

EMPLOYERS: Be wary of psychological harassment

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The notion of psychological harassment has become a reality in the last few years, rooted in both the employer's and the employee's day-to-day lives, along with other similar notions such as stress at work, depression or "burn out". The psychological implications of these notions may converge, but they are certainly not the same. Employers have to face the fact that psychological harassment is a very real hardship in the working environment. In 2016, in the "Quality of Work" project lead jointly with the University of Luxembourg, the "Chambre des Salariés du Luxembourg" published a study on psychological harassment in the work place in Luxembourg. The most impacted are employees and young workers in training aged 16 to 24. However, despite support from several quarters[1], the draft bill n°4979 regarding protection against psychological harassment in working relations, dating back to 2002, has still not been voted through[2]. To help you to grasp the notion of psychological harassment in working relations, here is some recent case law, which addresses the subject.

[1] According to Mobbing ASBL in May 2015 <http://www.lessentiel.lu/fr/news/luxembourg/story/25569671>

[2] Draft Bill n°4979 regarding protection against psychological harassment in working relations, dated 2002, was reactivated in 2014 in Parliament ("Chambre des deputes").

A DISPARATE LEGAL FRAMEWORK

Psychological harassment is neither defined nor governed by the Labour Code. The Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation set the foundation for the legal framework of psychological harassment.

Case law has based itself on this text in order to include psychological harassment in the Luxembourg legal system. The judges refer to the following definitions:

- *Harassment is viewed as a form of discrimination (...), which has the purpose or the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment*[1].

Later, the Convention of 25 June 2009 regarding harassment and violence in the work place, which became a general obligation under the Grand Ducal Regulation of 15 December 2009, held that:

- *Psychological harassment occurs when a person within the company commits, against a worker or a manager, repeated and deliberate wrongful acts which have the purpose or effect of:*
 - Infringing on his/her rights or dignity; or
 - Altering his/her working conditions or compromising his/her professional future by creating an intimidating, hostile, degrading, humiliating and offensive environment; or
 - Altering his/her mental or physical health.

In the absence of any specific text, the foundation of the employee's claim for damages against his/her employer for psychological harassment rests on the basis of contractual good faith[2].

Finally, obsessional harassment is punishable by the Criminal Code[3], which aims more generally to sanction

the person who has repeatedly harassed another, when he or she knew or should have known that this behaviour would seriously affect the victim's tranquility.

AN OBLIGATION TO REPORT PSYCHOLOGICAL HARASSMENT

Three conditions need to be met to establish psychological harassment:

- Wrongful acts;
- Repeated acts;
- Negative consequences for the employee.

Acts of psychological harassment do not necessarily require deliberate or malicious intent from the employer[4].

It is for the employee, the alleged victim of psychological harassment, to prove that (i) the employer did not execute the work contract in good faith, (ii) damage and (iii) a causal link between the alleged breach of the employer and the damage.

AN OBLIGATION TO REACT

The employer's power of direction and organization of the business obliges him to guarantee normal working conditions to his employees. Therefore, he has to take all necessary measures to prevent or stop any form of psychological harassment which could have a negative impact on his employees' health[5].

UPSTREAM WORK: An internal procedure to manage acts of harassment should be implemented.

Such a procedure should ensure that:

- The employer represses all forms of harassment in his business;
- There exist efficient means in the business to denounce and deal with harassment;
- Sanctions can be taken against the denouncer, in cases of improper and fallacious denunciations of harassment or against the harasser in cases of established harassment;
- The employer gives his full support to the victim of harassment.

IN CASES OF DENUNCIATION: An employer facing a precise and circumstanced denunciation or who knows of a case of potential psychological harassment is under an obligation to intervene.

The key step is to hold an internal inquiry with the victim, the potential harasser and more generally with other employees.

- The inquiry must be duly documented.
- Clear and precise information regarding the results of the inquiry and potential sanctions must be communicated to the parties involved.

An employer's knowledge of acts of psychological harassment is the sine qua non condition to render the employer liable if he fails to intervene to stop the harassment[6].

Even if he is not the perpetrator of the harassment, the employer can be held liable: if he does not react

appropriately, the employer is vulnerable to a claim for damages from the victim. Case law condemns not only vertical harassment i.e. that of a supervisor against a subordinate but also horizontal harassment between colleagues. The consequences of the acts have to be analyzed with a certain degree of objectivity and not only from the employee's point of view.

ADEQUATE MEASURES

During a second phase, the employer is obliged to take all adequate measures against the harasser. Such measures can go as far as an immediate dismissal for serious misconduct. Where the chosen sanction did not prejudice the victim[7], the Cour of Appeal nevertheless recently approved the decision to transfer an employee who was being harassed as a valid measure to prevent and stop her harassment[8].

FREQUENT ABSENCES AND DISMISSAL: BEWARE OF PSYCHOLOGICAL HARASSMENT!

The leading case law[9] holds that when an employer can no longer count on an effective collaboration with an employee due to his/her repeated absences, or after an uninterrupted period of 26 weeks of absence, the employer can proceed with the dismissal with notice of the employee. Irrespective of any wrongdoing, the behaviour or, more generally, the personal situation of the employee, can constitute an important impairment of the good functioning of the business and can, as such, justify the dismissal.

Employers should be careful if the absenteeism of the employee is linked to a situation of psychological harassment. In a judgment dated 15 July 2016[10], the Labour Court decided that the employer's decision had a sufficient basis to justify the dismissal of the employee. However, the Court went on to state that it would have been otherwise if the illness which caused the abnormally frequent absenteeism were directly linked to the employee's professional activity. This means that the employer's decision can seem, at first glance, to be a justified measure, unless the employee can prove he was the victim of psychological harassment, which in turn caused his prolonged absence from the company.

NOT TO BE CONFUSED

Psychological harassment in companies can be a reality. Such a threat must be taken seriously by employers and an adequate response put in place. However, psychological harassment should not become a permanent motive allowing employees to challenge the employer's decisions: the delivery of a warning to an employee who does not follow given instructions or does not behave professionally in the execution of his work does not constitute psychological harassment from the employer.

The feelings of a struggling employee in a situation of tension or stress, however intense, which is linked to a difficult professional situation or to the nature of his responsibilities, does not in itself mean that the employee is the victim of psychological harassment.

[1] Article 2 of Directive 2000/78/CE

[2] Article 1134 of the Civil Code

[3] Article 442-2 of the Criminal code: imprisonment from 15 days to 2 years and fine from EUR 251 to EUR 3,000.

[4] Court of Appeal 28 June 2007, BIJ 2008, p.56; Pas 34, p.114

[5] CSJ 3rd Ch, 3 July 2014, n°39788 du rôle

[6] CSJ 3ème chambre, 28 avril 2016, n°41470 du rôle

[7] JP ESCH-SUR-ALZETTE, 5 mars 2013 n°655/2013

[8] Cour 28 avril 2016, n°41470 du rôle

[9] Cour d'appel 3ème chambre, 8 décembre 2011, n°37022 du rôle et Cour d'appel, 3ème chambre, n°35867

du rôle
[10] Labour Court, 15 July 2016, n° 31317/16

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