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Recent developments in the area of psychological harassment:

an overview of the decisions pertaining to the interpretation of the new provisions of the *Act respecting labour standards*

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The new provisions pertaining to psychological harassment that were added to the *Act respecting labour standards*[1] (hereinafter referred to as the "ARLS") on June 1, 2004, have given rise to many arbitration awards and interpretations over the last two years that have expounded on the concept of psychological harassment.

The provisions of the ARLS pertaining to psychological harassment govern the relationships between employers and employees, work colleagues, and employees and third parties such as customers and suppliers. The ARLS provides individuals with the opportunity to file a complaint with the Commission des normes du travail (hereinafter the "CNT"), which will then refer it to the Commission des relations du travail (hereinafter the "CRT") if it considers the complaint well-founded or if the parties cannot reach an agreement[2].

Two years of existence: a brief statistical retrospective[3]

To provide an assessment of the first two years of the existence of the provisions of the ARLS pertaining to psychological harassment, the CNT, in a press release, has compiled statistics that speak for themselves. A sampling of these statistics covering a recent period indicate that:

- Between April 1, 2005 and March 31, 2006, nearly 2200 complaints were filed with the CNT;
- 38% of these complaints were resolved by settlement between the parties. For example, some of these settlements provided for the payment of compensation or the reimbursement of expenses related to a work re-insertion program;
- The CNT however referred nearly 200 complaints (approximately 9%) to the CRT, 32 of which were the subject of amicable settlements;
- In nearly 25% of the cases, the CNT determined that the conduct that gave rise to the complaints did not constitute psychological harassment;
- In addition, 24% of the complaints were withdrawn for various reasons (new employment, improvement of the situation at work, etc);
- Also, 8% of the complaints that were filed did not give rise to a remedy and approximately 5% of the complaints were terminated for administrative reasons;
- It is interesting to note that 62% of the complainants were women and that in most cases the complaints involved a person in a position of authority;
- In nearly 45% of the cases, the psychological harassment complaint was filed concurrently with another recourse under the ARLS (for example, a complaint alleging a prohibited practice or a dismissal without just and sufficient cause); and
- Lastly, in most cases, the complainants acknowledged that they did not approach their employers prior to filing their complaints.

1 R.S.Q. c. N-1.1.

2 On the other hand, under Section 81.20 ARLS, an employee covered by a collective agreement must exercise the recourses provided for in the agreement, to the extent that such recourses are available to him.

3 *Le harcèlement psychologique - deux ans de pratique à la Commission des normes du travail,* June 2006, available at http://communiques.gouv.qc.ca/gouvqc/communiques/GPQF/Juin2006/01/c9302.html.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

Recent decisions in the area of psychological harassment under the ARLS

Since the coming into force of the provisions respecting psychological harassment, the CRT has issued a few decisions under the new provisions of the ARLS. However, due to the integration by law of these provisions into all collective agreements [4], a majority of the decisions are still issued by arbitration boards.

• Decisions issued by the CRT

In the case of *Bourque and Centre de santé des Etchemins* [5], the complainant, an executive secretary in a health establishment, filed a psychological harassment complaint in which she alleged that her new superior attempted to reduce her autonomy and did not respect her work rhythm. However, the evidence showed rather that the complainant had had a serious diligence problem for many years, for which she had been reprimanded several times in the past. The complainant herself acknowledged her inability to yield to the organizational setting of the establishment, which she found too strict. According to the CRT, the employer was entitled to require that the complainant meet her obligations as an employee under her employment contract including, in particular, compliance with her work schedule. The CRT concluded that the complainant had failed to prove that comments or actions constituting psychological harassment or vexatious behaviour had affected her dignity.

In the case of *Bangia and Nadler, Danino S.E.N.C.* [6], the complainant was a legal secretary in a law firm. The complainant blamed his immediate superior for uttering words and taking actions that affected his dignity. However, a review of the evidence led the CRT to conclude that the complainant had not been a victim of psychological harassment. Indeed, while recognizing that the immediate superior may have made certain comments, the CRT considered that they had been made in reaction to the complainant's own behaviour. The evidence revealed that despite warnings by his employer, the complainant was taking it upon himself to modify the wording of dictations, particularly by adding to them, and was constantly asking questions about obvious facts or trivialities. According to the CRT, the comments that were the subject of the complaint denoted astonishment and exasperation rather than hostility and appeared normal when taken in their context.

The CRT concluded that:

> [Translation] **"In a working context, there are always situations that are more stressful than others. They may sometimes cause sharp reactions but one must always consider them in their context in order to assess the existence of any malicious intentions** [7]**."**

In this decision, the CRT pointed out that, in order to avoid [translation] "focusing solely on the point of view of a person suffering from victimization problems" [8], vexatious behaviour must be assessed according to the "subjective-objective" model, which means assessing whether a reasonable person would have concluded there was a harassment situation.

In addition, the CRT recently ruled, in the case of *Ganley and 9123-8014 Québec inc.* [9], that an employer who gave an employee an earful in front of customers, criticized him for his sexual orientation and refused to talk to him, committed hostile and repetitive acts that constituted vexatious conduct. It should be noted that an application for review has been granted in that case because the employer was not present at the hearing.

However, in another decision, the case of *Louise Hilaregy and 9139-3249 Québec inc.* [10], talking to the complainant loudly or using a contemptuous tone without other explanations was not found to constitute hostile behaviour.

In the case of *Allaire v. Research House Inc. (Quebec Recherches)* [11], the CRT allowed a psychological harassment complaint because the evidence showed that the complainant had been the victim of repeated and unwarranted criticism by his supervisor. In particular, the employer criticized the complainant's inability to meet certain performance objectives. However, the CRT concluded that the employer was relentless in trying to undermine the complainant's morale. It also blamed the employer for its lack of support to help the complainant meet his performance objectives. The CRT therefore ruled that the employer's criticism affected the complainant's psychological integrity and made him doubt his own abilities.

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4 Section 81.20 ARLS.

5 *Bourque and Centre de santé des Etchemins,* D.T.E. 2006T-314 (C.R.T.).

6 *Neal Bangia and Nadler, Danino S.E.N.C.*, 2006 QCCRT 0419 (C.R.T). Application for review under Section 127 of the *Labour Code* (C.R.T.), CM-2001-7500, CM-2001-7501, CM-2002-1681 and 234386.

7 *ibid,* p. 31.

8 *ibid,* p. 28.

9 *Ganley* and *9123-8014 Québec inc. (Subway Sandwiches & Salades),* D.T.E. 2006T-170 (C.R.T.).

10 *Louise Hilaregy* and *9139-3249 Québec inc. (Restaurant Poutine La Belle Province),* D.T.E. 2006T-550 (C.R.T.).

11 D.T.E. 2006T-380 (C.R.T.).

Early this year, the CRT issued a particularly interesting decision in the case of *Marois and Commission des droits de la personne et des droits de la jeunesse* [12] respecting an application to intervene by an executive, the alleged harasser, in a case between a complainant and her employer. In its first decision, the CRT had denied the executive's application to intervene on the ground that he did not have an interest distinct from his employer's and that only the latter could be the subject of an order of the nature provided for under the ARLS. However, upon review, a second decision of the CRT allowed the application of the executive in the following terms:

> [Translation] **"Based on the assertions of the complainant and the employer, everybody knows that only the conduct of Pierre Marois is at the crux of the dispute and that the CDPDJ dissociates itself from its president. However, if nothing was to change, the case would be heard on the merits without Pierre Marois having any guarantee that he will be heard and given the opportunity to defend himself since the respondent named in the complaints is the employer, the CDPDJ, an intangible being that cannot in itself commit harassment. A decision allowing the complaints will have a direct impact on his right to safeguard his dignity, his honour and his reputation. Another very particular element is that the Commission, when considering the merits, may have to take into account the particularities of the position of president of the CDPDJ to determine the appropriate remedies."** [13]

On August 1, 2006, the CNT filed an application in the Superior Court for judicial review of the CRT's decision. [14]

While the CRT describes Mr. Pierre Marois' case as an exception, it will be interesting to follow the evolution of the CRT's case law, particularly when executives file applications to intervene in which they allege that the complaint may affect their dignity or reputation.

• Decisions issued by arbitration boards:

In the recent interlocutory decision in the case of *Syndicat des employés municipaux de Matane and Matane (Ville de)* [15], two complainants who had filed a grievance alleging psychological harassment against a foreman filed a motion before the arbitrator requesting the issuance of a safeguard order under subsection 100.12 (g) of the *Labour Code* in order to establish the conditions for reinstatement of the foreman. It appeared that the foreman had been suspended for 6 months following the events. Based on the evidence gathered and the seriousness of the complainants' allegations, the arbitrator ordered the employer to take temporary measures, applicable for the duration of the arbitration process, to ensure that the foreman could not in any way come into contact with the complainants while performing his duties.

In the case of *Syndicat des employées et employés de métiers d'Hydro-Québec, section locale 1500 (SCFP-FTQ) and Hydro-Québec* [16], the arbitrator described the scope of the employer's obligation to ensure a work environment that is free of harassment under the second paragraph of Section 81.19 of the ARLS. He concluded that the ARLS requires employers to take reasonable measures to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it, irrespective of its source (work colleagues, employer's representatives or third parties).

The scope of the employer's responsibility with respect to psychological harassment was recently discussed in the case of *Métallurgistes unis d'Amérique, local 9414 and Les outillages K & K ltée* [17]. The arbitrator stated that an employer could not identify the problem solely on the basis of the information provided by the union. Thus, when a grievance is filed, the employer must, in the normal course of labour relations, investigate with its management personnel to determine the circumstances surrounding the filing of the grievance.

Conclusion

In the light of these recent decisions, it appears that the CRT generally follows the principles already established by arbitration boards respecting psychological harassment. Arbitrators generally acknowledge that an employer may exercise its management rights, subject to evidence being adduced of the abusive nature or unreasonableness of such exercise.

An analysis of the decisions already rendered shows that for their complaints to succeed, complainants are required to submit substantial evidence in support of their psychological harassment allegations. Therefore, it is not enough for one to simply state that he or she is the subject of psychological harassment; convincing evidence of hostile or unwanted acts or behaviour must be adduced.

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[12] *Marois and Commission des droits de la personne et des droits de la jeunesse*, D.T.E. 2006T-245 (C.R.T.).

[13] *Marois and Commission des droits de la personne et des droits de la jeunesse*, D.T.E. 2006T-694 (review hearing, C.R.T.), p. 9.

[14] Court number: 500-17-032266-069

[15] *Syndicat des employés municipaux de Matane and Matane (Ville de)*, D.T.E. 2006T-52 (T.A.).

[16] *Syndicat des employées et employés de métiers d'Hydro-Québec, section locale 1500 (SCFP-FTQ) and Hydro-Québec*, D.T.E. 2006T-302 (T.A.).

[17] *Métallurgistes unis d'Amérique, local 9414* and *Les outillages K & K ltée*, AZ-50386612 (T.A.).

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