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In Search of Coherence: Burden and Standard of Proof in International Administrative Law

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Abstract

The authors explore the rules governing the burden and standard of proof in international administrative law, both from a general perspective and in specific contexts such as termination for misconduct, harassment, retaliation, performance and promotions, and service-incurred illnesses. They compare the rules applied by various international administrative tribunals with those applied by courts in domestic jurisdictions. They conclude that some international organizations should review their rules in the interest of coherence, and revert back to a contextualized application of the usual civil standard of proof instead of applying different standards depending on the circumstances.

Keywords

burden of proof – standard of proof – evidence – rules of procedure – international administrative law – international organizations

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1 Introduction*

The rules governing the allocation of the burden of proof between litigants, and the standard they have to meet in order to prove their claims, go to the very heart of the dispute resolution process and the search for truth. In international administrative law, these two aspects are sometimes governed by the statutes and rules of each international organization, but they are more frequently determined by general principles of law. While one would think that resort to these principles would lead to some degree of harmonization across organizations, their application by international administrative tribunals sometimes differs, especially in areas such as termination for misconduct, harassment, retaliation, performance and promotions, and service-incurred illnesses. In some of those cases, the principles applied are also at odds with many domestic legal systems. This raises the question of whether there is any coherent rationale underlying those differences and, if not, why the outlier rules remain in place.

In this article, we explore the rules governing the burden and standard of proof in several international organizations, in order to paint a clearer picture of their similarities and differences. We proceed in two steps. First, we explain the general rules applied in international organizations, and we compare them with those applied in selected domestic jurisdictions (Section 2). Second, we move from the general to the particular, and we explore the rules applied by certain organizations in specific contexts such as termination for misconduct, harassment, retaliation, performance and promotions, and service-incurred illnesses (Section 3). We compare these rules with those applied domestically in similar contexts and, where significant differences emerge, we seek to identify the rationale for these differences. In some cases, we conclude that international organizations and administrative tribunals should review their rules in the interest of coherence, and revert back to a contextualized application of the usual civil standard of proof, instead of applying heightened standards depending on the circumstances, without a clear justification.

2 General Rules of Evidence: Burden and Standard of Proof

2.1 *Context and importance of the inquiry*

The burden of proof refers to a party's obligation to produce evidence to prove its assertions and claims and persuade the decision-maker, while the standard

* The research on which this article is based is up to date as of January 2020.

of proof refers to the degree or amount of evidence necessary to prove a claim. These two concepts are fundamental to the ability of a party to vindicate its rights, since "it comes to much the same thing not to have a right or to have a right which cannot be proved".[1] This is why rules governing the burden and standard of proof have been described as "the bedrock of civil litigation",[2] and why they are seen as essential to the rationality of decision-making processes.[3]

Despite their importance, there has been little discussion of those rules in the context of international administrative law, except in specific cases. This may be because each international organization is governed by its own legal framework—including particular statutes, rules and procedures. The fact that each organization's internal legal order is self-contained may seem to preclude any fruitful comparison.

Yet, international organizations have much more in common than might appear at first glance. Considering that they "face the same categories of issues relating to employment", they often "tend to adopt solutions that are coherent with the general trend".[4] They "look at each other for guidance, and a solution that holds good with respect to organization B may, *mutatis mutandis*, also be useful for organizations C, D and E".[5] For that reason, some authors consider that it is "justified to consider the law of the international civil service from a coordinated and comprehensive perspective, search for the common trends […] and hav[e] recourse, when necessary, to a comparative perspective to settle debated issues".[6]

This type of comparative exercise is particularly apposite for issues that are not comprehensively governed by written rules, which is often the case for the burden and standard of proof. In such cases, international administrative

1 Claude Giverdon, 'The Problem of Proof in French Civil Law' (1956) 31 *Tulane Law Review* 29.

2 Peter Gabriel, 'Burden of Proof and Standard of Proof in Civil Litigation' (2013) 25 *Singapore Academy of Law Journal* 130.

3 Niamh Kinchin, *Administrative Justice in the UN* (Edward Elgar, Cheltenham, 2018) 56.

4 Santiago Villalpando, 'The Law of the International Civil Service', in Jacob Katz Cogan, Ian Hurd & Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016) 1074.

5 Jan Klabbers, 'The Paradox of International Institutional Law' (2008) *International Organizations Law Review* 163; see also Zeynep Ucar Tagney & Mihail Stojanoski, 'The Administrative Tribunal of the Council of Europe: Some Observations with Regard to Procedural and Substantive Guarantees', in Paulo Pinto de Albuquerque & Krzysztof Wojtyczek (eds.), *Judicial Power in a Globalized World* (Springer, 2019) 628; this practice is exemplified for instance in *de Merode*, in which the WBAT noted that there is value in looking to the practice of other organizations: WBAT, Judgment No. 1, para 28.

6 Villalpando, (n 4) 1075–1076; see also CF Amerasinghe, 'Judging with and Legal Advising in International Organizations" (2001) 2 *Chicago Journal of International Law* 289, noting the desirability of ensuring consistency in international administrative law.

tribunals are called upon to develop their own rules, which they usually do by resorting to general principles of law.[7] These principles can be drawn from a variety of sources, including the practice of other international tribunals. Comparing the solutions adopted by different tribunals therefore presents an interesting potential for the development and refinement of those general principles.

Beyond the practice of other international administrative tribunals, general principles can also be inspired by domestic jurisdictions.[8] While international organizations have their own specific body of rules, their administrative judges come from a number of different countries and legal traditions, and they do "not [...] operate in a vacuum vis-à-vis decisions of national courts".[9] It is therefore helpful to compare the practice of international administrative tribunals with the practice that prevails in domestic jurisdictions. While that comparison will not replace the written rules of international organizations, it can influence the development of general principles.

For those reasons, we seek in this article not only to review the rules and principles governing the burden and standard of proof in international administrative law, but also to compare them across organizations and with domestic jurisdictions, in order to provide foundations on which tribunals may develop and refine the general principles they apply. With those considerations in mind, we turn first to the general principles governing the burden and standard of proof.

2.2 *Burden of proof*

The general rule regarding the burden of proof is that a party making an assertion must adduce evidence to prove it.[10] As a result, determining where the burden falls is a matter of identifying who makes the corresponding assertion. The burden of proof most often falls on the complainant, who usually

7 Villalpando, (n 4) 1082.

8 *Ibid.*; see also Robert A Gorman, 'The *De Merode* decision, and its influence upon international administrative law', in Olufemi Elias (ed), *The Development and Effectiveness of International Administrative Law* (Martinus Nijhoff, Leiden, 2012) 19.

9 Olufemi Elias & Melissa Thomas, 'Administrative Tribunals of International Organizations', in Chiara Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff, Leiden, 2012) 180.

10 See for example Alain Plantey & François Loriot, *Fonction publique internationale* (CNRS, Paris, 2005) 1406; *M.* v. *AfDB*, (25 November 2008) AfDBAT, Judgment No. 65, Application No. 2007/05, para 20, <www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Application%202007-05%20-%20Judgment%20of%2025%20November%202008.pdf>; *G.* v. *AsDB*, (23 September 2015), AsDBAT, Judgment No. 106, para 36, <www.adb.org/sites/default/files/microcontent/adbt0106.pdf>.

makes the greatest number of assertions in order to establish his or her claim. For instance, in a case where the complainant was alleging bad faith and abuse of authority, the Administrative Tribunal of the International Labour Organization (ILOAT) explained that "[a] 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."[11]

The ILOAT's case law is replete with examples of assertions that a complainant is required to prove in order to establish his or her claim:

- a complainant alleging that his performance reports are "false and fraudulent" has "to supply evidence of his allegations" or else "all such allegations should be rejected";[12]
- a complainant alleging that the committee responsible for deciding on the confirmation of her appointment after probation is biased has to adduce evidence to that effect;[13]
- a complainant alleging the existence of a practice has to provide evidence of such practice;[14]
- a complainant alleging misuse of authority cannot rely on presumptions since "the burden of proof is on the party that pleads it";[15]

11 *Omokolo* v. *WIPO* (*Nos. 1 and 2*), (3 July 1991) ILOAT, Judgment No. 1115, para 7, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1115&p_language_code=EN>.

12 *Waghorn* v. *ILO*, (12 July 1957) ILOAT, Judgment No. 28, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=28&p_language_code=EN>; see also, in that decision, the rejection by the ILOAT of a claim for damages resulting from an alleged employment accident, on the basis that the complainant failed to adduce evidence of the official nature of the travel during which the accident occurred.

13 *Verlaeken-Engels* v. *Eurocontrol* (3 July 1991) ILOAT, Judgment No. 1127, para 8, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1127&p_language_code=EN>.

14 *Diallo* v. *UNESCO*, (3 July 1991) ILOAT, Judgment No. 1116, para 5, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1116&p_language_code=EN>; see also *Chevallier* v. *ITU* (8 July 1999) ILOAT, Judgment No. 1851, para 7, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1851&p_language_code=EN>; *A.* v. *IAEA*, (6 February 2008) ILOAT, Judgment No. 2702, para 11, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2702&p_language_code=EN>.

15 *Giordimaina* v. *FAO* (30 January 2002) ILOAT, Judgment No. 2116, para 4(a), <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2116&p_language_code=EN>; see also *J.* v. *UNESCO* (24 January 2018) ILOAT, Judgment No. 3939, para. 10 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3939&p_language_code=EN>.

– "bad faith must be proved and is never presumed";[16]
– a complainant alleging "material injury [has] to prove it or offer at least some cogent evidence of it";[17]
– "[w]here a person seeks to bring himself or herself within an exception to a general rule […] it is for that person to establish that he or she falls within the exception";[18] and
– when a person seeks standing in front of a tribunal, based on an alleged verbal contract of employment with the organization, the ILOAT will refuse to grant standing if the complainant does "not supply any shred of proof of the existence of the contract of employment which he alleges was concluded verbally".[19]

For other assertions, the burden may sometimes fall on the defendant organization. Indeed, while an organization usually responds to most assertions instead of having the burden of proving them, it may nonetheless decide to make assertions of its own as a defence or to counter the complainant's narrative. In such a case, based on the general rule, it will have to prove these assertions. For instance, the ILOAT overturned a dismissal that the organization had justified based on the broader notion of the interest of the organization, noting that "[e]xtraordinary circumstances may arise in which the interest of the Organisation are threatened by the retention of even a valued servant", but that it "is for the Organisation to satisfy the Tribunal that such extraordinary

16 *R.M.* v. *OPCW* (4 February 2004) ILOAT, Judgment No. 2293, para 11 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2293&p_language_code=EN>; *see also W.* v. *CTBTO PrepCom* (4 February 2009) ILOAT, Judgment No. 2800, para 21 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2800&p_language_code=EN>; *V.* v. *OCPW* (*No. 6*) (28 June 2017) ILOAT, Judgment No. 3853, para 7 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3853&p_language_code=EN>; *K. K. W.* v. *CDE* (24 January 2018) ILOAT, Judgment No. 3902, para 11 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3902&p_language_code=EN>.

17 *Burnett* v. *Interpol* (*No. 3*) (29 January 1992) ILOAT, Judgment No. 1156, para 10 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1156&p_language_code=EN>; *Vicente-Sandoval* v. *Interpol* (*No. 4*) (29 January 1992) ILOAT, Judgment No. 1157, para 8 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1157&p_language_code=EN>.

18 *P.A.S.* v. *EPO* (14 July 2004) ILOAT, Judgment No. 2357, para 10 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2357&p_language_code=EN>; *U.* v. *UNIDO* (8 February 2012) ILOAT, Judgment No. 3083, para 14 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3083&p_language_code=EN>.

19 *Pellestier* v. *UNESCO* (11 September 1964) ILOAT, Judgment No. 68, para 2 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=68&p_language_code=EN>.

circumstances exist".[20] The ILOAT also overturned a dismissal based on unsatisfactory performance in a case where the organization had failed "to have proper appraisal reports made since" the latest satisfactory reports.[21] In both cases, the organization was trying to justify the dismissal—either based on its own interest or on the employee's unsatisfactory performance—and it thus had the burden to prove these justifications.

An implication of the general principle governing the burden of proof is that a party cannot be required to disprove an allegation. For instance, in a case concerning the non-renewal of a contract, the ILOAT rejected the argument "that in every case in which [an active member of the Staff Association] is involved the burden of proof passes to the Organization to show that his activities [in the Staff Association] had nothing to do with the decision".[22] However, while the ILOAT refused to reverse the burden in that case, it noted that "[e]ach case must be decided on the proper inferences to be drawn from its own facts",[23] which may result, for example, from the absence of reasons given by the organization, or from the presence or absence of animosity. Similarly, in a case where the complainant had received a letter from the Principal Director containing insinuations against him, the ILOAT indicated that "the onus of proof lie[d] on the Organisation to bear out its allegations and insinuations and not, as the Organisation submits, on the complainant to show them to be untrue".[24] Again, it would have been incompatible with the general rule governing the burden of proof to require the complainant to disprove allegations made against him.[25]

However, the burden of proof may be reversed in appropriate cases so as to fall onto the organization. For instance, the ILOAT has concluded that when

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20 *Saini* v. *FAO* (11 October 1966) ILOAT, Judgment No. 93, paras 3–4 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=93&p_language_code=EN>; see also for example, *Crockett* v. *WHO* (10 February 1993) ILOAT, Judgment No. 1234, para 19 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1234&p_language_code=EN>.

21 *Lee* v. *FAO* (11 July 1996) ILOAT, Judgment No. 1548, para 21 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1548&p_language_code=EN>.

22 *Olivares Silva* v. *PAHO* (3 June 1982) ILOAT, Judgment No. 495, para 5 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=495&p_language_code=EN>.

23 Ibid.

24 *Vollering* v. *EPO* (*No. 3*) (13 July 1994) ILOAT, Judgment No. 1340, para 11 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1340&p_language_code=EN>; see also *Dos Santos* v. *Eurocontrol* (*Nos. 1 and 2*) (15 July 1992) ILOAT, Judgment No. 1176, paras 11, 13, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1176&p_language_code=EN>.

25 *See also* Plantey & Loriot, (n 10) 788.

an appointment is terminated because of a reorganization, the organization "has [to prove] that it actually did its utmost to find a post matching the complainant's qualifications. […] It [is] not up to the complainant to prove that he was able to remain in the Organization's service in some capacity; it [is] up to the Organization to prove the contrary".[26] Even if the organization makes no assertion that it has done everything to find a suitable post for the complainant, the tribunal may still require it to adduce proof of that fact, presumably because it would be too difficult—or even impossible—for a complainant to prove the contrary, namely that there was a position in which he or she could have been placed. Similarly, in cases where the compliance of an organization with its own procedures is put into question, the burden is on the organization to show that the procedure was followed.[27]

Many domestic jurisdictions operate a similar reversal of the burden of proof in cases of termination, requiring the employer to adduce evidence of the justification for termination. In most Canadian provinces, for instance, "[b]ecause there are many legitimate reasons why an employee may be dismissed or laid off […] the onus of proof is now reversed by statute and placed on the employer to demonstrate, on the balance of probabilities, that the discharge was not motivated by any grounds prohibited" by law.[28] In the United Kingdom, the *Employment Rights Act 1996*,[29] imposes the onus on the employer, but limits it to a burden of demonstration, by providing in section 98 that

> In determining […] whether the dismissal of an employee is fair or unfair, it is for the employer to *show* (a) the reason […] for the dismissal, and (b) that it is a reason falling [under the purview of the Act] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.[30]

26 *G.* v. *WIPO* (8 July 2009) ILOAT, Judgment No. 2830, para 9 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2830&p_language_code=EN>; *see also P.* v. *WHO* (8 February 2017) ILOAT, Judgment No. 3755, para 19 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3755&p_language_code=EN>.

27 *B.* v. *OPCW* (3 February 2016) ILOAT, Judgment No. 3601, para 20 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3601&p_language_code=EN>.

28 George W. Adams, *Canadian Labour Law*, 2nd ed (Westlaw, Toronto, 2019) 10.120; *see also Wilson* v. *Atomic Energy of Canada inc.* (14 July 2016) Supreme Court of Canada, 2016 SCC 29, [2016] 1 RCS 770, para 51, <http://canlii.ca/t/gsh2f>.

29 Employment Rights Act 1996, c. 18 (U.K.).

30 *Ibid*, s. 98 (our emphasis).

By using the word "show" instead of more conclusive terms, for instance "prove", Parliament decided not to impose the burden of proof on the employer, while still reversing the burden of demonstration.[31] This position is not limited to common law jurisdictions; in France as well, the employer must show serious cause when dismissing an employee for cause.[32]

Another frequent situation in which the burden falls on the defendant organization is when proof must be made of the receipt of a notice, for example when the date is crucial to determine whether the action is time-barred or not. In such circumstances, the date on which the decision was received by the complainant will have to be established by sufficient evidence from the organization; otherwise, the Tribunal will take for granted the date alleged by the complainant. For instance, in a case where the date of receipt was crucial to the receivability of the complaint, the ILOAT noted that "[u]nder the general rules on the burden of proof, it is for the author to establish the date on which a communication was received".[33] Considering that "[t]he impugned decision [had] not [been] sent by registered post or with an official acknowledgment

31 See for example *Post Office Counters* v. *Heavey* (3 October 1989) Employment Appeal Tribunal, [1989] I.R.L.R. 513, para 14.

32 See for example. Cass.Soc 06/12/00; Ch Soc. Cour d'appel de Chambery 29/03/11 RG: 11/00483 AR/MFM.

33 *Quiñones* v. *PAHO* (14 May 1981) ILOAT, Judgment No. 447, para 2 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=447&p_language_code=EN>; *for an identical application, see Barberis* v. *UNWTO* (14 May 1981) ILOAT, Judgment No. 456, para 7 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=456&p_language_code=EN>; *Kirkov* v. *UNESCO* (17 March 1986) ILOAT, Judgment No. 723, para 4 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=723&p_language_code=EN>; *Pinto* v. *ITU* (*No. 3*) (12 July 2001) ILOAT, Judgment 2074, para 6 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2074&p_language_code=EN>; *P.* v. *UNESCO* (6 July 2005) ILOAT, Judgment No. 2473, para 4 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2473&p_language_code=EN>; *J. et al.* v. *Eurocontrol*, (1 February 2006) ILOAT, Judgment No. 2494, para 4 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2494&p_language_code=EN>; *A. et al.* v. *Eurocontrol* (1 February 2006) ILOAT, Judgment No. 3034, para 13 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2494&p_language_code=EN>; *S.* v. *UNIDO* (5 February 2014) ILOAT, Judgment No. 3253, para 7 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3253&p_language_code=EN>; *S.* (*Nos. 1 and 3*) v. *ITU* (8 February 2017) ILOAT, Judgment No. 3737, para 7 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3737&p_language_code=EN>; *S.* (*No. 2*) v. *ITU* (8 February 2017) ILOAT, Judgment No. 3738, para 8 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3738&p_language_code=EN>; *S.* v. *EPO* (8 February 2020) ILOAT, Judgment No. 3793, para 2 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3793&p_language_code=EN>.

of receipt" and "was not even dated", the ILOAT decided to "accept the complainant's statement".[34] Still, the ILOAT recently recalled that this rule "does not absolve the recipient of a document from adducing evidence contradicting or challenging persuasive evidence from the sender about the likely date of receipt".[35]

This latter example highlights an important aspect of the burden of proof, namely that even if one party has the burden of proving an allegation, it remains the responsibility of both parties to adduce evidence whenever possible, in order to allow the tribunal to weigh competing evidence. When evidence is adduced on both sides, the role of the burden of proof is effectively reduced to a tie-breaking device which operates in favour of a party when the other party, on which the burden falls, does not adduce evidence that meets the requisite standard. In practice, therefore, both parties will adduce evidence concerning most, if not all allegations. The failure to do so will sometimes weigh heavily against the party deciding not to adduce evidence, even if that party does not bear the burden of proof.

A good example of that principle is a case where a complainant was challenging disciplinary proceedings brought against him. The ILOAT noted that "the complainant [was] not legally obliged, particularly in a disciplinary case, to disprove the charges against him", but that "it [was] for the Tribunal to judge, in light of the evidence submitted *by the two parties*, whether proof of the charges emerge[d] from the documents in the dossier".[36] Because the complainant had "simply assert[ed] that the charges against him [were] false" and because "no document in the dossier provide[d] the slightest evidence in support of his allegations",[37] the ILOAT dismissed the claim. Therefore, even if the burden of proof did not technically rest on the complainant, his failure to adduce evidence was fatal to his defence.

Similarly, in one of its early decisions, the World Bank Administrative Tribunal (WBAT) had to examine allegations of unfair treatment and of non-observance of the employee's conditions of employment. The complainant argued that the organization had the burden to show that proper action had been taken. The WBAT concluded that this was not a problem of "burden of proof", because it was "incumbent upon both [parties] to provide the

34 *Quiñones*, (n 33) 2.

35 *A. et al.* v. *WIPO* (9 July 2014) ILOAT, Judgment No. 3344, para 10 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3344&p_language_code=EN>.

36 *Khelifati* v. *UNESCO* (14 May 1973) ILOAT, Judgment No. 207 (emphasis added), <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=207&p_language_code=EN>.

37 Ibid.

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 ha[d], or ha[d] not, been observed".[38] The Tribunal noted that it could "obviously not found its decision on the Applicant's simple and total denial", in the absence of any other evidence.[39] That principle has been reiterated by the WBAT on several occasions.[40]

In other words, in cases where both parties adduce evidence, the burden of proof does not matter that much, and the tribunal's task is rather to assess whether the evidence taken as a whole meets the established standard of proof.

2.3 *Standard of proof*

The general rule regarding the standard of proof in civil matters is that a party has to adduce sufficient evidence to establish, *on the balance of probabilities*, that his or her claims are true. This standard means that a claim will be considered proven when it is more likely than not to be true.

For instance, in a case where the complainant alleged a service-incurred illness, and where the organization's medical board found that there was no "conclusive" evidence of the illness, the ILOAT reversed the medical board's decision and noted that the standard of proof to be applied in such cases was the balance of probabilities, which meant that "if 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".[41]

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38 *Salle* v. *IBRD* (8 October 1982) WBAT, Judgment No. 10, para 35 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Salle%20v.%20IBRD.PDF>.

39 Ibid, para 36.

40 See for example, *Von Stauffenberg et al.* v. *WB* (27 October 1987) WBAT, Judgment No. 38, para 97 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/von%20Stauffenberg%2C%20Ganuelas%2C%20Leach%20v.%20The%20World%20Bank.PDF>.

41 *Kogelmann* v. *IAEA* (*Nos. 1, 2, 3 and 4*) (13 July 1994) ILOAT, Judgment No. 1373, para 16 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1373&p_language_code=EN>; *see also Abdel Malek* v. *WHO* (12 July 2000) ILOAT, Judgment No. 1971, para 15 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1971&p_language_code=EN>; *Bastari* v. *CERN* (18 November 1982) ILOAT, Judgment No. 528, para 4 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=528&p_language_code=EN>; *L.* v. *WHO* (4 July 2012) ILOAT, Judgment No. 3111, para 6 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3111&p_language_code=EN>.

Similarly, in a case of service-incurred illness, the WBAT briefly referred to the general standard of proof, noting that "the Claimant bears the burden of proving, by the preponderance of the evidence, that the injury alleged was caused by the accident".[42] The United Nations Appeals Tribunal (UNAT) also applies that standard, noting that "the applicable standard of proof […] is that of 'preponderance of evidence' [for] simple administrative action",[43] although as we will see below, a higher standard applies to disciplinary measures.

This "balance of probabilities" standard is also widely applied across common law jurisdictions.[44] In Canada, the Supreme Court reiterated that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities".[45] The Court noted that "a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations",[46] but rejected the idea that these factors should alter the standard of proof. This single standard of proof is explained by the fact that in civil cases, there is no presumption of innocence. As a result, "[s]ince society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities".[47] In addition the Court noted that a higher standard than the balance of probabilities would be unhelpful, because "it would seem incongruous for a judge to conclude that it

42 *Hasselback* v. *UNESCO* (28 March 2007) WBAT, Judgment No. 364, para. 50, <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Hasselback%20v.%20IBRD.PDF>, citing *Waugh* v. *D.C. Dept. of Emp. Svcs.* (13 December 2001) DC Court of Appeals, 786 A.2d. 595; *see also BI (No. 2)* v. *IBRD* (29 October 2010) WBAT, Judgment No. 445, para 25 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/BI%20%28No.%202%29%20v.%20IBRD.pdf>.

43 *Elobaid* v. *Secretary-General of the United Nations* (22 March 2018) UNAT, Judgment No. 2018-UNAT-822, para 35 <http://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-822.pdf>.

44 Most civil law jurisdictions (with the notable exception of mixed jurisdictions) do not use the concept of "standard of proof". For instance, France attaches different weight to different types of evidence, but has no general provision governing the standard of proof (*see* Code civil, art. 1353–1386-1, <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006118074/2016-10-01/#LEGISCTA000032042346>). When they discuss the "standard of proof", international administrative tribunals thus appear to draw from common law jurisdictions, which makes those jurisdictions a more appropriate basis for comparison.

45 *F.H.* v. *McDougall* (2 October 2008) Supreme Court of Canada, 2008 SCC 53, [2008] 3 SCR 41, para 40 <http://canlii.ca/t/20xm8>.

46 *Ibid.*

47 *Ibid*, para 42, citing J Sopinka, S N Lederman & A W Bryant, *The Law of Evidence in Canada*, 2nd ed. (LexisNexis, Toronto, 1999) 154.

was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur".[48]

The Australian High Court came to a similar conclusion, noting that the "ordinary standard of proof required of a party who bears the onus in civil litigation [...] is proof on the balance of probabilities" and that while "the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove", this "should not, however, be understood as directed to the standard of proof".[49]

This standard of proof means that the evidence must be convincing enough, and that a party cannot simply make allegations without providing sufficient evidence to support them. However, as the decisions of the Canadian Supreme Court and Australian High Court suggest, the balance of probabilities adapts to the circumstances of each case. This contextualization of the standard of proof was described by Lord Nicholls of the United Kingdom House of Lords who said that "the (civil) standard is the balance of probability" but that "[w]ithin that standard, the more unlikely the allegation, the more cogent must be the evidence to discharge the civil burden of proof".[50] More recently, the House of Lords reiterated the standard of the balance of probabilities in civil cases and its necessary contextualization, but left the door open to the application of the criminal standard in a limited range of civil cases, noting that "[t]here are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof".[51]

This contextualization of the standard of proof is also apparent in the decisions of international administrative tribunals. For example, 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".[52] That said, "evidence of personal prejudice is often concealed and may rest on inferences drawn from all the circumstances".[53] Therefore, it will be easier in those cases to prove a

48 *McDougall* (n 45) 44.

49 *Neat Holdings Pty Ltd* v. *Karajan Holdings Pty Ltd* (16 December 1992) High Court of Australia, [1992] HCA 66, (1992) 110 ALR 449, pp. 449–50; *see also Briginshaw* v. *Briginshaw* (30 June 1938) High Court of Australia, [1938] HCA 34, (1938) 60 C.L.R. 336, pp. 361–362.

50 *In Re H and Others* (*Minors*) (14 December 1995) UK House of Lords, [1996] AC 563, p 586.

51 *In Re B* (*Children*) (11 June 2008) UK House of Lords, [2008] UKHL 35, para 69.

52 *Rwegellera* v. *WHO* (*No. 2*) (9 July 1998) ILOAT, Judgment No. 1775, para 7, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1775&p_language_code=EN>; *cited in S.* v. *ICGEB* (24 January 2018) ILOAT, Judgment No. 3912, para 13 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3912&p_language_code=EN>.

53 *K.* v. *WHO* (8 February 2017) ILOAT, Judgment No. 3753, para 13 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3753&p_language_code=EN>.

claim based on inferences, while inferences may be insufficient to prove, for instance, the existence of a contract of employment or of a promise.

In the end, the application of the contextualized standard of proof may well be a matter of experience and judgment, without any fixed rule to indicate what will be sufficient in any given case. However, the general rule acts as a guide which requires tribunals to be convinced that a fact is more likely than not to be true.

3 Application to Specific Situations in Which Tribunals Have Departed from the General Rules

In some circumstances, tribunals have departed from these general rules. We turn now to some of those situations, highlighting in particular the similarities and differences across organizations, and with the situation prevailing in selected domestic legal systems. Those specific situations in which some tribunals have departed from general rules include terminations for misconduct (3.1), retaliation (3.2), improper motivation of decisions by an organization (3.3), harassment (3.4), performance reviews and promotions (3.5), and service-incurred illnesses (3.6).

3.1 *Termination for misconduct*

The first and perhaps most striking example of an exception to the general standard of proof is in cases of dismissal for disciplinary reasons (also referred to as termination for misconduct).

In such cases, it will often be impossible for a complainant to adduce evidence disproving the disciplinary charges brought against him or her. For that reason, the ILOAT has generally concluded that the burden shifts on the organization as soon as the complainant claims that he or she did not commit the alleged misconduct. In essence, an organization cannot "reverse the burden of proof by expecting the complainant to show that his conduct was 'spotless'".[54] This imposition of the burden of proof on the organization is similar to the above-mentioned reversal of the burden of proof in cases of termination in Canadian law, and it was reiterated on many occasions by the ILOAT.

For instance, in a case where the complainant was alleged to have contacted journalists in breach of her duty of loyalty, the ILOAT concluded that the simple denial by the complainant was sufficient to shift the burden of proof:

54 *Wadie* v. *WHO* (1 February 1995) ILOAT, Judgment No. 1384, para 11 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1384&p_language_code=EN>.

> 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. The Tribunal will not require absolute proof, which is almost impossible to provide on such a matter. It will dismiss the complaint if there is a set of precise and concurring presumptions.[55]

Later on, the ILOAT clarified the rule, noting that "[b]y declining to admit [disciplinary] charges, as she was entitled to do, the complainant required the Organization to prove its case".[56] The ILOAT also commented on the required standard of proof, adding that "although the proceedings are not criminal 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 beyond reasonable doubt".[57]

More recently, the ILOAT reiterated that higher standard, noting again that "when misconduct is denied, it is for the [organization] to prove it *and to prove it beyond reasonable doubt*".[58] In addition, "staff members are to be given the benefit of the doubt".[59] For instance, in a case where the organization was pleading a "precise and concurring presumption", the ILOAT refused

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55 *Pollicino* v. *FAO* (5 December 1984) ILOAT, Judgment No. 635, para 7 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=635&p_language_code=EN>; *see also Khelifati* (n 36).

56 *Navarro* v. *WHO* (27 June 1989) ILOAT, Judgment No. 969, para 16 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=969&p_language_code=EN>.

57 *Ibid*.

58 *D.* v. *WHO* (4 February 2009) ILOAT, Judgment No. 2786, paras 9, 16 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2786&p_language_code=EN> (emphasis added); *see also S.* (*No. 2*) v. *ICC* (7 December 2020) ILOAT, Judgment No. 4362, paras 7–8, <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=fr&p_judgment_no=4362&p_language_code=EN>; *A.-O.* v. *IAEA* (6 July 2016) ILOAT, Judgment No. 3649, para 14 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3649&p_language_code=EN>; *N.L.* v. *ICC* (28 June 2017) ILOAT, Judgment No. 3862, para 20 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3862&p_language_code=EN>; *S.* v. *ICC* (28 February 2017) ILOAT, Judgment No. 3863, para 8 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3863&p_language_code=EN>; *L.* v. *EPO* (24 January 2018) ILOAT, Judgment No. 3969, para 10 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3969&p_language_code=EN>.

59 *D.* v. *WHO* (n 58) 9; *see also U.* v. *FAO* (8 July 2009) ILOAT, Judgment No. 2849, para 16 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2849&p_language_code=EN>; *M.-S.* v. *WHO* (8 July 2010) ILOAT, Judgment No. 2913, para 9 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2913&p_language_code=EN>; *R.* v. *UNIDO* (8 February 2017)

to uphold the termination for misconduct because the presumption did not amount to proof beyond a reasonable doubt.[60] However, the ILOAT also noted that in some circumstances, presumptions may be sufficient to establish proof beyond a reasonable doubt.[61]

Despite this line of jurisprudence, the EPO recently challenged the application of that higher standard in a case where it had dismissed an employee for misconduct. The ILOAT reiterated that "[o]verall, the case law of the Tribunal is clear and consistent".[62] The EPO also argued that that standard could not be applied because "the same formulation is used in the English common law to establish the standard of proof in criminal proceedings".[63] The ILOAT noted that this consideration was "legally irrelevant, for the purposes of the Tribunal's judicial determination of the complaint",[64] but did not go further to explain the rationale underlying its own standard.

The WBAT, without applying the same standard of proof, still applies a heightened standard in disciplinary cases leading to dismissal. Its decision in *Arefeen* is often cited as the landmark decision on that point:

> 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.[65]

ILOAT, Judgment No. 3725, para 15 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3725&p_language_code=EN>.

60 *C.* v. *WIPO* (3 February 2010) ILOAT, Judgment No. 2879, para 11 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2879&p_language_code=EN>.

61 *F.* v. *CERN* (28 June 2017) ILOAT, Judgment No. 3875, para 8 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3875&p_language_code=EN>.

62 *H.* (*No. 24*) v. *EPO* (26 June 2018) ILOAT, Judgment No. 4047, para 6 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=4047&p_language_code=EN>.

63 *Ibid.*

64 *Ibid.*

65 *Arefeen* v. *IBRD* (26 April 2001) WBAT, Judgment No. 244, para 42 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Arefeen%20v.%20IBRD.PDF> (emphasis added); *see also P.* v. *IBRD* (24 May 2007) WBAT, Judgment No. 366, para 33 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/P%20v.%20IBRD.PDF>; *M.* v. *IBRD* (14 December 2007) WBAT, Judgment No. 369, para 61 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/M%20v.%20IBRD.PDF>; *R.* (*No. 2*) v. *IBRD* (1 July 2009) WBAT, Judgment No. 396, para 15 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/R%20%28No.2%29%20v.%20IBRD.pdf>. *See however Dambita* v. *IBRD* (26 April 2001) WBAT, Judgment No. 243, para 21 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Dambita%20v.%20IBRD.PDF>, in which the WBAT simply concluded that the standard

The UNAT, like the WBAT, has expressly rejected the standard of "beyond reasonable doubt" for misconduct.[66] Instead, "when 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".[67]

The UNAT has explained that the "clear and convincing" standard "means that based on the evidence presented by a party to the Dispute Tribunal during the trial, it must be highly and substantially probable that the factual contentions are true".[68] This seems to be quite similar to the standard applied by the WBAT, but lower than the standard applied by the ILOAT.

In the case of the African Development Bank, the Administrative Tribunal ("AfDBAT") has emphasized that "in disciplinary matters, the onus of proof lies with the prosecuting authority", and "the administration is only required to establish the facts with reliable, corroborating and convincing proof, to support accusations levied against a staff member".[69] However, where the Bank has established a *prima facie* case that the employee committed misconduct justifying dismissal, the burden shifts to the employee to rebut the evidence against him or her.[70] This standard is inspired by the standard applied by the UNAT and is lower than the "beyond reasonable doubt" standard applied by

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"must be higher than a mere balance of probabilities", without indicating more precisely the applicable standard. *Dambita* and *Arefeen* have been cited indistinctly since.

66 *Molari* v. *Secretary-General of the United Nations* (21 October 2011) UNAT, Judgment No. 2011-UNAT-164, paras 29–30 <http://www.un.org/en/internaljustice/files/unat/judgments/2011-unat-164.pdf>, *cited recently in Mobanga* v. *Secretary-General of the United Nations* (28 October 2016) UNAT, Judgment No. 2017-UNAT-741, para 24 <http://www.un.org/en/internaljustice/files/unat/judgments/2017-UNAT-741.pdf>.

67 *Applicant* v. *Secretary-General of the United Nations* (28 March 2013) UNAT, Judgment No. 2013-UNAT-302, para 29 (internal citations omitted), *cited recently in Majut* (29 June 2018) UNAT, Judgment No. 2018-UNAT-862, para 48 <http://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-862.pdf>.

68 *Diabagate* v. *Secretary-General of the United Nations* (2 April 2014) UNAT, Judgment No. 2014-UNAT-403, para 30 <http://www.un.org/en/internaljustice/files/unat/judgments/2014-UNAT-403.pdf>, *cited recently in Mobanga* (n 66) 24.

69 *M.* v. *AfDB* (n 10) 29–30.

70 *N.O.* v. *AfDB* (8 August 2008) AfDBAT, Judgment No. 62, Application No. 2007/04, <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Application%202007-04%20-%20Judgment%20of%2008%20August%202008.pdf>, *cited in E.O.* v. *AfDB* (30 November 2016) AfDBAT, Judgment No. 96, Application No. 2015/05, para 78 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/96_Application_2015-05_-_Judgment_of_30_November_2016.pdf>.

the ILOAT, which the AfDBAT has expressly rejected.[71] While the standard has been described as being simply the "balance of probabilities", the AfDBAT still requires, when "serious misconduct is alleged, [that] the proof [...] be cogent to satisfy the Tribunal that such serious misconduct has been committed".[72]

Lastly, the Asian Development Bank has resolved the question of the standard of proof applying to misconduct by expressly setting out that standard in A.O. 2.04 para. 9, and in Appendix 1 of A.O. 2.04 as "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". As a result, the Administrative Tribunal of the Asian Development Bank has refused to apply a higher standard than the usual civil standard, unlike other administrative tribunals.[73]

In short, it will generally be up to the organization to prove misconduct, although a *prima facie* case is sufficient at the AfDB 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" at the WBAT and the UNAT, to "reliable, corroborating and convincing" at the AfDBAT, to a simple "balance of probabilities" at the AsDBAT.

This diverging framework may be confusing for international civil servants,[74] who should be able to rely on a relatively stable and consistent body of rules and general principles, especially in a world in which mobility between

71 *C.* v. *AfDB* (17 October 2012) AfDBAT, Judgment No. 80, Application No. 2011/03, para 41 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Application%202011-03%20-%20Judgment%20of%2017%20October%202012.pdf>.

72 *X-D-P* v. *AfDB* (17 October 2012) AfDBAT, Judgment No. 81, para 88 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Application%202011-04%20-%20Judgment%20of%2017%20October%202012.pdf>; *see also B.O.* v. *AfDB* (30 November 2016) AfDBAT, Judgment No. 95, para 87 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/95_Application_2015-04_-_Judgment_of_30_November_2016-1.pdf>; *E.O.* v. *AfDB* (n 70) 79.

73 See *Hua Du* v. *AsDB* (31 January 2013) AsDBAT, Judgment No. 101, para 39 <https://www.adb.org/sites/default/files/microcontent/adbt0101.pdf>; *Hua Du* (*No.* 2) v. *AsDB* (31 July 2013) AsDB, Judgment No. 102, para 10 <https://www.adb.org/sites/default/files/microcontent/adbt0102.pdf>; a more complete description is found in *Nagarajah Gnanathurai* v. *AsDB* (17 August 2007) AsDBAT, Judgment No. 79, para 33 <https://www.adb.org/sites/default/files/microcontent/adbt0079.pdf>.

74 On the confusion arising, for instance, from the application of the "clear and convincing" standard at the UN, see Kinchin, (n 3) 112, 130, noting, *inter alia*, that internal investigations align with the standard applied by tribunals and that the uncertainty around the notion of "clear and convincing" poses problems in that context, it being considered by some as "an unrealistic standard [...] which creates 'an accountability vacuum'".

organizations is frequent. There may be good reason to minimize the differences across organizations, as some tribunals have sought to do over the years. Authors have noted that the lack of harmonization between tribunals can pose serious difficulties and create inequities.[75] In 2004, the International Law Association also noted that consistency and coherence between the case law of various organizations on similar points was desirable, suggesting that this "need for consistency and coherence" was "widely recognized".[76] A more recent study has noted that convergence is sensible given that various organizations face similar problems, even if they should retain some flexibility to apply the solutions that best fit their own reality in cases that warrant it.[77] In short, coherence across organizations is desirable where possible, especially for rules and principles that are developed by tribunals.

A look at domestic jurisdictions can provide some inspiration. In similar cases, most common law jurisdictions apply the usual civil standard, and not a heightened one. In Canada, for instance, labour arbitrators used to apply a criminal standard requiring proof beyond a reasonable doubt of the employee's misconduct in order to justify his or her termination, in a manner similar to the ILOAT. However, in recent years, arbitrators have reverted to the general rules governing the standard of proof in Canada, which require proof on the balance of probabilities.[78] Similarly, in the United Kingdom, courts have concluded that even in cases where "the effect of a dismissal would have very serious consequences" for a claimant, and where "evidence of misconduct must be clear and cogent […] [t]hat is not to say that the burden of proof becomes more than a balance of probability".[79] Australian courts have taken a similar approach, noting in cases of summary dismissals based on misconduct that "the onus rests on the employer to prove […] that the misconduct, has in fact, occurred" and that "this evidentiary onus must be discharged on the civil onus of proof (on the balance of probabilities)" although "the more serious the

75 Manfred Lachs, 'The Judiciary and the International Civil Service', in *Law of Nations, Law of International Organizations, World's Economic Law, Liber Amirocorum honouring Ignaz Seidl-Hohenveldern* (1988) 313.

76 International Law Association, 'Accountability of International Organisations: Final Report' (2004) 1 *International Organizations Law Review* 286.

77 Joan S Powers, 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?' (2018) *AIIB Yearbook of International Law* 78.

78 Morley R Gorsky et al, *Evidence and Procedure in Canadian Labour Arbitration* (Thompson Reuters, Toronto, 2019) 9–35.

79 *Suffolk Mental Health Partnership NHS Trust* v. *Crawford*, [2011] WL 664634, UKEAT/0338/10/DA, para 10, overturned in part on other grounds *Crawford* v. *Suffolk Mental Health Partnership NHS Trust* (17 February 2012) England and Wales Court of Appeal, [2012] EWCA Civ 138, [2012] I.R.L.R. 402.

allegation, the higher the burden on the employer to prove the allegation".[80] In short, instead of changing the standard of proof in such cases, domestic tribunals maintain the usual standard while taking into account the specificities of each case in their appreciation of the evidence.

While, as the ILOAT recently noted in response to the EPO's arguments, the law of domestic legal systems is not directly relevant to the views of international administrative tribunals on this topic, the reasoning behind the standard applied in the jurisdictions discussed previously appears more convincing than the one proposed by the ILOAT, WBAT and AfDBAT for the imposition of a heightened standard. Essentially, the argument raised by these tribunals is that the seriousness of the allegations and of the consequences on an employee of a dismissal based on disciplinary reasons justifies imposing a higher standard on the organization. But that same consideration was at play when the Canadian Supreme Court and the Australian High Court rejected a higher standard in similar circumstances and reiterated the existence of only one standard in all civil cases. The three main reasons given by the Supreme Court of Canada for a unique civil standard are applicable *mutatis mutandis* to international administrative tribunals and, in our opinion, would logically lead to the same conclusion and the imposition of a unified standard even in cases of termination for misconduct.

First, the application of a higher standard—especially a standard akin to the criminal standard—is usually justified by the existence of a presumption of innocence, itself justified by the deprivation of liberty that may result from a conviction. But even in civil cases with serious consequences, there is no similar implication of the "government's power to penalize or take away the liberty of the individual", and therefore no need for a higher standard.[81] Second, the application of a higher standard leads to practical problems. As some Canadian authors put it, a higher standard leads one to inquire: "what percentage of probability must be met? This is unhelpful because while the concept of '51 percent probability,' or 'more likely than not' can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot".[82] Third, a troubling logical conclusion flows from the imposition of a higher standard in some cases. As the Supreme Court of Canada described it: "To suggest that depending upon the seriousness, the evidence in the civil case

80 *Thomas* v. *Virgin Australia Airlines Pty Ltd* (4 July 2019) Fair Work Commission, [2019] FWC 4464, para 101.

81 *McDougall* (n 45) 42.

82 Linda R Rothstein, Robert A Centa & Eric Adams, 'Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof', in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (Irwin Law, Toronto, 2004) 466–67.

must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care".[83] This is inappropriate in light of the procedural safeguards afforded to all litigants, including their right to have evidence scrutinized carefully by the tribunal.

In short, it seems to us that a more coherent and rational position for international administrative tribunals would be to revert back to the usual civil standard of the balance of probabilities, even in cases of termination for misconduct, while taking into account the seriousness of the allegations and consequences for employees in assessing the evidence presented. Not only would this align international administrative tribunals with a widely shared position amongst common law domestic tribunals, it would also limit the potential confusion for civil servants across organizations. At the very least, tribunals should provide a clear and persuasive rationale for why the particular situation of their organization and in the case at hand warrants a departure from the usual civil standard. As we will see below, the same conclusion applies with respect to other areas of international administrative law where a higher standard is applied.

3.2 *Retaliation*

Retaliation is forbidden in most international organizations. It is generally defined as a consequence imposed on an employee as a result of whistleblowing. The burden and standard of proof usually remain the same in such cases, but some administrative tribunals recognize that it may be harder for a complainant to establish the retaliatory nature of a consequence. The ILOAT, for instance, has determined in a case where a complainant was challenging the withdrawal of an offer of employment, that "[i]t 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".[84]

The UNAT does not seem to have altered the standard or the burden of proof in respect of retaliation. It has expressed that in any given case it 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".[85] Similarly, the AsDBAT

83 *McDougall* (n 45) 45.

84 *B.* v. *Global Fund* (8 February 2017) ILOAT, Judgment No. 3748, para 6 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3748&p_language_code=EN> (internal references omitted).

85 *He* v. *Secretary-General of the United Nations* (28 October 2016) UNAT, Judgment No. 2016-UNAT-686, para 41 (emphasis added), <http://www.un.org/en/internaljustice/files/unat/judgments/2016-UNAT-686.pdf>.

applies the standard set forth in the Bank's official documents, which explicitly provide that retaliation is governed by Appendix 2 of AO 2.04, which in turn provides that "the standard of proof for the investigation is a preponderance of evidence".[86] Therefore, the usual standard of proof applies.

At the World Bank, "the burden lies with the Applicant to establish facts which would bring his claim within the Staff Rules' definition of retaliation",[87] even if "it is not always easy for an applicant to produce evidence to support a claim of retaliation".[88] This rule is based on one hand on the fact that "staff members are entitled to protection against reprisal and retaliation", but on the other hand on the fact that "managers must nevertheless have the authority to manage their staff and to take decisions that the affected staff member may find unpalatable".[89] Indeed, "[a]n allegation of retaliation is an allegation of very serious impropriety on the part of the alleged perpetrator and the Tribunal should not lightly find retaliation when a manager has made a difficult decision in relation to a staff member, simply because some time before, that staff member had had a troubled relationship with another manager."[90] Therefore, the WBAT appears to be more stringent in its application of the standard of proof than the ILOAT may be, for example.

It must be noted that national law concerning the protection of whistleblowers should not be presumed to apply in international administrative law. In the United States, retaliation against whistleblowers is severely punished, and it operates a reversal of the burden of proof. Indeed, when a whistleblower suffers adverse consequences contemporaneously with the whistleblowing, it will generally be to the person accused of wrongdoing to show that the consequences were not a result of the whistleblowing. For instance, in *Smith*, a US

86 *E.* v. *AsDB* (12 February 2014) AsDBAT, Judgment No. 103, para 53 <https://www.adb.org/sites/default/files/microcontent/adbt0103.pdf>.

87 *F* v. *IBRD* (18 June 2004) WBAT, Judgment No. 313, para 50 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/F%20v.%20IBRD.PDF>; *see also Prudencio* v. *IBRD* (14 December 2007) WBAT, Judgment No. 377, para 81 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Prudencio%20v.%20IBRD.pdf>; *AI* v. *IBRD* (23 March 2010) WBAT, Judgment No. 402, para 80 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/AI%20v.%20IBRD.pdf>.

88 *O.* v. *IBRD* (4 November 2005) WBAT, Judgment No. 337, para 49 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/judgments-orders/O%20v.%20IBRD337%20-%20Copy.PDF>, *citing Harou* v. *IBRD* (30 September 2002) WBAT, Judgment No. 273, para 68 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Harou%20v.%20IBRD.PDF>.

89 *O.* v. *IBRD* (n 88) 49.

90 *Ibid.*

court confirmed that in ERA whistleblower cases, the employee must establish prima facie that he or she engaged in a protected activity, that the employer knew it, that the employee suffered an adverse action, and that the circumstances raised the inference that the protected activity was a contributing factor in the adverse action.[91] It is then to the employer "to establish by *clear and convincing* evidence that the employer would have taken the same unfavorable personnel action in the absence of [the complainant's protected] behavior".[92]

In one WBAT case, the complainant relied on these provisions of US law to support his claim. He was claiming damages for an allegedly wrongful investigation, of which one of the grounds was a claim by a staff member that there had been retaliation against him because of whistleblowing. The Bank's Department of Institutional Integrity had initially concluded that US law on the topic did apply, but changed its mind in a further revision of its report. The WBAT approved the correction and concluded that US law did not apply.[93] This position seems correct, until international organizations decide to adopt similar evidentiary provisions to better protect their employees from retaliation.

In summary, the usual rules on the burden of proof and standard of proof seem to apply to cases of retaliation, despite the fact that more stringent provisions prevail in some jurisdictions. However, administrative tribunals will generally be aware of the difficulties in proving the retaliatory nature of a measure, and may take this into account when applying the general rules. This is a good example of the contextualization of the usual standard of proof described in the previous sections.

3.3 *Improper motivation*

In some cases, the complainant alleges that a decision was taken with an improper motivation (also referred to as an "improper motive" or "ulterior motive"). In those cases, the WBAT has concluded that "clear evidence" is needed, which appears to impose a higher standard than the usual civil standard.

In *Lysy*, for instance, the complainant claimed among other things that the criticisms found in her performance evaluation were based on improper motives. The WBAT indicated that "[a] finding of improper motivation cannot

91 *Smith* v. *Department of Labor*, 2017, US 4th Circuit, 674 Fed Appx 309, p 314.

92 *Ibid.* (emphasis added); for a discussion of the meaning of "clear and convincing evidence", *see Miller* v. *Department of Justice* (2 December 2016) US Federal Circuit, 842 F (3d) 1252, pp 1257–58.

93 *BC* v. *IFC* (23 March 2010) WBAT, Judgment No. 427, paras 42–44 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/BC%20v.%20IFC.pdf >.

be made without clear evidence".[94] The same criterion was applied in a case where the complainant alleged that the decision not to extend her contract was discriminatory and improperly motivated.[95] It has also been applied to a claim for reimbursement of a leave based on the alleged lack of good faith of a manager.[96] It has been applied as well in a case where the complainant was alleging that the decision not to select her for a given position was based on improper motives.[97]

While the ILOAT has recognized improper motivation as a ground for reviewing discretionary decisions, it has not specified the standard of proof that applies in such circumstances.[98] It has acknowledged that such claims often involve questions of personal prejudice, which "will rarely be susceptible of direct proof and must usually be established by inference", but it has also emphasized that "the Tribunal should not be overzealous to infer bad faith or improper motive simply because the individuals concerned do not enjoy good personal relations".[99] Overall, the civil standard appears unchanged when these cases come before the ILOAT.

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94 *Lysy* v. *IBRD* (14 May 1999) WBAT, Judgment No. 211, para 71 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Lysy%20v.%20IBRD.PDF>; see also *Riddell* v. *IBRD* (4 December 2001) WBAT, Judgment No. 255, para 42 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Riddell%20v.%20IBRD.PDF>; *BJ* v. *IFC* (29 October 2010) WBAT, Judgment No. 443, para 50 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/BJ%20v.%20IFC.pdf>.

95 *B.* v. *IBRD* (23 July 2001) WBAT, Judgment No. 247, para 15 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/B%20v.%20IBRD.PDF>; see also *Moss* v. *IBRD* (12 November 2004) WBAT, Judgment No. 328, para 51 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Moss%20v.%20IBRD.PDF>, where the complainant was claiming that the decision not to offer her a permanent position had been improperly motivated.

96 *Peprah* (*No. 2*) v. *IFC* (18 June 2004) WBAT, Judgment No. 310, para 31 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Peprah%20%28No.%202%29%20v.%20IFC.PDF>; see also *AF* v. *IBRD* (25 March 2009) WBAT, Judgment No. 393, para 37 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/AF%20v.%20IBRD.pdf>, also in the case of a leave.

97 *Hitch* v. *IBRD* (4 November 2005) WBAT, Judgment No. 344, para 59 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Hitch%20v.%20IBRD.PDF>.

98 See for example *Steele* v. *ILO* (6 June 1977) ILOAT, Judgment No. 310, para 2 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=310&p_language_code=EN>.

99 *Stjernswärd* v. *WHO* (29 January 1998) ILOAT, Judgment No. 1732, para 9 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1732&p_language_code=EN>.

Similarly, the UNAT has not changed the standard of proof that applies to improper motivation, but it has reiterated on many occasions that the burden of proof lies with the applicant to prove such motives, and not on the organization to disprove their existence.[100] That said, if the organization refuses to disclose the reasons for a contested decision, then the burden may shift on the administration "to show that the decision was neither arbitrary nor tainted by improper motives".[101]

Lastly, the AsDBAT has applied similar principles, noting that "[m]ere belief by the Applicant that the Respondent acted in improper motive does not produce a sufficient proof for the dismissal decision to be considered as arbitrary or abuse of power".[102] This is consistent with the standard of the balance of probabilities, under which mere beliefs are also insufficient.

In our view, and for the reasons described previously,[103] cases of improper motives do not justify applying a higher standard of proof than in other matters, as the WBAT does. Instead, a contextualized application of the usual standard seems more appropriate for conceptual and practical reasons, as other tribunals have concluded.

3.4 *Harassment*

In cases of harassment, the standard and burden of proof generally remain the same, although due to the seriousness of these claims, some tribunals emphasize the burden of the complainant to adduce sufficient proof. Again, that position is consistent with a contextualized application of the usual civil standard of proof.

For instance, the ILOAT has consistently held that "an allegation of harassment must be borne out by specific facts, the burden of proof being on the party pleading the harassment".[104] Later on, the ILOAT added that "it is for the person making the allegation to establish that the acts or decisions in question

100 See for example,. *Andreyev* v. *Secretary-General of the United Nations* (26 February 2015) UNAT, Judgment No. 2015-UNAT-501, para 33 <https://www.un.org/en/internaljustice/files/unat/judgments/2015-UNAT-501.pdf>, referring to: *Obdeijn* v. *Secretary-General of the United Nations* (16 March 2012) UNAT, Judgment No. 2012-UNAT-201 <https://www.un.org/en/internaljustice/files/unat/judgments/2012-unat-201.pdf>; *Jennings* v. *Secretary-General of the United Nations* (21 October 2011) UNAT, Judgment No. 2011-UNAT-184 <https://www.un.org/en/internaljustice/files/unat/judgments/2011-unat-184e.pdf>.

101 *Obdeijn* (n 100).

102 *Azimi* v. *AsDB* (23 January 2009) AsDBAT, Judgment No. 88, para 31 <https://www.adb.org/sites/default/files/microcontent/adbt0088.pdf>.

103 *Supra* section 3.1, pp 23ff.

104 *Annabi (No. 2)* v. *ILO* (12 July 2001) ILOAT, Judgment No. 2067, para 5 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2067&p_language_code=EN>;

were accompanied by some purpose or attitude which allows them to be so characterised".[105] Similarly, the WBAT has confirmed on several occasions that the burden of proof rests on the complainant in cases of alleged hostile workplace. More specifically, "[i]t is the Applicant's responsibility to provide specific and sufficient evidence to support her case".[106] Nothing in these statements departs from the usual standard of the balance of probabilities.

In addition, these positions reflect the law in domestic jurisdictions such as the United States and the United Kingdom. In a case of harassment, a US court emphasized the difference between "unsubstantiated allegations" or "mere perceptions" and "evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur".[107] Without changing the applicable standard of proof, the tribunal seemed to be concerned with the seriousness of harassment allegations, thus requiring "probative and reliable evidence" in support of an employee's allegations of harassment.[108] In the United Kingdom, similarly, a court noted that in harassment cases the "standard of proof remains the civil standard, i.e. on the balance of probabilities" but "the more serious the allegations the more cogent is the evidence required".[109] In other words, while the seriousness of harassment allegations does not formally alter the applicable standard of proof, it does affect the way in which the usual standard is applied.

However, the situation is much different in cases of sexual harassment, especially those leading to termination of employment. The WBAT has applied a heightened standard in cases of sexual harassment, when the claim amounts to misconduct entailing possible termination. In *M.* v. *IBRD*, the WBAT noted that "[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

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Gustavi (*No. 2*) v. *ILO* (30 January 2002) ILOAT Judgment No. 2100, para 13 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2100&p_language_code=EN>; *S.-M.* v. *UNESCO* (4 July 2013) ILOAT, Judgment No. 3233, para 6 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3233&p_language_code=EN>; *L.* v. *WIPO* (9 July 2014) ILOAT, Judgment No. 3347, para 8 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3347&p_language_code=EN>.

105 *C.* v. *FAO* (1 February 2006) ILOAT, Judgment No. 2521, para 12 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2521&p_language_code=EN>.

106 *AL* v. *IBRD* (9 December 2009) WBAT, Judgment No. 409, para 51 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/AL%20v.%20IBRD.pdf>.

107 *K.A.* v. *US Postal Service* (Honolulu Post Office) 2015 WL 6074198 (E.C.A.B.), p 5.

108 *Ibid.*

109 *A* v. *C*, [2003] WL 1610385, EAT/0357/02/SM; *see also In re H* (*minors*) (n 50) 586.

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".[110] In *P.*, another case of sexual harassment, the WBAT similarly referred to the standard of proof applicable in disciplinary cases, established in *Arefeen*, which requires "substantial evidence to support the findings of facts which amount to misconduct".[111] The UNAT also applies the "clear and convincing" standard in cases of sexual harassment. In a recent case in which the UNDT had concluded that "the fact of sexual harassment had been established only on a balance of probabilities", 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".[112] It is the organization's burden to show misconduct based on that standard.[113]

Lastly, the AsDBAT applies the standard set forth in the Bank's official documents, which expressly 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".[114] Therefore, no higher standard is applied by the AsDBAT in harassment cases.

In short, it seems that no higher standard of proof applies in cases of harassment, except where it amounts to misconduct and entails termination. In such a case, the principles discussed previously will apply and the standard of proof will generally be higher. However, for the reasons described in the section on termination for misconduct, it appears to us preferable to continue applying the same standard of the balance of probabilities in all cases, subject to its contextualization based on the circumstances.

3.5 *Performance reviews and promotions*

In general, appointments and promotion by international organizations are a matter of judgment and discretion. This is why the standard of proof required to challenge a promotion or appointment is generally higher than the usual balance of probabilities.

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110 *M.* v. *IBRD* (n 65) 60.

111 *P.* v. *IBRD* (n 65) 33, *citing Arefeen* (n 65) 42.

112 *Mbaigolmen* v. *Secretary-General of the United Nations* (22 March 2018) UNAT, Judgment No. 2018-UNAT-819, para 32 <https://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-819.pdf>.

113 See for example, *Aghadiuno* v. *Secretary-General of the United Nations* (22 March 2018) UNAT, Judgment No. 2018-UNAT-811, para 101 <https://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-811.pdf>.

114 *See E.* v. *AsDB* (n 86) para 53; *see also G.* (*No. 2*) v. *AsDB* (19 August 2016) AsDBAT, Judgment No. 107, para 66 <https://www.adb.org/sites/default/files/microcontent/adbt0107.pdf>.

In *Ochani*, the complainant challenged the decision to appoint another person, and not him, to a higher position. The ILOAT noted that "[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".[115] As a result, the tribunal adapted the required standard of proof, noting that "[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".[116]

Similarly, the UNAT applies a higher standard to questions of promotion, noting that "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".[117]

As for the WBAT, it has concluded to the contrary that the burden of proof can shift to the organization in some circumstances where a claimant challenges a discretionary decision, including in selection, appointment and promotion processes. However, the complainant must first show detailed allegations and factual support, but on the usual standard of proof.

In *Bertrand*, for instance, the complainant challenged the outcome of a selection process following a reorganization, after which he was not appointed to a managerial position. The WBAT concluded that "the detailed allegations and factual support presented by the Applicant in his pleas" justified that the case "be treated as one in which the burden of proof moved to the Respondent to show that Bank management acted fairly to the Applicant, rather than resting upon the Applicant the burden to show that the Bank acted unfairly".[118]

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115 *Ochani* v. *WHO* (28 January 1999) ILOAT, Judgment No. 1827, para 6 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=1827&p_language_code=EN>.

116 *Ibid* (emphasis added).

117 *Rolland* v. *Secretary-General of the United Nations* (11 March 2011) UNAT, Judgment No. 2011-UNAT-122, para 21 <https://www.un.org/en/internaljustice/files/unat/judgments/2011-unat-122.pdf>, *cited recently in Verma* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* (22 March 2018) UNAT, Judgment No. 2018-UNAT-829, para 14 (emphasis added) <https://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-829.pdf>. See also *Niedermayr* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* (30 October 2015) UNAT, Judgment No. 2015-UNAT-603, para 23 <http://www.un.org/en/internaljustice/files/unat/judgments/2015-UNAT-603.pdf>; *Staedtler* v. *Secretary-General of the United Nations* (2 July 2015) UNAT, Judgment No. 2015-UNAT-547, para 27 <http://www.un.org/en/internaljustice/files/unat/judgments/2015-UNAT-547.pdf>.

118 *Bertrand* v. *IBRD* (22 September 1989) WBAT, Judgment No. 81, para 20 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Bertrand%20v.%20IBRD.PDF>.

Generalizing the rule, the WBAT explained that this reversal was appropriate "[i]n the typical case in which the Applicant points to specific reasons for casting serious doubt upon the fairness of the Bank's selection process".[119]

In *De Raet*, another case concerning the Bank's 1987 reorganization, the complainant was sent a redundancy notice and received no offer of employment following the reorganization. The WBAT reiterated the *Bertrand* principle, noting that:

> . . . it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power – not, that is, until an Applicant has made out a prima facie case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.[120]

In *Nunberg*, the complainant challenged the Bank's decision to give her a 5 per cent salary increase when she had requested a 18.6 per cent increase based on alleged gender discrimination. Based on a report on gender discrimination within the Bank, as well as the concessions made by the Bank in the decision to increase her salary by 5 per cent, the WBAT drew an inference and concluded that the burden then fell "on the Bank to show that its decision to grant an increase of 5 per cent was a fair and reasonable response to the salary inequity affecting the Applicant, and that it was in accordance with the principles of fairness and impartiality".[121]

Conversely, in *BI* v. *IBRD*, the complainant challenged ratings in her overall performance evaluations, and the corresponding salary reviews. The WBAT reiterated its statement in *De Raet* and concluded, based on the facts of the case, that the Applicant had "not submitted evidence, beyond her own assertions, that the assessment of her performance [...] w[as] retaliatory or discriminatory", and thus had "not discharged her burden of proof".[122]

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119 *Ibid*.

120 *De Raet* v. *IBRD* (22 September 1989) WBAT, Judgment No. 85, para 57 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/de%20Raet%20v.%20IBRD.PDF>.

121 *Nunberg* v. *IBRD* (23 July 2001) WBAT, Judgment No. 245, para 46 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Nunberg%20v.%20IBRD.PDF>, *referring to Bertrand* (n 118) 20.

122 *BI* v. *IBRD* (29 October 2010) WBAT, Judgment No. 439, para 47 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/BI%20v.%20IBRD.pdf>; *see also BK* v. *IBRD* (29 October 2010) WBAT, Judgment No. 444, paras

Lastly, the AsDBAT applies a similar rule concerning the burden of proof in cases of performance evaluation and promotion, noting that "[t]he 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".[123]

In summary, the burden remains on the complainant to adduce sufficient evidence of an alleged abuse of authority in the context of a promotion or appointment. Some tribunals, including the ILOAT and UNAT, have imposed a higher standard of proof in these cases, but again, it seems to us that a preferable solution would be to impose the same civil standard in these cases while contextualizing it based on the circumstances of the particular case.

3.6 *Service-incurred illness*

In cases concerning sick leave or service-incurred illnesses, the burden of proof remains on the complainant. The ILOAT, for instance, has concluded that in those cases "the burden is on [the complainant] to prove service-incurred illness".[124] In a case where the complainant alleged that he had been unable to properly interact during an examination due to language issues, the ILOAT concluded that "[t]he burden of proof [was] on the complainant to satisfy the Tribunal that the findings of the medical examination [...] should be set aside because of language difficulties".[125]

That said, the ILOAT has allowed "a presumption in the complainant's favour that [the illness was not present] at the time" of employment.[126] 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".[127] However, it then falls on the complainant "to satisfy the Tribunal, with positive proof, that his impairment was service-incurred".[128]

Interestingly, the Staff Rules of the World Bank (Staff Rule 6.11, paragraphs 2.01 and 3.01) provide that the Claims Administrator will determine whether

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25–26 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/BK%20v.%20IBRD.pdf>.

123 *Azimi* (n 102) 31.

124 *Mischung* (*No. 5*) v. *ESO* (30 June 1988) ILOAT, Judgment No. 889, para 1 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=889&p_language_code=EN>.

125 *Curzi* v. *EPO* (8 December 1988) ILOAT, Judgment No. 932, para 10 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=932&p_language_code=EN>.

126 *Bastari* (n 41) 4.

127 *Ibid.*

128 *Ibid.*

an injury has arisen in the course of employment "in accordance with the provisions of the [District of Columbia Workers' Compensation Act of 1998 ("D.C. Act.")] specified in this Rule". Noting that the staff rules are however silent on issues such as the burden of proof, the WBAT refused to apply the "presumption of compensability" present in the D.C. Act, and concluded instead that "the Claimant bears the burden of proving, by the preponderance of the evidence, that the injury alleged was caused by the accident".[129] The basic principle thus remains unaltered.

In such cases, the WBAT applies an "objective standard", and thus 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".[130]

We note that in some domestic jurisdictions, legislatures have lowered the standard of proof incumbent on claimants in cases of service-incurred injuries or illnesses, especially where a compensation scheme is in place. In many Canadian provinces, for example, a compensation scheme was established to have "compensation to injured workers provided quickly without court proceedings".[131] As a result, the standard applying to the proof of causation between the workplace and the injury is "less stringent" than the usual balance of probabilities.[132] However, absent the adoption of similar schemes by international organizations, there would be no reason for their administrative tribunals to lower the applicable standard in a similar way.

4 Conclusion

The common theme that emerges from this review of the burden and standard of proof applied by international administrative tribunals in specific situations

129 *Hasselback* (n 42) 50; *see also BI* (*No. 2*) v. *IBRD* (n 42) 25.

130 *BI* (*No. 2*) (n 42) 26, *referring to Chhabra* (*No. 2*) v. *IBRD* (15 May 1998) WBAT, Judgment No. 193, para 8 <https://tribunal.worldbank.org/sites/tribunal.worldbank.org/files/Judgments%20and%20Orders/Chhabra%20%28No.%202%29%20v.%20IBRD.PDF>.

131 *Pasiechnyk* v. *Saskatchewan* (*Workers' Compensation Board*) (28 August 1997) Supreme Court of Canada, [1997] 2 S.C.R. 890, para 27, *citing Medwid* v. *Ontario* (*Minister of Labour*) (22 January 1988) Ontario High Court of Justice, (1988) 48 D.L.R. (4th) 272, p 279.

132 *B.C.* (*Workers' Compensation Appeal Tribunal*) v. *Fraser Health Authority* (24 June 2016) Supreme Court of Canada, 2016 SCC 25, paras 31–32.

is that some of them, particularly the ILOAT, WBAT and UNAT, apply a higher standard of proof when the issue at hand involves serious allegations or consequences. This may be the case when termination is justified by the employee's misconduct, when allegations of harassment are made, or when discretionary decisions related to career advancement are challenged.

As we noted above, this patchwork of standards may be confusing for organizations and civil servants alike, especially when servants move from one organization to another, becoming subject to different standards over time. It may also be confusing for civil servants moving from domestic positions to positions in international organizations, given the significant differences between standards applied in the latter context and the standard of proof generally applied in common law jurisdictions, namely the balance of probabilities.

The imposition of a higher standard may seem to be a good safeguard at first, but it should be rejected on the same grounds as it was rejected by many domestic jurisdictions and international administrative tribunals in matters relating to employment. The distinction between the ordinary standard and a higher standard may be conceptually difficult to understand, and may therefore lead to different levels of scrutiny by international administrative judges. In addition, this different and higher level of scrutiny in some cases puts into question the scrutiny of evidence in "normal" cases, in which it must then necessarily be lower, potentially breaching the procedural safeguards afforded to all litigants. And the imposition of a higher standard does not rest on a guiding principle such as the presumption of innocence and privation of liberty, which normatively justify the standard of proof beyond a reasonable doubt in criminal cases. Absent such justifications, the higher standard should be rejected in favour of a contextual application of the balance of probabilities in all cases. There may be reasons specific to an organization that would warrant a departure from the usual standard in some cases, but at the very least, when doing so, tribunals should provide a clear and persuasive rationale.

Given that the regulation of the standard of proof is drawn from general principles of law—except in organizations which have adopted rules on that matter, such as the AsDB—administrative tribunals have the power to change their position and revert back to that single standard of proof. Otherwise, international organizations may need to step in and, as the AsDB did, set out in detail the applicable standard of proof in their statute or regulations.

Biographies

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