EHRC EUROPEAN HUMAN RIGHTS CASES UPDATES

ANNOTATIE

C v. Romania (ECtHR, 47358/20) – Workplace sexual harassment: the extent of protection under the European Convention on Human Rights

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Annotatie bij Europees Hof voor de Rechten van de Mens, , ECLI:CE:ECHR:2022:0830JUD004735820 (EHRC-2022-0213)

Introduction

1. Since #MeToo, the topic of workplace sexual harassment has been attracting considerable attention. Several Council of Europe Member States have faced their own version of #MeToo scandals: France,[1] the Netherlands,[2] and Greece,[3] to name a few. Therefore, it was maybe to be expected that at some point, a case explicitly dealing with workplace sexual harassment would reach the European Court of Human Rights (the Court).

2. In the next paragraphs, I will first describe the facts of the case and the Court's judgment. Then, I will attempt a legal analysis of the judgment along three axes. First, I will discuss the axe of viewing sexual harassment through Article 8. The second axe is the potential positive obligation to ensure effective protective mechanisms at the workplace. Third, I pay attention to the Court's decision not to examine the case through a non-discrimination lens.

Case facts and judgment

3. The applicant, C., worked as a cleaner at the Timişoara East railway station, which belonged to a state-owned railway company. Having allegedly faced the station manager's (C.P.) sexual advances and aggressive behaviour for a period of two years, she decided to report him to her

own manager. When confronted by the manager, C.P. had apologised and the railway company appears to have not taken the matter any further. C. was subsequently given the choice to be transferred to another railway station or resign, and opted for the latter.

4. On 27 November 2017, a criminal investigation on the allegations made by C. was initiated by the prosecutor's office. Under Romanian criminal law, in order for the aforementioned facts to constitute a criminal offence the victim is required to feel threatened in her sexual freedom or humiliated. According to the final decision of the Timişoara District Court, which upheld the previous decisions of the prosecutors, C. did not fulfil this requirement, since (i) in the recordings she had made in order to support her statements, she had not seemed embarrassed by the discussions with C.P., (ii) C.P. had stated that they had once had sexual intercourse, and (iii) witnesses had stated that C. did not always seem sad after her encounters with C.P., but sometimes seemed rather cheerful.

5. The ECtHR found that the Romanian State had violated its positive obligations under Article 8 ECHR, due to significant flaws in the investigation of the applicant's case. The Court stressed that it could not ascertain how the domestic authorities had reached their conclusion. It held that the prosecutor had failed to place the applicant's statements into context,[4] no assessment had been made of the power differential between C. and C.P., and no psychological assessment of C. had been carried out. Moreover, the Court expressed its concern regarding the secondary victimisation faced by C., both because of the detailed account the national courts had given in their judgments of C.P.'s statements about C.'s private life and because of her confrontation with her former manager during the criminal investigation.

Sexual harassment seen through the lens of Article 8

6. Whereas C. had based her claim on Article 6(1) ECHR, the Court, utilising the principle *iura novit curia*, decided to examine the complaint based on Article 8. It thereby held that sexual harassment at the workplace can affect a person's psychological and sexual integrity in such a way that it falls within the scope of application of Article 8. This finding is not surprising: Article 8 has been extensively used over the last decades as a legal basis for claiming new rights under the ECHR.[5] In two[6] cases dealing with (non-sexual) harassment at work, *Špadijer* and *Dolopoulos*, the Court had also decided to examine the facts under Article 8. Its reasoning in these cases was that the concept of private life is not tied to an exhaustive definition, but 'includes a person's physical and psychological integrity, and extends to other values such as well-being and dignity, personality development and relations with other human beings'. The extension of these rulings to the present case, to my knowledge, first ECtHR judgment holding that Article 8 can offer protection to victims of workplace sexual

harassment, if it reaches a certain level of severity.[7]

7. From the Court's conclusion that the applicant's psychological and sexual integrity had been affected, I spot a parallelism to international and EU legal instruments viewing sexual harassment both as a psychosocial risk and a threat to a person's dignity. I will first discuss sexual harassment as a psychosocial risk. A psychosocial risk, as defined by the European Agency for Safety and Health at Work, is 'the result of poor work design, organisation and management, as well as poor social context of work, [which] may result in negative psychological, physical and social outcomes such as work-related stress, burnout and depression'.[8] The connecting line between workplace sexual harassment and psychosocial risks has already been drawn by instruments of international and EU law, providing the Court with plenty of sources of inspiration. In particular, the International Labour Organisation (ILO) in the Violence and Harassment Convention 190 defines sexual harassment as a form of gender-based violence and harassment,[9] and obliges Member States who have ratified Convention 190 to 'take into account violence and harassment and associated psychosocial risks in the management of occupational safety and health'.[10] In the European Union, it is soft law instruments that explicitly address the topic. The Framework Agreement on Harassment and Violence at Work, signed by BUSINESSEUROPE, UEAPME, CEEP, ETUC and the liaison committee EUROCADRES/CEC, contains a definition of sexual harassment and states that 'harassment and violence have the purpose or effect of violating a manager's or worker's dignity, affecting his/her health and/or creating a hostile working environment'.[11] Moreover, the European Parliament's Resolution of 26 October 2017 on combating sexual harassment and abuse in the EU states that 'sexual violence and harassment at the workplace is a matter of health and safety and should be treated and prevented as such'.[12]

8. The 'harm to dignity' approach is also central to most legal instruments dealing with sexual harassment. Dignity is linked to sexual integrity through the concept of objectification. According to Martha Nussbaum, an aspect of objectification is treating the object as lacking a boundary-integrity: it is permissible to violate an object.[13] Female employees who are sexually harassed do not have the choice to deny an opportunity to work without being subject to sexual exactions.[14] This lack of control, this objectification of a person ultimately violates their dignity.[15] Both EU Directive 2006/54 and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) define sexual harassment as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'.[16] This shows that there is a legal consensus that an attack on a person's sexual integrity constitutes a dignity harm, an opinion that the ECtHR now implicitly

appears to share.

A positive obligation for protective mechanisms at the workplace?

9. Before moving on to the examination of the criminal proceedings, the Court examined the Romanian system to protect against sexual harassment at the workplace. The Court noted that, even though an internal policy was in place that prohibited the violation of a person's dignity and encouraged reporting to the management, in the current case the manager had decided to have C. confront her alleged harasser and eventually had chosen not to proceed with an internal inquiry. According to the Court, such a lack of practical application of protective mechanisms at the workplace might constitute a violation of Article 8. Nevertheless, it did not reach a final conclusion on this matter, as it decided to focus on the applicant's complaint concerning the criminal proceedings.

10. Even though the Court did not give a definitive answer to the question of whether there is a positive obligation for the States to put in place effective protective mechanisms at the workplace under Article 8, my opinion is that the Court's tentative findings in this respect already can be seen as a big step. Workplace mechanisms can serve a dual purpose: they can help prevent sexual harassment as well as serve as a conflict resolution mechanism that is not as burdensome to the alleged victims as a more formal procedure. The EU,[17] the ILO,[18] and the Council of Europe, through the Istanbul Convention,[19] have stressed the importance of prevention in the battle against sexual harassment. In particular, the guide on ILO Convention 190 explains how a workplace policy can achieve the dual purpose of prevention and conflict resolution. On one hand, a workplace policy can define violence and harassment, provide examples, and inform employees about disciplinary actions, while on the other it can inform employees about complaint and investigation procedures, which protect individuals' right to privacy and their right not to be victimised or retaliated against.[20]

The choice not to examine the facts under Article 14 ECHR

11. In its reasoning regarding the application of Article 8, the Court noted that the domestic authorities did not take account of the context of the applicant's statements. It linked cases of sexual harassment to cases of domestic violence by noting that the public/private divide (i.e., the notion that what happens behind closed doors should be separated from the political and the legal sphere) leads to significant underreporting in relation to both types of cases. Moreover, the Court held that the domestic authorities did not take into account the relationship of subordination between C. and C.P., which might have shed light on the contradictory feelings that C. allegedly experienced after meeting C.P. The secondary victimisation of C., by way of unnecessarily including statements regarding her private life in a

judgment and by means of forcing her to face a confrontation with her former manager, are also a point of concern for the Court. Last, the Court suggested that C.'s decision to resign could possibly be seen as revealing her distress, which is a possibility that was discarded by the national authorities.

12. Having reached the finding that Article 8 had been violated, the Court decided not to examine the facts also under the prohibition of discrimination of Article 14 ECHR, since 'the applicant did not provide any material to allow the Court to assess the existence of potential discrimination'.[21] Sexual harassment is considered by the international and European Union legal instruments, which also are taken into consideration by the Court, as a form of discrimination that disproportionately affects women and girls.[22] However, in order to treat sexual harassment in the workplace as a form of discrimination, domestic authorities need to be able and willing to acknowledge the underlying beliefs, stereotypes and structural inequality, and the Court would need to be ready to recognise the discriminatory aspects involved in such sexual harassment. In this respect, the alleged perpetrator's statement ('Who would believe you? You're a cleaning lady, and I'm the boss and everybody knows who I am') is of great semantic interest. C.P. expressed what is many women's reality: if their harasser is (a) male and (b) in a position of power, impunity follows. Statistics prove this perceived reality: the European Union Agency for Fundamental Rights, in its 2014 EU-wide survey on violence against women, reported that 45% of women had experienced sexual harassment at least once during their lifetime and 71% of victims indicated that the perpetrator of an incident since the age of 15 was a man.[23] On a national level, the first baseline report on Romania by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) states that 'reasons for not taking harassment complaints to the police range from a lack of trust in the authorities, exacerbated by victim blaming, to the lack of awareness on what kind of conduct constitutes harassment'.[24]

14. Perhaps, however, the most prominent reason why the Court should have looked into the discriminatory treatment of C. by the Romanian authorities is related to her secondary victimisation. The Istanbul Convention, which has already been ratified by Romania, states that 'evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary'.[25] The Convention's Explanatory Report clarifies that 'presenting this type of evidence may reinforce the perpetuation of damaging stereotypes of victims as being promiscuous and by extension immoral and not worthy of the protection provided by civil and criminal law. This may lead to de facto inequality, since victims [of sexual violence], who are overwhelmingly women, are more likely to be provided with this protection if they are judged to be of a respectable nature'.[26] The domestic authorities, by opting to reproduce in their decision statements such as '[C.] had had sexual intercourse with

another employee from the railway station, and had got into a dispute with him and his wife, which had lasted until 2016', clearly repeated and emphasised misogynistic stereotypes.

15. The Court emphasised these points very clearly in relation to Article 8 ECHR, and thereby already implicitly recognised the discriminatory treatment of C. by the domestic authorities. This makes it difficult to understand why it concluded that it lacked material to assess the existence of potential discrimination. This is a position the Court has taken more often. In *J.L. v. Italy*, a case that concerned the secondary victimisation of a victim of rape, the Court similarly held that the domestic court's judgment was guilt-inducing and moralising, and conveyed sexist stereotypes, yet it still chose not to apply Article 14 because it had already reasoned that there was a breach of Article 8.[27] Indeed, the Court's case law regarding discrimination has been at times criticised for lacking force and coherence.[28] This partly has to do with the nature of Article 14 as a 'Cinderella provision', which requires that a difference in treatment must be linked to a substantive Convention right.[29] When the Court has already found a breach of the substantive Article, it may not decide to examine the case under Article 14.[30] Nevertheless, although this may explain the Court's choice, it fails to justify the Court's lack of attention to the distinct discrimination issues involved in sexual harassment cases.

Conclusion

16. A judgment of the European Court of Human Rights which acknowledges that conduct that constitutes sexual harassment can violate Article 8 if it reaches a certain level of severity, is certainly good news for sexual harassment victims. The Convention is now explicitly one of the many international legal instruments which address this important issue. Moreover, the Court's recognition that there may be a positive obligation for protective mechanisms at the workplace can prove to be a great step towards the effective enforcement of the prohibition of sexual harassment in the workplace.

17. By contrast, the Court's refusal to examine the facts through the lens of Article 14 is disappointing. Even though its judgments on domestic violence cases have largely applauded for their value towards achieving gender equality,[31] it appears hesitant to apply the notion that gender stereotypes can affect the enjoyment of women's human rights to other forms of gender-based violence. From a perspective of offering clarity and of the need to emphasise the problems of discrimination, this can be regarded as a missed opportunity.

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[1] See N. Onishi, 'Powerful Men Fall, One After Another, in France's Delayed #MeToo', *The New York Times* (online, updated on 8 April 2021).

[2] See C. Moses, '#MeToo Scandal at a Dutch TV Show Spurs a Sexual Assault Reckoning', *The New York Times* (online, updated on 31 January 2022).

[3] See K. Kallergis, 'Greece #Metoo: Women ending silence of sports abuse shake Greece', bbcnews.com, 20 January 2021.

[4] I elaborate on this topic hereafter; see paras. 11-15.

[5] See M. Burbergs, 'How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born. Article 8 ECHR', in: E. Brems and J. Gerards, *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge: Cambridge University Press 2014, p. 315-329.

[6] *Špadijer v. Montenegro*, ECtHR 9 November 2021, no. 31659/18, ECLI:CE:ECHR:2021:1109JUD003154918; *Dolopoulos v. Greece*, ECtHR 17 November 2015, no. 36656/14, ECLI:CE:ECHR:2015:1117DEC003665614.

[7] The European Court of Human Rights has ruled on cases of workplace sexual harassment before, but the focus was not on the issue of workplace sexual harassment in itself. See *Christine Goodwin v. the United Kingdom*, ECtHR 11 July 2002, no. 28957/95, ECLI:CE:ECHR:2002:0711JUD002895795; *Cudak v. Lithuania,* ECtHR 23 March 2010, no. 15869/02, ECLI:CE:ECHR:2010:0323JUD001586902.

[8] 'Psychosocial risks and stress at work', osha.europa.eu, 9 September 2022.

[9] Article 1(1)(b) of the ILO Violence and Harassment Convention 2019.

[10] Article 9(b) of the ILO Violence and Harassment Convention 2019.

[11] European Social Partners, *Framework Agreement on Harassment and Violence at Work*, Brussels: European Social Dialogue 2007, available online at etuc.org/en/framework-agreement-harassment-and-violence-work.

[12] European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP)), OJ C 346/18, p. 192–199.

[13] M.C. Nussbaum, 'Objectification', *Philosophy and Public Affairs* 24.4 1995, p.257.

[14] C.A. MacKinnon, 'Sexual Harassment of Working Women', Yale University Press 1979, p.25.

[15] As (accurately) depicted in a decision by the criminal division of the French Court of Cassation: "[Tlhere was, moreover, no doubt that the acts thus described had undermined the dignity of the complainant because of their degrading and humiliating character, by reducing her, because she was a woman, to that still widespread archetype of the object of the sexual desire of men." Cour de cassation [Cass.] [supreme court for judicial matters] crim., Apr. 26, 2017, Bull. crim., No. 16-83934.

[16] Article 2(1)(d) of 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) (OJ L 204/23) and Article 40 of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

[17] European Social Partners, *Framework Agreement on Harassment and Violence at Work*, Brussels: European Social Dialogue 2007, available online at etuc.org/en/framework-agreement-harassment-and-violence-work; European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP)), OJ C 346/18, p. 192–199.

[18] See Article 8 of the ILO Violence and Harassment Convention 2019.

[19] See Chapter III of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

[20] International Labour Organization, *Violence and harassment in the world of work: A guide on Convention No. 190 and Recommendation No. 206,* Geneva: International Labour Office 2021, p. 54-55.

[21] *C. v. Romania*, para. 90.

[22] See Article 2(a) of 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) (OJ L 204/23); Preamble, Article 3(a) and Article 40 of the Council of Europe Convention on preventing and combating violence against women and domestic violence; Preamble and Article 1(1)(b) of the ILO Violence and Harassment Convention 190.

[23] European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey. Main results*, Luxembourg: Publications Office of the European Union 2015, p. 98 and 112.

[24] GREVIO, *Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Romania*, France: Secretariat of the monitoring mechanism of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2022, para. 312.

[25] Article 54 of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

[26] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, para. 277.

[27] *J.L v. Italy*, 27 May 2021, nr. 5671/16, ECLI:CE:ECHR:2021:0527JUD000567116.

[28] See J. Gerards, 'The discrimination grounds of article 14 of the European convention on Human Rights', 13 *Human Rights Law Review* 2013 (1), p. 102.

[29] See R. O' Connell, 'Cinderella comes to the Ball: Art 14 and the right to non|discrimination in the ECHR', 29 *Legal Studies* 2009 (2), 211-229.

[30] See, for instance, *Dudgeon* v. *the United Kingdom*, ECtHR 22 October 1983, no. 7525/76, ECLI:CE:ECHR:1983:0224JUD000752576.

[31] See S. Murphy, 'Domestic Violence as Sex Discrimination: Ten Years Since the Seminal European Court of Human Rights Decision in Opuz v. Turkey', 51 *New York University Journal of Law and Policy* 2018, p. 1347-1358.