

Tips and Information Newsletter for International Civil Servants

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ILO Administrative Tribunal Provides Guidance on Proving He Said/She Said Sexual Harassment Claims in Judgment No. 4207 (sitting en banc)

In Brief

The ILO Administrative Tribunal, with all seven (7) Judges signing the judgment, recently decided an appeal in favour of a victim of sexual harassment at the IAEA. At the relevant time, the female victim was a G-4 staff member and the perpetrator a senior officer at the P-5 level. The Tribunal found that, although there were no witnesses to the alleged sexual harassment, there were significant factors present that substantiated the allegations. The Tribunal clarified the law in this area and thus has given important guidance for victims of sexual harassment as to how to prove their allegations where there are no direct witnesses, i.e., in cases of he said/she said sexual harassment. In particular, the Tribunal made it clear that a victim of harassment does not have to prove the case beyond a reasonable doubt, and reiterated its longstanding caselaw that the victim need not prove the harasser acted with intent.

Facts and Decision

In early January 2015, the P-5 senior officer joined the Agency and on 20 February the victim reported sexual harassment against him to the acting section head involving a “persisting pattern of unwelcome behaviour that made her feel uncomfortable and unsafe”, and on 23 February met with the staff counsellor, who advised that she would mediate the matter. She then reported the harassment to the new section head on 9 March 2015. In a meeting with the new section head and a human resource official, the victim was advised to take assertiveness training and to act less friendly.

On 19 March the victim sent a request for an investigation which was then opened by the Office of Internal Oversight Services (OIOS). OIOS concluded in a report issued on 31 August 2015 that:

“the evidence adduced shows that [the complainant] has been consistent in her reporting of the details of the incidents, including to her colleagues, and to OIOS. Because OIOS verified her account, which

¹ The author represented the victim in this appeal as well as the appeal cited by the Tribunal, Judgment 2524, which established for the first time that victims of harassment do not have to prove intent on the part of the harasser.

was corroborated by her colleagues, and considering that there was no evidence of ulterior motive on her part, OIOS finds [the complainant's] complaint against Mr [A.] credible and made in good faith . . . On the other hand, considering Mr [A.'s] vehement denials, his explanations of the incidents, including his apology to [the complainant], coupled with the fact that no independent witness was present during the incidents; OIOS cannot make a conclusive determination in this case.”

After making several inquiries, not until January 2017 did the Agency finally notify the victim of the OIOS findings and advised that a letter of warning would be issued to the perpetrator about his behaviour and he would be required to undergo training, and that the case was otherwise closed.

After initiating an internal appeal seeking moral damages, the Agency advised that based on the OIOS report and the lack of finding of harassment beyond a reasonable doubt, the victim's rights had not been violated and no compensation could be awarded.

In the appeal to the Tribunal, the Agency raised two very troubling arguments: i) since the perpetrator was not found guilty of harassment beyond a reasonable doubt the case was not proven; and ii) that the OIOS enjoys operational independence and its findings cannot be reviewed or changed by the Director General.

The Tribunal first rejected the second argument relating to the operational independence of the OIOS which it held only concerned its internal operations.

“It is observed that the operational independence of OIOS, as provided for in the OIOS Charter, concerns the independence of its internal operations. It does not in any way constrain or implicate the Director General's decision-making authority nor does it preclude judicial review of the OIOS's findings and conclusions underpinning a Director General's final decision.”

Second, the Tribunal stated that the “key issue” in the case concerned the “manner” in which the Agency procedurally dealt with the sexual harassment complaint. The Tribunal noted that (at that time) the Agency's policy on resolving harassment-related grievances stipulated that in the event the complaint is not resolved informally by voluntary mediation the victim could file a report of misconduct. The Tribunal then observed that the procedures relating to misconduct serve to determine if the subject staff member committed misconduct – sexual harassment – and whether a disciplinary measure should be imposed.

The Tribunal then importantly clarified that a report of harassment and a report of misconduct are “distinct and separate matters” and therefore must be dealt with separately.

“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 the Appendix G procedures, 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.”

This is a significant distinction. As far as the misconduct investigation is concerned, the victim is in fact the primary witness and not a party in the proceedings. The subject of the investigation is entitled to due process protections that peculiarly attach to misconduct proceedings. For example, it is well-settled that international organizations must prove misconduct beyond a reasonable doubt. This has created much confusion in the law since international organizations sometimes, as here, take the view that if the subject is not found guilty of harassment beyond a reasonable doubt there was no harassment. This recalls the infamous case of O.J. Simpson who was arrested for the murder of his ex-wife and her friend. Simpson was found not guilty by the jury in the criminal proceeding since the prosecution did not prove its case beyond a reasonable doubt. In civil court, where a much lower evidentiary standard applies, Simpson was found responsible for their deaths in civil court and ordered to pay significant financial damages to the families of the victims.

The Tribunal then observed that the Agency at that time did not have procedures to deal with complaints of harassment comprehensively. In the absence of such procedures, the Tribunal held that the Agency was obligated to respond to the complainant’s harassment complaint in accordance with the Tribunal’s relevant case law”, which requires a thorough and timely investigation, and importantly that “the applicable standard of proof for a finding of harassment in a case such as this is not ‘beyond a reasonable doubt’ but a less onerous standard (see Judgment 3725, consideration 14).” The Tribunal did not say this explicitly but certainly it means the preponderance of the evidence; or more likely than not; or better than a 50 per cent chance standard, which is the normal burden of proof applied by the Tribunal. The Tribunal added that, citing Judgment 2706, “an international organisation is liable for all the injuries caused to a staff member by their supervisor acting in the course of his or her duties, when the victim is subjected to treatment that is an affront to his or her personal and professional dignity . . . an international organization must take proper actions to protect a victim of harassment.”

The Tribunal then had to deal with the issue of whether the Agency conducted a thorough investigation. In this respect, it noted that the OIOS investigation was conducted as a misconduct investigation but implicitly found that it was sufficient for the harassment complaint, and stated that the OIOS investigation was “thorough” and “issued in a timely manner.” Indeed, in this case, the OIOS issued its report within six (6) months in September 2015 of receipt of the complaint. However, despite repeated requests, the victim did not receive notice of the formal outcome of the investigation until 14 months later in January 2017. The Tribunal also significantly clarified and confirmed that the victim of harassment must be notified of the outcome of the investigation. The Tribunal was very troubled by the unjustified delay and stated:

“Allowing a reasonable amount of time for the Administration to respond to the complainant’s claim of harassment, the complainant should have received a decision regarding her claim no later than 30 November 2015. However, the complainant did not receive a decision

until 31 January 2017. The unjustified delay of fourteen months is inexcusable and unreasonable and caused the complainant significant harm. As reflected in the complainant's communications to the Administration and the Director General, this delay caused the complainant significant distress, a feeling of isolation and stigmatization, fear for her personal security and worry about the continuation of her employment."

The Tribunal also noted that the Agency in error placed the burden on the victim to prove the alleged perpetrator "acted with intent".

The Agency "proceeded on the assumption that an allegation of harassment by the aggrieved staff member must not only be borne out by specific acts, the burden of proof being on the reporter of the harassment, but must also prove that the alleged perpetrator of the harassment acted with intent. This in turn resulted in the DDG-MT incorrectly applying the "beyond a reasonable doubt" standard of proof in his consideration of the complainant's claim of harassment. It is noted that the Tribunal has specifically rejected this assumption that intent on the part of the alleged perpetrator is required in order to establish harassment (see, for example, Judgments 2524, consideration 25, 3233, consideration 6, and 3692, consideration 18, and the case law cited therein). "

Finally, because of the passage of time, and since there was "sufficient evidence and information in the pleadings for the Tribunal to make an informed decision", the Tribunal declined to return the case back to the Agency. The Tribunal then found that the sexual harassment was substantiated, citing the following factors with reference to the OIOS report:

"OIOS's conclusion that . . . the complainant's complaint of sexual harassment was credible and made in good faith; that no finding was made regarding the credibility of Mr A.'s denials; that a decision was made that Mr A. would be warned about his 'behaviour'; and notwithstanding the fact that there was no independent witness present during the incidents, which is not uncommon and does not undermine the credibility of the complaint".

The Tribunal awarded 25,000 EUR in moral damages. While some may find this amount paltry, the Tribunal was sitting *en banc* and the award no doubt reflects the efforts of the seven (7) Tribunal Judges to resolve and compromise their different perspectives on the case.

Comment

For cases of he said/she said sexual harassment, in order to increase the likelihood of prevailing in a judicial forum, the victim should, in addition to complying with any applicable written procedures:

- i) Timely report the offending conduct;

- ii) Be consistent in the details of the report to colleagues, to any staff counsellor, ombudsperson, and to the investigator;
- iii) Reject any contention by the organization that the lack of witnesses undermines the credibility of the victim;
- iv) Remind the organization that there is no requirement to prove the harassment beyond a reasonable doubt or to show the offending conduct was intentional;
- v) Provide on a strictly confidential basis medical reports for treatment received as a result of the harassment;
- vi) Make inquiries on the progress of the investigation and outcome – any administrative delay will add to the moral injury; and
- vii) Become familiar with the internal appeal rules in order to preserve important rights in the event the organization does not resolve the matter to the victim's satisfaction.

This case also shows that it should not be unusual, given the different procedures and burdens of proof, that the harasser is not found guilty of misconduct even though the victim is able to show he/she was harassed. It also demonstrates the continuing difficulties of international organizations to resolve harassment-related grievances, and the victim will oftentimes be subject to further emotional stress and possible retaliation.