II- QUESTIONNAIRE 2014

Laws and regulations

1) What is the definition of violence, bullying and sexual harassment in the legislation in your country applicable to the workplace, if any?

Article 1 of the Working Conditions Act specifically defines sexual harassment as undesirable sexual approaches, requests for sexual favors or other verbal, non-verbal or physical behavior of a sexual nature, which also includes any of the following:

(i) Submission to such behavior is either explicitly or implicitly used as a condition for a person’s employment or promotion;

(ii) Submission to or rejection of such behavior by a person is used or partly used as a basis for decisions relating to the person’s work; or

(iii) Such behavior is aimed at affecting a person’s work performance or creating an intimidating, hostile or unpleasant working environment, or results in affecting a person’s work performance to an unreasonable extent or creating an intimidating, hostile or unpleasant working environment.

Bullying is defined as all forms of intimidating behaviour of a structural nature, coming from one or more employees (colleagues, managers) aimed at an employee or group of employees who is/are nog able to defend himself/themselves against this behaviour. An important aspect regarding bullying is the repetition of that behaviour in time.

Article 1a of the Equal Treatment Act (Algemene wet gelijke behandeling) defines harassment as conduct or behaviour which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.
2) Does your country have specific regulations to guarantee the protection of workers against violence, bullying and sexual harassment in the workplace?

Specific regulations are laid down in the Working Conditions Act, the Equal Treatment Act and the Equal Treatment Act of Men and Women. The prohibition on discrimination in the Equal Treatment Act and the Equal Treatment Act of Men and Women includes a prohibition on harassment. The Civil Code obliges the employer to provide a safe workplace in general (article 7:658 BW).

Scope of application

3) Who has a legal obligation to refrain from all acts of violence and moral or sexual harassment at work? (private and / or public sector - employers, employees, third party?)

Under the Dutch Civil Code, a “diligent employer” is primarily responsible for the prevention of sexual harassment and may not turn a blind eye to unwanted sexual advances within the company. Employers have the duty to protect their employees as much as possible from sexual harassment and its harmful consequences. All "employees" (including trainees, apprentices and temporary workers) are to be afforded protection therefrom.

Like the employer, the employee is also legally required to behave and act as a diligent employee and to observe the company’s disciplinary code. If an employee fails to meet these requirements, he or she commits a breach of contract. A direct order to refrain from sexual harassment is not necessary but may be included in the employment contract, the company rules or the collective bargaining agreement.

The employer’s obligation

4) Is the employer required to put in place a policy to prevent violence, bullying and sexual harassment in the workplace?

Yes, the employer must have a policy aimed at preventing employment-related psychosocial workload, or limiting it if prevention is not possible, as part of the general working conditions policy (Working Conditions Act article 3, sub 2). Employment-related psycho-social workload is being described as: the factors direct or indirect distinction, including sexual intimidation, aggression and violence, bullying, and work pressure, in the employment situation that cause stress (Working Conditions Act article 1, sub 3e).
5) Does the employer have to conduct a risk analysis taking into account the nature of his activities and the size of his business? What are the minimum preventive measures that he has to provide?

Yes, the employer has to conduct a risk analysis (Working Conditions Act, article 5). To prevent sexual harassment, the employer must evaluate the risk of sexual harassment and subsequently formulate a prevention program in order to limit the risks as much as possible. The employer must ensure, among other things, that the workplace is safe. Sexual harassment is considered to be a health and safety risk and therefore this topic needs to be addressed in these reports. Regular evaluations of the risks and of the effectiveness of the measures need to take place. If harassment occurs in spite of this, the employer must take more drastic measures. The employer can meet this obligation by appointing a confidant and by implementing a complaint procedure including sanctions. Employers are obliged to draft annual risk assessment reports and develop measures to prevent risks.

There are no specific rules regarding minimum preventive measures that the employer has to provide, other than stated above. There is no general legal obligation for employers to establish solid mechanisms (including complaints procedures) to protect victims. However, in the areas of healthcare, youth care and education, the legislator has issued some general legal measures which might have a preventive and protective effect. These are obligations to install complaints procedures and to report any case of sexual harassment to the Inspectorate, and even to the police (in case of education).

6) How are employees informed of the risks, the preventive measures and the procedures applicable to the victims of violence and moral or sexual harassment at work?

According to article 8 of the Working Conditions Act, the employer must ensure that the employees are effectively informed of the risks and the measures/procedures that are in place in order to prevent these risks.

7) Is the employer required to appoint persons with specific skills to deal with cases of violence and moral or sexual harassment at work?

Under the Working Conditions Act, there is an obligation on the employer to appoint employees with specific skills (‘experts’) to assist the employer with the compliance with his obligations under this Act (article 13). This therefore also applies to violence and moral or sexual harassment at work.

8) What are the sanctions against the employer who doesn’t adopt policies against violence and moral or sexual harassment at work?
Employers who fail to take measures may be fined under the Working Conditions Act (which hardly ever occurs, since the Labour Inspectorate is not very active in this respect). Employers may also be held liable by their employees who have suffered from violence and moral or sexual harassment. The Labour Inspectorate can also issue an order against an employer to comply with the Act within a given time frame.

**Remedies available to victims**

9) **What are the ways of actions available to the victims?**

- Internal procedures in the enterprise?
- External procedures?
- Legal remedies before the court?
  - Civil?
  - Criminal?

A harassed employee may choose to initiate court proceedings pursuant to the Dutch Civil Code and the equal treatment laws. If the employer is guilty of sexual harassment, the employee may base the claim on breach of contract, wrongful act or both. The employer has a contractual relationship with the employee, but if the “perpetrator” is a colleague, there is no contractual relationship. General tort law then applies. The employee may claim that the harassing colleague did not meet his or her duty as a diligent employee; thus, the colleague is considered to have committed a wrongful act. The harassed employee can also claim that the employer has not acted as a diligent employer by failing to provide for a safe working environment and preventing sexual harassment from taking place.

Sexual harassment as such is not a criminal law offence. As mentioned above, a victim who wants to receive some kind of compensation or wants the sexual harassment to stop, needs to use general civil law procedures. However, if the undesirable sexual approach or physical behaviour of a sexual nature is such that an assault or rape is concerned, criminal law proceedings may be commenced. Under the law, an assault or rape is an event in which violence is used or a threat of violence is made. If pressure of any other nature has been exerted and proof can be furnished that the harassed person could not offer resistance, Article 242 of Dutch Criminal Code applies as well.

Even if the employer is not himself the perpetrator, the victim still has possibilities to claim damages from him since the employer is the addressee of the (instruction) norm to ensure that working conditions are safe and to prevent/protect against (sexual) harassment, and may be held liable under that norm. The employer is also obliged to act as a ‘good employer’.
10) Who can take an action (the worker and/or the employer, colleague workers of the victim, others persons in contact with the victim, the union representative or the agent of an organization of employers, etc.)?

The employee, and for serious offences that constitute criminal conduct, the police.

11) Who bears the burden of proof of the violent acts and moral or sexual harassment at work?

In general, the employee bears the full burden of proof in civil court actions. However, under the scope of the Equal Treatment Act the burden of proof shifts to the employer if the employee can establish facts which give reason to believe that discrimination has occurred. Article 10 of the Equal Treatment Act stipulates that if a person who considers that he has been wronged through ‘discrimination’ under the Act (which includes violent acts and moral and sexual harassment), establishes before a court facts from which it may be presumed that discrimination has taken place, the employer has the burden of proof that the action in question was not in breach of this Act.

In criminal cases, the prosecutor has the burden of proof.

12) In order to avoid reprisals at work, is there special protection provided for the victim and the witnesses?
Specify the nature and duration of the special protection.

According to article 8a of the Equal Treatment Act, adverse treatment in reaction to the employees reliance on this Act is prohibited.

What about any improper use of the procedures?

13) What would be the consequences for a worker who has abused the procedure put in place to combat violence and moral or sexual harassment at work?

The employer could take disciplinary measures or, in serious cases, dismiss the employee.
If an employee makes false accusations, this may constitute a criminal offence and lead to penal sanctions.

Supervision and sanctions

14) Who is responsible for monitoring the measures put in place to combat violence and moral or sexual harassment at work?
The employer. The Labour Inspectorate has the obligation to monitor whether the employer complies with the Working Conditions Act. The Works Council, if in place, also has a role. According to article 28 of the Works Council Act, the Works council shall do all within its power to ensure due observance of any regulations regarding working conditions of employees within the enterprise. The Works Council must also guard against discrimination in general within the enterprise.

15) What are the sanctions applicable to perpetrators of violence and moral or sexual harassment at work?

Depending on the seriousness of the sexual harassment, the employer can impose sanctions in view of the breach of contract, varying from a reprimand to summary dismissal. The sanction must be in proportion to the seriousness of the misbehaviour. The perpetrator could also be obligated to pay damages to the victim.

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