

**CONSEIL DE L'EUROPE**————

————**COUNCIL OF EUROPE**

**TRIBUNAL ADMINISTRATIF  
ADMINISTRATIVE TRIBUNAL**

**Appeal No. 594/2018**

**(Matthias BAUER 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 HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

**PROCEEDINGS**

1. The appellant, Mr Matthias Bauer, lodged his appeal on 14 September 2018. It was registered on 26 September under No. 594/2018.
2. On 27 October 2018, the Governor submitted his observations on the appeal. The appellant filed submissions in reply.
3. The public hearing took place in the Tribunal's hearing room in Strasbourg on 26 March 2019. The appellant was represented by Maître Marie-Laure Bonaldi-Nut, lawyer practising in Paris, and the Governor was represented by Maître David Jonin, lawyer practising in Paris.

## THE FACTS

### I. CIRCUMSTANCES OF THE CASE

4. The appellant has been a permanent member of staff of the Council of Europe Development Bank (hereafter “the Bank”) since 29 August 1994.

5. Up until 2009, the appellant performed duties relating to institutional relations and international co-operation. In July 2009, he was assigned to the Governor’s Office as Deputy Head. Since the reorganisation of the Governor’s Office, he currently holds the position of Deputy Director of the Executive Office and General Services, at grade A6. On 30 April 2019, the applicant reached the statutory retirement age.

6. On 1 March 2018, the appellant submitted his application to renew his employment contract for a period of two years beyond his 65<sup>th</sup> birthday as from 1 May 2019. The Governor considers that, in the absence of a written reply from him, this request was deemed to have been rejected on 31 March 2018, pursuant to Article 3(2) of Rule No 03/2014 (see paragraph 34 below).

7. On 12 March 2018, the Chief Compliance Officer (hereafter “the CCO”) was informed of inappropriate conduct by the appellant towards Ms X. The appellant argues that he himself was never notified of this. The following day, the CCO met Ms X who described the facts that allegedly constituted the harassment in question.

8. On 15 March 2018 Ms X signed a form reporting inappropriate conduct to the CCO in relation to the alleged incidents which, as stated by the Governor, were as follows:

- Inappropriate and unprofessional language and physical gestures (Articles 3 and 13 of the Code of Conduct and Rule No. 02/2015);
- Prohibited conduct relating to dignity at work (Rule No. 02/2015);
- Abuse of position (Article 11 of the Code of Conduct).

9. On 15 March, three witnesses, working on the same floor where the alleged inappropriate conduct had taken place, who were in a position to provide information on the facts, were heard, anonymously, by the Investigation Panel.

10. As a compliance procedure had been initiated on 16 March 2018, the CCO verbally informed the appellant that a complaint had been lodged against him but did not provide him with the grounds of the complaint.

11. On the same day, the CCO appointed an Investigation Panel pursuant to Article 4.2.c of Rule No. 02/2015 on the protection of dignity at work, composed of staff members, to assess collectively the reported inappropriate conduct. The CCO called the

appellant for an interview with the Investigation Panel, scheduled for 28 March 2018, informing him of its composition.

12. On 19 March 2018, the CCO submitted a preliminary report to the Governor recommending the adoption of temporary measures to protect the parties pending the completion of the Panel's investigation. It was specified that the Panel had been set up "*[d]ue to the nature of the complaint, the organisational/hierarchical relation and the physical proximity of the complainant with the subject*". The Governor decided to adopt these measures in order to (i) limit contacts between the two members of staff and (ii) change Ms X's reporting line, placing her directly under the authority of another Director.

13. Following the appellant's request to postpone the interview initially scheduled for 28 March 2018 for work reasons, on 4 April 2018, he had an interview with the Investigation Panel, which read to him in full the report submitted by Ms X. The questions put by the members of the Investigation Panel to the appellant were intended to clarify and understand the situation and to analyse the facts in question. The complaints against the appellant were recorded in the minutes of the investigation, a copy of which was handed to him in person. However, the appellant refused to sign this document. He disputed the comments and attitude attributed to him by Ms X. The minutes contain the following passages:

"The purpose of this interview is to hear [the appellant's] testimony and to present him with the alleged facts described in [Ms X's] complaint.

(...)

The Investigation Panel points out that its role is not to judge the situation but to deal with a complaint; to analyse the facts presented and to outline the procedure in order to consider the facts and to present conclusions to the Governor. In this case, [Ms. X] describes facts that have nothing to do with her professional activities.

(...)

For the time being, the Panel is at the preliminary assessment stage and beyond personal grievances, (...) It is a fact that [Ms X] should have spoken to her superiors, but it is important to understand the situation that [Ms X] describes and to have a sense of the environment in which she works in order to have an in-depth understanding of the facts alleged; it is indeed very improbable that she has made it all up and it would be better to acknowledge the facts as having no harmful intention rather than being faced with a situation that could take on a completely different dimension. (...)

(...)

The Panel understands that the case is sensitive (...) and would like [the appellant] to help clarify the situation in a frank way. Even though we are in a state governed by the rule of law with a presumption of innocence, it is difficult not to take into account the worrying repetition of the alleged facts despite [the appellant's] denial. The Panel calls on him to be reasonable, since it cannot conceive that [Ms X] has made up all these details; it seems more likely to the Panel that certain of the [appellant's] friendly gestures, words or behaviour could have been misinterpreted by [Ms X].

[The appellant] continues to maintain that the facts of which he is accused are untrue. (...) The Panel highlights the fact that there are more than 10 (ten) dated incidents recorded; there is obvious suffering and fear on the part of the complainant. It is difficult to believe that everything has been made up by [Ms X] bearing in mind that 1) she is not directly subordinate to [the appellant], 2) the appellant does not carry out her appraisal, (and therefore she has no personal interest), 3) the facts described are not related to her professional tasks.

(...)

Conclusion:

The Panel confirms: (i) the interim measures announced (no physical contact between [the appellant and Ms X], compliance with the reporting line); (ii) the insertion of the alleged facts in the report to be submitted to the Governor, then [to the appellant] for comments; (iii) the strictly confidential nature of this meeting.”

14. Having been summoned for another hearing before the Investigation Panel on 11 April 2018, the appellant sent an email on 12 April 2018 challenging the investigation against him, noting, among other things:

“(...) Admittedly, during our interview, you read out to me, briefly, extracts from [Ms X’s] complaint but I was not given the opportunity to comment on what was in the complaint. As your questions were confined to asking whether I acknowledged the truth of each of her allegations, I obviously answered in the negative.

Here again, I refer to the rules governing the formal procedure, which under Article 4(2) require investigations to be conducted in an objective, impartial and fair manner, which was not the case because, at no time, was I able to initiate any defence or discussion, since the complainant’s statements were not challenged by your Investigation Panel.

In order to avoid a repetition of this type of approach, which is more inquisitorial than adversarial, I would be grateful if you could send me, before the meeting on 16 April, a copy of the complaint lodged against me together with any evidence so that I can defend myself in full knowledge of the facts, which is a fundamental right including at the stage of your investigation. I am sure that I do not need to cite the relevant Article of the ECHR.”

15. The following day, the CCO replied, stating in particular:

“ ...

*2. OCCO disclosed in full to you the content of the complaint of [Mrs X.], reading/describing in detail all the allegations, which you were given the opportunity to comment on during the hearing on 4.4.2018 and will be reflected in the minutes.*

*3. The purpose of the hearing on Monday 16.4.2018 is to give you the opportunity to further comment on not only the allegations but the assessment/preliminary findings of the panel and the fact finding activity which occurred since 4.4.2018. You will also receive on Monday during the hearing such preliminary findings in writing and you will have, as per article 4.2. c. of Rule 02/15 the opportunity to comment in writing within two (2) weeks of the hearing. You may also indicate further elements of proof or witnesses who should be heard to confirm or infirm the allegations. This is a standard procedure followed by OCCO in all investigations and in full compliance with the text and the spirit of Rule 02/2015.*

*Your statement that the complainant's declarations are not 'remises en cause' by the panel is therefore groundless.*

*4. OCCO should like to recall, ..., that the formal investigation under way does not amount to either disciplinary proceedings or to a procedure before a jurisdictional body, and its purpose is not to bring charges to an accused staff member but to provide an assessment of the alleged facts/behaviours to the Governor who ultimately has the authority to take decisions/further steps with respect to the matter (Art. 4.2. (f) of Rule 02/15)."*

16. On 12 April 2018, the appellant informed the Governor that he had cancelled two official assignments in which he should have participated. He stated the following:

"I confirm (...) that I have acted in accordance with your request (...) and cancelled (...) two assignments for which I had accompanied you during the past six years.

(...)

I understand that your request for cancellation follows the investigation (...) into an alleged complaint filed against me on 15 March 2018. As I have indicated clearly in an email today, (...), as of the present time I have not received any file, paper or document of any kind."

The appellant states that he had taken due note of the Governor's decision to prohibit him from participating in any external trips organised with member countries.

17. On 16 April 2018, the appellant had a second meeting with the Investigation Panel, which was based, this time, on a preliminary report that had been drawn up. The key points of the report were read out, explained and given to the appellant in person. The report noted, among other things, that the complainant had not been involved in any mediation with the appellant given the nature of the case, and that she had informed her superiors only shortly before filing her complaint. The report also mentioned that the Investigation Panel had heard six witnesses "*who given their proximity to the third floor, i.e. premises where both the complainant and the subject work, might have witnessed the alleged misconduct*" A deadline of 3 May 2018 was given to the parties to make their comments. The interview report noted in particular:

" [The appellant] shows a lack of confidence in the OCCO and the procedures in place because he has 'received no documents or written evidence' of the complaint following the meeting of 4 April last; he has 'been unable to respond to the ten (10)' complaints against him. He says he is very sensitive to such matters, 'being a human rights defender himself'.

(...)

The Panel points out that [the appellant] is in no way considered as 'accused' but that this 'administrative' stage is necessary for the processing of the complaint.

[The appellant] understands that the evidence gathered during the investigation, together with his own comments on the detailed preliminary report by the Panel, are part of a formal process required by the Panel in order to reach a conclusion. "I totally agree," he said. In response to [the appellant's] question, the CCO confirmed that the names of the interviewees do not appear in the report in order to ensure their protection.

(...)

[The appellant] was given the opportunity to read the report with the panel, to provide explanatory information or to read it at home. [He] preferred having the time to read the report in detail but nevertheless agreed to discuss the essential points.

The Panel summarised the key points found during its investigation in order to explain the situation (...), and the consequences to be considered. [The appellant] was informed that the statements made by [Ms X] had been confirmed by the persons interviewed by the Panel, and that there were two new facts (indirect testimonies in connection with the complaint), providing evidence that was consistent with the facts alleged by [Ms X].”

18. On 21 April 2018, the appellant sent an email to the CCO and the Investigation Panel requesting further investigations, as well as an analysis of Ms X’s “personality”. The appellant also asked for seven witnesses to be heard, if they had not already been heard. In his email, he wrote:

“I am fully aware that you remain an investigation panel, but even and above all at this stage, it is my right to be able to defend myself, as your report is intended to enable the Governor to take a decision against me and he must be fully informed about the ins and outs of this calamitous case because many crucial questions and points are being ignored.”

19. The CCO replied on 23 April 2018, as follows:

*“1. We did not interview [the two persons you mention] as our criterion ... was the proximity of the witnesses to the premises of the alleged facts described;*

*2. As a consequence of such criterion, please note that we interviewed most of the persons you mention who were present when the alleged facts occurred;*

*3. As we already stated in our preliminary findings and given the internal character of the investigation, we will not extend our interviews to former or retired staff;*

*4. With respect to your remark on the personality of the complainant, we would like to recall that the panel’s duty is to assess the facts in relation with the incidents described in the complaint and neither the complainant’s nor the subject’s personality as such. ...”*

20. On 2 and 3 May 2018 respectively, Ms X and the appellant submitted their comments on the preliminary report. The appellant, in his detailed statement, disputed the facts alleged against him by the complainant and considered that he was the subject of a biased investigation in that it failed to provide him with any opportunity to defend himself.

21. On 14 May 2018, the CCO delivered her final investigation report to the parties and the Governor. The observations of the appellant and Ms X were appended to the report. The Panel concluded, among other things (original version):

*“The complainant informed the CCO that she did not enter in mediation process with the subject (due to the nature and the type of the complaint), neither had she informed her reporting line Directors or Deputy Director before the recent period, i.e. the near time of her formal complaint.*

...

1. *As a preliminary remark, we would like to underline that the way the complainant's allegations were treated in the course of the period before the filling of the formal complaint on 15.3.2018 shows a worrying lack of understanding of the general principles (Art. 3), internal relations (Art. 13) and the spirit of Rule 2/15 and the monitoring of ethical behaviour by line managers. Potential incorrect and unethical behaviour should be the primary concern of all directors at the Bank and should be monitored and promptly tackled especially when it is of a recurring/repetitive nature.*

...

6. *Since most if not all of the incidents reported by the complainant occurred either in the kitchen on the third floor or in the surroundings with **no direct witnesses, the panel did not find direct evidence confirming the occurring of such events and situations, the subject denying altogether each of the episodes, words and situations alleged by the complainant.** The panel cannot therefore conclude as to the proof that such behaviours occurred and to their qualification as moral or sexual harassment.*

7. *Notwithstanding above, we should like to recall that the level of proof required in internal investigation is not the same required in formal jurisdictional proceedings, as the purpose of the investigation is in fact to determine whether there are elements that would justify the pursuit of disciplinary or other proceedings (Rule 2/2015 in fact does not replace but only precedes the adoption of disciplinary measures/opening of disciplinary proceedings).*

8. *In the light of the above and having recalled the applicable criterion for the assessment of evidence, **the criterion of probability ('more probable than not')** ..., the panel considers that there is **circumstantial evidence and elements that substantiate the complainant's allegations: as described in detail in the report, several interviewed colleagues have separately and independently confirmed the various occasions in which the complainant reported over time the distress that they confirmed as being genuinely and frankly exposed. The credibility of the complainant and the lack of motive to 'make up' or 'invent' the entire series of recurring episodes are also supportive of the conclusion.** The coherence of the circumstantial evidence described over the interviews, the concurrence of facts, their unambiguous and repetitive character, the level of precision of description of the circumstances underlying the alleged behaviour (dates, place, accuracy of words and verbal expressions) increase the credibility of the complainant and point to the inappropriate and unprofessional of the subject's alleged behaviour. **The generic denial by the subject of any contact confirmed the subject very constant and frequent presence in the 3<sup>rd</sup> floor kitchen. The subject, although mentioned both in the hearings and in his observation a generic 'complot' motive behind the complainant's allegations, was not able to give concrete evidence of such motivation.***

...

12. *In conclusion there is a likelihood that inappropriate and unprofessional behaviours may have occurred: it is paramount that the fundamental principles of ethics underlying dignity at work and Internal relations are recalled and reaffirmed vis-à-vis the subject, that adequate disciplinary measures according to Art. 54 of the Staff Regulations are considered and that appropriate organizational measures taken to prevent situations to occur in the future."*

22. On 16 May 2018, after having received and considered the final report, in accordance with article 4.2 (f) of Rule No. 02/2015, the Governor invited the appellant to an interview scheduled for 23 May 2018 to be attended by the Director of Human Resources, stating that:

*“Further to the conclusions of the Investigation Report date 14/05/2018, a copy of which you received from the Chief Compliance Officer on 15/05/2018, in application of articles 54 and 56 of the Staff Regulations and of article 2 of Appendix X of the Staff Regulations, I hereby invite your for a hearing in my office on Wednesday 23<sup>rd</sup> May 2018 at 14 o’clock.[sic]”*

23. The Governor reported that during this meeting, the appellant was given the opportunity to respond to the allegations and to engage in dialogue with the Governor to state his defence. Moreover, the appellant did not raise any new facts which would cast doubt on the Panel’s findings. On the contrary, the appellant remained silent and chose to criticise Ms X, even threatening to take legal action if his contract were not extended beyond retirement age.

24. Following this interview, on 25 May 2018 the Governor decided to issue a reprimand to the appellant, under Article 54 of the Staff Regulations. The decision noted:

***“Reprimand under Art. 54 of the Staff Regulations***

*Having regard to the Staff Regulations, the Code of Conduct applicable to CEB’s staff, Rule 02/2015 on dignity at work;*

*Having regard to the complaint filed by [X] with the Chief Compliance Officer on 15/03/2018;*

*Based on the investigation report from the Chief Compliance Officer (CCO) dated 14/05/2018 copy of which you received on 15/05/2018;*

*Further to the hearing held on 23/05/2018 as provided under article 56(1) of the Staff Regulations;*

*Having determined a failure to comply with the Code of conduct and Rule 02/2015,*

*I have decided to order the present reprimand, which, as provided under Article 58 of the Staff Regulations, shall be included in your personal administrative file. This disciplinary measure takes into account the conclusions of the CCO’s investigation report, your further observations during the hearing and my overall appreciation of the file. ...”*

25. On 28 May 2018, after a further meeting with the Director of Human Resources, the appellant was notified of organisational measures designed to protect the parties. These were as follows:

*“1. The temporary precautionary measures decided by the Governor and notified to you by your director ... on 20 March 2018 will become permanent.*

*2. As a consequence, you should not have any contact with Mrs [X] ...*

*3. As far as involvement in the preparation of meetings of the Governor is concerned, you shall concentrate on the usual aspects, except any involvement in the preparation of or participation at receptions, lunches or similar, thereby respecting point 2.*

*4. Other tasks will, as usual, be discussed with [your director].*

*5. To avoid in practice any contact whatsoever with Mrs [X], your office will be moved ...”*



26. On 18 June 2018, the appellant lodged an administrative complaint with the Governor, requesting the withdrawal of the reprimand and ancillary measures.

27. On 16 July 2018, the Governor rejected the complaint for the following reasons:

“4. (...) the reprimand was adopted in accordance with the applicable rules. ...

6. (...) the proceedings against you were conducted in an objective, impartial, independent and fair manner. Your rights were fully respected.

- you were given the opportunity to read the entire complaint against you;
- you were interviewed on several occasions and were able to make written submissions (...) [which] were incorporated into and appended to the Panel’s report;
- witnesses able to provide relevant factual information were also heard so that your case could be investigated on the basis of information from both sides.

For your part, you failed to provide any information that could lead the Governor to reconsider the reprimand imposed on you.

(...)

9. The relocation of your office is neither a precautionary measure nor a disciplinary measure. This is simply an organisational measure. (...) Your duties as Deputy Director of the Executive Office & Corporate Services have not been changed and you may continue to perform your duties normally within the Bank.

(...)

10. The refusal to grant your request for renewal of your contract beyond the statutory age limit is not related to the disciplinary measure imposed. You submitted your application for renewal on 1 March 2018 and it was implicitly rejected, pursuant to Article 3 of Rule No 03/2014, even before the disciplinary measure was pronounced. (...) The possibility of remaining in service until the age of 67, (...), is not an automatic right. This is a discretionary possibility assessed by the Governor on the basis of the needs of the department. In the present case, the non-renewal of your contract was decided in the interest of the department and without taking into consideration your disciplinary file.

(...)

11. You claim to have suffered harm as a result of the disciplinary measure and claim that your current medical situation is related to this measure. However, it has not been possible to establish a causal link between your medical situation and the disputed measure. The Doctor’s purely subjective assessment (...) is based on matters that he himself has not been able to observe within the Bank and which are therefore only the transcript of the remarks you have reported to him. In this respect, the CEB reserves the right to challenge the medical certificate dated 16 June 2018, which is clearly not in conformity with the applicable rules of professional ethics.”

## II. RELEVANT LAW

28. Article 24, paragraph 2 of the Staff Regulations applicable to staff members of the Bank is worded as follows:

“By way of exception, the Governor may, on a case-by-case basis and in the sole interests of the Organisation, ask a staff member to remain in service beyond the age of 65 years, under the conditions laid down in Article 24 bis.”

29. Article 24 *bis* of the Staff Regulations provides as follows:

“1. Staff members who meet the physical requirements of the employment may exceptionally be retained in service up to the age of 67 years at most.

(...)

7. The procedure shall be determined by the Governor in a rule.”

30. Article 56 of the Staff Regulations, entitled “Disciplinary Proceedings”, provides:

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

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

31. Appendix X to the Staff Regulations contains the Regulations on disciplinary proceedings. Its relevant provisions are as follows:

### Article 2

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

2. If the misconduct of which the staff member is accused may warrant one of the disciplinary measures provided for in Article 54, paragraph 2.c, d and e.1, the Governor shall lay before the Disciplinary Board a report clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed.”

### Article 3

“On receipt of the report, the staff member charged shall be entitled to see his 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 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.”

32. The relevant provisions of the Council of Europe Development Bank's Code of Conduct (approved by the Governing Board on 27 November 2009) are worded as follows:

**“11. Abuse of an official position**

The CEB's Appointed Officials, staff members and occasional contractual collaborators must not attempt to use their position at the CEB to influence any person or entity whatsoever with a view to gaining any personal advantage or any advantage to their authorised outside functions or external activities.

(...)

**13.3. Sexual harassment and blackmail**

All forms of sexual harassment and blackmail are strictly forbidden.”

33. Rule No. 02/2015 concerns protection of dignity at work. The relevant provisions state the following:

**“4. Procedure**

a. The Chief Compliance Officer (CCO) is responsible for mitigating risks of non-compliance with the present Rule. The CCO will therefore primarily encourage the informal resolution of complaints and will, when necessary, conduct investigations in connection with prohibited conduct under this Rule.

b. Any complaint under this Rule shall therefore be addressed in writing to the CCO (by duly signed letter or email).

**4.1. Informal Procedure**

a. Based on the CCO's preliminary assessment of the complaint, he/she will first decide whether an informal procedure may be appropriate. The preliminary assessment will be based, among other things, on the seriousness of the case and the position of the complainant.

b. The informal procedure is intended to provide a means with which to address a complaint in an open and non-adverse manner. (...)

(...)

**4.2. Formal procedure**

a. In cases where the informal procedure is not considered appropriate or has not resolved the situation, despite the willingness shown by the complainant, the CCO shall open an investigation.

b. Investigations undertaken within this framework must be conducted independently and must be respectful of the parties concerned. They must also be objective, impartial and equitable.

c. In cases when an investigation is opened, the CCO may refer the matter to an investigation panel composed of staff members appointed by him/her, with a view to

assessing the complaint collectively. The members of the panel shall be unconnected with the complaint and with the parties involved. The CCO on his/her own or with the assistance of the investigation panel will proceed to hold hearings with both parties and invited witnesses, will make an assessment of the situation, and will inform both parties of its preliminary conclusions in writing. The parties will have two (2) weeks to provide their written observations, after receiving the preliminary conclusions from the CCO.

d. The investigation shall be concluded, by the submission of a report by the CCO to the Governor within three (3) months of receipt of the complaint or, if recommended by the CCO, at the end of the informal procedure, in cases where the informal procedure was followed and was unsuccessful. (...)

e. The CCO's report to the Governor shall include his/her findings, the parties' observations, if any, and, if appropriate, his/her recommendations to the Governor.

f. The Governor shall take a decision on the CCO's recommendation within six (6) weeks of receiving the CCO's report. The Governor's decision will be duly substantiated and in cases where harassment is found to have occurred, it may include the initiation of disciplinary proceedings, as provided for in Articles 54 to 58 of the Staff Regulations (...)."

#### Article 5 Confidentiality

"(...)

b. Full confidentiality and protection from retaliation, reprisal, revenge or victimisation, in the workplace, which are themselves subject to disciplinary measures will be assured to any person who:

(i) reports actions, incidents or behaviours, which allegedly undermine the personality, violate the dignity of a person, or demean a staff member's self-respect and self-confidence on a personal level or in another form constitute harassment, psychological harassment and/or bullying;

(ii) participates in investigations; or

(iii) is otherwise connected to the case.

c. The confidentiality and protection referred to in paragraph 5.b also apply after the closure of procedures under this Rule."

#### Article 6 Interference with the procedures

"(...)

c. At any time during an investigation, the CCO may issue an interim report to the Governor recommending that, regardless of the outcome of the investigation, measures be taken to avoid these procedures interfering with the work environment. Should the Governor take such measures, these must be duly motivated and must remain suitable and proportionate."

34. Rule No. 03/2014 on service beyond the age limit details the procedure enabling the Governor, on a case-by-case basis, to ask a staff member to remain in service for a further two years beyond the age limit of 65 years.

35. Article 3 of this rule, entitled "Expression of interest", is worded as follows:

“A staff member may inform the Governor of his/her interest to remain in service beyond the statutory age limit by submitting a request in writing via the Director of Human Resources, not later than six months before reaching the statutory age limit.

Such a request does not give rise to any individual right to remain in service beyond the statutory age limit. If the Governor does not initiate the procedure of Article 2 within 30 days of the written request of the staff member, such a request shall be deemed to be rejected.”

## **THE LAW**

36. The appellant seeks the annulment of the decision taken by the Governor on 25 May 2018 imposing a reprimand and the measure of 28 May 2018 on reorganising his work.

37. The Governor invites the Court to declare the action partially inadmissible insofar as it challenges the failure to extend the applicant’s contract beyond the statutory age limit in order to obtain compensation for alleged damage and, in the alternative, to dismiss it and dismiss the action with regard to the annulment of the reprimand penalty and the organisational measures adopted.

### **A. As to the admissibility of the alleged prejudice caused by the non-renewal of the contract**

38. The appellant argues that the failure to renew his employment contract is a direct consequence of Ms X’s complaint, which was upheld and approved by the Bank without any proof or evidence of such a nature as to suggest that the facts of which he was accused were true.

39. The Tribunal notes that, as the appellant has stated in response to the Governor’s objection, the present action does not contain a complaint regarding the non-renewal of the appellant’s contract beyond the statutory age. Consequently, there is no need to rule on this point.

### **B. As to the merits**

#### *1. The appellant*

40. The appellant claims that the Bank seriously violated the presumption of innocence and did not allow him to properly defend himself before the Investigation Panel. He argues that it would appear that, as soon as Ms X reported the matter, he was presumed guilty of having contravened the Bank’s internal regulations, and that the facts reported, without any corroboration by direct witnesses, had been accepted as constituting inappropriate behaviour that violated the dignity of employees, or even sexual harassment.

41. The appellant further submits that the Human Resources Department did not wish to hear him between 12 and 15 March 2018. Neither the appellant's line managers nor the Human Resources Department had ever bothered to inform him, until 4 April 2018, of the scope of the complaint lodged against him. In addition, the complainant had subsequently refused any conciliation measures even though she had not previously reported any inappropriate behaviour on the part of the appellant to her line management.

42. The appellant argues that the cancellation of his participation in two external meetings in April 2018 was inappropriate and humiliating. Indeed, since the complainant had not been involved in those events, this could not have been a question of precautionary measures to prevent her from meeting the appellant. Moreover, that measure was neither motivated, suitable nor proportionate, contrary to Article 6 of Order No. 02/2015.

43. The appellant maintains that he was the subject of disciplinary proceedings and, in all fairness, should have benefited from the protection provided for in the rules on disciplinary proceedings. He disputes the reasoning behind the dismissal of his administrative complaint to the effect that, since a reprimand had been imposed on him, there was no need to convene the Disciplinary Board. The fact is that the disciplinary measures referred to in Article 4(2)(f) of Rule No. 02/2015 are those provided for in Articles 54 to 58 of the Staff Regulations. Although the dismissal in question indicates that, following receipt of the Investigation Panel's final report, the Governor had decided to initiate disciplinary proceedings, at no time was it indicated that such proceedings had been initiated because of a reprimand or that the penalty incurred was at most a reprimand such that a meeting of the Disciplinary Board would not be warranted. The appellant claims that it is not for the Governor to provide justification for the failure to refer the matter to the Disciplinary Board after the sanction had been imposed.

44. The appellant submits that, in the proceedings instituted under Rule No. 02/2015, an employee's only prerogative is to answer the investigators' questions, without being aware of the evidence which could be damaging to him: he has no knowledge of the testimonies or identity of those giving statements or even the facts they describe. Indeed, in violation of Articles 3, 4 and 5 of Appendix X, the applicant had never received his personal file or all the documents relating to the proceedings, despite his request of 3 May 2018; he had not been informed of the circumstances prior to the matter being reported and the complaint being lodged.

45. The Investigation Panel merely questioned the complainant's co-workers, and the appellant was unable to argue against their statements. He was found guilty of facts and allegations whose veracity could not be verified, as a result of the testimonies of persons chosen by the Investigation Panel on the basis of unknown criteria, but no doubt further to the complainant's recommendations. However, the witnesses he had called were allowed to give evidence in violation of Article 5 of Appendix X and Article 4(2)(c) of Order No. 02/2015.

46. The appellant adds that, in violation of Article 7 of Rule No. 02/2015, the Investigation Panel never wished to examine the appellant's request, which was justified by the untruth of the allegations made against him. The appellant replied to the preliminary report on 3 May 2018, but the Investigation Panel gave no attention to what he had said, as can be seen from the final report of 14 May 2018.

47. The appellant also alleges, referring to the manner in which the Investigation Panel had conducted its investigation, that it had failed to conduct it in an objective, impartial, independent and fair manner. In his view, the sanction of the reprimand that was imposed was not based on any serious consideration. The Investigation Panel's report revealed the absence of any evidence of the alleged grievances against the appellant and was inadmissible as it had ignored the rights of the defence, violating the *in dubio pro reo* principle.

48. As for the ancillary measure adopted on 28 May 2018, the appellant alleges that by moving his office from the 3<sup>rd</sup> floor where the Governor's and Vice-Governors' offices are located to the 5<sup>th</sup> floor, which houses the IT department, he was unable to perform his duties which necessitated immediate proximity to the Governor and the general services.

49. In the light of these circumstances, the appellant asks the Tribunal to:

- (i) acknowledge the biased nature of the investigations conducted by the Bank's Investigation Panel;
- (ii) acknowledge that he has been denied the legitimate right to defend himself as he was not privy to the evidence against him;
- (iii) acknowledge that his requests for further investigations made to the Investigation Panel were rejected without reason;
- (iv) acknowledge that he has never been investigated in respect of the complainant's false accusations, in accordance with Article 7 of Governor's Order No. 02/2015, despite his requests to that effect;
- (v) find that there is no evidence in respect of the accusations made by Ms X against the appellant;
- (vi) find that the Investigation Panel has no absolute certainty as to the veracity of the facts alleged by the complainant;
- (vii) declare and rule accordingly that the reprimand imposed on 25 May 2018 by the Governor of the Bank against the appellant is utterly unfounded in law and in fact;
- (viii) order its full revocation and the removal of the ancillary measures ordered on 28 May 2018.

## 2. *The Governor*

50. The Governor maintains that the appellant had benefited from all the applicable procedural guarantees. First, no violation of the principle of the presumption of innocence had occurred. The Investigation Panel was not a criminal court and the appellant was not in a position of being accused; and the right to be presumed innocent did not preclude the employer from exercising its disciplinary power.

51. The Governor adds that the investigation into the case in question was conducted by qualified persons with full guarantees of neutrality. The witnesses were heard and their testimony compared in order to reveal the truth. At the same time, the appellant had been heard and had been given the opportunity to submit his written observations on the preliminary report in order to respond to the allegations made against him.

52. Secondly, the Governor, referring to the relevant factual circumstances, argues that the appellant had been granted the right to defend himself in an adversarial context both in the compliance procedure and in the disciplinary procedure. In the course of the latter, the appellant had been heard by the Governor in the presence of the Director of Human Resources (see paragraph 23 above), to enable the Governor to form his own opinion on the case. If the evidence gathered by the Investigation Panel had not been sufficiently convincing, the Governor could, by exercising his disciplinary power, have decided not to sanction the appellant, as he was not bound by the Panel's conclusions. However, he had decided, on the basis of all reliable, specific, precise and consistent information, to punish the appellant with a reprimand. Subsequently, the Director of Human Resources had taken a number of organisational measures aimed essentially at preventing contacts between the applicant and Ms X.

53. The Governor then explains that he had not brought the matter before the Disciplinary Board because such a referral was necessary, pursuant to Article 2(2) of Appendix X, only where the alleged misconduct could lead to a reduction in step, demotion or removal from office. However, this was not the case here. Similarly, the guarantees provided for in Articles 3 and 5 of the said Appendix applied only in the event of a reduction in step, demotion or dismissal.

54. With regard to the witnesses, the Governor notes that the Investigation Panel had decided to enable the participation of all those who could help to establish the truth. Indeed, the complaints against the appellant resulted from the cross-referenced and concurring statements of these witnesses. Their identities had not been disclosed, in conformity with Article 5 (b) of Rule No. 02/2015. The Governor points out in this respect that in the Brillat and Priore case, the Tribunal held that it was perfectly legitimate to guarantee the anonymity of witnesses heard in a harassment case and to refuse to provide the defendants with information about them (see ATCE, No. 582/2017 and 583/2017 – Brillat (III) and Priore v. Secretary General of the Council of Europe, Decision of 14 May 2017, paragraph 129).

55. The Governor also argues that the level of evidence required in compliance investigations does not have to meet the same requirements as in a judicial context insofar as the purpose of investigations, consisting in assessing a probability criterion, is to determine whether or not the existence of the alleged facts against a given member of staff justifies the continuation of disciplinary proceedings. In this case, the Investigation Panel issued its conclusions on the facts after hearing the witnesses and comparing their testimonies.



56. The Governor, referring to the substance of the Investigation Committee's interview report of 4 April 2018, argues that the reprimand and ancillary measures notified to the applicant were fully justified.

57. He notes that the provisional measures were taken in accordance with Article 6(c) of Rule No 02/2015, having been proposed by the CCO in the preliminary phase of the investigation, and then duly adopted by himself, adding that they were both proportionate and justified and intended solely to preserve the respective rights of the parties. Once the disciplinary proceedings were completed, the Director of Human Resources notified the appellant of the organisational measures which were designed to prevent, through organisational changes, the possibility of any repetition of inappropriate behaviour observed; these were not of a disciplinary nature. The Governor points out that neither the provisional measures nor the organisational measures had had any impact on the appellant's duties, career or remuneration. Moreover, he alone had decided to cancel the planned official assignments to Washington and Amman in order to ensure the continuity of the investigation.

58. In the light of these considerations, the Governor believes that the appeal is unfounded.

### 3. *The Tribunal's Assessment*

59. The appellant calls for the annulment of the reprimand and the ancillary measures relating to the reorganisation of his place of work which have been imposed on him.

60. The Tribunal reiterates that in the event of an allegation of harassment, an international organisation must investigate the matter thoroughly and accord full due process and protection to the person accused. The organisation's duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context, that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account (see ILOAT, Judgment No. 4013 of 26 June 2018, paragraph 8, and other references cited).

61. Furthermore, the question as to whether harassment has occurred must be determined in the light of a thorough examination of all the objective circumstances surrounding the events complained of. An allegation of harassment must be borne out by specific acts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see ILOAT, Judgment No. 3692 of 6 July 2016, consideration 18, and the other references cited).

62. The Tribunal emphasises that the above-mentioned due process must not only respect the principles of adversarial proceedings and equality of arms, but that the administrative authority concerned must also ensure that its decisions are duly reasoned, in order on the one hand to provide the person concerned with sufficient information as

to whether the decision is well-founded or whether it is vitiated by a defect that would enable him/her to challenge its legality and, on the other, to allow the EU Tribunal to exercise its scrutiny of the legality of the impugned decision” (see European Union Civil Service Tribunal, judgment of 9 September 2015, *Stéphane de Loecker v European External Action Service*, F-28/14, paragraph 64, with other references).

63. The Tribunal also reiterates that the disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area (see ILOAT, judgment No. 3640 of 6 July 2016, consideration 29).

64. In the instant case, the Tribunal observes that the appellant was informed of the report made against him and of the opening of an investigation under the compliance procedure on 16 March 2018, once the form for reporting inappropriate conduct had been filed (see paragraphs 8 and 10 above), which the Tribunal, unlike the appellant, considers from a procedural point of view appropriate and in accordance with the applicable rules (see paragraph 33 above).

65. The Tribunal accepts that the appellant was informed for the first time of the content of the complaint filed by Ms X and the facts alleged against him during the interview with the Investigation Panel dated 4 April 2018 (see paragraph 13 above). However, since Ms X did not wish to use the informal procedure based on the wishes of the parties concerned, no mediation with the appellant was therefore possible and consequently he could not be informed (see paragraphs 12, 17 and 21 above). The CCO, exercising her decision-making authority and after assessing the nature of the facts reported, the hierarchical and organisational relationship between Ms X and the appellant, as well as their physical proximity in their place of work, decided to open the investigation and convene the Investigation Panel in accordance with the provisions of Rule No. 02/2015. In so doing, she exercised the rights that were hers in her capacity. The Tribunal points out in this respect that the appellant was duly and promptly informed of these procedural steps (see paragraphs 10-11 above).

66. Accordingly, the Tribunal considers that, although the applicant was not informed of the details of Ms X’s complaint at the initial stage of the proceedings, he was not totally in the dark either. Since the sole purpose of this procedural phase is to establish the plausible existence of the alleged facts, the Investigation Panel could have dismissed Ms X’s allegations if it had turned out that the facts reported by Ms X were unfounded, or indeed false.

67. It is true that the Governor, after reading the content of the preliminary report submitted to him by the CCO, adopted, as a precautionary measure, steps designed to protect the parties, without the complainant or the appellant having been able to become aware of that report (see paragraph 12 above). However, this was a preliminary report and both parties were treated in the same way. Similarly, at that precise moment, it was clear that the measures were provisional in nature.

68. As for the subsequent proceedings, the Tribunal observes that on 4 April 2018, the appellant was informed of all the facts alleged against him and was given the opportunity to present his version of the facts. He also received a copy of the report of the investigation (see paragraph 13 above). The Tribunal notes in this context that it appears from the record of the interview that the Investigation Panel conducted its proceedings in a professional manner, asking the appellant questions aimed at clarifying and analysing the facts of which he was accused. Before being heard once again by the Investigation Panel on 16 April 2018, the appellant expressed his views on the investigation conducted against him, receiving a detailed explanatory reply the following day (see paragraphs 14-15 above).

69. The Tribunal further observes that during the interview with the Investigation Panel on 16 April 2018 with regard to the preliminary report, the key points of the report were read out, explained and discussed with the appellant and the report was delivered to him personally (see paragraph 17 above). A deadline of 3 May 2018 was given to both parties to submit their respective comments.

70. The Tribunal also notes that six witnesses who were potentially able to help uncover the truth were heard by the Investigation Board, without their identities being disclosed (see paragraphs 9 and 17 above). In this regard, the Committee notes that the Investigation Panel proceeded in accordance with Article 5 b. of Rule No. 02/2015 and that, moreover, it is clear from its own case law that it is perfectly legitimate to guarantee the anonymity of witnesses heard in harassment cases and to refuse to disclose information about them to defendants (see ATCE, No. 582/2017 and 583/2017 – Brillat (III) and Priore v. Secretary-General of the Council of Europe, Decision of 14 May 2017, paragraph 129). The Tribunal adds that the appellant was partly informed of the procedure for hearing witnesses; this could, to some extent, dispel his doubts as to the witnesses heard (see paragraph 15 above).

71. As to the appellant's argument that he had not been afforded the protection referred to in the regulations on disciplinary proceedings and that, in the course of the investigation proceedings, he was never placed in a position to defend himself effectively, the Tribunal refers to the relevant case-law in this matter (see paragraphs 60-62 above) and to all the facts of the proceedings brought against the appellant, who is sufficiently familiar with its various steps. It therefore notes that the appellant benefited from an adversarial procedure which was in compliance with the principle of equality of arms and which culminated in a detailed report concluding that it was likely that inappropriate and unprofessional conduct had occurred (see paragraph 21 above).

72. The Tribunal notes that the Investigation Panel drafted its final report after both parties had expressed their views on the preliminary text (see paragraphs 20 and 21 above). It was only after having received this final report and after having interviewed the appellant that the Governor decided to impose the disciplinary sanction of a reprimand (see paragraph 24 above). The Tribunal accepts that the Governor's decision, as such, is rather succinct. However, it points out that the Governor states in his decision

that he had based his findings on the Investigation Panel's report, the substance of which was known to the appellant. Moreover, by referring extensively, in his observations to the preliminary report, his criticisms of the Investigation Panel's report, the appellant sufficiently shows that he had clearly understood the decision taken against him.

73. In view of the findings and conclusions of the final report of the Investigation Panel, and even though the appellant could legitimately claim to have provided excellent service during his long professional career with the Bank, the Tribunal considers that the Governor did not, in the present case, impose a disproportionate sanction by deciding to impose a reprimand on the appellant, a disciplinary measure which is among the least serious. As for the organisational measures subsequently adopted by the Director of Human Resources to protect the parties (see paragraph 25 above), the Tribunal considers that they did not have a substantial impact on the appellant's duties in the Bank, nor on his salary. It further states that such measures are fully in line with the objectives and spirit of the Bank's Code of Conduct. Moreover, they were not intended for disciplinary purposes but were administrative measures concerning the organisation of work.

74. In the light of these considerations, the Tribunal concludes that the appeal is unfounded and must be dismissed.

For these reasons,

The Administrative Tribunal:

Declares the appeal unfounded and dismisses it;

Orders each party to bear its own costs.

Adopted by the Tribunal in Strasbourg on 13 June 2019, and delivered in writing pursuant to Rule 35, paragraph 1 of the Tribunal's Rules of Procedure on 20 June 2019, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

N. VAJIĆ