

# EQUALITY IN THE WORKPLACE: TAKING CARE OF FEMALE EMPLOYEES

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*Dutch employers must, of course, act in accordance with legislation regarding, for example, equal treatment of men and women. However, when it comes to the workplace, gender difference should be recognized to achieve equality. What must employers keep in mind regarding a work culture where everyone feels comfortable? What are the legal rights of pregnant employees and employees with children? In this article, we will illustrate how Dutch law tries to create a safe and healthy work environment for us as female employees.*

## **Female-friendly work culture**

Employers should ensure a safe work environment. A recent judgment shows that this includes the obligation to create and maintain a female-friendly work culture. [1] This judgment was initiated by a female trader of a company that engages in securities trading and, more specifically, 'market making'. In this company, only 75 out of approximately 470 employees are female. At the time of the legal proceedings, the company consisted of 119 male traders and only 2 female traders.

The female trader requested the court to dissolve her employment contract. In this context, she referred to the female-unfriendly and unsafe work environment. As an outlet for the hard and competitive company culture, her employer allowed transgressive behaviour. An example of this is the 'trade sounds' played on the trading floor when a certain trade result was achieved: a short music fragment often including sexual connotations, such as 'Jerk it out', 'Sexy lady' and 'Bitch2'. Furthermore, in morning markets, where traders practice their skills, the traders traded on a fictitious market in, for example, dick pics, the salaries of female porn stars and the most expensive bra. Traders also regularly made sexually intimidating gestures, sounds, comments and jokes. They shared sexually charged expressions and images of scantily dressed women in WhatsApp groups. Company outings often ended in a strip club.

Based on the aforementioned, the court ruled that the employer had acted seriously

culpably towards the female trader. The employer had taken insufficient measures to change the company culture. Therefore, the court ordered the employer to pay an additional (so-called 'fair') compensation of €350,000 on top of the statutory severance payment of €64,000 to the female trader for taking inadequate action against an unsafe and female-unfriendly work climate.

## **Pregnant at work**

Under Dutch labour law, employers have to show extra consideration with respect to pregnant employees. In the following, we will go into some legislation applicable to pregnant employees, such as pregnancy and maternity leave and the (im)possibility to dismiss pregnant employees.

## Leave arrangements

During and after pregnancy, female employees are entitled to a minimum of 16 weeks pregnancy and maternity leave. At their own discretion, they can start the leave between six and four weeks - or between ten and eight weeks in the event of a

multiple birth - before the estimated delivery date. After childbirth, the employee is entitled to ten weeks maternity leave plus the number of days the pregnancy leave lasted shorter than six weeks (or ten weeks in the event of a multiple birth). During pregnancy and maternity leave, the employee is entitled to a benefit of 100% of the daily wage; however, this benefit may not exceed the maximum daily wage.

Furthermore, female (and male) employees are currently entitled to unpaid parental leave for each child under eight for a maximum period of 26 times the number of weekly working hours. As per 2 August 2022, employees receive a benefit equal to 50% of their daily wage - up to 50% of the maximum daily wage - for the first nine of the 26 weeks of parental leave

insofar as this is taken in the first year after the birth.

### Dismissal

Under Dutch law there are some prohibitions for an employer to (unilaterally) terminate an employment contract. For example, an employer may not terminate an employee's employment contract during her pregnancy. When starting proceedings to dismiss an employee, there is always an assessment on whether the employee is pregnant. For example, if an employer intends to dismiss an employee due to underperformance, a Dutch court will check whether the underperformance of the employee could be the result of pregnancy of the employee. If this is the case, an employee cannot be dismissed. From a Dutch law perspective, it is difficult to understand a

situation like that of Olympic athlete Allyson Felix. After giving birth to her first daughter, her employer wanted to pay her 70% less and offered no guarantees if her performance declined due to her pregnancy. She championed her values and signed a deal with another company. It is encouraging for other female employees that she spoke out against her employer's treatment of women who take breaks in their career to have children.

Furthermore, under Dutch law employers may not terminate the employment contract of an employee during the period in which she is on maternity leave. Nor can an employment contract be terminated during a period of six weeks after resuming work (i) following maternity leave or (ii) following a period of incapacity for work, that immediately



follows maternity leave, caused by the childbirth or the preceding pregnancy. Even if an employer intends to terminate the employment contracts of employees because of the cessation of the company's activities, it is not possible to dismiss an employee who is on pregnancy or maternity leave. There are only a few exceptions to these termination prohibitions, such as a termination during the probationary period or a dismissal on the spot.

In addition, an employer cannot terminate an employee's employment contract on the grounds that the employee is exercising the right to parental leave, adoption leave, leave for taking care of a foster child, or short-term and long-term care leave.

#### Safe and healthy work environment

The employer should organize the work of the pregnant employee in such a way that it has no harmful consequences for the pregnancy, the unborn child and the employee herself. This includes the obligation to (temporarily) adjust the workplace, working hours and/or the work if something poses a risk to the health and safety of the employee who is pregnant, recently gave birth or is breastfeeding.

A pregnant employee is entitled to a stable and regular pattern of work and rest. This means no night shifts or overtime, a lower than usual maximum to the hours of work per shift and week, and pregnancy examinations during working hours.


The employer must also make a suitable, lockable area with a bed or couch available to the employee during pregnancy and lactation for resting and breastfeeding or pumping breast milk.

#### **Combining work and motherhood**

The Dutch Flexible Work Act [2] entitles employees to request an adjustment of their working time, working hours, or work location. This is a valuable measure, for example, for female employees to combine children and work. Currently, employees can request the employer in writing for a change of place of work under the Flexible Work Act. However, this does not provide a right to work from home. The employer may refuse such a request. A legislative proposal 'Work Where You Want' has been drafted, based on which an employer would only be able to reject such a request if there are compelling business or service interests. If this legislative proposal will be adopted, this will be – in addition to the option to request an adjustment of working time

or working hours – a valuable opportunity for female employees to combine childrearing with working from home instead of at the office.

#### **Conclusion and recommendation**

As an employer, extra consideration is required regarding female employees. In addition to the (general) equal treatment regulations, Dutch law prescribes several rules on how to create a safe and healthy workplace for female – and in particular pregnant – employees. This is reflected, for example, in leave arrangements, working time and workplace adjustments, and prohibitions of dismissal. Recent case law has also shown that employers are obliged to create a female-friendly work culture to support everyone's wellbeing at work. However, regardless of the country and the legislation, in the 21st century, all companies should foster a culture where female employees feel that they are welcome and truly belong. 

[1] Amsterdam District Court, March 24, 2021, ECLI:NL:RBAMS:2021:1776.

[2] In Dutch: Wet Flexibel Werken.