IN FACT AND IN LAW

Labour Law

February 2003

Major Reform

By Michel Gélinas

The Quebec National Assembly has adopted the *Act to Amend the Act respecting Labour Standards* (Bill 143).

On December 19, 2002, a few months after revising the *Labour Code*, the Quebec Government adopted Bill 143, entitled *An Act to Amend the Act respecting Labour Standards and Other Legislative Provisions* (2002 c.x) [hereinafter the "Act"]. According to Labour Minister Jean Rochon, the challenge was [Translation] "to find a fair balance between the concerns of workers and the reality of Quebec business".

The Act will certainly have a major impact on employer-employee relationships in Quebec. It will also undoubtedly impose a greater burden on businesses in managing employee absenteeism.

The provisions of the Act will come into force on **May 1, 2003**, **except for** those relating to caregivers and psychological harassment, which will come into force on **June 1, 2004**, and those relating to paternity leave, which will come into force on the date section 9 of the *Act respecting Parental Insurance* comes into force, which date has not yet been determined.

The *Act respecting Labour Standards* contains several new provisions:

- provisions relating to psychological harassment in the workplace;
- increased worker protection, both when exercising a remedy relating to unjustified dismissal and when exercising a remedy relating to a prohibited practice;
- increase in the number of days of absence for family leave or for illness or death, the addition of paternity leave and various changes to maternity and parental leave;
- new rules to calculate the indemnity paid for general statutory holidays, intended to benefit part-time workers;
- the transfer to the *Act respecting Labour Standards* of certain provisions of the *Act respecting Manpower Vocational Training and Qualification* dealing with collective dismissals and the addition of a remedy available to an employee whose employer fails to respect the time periods for giving notice.

Psychological harassment in the workplace

The provisions relating to psychological harassment in the workplace will undoubtedly create an uproar and lead to many discussions in the working world.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

In fact, we wonder whether these provisions will have an effect opposite to what Minister Rochon expects and whether they will create an imbalance between business considerations and workers' expectations.

The Act contains a definition of psychological harassment which reads as follows:

> **"(...) any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee.**
>
> **A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment."**

Thus, workers will have a specific recourse for psychological harassment and employers will have to take reasonable steps to create a work environment which is free from such harassment. It should be noted that the employer's obligation in this respect is one of means and not of result. However, it is a two-pronged obligation of means—the employer must take reasonable action to prevent psychological harassment and, when it becomes aware of such behaviour, put a stop to it.

These new provisions are deemed to be an integral part of every collective agreement and therefore they may be the subject of a grievance. A worker who is not governed by a collective agreement who believes that he has been the victim of psychological harassment in the workplace may file a complaint with the *Commission des normes du travail*. The Legislator has also provided that such a complaint may be filed by a non-profit organization dedicated to the defence of employees' rights on behalf of one or more employees who consent thereto in writing.

Any complaint concerning psychological harassment must be filed within ninety (90) days of the last incidence of the offending behaviour. We should also mention that the *Commission des normes du travail* (hereinafter the " Commission") may represent an employee with respect to such a complaint before the *Commission des relations du travail*.

If the Commission takes action following a complaint, it refers it to the *Commission des relations du travail*. If the Commission refuses to take action, the employee may, within thirty (30) days of the decision, make a written request to the Commission that the complaint be referred to the *Commission des relations du travail*. The Act also provides that the *Commission des relations du travail* may, with the agreement of the parties, appoint a person to act as mediator. The Act further stipulates that, if the employee is still employed by the employer mentioned in the complaint, he is deemed to be at work during mediation sessions.

The Act contains sanctions for an employer which fails to fulfil its obligations respecting psychological harassment. Thus, the *Commission des relations du travail* may render any decision it believes fair and reasonable, taking into account all the circumstances of the matter, including:

- ordering the employer to reinstate the employee;
- ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;
- ordering the employer to take reasonable action to put a stop to the harassment;
- ordering the employer to pay punitive and moral damages to the employee;

Michel Gélinas has been a member of the Quebec Bar since 1977 and specializes in Labour Law

- ordering the employer to pay the employee an indemnity for loss of employment;
- ordering the employer to pay for the psychological support needed for a reasonable period of time determined by the Commission;
- ordering the modification of the disciplinary record of an employee who has been the victim of psychological harassment.

The Minister of Labour has also said that tools will eventually be developed to help employers prevent this type of harassment in the workplace.

The Act states that the *Commission des relations du travail* may not render an order for the payment of an indemnity or the payment of punitive and moral damages or the financing of psychological support for a period during which the employee is suffering from an employment injury within the meaning of the *Act respecting Industrial Accidents and Occupational Diseases* that results from psychological harassment. In addition, the *Commission des relations du travail* must reserve its decision with regard to financial matters if it is asked to decide on them before the complaint has been referred to the CSST or, where applicable, the CLP, (Workers' Compensation Board).

Balancing work, family responsibilities and personal life

The law currently prohibits employers from dismissing, suspending or transferring an employee who has three (3) months of uninterrupted service on the ground that he was absent by reason of illness or accident for a period not exceeding seventeen (17) weeks in the preceding twelve (12) months. The new section of the Act raises to twenty-six (26) weeks the time during which an employee may be absent from work without pay during a year for these reasons.

The Legislator requires an employer, at the end of an absence from work, to reinstate the employee in his former position with the same benefits, including the wages to which the employee would have been entitled had the employee remained at work. If the position held by the employee no longer exists when he returns to work, the employer must nonetheless recognize all the rights and privileges to which the employee would have been entitled if the employee had been at work at the time the position ceased to exist.

This new provision does not, however, prevent an employer from dismissing an employee if, in the circumstances, the consequences of the sickness or accident or the repetitive nature of the absences constitute good and sufficient cause.

The Act increases from five (5) to ten (10) the number of days during which an employee may be absent without pay for parental or family reasons. Under the current law, an employee may be absent for five (5) days per year, without pay, to fulfil obligations relating to the care, health or education of his minor child and the Act broadens the scope of this measure by allowing an employee to be absent to fulfil obligations related not only to the care, health or education of his child but also those related to the child of the employee's spouse, or because of the state of health of the employee's spouse, father, mother, brother, sister or one of the employee's grandparents.

The Act also creates the right of an employee who is credited with three (3) months of uninterrupted service to be absent from work, without pay, for a period of not more than twelve (12) weeks over a period of twelve (12) months where such employee must stay with a close relative as defined above because of a serious illness or a serious accident. However, if a minor child of the employee has a serious and potentially mortal illness, attested by a medical certificate, the employee is entitled to an extension of the absence, which shall end at the latest one hundred four (104) weeks after the beginning thereof.

In addition, the number of days during which an employee may be absent without pay on the occasion of the death of his spouse, a child, his father, mother, brother or sister is increased from three (3) to four (4).

Benefits

Under the Act, an employer must reinstate an employee in his regular position, and with the same benefits, at the end of an absence owing to sickness or an accident or for family or parental reasons. Thus, an employee's participation in group insurance and pension plans must not be affected by the absence, subject to regular payment of the contributions payable under those plans, the usual part of which is paid by the employer.

Hours of work

Under the current law, an employee is entitled to a weekly minimum rest period of twenty-four (24) consecutive hours. As of May 1, 2003, the minimum period of rest will be thirty-two (32) consecutive hours per week.

The Bill also introduces the right of an employee to refuse to work more than four (4) hours after regular daily working hours or more than fourteen (14) hours per day, whichever period is the shortest, and more than fifty (50) hours per week.

Finally, the Act specifies the situations in which an employee is deemed to be at work—break periods, when travel is required by the employer and during any trial period or training required by the employer.

Paternity leave

The Act creates paternity leave of five (5) consecutive weeks, without pay, on the birth of the child of an employee. The leave does not begin before the week of the birth and does not end later than fifty-two (52) weeks after the week of the birth.

Amendments to maternity and parental leave

An employee whose child is hospitalized during her maternity leave may suspend the leave following an agreement with the employer during the hospitalization. Bill 143 amends the current law and provides that when a pregnancy is terminated before the beginning of the twentieth (20th) week preceding the expected date of delivery, the employee is entitled to a special maternity leave, without pay, for a period of no longer than three (3) weeks, unless a medical certificate attests that the employee needs an extended leave.

If the termination of pregnancy occurs in or after the twentieth (20th) week, the employee is entitled to maternity leave without pay of a maximum duration of eighteen (18) consecutive weeks beginning the week of the event.

Adoption leave is no longer limited to a child who has not reached the age of compulsory school attendance (16 years) but henceforth applies to any minor child.

In accordance with the *Employment Insurance Act*, the purpose of the amendment to parental leave is to allow it to begin earlier, i.e. not the day the child is born or, in the case of adoption, the day the child is entrusted to the employee, or the day the employee leaves his work to go to a place outside Quebec in order that the child be entrusted to him, but the week these events occur. Thus, parental leave may begin no earlier than the week the child is born or, in the case of adoption, the week the child is entrusted to the employee within the framework of an adoption procedure or the week the employee leaves his work to go to a place outside Quebec in order that the child be entrusted to him. It ends not later than seventy (70) weeks after the birth or, in the case of adoption, seventy (70) weeks after the child was entrusted to the employee.

Finally, in the cases and subject to the conditions prescribed by regulation of the Government, parental leave may end at the latest one hundred four (104) weeks after the birth or, in the case of adoption, after the child was entrusted to the employee.

If the employer agrees, the employee may return to work on a part-time basis or intermittently during the parental leave.

Parental leave may be taken after giving notice of not less than three (3) weeks to the employer, stating the date on which the leave will begin and the date on which the employee will return to work. However, the notice may be shorter if the employee must stay with the newborn child or newly adopted child, or with the mother, because of the state of health of the child or of the mother.

At the end of maternity, paternity or parental leave, the employer must reinstate the employee in the employee's former position with the same benefits, including the wages to which the employee would have been entitled had the employee remained at work.

If the position held by the employee no longer exists when the employee returns to work, the employer must recognize all the rights and privileges to which the employee would have been entitled if the employee had been at work at the time the position ceased to exist.

Statutory general holidays, non-working days with pay and annual holidays

The purpose of Bill 143 is to promote access to statutory holiday rights for part-time employees. Under the current law, an employee must be credited with sixty (60) days of uninterrupted service to be entitled to statutory general holidays and non-working days with pay. In addition, for an employee to be entitled to the indemnity, the holiday must fall on a working day for the employee.

Thus, according to the new provision of the Act, the Legislator is granting an employee compensation for a statutory holiday regardless of whether the employee has uninterrupted service, and even if the holiday does not fall on a day the employee would normally work.

Also, the Legislator has introduced new rules to calculate the indemnity paid for general statutory holidays and non-working days with pay under which an employer must pay the employee an indemnity equal to 1/20 of the wages earned during the four (4) complete weeks of pay preceding the week of the holiday, excluding overtime.

However, the indemnity paid to an employee remunerated in whole or in part on a commission basis must be equal to 1/60 of the wages earned during the twelve (12) complete weeks of pay preceding the week of the holiday.

Finally, the Act provides that the employer may, at the request of the employee, allow the annual leave to be taken, in whole or in part, during the reference year.

In addition, if at the end of the twelve (12) months following the end of a reference year, the employee is absent owing to sickness or accident or is absent or on leave for family or parental matters, the annual leave may, with the consent of the employer, be deferred to the following year. If the annual leave is not so deferred, the employer must pay the indemnity for the annual leave to which the employee is entitled.

The easing of the eligibility requirements for statutory holidays will certainly have a significant impact on businesses in terms of additional costs, especially for companies using part-time labour.

Dismissal without good and sufficient cause: 2 years instead of 3

The current law provides that an employee credited with three (3) years of uninterrupted service in the same enterprise who believes that he has not been dismissed for a good and sufficient cause may present his complaint to the *Commission des normes du travail*. The legislator has reduced the eligibility period from three (3) to two (2) years. This provision will come into force on May 1, 2003.

Recourse against prohibited practices

The current law prohibits an employer or his agent from dismissing, suspending or transferring an employee, practicing discrimination or taking reprisals against him, or imposing any other sanction upon him for a series of reasons which are listed in section 122.

The Legislator broadens the scope of this section by protecting an employee against a prohibited practice which is imposed on him as a sanction on the ground that an inquiry is being conducted by the *Commission des normes du travail* in an establishment of the employer or on the ground that he has refused to work beyond his regular hours because his presence was required to fulfil family obligations and these absences are authorized by the Act.

Change of an employee's status

Although the concept of employee used in the *Labour Code* or the *Act respecting Labour Standards* has not been amended, the Act now gives very strong protection to an employee who believes that changes made by the employer to the mode of operation of the enterprise do not really change his status of employee.

Thus, the Legislator provides a procedure for making a complaint to the *Commission des normes du travail,* and a recourse to determine the status with the *Commission des relations du travail,* to determine whether an employee is entitled to retain the status of employee where the changes made by the employer to the mode of operation of the enterprise do not actually change that status into that of an independent contractor. Where the employee is in disagreement with the employer regarding the consequences of the changes on the status of the employee, the employee may file a complaint in writing with the *Commission des normes du travail*. On receipt of the complaint, the Commission makes an inquiry. If the Commission refuses to take action following a complaint, the employee may, within thirty (30) days of the Commission's decision, make a written request to the Commission for the referral of the complaint to the *Commission des relations du travail*.

At the end of the inquiry, if the Commission agrees to take action, it refers the complaint without delay to the *Commission des relations du travail* for it to rule on the consequences of the changes on the employee's status. The *Commission des relations du travail* must render its decision within sixty (60) days of the filing of the complaint at its offices.

Section 20.0.1 of the *Labour Code* has a similar provision which applies to unionized employees.

Collective dismissal

The provisions of the *Act respecting Manpower Vocational Training and Qualification* have been integrated into the *Act respecting Labour Standards*, and the Legislator has added a recourse available to an employee whose employer fails to respect the time periods for giving notice.

The Act prohibits an employer from unilaterally changing the conditions of employment during the notice period and gives a recourse to an employee whose employer does not respect the notice periods. Thus, an employer who does not give the notice prescribed by the Act or who gives insufficient notice must pay each dismissed employee an indemnity equal to the employee's regular wages, excluding overtime, for a period equal to the time period or remainder of the time period within which the employer was required to give notice.

No employee may cumulate the above indemnities with those prescribed by section 83 of the *Act respecting Labour Standards*. However, an employee must receive the greater of the indemnities to which he or she is entitled. Section 83 provides that an employer who does not give an employee the prescribed notice before terminating his employment or laying him off for more than six (6) months, as stipulated in section 82, must pay the employee a compensatory indemnity equal to his regular wage excluding overtime for a period equal to the period or remaining period of notice to which he was entitled.

Except where the collective dismissal affects less than fifty (50) employees, the Act also provides that the employer and the union or, in the absence of the union, the representatives chosen by the employees, must, at the request of the Minister, participate in the establishment of a reclassification assistance committee responsible for facilitating the re-entry of laid-off employees on the labour market.

Conclusion

It appears from the changes which have been adopted that the *Act to Amend the Act respecting Labour Standards and Other Legislative Provisions* will certainly have a major impact on employer-employee relationships in Quebec and that it could have an effect on the operating costs and management styles of many businesses in Quebec. However, these amendments are only a few of the many changes which have been made in labour law over the past few years.

Michel Gélinas

You may contact any of the following members of the Labour Law group with regard to this bulletin.

at our Montréal office
Pierre L. Baribeau
Jean Beauregard
Monique Brassard
Denis Charest
Michel Desrosiers
Jocelyne Forget
Philippe Frère
Alain Gascon
Michel Gélinas
Isabelle Gosselin
Jean-François Hotte
Guy Lemay
Carl Lessard
Dominique L'Heureux
Josiane L'Heureux
Catherine Maheu
Véronique Morin
Marie-Claude Perreault
Jean Pomminville
Érik Sabbatini
Antoine Trahan

at our Québec City office
Ève Beaudet
Pierre Beaudoin
Claude Larose
Marie-Hélène Riverin
Madeleine Roy

at our Laval office
Pierre Daviault
Gilles Paquette
René Paquette

Montréal
Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City
Suite 500
925 chemin Saint-Louis
Québec City, Quebec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Web Site
www.laverydebilly.com