

Workplace Bullying and Harassment in France and Few Comparisons with Belgium: a Legal Perspective

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I. Introduction

European framework-directive 89/391/EEC of 12 June 1989 concerning the implementation of measures aimed at promoting improvements in the health and safety of workers in the workplace marks a decisive turning point in improving health and safety at work. It guarantees minimum health and safety conditions throughout Europe, while authorising the member states to maintain or introduce stricter measures. The framework-directive certainly includes innovative provisions to oblige employers to take adequate steps to make work healthier and safer.

The framework-directive imposes a general obligation on employers to ensure their employees' safety. It introduces the principle of occupational risk assessments and encourages primary prevention, with the aim of preventing occupational risks as early as possible. The directive advocates imposing a "general obligation of prevention" on employers. Prevention is applicable to all risks, not only those on a necessarily restrictive list ("special obligation"). Furthermore, the framework-directive is intended to protect workers' "health", making no distinction between "physical health" and "mental health" in terms of occupational risk prevention, even if it is well-known that labour law practice emphasises the prevention of physical health hazards at work. The objective is to promote a "prevention culture". When the framework-directive dated 12 June 1989 was transposed into French law, it broadened the safety obligation beyond its previously restrictive interpretation. Indeed, the transposition law of 31 December 1991¹ stipulated that "law on health and safety" was based on "a general obligation of prevention imposed on employers, risk assessment, and training for workers and employee representatives"².

When the new legal provisions were introduced to combat moral harassment at work, the safety obligation took a new direction under the social modernisation law of 17 January 2002³, which introduced the concept of "physical and mental health"⁴ in the French Labour Code.

Although the phenomenon had always existed, "moral harassment at work" only really started to be considered in France in 1998, when the psychiatrist Marie-France Hirigoyen

¹ Law n° 91-1414 of 31 December 1991, *JORF* of 6 and 7 January 1992, p. 319.

² P. Chaumette, preface to L. Lerouge's thesis, *La reconnaissance d'un droit à la protection de la santé mentale au travail*, 2005, LGDJ, Coll. Bibliothèque de droit social, tome 40, 428 p.

³ Law n° 2002-73 on social modernisation of 17 January 2002, *JORF* of 18 January 2002, p. 1 008.

⁴ Initially intended to combat moral harassment, the system in its ultimate form exceeded its intended object.

published a book on this issue⁵. The author insisted: “It is possible to destroy a person with words, looks, and innuendos alone”⁶. She defined moral harassment in the workplace as “any abusive conduct, in particular behaviour, words, actions, gestures, and writing capable of violating the personality, dignity, or physical or psychological integrity of a person, jeopardising their employment, or deteriorating the working atmosphere”.⁷ Harassment may involve a manager and subordinate, or workers on the same level. However, the term “moral harassment” must be applied very carefully to avoid the risk of confusing this phenomenon with normal work-related stress or attempts to destabilise the manager of a company.

The influence of this book on French companies was immense and it raised awareness of this issue in the work world. Mare-France Hirigoyen’s book expressed in words the experiences of many workers that had not previously been recognised. Psychological pressure and insidious, perverse tactics that make it impossible to maintain a working relationship have, nevertheless, always been part of corporate life, as well as legal practice. Consequently, case law had recognised this phenomenon before 1998, even if different terms were used at the time. For example, in 1993, the Court of Cassation Chamber for Social and Labour Matters handed down a ruling that categorised an employer’s behaviour towards an employee as “insidious harassment”⁸.

Ms Hirigoyen’s book triggered a new collective awareness of the phenomenon of moral harassment at work. Associations for combatting moral harassment were founded and “moral harassment at work” became an issue in public debate. Two specific draft laws were submitted by French Member of Parliament Georges Hage in 1999 and Senator Roland Muzeau in 2001⁹. In 2001, the French Economic and Social Council (Conseil économique et social - CES)¹⁰ was also asked by the government at the time¹¹ to produce a report on this issue in the context of a draft law on social modernisation. It defined moral harassment as “all repeated actions aimed at degrading the human, relational, or material working conditions of one or more victims, in such a way as to compromise their rights and dignity, potentially having a serious impact on their health and jeopardising their career prospects”¹².

According to the 5th survey on working conditions, conducted by the Dublin foundation in 2010¹³, nearly 19 % of French workers had been victims of physical violence, intimidation, and moral or sexual harassment during the previous year. The average score in the 27 member states on this question was 14 %, ranging from 21 % in Finland or even 22 % in Australia to 8 % in Italy and even 7 % in Cyprus. Allowance should, however, be made for the fact that workers who are more aware of the phenomenon of moral

⁵ M.-F. Hirigoyen, *Le harcèlement moral, la violence perverse au quotidien*, Éditions La Découverte et Syros, Coll. Pocket, 1998, 252 p.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Cass. soc. 16 December 1993, n° 4176 D Baudelocque c/ Malnar.

⁹ The French Parliament consists of 2 chambers (bicameral system): the National Assembly (lower chamber) and the Senate (upper chamber).

¹⁰ It is now the Conseil économique, social et environnemental (CESE – Economic, social, and environmental council), <http://www.lecese.fr/>.

¹¹ “Jospin government”.

¹² Economic and social council, *Moral harassment at work*, Paris, 29 March 2001, reported by Michel Debout, 124 p. <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000130/0000.pdf>.

¹³ <http://www.eurofound.europa.eu/pubdocs/2011/82/en/1/EF1182EN.pdf>.

harassment at work tend to give more positive answers to questions concerning their exposure.

Nevertheless, the extent of public debate and discussions surrounding definitions¹⁴ has obliged legislators to take moral harassment at work into consideration. For example, a legal regime specific to harassment at work was developed in the French system, backed up by case law where interpretation by the courts improved the legal system enacted by legislators.

II. A specific legal regime for moral harassment at work in France and Belgium since 2002

France and Belgium have both developed specific legal regimes for moral harassment. However, besides a legal definition, a comprehensive legal arsenal is available to deal with moral harassment in France (A), whereas the Belgian legal system is less specific (B).

A. A legal definition backed by specific tools in France

The social modernisation law enacted on 17 January 2002 represented a fundamental step towards developing a legal framework for combatting moral harassment at work. This law marked the legislators' new awareness of occupational risks, particularly their consideration of the phenomenon of moral harassment at work and its legal recognition. Indeed, the social modernisation law developed a legal regime based on the introduction into the French Labour Code, Criminal Code, and Civil Service regulations of a legal definition (1), accompanied by specific provisions for combating this phenomenon (2), as well as immunity from dismissal for employees who report that they are harassment victims (3).

1. The legal definition of moral harassment at work

According to article L. 1152-1 of the French Labour Code "Employees should not be subjected to repeated actions constituting moral harassment, which intentionally or unintentionally deteriorate their working conditions and are likely to violate their rights and dignity, impair their physical or mental health, or jeopardise their professional future". An analysis of this provision shows that a situation must meet a certain number of conditions to be qualified as moral harassment at work. Firstly, the litigious acts must be "repeated". Secondly, these practices must be aimed at violating the victim's "rights" and "dignity". Finally, the third condition necessary to meet the definition of moral harassment is divided into three distinct parts: impairment to physical or mental health, or jeopardising the victim's career. The last three factors need not be combined, but one of them must be proven in combination with the first two conditions to meet the definition of moral harassment.

An identical definition was inserted in article 222-33-2 of the Criminal Code. This definition is, however, broader, as it is applicable to "moral harassment" in general and not only at work. However, the courts have considered that this definition should be restricted

¹⁴ Besides the definitions in the draft laws of 1999 and 2001, those given by Marie-France Hirigoyen and the Economic and social council, other definitions were proposed at various stages in the discussions: Christophe Dejourn, Michèle Drida, in particular.

to the workplace to avoid excessively widespread application. The vagueness of the text, which is also open to interpretation in terms of the actions likely to constitute the offense of moral harassment, thus gives unusual latitude to the criminal courts' powers of appreciation. However, case law from the Criminal chamber of the Court of Cassation has given full application to the law, while restricting it to the situations for which it was intended¹⁵. Case law also shows that the courts refused to apply the text to behaviour that could be construed as a normal exercise of the employer's management authority¹⁶.

When the law on sexual harassment, dated 6 August 2012, was enacted¹⁷, the maximum criminal penalty for moral harassment was raised from a 15,000 euro fine and one year's imprisonment to 30,000 euros and two years' imprisonment¹⁸. Civil service law was also amended with the same legal definition as the French Labour Code and Criminal Code. Article 6, paragraph 5 was introduced in the law of 13 July 1983¹⁹, specifying the rights and obligations of civil servants, but the legal criteria were not completely identical, particularly on the issue of qualification and the burden of proof²⁰.

Finally, since 2002, following several cases for failure to comply brought by the European Commission, French law was obliged to apply several European directives that had only been partially transposed into national law, particularly in the area of discrimination²¹. The law dated 27 May 2008²² included several provisions adopting European legal principles on combatting racial discrimination and extended the scope of "discrimination" by implementing the European definition of this concept. Discrimination now includes "harassment" (sexual and moral). According to article 1 (modified by the law of 6 August 2006 on sexual harassment), discrimination includes: "Any action related to one of the grounds mentioned in the first paragraph²³ and any actions with a sexual connotation, suffered by a person, with the purpose or effect of violating the person's

¹⁵ A. Coche, "Les conséquences pour les victimes des efforts jurisprudentiels destinés à compenser l'imprécision de l'incrimination de harcèlement moral", *op. cit.*

¹⁶ Cass. crim. 9 October 2007 n° 06-89.093, a civil servant was ruled not to have suffered moral harassment, although he committed suicide following years of severe criticism, as the criticism was justified.

¹⁷ Law n° 2012-954 of 6 August 2012 on sexual harassment, *JORF* of 7 August 2012 p. 12921.

¹⁸ The purpose of the article was to develop knowledge of the legal regime of moral harassment in private labour law. For more details concerning moral harassment and civil service law and its differences with the law applicable to the private sector, V. L. Lerouge, "Harcèlement : nouvelles dispositions issues de la loi du 6 août 2012", *Droit Social*, October 2012, p. 944-945.

¹⁹ Law n° 83-634 of 13 July 1983 on the rights and obligations of civil servants, *JORF* of 14 July 1983, p. 2174.

²⁰ V. L. Lerouge, "Les différences de traitement juridique du harcèlement moral dans le secteur privé et la fonction publique : des rapprochements possibles ?", *Droit social*, May 2012, p. 483-490.

²¹ Council Directive 2000/43/EC dated 29 June 2000 relative to the implementation of the principle of equal treatment of all persons without distinction of race or ethnic origin; Council Directive 2000/78/EC dated 27 November 2000, creating a general framework for equal treatment in employment and occupation; European Parliament and Council Directive 2002/73/EC, dated 5 July 2006, concerning the implementation of the principle of equal opportunities and equal treatment for men and women in access to employment, training, and career development, and working conditions; European Council Directive 2004/113/EC, dated 13 December 2004, on the implementation of the principle of equal treatment of men and women in matters of access to goods and services and supply of goods and services; European Parliament and Council Directive 2006/54/EC, dated 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The Commission made a number of grievances against France, alleging that its law did not adequately reflect faithfully these Directives. In 2008, France was under investigation for late implementation of Directive 2006/54/EC.

²² Law n° 2008-496 of 27 May 2008 including several provisions adapting to European law on combatting discrimination, *JORF* of 28 May 2008, p. 8801.

²³ "A situation of direct discrimination is one where a person is treated less favourably than another person is, has been, or will be in a comparable situation, on the basis of his/her belonging or not, in fact or supposition, to an ethnic group, race, or religion, or on the grounds of his/her beliefs, age, handicaps, sexual orientation or identity or sex".

dignity and creating an intimidating, hostile, degrading, humiliating, or offensive environment”.

However, this new definition did not result in the abrogation of the previous definition. The grounds for invoking one or other of these definitions were, nevertheless, different. Indeed, the 2002 definition is based on repeated actions, whereas the 2008 law provides a legal remedy for discriminatory actions, which are not necessarily repeated.

French legislators have also issued a set of specific legal provisions to enhance the effectiveness of prevention of moral harassment at work in the private sector.

2. Legal provisions devised to combat moral harassment at work

Several provisions in the French Labour Code were modified to clarify and support the definition of moral harassment: (a) the burden of proof; (b) the employer’s general obligation of prevention; (c) performance of the employment contract in good faith; (d) the powers of the Committee on health, safety, and working conditions (CHSWC) and the occupational health service; (e) the immunity of people reporting moral harassment incidents; (f) mediation; and (g) the role of worker representatives, as well as trade unions.

a. The burden of proof of moral harassment: a modified system

The burden of proof of moral harassment at work was modified, similarly to the system applicable in cases of discrimination²⁴. Under article 1154-1 of the French Labour Code, when a dispute meets the definition of moral harassment at work, “any applicant for employment, work experience, or on-the-job training, or employee is responsible for establishing the facts that support the presumption of harassment”.

It is then up to the defendant to prove that the actions that led to the complaint did not constitute harassment and that the decision was justified by: “objective elements that had nothing to do with harassment”. The judge then forms his/her own opinion and may order any steps to investigate the situation that s/he deems useful for reaching a decision. Finally, article 1154-1 of the French Labour Code authorises representative trade unions in the enterprise to take any legal action on behalf of an employee who feels that s/he has been a victim of moral harassment, subject to obtaining the written consent of the person concerned. The victim may stop the legal proceedings launched by the trade union at any time.

b. The extension of the employer’s general obligation of prevention to “physical and mental” health

The legislator also insisted that the employer’s obligation of prevention under article L. 4121-1, consisting of implementing the necessary measures to ensure workers’ safety and protect their health, was extended to include “physical and mental health”. Indeed, since 2002, employers have been under an obligation to prevent impairment to workers’ mental health and risks linked to moral harassment. This goes beyond provisions for combatting moral harassment to lay the foundations for the recognition of mental health in labour law. It is independent and may also form the basis of specific actions to ensure compliance or

²⁴ This is not the case in criminal law, where criminal procedure is applicable and the entire burden of proof is borne by the prosecution, or in civil service law, even if the Council of State has started to align its case law on the same requirement of proof applicable to discrimination cases.

apply penalties for failure to meet the employer's obligation of prevention in relation to workers' mental health²⁵.

The social modernisation law also modified the contents of the personnel regulations policy, which expresses the regulatory power of the employer. Under the law dated 4 August 1982 on workers' freedom in the enterprise²⁶, in addition to implementing the provisions of the French Labour Code, employers must issue norms on prevention via the personnel regulations policy and apply them to employees. This means that employers are obliged to include the requisite measures in the personnel regulations policy to ensure the application of health and safety legislation. The social modernisation law imposes the obligation on employers to implement measures: "to prohibit all moral harassment practices". The personnel regulations policy may only be issued following consultation with not only the works council or, in its absence, the workers' representatives, but also the committee on health, safety, and working conditions, i.e. the competent body for matters concerning physical and mental health at work. The imperative effect of this legislation means that employers are bound by their own rules, so the courts may treat the personnel regulations policy as an applicable source of law in disputes concerning moral harassment at work²⁷.

Article L. 4121-2 of the French Labour Code stipulates that employers must prepare a consistent prevention plan, integrating technical aspects, work organisation, working conditions, industrial relations, and the influence of ambient factors, particularly risks relating to moral harassment. This obligation is reinforced by article L. 1152-4 of the French Labour Code, specifying that employers must take all necessary steps to prevent moral harassment. The law dated 6 August 2012²⁸ stipulated that employers must also display in the workplace article 222-33-2 of the Criminal Code concerning the criminal offence of moral harassment. Furthermore, employment contract terminations are null and void in cases where there is a lack of knowledge of the definition of moral harassment at work or when an employee who lodges a harassment complaint benefits from immunity. Finally, the employer does not bear sole liability. Indeed, an employee responsible for actions constituting moral harassment is liable to disciplinary action.

Even if it was not introduced by the law dated 17 January 2002, the single occupational risk assessment created by the decree dated 5 November 2001²⁹ is likely to be an important instrument for combatting moral harassment at work. Employers are obliged to keep this document up to date by recording the results of all risk assessments concerning worker health and safety carried out in the company or its business units. This document is the physical and legal expression of corporate prevention policy. It forms the basis of the employer's liability for non-compliance with obligations concerning prevention, safety, and risk assessment. This single document is intended to identify all occupational risks in the company and include suitable preventive measures, i.e. moral harassment is included among the other risks inherent to the work environment. This single document provides an opportunity for workers and management in the company to hold an annual meeting on

²⁵ L. Lerouge, *La reconnaissance d'un droit à la protection de la santé mentale au travail*, LGDJ, Bibliothèque de droit social, tome 40, § 480.

²⁶ Law n° 82-689 on the freedoms of workers in enterprises of 4 August 1982, *JORF* of 6 August 1982, p. 2518.

²⁷ A. Supiot, "La réglementation patronale de l'entreprise", *Droit Social*, March 1992, p. 215-226.

²⁸ *Op. cit.*

²⁹ Order n° 2001-1016 of 5 November 2001 on the creation of a risk assessment on health and safety of workers, stipulated in article L. 230-2 of the Labour Code (article L. 4121-1 after 2008) and modifying the Labour Code, *JORF* of 7 November 2001, p. 17523.

occupational risks, in order to discuss the current status of this issue in the work environment, e.g.: stress at work, fatigue, suffering, and, of course, moral harassment. The occupational health service, labour inspectorate, and trade unions potentially have a role to play in raising employers' awareness of this issue in the context of the single document.

c. Performance in good faith of the employment contract

The social modernisation law added article L. 1222-1 to the French Labour Code, taking up the civil law principle that contracts must be performed in good faith (article 1134 of the Civil Code) and applying it specifically to employment contracts. Performance of the employment contract in good faith implies a respect for human rights, i.e. the integrity of the employee as a human being. In application of this principle, employers must implement measures to prevent impairing workers' health, so as to ensure that their health is not imperilled as soon as they accept the contractual employment relationship. The imbalance between the parties inherent to employment contracts certainly represents a privileged field for the obligation of good faith, according to the principle of ideal justice in the law on obligations and the relationship of trust between the contracting parties³⁰, especially in the case of moral harassment. While this principle was already strongly affirmed in the Civil Code, the introduction of the obligation of good faith into the French Labour Code is not simply symbolic. From the standpoint of moral harassment, it strengthens the mobilisation of the courts concerning the requirement that the employment contract be performed in good faith³¹.

d. Powers of the Committee on health, safety, and working conditions (CHSWC) and the occupational health service

This broadening to include "physical and mental health" is also valid pour the powers of the Committee on health, safety, and working conditions (CHSWC) and the occupational health service. Indeed, since 2002, to combat moral harassment, the CHSWC's role was extended: "to contribute to protecting the physical and mental health of workers in the business unit, including those employed by outside firms" (article L. 2002-4612 1° of the French Labour Code). According to article L. 4624-1 of the French Labour Code, the occupational health service shall propose individual measures to the employer to protect the mental health of an employee, depending on his/her condition.

e. Immunity of persons reporting moral harassment incidents

In order to protect workers and facilitate the reporting of moral harassment incidents, article L. 1152-2 of the French Labour Code stipulates that employees or persons on training or work-experience contracts may not be penalised, dismissed, or subjected to discriminatory measures for being or refusing to be subjected to repeated instances of moral harassment, or for bearing witness to or reporting such actions. The following article, L. 1152-3, annuls any termination of an employment contract due to lack of knowledge of the definition of moral harassment at work or the protective measures applicable to employees under these circumstances.

³⁰ Vigneau C., "L'impératif de bonne foi dans l'exécution du contrat de travail", *Droit Social*, July-August 2004, p. 706-714 ; Aynès L., "L'obligation de loyauté", *Archives de philosophie du droit*, 2000, p. 195.

³¹ Vigneau C., *op. cit.*

This employee immunity is based on the legislative principle of protecting basic freedoms and acting in the public interest. This principle is part of a broader legislative framework aimed at protecting workers from retaliatory measures when they report reprehensible conduct committed in the enterprise that has come to their knowledge due to their position to the corporate management or relevant authorities (e.g. whistleblowing on maltreatment or corruption)³².

The legislators felt that, in each case, this immunity was justified in order to protect basic freedoms or a higher public interest (the right to dignity, health, etc.). In the case of moral harassment, immunity is justified to ensure that harassment will be reported as soon as possible so that it can be stopped, not only in the interests of the victim, but also those of the employer, who may be held liable³³. The legislators also specified that immunity was not subject to proving the truth of the allegations.

f. The mediation procedure: an innovation in the French Labour Code

The social modernisation law of 17 January 2002 introduced a procedure for “specific mediation to put an end to moral harassment actions” into the French Labour Code for the first time. This provision was thus perceived as an innovation. Article L. 1152-6 of the French Labour Code thus provides for a mediation procedure initiated by any person in an enterprise who feels they have been a victim of moral harassment or by the person accused of that action. The mediator is chosen by agreement between the parties. The mediator obtains information on the status of relations between the parties. S/he attempts to reconcile their differences and submits written proposals for ending the harassment. If mediation fails, the mediator informs the parties of any applicable penalties and the protection granted to the victim under the complaints procedure. However, this procedure can only succeed if both parties accept the advice, opinion, or decisions of the mediator.

Mediation is a useful way of making health issues at work more approachable, particularly in the area of mental health, which is more difficult to assess objectively than physical health. It is intended as a constructive approach to interpersonal relations at work, aimed at improving working conditions. Whether or not mediation is successful, the discussions and proposals it produces are likely to have a positive impact. Corporate institutions responsible for preventing occupational risks may also benefit from this effect. The aim is also to raise employers’ awareness of weaknesses in the health aspects of their corporate organization as well as the extent of their general obligation of prevention and safety. Employers may then decide to take steps that they did not initially consider useful. The aim, therefore, of mediation is to foster respect for employee rights and healthy working conditions from the standpoint of prevention, rather than focusing on compensation for damages or after-the-fact medical care³⁴.

This procedure is, however, relatively little known and hardly used in France. Mediation culture is certainly not as well developed as it is in northern European countries. This is demonstrated by the fact that the conciliation phase, which is mandatory in all

³² J. Duplat, “La nullité du licenciement d’un salarié ayant relaté des faits de harcèlement”, *Semaine sociale Lamy*, 6 April 2009, n° 1394, p. 11-13.

³³ Cf. Cass. soc. 21 June 2006, *D.*, 2006, n° 41, p. 2831, note by M. Miné; *RDT*, p. 245, note by P. Adam, *JCP G*, n°41, II, 10166, note by F. Petit, L. Leblanc, “Harcèlement moral. Responsabilité personnelle du salarié et obligation de résultat de l’employeur”, *RJS*, 8-9/06, p. 670.

³⁴ C. Labbé, “Agir sur le processus de harcèlement : l’enrayer et le prévenir”, *Droit Ouvrier*, June 2002, p. 267-268.

Industrial Tribunal cases, is a constant failure, as only 10 % of the disputes are settled at this stage, while the remaining 90 % go on to court.

g. The role of worker representatives and trade unions

Worker representatives are the first contacts for workers on issues involving working conditions, before the CHSWC, especially as this body does not exist in enterprises with fewer than 50 employees. Their role is to present all individual or collective complaints to employers, especially those concerning the application of laws and regulations on health and safety (Article L. 2313-1 1° of the French Labour Code). The worker representatives may also pass on complaints and observations concerning: “the application of legislative and regulatory provisions that they are in charge of monitoring” (Article L. 2313-1 2° of the French Labour Code) to the labour inspectorate.

Worker representatives have the “right to act as whistleblowers”. If they observe, or are informed by an employee, that there has been a violation of personal rights, physical or mental health, or individual freedoms in the company that is not justified by the type of work to be done, nor proportional to the intended objective, they must inform their employer immediately. The employer must immediately investigate the complaint with the worker representatives and take the necessary steps to correct the situation. If the employer disagrees, fails to acknowledge the reality of the impairment to health, or refuses to agree to a solution, the worker representatives may apply to the Industrial Tribunal for an emergency ruling – provided the employee, who has been informed in writing, does not disagree. The tribunal may then order all the necessary measures to prevent impairment to the employee’s mental health and may also impose a fine for delays (Article L. 2313-2 of the French Labour Code).

Finally, since the 1980s, the trade union organisations have become relatively disengaged from issues concerning health and safety at work. However, a number of recent corporate agreements have covered the issue of stress at work. The most meaningful initiative in recent months is their successful agreement with the employers’ associations to transpose the European framework-agreements on stress at work, harassment, and abuse at work into French law³⁵, whereas three years of collective bargaining on strenuous working conditions had failed to produce an agreement.

Trade unions also act as a sounding-board for the workers to express themselves. The trade unions provide support to enable them to express their opinions directly, as a group, on the content, conditions, and organization of their work. In particular, this makes it easier to define the actions required to improve working conditions. Trade union action, via collective bargaining, makes worker initiatives more effective, so that those aspects of the working environment likely to impact mental health are taken seriously.

B. A legal definition without specific tools in Belgium

Belgium has a system which defines moral harassment at work, as well as recognising other phenomena inherent to “psychosocial risks at work”. Also in 2002, like the social modernisation law in France, Belgium also added an entire chapter to the law on workers’

³⁵ National interbranch agreement (ANI) on stress at work of 2 July 2008; National interbranch agreement (ANI) on harassment; and violence at work of 26 March 2010.

welfare in the performance of their work dated 4 August 1996³⁶ – which transposed the framework-directive dated 12 June 1989 into Belgian law – concerning “specific provisions on violence and moral or sexual harassment at work”³⁷, prescribing measures aimed at encouraging improvements in the health and safety of workers at work. These provisions cover both employees and the people assimilated by law into that category, including employers and even other people present in the workplace, such as customers and suppliers. Although the Belgian system has instituted a high degree of legal recognition of moral harassment at work and psychosocial risks – which makes it very interesting – the legal tools are still relatively underdeveloped.

The Belgian law on moral harassment at work focuses on three points: (1) prevention, (2) the actions open to the victim, and, finally, (3) measures for protecting workers who report that they have been victims of harassment.

1. Measures for preventing moral harassment at work

In the law dated 4 August 1996, article 32(*iii*) defines moral harassment as: “several abusive acts, which may be similar or different, external or internal to the company or institution, that continue over a period of time, with the aim or effect of violating the personality, dignity, or physical or psychological integrity of a worker or another person (...), in the performance of their work, jeopardising their employment, or creating an intimidating, hostile, degrading, humiliating, or offensive environment, manifested, in particular, by words, intimidations, actions, gestures, or written texts. These behaviours may be related, in particular, to religion or other beliefs, handicaps, age, sexual preferences, gender, race, or ethnic origin”. This last sentence integrates “discriminatory harassment”, which was not included in France until 2008.

Employers must implement the necessary measures to promote the workers’ welfare in the performance of their work. They must apply a general prevention policy for that purpose, particularly by introducing measures aimed at combatting violence and moral or sexual harassment in the workplace.

The law dated 4 August 1996 defined three levels of prevention. Firstly, primary prevention, aimed at preventing moral harassment by influencing its origins or contributory factors. All members of the management structure must be consulted and reminded of their obligations in terms of health and safety at work. The prevention committee must also be consulted, conditions in the workplace must be modified, and workers must be informed and trained in health at work relating to welfare issues.

The aim of secondary prevention is to prevent damage that may be caused by abuse or moral or sexual harassment at work. Measures to be implemented include informing all workers how victims may contact their prevention adviser or, if appropriate, employers may appoint one or more “trustworthy people”, with the prior agreement of all the worker representatives on the committee. These people retain their full independence and shall not suffer any prejudice as a result of their role as a “trustworthy person”. They may not act as prevention adviser to the occupational health service at the same time. They must also ensure that an impartial investigation is organised very rapidly into any moral harassment

³⁶ Law n° 1996012650 of 4 August 1996 on workers’ welfare in the performance of their work, *Moniteur belge* of 18 September 1996, p. 24309.

³⁷ Law n° 2002012823 of 11 June 2002 on protection from violence and moral or sexual harassment at work, *Moniteur belge* of 22 June 2002, p. 28521.

cases – e.g. abuse or sexual harassment – and take steps to receive, help, and support people who report themselves as victims.

Finally, the aim of tertiary prevention is damage limitation, i.e. taking care of victims and helping them return to work. Employers must appoint a prevention adviser specialised in psychosocial aspects of work, including abuse and moral or sexual harassment at work. A comparison with the French system on this point reveals a weakness, due to a lack of specialists trained in psychosocial risks, especially on CHSWC. Enterprises with fewer than 50 employees must call on external prevention adviser services. Firms with a prevention adviser specialised in psychosocial aspects of work, including abuse and moral or sexual harassment at work, in their in-house department for prevention and protection may also call on external services, if necessary. If employers do not obtain the prior agreement of all the worker representatives on the Committee on prevention and protection at work to appoint an internal prevention adviser, they must appoint an external prevention adviser. Employers may also appoint one or more “trustworthy people” to assist the prevention adviser.

Besides the employers’ obligations, victims or those who feel they have been victims of moral harassment also have specific means of action.

2. Actions open to victims of moral harassment

Workers who feel they have been victims of abuse or moral or sexual harassment at work have three options. They may choose the internal process, or contact the relevant civil service department, or bring a lawsuit in the appropriate court.

In the internal procedure, the victim contacts the firm’s “trustworthy person” or prevention adviser. When a worker contacts the trustworthy person, s/he takes the lead in dealing with the issue. S/he receives and listens to the complainant, gives advice, and provides the necessary assistance and support. On the worker’s request, the “trustworthy person” may attempt to reconcile the complainant and the presumed harasser. When the worker prefers to contact the prevention adviser or if there is no “trustworthy person” in the company or institution, the prevention adviser takes on the role of listener and arranges conciliation.

If conciliation does not settle the issue or seems impossible, the “trustworthy person” or prevention adviser submits a substantiated complaint, on the complainant’s formal request. A “trustworthy person” must submit the substantiated complaint to the relevant prevention adviser. This official complaint triggers specific legal protection for the complainant. The employer is then informed about the substantiated complaint by the prevention adviser and receives a copy of the document. Appropriate measures must be defined to put a stop to the moral harassment actions. The prevention adviser is in charge of examining the substantiated complaint and proposing suitable measures to the employer. If the moral harassment actions continue following implementation of these measures or the employer fails to take adequate steps, the prevention adviser, following consultation with the victim, contacts the competent civil servant appointed by the King to monitor compliance with the law dated 4 August 1996 and the relevant executory decisions. In this case, the monitoring body will also attempt to settle the situation.

In case of failure, the welfare monitoring service may issue a report or memorandum, which is transmitted to the labour auditor, i.e. the person who plays the role of public prosecutor in the labour tribunal. By expressly involving “welfare” in the labour monitoring body, the Belgian legislators clearly placed the emphasis on working

conditions. On the contrary, despite new developments in French law connected with the social modernisation law, the labour inspectorate maintains a broader role, although there is an acute awareness of psychosocial risks. The law dated 17 January 2002 did not set up a department specialised in working conditions, preferring to emphasise the role of preventive bodies within enterprises.

The labour auditor decides whether it is appropriate to institute criminal proceedings. If the labour auditor decides to prosecute, a summons may be issued for the perpetrator and, in some cases, the employer or a management representative to appear in the magistrate's court. The complainant worker may contact the regional office for monitoring welfare at work that has jurisdiction over his/her employer directly or institute criminal or civil proceedings in the appropriate court. Belgium, like France, has modified the burden of proof in cases of moral harassment. Thus, when a worker submits to the relevant court "evidence indicating the presumption that abuse or moral or sexual harassment at work has occurred", it is up to the defendant to prove that abuse or moral or sexual harassment at work did not take place.

3. Protection for workers who report that they have been victims of harassment

Daring to be a whistleblower or reporting that s/he has been a victim of moral harassment is not only difficult, but may also lead to reprisals against the complainant in the work situation. For this reason, the law dated 4 August 1996 provides several protective measures. These are applicable to workers who submit a substantiated complaint within the enterprise or institution where they work, in application of current procedures, those who submit a complaint to the civil service department in charge of monitoring welfare at work, the police, a public prosecutor or examining magistrate, and those who institute legal proceedings or have proceedings instituted on their behalf, with the aim of ensuring that they are protected from moral harassment. This is also applicable to workers who, in the context of the investigation into the substantiated complaint, submit a dated, signed document to the prevention adviser, stating the facts that they saw or heard personally, relating to the situation described in the substantiated complaint or presented in a witness report in a court case.

Employers are prohibited from terminating an employment relationship or making any unjustified, unilateral change in working conditions, except on grounds totally unconnected with the complaint, legal action, or witness report. The burden of proof is placed on the employer when a worker is made redundant or his/her working conditions are modified unilaterally in the twelve months following submission of a complaint or witness report. The same rules for burden of proof apply if an employer dismisses a worker or unilaterally modifies his/her working conditions following a law suit, until three months after the ruling is final.

If an employer terminates the employment relationship or unilaterally modifies the working conditions, thus violating the provisions of the law on welfare at work, the worker or a workers' organization of which s/he is a member, may request his/her reinstatement in the enterprise or the restoration of the conditions that applied before the events that led to the complaint. An employer who reinstates a worker in an enterprise or institution or restores him/her to his/her previous position, with the working conditions that applied before the events that led to the complaint, is obliged to pay the wages lost due to the dismissal or modification in working conditions, as well as the relevant employer and worker contribution charges. The employer must also pay compensation to the worker if

s/he is not reinstated to the position under the conditions that applied before the events that led to the complaint and the courts have ruled on the dismissal or unilateral modification working conditions, and also when the courts determine that the dismissal or unilateral modification in working conditions was contrary to the provisions aimed at protecting the worker from moral harassment. Finally, the worker chooses the form of compensation: either a lump sum corresponding to six months' gross pay, or the actual damages suffered. In the latter case, the worker must provide evidence of the damages suffered.

In addition to this particularly well-developed legal treatment of moral harassment, its application and interpretation will be facilitated by case law, which has evolved constantly since the social modernisation law was enacted.

III. Constantly evolving case law on French labour statutes

French case law on moral harassment at work developed in two stages. Firstly, the Court of Cassation established a link between moral harassment and the strict obligation to ensure safety (A), then resumed judicial review and broadened the interpretation of the definition (B).

A. Moral harassment at work and the strict obligation to ensure safety

In the history of case law, the concept of a “strict obligation to ensure safety” first appeared in transport law in the 20th century with the ruling handed down by the second civil chamber of the Court of Cassation in the *Compagnie Générale Transatlantique* case on 21 November 1911, then migrated into tort law (particularly in the medical field), and later into health-safety at work law via the 2002 “asbestos rulings”. The strict obligation to ensure safety, therefore, was introduced into social law by the “Asbestos” ruling on 28 February 2002³⁸ and confirmed by the plenary assembly on 24 June 2005³⁹. Failure to fulfil this obligation is considered an inexcusable fault – and facilitates its recognition, while opening up an additional remedy in social security law – when the employer “was, or should have been, aware of the danger to which the worker was exposed and did not take the necessary steps to protect him/her”. This paved the way for full compensation of the damages suffered by the victim. The French Court of Cassation considered that the strict nature of the obligation to ensure safety at work implied that the occupational risk should never have occurred.

The Court of Cassation Chamber for Social and Labour Matters also ruled on 28 February 2006 that employers are not only under a strict obligation to ensure and protect the health of workers in the workplace, but are also liable for guaranteeing its effectiveness. In light of the framework-directive dated 12 June 1989, Pierre Sargos, President of the Court of Cassation Chamber for Social and Labour Matters at the time, considered that the intensity of the safety obligation as defined in the Directive, i.e. “to ensure the safety and

³⁸ T. Aubert-Monpeyssen, M. Blatman, “Les risques psychosociaux au travail et la jurisprudence française : la culture de la prévention” in Lerouge L. (dir.), *Analyse jurisprudentielle comparée des risques psychosociaux en Europe*, L’Harmattan, 2012, p. 67-85 *forthcoming publication*.

³⁹ *Op. cit.*

health of workers in every aspect related to the work”, necessarily constituted a strict obligation⁴⁰.

On 21 June 2006, the Court of Cassation Chamber for Social and Labour Matters finally applied this strict obligation to ensure safety to moral harassment at work, following the enactment of the law dated 17 January 2002. In the *Propara*⁴¹ case that gave rise to this remarkable ruling, several workers had complained about their manager's brutal, rude, humiliating, and insulting behaviour, reporting threats, denigration, intimidation, and unjustified disciplinary measures at work. These actions were recognised and confirmed by a labour inspectorate report, which concluded that the manager in question was responsible for “widespread moral harassment resulting in a deterioration in working conditions, and a violation of the personal rights and dignity of certain workers, leading to an impairment of their physical and mental health”.

The Court of Cassation ruled on the actions constituting moral harassment at work, linking them with the employer's strict obligation. This ruling thus opened the door to effective integration of mental health, on an equal footing with physical health, in the employer's strict obligation to ensure safety. As a result, employers cannot be exonerated from liability, even if they have implemented measures to prevent moral harassment in the company and its business units, including cases where other misconduct contributed to the harassment. The Court of Cassation considered that these actions should not have happened.

Furthermore, an employer who takes no action although s/he is aware that an employee is responsible for moral harassment of a subordinate may be ordered to pay damages for “unfair non-feasance of the employment contract”⁴². Similarly, an employer may be liable for breach of an employment contract if s/he has not taken the necessary steps to prevent moral harassment of one worker by another⁴³. In an even more severe ruling, on 8 October 2007, the Grenoble Court of Appeal ruled that an employer was liable for failing to take sufficient steps to avoid harassment of a company employee by one of his/her subordinates⁴⁴. The fact that a manager was convicted for: “managerial behaviour leading to suffering at work” did not exonerate the employer from liability. The conviction of a subordinate for moral harassment and the absence of misconduct by the employer did not exonerate him/her from liability. The objective of these severe court rulings is not only to protect workers, but also to encourage employers to implement effective policies to prevent moral harassment in their companies, in order to avoid liability under this heading.

These actions are extremely serious, as they constitute a violation of human rights and the workers' right to dignity, enshrined in article 26 of the European Social Charter and article L. 1121-1 of the French Labour Code. Consequently, according to article L. 4122-1 of the French Labour Code, “each worker has a duty of care, as permitted by his/her training and capacities, of his/her own health and safety, as well as those of other people affected by his/her actions or omissions at work”. An employee who commits acts

⁴⁰ P. Sargos, “L'émancipation de l'obligation de sécurité de résultat et l'exigence d'effectivité du droit”, *JCP S*, 4 April 2006, 1278 note in Cass. soc. 28 February 2006, n° 05-41.555.

⁴¹ Cass. soc. 21 June 2006, *D.*, 2006, n° 41, p. 2831, note by M. Miné ; *RDT*, p. 245, note by P. Adam, *JCP G*, n°41, II, 10166, note by F. Petit, L. Leblanc, “Harcèlement moral. Responsabilité personnelle du salarié et obligation de résultat de l'employeur”, *RJS*, 8-9/06, p. 670.

⁴² Cass. soc. 7 February 2007, *RDT*, April 2007, p. 249, note by M. Véricel.

⁴³ Cass. soc. 21 February 2007, n° 05-41.741, unpublished.

⁴⁴ CA Grenoble, 8 oct. 2007, n° 06/02282 ; Adam P., “L'obligation de sécurité de résultat ne s'épuise pas dans la sanction disciplinaire”, *Semaine Sociale Lamy*, 13 May 2008, n° 1353, p. 11.

likely to violate the dignity of another employee is personally liable, even if s/he was acting in the employer's interest or on his/her orders. However, the Court of Cassation report considered that an employee who committed repeated, intentional actions of this kind was personally liable⁴⁵. The Criminal chamber issued a similar ruling on 28 March 2006⁴⁶.

Finally, in 2009, the Court of Cassation issued a wealth of clarifications concerning the legal system governing moral harassment at work, especially with the publication of the ruling dated 24 September 2008 concerning the judicial review of moral harassment at work⁴⁷. These decisions show the strict approach of the Court of Cassation, who interpreted the concept of moral harassment so broadly that the borderline between harassment and suffering at work has become less clear⁴⁸. In a ruling dated 10 February 2009, the Court of Cassation overturned a previous ruling that there was real and serious cause for dismissing an employee who had accused a line manager with harassment without proving the case, which constituted an abuse of freedom of expression. According to the Chamber for Social and Labour Matters, “‘repeated actions constituting moral harassment, which intentionally or unintentionally deteriorate an employee’s working conditions and are likely to violate his/her dignity and impair his/her health’ certainly described the behaviour of an HRD who, as reported in witness statements received by the court ruling on the facts of the case, treated his subordinates ‘harshly’ and exhibited inappropriate behaviour towards the victim, who told a colleague how frightened she was when the manager became angry and violent towards her”. However, although, according to certain authors, the concept of “harassment” seems to be moving closer to that of “suffering at work”, these are two distinct concepts. Indeed, the law only deals with moral harassment per se. The national multi-industry agreement dated 2 July 2008 defines suffering at work as: a state of stress that occurs when there is an imbalance between a person’s perception of his/her work and his/her own capacities to do it. While harassment may be a potential stress factor, it is based on specific, deliberate actions attributable to the employer, a manager, or another employee, likely to impair a worker’s physical or mental health, or jeopardise his/her future career⁴⁹.

The Court of Cassation Chamber for Social and Labour Matters adopted a protective stance towards employees, particularly when they report that they have been victims of moral harassment. In this type of situation, it is often difficult for the employee involved to provide evidence of harassment. The Court of Cassation considered, therefore, in the ruling dated 10 March 2009, that it must be proved that the employee acted in bad faith to constitute abuse of freedom of expression. The employer is also required to prove that the employee clearly intended to do harm. In this particular case, the dismissal letter did not contain any clear evidence of the bad faith of the employee who had just been made redundant⁵⁰.

⁴⁵ Annual report by the Court of Cassation 2006, p. 281, http://www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf.

⁴⁶ Cass. crim. 28 March 2006, *RTD Civ.*, 2007, n° 1, p. 235, note by P. Jourdain, *JCP G*, 2006, n° 47, II, JP, 10188, note by J. Mouly, *Gaz. Pal.*, 2006, n° 298, p. 22, note by Y. Monnet, *JCP S*, 2006, n° 23, p. 28, note by J.-F. Cesaro.

⁴⁷ *Cf. infra*.

⁴⁸ Cass. soc. 10 February 2009, *JCP S*, n° 21-22, 19 May 2009, p.28-29, note by F. Pelletier “D’un comportement “rude” au harcèlement moral”.

⁴⁹ *Ibid.*

⁵⁰ Cass. soc. 10 March 2009, *Droit. Ouvrier*, September 2009, p. 456-457, note by P. Rennes.

Thus, in a ruling dated 29 April 2009, the Court of Cassation ruled that an employee who brings allegations of moral harassment must present evidence, which is disclosed to the defendant, who is then required to prove that the actions in question did not constitute harassment and that his/her decision to dismiss the worker had no connection with the harassment issue. The Court of Appeal did not examine whether the facts established by the employee justified the presumption of moral harassment, although the complainant reported the consequences of these actions on his health and work, nor did they give legal grounds for their decision to dismiss the employee's claim for damages resulting from moral harassment.

On 30 April 2009, taking into account the modifications in the law dated 27 May 2008, which introduced several adaptations to European law in the area of combatting discrimination, the Chamber for Social and Labour Matters specified that it was up to the courts to consider the facts taken as a whole and determine whether the presumption of harassment was justified. It is, therefore, necessary to examine the grounds for harassment, which has become increasingly discriminatory since the concept of discrimination was introduced into the legal definition. The complainant is only obliged to present evidence to support the presumption that moral harassment has occurred. Consequently, the Court of Appeal could not reject the employee's suit merely on the grounds that his state of health was unrelated to the deterioration in working conditions⁵¹. The dismissal was, therefore, automatically null and void.

Finally, despite the now very active involvement of labour tribunals in moral harassment cases, the Court of Cassation ruling dated 1 July 2009 set limitations on the courts' powers to interfere in contractual relations. Indeed, the Court of Cassation stated that, in application of article L. 1152-4 of the French Labour Code, employers must take all necessary steps to prevent moral harassment, but the courts do not have the power to order the modification or termination of the employment contract. Consequently, the courts cannot order an employer to impose disciplinary measures on employees responsible for harassment. It is up to the employer to decide whether disciplinary measures are required⁵².

Besides the applying the strict obligation to ensure safety to cases of moral harassment, the Court of Cassation Chamber for Social and Labour Matters also examined the implications of the legal definition of moral harassment.

B. Extensive interpretation of the definition of moral harassment by the Court of Cassation

The legal definition of moral harassment at work and the broadening of this concept have, in particular, been interpreted by the Court of Cassation in determining what constitutes moral harassment (1). The Court of Cassation thus adopted an extensive interpretation of this definition (2).

1. Resumption of the judicial review of moral harassment at work

Judicial review is required to ensure that the law on moral harassment at work, as defined by the social modernisation law, is applied properly, without any abuse of rights.

⁵¹ Cass. soc. 30 April 2009 n° 07-43.219, *Semaine Sociale Lamy*, 12 May 2009, n° 1399, p. 15 ; Cass. soc. 30 April 2009 n° 07-43.219, *Droit Social*, July-August 2009, p. 870-871, obs. P. Chaumette.

⁵² Cass. soc. 1^{er} July 2009, *JCP S*, n° 39, 22 September 2009, n° 1418, note by C. Leborgne-Ingelaere.

The Court of Cassation initially issued a ruling on 27 October 2004⁵³, stating that it was up to the court of first instance to determine whether the facts of the case constituted moral harassment, referring to their sovereign right to assess whether the evidence met the relevant legal criteria. The Court of Cassation decided only to review the causation, as stipulated in article 455 of the New Civil Procedure Code⁵⁴. The Court maintained this position in two further rulings, issued on 23 November 2005 and 26 September 2007, relying on the trial court's decision concerning the existence of moral harassment⁵⁵. However, on 24 September 2008, the Court of Cassation Chamber for Social and Labour Matters issued four decisions that overturned the 2004 case law on judicial review of lower court rulings on harassment. From that date on, the Court of Cassation judges decided to review the evidence themselves, giving several reasons for this change.

Indeed – and this clearly demonstrates the importance of European law – in light of the Council directive dated 27 November 2000, introducing a general framework in favour of equal treatment in work and employment⁵⁶, the Court of Cassation decided to review their position on the distribution of the burden of proof between employees and employers in harassment cases. In their rulings dated 24 September 2008, they did not simply review the causation, but also carried out a judicial review of cases involving moral harassment at work. Consequently, the complainant is now responsible for providing evidence to prove the alleged facts. The court must examine these facts and determine whether, *taken as a whole*, they confirm that the alleged harassment actually took place. It is then up to the employer to establish that these actions did not constitute harassment⁵⁷. Courts of Appeal that had not taken all of the evidence provided by the complainant into account were criticised⁵⁸.

This reversal of case law by the Court of Cassation on 24 September 2008 nevertheless raised the issue of the necessity of a judicial review of moral harassment at work. This re-examination was found to be necessary for several reasons, despite some reservations on the subject.

Judicial review of these rulings on moral harassment at work raises issues related to the very concept of “moral harassment”, which is complex and extremely subtle, and thus not very well suited to the usual review procedures of the Court of Cassation⁵⁹. Nevertheless, there are several possible explanations for what could be described as the Court of Cassation's re-appropriation of the judicial review of moral harassment rulings by lower courts.

The Court of Cassation has jurisdiction over assessing whether the decisions of lower courts are compliant with the law, but is not supposed to review the facts. However, they

⁵³ Cass. soc. 27 October 2004, *Semaine Sociale Lamy*, n° 1193, p. 11, *RJS*, 1/05, n° 4, *Droit Social*, January 2005, p. 100, obs. C. Leroy-Loustaunau.

⁵⁴ J.-Y. Frouin, “Sur le contrôle par la Cour de cassation de la qualification juridique de harcèlement moral”, *RJS*, 10/05, p. 671.

⁵⁵ Cass. soc. 23 November 2005, *Bull. V*, n° 334, *Droit ouvrier*, June 2006, p. 307, *Droit Social*, February 2006, p. 229, obs. by J. Savatier, *JCP S*, 2006, n° 7-8, p. 18, note by P. Morvan; Cass. soc. 26 September 2007, n° 06.43-029, unpublished.

⁵⁶ Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, *JOCE* L 303 of 2 December 2000, p. 16.

⁵⁷ Cf. Communication by the Court of Cassation on rulings n° 1611, 1612, 1613 and 1614 of 24 September 2008; L. Lerouge, “Le contrôle de qualification du harcèlement moral au travail. À propos des quatre arrêts rendus par la Chambre sociale de la Cour de cassation le 24 septembre 2008”, *Petites Affiches*, n° 1 and 2, January 2009, p. 7-14.

⁵⁸ Appeals n° 06-45.747 and 06.45.794.

⁵⁹ Cf. P. Adam, “Un contrôle, dans quel dessein?”, *Semaine Sociale Lamy*, 29 September 2008, n° 1368, reported by Françoise Champeaux, p. 12.

are supposed to review the legal interpretation of the evidence in cases where legislation gives or creates a legal definition, accompanied by specific legal consequences. The Court of Cassation does not review the material evidence admitted by the lower courts, but ensures that the legal interpretation of the evidence was correct⁶⁰. However, the issues concerning the legal definition of moral harassment, enshrined in the social modernisation law, have made it necessary and, in some cases, essential, for the court to interpret this new and complex concept, rather than leaving it up to the court of first instance⁶¹.

This is particularly important as a case of moral harassment at work may have very severe legal consequences for the person convicted. Also, with respect to the directive dated 27 November 2000, setting up a general framework to promote equal treatment in work and employment, a judicial review of the lower court's interpretation by the Court of Cassation Chamber for Social and Labour Matters seems appropriate to uphold the principle of equality of all parties before the courts⁶². Nevertheless, some room for manoeuvre must be retained concerning the burden of proof, to protect the rights of workers who whistleblow on practices at work that violate their dignity or affect their mental health. However, some authors feel that a greater focus on “intent to do harm” would contribute to a more precise definition of this phenomenon, thus reducing slanderous whistleblowing or the misplaced use of the term “moral harassment at work”⁶³.

A judicial review of the definition of moral harassment may also be justified in the context of harmonising the case law of the Criminal chamber and the Chamber for Social and Labour Matters, as the definitions of moral harassment in the French Criminal and Labour Codes are identical. In their ruling dated 21 June 2005⁶⁴, the Criminal chamber of the Court of Cassation carried out a judicial review of the elements required to constitute the offence of moral harassment⁶⁵. The Criminal chamber felt that Court of Appeal clearly described the material and intentional elements: “provided there was clear evidence that the employer was responsible for repeated actions with the purpose or effect of causing a deterioration in working conditions likely to impair the victim’s rights”. The Chamber for Social and Labour Matters has now adopted the same policy, via a decision dated 24 September 2008, which seemed less concerned than that of the Criminal Chamber with the definition of moral harassment stated in articles L. 1152-1 to L. 1152-3 of the French Labour Code, particularly, in any event, in view of their pragmatic assessment of the variety of actions likely to be recognised as moral harassment⁶⁶.

Other authors consider that, similarly to the issue of real and serious grounds for dismissal⁶⁷, the lack of a judicial review of the definition of moral harassment at work since the decision dated 27 October 2004 has resulted in a risk of arbitrary court rulings. A causation review only made it possible to overturn rulings where the courts did not provide

⁶⁰ J.-Y. Frouin, “Sur le contrôle par la Cour de cassation de la qualification juridique de harcèlement moral”, *RJS*, 10/05, p. 671.

⁶¹ P. Waquet, “Un contrôle naturel et nécessaire”, *Semaine Sociale Lamy*, 29 September 2008, n° 1368, reported by Françoise Champeaux, p. 11.

⁶² Cass. soc. 24 sept. 2008, *JCP S*, 2008, n° 42, p. 37, note by C. Leborgne-Ingelaere.

⁶³ P. Adam, “Harcèlement moral (managérial), dénonciation d’actes répréhensibles par le salarié et réaction patronale”, *Droit Ouvrier*, January 2008, p. 1.

⁶⁴ Cass. crim. 21 June 2005, *Bull. crim.*, n° 187.

⁶⁵ A. Martinel, “Harcèlement moral et contrôle de la Cour de cassation”, *Semaine Sociale Lamy*, 29 Sept. 2008, n° 1368, p. 5.

⁶⁶ Cf. Cass. soc. 23 November 2005 *JCP S*, 2006, n° 7-8, p. 18, note by P. Morvan.

⁶⁷ Cf. J. Pélissier, A. Supiot, A. Jeammaud, *Droit du travail*, Dalloz, Coll. Précis, 2008, § 466 on the actual and serious cause for dismissal.

any grounds for their decision or contradicted themselves. However, the Court of Cassation's judicial review of the definition on 24 September 2008 may be considered beneficial, provided it does not result in a challenge to the interpretation built up by case law and legal theory over the past six years⁶⁸.

Finally, the diversity of interpretations in the lower courts alone may justify the Court of Cassation's decision to resume a judicial review of moral harassment at work cases. The situation is similar concerning ambiguities in the case law of the Court of Cassation itself.

2. Broadening the definition of moral harassment at work

While the requirement that the actions be repeated to prove "harassment" is maintained as an intrinsic criterion, two rulings by the Chamber for Social and Labour Matters on 10 November 2009 have resulted in a considerably broader definition. Following the resumption of judicial review of the proof of moral harassment at work by the Court of Cassation on 24 September 2008⁶⁹, 2009 was a very important year in terms of defining the boundaries of moral harassment. On 10 November 2009, the Chamber for Social and Labour Matters continued in the same vein by examining the issue of the intentions of the perpetrator of actions constituting moral harassment at work within the definition of moral harassment⁷⁰. In future, moral harassment may be identified in the absence of malicious intent, whereas the rulings issued on 24 September 2008 had envisaged a more restrictive concept. Apparently, however, a few unpublished rulings handed down in 2009 indicate the acceptance of a broader view⁷¹.

The Court of Cassation Chamber for Social and Labour Matters considered that moral harassment, according to articles L. 1152-1 and L. 1154-1 of the French Labour Code, is "independent of the intentions of its perpetrator". The actions simply need to be repeated and have the effect of deteriorating the working conditions, in a way "resulting in a violation of the rights and dignity of workers, leading to an impairment of their physical and mental health or jeopardising their future career". This very broad interpretation of the definition of moral harassment, eliminating the requirement to prove the perpetrator's malicious intent, is likely to give rise to "harassment around every corner" or a sort of "involuntary harassment"⁷².

Furthermore, when asked whether management methods could, in some cases, constitute moral harassment at work, the Court of Cassation gave a positive answer on 10 November 2009. Indeed, according to a very clear principle stated by the Chamber for Social and Labour Matters, moral harassment may occur when "management methods implemented by a line manager lead to a particular employee being the target of repeated actions with the purpose or effect of producing a deterioration in working conditions likely to violate their rights and dignity, impair their physical or mental health, or jeopardise their future career"⁷³.

⁶⁸ P. Adam, "Un contrôle, dans quel dessein ?", *op cit*.

⁶⁹ *Op. cit.*

⁷⁰ L. Lerouge, "La constitution du harcèlement moral au travail indépendamment de l'intention de son auteur", note sous Cass. soc. 10 November 2009 n° 08-41.497, *Petites Affiches*, n° 28, 9 February 2010, p. 18-21.

⁷¹ Cass. soc. 5 May 2009, n° 07-45.397 ; Cass. soc. 13 May 2009, n° 08-46.610 ; Cass. soc. 17 June 2009, n° 07-43.947 ; *Liaisons sociales Quotidien*, 26 Nov. 2009, n° 15492.

⁷² See on this issue P. Adam, "Harcèlement moral : la place (incontournable) de l'intention malveillante. De l'intérêt d'une lecture combinée des articles L. 1152-1 et L. 1154-1 du Code du travail", *SSL*, n° 1404, 15 June 2009, p. 8.

⁷³ L. Lerouge, "Vers la qualification de méthodes de gestion de harcèlement moral ?", note in Cass. soc. 10 November 2009 n° 07-45.321, *Petites Affiches*, n° 21, 29 January 2010, p. 9 - 12.

C. Compensation for the effects of moral harassment at work

The social security courts' interpretation of moral harassment deals with care for the victim's health in the context of occupational health legislation. Some employees have attempted to have moral harassment as the cause of their depression recognised as a work-related accident. This was a poor line of argument as moral harassment due to repeated actions is obviously excluded from the scope of industrial accidents, for which an element of suddenness must be proved. However, even if a Court of Cassation ruling dated 24 May 2005 rejected this claim, confirming that suddenness was a criterion for recognising work-related accidents, they still took the time to restate the legal criteria, which require a drastic deterioration in the victim's mental faculties connected with the moral harassment⁷⁴. The courts may consider that the consequences for mental health constitute a work-related accident when they are sudden and extreme, i.e. when an employee "cracks" under the pressure of a deterioration in working conditions caused by moral harassment, or even due to work organization (suicide, sudden depression). This also means that a diffuse depression, i.e. the most common type, is not covered by legislation on industrial accidents, but rather by the provisions on occupational diseases.

Recognised incidents of moral harassment (e.g. an emotional shock following a violent disagreement over the telephone with a manager, following a considerable deterioration in relations over the previous months) may result in psychological consequences that prevent the person from returning to work. For example, the Versailles Court of Appeal classified fainting due to an emotional shock following recognised incidents of moral harassment as a work-related accident⁷⁵.

Even when the symptoms of mental deterioration leave no doubt as to their classification as a work-related accident, it is difficult to determine the trigger factor. The onset of the pathology must be correlated with an event associated with an emotional shock that occurred in the workplace for the principle of presumption of cause and effect to be applicable. Thus, some courts may admit a causal link between moral harassment at work and the victims' depressed state, resulting in their committing suicide⁷⁶. Furthermore, while the ruling issued by the second civil chamber of the Court of Cassation on 3 April 2003 refused to classify moral harassment at work as a work-related accident, they did not exclude the possibility that moral harassment was a potential cause of the victim's suicide, making it possible to benefit from the legislation on industrial accidents⁷⁷. Proof was required that the harassment and emotional shock that occurred at work constituted the trigger event that caused the victim to attempt to commit suicide.

The Court of Cassation also ruled on the link between moral harassment at work and attempted suicide. The Court of Cassation ruling on 22 February 2007 was remarkable from this standpoint. Besides its importance in terms of Social Security benefits for the consequences of moral harassment at work, as well as suicide, the second civil chamber of the Court of Cassation based their decision on the employer's strict obligation to ensure the workers' safety, confirmed by the plenary assembly of the Court of Cassation on 24 June

⁷⁴ Cass. civ. 2nd 24 May 2005, *JCP S*, n°1, June 2005, n° 1019, note by X. Prétot ; *RJS*, 8-9/05, n° 901 ; *Lexbase Hebdo*, édition sociale, n° 172, 16 June 2005, note by C. Willmann.

⁷⁵ CA Versailles 20 March 2000, *LPS*, 2003, n° 1915.

⁷⁶ TASS Dijon 1^{er} December 2002, TASS Grenoble 18 oct. 2002, *Droit. Ouvrier.*, 2003, p. 123, note by L. Millet.

⁷⁷ Cass. civ. 2nd 3 April 2003, *Droit Ouvrier*, Jan. 2004, p. 21, note by F. Saramito.

2005⁷⁸ and applied to moral harassment in the ruling dated 21 June 2006⁷⁹. Furthermore, the Court of Cassation ruling on 15 November 2006 stipulated that the fact that, even before the health consequences were covered by social security benefits, the legislation on industrial accidents and occupational diseases did not preclude compensation being awarded to the worker for damages caused by moral harassment⁸⁰.

While the labour and social security tribunals are directly involved in cases of moral harassment at work, the French Labour Code also provides for a criminal sentence.

IV. Conclusion

As we have seen, in order to compensate for a legal definition of moral harassment considered to be too general, the courts have used their power to interpret the texts in case law and define the boundaries of moral harassment at work, perhaps too broadly. Indeed, trapped to some extent by a legal remedy that has been “in vogue” since 2002, the Court of Cassation adopted a considerably broader definition of moral harassment, in order to cover situations that are not necessarily moral harassment per se, but certainly deserve prosecution.

Also, provisions such as the performance in good faith of the employment contract (art. L. 1222-1 of the French Labour Code) and the general obligation to ensure safety (art. L. 4121-1 of the French Labour Code) are currently under-utilised to prosecute in situations related to psychosocial risks at work, but which do not constitute moral harassment, like the concept of “psychosocial burden”, introduced in the Belgian system in 2007⁸¹, which includes stress, conflicts, violence, and moral or sexual harassment at work. The case law of the French Court of Cassation was certainly stimulated by the supranational context surrounding the framework-directive dated 12 June 1989, marked by the swing from a risk compensation approach to a prevention-based system.

⁷⁸ Cass. Plén. Ass. 24 June 2005, *JCP S*, n° 3, 12 July 2005, n° 1056, note by P. Morvan ; *D.*, 2005, n° 34, p. 2375, note by Y. Saint-Jours ; *Dr. Soc.*, n° 11, November 2005, p. 1067, note by X. Prétot.

⁷⁹ *Op. cit.*

⁸⁰ Cass. soc. 15 November 2006, *RDSS*, n° 2/2007, p. 356, note by M. Badel, *Semaine Sociale Lamy*, 12 December 2006, p. 20, note by J.-E. Tourreil, *JCP E*, 2007, n° 9, p. 47, note by G. Vachet.

⁸¹ According to the royal decree of 17 May 2007, the “psychosocial burden” at work is “any burden originating from the performance of work, which occurs during the performance of work and has prejudicial consequences for the person’s mental or physical state”.