# CONSEIL DE L'EUROPE———<br>————COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF
## ADMINISTRATIVE TRIBUNAL

**Appeal No. 651/2020**
**(B v. Secretary General of the Council of Europe)**

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,
Ms Lenia Samuel,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

Ms Christina OLSEN, Registrar,
Mr Dmytro TRETYAKOV, Deputy Registrar,

has delivered the following decision after due deliberation.

**PROCEEDINGS**

1. The appellant lodged the present appeal on 30 April 2020. The appeal was registered on the same day under No. 651/2020.

2. On 18 May 2020, the Chair agreed to the appellant's request for anonymity.

3. On 2 July 2020, the appellant filed a supplementary memorial. On 15 October 2020, the Secretary General submitted her observations on the appeal. The appellant filed observations in reply on 4 January 2021.

4. The parties having agreed to waive oral proceedings, the Chair decided on 6 January 2021 that there was no need to hold a hearing.

**THE FACTS**

I. CIRCUMSTANCES OF THE CASE

5. The appellant, B, has been a permanent staff member of the Council of Europe since 1994 and has worked in various directorates and entities of the Organisation. Since 8 October 2018, he has been on sick leave.

6. On 15 January 2018, four staff members of the Organisation submitted jointly a memorandum to the Committee for Health and Safety ("CHS") alleging that the appellant's working methods and management of interpersonal relations had harmed their health and dignity, as well as those of other colleagues. They requested that the CHS open an investigation into these allegations under Article 2, paragraph 2, of Rule No.1338 on the CHS. The CHS declined to take up this issue and to open an investigation because it is not competent to deal with complaints relating to the behaviour of individual staff members.

7. On 10 April 2018, an internal inquiry was ordered into the allegations the complainants had made in their memorandum to the CHS, under the terms of Instruction No. 51 of 10 June 2006 on internal inquiries. The inquiry was entrusted to the Directorate of Internal Oversight ("DIO") in order to avoid any risk of conflict of interest or the appearance of a conflict of interest. The appellant was informed by the Director of DIO of the opening of the inquiry by a memorandum dated 23 April 2018.

8. On 30 May 2018, the internal inquiry ordered on 10 April 2018 was cancelled and a new inquiry into the same allegations was entrusted to the Director of DIO. Whereas the first inquiry had been ordered by the Deputy Secretary General, the memorandum launching this second inquiry was signed by the Secretary General himself so as to take into account the findings of the Administrative Tribunal in its decision of 17 May 2018 on appeals nos. 582/2017 and 583/2017.

9. On 15 February 2019, the appellant lodged a complaint with the Commission against Harassment against the staff members who had authored the memorandum of 15 January 2018 addressed to the CHS.

10. On 13 May 2019, DIO concluded its inquiry and finalised its inquiry report. The inquiry found that there was sufficient evidence to conclude that it was more probable than not that the appellant has breached the Organisation's internal rules and that in some cases the appellant's behaviour amounted to harassment and that his behaviour may be qualified as prohibited conduct, within the meaning of Article 1 of Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe, and in breach of Articles 3, 4, 5, 6, 7, 8, 9 and 10 of the Charter of Professional Ethics, as well as Articles 25 and 30 of the Staff Regulations.

11. In June and July 2019 three of the four individuals against whom B had lodged a complaint lodged themselves a complaint against B with the Commission against Harassment.

12. On 11 July 2019, the Secretary General submitted a report under Article 55, paragraph 3 of the Staff Regulations and Article 2, paragraph 2 of the Regulations on disciplinary proceedings (Appendix X to the Staff Regulations) to the Chair of the Disciplinary Board by which he referred the matter which DIO had investigated to the Disciplinary Board.

13. On 17 October 2019, the Commission against Harassment issued its opinion and recommendations regarding the complaint lodged by B as well as the complaints lodged against B. As regards the complaint lodged by B, the Commission found that although B had been subjected to a humiliating and offensive working environment due to the deliberate public dissemination of serious allegations against him, B had not been subjected to any conduct which, intentionally or unintentionally, was prejudicial to his personality, dignity or

physical or psychological integrity. As regards the complaints lodged against B, the Commission found that B's conduct vis-à-vis two of the three complainants amounted to prohibited conduct under the terms of Rule No. 1292 and recommended that the Secretary General take appropriate measures, including at least a written warning about B's lack of respect for the hierarchy and unacceptable behaviour towards his colleagues.

14. By a memorandum dated 19 November 2019 the Secretary General asked the Chair of the Disciplinary Board to consider the relevant findings of the Commission against Harassment within the scope of the proceedings pending before the Board due to the similarity of the facts examined under the two procedures.

15. On 27 November 2019, the Secretary General sent a memorandum to B, the Chair of the Commission against Harassment and the Director of Human Resources informing them of the decisions and measures she had taken in the light of the recommendations adopted by the Commission. As regards the proceedings pending before the Disciplinary Board, she indicated that she reserved the right to take a decision on possible disciplinary measures against B in the light of the Board's opinion in accordance with the procedure set out in the Regulations on disciplinary proceedings (Appendix X to the Staff Regulations).

16. On 2 December 2019, the Disciplinary Board delivered its opinion in accordance with Article 8, paragraph 1, of the Regulations on disciplinary proceedings. The opinion found *inter alia* that the established behaviour of B consisted, in relation to the complainant who had been under B's hierarchy, of a management style which created a hostile, humiliating and offensive working climate and of close supervision to which he subjected her, and, in relation to the complainant who had been B's hierarchical superior, of a sustained, repetitive and systematic abusive conduct at the workplace, which, intentionally or unintentionally, caused deterioration of the working climate and created a hostile, intimidating and offensive environment. Having therefore found that B had committed acts of harassment (under the terms of both Instruction No. 44 of 7 March 2002 on the protection of human dignity at the Council of Europe and Rule No. 1292 of 3 September 2010 which repealed this instruction), the Board unanimously concluded that the disciplinary measure adequate in the circumstances of the case at hand was that of downgrading, provided for in Article 54, paragraph 2 (e) of the Staff Regulations.

17. By decision *ad personam* no. 7584 of 17 December 2019, the Secretary General imposed upon the appellant the disciplinary sanction of downgrading (from grade A4 to grade A3) for acts of psychological harassment. The decision indicated the following:

> "On 2 December 2019, the Disciplinary Board issued an opinion in which it found that [B] has committed disciplinary misconduct, namely behaviour consisting:
>
> - in relation to a hierarchical subordinate, of [B]'s management style which created a hostile, humiliating and offensive working climate, and of close supervision to which he subjected that colleague and
> - in relation to a hierarchical superior, of a sustained, repetitive and systematic abusive conduct in the workplace, as demonstrated by gestures as well as spoken and written words, which, intentionally or unintentionally, caused a deterioration of the working climate and created a hostile, intimidating and offensive environment for that person.
>
> The Disciplinary Board based [its] finding on the facts established by the Commission against harassment and set out in its opinion of 17 October2019. (…)

> The Secretary General shares the view of the Disciplinary Board that the established facts imputable to [B] amount to psychological harassment and therefore constitute serious misconduct warranting a disciplinary sanction. (…)
>
> Having considered with great care all sanctions provided for in Article 54 of the Staff Regulations, and having reached the conclusion that the serious misconduct committed by [B] does not make it possible to envisage his keeping managerial responsibilities, the Secretary General
> DECIDES to follow the recommendation of the Disciplinary Board and to downgrade [B] to grade A3 with effect as of 1 January 2020. (…)"

18. On 31 January 2020, the appellant lodged an administrative complaint seeking the annulment of decision *ad personam* no. 7584 of 17 December 2019 and compensation for the non-pecuniary damage suffered as a result of the propagation of unfounded accusations and his submission, as a consequence, to an irregular investigation procedure.

19. On 2 March 2020 the Secretary General dismissed the complaint in its entirety on the grounds that it was ill-founded.

20. On 30 April 2020 the appellant lodged this appeal.

## II. THE RELEVANT LAW

21. Article 59 of the Staff Regulations governs the complaints procedure and is worded as follows:

> "(…)
> 2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.
> 3. The complaint must be made in writing and lodged via the Director of Human Resources:
> (…)
> b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure; (…)."

22. Article 60 of the Staff Regulations governs the appeals procedure. The paragraphs relevant to the instant case are worded as follows:

> "1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.
> 2. The Administrative Tribunal, after establishing the facts, shall decide as to the law. In disputes of a pecuniary nature, it shall have unlimited jurisdiction. In other disputes, it may annul the act complained of. It may also order the Council to pay to the appellant compensation for damage resulting from the act complained of.
> 3. An appeal shall be lodged in writing within sixty days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 4. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods. (…)"

23. The conduct of inquiries concerning breaches of the Organisation's internal rules is subject to Instruction No. 51 of 10 June 2006 on internal inquiries. Under Article 1, paragraph 1a, of this instruction:

> "[t]he Secretary General, if s/he has reasonable cause to believe that there has been a breach of the Organisation's internal rules, may instruct the Director General of Administration and Logistics to conduct, together with one or several other staff member(s), an inquiry in order to establish the relevant facts and make recommendations in this connection."

24. The prohibition of sexual and psychological harassment at the Council of Europe is enshrined in Rule No.1292 of 3 September 2010 on the protection of human dignity at the Council of Europe. Under Article 1, paragraph 3, of this rule, psychological harassment is defined as:

> "any sustained, repetitive and/or systematic abusive conduct in the workplace or in connection with work in the form of behaviour, actions, gestures, spoken or written words, threats or working organisation methods which, intentionally or unintentionally, is prejudicial to a person's personality, dignity or physical or psychological integrity or causes a deterioration in the working environment or endangers that person's employment or creates a hostile, intimidating, degrading, humiliating or offensive environment. Psychological harassment may be the result of the behaviour of one or several persons".

This rule sets out the different non-contentious and contentious procedures applicable in cases of harassment, which include direct discussion with the other party, recourse to the hierarchical superior(s), seeking assistance and advice from different interlocutors within Administration and/or the Staff Committee, addressing the Confidential counsellors, mediation, and lodging a complaint before the Commission against harassment.

25. Prior to its entry into force, the relevant instrument addressing the issue of harassment at the Council of Europe was Instruction No. 44 of 7 March 2002 on the protection of human dignity at the Council of Europe.

26. The composition of the Commission against Harassment established under Rule No.1292 is governed by Article 8 of this rule:

> "1. A Commission against Harassment (hereafter "Commission") shall be established, comprising four persons and their substitutes. Two of the Commission members - and their substitutes - shall be appointed by the Secretary General and the remaining two – and their substitutes – by the Staff Committee. At least one of the persons appointed by the Secretary General, and his/her substitute, shall hold a University degree in law. The members of the Commission and their substitutes shall be appointed for a renewable term of two years. They shall receive specialised training immediately after their appointment and then at yearly intervals. The substitute members shall act when their titular members are prevented from doing so.
>
> 2. The members of the Commission shall remain in place until their successors have been appointed. Members who have been replaced shall continue to deal with such cases as they already have under consideration. (…)
>
> 4. The Secretary General shall also appoint a Secretary and his/her deputy for a renewable two-year term, who shall not be deemed to be members of the Commission."

27. The proceedings before the Commission against Harassment are described in Article 10 of Rule No. 1292 which reads as follows:

> "1. The proceedings before the Commission shall be adversarial, in the sense that the parties shall have full access to the material before the Commission, subject to any reasoned ruling, in writing, to the contrary by the Commission, and shall be able to comment on them and on each other's submissions – the alleged perpetrator having the right of last reply.

4. Each party shall be entitled to object to a member of the Commission. The first objection shall be automatically accepted. As regards subsequent objections, the Commission shall decide whether or not to accept them on the basis of all information available to it. Members who have to step down under this provision are replaced by their substitutes. Each party shall also be entitled to request that a member of the Organisation's medical service and/or the social worker sit with the Commission as observers.

5. The Commission and its rapporteur(s) shall enjoy the same powers as the staff members conducting an internal inquiry under the relevant Instruction[3]. As regards hearing both parties and witnesses proposed by them, the Commission, or one or several of its members it has appointed as rapporteur(s) shall hear them all separately. The Commission, when hearing witnesses, shall make any arrangements that may be necessary to protect them from undue pressure, such as ensuring anonymity."

28. Disciplinary measures are dealt with in Part VI of the Staff Regulations. The different types of possible disciplinary sanctions are set out in Article 54 of the Staff Regulations, as follows:

"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."

29. The statutory provision governing the setting up of the Disciplinary Board is Article 55 of the Staff Regulations, which stipulates:

"1. A Disciplinary Board shall be set up, consisting of a Chair and four members. The Chair shall arrange for secretarial assistance.
2. The Secretary General shall each year appoint the Chair of the Disciplinary Board, this office being incompatible with membership of the Joint Committee. The Secretary General shall also draw up a list containing, if possible, the names of two staff members from each grade in each category mentioned in Article 4. The Staff Committee shall at the same time transmit a like list to the Secretary General.
3. Within five days of receipt of a report initiating disciplinary proceedings, the Chair of the Disciplinary Board shall, in the presence of the staff member concerned, draw lots from among the names in the above-mentioned lists to decide which four members shall constitute the Disciplinary Board, two being drawn from each list.
4. Members of the Disciplinary Board shall not be of a lower grade than that of the staff member whose case the Board is to consider.
5. The Chair shall inform each member of the composition of the Board.
6. Within five days of the formation of the Disciplinary Board, the staff member in question may make objection once to any of its members other than the Chair.
7. Within the same period any member of the Disciplinary Board may ask to be excused from serving, provided he or she has legitimate grounds.
8. The Chair of the Disciplinary Board shall, by drawing lots, fill any vacancies.
9. The Chair and members of the Disciplinary Board shall be completely independent in the performance of their duties. The proceedings of the Board shall be secret."

30. The Regulations on disciplinary proceedings are set out in Appendix X to the Staff Regulations. The relevant articles of the regulations establishing the procedure to be followed and the rights of the staff members concerned during this procedure are as follows:

> "Article 2
>
> (…)
>
> 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 Secretary General shall lay before the Disciplinary Board a report clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed.
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> 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.
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> Article 3
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> On receipt of the report, the staff member charged shall be entitled to see his or her complete personal file and to take copies of all documents relevant to the proceedings.
>
> Article 4
>
> At the first meeting of the Disciplinary Board the Chair shall appoint one of its members to prepare a general report on the matter.
>
> Article 5
>
> 1.The staff member concerned shall have not less than fifteen days from the date of receipt initiating disciplinary proceedings to prepare his or her defence.
>
> 2. When staff members appear before the Disciplinary Board they shall have the right to submit written or oral observations, to call witnesses and to be assisted in their defence by a person of their own choice.
>
> Article 6
>
> The Secretary General shall likewise have the right to call witnesses.
>
> Article 7
>
> 1.If the Disciplinary Board requires further information concerning the facts complained of or the circumstances in which they arose, it may order an enquiry in which each side can submit its case and reply to the case of the other side.
>
> 2.The enquiry shall be conducted by the rapporteur. For the purpose of the enquiry the Disciplinary Board may call for any document relating to the matter before it.
>
> 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 Secretary General 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 Secretary General shall take his or her decision within one month; he or she shall first hear the staff member concerned."

**THE LAW**

31. The appellant requests that the Secretary General's decision *ad personam* no. 7584 of 17 December 2019 which imposed on him the disciplinary sanction of downgrading from A4

to A3 as from 1 January 2020, and the Secretary General's decision of 2 March 2020 rejecting the administrative complaint both be set aside.

32. The appellant also seeks compensation for the damage suffered as a result of the downgrading, namely the difference in salary between the grades A3 and A4 since 1 January 2020 and the loss of all related benefits – the difference in question being estimated *ex aequo et bono* at 1 500 euros per month. In addition, the appellant claims compensation for non-pecuniary damage, estimated *ex aequo et bono* at 10 000 euros. Lastly, the appellant asks for the respondent to be ordered to pay all legal costs in the amount of 8 000 euros.

33. For her part, the Secretary General invites the Administrative Tribunal to declare the present appeal inadmissible and unfounded and to dismiss it in its entirety.

I. THE PARTIES' SUBMISSIONS

*1) The appellant*

**a. Errors of law**

34. The appellant contends that the Secretary General committed an error of law by imposing a disciplinary sanction without establishing the facts that allegedly constitute moral harassment. He maintains that there was a failure to establish the facts at every stage of the proceedings and that this failure relates to all of the following acts: the Secretary General's decision of 2 March 2020 to reject the appellant's administrative complaint; the decision *ad personam* no. 7584 imposing the disciplinary sanction; the opinion of the Disciplinary Board and the opinion of the Commission against Harassment. All these acts merely repeat the letter of the relevant legal definition of harassment but fail to state the acts, gestures or words on the basis of which it was concluded that there had been harassment.

35. The appellant further submits that the Secretary General committed an error of law by qualifying the facts ascribed to him of "close supervision" and "refusal of authority" as amounting to moral harassment within the meaning of the applicable rules. The appellant argues that had these facts been proven, they would not have reached the threshold of severity required to qualify as moral harassment.

**b. Breach of the obligation to provide reasons**

36. The appellant maintains that the Secretary General failed in her obligation to provide reasons on several counts. Firstly, she omitted to establish the facts, as argued above. Secondly, by referring to several legal provisions without specifying what the appellant is supposed to have done to infringe these provisions, she created uncertainty as to the legal grounding of the disciplinary sanction imposed. Thirdly, she did not attempt to remedy several shortfalls deriving from the contradictory reasoning of the Disciplinary Board and the Commission against Harassment, to which her decisions nevertheless refer. Fourthly, she did not reply to all the arguments raised in the appellant's administrative complaint. Lastly, she failed to address the concerns that the appellant had conveyed to the Administration about the situation complained of.

**c. Manifest errors of appreciation**

37. The appellant submits that the Secretary General's decision *ad personam* no. 7584 is also flawed as a result of several manifest errors of appreciation. In support of this claim, the appellant advances the following arguments relating to the opinions of the Commission against Harassment and the Disciplinary Board on which the *ad personam* decision is based: the conclusion reached in regard to the appellant's "refusal of authority" is grounded in an unsubstantiated and very incomplete version of the facts; the decision fails to draw any conclusion from the various failings on the part of the appellant's superior; it also fails to take account of the positive appraisals the appellant had always received, including in respect of managerial competencies. In addition, it relies on a misrepresentation of the appellant's employment history which ignores the appellant's repeated efforts to settle conflicts at work and to obtain coaching.

**d. Procedural violations during the enquiry conducted by DIO**

38. To the extent that DIO's inquiry report was taken into account by the Disciplinary Board, the appellant contends that the inquiry was marred by the violation of rights under Article 55 of the Staff Regulations and the unfairness of the procedure. The appellant refers in this connection to the arguments raised at the administrative complaint stage.

**e. Procedural violations before the Commission against Harassment**

39. As for the proceedings before the Commission against Harassment, the appellant invokes procedural violations concerning the right of defence, in particular the hearing of witnesses and the principle of adversarial proceedings.

40. Firstly, the appellant was not invited to comment on the responses to the complaint he had lodged against the complainants in breach of Article 10, paragraph 1, of Rule No. 1292 establishing the right of the parties to comment on each other's submissions and the right of last reply of the alleged perpetrator.

41. Secondly, the Commission failed to provide valid grounds justifying its decision to hear only a limited number of witnesses from among those he had proposed.

42. Thirdly, the Commission further failed to notify the appellant about the identity of the witnesses it heard and the content of their testimony, in violation of the appellant's right of defence and of the principle of adversarial proceedings. In order to justify the departure from this principle, the Commission should have advanced cogent reasons justifying its decision to admit anonymous evidence and to deny the appellant any access thereto – including in an anonymised form – and such use should have been remedied by sufficient counterbalancing factors, especially since the decision to impose the disciplinary sanction appears to rest largely on anonymous testimonies.

43. Fourthly, the Commission denied the appellant the opportunity to comment on the complaints against him without taking into consideration the difficulties for the appellant in being heard in person owing to health reasons, and this amounted to a violation of the appellant's right to be heard.

44. The appellant also considers that Article 8, paragraph 1, of Rule No. 1292 on the composition of the Commission against Harassment was not complied with and advances several arguments in support of this grievance: the *ad hoc* appointment as a member of K.M.

outside any provision in the rules and the fact that K.M. participated in the examination of the complaints against the appellant when she could have been replaced by a properly appointed member following the Staff Committee elections in June 2019; the doubt that such an *ad hoc* appointment casts on the impartiality of the Commission's members; the further doubts about their impartiality stemming, on the one hand, from the appointment, in addition to K.M., of a second member, P.T., to the Commission, only after the appellant's complaint had been lodged and on the other, from the participation in the proceedings of a member of the secretariat of the Commission, R.M., "who had not only appeared as a witness against [the appellant] in the inquiry but also acted in ways that frustrated [the appellant's] fair-trial rights in the proceedings before the Commission against Harassment".

45. In connection with the replacement of E.B. by P.T. following the lodging of the appellant's complaint, the appellant further invokes a violation of paragraph 2 of Article 8 of Rule No. 1292 which stipulates that members who have been replaced shall continue to deal with such cases as they already have under consideration.

**f. Procedural violations before the Disciplinary Board**

46. The appellant raises several grievances regarding the procedure before the Disciplinary Board.

47. The first grievance relates to a violation of the right to be heard as a consequence of the Board's decision to introduce the opinion of the Commission against Harassment into the disciplinary proceedings and to focus its opinion on that of the Commission. The appellant denies having had the opportunity to comment on the Commission's findings upon submitting to the Board written observations since at the time, it was not known that the Disciplinary Board had the report of the Commission against Harassment under consideration. The appellant adds that it would have been for the Administration to ask for such observations - which it did not – out of consideration for the fact that the appellant could not have submitted *proprio motu* further observations. In these circumstances, the appellant believes that the hearing before the Board should have been adjourned or, alternatively, a date set for a second hearing.

48. The appellant accordingly considers that the procedure followed did not afford him the possibility of contesting the opinion of the Commission against Harassment and of demonstrating that such an opinion did not provide a safe basis for recommending a disciplinary sanction.

49. The second procedural grievance raised by the appellant concerns the right to call witnesses. By considering the appellant's failure to comply with the "prescribed form" for presenting witness evidence as tantamount to a waiver of the right to call witnesses - instead of the result of a misunderstanding - the Disciplinary Board unduly restricted the appellant's exercise of such a right for reasons that were never explained.

50. The appellant also considers that the Disciplinary Board was not properly constituted. The appellant refutes the Disciplinary Board's interpretation of Article 55, paragraph 6, of the Staff Regulations that only one member of the board can be objected to. He thus disagrees with the Board's ensuing decision that only the first person on the list of three persons to whom the appellant's objection pertained, was to be considered as the person effectively concerned by the objection. The appellant also considers this decision to be arbitrary because

the Board failed in its obligation to seek clarification when in doubt. The appellant further complains of not being afforded access to the information on the inquiry under Instruction No. 51 which would have been necessary for him to ask for a member or a substitute of the board to step down for valid reasons. The appellant contends that the approach followed in setting up this body undermines litigants' confidence in the proceedings. Lastly, the appellant denies having waived the right to raise this complaint for failing to do so during the hearing before the Disciplinary Board, based on the consideration that the only admissibility condition relates to the appellant's duty to raise the relevant issue at the administrative complaint stage.

**g. Breach of the reasonable time requirement and the *ne bis in idem* principle**

51. The appellant challenges the lawfulness of the Secretary General's decision(s) on the ground of non-compliance with the reasonable time requirement, more than 10 years having lapsed between the opening of the inquiry under Instruction No. 51 and some of the alleged facts which triggered this inquiry.

52. The appellant considers that the fact that the Staff Regulations do not contain express rules on prescription for disciplinary offences does not dispose of the question of whether there is a time limit for lodging complaints of moral harassment. The impugned decision failed to assess *in concreto* whether the complaint had been lodged within a reasonable time and is therefore unlawful.

53. The appellant further contends that the decision breaches the principle of *ne bis in idem* since at the time of the facts in question, the hierarchy and the Administration had found nothing reproachable in the appellant's acts that would warrant the instituting of disciplinary proceedings and they had taken a clear stance in this respect.

**h. Violation of the principle of good administration and the duty of care**

54. The appellant argues that the Administration violated its duty of protection and care. In this connection, mention is made of the Administration's failure to act on the appellant's complaints and requests for, at a minimum, a counter-inquiry into the behaviour of the complainants which ultimately led to the finding by the Commission against Harassment that harassment had occurred. By contrast, the Administration showed great indulgence towards the complainants in deciding to open an extensive inquiry under Instruction No. 51 instead of applying the special procedure prescribed for harassment allegations under Rule No. 1292.

**i. Proportionality**

55. The appellant submits that a further reason for setting aside the impugned decision is the manifestly disproportionate character of the sanction of downgrading. The appellant adduces several factors and mitigating circumstances in support of this claim: the limited scope of the Disciplinary Board's finding that the appellant should not have managerial responsibilities, namely the fact that it concerns a single staff member; the criticism levelled against one of the complainants by the Commission against Harassment; the lack of support shown towards the appellant by the Administration despite repeated requests for assistance; the appellant's prior good service.

*2) The Secretary General*

**a. Procedural violations during the inquiry conducted by DIO**

56. The Secretary-General considers that the appellant's allegations of procedural violations at the stage of the internal inquiry are unsubstantiated and, in any event, ill-founded. She refers in this regard to the replies given to the appellant at the administrative complaint stage.

**b. Procedural violations before the Commission against harassment**

57. The Secretary General first notes the specific nature of the proceedings before the Commission against Harassment, which has no decision-making power and cannot be compared to a jurisdictional or disciplinary body. For this reason, she dismisses the case law invoked by the appellant as non-relevant to the case at hand to the extent that it refers to criminal law cases.

58. As regards the various procedural violations alleged by the appellant, the Secretary General notes that the first grievance, concerning the fact that he was not invited to comment on the complainants' observations, was not raised at the administrative complaint stage and is therefore inadmissible for non-exhaustion of internal remedies. The Secretary General further notes that since this grievance concerns the complaint lodged by the appellant and not the complaint lodged against the appellant, it is not relevant to the case at hand which relates to the consequences of the latter complaint.

59. As for the second grievance concerning the limitation of the number of witnesses heard from among those proposed by the appellant, the Secretary General observes that it was neither expedient nor desirable for the Commission to hear all the numerous witnesses proposed by the parties which is why, in making use of its discretionary power, it chose to hear only those persons who had directly witnessed the facts related to the complaint or who were in a position to provide the Commission with information on the general situation. She also notes that out of the 17 witnesses proposed by the appellant, seven were heard and the appellant failed to demonstrate why this number was insufficient and to what extent hearing a larger number of witnesses would have altered the conclusions reached by the Commission.

60. In relation to the appellant's third grievance concerning the non-disclosure of the identity of the witnesses, the Secretary General asserts that witnesses heard by the Commission are shielded by the principle of confidentiality under the relevant provision of Rule No. 292 regarding the procedure before the Commission against Harassment (see paragraph 27 above). She observes that in any event, the appellant neither asked to be present or represented during their hearing, nor asked for the witness statements to be sent to him, which is why no *ad hoc* decision was necessary to grant them anonymity. She further underlines that the appellant became indirectly aware of the content of the testimonies on reading the opinion of the Commission against Harassment, and that the appellant's ability to exercise his right of defence was in any case ensured before the Disciplinary Board.

61. As to the appellant's claim that he was denied the right to comment on the harassment complaints lodged against him, the Secretary General contends that the appellant was invited to make comments from the moment the complaints were notified and repeatedly thereafter. She adds that although medical reasons prevented the appellant from accepting the

Commission's invitation to attend the hearing in person, the appellant could have arranged for himself to be represented and could in any case have submitted comments in writing.

62. Regarding the composition of the Commission, the Secretary General notes the following: the appointment of K.M. on an *ad hoc* basis was dictated by the simultaneous disqualification of a full member and his alternate - an exceptional circumstance not provided for in the applicable regulations; as for the appointment of P.T., this was ongoing at the time of the lodging of the appellant's complaint and P.T.'s predecessor had not yet undertaken the examination of the case, with the result that no violation of Article 8, paragraph 2, can be considered to have occurred; there is no provision to support the appellant's reasoning that any decision on the complaints should have been taken by the Commission as constituted after the June 2019 elections and it was entirely justified that the same members should decide on the fate of all the complaints in view of the similarity and interconnection between the cases. The Secretary General further notes that the appellant failed to object to the composition of the Commission and to raise this grievance at the stage of the administrative complaint, with the result that this plea is inadmissible. She raises the same argument in relation to the appellant's grievance concerning the participation of K.M. As to R.M., the Secretary General asserts that there is no incompatibility between the status of witness for the internal inquiry and that of Secretary of the Commission against Harassment. She adds that in any case, R.M. was not a member of the Commission and the appellant has provided no evidence that R.M. exercised any influence over the Commission's decision-making process.

**c. Procedural violations before the Disciplinary Board**

63. The Secretary General refutes the appellant's submission that the introduction into the disciplinary proceedings of the opinion of the Commission against Harassment led to a violation of the right to be heard. To this end, she quotes the Disciplinary Board's opinion that "[w]hile the Opinion and Recommendations of the Commission date back to 17 October 2019, they were introduced into the proceedings before the Board (…) in [B's] observations submitted on 6 November 2019. [B] manifestly had and used the opportunity to comment on the findings of the Commission both in [the] written observations and in the oral submissions made (…) at the hearing on 21 November 2019".

64. As regards the appellant's right to call witnesses, the Secretary General recalls the circumstances in which the Board reached the conclusion that the appellant failed to make use of this right: in submitting a list of witnesses to be heard, the appellant failed to comply with the form prescribed by the Board and offered no explanation as to why the prescribed form was not respected or why another form should have been used. The Secretary General adds that the appellant's representatives did not raise any issues in this respect at the hearing on 21 November 2019 before the Disciplinary Board.

65. Concerning the appellant's claim that the Board was not properly constituted, the Secretary General submits that the procedure followed to appoint the members of the Board and their substitutes took place in the presence of the appellant's representative and with her agreement. She refutes the appellant's extensive interpretation of the rule providing for the right to challenge the membership of the Board and considers that the appellant's right to object once to any of the members of the Board was used up with respect to the first person on the list of three members to whom the appellant had sought to object. The Secretary General also rebuts the claim that the appellant lacked the necessary information to properly exercise the right in question by noting that the appellant was in possession of the inquiry report which

set out all the information gathered, including references to the various persons involved in one way or another with the facts under inquiry.

### d. Violation of the principle of good administration and the duty of care

66. As regards the appellant's contention that the Organisation violated its duty of good administration and care, the Secretary General considers this complaint inadmissible, and in any case manifestly unfounded for lack of convincing evidence. She refers here to the failure to seek annulment of the decisions taken on the appellant's complaint against the complainants.

### e. Breach of the reasonable time requirement and the *ne bis in idem* principle

67. The Secretary General considers that in the absence of a limitation period under the applicable internal rules and in view of the discretionary power of the Organisation to initiate disciplinary proceedings, as well as by virtue of its duty of care towards its employees, the Secretary General did not breach the reasonable time requirement upon deciding to initiate disciplinary proceedings in respect of facts reported more than ten years after their occurrence.

68. The Secretary General also observes that only one disciplinary sanction was imposed in respect of the facts at issue, namely downgrading, thus meeting the requirement of *ne bis in idem* set forth in Article 54, paragraph 3 of the Staff Regulations according to which "[a] single offence shall not give rise to more than one disciplinary measure". She adds that none of the events which occurred at the time of the facts at hand were such as to prevent the initiation of the disciplinary proceedings which are the subject of the present appeal.

### f. Errors of law and of appreciation

69. The Secretary General submits that she duly exercised her discretionary power after a thorough examination of all the material in the file and a fair assessment of the measures to be taken. Her decision of 17 December 2019 sets out the reasons why the conduct in which the appellant engaged constituted a serious breach of duty and why the sanction of downgrading was appropriate. It does so by referring to the facts as established and assessed by the Disciplinary Board and the specialised body mandated to investigate allegations of harassment, namely the Commission against Harassment. The Secretary General therefore denies that she committed any error of law or of assessment.

### g. Breach of the obligation to provide reasons

70. The Secretary General notes that the question of whether the statement of reasons for a decision imposing a sanction on a staff member is sufficient must be assessed not only with regard to the wording of the decision, but also with regard to its context. She further points out that the reasons for a decision may be given by explicit or implicit reference to other documents. In the light of these considerations, the Secretary General considers that the contested decision was sufficiently reasoned to enable the appellant to exercise his rights of defence and that she did not breach her duty to provide reasons by referring in her decision to the conclusions of the Disciplinary Board, which in turn, referred to the conclusions of the Commission against Harassment.

**h. Proportionality**

71. The Secretary General submits that the sanction of downgrading was appropriate and proportionate in view of the nature and gravity of the misconduct established against the appellant, the context and circumstances of the case, as well as the interests of the Organisation which must preserve confidence in the Council of Europe's adherence to its own values. She notes that the appellant's professional experience within the Organisation and the fact of having received positive appraisals cannot constitute an attenuating circumstance, contrary to what the appellant maintains. She adds that her decision of 17 December 2019 provides a sufficient explanation in this respect, in addition to explaining why the other, less severe, sanctions were unsuitable in the present case.

**i. The appellant's claims for compensation**

72. The Secretary General considers that, in the absence of any irregularity attributable to the Organisation, the appellant is not entitled to compensation for any damage, nor to reimbursement of the costs incurred.

73. In the alternative, the Secretary General observes that the appellant's allegations that he suffered non-pecuniary damage as a result of the "unfounded" accusations against him and the "oppressive" inquiry he endured have not been proven. As to the appellant's claim for reimbursement of legal expenses, the Secretary General asks the Tribunal to reject this claim on the grounds that the appellant has failed to substantiate these costs and has not submitted any documents or evidence in support of this claim, despite being required to do so under Article 11 of the Statute of the Tribunal.

II. THE TRIBUNAL'S ASSESSMENT

74. The present appeal seeks annulment of the decision *ad personam* dated 17 December 2019 whereby the Secretary General imposed the disciplinary sanction of downgrading on the appellant. To this end, the appellant alleges irregularities and illegalities committed by the bodies involved in the examination of the allegations of harassment made against him. The appellant puts forward several contentions and submissions designed to show that the procedures leading up to the adoption of the impugned decision are marred by irregularities, and that this decision is, as a consequence, vitiated. The appellant also presents claims for compensation.

75. It is in the light of the above, therefore, that the Tribunal will examine the appellant's submissions.

1. **Setting aside the decision *ad personam***

76. The Tribunal notes first of all that (a) the appellant adduces several arguments to establish the Secretary General's failure to state reasons for the impugned decision and, more generally, for a series of earlier acts that were detrimental to him. Secondly, (b) the appellant claims that the impugned decision is flawed because of several procedural irregularities affecting his rights, in particular his right of defence and his right to be heard. Thirdly, (c) the appellant contends that the composition of the Disciplinary Board and the Commission against Harassment was irregular. Fourthly, (d) the appellant submits that several errors of assessment were committed by the Secretary General in breach of the rules laid down by the

Organisation. Fifthly, (e) the appellant contends that the sanction imposed on him by the impugned decision violated the principle of proportionality. Lastly, (f) the appellant makes further contentions concerning the illegality of the impugned decision.

a. *Duty to state reasons*

77. The appellant asserts that by reasoning her decision by reference to the findings and conclusions of the Disciplinary Board and the Commission against Harassment, the Secretary General did not properly discharge her duty to give reasons. Besides creating uncertainty as to the legal grounding of the disciplinary sanction imposed, her decision gave weight to irrelevant facts, relied on contradictory reasoning and overlooked the appellant's own arguments and concerns about the situation complained of.

78. The Tribunal notes that it is settled international administrative case law that the obligation to give reasons is intended to provide the staff member concerned with sufficient information to enable him or her to ascertain whether that decision is well founded or whether it suffers from a defect that would enable him or her to challenge its lawfulness, for example by filing an appeal. A review body must also know the reasons so as to tell whether the impugned decision is lawful.

79. It should be borne in mind that the question whether a decision imposing a disciplinary sanction on a staff member complies with the duty to state reasons must be assessed having regard not only to the wording of that decision, but also to its context and to all the legal rules governing the field concerned, in this case disciplinary matters.

80. In that regard, although the Administration is required to state the elements of fact and law which constitute the legal basis of its decisions and the considerations which led to its adoption, it is nevertheless not required to discuss all the issues of fact and law which have been raised during the proceedings (see decision of the Tribunal in Appeal No. 501/2011 Michel SEMERTZIDIS v. Governor of the Council of Europe Development Bank , paragraphs 43 and 44). In any event, the reasons given for a decision are sufficient if it was adopted in circumstances known to the staff member concerned which enable him or her to understand the scope of the measure concerning him or her.

81. In the present case, the Tribunal observes that the Secretary General reasoned her decision *ad personam* no. 7584 by reference to the findings of the Disciplinary Board which concluded that "the established facts imputable to [B] amount to psychological harassment and therefore constitute serious misconduct warranting a disciplinary sanction". The Secretary General's decision also followed the Board's recommendation to downgrade [B], taking the view that such sanction was "entirely proportionate to the nature and gravity of the established misconduct". The Disciplinary Board, in turn, relied upon the findings of the Commission against Harassment, which it adopted, finding that [B]'s behaviour had "amounted to harassment within the meaning of Rule No. 1292".

82. Furthermore, the Tribunal notes that the impugned decision provides clear indications explaining why the Secretary General followed the Disciplinary Board's opinion and the reasons which justified her choice of sanction. The fact that the Secretary General did not elaborate in detail on the Disciplinary Board's analysis or further explain the elements contained therein is not sufficient to conclude that the contested decision was not reasoned. Indeed, the *ad personam* decision was taken in a context well known to the appellant on the

basis of the elements that were discussed first at the level of the Commission against Harassment and then at the level of the Disciplinary Board.

83. The Tribunal accordingly considers that the Secretary General provided sufficient justification for the impugned decision with regard to the various arguments which the appellant had raised in the course of the proceedings.

84. In response to the appellant's claims that on several issues the reasoning in the contested decision is defective (see paragraph 77 above), the Tribunal considers that these claims are not relevant to the duty to state reasons. Whilst the appellant appears to argue that in the present case there has been a violation of the obligation to state reasons, in reality, he invokes errors of assessment which were allegedly committed by the Administration.

85. The Tribunal considers that the appellant was sufficiently informed of the reasons for the adoption of the challenged decision. This is clearly evidenced by the various arguments and pleas in law that he put forward in his appeal before the Tribunal.

86. The Tribunal therefore concludes that the allegation concerning a breach of the obligation to give reasons for the impugned decision must be rejected.

b. *Procedural defects affecting the right of defence*

87. It should be reiterated that respect for the right of defence, of which the right to be heard is an integral part, is a fundamental principle that applies to all persons and must be guaranteed in all proceedings that may give rise to a complaint. Compliance with the right of defence requires that the staff member against whom the Administration has initiated administrative proceedings should be given the opportunity, in the course of those proceedings, to put forward his or her point of view on the existence and relevance of the facts, the alleged circumstances and the documents which the Administration intends to use against him or her.

88. The Tribunal considers also that the exercise of the right of defence, and in particular the right to be heard, also implies that the Administration must give due consideration to the observations thus submitted by the person concerned by examining, with care and impartiality, all the relevant aspects of the case. The right to be heard must thus enable the Administration to investigate the case in such a way as to take a decision in full knowledge of the facts so that, if necessary, the staff member concerned can validly exercise his or her right to bring an action before the Tribunal.

89. Lastly, the existence of a violation of the right to be heard must be assessed in the light, in particular, of the legal rules governing the matter concerned, in this case the disciplinary procedure.

90. The appellant considers that his right of defence was violated on several occasions, in the context of the proceedings, both before the Disciplinary Board and the Commission against Harassment. In his opinion this constitutes a procedural defect which renders the impugned decision illegal. In this regard, the appellant puts forward the following five contentions.

91. Firstly, the appellant contends that the introduction into the disciplinary proceedings of the opinion and recommendations issued by the Commission against Harassment infringed his right of defence. The essence of this claim is that the way in which the Commission's findings were incorporated into disciplinary proceedings unfairly deprived the appellant of the ability to organise his defence.

92. In that regard, the Tribunal notes that the appellant was notified of the joinder of the proceedings before the Commission against Harassment and those pending before the Disciplinary Board on 19 November 2019, the date on which an email was sent to the appellant's legal representative conveying to her for information the memorandum that the Secretary General had sent the same day to the Chair of the Disciplinary Board. In the memorandum in question, the Secretary General asked the Chair of the Disciplinary Board "to join the procedures and consider the relevant findings of the Commission within the scope of the pending proceedings".

93. Prior to the issuance of this memorandum, the Secretary General had produced her report referring the matter to the Disciplinary Board on 11 July 2019 and the appellant had submitted his written observations to the Board on 6 November 2019 covering the Secretary General's referral report and the inquiry report.

94. The hearing before the Disciplinary Board at which the appellant was represented by his legal representative took place on 21 November 2019.

95. On 27 November 2019, the Secretary General sent a memorandum directly addressed to the appellant, the Chair of the Commission against Harassment and the Director of Human Resources confirming the request set out in her earlier memorandum of 19 November 2019 to the Chair of the Disciplinary Board for a joinder of the proceedings and conveying the decision she had taken on the follow-up to the findings of the Commission against Harassment.

96. It is observed that there are no specific provisions in the Staff Regulations and implementing rules that articulate a solution to deal with the joinder of the procedures at issue. In the absence of such provisions, the Tribunal considers that the key question to examine is whether, following the decision to add the findings of the Commission against Harassment to the file before the Disciplinary Board, (1) the appellant was properly informed of the reprehensible acts which transpired from the Commission's findings, as well as of the circumstances in which they were allegedly committed and (2) the timeline followed afforded the appellant sufficient time to prepare his defence in relation to these charges.

97. The Tribunal notes in this connection that the Secretary General's memorandum of 19 November 2019 stressed that "the facts underlying the [Commission's] findings and the related recommendation (…) are the same as part of those that were the subject of the inquiry report at the origin of the pending disciplinary proceedings".

98. The Secretary General's memorandum further explained that "the joinder of the two procedures is necessary insofar as the same facts are concerned since, pursuant to Article 54, paragraph 3, of the Staff Regulations "a single offence shall not give rise to more than one disciplinary measure"". By way of a conclusion, the memorandum noted that "the full text of the opinion of the Commission against harassment had been submitted to the Disciplinary

Board by [the appellant] and has thus become an integral part of the file in the disciplinary proceedings".

99. Considering that the facts subsumed in the disciplinary proceedings were covered in the preceding report by DIO and that they neither altered nor expanded the charges brought against the appellant, the Tribunal finds that the introduction of the Commission's findings into the disciplinary proceedings neither affected the appellant's knowledge of the charges brought against him, nor adversely impacted his ability to put forward a defence against them.

100. In these circumstances, it is immaterial that the appellant learned about the inclusion of the Commission's findings in the disciplinary proceedings after having submitted written observations to the Disciplinary Board and a couple of days before the hearing with this body, without being granted a further opportunity or a new deadline to present comments. Significantly, the appellant had himself already included the Commission's findings in those written observations, not only to disprove the conclusions of the inquiry report on the basis of which the disciplinary proceedings were instituted, but also to challenge those same findings.

101. In addition, the appellant seeks to demonstrate that in the context of the exercise of his right of defence at any given stage it was not enough for him to receive the documents and information which were prejudicial to him, and he should, in addition, have been formally invited to intervene in order for this right to be effectively respected. In the Tribunal's view, these allegations are unfounded in law and in fact.

102. The Tribunal notes that the appellant seeks to establish that there are procedural defects in the present case that confirm an alleged violation of his right of defence, and that this violation therefore renders the contested decision flawed, without he himself in any way having substantiated the context in which his right of defence was violated.

103. In the light of the above, the Tribunal considers that the manner in which the Disciplinary Board relied on the findings of the Commission against Harassment did not prevent the appellant from exercising his right of defence. Moreover, contrary to what the appellant claims, he was never prevented from expressing his point of view.

104. The Tribunal therefore concludes that the appellant's first contention must be rejected as unfounded.

105. The second grievance raised by the appellant to contest the regularity of the procedure before the Disciplinary Board relates to the right to call witnesses and as a consequence his right of defence. The appellant claims having been denied this right after the Board decided that the failure to comply with the prescribed format for presenting witness evidence was tantamount to a waiver of this right. The appellant considers that the Board had no authority to take this decision without any explanation or information.

106. In the present case, by email dated 15 October 2019, the secretariat of the Disciplinary Board informed the appellant that the hearing before the Board had been scheduled for 21 November 2019 and invited the appellant to inform the Board, by 8 November 2019, "whether [the appellant was] going to appear and, if so, how (alone, accompanied or represented, and if so, by whom (name, capacity, contact))". The email stated that the appellant had, *inter alia*, the right to call witnesses and that "witness evidence [was] to be presented in writing, by the above indicated date, specifying the name, capacity and contact of

the witness”. The email added that, likewise, “any witness evidence submitted by the Administration would similarly be transmitted to the Members and to [the appellant] before the hearing”.

107. On 8 November 2019, the appellant submitted a list of witnesses with an indication of the topics on which they would be heard.

108. In its opinion of 2 December 2019, the Board noted that “this submission [disrespected] the form prescribed in line with the Board’s inherent power to organise the proceedings. At the same time, it [noted] that [the appellant] had indicated nothing by way of an explanation as to why the prescribed form was not respected or why another form should have been applied. It accordingly [concluded] that the [appellant] had failed to make use of [the] right to hear witnesses”.

109. In the light of the aforesaid facts, the Tribunal finds that in deciding to admit only testimonial evidence submitted in written form and within a prescribed period before the hearing, the Disciplinary Board did not overstep its powers, nor did it unduly restrict the appellant’s right to call witnesses. Once the time limit for supplying such evidence had expired, it was within the Board’s powers to refuse to admit the witnesses included in the appellant’s list of 8 November 2019 and/or to consider that the appellant had failed to exercise the right to call witnesses.

110. Although it would have been appropriate for the Disciplinary Board to inform the appellant thereof, the failure to do so does not, in the Tribunal’s view, amount to a procedural flaw that could invalidate the procedure. The Tribunal also notes that once the appellant became aware – during the hearing on 21 November 2019 at which he was represented – of the Board’s decision not to admit any witness from the list of 8 November 2019, the appellant did not contest the Board’s decision, nor was any attempt made to reverse this decision by claiming, for example, that the failure to comply with the prescribed form for presenting testimonial evidence was unintentional and/or the result of a misunderstanding or of an excusable error which would have justified restarting the time limit for submitting such evidence.

111. In these circumstances, the Tribunal concludes that appellant’s second contention must be rejected.

112. As regards the appellant’s third contention that the Commission against Harassment did not hear all the persons whom the appellant wished to see testify, thus affecting his right of defence, the Tribunal notes that the Commission enjoys the same powers as the staff members conducting an internal inquiry under the relevant Instruction, namely Instruction No. 51 of 10 June 2006 on internal inquiries. In its role as the entity responsible for an administrative investigation into complaints of harassment, the Commission is required to investigate the files that are submitted to it in a proportionate manner. It thus has broad discretion with regard to the conduct of the investigation and, in particular, with regard to assessing the quality and usefulness of the cooperation provided by the witnesses.

113. The Tribunal finds therefore that the third contention does not stand.

114. The appellant contends fourthly that the use in the present case of anonymous evidence and the fact that he was denied access to the witnesses' statements in an anonymised form undermined his right of defence.

115. The Tribunal notes that, in accordance with Article 10, paragraph 1, of Rule No. 1292, "[t]he proceedings before the Commission shall be adversarial, in the sense that the parties shall have full access to the material before the Commission, subject to any reasoned ruling, in writing, to the contrary by the Commission (…)". Regarding testimonial evidence, paragraph 5 of Article 10 of Rule No. 1292 specifies that the Commission has the duty, when hearing witnesses, to "make any arrangements that may be necessary to protect them from undue pressure, such as ensuring anonymity". The French version of this provision is worded as follows: "La Commission, lorsqu'elle entend des témoins, prend toutes dispositions nécessaires pour les protéger contre toute pression. En particulier, elle garantit leur anonymat".

116. The Tribunal takes account of the fact that while it is not clear from a literal reading of paragraph 5 of Article 10 of Rule No. 1292, especially the English version, that witness anonymity is a given, it has become the practice of the Commission against Harassment to automatically grant anonymity. This transpires from the submissions of the Secretary General who indicates that witnesses are in principle guaranteed anonymity under Rule No. 1292 and that in the case at hand, this information was communicated to all witnesses, who were thus able to testify, secure in the knowledge that their identity and the content of their testimony would not be disclosed to the parties.

117. As to the appellant's argument that there should have been a reasoned decision in writing by the Commission against Harassment to grant anonymity, the Tribunal does not consider that the Commission's practice of granting anonymity automatically, without any justification, contravenes the rule in Article 10, paragraph 1 of Rule N° 1292, because this general rule is superseded by the more specific rule in Article 10, paragraph 5, which does not require any written reasoned decision to grant witness anonymity.

118. The Tribunal has stated in the past (see paragraph 129, ATCE decision in appeals Nos. 582/2017 and 583/2017, Brillat and Priore (III) v. the Secretary General), that "it is for the Secretary General – exercising his disciplinary power if necessary – to take all necessary steps to ensure that these interviews are anonymous and that persons who give evidence are not subjected to reprisals or threats".

119. The possibility thus granted to the Administration is not necessarily incompatible with respecting the right to be heard of a person who is accused of acts of harassment.

120. The Tribunal considers, however, that whenever arrangements are in place to protect witnesses against undue pressure, it is necessary for the procedure followed to achieve a reasonable balance between, on the one hand, the need to safeguard the confidential nature of information and documentation pertaining to the investigation of a harassment complaint and, on the other hand, the due process rights of the parties in disciplinary proceedings.

121. According to settled case-law (see for example, ILOAT, Judgment 2771, paragraph 18 ), this balance consists in considering that, where disciplinary proceedings are brought against an official who has been accused of harassment, testimonies and other materials which are deemed to be confidential pursuant to provisions aimed at protecting third parties need not be

forwarded to the accused official, but she or he must nevertheless be informed of the content of these documents in order to have all the information which she or he needs to defend herself or himself fully in these proceedings. In order to respect the right of defence, it is sufficient for the official to have been informed precisely of the allegations made against her or him and of the content of testimony taken in the course of the investigation, in order that she or he may effectively challenge the probative value thereof. To achieve this aim, certain techniques may be used, such as disclosing the substance of the witness statements in the form of a summary, or the redaction of some of the content of those statements.

122. In the case at hand, the Tribunal notes that it was never examined whether it would have been possible to reconcile respect for the legitimate interests of witness confidentiality with the appellant's right of defence. The Tribunal admits, as noted by the Secretary General, that the Commission against Harassment has no decision-making power and cannot be compared to a jurisdictional or disciplinary body. The Tribunal observes, however, that once the evidence collected by the Commission against Harassment was admitted in the disciplinary procedure, the appellant's rights of defence fully applied.

123. The Tribunal also observes that in the procedure before the Disciplinary Board the appellant had clearly asked to be given access to the file in its entirety, including the hearings of the various witnesses heard. Owing to the procedure followed, the only content of the testimonies heard by the Commission against Harassment to which the appellant had access is that which was transposed in the Commission's opinion.

124. Having carefully examined the wording used in the Commission's opinion to relay this content, the Tribunal concludes that, on the whole, the information provided on the subject of these testimonies was sufficient to enable the appellant to become acquainted with the facts of the case, as well as with the evidence gathered against him, to present his own version of the facts, to criticise the administration of the evidence already gathered, and to adduce evidence of his own.

125. The Tribunal therefore rejects the appellant's fourth contention.

126. The appellant fifthly contends that the procedure before the Commission against Harassment is marred by an irregularity on the grounds that he was denied the right to comment on the allegations against him. He also contends that he was unfairly denied the right to comment on the responses given in reaction to the complaint that he had himself lodged with the Commission.

127. As regards the appellant's complaint, the Tribunal notes that he was heard by the Commission on 29 April 2019. As regards the complaints lodged against him, the appellant was informed thereof by a letter dated 31 July 2019 conveyed through an email dated 5 August 2019 from the secretariat of the Commission against Harassment which indicated "[la Commission reviendra] vers vous prochainement pour vous proposer une date d'audition".

128. The Tribunal notes that on 18 September 2019, the appellant received a further email from the secretariat of the Commission against Harassment stating that "[t]he Commission against harassment is wondering if you'd like to react to the three complaints that were sent to you during the summer?" and that "[t]he Commission would like to invite you to a hearing to comment the complaints?". The appellant replied on the same day by an email in which he commented: "[i]n your email you're asking me whether I would like to react to the

complaints. This is the first time I am asked this question (see the email of 5/8). Are you also asking me whether I want to be invited to a hearing?" In this email, the appellant also mentioned his health problems and indicated that he would be consulting a doctor on 27 September 2019 for advice "on what [he] should do or avoid doing". The appellant concluded his email by stating: "I'd also like to ask for your permission to reply to your questions shortly after 27/9".

129. After attempting to arrange a meeting with the Chair of the Commission – who declined –, on 1 October 2019, the appellant sent the latter several medical certificates indicating that his health had deteriorated and that "stress est totalement contre-indiqué". Together with the medical certificates, the appellant submitted a message he had received from the Organisation's medical officer suggesting that he should "produire les certificats médicaux, que vous m'avez transmis, à la personne qui vous a convoqué aux prochaines réunions et de lui indiquer que vous ne vous sentez pas en état d'y participer".

130. The exchange of e-mails between the Chair of the Commission and the appellant referred to in the previous paragraph was the last communication to occur between the Commission and the appellant before the latter was notified of the conclusions reached by the Commission against Harassment on 17 October 2019.

131. The Tribunal notes that the appellant was informed that the Commission against Harassment "would like to invite [him] to a hearing to comment the complaints". In response, he produced a medical certificate confirming that he was not fit to attend the hearing, but in his replies to the Commission, he did not state whether he intended to react to the complaints lodged against him.

132. The Tribunal considers that, with regard to the proceedings before the Commission against Harassment, the appellant, through constantly alleging a lack of concern on the part of the respondent with regard to his own response to the complaints against him ever since they were lodged, attempted to show that his right to be heard was violated. It is clear from the circumstances of the case, however, that he was repeatedly reminded of his right to comment on the complainants' submissions against him and therefore, he cannot claim that an irregularity was committed by the respondent in respect of his rights.

133. The Tribunal takes the view that the information provided to the appellant was sufficient to enable him to exercise his right to be heard. Having failed to do so, by his own choice, he cannot justifiably allege that the decision of the Commission against Harassment to proceed without hearing him or obtaining his written comments – whether on the complaints against him or on the reactions to his own complaint – infringed his rights of defence or to be heard.

134. The Tribunal therefore concludes that the fifth contention must also be dismissed, as must the present plea as a whole.

c. *Composition of the Disciplinary Board and of the Commission against Harassment*

135. The appellant claims that the Disciplinary Board was unlawfully constituted owing to an erroneous interpretation by the Board of the relevant rules.

136. In the first place, the Tribunal observes that only a strict interpretation of these rules can guarantee the transparency of the disciplinary proceedings and protect the staff member from all arbitrariness.

137. In this connection, Article 55 of the Staff Regulations, reproduced in paragraph 29 above, entitles the staff member in question to make objection once to any of its members other than the Chair, within five days of the formation of the Board. Under the terms of this rule, the four members of the Board, other than the Chair, are chosen by drawing lots from a first list of names established by the Secretary General and another list established by the Staff Committee, two lots being drawn from each list. In the event of a vacancy, paragraph 8 of Article 55 states that "[t]he Chair of the Disciplinary Board shall, by drawing lots, fill any vacancies".

138. In the present case, on 23 September 2019, in the presence of the appellant's representative, lots were drawn for the designation of two titular members of the Board from each of the two lists, as well as six substitutes (three from each of the respective lists). By an e-mail dated 30 September 2019, the appellant objected to a member drawn from the Staff Committee's list, a substitute from the Secretary General's list and a substitute from the Staff Committee's list.

139. On 3 October 2019 the secretariat of the Disciplinary Board informed the appellant that the two members drawn from the Staff Committee's list "were excused from sitting on the Board by way of, respectively, an excuse under Article 55/7 of [the Regulations] and an objection on the part of [the appellant] under Article 55/6 of [the Regulations] and that they had been replaced by two substitutes from the Staff Committee's list. One of the latter substitutes had been objected to by the appellant in his e-mail of 30 September 2019 mentioned in the previous paragraph.

140. On the basis of these factual elements, the Tribunal firstly takes the view that the wording of the rule leaves no room for doubt as to the fact that the staff member in question can only object to one member of the Board at a time, contrary to what the appellant claims. The Tribunal does not share the appellant's argument that such an interpretation "is likely to undermine litigants' confidence in the proceedings, as it cannot be excluded in practice that more than one member might be biased against the defendant". Should such a case arise, it would be possible in any event to request that the member of the Board in question ask to be excused from serving.

141. Secondly, as has already been stated in the past (see ATCE decision in Appeal No. 501/2011 - Michel SEMERTZIDIS v/ Governor of the Development Bank of the Council of Europe , paragraph 58), the Tribunal is critical of the Disciplinary Board's practice of immediately drawing by lots the names of the staff members to sit on the Board and the names of possible substitutes rather than drawing the names of the Board members and, only subsequently, the names of the substitutes when, and above all if, the need for substitutes

arises. The practice adopted seems intended to avoid any undue formalism which would encumber the procedure, but this practice is contrary to the regulations governing the procedure. Above all, it reduces the right of objection available to the appellant at each drawing of lots.

142. Notwithstanding the above, the Tribunal notes that this manner of proceeding was agreed upon by the lawyer mandated by the appellant to attend the meeting at which the drawing of lots took place. The Tribunal further notes that in the appellant's submissions, it has neither been alleged nor otherwise established that there were any grounds calling into question the subjective or objective independence or impartiality, according to accepted legal standards, of the substitute member of the Board drawn from the list of the Staff Committee to whom the appellant had objected. In the absence of proof that this circumstance has caused harm to the appellant, the Tribunal considers that this manner of proceeding did not vitiate the procedure.

143. Thirdly, the Tribunal considers that, in the absence of any indication on the part of the appellant as to an order of priority between the three names given (see paragraph 50), the Board had full discretion to consider that the objection applied to the first person on the list. It therefore rejects the appellant's argument that the Disciplinary Board's failure to ask him for clarification prevented the appellant from exercising his right of objection.

144. Fourthly, the Tribunal agrees with the Board's position that "an objection under Article 55 §6 of the Regulations takes in principle precedence over a request to be excused under Article 55 § 7 of the Regulations". The Tribunal finds that the Board's interpretation is the most apt to serve the needs of the procedure and the legitimate interests of the staff members concerned. The Tribunal adheres to the Board's position that the right to make an objection is a part of the defence rights of the person concerned and should therefore take precedence. The right to make an objection, moreover, has a certain aspect of privilege to it in the sense that the person concerned may exercise it without having to provide any grounds.

145. The appellant's last argument in support of his claim that the Disciplinary Board was not properly constituted is that, having been prevented from accessing the records of the DIO's inquiry, he lacked the information that would have made it possible to participate intelligently in the procedure under Article 55 of the Staff Regulations.

146. In this respect, the Tribunal notes that a copy of the entire file of the proceedings before the Disciplinary Board was given to the appellant's representative at the time of the drawing of lots. The appellant is therefore wrong in claiming that he did not have the necessary information to exercise his right to challenge the members of the Board in full knowledge of the facts.

147. In these circumstances, the appellant's claim that the Disciplinary Board was unlawfully constituted fails.

148. The appellant further claims that the rules concerning the composition of the Commission against Harassment were not complied with in his case. He maintains that the fact that two out of the four members of the Commission who heard his complaint were appointed after his complaint was lodged, to hear his complaint on 29 April 2019 gives rise to legitimate doubts about their impartiality. The appellant further contends that following the

Staff Committee elections in June 2019, any decision on the complaints lodged against him should have been taken by the Commission as constituted after these elections.

149. Having examined the circumstances in which the two members of the Commission were appointed, the Tribunal does not find that their appointment and the fact that they examined both the appellant's complaint and the complaints against the appellant contravened the rules on the composition of the Commission or cast any doubt as to subjective or objective bias on the part of the Commission.

150. As regards the appellant's arguments challenging the involvement of the Commission's secretary, the Tribunal finds that they do not succeed in demonstrating how such involvement could have exposed the appellant to any harm, given the limited role of the secretary to the Commission and the fact that she was not included in its decision-making process.

151. In any event, the Tribunal notes that after raising a first objection as to the composition of the Commission, the appellant failed to raise subsequent objections which he would have been entitled to do under Article 10, paragraph 4, of Rule No. 1292, to challenge the impartiality of any one of its members on the grounds of his choice.

152. On the basis of the foregoing considerations, the Tribunal concludes that the present plea must be rejected in its entirety.

d. *Errors of assessment*

153. By means of several contentions the appellant submits that by adopting the contested decision the Secretary General committed errors of assessment. In the appellant's opinion, these errors stem from the fact that the Disciplinary Board – like the Commission against Harassment – erroneously concluded that the appellant's behaviour amounted to harassment.

154. These allegations are not accepted. In the first place, the Tribunal considers that the Secretary General's decision *ad personam* no. 7584, the Disciplinary Board's opinion and the opinion of the Commission against Harassment all consistently framed their findings with reference to the main instrument governing the prevention of harassment at the Council of Europe, namely Rule No. 1292, and, as regards the facts attributed to the appellant prior to the entry into force of this rule, Instruction No. 44 which Rule No. 1292 repealed. They leave no doubt as to the fact that the misconduct which justified the imposition of a disciplinary sanction is that of psychological harassment, as defined under Article 1, paragraph 3, of Rule No. 1292.

155. Regarding the claim that the decision complained of took into account irrelevant facts, the Tribunal notes that the reference in the Disciplinary Board's opinion to the inquiry report served the purpose of further corroborating the appellant's general attitude of disrespect vis-à-vis his hierarchy but was not necessary to support the self-standing findings of the Commission against Harassment, which provided the reasons for concluding that there had been disciplinary misconduct.

156. As to the further claim by the appellant that the impugned decision relies on the contradictory reasoning of the Commission against Harassment, the Tribunal does not consider that the Commission contradicted itself by stating on the one hand (paragraph 98 of

its opinion), that "[la Commission] n'a pas à examiner le respect ou non-respect par [B] des règles de l'Organisation, de la hiérarchie (…)" and on the other hand (paragraph 135 of its opinion), that at the very least, the appellant should be sent "a written warning about his non-respect for the hierarchy". The Commission was entitled to examine the appellant's alleged lack of respect for his managers to the extent that such acts could amount to harassment and where such harassment was considered established, it had full discretion to submit its recommendations to the Secretary General which it did in the relevant section of its opinion (paragraph 135). Beyond the scope of its competence, it was not for the Commission to assess the consequences to be drawn from the appellant's lack of respect for his hierarchical superiors (as stated in paragraph 98 of its opinion).

157. With regard to the appellant's argument that the reasoning of the impugned decision does not take into account his own concerns about the situation complained of, the Tribunal notes that the Disciplinary Board took a clear stand on this issue by stating that "the unlawfulness of [B's] behaviour is in no way affected by the alleged actions or omissions of the Administration or third parties". The Board also considered that "[B's] work appraisals have by large been positive and it has not been disputed by the Administration that this included his performance as a manager. However, it is equally true that [B] was repeatedly transferred to different working settings in response to a series of conflictual situations". This argument therefore fails.

158. As regards the material facts underlying the charge that the appellant's behaviour amounted to harassment, the Tribunal recalls that the Disciplinary Board found that these facts were within the factual scope of the proceedings before it and reached the conclusion that the facts, as established by the Commission against Harassment, were lawfully established for the purposes of the disciplinary proceedings.

159. The Tribunal admits that the initial inquiry report, and the Secretary General's referral report which relied upon it, did not make it entirely clear which of the numerous facts reported constituted misconduct. The Tribunal finds that this was in part due to the broad scope of DIO's inquiry which was widened to encompass other similar behaviour on the part of the alleged harasser with a view to corroborating the allegations made by the complainants.

160. The facts of which appellant was accused were nevertheless narrowed down at subsequent stages of the proceedings, particularly during the procedure before the Commission against Harassment. Numerous allegations against the appellant, namely the more serious ones involving threats, aggressive behaviour and acts of sexual harassment, were dismissed by the Commission against Harassment.

161. The appellant's detailed argumentation in the written and oral submissions at the different stages of the proceedings, including before this Tribunal, bear witness to the appellant's precise knowledge of the allegations and facts which were ultimately upheld to impose a disciplinary sanction.

162. In the case at hand, the facts attributed to the appellant are constituted by a series of actions repeated over time whose cumulative effect was found to constitute harassment, without it being always possible to establish a direct causal link between each and every one of these facts and the violation of the rules prohibiting harassment.

163. It is the behaviour that resulted from this series of actions - which the Commission against Harassment summarises in terms of “abusive conduct” and “refusal of authority” vis-à-vis B’s hierarchical superior as well as “close supervision” and a “managerial style” that created a hostile and humiliating working environment in the case of B’s subordinate – which was found to constitute harassment.

164. In addition, as regards substantiation of the charges, it is for the Tribunal to judge, in the light of the evidence submitted by the two parties, whether proof of the charges emerges from the documents in the file. However, it must also be observed that it is well settled in the case law that “it is not the Tribunal’s role to reweigh the evidence before an investigative body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved and of assessing the reliability of what they have said. For that reason, such a body is entitled to considerable deference. So that where [an investigative body] has heard evidence and made findings of fact based on its appreciation of that evidence and the correct application of the relevant rules and case law, the Tribunal will only interfere in the case of manifest error” (see ILOAT Judgment 4207, consideration 10, Judgment 3593 , consideration 12).

165. The Tribunal therefore concludes that the facts on which the disciplinary measure is based have been established in part by the DIO inquiry, and then refined and substantiated by the Commission against Harassment. In the present case the Tribunal notes that the file provides objective evidence of the matters for which the appellant was charged and sanctioned and that the evidence collected throughout the proceedings sufficed to reach the standard of proof required in these matters.

166. On the basis of the above, the Disciplinary Board found that the appellant’s behaviour vis-à-vis his subordinate was “contrary to the Organisation’s core values of professionalism, integrity and respect as well as the principles of dignity, mutual respect and courtesy as commanded by Charter of 15 July 2005 and Instruction No. 44 of 7 March 2002 on the protection of human dignity at the CoE”, while the appellant’s behaviour in relation to his superior “was contrary to in particular Article 1 § 3 of the Rule No. 1292 and Article 30, § 1 of the Staff Regulations”.

167. In these circumstances, by relying on the proposals of the Disciplinary Board, the Secretary General did not commit any error of assessment that might vitiate the impugned decision.

168. The Tribunal concludes that this plea is also unfounded and must be dismissed.

e. *Proportionality of the disciplinary measure*

169. The Tribunal reiterates that the legality of any disciplinary measure presupposes that the facts of which the person concerned is accused are established. This is precisely the case here.

170. The Tribunal considers that the assessment of the seriousness of the misconduct found by the Disciplinary Board against the appellant and the choice of the sanction which, in this case, appears to be the most appropriate, are in principle within the broad discretion of the Administration, unless the sanction imposed is disproportionate to the facts as ascertained.

171. In assessing the proportionality of a disciplinary measures in relation to the seriousness of the facts, the Tribunal must take into account the fact that the determination of the sanction is based on an overall assessment by the Secretary General of all the concrete facts and circumstances of each case.

172. In the present case, the Secretary General's decision *ad personam* endorsed the Disciplinary Board's recommendation to impose the sanction of downgrading. The decision specified that the gravity of the case is compounded by the fact that [B] has been found to have harassed not one but two fellow staff members; that his behaviour with regard to each occurred over a sustained period of time; and that he is a mid-ranking manager who should be relied upon to behave in an exemplary manner. The decision also stated that "due to his legal background and professional experience, [B] has in-depth knowledge of the Organisation's rules which should have made him particularly aware that a violation of the psychological integrity of others is against the values promoted by the Council of Europe and will not be tolerated by the Organisation".

173. Contrary to the appellant's claims, the Disciplinary Board did not fail to take into account the positive appraisals of the appellant (paragraph 145 of the Board's opinion) nor did it overlook the difficulties which the appellant himself experienced in his working relationships and which he reported to the Administration (paragraph 139 of the Board's opinion).

174. The Tribunal considers that, contrary to the appellant's allegations, the reasons given by the Secretary General for imposing the sanction of downgrading meet the requirements set out in paragraphs 169 to 171 above.

175. The Tribunal is thus satisfied that in taking her decision, the Secretary General appropriately weighted the seriousness of the misconduct and all the relevant circumstances of the case, both aggravating and mitigating.

176. As for the reasons given for choosing the disciplinary measure of downgrading, the Tribunal notes that the Secretary General reviewed the different possible sanctions under Article 54 of the Staff Regulations and gave detailed explanations before ruling out the less severe sanctions.

177. In these circumstances, the Tribunal concludes that the Secretary General did not exceed her discretionary power in explaining her reasons. Hence, it is not for the Tribunal to substitute its own assessment and determine whether another disciplinary measure would have sufficed.

178. Therefore, this contention is also unfounded and must be rejected.

f. *Further contentions concerning the illegality of the impugned decision*

179. With regard to the alleged violation of the principle of good administration and the duty of care, the Tribunal notes that, by means of a series of contentions which were also presented in the context of previous pleas, the appellant seeks to show that, in the proceedings which followed the lodging of the complaints against him, the Administration did not properly examine his situation and failed in its duty of care.

180. The appellant further contends that insofar as the proceedings brought against him on the basis of his subordinate's complaint concerned facts which had occurred more than ten years earlier, the Administration should have assessed whether the reasonable time requirement had been complied with, in the interest of legal certainty. In this connection, he alleges that since at the time of the alleged incidents "nobody found anything reproachable concerning [his] acts, gestures or words", the opening of disciplinary proceedings against him constitutes a breach of the *ne bis in idem* principle.

181. These contentions must be rejected. No valid argument has been put forward by the appellant proving that, in her assessment, the Secretary General committed errors resulting from a breach of the principle of sound administration and the duty of care. Nor has the appellant presented any valid argument showing that the Administration acted in breach of the reasonable time requirement and the principle of good administration, without taking into account the interests and situation of the appellant. Lastly, the argument in relation to the principle of *ne bis in idem* must be rejected as devoid of any legal basis.

182. Consequently, these contentions are also unfounded and must be rejected, just as the submission for setting aside the challenged decision must be rejected in its entirety.

2. **Compensation**

183. It should be reiterated that, in accordance with settled case law if a submission for compensation is closely linked to a claim for annulment, the rejection of the latter also entails the rejection of the claim for compensation.

184. In the present case, the submissions for compensation have such a link with the submissions for annulment and are also to be rejected.

185. It follows from the foregoing that the appeal must be dismissed in its entirety.

III. CONCLUSION

186. The appeal is unfounded.

For these reasons, the Administrative Tribunal:

Declares Appeal No. 651/2020 unfounded and dismisses it;

Decides that each party shall bear its own costs.

Adopted by the Tribunal by videoconference on 29 June 2021 and delivered in writing on 13 July 2021 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the English text being authentic.

The Deputy Registrar of the Administrative Tribunal

The Chair of the Administrative Tribunal

Dmytro TRETYAKOV

Nina VAJIĆ