

Workplace Harassment in the Province of Quebec: what's new and trendy?

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Introduction

The Quebec *Labour Standards Act, R.S.Q., c. N-1.1* (the L.S.A.) was amended almost 5 years ago to include several provisions pertaining to psychological harassment in the workplace².

Section 81.18 of the L.S.A. provides that:

“Psychological harassment means any vexatious behavior 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 a behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment”.

Section 81.19 also contains the following:

“Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behavior, to put a stop to it”.

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² June 1, 2004 (2002, c. 80).

Although not specifically stated, it is recognized that a well-publicized corporate policy prohibiting all types of harassment can be an efficient tool to ensure that everyone is made aware of an employer's obligations and of the potential consequences in case of a violation.

Such policies typically include a description of what is prohibited and the procedures to be followed should someone feel victimized. How the policy is implemented, the processing of complaints and the follow-ups become all the more crucial.

Managing a complaint dealing with harassment entails a) an investigation of some sort, the extent of which may vary depending on the particular circumstances ³ and b) a good understanding of the concept.

What's new and trendy?

I. More and more employers conduct internal investigations

A commitment to investigate with promptness and thoroughness is essential to understand what is alleged to have happened and, in case of a finding of actual harassment, to take appropriate measures to ensure that harassment will not

³ It should be stressed that investigations can and should be launched even in the absence of a formal complaint if there are reasonable grounds to believe that a violation of the policy has occurred. Employees should therefore be made aware of this to avoid unpleasant reactions.

occur again. It can also allow an employer to take other corrective actions if the investigation shows that there is another type of problem such as a disagreement or an isolated misbehavior (other than serious).

An effective investigation is one that is conducted by an impartial investigator (or committee). The designated person should be experienced and able to interview the parties and witnesses, scrutinize and analyze the evidence and draft a clear report (with recommendations and options, if required).

If employers do not retain the services of a third party as an external investigator, they should ensure that the designated person has been trained and has no actual, apparent or perceived conflict of interest or bias⁴. Conducting investigations is a complex task and faulty actions, whether voluntary or not, can lead to negative and costly consequences and, needless to say, affect the corporate image of the organization.

Recent case law pertaining to the conduct of internal investigations related to harassment in the workplace

- *Cheikh-Bandar c. Pfizer Canada Inc.*, 2008 QCCRT 0124, March 10, 2008, canlii.org/fr/qc/qccrt/doc/2008 (under

⁴ See in particular, *Competencies Profile for Harassment Investigators*, under Policies: www.tbs-sct.gc.ca.

review, Quebec Superior Court, SC 500-17-042334-089, April 14, 2008)

The complainant was never met to substantiate his written complaint and his witnesses were not interviewed. The tribunal had these comments:

“The conduct of this investigation and the conclusions based on the apparent bad faith and arbitrariness of the managers who conducted it can easily show that someone wanted to protect a more productive or a key employee at the detriment of one less efficient”. (At paragraphs 264 and 265, unofficial translation)

- ***Ville de Québec c. Alliance des professionnels de la Ville de Québec, DTE 2007T-289, (2007) R.J.D.T 653***

The arbitrator found that the Complainant was not asked to submit his version of the events and only basic verifications were made.

The complainant had a right to be heard by his employer who in turn had the duty to objectively find the truth: *“In the name of prudence, extensive verifications of the facts should have been made to validate such grave suspicion towards an employee in whom confidence is essential”* (At page 16, unofficial translation).

Other leading cases pertaining to the conduct of investigations

Conference paper

Canadian Bar Association National Administrative Law and Labour and Employment Law Conference, Ottawa, November 21-22, 2008.

- ***C.R. v. Schneider National Carriers Inc.*, 2006 Canlii 532, January 10, 2006 (Ontario Superior Court)**

The two complainants were met together; the respondent was not told why she was summoned to an interview nor was she given the names of the complainants or any relevant information. She was asked general questions. She was dismissed a few minutes after a basic report was handed. The investigation was conducted by someone in good faith, nevertheless inexperienced. The respondent was not given the proper information allowing her to refute the allegations.

- ***Dorette Suckoo v. Bank of Montreal*, 2006 F.C. 554 (Federal Court)**

Witnesses need to be interviewed; however, the investigator does not need to interview all of them (At paragraphs 4, 7, 9, 10 and 17), citing *Murray c. Canada*, 2002 CFPI 699 (appeal dismissed, 2003 FCA 222) and *Grover c. Conseil National de recherches*, 2001 CFCI 687.

- ***McIntyre v. Rogers Cable T.V. Ltd.*, (1996) B.C.J. no. 200 (B.C. Supreme Court)**

The investigation was flawed: for example, some key informants were interviewed by phone and some of the declarations were not put in writing. One other key informant was never interviewed. The measure imposed to the respondent (suspension and request to send written apologies) had already been decided prior to the investigation.

- ***Miller v. Canada (Human Rights Commission), 1996, 28 CHRR D/322, decision 29 (Federal Court)***

“The rule of procedural fairness requires that a complainant know the substance of the case against him or her. The complainant is not entitled to every detail but he should be informed of the broad grounds of the case. The complainant is not entitled to the investigator’s notes of interviews or the statements obtained from the persons interviewed. He must be informed of the substance of the case and he has every right to expect that the investigator’s report fully and fairly summarizes the evidence obtained in the course of the investigation. He must be given the opportunity to respond. He is also entitled to the disclosure of an opposing party’s comments when those comments contain facts which differ from those set out in the investigative report”. (At paragraph 23)

Note: In Quebec, see *Fraternité des policiers de Gatineau Inc. vs. Ville de Gatineau*, 2008 QCCA 161 regarding the right of access (in this decision, the refusal of access to a confidential report further to a work climate investigation was held justified under the circumstances; this decision also contains references to other cases denying access to investigation reports prepared in the context of harassment complaints).

- ***F. Bernier et als. and Caisse populaire de la Mitis, 2006 QCCRT 442 (by analogy)***

The investigator was a former police officer. The commissioner noted that the investigators comments before starting his

interview have been somewhat intimidating and the analysis should have been more objective.

A Few tips to ensure efficient and successful investigations

A. *Verify the investigator's credentials and experience*

Human Resources professionals, lawyers and psychologists are the individuals most frequently asked to conduct internal investigations. Do not hesitate to question them before confirming the mandate (for example, typical questions include: What is your experience and training background?; How long have you been conducting investigations?; Are you a member of a professional association?; In what type of organizations have you been involved as an investigator?; What is your approach and what methodology do you follow?; When do you expect the report could be handed?; How much will it cost?; Do you have an insurance policy covering your services?).

B. *Request a commitment from the investigator regarding his neutrality and objectivity*

Investigators should be good listeners, respectful, sensitive, patient, well organized and there should be no actual, apparent or perceived conflict of interest or bias in the accomplishment of their mandate.

C. Ensure that the investigation is promptly launched and completed

The longer an investigation takes, the more stressful and disruptive the situation may become for all those involved. The investigator's availability is crucial.

D. Ensure that the principles of procedural fairness are complied with:

- The process should be explained to both parties;
- The complainant should be allowed to comment and substantiate the allegations and the respondent should be informed and allowed the opportunity to respond; the complainant should also be subsequently informed and questioned if need be;
- If so desired, both parties should be allowed to be accompanied by an observer (a friend, a spouse, a colleague, a union representative or even a lawyer), remembering however that the investigator will usually deal directly with the parties (see *Honda Canada Inc. v. Keays*, 2008 SCC 39 (June 27, 2008), <http://scc.lexum.umontreal.ca/en/2008/2008scc39/2008scc39.html>), at paragraph 77)⁵;

⁵ "Finally, the Court of Appeal pointed to Honda's refusal to deal with Keays' counsel. There is no legal obligation on the part of any party to deal with an employee's counsel while he or she continues with his or her employer. Parties are always entitled to deal with each other directly. What was egregious was the fact that Honda told Keays that hiring outside counsel was a mistake and that it would make things worse. This was surely a way of undermining the advice of

- The documentary evidence submitted should be carefully identified;
- The parties should be invited to provide the names of potential witnesses;
- Confidentiality, although not an absolute right⁶, should be preserved;
- The interviews should take place in a private and neutral location;
- When gathering the testimonies, open-ended questions should be asked as a rule;
- All informants should be asked to read and sign their declaration confirming that it reflects what they said and that they will respect the confidentiality of the information. It is a good practice to offer each informant a copy of their declaration at the end of the interview;
- The investigator should not hesitate to further question an informant, irrespective of his status in the file, if need be.

E. Ensure that the investigation report is complete:

An investigation report should include:

the lawyer. This conduct was ill-advised and unnecessarily harsh, but it does not provide justification for an award of punitive damages”.

⁶ The disclosure of information by the investigator to a third party (for example a witness) should be done on a need-basis only.

- The terms of the mandate;
- The context of the complaint or alleged problem and the issues raised;
- A description of the methodology followed;
- A summary of the facts and the declarations obtained from the parties and witnesses;
- An account of how the witnesses were chosen for interviews; the investigator should be able to explain why some witnesses identified by a party were not interviewed;
- An objective analysis based on the facts and the evidence and a conclusion on each allegation as well as a final conclusion and recommendations, if requested. The documentary evidence filed should be listed and appended to the report.

F. Ensure that the report is delivered within a reasonable timeframe

As a general rule, the report should be submitted to the person in charge (for ex. an H.R. representative), within 30 to 45 days, depending on the circumstances.

II. Strict interpretation of the definition of psychological harassment

The current trend is fairly restrictive. All four conditions specified in the L.S.A.⁷ must be met before concluding that harassment occurred and when isolated, the alleged conduct must be serious and have a lasting harmful effect on the complainant.

Examples of conduct that does not amount to harassment:

- Legitimate disciplinary or administrative measures even if firm and unpleasant for the employee;
- Justified unsatisfactory job performance review;
- Stress, conflicts and disagreements.

Examples of conduct that amounts or may amount to harassment:

- Abusive/malicious approach
- Calling an employee on several occasions with no apparent reasons;
- Changes in the working conditions (unjustified relocation, refusal to provide work and cancellation of a granted holiday);
- Contemptuous behavior (verbal/non verbal);
- Excessive surveillance;
- Intimidation;
- Isolation;
- Lack of empathy, respect;
- Yelling, rumors, unjustified criticisms, inappropriate jokes;
- Touching, grabbing, aggressiveness, etc. (sexual connotation)

⁷ See Section 81.18.

In all cases, it has repeatedly been decided that: the burden of proof rests upon the complainant; the repetition of the act/conduct must be proven although one serious incident may be of such an intensity that it may be sufficient; the hostile or undesired effect and consequences must be looked at by considering the impact on the victim; the facts must be examined as a whole, particularly when the evidence reveals a series of incidents which isolated may be viewed as insignificant; the standard to be applied is determined from the point of view of a reasonable person placed under similar circumstances; and, the intent of the presumed harasser is not relevant to determine whether or not harassment occurred⁸.

Conclusions

It is important the employers and employees be aware of what constitutes harassment and be given the information and tools to prevent it, if need be.

It is also important that efficient mechanisms be put in place to allow the resolution of workplace harassment related issues and that diligent follow-ups be made.

Several complaints have been filed in the Province of Quebec over the past years, internally or with the Labour Standards Commission⁹ in non unionized settings or through the grievance procedure in unionized settings.

⁸ It will however be taken into consideration when deciding what kind of measures should be imposed to a faulty employee.

⁹ In 2007-2008 for instance, the Labour Standards Commission received 1781 complaints (2007-2008 Annual report, www.cnt.gouv.qc.ca and its July 3, 2008

If you represent a complainant or a respondent:

- Ensure that your client understands what constitutes “harassment”;
- Request a copy of the applicable policy if any;
- Ensure that your client is made aware of the process and, if a complainant, of his options;
- Although it may seem obvious, insist that your client (if a respondent) be fully aware of the substance of the allegations filed against him;
- Guide your client in the preparation of the list of the allegations or responses;
- If you wish to accompany your client during the investigation interview, remember that at this stage, your presence is permitted as an observer only (the investigation is not a trial).

Other sources of interest (selective list)

Aggarwal, Arjun P. and Madhu M. Gupta, *Sexual Harassment Investigations*, Harassment Publications, Ottawa, 2004.

Press release

<http://communiqués.gouv.qc.ca/gouvqc/communiqués/GPOE/Juillet2008/03/c9721.html>).

Conference paper

Canadian Bar Association National Administrative Law and Labour and Employment Law Conference, Ottawa, November 21-22, 2008.

Cantin, Isabelle and Jean-Maurice Cantin, c.r., *Politiques contre le harcèlement au travail et réflexions sur le harcèlement psychologique*, second edition, Yvon Blais Inc., 2006, namely pages 125-143 detailing the step-by-step process ensuring efficient internal investigations.

Rubin, Janice and Christine M. Thomlinson, *Human Resources Guide to Workplace Investigations*, Canada Law Book, 2006.

Codification administrative de la Commission des normes du travail, *Interprétation et jurisprudence*, 2008, pages 126 and ss.

Internet sites : www.cnt.gouv.qc.ca; www.crt.gouv.qc.ca; www.cai.gouv.qc.ca; www.orhri.org ; www.soquij.qc.ca; www.lareferencerh.com

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