

## LEGAL UPDATE

### Transgressive behaviour at staff party insufficient for summary dismissal

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On 10 February 2022, the District Court of East Brabant [ruled](#) on a highly topical issue, that of (sexually) transgressive behaviour. It follows from this ruling that it does not always warrant summary dismissal.

#### Background

During a staff party, the employee in question spoke to a female colleague and several others about the thesis the female colleague was writing on 'fistfucking'. This raised questions among several colleagues, and the female colleague emphasised that it was a scientific study forming part of her philosophy course. Later in the evening, the song *The Time of My Life* was played. The employee and the female colleague decided to re-enact the scene from the film *Dirty Dancing*, with her being lifted by him. The employee and the female colleague then talked about the lift; apparently, it had not gone smoothly. The conversation escalated and eventually the employee made a comment about rape (what exactly, is unclear). The female colleague reacted fiercely to this and walked off. At the end of the evening, the employee walked back over to her. He squeezed her buttocks and said something along the lines of "*that was just a joke back there*". Despite the fact that the employee had apologised, the female colleague reported the incidents and the municipality decided to summarily dismiss the employee.

#### Summary dismissal

The subdistrict court considered that the issue of sexually transgressive behaviour is particularly topical and that each situation must be assessed on its own merits based on all the specific circumstances of the case.

In this case, the subdistrict court found it relevant that there was a working relationship, but that the incident occurred during a party and not at the office. The colleagues in question were in a WhatsApp group together and also socialised outside work. The way they had danced together on the night in question was indicative of the way they usually interacted.

Whatever the employee had said about rape, the subdistrict court found that it was inappropriate because it was not a subject to joke about. According to the subdistrict court, the employee had gone too far by pinching his female colleague's buttocks later that evening, especially since he knew that she had taken offence to the remark about rape. Nevertheless, according to the subdistrict court, this behaviour could not be separated from the context of the conversations that had taken place and the rest of the evening. Moreover, there was no evidence of any sexual overtones, given the atmosphere of the evening and the relaxed interactions.

All things considered, the subdistrict court concluded that the employee's actions were culpable, but that the municipality had resorted to too severe a remedy by summarily dismissing the employee.

#### Conditional request for termination

The municipality had submitted a conditional request to terminate the employment contract in case this happened. In considering that request, the subdistrict court considered whether the employee's colleagues could still work with him and do so in a responsible way to be of decisive importance. The municipality argued that it could not create a safe working environment while the employee was still employed, but the employee himself submitted audio recordings showing that it could. The municipality was given the opportunity by the subdistrict court to prove that it could not be required to continue the

employment contract, specifically because of the unsafe work situation for colleagues. Whether the employee's conduct in this case will actually lead to dismissal thus remains to be seen.

Do you have any questions about (sexually) transgressive behaviour? Then check out our [theme page](#) or contact one of our specialists.

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