

Countdown to Implementation of Legislation on Psychological Harassment in the Workplace

By Véronique Morin

On June 1st, 2004, new recourses for psychological harassment at work will come into force.

The imminent arrival of these remedies should motivate employers to implement effective mechanisms to prevent and settle situations of psychological harassment at work.

However, June 1st is quickly approaching and most employers are not properly prepared. This bulletin provides an overview of the various actions that an employer should take in the interest of reducing any possibility of proceedings being initiated against it based on the new provisions of the *Labour Standards Act* (R.S.Q., chapter N-1.1, referred to as the *LSA*).

Concept of psychological harassment

Section 81.18 of the *LSA* defines psychological harassment as follows:

- any vexatious behaviour [having the character of a vexation, namely conduct that vexes, mistreats, harms, humiliates, according to various dictionaries];
 - in the form of conduct, verbal comments, actions or gestures that are;
 - repeated; and
 - hostile or unwanted;
 - that affects an employee's dignity or psychological or physical integrity; and
 - that results in a harmful work environment for the employee.



Section 81.18 of the *LSA* states that a single serious incidence of such behaviour that has a lasting effect on an employee may also constitute psychological harassment where the behaviour adversely affects the employee's dignity or psychological or physical integrity and is an **ongoing** source of stress for the employee.

In order to fully assess psychological harassment, collective agreements and company policies may also be relevant in determining notably the parties' commitment to ensure a positive and harmonious workplace.

Every case of harassment must be considered on an individual basis in light of its surrounding circumstances. Various factors can also be taken into account, whether they be objective (for example: the nature, intensity and gravity of the conduct) or subjective (such as objections made by the person concerned, the effect of the behaviour on that person).

The following forms of behaviour may constitute psychological harassment:

- preventing a person from expressing himself or herself;
- criticizing someone's work or private life;
- threatening someone verbally or in writing;
- refusing to deal with a person or ignoring his or her presence;
- isolating a person or denigrating that person to his or her co-workers or colleagues;
- forcing a person to do humiliating tasks;
- ceasing to give work to a person;
- forcing a person to perform completely useless and/or absurd tasks;
- questioning someone's ability or skills;
- insulting a person by using obscene or degrading terms;
- administratively harassing or excessively controlling a person's work;
- contesting or casting doubt on a person's decisions.



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Some situations may be unpleasant for an employee, but this does not automatically constitute psychological harassment, particularly in the following circumstances:

- the legitimate (i.e., not discriminatory, not arbitrary and not abusive) use of management right in cases of promotion, demotion, suspension, etc.;
- usual and ongoing evaluation of employee performance, attendance or discipline at work;
- expressing disagreement or stating a contrary, but reasonable, point of view.

In a recent case in which our firm acted, the arbitrator recognized that an employer's management right, provided that it is exercised without discrimination, arbitrariness or abuse of power, does not constitute psychological harassment¹:

[unofficial translation] "If the legislator thought it necessary to insert a section in the *Labour Standards Act* providing a specific remedy for any employee who suffers psychological harassment, it would be wrong to broaden it to include any situation in which an employer might legitimately intervene by virtue of its management right when that intervention is intended for the well being of the organization or to motivate an employee to behave properly." (paragraph 109 of the award)

Respective rights and obligations of employee and employer

With the coming into force on June 1st, 2004 of the new provisions of the *LSA*, every employee has a right to a working environment free from psychological harassment. The corollary of that right is that the employer must take reasonable action to prevent and put a stop to psychological harassment in the workplace (section 81.19 of the *LSA*).

While the employer does not have an obligation of result, it must implement various mechanisms to prevent, manage and resolve complaints.

In a union context, it would be correct to think that this obligation is not imposed exclusively on the employer, but also on the union. An employee can now file a complaint with the Commission des relations du travail under section 47.3 of the *Labour Code* if the employee believes that he or she was the victim of psychological harassment, and his or her union acted in bad faith, in an arbitrary or discriminatory manner, or was seriously negligent regarding the employee, thereby entitling the employee to file a grievance.

Terms of the new remedy

The new provisions of the *LSA* allow recourses for psychological harassment, which must be initiated within ninety (90) days of the occurrence of the last incidence of harassment.

Whether the victim is unionized or not, as of June 1st, 2004 an employee can initiate proceedings based on the new provisions of the *LSA* by alleging psychological harassment and that it occurred no more than ninety (90) days prior to June 1st, 2004.

Generally, unionized employees must exercise their recourses in accordance with the collective agreement. However, despite its provisions, a unionized employee will now be able to file a grievance within ninety (90) days of the last incident that the employee intends to allege as constituting psychological harassment of him or her (sections 81.20 and 123.7 of the *LSA*).

Whether the presumed victim is unionized or not, various remedial actions are possible and a variety of orders can be made against the employer, by an arbitrator or by the Commission des relations du travail, depending on the circumstances (section 123.15 of the *LSA*), including:

- reinstatement;
- payment of an indemnity up to a maximum equivalent to wages lost;
- implementation of reasonable action to put a stop to the psychological harassment;
- payment of punitive and moral damages;
- payment of an indemnity for loss of employment;
- payment for the psychological support needed by the employee for a reasonable period of time to be determined;
- modification of the victim's disciplinary record.

The arbitrator or the Commission des relations du travail may also reserve jurisdiction regarding payment of certain indemnities or payment of fees for psychological support where a claim under the *Act respecting industrial accidents and occupational diseases* (R.S.Q., chapter A-3.001), is probable because the victim appears to have sustained an employment injury as a result of the alleged psychological harassment. The existence of the injury will result in different tribunals having jurisdiction, without however indemnifying the victim twice (section 123.16 of the *LSA*).

¹ *Union des routiers, brasseries, liqueurs douces et ouvriers de diverses industries, local 1999 et La Brasserie Labatt ltée*, Mtre Marcel Morin, arbitrator, February 16, 2004; Mtre Sylvain Bailly, attorney for the union and Mtre Véronique Morin, attorney for management.



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Policy of prevention and intervention in the event of psychological harassment

An employer must take reasonable action to protect the rights of employees to a workplace free from psychological harassment. Such action will not only prevent psychological harassment at work, but also reduce the probability of legal proceedings being instituted and the employer's liability being incurred.

An employer must thus be able to prove the measures it adopted and applied to promote a workplace free from psychological harassment and to provide for the efficient and effective handling of reports and complaints.

The content of a policy on psychological harassment prevention and intervention will vary from employer to employer, notably according to its internal structures and existing work organization, in order to cover all possible situations of psychological harassment (such as service or manufacturing activities, the frequency of contact between the company's employees and its customers or suppliers, and the presence of senior or middle managers, foremen and supervisors).

At minimum, the policy should contain the following features and clarify the conditions of their application:

- a clear statement of the employer's objectives regarding the prevention of psychological harassment at work, notably through training and the raising of awareness of employees and managers and the implementation of mechanisms for reporting psychological harassment and for swift intervention thereafter, in order to put a stop to incidents of psychological harassment;

- mechanisms for regular dissemination of the policy and its objectives to all staff members (senior executives, managers and employees, etc.) stating that every such member will be supported should he or she be the subject of psychological harassment by third parties (clients, sub-contractors, suppliers) in the workplace or in the course of work;
 - identification of the obligations of the union and of its representatives notably, regarding the cooperation and involvement of the union and its members before the various levels of adjudication provided for in the policy and regarding the reasonable actions to be taken to prevent and quickly put a stop to any conduct that may constitute psychological harassment;
 - encouragement of any employee who is a victim or witness to a situation of psychological harassment to report it or take the necessary steps to put a stop to it;
 - definition of psychological harassment, to be specifically distinguished from situations of discrimination, aggression, violence or abuse of power (an employer must be diligent and verify that the policy on psychological harassment to be adopted does not encompass any situations or prevention or handling mechanisms already covered in previously adopted policies on discrimination, aggression or violence in the workplace);
 - identification of the responsibilities of the employer and the unions or other employee representatives;
 - a clear statement of the employer's intention to sanction any form of psychological harassment, notably by disciplinary measures;
- principle of confidentiality applicable to the intervention mechanisms and the handling of complaints;
 - prohibition of reprisals against any person who reports or lodges a complaint concerning psychological harassment;
 - identification of the responsibilities of the various interveners (such as the employee's superior, immediate supervisor, complaints handling committee, HST committee and HR manager);
 - the stages of intervention applicable to situations of psychological harassment (such as investigation, provisional measures, dispute resolution, employee assistance program);
 - procedures applicable in the event of a report of psychological harassment or the lodging of a formal complaint, for the purposes of handling such report or complaint and in anticipation of the decision to be rendered.

Recommendations

Before June 1st, 2004, it is essential that all employers arrange for the drafting, adoption and implementation of a prevention and intervention policy in cases of psychological harassment. The policy must be quickly disseminated throughout the organization and to all employees.

In addition, an informed employer should ensure that it settles any situation potentially involving psychological harassment that occurred before June 1st, 2004. On June 1st, 2004, an employee will be entitled to file a complaint for acts that may have taken place within the previous ninety (90) days and that may, according to the employee's allegations, constitute psychological harassment at work.

The task does not end on June 1st, 2004.



Employers must ensure regular dissemination of the policy adopted on psychological harassment, both to employees and various stakeholders, be they consultants, sub-contractors or clients.

A clear statement of a *zero* tolerance policy and maintenance of consistent behaviour on the part of the employer will promote the prevention of psychological harassment and related complaints, but will also enable the employer to submit convincing and effective grounds of defence should legal proceedings be initiated.

On June 1st, 2004, an employer can continue to exercise its management right. However, it must ensure that it deals with all its employees in a fair, consistent and reasonable manner so that no particular employee can allege that it received different, discriminatory, unreasonable or abusive treatment. Although the employer investigates a reported situation thoroughly and objectively, by recording on file the facts and reasons warranting any decision

that it may be required to make regarding a particular employee (such as probation, leave authorization, transfer, promotion and administrative or disciplinary measures), the employee may nevertheless allege psychological harassment, but the employer will be able to mount a defense and explain its decision.

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