




# Rules of Evidence in International Administrative Law

Burden of Proof and standard of Proof

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## General notions – Burden of proof

- A party making an assertion must adduce evidence to prove it.
- Often falls on the complainant.
- ILOAT, *Omokolo (Nos. 1 & 2)* Judgment No. 1115 (1991) at para 7. The complainant was alleging bad faith and abuse of authority:

*“Complainant must discharge the burden of proof and satisfy an internal appeal body or the Tribunal that the balance of probability is that his allegations of fact are true. He will fail to discharge that burden if, after weighing all the evidence, the internal body or the Tribunal is unable to come down on his side”*



## ILOAT: Complainants are required to prove.....

- That the performance reports are “false and fraudulent” (ILOAT, Judgment no.28)
- That the committee responsible for deciding on the confirmation of his/her appointment after probation “is biased” ( ILOAT Judgment no.1127)
- The existence of a practice (ILOAT, Judgment no.1116)
- Misuse of authority (ILOAT, Judgment no. 2116 )
- Bad faith (must be proved and is never presumed) (ILOAT, Judgments no.2293, no. 2800, no. 3853, no. 3902)
- Material injury (prove it or at least offer some cogent evidence of it) (ILOAT, Judgment no.1156, no. 1157)
- That he/she falls within an exception (ILOAT, Judgment no.2357, no. 3083)
- Alleged verbal contract or verbal renewal of contract (ILOAT, Judgment no. 68)



Defendant Organizations respond to most assertions instead of having the burden of proving them...

- **However**, they sometimes have the burden to prove assertions to counter the narrative advanced by the complainant when:
  - ✓ the notion of best interest of the Organization is used as grounds for dismissal.
  - ✓ Proper appraisal reports in case of unsatisfactory performance.
  - ✓ If reorganization, it is up to the Organization to prove that it could not find a post matching the complainant's qualifications.
  - ✓ The receipt of a notice by a complainant when the date is crucial to determine whether the action is time-barred.
  - ✓ The compliance of an organization with its own procedures.



## Arguments to the effect that the burden of proof should be reversed are generally unsuccessful

- A dismissed employee argued that in all cases in which a member of the staff association is dismissed, the burden should shift to the organization (ILOAT, Judgment No. 495).
- An organization argued that the complainant had to prove that insinuations made against him in a letter were false, instead of the organization having to prove these insinuations (ILOAT, Judgment No. 1340).



## In practice...

- The burden of proof is of limited importance in many cases, because both parties generally have to adduce evidence.





## In practice...

- In a case concerning the challenge of disciplinary proceedings:

*“the complainant [was] not legally obliged, particularly in a disciplinary case, to disprove the charges against him” ... “it [was] for the Tribunal to judge, in light of the evidence submitted by the two parties, whether proof of the charges emerges from the documents in the dossier”*

The complainant had “simply assert[ed] that the charges against him [were] false” and “no document in the dossier provide[d] the slightest evidence in support of his allegations”. The ILOAT dismissed the claim.

*Khelifati*, **ILOAT** Judgment No. 207 (1973).



## In practice...

- In a case on allegations of unfair treatment, the complainant argued that the organization had the burden to show that it had taken proper action.

The WBAT's conclusion: It was not a problem of “burden of proof” because it was “incumbent upon both [parties] to provide the Tribunal with all the available evidence in order to allow it to pass judgment upon the Applicant’s allegations [...]; and it [was] for the Tribunal to determine, in the light of the evidence made available to it, whether the Applicant’s conditions of employment have, or have not, been observed”. The applicant’s simple denial was insufficient.

*Salle v. IBRD*, WBAT Judgment No. 10 (1982), at paras. 35-36.





# STANDARD

## Evidentiary Standards: civil and criminal.

- **Substantial evidence:** This standard falls between probable cause and preponderance of the evidence, and requires more than a “mere scintilla of evidence”. American standard in administrative law.
- **Preponderance of the evidence:** Balance of probabilities . A event was more likely than not to have occurred. More convincing force. ( 51percent + likelihood of occurrence). **Traditional civil standard in civil law and common law.**
- **Clear and convincing evidence:** higher threshold standard. A particular fact is substantially more likely than not to be true. ( More a standard of persuasion than a standard of proof).
- **Beyond a reasonable doubt:** the only logical explanation that can be derived from the facts. No other logical explanation can be inferred or deduced from the evidence. Highest standard of proof. Usually a **criminal standard of proof.**



## General rule: Preponderance of the evidence

- A party has to adduce sufficient evidence to establish, on the balance of probabilities or preponderance of the evidence, that his or her claims are true.
- A claim will be proven when it is more likely than not to be true.

“The board based the second of its findings on the lack of "conclusive" evidence. But that was not the standard of proof it was required to apply. [...] [I]f on the evidence taken as a whole it seems **more likely than not** that some or all of the complainant's symptoms were caused by exposure to toxic solvents she will have discharged the onus of proof.”

*Kogelmann (Nos. 1, 2, 3 and 4)*, **ILOAT** Judgment No. 1373 (1994), at para. 16.



## General rule: Preponderance of the evidence

- The balance of probabilities is the most common standard of proof consistent with the Uniform Guidelines for Investigations (2nd Edition) endorsed by the Conference of International Investigators of the United Nations Organizations in June 2009, which states that:
  - 12. The Standard of Proof that shall be used to determine whether a
  - complaint is substantiated is defined for the purposes of an investigation
  - as information that, as a whole, shows that something is **more probable than not**. Cited in Judgement ILOAT 3725)



## General rule...

- *Hasselback*, WBAT Decision No. 364 (2007), at para. 50:  
“the Claimant bears the burden of proving, by the **preponderance of the evidence**, that the injury alleged was caused by the accident”.
- *Elobaid*, UNAT Judgment No. 2018-UNAT-822, at para. 35:  
“the applicable standard of proof [...] is that of “**preponderance of evidence**” [for] simple administrative action”



## Guidance rule

The standard of proof adapts to the **circumstances**: evidence specific to the particular case.

When alleging personal prejudice, a complainant has to introduce “evidence of sufficient quality and weight to persuade the Tribunal [...], [m]ere suspicion and unsupported allegations [being] clearly not enough”.

*Rwegellera (No. 2)*, ILOAT Judgment No. 1775 (1998).

That said, “evidence of personal prejudice is often concealed and may rest on inferences drawn from all the circumstances”.

*K. v. WHO*, ILOAT Judgment No. 3753 (2017).





## *Application to specific situations*

### **1. Termination for disciplinary reasons (misconduct)**

- **ILOAT: Burden of proof:** When a complainant claims that he or she did not commit the alleged misconduct, the burden shifts on the organization to prove the misconduct ( Onus'reversal).

She can go no further than that since it is impossible to adduce evidence to rebut the charge. Her statement that she did not commit the misconduct she is charged with shifts the burden of proof to the Organization.

*Pollicino, ILOAT Judgment No. 635 (1984), at para. 7.*



## Application to specific situations

### Termination for disciplinary reasons

- **ILOAT: Standard of proof: Beyond a reasonable doubt.**

“the seriousness of the charges and the concomitant penalty demand that before there can be a finding against the complainant the charges must be proved (by the Organization) beyond reasonable doubt”

*Navarro*, ILOAT Judgment No. 969 (1989), at para. 16

*D.v.WHO*, ILOAT Judgment No. 2879 (2009) at paras 9. and 16.

**Most recently:** *H. (No. 24) v. EPO*, ILOAT Judgment No. 4047 (2018), at para. 6.

ILOAT has noted that in some circumstances presumptions may be sufficient to establish proof beyond a reasonable doubt. *F.V.Cern*, ILOAT Judgment No. 3875 (2017), at para.8

Moreover, ILOAT adopt a deferential position towards decision-makers while reviewing evidence. *L.v.WHO*, ILOAT Judgement No.2699 (2008) , at para 9.



*Application to specific situations*  
**Termination for disciplinary reasons**

- **WBAT Standard of proof: Clear and convincing evidence**

The standard of evidence in disciplinary decisions leading ... to dismissal must be **higher than a mere balance of probabilities**. In several decisions, the Tribunal has emphasized that there must be substantial evidence to support the finding of facts which amount to misconduct.

*Arefeen*, WBAT Judgment No. 244 (2001), at para. 42.

*Dambita*, WBAT Judgment No. 243 (2001), at para. 21.



*Application to specific situations*  
**Termination for disciplinary reasons**

- **UNAT : standard of persuasion: Clear and convincing evidence**

“[W]hen termination is a possible outcome, misconduct must be established by clear and convincing evidence”, which “means that the truth of the facts asserted is **highly probable**”.

Judgment No. 2013-UNAT-302, at para. 29.

Most recently: *Majut*, 2018-UNAT-862, at para. 48.

“[B]ased on the evidence presented by a party to the Dispute Tribunal [...], it must be **highly and substantially probable** that the factual contentions are true”.

*Diabagate*, Judgment No. 2014-UNAT-403, at para. 30.



## *Application to specific situations*

### Termination for disciplinary reasons

- **African Development Bank( AfDBAT) :Standard of persuasion:** Reliable, corroborating and convincing proof.
- “In disciplinary matters the onus of proof lies with prosecuting authority....the administration is only required to establish the facts with reliable, corroborating and **convincing proof**, to support accusations levied against a staff member”

*M. v. AfDB*, AfDBAT Case No. 2007/05, 25 November 2008, at paras. 29-30.

The AfDBAT requires, when “serious misconduct is alleged, [that] **the proof [...] be cogent** to satisfy the Tribunal that such serious misconduct has been committed”.

*X-D-P v. AfDB*, AfDBAT Judgment No. 81, 17 October 2012, at para. 88.





## *Application to specific situations*

### Termination for disciplinary reasons

- **AsDBAT** (Asian Development Bank): **Preponderance of the evidence**  
Established by the internal documents of the organization (A.O. 2.04, para. 9 and Appendix 1)  
“Evidence which is more credible and convincing than that presented by the other party. In cases of misconduct, it is a standard of proof requiring that the Evidence as a whole shows that it is more probable than not that the staff member committed the misconduct”. ( Preponderance of the evidence).



## **Conclusion** on “*termination for disciplinary reasons*”


- It will be to the organizations to prove misconduct (onus reversal) although a *prima facie* case is sufficient at the AfDBAT to shift the burden to the complainant.
- The standard of proof varies depending on the Organization from “beyond reasonable doubt” at the ILOAT, to “clear and convincing evidence” at the WBAT, the UNDT and UNAT , to “reliable, corroborating and convincing” at the AfDBAT, to a simple “balance of probabilities” at the AsDBAT.



## Application to specific situations

### 2. Retaliation

- The burden and standard remain the same, balance of probabilities, but tribunals recognize that it is harder for a complainant to establish the retaliatory nature of a consequence.
- *B. v. Global Fund*, **ILOAT** Judgment No. 3748 (2017), at para. 6:  
“It is incumbent on the complainant to establish that the actions or conduct complained of was retaliatory, though it can be accepted that evidence of personal prejudice is often concealed and such prejudice can be inferred from surrounding circumstances”.



## Application to specific situations

### Retaliation

- **UNAT:** *He v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-686, at para. 41:

The Tribunal has “to decide if the [claimant] has established on a balance of probabilities that the [measure taken, such as the] non-renewal of her contract was unreasonable on grounds of the true reason being retaliation”.

- **WBAT:** *F v. IBRD*, WBAT Judgment No. 313 (2004), at para. 50; *O. v. IBRD*, WBAT Judgment No. 337 (2005), at para. 49.

“the burden lies with the Applicant to establish facts which would bring his claim within the Staff Rules’ definition of retaliation”, even if “it is not always easy for an applicant to produce evidence to support a claim of retaliation”.



## Whistleblowers: National law v. International administrative law.

- The WBAT concluded that US law did not apply to wrongful investigation and whistleblowing.

BC v. IFC, **WBAT** Judgment no. 427 (2010), at paras. 42-44





## Application to specific situations

### 3. Improper Motivation


- *Lysy v. IBRD*, **WBAT** Judgment No. 211 (1999), at para. 71:  
“[a] finding of improper motivation cannot be made without clear evidence”
- The usual standard of proof applies at the ILOAT, the UNAT and the AsDBAT. However, the organization has to justify its decision in some way, to show that it was neither arbitrary nor tainted by improper motives.



# Application to specific situations

## 4. Harassment

- The rules remain the same, but some tribunals emphasize the burden of the complainant to adduce sufficient evidence. See TAOCDE No. 81, 17 mars 2016.
- *Annabi (No. 2)*, **ILOAT** Judgment No. 2067 (2001), at para. 5:  
“an allegation of harassment must be borne out by specific facts, the burden of proof being on the party pleading the harassment”
- *C. v. FAO*, **ILOAT** Judgment No. 2521 (2006), at para. 12:  
“it is for the person making the allegation to establish that the acts or decisions in question were accompanied by some purpose or attitude which allows them to be so characterized”



## *Application to specific situations*

### Harassment

- *AL v. IBRD*, **WBAT** Judgment No. 409 (2009), at para. 51.  
“It is the Applicant’s responsibility to provide specific and sufficient evidence to support her case”

**AsDBAT** applies the standard set forth in the Bank’s official documents, which explicitly provide that harassment investigations are to be conducted in accordance with Appendix 2 of AO 2.04, which in turn provides that “ the standard of proof for the investigation is a preponderance of evidence” Therefore there is no higher standard of persuasion applied in harassment cases. See *G ( No.2) v. AsDB*, AsDBAT Judgement no. 107 (2016) at para 66. ( *E. v. AsDB*, AsDBAT Judgement No. 103 (2014), at para 53.)



## Application to specific situations

### Sexual Harassment

- A higher standard of persuasion applies in cases of sexual harassment at the **WBAT**.
- *M. v. IBRD*, **WBAT** Judgment No. 369 (2007), at para. 60.

“[s]exual harassment is a grave offense that entails the sanction of termination, and the standard of proof must be demanding to the point of being clear and convincing. The fact of such misconduct cannot be “established” by conjecture or speculation. It is not enough to assert that there is “reasonably sufficient” evidence to support a finding of misconduct in this type of allegation” Also see *P.v. IBDR*, **WBAT** Judgment No. 366 (2007) at para 33, citing *Arefeen*, **WBAT** Judgement No 244 (2001), at para 42).



## Application to specific situations

### Sexual Harassment

- *Mbaigolmen*, Judgment No. 2018-UNAT-819, at para. 32.

The **UNDT** concluded that “the fact of sexual harassment had been established only on a balance of probabilities”, but the **UNAT** instead concluded that the facts “constitute[d] a clear and convincing concatenation of evidence establishing, with a high degree of probability, that the alleged misconduct in fact occurred”.





*Application to specific situations:*

### 5. Career (Promotion, Mobility)

- In general, appointments and promotion by international organizations are a matter of judgment and discretion. Therefore a higher degree of deference is required.
- The standard of proof required to challenge a promotion or appointment is generally higher than the usual preponderance of evidence at 50+1 statistical probability. It is the **substantially** “more likely than not” standard.



## Application to specific situations

### Career (Promotion, Mobility)

- *Ochani*, ILOAT Judgment No. 1827 (1999), at para. 6.

“[t]he selection of candidates for promotion is necessarily based on merit and requires a high degree of judgment on the part of those involved in the selection process”. As a result, “[t]hose who would have the Tribunal interfere must demonstrate a serious defect in it; it is not enough simply to assert that one is better qualified than the selected candidate”.



## *Application to specific situations*

### Career (Promotion, Mobility)

- *Rolland*, Judgment No. 2011-UNAT-122, at para. 21:  
“a candidate challenging the denial of promotion must prove through clear and convincing evidence that the procedure was violated, members of the panel exhibited bias, irrelevant material was considered, or relevant material ignored”



## *Application to specific situations*

### Career (Promotion, Mobility)

- *Bertrand*, WBAT Judgment No. 81 (1989), at para. 20.
  - In the typical case in which the Applicant points to specific reasons for casting serious doubt upon the fairness of the Bank's selection process, it is for the Bank to dissipate this doubt by providing the facts that are readily available to it in order to show no more than that its discretion has been fairly exercised.
- See also *De Raet*, WBAT Judgment No. 85 (1989), at para. 57.




## Application to specific situations

### Career (Promotion, Mobility)

- *Azimi v. AsDB*, **AsDBAT** Judgment No. 88 (2009), at para. 31.

“The rule that the Applicant must carry the burden of showing *prima facie* that the managerial act or decision being challenged was vitiated by arbitrariness or disregard of due process, is the common rule that is recognized in all judicial or quasi-judicial dispute settlement”





## Application to specific situations

### Sickness

- The burden and standard generally remain the same.
- *Mischung (No. 5)*, **ILOAT** Judgment 889 (1988), at para. 1.  
“the burden is on [the complainant] to prove service-incurred illness”.
- *Curzi*, **ILOAT** Judgment No. 932 (1988), at para. 10.  
“The burden of proof [was] on the complainant to satisfy the Tribunal that the findings of the medical examination [...] should be set aside”.
- *Hasselback*, **WBAT** Judgment No. 364 (2007), at para. 50.  
“The Claimant bears the burden of proving, by the preponderance of the evidence, that the injury alleged was caused by the accident”



## *Application to specific situations*

### Sickness

- However, the **ILOAT** has adapted the general rules:
  - The ILOAT has allowed “a presumption in the complainant’s favour that [the illness was not present] at the time” of employment. That reversal of the burden of proof is based on the principle that “[i]t is for the employer to make proper arrangements for a comprehensive check-up of the applicant for employment”. However, it then falls on the complainant “to satisfy the Tribunal, with positive proof, that his impairment was service-incurred”.

*Bastari*, ILOAT Judgment No. 528 (1982), at para. 4.



## Application to specific situations

### Sickness

- The **WBAT** applies an “objective standard”.
  - The Applicant has the burden of proving “that the actual working conditions, judged objectively and not from the viewpoint of the claimant’s subjective perception, were the cause of the injury alleged, and that the actual working conditions could have caused similar injury in a person who was not significantly predisposed to such injury”.

*BI (No. 2) v. IBRD*, WBAT Judgment No. 445 (2010), at para. 26.



# Conclusion