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When the Exception Becomes the Rule: Disclosure of Evidence in Disciplinary Cases

Introduction

Disclosure of evidence in disciplinary cases of harassment, and particularly sexual harassment, has required the International Labour Organization Administrative Tribunal (ILOAT) to carefully balance the due process rights of the accused with the rights of witnesses and targets of misconduct to have an investigation handled with strict confidentiality.

General Rule: Disclose all Evidence

ILOAT caselaw highlights that in disciplinary cases, according to a general principle of law, a staff member must “*have access to all the evidence on which the authority bases (or intends to base) its decision*”. (ILOAT Judgment 2229, cons. 3(b))

As a result, since 2003, the date of the above judgment, organizations have usually been required to disclose to a staff member accused of misconduct all the evidence upon which the administration relies to base its disciplinary decision. This means that during the disciplinary process a staff member can examine the evidence collected during an investigation, including witness statements, prior to responding to the charges and being found guilty of wrongdoing.

Recent ILOAT caselaw, however, has created an important exception to this general rule.

Exception to Disclosure (ILOAT Judgments 3640 and 4343)

In **Judgment 3640** (2016), concerning UNESCO, the ILOAT examined a former staff member’s complaint against his summary dismissal as a disciplinary measure after an internal investigation concluded that he had sexually harassed and/or engaged in unwelcome conduct towards **21 women**.

The complaint was examined by a plenary of all seven ILOAT judges, which happens in exceptional cases. (ILOAT Statute Article III.3)

The ILOAT noted that full witness statements were not disclosed to the complainant and the identities of witnesses were not revealed to him. According to the caselaw cited above, this would normally constitute a breach of due process. However, the ILOAT decided to draw a “*a reasonable balance*” (cons. 20) between the strict confidentiality of information and documentation pertaining to harassment investigations and the due process rights of the accused. It noted that the investigation report contained “*an extremely detailed description of all the instances of unwelcome behaviour.*” The ILOAT found that the accused was given a “*real opportunity to dispute the various items of evidence gathered in the course of proceedings against him*” and to rebut the charges. (Cons. 21) The ILOAT therefore found no breach of due process and dismissed the former staff member’s complaint.

In the very recent **Judgment 4343** (December 2020), concerning the IAEA, the ILOAT examined a staff member’s complaint against his demotion and removal of supervisory responsibilities as a disciplinary sanction. The sanction was the result of an investigation and disciplinary process that found he had engaged in a pattern of harassment against a supervisee. The investigators did not disclose the name of witnesses to the staff member accused of misconduct or to the disciplinary board reviewing the investigation report. The only information about witness statements made available to the disciplinary board was a “*very brief summary provided by [investigators] in the relevant parts of the final investigation report.*” (Cons. 12) The ILOAT relied on Judgment 3640, stating that it was “*necessary to consider whether the evidence in the present case shows that the complainant was sufficiently informed of the content of the witness statements, even though they were not shared with him.*” (Cons. 14) The ILOAT noted that the complainant reviewed the investigator’s report summarizing the relevant testimonies and he had been informed of the statements during his interview with investigators. As a result, it considered that he had an opportunity to challenge the statements when the disciplinary board interviewed him. It dismissed his complaint, finding he had an adequate opportunity to defend himself.

What does this mean for staff members of international organizations?

The judgments indicate that international organizations might elect to withhold evidence from an accused during a disciplinary process unless the organization’s procedures require it to be shared. The judgments are now most relevant to allegations of harassment and sexual harassment, but one could imagine that evidence disclosure obligations in cases about abuse of authority, discrimination or fraud could be viewed in a similar fashion.

Given the time and effort involved in fulfilling evidence disclosure obligations, organizations might increasingly decide to withhold witness statements and other evidence from staff members accused of misconduct. A lack of evidence disclosure will obstruct staff members from adequately defending themselves from accusations of misconduct. It may also erode a staff member’s presumption of innocence.

While the ILOAT may overturn some disciplinary sanctions for failing to strike a reasonable balance between disclosure of evidence and confidentiality considerations, in many instances significant damage to a staff member's career and reputation will have already transpired.

Staff members found guilty of misconduct do not only face sanctions from their employer. They also increasingly encounter stigmatization and blacklisting when they seek employment elsewhere because many international organizations will share information about disciplinary sanctions that were imposed to potential employers. This information sharing will occur even when an investigation is completed under dubious circumstances and a staff member is undertaking the lengthy process of an appeal.

What can be done to reinforce staff members' rights?

Staff unions and staff representatives should be aware of this change in ILOAT caselaw and inform their constituents of the impact it could have on their ability to defend themselves if they are accused of wrongdoing.

Consideration also should be given to reinforcing an accused's rights to the disclosure of evidence in disciplinary proceedings. The best way to reinforce this general principle of law is to ensure that an organization's investigation or disciplinary procedures, or its staff rules, clearly require the disclosure of evidence to an accused.

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Mr. Fishman has provided legal advice within the United Nations system, with an expertise in employment law, for nearly a decade. He served as a staff member in numerous international organizations, including the World Trade Organization, Special Tribunal for Lebanon and as part of the legal secretariat of the WHO Global Board of Appeal. He has training and experience in conducting United Nations harassment investigations and is a certified and experienced workplace mediator. Mr. Fishman stands ready to assist employees in disputes and appeals with their employer and to advise staff associations of international organizations on a range of topics, as well as by serving as an investigator or mediator. This article provides general information and is not legal advice.

