

D'A. (Nos. 1 and 2)

v.

PAHO

131st Session

Judgment No. 4347

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr M. D'A. against the Pan American Health Organization (PAHO) (World Health Organization) on 28 March 2018 and corrected on 11 May, PAHO's reply of 19 September, corrected on 5 November 2018, the complainant's rejoinder of 14 February 2019 and PAHO's surrejoinder of 3 July, corrected on 23 July 2019;

Considering the second complaint filed by Mr M. D'A. against PAHO on 18 September 2018 and corrected on 1 November 2018, PAHO's reply of 26 February 2019, the complainant's rejoinder of 4 June and PAHO's surrejoinder of 12 August 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the cases may be summed up as follows:

The complainant impugns the decision of the Director of PAHO to impose on him the disciplinary measure of reassignment with reduction in grade.

The complainant joined PAHO in 1986. At the material time he held the position of Director, Department of Knowledge Management and Communications (KMC), at grade D-1.

On 5 February 2013 Mr M., who was then serving his probationary period in KMC, filed a formal complaint of harassment against the complainant and Mr N., his second and first-level supervisors respectively.

Mr M.'s harassment complaint was referred to the Ethics Office. After a preliminary review, the Ethics Officer carried out a formal investigation, in the course of which several witnesses were interviewed. The complainant was informed of this by a memorandum of 19 September 2013.

By a letter of 8 August 2014, the Director of Administration notified the complainant of the charges brought against him, namely, abuse of authority, creating a hostile work environment, harassment and bullying. The charges of abuse of authority and creation of a hostile work environment were based, in particular, on allegations that the complainant had shown favouritism towards Mr N. and Ms C., who was then working in KMC as a consultant, by failing to hierarchically separate them when he became aware that they were involved in an intimate relationship; by reassigning Ms C. to a different unit within KMC only on paper ("sham reassignment") – she was allowed to continue working in the same office and in close collaboration with Mr N.; by authorising her to accompany Mr N. on three missions; by approving paid annual leave for Ms C., contrary to PAHO's Policy on Consultants; and by approving the purchase of a laptop computer for Ms C., even though there were other computers available for her to use. The charges of harassment and bullying were mainly based on the complainant's failure to conduct a proper and fair appraisal of Mr M.'s performance and the decision not to confirm his appointment at the end of his probationary period, which was allegedly designed to free up funds to extend Ms C.'s contract beyond 31 July 2013. The Director of Administration asked the complainant to respond, which the latter did on 10 October 2014.

By a letter of 9 June 2015, the Director of Administration informed the complainant that the Administration considered the evidence to be sufficient to substantiate the charges raised in the 8 August 2014 letter. He stated that the complainant's actions constituted misconduct for which the appropriate disciplinary measure was reduction in grade and reassignment to a non-managerial post. By another letter of 9 June 2015, the Director of Human Resources Management (HRM) informed the complainant of the decision to reassign him, effective 22 June 2015, from the grade D-1 post which he then held to a grade P-5 post.

On 1 October 2015 the complainant filed an appeal against the 9 June decision taken by the Director of Administration. On 3 November 2017 the Board of Appeal issued a preliminary recommendation in which it noted that the decision-making process in the complainant's case was tainted

by a fundamental procedural error because the Director of Administration did not have authority to take the decision to impose a disciplinary measure, and the decision of 9 June 2015 was thus *ultra vires*. The Board recommended that the Director of PAHO request the new Deputy Director, who was the competent authority, to proceed with a fresh analysis of the evidence and to issue a new decision, after which the case could again be referred to the Board of Appeal for its review of the merits.

By a letter of 27 December 2017, the Director of PAHO informed the complainant that, although she did not agree with the Board's finding that the disciplinary decision of 9 June 2015 was *ultra vires*, given that the Deputy Director at the relevant time had a conflict of interest, she had nevertheless requested the new Deputy Director to review that decision. Further to that request, the Deputy Director provided on 21 December 2017 a written opinion – a copy of which was attached to the 27 December letter – in which she concluded that the 9 June 2015 decision was based on fact and that the disciplinary measure imposed by the Director of Administration was proportionate to the gravity of the complainant's misconduct. In her letter of 27 December 2017, the Director of PAHO also informed the complainant that she would be notifying the Board of Appeal of the Deputy Director's opinion so that the Board could proceed to consider the merits of his appeal. The 27 December 2017 decision is the decision impugned by the complainant in his first complaint, filed with the Tribunal on 28 March 2018.

The Board of Appeal rendered its final report on the merits of the appeal on 22 May 2018. It concluded that the complainant's reduction in grade and reassignment were appropriate measures and recommended that the appeal be rejected.

By a letter of 22 June 2018, the Director of PAHO informed the complainant that she agreed with the Board's recommendation. That is the decision impugned by the complainant in his second complaint, filed with the Tribunal on 18 September 2018.

In his first complaint the complainant asks the Tribunal to quash the impugned decision, Mr M.'s harassment complaint and the charges of misconduct brought by PAHO against him. He also asks the Tribunal to quash the decision of 9 June 2015 imposing on him the disciplinary measure of a reduction in grade and to order PAHO to pay him all salary, benefits, entitlements, step adjustments, pension contributions

and other emoluments that he would have received had he not been demoted, with retroactive effect from 9 June 2015 through the date of full execution of the Tribunal's judgment. He seeks reinstatement in his former grade D-1 post. He claims moral damages in an amount not less than 250,000 Swiss francs and an additional amount for the excessive delays in the internal proceedings. He also claims exemplary damages. He seeks an award covering all the costs he incurred and such other relief as the Tribunal deems necessary, just and fair.

In his second complaint the complainant asks the Tribunal to quash the impugned decision and he seeks the same relief as in his first complaint.

PAHO asks the Tribunal to dismiss both complaints and all associated claims for relief.

CONSIDERATIONS

1. On 5 February 2013, Mr M., a staff member then serving his probationary period in KMC, filed a formal complaint of harassment with the Ethics Office against his second-level supervisor, the complainant, and his first-level supervisor, Mr N., alleging that the two supervisors had bullied him, removed his job responsibilities, and engaged in favouritism and preferential treatment towards Ms C., a consultant in KMC, where they all worked. After a preliminary review, the Ethics Office initiated a formal investigation into the allegations and began interviewing witnesses in May 2013.

2. By letter dated 8 August 2014, the Director of Administration notified the complainant of the completion of the investigation and the Administration's decision that there was "*prima facie* evidence to substantiate that while [the complainant was] the Director of [KMC], [his] personal friendship with [Mr N.], Unit Chief of KMC/KM and [Ms C.], an International PAHO [c]onsultant [...] working in KMC/KM at that time, led [the complainant] to take decisions influenced by [his] personal relationships and not the best interest of the Organization". The Director of Administration also noted that: the favouritism shown towards Mr N. and Ms C. was an abuse of authority and had created a hostile work environment for Mr M. and others in the department; the complainant had failed to hierarchically separate Mr N. and Ms C. (who were involved in an intimate relationship) and had allowed Mr N. to

take managerial decisions regarding Ms C.'s employment status and pay despite the conflict of interest; the efforts to separate Mr M. from service "lacked objectivity, were improper, and constituted harassment"; and the complainant's "attempt to coerce [Mr M.] by making a quid pro quo offer of appointment confirmation in exchange for his withdrawing a complaint to the PAHO Staff Association, amounted to bullying, a form of harassment". It was explained that those actions constituted misconduct under PAHO Staff Rule 110.8 and, if the allegations were found to be true, the complainant would be advised in writing of any proposed disciplinary action and given the opportunity to reply to those charges. The list of charges cited: abuse of authority; creating a hostile work environment; harassment and bullying. The complainant was requested to submit his reply to the charges, which he did on 10 October 2014.

3. By letter dated 9 June 2015, the Director of Administration informed the complainant that the Administration had determined that there was sufficient evidence to substantiate the allegations set forth in the 8 August 2014 letter, and that the evidence confirmed that his conduct "did not conform to the standards that were expected of [him] as a senior official in PAHO, as set forth in PAHO's Code of Ethical Principles and Conduct and the International Civil Service Commission (ICSC) Standards of Conduct for the International Civil Service". The full basis for the findings and conclusions regarding the complainant's "lack of compliance with the established standards", as well as responses to issues raised in the complainant's 10 October 2014 reply, were provided in a 16-page attachment to the letter; a brief summary was included in the body of the letter. The complainant was informed that his actions constituted a serious breach of PAHO's ethical principles and rules of conduct; that those actions constituted misconduct under Staff Rule 110.8.1, subjecting him to disciplinary measures under Staff Rule 1110; and that the fact that he was a senior manager was considered to be an aggravating factor. The result was that the Organization decided to "reduce [his] grade to the P-5 level and to reassign [him] to an appropriate non-managerial post given that [the complainant's] actions ha[d] undermined the Organization's confidence in [his] managerial abilities". In a separate letter, also dated 9 June 2015, the Director of HRM notified the complainant of the decision to transfer him to a grade P-5 post.

4. The complainant filed a timely appeal against the decision contained in the 9 June 2015 letter from the Director of Administration. The Board of Appeal found that there was a “fundamental procedural error” in the case which made it inappropriate to address the merits at that time. Instead, it presented a preliminary recommendation, dated 3 November 2017, regarding the procedural flaw, in which it noted that PAHO had not followed the “clearly prescribed path of decision-making on harassment claims”, as detailed in the PAHO Policy on the Prevention and Resolution of Harassment in the Workplace (PAHO Harassment Policy), at paragraphs 49 to 51, which read as follows:

- “49. When an investigation is carried out, the Ethics Office will prepare a written report containing its findings of fact and conclusions on the merits of the allegation(s) of harassment. This report will normally be submitted to Human Resources Management within 120 calendar days of receiving the workplace harassment reporting form.
- 50. In the event of a conflict of interest, the report will be submitted instead to the Deputy Director for consideration.
- [...]
- 51. Upon receipt of an investigation report, Human Resources Management or the Deputy Director, as the case may be, will make a decision whether the allegations of harassment have merit.”

5. The Board of Appeal considered the attachment to the Director of Administration’s 9 June 2015 decision, which stated, inter alia, that the Director of Administration had been chosen to take the decision regarding Mr M.’s harassment complaint, as there were conflicts of interest for both HRM and the Deputy Director. The Board of Appeal found that there were indeed facts in the case which justified HRM’s recusal; specifically that “an official of HRM [had been] consulted by [the complainant] about the proposed termination of [Mr M.] and this same official [had] attended a meeting with [Mr M.], [the complainant], the Director of HRM and a representative from the Staff Association; this HRM official was later interviewed by [the Ethics Office]. Considering these circumstances in context, it was appropriate to conclude that HRM had an arguable conflict of interest”. The Board of Appeal did not find that the facts relating to the refusal to send the Ethics Office’s investigation report to the Deputy Director justified a similar conclusion.

6. The Board of Appeal noted that the reason set out in the attachment to the 9 June 2015 decision for the Deputy Director not being assigned to take a decision in the case was that “the [Deputy Director] served as [the complainant’s] first-level supervisor and the Organization felt [that] it was not appropriate to have the [Deputy Director] review and make decisions involving someone in a direct line of supervision, both to maintain the appearance of objectivity and to preserve [the complainant’s] reputation with [his] immediate supervisor”. The Board of Appeal found that rationale to be unacceptable, stating: “One of the duties of a supervisor is to discipline errant subordinates. Under the theory expressed by the [Director of Administration], a direct supervisor would arguably never be in a position to discipline a subordinate; such a result would be nonsensical. The fact that the [Deputy Director] was [the complainant’s] direct supervisor did not create *per se* a ‘conflict of interest’. In the absence of clearly articulated evidence of bias, lack of objectivity or some other conflict of interest, the Board finds no basis for bypassing the [Deputy Director] in this case. The Board concludes, based on [the] record, that there was no conflict of interest that prevented the [Deputy Director] from rendering a decision pursuant to the PAHO Harassment Policy.” It went on to state that “the Organization is not free to deviate from its own law on an *ad hoc* basis” and that “[t]he law as written must be obeyed”. In light of those considerations, the Board of Appeal found that “[the Director of Administration] had no authority under PAHO law to render a decision” and that the decision was thus taken “*ultra vires*”. It also stated that “[t]he only reasonable resolution at this juncture is not to rescind the decision, but to remand it to the current [Deputy Director] (who assumed that position after the decision in this case) and instruct her to issue a new decision. That decision should be made independent of the [Director of Administration’s] decision. No personnel who worked on the [Director of Administration’s] decision should be involved in the decision-making. Moreover, the decision should be based solely on the evidence previously presented to the [Director of Administration] and should not take into consideration materials accumulated subsequent to that decision (including the documents in this appeal).” It therefore recommended that “the Director assign the [Deputy Director] to make a fresh analysis of the evidence and issue a new decision” and that, if necessary, “[t]he merits of [the] case [could] then be returned to the

Board of Appeal [...] after the parties ha[d] been given the opportunity to respond to the new decision”.

7. In a letter dated 27 December 2017, the Director of PAHO informed the complainant that the Board of Appeal had issued a preliminary recommendation on his appeal against the 9 June 2015 decision to demote and reassign him to a post at the P-5 level. After a brief summary of the Board of Appeal’s findings and recommendation, the Director stated that, while she concurred with the Board of Appeal’s conclusion regarding HRM’s conflict of interest, she could not agree with its conclusion that the former Deputy Director did not also have a conflict of interest. She noted that “[t]he Board’s rationale for finding that the former [Deputy Director] did not have a conflict of interest [was] flawed in one fundamental aspect – the Board’s belief that ‘one of the duties of a supervisor is to discipline errant subordinates’. In fact, supervisors in PAHO have no authority to impose disciplinary measures on their staff for engaging in misconduct. Paragraphs 70 and 71 of PAHO’s Investigation Protocol establish that HRM is the entity that has been delegated the primary responsibility for taking action and making decisions regarding disciplinary measures:

70. The investigation report will be provided by the investigator to the official or entity in PAHO that has primary responsibility to take action or make a decision concerning the issue under investigation.
71. Reports into allegations of wrongdoing, including reports into formal complaints of harassment, that involved a PAHO staff member or national employee, as referred to in PAHO’s Staff Rules and Regulations, will normally be referred to Human Resources Management (HRM), which will decide whether to initiate disciplinary proceedings in accordance with the applicable Staff Rules and procedures.” (Original emphasis.)

8. The Director went on to cite Staff Rule 1110 regarding disciplinary measures for misconduct, noting specifically that “[n]o PAHO supervisor has the authority to impose any of the above-listed disciplinary measures on a member of his or her own staff. The authority to take disciplinary measures is delegated to HRM and, if necessary, [the Deputy Director] in their capacity as members of PAHO’s senior management (and, in the case of the [Deputy Director], as a member of Executive Management) and not in their capacity as PAHO supervisors” (original emphasis). In light of that, the Director found that she could not accept the Board of Appeal’s conclusion that

the former Deputy Director, in his role as the complainant's direct supervisor, had the delegated authority to take disciplinary measures against him. The Director stated that "[the Deputy Director's] authority to take disciplinary measures would have stemmed from his senior management position" but that "his role as [the complainant's] first-level supervisor created a conflict of interest for him with respect [to] his ability to substitute for HRM in light of HRM's own conflict of interest". She noted that due to his supervision of and interaction with KMC staff, "[the former Deputy Director's] relationships and decisions created an actual conflict of interest for him" which the Deputy Director had himself recognized, and that they also created a "perceived conflict of interest for him that was sufficient to require that he recuse himself from this matter" in accordance with the PAHO Code of Ethical Principles and Conduct (original emphasis).

9. The Director of PAHO did not agree with the Board of Appeal's finding that the Director of Administration's decision was *ultra vires*, nor did she agree with its recommendation that the matter be remanded to the new Deputy Director. However, she did ask the new Deputy Director to review the Director of Administration's 9 June 2015 decision, together with all relevant documents, and to provide an opinion. The Director informed the complainant that the new Deputy Director had done so and had concluded that the Director of Administration's finding that the complainant had engaged in misconduct was based on fact and the disciplinary measure imposed was proportionate. She stated that the opinion was attached to the current letter (and would be shared with the Board of Appeal so that the Board could "move forward to consider the merits" of his appeal) and asked the complainant to note that "[the new Deputy Director's] opinion d[id] not constitute a new or final appealable decision in this case and it d[id] not replace or supplant the [Director of Administration's] 9 June 2015 decision, which continue[d] to be the Organization's final appealable decision with respect to the finding that [he had] engaged in misconduct and that disciplinary measures were warranted" (original emphasis). The complainant filed his first complaint with the Tribunal on 28 March 2018 against the Director of PAHO's 27 December 2017 decision but also included in his complaint arguments and claims regarding the merits of his appeal. He requests oral proceedings.

10. In its 22 May 2018 final report on the merits of the appeal, the Board of Appeal, referring to Staff Rule 1230, noted that its review would essentially be limited to determining whether PAHO's actions against the complainant complied with the applicable law, were tainted by personal prejudice and/or failed to give complete consideration to the relevant facts; whether the charges/allegations against the complainant were proven; and whether the imposed disciplinary measure was reasonable and consistent with governing rules and due process requirements.

11. After a detailed analysis of the submissions before it, the Board of Appeal considered the three broad charges of which the complainant had been found guilty, namely: (a) abuse of authority; (b) harassment; and (c) bullying. It found that the evidence was "much more compelling" that the complainant was aware of the relationship between Mr N. and Ms C. as early as December 2011 and that PAHO had proven that the alleged transfer of Ms C. was a sham. It also found that PAHO had proven that "[the complainant had] failed to carry out his duties as a manager by not enforcing the Code of Ethical Principles and Conduct". The Board concluded that that failure and the sham reassignment of Ms C. amounted to an abuse of authority. With regard to the charges relating to favouritism, the Board of Appeal stated that "[a]lthough [it] d[id] not find sufficient proof of favouritism, it d[id] find that [the complainant had] intentionally violated PAHO's rule barring consultants from taking annual leave". It also found that "[t]he approval of [Ms C.'s] leave was 'the exercise of authority in a manner that serve[d] no legitimate work purpose' and therefore fit the definition of abuse of authority" (original emphasis). The Board of Appeal found that the complainant "knowingly and intentionally deviated from standard procedures when attempting to terminate [Mr M.]" and that "[t]he evidence also support[ed] a finding that the appraisal and termination was tainted by an improper motive: the desire to terminate [Mr M.] so that money could be freed up for an extension of [Ms C.'s] consultancy". It went on to state that "[a]lthough the Organization [had] proved the facts supporting the charges against [the complainant], the Board disagree[d] that 'harassment' was the proper charge. There [was] no evidence or charge that [Mr M.] was the victim of harassment because of gender, nationality, etc. Rather, the facts point[ed] solely to a possible charge

of ‘personal harassment’” which is described in the PAHO Harassment Policy as follows:

- “11. Personal harassment consists of any improper and unwelcome conduct, comment, or display that demeans, belittles, or causes personal humiliation or embarrassment to the recipient and which the person knew, or ought to reasonably have known, would cause offence or harm.
12. Examples of behavior that may amount to personal harassment include:
 - Name calling, insults, derogatory remarks, or inappropriate jokes;
 - Shouting at a subordinate or co-worker, either in private or in front of others;
 - Spreading rumors, gossip, or innuendo with the intent of harming someone or damaging their reputation;
 - Constant and unjustified criticism.”

The Board found that although the allegations regarding the complainant’s treatment of Mr M. were proven, they did not amount to “personal harassment” as described in the PAHO Harassment Policy. However, it did find that the complainant’s “termination decision was an abuse of authority because it was tainted by improper motives and by intentional disregard of proper procedures”.

12. The PAHO Harassment Policy specifies a non-exhaustive list of the types of harassment which includes: personal harassment; sexual harassment; bullying; abuse of authority; and hostile work environment. It describes bullying as follows:

- “16. Workplace bullying consists of threats, intimidation, aggressive behavior, and physical and/or verbal abuse that are primarily intended to cause physical or psychological harm to someone else, including attempting to destroy or damage a person’s self-esteem or confidence.
17. Examples of behavior that may amount to bullying include:
 - Constant negative remarks or repeated criticism or sarcasm;
 - Isolating, excluding, or ignoring someone;
 - Making repeated threats of dismissal without just cause;
 - Public humiliation, such as reprimanding an employee in a meeting or in the presence of other people, yelling at or swearing at an employee, making personal insults or name-calling;
 - Intimidation, which instils a sense of fear in the person being bullied, whether it be fear of losing one’s job, fear of humiliation, fear of being ostracized, or fear of reprimand.”

Abuse of authority is described as follows:

- “18. Abuse of authority occurs when a manager or supervisor improperly takes advantage of his or her position or unfairly uses his or her authority to undermine a person’s work or job performance, threaten the person’s livelihood, or interfere with or influence a person’s career. It is the exercise of authority in a manner that serves no legitimate work purpose and ought reasonably to be known to be inappropriate. [Emphasis added.]
19. Examples of conduct that constitute an abuse of authority include:
- Asking subordinates to carry out personal errands;
 - Belittling an individual or a team’s work;
 - Exhibiting favouritism;
 - Setting unrealistic goals or deadlines;
 - Removing areas of responsibility or impeding work performance;
 - Unjustifiably withholding resources or information that a person or team needs to perform their job.”

Hostile work environment is described as follows:

- “20. A hostile work environment is characterized by an activity or behavior, not necessarily directed at anyone in particular, that creates an intimidating, uncomfortable, or offensive workplace and that interferes with work.
21. Examples of behavior that may lead to a hostile work environment include:
- Sexual, racial or religious insults or jokes;
 - Abusive treatment, yelling, or screaming;
 - Openly displaying pornographic or other offensive material.”

13. The Board of Appeal found that the complainant’s conduct towards Mr M. did not amount to bullying but nevertheless concluded that “[the complainant’s] effort to persuade Mr M. to drop his complaint to the Staff Association was an abuse of authority”. Considering that “this case involve[d] a manager guilty of multiple misdeeds that were intentional and that evidenced a pattern of favouritism and abuse of authority”, the Board of Appeal concluded that the complainant’s reduction in grade and reassignment were appropriate measures. It recommended that the appeal be denied in its entirety.

14. The Director of PAHO informed the complainant, by letter dated 22 June 2018, of her decision to endorse the recommendation of the Board of Appeal. The complainant impugned that decision in his second complaint before the Tribunal, filed on 18 September 2018. He requests oral proceedings.

15. As the two complaints are based on the same material facts and raise the same issues of fact and law, they may be dealt with in one judgment and are therefore joined, as requested by both parties.

The parties have presented ample submissions and documents to permit the Tribunal to reach an informed and just decision on the cases. The request for an oral hearing is, therefore, rejected.

16. The complainant submits that his first complaint, against the 27 December 2017 decision, is receivable “as all internal avenues for redress have been exhausted”. The impugned decision of 27 December 2017 addressed exclusively the preliminary recommendation of the Board of Appeal regarding the alleged procedural flaw. However, the complainant’s first complaint (filed on 28 March 2018) addressed not only the Director’s decision on the preliminary recommendation, but also the merits of his appeal to the Board of Appeal. The Tribunal notes that the Board of Appeal had not, at that time, reviewed the merits of the complainant’s appeal or formulated its final recommendation, and the Director of PAHO had not taken a final decision on the appeal. The Board of Appeal issued its final report on 22 May 2018 and the Director of PAHO issued her final decision on the merits of the complainant’s appeal on 22 June 2018. PAHO submits (in its reply to the first complaint) that “despite the Organization’s strong objection to [c]omplainant’s non-observance of proper procedure before this Tribunal in the present case, the Organization agrees to the Tribunal’s review of the full merits of this case in order to cooperate and facilitate the work of the Tribunal, and in order not to delay the final disposition of [c]omplainant’s appeal”.

17. Article VII, paragraph 1, of the Tribunal’s Statute provides that a complaint will not be receivable “unless the decision impugned is a final decision”. As the appeal was ongoing and no final decision had therefore been reached at that point, the complainant’s first complaint does not meet the requirement of Article VII, paragraph 1, of the Statute. Accordingly, his first complaint is irreceivable and must be dismissed.

18. In his second complaint, filed with the Tribunal on 18 September 2018, the complainant impugns the Director of PAHO's decision of 22 June 2018 to accept the Board of Appeal's final recommendation, dated 22 May 2018, to uphold the disciplinary measure imposed on the complainant and to dismiss the appeal in its entirety.

19. The relevant grounds for complaint against the 22 June 2018 decision can be broadly summarized as follows:

- (a) Errors of law, including procedural flaws in the investigation, decision-making, disciplinary, and appeal proceedings vitiate the impugned decision;
- (b) Errors of fact vitiate the impugned decision;
- (c) PAHO acted in bad faith, did not respect the complainant's dignity, and breached its duty of care towards him;
- (d) Excessive delays in the investigation and disciplinary proceedings caused injury to the complainant and warrant an award of damages; and
- (e) The imposed disciplinary measure was not proportionate to the alleged misconduct.

20. The complainant alleges that there were procedural flaws in the investigation process, including the non-disclosure of the investigation report prepared by the Ethics Office, conflicts of interest, abuse of authority, and the unlawful expansion of the scope of the investigation beyond the allegations made in the original harassment complaint.

21. Regarding the non-disclosure of the investigation report, the Tribunal recalls that in Judgment 2229, consideration 3(b), it stated: "According to general principles of law, the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. Under normal circumstances, such evidence cannot be withheld on the grounds of confidentiality." In the present case, by a letter of 8 August 2014, the complainant was provided with the list of charges and the 38 annexes of evidence on the basis of which the list had been compiled (including all witness statements and relevant emails); by a letter of 9 June 2015, he was provided with the confirmation of his misconduct and, in the attachment to that letter, with a 16-page document providing "the basis for the

findings and conclusions regarding [his] lack of compliance with the established standards”; moreover, he was also provided with the Board of Appeal’s preliminary recommendation and final report in the impugned decisions (letters of 27 December 2017 and 22 June 2018 respectively). The Tribunal is therefore satisfied that, although PAHO, relying on paragraphs 68 and 69 of the Investigation Protocol, did not provide the complainant with a copy of the investigation report, he was provided with all evidence related to the charges and the specific evidence on which the final decision was based, and that he was given ample opportunity to respond to the allegations against him. His pleas in this respect are therefore unfounded.

22. The Ethics Office did not err in expanding the scope of its investigation beyond the allegations in the harassment complaint. An organization has the authority and the duty to investigate any indications of related misconduct which it discovers in the course of an investigation on its own or through claims made by staff members. In the present case, the expanded investigation was directly related to the original allegations of misconduct. The complainant has not presented any convincing evidence that the Ethics Office abused its authority or had any conflict of interest. Contrary to the complainant’s arguments, the fact that the Audit Committee had recommended a separation of the investigation function from the Ethics Office does not render the provisions in force at the time of the investigation unlawful.

23. Concurring with the Board of Appeal’s preliminary recommendation, the complainant alleges that there was an unlawful delegation of authority to the Director of Administration because of the failure to follow the procedure set out in paragraphs 49 to 51 of the PAHO Harassment Policy, which provide that a decision on disciplinary action shall be taken by HRM or, in case of a conflict of interest, the Deputy Director. As noted in Judgment 3958, consideration 11, “[a] conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest”. In the present case, the former Deputy Director’s close working relationship with the complainant and other staff members in KMC created, at the very least, a perception of a conflict of interest. The Tribunal is satisfied by the justification

provided by the Director of PAHO in her 27 December 2017 letter (summarized in considerations 7 to 9 above) that a valid conflict of interest existed for both HRM and the former Deputy Director, and finds that, in the circumstances, the delegation of authority to the Director of Administration was lawful.

24. The complainant argues that PAHO failed to follow the procedures laid down in the PAHO Harassment Policy, as it did not order a review of the harassment complaint by the Grievance Panel. The Tribunal observes that staff were notified by a General Information Bulletin, issued on 1 September 2011, that the Grievance Panel had been dissolved and that the Ethics Office would handle harassment complaints. Thus, PAHO followed the proper procedure that was applicable at the relevant time for processing harassment claims through the Ethics Office.

25. The complainant asserts that PAHO's Office of the Legal Counsel had conflicts of interest stemming from the fact that it was consulted with regard to the performance evaluation process for Mr M. and the investigation and disciplinary procedures. This assertion is wrong. The Office of the Legal Counsel had no conflict of interest as its role is to act as PAHO's legal advisor when consulted on any issues related to the legality of PAHO's actions, processes and procedures, including but not limited to performance evaluations, misconduct investigations and disciplinary proceedings. The complainant is mistaken in asserting that the Office of the Legal Counsel "is presumed to defend all PAHO Staff when needed". The Ethics Office acted in accordance with paragraph 71 of the Investigation Protocol in forwarding a copy of the investigation report to the Office of the Legal Counsel so that it could ensure, prior to the issuance of the 8 August 2014 letter of charges, that all applicable rules, policies and procedures with respect to the investigation had been followed and that there was sufficient information and evidence to support the charges of misconduct.

26. The complainant argues that he was disadvantaged by two distinct and irregular parallel processes, as he was not informed of the investigation into the harassment complaint against him while he was involved in Mr M.'s performance evaluation process. There is no reason for which the complainant should have been notified that he was the

subject of a harassment complaint while he was involved in the performance evaluation process for the staff member who raised the complaint. The Ethics Office acted within its competence in deciding to notify him only after the investigation into his alleged misconduct had begun in order to preserve the evidence and to eliminate the potential for witness tampering or intimidation. His rights were not infringed by the delay in his notification (see, for example, Judgment 3295, consideration 8).

27. The complainant asserts that the final decision was vitiated by errors of fact, as the allegations regarding favouritism and personal relationships, the sham reassignment of Ms C., his actions creating a hostile work environment, the bullying and harassment of Mr M., and the abuse of authority were unsubstantiated. The Tribunal, in accordance with its case law, shall not reweigh the evidence but shall limit itself to evaluating the lawfulness of the Board of Appeal's and Director's findings and conclusions on the evidence (see, for example, Judgments 4237, consideration 12, 4207, consideration 10, and 3964, consideration 13). In the present case, the allegations of misconduct and the charges listed in the 8 August 2014 letter were reviewed by multiple authorities, namely by the Ethics Office (as a fact-finding body conducting the investigation), the Office of the Legal Counsel, the Director of Administration, the Board of Appeal, the new Deputy Director, and the Director of PAHO, with the conclusion that the misconduct was proven and the disciplinary measure was proportionate. As stated above, the Tribunal finds no flaws in the proceedings leading to the final decision and notes that the decision was fully justified and motivated. Moreover, the evidence provided, including the concurrence of the witness statements and the complainant's own submissions and responses to the interviews conducted by the Ethics Office, shows no error in the Director's conclusion.

28. The complainant also submits that the decision is vitiated by an error of law, as the Board of Appeal was improperly composed and the appointment of a new Board of Appeal led to an egregious delay in the proceedings. The Tribunal finds that the composition of the Board of Appeal which reviewed his appeal was lawful and the delays in reconfiguring the Board of Appeal were not egregious. The length of the delay was principally determined by the complainant's request to change the composition of the panel which was proposed to him on

26 May 2016. He requested the change as he objected to the proposal that the Board of Appeal members remain on the Board of Appeal beyond the expiry of their mandates, despite assurances that they had agreed to the extension of their appointments at the Organization's request and with the knowledge and concurrence of the Staff Association. Therefore, the appeal was stayed, pending new elections for the Board of Appeal members nominated by the Staff Association. While it took a year to finalize the composition of the new panel, the Board of Appeal, once properly composed, rendered its preliminary report within three months and its final report within five months of receiving the Director's 27 December 2017 decision. Moreover, the complainant has not provided convincing evidence of any negative effect on him caused by the delay in the proceedings before the Board of Appeal.

29. The complainant asserts that PAHO acted in bad faith, with bias and personal prejudice against him, did not respect his dignity, and breached its duty of care towards him. He submits, *inter alia*, that the witness testimonies were untruthful and argues that by relying on them PAHO has based its decision on "hearsay" and "innuendo". The complainant does not present any convincing evidence to support his allegations of bias, prejudice, and breach of duty of care. Moreover, the Tribunal observes that the witness testimonies were concordant and the record of the complainant's interview of 16 October 2013 illustrates the complainant's attitude (the complainant described himself as "results-based" and explained that "[i]f we were to follow the rules [...] I'm failing everywhere").

30. The Tribunal finds that it was open to the Director of PAHO to conclude that the complainant's misconduct amounted to harassment, as the proven abuse of authority constitutes harassment, in accordance with the terms of the PAHO Harassment Policy noted in consideration 12 above.

31. The complainant argues that the imposed disciplinary measure lacked proportionality. In Judgment 3640, consideration 29, the Tribunal stated: "The disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area." In the present case, the Tribunal considers that the imposed disciplinary measure was not disproportionate.

32. The complainant claims that excessive delays throughout the various stages of the proceedings against him caused him injury and warrant an award of damages. Although the overall duration of the proceedings may appear lengthy, the Tribunal notes that they were complex and involved investigation into allegations against both the complainant and Mr N. and multiple stages of review by various authorities. Therefore, no award of damages is warranted on this basis.

33. In light of the above, the complainant's second complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 22 October 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ