

focus

on Employment, Labour and Pensions



FRASER MILNER CASGRAIN LLP

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QUEBEC ADOPTS NEW MEASURES AIMED AT ELIMINATING PSYCHOLOGICAL HARASSMENT IN THE WORKPLACE

On June 1st, 2004, Quebec enacted legislation aimed at preventing and sanctioning psychological harassment in the workplace. This reform will undoubtedly have a major impact on employer-employee relationships as well as on relationships between work colleagues.

The psychological harassment provisions contained in the *Act Respecting Labour Standards*¹ (the “**Act**”) are relevant to both union and non-union employees as the Act clearly provides that the provisions are deemed to be an integral part of every collective agreement.

The Act defines psychological harassment 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.”

The Act imposes upon employers the obligation to take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.

The definition as provided in the Act is broad and as such, the members of the *Commission des relations du travail* (Quebec’s Labour Relations Board) (hereinafter the “**C.R.T.**”) might find it difficult to interpret. The C.R.T. will most likely be called upon to determine a complex range of questions dealing with the issue. To name a few, courts will have to determine the fine line between constructive criticism regarding employee’s performance and psychological harassment, or, whether

the new provisions extend to psychological harassment inflicted by clients or suppliers of the employer as well.

In the event an employee feels that he has been or is being psychologically harassed, the Act provides the employee with certain recourse. In this regard, it is important to note that a complaint concerning psychological harassment must be filed within 90 days of the last incidence of the offending behaviour.

The Act also provides a specific recourse to dispose of psychological harassment cases with the objective of permitting the Labour Standards Commission (hereinafter the “**Commission**”) to intervene and prevent harassment before an employee suffers prejudicial consequences. Additionally, the Act also vests the Commission with powers of investigation and inquiry. The Legislature has also provided that a complaint may be filed by a non-profit organization dedicated to the defence of employees’ rights on behalf of one or more employees with their consent.

During the inquiry, the Commission may upon agreement of the parties, request that the Minister of Labour appoint a mediator. In this regard, the mediator may also act as an advisor or assistant to the employee during the mediation process. If the Commission decides to take action, it then refers the complaint to the C.R.T. for adjudication. The Commission may then represent the employee at any proceedings before the C.R.T.

In the event that an employee files a complaint and the Commission refuses to follow through, the employee may nevertheless petition the C.R.T. directly in order to have them investigate a complaint.

If the C.R.T. deems that an employee was indeed a victim of psychological harassment and that the employer failed to provide a working environment free from psychological harassment, it may render any of the following decisions, namely:

- order the reinstatement of the employee;
- order the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;
- order the employer to take reasonable action to put a stop to the harassment;
- order the employer to pay punitive and moral damages to the employee;
- order the employer to pay an indemnity for loss of employment;
- order the employer to pay psychological treatment costs required by the employee for a reasonable period of time; and/or
- order the modification of the disciplinary record of the employee.

The aforementioned lists is not exhaustive and the preamble of Section 123.15 of the Act clearly confers on the C.R.T. the power to “render any decision it believes fair and reasonable taking into account all the circumstances of the matter”.

In light of the foregoing, and particularly in light of the sanctions and costs associated with the provisions of psychological harassment, it is important for Quebec employers to adopt measures in order to prevent psychological harassment in the workplace.

There are effective and concrete ways to prepare for the application of the new provisions. For example, employers may amend existing company policies to provide for appropriate mechanisms to allow employees to report harassment as well as proper internal procedures.

To deal with and investigate complaints in a manner that protects both the rights of the complainant and the alleged author(s) of the harassment. Such policies should also contain remedial guidelines as well as sanctions in case of violation.

Overall, employers should implement appropriate working conditions where everybody benefits, ensure good personnel management and identify problem cases now and see to their settlement.

Ultimately, it will be case law that will provide employers with specific guidelines and hopefully such decisions will provide clarity, uniformity, and direction in regards to the application of the new provisions.

SUPREME COURT OF CANADA DETERMINES THAT THE QUEBEC HUMAN RIGHTS TRIBUNAL MAY RULE ON A LABOUR DISPUTE

In 1997, the *Fédération des syndicats de l'enseignement* (FSE), a federation consisting of 53 Quebec teachers' unions, entered into an industry wide cost-cutting agreement in order to avoid the imposition of legislated employment terms for Quebec teachers.

The agreement contained a provision to the effect that teaching experience acquired during the 1996-1997 academic year would not count towards seniority and salary, thereby adversely affecting younger teachers who had not reached the top of the pay scale.

The teachers filed complaints with the Quebec Human Rights Commission alleging that the agreement violated the *Quebec Charter of Human Rights and Freedoms* and discriminated against them on the basis of their age by treating them less favourably than their older colleagues.

When the complaint reached the Quebec Human Rights Tribunal, the province of Quebec along with the school boards and unions filed a motion urging the Tribunal to decline jurisdiction on the grounds that the matter fell within the exclusive jurisdiction of an arbitrator under the collective agreement. The Tribunal denied the motion and the Quebec

Court of Appeal reversed the Tribunal's ruling in a 2-1 decision maintaining that the dispute fell within the exclusive jurisdiction of an arbitrator appointed under the Quebec Labour Code.

The Supreme Court of Canada ruled, in a 5-2 decision, that the Quebec Human Rights Tribunal was competent to hear the teachers' complaint and held that the terms of the collective agreement discriminated against the teachers.

Chief Justice Beverley McLachlin, writing for the majority, held that the Tribunal has jurisdiction over the matter as the dispute did not arise out of the operation of the collective agreement itself but rather from its negotiation. In citing the 1995 Supreme Court *Weber* decision, the Chief Justice wrote that the case does not always confer upon arbitrators exclusive jurisdiction in labour-union disputes but that other tribunals may have overlapping jurisdiction depending on the legislation and the nature of the dispute. The Chief Justice maintained that the essential question is to determine whether the relevant legislation, taken in its full factual context, clearly confers exclusive jurisdiction upon the labour arbitrator. According to the Chief Justice, a two step

analysis is required, namely the determination as to what the relevant legislation says about the arbitrator's jurisdiction and secondly, the determination as to which tribunal is a "better fit" based on a factual perspective of the dispute. The legal characterization of the dispute (i.e. human rights claim or claim under a collective agreement) is of no consequence according to the Chief Justice.

With respect to the case at bar, the Chief Justice wrote that while the Quebec Labour Code assigned exclusive jurisdiction to an arbitrator, such jurisdiction was over the "interpretation or application" of a collective agreement and the dispute in question did not, as in the *Weber* case, arise out of the operation of the collective agreement, but rather the pre-contractual negotiation of the agreement.

The Chief Justice wrote that the teachers could not be faulted for not asking the unions to file a grievance on their behalf because:

1. the nature of the question cannot be characterized as a grievance under the collective agreement, since the claim is not that the agreement has been violated, but that the agreement is itself discriminatory;
2. the unions are opposed in interest to the teachers on this matter;
3. had a grievance been filed, the labour arbitrator would not have had jurisdiction over all the parties to the dispute; and
4. because the teachers general challenge to the validity of a provision in the collective agreement affects hundreds of teachers, the Human Rights Tribunal is a "better fit" for the dispute than a single arbitrator.

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General), 2004 SCC 39.

On the same day that this decision was rendered, the Supreme Court of Canada ruled on a similar matter in the case of *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40.

In this particular matter, the Court was split 4-3 in assigning jurisdiction to the Quebec Social Affairs Commission (now the *Tribunal administratif du Québec*) rather than the Quebec Human Rights Tribunal in the determination as to whether the *Income Security Act* (R.S.Q., c. S-3.1.1.) violated the *Quebec Charter of Human Rights and Freedoms* by discontinuing social assistance benefits to a pregnant woman who was receiving employment insurance benefits.

In this case, two of the five judges (Justices Binnie and Fish) who supported Chief Justice McLachlin in the teachers case sided with Justices Bastarache and Arbour who were dissenting in that particular matter. Although the two judges agreed with Chief Justice McLachlin as to the test that was applied, the Court concluded that the application of such a test resulted in a different outcome.

Mr. Justice Binnie focused on the notion that the legislation constituting the Social Affairs Commission clearly assigned jurisdiction to that body to entertain the issues of the current matter. Mr. Justice Binnie wrote, "The legal factors that favoured the jurisdiction of the Quebec Human Rights Tribunal in *Morin*... do not apply here. Firstly, we held in *Morin* that the nature of the question does not lend itself to characterization as a grievance under the collective agreement. There is no doubt here that Ms. Charette's claim is under the *Income Security Act* and the CAS [Quebec Social Affairs Committee] is competent to deal with it.". Mr. Justice Binnie also distinguished the present matter from the *Morin* case in maintaining that Ms. Charette, unlike the teachers' situation would not be represented by unions that were opposed in interest to the complainants. Lastly, Mr. Justice Binnie ruled that the CAS, unlike the labour arbitrator in *Morin*, has jurisdiction over all relevant parties to the complaint and the legislature gave the CAS exclusive jurisdiction over income security benefits including the power to adjudicate Charter arguments.

NEW ONTARIO PENSION FEES - IT'S MORE EXPENSIVE TO ALLOW FORMER EMPLOYEES TO STAY IN YOUR PENSION PLAN

It is common for terminated employees to leave their pension benefits in their former employer's registered pension plan. Terminating employees may like the convenience and low fees of their former employer's pension plan. Unfortunately, the plan administrator (who is usually the employer) cannot force a terminated employee to complete the required forms that provide for a transfer of the benefit to another locked-in plan.

Why should a plan administrator care about transferring out the registered pension plan benefits of terminated employees? One reason is that the plan administrator continues to be legally obligated to administer the pension benefits in accordance with pension legislation and the high standards of the common law. For example, the plan administrator will continue to be obligated to monitor the performance of investment managers of defined contribution accounts of their former employees.

Another reason is cost. Many trustees and other funding agents charge a per-member fee, regardless of whether the member is employed.

A new reason to care about how many former employees are in your pension plan is a new regulatory fee. It applies to pension plans that are subject to Ontario filing fees. Until now, plan administrators paid a \$6.15 fee only for each active member. The Financial Services Commission of Ontario has now added a filing fee of \$4.15 for each former member and plan beneficiary.

Employers should look at how many members of their pension plan are former employees, and consider ways to encourage them to leave the plan. It is becoming more expensive to let them stay in the plan.

For further information, please contact any of our employment, labour and pensions group members:

Montréal

Jean Bazin, Q.C. (514) 878-8804
Michel Towner (514) 878-8820
Denis Manzo (514) 878-8829
Guy Lavoie (514) 878-8842
Yves Turgeon (514) 878-8839
* Christian Létourneau (514) 878-8860
Marie-Noël Massicotte (514) 878-8821
Amélie Pelland (514) 878-5833
Nicholas Sénéchal (514) 878-5863
Chantal Douillette (514) 878-5869

* also pensions

Ottawa

Catherine Coulter (613) 783-9660
Sheri Farahani (613) 783-9621
Sean F. Kelly (613) 783-9654

For e-mail (by name): first.last@fmc-law.com

Toronto

Michael Horan (416) 367-6773
Anneli LeGault (416) 863-4450
Malcolm MacKillop (416) 367-6818
Catherine Osborne (416) 862-3468
Kenneth Peel (416) 863-4396
Kristin Taylor (416) 863-4612
Lisa Goodfellow (416) 863-4726
Curtis McDonnell (416) 862-3460
Adrian Miedema (416) 863-4678
Alexandra Tinmouth (416) 863-4650
Blair W. McCreddie (416) 863-4532
Pamela Leiper (416) 863-4596
Jordan Winch (416) 863-4761
Laurie Jessome (416) 863-4642
Kerry Williams (416) 863-4563
Brad Rafauli (416) 863-4642

Edmonton

Thomas Wakeling, Q.C. (780) 423-7342
Adrian C. Elmslie (780) 423-7364
Fausto Franceschi (780) 423-7348
Joseph Hunder (780) 423-7354

Calgary

Michael Ford (403) 268-7172
Barbara Johnston (403) 268-3030
Erika Ringseis (403) 268-7043

Vancouver

Carman J. Overholt, Q.C. (604) 662-5165
Gary T. Clarke (604) 443-7133
Jeevyn Dhaliwal (604) 443-7138

Pensions

Paul F. Baston (416) 863-4622
Mary Picard (416) 863-4469
Audrey H. Mak (416) 361-2322
Mark S. Rowbotham (416) 367-6757
Janice Clugston (416) 361-2355

Upcoming Seminar

Keeping Your Edge: Current issues for managing people

Do you manage people?

Fraser Milner Casgrain LLP is pleased to host a dynamic one-day seminar in Calgary on October 27, 2004 designed with your employment and labour issues in mind. Lawyers from our National Employment, Labour and Pensions Group will provide a multijurisdictional perspective on current issues in employment and labour law to help you deal with changing legal issues in the workplace.

For further information on the seminar, please visit our website at www.fmc-law.com/employmentandlabour

This newsletter is designed to supply brief details of recent legislative or other initiatives of interest and some commentary. The summaries and comments provided are, of necessity, brief and should not be relied upon as legal advice. We encourage you to contact any member of the Employment, Labour and Pensions Practice Group for further details or advice in the context of a particular situation.