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THE QUEBEC SYSTEM FOR PROTECTION AGAINST PSYCHOLOGICAL HARASSMENT IN THE WORKPLACE: CASE LAW PECULIARITIES AND ISSUES

JULIE BOURGAULT

Associate Professor, Université du Québec en Outaouais, member of the Interuniversity Research Centre on Globalization and Work (CRIMT) and the Labour and Society Research Group (ERTS).

ANNE-MARIE LAFLAMME*

Professor and Dean, Faculty of Law, Université Laval; member of the Interuniversity Research Centre on Globalization and Work (CRIMT).

Introduced in 2004 as part of the Act Respecting Labour Standards (hereinafter referred to as the LSA), special provisions for protection against psychological harassment in Quebec were added to the pre-existing legal framework¹ The public policy provisions of the LSA define psychological harassment in the workplace and require employers under Quebec jurisdiction to prevent or put a stop to harassment, whether the alleged harasser is a representative of the employer or a fellow employee. This recourse is available to employees covered by the LSA regardless of where they work or of the source of the harassment.² However, once the employer has fulfilled the obligation to prevent or put a stop to harassment, such recourse becomes inadmissible, even when the acts are proven to have constituted harassment.

Despite the presence of special legislative protections and the recognition that this right is of a fundamental nature,³ psychological harassment at work remains common in Quebec and has generated a voluminous body of case law.

* The author would like to thank Clara Morissette, a student in the Bachelor of Law program at Université Laval, for her help with the case law research. All quotes are our translation.

1 See J. Bourgault, *Le harcèlement psychologique au travail : Les nouvelles dispositions de la Loi sur les normes et leur intégration dans le régime préexistant*, Montreal, Wilson & Lafleur, 2006, p. 7-10 and 134.

2 M.-F. Chabot, «Les normes légales contre le harcèlement psychologique : loin d'être minimales», *Conférence des juristes de l'État 2011, Actes de la XIXe Conférence tenue à Québec les 13 et 14 avril 2011*, Cowansville, Yvon Blais, 2011, 483-548, p. 487-493.

3 *Syndicat des employées et employés de métiers d'Hydro-Québec, local 1500 (SCFP-FTQ) vs. Fontaine*, 2006 QCCA 1642, par. 81.

The *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (CNESST, labour standards, pay equity, and workplace health and safety commission)⁴ handled 3,617 complaints in 2016, 151 of which resulted in judicial interventions.⁵

In this regard, an analysis of recent case law from the *Tribunal administratif du travail* (TAT, administrative labour tribunal), its predecessor the *Commission des relations de travail* (CRT, labour relations board) and the *Tribunaux d'arbitrage* (TA, arbitration tribunals) allows us to identify certain key jurisprudential issues. On the one hand, the identification of psychological harassment at work has given rise to a large body of case law which helps sketch out the contours of the legal definition. On the other hand, the choice made by legislators to frame complaints under the law governing minimal working conditions renders the victim compensation process somewhat more complex, particularly for those who have suffered damage to their health, the compensation of which falls exclusively under the system of compensation for occupational injuries.⁶ The scope of this paper does not permit us to cover all these aspects. We will therefore limit ourselves to examining the case law corresponding to the legal definition of psychological harassment within the meaning of the LSA (I), showing its contours and limits (II).

I - IDENTIFYING PSYCHOLOGICAL HARASSMENT

Section 81.18 of the LSA 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 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.» In light of this definition, workplace psychological harassment occurs whenever vexatious behaviour impacts both an employee and the workplace. Case law defines each of these components (A) and takes a global approach to the identification of vexatious behaviour (B).

A - THE COMPONENTS OF THE DEFINITION: VEXATIOUS BEHAVIOUR AND ITS EFFECTS

Proving psychological harassment in the workplace first requires a demonstration of the vexatious nature of the behaviour, and then a demonstration of the effects of this behaviour. In the absence of vexatious behaviour, there can be no effects, thus meaning that there is no harassment.⁷

4 The CNESST replaced the former labour standards commission (CNT).

5 CNESST, *Rapport annuel de gestion 2016*, Appendix 2, p. 172.
<http://www.cnesst.gouv.qc.ca/Publications/400/Documents/DC400-2032-10web.pdf>

6 J. Nadeau, *Le harcèlement psychologique au travail : l'accès difficile à l'indemnisation*, Cowansville, Yvon Blais, 2014; A.-M. Laflamme, J. Nadeau, «Le harcèlement psychologique au travail: une atteinte à la santé ou à la dignité de la personne?» *Conférence des juristes de l'État 2011, Actes de la XIXe Conférence tenue à Québec les 13 et 14 avril 2011*, Cowansville, Yvon Blais, 2011, p. 437-482.

7 *Breton vs. Compagnie d'échantillons National ltée*, 2006 QCCTR 0601, par. 150.6; *Syndicat de l'enseignement de la Rivière-du-Nord vs. Commission scolaire de la Rivière-du-Nord*, 2016 QCTA 653, par. 116-117; *Association des professeurs de Lignery vs. Commission scolaire des Grandes Seigneuries*, 2017 QCTA 409, par. 601; *Laberge et Le Havre des femmes*, 2017 QCTAT 271, par. 27; *Guimond vs. Union canadienne des Moniales de l'Ordre de Saint-Ursule*, 2017 QCTAT 5543, par. 62.

Vexatious behaviour refers to «an attitude or conduct tending to harm or infringe an individual's dignity.»⁸ In this sense, «a determination of the vexatious nature of a behaviour is directly related to its results,» where «the individual is disparaged and denigrated both personally and professionally.»⁹ The harasser's intention to harm, however, is not a relevant consideration in the analysis.¹⁰

Vexatious behaviour is characterized by **hostile or unwanted** conduct, words, acts or gestures. Case law has established that the conduct of «an individual displaying aggressive intentions, and acting as an enemy, in a belligerent, antagonistic, inimical, unfavourable or threatening manner,» can be described as hostile. Unwanted conduct refers to «behaviour that is neither sought, expected nor desired, whether explicitly or implicitly.»¹¹ Whether the refusal is explicit or implicit, it is important that «the facts alleged [be] objectively [...] perceived as unwanted.»¹² Thus, **when** the alleged conduct arises in response to provocative or disturbing behaviour on the part of the claimant, «unless the reaction is disproportionate, and always considering the circumstances, it cannot be considered hostile or unwanted.»¹³

Moreover, since «such words, deeds or acts are generally innocuous when considered in isolation, but have a serious cumulative effect due to their repeated and continuous nature and the consequences they produce,»¹⁴ they must indeed be **repeated** in order to constitute vexatious behaviour, unless it is a question of gross misconduct. Such gross misconduct is relatively exceptional. Examples might include «publicly reading a list of unjustified criticisms of the claimant in front of a room full of citizens and journalists,» or threatening an employee with the words, «I'm gonna kill you.»¹⁵

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- 8 *Centre hospitalier régional de Trois-Rivières (Pavillon St-Joseph) vs. Syndicat professionnel des infirmières et infirmiers Mauricie/Cœur-du-Québec*, [2006] R.J.D.T. 397 (T.A.), par. 166. See also *Laberge*, *ibid*, par. 140; *Association des professeur(e)s de Bishop's University et Université Bishop's*, 2016 QCTA 743, par. 592.
 - 9 G. Poirier, R.L. Rivert, *Les nouvelles normes de protection en cas de harcèlement psychologique au travail: une approche moderne*, Editions Yvon Blais, 2004, 155 pages, p. 57, 58, cited in *Bangia vs. Nadler Danino S.E.N.C.*, 2006 QCCRT 0419 and *Danies vs. Villa-Maria*, 2015 QCCRT 0705.
 - 10 *Centre hospitalier régional de Trois-Rivières*, *supra* note 8, *Alliance du personnel professionnel et technique de la santé et des services sociaux (APTS) vs. CIUSSS du Centre-Ouest-de-l'Île-de-Montréal*, 2017 QCTA 348, par. 70; *Lachapelle-Welman vs. 3233430 Canada inc. (Portes et fenêtres ADG)*, 2016 QCTAT 3557, par. 110. See, on the other hand, *Laberge*, *supra*, note 7, § 80, where the intention does appear to be taken into account: «In view of the foregoing, the Tribunal finds that the various situations invoked by the Applicant in support of her complaint of psychological harassment do not substantiate the existence of behaviours **intended** to harm, injure or denigrate her.» (our emphasis)
 - 11 *Centre hospitalier régional de Trois-Rivières*, *supra* note 8, par. 172-174. See also: *Laberge*, *supra* note 7, par. 143; *Bangia vs. Nadler Danino*, *supra* note 9, par. 85; *Association des professeur(e)s de Bishop's University*, *supra* note 8, § 594-595.
 - 12 *Syndicat des chargées et chargés de cours de l'Université de Montréal vs. Université de Montréal*, 2017 QCTA 225, par. 131, citing *Habachi vs. Commission des droits de la personne*, D.T.E. 99T-945 (C.A.).
 - 13 *Syndicat de l'enseignement de la Rivière-du-Nord*, *supra* note 7, par. 166.
 - 14 *Centre hospitalier régional de Trois-Rivières*, *supra* note 8, par. 169. See also *Bangia vs. Nadler Danino*, *supra* note 9, par. 81; *Danies*, *supra* note 9.
 - 15 *Dubé vs. Lochaber-Partie-ouest (Municipalité du canton de)*, 2015 QCCRT 0455, § 196 and *Franche et Restaurant & Délicatesse Gerry's inc.*, 2015 QCCRT 0608.

To constitute psychological harassment, the vexatious behaviour must **infringe the dignity or integrity** of the employee and create a harmful work environment. The infringement of integrity «must leave scars or have after-effects, which, while not necessarily physical or permanent, exceed a certain limit»; it must «impact, in more than a transient manner, the victim's physical, psychological or emotional equilibrium.»¹⁶ Dignity refers to «a person's self-respect, self-esteem and self-love»;¹⁷ it «is flouted when persons or groups are marginalized, disregarded, or denigrated.»¹⁸ Findings of such infringement have been made in cases involving death threats¹⁹ or humiliating or contemptuous remarks.²⁰ Thus, behaviour deemed vexatious generally infringes a person's dignity insofar as this classification also refers to the impact of such behaviour on the victim's self-esteem.

Lastly, case law defines a **harmful work environment** as «an environment that is harmful, unhealthy, damaging, and prevents the normal achievement of the objectives associated with the employment contract.»²¹ By way of illustration, in the *Lachapelle-Welman* case, the TAT found that the claimant, a shy person, having been repeatedly asked questions of a sexual, personal, unsavoury, and dubious nature, had «not been 'treated with modesty, discretion, restraint, regard, esteem, consideration, respect, deference or in a civil manner'» by his colleagues, and had been «marginalized and devalued for being different,»²² which thus created a harmful work environment.

B - THE GLOBAL APPROACH TO VEXATIOUS BEHAVIOUR

Since vexatious behaviour is generally the result of repeated conduct, the courts use a global approach to determine the vexatious nature of behaviour: «We must not limit ourselves to a case-by-case examination. While such an examination remains relevant and necessary, only a global analysis makes it possible to evaluate the real severity of the set of behaviours as a whole.»²³

This global approach allowed the Court of Appeal to classify as psychological harassment the conduct of an employee who **harmed several victims** successively, even though each individual victim was not necessarily the object of repeated vexatious behaviours.²⁴ Conversely, this comprehensive approach may also in certain cases allow specific behaviours to be removed from the notion of psychological harassment. For

16 *Québec (Public trustee) vs. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 R.C.S. 211; *Centre hospitalier régional de Trois-Rivières*, *supra* note 8, par. 177; *Bangia vs. Nadler Danino*, *supra* note 9, par. 89; *Laberge*, *supra* note 7, §145.

17 *Laberge*, *ibid.*, par. 145; *Breton*, *supra*, note 7, § 155; *Law vs. Ministre de l'emploi et l'immigration*, [1999] 1 RCS 497, 530.

18 *Law vs. Ministre de l'emploi et l'immigration*, *ibid.*, 530; *Bangia vs. Nadler Danino*, *supra* note 9, par. 88.

19 *Roc vs. Poulbec inc.*, 2007 QCCRT 0441; *Franche*, *supra* note 15.

20 *Orentes Silva vs. 9009-1729 Québec inc.*, 2016 QCTAT 2155; *Dubé*, *supra* note 15, §216-219.

21 *Laberge*, *supra* note 7, par. 147; *Lachapelle-Welman*, *supra* note 10, par. 114, *Bangia vs. Nadler Danino*, *supra* note 9, §91.

22 *Lachapelle-Welman*, *ibid.*, §112.

23 *Breton*, *supra* note 7, §152.1 and 150.5; *Bangia vs. Nadler Danino*, *supra* note 9, §83; *Syndicat de l'enseignement de la Rivière-du-Nord*, *supra* note 7, §121.

24 *Centre de réadaptation en déficience intellectuelle du Saguenay-Lac-Saint-Jean (CRDI) vs. Fortier*, 2014 QCCA 1581.

example, the TAT held that the act of taking a claimant by the arm and pulling her to a place she had refused to go and insulting her in front of her line manager constituted hostile or unwanted conduct. However, the court did not find that this constituted vexatious behaviour, since «these two acts, while certainly inappropriate, were, rather, simply part of a difficult relationship between co-workers with incompatible personalities.»²⁵

In some decisions, while claiming to follow a global approach, judges have assessed the vexatious nature of individual behaviours rather than evaluating their hostile or unwanted nature. In fact, a global analysis involves first examining the behaviours on a case-by-case basis to determine whether they are hostile or unwanted. Then, it must be determined whether, from a global perspective, these behaviours present the repetitive nature essential for a classification as vexatious behaviour.²⁶ Indeed, the fact that an act is objectively unwanted does not automatically make it vexatious.²⁷ For example, in the *Danies* case,²⁸ the CRT held that while the Director's anger towards the claimant did not in itself constitute vexatious behaviour, and should thus not be included in the global analysis, it would nevertheless be possible to describe such conduct as «objectively unwanted.» Conduct becomes vexatious when it involves repeated hostile and unwanted acts, which in isolation may seem trivial. For instance, in the *Lachapelle-Welman* case, each act, taken individually, could not be described as vexatious behaviour, even though the conduct was objectively unwanted. The repeated nature of these acts, did however lead the TAT to make a finding of vexatious behaviour.²⁹

II - EXCLUSION FROM CLASSIFICATION AS PSYCHOLOGICAL HARASSMENT

In order to determine whether vexatious behaviour constitutes psychological harassment, the courts have developed certain principles. First, the behaviour must be assessed from the perspective of a reasonable observer (A). After all, case law has identified situations that do not generally constitute harassment, but «may be perceived as such by a person displaying excessive distrust, a tendency to feel victimized, depression, or any other personality trait or disorder tending to distort his or her perception of things.»³⁰ This might arise in the case of difficult employment relations (B) or the normal exercise by the employer of the prerogatives of management (C).

25 *Brochu vs. 9139-8891 Québec inc. (Expédia Centre de croisières de Québec)*, 2017 QCTAT 3083.

26 See the application of this approach in *Breton*, *supra* note 7, § 150.7 and 162-196.

27 For example, in the *Syndicat de l'enseignement de la Rivière-du-Nord* case, *supra* note 7, in §128, the judge held that «some claims of vexatious behaviour by the management towards the plaintiff must be rejected outright,» while specifying, however, in §145, that: «No matter how you analyze these situations, whether one by one or globally, or in the aftermath of other events, they can in no way be seen as vexatious behaviours on the part of management.» See also *Giroux vs. Café de la Débrouille*, 2015 QCCRT 0590, par. 26; *Danies*, *supra* note 9, §614-616.

28 *Danies*, *ibid*, §614.

29 *Lachapelle-Welman*, *supra* note 10.

30 *Syndicat de l'enseignement Rivière-du-Nord*, *supra* note 7, §120; *Syndicat des techniciens, techniciennes et professionnels, professionnelles du Centre de santé et de services sociaux de l'Énergie vs. Centre de santé et de services sociaux de l'Énergie (CIUSSS)*, 2017 QCTA 409, §982-984.

A - THE REASONABLE VICTIM'S PERSPECTIVE

Due to the subjective nature of an assessment of workplace psychological harassment, it is inappropriate to take the claimant's perception as the exclusive point of reference for the analysis.³¹ The perception of events may be tainted by the claimant's personality, especially when he or she «is a victim or person with victimization issues or suffering from paranoia.»³² Thus, «any situation involving the slightest annoyance in a workplace» could appear to be a manifestation of psychological harassment in the eyes of a person with a distorted view of reality.³³

To prevent what may simply be inappropriate comments from being interpreted as workplace psychological harassment,³⁴ the analysis must instead be based on the «subjective-objective» model of the reasonable victim, by determining whether a «reasonable person, of normal diligence and prudence, in the victim's place, would consider the alleged harasser to have exhibited vexatious behaviour.»³⁵ For example, in the *Roblin* case, the TAT held that the claimant's perspective was not that of a reasonable victim, finding that he was «incapable [...] of seeing things in a correct and reasonable light.»³⁶ Likewise, in the *Laberge* case, the TAT took the claimant's strong personality into consideration in its assessment of the events.³⁷

B - DIFFICULT EMPLOYMENT RELATIONSHIPS

It is therefore the perspective of a reasonable victim that permits the courts to draw a distinction between psychological harassment and a difficult employment relationship. As such, case law has held that «relationships in the workplace are not necessarily free of outbursts, conflicts, or manifestations of anger,»³⁸ and that «a lack of courtesy, coldness, indifference to others, limiting communication exclusively to what is necessary to get the job done, and even rudeness, may be unpleasant and sometimes frustrating acts, but do not

31 *Bangia vs. Nadler Danino*, *supra* note 9, §95, citing *Habachi*, *supra* note 12.

32 *Ibid*; *Bangia vs. Avoman*, 2016 QCTAT 7255. M.-F. Hirigoyen, *Le harcèlement moral dans la vie professionnelle*, Eds. La Découverte and Syros, Paris, 2001, 444 pages, p. 83, 84, explains the phenomenon of victimization as follows: «some people may derive pleasure from taking on a victim role. As such, they do not seek to find a way out of their difficult situation, because it gives them an identity and an opportunity to complain. Their victim role gives meaning to their pain, and to maintain this mode of existence they must hound their aggressors endlessly, seeking remedies that will continually prove insufficient.»

33 *Bangia vs. Avoman*, *ibid*, par. 85; *Danies*, *supra* note 9; *Bangia vs. Nadler Danino*, *supra* note 9, §96

34 *Duclos et Industrielle Alliance, assurances et services financiers inc.*, 2015 QCCRT 0262, Denial of request for judicial review, 2015 QCCS 6268, § 85.

35 *Breton*, *supra* note 7, paragr. 151; *Dubé*, *supra* note 15, §148 and 149; *Guimond*, *supra* note 7, §62; *Lachapelle-Welman*, *supra* note 10; *Laberge*, *supra* note 7, §149, *Syndicat de l'enseignement de la Rivière-du-Nord*, *supra* note 7, §118-119.

36 *Roblin vs. Commission scolaire Sir-Wilfrid-Laurier/Sir-Wilfrid-Laurier School Board*, 2017 QCTAT 3889, par. 557; *Syndicat de l'enseignement de la Rivière-du-Nord*, *ibid*, §179-181.

37 *Laberge*, *supra* note 7, §117; *Dubé*, *supra* note 15, §161 (claimant's sensitive disposition).

38 *Dubé*, *ibid*, §191.

necessarily amount to vexatious behaviour.»³⁹ For example, the courts have refrained from making a finding of harassment in cases involving interactions between two individuals who did not get along but nevertheless managed to have their arguments⁴⁰ and disrespectful comments overheard in a context of open conflict. In this last case, the court found that the claimant's personality affected the way she perceived the conflict.⁴¹

C - THE EMPLOYER'S MANAGEMENT RIGHTS

Conduct related to the exercise of management rights must also be assessed from the perspective of a reasonable victim. Abuse of authority by employers accounted for 46 percent of complaints filed with the CNT between 2010 and 2013.⁴² This distinction, then, has been the subject of a robust body of case law establishing several principles. First of all, jurisprudence has held that management rights constitute a discretionary power, which affords employers the right to make mistakes. In this sense, a reasonable exercise of management rights does not constitute workplace psychological harassment.

An unreasonable exercise of management rights through arbitrary, abusive or discriminatory supervisory practices may be considered workplace psychological harassment only when all the criteria for harassment are met.⁴³ For example, being made to undergo evaluations⁴⁴ or being subjected to disciplinary measures⁴⁵ does not constitute harassment as long as these decisions are justified. However, if an employer gets angry with an employee every time he makes a mistake and uses humiliation as a management tool, this might count as psychological harassment.⁴⁶

In conclusion, the characteristics of the provisions aimed at protecting workers from psychological harassment have given rise to various legal issues regarding the determination of harassment. Jurisprudence has held that certain behaviours that may be inappropriate and harmful may nevertheless not necessarily constitute psychological harassment within the meaning of the LSA.

39 *Commission scolaire des Hautes-Rivières et Syndicat du personnel de soutien des Hautes-Rivières*, [2012] R.J.D.T. 1005 (T.A.), par. 487, Determination of compensation, 2014 QCTA 85, Denial of request for judicial review, 2015 QCCS 4085.

40 *Dian vs. Les pêcheries Norrel Québec inc.*, 2007 QCCRT 0551.

41 *Dubé*, *supra* note 15, §190 and 192.

42 C. Belzile and V. Caron, «Profil des salariés ayant déposé une plainte pour harcèlement psychologique», in *Le harcèlement psychologique au travail 2004-2014, De la prévention à la résolution*, Yvon Blais, Cowansville, Québec, 2014, p.1.

43 *Dessureault vs. La Revue de Terrebonne inc.*, 2010 QCCRT 0094, §16-18; *Guimond*, *supra* note 7, §20; *Laberge*, *supra* note 7, par. 153; *Association des professeur(e)s de Bishop's University*, *supra* note 8, par. 599 and seq.; *Bangia vs. Nadler Danino*, *supra* note 9, §249-251.

44 *Syndicat des chargées et chargés de cours de l'Université de Montréal*, *supra* note 12, §115.

45 *CIUSSS de l'Énergie*, *supra* note 30, §1000.

46 *Franche*, *supra* note 15, §121-125.

These behaviours may, however, infringe the right to fair and reasonable conditions of employment within the meaning of the Quebec *Charter of human rights and freedoms*. Moreover, in a recent decision⁴⁷ an arbitrator found that a work performance optimization program constituted a violation of the right to fair and reasonable conditions of employment due to its adverse impact on the working environment. Conversely, complaints of psychological harassment have been rejected because a departmental reorganization did not target solely the claimant but rather all the personnel in the firm,⁴⁸ or because the performance objectives set by the employer were reasonable.⁴⁹ In fact, unlike for a claim of psychological harassment, the finding of a violation of the right to fair and reasonable conditions of employment does not require there to have been vexatious behaviour, and involves only the impact on the workplace.⁵⁰

47 *Alliance du personnel professionnel et technique de la santé et des services sociaux (APTS) vs. Centre intégré universitaire de santé et de services sociaux du Nord-de-l'Île-de-Montréal*, 2016 QCTA 129, Denial of appeal for judicial review, 2017 QCCS 1583.

48 *Centre intégré universitaire de santé et de services sociaux du Centre-Ouest-de-l'Île-de-Montréal*, *supra* note 10, §76.

49 *CIUSSS de l'Énergie*, *supra* note 30, par. 830.

50 For an analysis of this decision, see J. Bourgault, L. Boivin, «Nouvelle gestion publique, action syndicale et défense du droit à des conditions de travail justes et raisonnables», in J. Grenier and M. Bourque, *Le système de santé et des services sociaux québécois. Une analyse de l'évolution des services sociaux et du travail social: idées, institutions, acteurs (working title)*, Québec, Presses de l'Université Laval, forthcoming.