

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal Nos. 582/2017 and 583/2017

(Régis BRILLAT (III) and Riccardo PRIORE v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,  
Ms Mireille HEERS,  
Mr Ömer Faruk ATEŞ, Judges,

Assisted by:

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

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. The first appellant, Mr Régis Brillat, lodged his appeal on 21 July 2017. It was registered the same day under no. 582/2017. The second appellant, Mr Riccardo Priore, lodged his appeal on 24 July 2017. It was registered the same day under no. 583/2017.
2. On 15 September 2017, the appellants submitted joint further pleadings.
3. On 27 October 2017, the Secretary General submitted his observations on the appeals.
4. On 4 December 2017, the appellants filed joint observations in reply in which they made a number of interim claims.
5. On 13 December 2017, the Secretary General submitted his comments on the said interim claims.

6. The public hearing in both appeals took place in the Administrative Tribunal's hearing room in Strasbourg on 24 January 2018. The appellants were represented by Me Carine Cohen Solal, barrister at the Strasbourg bar, while the Secretary General was represented by Mr Jörg Polakiewicz, Head of the Directorate of Legal Advice and Public International Law (Jurisconsult), assisted by Ms Sania Ivedi, administrative officer in the Legal Advice Department. Before the hearing, the Chair informed the parties that the Tribunal would rule on the interim claims after the oral proceedings had commenced.

7. Following the hearing, the Tribunal ruled on the interim claims, ordered that the Commission against Harassment's file be lodged with its Registry and reserved judgment as to whether it should be communicated to the parties.

8. On 29 January 2018, the Commission against Harassment lodged the file with the Registry.

9. On 7 March 2018, the Tribunal decided that there was no reason to communicate the file to the parties, either in full or in extracts, and notified the parties accordingly.

10. On 8 March 2018, the counsel for the appellant in appeal no. 586/2017 (paragraph 13 below) contacted the Tribunal. He made it clear that he was acting not for his client but rather for a third party who had been interviewed by the Commission against Harassment anonymously and who was concerned that the Commission's file might be communicated to those appearing in the two cases No. 582 and No. 583/2017. He therefore submitted a series of requests to the Tribunal.

11. On 16 March 2018, the said counsel was informed of the Tribunal's decision of 7 March 2018. He was told by the Registrar that, in the light of that decision, it seemed that his letter did not require any response to his requests and that there was no need to consider the issue of the admissibility of a request from someone who was not involved in the proceedings and who wished to remain anonymous vis-à-vis the Tribunal, too.

## **THE FACTS**

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

12. Both appellants are Council of Europe staff members, working in the same department. The first appellant holds grade A5 and is the hierarchical superior of the second appellant, who holds grade A3.

13. Both appellants were accused, for various reasons, of psychological harassment in proceedings instituted, pursuant to Rule No. 1292 on the protection of human dignity at the Council of Europe (paragraphs 45-47 below), by a staff member who had been working under them. The staff member in question lodged an appeal with the Tribunal ((No. 586/2017) to complain about the failure to award him the compensation which he had claimed at the end of the proceedings against the two appellants.

14. The relevant facts of the two appeals are reproduced in this decision without giving any details that might compromise the confidential nature of the procedure for reviewing complaints of this kind and may be summarised as follows.

**A. The proceedings before the Commission against Harassment**

15. Under an agreement signed between the Council of Europe and the government of which the staff member subjected to harassment is an official, the latter was seconded to the Council of Europe for one year as from 15 July 2015, as a programme advisor.

16. The staff member in question was assigned to the first appellant's department, and the second appellant became his line manager.

17. On 21 September 2016, the staff member applied to the Commission against Harassment ("the Commission").

18. On 23 September 2016, the Commission registered the complaint. Twenty-four pages in length, it had 101 appendices.

19. On 14 November 2016, the Commission discussed the complaint.

20. On 15 November 2016, the Commission communicated the complaint to the appellants and gave them until 23 November 2016 to submit observations, *inter alia*.

21. The two appellants having requested more time on 17 and 21 November 2016, the Commission extended the deadline to 5 December 2016.

22. On 5 December 2016, the appellants submitted their observations; these documents consisted of 19 pages in the case of the first appellant and 73 pages in the case of the second appellant. Both documents also included appendices. In their documents, the appellants made submissions concerning both the length and regularity of the proceedings and the substance of the complaint. They also asked the Commission to interview a number of witnesses.

23. On 16 December 2016, the staff member who had been harassed submitted supplementary observations.

24. On 19 December 2016, the Commission proceeded to hear the second appellant while the first appellant was heard on 20 December 2016.

25. On 12 January 2017, the Commission delivered an initial decision concerning the procedural objections raised by one or other appellant. It concluded that it could examine the merits of the complaint.

26. On 16 January 2017, the second appellant submitted his comments on the supplementary observations made by the staff member who had been harassed.

27. On 19 January 2017, the Commission adopted a second decision: referring to Article 10, paragraph 2, of Rule No. 1292, it decided to extend the duration of the proceedings (paragraph 47 below) by one month until 14 February 2017.
28. On 20 January 2017, the staff member who had been harassed submitted observations on the second appellant's comments dated 16 January 2017.
29. On the same day, the first appellant submitted comments on the staff member's supplementary observations dated 16 December 2016, which had come to his notice on 9 January 2017.
30. On 21 January 2017, the staff member who had been harassed submitted comments on the first appellant's comments.
31. On 2 February 2017, the first appellant likewise submitted comments on the comments made by the staff member who had been harassed.
32. On 8 February 2017, the Commission noted that it would be unable to complete its work by 14 February 2017 and adopted a third decision: for the second time, under Article 10, paragraph 2, of Rule No. 1292, it extended the duration of the proceedings (paragraph 47 below) by three weeks, until 7 March 2017.
33. On the same day, the Commission adopted a fourth decision and, under Article 10, paragraphs 1 and 5, decided to grant anonymity to all the witnesses heard in the proceedings (January/February). It took this decision because the appellants had asked to see the statements. As a result of this decision, the appellants did not know how many witnesses were interviewed or who the witnesses were, or what was said at the hearings.
34. On 3 March 2017, the appellants each submitted observations on the decisions of 12 January and 8 February 2017. In these documents, which were identical in terms of content, they challenged the Commission's decisions.
35. On 7 March 2017, the Commission adopted its opinion and made six recommendations to the Secretary General. Among the measures was a recommendation to impose a disciplinary measure in the form of a written warning (Article 54, paragraph 2, of the Staff Regulations).
36. In a confidential memorandum issued the same day, and of which there is no record in the document containing the opinion and recommendations, the Commission warned the Secretary General that there was a risk that the appellants might take retaliatory action against the staff members who had taken part in the proceedings before the Commission.
37. On 8 March 2018, the Deputy Secretary General sent a memorandum to the first appellant's immediate superior.

38. On 13 April 2017, the Deputy Secretary General issued a decision on the measures to be taken in the light of the conclusions and recommendations of the Commission against Harassment.

39. On 12 July 2017 the appellants each lodged an administrative complaint with the Secretary General under Article 59, paragraph 2, of the Staff Regulations. In their appeals they asked that the Deputy Secretary General's decision of 13 April 2017 be set aside.

40. The first appellant also requested the annulment of any steps taken pursuant to the said decision.

41. On 12 July 2017, the Secretary General rejected the administrative complaint on the ground that it was ill-founded. He contended, *inter alia*, that "the Deputy Secretary General is thus authorised, as part of her duties, to act on behalf of the Secretary General in a large number of areas related to staff management, including measures ordered under Rule No. 1292". Other arguments sought to address the other criticisms relating to procedural and substantive issues.

42. On 21 and 24 July 2017 the appellants lodged the present appeals respectively.

## **B. Disciplinary proceedings**

43. In the meantime, two disciplinary procedures had been instituted against the appellants. After interviewing them separately, on 27 June 2017 the Deputy Secretary General issued them with written warnings by way of a disciplinary measure.

44. The parties have not informed the Tribunal whether the appellants challenged these two decisions by lodging an administrative complaint.

## **II. APPLICABLE LAW**

45. Matters relating to harassment are governed by the Secretary General's Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe.

46. This rule provides for non-contentious proceedings before designated categories of persons and contentious proceedings before the Commission against Harassment. On 21 October 2010, the said Commission adopted its Rules of Procedure.

47. Rule No. 1292 reads as follows:

### **PART I: PROHIBITION OF HARASSMENT**

#### **Article 1 - Prohibited Conduct**

1. Any form of sexual and psychological harassment in the workplace and/or in connection with work at the Council of Europe shall be prohibited as conduct infringing the dignity of men and women.

2. For the purposes of this Rule, sexual harassment is any physical or verbal conduct of a sexual nature infringing the dignity of women and men at work which is unwanted by or offensive to the recipient(s) subjected to it and which creates a humiliating or intimidating working environment for that/these person(s). The essential characteristic of sexual harassment is that it is unwanted by the recipient(s). A single incident may constitute sexual harassment if it is sufficiently serious.

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

4. The fact that the victim of sexual or psychological harassment is a subordinate of the perpetrator(s) is an aggravating circumstance. So is the fact that harassment continued after the perpetrator was informed that the victim had had recourse to the procedures of this Rule.

## PART II: NON-CONTENTIOUS PROCEDURE

(...)

### Article 8 - Commission against Harassment

1. A Commission against Harassment (hereafter "Commission") shall be established, comprising four persons and their substitutes. Two of the Commission members - and their substitutes - shall be appointed by the Secretary General and the remaining two - and their substitutes - by the Staff Committee. At least one of the persons appointed by the Secretary General, and his/her substitute, shall hold a University degree in law. The members of the Commission and their substitutes shall be appointed for a renewable term of two years. They shall receive specialised training immediately after their appointment and then at yearly intervals. The substitute members shall act when their titular members are prevented from doing so.

(...)

3. Members of the Commission shall be fully independent in discharging their duties. They shall not receive any instruction. They shall not be liable to disciplinary measures as a result of any opinions expressed or advice given in the course of their duties.

(...)

### Article 9 – Complaint

1. A person who considers him/herself to be a victim of sexual or psychological harassment may submit a written complaint to the Commission where efforts to find a solution under the non-contentious procedure have failed, or where he/she deems recourse to this procedure to be inappropriate in view of the seriousness of the facts or the stage which the harassment has reached.

2. Where the non-contentious procedure has not been followed, the Commission shall decide whether this was appropriate. If the Commission considers that the non-contentious procedure should have been followed, it shall refer the case to mediation (Article 7) or ask the alleged victim to address him/herself to one of the persons under Articles 4-6. Such a referral shall only occur when it would be reasonable for the alleged victim to follow the non-contentious procedure and it shall not preclude him/her from complaining to the Commission again if the non-contentious procedure does not produce results.

### Article 10 - Proceedings before the Commission

1. The proceedings before the Commission shall be adversarial, in the sense that the parties shall have full access to the material before the Commission, subject to any reasoned ruling, in writing, to the contrary by the Commission, and shall be able to comment on them and on each other's submissions – the alleged perpetrator having the right of last reply.
2. The proceedings shall be concluded within two months from receipt of the complaint. In exceptional circumstances, the Commission may decide to extend this period by a further month, in which case it shall inform both parties – the alleged victim and the alleged perpetrator – of its reasons for having done so and the new deadline it has set itself.
3. The Secretary of the Commission shall acknowledge, within five days, receipt of the complaint and inform the alleged perpetrator and the Director of Human Resources in writing.
4. Each party shall be entitled to object to a member of the Commission. The first objection shall be automatically accepted. As regards subsequent objections, the Commission shall decide whether or not to accept them on the basis of all information available to it. Members who have to step down under this provision are replaced by their substitutes. Each party shall also be entitled to request that a member of the Organisation's medical service and/or the social worker sit with the Commission as observers.
5. The Commission and its rapporteur(s) shall enjoy the same powers as the staff members conducting an internal inquiry under the relevant Instruction[3]. As regards hearing both parties and witnesses proposed by them, the Commission, or one or several of its members it has appointed as rapporteur(s) shall hear them all separately. The Commission, when hearing witnesses, shall make any arrangements that may be necessary to protect them from undue pressure, such as ensuring anonymity.
6. At any stage of the proceedings, the Commission may place itself at the disposal of the parties with a view to securing a friendly settlement. The friendly-settlement procedure shall ensure that both parties are dealt with on an equal footing and with due regard to their statutory rights and guarantees.
7. When a friendly settlement is reached, the Commission shall decide to discontinue the proceedings before it. If not, the Commission shall resume its examination of the complaint.
8. At the end of the procedure, the Commission shall express its opinion on the facts of the case, with final conclusions, which it shall transmit to the Secretary General. The Commission shall also make recommendations to the Secretary General on any measures that may be needed to ensure respect of this Rule. Depending on the seriousness of the case, the Commission may recommend that disciplinary proceedings be initiated against the staff member at fault in accordance with Articles 54 to 58 of the Staff Regulations or the temporary staff member at fault in accordance with the applicable rules. The Commission shall inform both parties and the Director of Human Resources of its final conclusions and recommendations in writing.
9. Where the Secretary General, the Deputy Secretary General or the Secretary General of the Parliamentary Assembly is the alleged perpetrator, the Commission on Harassment shall transmit the documents mentioned in the previous paragraph, to the Chair of the Committee of Ministers and the President of the Parliamentary Assembly of the Council of Europe.
10. The Commission shall render its opinions in complete independence.

#### PART IV: MEASURES

##### Article 11 - Measures ordered by the Secretary General

1. Within six weeks of the transmission of the Commission's report, the Secretary General shall issue his/her decision on the case in writing. The decision shall contain full reasons and shall designate the authority that shall implement any measures the Secretary General orders. The Secretary General's decision

shall be communicated to both parties, the Chairperson of the Commission and the Director of Human Resources.

2. The measures that may be ordered by the Secretary General after completion of any disciplinary proceedings are those provided for in Article 54, paragraph 2 of the Staff Regulations and the applicable provisions for temporary staff members.

3. Where the sexual or psychological harassment is carried out by a person who is not a Secretariat member, the measures taken by the Secretary General to ensure the effective protection of the victim may include denying the perpetrator access to Council of Europe premises, ceasing collaboration between the Council of Europe and him/her and informing his/her employer or supervisory authority as the case may be.

4. The implementing authority shall inform the Chairperson of the Commission and the Director of Human Resources of the measures taken further to the Secretary General's decision.

#### Article 12 - Interference with the Procedures

1. Disciplinary proceedings, as provided for in Articles 54 to 58 of the Staff Regulations and the applicable provisions for temporary staff members, may be initiated against a staff member or a temporary staff member who hinders the procedures provided for in this Rule with regard either to a person who, considering that s/he is a victim of sexual or psychological harassment, has used the procedures of this Rule, or with regard to any person who agrees to give evidence on behalf of the alleged victim or the alleged perpetrator.

2. Equally, disciplinary proceedings may be initiated against a staff member or a temporary staff member who, for the same purpose, proffers threats or exercises hostile behaviour.

3. Pending the taking of disciplinary measures, the Secretary General may, after hearing the Chairperson of the Commission, order any provisional measures that may be called for to protect the alleged victim or the person who agrees to give evidence. These must be suitable and strictly proportionate.

4. This article also provides protection after the closure of the procedures of this Rule.

#### Article 13 - Unfounded accusation

Disciplinary proceedings, as provided for in Articles 54 to 58 of the Staff Regulations and the applicable provisions for temporary staff members, may also be initiated against a staff member or a temporary staff member who knowingly makes false allegations concerning the facts underlying a complaint of sexual or psychological harassment against another person.

#### Article 14 - Lack of Effective Protection

Persons who complain of being victims of sexual or psychological harassment and who consider that they did not receive effective protection may lodge an administrative complaint with the Secretary General under Article 59 of the Staff Regulations.

### PART V: OTHER PROVISIONS

#### Article 15 - Confidentiality of the procedure

All persons involved in a case of alleged sexual or psychological harassment, including the parties themselves, shall be required to respect the strictest confidentiality concerning the non-contentious procedure and the procedure before the Commission, which may have been followed for its examination.  
(...)

#### Article 18 - Awareness-Raising



The Directorate of Human Resources shall ensure that all Secretariat members and those participating in the Organisation's activities are aware of the importance attached by the Council of Europe to a working environment which is free of sexual and psychological harassment. The role of management in developing and maintaining such an environment shall be particularly stressed.

(...)

## PART VI: ENTRY INTO FORCE AND TRANSITIONAL PROVISIONS

(...)

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[1] The term designates staff members under Article 1 of the Staff Regulations, temporary staff members under the relevant Rules and seconded officials under Article 1a of the Regulations on secondment of international or national, regional or local officials to the Council of Europe.

[2] See e.g. the Rule on the conditions in which staff members can represent or assist other staff members before the Administrative Tribunal or accompany them in the proceedings before the Commission against Harassment or in the course of an internal enquiry and the Rule on Mediation.

[3] Currently Instruction No. 51 of 10 June 2006 on internal inquiries.

48. As regards the delegation of powers by the Secretary General to the Deputy Secretary General, Resolution (55) 29, adopted on 19 November 1955 by the Ministers' Deputies of the Council of Europe, concerns the functions of the Deputy Secretary General and the Clerk of the Consultative Assembly. As for the other documents, a summary is provided in the arguments which the Secretary General presented during the proceedings, in support of his submissions (paragraphs 79-84 below).

49. Disciplinary matters are dealt with in Part VI of the Staff Regulations and in Appendix X (Regulations on disciplinary proceedings) to the Staff Regulations. Article 54, paragraph 2, of the Staff Regulations establishes that there are six disciplinary measures, of which a written warning is the least severe.

## THE LAW

### I. JOINDER OF THE APPEALS

50. Given the connection between the two appeals, the Administrative Tribunal ordered their joinder pursuant to Rule 14 of its Rules of Procedure.

### II. EXAMINATION OF THE APPEALS

51. The two appellants asked the Tribunal to annul the Deputy Secretary General's decision of 13 April 2017 and consequently any measures that had been taken or might be taken on the basis of that decision, including the decisions *ad personam* already taken by the Deputy Secretary General on 27 June 2017, namely:

- a) annulment of the written warnings;
- b) removal of these warnings from the appellants' personal files;

- c) removal of the Commission's opinion from the appellants' personal files;
- d) reinstatement of the second appellant in his post in the Department of the Social Charter (should the Deputy Secretary General have decided to remove him in the interim).

52. Lastly, the appellants claim compensation for the personal and professional non-pecuniary damage suffered and reimbursement of the costs incurred by the appeals.

53. The Secretary General, for his part, asks the Tribunal to find that none of the arguments relied on by the appellants can justify their request to have the Deputy Secretary General's decision of 13 April 2017 set aside.

54. The Secretary General further requests that the claims for compensation and reimbursement of costs be dismissed.

#### **A. The parties' submissions**

55. For the purposes of this decision, the parties' submissions may be summarised as follows.

##### *1. The appellants*

56. The appellants submit four pleas in support of their appeals:

- 1. the preliminary matter of the jurisdiction of the Deputy Secretary General;
- 2. irregularities in the procedure before the Commission against Harassment;
- 3. the erroneous assessment of the facts by the Commission against Harassment;
- 4. the incorrect assessment of the facts by the Deputy Secretary General.

##### *a) The preliminary matter of the jurisdiction of the Deputy Secretary General*

57. The appellants note that, in their administrative complaints, they questioned the right of the Deputy Secretary General to issue such a decision when Rule No. 1292 expressly attributes that power to the Secretary General, with no mention of the possibility of it being delegated.

58. In the light of the response which the Secretary General gave to their administrative complaints on 12 June 2017, the appellants argue, in their further pleadings (paragraph 2 above), that it is for the Secretary General to produce evidence of the material existence of a delegation of power to the Deputy Secretary General in respect of decisions taken following complaints lodged with the Commission against Harassment, failing which the decision of 13 April 2017 must be annulled as the person who signed it had no authority to do so.

59. In their observations in reply (paragraph 4 above), the appellants maintain their position.

##### *b) Irregularities in the procedure before the Commission against Harassment*

60. According to the appellants, the procedure before the Commission against Harassment failed to comply with the provisions of Rule No. 1292 of 3 September 2010 on the protection of

human dignity at Council of Europe, and was substantively flawed because of the multitude of irregularities that marked it.

61. The appellants consider that in their case, there were irregularities that can be divided into three groups: lack of recourse to non-contentious proceedings, the procedure before the Commission against Harassment and, lastly, failure to respect the rights of the defence.

### **1. The lack of recourse to non-contentious proceedings**

62. The appellants point out that, whereas in cases of allegations of harassment priority is given to dialogue and the friendly settlement of disputes, non-contentious proceedings, as provided for in Articles 3 to 7 of Rule No. 1292 (paragraph 47 above) were bypassed and the matter was referred directly to the Commission against Harassment, on the recommendation of the Mediator, no less, in violation of his obligations.

63. The appellants maintain that in the present case direct recourse to the Commission against Harassment was premature to say the least. According to them, the procedure is also surprising as the appellants were informed in the course of the proceedings that the staff member who was harassed had previously spoken with the medical officer and the Mediator, neither of whom attempted to contact the appellants to find a friendly settlement to the dispute.

64. The appellants further maintain that at this stage in the proceedings, the staff member's complaint was handled with no regard whatsoever for the rights of the defence. There is no denying, they argue, that such a decision deprived the appellants of the friendly settlement of the complaint, and therefore of several stages prior to contentious proceedings to defend their position. In their view, considering the nature of the complaints made by the staff member who was harassed, there was no justification for bypassing the non-contentious procedures, unless the aim was in fact to deprive the appellants of the right to express themselves in a more flexible, less formal setting than the Commission against Harassment.

### **2. The proceedings before the Commission against Harassment**

65. According to the appellants, the procedure followed by the Commission was in breach of Rule No. 1292 for three reasons: failure to observe the specified deadlines, the length of the proceedings and lack of access to all the evidence before the Commission.

66. After recalling the sequence of events and the list of decisions and hearings, the appellants allege:

- a) failure to respect procedural deadlines;
- b) irregular and unfair proceedings;
- c) lack of access to material in the possession of the Commission;
- d) irregularity in the composition of the Commission;
- e) lack of impartiality on the part of the members of the Commission;
- f) lack of impartiality on the part of the Secretary of the Commission.

67. With regard to the complaint made in d), the appellants contend that the composition of the Commission against Harassment during these proceedings was not in compliance with the rules.

68. They maintain that according to the letters drafted by the Commission in the course of the proceedings, and in particular its opinion of 7 March 2017, it appears that a substitute intervened in the proceedings at a time when his/her intervention was not justified because the full members were present. The members who signed the Commission's opinion and recommendations of 7 March 2017 were W., B., O. and H. According to the appellants, however, O. and H. could not sit at the same time as H. is the substitute of O.

69. In support of their claim that there was an irregularity, the appellants refer to the list of members and substitutes of the Commission against Harassment as published on the Organisation's intranet site on 3 March 2017.

70. The appellants infer from this that the composition of the Commission was completely irregular according to the provisions of the last sentence of paragraph 8.1 of Rule No. 1292 and Article 1, paragraph 4, of the Commission's Rules of Procedure (paragraph 47 above).

### **3. The failure to respect the rights of the defence: the adversarial principle and the principle of equality of arms**

71. The appellants contend that the procedure followed by the Commission impaired the rights of the defence as it disregarded the adversarial principle and the principle of equality of arms.

72. Firstly, they argue that according to the adversarial principle the parties to a dispute must find themselves in a position of perfect equality before the body examining the case. Each party must have access to the observations and evidence of the other party if they are to have an effective discussion. This is a general principle of law of which an organisation like the Council of Europe cannot possibly be unaware. They refer here to the case law of the European Court of Human Rights (judgment in *Lobo Machado v. Spain* of 20 February 1996).

73. In the present case, the appellants complain that they did not have access to all the material in the file, and in particular the records of the witness statements.

74. It is accordingly clear that the appellants were at no time in a position to reply and defend themselves fairly.

75. The appellants further contend that, in addition to the adversarial principle, its corollary, the principle of equality of arms was also flouted. Still under the pretext of the principle of the confidentiality of the proceedings, the appellants were warned not to speak about or refer to the proceedings with anyone, failing which they might be considered to have made threats or used pressure to influence witnesses.

*c. Incorrect assessment of the facts by the Commission against Harassment*

76. According to the appellants, inadequate reasons were given for the Commission's opinion and the Commission paid no attention to the objections raised regarding either the facts of the case or the legal aspects. The appellants put forward a series of arguments concerning the facts on which the Commission against Harassment based its decision.

*d. Incorrect assessment of the facts by the Deputy Secretary General*

77. The appellants maintain that the Deputy Secretary General simply approved the opinion of the Commission against Harassment, with the exception of one point, without making any concrete, objective analysis of the objections and evidence presented.

78. In addition, the Deputy Secretary General did not analyse the precise facts concerning the harassed staff member's conduct at work and nothing else; instead she took into account general, ill-founded views concerning the alleged "general atmosphere" in the Department and the statements of "a number of witnesses" to affirm that the second appellant psychologically harassed the staff member in question, and that the first appellant did not do enough to stop it.

*2. The Secretary General*

*a) The alleged lack of authority of the Deputy Secretary General*

79. In response to the appellants' arguments concerning the Deputy Secretary General's lack of authority to give a decision under Article 11 of Rule No. 1292, the Secretary General states that the distribution of tasks between the Secretary General and the Deputy Secretary General is an integral part of the reform of the Organisation, as requested by the Committee of Ministers to ensure the efficient and strategic management of the Secretariat in accordance with its decisions and priorities.

80. He further states that it had been decided that the Secretary General would be responsible for questions with a political dimension, while the main tasks of the Deputy Secretary General should be the budgetary, administrative and human resources management of the Organisation. This distribution of tasks was published and is reflected in the competences for the post of Deputy Secretary General approved by the Committee of Ministers which serve as a basis for election to the post of Deputy Secretary General. In support of this claim, the Secretary General cites a document produced by the Committee of Ministers of the Council of Europe for its meeting on 2 February 2012 concerning the election procedure (Appendix 1 to the Secretary General's observations - paragraph 3 above).

81. The Deputy Secretary General, it is argued, is thus authorised, as part of her duties, to act on behalf of the Secretary General in a large number of areas related to staff management, including measures ordered under Rule No. 1292. The Secretary General further contends that he regularly delegated his powers in such matters to the Deputy Secretary General; by way of proof, he submits a document, dated 4 September 2012, entitled "*Areas of responsibility for D[eputy] S[ecretary] G[eneral]: 2012-2015*" together with his *Speaking Notes* for the Committee of

Ministers meeting on 4 July 2012 (Appendices nos. 2 and 3 to the Secretary General's observations – paragraph 3 above).

82. The Secretary General also cites the case-law of the Administrative Tribunal according to which “every administrative act is carried out in the name and on behalf of the Secretary General by virtue of a delegation of power. It is for the Secretary General to decide under what conditions and to which official of the administrative hierarchy he delegates his power. Such a procedure is moreover in keeping with the Council of Europe's practice” (ATCE, formerly the Appeals Board of the Council of Europe, decision of 25 October 1985, Mr Sorinas Balfego v. Secretary General, appeal no. 114/1985, § 53).

83. In any event, the Deputy Secretary General, by her rank, her role and her authority, is, it is maintained, perfectly qualified to act on the Secretary General's behalf as the decision-making authority in respect of measures taken following a finding of harassment. Resolution (55) 29 adopted on 19 November 1955 by the Committee of Ministers on the responsibilities of the Deputy Secretary General and the Clerk of the Consultative Assembly – now the Secretary General of the Parliamentary Assembly - provides that the Deputy Secretary General “shall act as the permanent assistant of the Secretary General in the supervision of all departments of the Secretariat (and) when the Secretary General is absent, or for other reasons, not available, the Deputy Secretary General shall replace him and exercise all his duties and responsibilities”.

84. In the Secretary General's view, it is clear from the above that the Deputy Secretary General was definitely authorised to decide what measures should be taken following the transmission of the report of the Commission against Harassment.

*b) The alleged irregularity of the procedure before the Commission against Harassment*

85. After drawing attention firstly to the particular nature of the procedure before the Commission against Harassment, the Secretary General points out that the said Commission has no decision-making power. The role of the Commission against Harassment is to inform the Secretary General of the facts and circumstances alleged by a person complaining of harassment and to shed all possible light on the merits of the allegations against a staff member. The purpose of the report the Commission submits to the Secretary General is to enable him to make an informed decision concerning the allegations of harassment, by presenting him with all the relevant facts and information, in all impartiality.

86. The procedure before the Commission against Harassment, therefore, is not judicial or even disciplinary, although its outcome might justify the institution of disciplinary proceedings. The particular nature of proceedings before the Commission against Harassment should thus be borne in mind when examining the complaints formulated by the appellants.

87. The Secretary General then comments on the lack of recourse to non-contentious proceedings, the failure to respect procedural deadlines, the allegedly irregular and unfair proceedings, the alleged lack of access to material in the possession of the Commission and the alleged irregularity in the composition of the Commission.

*c. The alleged irregularity in the composition of the Commission*

88. On this last subject, after referring to the wording of Article 8 of Rule No. 1292 (paragraph 47 above), the Secretary General notes that the appellants claim that the composition of the Commission against Harassment was irregular because of the simultaneous presence of a member and her substitute. He notes that, according to the appellants, a titular member who is unable to attend should, in principle, be replaced by his or her substitute, so the substitute cannot sit on the Commission at the same time as the member he or she is supposed to replace when that member is unable to attend.

89. Regarding the circumstances of the case, the Secretary General points out that one of the two members appointed by the Staff Committee and that member's substitute were both unavailable to sit with the Commission against Harassment to examine the complaint at issue. That is why the second substitute appointed by the Staff Committee was called upon to sit in the other's stead. The Secretary General submits that there is no rule against replacing a member by the other substitute, appointed respectively either by the Staff Committee or by the Secretary General, in the event that both the member and the substitute appointed to replace him or her are unavailable.

90. The Secretary General accepts that this can indeed give rise to a situation where a member sits at the same time as the substitute appointed to replace him or her when absent, but this does not compromise the proceedings or make the composition of the Commission against Harassment irregular in any way.

91. The Secretary General infers from this that in the present instance, the composition of the Commission against Harassment did not affect the equal representation on this body: two of the members were members appointed by the Secretary General and two were members appointed by the Staff Committee.

92. He adds that if they felt that the composition of the Commission put them at a disadvantage, the appellants could have objected to one or more members under Article 10, paragraph 4, of Rule No. 1292. Yet they did not avail themselves of that possibility.

93. It follows, therefore, that the composition of the Commission against Harassment cannot be said to have been irregular.

94. The Secretary General goes on to present his arguments regarding the complaints about the lack of impartiality on the part of the members of the Commission, the alleged failure to respect the rights of the defence, the adversarial principle and the principle of equality of arms.

95. Lastly, the Secretary General denies that the facts were incorrectly assessed by the Commission and by the Deputy Secretary General.

**B. The Tribunal's assessment**

*1. The preliminary matter of the jurisdiction of the Deputy Secretary General*

96. The Tribunal notes that the first question put to it by the appellants is whether, given the particular nature of the impugned proceedings, it is possible, based on the current wording of Rule No. 1292, for the Secretary General to delegate to the Deputy Secretary General the powers conferred on him under this Rule.

97. The Tribunal confirms that it is possible, insofar as Rule No. 1292 is an internal regulation that was adopted by the Secretary General himself. Certainly it would have been preferable if the power to delegate had been expressly mentioned in the Rule itself but this omission is not a problem in the instant case as the Deputy Secretary General did not act on her own initiative but made it clear from the outset that she was acting on behalf of the Secretary General. Given her grade and role in the Organisation, such a statement could reasonably be deemed to constitute a remedy for the omission observed.

98. It remains to be ascertained whether the Deputy Secretary General was assigned the powers in question in the proper manner.

99. On the subject of lack of authority, the Secretary General's arguments concern both measures at the level of the Organisation in general and decisions that relate more specifically to the role of the Deputy Secretary General.

100. With regard to the first set of arguments, the Tribunal notes that the Secretary General refers to a "distribution of tasks between the Secretary General and the Deputy Secretary General [which] is an integral part of the reform of the Organisation, as requested by the Committee of Ministers to ensure the efficient and strategic management of the Secretariat in accordance with its decisions and priorities" (paragraph 80 above). The Secretary General, however, has not provided the Tribunal with any material that would support this assertion.

101. He does, admittedly, state that this distribution was made public; once again, however, he provides no evidence that the distribution of tasks was common knowledge. Nor is there any mention of the distribution of powers and responsibilities between the Secretary General and the Deputy Secretary General on the relevant websites. The Tribunal further notes that when the Secretary General states that the "the main tasks of the Deputy Secretary General should be the budgetary, administrative and human resources management of the Organisation", that does not necessarily imply a delegation of the Secretary General's powers in these areas.

102. As regards the material submitted by the Secretary General to substantiate his claims, the Tribunal notes that the documents in question are not such as to provide the necessary confirmation.

103. In effect, the Committee of Ministers document for the meeting on 1 February 2012, concerning the competence framework for the post of Deputy Secretary General in the context of the procedure for electing the Deputy Secretary General (Appendix 1 to the Secretary General's observations - paragraph 3 above), states that the successful candidate "shall act as the permanent assistant of the Secretary General in all matters, in supervision of all departments of the Secretariat, except the Secretariat of the Parliamentary Assembly, as well as replace the



Secretary General and undertake all his/her duties and responsibilities when he/she is absent or otherwise unavailable.” Leaving aside the fact that the document refers not to the Deputy Secretary General’s current term of office, which began in 2015, but rather to her first term which began in 2012, it must be recognised that at no point is there any question of assigning specific responsibilities or delegating authority in matters relating to human resources management. Rather it is a matter of acting as permanent assistant and standing in for the Secretary General when he/she is absent or unavailable.

104. Next, as regards the Secretary General’s assertion that he “regularly delegated his powers in such matters to the Deputy Secretary General”, the Tribunal is compelled to note that the evidence submitted (Appendix 2 to his observations – paragraph 3 above) cannot in fact be construed as such.

105. This unsigned document, dated 4 September 2012 and entitled “*Areas of responsibility for D[eputy] S[ecretary] G[eneral]: 2012-2015*” does in fact indicate under the heading “Administration/Human resources” that the Deputy Secretary General has responsibilities in relation to “*Decisions on recommendations made by the Commission against Harassment as concerns harassment cases*”. But without going into the nature of this document and the extent to which it was made public and circulated to Council of Europe staff, it will be observed that it applied only to the period 2012-15. As far as the Tribunal is aware, no decision was ever taken to extend the validity of this document, and the Secretary General makes no mention of any such decision.

106. In these circumstances and even though the Secretary General has not put forward any arguments in this regard, the Tribunal believes it is worth considering whether the validity of this allocation of responsibilities, which took place in 2012, could be understood to apply, or could have been tacitly extended, beyond the 2015 expiry date, given that the delegator and the delegatee were both elected for a second term. For even though this was not stated during the proceedings before the Tribunal, it is a well-known fact that the Secretary General was re-elected in 2014 for a second term.

107. In the Tribunal’s view, the answer has to be no.

108. In order to be valid vis-à-vis third parties, a delegation must be clear and properly worded. The particular nature of harassment proceedings, which cannot be deemed to constitute an ordinary administrative act, requires that any delegation of authority in such matters be effected in due form and in accordance with all the rules, so if one of these conditions is not met, the act performed by the party to whom authority has been delegated is liable to be invalidated.

109. Admittedly, in the third document submitted by the Secretary General in support of his defence (Appendix 3 to his observations – paragraph 3 above), reference is made to a delegation of authority for which, unlike in the case of the document in Appendix 2 mentioned above, no validity period is specified. The document in question is the Secretary General’s *Speaking Notes* for the Committee of Ministers meeting of 4 July 2012 and the Secretary General explains that he “*delegated to the Deputy Secretary General responsibility for a number of tasks including ... taking of decisions concerning individual staff matters*”. The fact is, however, that the delegator

and delegatee having been re-elected, a new delegation of authority would need to have been approved, or, at the very least, the validity of the 2012 delegation of authority explicitly confirmed. Having reached this conclusion, the Tribunal has no need to consider the question as to whether the broad terms in which this statement is worded – which do nevertheless leave room for doubt - might cover harassment proceedings which, in the document in Appendix 2 mentioned above, were dealt with in a specific point.

110. Next, the Tribunal cannot subscribe to the Secretary General's view that "in any event, the Deputy Secretary General, by her rank, her role and her authority, is perfectly qualified to act on the Secretary General's behalf as the decision-making authority in respect of measures taken following a finding of harassment."

111. The Tribunal notes that while the rank, role and authority of the Deputy Secretary General may justify assigning her powers in the area in question, they cannot justify the fact that those powers may be exercised without a clear, precise and public delegation of authority.

112. Further, the Tribunal wishes to emphasise that its case law in matters relating to the delegation of authority, as cited by the Secretary General, refers to the exercise of the Organisation's normal administrative activities and not to the exercise of special authority for the purpose of giving effect to the internal investigation powers conferred on a body which, although certainly made up of staff members, operates independently and whose activities are clearly distinct from those of staff who conduct an internal investigation on behalf, and at the request, of the Secretary General. The said case law does not extend to the activity in question, therefore.

113. Lastly, the Secretary General asserts that, in any event, the Deputy Secretary General, by her rank, her role and her authority, is perfectly qualified to act on the Secretary General's behalf as the decision-making authority in respect of measures taken following a finding of harassment. Resolution (55) 29 adopted on 19 November 1955 by the Committee of Ministers on the responsibilities of the Deputy Secretary General and the Clerk of the Consultative Assembly – now the Secretary General of the Parliamentary Assembly - provides that the Deputy Secretary General "shall act as the permanent assistant of the Secretary General in the supervision of all departments of the Secretariat (and) when the Secretary General is absent, or for other reasons, not available, the Deputy Secretary General shall replace him and exercise all his duties and responsibilities".

114. The Tribunal notes, however, that at no point does Resolution (59) 29 assign the Deputy Secretary General any powers or responsibilities of his/her own: far from it, the text makes it very clear that the role of the Deputy Secretary General is to act as the Secretary General's assistant and to stand in for him/her if he/she is absent or unavailable.

115. Having concluded that there was no formal delegation of authority, the Tribunal must decide what conclusions are to be drawn from this: is the contested decision to be considered null and void or, given that decisions of this kind may be lawfully delegated, is the flaw merely a technical one, with no implications for the legality of the act in question?

116. In the view of the Tribunal, consideration should be given to the nature of the impugned

proceedings and of the decision to be taken – which is obviously a consequence of the decision-maker’s opinion – which may result in disciplinary and administrative action. Based on these criteria, the Tribunal concludes that the flaw is not a purely technical one but rather sufficient to taint the legality of the Deputy Secretary General’s decision and render it invalid.

2. *The alleged irregularity of the proceedings before the Commission against Harassment*

117. Having reached this conclusion, the Tribunal has no need to consider the complaints that refer to the merits of the Deputy Secretary General’s decision. Nor is there any need for it to rule on the numerous complaints concerning irregularities in the proceedings before the Commission against Harassment or on the merits of the Commission’s opinion. It does consider it necessary, however, to rule on the complaint concerning the irregularity in the composition of the Commission against Harassment which, in the Tribunal’s view, is the most important of the complaints concerning procedure.

118. In the Tribunal’s view, it is clear from reading the French and English versions of Article 1 of Rule No. 1292 that the substitute members are assigned to individual titular members, rather than to whole components of the Commission, such as the Secretary General or the Staff Committee. The second sentence reads: “Two of the Commission members - and their substitutes - shall be appointed by the Secretary General and the remaining two - and their substitutes - by the Staff Committee” while the last sentence reads: “The substitute members shall act when their titular members are prevented from doing so”. In the Tribunal’s view, if the substitute members were meant to act as substitutes for the component as a whole, the first of the two sentences in question would read: “Two of the Commission members – and the substitutes – shall be appointed by the Secretary General, and the remaining two – and the substitutes – by the Staff Committee” while the second would read: “Substitute members shall act when the titular members are prevented from doing so”.

119. It has to be recognised, furthermore, that in his arguments, the Secretary General does not dispute this interpretation but merely seeks to justify the substitution in question by stating that one of the titular members and that member’s substitute were both unavailable to sit with the Commission against Harassment and that there is no rule against the other substitute sitting at the same time as the titular member he or she was appointed to replace. In the present instance, however, the fact that there was no explicit prohibition was not sufficient and the text would have needed to make specific provision for this composition in cases where a titular member and that member’s substitute are both unavailable to sit. Nor has the Tribunal received any information from the Secretary General regarding this fact that a titular member and that member’s substitute cannot sit at the same time.

120. The Secretary General having argued that the balance between representatives of the Secretary General and representatives of the Staff Committee was maintained, the Tribunal notes that this fact is not relevant to the examination of the complaint in question.

121. Lastly, the Secretary General having argued that the appellants could have availed themselves of their right to object, the Tribunal notes that such challenges are more concerned

with whether or not it is appropriate to sit, rather than with issues relating to the lawfulness of the composition.

122. Having reached this conclusion, the Tribunal is compelled to observe that at the time when it adopted its opinion, the Commission against Harassment was not constituted in a manner consistent with Rule No. 1292. Ultimately, no significance can be attached to the fact that the balance between representatives of the Secretary General and staff representatives was maintained.

### **C. Decision to be taken**

123. In their submissions, the appellants ask the Tribunal to annul the Deputy Secretary General's decision of 13 April 2017 and "consequently [of] any steps that had been taken or might be taken on the basis of that decision, including the decisions ad personam already taken by the Deputy Secretary General on 27 June 2017".

124. Earlier, in their joint grounds of appeal (paragraph 2 above), the appellants indicated as related measures to be set aside four measures, all of which occurred after the impugned decision of 13 April 2017.

125. The Tribunal notes that any measure taken after the annulled act from which that measure stems ceases to be lawful by the mere fact of the Tribunal's decision. It is clear, therefore, that the four measures referred to in the previous paragraph cease to be lawful and must be set aside following the annulment of the decision of 13 April 2017.

126. While, however, it is within the Tribunal's power to declare these four documents invalid in the case of the first appellant, it cannot strictly do so in the case of the second appellant, as unlike the first appellant, the second appellant did not ask for them to be annulled at the time of submitting his administrative complaint. And the legal framework for the proceedings is determined by the challenge raised in the administrative complaint. There being no public-policy grounds for the Tribunal to rule of its own motion, it is not necessary for it to adjudicate *ultra petita*. It will, however, be for the second appellant and the Organisation to draw the appropriate conclusions in this regard from the present decision.

127. As regards the conclusions to be drawn with regard to the opinion of the Commission against Harassment, which was delivered before the decision of 13 April 2017, the Tribunal notes that at no time was this opinion challenged via the disputes procedure. The requests submitted to the Secretary General and to the Tribunal in the two administrative complaints and in the two appeals are clear on this point, for although the appellants allege irregularities in the proceedings prior to the decision of 13 April 2017, they have made no request for the Commission's opinion to be set aside.

128. Here again, there being no public-policy grounds for the Tribunal to rule of its own motion, it is not necessary for it to adjudicate *ultra petita*. It will, however, be for the appellants and the Organisation to draw the appropriate conclusions in this regard from the present decision.

129. Lastly, numerous concerns having been expressed both before the Commission against Harassment and before the Tribunal by individuals interviewed by the Commission against Harassment regarding the anonymity that had been granted by the Commission in order to protect them, the Tribunal considers it necessary to point out that, in accordance with Article 12 of Rule No. 1292, it is for the Secretary General – exercising his disciplinary power if necessary – to take all necessary steps to ensure that these interviews are anonymous and that persons who give evidence are not subjected to reprisals or threats.

130. This protection continues to apply after the proceedings have ended.

#### **D. Damages**

131. The two appellants are each claiming 50 000 euros in damages.

132. The first appellant claims to have suffered direct damage to his professional integrity and health.

133. The second appellant claims to have suffered serious personal, family and professional non-pecuniary damage as a result of the accusations made against him.

134. Both appellants justify their claims by presenting arguments concerning each head of damage claimed.

135. The Secretary General, for his part, fails to see what might justify such compensation and considers that no such sums should be awarded.

136. The Secretary General presents his arguments and concludes by stating that the confidential nature of the Commission against Harassment's work ensured that the appellants were protected from any undue harm that might have been caused to their image or reputation.

137. After examining the arguments presented by the parties, the Tribunal considers that the appellants should not be awarded pecuniary compensation as the outcome of the appeals constitutes adequate compensation in itself.

138. In this connection, the Tribunal notes that it has decided not to rule on the merits of either the impugned decision or the opinion of the Commission against Harassment, and that, in any case, the appellants have not asked for that opinion to be set aside, having sought annulment only of the Deputy Secretary General's decision and the measures which followed it.

#### **E. Costs**

139. The first appellant asks the Tribunal to order reimbursement of all the costs incurred in these proceedings, which he puts at 13 700 euros, broken down as follows: 5 200 euros for the assistance of a lawyer in the proceedings before the Commission against Harassment and 8 500 euros for the proceedings relating to the administrative complaint and the present appeal.

140. The second appellant requests the sum of 17 500 euros on the same basis: 6 000 euros for the assistance of a lawyer in the proceedings before the Commission against Harassment, 3 821.98 euros for translation costs incurred in the same proceedings and the remainder for lawyer's fees incurred in the proceedings before the Tribunal.

141. The Secretary General invites the Tribunal to dismiss these claims. As regards the costs incurred in the proceedings before the Commission against Harassment, it notes that those proceedings were not judicial so no claim for the reimbursement of those costs can be accepted.

142. Regarding the other costs, the Secretary General contends that, under Article 11 of the Statute of the Administrative Tribunal (Appendix XI to the Staff Regulations), the only costs which the Tribunal can award are the (vouched) costs of the appeal incurred by appellants in the proceedings before the Tribunal, and only if the appeal has been allowed. The claims should therefore be dismissed.

143. The Tribunal notes that the present appeal is specifically concerned with the proceedings before the Commission and that it was only reasonable that the appellants should arrange for themselves to be assisted by a lawyer. They are, therefore, entitled to reimbursement of the costs incurred in the proceedings before the Commission.

144. As to whether the costs are reasonable, the Tribunal notes firstly that they appear to be excessive given that in none of the case documents submitted to it did the representatives act on behalf of their clients and that therefore they probably merely advised them or perhaps drafted documents which they did not sign. The Tribunal considers it reasonable therefore to order reimbursement of the sum of 8000 euros in the case of the first appellant and 8000 euros in the case of the second appellant.

145. Secondly, as regards translation costs, the second appellant has not sufficiently demonstrated the need for these translations. While staff members have the right to choose their counsel, that does not mean that the attendant translation costs should automatically be borne by the Organisation if their appeal is well founded. There is to be no reimbursement of these costs, therefore.

### III. CONCLUSION

146. The two appeals are well founded and the impugned decisions concerning the appellants must be set aside as indicated above.

147. The first appellant should be reimbursed in the amount of 8 000 euros by way of costs and the second appellant in the amount of 8 000 euros, likewise by way of costs.

For these reasons,

The Administrative Tribunal:

Orders the joinder of the appeals;

Declares the appeals well founded and annuls the impugned decision, as indicated above;

Orders the Organisation to reimburse the first appellant in the amount of 8 000 for costs and the second appellant in the amount of 8 000 on the same basis.

Adopted by the Tribunal in Strasbourg, on 14 May 2018, and delivered in writing on 17 May 2018 pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

A. ROZAKIS