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#Metoo recent case law in the Netherlands

#MeToo: a recent overview of Dutch case law, and what employers should learn from it

The #MeToo movement that has grown from the Harvey Weinstein sexual abuse scandal has led to increased interest in the way employers react to sexual abuse scandals in the workplace. As the #MeToo movement has empowered more people to come forward and raise their issues at their companies or organisations, there has also been a continued focus on how Dutch courts rule if an employer initiates court proceedings to terminate the employment agreement of the employee who is accused of improper (sexually-related) conduct at the workplace. In recent months, several decisions have been published on this subject. Case law shows that such behaviour does not necessarily lead to courts ruling particularly harshly on employees who are being accused of sexually improper conduct, when in the age of #MeToo, one would expect the courts to be more outspoken.

On 8 December 2017, the district court of Amsterdam granted an equitable payment of EUR 10,000 – in addition to the statutory transition payment – to a lecturer who was accused of sexually intimidating behaviour towards several female students. Although the court held that there was a reasonable ground to terminate the employment agreement, it nevertheless ruled that the employer – a university for applied sciences – had seriously disregarded its internal procedures when handling the complaint. According to the court, the employee had to be compensated for such failure of his employer.

A similar decision was rendered by the district court of The Hague on 1 March 2018, in which the court ruled that sexual harassment of a female trainee did not result in a culpable act, as the employer had already given the employee an official warning following the incident. Only after the warning had the employer initiated court proceedings in order to dissolve the employment agreement. Although the employee had not acted culpably, the employment agreement was dissolved by the court – subject to the payment of the statutory transition payment – due to the fact that the employment relationship between the employer and the employee was disturbed.

The court of appeal of The Hague took a stricter approach in its decision of 13 February 2018, ruling that the employee had acted seriously culpably after having demonstrated sexually improper behaviour towards two female colleagues. Following the complaints, the employer had suspended the employee after which the employer had requested the district court to terminate the employment agreement. Both the cantonal court and the court of

appeal ruled that the employment agreement must be terminated. The employee was not awarded any statutory transition payment.

In its decision of 1 May 2018, the district court of Amsterdam underlines the importance of following the employer's own internal disciplinary regulations. An employee had displayed inappropriate behaviour at the employer's annual Christmas party; drinking excessively, insulting a colleague and repeatedly 'touching up' another colleague. After a brief suspension, the employer instantly dismissed the employee, justifying the dismissal as "fitting in the context of the current #MeToo discussion". The court however ruled that the instant dismissal was too severe, given the fact that the employer had not followed its own internal sanctioning procedure. The employer should have pointed out that the employee was entitled to react to the complaint within 48 hours and that he could seek counsel. The court also weighed the employee's age (58 years old), years of service (38) and the fact that the employee had apologised for his behaviour.

An important lesson from these decisions is that employers should evaluate (or re-evaluate) how they handle sexual harassment-related behaviour and complaints within their organisation. As employers are legally obliged to provide a safe working environment for their employees, they must have adequate complaint procedures and disciplinary protocols in place, including a confidential counsellor employees can turn to. It is essential that employers continuously bring these protocols to the attention of their employees. When there is a complaint of sexual harassment filed against an employee, employers should strictly follow the internal procedures laid down in these protocols. It is also important that employers consider other sanctions than (instant) dismissal, such as an official warning, and hear both parties' sides of the story. Employers should also realise that the way they respond to the #MeToo movement and to individual claims may have a significant impact on their reputation, their employees' morale, and their ability to attract and retain employees. Employers would do well to evaluate the corporate culture within their organisation and – if necessary – revise their sexual harassment training, complaint procedures and disciplinary protocols.