CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 622/2019 (Michel BRECHENMACHER (II)
v. Secretary General of the Council of Europe)

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 Michel Brechenmacher, lodged his appeal on 3 August 2019. On 5 August 2019, it was registered under No. 622/2019.

2. On 12 September 2019, the Secretary General in office at the time submitted his observations on the merits of the appeal.

3. On 11 October 2019, the appellant submitted observations in reply.

4. The public hearing took place in the Administrative Tribunal's hearing room in Strasbourg on 10 December 2019. The appellant was represented by Maître Grégory Thuan Dit Dieudonné, member of the Strasbourg Bar, while the Secretary General was represented by Mr Jörg Polakiewicz, Jurisconsult and Director of Legal Advice and Public International Law, assisted by Ms Sania Ivedi and Ms Ine De Coninck, both legal advisers in the Legal Advice Department.

THE FACTS

I. FACTS OF PRESENT PROCEEDINGS

5. The appellant was a Council of Europe staff member on an indefinite-term contract. He held the grade C5 and worked as team leader in charge of fire safety.

6. The appellant was previously the subject of disciplinary proceedings, which ended with the ordering of his dismissal on 28 May 2018 (ad personam decision No. 7344), against which he lodged an appeal. The Tribunal set aside the dismissal in a decision of 26 March 2019 (ATCE, Appeal No. 591/2018 – Brechenmacher v. Secretary General of the Council of Europe).

7. The Tribunal refers to its aforementioned decision of 26 March 2019 for further details regarding the facts that gave rise to this first dismissal and the related disciplinary proceedings.

8. In its decision, the Tribunal stated the following:

> "(…)
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> 91. In this respect, and in assessing whether the disciplinary measure imposed was proportionate in relation to the seriousness of the facts established, the respondent was required to have regard to a number of considerations, including circumstances that might mitigate or aggravate the staff member's conduct, in determining the seriousness of the wrongdoing and in deciding on the most appropriate disciplinary measure.
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> 92. As it turns out, however, there is nothing in the decision complained of to show that the most severe disciplinary measure was the most appropriate one. The obligation to provide an enhanced statement of reasons in the contested decision was more imperative here given the length of time for which the staff member had served in the Organisation.
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> 93. In this respect, the Tribunal considers that the argument put forward by the Secretary General at the hearing to the effect that a case-by-case review to establish the most appropriate sanction was merely a formality should be rejected.
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> 94. The fact that he had recourse to the most severe disciplinary measure placed an obligation on the respondent to give sufficient and detailed reasons why the only fitting punishment for the alleged acts was removal from post and not one of the other sanctions provided for in Article 54, paragraph 2, of Part VI of the Staff Regulations. A suspended criminal sentence was certainly something that needed to be considered by the respondent when adopting a disciplinary measure; in those circumstances, however, the decision imposing the sanction should have set out the reasons why the most severe measure was the only appropriate one, yet it did not do so.
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> 95. In the absence of an adequate statement of reasons, therefore, the Tribunal is unable to exercise the scrutiny necessary to determine whether the disciplinary measure of removal from post was proportionate to the offences allegedly committed by the appellant.
>
> 96. The Tribunal does not underestimate the importance of the fight against harassment, especially when it comes to sexual harassment of a subordinate, one who is also in a vulnerable position professionally speaking. As the Chair of the Tribunal has already pointed out in her Order of 20 June 2018 (paragraph 33 above), however, this fight must always be conducted in accordance with the rules.
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> (…)."

9. In connection with execution of this decision (Article 60, paragraph 6, of the Staff Regulations), the Secretary General notified the Tribunal on 2 May 2019 of the implementing measures which he had taken further to it. He indicated that, for the reasons given there, he had decided to resume the disciplinary proceedings from the exact point at which the unlawfulness had been established by the Tribunal. The Secretary General added that he had issued a fresh dismissal decision the same day, of which the appellant had been notified.

10. The six-page ad personam decision (No. 7478 of 2 May 2019) was worded as follows (original):

> "The Secretary General,
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> HAVING REGARD to Articles 12, paragraph 1, and 25 of the Staff Regulations;
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> HAVING REGARD to Articles 1 and 2 of Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe and Article II.4 of the Charter on professional ethics of 15 July 2005;
>
> HAVING REGARD to Articles 54 et seq. of the Staff Regulations;
>
> HAVING REGARD to the Regulations on disciplinary proceedings (Appendix X to the Staff Regulations);
>
> HAVING REGARD to the opinion of the Disciplinary Board of 27 April 2018;
>
> HAVING REGARD to the Secretary General's decision ad personam No. 7344;
>
> WHEREAS the decision has been annulled by the Administrative Tribunal of the Council of Europe on the grounds that it was not sufficiently motivated, in particular - as indicated by the Administrative Tribunal - in view of the need to give precise reasons as to the choice of the sanction and the reasons why the sanction chosen is the most appropriate in relation to the other sanctions provided for in Article 54, paragraph 2, of the Staff Regulations;
>
> CONSIDERING THAT the appropriate measure to execute the Administrative Tribunal's judgment is to adopt a new decision, taking account of the grounds invoked by the Tribunal to justify the annulment and reflecting more clearly the Secretary General's reasoning;
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> [The applicant] having already been heard in conformity with Article 8, paragraph 2, of the Regulations on disciplinary proceedings;
>
> DECIDES as follows:
>
> By a judgment of the Tribunal correctionnel of Strasbourg of 23 May 2017, [the applicant] was found guilty of a sexual assault on a colleague, employee of the external service provider [...], and was sentenced to a suspended prison sentence of six months. [The applicant] did not appeal against this judgment, which has become final. The Disciplinary Board was seized on 16 February 2018 in accordance with Article 2, paragraph 2 of the Regulations on disciplinary proceedings on the basis that the final criminal conviction at stake justifies the application of the sanctions provided for in Article 54, paragraph 2 (c) to (f) of the Staff Regulations.
>
> In its opinion of 27 April 2018, the Disciplinary Board stated that the facts established by that judgment were "essentially the same as those assessed" previously by the Disciplinary Board, which held that [the applicant's] behaviour did not constitute a disciplinary misconduct. The Board also considered that it was "in no way in a subsidiary position to the Tribunal" and "fail[ed] to identify any elements in the proceedings before the Tribunal that should call in question the conclusions in the original opinion". The Disciplinary

Board recommended to the Secretary General that no disciplinary measure should be taken with regard to [the applicant].

The Secretary General disagrees with the Disciplinary Board's conclusion. In particular, he considers that the Disciplinary Board's recommendation is based on a manifestly erroneous assessment of the authority of the judgment delivered by the Tribunal correctionnel. This judgment, which has not been appealed and became final, indisputably establishes, contrary to the opinion of the Disciplinary Board, [the applicant's] guilt and convicts him for sexual assault. The Secretary General believes that the fact that the Disciplinary Board had previously considered the same facts and reached a different conclusion than that of the Tribunal correctionnel is irrelevant to the assessment to be made in the context of the present disciplinary proceedings related to [the applicant's] final criminal conviction.

The Secretary General recalls that staff members of the Council of Europe shall strictly comply with the public order of the host state and observe its laws, and that staff members' behaviour that violates human dignity shall not be tolerated by the Organisation. In this respect the Secretary General recalls that the facts considered by the Tribunal correctionnel have been established previously in an internal inquiry conducted by instruction of the Secretary General following the victim's report of the facts concerned, through her management, to the Council of Europe. This inquiry concluded that [the applicant's] had committed acts of sexual harassment against a female colleague. The Tribunal correctionnel of Strasbourg went further in its judgment of 23 May 2017 by characterising the act committed by [the applicant's] on 11 June 2015 as sexual assault and sentencing [the applicant's] to a suspended prison sentence of six months.

The Secretary General first notes that the sanctioned acts are totally incompatible with the duties performed by [the applicant's] as a fire safety team leader which may include physical contacts with women in situations of particular vulnerability for professional purposes - such as resuscitation and first aid - and the exercise of authority over colleagues as a team leader. Exemplary probity is required in the performance of these duties especially in view of the large number of people who may need assistance in the context of first aid, i.e. staff members, but also experts taking part in the work of the Council of Europe, external providers and many visitors.

Unlike the Disciplinary Board, the Secretary General considers that [the applicant's] conviction may not remain without response by the Organisation, particularly given the nature of the offence and the fact that it was committed against a co-worker and one who worked under the authority of [the applicant']. Sexual assault - in particular when perpetrated on a co-worker - constitutes gross misconduct and must be sanctioned.

The Secretary General recalls that in a Policy Statement of 28 September 2010 on harassment, he and the Deputy Secretary General have committed themselves to guaranteeing a work environment free of sexual and psychological harassment and to establishing a culture of mutual respect in accordance with Article 4 of the Charter on professional ethics. In this respect, the Secretary General and the Deputy Secretary General have undertaken to take appropriate measures against proven harassers, including disciplinary measures under Article 54 of the Staff Regulations, and to afford effective protection to the staff members who are victims of harassment.

The Secretary General further recalls that an Organisation such as the Council of Europe, which sets standards in the field of human rights and in particular concerning the protection of women against violence, has a crucial responsibility to act by complying with its own standards when dealing with staff members committing gender-based violence.

The Secretary General also recalls that the solemn commitment entered into under Article 25, paragraph 1, of the Staff Regulations, signed by staff members when taking up their duties, is binding on the staff member in every sphere of life, covering both occupational, social and private activities. A Council of Europe staff member has a duty to show exemplarity of behaviour at all times and not to harm the Organisation's reputation. Every staff member must in particular at all times abide by the law and respect the public order of the host state. In conformity with Article 25 of the Staff Regulations, the staff members of the Council of Europe must refrain from any action which might reflect upon their position as members of the staff of the Council or which might be prejudicial morally or materially to the Council.

Contrary to the Disciplinary Board's finding, [the applicant's] conviction demonstrates that he failed to comply with the basic ethical principles of integrity and respect for the dignity of others which the Council of Europe demands of its staff members at all times and most especially in contexts related to the exercise of their employment. [The applicant] did not conduct himself in the manner required of an international civil servant, in breach of Article 25[(loyalty and integrity)] of the Staff Regulations. The misconduct resulting in the final conviction of [the applicant'] is also in breach of Articles 1 [(Prohibited conduct)]and 2 [(Field of Application)] of Rule No 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe prohibiting all forms of sexual harassment in the workplace, and of Article II. 4 [(Dignity, mutual respect and courtesy)]of the Charter on professional ethics of 15 July 2005.

In order to choose the most appropriate sanction, the Secretary General takes into account a number of circumstances:

- as recalled in the judgment of the Tribunal correctionnel of Strasbourg, [the applicant] already had a previous disciplinary record for unwanted sexual behaviour perpetrated against a female colleague;

- the reprimand imposed on [the applicant] on 5 February 2014 in this context obviously did not have the desired effect, because [the applicant] again committed misconduct of a sexual nature by sexually assaulting a colleague;

- [the applicant] did not appeal against his conviction, which is therefore final in establishing the occurrence of sexual assault;

- [the applicant] has not presented his apologies to the victim and the Tribunal correctionnel noted that his lack of recognition of his sexual assault did not reassure it as to his future conduct;

- [the applicant] has been serving in the Council of Europe since 8 January 1996. This long period of service should have made him acutely aware that a violation of the bodily integrity of others is against the values promoted by the Council of Europe and will not be tolerated in the Organisation. Thus, [the applicant] long period of service should be seen, not as a mitigating factor, but rather as an aggravating circumstance;

- the duties performed by [the applicant] as a fire safety team leader entail physical contact with women for professional purposes (including resuscitation and first aid) and also imply a relationship based on trust and respect for the integrity of others that [the applicant] has irremediably damaged by his behaviour;

- in accordance with paragraph 4 of Article 1 of Rule No. 1292, the relationship of authority between the victim of the sexual assault and [the applicant] should be seen as an aggravating circumstance.

Furthermore, the Secretary General considers that the Organisation cannot expose its staff or other persons involved in its activities - particularly in view of the specific functions performed by [the applicant] as a fire safety team leader - to the risk of a person with a criminal and disciplinary record re-offending by committing further gender- based violence. By continuing to employ a staff member who has been convicted of sexual assault, the Organisation as an employer exposes itself to the risk of being sued by other potential victims who would have an easy task of demonstrating that the Organisation has failed to comply with its duty of care by employing a high-risk individual who has repeatedly shown that he disregards elementary principles of respect of human dignity.

The Secretary General does not share the Disciplinary Board's opinion that the reputational damage to the Organisation is negligible in the present case. The final conviction for sexual assault of [the applicant] by judgment of 23 May 2017, which is public, adversely affects the Organisation's reputation, in particular vis-à-vis its external service provider [...], and, by bringing the Organisation into public discredit, is prejudicial to the Council of Europe. The Secretary General also considers that if [the applicant] were to remain a staff member, it would cast an extremely unfavourable light on the Organisation, exposing it to justified criticism

from the media and civil society which would rightly criticise the Council of Europe for disregarding its own standards as well as its commitment to fight against gender-based violence. The integrity of the Organisation's role in setting standards and promoting them to member States would suffer significantly, if a convicted sexual offender such as [the applicant], in the light of the facts of this case, were allowed to continue working for the Organisation.

With regard to the choice of the most appropriate sanction, in the Secretary General's view, any sanction short of dismissal would not be proportionate to the seriousness of the misconduct committed and would fail to attain the Organisation's objective to fight sexual abuse and other infringements of individuals' rights. If [the applicant] were to remain a staff member of the Organisation despite his criminal conviction for sexual assault against a colleague, this would have a chilling effect by discouraging victims from coming forward and more generally, would undermine staff confidence and discredit our zero- tolerance policy.

It can be discerned from other previous disciplinary cases that a written warning or a reprimand is appropriately applied to conduct which is mildly or moderately objectionable e.g. in cases of unprofessional behaviour, or negligence which has not caused considerable damage to the Organisation. It is therefore clearly inappropriate in the case of gross misconduct.

With regard to a sanction such as deferment of advancement of step or relegation in step, which would impact on [the applicant's] remuneration, the Secretary General considers that such a sanction would be manifestly inappropriate in a case of sexual assault. Such a sanction could be perceived as setting a monetary value which perpetrators can pay in order to evade punishment, even after having committed an offence directed at the core of the human dignity that this very Organisation has been set up to uphold and protect.

The latter consideration would also apply to the sanction of downgrading (which is the closest sanction to removal from post). Furthermore, downgrading, as well as lower sanctions, would imply that [the applicant] would remain a staff member in the service of the Organisation. The Secretary General therefore does not consider downgrading or any other lower sanction as being effective in protecting future potential victims, proportionate and dissuasive enough. These considerations also explain why the Secretary General considers that it is not possible to assign [the applicant] to another post in the Secretariat.

In light of the above and having concluded that the acts committed by [the applicant], as proven by the Tribunal correctionnel, are particularly serious in nature, especially in view of the functions performed by [the applicant]; that they amount to gross misconduct in breach of the staff member's most fundamental obligations; and furthermore that this gross misconduct demonstrates his flagrant disregard for the Council of Europe's values;

Having considered with great care all sanctions provided for in Article 54 of the Staff Regulations, and reached the conclusion that this gross misconduct does not make it possible to envisage his being maintained in the Council of Europe staff, even at a lower grade and in non-managerial functions;

DECIDES to remove [the applicant] from post and terminate his contract with the Organisation with immediate effect.

Strasbourg, 2 May 2019

The Secretary General

[…]".

11. On 24 May 2019, the appellant submitted an administrative complaint to the Secretary General against the decision of 2 May 2019 (Article 59, paragraph 2, of the Staff Regulations).

12. On 25 June 2019, the Secretary General rejected the administrative complaint on the ground that it was unfounded.

13. On 3 August 2019, the appellant lodged the present appeal.

II. RELEVANT LAW

14. Disciplinary matters are governed by Part VI (Discipline) of the Staff Regulations and by Appendix X to the Staff Regulations (Regulations on disciplinary proceedings).

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

> "Article 54 – Disciplinary measures
>
> 1. Any failure by staff members to comply with their obligations under the Staff Regulations, and other regulations, whether intentionally or through negligence on their part, may lead to the institution of disciplinary proceedings and possibly disciplinary action.
>
> 2. Disciplinary measures shall take one of the following forms:
> a. written warning;
> b. reprimand;
> c. deferment of advancement to a higher step;
> d. relegation in step;
> e. downgrading;
> f. removal from post.
>
> 3. A single offence shall not give rise to more than one disciplinary measure.
>
> Article 55 – Disciplinary Board
>
> 1. A Disciplinary Board shall be set up, consisting of a Chair and four members. The Chair shall arrange for secretarial assistance.
>
> (…)
>
> Article 56 – Disciplinary proceedings
>
> 1. Disciplinary proceedings shall be instituted by the Secretary General after a hearing of the staff member concerned.
>
> 2. Disciplinary measures shall be ordered by the Secretary General after completion of the disciplinary proceedings provided for in Appendix X to these Regulations.
>
> (…)
>
> Article 58 – References in personal administrative files
>
> No reference to a disciplinary measure shall remain in the personal administrative file of the staff member concerned after two years in the case of a written warning or reprimand, and after six years in the case of other measures except removal from post."

16. The relevant provisions of Appendix X to the Staff Regulations read as follows:

"Article 1

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

Article 2

1. (…)

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

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

(…)

Article 12

Where there are new facts supported by relevant evidence, disciplinary proceedings may be re-opened by the Secretary General on his or her own initiative or on application by the staff member concerned."

THE LAW

17. The appellant is asking that the ad personam decision taken on 2 May 2019 by the Secretary General in office at the time to dismiss him again by way of a disciplinary measure be set aside and that he be reinstated in his post.

18. He is also asking the Tribunal to award him 100% of the earnings he has lost since 2 May 2019 and 5 000 euros for non-pecuniary damage. Lastly, he is seeking 4 800 euros in costs.

19. The Secretary General invites the Tribunal to declare the appeal unfounded and to dismiss it. She also asks that it dismiss the appellant's claims for compensation.

I. THE PARTIES' SUBMISSIONS

A. The appellant

20. The appellant maintains that the impugned decision was flawed on three grounds: the non-compliance of the ad personam decision with internal regulations, the inadequacy of the reasons given and the disproportionate nature of the measure.

1. *On the compliance of the Secretary General's decision with the internal regulations*

21. The appellant maintains that in executing the Tribunal's decision of 26 March 2019 setting aside the dismissal decision of 25 May 2018, the Secretary General in office at the time failed to

comply with all the rules governing disciplinary proceedings which ensure the fairness of those proceedings and respect for the rights of the person subject to disciplinary measures.

22. The appellant points out that the Secretary General held that there were no grounds for hearing him again or for referring the matter back to the Disciplinary Board, as the dismissal decision of 2 May 2019 was based on the same facts as those considered in the decision of 25 May 2018. He states that the Secretary General did so because the appellant had already been heard in the proceedings concerning the first dismissal decision.

23. In support of his position, the appellant states that, in accordance with Article 2 of the said Appendix X, if the alleged misconduct may warrant removal from post, the Secretary General must lay before the Disciplinary Board a report clearly specifying the reprehensible acts and the circumstances in which they were allegedly committed. Moreover, once the Disciplinary Board's report has been submitted to the Secretary General, he or she must take his or her decision after "hear[ing] the staff member concerned" (Article 8 of the aforementioned Appendix).

24. The applicant points out that he was not granted any hearing following the Tribunal's annulment of the first dismissal; he therefore was not able to make any submissions given that he had not even been informed of the Organisation's intention to issue a fresh decision removing him from his post.

25. The applicant is of the view that he was therefore deprived of the opportunity to discuss the purpose and nature of this new measure and that, at that stage in the proceedings, he was not able to make the observations necessary to enable him to exercise his right of defence.

26. He further maintains that deeming the impugned decision lawful in terms of compliance with the regulations governing disciplinary proceedings would have the effect of substantially undermining the import of the Tribunal's decisions and of the rights of those seeking redress. If all decisions set aside by the Tribunal could be deemed lawful after the event by the Secretary General without the persons concerned being heard or being informed of the proceedings and hence without their having access to their files or being able to make any observations, equality of arms would clearly be destroyed, as, in his view, was true in the instant case.

27. The appellant infers from this that the Secretary General's decision undermined the fundamental principles of the right to a fair trial.

28. Consequently, because the appellant was deprived of the opportunity to exercise his rights in the proceedings and the Secretary General could not take a dismissal decision without referring the matter to the Disciplinary Board, the impugned decision should be set aside on the ground that it breached the internal rules on disciplinary proceedings.

2. *On the inadequacy of the statement of reasons*

29. The appellant accepts that, in disciplinary matters, the authority vested with disciplinary power in an international organisation has discretion as to the choice of sanction to be imposed on

a member of its staff on account of misconduct by the latter. To this end, it is open to the Secretary General to deviate from the opinion delivered by the Disciplinary Board.

30. Nevertheless, case-law requires reasons to be given for administrative decisions and this obligation is amplified when the authority vested with disciplinary power decides to impose the most severe sanction on the employee concerned.

31. With regard to the various grounds given by the Secretary General in the fresh impugned decision, the appellant notes the following:

- The Secretary General mentions the reprimand issued to the appellant by a decision of 5 February 2014 in the context of the first disciplinary proceedings in an attempt to demonstrate the repetitive nature of the appellant's inappropriate conduct towards his female colleagues.

32. The appellant points out that, in the 22 years that he worked as a permanent staff member in the Council of Europe's fire safety department, and the 12 years that he held the position of team leader, he was only once before the subject of disciplinary proceedings, and those ended merely in a reprimand. He adds that, in the present proceedings, the Disciplinary Board twice concluded that the allegations before it were not such as to warrant a disciplinary measure under the internal regulations and that the Secretary General himself initially confirmed this view. Accordingly, although the allegations against the appellant concerning the two female staff members of the outside service provider should not be belittled, the appellant is of the view that he cannot be accused of frequent and repetitive inappropriate conduct.

33. The appellant adds that, throughout his career at the Council of Europe, he received very positive appraisals and, given his proven professionalism, to contend that the decision to remove him from his post was justified "in view of the specific nature of the duties performed" insofar as "they may imply physical contacts with women for professional purposes" does not seem very appropriate. No comment of this kind was ever noted in his work appraisals.

- The Secretary General also relies on the fact that the appellant did not appeal against his conviction by Strasbourg Criminal Court on 23 May 2017.

34. The appellant argues that his failure to appeal against his conviction was not synonymous with an admission of guilt but should be construed more as a desire to put an end as quickly as possible to a judicial process that had left him exhausted, worn out and severely affected psychologically. Moreover, neither the Council of Europe's Disciplinary Board, as an independent body, nor the Secretary General for that matter is bound by the judgments handed down by domestic courts, having regard to the duality that exists between criminal offences and administrative misconduct.

- Lastly, the Secretary General again refers to the damage to the Organisation's reputation and its image among outside partners, civil society, the media and broader public opinion.

35. The appellant takes issue with the argument concerning the repercussions which his possible reinstatement could have on the Council of Europe's image. He argues that the Secretary General did not adduce any evidence that news either of the allegations against him or of the Tribunal's decision annulling his dismissal spread beyond the staff of the service provider or of the Organisation. In his view, the number of people aware of the matter is therefore limited, so any negative repercussions on the Organisation's image will be equally limited.

36. He further argues that the risk of the Organisation being exposed to criticism from the media and civil society in the event of another penalty having been imposed on the appellant is minimal. In this connection, he notes that the decision setting aside his dismissal and hence allowing his possible reinstatement within the Organisation did not provoke any strong reactions and had only a very limited impact.

37. The appellant adds that even though the Secretary General sought to provide more reasons for his second dismissal decision, he essentially repeated the same grounds already relied upon in his first dismissal decision. As was the case the first time, these grounds remain manifestly insufficient to justify the measure imposed.

3. *On the disproportionate nature of the measure*

38. The appellant maintains that this fresh decision to remove him from his post also breaches the principle of proportionality required in the matter.

39. After referring to the ILOAT's case-law (P. v. UNESCO, 6 July 2016, Judgment No. 3640, A. v. WTO, 3 February 2016, Judgment No. 3602), the appellant contends that when determining the measure to be imposed, in particular when consideration is being given to the most severe disciplinary measure, the seriousness of the alleged misconduct must be assessed in accordance with criteria identified by the tribunals of international organisations, i.e., the nature of the allegations, the number of persons concerned, the duration of the misconduct concerned, its repetitive nature and the consequences for the victim.

40. The appellant notes that, in rejecting his administrative complaint of 25 June 2019, the Secretary General maintained, with reference to ILOAT case-law (Judgment No. 3640, cited above), that a dismissal decision could not be deemed disproportionate in cases similar to his one.

41. Nevertheless, with regard to the case-law cited by the Secretary General, the appellant maintains that, contrary to the Secretary General's claims, his situation is very far removed from the circumstances in the case which the Secretary General relied on in support of his conclusions. He points out that only one single allegation was laid against him, namely a fleeting act alleged to have been committed in the evening of 11 June 2015 (decision of 26 March 2019, cited above, paragraph 11) against one female colleague, which none of the colleagues present had witnessed. While the appellant does not seek to advance the number of persons concerned as a mitigating circumstance, in his view, this aspect is one of the criteria to be combined with others in assessing the proportionality of the measure imposed.

42. With regard to the choice of the disciplinary measure, the appellant goes on to say that the Tribunal has a duty to determine whether any measure imposed is appropriate and proportionate so as to prevent arbitrary decisions.

43. He contends that, as mentioned in the Tribunal's decision concerning the appellant's initial dismissal, the fact that it had recourse to the most severe disciplinary measure placed an obligation on the Organisation to give sufficient and detailed reasons why the only fitting punishment for the alleged acts was removal from post and not one of the other sanctions provided for in Article 54 of the Staff Regulations. In his view, the Secretary General did not provide any detailed reasons for the choice of the measure in the fresh dismissal decision. Even though the latter gave the impression of being more substantiated than the previous one, the reasons given did not satisfy the necessary requirements and were not sufficient to justify the imposition of the harshest and most severe measure.

44. The appellant adds that the decision removing him from his post with immediate effect was also disproportionate in relation to the actual harm done to the Organisation's reputation, which he maintains was very limited, if not non-existent.

45. Lastly, the appellant further states that the fresh disciplinary measure was disproportionate in relation to his personality and entailed disproportionate and manifestly excessive consequences for his personal and working life.

46. In the light of the above, the appellant concludes that the dismissal decision of 2 May 2019 should be annulled on the grounds of a clear lack of proportion between the seriousness of the misconduct committed and the severity of the disciplinary measure imposed.

B. The Secretary General

1. *As to compliance with disciplinary procedure*

47. The Secretary General begins by pointing out that the dismissal decision of 2 May 2019 was fully in compliance not only with the regulations applicable to disciplinary matters but also with the general principles applicable to legal proceedings, in particular administrative proceedings.

48. She adds that, under Article 60, paragraph 6, of the Staff Regulations, it falls to the Secretary General to decide how to execute decisions by the Tribunal. In this connection, the head of the organisation has discretionary powers that have to be exercised in compliance with the principle of res judicata (ATCE, Appeals Nos. 530/2012 and 531/2012, Prinz (II) and Zardi (II) v. Secretary General, decision of 6 December 2012, paragraphs 87-92).

49. The Secretary General notes that, in the instant case, the Tribunal's decision of 2 April 2019 set aside the decision of 25 May 2018 to dismiss the appellant on procedural grounds relating to inadequate reasoning. However, in accordance with the general legal principles applicable to annulment proceedings, in the event of annulment on procedural grounds, the authority which took the flawed decision may make a fresh decision in respect of the same facts.

50. In the instant case, given the annulment of the initial dismissal decision on the grounds of insufficient reasoning, and in order to replace the decision set aside by a fresh decision that was lawful in accordance with the Tribunal's ruling, the Secretary General in office at the time decided to resume the proceedings at the exact point at which they became flawed, i.e. at the stage of the decision itself. Accordingly, the appellant was not justified in alleging that there had been any breach of the rules on disciplinary proceedings.

51. The Secretary General is of the view that only the lawfulness of the dismissal decision of 25 May 2018 was challenged by the Tribunal, not the disciplinary proceedings that preceded it. This was clear from the text of the decision because the Tribunal had confined itself to censuring the failure to provide adequate reasons for the decision taken at the end of the disciplinary proceedings.

52. The dismissal decisions of 25 May 2018 and 2 May 2019 therefore stemmed from a single set of disciplinary proceedings commenced on 16 February 2018 in the course of which the appellant had been able to exercise his rights of defence in full.

53. In deciding to resume the disciplinary proceedings at the stage where they had been flawed in order to issue a fresh decision in line with the points made by the Administrative Tribunal, the Secretary General in office at the time took full account of the Tribunal's decision of 2 April 2019 and drew all the relevant conclusions from the annulment ordered.

54. It therefore fell to the Secretary General to adopt a new decision giving adequate reasons. In so doing, he took account of the Tribunal's stated need for an adequate statement of reasons to enable it to exercise the scrutiny necessary to determine whether the disciplinary measure of removal from post was proportionate to the appellant's alleged misconduct.

55. In the light of all the foregoing, the Secretary General concludes that the appellant is in no way justified in claiming that he was not able to exercise his rights.

2. *As to the inadequacy of the statement of reasons*

56. The Secretary General begins by pointing out that, as the Tribunal has consistently held in disciplinary matters, it is for the Secretary General to assess what sanction should be imposed and the Tribunal cannot substitute its own appraisal for that of the Secretary General.

57. The Secretary General goes on to state that, of course, such discretion must be exercised lawfully, and it is from this perspective that the Secretary General's decision is subject to review by the Tribunal. Although it has no say as to whether a disciplinary measure is called for, the Tribunal is allowed, therefore, to satisfy itself that the punishment is appropriate and to set aside any punishment which is disproportionately severe. In this respect, the Secretary General points out that, according to the Tribunal's case-law, an error of law is deemed to have occurred if the disciplinary measure is "out of all proportion to the objective and subjective circumstances in which the misbehaviour was committed" (ATCE, Appeals Nos. 190/1994, 196/1994, 197/1994 and 201/1995, Lelegard I, II, III and IV v. Governor of the Council of Europe Social Development

Fund, decision of 29 September 1995, paragraphs 177-178; Appeals Nos. 187/1994 and 193/1994 (ROOSE I and II v. Governor of the Council of Europe Social Development Fund, decision of 29 September 1995, paragraphs 125-126).

58. With regard to the present appeal, the Secretary General firmly believes that, in removing the appellant from his post, the respondent took into account both the nature of the allegations against the appellant and his conduct. He therefore did not overstep the discretion allowed him.

59. The Secretary General asserts that, in accordance with his duty to give reasons, the Secretary General in office at the time listed all the reasons why he did not agree with the Disciplinary Board's conclusions in his ad personam decision dated 2 May 2019.

60. She points out that, in departing from the Disciplinary Board's recommendation, her predecessor had held, in particular, that that recommendation was based on a manifestly erroneous assessment of the authority of the judgment delivered by the Criminal Court. The fact that the Disciplinary Board had previously considered the same facts and reached a different conclusion than that of the Criminal Court was irrelevant to the assessment to be made in the context of the disciplinary proceedings relating to the appellant's final criminal conviction.

61. The report of 16 February 2018 referring the matter to the Disciplinary Board clearly indicated that the breaches allegedly committed by the appellant were based on his final criminal conviction. This set of disciplinary proceedings constituted new disciplinary proceedings – not a re-opening of the first set of disciplinary proceedings – in which the Disciplinary Board was called upon to rule on the appellant's criminal conviction. The Disciplinary Board, however, did not consider the reasons why it had been asked to give a decision in this second set of disciplinary proceedings. The Secretary General points out that, unlike the Disciplinary Board, the Secretary General in office at the time took account of the facts on which the opening of the second set of proceedings was based, namely the appellant's final conviction by Strasbourg Criminal Court. That was why he decided to depart from the Disciplinary Board's recommendation and, unlike the board, concluded that the seriousness of the allegations against the appellant warranted disciplinary action.

62. In the light of the foregoing and of the points made in the ad personam decision of 2 May 2019, the Secretary General held that he was perfectly justified in departing from the opinion issued by the Disciplinary Board in the second set of disciplinary proceedings and in concluding that the appellant's criminal conviction warranted disciplinary action.

63. In so doing, he gave an exhaustive explanation for his decision, setting out the reasons why dismissal was justified in the case of the appellant.

64. The Secretary General states that it was noted, in particular, that the acts concerned were totally incompatible with the duties performed by the appellant as fire safety team leader.

65. The Secretary General therefore considered that the appellant's conviction could not remain without a response from the Organisation, particularly given the nature of the offence and the fact that it had been committed against a co-worker and one who moreover worked under his

authority. The Secretary General took the view that sexual assault constituted gross misconduct which had to be sanctioned, in particular when perpetrated on a co-worker.

66. The Secretary General observes that, unlike the Disciplinary Board, her predecessor therefore considered that the appellant's criminal conviction demonstrated that he had failed to comply with the basic ethical principles of integrity and respect for the dignity of others which the Council of Europe demands of its staff members at all times and most especially in contexts related to the exercise of their employment. The appellant had not conducted himself in the manner required of an international civil servant, in breach of Article 25 of the Staff Regulations. The misconduct that resulted in the appellant's final conviction had also been in breach of Articles 1 and 2 of Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe prohibiting all forms of sexual harassment in the workplace, and of Article II. 4 of the Charter on professional ethics of 15 July 2005.

67. With regard to the choice of the most appropriate disciplinary measure to be imposed on the appellant, the Secretary General believes that her predecessor indicated in detail in his decision the grounds justifying the need to impose the penalty of removal from post on the appellant in view of the particular circumstances of the instant case. In her view, it follows from all the foregoing that the ad personam decision of 2 May 2019 was fully reasoned and set out all the grounds why the appellant's conviction for sexual assault by Strasbourg Criminal Court justified the Secretary General imposing the most severe disciplinary punishment on him, as it was the only one appropriate in the appellant's case.

68. Consequently, the Secretary General further maintains that the Secretary General in office at the time complied fully with the requirement for a detailed and enhanced statement of reasons set out by the Tribunal in its decision of 2 April 2019 by listing all the reasons why he had departed from the Disciplinary Board's recommendation, the reasons why the acts of which the appellant was accused constituted particularly serious misconduct on his part, the reasons why disciplinary action had to be taken in respect of that misconduct and the reasons why removal from post was chosen and the other disciplinary measures available could not be taken into consideration.

69. The Secretary General concludes that the appellant's claim that the statement of reasons for the fresh dismissal decision was inadequate is therefore unfounded.

3. *As to the disproportionate nature of the measure imposed*

70. The Secretary General points out that the acts of sexual violence of which the appellant was accused were of undeniable seriousness. In view of the previous complaints against him, the applicant was not unaware that female colleagues might perceive his conduct towards them as inappropriate or offensive. That did not prevent him from once again behaving in a reprehensible manner towards the staff member from the service provider. The Secretary General notes that disciplinary proceedings had already been brought against the appellant in the past because of inappropriate sexual conduct towards a female colleague, which had resulted in his being issued with a reprimand on 5 February 2014. Even though the extremely serious nature of the conduct of which he was found guilty was in itself justification for the dismissal measure imposed on him,

the repetitive nature of his inappropriate conduct demonstrates the need for such a measure still further.

71. The dismissal measure was necessary because of the nature and seriousness of the appellant's misconduct and of the specific nature of the duties he performed. As explained in the decision of 2 May 2019, the Secretary General considered that neither a written warning, a reprimand, deferment of advancement to a higher step or relegation in step nor downgrading constituted an appropriate sanction.

72. The Secretary General maintains that international administrative case-law also shows that dismissal on the grounds of sexual harassment cannot be considered disproportionate (ILOAT, Judgment No. 3640, paragraphs 29-32), in particular in cases similar to the appellant's (UNDT/2011/046, Hallal v. Secretary General of the United Nations, Judgment of 9 March 2011, paragraphs 68-70).

73. The Secretary General further maintains that the "very positive appraisals" which the appellant received throughout his career do not constitute a mitigating circumstance, as the appraisal of his performance of his duties was not relevant in view of the misconduct of which the appellant was accused.

74. Lastly, the Secretary General points out that all the grounds which justified the choice of dismissal rather than any other disciplinary measure provided for in Article 54 of the Staff Regulations are set out in full in the impugned decision. In her view, the Secretary General in office at the time considered all the disciplinary measures provided for in Article 54 of the Staff Regulations and came to the conclusion that the appellant's gross misconduct meant that there could be no possibility of keeping him on the Council of Europe staff, even on a lower grade and with non-managerial duties. Removal from post was therefore proportionate to the seriousness of the misconduct he was accused of.

75. In conclusion, the Secretary General maintains that it follows from all the foregoing that the ad personam decision of 2 May 2019 by which the Secretary General in office at the time imposed the disciplinary measure of removal from post on the appellant was not in any way unlawful.

II. THE TRIBUNAL'S ASSESSMENT

76. From the outset, the Tribunal considers that it needs to be pointed out that the present appeal is based on a fresh administrative decision which the appellant believes breached his rights, even though the respondent contends that the purpose of the measure was to execute the Tribunal's decision of 26 March 2019. The Tribunal therefore must rule solely on the basis of the points of fact and law brought before it in the present proceedings, which do not constitute objection to execution proceedings.

77. The appellant submits three grounds of appeal: failure to comply with the regulations governing disciplinary proceedings, the lack of a detailed statement of reasons and the disproportionate nature of the measure.

A. On failure to comply with the regulations governing disciplinary proceedings

78. The appellant maintains that the decision of the Secretary General in office at the time to renew the dismissal decision without resuming the previous proceedings was in breach of the Staff Regulations. The procedure was therefore unfair and undermined his right of defence. In his view, there were two issues here: the lack of a fresh opinion from the Disciplinary Board and the failure to hear him before the decision was taken.

79. The appellant points out that Article 2 of Appendix X to the Staff Regulations provides that the Secretary General must refer the matter to the Disciplinary Board before imposing the disciplinary measure of removal from post. Moreover, under Article 8 of the same Appendix, the Secretary General must hear the person concerned before taking a decision.

80. On the latter point, the appellant concludes that he was therefore deprived of the opportunity to discuss the purpose and nature of the fresh punishment and at that stage in the proceedings was not able to make the observations necessary to enable him to exercise his right of defence.

81. In its Brechenmacher decision of 26 March 2019, the Tribunal set aside ad personam decision No. 7344 (paragraph 6 above) on the grounds that the absence of an adequate statement of reasons prevented it from exercising scrutiny over the merits of the dispute. In order to execute the ruling, the Secretary General was therefore required to take a decision giving sufficient reasons for the imposition of the proposed disciplinary measure. Pursuant to the Brechenmacher decision of 26 March 2019, the Secretary General adopted the impugned ad personam decision set out in paragraph 10 of the present ruling.

82. In this connection, the Tribunal notes that the reasons given by the Secretary General in this ad personam decision satisfied his obligations under the Brechenmacher decision. The statement of reasons in the decision impugned in this appeal does enable the Tribunal to understand the Secretary General's reasons for taking the decision and imposing the disciplinary measure of removal from post.

83. In this connection, and according to well-established case-law of European and international courts, the Tribunal points out that in cases where administrative measures are set aside because no reasons were given or the reasons given were insufficient, the proceedings resume from the point at which the unlawfulness occurred (see, according to well-established case-law of the EU Court of Justice, the judgments in cases T-225/18, points 80-81, T-385/04, point 114, and T-503/04, points 69 et seq.). This applies in the instant case. In these circumstances, and contrary to the appellant's claims, in the absence of fresh evidence, the Administration was not required to resume the proceedings at a stage prior to that where the unlawfulness occurred. Moreover, it is clear in the instant case that the appellant was heard by the Secretary General in the course of the disciplinary proceedings and that he did present his defence during the proceedings.

84. It follows that the appellant's ground of appeal is unfounded and must be dismissed.

85. In these circumstances, the Tribunal must examine the two other grounds of appeal put forward by the appellant.

B. On the inadequacy of the statement of reasons

86. The Tribunal notes that, under this ground of appeal, the appellant sets out a series of arguments that strictly speaking relate not to the "inadequacy of the statement of reasons" but rather to "incorrect reasons". Nevertheless, the Tribunal notes the following.

87. With regard to the appellant's argument concerning the reference to the reprimand issued previously in order to demonstrate the repetitive nature of his inappropriate conduct towards female colleagues, the Tribunal firstly notes that the appellant has not made any submissions based on failure to comply with Article 58 of the Staff Regulations (paragraph 20 above) so as to challenge the Secretary General's ability or otherwise to refer to the said reprimand. As the implementation of the provision concerned is not a matter of public policy, the Tribunal does not believe that it has to raise it ex officio. In this connection, "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 (…). 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" (ATCE, Appeal No. 593/2018 – Luca Schio v. Governor of the Council of Europe Development Bank, decision of 20 June 2019, paragraph 79).

88. With regard to the appellant's arguments regarding the inadequacy of the reasoning concerning the reprimand, the Tribunal is compelled to conclude that the Secretary General did not overstep the discretion allowed him by referring to a previous disciplinary measure in assessing the seriousness of the misconduct to be punished. His aim was to highlight the repetitive nature of the misconduct so as to demonstrate the need for disciplinary action.

89. Admittedly, the Secretary General's decision does cite case-law (paragraph 72 above) which, as the appellant correctly pointed out, refers to cases more serious than his, especially as regards the number of victims. Nevertheless, this case-law was also established when only a single act was involved (UNDT/2011/046, Hallal v. Secretary General of the United Nations, Judgment of 9 March 2011, cited above, paragraph 1). In addition, the Tribunal must note that, in adopting the dismissal decision, the Secretary General also expressed the view that the misconduct that gave rise to the appellant's criminal conviction was not insignificant and that the standards of behaviour expected by the Organisation would be seriously undermined if the appellant continued to work there. He further indicated that he could not expose the staff to the risk of re-offending because of the appellant's repeated misconduct, nor could he expose the Organisation to the risk of being sued for negligence.

90. The Tribunal takes the view that the Secretary General in office at the time did not exceed the limits of his discretionary power and, above all, did not make observations that invalidated the impugned measure.

91. At the same time, the fact that the appellant had worked for 22 years with only one reprimand and no criticisms in his performance appraisals does not constitute a mitigating circumstance. On the contrary, this fact could be an aggravating circumstance insofar as, not being a newcomer to the Organisation, the appellant had a duty to be familiar with the rules governing relations between colleagues and with outside staff, including outside the workplace. Moreover, even though there were no references to this matter in his performance appraisals, it has to be said that the reports appraising his performance of his duties were not relevant in view of the misconduct of which he was accused.

92. This part of the ground of appeal is therefore unfounded and must be dismissed.

93. Regarding the appellant's complaint about the Secretary General also relying on the fact that the appellant did not appeal against his conviction by Strasbourg Criminal Court on 23 May 2017, the Tribunal notes that it is true that the Secretary General did refer in his dismissal decision to the fact that the conviction by Strasbourg Criminal Court had become final.

94. Nevertheless, contrary to the appellant's claims, the Secretary General did not refer to that fact in an assertion that the appellant had admitted his guilt but merely for the purpose of stating that the facts of the offence had been established in the French courts. There was nothing to prevent the Secretary General from making such a reference in his decision to take disciplinary action against the appellant.

95. This part of the ground of appeal must therefore be dismissed.

96. Regarding the reference made again by the Secretary General to the damage to the Organisation's reputation and its image among outside partners, civil society, the media and broader public opinion, the appellant asserts that the negative repercussions following his conviction by the French courts and the annulment of his dismissal by the Tribunal would have been limited for the Organisation. Accordingly, the renewed dismissal could not be justified by that argument.

97. The Tribunal notes that account must be taken not only of immediate reactions but also of those which may occur within a reasonable timeframe, the impact of which, however, cannot be determined for the time being.

98. In the view of the Tribunal, even though the impact of the appellant's conduct might remain confined to the staff of the service provider and the Organisation, the relevant publicity would nevertheless be negative for the Organisation in view of the values it promotes in its institutional activity. This is because the Organisation has often drawn civil society's attention to the importance of respecting the values which were flouted in the instant case.

99. This part of the ground of appeal is therefore not founded either.

In conclusion, this second ground of appeal must also be dismissed.

C. On the disproportionate nature of the measure

100. In line with its case-law, the Tribunal must first determine whether sufficient reasons were given for the disciplinary measure chosen and then whether the choice was appropriate and proportionate to the alleged misconduct.

101. Regarding the former point, the Tribunal concludes that the Secretary General did give sufficient reasons for his choice insofar as he reviewed all the other disciplinary measures and explained why they could not be taken into consideration and why removal from post was the only possible measure.

102. As the Secretary General did not exceed his discretionary power in the matter in explaining his reasons, it is not for the Tribunal to substitute its own assessment and determine whether another disciplinary measure would have sufficed.

103. Moreover, with regard to proportionality, the appellant's arguments are not such as to lead the Tribunal to conclude otherwise. The conduct resulting in the appellant's conviction was in breach of Articles 1 and 2 of Rule No. 1292 on the protection of human dignity at the Council of Europe prohibiting all forms of sexual harassment in the workplace or in connection with work in the Council of Europe, and of Article II. 4 of the Charter on professional ethics of 15 July 2005. Yet the Organisation advocates a zero-tolerance approach in combating sexual harassment.

104. In the Tribunal's view, the Secretary General gave sufficient reasons for the choice of disciplinary measure in opting for the most severe measure.

105. This ground of appeal must therefore also be dismissed.

106. As the appellant mentioned the issue of the immediate implementation of his removal from post without, however, submitting a specific complaint, the Tribunal points out that, under Article 23 of the Staff Regulations:

> Article 23 – Termination of contract
>
> "(…)
> 3. A contract for either a fixed or an indefinite period may be terminated at the end of a calendar month by:
> (…)
> b. the Secretary General, on one of the following grounds:
> (…)
> dismissal for disciplinary reasons;
> (…)".

107. It will therefore be for the appellant to take the necessary steps should he believe that his rights have not been respected in this regard.

108. It follows that this point is not to be taken into consideration.

III. CONCLUSION

109. The appeal is unfounded and must be dismissed.

On these grounds,

The Administrative Tribunal:

Declares Appeal No. 622/2019 unfounded and dismisses it;

Orders that each party shall bear its own costs.

Adopted by the Tribunal in Strasbourg on 28 January 2020 and delivered in writing on 5 February 2020 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,