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SEXUAL HARASSMENT IN THE WORKPLACE

ILN LABOR & EMPLOYMENT GROUP

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SEXUAL HARASSMENT IN THE WORKPLACE: WHAT CANADIAN: QUEBEC COMPANIES NEED TO KNOW

Quebec has long been considered the California of the East and a pioneer in adopting some of the most far-reaching obligations with respect to harassment in the workplace in its widest form, as well recourses and remediation provisions "with teeth".

Legal Provisions that Apply

In adopting its *Charter of Human Rights and Freedoms* ["*Charter*"] in 1975, seven years before the adoption of its federal equivalent, the Quebec legislature established (i) the fundamental right of every person to the safeguard of "his dignity, honour and reputation" (s 4) and (ii) that "[e]very person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on […] sex, gender identity or expression, pregnancy, sexual orientation […]" (s 10). The *Charter* also provides that "[d]iscrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right." (s 10). By 1982, with the adoption of s 10.1, the legislature provided that "[n]o one may harass a person on the basis of any ground mentioned in section 10". In so doing, it created a separate and distinct quasi-constitutional right to be free of sexual harassment or harassment because of sexual orientation, expanded in 2016 to cover, as well, harassment because of gender identity.

When the *Civil Code of Québec* was replaced in 1994, the provisions governing the contract of employment contained a positive obligation on every employer to take all appropriate measures, *inter alia*, "to protect the health, safety and dignity of the employee" (art 2087).

With the coming into force, in 2004, of new labour standards legislation regarding psychological harassment (ss 81.18–81.20 of the *Act Respecting Labour Standards*, hereinafter "*QLSA*"), defined as "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" (s 81.18), it was in some circles criticized for legislating civility in the workplace. In the years since its adoption, it has become part of the social and economic fabric of the Quebec employment landscape. At the same time, it has become a minefield for employer-side employment lawyers and their clients.

In 2018, the Quebec legislature amended ss 81.18 and 81.19 *QLSA*, *inter alia*: (a) by specifying that "psychological harassment" includes "verbal comments, actions or gestures of a sexual nature" and (b) providing that not only must employers take reasonable action to prevent psychological harassment, including sexual harassment, putting a stop to it whenever they become aware of such behaviour, but must adopt and make available to their employees a psychological harassment prevention and complaint processing policy that includes sections on behaviour that manifest in comments, actions or gestures of a sexual nature.

All of the above are considered matters of public order, either by specific provision of law or through case law and, as such, cannot be avoided or contracted out of. All of the above is buttressed by the right instantiated in the *Charter* at s 4, by the right of every person "to the safeguard of his dignity, honour and reputation".

Dignity being the status or quality of being worthy of honour or respect, and a sense of pride in oneself and self-respect, the Supreme Court of Canada, in two seminal cases, *Janzen* [*Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252] and *Robichaud* [*Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84] held that "sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being" [*Janzen*].

In *Janzen*, the Supreme Court distanced itself from the quid pro quo — hostile environment distinction caused by sexual harassment, relied upon in U.S. courts — adopting the precept that sexual harassment which creates a hostile or offensive environment for members of a particular sex is as demeaning and disconcerting as the most abhorrent of racial epithets.

As can be seen in Quebec, sexual harassment or the prohibition thereof has multi-levelled sources, grounded in both statute, the *Civil Code* and quasi-constitutional *Charter* rights.

Remediation and the Piper Pays the Price

With respect to psychological harassment and now sexual harassment in the workplace, the primary respondent is not the perpetrator, but rather the employer. In that context as well, the employer's responsibility pursuant to ss 81.18 et seq. *QLSA* is not only vis-à-vis his own employees, including management, but indeed anyone having access to or being present in or at the workplace. That is not to say that the actual perpetrator is absolved of responsibility. It is rather that he who has the "deep pockets", e.g. the employer, pays the price, first and foremost.

Psychological harassment, including by definition sexual harassment as well as independently, may also be made the subject of a workmen's compensation claim.

The prohibitions and obligations regarding psychological harassment are set out in the *QLSA*, which normally *does not* apply to senior executives. By exception the provisions of ss 81.18–81.20, and 125.3 et seq. regarding psychological harassment and the statutory recourses that pertain *do* cover them.

Objective of the Provisions Regarding Psychological Harassment

Some have said that the objective of the legislature in prohibiting psychological harassment was to create a new platform for redress because (i) the employee's recourse for violation of the employer's obligation to protect and safeguard the dignity of the employee was considered too costly and too long, and (ii) because it wished to oblige the employer to make changes "upstream", whatever the source, indeed at the source, to avoid the perpetuation of the situation.

Remedies

There are numerous arrows to an employee's bow in seeking redress. The most efficient from the employee's point of view, and costly from the employer's point of view, are complaints filed either pursuant to ss 123.5 et seq. of the *QLSA*, and complaints pursuant to ss 124 et seq. thereof. Here's why. Both of these recourses allow an employee to receive free legal advice and representation by attorneys in the employ of the CNESST, the agency that oversees the *QLSA*, and seek compensatory, moral and punitive damages, and, in the case of termination of employment, compulsory reinstatement, plus interest costs, and, if there is some kind of psychological impairment, costs of support with no defined end.

Prior to the latest amendments to the *QLSA*, an employee had 90 days to file a complaint of psychological harassment after which it became "time-barred" or "prescribed". The time bar has now been lengthened to two years. However, since the time bar begins to run from "the latest manifestation" thereof, in the case of repeated conduct, proof may be led spanning years with all the attendant headaches of disproving the alleged conduct if it's the employer who is your client.

Such complaints are heard and decided by the Administrative Labour Tribunal, unless the employee is covered by a collective bargaining agreement. The provisions of the *QLSA* respecting psychological harassment are deemed incorporated into any and all collective bargaining agreements, and, as such, are heard necessarily and exclusively by a grievance arbitrator who would have equivalent remedial powers.

As is the case in many jurisdictions, administrative tribunals or commissions are less reluctant to push the envelope to advance the law in favour of the victim or alleged victim than the civil courts might be.

Five years after introduction of the original legislation, the Commission des normes du travail ("Commission"), the Administrative Labour Tribunal's predecessor examined the experience with the relevant provision and found:

- For the five-year period (June 2004–June 2009), the Commission received 10,095 complaints;
- 95% of the complaints related to psychological harassment in the form of repeated conduct;
- 73% of the complaints involved a person in "position of authority";
- 63% of the complaints were filed by women;
- 355 of the complaints were settled through mediation at the Commission stage;
- 911 complaints were referred to the Commission, but 723 were dealt with in out-of-court settlements;
- Between June 1, 2004 and March 31, 2010, the Commission rendered 108 decisions. Of those, 36 decisions (33.3%) concluded that the employee was the object of psychological harassment (35 complaints were granted because the employer failed in his obligation set out at s 81.19 and one complaint was denied, even though actual harassment had been found, because the

employer had fulfilled his obligations). Correspondingly, 72 decisions (66.6%) concluded that the employee was not the object of psychological harassment in the workplace;

The upshot of all of this is, in my view, that such complaints are almost a free lottery ticket for employees, lodged in the hope of forcing the employer to settle, knowing full well that since litigation will cost the complainant nothing, while litigation can cost the employer his back teeth.

These recourses do not supplant the remedies provided for by the *Charter*, as pursuant to s 123.6 *QLSA*, with the complainant's consent, when the matter might involve "discrimination" pursuant to ss 10 or 10.1 of the *Charter* (see above), the recourses may be doubled up by transmitting that complaint to the Quebec Human Rights Commission for investigation and prosecution before the Quebec Human Rights Tribunal.

Settlement Considerations

As statistics show, the vast majority of psychological harassment complaints have been settled out of court. Settlement of psychological harassment complaints based on alleged conduct which might approach the level of sexual assault, as defined by the Canada *Criminal Code*, may be particularly problematic.

In Canada, sexual assault generously interpreted can constitute an indictable offence, (what in the U.S. may be referred to as a felony). It is the Crown or prosecuting attorney who gets to decide whether to proceed by way of indictment or by way of summary conviction.

The problem is the offence of compounding an indictable offence. S 141(1) of the *Criminal Code* provides that "[e]veryone who asks for or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years".

It may very well be that a non-disclosure agreement as part of a settlement agreement could be considered "valuable consideration", rendering the signatories to such agreements and any person aiding or abetting its signature liable to prosecution (on parties to offences, see s 21 of the *Criminal Code*). When drafting provisions in settlements out of court, when the subject matter of psychological harassment is sexual in nature, it may be more than prudent to take all of this into account.

As an aside, those of us who represent employers, when asked to draft "Protocols of Return to Work" following particularly violent strikes in which criminal complaints had been laid, protocols requiring the retraction of same, may have had occasion to worry about this concept of "compounding an offence" in the past.

Other Considerations

There are other considerations to be taken into account regarding settlements that are perhaps peculiar to Quebec. Matters that are declared to be matters of public order are of two kinds: public order of direction, or public order of economic protection. The Canada Supreme Court has already ruled that while one cannot waive matters of public order of direction, one can properly release or waive rights or

recourses of economic protection, provided the waiver is executed *only after the right is acquired*. Most provisions of the *QLSA* and of those parts of the *Civil Code* have been determined to be of "economic protection". As far as sexual harassment is concerned, I would say that since there is a distinct societal interest in its prohibition, a settlement that includes a complete waiver of rights that derive from the *Charter*, and particularly rights deriving from s 10.1 thereof regarding sexual harassment, might not be bulletproof.

Conclusion

And if my views differ from those of my betters, I differ with deference.

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