discrimination Tribunal for hearing by letter of 11 August 2008.

The case was dealt with at the Tribunal meeting held in Oslo on 28 October 2008. The following members of the Tribunal took part in the hearing of the case: Aslak Syse (Chair), Gudrun Holgersen (Deputy Chair), Thom Arne Hellerslia, Abid Q. Raja and Britt Elin Strand.

Harstad Municipality was represented by the Chief Municipal Executive, a personnel adviser and Tor Allstrin, a KS lawyer. Further, C attended together with the head employee representative of the Norwegian Union of Municipal and General Employees, Harstad and Hans Christian Monsen, a lawyer with the Norwegian Union of Municipal and General

Employees. May Schwartz represented the Equality and Anti-Discrimination Ombud. The Tribunal secretariat was represented by Christel Kirkøen.

### **The submissions of the parties:**

Harstad Municipality (the municipality) denies that the pay of the two charge nurses contravenes section 5 of the Gender Equality Act (see also section 3).

The municipality asserts, firstly, that the employees to which the case relates do not carry out work of equal value.

The qualifications required for the technical coordinator positions in question are higher than those for the position of charge nurse.

The managerial responsibility of the charge nurses is linked to work supervision. The engineers' managerial responsibility is linked to the coordination of at times difficult technical operations.

The charge nurses' positions are, in contrast to those of the technical coordinators, split. Fifty percent of B's position is linked to nursing tasks, while the rest is linked to charge-nurse work tasks. For C's position, the split is 80% nursing tasks and 20% charge-nurse tasks. This means that the technical coordinator positions are on a different organisational level than the charge nurse positions.

Moreover, there are nursing advisers in the health sector. There are no such advisers in the technical sector, as the technical coordinators take care of the technical guidance themselves.

As regards working conditions, the municipality points out that there is also round-the-clock operation in the water supply and sewerage sector.

The municipality submits in the alternative that there are objective grounds for differential pay in this case. The pay differences between the charge nurses in question and the technical coordinators in question have been fixed without regard to sex.

Firstly, the technical coordinators in question have both materially longer municipal experience and longer periods of service in their current positions than B and C. Pay differences that are due to differing lengths of service are accepted as an objective basis for differential pay. This is clear from EU law.

Secondly, the technical coordinators in question occupy key positions in the municipality. They have top expertise that has been developed over several years in central positions in the municipality. This expertise is in demand, and difficult to replace.

There are other technical coordinators who have been offered higher pay than the technical coordinators in question. This is due, among other things, to the fact that they manage larger departments and therefore bear greater responsibility. Charge nurses who manage larger departments have been offered NOK 427,000, effective from 1 May 2008. This shows that the size of the departments and the amount of responsibility are also a factor in the settlement of pay.

High pay was necessary to recruit and retain the technical coordinators in question. The same considerations do not apply to the charge nurses in question. The municipality must be free to use pay as an instrument to recruit persons to and retain persons in such key positions. Market considerations are considered relevant in relation to both direct and indirect discrimination. This is clear from the preparatory works to the Gender Equality Act, the case law of the Tribunal and the case law of the European Court of Justice. Moreover, the equal pay provision is not intended to affect the market's valuation of different occupational groups.

The engineers have, in contrast to the nurses, a large alternative job market outside the public and municipal sector. For several years, very few candidates have been trained in the municipal engineering areas. The municipality faces competition from many quarters in the fight to recruit and retain engineers in general, including from the contractor and building industry in the region, the architecture and consulting industry, the Norwegian Armed Forces, the Norwegian Public Roads Administration, the county municipality, the University Hospital (Harstad department), various electricity plants, the Knowledge Park, the State, the oil industry and nearby municipalities. This market has grown in recent times. The level of pay is high in the competitive market.

H was made offers by two other employers in connection with G leaving his technical coordinator position on 1 September 2007 and H taking it over. In the end, she chose to accept the technical coordinator position. Her annual salary at the time that she took up the position was NOK 405,000.

There were five applicants for a technical coordinator position (not one of the relevant positions in the ABY), advertised in the autumn of 2007. The person nominated as the number two candidate accepted the position, but only after submitting a pay claim of NOK 460,000 and receiving an offer of NOK 440,000.

Moreover, it is generally difficult for the municipality to recruit engineers. A short time ago, the municipality offered an engineering position with an annual salary of NOK 380,000 to a woman engineer. She rejected the municipality's offer. It is unclear whether pay was decisive in the decision, but it is a fact that the woman was offered approximately NOK 100,000 more in salary per year by a publicly owned business.

Normal engineering positions in the ABY unit were advertised on two occasions at the beginning of 2008. The manager made two offers in this connection, but both were rejected by the candidates in question. The unit manager therefore chose to make an offer to a candidate who applied the first time.

In 2007, three engineering positions in the DRU unit were advertised. A total of 10 people with engineering expertise applied for these positions. Two of these positions have been filled with relatively newly qualified engineers. The third position remains vacant, as the person to whom the position was offered rejected it due to receiving a better offer from the Norwegian Defence Estates Agency.

Further, there is generally a high turnover among engineers. There are 15 engineering positions in the ABY. Seven of the engineers have left during the past year, meaning a turnover of 46.7%. In the DRU, 50% of the unit's engineers have left during the period 2005–2007, primarily in order to take up positions in corresponding state-owned or private

enterprises with salaries NOK 50,000–100,000 higher than they received from the municipality.

The municipality currently has good access to well-qualified labour for the charge nurse positions. The last time a charge nurse position was advertised, at the end of 2006/beginning of 2007, the municipality received seven applications. Moreover, turnover has not been a problem in relation to these positions.

There was a lack of nurses in the 1980s and 1990s. The municipality implemented special pay-related stimulus measures at that time in order to recruit nurses. However, these measures were discontinued on 9 March 2006.

It would be unreasonable if the municipality were unable to utilise the instrument of pay where market considerations indicate its necessity. The technical coordinators manage engineers. It is good personnel policy also to pay technical coordinators more when difficult recruitment and high turnover among engineers presses up engineers' pay.

If the fact that the municipality considers it necessary to pay certain male employees highly leads to the municipality having to increase the pay of university college groups dominated by women, this will have major consequences for pay growth in the municipality and thus for the municipality's financial frameworks. There is nothing in the preparatory works to the Gender Equality Act to indicate that the relevant provisions are intended to have such effects.

The salaries have been negotiated through pay talks, in which the focus has been on adjusting the pay of low-pay workers upwards. The intention of the Gender Equality Act has not been first to achieve upward adjustments for the low-paid via the pay settlements and then to bring proceedings under the Gender Equality Act in order to secure an upward adjustment of the pay of female university college groups.

B and C's trade union, the Norwegian Union of Municipal and General Employees, asserts that the municipality's remuneration of the charge nurses in question contravenes the principle of equal pay for work of equal value in section 5 of the Gender Equality Act (see also section 3).

The charge nurses in question carry out work of the same value as the four technical coordinators.

The municipality's statement that the engineers *have top expertise related to municipal engineering areas, developed over a long time* is not a sufficient reason to conclude that the department engineers carry out work of a higher value than the charge nurses. Reference is made to the objective of the rule and to effectiveness considerations.

The technical coordinators also have mixed work tasks; some of their work tasks are also ordinary engineering tasks. The charge nurses and the technical coordinators are therefore on approximately the same level within the municipality. However, the charge nurses bear more personnel responsibility than the technical coordinators.

There are technical coordinators among the nurses, but they have less responsibility than the charge nurses.

The special factor related to the working conditions of the charge nurses is that the nursing homes are in round-the-clock operation, and many of the employees work part-time. The department manager therefore faces a great challenge in maintaining contact with all employees and ensuring that there are always qualified personnel on duty.

The case concerns an instance of indirect discrimination. There is no objective reason for differential pay in this case.

The Norwegian Union of Municipal and General Employees disputes the municipality's assertion that the four technical coordinators have longer length of service and greater expertise than the two charge nurses, and that this can largely explain the pay differences.

Firstly, it is pointed out that other charge nurses with longer length of service than the two charge nurses to whom this case relates experience the same difference in pay compared to the department engineers.

The fact that all of the technical coordinators in question have been offered the same salary, NOK 440,000, with effect from 1 May 2008, also indicates that length of service is not the real reason for paying the technical coordinators in question more than the charge nurses in question.

Further, the charge nurses in question have longer educations than the technical coordinators in question.

The Norwegian Union of Municipal and General Employees further disputes that market value may be used to disprove the existence of indirect differential treatment in this case. Rather, the market mindset, as practised by the municipality in its remuneration policy, may provide proof of the existence of indirect differential treatment, as this mindset results in the systematic differential remuneration of women and men who carry out work of equal value.

The market value perspective as a legitimising ground for differential pay only becomes relevant in the assessment of whether the indirect differential treatment is nevertheless permitted under the exception, and particularly under the test of proportionality in section 3, fourth paragraph. The principles relating to giving weight to factors such as market value when setting pay constitute a legal standard, the further development of which the legislator has left to case law (see Proposition to the Odelsting No. 77 (2000–2001), page 61).

The Norwegian Union of Municipal and General Employees points out that the differences in pay are a structural problem, and points to the fact that the engineers were also better paid during periods in which nurses were in short supply. It is also pointed out that the engineers come from a historically male-dominated arena, in which practical expertise and professional upgrading along the way are noted and given weight. The Norwegian Union of Municipal and General Employees is of the view that the municipality's settlement of pay for the university college group is based on an informal valuation of occupations.

The municipality has in any event not substantiated that it was necessary for it to use pay as an instrument for recruiting and retaining the engineers.

The Norwegian Union of Municipal and General Employees disputes the municipality's claim that it does not face equally large problems in recruiting and retaining charge nurses as it faces in relation to engineers. It believes that the municipality has not documented any recruitment problem in relation to the engineers. Further, it is pointed out that Harstad municipality adopted recruitment and stimulus measures in relation to nurses in the period June 2001 to December 2005. Corresponding measures have never been implemented in relation to retaining and recruiting engineering expertise.

Expanded lists of applicants for the period 2004–2007 show that there were four applicants for a technical coordinator position in the DRU, 19 applicants for a position as a department engineer in the DRU, and 12 applicants for a position as a survey engineer in the ABY.

At the time that B was appointed as a charge nurse, three positions at nursing home Y were advertised. There were three applicants, but only one of the applicants was qualified pursuant to the job description. However, the advertisement permitted other further education than in the field of administration and management, and accordingly two of the applicants for the three positions were appointed as qualified.

It is further pointed out that the municipality has not documented that it experiences competition from many quarters in its fight to recruit and retain engineers. It is apparent from the minutes of remuneration policy discussion meetings in June 2006 that the municipality believed that there were no noteworthy recruitment problems at that time.

Further, the employer has not proved that the same result could not have been achieved with other instruments. The only instrument used in relation to engineers has been pay, given upon appointment and later in local negotiations. The Norwegian Union of Municipal and General Employees points out that the department engineers were also more highly paid than the charge nurses in the period during which there were major recruitment problems on the nursing side. This was so despite acceptable access to engineers. It appears as though the municipality generally uses the market consideration where technical coordinators are concerned. This is not consistent with the objectives of the Gender Equality Act, as the result is that typically female occupations do worse in the pay battle.

The deciding question of principle is whether paying the municipality's department engineers more than the two charge nurses is a disproportionate intervention in relation to the objective: recruiting and retaining engineering expertise. In this assessment, the interests of the two woman charge nurses and the gender equality consideration must weigh more heavily than the market consideration. This is clear from the preparatory works to the Gender Equality Act.

## **The Tribunal's assessments**

### Introductory comments

The Tribunal has assessed whether B and C are entitled to the same pay as their male colleagues D, E, F and G. The case relates to concrete pay demands by specific employees, which will be assessed on the basis of section 5, first paragraph, of the Gender Equality Act:

*Women and men in the same enterprise shall have equal pay for the same work or work of equal value. The pay shall be fixed in the same way for women and men regardless of sex.*

The pay differences have changed since the case was brought before the Tribunal. However, the Tribunal is conducting its assessments on the basis that the pay differences have not been more than NOK 42,000 during the period between the submission of the case to the Tribunal and the date of the Tribunal's decision. In addition, C has been temporarily employed as a unit manager since 13 August 2008, with an annual salary higher than that of the technical coordinators. However, B and C wish the case to be assessed by reference to the positions they held at the time that the case was submitted to the Tribunal. The Tribunal has therefore carried out its assessments on the basis of the circumstances of the positions at the time that the case was submitted to the Tribunal.

### Is the work of equal value?

The Tribunal has considered whether the work involved in the charge nurse positions in question is of equal value to the work involved in the technical coordinator positions in question. Pursuant to section 5, third paragraph, of the Gender Equality Act, it is necessary to carry out *an overall assessment in which importance is attached to the expertise that is necessary to perform the work and other relevant factors, such as effort, responsibility and working conditions.*

Section 5, second paragraph, of the Gender Equality Act provides that the right to equal pay for the same work or work of equal value *shall apply regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements.* This was added through the amendment of section 5 of the Gender Equality Act in 2002. The reason for sharpening the act in this area was to deal with the pay difference that traditionally rests on unequal valuation of female and male occupations. On page 58 of Proposition to the Odelsting No. 77 (2000–2001), it is emphasised that *if the equal pay provision is to be a good and effective instrument in a gender-segregated job market, it must be possible to compare entirely different occupations and professions.*

The report of the Public Committee on Job Evaluation (NOU 1997:10), is based on the premise that the evaluation is to be carried out on the basis of the qualification requirements that would be specified if the position were to be advertised. The expertise of the current holder of the position is not decisive in the assessment of whether the positions are of equal value.

The Tribunal accepts that the real qualification requirements for the charge nurse and technical coordinator positions are the same: a three-year education at university college level. Neither B nor C had higher management qualifications when they were appointed to their positions as charge nurses. None of the technical coordinators in question had more than three years' education at university college level when they were engaged by the municipality. The municipality reported at the Tribunal meeting that it had difficulty recruiting persons with more than a university-college-level education for technical coordinator positions.

The next question is whether one of the job categories involves greater responsibility.

Both the charge nurses and the technical coordinators in question are directly subordinate to a unit manager, who in turn reports to the Chief Municipal Executive. They are therefore on the same organisational level within the municipality.

The work responsibilities involved in both types of position are mixed, and involve performing both professional tasks and management. The Tribunal does not consider it decisive that the charge nurse positions are formally split into nursing tasks and management tasks. The Tribunal is thus proceeding on the basis that the technical coordinators also carry out normal engineering tasks/case handler tasks.

Both the charge nurse positions and the technical coordinator positions in question involve professional and administrative responsibility for the department, including responsibility for personnel. The departments they manage are of somewhat different sizes. The budget of the two relevant departments in the water supply and sewerage sector is larger. On the other hand, the charge nurse positions involve responsibility for more personnel than the positions of the technical coordinators in question. All in all, this does not indicate that one of the positions involves greater responsibility.

The most material difference between the positions appears to be that the charge nurse positions involve a greater degree of management responsibility linked to work management and responsibility for residents, while the management responsibility involved in the relevant technical coordinator positions is primarily linked to the coordination of technical operations, including the coordination of municipal and hired-in personnel, and responsibility for matters in the relevant specialist area.

Any errors made by the technical coordinators mainly have financial consequences for the municipality. Any errors made by the technical coordinators in the water supply and sewerage sector can also have serious consequences for the inhabitants of the municipality if the result is that the water supply system or the sewerage system does not function. Decisions made under the Planning and Building Act can be highly significant in relation to building safety, environmental protection and other important social considerations.

Any errors made by the charge nurses can have immediate consequences for the lives and health of the residents. The position of charge nurse is very much about human relations and the ability to provide care, along with medical responsibility. Moreover, the work may require the ability to cope with serious situations, including dealing with acute and threatening situations.

The Tribunal would point out that one of the objectives of the equal pay provision and the job evaluation is to adjust upward professions typically chosen by women. Effectiveness considerations therefore indicate that the same weight should be attached to responsibility for people as to responsibility for tangible assets. Moreover, the report of the Public Committee on Job Evaluation emphasises that this is important in order to ensure that the system measures responsibility in a gender-neutral manner.

It does not appear that the work involved in any of the positions distinguishes itself by imposing a greater burden than the other positions in terms of working conditions and other matters related to the nature of the work.

Against the backdrop of an overall evaluation of the matters mentioned above, the Tribunal finds that the work involved in the charge nurse positions in question is of equal value to the work involved in the technical coordinator positions in question. In this assessment, the Tribunal has taken into account that an important factor in the application of the Gender

Equality Act's provision on work of equal value is the consideration relating to the effectiveness of the statutory provision.

Are the pay differences nevertheless permitted?

The technical coordinators in question are more highly paid than B and C. Pursuant to the wording of section 5, first paragraph, first sentence, of the Gender Equality Act, B and C are therefore entitled to the same pay as the technical coordinators in question. However, the Gender Equality Act's equal pay requirement is not interpreted to mean that women and men who perform work of equal value must always receive the same pay. Accordingly, pay differences based on other objective factors are accepted.

Firstly, the pay differences must be based on factors other than sex. If women and men are assessed in the same manner on the basis of gender-neutral criteria, the situation does not contravene the prohibition on direct discrimination on the basis of sex in section 3, first paragraph.

The Tribunal concludes that it has been substantiated that the current income disparities are not based on sex, but on other factors (see further below).

The pay differences therefore do not contravene the prohibition on direct discrimination on the grounds of sex.

However, apparently gender-neutral pay settlement norms may contravene the prohibition on indirect discrimination. The employer's reason for the pay difference must therefore also be assessed by reference to section 3, third and fourth paragraphs. The Tribunal cannot see that the question of indirect discrimination in pay settlement has been dealt with in previous Tribunal case law. However, the Tribunal finds that section 3 concerning indirect discrimination also applies to cases under section 5 (see Proposition to the Odelsting No. 77 (2000–2001), page 52, and Proposition to the Odelsting No. 33 (1974–75), page 58).

As a general rule, apparently gender-neutral pay settlement norms *that actually have the effect of putting one sex in a worse position than the other* contravene the prohibition on indirect discrimination (see section 3, third paragraph).

According to the preparatory works and the case law of the European Court of Justice, a significant larger number of women than men must be affected. The Tribunal finds that this is so in this case. It is pointed out that only women occupy charge nurse positions in the municipality. Two of a total of 13 middle manager and technical coordinator positions in the technical sector in the municipality are occupied by women. Nine of the positions are occupied by men, and two are currently vacant. The Tribunal is aware that this is a small statistical base. As the gender distribution corresponds to the gender composition of these occupational groups in general, and therefore cannot be considered random, the Tribunal has concluded that the requirement for a distorting gender-related effect must be considered satisfied.

Basically, therefore, the pay differences contravene the prohibition on indirect discrimination.

The unequal pay is nevertheless permitted pursuant to section 3, fourth paragraph, if it has an *objective purpose that is independent of gender, and the means that is chosen is suitable, necessary and is not a disproportionate intervention in relation to the said purpose.*

The requirement of *objectivity* first and foremost means that the employer's reasons for the pay differences must rest on real needs. Further, the means chosen to realise the objective must be *suitable* for achieving or promoting that which one wishes to achieve through the action. The requirement that the action must be *necessary* in relation to the purpose is also a condition that it must not be practically possible to choose other, non-discriminatory alternative actions. The action is unlawful if the same result can be achieved without producing unequal treatment.

It follows from both the preparatory works and Norwegian and EU case law, both before and after the amendment of 2002, that length of service and market value may be regarded as possible gender-neutral reasons for remunerating employees differently. As regards market considerations, it follows from, among others, case 2/2001 of the Gender Equality Board of Appeals and case 13/2006 of the Equality and Anti-Discrimination Tribunal that it is insufficient to point out that it is generally difficult to recruit particular occupational groups. The employer must substantiate that there are concrete circumstances that make it necessary to use pay as an instrument in respect of the employees in question.

It is the employer who bears the burden of proving that the pay differences are nevertheless lawful (see section 16 of the Gender Equality Act).

The Tribunal does not find that the municipality has substantiated that the length of service of the technical coordinators in question is the direct cause of the differences in pay.

It is pointed out that other charge nurses employed by the municipality who have longer length of service than the two in question experience the same pay difference in comparison to the engineers in question. H, who took up G's technical coordinator position in September 2007, was given an annual salary of NOK 405,000. She had no experience as a technical coordinator before taking up the position. Further, the technical coordinators in all of the positions in question, including H, have now been offered the same pay by the employer.

However, the municipality has substantiated that the technical coordinators in question, through their long-term employment relationship with the municipality, have developed top expertise, and that they hold key positions in the municipality. This expertise is difficult for the municipality to replace.

The municipality has further substantiated that there is strong competition as regards recruiting and retaining engineers in general, and that the level of ordinary engineer salaries is consequently being pressed up.

Documented recruitment problems are also relevant in relation to positions that have already been filled, and in respect of persons who have been employed in their positions for a relatively long time. It is good personnel policy to take into consideration those who are already employed when the market presses starting salaries up (see case 3/2001 of the Gender Equality Board of Appeals).

The Tribunal therefore concludes that the municipality has substantiated that the pay differences are based on impartial, objective factors that are not gender-related.

The Tribunal also concludes that the higher remuneration was a suitable and necessary instrument for being able to retain the technical coordinators in question. The Norwegian Union of Municipal and General Employees has claimed that the municipality could have used other instruments than pay. However, pursuant to section 5, fourth paragraph, of the Gender Equality Act, all benefits provided by the employer must be taken into account when making a comparison pursuant to section 5, first paragraph.

Further, the higher remuneration must not be *a disproportionate intervention*. The term *intervention* is directed at the consequences of the action from a gender equality perspective. Different interests must be weighed against each other. The interests of the person who treats differently, and that person's reasons for the action, must be weighed against the gender equality consideration and the consequences of the action for the person who is treated differently. The gender equality consideration must be given particularly great weight in the weighing of interests. The results of such weighing depend on which part of society the situation concerns, and on the types of actions involved (see Proposition to the Odelsting No. 77 (2000–2001), page 112).

The Tribunal has split into a majority and a minority in relation to the assessment of disproportionality:

*The majority* (members Syse, Holgersen, Hellerslia and Strand), points out that there is no general answer as regards the weighing of interests that has to be undertaken and, moreover, that this is not the purpose of the Gender Equality Act. A concrete weighing of interests must be undertaken in each case.

The consequence for B and C is that they receive up to NOK 42,000 less in pay than the technical coordinators to whom they compare themselves, for work that is of equal value. However, the majority of the Tribunal believes that it would be unreasonable if the municipality in this case were unable to use pay as an instrument for retaining the technical coordinators in question. The majority has also taken into consideration that the pay differences are of a magnitude that can be justified by reference to the consideration to which weight has been given. Reference is also made to page 59 of Proposition to the Storting No. 77 (2000–2001), where it is emphasised that the Gender Equality Act is not intended to be used to achieve general upward adjustments of pay for entire occupational groups. Further, reference is made to the fact that political consideration is being given to the question of how the problems related to pay conditions in occupations typically chosen by women can be resolved (see NOU 2008:6, Women and pay).

The differential pay practice is therefore covered by the exception rule in section 3, fourth paragraph.

The majority has therefore concluded that the differential remuneration of B and C and the technical coordinators in question does not contravene section 5 of the Gender Equality Act (see also section 3).

*The minority* (member Raja), has with strong doubts concluded that market considerations cannot be accepted as a gender-neutral ground in this case.

The minority points out that charge nurse positions traditionally attract women, while engineer positions generally, and technical coordinator positions in particular, have traditionally been occupied primarily by men. Giving weight to market considerations in relation to the male-dominated group will therefore have a distorting gender-related effect, and affect women who carry out work of the same value as that carried out by men. This will have major consequences from a gender equality perspective.

The minority has therefore concluded that the lower remuneration of the charge nurses contravenes section 5 of the Gender Equality Act (see also the prohibition on indirect differential treatment in section 3). The minority therefore largely agrees with the Ombud's reasoning on this point.

The Tribunal has also noted that the municipality's pay offer relating to new annual salaries effective from 1 May 2008 for the persons in question has the result that the pay difference is being evened out, and is proceeding on the basis that the municipality has the aim of further equalisation.

\*\*\*

The decision is a final administrative decision that cannot be reviewed by means of an administrative appeal. Pursuant to section 12 of the Act relating to the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (the Anti-Discrimination Ombud Act), which concerns review of the Tribunal's decisions, the decision may be submitted to the courts for a full review of the case. Legal proceedings for the review of the Tribunal's decision must be brought within three months of receipt of notification of the decision. Proceedings regarding the validity of the Tribunal's decision must be brought against the State as represented by the Tribunal.

## **CASE 23/2008**

### **The Equality and Anti-Discrimination Tribunal has made the following decision:**

Harstad Municipality's remuneration of the charge nurses B and C and the technical coordinators to whom they compare themselves does not contravene section 5 of the Gender Equality Act (see also section 3).

Oslo, 14 November 2008

Aslak Syse  
Chair

Gudrun Holgersen  
Deputy Chair

Thom Arne Hellerslia

Abid Q. Raja

Britt Elin Strand