CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 521/2011 (R. V. (II) v. Governor of the Council of Europe Development Bank)

The Administrative Tribunal, consisting of:

Mr C. ROZAKIS, Chair,
Mr J. WALINE, Judge,
Mr S. KIZILYEL, Deputy Judge,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, R. V., lodged his appeal on 16 December 2011. On 19 December 2011, the appeal was registered under No. 521/2011. The Chair of the Tribunal authorised the appellant to retain the anonymity which he had granted him when a first appeal was lodged (paragraph 7 below).

2. On 3 January 2011, the appellant's counsel filed a supplementary memorial.

3. On 14 February 2011, the Governor forwarded his observations concerning the appeal. The appellant submitted a memorial in reply on 1 March 2011.

4. On 11 April 2012, with the opening of the oral proceedings imminent, the appellant made a request for a third person to file a document.

On 12 April 2012 the Governor indicated that he did not object to the acquisition of this document, though on the express condition that other documents, likewise addressing the

question raised in the first document, should also be forwarded to the Tribunal. He specified that he held all these documents at the Tribunal's disposal.

On 13 April 2012, the Chair requested the filing of all these documents, which reached the Registry on 19 April 2012.

5. The public hearing in this appeal, initially scheduled for 18 April 2012, finally took place in the Tribunal's hearing room in Strasbourg on 20 June 2012. The appellant was represented by Ms Christine Hillig-Poudevigne and Ms Sophie Lemaître, the Governor by Mr Jean-Michel de Forges, all barristers in Paris.

THE FACTS

I. BACKGROUND

6. Prior to the commencement of this dispute, the appellant, a French national, was a permanent staff member of the Council of Europe Development Bank ("the Bank"). He held the grade A6 and was Director of General Administration. Through this appeal, he challenges the Governor's decision to dismiss him on disciplinary grounds. At the time of this decision, the appellant had been off work due to illness since 30 June 2010, albeit with some interruptions.

7. Before lodging this appeal, the appellant had lodged a first appeal concerning a question of functional protection (CEAT, Appeal No. 470/2011, R.V. v. Governor, decision of 26 July 2011). He had also lodged an administrative complaint (Article 59, paragraph 2, of the Staff Regulations) against the Governor's decision, dated 21 June 2010, to relieve him of human resources management through the separation of the human resources department from the Directorate of General Administration and to make it a directorate in its own right. This complaint is currently pending before the Advisory Committee on Disputes (paragraphs 5-7 of the aforementioned Article 59). The appellant had also lodged another administrative complaint but did not appeal to the Tribunal against the Governor's decision to dismiss it.

After lodging this appeal, the appellant lodged a third appeal (Appeal No. 528/2012 – R.V. (III) v. Governor) complaining of the decision not to grant him invalidity, and this appeal is currently pending before the Tribunal.

II. CIRCUMSTANCES OF THE CASE

8. After two invitations to an interview, on 13 April 2011 the Governor sent the appellant a third invitation, pointing out that this time it was a summons to attend the interview prescribed by Article 56 of the Staff Regulations (paragraph 18 below). The interview did not take place and, with the parties' agreement, was replaced by a procedure of exchange in writing of questions which the appellant answered in a letter of 8 May 2011.

9. On 22 June 2011, the Governor applied to the Disciplinary Board. He accused the appellant of the five following reprehensible acts:

a) unjustified accusations of psychological harassment made against the Governor;

b) [four] errors committed in the surveillance and conclusion of contracts;

c) computer intrusion by using a colleague's computer to send a message described as a joke to the Chief Compliance Officer;

d) breach of the provisions of the Bank's Code of Conduct on conflicts of interest, which had involved his calling upon several suppliers of the Bank to carry out work in a private capacity;

e) appraisal of a staff member of his Directorate in place of the staff member's line manager, allowing the staff member to fill in the relevant form himself.

In his final submissions, the Governor took care to state, in accordance with the procedure, that he was prompted to envisage applying one of the three most severe penalties requiring referral to the Disciplinary Board, viz. relegation in step, downgrading and dismissal.

10. On 27 September 2011, the Disciplinary Board delivered its opinion that only the acts underlying the charge concerning conflict of interests constituted a disciplinary offence. The Disciplinary Board considered that the acts held against the appellant should carry a disciplinary measure, and proposed a reprimand (Article 54, paragraph 2 b. of the Staff Regulations).

11. As the appellant was to be heard before the Governor took his decision (Article 8, paragraph 2, of the Regulations on disciplinary proceedings – paragraph 20 below), an appointment was made for 21 October 2011. However, on the appointed day the appellant was received by two of the three Vice-Governors.

12. On 24 October 2011 the Governor decided, having consulted the three Vice-Governors, to remove the appellant from post on disciplinary grounds with effect from 31 October 2011.

13. On 26 October 2011, the appellant made an administrative complaint to the Governor against the decision to remove him from post (Article 59, paragraph 2 of the Staff Regulations).

14. On 3 November 2011, the appellant lodged a request for stay of execution of the act complained of (Article 59, paragraph 9 of the Staff Regulations). On 18 November 2011, the Chair of the Tribunal dismissed the request.

15. On 24 November 2011, the Governor dismissed the administrative complaint.

16. On 16 December 2011, the appellant brought the present appeal.

III. REGULATIONS CONCERNING THE BANK

17. The Council of Europe Development Bank – formerly the Council of Europe Social Development Fund and earlier Resettlement Fund – was established in 1956 by a Council of Europe Partial Agreement.

Under the terms of Article XI – Section 1 – para. d. of the Articles of Agreement of the Bank, the Council of Europe Staff Regulations shall be applicable to the staff of the Bank in any matter not covered by a specific decision of the Bank's Administrative Council.

In its decisions of 29 September 1995 in Appeals Nos. 189 and 195/1994, 190, 196, 197/1994 and 201/1995, the Tribunal gave an overview of this institution and of the rules governing its operation.

18. The sphere of discipline is governed by Part VI (Discipline) of the Staff Regulations and by Appendix X to the Staff Regulations. Disciplinary power is exercised by the Governor while the competent Disciplinary Board is the one set up by the Council of Europe, though with a change in its membership (see Article 55 *bis* quoted in paragraph 19 below).

19. The relevant provisions of Part VI read as follows:

PART VI: Discipline

Article 54 – Disciplinary measures

"1. Any failure by staff members to comply with their obligations under the Staff Regulations, and other regulations, whether intentionally or through negligence on their part, may lead to the institution of disciplinary proceedings and possibly disciplinary action.

2. Disciplinary measures shall take one of the following forms:

a. written warning;

b. reprimand;

c. deferment of advancement to a higher step;

d. relegation in step;

e. downgrading;

f. removal from post.

3. A single offence shall not give rise to more than one disciplinary measure.

Article 55 – Disciplinary Board

1. A Disciplinary Board shall be set up, consisting of a Chair and four members. The Chair shall arrange for secretarial assistance.

(…)

Article 55 *bis*

1. When dealing with cases referred by the Governor of the Council of Europe Social Development Fund, the Disciplinary Board shall include two members of the Fund's staff.

(…)

Article 56 – Disciplinary proceedings

1. Disciplinary proceedings shall be instituted by the Secretary General after a hearing of the staff member concerned.

2. Disciplinary measures shall be ordered by the Secretary General after completion of the disciplinary proceedings provided for in Appendix X to these Regulations.

(…)"

20. The relevant provisions of Appendix X to the Staff Regulations are worded as follows:

APPENDIX X: Regulations on disciplinary proceedings

Article 1

"Article 1

These Regulations, issued in accordance with Article 56 of the Staff Regulations, govern disciplinary proceedings.

Article 2

1. No warning or reprimand shall be ordered by the Governor before hearing the staff member concerned.

2. If the misconduct of which the staff member is accused may warrant one of the disciplinary measures provided for in Article 54, paragraph 2.c, d, e and f, the Governor shall lay before the Disciplinary Board a report clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed.

3. The said report shall be transmitted to the Chair of the Disciplinary Board, who shall bring it to the knowledge of the Board members and of the staff member.

(…)

Article 8

1. After consideration of the documents submitted and having regard to any statements made orally or in writing by the staff member concerned and by witnesses, and also to the results of any enquiry undertaken, the Disciplinary Board shall, by majority vote, deliver an opinion, stating its grounds, on the disciplinary measure appropriate to the facts complained of, and transmit the opinion to the Governor and to the staff member concerned within one month of the date on which the matter was referred to the Board. The time-limit shall be three months where an enquiry has been held on the instructions of the Disciplinary Board.

2. The Governor shall take his or her decision within one month; he or she shall first hear the staff member concerned.

(…)

Article 11

Costs incurred on the initiative of a staff member in the course of disciplinary proceedings, and in particular fees to a person chosen for his or her defence from outside the Bank, shall be borne by the staff member when the disciplinary proceedings result in any of the measures set out under Article 54, paragraph 2.c to f of the Staff Regulations.

(…)"

THE LAW

21. The appellant has brought this appeal to ask that the Governor's decision to remove him from post be set aside.

22. On the appeal form, the appellant stated that the purpose of the appeal was to request revocation of the decision to remove him from post and the award of damages for a wrongful, discriminatory and vexatious decision furthermore taken in a context of professional ill-health duly recognised since 30 June 2010.

He also requested the award of just compensation for deterioration of working conditions constituting harassment within the meaning, in particular, of Instruction 44 of 7 March 2002 on the protection of human dignity at the Council of Europe.

Concerning the second request, the appellant pointed out that only now could he finally seek compensation in respect of this claim, as his earlier administrative complaint (concerning the decision of 21 June 2010 whereby his duties had been substantially curtailed) had still not received a reply. He added that this lack of reply had therefore prevented him so far from bringing an appeal before the Tribunal.

23. In the conclusions to his supplementary memorial, the appellant asks the Tribunal to:

a) find the decision to remove him from post null and void, and order his reinstatement with effect from the date of removal;

b) find that he was a victim of a situation of psychological harassment;

c) order the Bank to pay damages on these two grounds.

Finally, the appellant asks that the Bank be ordered to pay 12 000 euros in respect of the expenses incurred in the disciplinary proceedings.

24. The Governor for his part asks the Tribunal to declare the appeal inadmissible in so far as it concerns recognition of and compensation for a situation of psychological harassment, and at all events to dismiss it.

The Governor defers to the Tribunal concerning the costs and expenses.

I. SUBMISSIONS OF THE PARTIES

25. During the proceedings the parties described – with supporting legal arguments – several circumstances not directly related to the subject-matter of this appeal. Consequently, the Tribunal will refrain from giving a summary of them here and from undertaking an examination of these arguments, as they are not material to an examination of the complaints in this appeal.

A. Admissibility of the allegation of psychological harassment and the request for compensation on that ground

1. The Governor

26. Le Governor contends that the appeal is partly inadmissible in two respects.

He emphasises that in the appellant's appeal form the appellant sought annulment of the decision to remove him from post and award of compensation to redress prejudice consisting in a deterioration of his working conditions which allegedly constituted harassment. The Governor adds that in his supplementary memorial the appellant requests, apart from having the removal from post set aside, the finding of a situation of psychological harassment together with redress by a single compensation payment of two wrongs, one arising from his removal and the other from his situation of psychological harassment.

27. In the Governor's view however, while there is no problem of admissibility regarding the requests for annulment of the removal from post and award of compensation for the prejudicial consequences of this act in pursuance of Article 60, paragraph 2, third sentence of the Staff Regulations, the same does not apply to the request that the appellant be found victim of a situation of psychological harassment.

28. After making a combined examination of Articles 59, paragraph 2 and 60, paragraph 1 of the Staff Regulations, the Governor asserts that for one thing the Tribunal has jurisdiction only in respect of "administrative acts" and furthermore that the admissibility of an appeal is determined

by the object of the administrative complaint that must precede the appeal. Now, in the instant case the administrative complaint purely concerned setting aside the removal from post, not a problem of psychological harassment. The appeal is thus considered inadmissible failing a prior administrative complaint in inviting the Tribunal to ascertain a situation of psychological harassment, and consequently in claiming compensation on that ground.

29. The Governor adds that in his first appeal (paragraph 7 above), the appellant had already put a request to the Tribunal that it ascertain a situation of psychological harassment; however, in its decision of 26 July 2011, the Tribunal dismissed this request. The Governor infers from this that the present appeal has the purpose of asking the Tribunal to rescind its earlier decision.

30. Thus the Governor comes to the conclusion that the requests for ascertainment of psychological harassment and for redress of this prejudice are inadmissible for the additional reason that they go against the *res judicata* force of the Tribunal's determination.

The Governor asserts that this objection based on *res judicata* would not be raised if the appellant had made other moves to obtain, in the light of new facts, a new administrative act in relation to a fresh instance of psychological harassment.

31. The Governor then enters into a series of medical considerations which the Tribunal sees no need to summarise.

2. The appellant

32. The appellant for his part firstly contests that the supplementary memorial contained different claims than the appeal form, and asserts that only their presentation differed. To his mind, when the supplementary memorial was written it seemed simpler in terms of the presentation and legibility of a complex file to set the compensation claims apart in one section. Thus there was no alteration to the claims.

33. Concerning the admissibility of the request for a finding of psychological harassment, the appellant asserts that the administrative complaint about removal from post necessarily embodies the question of psychological harassment.

34. Next, he considers it incorrect to assert that no previous request was put to the Governor, as that was the purpose of an administrative complaint lodged on 19 July 2010, currently pending before the Advisory Committee on Disputes (Article 59, paragraph 5 of the Staff Regulations) since July 2010. The appellant claims that the hiatus in the examination of this complaint forced him to reactivate his request in the context of challenging the removal from post, which should in no way prevent the Tribunal from considering at this stage the question of psychological harassment. Failure to do so would be tantamount to a denial of justice particularly prejudicial to a staff member, above all regarding such a delicate question as psychological harassment.

35. Finally, he does not think that his claim is contrary to *res judicata* because in its first decision the Tribunal did not address the question of psychological harassment but rather that of functional protection. However, the Tribunal's dismissal of the appeal is not to be regarded as acknowledging the absence of any situation of psychological harassment.

36. Concerning his medical condition, the appellant goes on to present a series of considerations which the Tribunal feels it need not summarise here either. Suffice it to recall that the appellant lodged a third appeal (paragraph 7 above).

B. The merits of the appeal

1. The appellant

37. The appellant makes two pleas in his appeal: setting aside of the decision on removal from post as a wrongful, discriminatory and vexatious decision, and recognition of the deterioration of working conditions constituting psychological harassment within the meaning, in particular, of Instruction 44 of 7 March 2002 on the protection of human dignity at the Council of Europe.

a) Setting aside the decision on removal from post

38. The appellant firstly engages in a series of legal considerations before turning to his own case.

39. Recalling the Tribunal's case-law, the appellant straightway acknowledges that the Governor has a margin of discretion in choosing the disciplinary measure to impose; however, the measure must comply with the principle of proportionality.

After recalling that according to this case-law, the Governor had a duty to demonstrate exhaustively the reasons prompting him to diverge from the opinion of the Disciplinary Board, the appellant submits a series of arguments concerning, in turn, prohibited measures and infringement of the principle that none may be at once judge and party (*nemo iudex in causa sua*).

40. As to prohibited measures, the appellant firstly cites a succession of texts including Article 26 of the revised European Social Charter, establishing in his view the prohibition of penalising an employee for having reported a situation of psychological harassment; from this he infers the existence of specific individual protection in order that none is penalised for having undergone or witnessed acts of psychological harassment.

The appellant then invokes the principle prohibiting double penalisation (*ne bis in idem*), a general principle of law taken up in paragraph 3 of Article 53 of the Staff Regulations (paragraph 19 above).

41. As to the principle that none may be both judge and party, the appellant recalls that this principle is laid down in order to guarantee the independence and impartiality necessary for proper justice.

42. Concerning his own case, the appellant contends that his removal from post is to be considered null and void. Indeed, he argues, this measure was excessive and was taken by the Governor as both judge and party (being personally concerned by the accusations of

psychological harassment); it was also void and discriminatory in being founded on wrongful motives; next, it constituted a double penalty which furthermore was unwarranted; finally, the removal from post was vexatious.

b) As to harassment

43. The appellant recalls the terms of the Bank's Code of Conduct as well as Council of Europe Instruction No. 44 of 7 March 2002 on the protection of human dignity at the Council of Europe. He refers to the latter text even though it was repealed on 1 October 2010 by Rule No. 1292 on the protection of human dignity at the Council of Europe. He makes an analysis of events before 21 June 2010, of the act of 21 June 2010 (the Governor's decision to relieve him of responsibility for human resources) and lastly of events after that date.

Concerning the first period, the appellant perceives in it a deterioration of working conditions that came about very insidiously, and enters into an account of several events which he says do not require separate analysis but rather consideration in their entirety.

He then contends that the act of 21 June was directed against him and constitutes the more visible side of the degrading treatment of which he had been a victim since the summer of 2009.

Finally, as to the period after that date, the appellant claims that the deterioration of working conditions persisted and that it all ended in his removal from post.

44. In conclusion, the appellant asks the Tribunal to find that the situation which he underwent constitutes psychological harassment.

2. The Governor

a) Setting aside the decision on removal from post

45. For his part, the Governor contends that the appellant adduces four reasons for alleging the illegality of his removal from post: inadequacy of reasoning, disregard of the *ne bis in idem* principle, breach of the principle that none may be both judge and party, and lastly wrongful motives. He answers these allegations as follows.

46. Concerning inadequacy of reasoning the Governor, after recalling the arguments encapsulated in his decision to remove the appellant from post on the five counts brought before the Disciplinary Board, asserts that he did provide detailed reasons for his decision to diverge from the conclusions of the Disciplinary Board.

After noting that the appellant does not raise the question whether the reasoning provided was sufficiently convincing – a question which, to the Governor, merges with the question whether the measure adopted by him was not out of all proportion to the seriousness of the alleged misconduct – the Governor puts forward a series of considerations seeking to establish that, having regard to the Articles of Agreement of the Bank, to the nature and level of the appellant's responsibilities, the appellant's errors and behaviour as a whole could only prompt him to remove the appellant with final effect from the establishment of the Bank.

47. As to infringement of the *ne bis in idem* principle the Governor observes that, contrary to the appellant's assertion the decision, pre-dating the removal from post, not to award the appellant a performance bonus for the year 2011 was not to be regarded as a "disguised sanction" but rather an application of Rule No. 03/2008 regulating this. The Governor comes to this conclusion after recalling that the appellant had nevertheless made an administrative complaint to him against this decision to withhold the bonus and had not contested its dismissal by bringing an appeal before the Tribunal.

48. Next, the Governor recalls that the principle that none may be both judge and party ("*non potest esse judex et pars*") is meant to apply to judicial proceedings but not to administrative procedures. He adds that in administrative matters, particularly discipline, the applicable principle is that of impartiality, which is appreciably different.

The Governor adds that even if he could confine himself to asking the Tribunal to dismiss this argument, he considers himself obliged to show that he took his decision with all due impartiality and in the sole interests of the Bank. To do so he recalls firstly that four of the complaints laid against the removal from post had nothing to do with the alleged harassment, so that the Governor could not be regarded as being both judge and party. Concerning the fifth complaint, the appellant's psychological harassment in his dealings with the Governor, the latter emphasises that the mere fact of the appellant's making this allegation did not prevent him from exercising disciplinary authority. With regard to the instant case, the Governor adds that he took every precaution in order that the principle of impartiality might be genuinely upheld.

49. In reply to the complaint about wrongful motives, the Governor accepts that a staff member cannot be penalised for declaring himself victim of harassment; he adds that the appellant nonetheless abused his right to declare himself a victim since he never adduced the least shred of evidence of it although he had eleven months in which to do so.

b) Concerning harassment

50. The Governor maintains that with two exceptions, the appellant puts the same case as in Appeal No. 370/2011 which was already determined by the Tribunal. Regarding these exceptions, he notes that they concern two affidavits by former assistants of the appellant and that the assertions made therein are inaccurate. He therefore considers that the Tribunal would not be able to ascertain a situation of psychological harassment.

51. In conclusion, the Governor asks that the appeal be dismissed.

C. Concerning the requests ancillary to setting aside the removal from post

52. After requesting that the removal be declared null and void, the appellant invites the Tribunal to order his reinstatement in post with effect from the date of removal. He also asks that the Bank be ordered to take prompt action in consequence of the decision, including restoration of all his rights (pension rights included) from the date of removal.

53. The Governor recalls that, subject to the possible application of Article 60, paragraph 7 of the Staff Regulations, were the Tribunal to set aside the contested removal, the appellant would be reinstated in the Bank's establishment.

D. Concerning the compensation claims

54. In his supplementary memorial, the appellant asks the Tribunal for redress on two heads for the nullity of the removal from post and for the psychological harassment allegedly undergone. The damages claimed on that account come to 18 basic monthly salary payments for grade A6, step 8, valued at the date of the Tribunal's decision.

55. The Governor for his part considers this claim inadmissible in so far as it concerns psychological harassment, owing to the inadmissibility of this complaint. As to the prejudice arising from his loss of job, the Governor asserts that the appellant provides no basis on which to evaluate it. Moreover, reinstatement subsequent to setting aside the removal from post (paragraph 52 above) would mean that there was no cause for compensation over and above the amount to be paid for remuneration not received between the date of removal and the date of reinstatement.

E. Concerning the costs of the appeal (Article 11 of Appendix IX to the Staff Regulations)

56. The appellant asks the Tribunal to order the Bank to pay him 12 000 euros in respect of his legal costs.

57. The Governor for his part relies on the discretion of the Tribunal.

II. THE TRIBUNAL'S ASSESSMENT

A. Admissibility of the complaint of psychological harassment and of the claim for compensation on that account

58. The Tribunal recalls that, as the Governor correctly points out, before bringing an appeal before the Tribunal an appellant must make an administrative complaint to the Governor so that he may redress it if the grievances prove founded. Under the terms of Article 59, paragraph 2 of the Staff Regulations, the complaint must be made against an administrative act − which term, as specified in the same provision, refers to any individual or general decision or measure. This presupposes that the act is clearly identified in the administrative complaint, otherwise it would be impossible for the Governor to redress. Nor may the administrative complaint be supplemented or amplified by raising grievances that concern other acts than the one originally complained of.

59. In the instant case, from its reading of the text in question the Tribunal finds that the administrative complaint in which this appeal originates only concerned the decision on removal from post. Indeed, in his submissions the appellant confined himself to asking the Governor to revoke the decision of 24 October 2011. In his administrative complaint the appellant admittedly made reference firstly to a letter – sent on 24 October 2011 by his wife to the Director of Human Resources – in which there was question of the possibility that the disciplinary proceedings might

be part of a "more general process" to the detriment of the appellant; he then claimed that the decision to remove him from post placed him in an "intolerable personal situation". However, these comments are not clear enough – or even succinctly elaborated on – to enable the Tribunal to conclude that the appellant was already complaining, at the stage of the administrative complaint, to be the victim of harassment as well.

60. In the light of the arguments adduced by the appellant to substantiate the admissibility of his complaint, the Tribunal is bound to point out that the administrative complaint concerning the decision on removal from post does not necessarily embody the question of psychological harassment. Likewise, no importance can be attached to the fact that the appellant has already made a complaint to the Governor specifically concerning psychological harassment and that this administrative complaint is currently pending before the Advisory Committee on Disputes. However, the Tribunal agrees with the appellant that the decision in Appeal No. 370/2011 cannot form an impediment to its examination in the present appeal, even if the administrative complaint in which it originated had borne on this point too, of a complaint of psychological harassment, since that in view of the subject of that first appeal (functional protection), breach of the *res judicata* principle cannot be asserted. But this conclusion is not likely to influence the result at which the Tribunal arrives in the instant case on the basis of the foregoing considerations.

61. In conclusion, the objection of inadmissibility raised by the Governor is founded, and the allegation concerning psychological harassment must be declared inadmissible.

The Tribunal must therefore confine itself to only examining the submission concerning removal from post as a disciplinary measure.

B. The validity of setting aside the decision on removal

62. The Tribunal notes firstly that the Disciplinary Board has expressed the opinion that only one of the charges brought by the Governor warranted a disciplinary measure, and proposed a reprimand. In his decision of 24 October 2011, the Governor diverged from this opinion, took the view that all four charges warranted a disciplinary measure and that it should be the most severe penalty, namely removal from post.

63. The Tribunal acknowledges firstly that the Governor is not bound to comply with the opinion of the Disciplinary Board. It has acknowledged this, moreover, in its case-law in which it has stated that detailed and convincing reasons must be given for non-compliance (CEAT, Appeals Nos. 245/1998 and 249/1998 – Bouillon (III) et (IV) v. Secretary General, decision of 20 May 1999, paragraph 80, and Appeal No. 316/2003 Kling v. Secretary General, decision of 7 May 2004, paragraph 46).

Furthermore, the relevant provisions are plain. Under the terms of Article 56, paragraph 2 of the Staff Regulations, "disciplinary measures shall be ordered by the Governor", paragraph 19 above); besides, according to Article 8, paragraph 2 of the Regulations on disciplinary proceedings (paragraph 20 above), "the Governor shall take his or her decision (…); he or she shall first hear the staff member concerned". It is inconceivable to the Tribunal that the person concerned would need to be heard if the Governor was to confine himself to endorsing the Disciplinary Board's opinion in its entirety and merely adopt a decision ratifying it.

64. Thus the Governor is not only able to diverge from the proposal for a measure made by the Disciplinary Board, but also able to make a different assessment of the facts which in his view warranted referral to the Disciplinary Board. Moreover, the appellant accepts that in accordance with the Tribunal's case-law the Governor was able to diverge from the opinion of the Disciplinary Board but in his view had in so doing to give exhaustive reasons at the conclusion of an impartial procedure. Conversely, the appellant feels that the Governor could not diverge radically from the opinion of the Disciplinary Board, as that would be tantamount to setting at naught the advisory role of that disciplinary body. It is plain to the Tribunal that while this possibility exists, nonetheless such a decision must have detailed supporting arguments as to the expediency of ordering a far more severe measure.

65. Consequently, the Tribunal must firstly verify whether the Governor gave exhaustive reasons for his decision and, if so, whether the decision taken was manifestly disproportionate to the reprehensible acts. This second evaluation naturally presupposes an assessment by the Tribunal as to the disciplinary nature of those acts.

66. The Tribunal finds that the Governor gave sufficient reasons for his decision to diverge from the Disciplinary Board's opinion and justified his decision to choose the disciplinary measure of removal from post. Besides, the Governor also indicated, albeit succinctly, the reasons why he considered that downgrading – the severest disciplinary measure next to removal – could not be contemplated.

67. Thus the Governor justified his decision on removal and fulfilled the conditions stipulated by the Tribunal's case-law.

68. Having reached this conclusion, the Tribunal must ascertain whether the disciplinary measure adopted was proportionate to the misconduct held against the appellant.

69. According to the Tribunal's case-law,

> … the proportionality of the contested disciplinary decision is to be examined in the light of the specific circumstances surrounding this case. It recalls that for some years past there has been conflict between the appellant and her head of department. For some time, this conflict has attained proportions not to be disregarded in this context. The Tribunal notes that the measure imposed is the severest of those applied in the Council of Europe. However, the Disciplinary Board has dismissed two out of three charges of misconduct and admitted only the one concerning non-observance of working hours. The Tribunal acknowledges that the Secretary General has a margin of discretion in choosing which disciplinary measure to impose, but this margin is subject to oversight. In this connection the Tribunal notes that the question of the appellant's possible transfer was raised and that solutions were sought (cf. CEAT, decision of 29 March 1996 in Appeal No. 212/1995, para. 16). At the hearing in an earlier appeal, the appellant recalled without contradiction by the Secretary General that she had applied for transfer and that this had also been requested by the Director of the Pharmacopoeia, and indicated that according to the latest information which she had received from the DHR, a possibility had lately presented itself. Thus the transfer was requested several times by the appellant, called for by her

> head of department and recommended by the Organisation's medical adviser. However, no decision to that effect was taken. Moreover, to the best of the Tribunal's knowledge, no proposal for transfer has been made to the appellant. The Tribunal considers that despite the highly specialised character of the duties discharged by the appellant, it was quite obviously impossible to carry out this transfer in an Organisation of the size of the Council of Europe. (CEAT, Appeals Nos. 245/1998 and 249/1998 – Bouillon (III) and (IV) v. Secretary General, decision of 20 May 1999, paragraph 79).

70. More recently, the Tribunal found as follows:

> "The Tribunal observes that the Governor, as the organ vested with disciplinary authority, has discretion to weigh the severity of the disciplinary measure with the sole proviso that the measure decided upon is not manifestly disproportionate to the misconduct. In the instant case, he did not concur with the Disciplinary Board and recommended a more severe measure, having taken into consideration certain specific facts of the case including the appellant's professional position in the CEB. (CEAT, Appeal No. 501/2011 - Semertzidis v. Governor, decision of 11 June 2012, paragraph 40)."

71. Where the instant case is concerned, the Tribunal feels it must conduct an overall examination of the determinations made by the Governor, rather than look separately at each fact held against the appellant in the decision to remove him.

72. In this connection, the Tribunal notes that the arguments put forward by the Governor are not such as to warrant the severity of the measure. Of course, irrespective of whether or not the appellant's misconduct was of a disciplinary nature, it involved acts intrinsically capable of disrupting the Bank's proper functioning and affecting the appellant's obligation to abide by its rules; however, these acts could not attain such a degree of seriousness as to warrant the maximum penalty.

73. As to the acts charged against the appellant by the Governor and mentioned in paragraph 9 b), c) and e) above, the Tribunal finds that they are nonetheless trifling and at all events not such as to justify, whether singly or in combination with other elements, a removal from post.

74. As to the appellant's allegations of psychological harassment, the Tribunal notes that the fact of alleging such harassment does not constitute a disciplinary offence even if, as emphasised by the Governor, the appellant has not provided proof of his allegations.

True, in the Council of Europe regulatory apparatus, Article 13 (unfounded accusation) of Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe is worded as follows:

> "Disciplinary proceedings, as provided for in Articles 54 to 58 of the Staff Regulations and the applicable provisions for temporary staff members, may also be initiated against a staff member or a temporary staff member who knowingly makes false allegations concerning the facts underlying a complaint of sexual or psychological harassment against another person."

However, the arguments set out by the Governor in his decision on removal and during the disputes procedure are not apt to prove that the appellant has "knowingly made false allegations". Indeed, the Governor primarily held against him the fact of not having adduced conclusive evidence and thus of having made wrongful use of the procedure, which is something else again than the condition of falsehood of allegations required by the aforesaid Article 13. Furthermore, the fact that the appellant allegedly publicised his initiative could not constitute a ground for altering the assessment of the facts.

As regards the contention that the appellant reiterated his allegations of harassment in "several proceedings before the Administrative Tribunal or the Advisory Committee on Disputes", the Tribunal recalls that under Article 14 (Lack of effective protection) of Rule No. 1292,

> "Persons who complain of being victims of sexual or psychological harassment and who consider that they did not receive effective protection may lodge an administrative complaint with the Secretary General under Article 59 of the Staff Regulations."

The Tribunal fails to see how the appellant could be penalised for having invoked a right that was statutorily secured to him.

75. Concerning the complaint about breach of the provisions of the Bank's code of conduct, the Tribunal recalls that the Governor asserts, in his decision on removal, that he recently downgraded another staff member for comparable misconduct regarding which the Disciplinary Board was of the opinion that relegation in step should be awarded. He adds that the case of the present appellant was more serious in so far as he had heavier responsibilities in the Bank and had participated in drawing up the code of conduct.

Although it was not explicitly stated during the proceedings, this other case seems to have prompted an appeal in which the Tribunal recently ruled and held that the measure finally taken by the Governor was proportionate. However, in the instant case the Tribunal is not convinced that the additional elements invoked by the Governor for penalising the appellant are of a kind to warrant his removal from post. Indeed, these elements should be examined in the light of the triviality of the misconduct in so far as the Bank clearly suffered no prejudice and finally the appellant made no gain.

76. As to the other acts with which the Governor charges the appellant, the Tribunal finds them also trifling and at all events not such as to warrant removal from post whether taken singly or in combination with other elements.

77. In conclusion, the acts held against the appellant by the Governor, whatever their reprehensible character, are not such as to warrant removal from post even having regard to the appellant's grade and duties.

78. Thus the Tribunal comes to the conclusion that there was a manifest error of assessment and the removal from post cannot be regarded as a penalty commensurate with the facts singled out by the Governor in his decision, much less with those taken into consideration by the Disciplinary Board. It follows that the removal from post is unlawful and should be set aside.

C. Concerning the ancillary requests to setting aside the removal from post

79. The Governor acknowledges and accepts that if the removal from post was set aside, the appellant would be reinstated in the Bank. In accordance with the practice followed in the past, this reinstatement occurs as from the effective date of the removal from post which has been set aside, and moreover in respect of all the issues. Thus, as reinstatement is a consequence of the decision to set aside, the Tribunal need not rule *expressis verbis*. Furthermore, if the appellant considers that the Governor has not carried out the decision correctly, he may bring fresh proceedings.

80. Finally, having regard to the reference made by the Governor to Article 60, paragraph 7 of the Staff Regulations, the Tribunal does not deem it necessary to take this argument into consideration here since this article can only be invoked at the stage of execution of the decision and at all events is only applied with the Tribunal's consent.

D. As to the compensation claim

81. In respect of the two claims made to the Tribunal, the appellant seeks payment of an amount equivalent to eighteen monthly payments of the basic grade A6, step 8 salary, valued at the date of the Tribunal's decision. The Governor objects to this.

82. The Tribunal observes at the outset that in formulating this amount the appellant had in mind the prejudice incurred on both heads of the appeal brought before the Tribunal, the second of which was nevertheless declared inadmissible; consequently, this complaint cannot be taken into consideration for the purpose of compensation. In so far as there is cause to redress the damage (other than loss of salary which is dealt with in the context of the executing measures for this decision) sustained by the appellant because of the removal from post, the Tribunal feels it must rule as follows.

83. Under the terms of Article 60, paragraph 2 last sentence of the Staff Regulations as applicable to the Bank, the Tribunal may "order the Bank to pay to the appellant compensation for damage resulting from the act complained of". The Tribunal has held that an appellant should not merely claim compensation but substantiate his claim and place a figure on the desired compensation (CEAT, Appeal No. 455/2008 - Musiałkowski v/ Secretary General, decision of 30 October 2009, paragraph 52). In the instant case, the material provided by the appellant shows that there is cause to award compensation for the non-material prejudice which he sustained because of the decision to remove him from post which the Tribunal decides to set aside, and the Tribunal considers that it should fix the compensation at 20 000 euros.

E. Concerning the procedural costs and expenses

84. The appellant, who availed himself of the services of counsel, has requested 12 000 euros in respect of costs and expenses. The Tribunal considers it reasonable that the Governor should reimburse on that account the requested sum (Article 11, paragraph 2 of the Statute of the Tribunal – Appendix XI to the Staff Regulations).

III. CONCLUSION

85. The appeal is founded and the contested decision must be set aside. The appellant is also entitled to compensation redressing the damage consequential to the act complained of.

On these grounds,

The Administrative Tribunal:

Declares the appeal inadmissible in so far as it concerns the allegation of psychological harassment;

Declares the appeal founded for the remainder and sets aside the contested decision;

Rules that the Governor must pay the appellant 20 000 euros compensation to redress the damage consequential to the act complained of;

Rules that the Governor must refund to the appellant the sum of 12 000 euros for costs and expenses.

Adopted by the Tribunal in Strasbourg on 25 September 2012 and delivered in writing in accordance with Article 35, paragraph 1 of the Tribunal's Rules of Procedure on 26 September 2012, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. ROZAKIS