

September 2023

3 Key takeaways

(Sexually) transgressive behaviour in the workplace

Since the start of the #MeToo movement, (sexually) transgressive behaviour as a major problem in society has not lost any of its topicality. In this context, Maartje Govaert was recently invited to an expert meeting with government commissioner Mariëtte Hamer in relation to the [Guideline for Reports of sexual transgressive behaviour in the workplace](#) which was published in May 2023. As transgressive behaviour has not been recognised and acknowledged for a long time, it is expected that more (alleged) victims will feel empowered by societal developments and are therefore more likely to come forward. It is important to make sure that such reports receive the attention and follow-up they deserve.

In our recent 'Employment Essentials webinar', Maartje Govaert and Daniël Kuiper discussed the legal framework regarding (sexually) transgressive behaviour in the workplace and the latest developments in case law. Furthermore, they shared tips & tricks on investigating a report. The webinar helped over 100 participants find get answers to their current questions. We have summarised the three main takeaways.

1

Employers have to demonstrate a high degree of responsibility

Case law shows that the applicability of clear and frame-setting policies on social safety and undesirable behaviour is crucial. The legal assessment of transgressive behaviour depends not only on the behaviour of the alleged perpetrator, but also on how the employer has responded to such behaviour and the extent to which the employer has fulfilled its obligation to provide a safe working environment. Employers should therefore look critically at their policies and be aware that including a general statement that transgressive behaviour will not be tolerated will in all likelihood be insufficient. Employers should also pay attention to pursuing a policy in which the threshold for voicing a complaint is as low as possible. Concrete starting points in this respect are, for example, the appointment of a confidential advisor (which will also be required when the [legislative proposal](#) for the mandatory appointment of a confidential advisor has come into effect) and the adoption of a speak up policy.

When assessing a court case regarding (sexually) transgressive behaviour, Dutch courts take

into account all the relevant facts and circumstances of the case. As a result, case law is rather difficult to predict. In our experience, examples of relevant circumstances are:

- The duration of the employment relationship
 - The employee's personal situation
 - The extent to which the employer has implemented clear and frame-setting policies
 - The culpability of the employee's behaviour (considering the employee's position)
 - The way in which the employer intervened after becoming aware of the (sexually) transgressive behaviour
 - The extent to which the employer exercised supervision to ensure a safe working environment
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2

They also need to ensure that policies are adequately and regularly communicated and understood

At least as important as having clear and frame-setting policies, is communicating the content of those policies adequately and regularly to the workforce. This will raise awareness of, among other things, the acceptability of certain behaviours and how to make complaints. In other words, the mere existence of a policy on (sexually) transgressive behaviour, without the employees being sufficiently aware of its contents, is insufficient and may be held against the employer. There are a number of ways in which the obligation to inform and train employees can be met, for example by setting up training courses or discussion groups.

3

A proper investigation protocol is key in cases where an investigation is initiated

It goes without saying that all complaints and signals of (sexually) transgressive behaviour should be taken seriously by employers. However, in some cases, it may be necessary to launch an investigation in order to get all the relevant facts on the table. In this regard, it is essential for employers to have a proper investigative protocol in place, which should include the necessary guidance and weighting factors for employers to adhere to.

Conducting a diligent investigation in all cases requires that:

- The arguments of both parties are heard
- The investigation is thorough and objective
- The (potential) measures to be imposed are reasonable and proportionate

In addition to the above, a number of other elements are relevant to the conduct of an investigation, including - but not limited to - the question whether the investigation will be conducted internally or externally and whether the alleged perpetrator will be suspended for the duration of the investigation. There are no hard and fast rules in this regard, meaning that the specific plan of approach should be determined on the basis of all relevant facts and circumstances of the particular case.

Questions

Our Employment & Pensions team has extensive experience in dealing with cases regarding transgressive behaviour and advising on potential measures that can be taken in this regard. Do you have questions on this topic or wish to discuss the aforementioned guideline? We are happy to assist you.

Contact



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