How Should Harassment Cases Be Dealt with in International Organizations? A Concise Guide through the Case Law of the Administrative Tribunal of the International Labour Organization

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Instead of promoting multilateralism and international cooperation, the current COVID-19 health crisis has only strengthened trends towards reinforcing the importance of the State, both nationally, by giving public authorities a crucial role in directing many aspects of social life, and internationally. Globally, the current tendency is rather "every State for itself" than international cooperation. Each State opts for its own measures against the pandemic, sometimes closing borders, stopping cross-border traffic and movement of people, and competing for medical equipment and vaccines. As if coronavirus recognizes borders and national sovereignty.

In that general context, a tribute paid to an international court of justice is of particular importance. The rule of law is essential not only for the stability of the international legal order but also for the proper functioning of international organizations.

It is sometimes too easily forgotten that international organizations are not composed only of Member States. They also have their own staff. In a multilateral structure, the staff is like cement: a cohesive factor which with its flexibility and solidity enables the entire structure to hold

[1] The views expressed herein are those of the author and do not necessarily reflect the views of the International Labour Organization or its Administrative Tribunal.

together. Recognizing this role, Member States have chosen, since the early days of the League of Nations, to offer highly competitive conditions of employment to attract competent candidates for jobs in international organizations.

In contrast to the European Union and the Eurasian Economic Union, which assigned to their Courts of Justice the task of dealing with disputes between the Union and its staff, many other international organizations opted to create their own[2] or recognize an existing specialized international administrative tribunal. The Administrative Tribunal of the International Labour Organization ("the Tribunal") is the oldest and the most influential among these tribunals, with more than 4,300 judgments adopted to date and some 60 international organizations under its jurisdiction. These organizations include the majority of the UN Specialized Agencies[3], the International Organization for Migration, the World Trade Organization, the Organization for the Prohibition of Chemical Weapons, CERN and the International Criminal Court, to name only a few[4].

The issues that the Tribunal faces correspond to general trends in society. Some people challenge the way their employment is terminated, others claim social benefits. Lately, the issue of harassment has become increasingly important, especially in Western society, and its significance for the world of work is growing. In 2019, the conference celebrating 100 years of the International Labour Organization (ILO) adopted the Violence and Harassment Convention, 2019 (No. 190), and the related Recommendation (No. 206). The fight against harassment has thus become a global concern.

Accordingly, the number of cases before the ILO Administrative Tribunal where the complainant argues that she or he is a victim of harassment has increased in recent years. While this issue is not new for

[2] For example, NATO, the IMF, the World Bank, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank and the OECD.

[3] Nine out of 17 agencies: the FAO, ITU, ILO, UNIDO, UNESCO, UNWTO, UPU, WHO and WIPO. As indicated in the previous note, the World Bank and the IMF have their own administrative tribunals. The ICAO, IFAD, WMO and IMO recognized the competence of the UN system of justice.

[4] The full list of organizations can be found at https://www.ilo.org/tribunal/membership/lang--en/index.htm (accessed on 27.12.2020).

the Tribunal[5], the wealth of arguments presented and the number of new cases have permitted the Tribunal to clarify several aspects of its case law and, through this case law, to influence the internal legal systems of all organizations under its jurisdiction.

Definition of harassment

One of the main difficulties confronting the Tribunal is the lack of a uniform definition of harassment. The Tribunal cannot give its own definition, but has to rely on the way the organizations have defined it in their staff regulations and rules[6]. Although these definitions are often similar, they can differ in many elements, and, pursuant to Article II, paragraphs 1 and 5 of its Statute, the Tribunal has to respect these differences since the definitions form part of the applicable law for each organization against which a case is filed. This means that the Tribunal potentially has to adjust to some 60 sets of applicable rules and regulations.

In substance, most definitions refer to unwelcome aggressive and offensive behaviour. Such behaviour is often manifested over a period of time and may involve not only acts that can each be viewed individually as harassment, but also acts that produce a cumulative effect of harassment. In Judgment 4253, consideration 5, the Tribunal explained that:

"[H]arassment may involve a series of acts over time (see Judgments 2067, consideration 16, and 4034, consideration 16) and can be the result of the cumulative effect of several manifestations of conduct which, taken in isolation, might not be viewed as harassment (see, for example, Judgments 3485, consideration 6, and 3599, consideration 4), even if they were not challenged at the time when they occurred (see, for example, Judgment 3841, consideration 6)."

While it is generally accepted that harassment may be committed by a series of acts, several international organizations provide in their definitions

[5] For a review of milestones in the jurisprudence on this matter, see Donata Rugarabamu, "Milestones in the jurisprudence of the International Labour Organization Administrative Tribunal: Guiding international organizations and their personnel in addressing harassment", in: 90 years of contribution of the Administrative Tribunal of the International Labour Organization to the creation of international civil service law, edited by Dražen Petrović, Geneva, 2017, pp. 137-151, accessible electronically at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---trib/documents/meeting-document/ wcms_613944.pdf.

[6] See, for example, Judgments 4253, consideration 11; 2594, consideration 18; 4038, consideration 18; and 4039, consideration 16.

that even a single act can constitute harassment[7]. However, some caution may be needed with regard to isolated incidents. First, the rules often stress that it is exceptional for single occurrences to be sufficient to establish harassment, and second, such cases may more frequently involve sexual than other types of harassment.

Although it does not give its own definition of harassment, the Tribunal has insisted on one essential element which, over time, has been generally (if not yet universally) accepted in the definitions used by international organizations. It is that there is no need to prove that the alleged perpetrator intended to engage in harassment[8]. What matters is the perception that the person who is the object of the conduct "may reasonably and objectively have of acts or remarks liable to demean or humiliate him/her"[9].

The Tribunal's case law recognizes three types of harassment: "moral harassment" (or simply "harassment"), "sexual harassment" and "institutional harassment".

The first two types of harassment are widely recognised and involve the relationship between two or more persons. However, many organizations make a serious mistake by considering harassment as exclusively an inter-personal problem. Indeed, it is wrong to say that it is for the alleged victim to prove harassment to the standard of proof necessary to establish the guilt of the alleged harasser, that is, according to the Tribunal's case law, the standard of proof beyond reasonable doubt[10]. In fact, it is the Administration of an organization which plays a central role in the response to any harassment since each international organization has a duty to provide a safe and adequate working environment for its staff members[11].

7 See Judgment 2594, consideration 18.

8 See, for example, Judgments 4207, consideration 20; 3692, consideration 18; 3250, consideration 9; 3233, consideration 6; 2524, consideration 25; and 2100, consideration 13.

9 Judgment 4265, consideration 6. See also Judgment 3318, consideration 7.

10 A recent report prepared by four lawyers belonging to the Common Law legal tradition points to an instance of such a misunderstanding: "The high standard now in effect fails to take account of the serious consequences for the complainant who is stigmatised and left vulnerable when a complaint is rejected." Report on the work of the Independent Expert Panel on Prevention of and response to harassment, including sexual harassment; bullying and abuse of power at UNAIDS Secretariat, December 2018, paragraph 152, https://www.unaids.org/sites/default/files/media_asset/report-iep_en.pdf (accessed on 25.12.2020).

11 See Judgments 4207, consideration 15, and 2706, consideration 5, citing Judgment 2524.

This includes an obligation to ensure a harassment-free environment by ensuring that no staff member is harassed in the workplace.

The Administration has therefore a double responsibility: on one hand, to protect the victim of harassment, and, on the other, to punish the perpetrator of the misconduct in question. These are two distinct legal relationships. The Tribunal, in its full composition of all seven judges, recently adopted Judgment 4207, which, in consideration 14, states the following:

"A claim of harassment and a report of misconduct based on an allegation of harassment are distinct and separate matters. A claim of harassment is a claim addressed to the organization the resolution of which only involves two parties, the organization and the reporter of the harassment. In contrast, a report of alleged misconduct, based on an allegation of harassment, triggers [...] a process that is directed at the culpability of the staff member in question and potentially the imposition of a disciplinary measure. In this process, the two parties are the organization and the staff member in question. In this process, the reporter of the misconduct, a potential victim of the harassment, is a witness and not a party in the proceedings."

In other words, the perspective is different for the Administration in the two situations. It faces different persons, it has different obligations, and it has to meet a different standard of proof when dealing with an allegation of harassment made by a victim and when it is required to determine whether and how to sanction an alleged harasser.

As for the third type of harassment, institutional harassment, it is less well-known and also less frequent. It occurs when it is difficult to identify one single person or one single incident that cause prejudice to an official. The Tribunal has explained that "decisions which appear to be managerially justified when taken individually, can amount to institutional harassment when the accumulation of repeated events of mismanagement or omissions, for which there is no reasonable explanation, deeply and adversely affect the staff member's dignity and career objectives"[12].

12 Judgment 4345, consideration 8. See also Judgments 3250, 4111 and 4243.

The decisive element is that there is no reasonable explanation for such decisions or acts[13]. However, it is not enough to argue that the contested acts arise from managerial or administrative need. As the Tribunal stated in Judgment 3250, consideration 10:

"While the conduct of management which is necessary and reasonable would not constitute harassment, the present case demonstrates how continued mismanagement showing gross negligence on the part of the Organization cannot justify any longer the 'managerial need' for the repeated temporary transfers of the complainant which had an ill effect on her. Taken individually, the isolated incidents [...] can perhaps be considered as improper but managerially justified, but taken as a whole the effect is much more damaging to the complainant and can no longer be excused by administrative necessity."

Generally, it is clear that the Administration has wide powers in the workplace, often of a discretionary nature. These entail corresponding responsibilities: it must address the issue of harassment adequately by promulgating internal rules, clearly defining internal policies and standards, investigating allegations of harassment, protecting victims and assuming liability for injury, and punishing perpetrators. To this end, the Administration must be guided by the Tribunal's case law. As Donata Rugarabamu has concluded, "[b]y following the very carefully articulated judgments of the Tribunal on harassment cases, United Nations System organizations, as well as their personnel, can take significant steps towards upholding the core values that underpin the international civil service and strengthen the rule of law"[14].

How should allegations of harassment be dealt with?

The general rule is that harassment cases should be handled as quickly and efficiently as possible, in order to protect staff members from unnecessary suffering[15].

[13] Judgment 4111, consideration 7. See also Judgments 4038, consideration 18; 3447, consideration 9; and 2524, consideration 25. However, "an explanation which is prima facie reasonable may be rejected if there is evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken (see Judgment 2524, consideration 25)", Judgment 4265, consideration 7.

[14] Donata Rugarabamu, op. cit., p. 151.

[15] See, for example, Judgments 4243, consideration 24; 3447, consideration 7; and 2642, consideration 8.

However, for an organization to be able to react properly, someone has to report the harassment. Normally, it is the alleged victim who submits a harassment grievance[16]. In many organizations, harassment can also be reported by persons other than victims, such as managers or other officials who may know about it. Similarly, the Administration may be informed by a whistle-blower or a medical advisor. Even without a formal grievance, "given the serious nature of a claim of harassment, an international organization has an obligation to initiate the investigation itself"[17].

Harassment has to be reported quickly if the organization is to act appropriately[18], because this will enable it to gather reliable testimony from witnesses as to whether the incidents cited occurred and how third parties may have perceived them[19].

The allegation of harassment[20] has to be borne out by specific facts and the person alleging harassment bears the burden of proving the allegation[21]. Sometimes this may be difficult and it is understood that an accumulation of events over time may be cited in support of such an allegation[22]. An unlawful decision or inappropriate behaviour is not enough to prove that harassment has occurred[23]. In other words, it is not sufficient to mention simply the word harassment in a grievance addressed to the Administration.

Very often, organizations provide for a special procedure to deal with harassment grievances. If the person alleging the harassment has failed to

[16] It must be borne in mind that "[w]here the allegation of harassment is based on an accumulation of events, the date of the last event is the date for the purpose of calculating the relevant time limits". See Judgment 3347, consideration 8.

[17] See Judgment 3347, consideration 14.

[18] In Judgment 4034, consideration 12, the Tribunal stated that "[a]lthough the Organization is obliged to investigate any incidents that might constitute harassment, the employee must nevertheless report those incidents in good time so as to allow the Organization to fulfil its duty". See also Judgment 2186, consideration 4.

[19] See Judgment 4035, consideration 4.

[20] In whatever form it is made. In Judgment 3608, consideration 6, the Tribunal stated: "A staff member claiming harassment need not articulate the claim with the clarity or precision that might be expected of a lawyer drafting pleas. Any claim reasonably understood as raising an allegation of harassment must be investigated."

[21] See, for example, Judgments 2745, consideration 20; 3347, consideration 8; 3692, consideration 18; 3871, consideration 12; 4171, consideration 7; and 4253, consideration 6.

[22] Judgment 4034, consideration 16.

[23] Judgment 2861, consideration 37.

address her or his grievance to an appropriate body, the Administration has a duty of care to direct the person towards the correct procedure[24].

Once an organization has received a claim of harassment, it has a clear duty to investigate it[25]. As the Tribunal has stated in several judgments, for example in Judgment 3069, consideration 12, "an international organisation has to ensure that an internal body charged with investigating and reporting on claims of harassment is properly functioning".

The investigation must be initiated promptly, conducted thoroughly and the facts must be determined objectively and in their overall context[26]. The law must be applied correctly and a person claiming, in good faith, to have been harassed cannot be stigmatised or victimised on that account[27]. The way the investigation should be conducted is a question that needs much more space and cannot be detailed here.

Upon the conclusion of the investigation, the alleged victim is entitled to a response from the Administration regarding the claim of harassment[28]. The response is not necessarily linked automatically to the sanction against the alleged perpetrator. In other words, it is not satisfactory to tell the alleged victim that the Administration could not prove harassment by the alleged perpetrator and hence the harassment alleged by the victim cannot be established. There are many reasons for this. The first is that the standard of proof is not the same. While the standard of proof required by the Tribunal for misconduct is "beyond reasonable doubt", which is a relatively high bar[29], there has been a considerable misunderstanding that the same standard applies when determining whether harassment has occurred from the victim's perspective. The Tribunal has ruled that

[24] See, for example, Judgments 4140, consideration 6; 3928, consideration 14; 3754, consideration 11; 3660, consideration 7; 3423, consideration 9(b); 3034, consideration 1; 2882, consideration 6; 2345, consideration 1; and 1832, consideration 6.

[25] See Judgments 3608, consideration 6; 3413, consideration 10; 3365, consideration 26; 2973, consideration 16; 2910, consideration 13; and 2642, consideration 8.

[26] See, for example, Judgments 4013, consideration 10; 3337, consideration 11; 3314, consideration 14; and 3071, consideration 36.

[27] See, for example, Judgments 2642, consideration 8, and 1376.

[28] See Judgment 4207, consideration 15.

[29] As the Tribunal has clarified recently, this is not the criminal law standard which may exist in some legal systems, but the standard which serves a purpose peculiar to the law of the international civil service. See Judgment 4362, considerations 7 and 8.

a lower standard must be met in the latter case[30]. The second reason is that the victim cannot be held hostage by the length of disciplinary proceedings against the alleged harasser, and, as the Administration has a discretionary power to initiate a disciplinary procedure (or not), its response to the staff member alleging harassment cannot depend on whether it decides to do so.

Indeed, once a finding of harassment has been made by the Administration, it should put an end to this behaviour as quickly as possible[31] and take effective and immediate steps to prevent any further occurrences[32]. These steps might include offering appropriate advice and guidance to the person accused of harassment on how to change her or his behaviour[33] or relocating the staff member who was subjected to the harassment to another workplace or even another position. The organization has to restore the victim to a normal work situation and, if necessary, redress the injury caused. Ordinarily, this redress takes the form of monetary compensation for the injury suffered, as moral damages[34].

Even if the organization determines that a particular person harassed another, it is liable for the injury. This differs from national legal systems. According to the Tribunal's case law, by virtue of the principle that an international organisation must provide its staff members with a safe and healthy working environment, it is liable for all injuries caused to a staff

[30] In Judgment 4289, consideration 10, the Tribunal explained "[w]hile an allegation of harassment may found disciplinary proceedings in which the standard of 'beyond reasonable doubt' would apply, it has no application in the assessment of the claim of harassment where the staff member is seeking workplace protection or damages or both. This issue has recently been addressed by the Tribunal (see Judgment 4207, consideration 20)".

[31] See Judgment 4158, consideration 3.

[32] As the Tribunal said in Judgment 4299, considerations 4 and 5: "[T]he organization's primary obligation is to investigate whether there has been harassment and, if satisfied that there has been, take steps to prevent any further harassment. This obligation is part of a more general obligation to ensure that officials work in a safe working environment free from physical and psychological risk (see, for example, Judgment 4171, consideration 11)."

[33] See Judgment 4158, consideration 3. It should be noted that the Tribunal stated that "an organization is only required to take such measures if they are essential or, at least, necessary".

[34] See, for example, Judgments 4299, consideration 5, and 4158, consideration 3. If the internal rules do not provide the ground for such compensation, "[i]t is certainly something that can be awarded in proceedings in the Tribunal" (Judgment 4241, considerations 24 and 25).

member by a supervisor when the victim is subjected to treatment that is an affront to her or his dignity[35].

Disciplinary sanctions against the harasser

Once it has collected sufficient evidence, the Administration may decide, within its discretionary power, to start disciplinary proceedings against the alleged perpetrator(s) which may lead to the imposition of a range of disciplinary sanctions, including dismissal. It is for the organization to take such a decision because the victim has no right to demand the punishment of another person[36]. Many organizations have declared zero tolerance of harassment, and the number of cases before the Tribunal involving the punishment of harassers has indeed increased.

The disciplinary procedure must provide all guarantees of due process, although, in the case of sexual harassment, some assumptions arising from a pattern of behaviour may be drawn and the protection of the victim and witnesses may be reinforced. For example, in Judgement 3640, adopted by all seven judges, in response to the complainant's argument that his right of defence was violated because he was never provided with the full content of the witness statements forming the basis of the accusations against him or informed of the witnesses' names, and the organization's counter argument that it had not disclosed this information because it was bound to protect the witnesses in a harassment investigation, the Tribunal

"consider[ed] it both necessary and possible to achieve a reasonable balance between the various provisions [...], according to which the strictly confidential nature of information and documentation pertaining to the investigation of a harassment complaint must be safeguarded 'without prejudice to the due process right of the parties in disciplinary proceedings'. This balance consists in considering that, where disciplinary proceedings are brought against an official who has been accused of harassment, testimonies and other materials which are deemed to be confidential pursuant to provisions aimed at protecting third parties need not be forwarded to the accused official, but she or he must nevertheless be informed of the content of these documents in order to have all the information which she or he needs to defend herself or himself fully in

[35] See, for example, Judgments 4217, consideration 9; 3170, consideration 33; 2706, consideration 5; 1875, consideration 32; and 1609, consideration 16.

[36] See Judgment 1899, consideration 3.

these proceedings. As the Tribunal has already had occasion to state, in order to respect the rights of defence, it is sufficient for the official to have been informed precisely of the allegations made against her or him and of the content of testimony taken in the course of the investigation, in order that she or he may effectively challenge the probative value thereof (see Judgment 2771, under 18)"[37].

In consideration 14 of the same Judgment 3640, the Tribunal, recalling that its case law[38] requires "that the question of whether or not harassment has occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the events complained of by the alleged victim in the context of an inquiry into a sexual harassment complaint", determined that "[i]t is by no means abnormal that the investigations conducted with a view to ascertaining the truth of the statements contained in the complaint should be widened to encompass other similar behaviour on the part of the alleged harasser. In fact, that is often the best means of corroborating the allegations of the complainant in an area where [...] it may be impossible to produce material evidence".

A particular difficulty seems to lie in the treatment of the alleged perpetrator during the investigation stage, which, according to the Tribunal, does not involve an adversarial procedure and concentrates on fact-finding[39]. The investigation in harassment cases has to deal in parallel with the alleged victim's accusations and the alleged harasser's rebuttal, but is not necessarily focused on the latter. The disciplinary procedure, on the other hand, centres completely on the alleged harasser and should be conducted according to well-established due process rights. The victim is only a witness in these proceedings, which are based on the charge brought by the Administration.

[37] Judgment 3640, consideration 20. See also Judgment 3995, consideration 5, where the Tribunal refers to "witness protection and freedom of expression".

[38] The Tribunal referred to Judgments 2553, consideration 6, in fine, 3166, consideration 16, in fine, or 3233, consideration 6.

[39] As explained in Judgment 4039, consideration 3, "[t]he purpose of such an investigation, which may be compared – in terms of criminal justice – to the investigation that precedes possible criminal proceedings, is not to gather evidence which can be used against the person concerned, but to provide the competent authority with information enabling it to decide whether the opening of a disciplinary procedure is warranted".

In Judgment 3640, the Tribunal clarified the relationship between the investigation and the disciplinary proceedings and explained that:

"[W]hile an international organization cannot rely only on an internal investigative report in taking disciplinary measure against a staff member, such a report may nevertheless serve as a basis for initiating disciplinary proceedings if the indications of misconduct that it contains justify that course (see, for example, Judgment 2365, under 5(e)). When an organisation initiates proceedings in the light of such a report, it is not obliged to repeat all the investigations recorded in the report, but must simply ensure that the person concerned is given the opportunity to reply to the findings it contains so as to respect the rights of defence (see Judgment 2773, under 9)."

An organization has to establish "beyond reasonable doubt" that the official concerned committed harassment in order to be able to impose one of the disciplinary sanctions provided for in its internal rules, but it has to comply with the principle of proportionality. If the harassment is established, the sanction applied is very often dismissal.

It is possible for the harassment complaint to be dismissed but for the official against whom the allegations were made still to be subject to a disciplinary sanction. This is because the investigation and the disciplinary procedure may reveal misconduct that cannot be categorized as harassment[40].

Conclusions

This was an attempt to provide a "concise guide" through the very rich case law of the ILO Administrative Tribunal. It is obvious that a reading of the judgments is always subjective and only the Tribunal itself can properly interpret its case law. Any other author, including myself, is guided by her or his own understanding of the text, and the selection of judgments and citations is necessarily personal. But, since the Tribunal often recalls its previous case law, the main lines of jurisprudence appear quite well defined.

It can be anticipated that the Tribunal's case law will be further refined in the near future. The number of cases filed by both alleged victims whose harassment complaints have been rejected by the organizations and officials on whom disciplinary sanctions have been imposed for harassment is constantly increasing. New complaints before the Tribunal often contain arguments different from those already raised in the past and they make

[40] See Judgment 4279, consideration 11.

reference to recent legal documents, including judgments of other tribunals, as this issue is attracting a growing interest everywhere. This will inevitably bring forth a fitting response from the Tribunal.

Harassment is behaviour that has no place in international organizations. All international courts and tribunals should help organizations to deal with it in an appropriate manner by developing jurisprudence that is realistic and adequate to reach the objective of eliminating harassment from the working environment within international organizations.