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Legal Focus: Employer's liability for transgressive behaviour in the workplace in the Netherlands

In the Netherlands, the employer is liable if they fail to ensure a safe working environment for their employees who suffer harm as a result

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by **Daphne Gouweloos** |

Insurers may see more liability claims stemming from the workplace



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Sexually transgressive behaviour has received widespread attention since the #MeToo movement in 2017. More recently, there have also been claims in the Netherlands involving other forms of transgressive behaviour, such as intimidating, humiliating or transgressive acts committed by people in certain positions (namely managers or celebrities).

In the Netherlands, the question of an employer's liability for transgressive behaviour in the workplace is more topical than ever. Can employees who have experienced transgressive behaviour from a colleague

successfully hold their employer liable for any harm?

In the Netherlands, the employer is liable if they fail to ensure a safe working environment for their employees who suffer harm as a result (Article 7:658 Dutch Civil Code).

In this context, duty of care involves compliance with both written and unwritten societal norms. These societal norms and values are subject to change, with dialogue on shifting moral boundaries in full swing. Employers are also invited to engage in conversation with their employees to define the boundaries together. The limits to the employer's liability will ultimately be determined by case law.

Transgressive behaviour and its legal consequences are particularly prevalent in employment law. There could be a situation where, for example, an employee accused of transgressive behaviour opposes their dismissal. The employer's responsibility seems to outweigh the responsibility of the employee guilty of transgressive behaviour.

Serious culpability

An employee will lose their (statutory) right to a transition payment at the end of the employment only in exceptional cases, where it is evident the employee's acts or omissions are seriously culpable. In this case, the employer's acts or omissions should also be taken into account, as it is their responsibility to prevent transgressive behaviour in the organisation and to take action when this behaviour occurs.

In several employment law cases, this has resulted in the employee guilty of transgressive behaviour receiving a transition payment, in part because the employer was also to blame for not holding the employee to account for their behaviour.

What is more, an employee who crosses societal boundaries cannot be dismissed with immediate effect; there must be an urgent reason for such dismissal.

In one case, the court found an employee who had repeatedly made inappropriate jokes and, on one occasion, touched someone inappropriately was guilty of culpable behaviour, but held there was insufficient ground for dismissal with immediate effect. However, in a case involving an employee who had pulled down another employee's trousers as a joke in front of their colleagues, dismissal with immediate effect was in fact permitted.

An employer may ask the court to dissolve an employee's contract, but there must be justification, such as culpable conduct by the employee. The Den Bosch Court of Appeal has ruled on an employment law case involving an assistant anaesthetist who had been suspended following a complaint of sexual harassment. An investigation concluded the employee's behaviour justified a serious reprimand. He had suddenly and without consent kissed a female colleague on the mouth for several seconds in the operating room. There had been three other alleged incidents of inappropriate behaviour.

The employer tried to have the employment contract dissolved, but the sub-district court judge rejected this request. According to the Court of Appeal, the employer had failed in its duty of care towards the assistant anaesthetist by not providing him with sufficient guidance to help his return to the workplace after the request for dissolution of his employment contract had been rejected.

In cases where it is not the person guilty of transgressive behaviour but the victim who leaves employment, fair compensation is sometimes granted to the victim on account of culpable, overly lenient conduct by the employer.

Legal risk

There have been several judgments in which an employer was found liable for the sexual harassment of an employee by a colleague. As yet there is no case law on liability for transgressive behaviour but combatting harassment in the workplace is high on the Dutch government's agenda, so we expect to see an increase in legal proceedings on this subject in the near future.

Based on recent judgments, there are some things to be considered when assessing the employer's liability: First, the employee must prove there are or have been harmful working conditions. In the case of bullying, these conditions must have been present on a structural basis. This threshold is not always met.

The employer must pursue a clear and demonstrable policy to prevent/limit work stress and psychological harm. The employer can be blamed for not having a written risk inventory and evaluation, a plan of action and a complaints procedure for undesirable behaviour. Without an independent confidential adviser or clear code of conduct laying out inappropriate manners, the court may also (in part) rule the employer has not fulfilled its duty of care.

If an employer receives several complaints about an employee's behaviour, it is expected to act. The complaints must be investigated according to the employer's protocol, suspending the employee for a short period and giving them a written warning.

If the employer is completely unaware of an employee's intimidating behaviour, this may be an argument against assuming liability (especially if there was in fact a policy in place, focusing on work stress).

Finally, under certain circumstances, the employer may be required to provide proper aftercare to employees who have experienced transgressive behaviour at work. In case law, this aftercare obligation is seen especially in the case of employees who have experienced shocking events at work (for example, train drivers).

None of this is easy for employers. While the employer's duty of care requires they take employee complaints seriously, they must also protect the alleged perpetrator from false accusations. Both parties deserve a careful investigation and have a right to a fair hearing.

Even if it is established an employee's behaviour is inappropriate, this does not guarantee an easy dismissal for the employer. A request for dissolution of an employment contract is often rejected because the employee was not warned and the employee was unaware their behaviour was unacceptable. Moreover, the Supreme Court exercises caution in assessing the employee's behaviour.

Given the changing views on this in society, we must be careful of hindsight bias. The central question should be whether the employer properly considered the risks and precautions at the time of the alleged behaviour. A violation of the duty of care and therefore employer liability cannot readily be assumed if the employer had pursued a demonstrable policy focusing on work stress and was unaware of the behaviour or if the behaviour only appears retrospectively to have been transgressive.

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