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Ditomene c. Boulanger, the next round: the Court of Appeal holds that procedural fairness rules need not be followed in the context of an employer's investigation into alleged harassment

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In a unanimous decision dated November 17, 2014,[1] the Court of Appeal of Québec held that the procedural fairness rules applicable in administrative and public law do not apply in the context of a psychological harassment investigation conducted by an employer. As a result, the Court set aside the judgment of the Court of Québec ordering the lawyer who conducted the investigation to pay $3,000 in damages.[2]

The Court of Québec at first instance concluded that the external investigator retained by the employer committed a fault by failing to comply with the obligations imposed by employer's policy and by her contracts for services, which in particular, required her to ensure "the fairness of the investigative process". In its judgment, the Court of Quebec identified the following breaches: refusal to provide the employee with the complaints made against him, refusal to provide him with a copy of the policy, refusal to provide him with the witnesses' and complainants' versions of the facts, failure to ensure that the investigation was conducted by the same individuals from the beginning to end, unnecessary request for a written undertaking of confidentiality, late notices to appear, and insufficiency of the report regarding the complaints made against the appellant.

After having dismissed the employee's main appeal, the Court of Appeal allowed the external investigator's cross-appeal. The Court was of the view that the only question that the trial judge had to ask himself was whether the external investigator breached her obligations and committed a fault in the execution of the fact-finding mission conferred on her by the employer which made her extra-contractually liable to the employee under investigation.

This question cannot be answered by simply referring to the rules of procedural fairness applicable in an administrative and public law context. According to the Court, such procedural fairness rules do not apply to an employer (even in the public sector) who conducts an investigation in order to determine the existence of psychological harassment and, if warranted, addresses it through the imposition of disciplinary measures against the harasser.[3] The Court added that such an investigation, even one conducted by a third party mandated for that purpose, is inherently linked to the exercise of the employer's authority to manage and discipline and need not be subject to procedural requirements comparable to those applicable to, among others, administrative or judicial

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tribunals or the adversarial process applicable before such bodies.

As a result, an employer may adopt a policy which refers to the principles of natural justice or procedural fairness, but the applicable rules remain of those applicable in the realm of civil liability. Thus, even in the absence of an employer policy, in the case of a bungled investigation which results in a sanction being undeservedly and harmfully imposed on an employee, the employer or the investigator could be held liable to the extent a fault has been committed.

In the *Ditomene* case, the Court of Appeal was of the opinion that the language used in the employer's policy (specifically, the obligation to ensure the "fairness of the process") did not impose a duty to ensure full compliance with the principles of procedural fairness as they have been developed in a public law context or with the rules applicable before a body exercising jurisdictional duties, nor did it require that the investigation be transformed into an adversarial process. The Court of Appeal concluded that there may be cases where an investigator's conduct or way of doing things would constitute a fault which could possibly result in a determination of liability, but this was not the case in the circumstances of the *Ditomene* case.

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[1] 2014 QCCA 2108 (the "*Ditomene case*").

[2] 2013 QCCQ 842.

[3] On this subject, the Court of Appeal refers notably to the case of *Université de Sherbrooke v. Patenaude*, 2010 QCCA 2358 (see in particular, paragraph 39 of this judgment).

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