

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 528/2013 (R. V. (III) v. Governor of the Council of Europe Development Bank)**

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,  
Mr Jean WALINE,  
Mr Rocco Antonio CANGELOSI, Judges,

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 5 April 2012. On 12 April 2012, the appeal was registered under number 528/2012. The Chair of the Tribunal authorised the appellant to retain the anonymity which he had granted him when the first two appeals were lodged (paragraph 7 below).
2. On 3 January 2012, the appellant's counsel, Maître Christine Hillig-Poudevigne, filed a supplementary memorial.
3. On 14 February 2012, the Governor's representative, Maître Jean-Michel de Forges, forwarded his observations on the appeal. The appellant submitted a memorial in reply on 1 March 2012.
4. The parties having indicated their willingness to dispense with oral proceedings, the Tribunal decided that it was unnecessary to hold a hearing.

5. Having been authorised to do so by the Chair on 11 October 2012, the Governor filed a rejoinder, to which the appellant replied on 25 October 2012.

## **THE FACTS**

### **I. BACKGROUND**

6. Prior to the commencement of this dispute, the appellant, of French nationality, was a permanent member of staff of the Council of Europe Development Bank (“the Bank”). He held grade A6 and was Director of General Administration. Through this appeal, he is challenging the Governor’s decision not to grant him invalidity. 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 protection in his official capacity (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 by separating the human resources department from the Directorate of General Administration and making 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. He subsequently lodged an appeal against the decision to remove him from post on disciplinary grounds (Appeal No 528/2012 – R.V. (III) v. Governor). In a decision delivered on 26 September 2012, the Tribunal annulled that decision.

### **II. CIRCUMSTANCES OF THE CASE**

8. On 2 September 2011, the appellant was informed that the Bank’s insurance company recognised the occupational nature of his illness with effect from 30 June 2010.

9. On 5 September 2011, the appellant applied to be declared a permanent total invalid under Article 13, paragraph 1, of Appendix V to the Staff Regulations. At the same time, he gave the name of the doctor he wished to appoint (Dr G.). Lastly, he enquired about the appropriate procedure for transmitting the complete medical file to Dr C., the Organisation’s medical adviser, who had already reviewed his situation twice at the Bank’s request.

10. On 3 October 2011, the Bank gave the name of the doctor it wished to appoint (Dr J.)

11. On 6 October 2011, the doctor appointed by the appellant agreed to the proposal by the Bank’s doctor regarding the appointment of the third doctor (Dr M.).

12. On 10 October 2011, the doctor appointed by the Bank met the appellant. On that occasion, he informed him that he had contacted the third doctor with a view to an examination, which could not be held until the second week of November 2011.

13. On 24 October 2011, the Governor dismissed the appellant on disciplinary grounds.

14. The examination of the appellant nevertheless went ahead, at his own request, on 7 November 2011.

15. On 16 December 2011, the doctor appointed by the appellant sent an email to the Bank's Director of Human Resources with copies to the other two members of the Board. The message read as follows:

“[The doctor appointed by the Bank] wishes to suspend the Board's proceedings for reasons which he does not specify. I confess that I find this very unusual and surprising. To say the least, this shows a certain disregard for his fellow doctors, the other appointed members of the Board... I would like you to tell me whether [the doctor appointed by the Bank] has been instructed to direct the Board's proceedings or whether he is one of the three members like [the third doctor] and myself. If so, on what authority can he suspend the Board's proceedings? I would add that collusion by a Board member with the employer would be a serious infringement of medical ethics and medical secrecy liable to prosecution under the Criminal Code. Please reply promptly or forward to the person responsible. Furthermore, why have I not received a form from you for setting out my findings?”

16. On the same day, the doctor appointed by the Bank replied that he was not cancelling the Board's proceedings but postponing them.

17. Still on the same day, the doctor appointed by the appellant gave the following reply:

“On what basis and for what reason? [The third doctor] and I do not share your opinion. That is a fact. Does that entitle you to cancel the Board's proceedings?”

I am forwarding this correspondence to the patient, the person most directly affected by this high-handed decision, and to the medical council, and I await your reply.”

18. On 19 December 2011, the Director of Human Resources sent the following reply to the doctor appointed by the appellant:

“As the CEB's medical adviser, [the doctor appointed by the Bank] is a member of the Invalidation Board as provided for in the regulations, but also has a co-ordinating/secretarial role: he is the one who, in due time, will forward the Board's decision, countersigned by the three doctors on the Board, to the Organisation. As requested, you will find herewith the form which was used in other Invalidation Board proceedings.

The CEB just needs the Board's opinion in order to put in place an invalidity pension, if appropriate. It must not be privy to the Board's proceedings and must under no circumstances receive any medical information (please refer to my message of last Wednesday in which I drew your attention to the fact that you inadvertently sent a document containing medical data).”

19. On 22 December 2011, the appellant's wife contacted the doctor appointed by the Bank to ask whether any decision had been taken by the Board.

20. On 23 December 2011, the doctor appointed by the Bank sent the following message to his two fellow doctors:

“I am pleased to invite you to the meeting concluding the Invalidation Board's proceedings relating to [the appellant] on Tuesday 2 January 2012, [...] at 3 pm, at my surgery. The purpose of this meeting is to produce a collective decision reflected in the signing of a CEB administrative document by the three members of the Invalidation Board. This administrative document must observe medical confidentiality and will be the only officially recognised document containing our findings. If you cannot attend this meeting, please be so kind as to send me this document, duly signed, at [...]. If you feel that you cannot answer the questionnaire as indicated, you may either state that you cannot answer the questionnaire or you may briefly indicate the desired changes, the most important thing being that you should send me this document duly signed before the date of the Board meeting. No other document has administrative value for the CEB.”

21. On 29 December 2011, the doctor appointed by the appellant sent the following message to the doctor appointed by the Bank:

“It is unacceptable to schedule a meeting at such short notice without having first consulted us. We are not your lackeys, Mr [doctor appointed by the Bank]. I will not attend this meeting and have decided to refuse to sign anything, so numerous are the procedural and ethical irregularities related to these Invalidation Board proceedings. Furthermore, you mention an official CEB questionnaire, which I have never received. I wish to inform you that I am holding our official correspondence at my patient's disposal so that he may, if he so wishes, send it to the medical council and the CEB in order to request the withdrawal of this Board, which is a complete travesty.”

22. On 3 January 2012, the Bank's medical adviser sent the Bank a letter in which he set out a series of medical considerations [supplementing the findings of the Invalidation Board meeting of Tuesday 3 January 2012]. Appended to this letter were the findings of the Invalidation Board set out on the relevant administrative form. This document contained the indication mentioned in the letter and was signed by two of the three doctors. The space for entering the date of the Board meeting was not filled in, and one signature was dated 30 December 2011 and the other 3 January 2012.

23. On 7 January 2012, the doctor appointed by the appellant sent the latter the following message:

“I am writing to inform you that the irregularities I have observed in the proceedings of the CEB Invalidation Board relating to you (lack of independence vis-à-vis the employer, authoritarian manner employed by [the doctor appointed by the Bank] in convening a meeting following an indefinite postponement without any clear reasons being given, lack of transparency in the proceedings, etc) have led me to refuse, as things stand, to sign any document whatsoever in order to protect your interests (I have also refused to send the

CEB a bill). What I expect of them is to clarify their procedure to bring it into line with basic medical ethics. For the time being I have no news from the organisation, but I will certainly let you know should there be any change.”

24. On 9 January 2012, the Governor wrote as follows to the appellant:

“In a letter dated 5 September 2011, you requested the appointment of an Invalidity Board in accordance with the provisions of Article 13 of Appendix V to the Staff Regulations (Pension Scheme rules). Receipt of this request was acknowledged in a letter from the DRH dated 6 September 2011, to which the relevant passages from Appendix V and its implementing instructions (Articles 13 and 16) were appended. Under Article 13/2 § xi of these implementing instructions, the findings of the Invalidity Board are determined by a majority vote. The findings were communicated to me in a letter dated 3 January 2012 from the Bank’s medical adviser, who, under Article 13/2 § ii of the aforementioned implementing instructions, acts as secretary to the Invalidity Board. These findings were that you are not suffering from total invalidity which prevents you from performing the duties corresponding to your post within the Organisation. Consequently, as provided for under Article 13/3 § I of the aforementioned implementing instructions, in accordance with the findings of the Invalidity Board, I do not recognise you as an invalid within the meaning of Article 13 § 1 of Appendix V to the Staff Regulations (Pension Scheme rules).”

25. On 20 January 2012, the appellant submitted an administrative complaint to the Governor against the latter’s decision of 9 January 2012 (Article 59, paragraph 2, of the Staff Regulations).

26. On 17 February 2012, the Governor dismissed the administrative complaint.

27. On 5 April 2012, the appellant lodged this appeal.

### III. REGULATIONS CONCERNING THE BANK

28. The Council of Europe Development Bank – formerly the Social Development Bank and, before that, the Council of Europe Resettlement Fund – was set up in 1956 under a Council of Europe Partial Agreement.

Under Article 11, Section 1.d. of the Bank’s Articles of Agreement, the Council of Europe Staff Regulations are 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 and 197/1994, and 201/1995, the Administrative Tribunal briefly described this institution and the rules governing its operation.

29. Invalidity is governed by Chapter III (Invalidity pension) of Appendix V (Pension Scheme rules) to the Staff Regulations. This text is supplemented by implementing instructions. The implementing instructions of the Council of Europe Pension Scheme rules are applicable to

the pension scheme for staff of the Bank except where specific measures are taken by the Administrative Council.

30. The relevant provisions as communicated by the Bank to the appellant upon submission of his claim for invalidity read as follows.

31. Article 13 of the Pension Scheme rules governing eligibility for an invalidity pension reads as follows:

### Chapter III: Invalidity pension

#### Article 13 – Conditions of entitlement – Invalidity Board

“1. Subject to the provisions of Article 2, an invalidity pension shall be payable to a staff member who is under the age limit laid down in the Staff Regulations and who, at any time during the period in which pension rights are accruing to him, is recognised by the Invalidity Board defined below to be suffering from permanent invalidity which totally prevents him from performing his job or any duties corresponding to his experience and qualifications which may have been proposed to him by the Organisation.

2. The Invalidity Board shall consist of three medical practitioners, the first two being appointed by the Organisation and the staff member concerned, respectively, and the third one selected jointly by the first two. Cases shall be submitted to it by the Organisation either on its own initiative or at the request of the staff member.”

32. The relevant implementing instructions concerning Article 13, as applicable to the Bank and communicated to the appellant, read as follows:

“ **Instruction 13/2 – Invalidity Board**  
(...).

#### *Secretariat of the Invalidity Board*

ii) The CEB shall appoint a staff member as secretary of the Invalidity Board. Secretariat services may also be provided by the CEB’s medical adviser, who shall be given any administrative assistance he requires.

#### *Convocation and composition of the Invalidity Board*

iii) When the Invalidity Board is to be convened at the staff member’s request, the request shall be addressed to the Head of Personnel responsible for him; it must include his formal application to be declared a permanent total invalid, and give the name of the medical practitioner who is to represent the staff member on the Invalidity Board. The request may be accompanied by a medical file, under separate confidential cover, for the attention of the CEB’s medical adviser.

(...)

### **Meeting of the Invalidity Board**

vii) The Invalidity Board shall meet at the latest within 60 calendar days following the appointment of the third medical practitioner.

(...)

ix) The proceedings of the Invalidity Board shall be secret. The Board may ask to hear the staff member concerned. It may also ask him to undergo an additional medical examination by a medical practitioner appointed by the Board.

(...)

xi) The findings of the Invalidity Board shall be determined by a majority vote. They shall be final except in the case of obvious factual errors and without prejudice to the competence of the Administrative Tribunal.

(...)

### **Instruction 13/3 – Decision of the Governor**

#### **Decision under Article 13, paragraph 1, or Article 14, paragraph 2**

i) In accordance with the findings of the Invalidity Board, the Governor shall decide either:

a) to grant to the staff member concerned an invalidity pension under Article 13, paragraph 1, or Article 14, paragraph 2; this decision shall specify the date on which the pension takes effect; or,

b) not to recognise the staff member as an invalid within the meaning of the Rules.

(...)

#### **Notification of the decision of the Governor**

iv) Within 30 calendar days of receipt of the findings of the Invalidity Board, the Governor shall notify his decision in writing, together with the findings of the Invalidity Board, to the staff member or former staff member.”

### **THE LAW**

33. The appellant lodged this appeal to request the annulment of the Governor’s decision of 9 January 2009 informing him of the rejection of his application to be declared an invalid.

He further requests a finding that “the Bank was guilty of wrongful concealment in failing to disclose the findings of the Invalidity Board [to the appellant], in breach of the regulations”.

Lastly, the appellant asks that the Bank be ordered to pay the sum of 5 000 euros in respect of the costs incurred in these proceedings.

34. For his part, the Governor asks the Tribunal to dismiss the appeal.

The Governor defers to the Tribunal with regard to costs and expenses.

## I. SUBMISSIONS OF THE PARTIES

35. The appellant first submits that the Governor’s decision should be annulled because the proceedings of the Invalidity Board suffered from numerous irregularities. Secondly, he considers the procedure to be vitiated by the fact that the Bank failed to disclose the Invalidity Board’s findings.

36. Regarding the first ground of appeal, the appellant refers to Article 13/2, complaining of an infringement of paragraphs (ii), (iii) and (vii) of that provision (paragraph 32 above) because

- he discovered belatedly that the doctor appointed by the Bank also acted as secretary to the Invalidity Board. The appellant accordingly questions whether this appointment was in order;

- he was not informed that Dr C. was not the Bank’s medical adviser in proceedings of the Invalidity Board;

- the Invalidity Board did not meet within the 60-day time limit.

The appellant further alleges an infringement of paragraphs (ix) and (xi) of the same provision and of paragraph (iv) of Article 13/2 (more correctly 13/3) concerning respectively additional examinations and the time limit for the Governor’s decision.

37. For his part, the Governor disputes that the Invalidity Board was not formed in the proper way, Dr J. having been appointed medical adviser to the Bank. Furthermore, he was entitled to act as secretary to the Board under the terms of Article 13/2 (ii) of the implementing instructions.

38. As to the length of the invalidity proceedings, the Governor states that he has no information regarding whether the Board met before 3 January 2012. However, if that were not the case, there would be no substantial irregularity whereby the Board’s opinion, and hence the Governor’s decision, would be rendered void. He argues that it would be unfair if the Bank were to suffer the legal consequences of a procedure which is outside its control. In any event, the length of the proceedings would not be such as to vitiate the decision.

39. Regarding the proper functioning of the Board, the Governor emphasises that the Bank took care to remain outside any discussions that may have taken place between the members of the Board.

40. As to the complaint concerning the Board's findings, the Governor submits that there are no rules requiring him to forward the administrative form completed by the members of the Board rather than a "notification" of the findings. Even assuming that it was obligatory to forward the administrative form, this formality would not affect the staff member's rights.

## II. THE TRIBUNAL'S ASSESSMENT

41. The Tribunal notes first of all, from the information provided to it by the parties, that the proceedings before the Invalidity Board clearly did not take place in a calm manner. It is not for the Tribunal to look into the reasons for this situation, but that does not prevent it from making this finding.

42. Regarding these proceedings, it is true that the Bank must not interfere in the conduct of the proceedings, which are covered by medical confidentiality. The Tribunal considers, however, that it is wrong that the Bank should not be able to obtain administrative information after the end of the procedure enabling it to determine whether the procedure was conducted in accordance with the rules.

43. However that may be, it is clear from the facts brought to the Tribunal's attention that the Board did not hold a meeting and that one of the signatures was dated with a date preceding that of the supposed meeting. Furthermore, that supposed date falls outside the time limit within which the Board is required to meet (sixty days) and no information has been given about a possible first meeting under cover of medical confidentiality. The argument of confidentiality cannot be validly relied upon vis-à-vis the Tribunal.

44. These facts are sufficient for the Tribunal to establish the irregularity of the procedure and to annul the decision of 9 January 2012.

45. Having reached that conclusion, the Tribunal has no need to consider the appellant's other grounds of appeal.

46. The fact that the Governor had no margin of discretion in taking his decision is not an element which could justify the Tribunal in deciding otherwise.

47. The appellant, who had recourse to the services of a lawyer, claimed 5 000 euros by way of costs and expenses. The Tribunal considers it reasonable for the Governor to reimburse the sum of 3 000 euros under this head (Article 11, paragraph 2, of the Tribunal's Statute – Appendix XI to the Staff Regulations).

## III. CONCLUSION

48. The appeal is well founded and the contested decision must be annulled. The appellant is also entitled to 3 000 euros in respect of costs and expenses.

For these reasons,

The Administrative Tribunal:

Declares the appeal well founded and annuls the contested decision;

Orders the governor to pay the appellant the sum of 3 000 euros by way of costs and expenses.

Adopted by the Tribunal in Strasbourg on 6 December 2012 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 6 December 2012, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS