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Mental Health Week – What are the obligations of employers with regard to mental health?

Since October 6, 2021, the employer's general health and safety obligation under section 51 of the *Act Respecting Occupational Health and Safety* (AOHS) explicitly states that "every employer must take the necessary measures to protect the health and ensure the safety and physical and mental well-being of his worker." Although case law has recognized for more than 20 years that the concept of "health" under the AOHS must be interpreted broadly to include mental health,[1] this legislative amendment removes any doubt in the matter.

It is now clear that Québec employers are required to take proactive preventive measures to protect their employees from psychosocial risks within their company. In this regard, it is worth recalling that the Institut national de santé publique du Québec (INSPQ) defines psychosocial risks as "factors related to work organization, management practices, working conditions, and social relations which increase the likelihood of adverse effects on the physical and psychological health of workers exposed" [our translation].

[1] Chagnon and Marché Bel-Air Inc. [2000] CLP 388

In addition, the INSPQ identifies seven key risk factors that employers should consider in the context of their legal duty to protect mental health, namely:

- Overwork and time constraints;
- Low decision-making autonomy;
- Low recognition of work;
- Job insecurity;
- Poor social support by the manager and co-workers;
- Poor information and communication; and
- Psychological harassment.

With respect to this last risk factor, the *Act respecting labour standards* (ASL) has, since 2004, enshrined the right of Québec employees to work in a harassment-free workplace, as well as the corollary obligation of their employer to take reasonable steps to prevent psychological harassment and to put an end to the harassment situations brought to its attention.[2] According to case law, this implies that the employer must put in place preventive measures, not just reactive ones, and adopt internal directives establishing appropriate measures and intervention mechanisms that are adapted and diligent, whenever there is a report of a possible failure.[3] Moreover, since 2019, the ASL specifically requires Québec employers to adopt a policy on the prevention of psychological harassment and the handling of complaints[4] and to ensure that it is known to staff and easily accessible.

Furthermore, several mental health conditions may be considered a "handicap" under the *Charter of Human Rights and Freedoms*. Thus, the employer of a person with a medically recognized psychological condition may be required to accommodate the person, up to the point of undue hardship. Relevant accommodations may involve granting leave, modifying duties, either permanently or temporarily, or even reassigning the employee to another position. For example, an arbitrator has already ruled that an employee is entitled to be exempted from tasks that cause her panic attacks even if this violates the principle of job rotation.[5] As in all accommodation cases, the affected staff member (and his or her union, if any) is required to actively participate in the identification and implementation of reasonable accommodation measures.[6]

In conclusion, to meet its legal obligations regarding workers' mental health, an employer can adopt various strategies, from adopting internal policies on psychological harassment and psychological health and safety, to implementing reasonable accommodation measures to allow an employee with a particular condition to keep working, to seeking injunctions. In the recent case of *Ville de Saint-Constant v. Vachon*[7], the Superior Court confirmed that an employer's legal obligation "to take the necessary steps to protect the health, safety and physical and psychological integrity of the persons employed by it" [our translation] as well as its obligation to provide a harassment-free workplace may justify applying for and obtaining an injunction against a problematic citizen in order to prohibit him or her from attending municipal council meetings or from entering the city's premises where its employees work.

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[2]Section 81.19

[3]See, for example, *Syndicat des fonctionnaires municipaux de Montréal (CUPE) v. City of Montréal*, ETD 2009T-72; Lachapelle-Welman and 3233430 Canada Inc. (Portes et fenêtres ADG), 2016 QCTAT 3557.

[4]Section 81.19

[5]Plastiques TPI Inc. and Syndicat des travailleurs du plastic de Coaticook (CSD), D.T.E. 2005T-165 (TA).

[6]Central Okanagan School District no 23 c. Renaud, [1992] 2 R.C.S. 970

[7]2023 QCCS 761

Practical advice

To ensure that they meet their obligations, we recommend that employers:

- Identify the risks that could affect the psychological health and safety of their personnel while performing work, both remotely and in person;
- Revise and/or adopt policies on psychological harassment and psychological health and safety;
- Ensure the implementation of their policies through training and adequate supervision of their personnel;
- Clearly define the obligations and responsibilities of employees and properly manage the workload of each employee;
- Implement effective conflict resolution practices; and
- Encourage respectful behaviour among all workplace players and intervene quickly, including by imposing appropriate disciplinary measures, in the event of non-compliance.

Decision briefs

Syndicat des professionnelles et professionnels municipaux de Montréal v. Montréal (Ville), 2023 QCTA 63 (AZ-51915034)

An employee within a security team was dismissed, following an unpaid suspension of approximately 30 business days, for violating the cybersecurity policy by archiving over 1,800 emails and 300 documents belonging to the employer in a personal cloud system (Dropbox).

A grievance arbitrator was asked to rule on the reasonableness of the suspension and the dismissal. On February 13, 2023, the decision was rendered. Dismissal was found to be an appropriate and proportionate penalty due to the seriousness of the allegations and the aggravating factors demonstrated. Aggravating factors included the duties performed, the sensitive and highly confidential nature of certain documents and the fact that the complainant had participated in the development of the policy. As for the length of the suspension, the arbitrator found that due to the complexity of the case, 30 working days was reasonable to gather and analyze the facts and to decide based on the facts obtained. With regards to the absence of pay during the suspension period, the arbitrator applied the teachings of the Supreme Court of Canada's Cabiakman decision. The arbitrator concluded that, although an administrative suspension is generally with pay, the absence of pay was justified because the purpose of the suspension was not only to protect the employer's legitimate interests but also to investigate the extent of the complainant's misconduct.

CISSSMO Employees Union – CUPE 3247 v. CISSS de la Montérégie-Ouest, 2023 CanLII 13608

An administrative technician who has been on sick leave for nearly three (3) years stated that she is ready to return to work gradually. The employer, however, wanted an expert's opinion before authorizing the employee's return to work, but the meeting with the employer's expert was postponed so that the employee could undergo an MRI (magnetic resonance imaging) scan. The employer's expert concluded that the employee was fit to return to work gradually, and she began a gradual return.

Without disputing the employer's right to verify the complainant's medical condition, the union filed a grievance, alleging that the employer treated the file negligently and must compensate the employee for her losses. The union claimed that the postponement of the assessment was unwarranted and that the MRI was not required for the assessment. It also argued that the delay in transmitting the expert's report to the employee's physician (it took approximately one month) was evidence of negligence on the employer's part.

On February 24, 2023, the arbitrator ruled on the processing time for a return-to-work request after a sick leave. The arbitral tribunal found that the need for an orthopaedic assessment was justified due to the complexity of the employee's medical file. The Tribunal also found that the employer cannot be held liable for the significant orthopaedic consultation delays resulting from the COVID-19-related public health emergency. However, it ruled that the employer was negligent in waiting four (4) weeks before sending the report to the employee's physician, which delayed her return to work and caused her financial loss. As a result, the arbitrator ordered the employer to pay the equivalent of four (4) weeks' worth of wages to compensate for the loss.

Poinlane v. Cégep de Jonquière, 2023 QCTAT 921

A teacher at the Cégep de Jonquière who was also the union president was suspended with pay during an investigation into allegations of psychological harassment against him. The employee was prohibited from entering the workplace or the union hall and from communicating with staff and students during the investigation. The employee filed a complaint against the employer for intimidation, interference and obstruction in union business, while the union filed a complaint for retaliation. The employee and the union requested that the Administrative Labour Tribunal issue interim orders allowing the employee to resume his teaching duties and access the workplace to perform his duties as a union president. The employer contested the application, alleging that the suspension with pay was necessary for the investigation and to prevent workplace harassment.

On February 27, 2023, the administrative judge had to determine whether there was an apparent right, serious or irreparable harm and inconvenience that was more harmful to the employee and the union than to the employer and justified ordering that the employee be reinstated to carry on his union activities.

With no evidence of harassment at this stage of the proceedings, the Tribunal found that the suspension imposed [translation] "to ensure the investigation's objectivity" was disproportionate and appeared to be a pretext to punish the union's "directing mind." Additionally, the administrative judge found that the suspension with restrictions caused serious and irreparable harm to both the employee's right to association and his right to work, while the employer hadn't demonstrated any serious harm if the employee returned to work. The application for reinstatement of the union president in his teaching duties was, therefore, granted.

***Croteau v. Chantier Davie Canada Inc.*, 2023 QCTAT 971**

On March 1, 2023, the Administrative Labour Tribunal had to rule on a complaint under section 122 of the *Act respecting labour standards* (ARLS) filed by an employee alleging that he had been dismissed because he had informed his employer that he would be undergoing surgery in three (3) to five (5) months. In its decision, the administrative judge found that such a notification could be enough to show that the employee intended to exercise a right conferred by the ARLS and therefore trigger the application of the presumption that the employee was dismissed for a reason prohibited by the ARLS. However, by demonstrating that the termination of employment resulted from the employee's failure to comply with the safety ratings imposed by the employer, the employer was able to rebut the effects of this presumption. Thus, when the employer showed that there was a real cause for the termination of employment that was not related to the employee's right to be absent from work, the court dismissed the employee's claim.

***Sirois v. Glencore Canada Corporation Mine Raglan*, 2023 QCTAT 1003**

The complainant had worked for the employer since 2008. As a result of work difficulties stemming from a personality conflict with her supervisor, she had been absent from work since August 2016. It is worth noting that the problem arose from a simple personality conflict and not from psychological harassment.

About a year after the start of her leave, the employer had the complainant assessed by its physician, who concluded that she was fit to return to work without delay and without restriction. However, at the request of the complainant's doctor, the employer agreed that she would make a long gradual return. A few days after her complete return, the complainant was absent again. The employer had her assessed again by its physician, who concluded that the [translation] "problem [was] mild and did not justify an absence." The complainant disputed this opinion by providing a report from her own expert stating that she was only partially in remission and that "the medical leave [was] entirely justified and could be extended." Nonetheless, after consulting with their expert, the employer informed the complainant that they no longer considered her absence justified and that she was expected to work. The complainant persisted in her refusal, and the employer terminated her employment.

Before the Administrative Labour Tribunal , the complainant argued that her dismissal for "absence without just cause" was not justified because her absence was supported by two doctors. However, the Tribunal found that the evidence showed that the employer's refusal to assign a new supervisor was the reason for her new absence and ultimately for her refusal to resume her duties, although the employer's decision was not unreasonable or unjustified. Moreover, the Tribunal did not accept the opinion of the complainant's expert, who condoned a long absence without a plan or treatment. Additionally, the Tribunal observed that the employer had not been prompt in its management of the file and had obtained appropriate medical opinions, while the complainant had rejected all measures proposed by the employer to improve her relationship with her supervisor.

In these circumstances, the Tribunal held that the complainant's refusal to return to work constituted insubordination, that the evidence showed clearly that progressive discipline would have made no difference, and that, consequently, the dismissal was justified.

Reminder

Charter of the French Language* amended by the *Act respecting French, the official and common language of Québec

With the amendment of the *Act respecting French, the official and common language of Québec*, effective June 1, 2023, membership contracts must be written in French or they will be considered null and void. However, parties may choose to be bound by a version written in another language, provided the member expressly requests it after being given a French version. This change will affect many termination agreements and releases signed in a termination context.

Also, we remind you that employers have until June 1, 2023 to translate into French all documents related to working conditions and training documents produced for their employees before June 1, 2022.

Varia

An Act respecting industrial accidents and occupational diseases* amended by an *Act to modernize the occupational health and safety regime

Since April 6, decisions concerning opinions of the Bureau d'évaluation médicale, the Comité spécial des présidents, the Comité des maladies professionnelles oncologiques and decisions concerning financing can be challenged directly before the Administrative Labour Tribunal, without prior review by the Direction générale de la révision administrative.

Bill 19, An *Act respecting the regulation of work by children*

On March 28, the Minister of Labour Jean Boulet tabled Bill 19 in the National Assembly of Québec. The bill proposes measures to regulate the work of children aged 16 and under, and is currently in the presentation stage. We will keep you informed of its progress.

Stay tuned!

Labour Spotlight Series:

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Authors

Arianne Bouchard
Partner and CRHA
arianne.bouchard@dentons.com

Sarah-Émilie Dubois
Senior Associate
sarah-emilie.dubois@dentons.com

Camille Paradis-Loiselle
Senior Associate
camille.paradis-loiselle@dentons.com