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ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK – CURRENT SITUATION AND FUTURE CHALLENGES IN THE CONTEXT OF MACEDONIAN LABOUR LAW

-abstract-

At a global level, the recognition and regulation of violence and harassment at work generally dates back to the 1980s, first with respect to sexual harassment and then gradually concerning harassment in general (based on the existence of a protected ground of discrimination or independent from it). It was not until 2019 that the International Labour Conference adopted the two international labour standards (Convention No. 190 and Recommendation No. 206) aimed at eliminating violence and harassment in the world of work. These international standards, together with the EU legislation in the field of harassment and sexual harassment, become 'benchmarks' for the harmonization and development of the national legal framework for protection against violence and harassment in the workplace in North Macedonia. The national legislation of North Macedonia addresses the issues of harassment and sexual harassment, as well as psychological harassment (commonly named mobbing) as issues covered by several different regulations in the fields of labour, equality and non-discrimination, occupational safety and health and even criminal law. Hence, one of the main goals of this article is to contribute to an improved definition and understanding of the treated concepts in the context of the Macedonian national legislation. The authors of this article also analyze the no less important elements in the system of protection against harassment, such as: determining the definition and scope of application of harassment at work; prevention measures and policies; procedure for protection from harassment; remedies and sanctions for perpetrators.

Key words: violence and harassment; harassment based on sex; sexual harassment; psychological harassment.

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I. INTRODUCTION

Violence and harassment in the workplace is a negative and dangerous phenomenon which can affect all workers, irrespective of their employment status, type of work they perform, sectors in which they work (private or public, urban or rural) and the fact whether they are employed in the formal or informal economy.[1] While the term 'violence' has traditionally referred to certain physical forms of conduct or behaviour (e.g. physical attacks, beating, kicking, slapping, stabbing, shooting, pushing, etc.), over the last few decades, more forms of violence and harassment at work that are mainly non-physical, have become subject to regulation, including psychological forms (e.g. manipulating a person's reputation, isolating a person, slandering and ridiculing, devaluating rights and opinions, setting impossible working goals and deadlines, underutilizing talent, etc, which can also manifest as mobbing and/or bulling) and sexual forms (e.g. all sorts of sexual assaults, blackmails, advances, comments, innuendos, etc.) of violence and harassment at work. [2] Given the wide spectrum of negative and often overlapping behaviours and practices of violence and harassment at work, any attempt to distinguish or treat these terms independently is a complex manipulation. However, despite such a setting, the first international instruments regulating violence and harassment in the world of work in an integral manner (the Violence and Harassment Convention No. 190 and the Recommendation No. 206 of the International Labour Organization), were adopted only in 2019. Convention No. 190 defines the term 'violence and harassment in the world of work' (which essentially encompasses two separate but functionally related terms) in the broadest sense, as a 'range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.'[3] According to Convention No.190, gender-based violence and harassment in the world of work, in turn, is defined as 'violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment'.[4] Although it is evident from the text of the Convention that gender-based violence and harassment is a subcategory of violence and harassment in the world of work, the Convention does not exclude the possibility of qualifying these terms as a single or separate concept, depending on the legal approach in national laws[5]. The adoption of the 2019 Convention and Recommendation is a result of several decades of development of the issue relating to recognizing and regulating violence and harassment in the workplace and in employment at universal, supranational and national levels. At the universal level, the recognition and regulation of violence and harassment at work and employment dates back to the 1980s, at first in the context of sexual harassment.[6] In parallel,

[1] International Labour Organization, *ILO Violence and Harassment Convention No. 190 and Recommendation No. 206*, (Policy Brief, 2020).
[2] Chappell, D and Di Martino, V, *Violence at Work*, (International Labour Office, 2006).
[3] ILO Violence and Harassment Convention, 2019 (No. 190), Art. 1, para. 1, a.
[4] ILO Violence and Harassment Convention, 2019 (No. 190), Art. 1, para. 1, b.
[5] ILO Violence and Harassment Convention, 2019 (No. 190), Art. 1, para. 2.
[6] Chronologically, the activities of ILO in the context of protection against violence and harassment in the world of work at first referred to "*sexual harassment"* as a form of discrimination (for instance, in the General Report of the Committee of Experts on the Application of Conventions and Recommendations on the application of Discrimination (Employment and Occupation) Convention no. 111, 1988) and then as an *issue in the field of occupational safety and health* (for instance, at the 1989 Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment). Sexual harassment started to be treated as a form of violence against women by the Committee on Elimination of Discrimination against Women (CEDAW), which monitors the implementation of the 1879 UN Convention on the Elimination of All Forms of Discrimination against Women.

tendencies to regulate harassment and sexual harassment are also evident in the European Union, in the form of Resolutions and Recommendations[7], as well as in the form of Directives.[8]

While the all-embracing notion 'violence and harassment', i.e. 'gender-based violence and harassment in the world of work is of a more recent date, and is an expression of the inclusive, integral and gender-responsive approach of the ILO Convention No. 190, for many years at a comparative level, a number of different terms (e.g. psychological harassment, moral harassment, mobbing, bullying, etc.[9]), have been used, that are usually unified around the terms 'harassment' and 'sexual harassment at work. In principle, there are two dominant paradigms on which the explanation of the terms harassment and sexual harassment is built. The first paradigm (primarily represented in the US legal system) is based on the concept of perceiving harassment, solely as a form of discrimination, while the second (primarily represented in EU law and continental European countries), although, treating harassment (and particularly sexual harassment) as a form of discrimination is based on the concept of understanding harassment as a broader issue of protection of dignity[10]. While the US concept is designed to protect against discriminatory harassment (primarily in the fields of racial and sex-based harassment), the concept of the EU and European continental law, although containing an anti-discrimination component, generally develops on a broader scale and leans towards protection against any form of workplace harassment (discriminatory and non-discriminatory) that applies to all workers, not just certain groups of workers (for example, members of minority groups or women).[11]

The legal framework for addressing violence and harassment (including gender-based violence and harassment) at work in North Macedonia is subject to slow but gradual making over a decade and a half. The term 'violence' is primarily placed in the context of criminal law and regulated in the Criminal code.[12], Its specific forms to which women are disproportionately more exposed than men, such as *domestic violence* and *violence against women*, are subject to the regulation of certain special laws.[13] Instead, the Macedonian legal system uses the concept of protection against

[7] See: 1986 Resolution of the European Parliament on Violence against Women, 1990 Resolution of the European Council on the Protection of Dignity of Women and Men at Work, 1991 Recommendation of the European Commission on the Protection of Dignity of Women and Men at Work and the accompanying Code of Practices on the measures to combat sexual harassment; 2001 Resolution of the European Parliament on Harassment in the Workplace; 2018 Resolution of the European Parliament on measures to prevent and combat mobbing and sexual harassment at workplace, in public spaces, and political life in the EU.

[8] See: *Directive 2006/54/EC* of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast), 2006 O.J. (L 205); *Council Directive 2000/43/EC* of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180); *Council Directive 2000/78/EC* of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303).

[9] International Labour Organization, *Safe and Healthy Working Environments Free from Violence and Harassment. The Report at a Glance*, (ILO, 2020).

[10] See Friedman, Gabrielle S. and Whitman, J.Q, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, (Columbia Journal of European Law Vol.9, 2003).

[11] See Lerouget, L, and Heber, L.C, T*he Law of Workplace Harassment of the United States, France, and the European Union: Comparative Analysis after the adoption of France's New Sexual Harassment Law*, (Comparative Labor Law and Policy Journal Vo.35, 2013).

[12] Official Gazette of the Republic of Macedonia, no. 37/1996.

[13] E.g. The Law on prevention, elimination and protection against domestic violence of 2014, Official Gazette of the Republic of Macedonia, no.138/2014; Law on prevention and protection against violence against women and domestic violence of 2021 (Official Gazette of RNM, no.24/2021) as an implementing act of the Council of Europe Convention on preventing and combating violence against women and domestic violence, ratified by North Macedonia's Assembly in 2018.

harassment at work as an integral concept (including gender-based harassment), first within the general regulations on labour relations and equality and non-discrimination, and then with the special regulation on protection against workplace harassment. Anyhow, the legal framework is still characterized by a series of conceptual ambiguities, obscurities and contradictions, starting from the definition and prevention and protection to legal remedies and sanctions for perpetrators of harassment.

II. THE CONCEPT OF PROTECTION AGAINST HARASSMENT IN THE WORKPLACE AND EMPLOYMENT IN NORTH MACEDONIA

1. Development of the concept and emergent forms of harassment

The issue of harassment at work has been the subject of gradual legal regulation in North Macedonia for approximately 15 years. The chronology of the regulation of harassment at work (including gender-based harassment) may be structured in three phases, in particular: the first phase (2005-2009), the second phase (2009-2013) and the third phase (2013-present day). The first phase (2005-2009) started with the first attempt for more concrete recognition and regulation of harassment at work in North Macedonia within the frames of the 2005 Labour Relations Law[14] (hereinafter: LRL). Within this phase, *harassment and sexual harassment* were defined exclusively as forms of discrimination, i.e. discriminatory harassment. The second phase (2009 - 2013) covers the period of expansion of the meaning and context of harassment and results in amendments to the LRL from 2009 which established the term *psychological harassment – mobbing,* again defined as discriminatory harassment. The third phase (since 2013) marked the beginning of the cross-cutting legislative approach to harassment, under which harassment, on one hand, started to be regulated independent of the existence of any prohibited discrimination ground, while, on the other, it persisted as a form of discrimination (within the framework of the LRL), but also as a subject matter of the equality of treatment and non-discrimination regulations, such are the Law on equal opportunities of women and men of 2012[15] and the Law on prevention and protection against discrimination of 2020 (hereinafter: LPPAD)[16]. The most important milestone in this phase is the adoption of the Law on protection against workplace harassment (hereinafter: LPAWH)[17]. The main text of the 2013 Law on protection against workplace harassment has been adopted after being reviewed by the Economic and Social Council of the Republic of Macedonia, and after eight years of enforcement of the Law and the two amendments to the original text[18], North Macedonia is on the brink of adopting a new Law on protection against harassment in the workplace. It is expected that the new Law on protection against workplace harassment would revise several important aspects of the regulation of harassment in the workplace, starting with the notion and definitions of psychological and sexual harassment, through the personal and functional scope of application of the law, to the measures and procedures for prevention and protection against harassment in the workplace, etc.

[14] Official Gazette of the Republic of Macedonia no. 62/05.
[15] Official Gazette of the Republic of Macedonia, no.6/2012.
[16] Official Gazette of the Republic of North Macedonia no. 258/2020.
[17] Official Gazette of the Republic of Macedonia no. 79/2013.
[18] See: Law amending the Law on Protection against Workplace Harassment, Official Gazette of the Republic of Macedonia, no. 147/2015 and No. 103/2021.

In Macedonian legislation, the term 'harassment', generally appears in two forms: first, as *discrimination,* i.e. discrimination-based harassment and second, as *non-discrimination-based harassment*, i.e. harassment in the workplace.[19] While the former is regulated by one set of legislative acts (LRL, Law on equal opportunities of women and men and LPPAD), the letter is governed by the LPAWH, which contains an indicative list of behaviours and activities that are not considered 'harassment at the workplace' and among which is discrimination.[20] This division is further reflected in the 'legal channels' of protection against harassment at work. Compared to the legal channel of protection envisaged in the LRL (which only provides rules regarding the shifting of the burden of proof to the employer[21] and protecting persons who have initiated proceedings or testified during a procedure for legal protection against psychological harassment[22]), the LPAWH, establishes a more comprehensive system for reporting and resolving disputes for protection against harassment, which, despite numerous weaknesses, has emerged as the main and most important legal channel. Anyway, despite the substantial and procedural differences between the two legal regimes for regulating harassment, in practice, the line between them is very thin, or virtually inexistent. This is so because in the procedures for court redress against harassment at work, the courts are tolerating claims based both on LPAWH and LRL, and in the judgments passed they rarely belabour the existence or inexistence of discrimination in the context of the existence or inexistence of harassment at the workplace.[23] Gender-based harassment in the Republic of North Macedonia is not a separate and distinct concept of harassment, but it is regulated and developed within the broader term 'harassment' at work, which includes sexual harassment. In the last few years, the first more significant researches aimed at identifying sexual violence and harassment, including sexual harassment, have been conducted.[24] However, despite the slow but gradual development of the regulation of violence and harassment at work (including gender-based violence and harassment) and the raising of awareness of these phenomena, the impression is that they are still not sufficiently recognized by people in the country.

2. Definition of harassment in the workplace

The definition of the terms 'harassment' and 'sexual harassment' dates at the time of the adoption of the Labour Relations Law in 2005 and primarily arises from the need to align the Macedonian labour legislation with the European 'acquis communitaire'. LRL defines **harassment** as '*any unwelcome behaviour caused by any of the cases referred to in article 6 of*

[19] See Каламатиев, Т, *Антидисриминацијата и психолошкото вознемирување (мобинг) во позитивното право на Република Македонија*, (Droit du Travail. Première Journèe d'ètude de droit comparè franco-macèdonien, 2013).
[20] See LPAWH, Art.8, para 1, point 1.
[21] LRL, Art.11, para 2.
[22] LRL, Art.11, para 3.
[23] See: Judgments of the Appelate Court in Bitola (dated 09.10.2019, ROZH no. -834/13; dated 23.04.2020, ROZH no. -604-19;); Judgment of the Appelate Court in Skopje (dated 15.10.2014, ROZH no. -219/14; dated 15.09.2016, ROZH no. -316/15; dated 10.10.2013, ROZH no. -834/13; dated 24.10.2013, ROZH no. -775/13).
[24] According to a research conducted as part of a Study on the scope of various forms of sexual violence in the Republic of Macedonia from 2017, the following forms of sexual harassment in the workplace were recognized: abuse of position (demonstration of power); sexual blackmail (job loss); comments and jokes with sexual connotations; unwanted touches; issues of intimate life; sexually connoted proposals; exposure to pornographic material; employment-based on physiognomy; comparison of physiognomy between colleagues with a detailed description; ambiguous comments, etc. See Dimusevska.E and L.Trajanovska (2017).

the present law[25] *that aims at or amounts to a violation of the dignity of the job applicant or the employee, and which causes fear and creates hostile, degrading or offensive conduct*.[26] **Sexual harassment**, on the other hand, usually takes two forms: **hostile work environment** and **quid pro quo.** In literature, sexual harassment in the form of *a hostile work environment* means conduct creating an intimidating, hostile or humiliating environment and occurs in the form of unacceptable or degrading jokes or comments of sexual nature, illustration of offensive sexually explicit materials, etc. On the other hand, sexual harassment in the form of *quid pro quo* means a person's rejection of, or submission to, conduct amounting to sexual harassment, where such rejection or submission is used explicitly or implicitly as a basis for a decision which affects that person's job. Such form of sexual harassment exists when, for instance, the acceptance or rejection of some sexual advance is a basis for a decision concerning the participation at meetings, advancement in the career, pay increase, assignment of work or continuation of the employment contract.[27] The LRL defines 'sexual harassment' as '*any verbal, non-verbal or physical behaviour of a sexual nature which aims at or amounts to a violation of the dignity of the job applicant or the employee, and which causes fear and creates a hostile, degrading or offensive conduct'.*[28] The definition of the term sexual harassment in the LRL includes the form 'hostile work environment', but not the 'quid pro quo' form. There are also other shortcomings in the existing definition (e.g. with regard to the omission of the terms 'unwelcome/unacceptable' *verbal, non-verbal or physical behaviour of a sexual nature*, etc.). There is a parallel legal regime which recognizes and defines the terms harassment and sexual harassment established by the Law on Prevention and Protection against Discrimination. The differences in the definitions of harassment and sexual harassment in LPPAD and LRL are insignificant. The only substantive difference is the fact that harassment and sexual harassment, when regulated by the LPPAD, as compared to the Labour Relations Law, have a wider scope of application, since, in addition to the field of work and labour relations, they apply also to the fields of education, science and sport; social security, including social protection, pension and disability insurance, health insurance and healthcare; judiciary and administration; housing; public information and media; access to goods and services; association and activities of political parties, associations, foundations, trade unions or other membership-based organizations; culture; and other fields.[29]

The 2009 amendments to the LRL, introduced the term **psychological harassment – mobbing**. Although the intent behind the introduction of the new concept was to increase the overall protection of the workers against psychological harassment in the workplace, independent of the motives of the perpetrator of the mobbing (e.g., whether the mobbing is caused by a specific discrimination ground or by arbitrary personal intolerance and dislike notwithstanding the existence of any discrimination ground), psychological harassment – mobbing was defined as a *form of discrimination.*[30] According to LRL mobbing is '*any negative behaviour of an individual or a group that is often recurring (at least within a period of six months) and amounts to a violation of the dignity, integrity, reputation and honour of the employees and cause fear or creates a hostile,*

[25] It refers to cases treated as discrimination grounds, such as: racial or ethnic origin, colour of skin, sex, age, health status, and disability, religious, political or other conviction, trade union membership, national or social extraction, property status, sexual orientation or other personal circumstances.

[26] See: LRL, article 9, paragraph 3.

[27] Pillinger. J, *Handbook addressing violence and harassment against women in the world of work*, (International Labour Organization and UN Women, 2019).

[28] See: LRL, article 9, paragraph 4.

[29] See: LPPAD, article 3

[30] LRL, article 9-a, paragraph 2.

degrading or offensive behaviour, the ultimate goal of which may be termination of employment or resignation from work'.[31] The introduction of the term 'mobbing' in the Macedonian labour legislation was accompanied by the undertaking of the first practical actions to raise the awareness among Macedonian workers about the existence and the available protection against this adverse phenomenon. Within the period from 2008 to 2009, the Federation of Trade Unions of Macedonia (SSM) and the Macedonian Mobbing Association carried out one of the first studies on the existence, manifestation and effects of mobbing on the psychological and physical health of workers in the Republic of Macedonia. The results of the study showed that as many as 41% of the respondents had been victims of mobbing (most of them, i.e. 31% due to negative behaviour relating to the performance of the working duties such as excessive controls, framing, etc.; 23% due to verbal obstructions; 20% due to gossip, taunting and intrigues; 15% due to social isolation, and 11% due to health risks caused by intimidation, assaults and sexual harassment). Most of the victims of mobbing (30% in total) have been exposed to mobbing due to their political convictions or political party membership, which indicates that a significant part of the mobbing in Macedonia arises from discriminatory grounds and amounts to discriminatory harassment.[32] The study also showed that mobbing was present more in the public rather than the private sector. Taking into account the superficial legal framework governing mobbing in the LRL, the trade unions (mostly SSM) insisted on a more detailed and comprehensive governing of this phenomenon by a new, special law[33], which led to the adoption of the Law on protection against harassment in the workplace. LPAWH, similarly to the Labour Relations Law, is primarily dealing with the terms 'psychological harassment' and 'sexual harassment'. According to LPAWH, psychological harassment at the workplace means '*any negative behaviour of an individual or a group that is recurrent, continued and systematic and amounts to a violation of the dignity, integrity, reputation and honour of the employee and causes fear or creates discomfort or degradation, the ultimate goal of which may be a violation of physical or mental health, compromising the professional future of the employee, termination of employment or resignation from work'*.[34] While both laws are identically defining sexual harassment, one could note several substantial differences in the definitions of psychological harassment. Firstly, it is evident that, as opposed to LRL, LPAWH does not use the term 'mobbing' to complement the term 'psychological harassment in the workplace', despite the fact that both laws regulate an identical phenomenon. Furthermore, the definition of mobbing in LPAWH is also characterized by three substantial differences compared to the one in LRL.

The first substantial difference refers to the *period of time* within which the negative behaviour is recurring, which is necessary to qualify such behaviour as mobbing (where LRL provides for a period of at least six months, LPAWH notes that psychological harassment should be recurring continually and systematically, without specifying a period of time). Despite the legal vagueness relating to the dynamics, (frequency, duration and recurrence), i.e. the inconsistency of the timeframe within which the negative behaviour should occur so as to be qualified as psychological harassment, the case law usually starts from the qualification laid down in LRL, under which the prerequisite for the existence of mobbing is that the plaintiff suffered psychological harassment

[31] LRL, article 9-a, paragraph 1.
[32] See: Velichkovska, J, *Mobbing – psychological pressure in the workplace*,(SSM and Friedrich Ebert, 2009).
[33] See: https://www.ssm.org.mk/mk/mobingot-se-ushte-cheka-poseben-zakon (accessed on 14.08.2021)
[34] See: LPAWH, article 5, paragraph 1.

for a period of at least six months.[35] Argumentum a contrario, the chances of a one-off negative behaviour violating the dignity, integrity, reputation and honour of the employee being qualified as psychological harassment, notwithstanding the extent of the adverse effects it has caused, are very slim since neither the legal framework nor the jurisprudence recognizes such behaviour as mobbing.

The second difference relates to *potential consequences, i.e. the ultimate goal* of psychological harassment. While under LRL the ultimate goal *may* be termination of employment or resignation from work, under LPAHW, in addition to termination of employment or resignation from work, the ultimate goal of mobbing may also be harmful to the physical or mental health and compromise the professional future of the employee. The jurisprudence, in the author's opinion, is unjustifiably and too restrictively sticks with the consequences of mobbing laid down in LRL. In a number of court disputes for protection against psychological harassment, the courts are implicitly making the qualification of certain behaviour as mobbing contingent upon the prior decision on termination of employment of the plaintiff (employee).[36]

The third difference concerns the *legal treatment of psychological harassment*, where LPAWH does not equate the term psychological harassment to discrimination in any of its provisions. The indicative list of behaviours and activities that are not deemed to be harassment in the workplace in LPAWH is a subject of criticism by the expert community, inter alia, because it includes *individual enactments* adopted by the employer and regulating rights, obligations and responsibilities arising from employment, as well as *denying and preventing the exercise of rights* laid down in law, collective agreement and employment contract.[37] In view of the fact that in practice the violation of the employees' rights arising from employment is often causally related to the violation of their personal rights (health, dignity, integrity, reputation and honour) as a result of a suffered harassment, such cases included in the indicative list lead to unnecessary restrictions of the definition of psychological and sexual harassment and in the protection of the victims against harassment. The courts usually fall into such a trap and in a large number of cases where the findings of psychological harassment subtly arise from specific individual enactment of the employer regulating rights, obligations, and responsibilities or denying and preventing the employees from exercising their rights arising from employment, the courts find that there are no elements of psychological harassment in the workplace present.[38]

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[35] For instance, such a position has been taken by the **Appellate Court in Skopje,** which, in its Judgment dated 08.11.2018 (ROZH-1422/18) states that "*the plaintiff has worked at the job from the time of appointment of the defendant as the new director of the institution until the time of filing the lawsuit at hand less than six months, which is the minimum requirement for establishing the existence of psychological harassment in the workplace".* In another case, the **Appellate Court in Bitola**, in its Judgment dated 03.10.2017 (ROZH-529/17), stated that "*the harassment activities should be very intensive at least once per week or should occur in the course of a longer period of time of at least six months".*

[36] See the following Judgments of the Appellate Court in Skopje: Judgment dated 10.10.2013(ROZH no. -834/13); Judgment dated 15.10.2014 (ROZH no. 219/14); Judgment dated 15.09.2016 (ROZH no. 316/15).

[37] See: LPAWH, article 8, paragraph 1, indents 2 and 3.

[38] Such examples may be found in the following cases: **Judgment of the Appellate Court in Skopje (ROZH 219/14)** where the plaintiff had a successful lawsuit to annul a decision on termination of employment for economic reasons, followed by *reduced salary, reassignment to a lower position, work tasks not in line with qualifications, ban on attending a joint New Year's celebration, withdrawal of an official telephone;* **Judgment of the Appellate Court in Skopje (ROZH 316/15)** *where the employer imposed two consecutive fines against the worker, has not assign him any work tasks during the period January – February;* **Judgment of the Appellate Court in Skopje (ROZH 1588/17)**, where following the participation of the plaintiff (head of the Human Resources Department in the Basic Court Skopje 1 Skopje in the protests of the so-called Colourful Revolution, the defendant (President of the Basic Court Skopje 1 Skopje) *unlawfully reassigned the plaintiff to perform other work tasks with a virtually unattainable*

3. Scope of protection

The personal scope of the protection against harassment (including sexual harassment), as well as psychological harassment in the workplace in the Macedonian legal system, depends primarily on the regulation defining these terms. If harassment and psychological harassment are analysed in terms of the Labour Relations Law, it could be noted that the Law applies a narrow and restrictive approach. The subjects of the protection against harassment are the '*job applicant*' and the '*employee*'. The term job applicant is not defined in LRL or another special law, hence we derive its definition from theory, where this term implies a person who applied to the vacancy announcement and meets the general and specific requirements to enter into an employment relationship for a specific job.[39] LRL defines the term 'worker', i.e. 'employee' as *any natural person who has established an employment relationship by virtue of entering into an employment contract*.[40] This category is broad enough to cover workers who entered into employment contracts, including the non-standard employment contracts recognized by Macedonian labour law, but it is too narrow to cover the undeclared, i.e. informal workers and workers in disguised employment (mainly working under false civil-law contracts). A broader personal scope of protection may be found in the Law on Prevention and Protection against Discrimination and the Law on Equal Opportunities for Men and Women, but, as we have already discussed, these laws cover only discriminatory harassment.

Compared to LRL, the Law on Protection against Harassment in the Workplace provides for a broader personal scope of protection. In addition to *job applicants and employees*, it also applies to *persons engaged under contracts* who participate in the work at the employer,[41] including *volunteering contracts, service contracts, copyright contracts and other types of contracts.*[42] By virtue of such an approach, the scope of LPAWH extends to apply to *other workers irrespective of their contractual status*, including persons under contracts (other than an employment contract) directly engaged by the employers or with the mediation of the so-called 'copyright agencies', freelancers, etc. The Law also implicitly includes *volunteers*[43]*,* but not *interns and apprentices* and *job seekers.*

Although the Law on Protection against Harassment in the Workplace does not set forth explicitly the functional scope of protection against harassment, it is evident that it applies *to all sectors, whether private or public.* In this context, LPAWH covers all economic activities, i.e., sections, divisions, groups and classes under the National Classification of Activities, and it applies in all areas, whether urban or rural. However, the LPAWH, *per se*, does not include workers in the informal economy. According to the most recent available data from the Labour Force Survey of

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performance rate of 400 cases per month, which was ascertained by the State Labour Inspectorate, following a monthly report on temporary incapacity for work due to illness the report was made public at a personal Facebook profile and attracted offensive comments, a motion for disciplinary procedure was filed against the plaintiff.

[39] See: Kalamatiev, T. *Засновање на работен однос на работниците*, (PhD thesis, 1998).

[40] LRL, article 5, paragraph 1, indent 2.

[41] See: LPAWH, article 3, paragraphs 1 and 3.

[42] See: LPAWH, article 3, paragraph 3.

[43] The current Macedonian labour law recognizes two types of 'volunteers': The status of the first group is regulated with the Law on Volunteering and they are defined as *natural persons who provide services, skills and knowledge for the benefit of other persons, authorities, organizations and other institutions, voluntarily and without any financial or other personal gain* (article 4). The status of the second type of volunteers is regulated by the Labour Relations Law and they may be defined as persons who *voluntarily serve as interns as a requirement to take a professional exam or for independent performance of the activity, in accordance with a special law* (article 61).

the State Statistical Office which measures this phenomenon, the share of informal employment in the total employment in the country in 2016 amounted to 18.5%, and the greatest part (around two thirds, or 65-66%) thereof is accounted for by persons working in agriculture.[44] Such data, to a certain extent, make suspect the effective enforcement of protection against violence and harassment in the workplace in the rural areas. Typical forms of informal employment in North Macedonia are: unregistered activity, undeclared employment and under-declared employment (i.e., envelope wage or disguised wage).[45] Although the term disguised employment is not explicitly mentioned in the documents (strategies, programmes) addressing informal employment in North Macedonia, we believe that this non-standard work arrangement, which also has characteristics of informal employment, is quite present in the practice. Therefore, despite the fact that the LPAWH does not include, de iure, individuals working in the informal economy, the fact that it includes in its scope individuals engaged under contracts (volunteering, service, copyright and other types of contracts) implies that it applies indirectly also to certain forms of work belonging to the category of informal employment.

The scope of protection against harassment in the workplace laid down in the LPAWH also covers the 'place' and the 'time' of the workplace harassment. The existing provisions of the Law extend the scope of protection against harassment outside of the usual 'workplace' where the employee is working or has been assigned, including the place/places he/she is passing on the way to and from work[46], while the Law defines the time when the psychological and sexual harassment is carried out as the working hours and the time travelling to and from work.[47]

III. PREVENTION AND PROTECTION AGAINST HARASSMENT

The existing legal framework for the prevention of harassment at work is regulated superficially. Primarily stems from the general obligations that the LRL assigns to the employer to protect and respect the personality, dignity and privacy of the worker and ensure that no worker is a victim of harassment and sexual harassment.[48] A more specific operationalization of these principles cannot be found either in the Law on occupational safety and health of 2007[49], which in no provision explicitly addresses the dangers and risks that may lead to violence and harassment (including gender-based violence and harassment) at work[50]. The LPAWH provides certain general rules for the conduct of the employer and the employee at work, as well as certain general obligations and responsibilities of the employer and the employees, which are important for prevention and protection against harassment. However, the LPAWH does not oblige the employers with any provision: to adopt policies (internal acts) for protection against harassment in the workplace; to inform and consult the workers' representatives in the adoption of such policies; to train individuals exercising the authority, duties or responsibilities of an employer, to properly manage human resources and deal with requests from employees for protection against harassment; to appoint a person (employee) tasked with hearing, counselling, assisting and supporting the person who has initiated a procedure or is a victim of gender-based violence or harassment in the workplace, or the perpetrator of the harassment.

[44] See: Strategy for the formalization of the informal economy in the Republic of Macedonia.
[45] See: A.Ristovski, Fixed-term contracts and disguised employment relationships in North Macedonia, (ILO, 2021).
[46] See: LPAWH, article 7, paragraph 2.
[47] See: LPAWH, article 7, paragraph 3.
[48] LRL, Art 43.
[49] Official Gazette of the Republic of Macedonia, no. 92/2007.
[50] LPAWH, Art.10 and Art.11.

The procedure for protection against harassment in the workplace, according to LPAWH is carried out in two instances: at the employer (i.e. internal procedure) and before the competent court (i.e. external procedure). The procedure for protection against harassment in the workplace at the employer (i.e. internal procedure), principally consists of two stages: a *preliminary procedure* and a *procedure at a request for protection against harassment in the workplace* (i.e. mediation procedure). The first stage, or the so-called *preliminary procedure*, requires submission of a written warning, i.e. addressing the perpetrator of the harassment by the harassed person, that the harasser's conduct is *disturbing*[51], or that it is *inappropriate, unacceptable* and *unwanted.*[52] The preliminary procedure aims to resolve the dispute in such a manner that, following the warning, the perpetrator of the harassment shall forthwith stop the unwelcome behaviour, and the harassed person shall not instigate further procedure upon a request for protection against harassment in the workplace at the employer.[53] If the preliminary procedure fails, it is deemed that the harassed person can initiate the second stage, i.*e. procedure at a request for protection against harassment in the workplace*, which is, actually, a procedure that provides the basis for the start of internal mediation as a mechanism of amicable settlement of the dispute at the employer (mediation procedure).

The mediation procedure is conducted by mediators appointed by the employer from its employees.[54] There are two possible outcomes of the mediation procedure. The first is that the parties agree on the selection, i.e. appointment of a mediator, and the second is that the parties fail to agree on the selection, i.e. appointment of a mediator who would conduct the mediation procedure. In case of the first outcome, the mediator should complete the procedure within 15 days.[55] The procedure may end with successful mediation (if the parties agree on the end of the harassment, recommendations and manner for removal of possibilities for further harassment), where the employer is obliged to act upon the recommendations of the agreement, and with unsuccessful mediation (where the parties fail to reach an agreement). The Law does not specify the content of the recommendations, i.e. actions that would arise therefrom. In case of the second outcome, the employer, i.e. the person authorized by the employer, is obliged, within eight days, to deliver written notification to the person who filed the request for protection against harassment that no mediator has been selected[56], whereupon the person who filed the request shall be entitled to legal recourse within 15 days.[57] The mutual relationship and causality of the two stages (the preliminary and the mediation) of the procedure for protection against harassment at the employer (i.e. internal procedure) and their relationship and causality with the procedure for protection before the competent court (i.e. external procedure) are regulated vaguely. In practice, it is usually deemed that the preliminary procedure (written warning, i.e. address) is not a prerequisite for initiating the procedure upon request for protection against harassment in the workplace (mediation procedure) or exercising legal recourse against harassment in the workplace before the competent court. The establishment of appropriate and effective mechanisms and procedures for internal protection against harassment in the workplace is also hampered by the superficial and underdeveloped system of mediation, which fails to determine the competencies and criteria for

[51] See LPAWH, article 5, paragraph 3.
[52] See LPAWH, article 17.
[53] See LPAWH, article 17.
[54] See LPAWH, article 12.
[55] See LPAWH, article 24, paragraph 5.
[56] LPAWH, Art 22, paragraph 2.
[57] LPAWH, Art 22, paragraph 3.

the appointment of mediators by the employer and prescribes no obligation for the employers to provide training to the mediators.

The judicial protection against workplace harassment (i.e. external procedure) is exercised by bringing a lawsuit to the competent court. The dispute has the character of a labour dispute[58] and the provisions of the Law on civil procedure[59] apply accordingly. The courts with jurisdiction to rule on labour disputes in the first instance are the Basic Courts with general jurisdiction (i.e. the courts adjudicating in the first instance in civil law disputes)[60]. The Appellate Courts have the jurisdiction to rule in the second instance, i.e. in the procedures of appeal against the decisions of the basic court.[61] Finally, in the third judicial instance, the Supreme Court of the Republic of North Macedonia has the jurisdiction to decide on extraordinary legal remedies against effective decisions of the courts and the decisions of its panels when it is stipulated in the law.[62] The extraordinary legal remedy (review) of second instance judgments may be exercised in any case of labour disputes on termination of employment, notwithstanding the value of the dispute.[63] If the labour dispute does not relate to termination of employment, or if the value of the dispute is not exceeding MKD 1,000,000, the review shall be dismissed as impermissible. Such restriction also applies to disputes relating to protection against harassment in the workplace.[64]The LPAWH does not regulate the periods for bringing a lawsuit for protection against harassment to the competent court clearly and coherently. The only case where the Law provides for a preclusive period of 15 days for bringing a lawsuit and initiating court proceedings is the case where the parties concerned fail to reach an agreement on the appointment of a mediator.[65]

The Law fails to settle the dilemma relating to the period for filing a lawsuit in the case when the mediation procedure has been initiated and completed unsuccessfully, i.e. the parties have failed to reach an agreement. In the procedure before the competent court, the burden of proof is on the defendant, if the plaintiff, in the course of the procedure, has rendered likely the existence of the harassment.[66] However, it appears that the rules on the burden of proof do not play a significant role in the court's decision-making, since, in some judgments, courts shift the burden of proof expressly to the plaintiff (i.e. the alleged victim of harassment), stating that *the plaintiff has failed to prove the existence of the grounds*, i.e., *failed to prove that he or she has been subjected to workplace harassment.*[67] When the procedural anomalies are added to the substantial ambiguities in defining and determining the concept of harassment at work, the epilogue is that judicial protection against harassment at work in North Macedonia is still very weak.[68] In addition to the

[58] See LPAWH, Art 31.
[59] Official Gazette of RM No. 79/05.
[60] See Law on Courts (Official Gazette of R. Macedonia no. 58/06), article 30, paragraph 2, indent 9.
[61] See Law on Courts, article 33, paragraph 1, indent 1.
[62] See Law on Courts, article 35, paragraph 1, indent 4.
[63] See Law on Civil Procedure, article 372, paragraph 3, indent 3.
[64] For example, the Supreme Court dismissed the motion for review of a second instance judgment in a case of discrimination and psychological harassment in the workplace with a value of MKD 610,000.00, (Rev 3. no. 105/2014). See Macedonian Association of Young Lawyers (2014).
[65] See LPAWH, Art 22, paragraph 3.
[66] See LPAWH, Art 33.
[67] See: Judgment of the Appellate Court Skopje (ROZH 316/15), Judgment of the Appellate Court in Bitola (ROZH 589/18).
[68] It is considered that the first judgment finding psychological harassment-mobbing in the country was adopted only in 2016. By Judgment of 2016 (RP-215/14), the Basic Court Skopje II Skopje found that the plaintiff was psychologically harassed by two persons (defendants), who, through their actions, caused him mental anguish, fear, degradation and violated his dignity, honour, and reputation, with the ultimate goal of making him resign his

evident need to improve the legal framework against harassment at work, what is also evident is that there is still room to improve the level of training and sensitise the judges in the cases of protection against harassment in the workplace and discrimination.[69]

IV. LEGAL REMEDIES AND SANCTIONS

Macedonian legislation provides for several legal remedies for protection against harassment. Such are: the *interim measures for protection* (issued by the employer or the competent court), *compensation for damage* (adjudicated by the court in favour of the victim of harassment) and *the right to resignation* by the employee due to exposure to violence at work with indemnification by the employer. The *interim measures* are reduced to temporary redeployment to different work premises, i.e. environment (if issued by the employer) [70] or a restraining order instructing the harasser not to get close to the workplace of the employee and prohibiting the harasser not to make phone calls or communicating (if ordered by the court) to prevent violent behaviour or remove irreparable damage.[71] In both cases (when they are imposed by the employer and by the court), the LPAWH does not stipulate clearly for whom are such temporary measures intended (whether the harassers or the harassed). The protection that may be provided by the court, may also include *compensation for pecuniary and non-pecuniary damage* caused by the harassment in the workplace.[72] Finally, the employee who is facing insults and violent behaviour by the employer, or whose employer, despite the warnings by the employee that he or she is exposed to insults and violent behaviour by other employees, fails to prevent such behaviour, shall be entitled to certain legal remedies arising from the LRL. In the case referred to above, the employee *may terminate the employment contract with the employer without notice*, acquiring a right to compensation in the amount of at least the salary lost (as if he or she has worked during the notice period) and severance pay (as if his or her employment has been terminated due to economic reasons).[73]
The legal framework against harassment in the workplace also governs the matter of the sanctions, i.e., the disciplinary liability of the perpetrator of harassment. In the selection of disciplinary measures against the perpetrator of the harassment, LPAWH initially refers to systemic laws governing labour relations (primarily, the LRL as well as other special laws in the field of civil servants). However, one should take into account the fact that the LRL (as a *lex generalis*) does not govern the matters of disciplinary procedure and disciplinary sanctions in a systematic manner. Currently, the only disciplinary measure that arises implicitly from LRL is the monetary fine for violation of the work order and discipline or work duties. The LPAWH itself stipulates the possibility for issuing a disciplinary measure – termination of employment of the perpetrator of harassment. Yet, LPAHW makes such a disciplinary sanction a subject of the fulfilment of two cumulative conditions, in particular: firstly, the employer has previously issued another, alternative disciplinary sanction against the harasser, laid down in the laws referred to above, and secondly, the harasser has repeated the harassment within a period of six months upon the time when he or

employment. In a procedure upon an appeal by the defendants, the Appellate Court in Skopje adopted the Judgment (ROZH-86/18) reversing the judgment of the Basic Court Skopje 2 and dismissing the claim. However, in a review procedure, in February 2020 the Supreme Court of RNM, by a Judgment in Review (Rev. 3, no. 15/2018) reversed the judgment of the Appellate Court and upheld the judgment of the Basic Court Skopje 2.

[69] See Macedonian Association of Young Lawyers (2014).

[70] See LPAWH, article 27

[71] See LPAWH, article 34.

[72] See LPAWH, article 32.

[73] See LRL, article 100.

she has been issued the disciplinary sanction.[74] In practice, how disciplinary liability and disciplinary sanctions against the harasser are established raises several dilemmas. One of the dilemmas is whether the initially issued disciplinary sanction for harassment in the workplace, always has to be more lenient than termination of employment, independent of the gravity of the harassment and its effects on the victim, including victims of sexual harassment? Another relevant dilemma is whether the prerequisite for repeating the harassment within a period of six months, which may result in termination of employment, is a period of time that is too short concerning the protection of the victim against harassment, i.e., what would happen if the harasser repeats the harassment following the expiry of the six months upon the issuing of the prior, alternative disciplinary measure, i.e. whether the harasser would be sanctioned by termination of employment or by another more lenient sanction?

V. CONCLUSION

By ratifying relevant international and regional instruments and aligning national legislation with EU law, North Macedonia has been shaping its legal framework for protection against violence and harassment at work, including gender-based violence and harassment, for more than 15 years now. The role of workers' and employer's organizations, judges, labour inspectors, police officers and other competent authorities and bodies is of great importance for the development of the awareness about eliminating violence and harassment in the workplace. The fact that in the last decade North Macedonia has seen an increase of the number of judicial proceedings for protection against harassment, i.e. psychological harassment in the workplace - mobbing is encouraging. In any case, the general perception of the expert community is that the case law relating to psychological harassment in the workplace cannot boast of clearly set guidelines and practices for successful addressing of this phenomenon, as well as that there is still room to improve the level of training and sensitise the judges in the cases of protection against harassment and discrimination.

Violence and harassment at work in North Macedonia are generally addressed through two legal regimes that govern harassment in the field of employment and work. The first legal regime derives from the LRL and regulates harassment (including psychological harassment - mobbing) as discrimination. The second legal regime derives from the LPAWH and regulates harassment as psychological and sexual harassment in the workplace, without it being defined as discrimination. In practice, not only is the difference between the two concepts of protection against harassment (including gender-based harassment) ambiguous, but it is also unclear, which of them, would be more adequate to seek protection from. It seems that with the adoption of the LPAWH in 2013, the Macedonian legislator is inclined towards more thorough and comprehensive protection from violence and harassment in the workplace. However, this law contains several systemic weaknesses in regards to prevention and protection, legal remedies and sanctions. Fortunately, the social partners represented in the Economic and Social Council of the Republic of North Macedonia (i.e. the representatives of the Government and the representative organizations of workers and employers), in March 2021, unanimously supported the initiative for ratification of the Violence and Harassment Convention, No. 190 of the ILO. At the same time, a new Law on protection against workplace harassment is being drafted, as well as a new Law on labour relations. This increases the optimism that the future legal framework for protection against gender-based

[74] See LPAWH, article 29, paragraph 2.

violence and harassment at work will be more harmonized and improved, while the awareness of recognizing and reporting such a workplace behaviour will be increased.