

## Psychological Harassment in the Workplace: What's New?

By Michel Gélinas and Vicky Lemelin

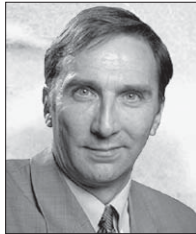
### Introduction

Since June 1, 2004, the *Labour Standards Act* (hereinafter the "L.S.A.") requires employers to provide a work environment free from psychological harassment. Thus, employers must, as a first step, take reasonable measures to prevent psychological harassment and then, whenever they become aware of such behaviour, put a stop to it. These duties imposed on employers are obligations "of means" as opposed to obligations "of result".

### Psychological harassment prevention

The adoption and implementation of a prevention and intervention policy serve both as a tool for employers wishing to diminish the risks of psychological harassment in their organizations and as a ground of defence against psychological harassment complaints that may be filed with a judicial body.

It is essential that the policy fit the realities of the organization, that is, its size and structure as well as the resources available to it. To simply copy another company's policy is not advisable.



(With the collaboration of Nicolas Joubert)

### Managing and investigating psychological harassment complaints

An employer should adopt a proactive approach as soon as an employee complains about being the subject of psychological harassment, and all the more so when the employer is notified that a psychological harassment complaint has been filed with the Commission des normes du travail (hereinafter the "C.N.T").

A proactive approach means that the employer should react swiftly and conduct its own investigation to ascertain the merits of the allegation of psychological harassment, including any complaint already filed.

When the alleged victim of psychological harassment files a complaint with the C.N.T., one of its investigators is assigned to investigate. However, this does not relieve the employer from carrying out its

own investigation to try to find a quick solution to the situation raised in the complaint: by doing so, the employer is fulfilling the obligations imposed on it by the L.S.A., which is something it will be able to point out to a judicial body should the need arise.

In the course of its investigation, the employer should meet with the persons involved in the harassment situation, that is, the alleged victims, those whose behaviour is at issue, as well as any potential witnesses. The employer should also gather and document the facts and obtain written statements from the victim and the other persons involved. It is indeed important to know the details of the complaint in order to check the validity of the harassment allegations and gather information to prepare for the hearing before the Commission des relations du travail (hereinafter the "C.R.T.") in the event that the C.N.T. agrees to pursue the complaint process to adjudication, which will be the case if the C.N.T. decides to take action at the end of its own inquiry.



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Upon completion of its investigation, the employer should prepare a report containing, in particular, the following information: the harassment allegations, a summary of the evidence gathered, the steps taken by the employer in trying to resolve the problem and a recommendation concerning appropriate disciplinary or administrative measures.

The C.N.T. analyzes complaints upon receipt and, where it appears that psychological harassment has occurred, also gathers the necessary information by contacting or meeting with the complainant, the employer's representatives, that is, the director of human resources and the chief executive officer, as well as the witnesses and the alleged harasser(s).

When a complaint is filed with the C.N.T., the employer would be well-advised to try to obtain as much information as possible from the C.N.T. and get assistance from its own legal counsel in order to safeguard its rights with respect to the disclosure and exchange of all relevant information and documents.

Resorting to mediation to try to settle a psychological harassment complaint may be appropriate. Mediation may take place at the stage of the C.N.T. investigation, or when the C.R.T. is seized of the complaint, or indeed at any time before the case is taken under consideration for ruling. In order to do so, the parties may, under the L.S.A., request that the Minister appoint a person to undertake the mediation, in which the legal advisors of the parties may participate. The parties may also agree to try to settle their dispute between themselves or to retain the services of an external mediator of their choice.

### Statistics

In order to increase public awareness of the issue of psychological harassment in the workplace, the C.N.T. has published some relevant statistics.

By June 2005, approximately 2,500 complaints originating from most everywhere across the province had been filed with the C.N.T., of which 48% had already been settled while 52% were still being processed. One complaint out of

every three was already the subject of an agreement between the employer and the complainant. The C.N.T. had carried out nearly 300 investigations and 36 complaints had been transferred to the C.R.T. for hearing.

The following table shows the regional distribution of the complaints filed as of June 2005.

It is interesting to note that 93% of the complaints were filed as a result of repeated offensive conduct while only 7% of the complaints were filed in response to a single incident. In addition, while they represent 49% of the working population, 62% of the complainants were women. Lastly, 81% of the complaints involved persons in a managerial position.

REGIONS	Number of complaints filed (Total of 2,500 complaints)	% of complaints	Cases settled (48% of the files)	Agreements between the employee and the employer (one complaint out of three)
Montréal	731	29 %	Unavailable	Unavailable
Montérégie	400	16 %	182	64
National Capital (Quebec City region)	248	10 %	125	55
Laurentians	171	7 %	74	29
Mauricie and Centre du Québec	167	7 %	85	17
Lanaudière	134	5 %	65	29
Laval	133	5 %	55	23
Eastern Townships	99	4 %	47	21
Saguenay / Lac-Saint-Jean	98	4 %	56	19
Outaouais	97	4 %	50	17
Chaudière-Appalaches	80	3 %	49	18
Bas St-Laurent and Gaspésie-Îles-de-la-Madeleine	76	3 %	45	3
Abitibi-Témiscamingue and Northern Quebec	36	1 %	22	11
North Shore	30	1 %	20	6

Source: Press releases of the Commission des normes du travail, *Bilan de l'an 1 sur le harcèlement psychologique au travail*, June 14, 2005

## A psychological harassment case law sampler

Since the provisions respecting psychological harassment came into force, many complaints have been filed with the C.N.T., some of which have been transferred to the C.R.T. To this day, however, the C.R.T. has issued only one decision<sup>1</sup>.

In that decision, the Commissioner ruled that, under the L.S.A., only an “employee” may make a complaint for psychological harassment in the workplace and that the complainant is required to establish his or her status as an employee within the meaning of the L.S.A.. The Commissioner dismissed the complaint on the ground that the employment relationship was ended many years before the complaint was filed and, consequently, he did not analyse the concept of psychological harassment.

However, many interesting decisions by the C.R.T. deal with the concept of psychological harassment in contexts other than that of a harassment complaint filed under L.S.A. provisions.

For instance, in the context of a complaint for wrongful dismissal, the Commissioner concluded that a new supervisor asking elementary questions to an employee under his or her direct authority respecting such employee’s work could not be considered as psychological harassment. Harassment must be considered objectively rather than being based only on subjective perceptions<sup>2</sup>.

In another case<sup>3</sup>, an employee filed a complaint under Section 15 of the *Labour Code*, alleging that the employer had taken reprisals against him and suspended him in response to his active role in a union organizing drive, which had led to the filing of a petition for certification. It was proved that the complainant had been harassing two colleagues to get them to sign membership cards. Having been notified of this situation, and mindful of its obligation to provide a work environment free from

any harassment, the employer had issued a written reprimand to the employee and suspended him for one day. The C.R.T. ruled that the employer had proper cause to do so and dismissed the complaint.

Given that the provisions of the L.S.A. respecting psychological harassment, including any necessary modifications thereto, are deemed to be an integral part of every collective agreement<sup>4</sup>, many arbitration awards contain discussions of this concept.

For instance, in the *Conseil canadien des Teamsters et Purolator Courrier ltée*<sup>5</sup> case, an employee was dismissed for having psychologically harassed a female colleague, in particular by pulling her hair, touching her shoulder with his finger and startling her. The arbitrator ruled that the dismissal was justified and that, in certain cases, jokes and teasing may become harassment when the victim clearly indicates his or her disapproval and desire that such repetitive behaviour cease. It is interesting to note that in this case the arbitrator specified that the employer did not fail to fulfill its obligations because, to intervene appropriately, the employer would have had to be provided with more details about the problem by the victim. Instead of doing so, the victim, being the only woman in the plant, preferred to try to solve the problem by herself in order to avoid giving the impression that she was relying on the employer to resolve it.

In another case, *Chandonnet et Centre hospitalier Anna-Laberge*<sup>6</sup>, the arbitrator concluded that words exchanged firmly and with conviction, in clear and direct language, in a context in which the two parties to the discussion have opposite points of view, do not constitute psychological harassment.

In the *Société canadienne des postes et Syndicat des travailleuses et travailleurs des postes (factrices et facteurs ruraux et suburbains)*<sup>7</sup> case, a postal carrier who was absent from work because of an employment injury was required to be replaced in accordance with the collective agreement.

Dissatisfied with the work of her replacement, her supervisor contacted the carrier several times to try to coerce her back to work. The arbitrator ruled that such conduct did not constitute psychological harassment within the meaning of Section 81.18 of the L.S.A.. However, he ruled that the employer had abused its management rights since the carrier was entitled not to come to work.

In a recent decision<sup>8</sup>, the arbitrator, Mr. Blais, held that an employee’s allegations of psychological harassment by a superior can neither be considered as offensive words against the superior nor give rise to the imposition of a disciplinary measure. Indeed, a decision to the contrary could dissuade an employee from exercising its right to a workplace free from psychological harassment.

## Conclusion

The diverse circumstances that have given rise to the interpretation and application of the concept of psychological harassment under the standards introduced in the L.S.A. on June 1, 2004 are interesting. The decided cases generally follow the lines previously traced by arbitration case law. It will be interesting to observe the approaches that will be adopted by the C.R.T. in its future decisions and the members of our Labour and Employment Group will keep you posted as promptly as possible.

<sup>1</sup> *Montreuil et Collège François-Xavier Garneau*, D.T.E. 2005T-534 (C.R.T.).

<sup>2</sup> *Patenaude et Groupe SGF inc.*, D.T.E. 2005T-942 (C.R.T.).

<sup>3</sup> *Drapeau et SFBC Anapharm inc.*, D.T.E. 2005T-632 (C.R.T.).

<sup>4</sup> Section 81.20 L.S.A.

<sup>5</sup> D.T.E. 2005T-87 (T.A.).

<sup>6</sup> D.T.E. 2005T-418 (T.A.).

<sup>7</sup> D.T.E. 2005T-806 (T.A.).

<sup>8</sup> *Société des loteries du Québec et Syndicat des travailleuses et travailleurs de Loto-Québec (CSN)*, D.T.E. 2005T-880 (T.A.).

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