

# **CONSEIL DE L'EUROPE**————— —————**COUNCIL OF EUROPE**

## **TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL**

**Appeal No. 593/2018 (Luca SCHIO  
v. Governor of the Council of Europe Development Bank)**

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,  
Ms Françoise TULKENS,  
Mr Christos VASSILOPOULOS, Judges,

Assisted by:

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

has delivered the following decision after due deliberation.

### **PROCEEDINGS**

1. The appellant, Mr Luca Schio, lodged his appeal on 7 August 2018. It was registered on 3 September 2018, under No. 593/2018. The submissions setting out the grounds of the appeal were appended to the appeal form.
2. On 2 October 2018, the Governor submitted his observations on the appeal.
3. On 10 December 2018, the appellant submitted observations in reply.
4. The public hearing took place in the hearing room of the Administrative Tribunal in Strasbourg on 23 January 2019. The appellant was represented by Mr Philippe Tessier, lawyer practising in Paris, assisted by Mr Giovanni M. Palmieri, legal adviser on international civil service law, while the Governor was represented by Mr David Jonin, lawyer practising in Paris, assisted by Mr Jan De Bel, Director of Legal Affairs of the Bank, and Mr Andrea Buccomino and Ms Laura Guiard, both staff members of the same Directorate.
5. The parties submitted documents to the Tribunal at the end of the hearing.

6. On 24 January 2019, the appellant's council subsequently forwarded documents requested from him by the Tribunal, and the Governor was notified.

## **THE FACTS**

### **I. THE CIRCUMSTANCES OF THE CASE**

7. The appellant has been a Council of Europe Development Bank staff member on a contract of indefinite duration since 1992. He holds the grade A5 and, at time of the alleged facts, he had been Director of the European Cooperation and Strategy Department, which is part of the Directorate of European Cooperation and Strategy, since 2014.

8. Before the Tribunal, the appellant complained about the appraisal made of him for the year 2017 and psychological harassment.

9. Regarding the first complaint, the appellant pointed out that his appraisals had been good in previous years, whereas the Governor played down this claim.

10. Where the 2017 exercise was concerned, the appellant had two interviews with his line manager, on 1 and 13 (16 according to the appellant) February 2018, with an exchange of e-mails between them in the meantime. Regarding the appellant's complaint to the Tribunal that the second interview had been very short, the Governor pointed out that it had been cut short by the appellant of his own will.

11. After the appellant had referred the matter to the Bank's Mediator, on 21 March and 12 April 2018, talks were held between the Mediator, the appellant and the appraiser.

12. Before the Tribunal, the Governor stated that, contrary to the appellant's claims, there had been no final report from the Mediator on the appellant's case.

13. During that period, the appellant was on sick leave. After being initially signed off on 20 December 2017, the appellant remained absent until 9 April 2018, with a few intermittent brief returns to work.

14. On 13 April 2018, the appellant received notification of the final version of the appraisal. The final performance level grading indicated on the form was unsatisfactory ("D"). As a result, in line with the regulations in force at the Bank, he was deprived of his annual bonus and he was notified of this on 27 April 2018.

15. The appraisal form had been electronically signed only by the appellant's line manager (n+1) and not by that manager's own hierarchical superior (n+2), who was actually the Governor himself.

16. Concerning the complaint about harassment, the appellant and the Governor made a number of claims before the Tribunal, which it is unnecessary to go into in detail here. Suffice it to say that the appellant initially contacted the Chief Compliance Officer on 15 March 2015 and subsequently referred matters to her on three occasions under the informal procedure (5 April and 15 September 2016 and 2 February 2018), regarding his personal situation and the conduct of his line manager.

17. In a statement produced on 28 September 2018 for the needs of the present appeal, the Chief Compliance Officer concluded that, “in the light of the evidence submitted, the situation [of the appellant] could not therefore be classified as psychological harassment”. The Chief Compliance Officer also pointed out that the appellant had not wished to make a formal report under the procedure provided for in Article 4 of Rule no. 02/2015 (paragraphs 29-32 below).

18. On 11 May 2018, the appellant submitted an administrative complaint to the Governor via a letter from his counsel (Article 59 paragraph 2 of the Staff Regulations applicable to the Bank’s staff, incorporating the articles of the Council of Europe Staff Regulations and the specific decisions of the Bank’s Administrative Council).

19. After putting forward arguments seeking to prove that his line manager had taken over some of his duties and blocked the exercise of those that remained, the appellant stated that his 2017 appraisal had been the culminating point of this “process of constant degradation”. The appellant claimed that the appraisal “did not follow the rules as, on top of being based on inaccurate reasoning, it constituted a disguised sanction”.

20. On 8 June 2018, the Governor rejected the administrative complaint as being unfounded.

21. In his reply, the Governor considered the disputed appraisal and also the non-payment of a bonus, noting that:

“Firstly, after looking at your appraisal file, the Bank confirms that the appraisal rapport presents no irregularities, formal or substantive, and the appraisal grading of ‘*Partially unsatisfactory performance*’ was awarded to you by the appraiser in keeping with the rules.

Under the rules applicable to the [Bank] (Article 22 of the Staff Regulations, Rules nos. 02/2016 and 03/2016), the appraiser produced an objective review of your performance during the reference period (2017).”

The Governor’s reply then focused on the appraiser’s prerogatives of appraisal and reasons for the appraisal and continued with comments on the issues raised by the appellant. The Governor ended his decision with the statement:

“Ultimately, your administrative complaint must be rejected on the following grounds:

- a) Examination of your appraisal report shows that it was drawn up in line with the procedural rules and contains neither substantive errors nor contradictions. The appraisal is based on an objective analysis of your performance during the year 2017.
- b) The actions described do not constitute a disguised disciplinary sanction and cannot be classified as harassment.”

22. On 7 August 2018, the appellant lodged the present appeal.

23. At the hearing, the parties informed the Tribunal that the appellant now worked in another Directorate of the Bank, exercising other duties, which he had accepted.

## II. RELEVANT LAW

### A. Appraisal and bonus system

24. Appraisals at the Council of Europe Development Bank, insofar as this is relevant to the case, are currently governed by Rule no. 02/2016 of the Governor of 23 November 2016 on staff appraisal.

25. Article 1 contains a general introduction, worded as follows:

“1. This Rule lays down the conditions in which staff members (appraisees) are appraised.

2. The appraisal process shall be a process of dialogue between staff members and their appraisers and hierarchical superiors. The appraisal process consists of a performance review (see Part II of this Rule) and a development review (see Part III of this Rule) of the staff member.

(...)

4. Throughout the reference period, the appraiser is responsible for providing managerial support to achieve the objectives. The staff member being appraised (appraisee) is responsible for informing the appraiser about any difficulties he may encounter (or may reasonably foresee) in achieving the objectives.

5. Appraisers shall give staff members (appraisees) regular feedback about their performance, both in areas in which they are doing well, and in areas in which they can further develop during the reference period. They shall seek to help staff members (appraisees) to reach their objectives. Appraisees shall in turn be responsible for carrying out assigned duties and responsibilities to best meet performance requirements and shall seek to take feedback positively. Therefore, appraisees shall seek to acknowledge areas of improvement and try to take corrective actions to rectify weaknesses whenever necessary.

6. A Major Administrative Unit is a unit headed by a staff member reporting directly to the Governor. The Heads of Major Administrative Units shall ensure that the appraisal system functions properly and that it is applied in a consistent and harmonious manner within the respective unit. The Heads of Major Administrative Units shall also carry out the appraisal process in a timely manner in accordance with the schedule established by the Directorate responsible for Human Resources. Failure to complete the appraisal process adequately on time will be indicated to the Governor and may impact their own respective appraisals.”

26. Article 4 paragraphs 1 and 3 of Rule no. 2/2016 read as follows:

“Article 4 - Common aspects of performance and development reviews

1. The date(s) of the performance and development reviews shall be agreed between the appraiser (n+1) and the appraisee, as far as practicable, in compliance with the process and annual timeline set by the Directorate responsible for Human Resources.

(...)

3. The appraisee shall sign or electronically validate the performance and development review form(s) after having, as the case may arise, included his observations in the form(s), and then return the form(s) to the appraisers (n+1) within five working days of receipt. The appraiser (n+1) shall sign or electronically validate the form(s) and the appraiser's hierarchical superior (n+2) shall sign or electronically validate the form(s)."

27. In contrast to the situation at the Council of Europe, no special stipulation is made for the case where the n+1 is the Head of a Major Administrative Unit who, as a result, reports directly to the Governor. At the Council of Europe, Rule no. 1356 of the Secretary General of 12 March 2014 on appraisal states, in Article 8, that:

"3. Appraisal reports shall be countersigned by the appraiser's appraiser (n+2). Where the appraiser (n+1) is the Head of a Major Administrative Entity, appraisal reports shall be countersigned by the Secretary General or Deputy Secretary General only if the appraisee so requests.

4. An appraisee who does not agree with the substance of the appraisal drawn up by the appraiser (n+1) may request an interview with the appraiser's appraiser (n+2). The appraisee shall inform his or her appraiser (n+1) of this."

28. Article 13 of Rule no. 2/2016 of the Governor of 23 November 2016 establishes a procedure to follow in cases where there is a difference of opinion on performance, stipulating that the appraisee may ultimately request an interview with the n+2. In contrast to arrangements at the Council of Europe, there is no provision at the Bank for third parties to participate in interviews between appraisees and their n+1.

29. The bonus system, insofar as this is relevant to the case, is governed by Rule no. 03/2016 of the Governor of 23 November 2016.

Under Article 3 paragraph 5:

"Each performance review ranking level shall be allocated a bonus percentage."

Paragraph 7 of that Article stipulates that:

"The performance review ranking levels 'partially unsatisfactory performance' and 'unsatisfactory performance', as defined in article 8, paragraph 1 of Rule no. 02/2016 on staff appraisal shall correspond to a zero percent bonus."

## **B. Psychological harassment**

30. Questions of harassment are governed by Rule no. 02/2015 of the Governor of 18 May 2015 on the protection of dignity at work. Article 2 prohibits any form of sexual and psychological harassment and provides definitions of each. Article 4 stipulates that the Chief Compliance Officer is responsible for mitigating risks of non-compliance with this rule and should primarily encourage the informal resolution of complaints and, if necessary, conduct investigations.

31. The rule provides for two procedures: one informal procedure and one formal procedure.

32. The informal procedure is intended to provide a means with which to address a complaint in an open and non-adverse manner. During this procedure, the Chief Compliance Officer may request assistance and advice from the Bank's Mediator.

33. If the informal procedure is not considered appropriate or has not resolved the situation, despite the willingness shown by the complainant, the Chief Compliance Officer "shall open an investigation" which is concluded by the submission of a report to the Governor.

### **C. Mediation**

34. Within the Bank, mediation is governed by Rule no. 01/2011 of the Governor of 4 October 2011. Under Article 3 of that rule, the Mediator proposes a friendly settlement to the persons concerned. Should the Mediator find that it is not possible to propose a satisfactory solution in a reasonable time, they inform the persons directly concerned and the Governor, stating the reasons that prevented them from settling the matter.

35. In accordance with Article 6 of the rule, the Mediator submits a twice-yearly progress report to the Governor indicating the cases referred to them and those they have declared admissible. They must present a summary report every year indicating the number and nature of the problems submitted to them.

## **THE LAW**

36. The appellant is seeking annulment of the Governor's decisions of 13 April 2018 (appraisal form) and 8 June 2018 (rejection of his administrative complaint). He also asks for the payment of 10 000 euros by way of compensation for the non-pecuniary damage suffered as a result of the psychological harassment endured and the resulting deterioration of his professional situation. Finally, the appellant seeks reimbursement of the procedural costs which he puts at 8 000 euros.

37. The Governor invites the Tribunal to declare the appeal inadmissible and to dismiss it. Where costs are concerned, he leaves the matter to the Tribunal's discretion.

## **I. THE PARTIES' SUBMISSIONS**

### **A. The appellant**

38. In the submissions drawn up when the appeal was lodged (paragraph 1 above), the appellant claims that the impugned appraisal decision must be considered in terms of both form and substance and he puts forward a whole set of arguments in support of his claim. He also sets out arguments relating to psychological harassment in this connection.

39. In his observations in reply (paragraph 3 above), when discussing the form of the appraisal, the appellant puts forward a new argument not previously mentioned in his submissions or the administrative complaint (paragraph 18 above), relating to the fact that the

Governor had not signed the appraisal report in his capacity of the appraiser (n+2) of the line manager (n+1).

1. *Appraisal procedure*

**a. Arguments relating to form**

40. In his submissions, the appellant puts forward several arguments.

41. Firstly, he claims that the appraisal was not finalised within the deadline set by the Directorate of Human Resources and that the Governor had not demonstrated that he had done his utmost to comply with the deadlines.

42. In response to the Governor's claim in his observations that this argument was inadmissible (paragraphs 2 above and 55-56 below), the appellant states in his observations in reply that his arguments regarding the admissibility of the complaint relating to Article 4 paragraph 3 of Rule no. 02/2016 (paragraph 26 above) are applicable here *mutatis mutandis*.

43. The appellant also contends that the first draft of the appraisal and the final version were submitted to him after very short meetings and, where the final version was concerned, with no account taken of his comments. He further maintained that the appraisal did not respect the basic principles set out in the guide on how to carry out an appraisal interview, indicating methods and practical case studies, which refers, in particular, to the appraiser's duty to ensure regular and constant feedback throughout the year, which had not been the case in this instance.

44. The appellant then pointed out in his observations in reply to the Governor's observations, for the first time, that in addition to not complying with deadlines, there had been a substantial irregularity resulting from non-compliance with Article 4 paragraph 3 of Rule no. 02/2016 of the Governor on staff appraisal (paragraph 25 above) as the hierarchical superior (n+2) – namely the Governor – of the appraiser (n+1) had neither signed nor electronically validated the appraisal.

According to the appellant, this omission by the Governor – who had himself adopted Rule no. 02/2016 –, “may rightly be deemed as furthermore violating the general principle of law of *“legem patere quam ipse fecisti”*. The appellant added that international case-law did not hesitate to annul appraisals that had not been signed by two appraisers, emphasising that the appraisal document must be complete.

45. In his observations in reply, the appellant also focuses on the admissibility of the complaint, claiming that it would be admissible according to the Tribunal's case-law (TACE, Appeal No. 294/2002 – Marchenkov v. Secretary General, decision of 28 March 2003, paragraphs 18-20, relating to the admissibility of complaints raised at the stage of the submission of the first document to the Tribunal, namely the supplementary pleadings). The appellant adds in passing that the Governor has twice stated his view on the compliance of the procedure with the applicable rules: in his decision to reject the administrative complaint and in his observations before the Tribunal.

46. At the hearing, the appellant added that, in any case, the Tribunal could rule on the complaint as it was an irregularity which the Tribunal could raise at its own initiative if none of the parties raised it.

**b. Arguments concerning the well-foundedness of the appraisal**

47. Regarding the complaints concerning the well-foundedness of the appraisal procedure, the appellant does not dispute that his line manager has the power to appraise him; however, that power is to be exercised within certain limits. The appellant puts forward arguments relating to the lack of objectivity, the shortcomings of the contradictory procedure, bias and misuse of the procedure.

48. The appellant adds that the impugned appraisal was merely the culminating point of a process of blatant psychological harassment in which he was gradually stripped of his duties and responsibilities which were then reassigned to his line manager and other colleagues of the latter. The appellant further contends that the impugned appraisal was a disguised sanction against him for having expressed his personal opinion on the recruitment of an individual who was to become his direct colleague contrary to the standards and procedures applicable to the Bank.

**2. *Psychological harassment***

49. Regarding the claim of psychological harassment, the appellant claims that the various instances of bullying culminating in a poor appraisal constitute psychological harassment, which is expressly prohibited by Rule no. 02/2015 (paragraph 29 above).

50. In support of his complaint, the appellant mentions these different instances of bullying, two of which were connected to the arrival of his new line manager, in March 2015, and took place shortly beforehand. They concerned his “dismissal” – described by the Governor as a replacement upon expiry of term of office - from the position of chair of the Bank’s Health and Safety Committee in February 2015, and a move of office effected without him being informed and in his absence.

51. As for the bullying after his line manager had taken up his post, the appellant highlights the different clashes between him and his line manager who, he claims, took over duties that had been his, without any real justification. The appellant supports his claim by listing actions targeting his work during intergovernmental meetings.

52. Finally, the appellant ascribes this bullying to the opinion he had expressed on the recruitment in 2015, desired by his line manager against his will, of the individual who was to become the appellant’s direct colleague and to his working relations with that person.

**B. The Governor**

1. *Appraisal procedure*

**a. Arguments regarding the form**

53. In his observations (paragraph 2 above), the Governor firstly argues that the appellant's complaint as to the irregular nature of his 2017 appraisal for non-compliance with the Bank's procedures and standards is inadmissible.

54. The Governor points out that this complaint was submitted for the first time before the Tribunal and that, according to the Tribunal's case-law, an administrative complaint may not be "supplemented or amplified by raising grievances that concern other acts than the one originally complained of" (TACE, Appeal No. 521/2011 – R.V. (II) v. Governor of the Council of Europe Development Bank, judgment of 26 September 2012, paragraph 58).

55. Accordingly, as no reference was made to it in the administrative complaint, the claim, submitted for the first time before the Tribunal, should be declared inadmissible, as it would make the scope of the appeal broader than the administrative complaint.

56. In the event of the Tribunal declaring this claim relating to deadlines admissible, the Governor considers that it is not founded, as the texts quoted by the appellant have no statutory or regulatory significance but are provided for information purposes, with the deadlines indicated purely as a rough guide, on top of which the appellant was on sick leave three times, delaying finalisation of the appraisal for that duration.

57. At the hearing, in response to the appellant's complaint relating to the Governor's failure to sign the appraisal in his capacity of n+2, raised by the appellant for the first time in his observations in reply (paragraph 3 above), the Governor submitted no argument as to the admissibility of the complaint, going no further than stating that the appellant's submission had been "a little last-minute because, you never know, something might come of it, that is what putting forward this argument a few days before the hearing was all about".

As to the well-foundedness of the complaint, the Governor argues that, in this particular case, the rules applicable at the Bank would not require a double signature because the Governor is the point of referral for staff appealing against managers' decisions in respect of them and this includes their appraisal results, meaning that a power of appraisal could not be assigned to the authority which is effectively the arbiter of those very appraisals in the context of an internal appeal procedure that would apply. Requiring the additional signature of the Governor would be contrary to the principle that one cannot be both judge and party to proceedings.

**b. Arguments regarding the well-foundedness of the appraisal**

58. The Governor states that the appellant does not in any way criticise the content of the appraisal and does no more than compile a series of claims that are "dated, peripheral and extraneous to the appraisal of his abilities".

59. For his part, the Governor puts forward arguments to counter the appellant's complaints, stressing in particular his inadequacy in attaining objectives, the absence of any contradictions and the dialogue that took place prior to the appraisal.

60. In his eyes, the appraisal unequivocally established the professional shortcomings of the appellant, finding that his objectives had not been attained or only partially. Furthermore, there was no contradiction in the drafting of the appraisal report and, finally, dialogue between the appellant and his line manager did indeed take place in the appraisal process, both during the reference period and in the report drafting phase.

## 2. *Psychological harassment*

61. According to the Governor, the appellant's description of his line manager's actions as vexatious and constituting psychological harassment have no foundation whatsoever. This also applied to the various arguments put forward by the appellant to demonstrate psychological harassment in an attempt to misrepresent the truth.

62. Firstly, the Governor disputed the fact that the appellant was removed from his position of chair of the Bank's Health and Safety Committee as, in fact, his term of office had expired, and another staff member had been appointed in order not to leave the position vacant. The Governor regretted that the office move had taken place in the appellant's absence, but he denied that the appellant had not been informed and had been "evicted". The Governor further disputed that the recruitment of the appellant's line manager (contrary to the appellant's claim) and direct colleague had been irregular. Finally, concerning relations between the appellant and the staff recruited to work with him, the Governor pointed out that the Chief Compliance Officer had not found any irregularities.

63. With regard to the appellant's duties, the Governor maintains that they were in keeping with his grade and profile. On the subject of the workplace incidents that took place between 2016 and 2018, the Governor asserts that the appellant's allegations are far removed from what really happened and were minor incidents in relation to his entire activity.

64. Finally, the Governor denies that there was a causal link between the disorders suffered by the appellant and the alleged harassment. Indeed, a medical certificate issued to the appellant was in breach of the code of medical ethics applicable in France.

## II. THE TRIBUNAL'S ASSESSMENT

### A. **Preliminary remarks**

65. Before considering the appellant's pleas in law, the Tribunal considers it necessary to make two observations.

66. Firstly, the appellant has invited the Tribunal, if it thinks necessary, to order the deposit of the outside consultant's report on the reorganisation of the Bank and the report said to have been drawn up by the Mediator after speaking to the appellant and which only the Governor has received.

67. The Governor deposited the outside consultant's report at the hearing, and the parties expressed their views on this document.

68. With regard to the Mediator's report, the Tribunal took note of the Governor's statement that the Mediator had not drawn up a report on the appellant's case but only an activity report for 2018 which he was willing to provide to the Tribunal if it wished to have a copy. However, the Tribunal does not consider it necessary to ask for that report in the present appeal.

69. Secondly, the appellant is seeking not only the annulment of the act of which he complains, namely the decision of 13 April 2018, but also the annulment of the decision of 8 June 2018 rejecting the administrative complaint.

70. However, under Article 60 paragraph 2 of the Staff Regulations, other than in disputes of a pecuniary nature in which it could order payment of compensation, which is not applicable here, the Tribunal can annul only the act complained of, which in this case is the appraisal of 13 April 2018. Accordingly, as it has no power of cassation, the Tribunal cannot annul the rejection of the administrative complaint, which is not an "administrative act" within the meaning of Article 59 paragraph 2 of the Staff Regulations, but an act within the impugned procedure.

71. In its decision, therefore, the Tribunal must rule on the two complaints of the appellant insofar as they relate to the annulment of the appraisal of 13 April 2018.

## **B. Appraisal procedure**

### *1. Arguments relating to the form*

72. Firstly, the Tribunal must rule on the admissibility of the complaints concerning appraisal deadlines and the lack of validation by the Governor in his capacity of n+2.

73. According to the Tribunal's case-law, before lodging an appeal, an appellant must lodge an administrative complaint with the Governor so that the latter may remedy the situation if the claims are founded. Under Article 59 paragraph 2 of the Staff Regulations, the complaint must be against an administrative act. Furthermore, appellants may not supplement or amplify administrative complaints by raising grievances that concern other acts than the one originally complained of. The Tribunal has also held that comments made at the stage of the administrative complaint that were not clear enough – or even succinctly elaborated on – did not enable the Tribunal to conclude that the appellant was already complaining, at the stage of the administrative complaint, to be the victim of an act other than the one specified in the administrative complaint ([TACE, Appeal No. 521/2011 \(R. V. \(II\) v. Governor of the Council of Europe Development Bank, judgment of 26 September 2012, paragraphs 58-60\)](#)).

74. On the other hand, the appellant may broaden the scope of grievances related to the impugned act (since, at the stage of the administrative complaint, appellants are not obliged to specify all their grievances in detail). They must do so in the first document they submit to the Tribunal, i.e. in the submissions deposited *in extenso* or in the supplementary pleadings if they

choose to deposit summary pleadings. For his part, the Governor must submit his objections of inadmissibility in his first submission following the deposit of the complaint, i.e. *in limine litis* (TACE, Appeal No. 309/2002 – [Sergey Belyaev v. Secretary General](#), judgment of 4 July 2003, paragraphs 25-31). Obviously, grievances relating to matters of public order constitute an exception to this rule and as such may be raised at any stage of proceedings, in keeping with international case-law.

75. With regard to the decision to be taken in the present appeal, the Tribunal notes that it is quite clear from the letter of 11 May 2018 (paragraph 18 above) that, at the stage of the administrative complaint, the appellant complained only of an unjust appraisal and did not dispute the procedure followed, even fleetingly.

76. Accordingly, when the appellant contested the form of the appraisal before the Tribunal, he was submitting a completely new grievance to it relating to the procedure followed for the appraisal. No importance may be attributed to the fact that in the present appeal, unlike the R.V. (II) v. Governor appeal mentioned above, the act contested remains the same, as the grievance is entirely different and stands apart from the claims made in the administrative complaint.

77. At the administrative complaint stage, the appellant did not even voice any doubts or criticism regarding the procedure. It follows that no conclusion may be drawn from the fact, pointed to during the proceedings by the appellant, that when rejecting the complaint the Governor had spontaneously stated that "examination [of the] appraisal report shows that it was drawn up in accordance with the procedural rule", as this statement is too general to be interpreted as an indication that the Governor examined the regularity of the procedure in any way (paragraphs 40-44 above). In these circumstances, the Tribunal views this statement as a standard formula.

78. Accordingly, the Tribunal has reached the conclusion that the appellant is time-barred from raising grievances over the form of the appraisal procedure, namely issues of deadlines and the absence of the Governor's signature, since he did not raise them in the administrative complaint (TACE, Appeal No. 258/2000 – [Ballester v. Secretary General](#), judgment of 31 January 2002, paragraph 49).

79. In response to the appellant's submission that, in any case, the Tribunal could raise the grievance *ex officio*, the Tribunal reiterates that it has the prerogative of raising at its own initiative the issue of compliance with admissibility requirements which is a matter of public order (TACE, appeals Nos. 290-292/2001, 295/2002, 298-301/2002, 303/2002 and 304/2002 – [Staff Committee \(V\) and others v. Secretary General](#), judgment of 20 December 2002, paragraph 60). However, given the nature of the dispute before it, it is not in a position to examine *ex officio* grievances raised at a late stage by an appellant for which, above all, he has not exhausted all internal remedies prior to applying to the Tribunal.

80. Nevertheless, where the absence of a signature by the Governor in his capacity of n+2 is concerned, the Tribunal should point out that this practice – which was the word employed by the Governor – is applied to all staff members who fall into the same category as the appellant. Contrary to the practice of the Council of Europe (see paragraph 27 above), this is common practice notwithstanding the wording of Article 4 paragraph 3 of Rule no. 2/2016 (paragraph 26 above)

which states that the appraisal shall be signed by the n+2 without making any distinction between staff who would have the Governor as their n+2 and the other staff.

81. That said, this discrepancy between practice and the letter of the text cannot provide grounds for an *ex officio* examination of this grievance, as any staff member in such a case could rely on Article 59 of the Staff Regulations to defend their interests.

82. In conclusion, the finding that it is time-barred must be maintained.

2. *Arguments relating to the well-foundedness of the appraisal*

83. The Tribunal recalls its case-law which states that, in the area of appraisals, the authority vested with the power of appointment has discretionary power which, however, is subject to stricter scrutiny by the Tribunal than other areas:

“... appraisal is not a field in which discretionary power can be exercised with the latitude which the Organisation enjoys in other areas. Indeed, the very nature of the appraisal exercise demands that the Organisation should be as objective as possible and, therefore, that it should remain as objective as possible in the appraisal process. Scrutiny of substantive legality should therefore be stricter than in other fields.”  
(TACE, Appeal No. 539/2013, Andrea v. Secretary General, [judgment of 31 January 2014](#), paragraphs 50-51)

84. As the appellant has argued that the appraisal was a factor in his harassment, the Tribunal will examine this aspect below in conjunction with the grievance relating to that harassment.

85. More specifically concerning the grievance over the appraisal, the Tribunal notes that the appellant has put forward several claims.

86. He claims that the appraisal did not comply with the Bank's procedures and standards, as it was not preceded by real exchanges or substantial dialogue or followed up by the mentoring proposed. Furthermore, his line manager had not wished to take his comments into account and modify the final appraisal. The appellant argues therefore that, given the quality of the exchanges between them, the adversarial principle which must govern the appraisal procedure was not respected.

87. The appellant then claims that the appraisal was vexatious and contradictory as he was criticised for not maintaining contact with international organisations while he had in fact been sidelined by his manager. He further claims that the appraisal was a disguised sanction in response to the opinion he had expressed during the recruitment of his colleague.

88. He also believes that the appraisal was lacking in objectivity and driven by bias geared to getting rid of him. This is tantamount to saying that there was misuse of authority by the appraiser using a biased appraisal to get rid of the appraisee.

89. After hearing the arguments put forward both during the written procedure and at the hearing, the Tribunal comes to the conclusion that the facts cited by the appellant do not prove the existence of the alleged violations. The appraiser settled for an appraisal of facts for which it is not for the Tribunal to substitute its own appraisal. Notwithstanding the fact that scrutiny of

internal legality must be stricter in the field of appraisal than elsewhere, it does not appear that there were discrepancies between the conclusions drawn by the appraiser and the facts cited, some of which, indeed, were not disputed by the appellant but borne out by arguments which, while it is unnecessary to examine them in detail, the Tribunal finds singular from the administrative viewpoint.

90. In the case at point and in contrast to the *Andrea v. Secretary General* appeal, the appellant's appraisal was not positive on the whole and it may have caused him prejudice (TACE, [aforementioned judgment](#), paragraph 53); the fact of the matter is that the internal legality of the appraisal procedure was not violated.

91. More specifically concerning the claims of bias and misuse of authority, the Tribunal notes that, while it cannot rule out that the appraiser's intention was, in the words of the appellant, "to drive him out of his directorate", it has to be said that the appellant has not proven his claim and, in any case, the mention of a transfer in the appraisal cannot constitute proof of the alleged misuse of authority.

92. In conclusion, these complaints relating to the substance of the appraisal are unfounded.

### **C. Psychological harassment**

93. The appellant states that the manner in which he was treated by his line manager constitutes psychological harassment.

94. The Tribunal notes from the outset that the appellant considered that some of the arguments put forward by the Governor referred to a claim of inadmissibility of part of this grievance as the matter had not been referred to the Chief Compliance Officer under a formal procedure. However, the Tribunal believes that the Governor's arguments related rather to the well-foundedness of the arguments even though, incorrectly in relation to the Tribunal's terminology, the Governor speaks of "admissibility".

95. In any event, no conclusion of inadmissibility may be drawn as, under the system established by the Bank, the appellant was not obliged to open a formal procedure before the Chief Compliance Officer before lodging an administrative complaint with the Governor. In fact, she could have opened a formal procedure at her own initiative had she felt it necessary.

96. As to whether the submission is well-founded, the Tribunal recalls that Article 2 (prohibited conduct) of the rule on the protection of dignity at work applicable at the Bank (see paragraph 20 above), defines psychological harassment as:

"c. 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 organization 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."

97. The same Article 2 adds:

“f. It is clarified here that constructive professional feedback, commentaries with respect to underperformance, job related criticism, professional advice, refusal of career advancement, disagreements on staff work performance or annual staff appraisals will not be considered as actions against integrity and dignity and cannot, when performed in good faith, be raised as such.”

98. The Tribunal observes that by reproaching his line manager and the colleague working under him of actions creating a situation of harassment, the appellant talks of humiliations regarding his work, the constant downscaling of his duties for no objective reason and the lack of instructions and follow-up from his line manager. The appellant also mentions decisions of an administrative nature (moving of his office in his absence and non-renewal of his duties of chair of the Bank’s Health and Safety Committee). He also complains about the procedure followed for his 2017 appraisal which, in his view, constitutes a disguised sanction with the aim and effect of discrediting the considerable work carried out over many years in the eyes of his colleagues.

99. The Tribunal reiterates that psychological harassment is any abusive conduct in the workplace consisting in gestures, words or repetitive or systematic behaviour or action intended to cause a deterioration in the working conditions of the staff member concerned (TACE, Appeal No. 513/2011 ([D. M. v. Governor of the Council of Europe Development Bank](#), of 11 June 2012, paragraph 64)).

100. Then, according to the Tribunal’s case-law on harassment, a staff member believing themselves to be harassed must be able to prove the existence of facts warranting a presumption of harassment, and the person accused of it must prove that his actions do not constitute harassment or are justified by reasons unrelated to any harassment (*ibidem*, paragraph 62).

101. Regarding the concrete acts mentioned by the appellant, the Tribunal comes to the conclusion that they did not meet the conditions for being deemed as harassment according to the definition given by the applicable text or, leaving aside the definition, more generally in terms of the issue of harassment in the workplace. In the eyes of the Tribunal, these acts took place in a context of relations that were sometimes tense and difficult but also specific to work between the Director and his subordinate.

102. More specifically with regard to the moving of the appellant’s office – which the Governor himself acknowledges took place in regrettable circumstances –, it was certainly untimely but, in the absence of conclusive evidence, it could not be regarded as an act indicative of harassment in its own right.

103. As for the claims regarding the non-renewal of duties of chair of the Bank’s Health and Safety Committee, even in the light of the brevity of explanations provided by the Governor, the appellant’s statements do not contain sufficient information to conclude that there was harassment rather than simply the application of the rules governing this area.

104. The appellant also refers to the contents of numerous e-mails exchanged with his hierarchy. However, after reading them, the Tribunal cannot consider these e-mails as constituting acts of harassment targeting the appellant. As for the line manager’s response to the appellant’s protests

over exchanges with the colleague who was to work under him and whose e-mails suggest a degree of acrimony, doubtless due to difficult working relations between the two staff members, the Tribunal considers that this response was not at a level that would constitute some form of harassment.

105. Finally, the running of the appraisal procedure which the Tribunal is examining from the viewpoint of the complaint of harassment certainly points to a conflictual situation but the fact that the content of the appraisal differed from that of previous years' appraisals cannot constitute proof of a form of psychological harassment.

That said, the Tribunal considers that, in view of the situation that was ultimately resolved, after the application to the Tribunal, by the appellant's transfer, it would have been desirable for the appellant to initiate the procedure provided for in Article 13 of Rule no. 02/2016 to resolve the differences of opinion between appraiser and appraisee. Indeed, this procedure would also have provided an opportunity to look at the issue of the appellant's n+2 without having to wait for the litigation stage.

106. In the light of all these considerations, the Tribunal comes to the conclusion that, even though the appellant's working atmosphere could be criticised, the acts raised by the appellant did not constitute a practice of harassment and, consequently, it rejects this complaint.

### III. CONCLUSION

107. In conclusion, the appeal is partly time-barred and unfounded for the remainder.

For these reasons, the Administrative Tribunal:

Declares the grievances relating to the form of the appraisal procedure inadmissible on grounds of being time-barred;

Dismisses the Governor's objection of inadmissibility on grounds of not having exhausted internal remedies in respect of the grievance concerning psychological harassment;

Declares the remainder of the appeal unfounded and dismisses it;

Orders that each party bear its own costs.

Adopted by the Tribunal in Strasbourg on 12 June 2019 and delivered in writing on 20 June 2019 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

N. VAJIĆ