The Lean or Toyota Method: Questioning its Application in the Recent Decision in Centre universitaire de santé et de services sociaux du Nord de l'île de Montréal c. Jobin

August 01, 2017

By a judgment rendered on April 21, 2017, the Superior Court of Québec held the conclusion of a grievance arbitrator reasonable in finding that an employer had caused a moral injury to its employees by carrying out a workload reorganization that was essentially inspired by the *Lean* method (which is also called the *Toyota* method, after the company that first developed it).

The Facts

In 2010, the Home Care division of the "Loss of Autonomy from Aging and Physical Impairment Program" of the *Centre intégré universitaire de santé et de services sociaux du Nord de l'île de Montréal* (the "Employer") was impacted by a directive from the Ministry of Health and Social Services. The directive obliged the Employer to report annually the time spent by caregivers on activities and required a 10% increase in the total number of hours of direct interaction with patients; otherwise, the Employer's annual operating budget would be cut. Consequently, as in many other facilities in Québec's health and social services network, the Employer decided to review its management and caregiving processes by reorganizing the workload in accordance with an "Optimization Plan".

One of the features of the reorganization, the "PSP", was a system for planning and assessing performance which required a form to be completed by every caregiver weekly, depending on the employee's profession or occupation. Each and every activity to be performed was categorized and a fixed period of time, in minutes, was pre-determined for its completion. The caregiver was required to report the time he or she had actually devoted to each activity at the end of the week, which resulted in a performance percentage. Such service optimization measures were derived from the so-called *Lean* method of management.

Between its implementation in May 2012, and its actual abandonment in February 2013, the PSP underwent some improvements, which, however, failed to resolve the resulting problems or to calm the tensions that it had caused among the staff.

On October 10 and 11, 2012, the *Alliance du personnel professionnel et technique de la santé et des services sociaux* (the "Union") filed 12 collective grievances accusing the Employer of failing to act to improve the unhealthy and harmful working environment created by the reorganization of the workload. In all, some 52 workers signed the grievances. The Union argued that the undue and unhealthy pressure exerted to motivate the caregivers to complete the PSP and to comply with its standards was impairing both their professional judgment and their clinical expertise.

Consequently, the Union claimed moral, as well as punitive and exemplary damages in an amount left to the discretion of the grievance arbitrator, to be paid to each worker on the payroll who had signed the grievances. For its part, the Employer sought to have the grievances dismissed.

The Arbitral Award[1]

The arbitrator, Mr. Carol Jobin, took the view that he would have to determine whether the Employer, in implementing and managing the PSP, had failed in its obligations and should therefore be ordered to pay damages to the workers concerned.

On the one hand, he concluded that the Employer had breached its obligation to maintain just and reasonable working conditions which safeguard the dignity and health of the employees. He further concluded that that breach had caused them to sustain a moral injury, and in that regard, he awarded a symbolic amount of $500 in moral damages to be paid to each worker who had signed the grievances.

In arbitrator Jobin's view, the application of the PSP had had a direct and structuring impact on working conditions. Apart from increasing the workload with regards to the tasks to be performed, the system had adversely affected the employees both morally and psychologically. Their inability to meet the objectives set or the new standards gave rise to feelings of failure, loss of self-confidence and a sense of being incompetent and worthless. Having to justify their performance in the light of gaps in achieving the quantified objectives had resulted in both humiliation and guilt. The caregivers had thus suffered a moral injury.

On the other hand, arbitrator Jobin noted that the Employer's conduct had not impaired the professional integrity or the ethical responsibilities of the employees in question. As such, the caregivers may have experienced dissatisfaction and legitimate frustrations, but those effects were not sufficient to trigger any award of moral damages.

Lastly, arbitrator Jobin declined to award any punitive and exemplary damages, concluding that the Employer believed, in good faith, in the progress or the improvements that the PSP would achieve, and that it had not intended to prolong the discomfort and psychological suffering that the workers in question had experienced.

The Superior Court's Judgment[2]

The Employer filed an application for judicial review of the arbitral award rendered by arbitrator Jobin, contending that the applicable standard of review in this case was correctness. Justice Babak Barin dismissed that argument, however, holding instead that the applicable standard was reasonableness. Barin J. then concluded that arbitrator Jobin's decision remained within the range of reasonable conclusions: his decision was intelligible, transparent and justified by the facts and the relevant provisions of the applicable collective agreement.

In Justice Barin's opinion, although the implementation of such a system resulted directly from management's rights granted by the collective agreement, those rights remained subject to the other provisions of the collective agreement and had to be exercised without any abuse, discrimination or bad faith, and not in any unreasonable manner.

Barin J. also confirmed that the award of moral damages was within the spectrum of possible and reasonable outcomes.

Conclusion

In the light of arbitrator Jobin's arbitral award, prudent employers, when introducing optimization and performance assessment programs inspired by the *Lean* method, should ensure that the working conditions of the employees involved will not be affected so as to cause them undue or harmful pressure, or in any way whereby the effects of the measures imposed could jeopardize their ethical obligations.

More specifically, prudent employers should ensure that performance assessment programs do not impose any excessive workloads on employees, which could prevent them from performing their essential duties. Furthermore, employers should ensure that both occupational and psychological support is available to all workers affected by reorganizations and optimization and performance assessment programs, and keep them informed about the process and its expected, desired or potential consequences.

Moreover, without questioning the application of the *Lean* method, this decision nevertheless sounds a warning. Should the method be incorrectly applied in any situation, court intervention for abuse of managerial rights could be a consequence. One must also remember that any modification of the workload of employees in the healthcare sector can give rise to the contestation of that modification under the procedures set forth in the national collective agreements. In short, wise employers wishing to implement any such changes to their employees' workload should ensure that they have available statistics showing comparable workloads elsewhere in the healthcare network before moving ahead.

[1] *Alliance du personnel professionnel et technique de la santé et des services sociaux (APTS)* et *Centre intégré universitaire de santé et de services sociaux du Nord de l'île de Montréal (installation CSSS Ahuntsic/Montréal-Nord) (griefs collectifs)*, 2016 QCTA 129.

[2] *Centre universitaire de santé et de services sociaux du Nord de l'île de Montréal* c. *Jobin*, 2017 QCCS 1583.

By

Maude Galarneau

Expertise

Labour & Employment

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749