JUDGMENTS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2015

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2015

2015

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NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 April 2015 AT-J(2015)0001

Judgment

Case No. 2014/1028

PK,

Appellant

v.

NATO Support Agency,

Respondent

Brussels, 23 March 2015

Original: English

Keywords: suppression of post; redundancy; termination of contract; internal directive; priority consideration for vacant posts; good administration and duty of care; legitimate expectations.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 24 February 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal registered on 1 September 2014, by Mr PK, against the NATO Support Agency (NSPA), which was registered on 2 September 2014 as Case No. 2014/1028. The appellant seeks annulment of the respondent's decision dated 5 May 2014 informing appellant that his contract would be terminated on 31 December 2014.

2. The answer of the respondent, dated 27 October 2014, was registered on 10 November 2014. The reply of the appellant, dated 9 December 2014, was registered on 22 December 2014. The rejoinder of the respondent, dated 20 January 2015, was registered on 21 January 2015.

3. The Tribunal's Panel held an oral hearing on 24 February 2015 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence of Mrs Laura Maglia, Registrar *a.i*.

4. The appeal was lodged after the coming into force on 1 July 2013 of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending the NCPR's Chapter XIV and Annex IX thereto and, *inter alia*, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

5. The background and material facts of the case may be summarized as follows.

6. Appellant was selected in October 2012 for the post of Procurement Officer PP188 with a deployment clause in support of the NATO International Security Assistance Force (ISAF) mission.

7. Prior to this selection, appellant was offered a contract of "employment for international staff" by the European Union from 16 October 2012 to 30 June 2013. According to Article 11.3 of this contract, appellant's gross salary was €5.500 payable monthly in arrears. Appellant received also significant daily allowances.

8. In March 2013 and on the basis of the appellant's selection by respondent for the above-mentioned post of Procurement Officer, the NSPA offered him a definitive duration contract for three years, taking effect from 2 April 2013, at grade A-2.

9. By letter dated 5 July 2013, NSPA informed appellant that the ISAF mission, as well as the support provided by NSPA to this mission, would end on 31 December

2014. In the absence of any precise information concerning the role assigned to the NSPA team after the end of this mission, respondent indicated to appellant that his post would be suppressed no later than 31 December 2014. In this correspondence, it is underlined that the letter dated 5 July 2013 is purported to keep appellant informed and does not constitute a formal notification of the suppression of his post. In the same letter, respondent indicated that in any case appellant would receive notification about the suppression of his post. This letter also indicated that *"there is standard Agency process which will be followed to support"* appellant *"taking care to understand what (appellant) wants in terms of personal situation and career"* and *"doing everything to find an alternative post in NSPA, or elsewhere in NATO"*.

10. Moreover, in the letter dated 5 July 2013, respondent indicated to appellant that in case he did receive formal notification of suppression of his post, he would be provided with more information at a personal interview. As a last resort, if NSPA was unable to reassign appellant to another post, appellant might be entitled to an indemnity for loss of job, in accordance with the relevant provisions of the NCPR.

11. By letter dated 5 May 2014, appellant received the formal notification of the decision suppressing his post and consequently terminating his contract. In this letter respondent recalled that in case the NSPA was unable to find another suitable position for appellant, the latter would be entitled to an indemnity for loss of job provided that the conditions laid down in the NCPR were fulfilled. This is the contested decision.

12. In another letter the same day, 5 May 2014, respondent told appellant to contact the Human Resources division to set up a career interview and to post his *curriculum vitae* on the NATO Clearing House for the attention of other NATO bodies. In addition, this letter indicated that appellant had priority for all posts of his grade in all NSPA locations and that the Selection Committee would try to match his qualifications. In case it proved impossible to offer him further employment, contract termination arrangements would be initiated and the potential for the loss of job indemnity would be clarified.

13. By letter dated 4 June 2014, appellant lodged a complaint on the basis of Article 61.3 of NCPR and Article 4 of Annex IX to the NCPR. Respondent rejected this complaint by a decision dated 3 July 2014.

14. On 1 September 2014 appellant lodged the present appeal.

15. On 4 December 2014, respondent informed appellant about the termination of his contract on 31 December 2014 at 24:00 hrs.

16. By letter sent on 20 February 2015, appellant submitted to the Tribunal documentation relative to the vacancies available within NATO and NSPA.

C. Summary of parties' principal contentions, legal arguments, and relief sought

(i) Appellant's contentions

17. Appellant requests, on the one hand, the cancellation of the contested decision and in that respect has developed three pleas.

18. Firstly, appellant argues that respondent breached its obligations under article 57.2 of the NCPR, since it did not make him an actual job offer or find a suitable position for him.

19. In particular, appellant stresses that there is no evidence that respondent took the appropriate initiatives and actions to consider appellant for any vacant post of his grade corresponding to his profile and his experience in the NSPA until 31 December 2014 before deciding to terminate his contract. This obligation derives also from the jurisprudence of the European Courts which emphasizes that the termination of a contract in case of restructuring of the administrative services is regarded only as an *ultima ratio*.

20. Concerning the list dated October 2014 established by the respondent's services, according to which the appellant's file was considered for different posts by a Selection Committee from May to September 2014, appellant contests formally the content of this list, stressing several inconsistencies, and argues that he was never invited by this Committee for an interview in order to express his opinion. In addition, in this list different posts directly concerning appellant are omitted. Therefore, on the basis of rule 9.2(h) of the rules of procedure appellant requests that the Tribunal order respondent to produce material evidence which would corroborate the assessment of the appellant's unsuitability for the positions mentioned in this list.

21. Appellant stresses that, even if a Selection Committee decided who should receive new contract offers after the suppression of the ISAF mission, there was no transparent procedure or objective criteria concerning the selection of the candidates. Appellant was never invited to participate in this procedure and was not informed about the final selection. Consequently, appellant was in fact discriminated against vis-à-vis the other agents.

22. In addition, appellant submits that respondent did not publish a list of vacant posts outside NATO and did not take his profile into account for posts of lower grades. Appellant recalled that after the creation of nine new senior positions in the framework of RSM, he is the only A-2 procurement officer remaining without a post. In that respect, appellant believes that a more balanced combination of the existing A-3 and A-2 positions could allow him to be offered a new contract. Furthermore, appellant applied for grade A-3 and A-4 posts and his applications were endorsed by his superior, an element which clearly indicates that he was performing his duties satisfactorily at grade A-2.

23. Under the above-mentioned perspective, appellant considers that respondent breached his obligation to entitle appellant for a priority right to be offered a new position under article 57.2 of NCPR after the suppression of his post.

24. Secondly, appellant considers that the contested decision was adopted in violation of the fundamental right to consultation and negotiation. Indeed, this decision was not preceded by any information or consultation of the Staff Committee. This point is essential because the suppression of the appellant's position PP 188 was part of a wide-ranging process which would lead to the suppression of at least 120 posts in the NSPA; consequently, the consultation of the Staff Committee, before the adoption of the contested decision, was mandatory given the fact that the subject matter of the case had an obvious collective interest. The consideration is also confirmed by Articles 89.1 and 90 of NCPR. In particular, according to Article 89.1 of NCPR, the Staff Committee shall provide a channel for the expression of opinion by the staff and to this end the head of the NATO body concerned shall establish appropriate working procedures. Therefore, the challenged decision must be cancelled for lack of this mandatory consultation of the Staff Committee.

25. Thirdly, appellant argues that the challenged decision breached the principle of good administration, of duty of care and of good faith in relation to his right to proper information. When appellant signed his contract, respondent did not inform him about the risk that the positions relating to the ISAF mission would possibly be suppressed and offered appellant a three-year contract. The suppression of the ISAF mission was however predictable and this results also from the fact that three months after appellant took up his duties, he was informed of the suppression of his position.

26. In that respect, appellant stresses that the three-year contract was a fundamental element on the basis of which he decided to resign from his position within the EU and to join the NSPA. Knowing full well that this element constituted a substantial rationale for appellant to join the NSPA, with the adoption of the challenged decision, respondent breached the duty of care and the principle of good administration and violated the principle of the legitimate expectations of the appellant to continue working within the NSPA.

27. On the other hand, appellant requests compensation for the material and non-material damage suffered as a result of the contested decision.

28. Firstly, appellant considers that the contested decision caused him material harm because he was not reassigned to an equivalent post; the amount of compensation sought is €64.676, *i.e*. the equivalent of ten months' gross salary. Secondly, appellant considers that the contested decision deprived him of a chance to be reappointed with the NSPA and to carry on his employment relationship, causing him moral harm evaluated at €50.000.

29. On the basis of the above, in his appeal to the Tribunal, appellant seeks:
- annulment of the contested decision dated 5 May 2014;
- annulment of the 3 July 2014 decision rejecting the appellant's complaint against the contested decision;

- compensation of the appellant's material harm, evaluated *ex aequo et bono* at €64.676;
- compensation of the appellant's moral harm, evaluated *ex aequo et bono* at €50.000;
- reimbursement of all the legal costs incurred, travel and subsistence costs and fees of the retained legal counsels.

(ii) Respondent's contentions

30. Concerning, on the one hand, the appellant's request for cancellation of the contested decision, respondent stressed, firstly, that this decision did not infringe Article 57.2 of NCPR.

31. Respondent argues that it took all the necessary initiatives in accordance with the requirements provided for by Article 57.2 of NCPR. In particular, respondent informed appellant in advance that his position would be suppressed and stressed that this article confers on the concerned person a priority examination for a vacant post of the same grade, not a right to be reassigned to a position. Appellant was considered for any vacant post corresponding to his qualifications and his grade but he was not selected for any post by the Committee established for this purpose, as shown by the list dated October 2014.

32. In relation to the application for a post of lower or higher grade, respondent stressed that this option is not covered by the scope of Article 57.2 of NCPR. In that respect, appellant has to follow the ordinary selection procedure without the possibility of benefiting from the priority consideration provided for by Article 57.2 of NCPR.

33. Secondly, respondent contests that a fundamental right to consultation and negotiation is recognized by Articles 89 and 90 of NCPR. In addition, such a fundamental right or principle is not recognized as a general principle of public international law that obliges respondent to consider its decision under the scope of this right or principle.

34. Thirdly, respondent strongly objects that the contested decision infringed the fundamental principles of good administration and the duty of care and breached also the legitimate expectations of appellant to be reappointed with the NSPA. Indeed, in addition to the fact that it was common knowledge, since the Chicago Summit in May 2012, that the ISAF mission would be ended, respondent informed appellant 18 months before the end of his contract about the suppression of his position, allowing him to envisage alternative plans. Furthermore, although Article 57.2 of NCPR confers on appellant priority consideration for a vacant post, respondent took initiatives to have appellant's file considered by the designated Selection Committee.

35. In relation to the violation of the principle of legitimate expectations, respondent recalled that with the initiative taken to propose to appellant a new post, respondent did not create a legitimate expectation that appellant would be in any case reappointed by the NSPA. On the contrary, as it results from the letter dated 5 July 2013 and the contested decision dated 5 May 2014, respondent emphasized that all the necessary

initiatives and actions would be taken to propose a new post but not to reappoint him. However, it is clearly indicated in the same letter and decision that in case the Committee did not select appellant, the latter could be entitled to an indemnity for loss of job in accordance with the relevant provisions of the NCPR.

36. Concerning, on the other hand, appellant's claims for compensation, respondent submits that appellant did not suffer any moral or material damages as a result of the adoption of the contested decision.

37. Respondent seeks from the Tribunal:
- to declare all appellant's requests to be without merit;
- to dismiss appellant's appeal.

D. Considerations

(i) On the respondent's objection regarding the submission before the Tribunal of additional documentation after the end of the written procedure

38. Appellant submitted on 20 February 2015 to the Tribunal documents relating to the vacancies available within NATO and NSPA. During the hearing respondent claimed that appellant's action was inadmissible.

39. The Tribunal recalls that documents and other items relating to an ongoing case that are presented after the deadlines established by the NCPR and the Tribunal's Rules of Procedure shall be included in the file for the case in question and taken into consideration only if they are sent to the party concerned within a reasonable period of time (see AT judgment in Case No. 2013/1001, paragraph 48).

40. This is clearly not the case in the present dispute. The documents in question were submitted to the Tribunal and, as declared in the case hearing, sent to respondent only three days before this hearing. As no sufficient explanation was given to justify this very late presentation of the documents in question, the respondent's objection must be upheld.

41. It follows that the documents sent to the Tribunal and respondent on 20 February 2015 shall not be included in the file for the present case.

(ii) On the submissions on cancellation

42. Appellant requests annulment, firstly, of the decision dated 5 May 2014 informing appellant that his contract would be terminated on 31 December 2014 and, secondly, of the decision of 3 July 2014 rejecting appellant's complaint against this decision.

43. To start with, in the decision dated 3 July 2014 rejecting appellant's complaint, the respondent made no substitution of the reasons given in the above-mentioned decision of 5 May 2014 (contested decision). Consequently the submissions on

cancellation directed against the decision of 3 July 2014 are the same as those directed against the decision dated 5 May sent to appellant.

44. In the light of the foregoing, it should be noted that appellant invokes three pleas in support of its submission on cancellation of the contested decision: first, violation of Article 57.2 of NCPR; second, violation of the fundamental right to consultation and negotiation; third, violation of fundamental principles such as the principle of good administration and of the duty of care, the principle of legitimate expectations in relation to the right to proper information and the principle of good faith. Appellant does therefore not challenge the regularity of the contested decision.

On the first plea concerning the violation of Article 57.2 of NCPR

45. According to Article 57.2 of NCPR:

> staff members who become redundant shall be given the opportunity to apply for the vacant posts throughout the Organization and the candidature of such staff members for a post of their own grade shall be considered before other recruitment is put in hand.

46. For the application of this provision three conditions must be fulfilled: first, a staff member must become redundant; second, such a staff member has a priority to apply for vacant posts before any recruitment; and third, the applicant can apply only for posts of the same grade.

47. In the present case, appellant, who became redundant following the suppression of his post, argues that the two last conditions were not fulfilled.

48. With regard to the second condition noted above, appellant argues that in practice respondent did not ensure that appellant's candidature for a new post was in fact prioritized. In his opinion respondent should have observed the entire procedural requirements provided for by Article 57.2 of NCPR and have invited him at least for interviews by the Selection Committee. He adds that in fact, despite the intention to establish a transparent process for the application of Article 57.2 of NCPR, respondent, with an internal directive sent to all the redundant agents (letter dated 5 July 2013), put in place a framework that excluded only appellant from the benefits of Article 57.2 of the NCPR.

49. In this regard, the Tribunal observes that an internal directive is a decision by a NATO body which is communicated to all staff and seeks to ensure that the officials and members of the staff concerned are treated equally, in an area in which that body has broad discretion conferred by the NCPR. This directive must be regarded as an indicative rule of conduct which the administration imposes upon itself and from which it may not depart without stating the reasons which have led it to do so, since otherwise the principle of equal treatment would be infringed.

50. In the present case, the letter dated 5 July 2013 constitutes an internal directive for the purposes of the above-mentioned paragraph.

51. In this letter, as explained with details by a second letter dated 5 May 2014, respondent invited appellant to contact the competent services for setting up a career interview and to send his *curriculum vitae* to the competent NATO services. The letter also indicates that appellant will have priority for all posts of his grade in all NSPA locations and that the Selection Committee will try to match his qualifications. Respondent did never indicate that a redundant agent would receive in any case an offer of a new contract.

52. With the adoption of the contested decision, *i.e.* the suppression of the post, respondent was indeed as from 5 May 2014 bound to apply Article 57.2 as well as to respect the additional obligation that it imposed on itself to consider the applicant for all vacant posts. Appellant has not only not convincingly established that respondent has not respected these obligations, but, and more importantly, he has not established how the alleged non-observance of these obligations, which occurred after the adoption of the contested decision and even after the lodging of the present appeal, could have affected the content of the contested decision or could have made that decision illegal, requiring its annulment. The alleged non-observance, for example of the selection procedure by the Selection Committee, might perhaps lead to a different claim or claims, but cannot entail the annulment of the contested decision and cannot be considered in the present appeal.

53. Finally, appellant invites the Tribunal to recognize in general the right of a redundant agent to be given a new offer after the suppression of his post in the event that the procedural aspects during the examination of the priority rule provided in Article 57.2 of NCPR were not respected.

54. This argumentation must be rejected. According to Article 57.2 of NCPR, respondent only has the obligation to give priority consideration to appellant's applications, not to accept them. Indeed, this provision does not give those concerned any preferential treatment in terms of access to vacant posts of their grade but confers only a procedural advantage by requiring respondent to consider their candidature for such post before other recruitments (see NATO Appeals Board Decisions nos. 306 and 882).

55. In the present case, this procedural advantage was respected and therefore the second condition required by Article 57.2 of NCPR is fulfilled.

56. Concerning the third condition, appellant considers that a combination of A-2 and A-3 positions could allow respondent to offer him a new post.

57. The Tribunal considers at the outset that this argument must be rejected. Indeed, it results from the letter of Article 57.2 of NCPR that the priority rule provided for in this provision concerns an agent who applies for a new post of the same grade as the suppressed post.

58. It is for appellant to apply for any position of a different grade, to which Article 57.2 of NCPR is not applicable, however. It is precisely in this context that appellant applied for other posts of different grades.

59. The third condition required by Article 57.2 of NCPR also being fulfilled, it follows that the first plea alleging breach by the contested decision of the requirements provided for by Article 57.2 of NCPR must be rejected.

On the second plea relating to the violation of the fundamental right to consultation and negotiation

60. With this plea appellant argues that the contested decision must be annulled because this decision was adopted without prior consultation of the staff representatives, in violation of the fundamental right to consultation and negotiation. This also is confirmed by the requirements provided for in Article 89.1 of NCPR. Appellant is not an elected staff representative, so this claim involves rights asserted as a staff member, not as a staff representative.

61. Concerning the application of the fundamental right of consultation of the staff representatives, as deriving from international conventions, the Tribunal recalls that – as already stated in its case law – such principle is not directly binding on NATO bodies (see AT judgment in Case No. 2014/1017, paragraph 65). As a consequence, appellant's contentions regarding failure of a legal duty to engage in collective bargaining cannot be accepted and this argument must be rejected.

62. Almost all international organizations have established mechanisms for addressing management-staff relations; in NATO's case, these are reflected in Chapter XVIII of the NCPR. Insofar as appellant supports the view that the right of prior consultation and negotiation of the staff representatives derives from Article 89.1 of NCPR, the Tribunal considers that this Article does not *expressis verbis* confer an obligation on the NATO bodies to consult the staff representatives' committee prior to the adoption of a decision such as the challenged decision. Indeed, this provision provides only the establishment of appropriate "working procedures" and does not refer to any obligation for the NATO body concerned to obtain the opinion of the staff representatives before the adoption of such decision. Moreover, the Tribunal was informed during the oral hearing that regular meetings did take place between the Head of Human Resources and staff representatives to discuss the matter.

63. In those circumstances, the plea relating to violation of the fundamental right to consultation and negotiation must be rejected.

On the violation of fundamental principles such as the principle of good administration and of the duty of care and the principle of legitimate expectations

64. Concerning, firstly, the violation of the principle of good administration and of the duty of care, appellant argues that respondent did not inform him consistently and did not provide all the relevant information about the possibility that his post would be suppressed before offering him the fixed term contract.

65. It should be preliminarily noted that, with this plea, appellant developed in his reply arguments alleging that respondent did not take adequate steps to propose a suitable position to appellant after the suppression of his post, in relation to the regime

of Article 57.2 of NCPR. All these arguments do not affect the Tribunal's conclusion to reject the plea of the violation of Article 57.2 of NCPR.

66. Nevertheless, appellant considers that the principle of good administration and the duty of care in relation to his proper right to be informed about the respondent's intention and action to offer him a new contract are violated as such with the adoption of the contested decision.

67. The Tribunal recalls that the principle of good administration and the duty of care mean, in particular, that the administration adopting a decision must take into account all the factors which may influence such decision, including the interest of the service and also the interest of the staff member concerned.

68. The arguments set out by appellant may not affect the consideration mentioned above. Indeed, irrespective of the political decision to terminate the ISAF mission taken at the Chicago Summit in 2012, respondent took into account both the interest of the services and that of the staff members and maintained its planning while waiting for a definitive decision. In that respect, in its letter dated 5 July 2013 respondent also informed all the persons concerned about the termination of the mission and the possibility that their posts would be suppressed. In this letter, sent to the concerned staff members 18 months before the termination of the mission, it is explained in detail that NSPA did not decide to terminate definitively the contracts of the concerned agents and undertook to consider all the appropriate measures in order to propose new contracts to the concerned staff.

69. Concerning, secondly, the violation of the principle of legitimate expectations, appellant stresses that the three-year contract offered to him was a substantial rationale to join the NSPA and to resign from his post with the EU. Therefore with the adoption of the contested decision, respondent violates the principle of the legitimate expectations of the appellant to continue his contract with the NSPA.

70. The Tribunal recalls that the principle of the protection of legitimate expectations applies to any individual in whom the administration has instilled justified and clear hopes by giving specific assurances in the form of precise, unconditional and consistent information from authoritative and reliable sources.

71. The arguments put forward by appellant could not lead to the conclusion that the above-mentioned principle was violated. Indeed, with the offer of a three-year contract, respondent did not create a legitimate expectation for appellant that, first, this contract would be renewed or, for any other reason, that this contract would not be terminated.

72. The argument that appellant chose the offer of the NSPA on the basis of the three-year engagement, and for this reason resigned from his post with the European Union, must also be rejected. Indeed, this consideration, regardless of its truthfulness, cannot as such create a legitimate expectation for appellant that his contract would be renewed by the NSPA.

73. It follows from the foregoing that the third plea developed by appellant must also be dismissed, as must the submissions on cancellation; as a result there is no need to rule on the appellant's request to order respondent to produce material evidence.

(iii) On the submissions seeking compensation

74. Appellant claims that he has suffered material and non-material damage deriving from the adoption of the contested decision.

75. In accordance with its settled case law, the Tribunal points out that submissions on compensation must be dismissed when they are closely linked to submissions on cancellation which have themselves been dismissed as groundless (see AT judgment in Case No. 903, paragraph 98).

76. In the present case, a study of all the arguments put forward by appellant to support his submission on cancellation of the contested decision has revealed no illegal action by respondent and thus no misconduct for which respondent could be held liable. Hence, the submission of appellant's compensation for material and non-material damage that he has suffered owing to irregularities in relation to the contested decision must also be dismissed as groundless.

77. It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

E. Costs

78. Article 6.8.2 of Annex IX to the NCPR states as follows:

> in cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order NATO body to reimburse, with reasonable limits, justified expenses incurred by the appellant.

79. As the appeal has been dismissed in respect of all the submissions therein, appellant cannot be granted any sums under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal of Mr PK is dismissed.

Done in Brussels, on 23 March 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 April 2015 AT-J(2015)0002

Judgment

Case No. 2014/1029

DA,
Appellant

v.

NATO Support Agency,
Respondent

Brussels, 23 March 2015

Original: English

Keywords: redundancy; admissibility; lack of material damage; collective bargaining.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 23 February 2015.

A. Proceedings

1. The NATO Administrative Tribunal was seized of an appeal, dated 1 September 2014, and registered on 2 September 2014, by Mr DA, against the NATO Support Agency (NSPA). The appeal seeks annulment of NSPA's General Manager's letter of 5 May 2014 notifying appellant of the termination of his contract on 31 December 2014, and of the General Manager's letter of 3 July 2014 rejecting his complaint.

2. The answer of the respondent, dated 27 October 2014, was registered on 10 November 2014. The reply of the appellant, dated 8 December 2014, was registered on 19 December 2014. The respondent's rejoinder, dated 19 January 2015, was registered on 21 January 2015.

3. The appeal is one of several stemming from the respondent's suppression of a substantial number of posts at the end of 2014. Many of these post suppressions stem from the end of NATO's ISAF mission in Afghanistan.

4. The Tribunal's Panel held an oral hearing on 23 February 2015 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, all in the presence of Mrs Laura Maglia, Registrar *a.i*.

5. The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV of the NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

6. The material facts of the case may be summarized as follows.

7. The appellant is a former military officer who held an A-3 position as Senior Technical Officer (maintenance). He held three three-year duration contracts beginning in 2007; between 2007 and 2014, he was deployed for three years in Afghanistan. His final contract indicates that he worked on airport operations at Kandahar Airfield. The appellant stated that he chose to join the respondent *in lieu* of being promoted to a high rank in his national military service.

8. Like many other similarly situated NSPA staff members, the appellant was notified on 5 July 2013 that his post would likely be suppressed because of the end of the ISAF Mission in Afghanistan. On 5 May 2014, he received a letter from respondent's General Manager notifying him that his post would be suppressed and his contract terminated as of 31 December 2014. The General Manager's letter stated that

he would be "*automatically considered for any vacant posts of the same grade, in all NSPA locations, corresponding to your qualifications and skills*."

9. After the appeal was filed, on 14 November 2014, the appellant signed a one-year definite duration contract for an A-3 post with the respondent through 31 December 2015. However, appellant maintains that he has not been "re-affected" as required by law, and so maintains the appeal.

C. Summary of the parties' principal contentions, legal arguments, and relief sought

(i) The appellant's contentions

10. First, the appellant contends that his three definite duration contracts were improperly classified, and that he should have received two initial contracts under NCPR Article 5.1, followed by an indefinite duration contract under NCPR Article 5.5. Appellant therefore contends that he is entitled to the rights to re-employment/loss of job indemnity of a staff member with an indefinite contract. The appellant further disputes the terms of his current contract with the respondent, contending that he should have received an indefinite contract and that he received no guarantees regarding his entitlements at the conclusion of his current contract.

11. Second, appellant maintains that NSPA failed to "re-affect" him in violation of its duty of care under NCPR Article 57.2.[1] Appellant invoked in this regard certain jurisprudence of the International Labour Organization Administrative Tribunal, which was said to reflect general principles of international administrative law imposing substantial obligations on employing agencies to find positions for staff members facing redundancy, including consideration of positions at lower grades.

12. The appellant lists several posts (including some at a higher A4 grade) for which he unsuccessfully sought transfers, but "*so far his requests have been either rejected, for no reason or because the post in question was of a higher grade than his, or remain unanswered*". The appeal accordingly contends that "*the Agency has not respected its duties toward the Appellant and his priority right*".

13. Third, appellant maintains that the 5 May letter announcing suppression of his post was not preceded by any information or consultation with the NSPA Staff Committee or the Confederation, contrary to NCPR Articles 89.1 and 90. The appeal contends in this regard that, in accordance with fundamental norms of international administrative law, the respondent's obligation to "maintain suitable contacts" with the staff under Article 89.1 included a duty to bargain collectively regarding redundancies.

14. Fourth, appellant contends that the respondent failed to meet its duty of good administration and care, including by failing to provide appropriate information. He

[1] Article 57.2 of the NCPR provides: "Staff members who become redundant shall be given the opportunity to apply for the vacant posts throughout the Organization and the candidature of such staff members for a post of their own grade shall be considered before other recruitment is put in hand."

contends in this regard that suppression of his post will disrupt his daughter's schooling and otherwise cause him and his family great difficulty and distress.

15. The appellant initially requested:
- annulment of the General Manager's 5 May 2014 letter informing him that his contract would be terminated on 31 December 2014;
- annulment of a 3 July 2014 decision rejecting appellant's complaint regarding the 5 May letter;
- substantial monetary compensation for material harm calculated *ex aequo et bono* in the amounts of either €1.101.361,69 or €89.540,16;
- €50.000 in compensation for moral harm; and
- reimbursement of legal fees and legal, travel and subsistence costs.

16. By letter dated 29 January 2015, appellant's counsel withdrew his claim for compensation for material and moral harm. According to that letter, appellant's "*aim is to stabilize his position in NSPA by the granting of a permanent job and not money*."

(ii) The respondent's contentions

17. The respondent did not initially contest admissibility of the appeal. However, following appellant's re-employment with the agency in an A-3 position, the respondent contends that the claim is inadmissible, in that he is now employed and "*has no reason to complain*." The respondent invited the Tribunal to consider applying Article 6.8.3 of Annex IX, which authorizes the Tribunal to order an appellant to pay reasonable compensation to a respondent agency in cases of, inter alia, abuse of the appeals procedure.

18. The respondent contends that appellant's first claim is without substance, as the General Manager's 3 July 2014 letter denying appellant's administrative complaint states that if the agency cannot place him in another post, "*your contract will be considered as an indefinite duration contract*". The respondent's rejoinder and its representatives at the hearing confirmed that this would be the case.

19. The respondent denied appellant's second claim, that it did not satisfy its duty to place him in a suitable new position. It noted that appellant had in fact signed a new one-year contract prior to the end of his previous contract and is currently serving in an A3 position. The respondent described the procedure it had followed to give priority consideration to persons in appellant's situation, submitting a long list of positions for which appellant was considered. The respondent's representative stated at the hearing that of 122 persons rendered redundant on account of termination of the ISAF mission, only fourteen persons had been separated.

20. Respondent also disputed appellant's third claim, that it violated NCPR Articles 89.1 and 90 by failing to consult with the NSPA Staff Commission or the Confederation prior to the 5 May 2014 letter announcing suppression of his post and the posts of other similarly situated staff members. In respondent's view, the determination of staffing levels to meet agency requirements and funding is a fundamental responsibility of agency management, and is not subject to negotiation or consultation with staff organizations. However, at the hearing, respondent's representatives represented that

there had been regular briefings of staff regarding the consequences of termination of the ISAF mission, and that affected staff were encouraged to seek information and guidance from respondent's human resources personnel.

21. Finally, the respondent denied appellant's contention that it had acted with a lack of concern for the appellant and had failed to provide him with sufficient information. The respondent indicated that its funding and staffing levels reflected shifting requirements and priorities set by its national "customers". Respondent stated that, against this uncertain background, it had sought to provide affected staff with as much information as possible regarding their situation. Respondent noted in this regard the warning letter sent to the appellant and other similarly situated staff in July 2013, roughly eighteen months before termination of their contracts.

D. Considerations and conclusions

(i) Considerations on admissibility

22. As discussed above, the appellant's situation and his claim have both evolved in the six months since the claim was filed on 1 September 2014. In November 2014, appellant accepted a new contract and is currently employed by the respondent in an A3 position. In January 2015, appellant withdrew his claims for monetary compensation, so there is no claim of material damage. Accordingly, it is not apparent that any material of moral injury remains to be remedied.

23. In his reply and by his counsel's arguments at the hearing, appellant contended that his new one-year contract was improper because he should have received an indefinite duration contract, and that he was insufficiently informed regarding the situation that will exist at the expiry of his current contract. These contentions were not part of the appellant's initial appeal. To the extent the appellant now objects to the terms of his current contract, these objections pose a new claim that is not admissible in the current proceeding.

24. At the hearing, appellant's counsel stated that he had appealed only to maintain his relationship with NATO. That is not sufficient basis to maintain a claim in the absence of any showing of material or moral injury.

25. The claim is inadmissible and is dismissed.

E. Costs

26. The respondent invited the Tribunal to consider applying Article 6.8.3 of Annex IX, which authorizes the Tribunal to order an appellant to pay reasonable compensation cases of intentional abuse of the appeals process. The Tribunal does not believe that the circumstances of this case warrant the exercise of this power. While the appeal has been found inadmissible, the Tribunal does not regard it as having been brought for abusively or for purposes of harassment.

27. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is inadmissible and is dismissed.

Done in Brussels, on 23 March 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 April 2015 AT-J(2015)0003

Judgment

Case No. 2014/1030

YY,

Appellant

v.

NATO Support Agency,

Respondent

Brussels, 25 March 2015

Original: English

Keywords: suppression of post; redundancy; employer's discretionary management power; priority for vacant posts; appeal limited to challenged decision.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 24 February 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal registered on 5 September 2014, by Mr YY, against the NATO Support Agency (NSPA), seeking annulment of the decision informing him that his contract would be terminated.

2. The answer of the respondent, dated 29 October 2014, was registered on 10 November 2014. The reply of the appellant, dated 10 December 2014, was registered on 22 December 2014. The rejoinder of the respondent, dated 20 January 2015, was registered on 21 January 2015.

3. The appeal is one of several stemming from the respondent's suppression of a substantial number of posts at the end of 2014.

4. The Tribunal's Panel held an oral hearing on 24 February 2015 at NATO Headquarters. The Tribunal heard arguments by appellant's counsel and by representatives of the respondent, all in the presence of Mrs Laura Maglia, Registrar *a.i*.

5. The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV of the NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

6. The background and material facts of the case may be summarized as follows.

7. Appellant joined the NSPA on 1 September 2012, with an indefinite duration contract, holding the post of Chief of Branch Operations and Engineering (IT014), at an A-4 level.

8. On 5 May 2014 appellant was informed by the NSPA General Manager that his indefinite duration contract would come to an end on 31 December 2014, due to the suppression of his post in accordance with the Agency's 2015 Organization and Personnel Establishment (O&PE) proposal subject to the Agency Supervisory Body (ASB) approval by the end of December 2014. In this letter the following statement was included: "*Please be assured however that you will, from now on until 31 December 2014, automatically be considered for any vacant posts of the same grade, in all NSPA locations, corresponding to your qualifications and skills. Should we be*

unable to find you another suitable position, you may be entitled to an indemnity for loss of job if conditions laid down in Annex V of the NATO Civilian Personnel Regulations are fulfilled".

9. Appellant lodged a complaint with the NSPA General Manager on 4 June 2014, which was rejected by a decision dated 3 July 2014. In this decision the General Manager reiterated that appellant will continue to be considered, until 31 December 2104, for any vacant posts of the same grade, in all NSPA locations, corresponding to his qualifications and skills.

10. On 9 December appellant received the termination of contract letter dated 4 December 2014.

11. Appellant was on sick leave from 5 to 12 December 2014.

C. Summary of parties' principal contentions, legal arguments, and relief sought

(i) The appellant's contentions

12. First, the appellant contends that with the HONB decision to reject his complaint, the respondent was bound by the obligation to look for a suitable position in order to reappoint him before the termination of his contract. Appellant alleges that the respondent did not make any offer and didn't take any concrete steps in this regard. Appellant supports these allegations by bringing some examples of posts that would have met his profile and instead were assigned to non-redundant staff members. Appellant consider this as being a violation of Article 57.2 of the NCPR insofar as he was not re-assigned and was not given priority for the available vacancies throughout the Organization.

13. Second, the appellant claims a manifest error of assessment in the NSPA decision to suppress his post and argues that the respondent is in breach of the obligation to state reasons by not addressing the arguments put forward in his complaint concerning the existence and identification of other posts and the continued need for appellant's duties. Appellant brings evidence by analysing internal policy documents (in particular the 2015 Organization and Personnel Establishment Proposal), setting out the future work requirements of the NSPA and the requests for contractors to be recruited in 2015. Appellant submits that these demonstrate that his workload is needed and in fact also increasing. Appellant considers that there is no work-related reason for the suppression of his post; that there is no ISAF related reason; that the NATO Agency reform and the reorganization of services dictates that it is in the interest of Nations to retain the post to lead the change of the service implementation until at least 2017/2018, when the services responsibility may be passed to the NATO Communication and Information Agency (NCIA); and that there is no reason of urgency to terminate the post.

14. Third, the appellant also states that, considering that the suppression of his post is part of a wider process leading to the suppression of a total of 120 posts within the NSPA, this process is a matter of collective interest and that the respondent is in violation of the fundamental right to consultation and negotiation stemming from Article 89.1 of the NCPR.

15. Fourth, the appellant further adds that the respondent is in violation of the duty of good administration and care towards its agents, and in particular its duty of information. Appellant contends that he has never obtained clear and precise information; this has had adverse financial consequences, notably the fees for one of his sons at a university in the United States. Appellant also notes that as he was on sick leave when he received the termination of contract letter (letter dated 4 December 2014), the period of notice should have been extended for the duration of his sick leave.

16. Appellant therefore requests:
- the annulment of the NSPA General Manager's decision informing him that his contract would be terminated (5 May 2015 letter) and the confirmation of such decision (4 December 2014 letter);
- the annulment of the decision rejecting his complaint (3 July 2014);
- compensation for material harm evaluated *ex aequo et bono* at €945.824 (to which should be added the employer contributions to the pension scheme), plus European Central Bank interest rate + 2 points;
- compensation for moral harm evaluated *ex aequo et bono* at €50.000;
- reimbursement of half of the costs engaged for the studies of his son, evaluated at €85.000 (plus European Central Bank interest rate + 2 points); and
- reimbursement of the costs of retaining counsel, travel and subsistence.

(ii) The respondent's contentions

17. Respondent does not contest that the appeal was duly lodged within the legal time limit.

18. Respondent submits that appellant has the right to be given priority consideration for vacant NSPA posts of the same grade and corresponding to his qualifications and skills, but he has no right *per se* to be re-assigned.

19. Respondent argues that Article 57.2 which deals with staff members who become redundant clearly refers to posts of the same grade; does not create any positive obligation to reappoint a redundant staff member a fortiori when there is no vacant post of the same grade corresponding to his/her qualifications and skills; does not create an entitlement for redundant staff to simply identify a post of the same grade and demand to be transferred on it; does not dispense with a redundant staff member's obligation to participate in a selection process; and does not apply to posts of a lower/higher grade.

20. Respondent points out that appellant has been considered and will continue to be considered until the end of his contract for any suitable posts. Respondent observes that appellant was duly informed of the procedures to be followed, including information about posting his *curriculum vitae* on a NATO Clearing House mechanism for redundant staff members, by having contacts with the HR department and a career interview with the Chief of the HR Division. Also respondent notes that roughly 90% of NSPA redundant staff members were successfully internally reassigned in 2014, despite the end of the ISAF mission, and that it has no authority over other NATO bodies' recruitment processes.

21. Considering the alleged error in appreciation in deleting appellant's post, respondent considers that appellant misunderstood the reasons for the suppression of his post. Respondent explains that the suppression resulted from the end of the ISAF mission in Afghanistan, necessary organizational realignment (NSPA is a customer funded organization), and NATO's reform mandated savings initiatives and workload changes, and is not *per se* linked to the future transfer of common IT services to the NCIA, as appellant contends. Respondent also notes that appellant does not contest that his post is proposed for suppression, and adds that under Article 9 of the NCPR, the HONB has the right to terminate a contract of employment when the post which the staff member holds is suppressed.

22. Respondent denies a fundamental right to consultation and negotiation in connection with suppression of the post, as this principle is not recognised as a general principle of law in public international law and as the NATO AT has already ruled in its judgment in Case No. 2014/1017. Further the relevant Articles of the NCPR quoted by appellant do not foresee this right within a NATO body, nor to the respondent's knowledge does such right exist in any of the other Coordinated Organizations.

23. Concerning the timing by which appellant was informed of the suppression, respondent affirms that it did everything that was possible to inform appellant at the earliest possible date in order to allow him to make alternative plans and/or make personal decisions regarding his specific family situation. Respondent, while acknowledging that some staff members whose posts were intrinsically dependent on the existence of the ISAF mission were warned earlier (5 July 2013), all NSPA staff members whose posts were instead proposed for suppression in the 2015 Organization and Personnel Establishment Proposal, were informed of the redundancy status in May 2014. Accordingly, respondent argues that appellant was not treated differently. Respondent disputes the application of Article 10.4 (notice of period for staff members on sick leave) as appellant was not sick on 5 May 2014 when he was notified of the suppression of his post.

24. Respondent rejects any moral or material damages requested by appellant denying the principle, validity and amounts of his damages claims.

25. Respondent requests:
- that the appeal be considered without merits and dismissed.

D. Considerations and conclusions

26. The appeal, being lodged within the time limits and its admissibility not being in dispute, is admissible.

27. Although the first plea of the appellant regards the right of priority to vacancies, the Tribunal considers that the logical sequence of arguments requires first an analysis of the question of the suppression of the appellant's post (*i.e.* the second, third and fourth pleas).

28. Appellant claims that the organization did not justify the suppression of his post and, furthermore, considers that the functions he has been performing are expected to be carried out at least until 2017. Appellant seeks to convince the Tribunal of a manifest error of appreciation committed by the respondent. The reasons given by the appeal involve the appellant's detailed views on organizational matters and regarding the manner in which the respondent should organize and staff its activities in the near future.

29. Under Article 9(iii) of the NCPR, the HONB "*has the right to terminate contracts for due and valid reasons, … if the post which the staff member holds is suppressed*". The Tribunal points out that the decision for deletion of a post remains entirely inside the discretionary powers of the organization. While it is true that such a decision may be submitted to the control of legality, it is subject to limited review. It can only be considered unlawful if it was taken without authority, if it was based on an error of law, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or procedure; or if there was an abuse of authority, that is to say whenever, in the light of all the circumstances of the case, the HONB acted substantially for purposes other than those he could legally pursue in the exercise of his powers (*cf* AT judgment in Case No. 885, paragraphs 33–36).

30. In its settled case law, the Tribunal recalled that the purpose of substantiation of the HONB'S decisions is both to provide the other party with enough information and to enable eventual judicial oversight (see AT judgment in Case No. 897, paragraph 47 and the case law mentioned there). In the present case, the reasons for the suppression of the appellant's post were widely explained by the HONB and were well known by appellant despite his disagreement with those reasons. The respondent detailed in its decision dated 3 July 2014 the root causes for the suppression of the post, all of them reflected at the 2015 Agency's O&PE: the end of the ISAF mission in Afghanistan, the necessary organizational realignment, the NATO Reform mandated savings initiatives and the workload changes.

31. The Tribunal observes that the reasons for the suppression given by the HONB are based on the need to change the organization, not only after the end of the Afghanistan mission, but also because of the convergence of other circumstances. The suppression of the post is not based on any particularity of the appellant but on service requirements. In contrast to Case No. 2014/1026, no evidence has been presented that appellant's post has been preserved under another denomination. Hence, the Tribunal will not substitute its view for the organization's assessments and decide which

would be the best methods of achieving its objectives, as appellant urges by submitting his own management plan instead of the employer's. The second plea must be rejected.

32. Appellant also argues that the contested decision must be annulled because it was adopted without prior consultation of the staff representatives in violation of the fundamental right to consultation and negotiation, which the appeal contends is confirmed by the requirements of Article 89.1 of NCPR. Appellant is not an elected staff representative, so this claim involves rights asserted as a staff member, not as a staff representative.

33. Concerning the application of a fundamental right of consultation of the staff representatives, as deriving from international conventions, the Tribunal recalls that – as already stated in its case law – these conventions are not directly binding upon NATO bodies (see AT judgment in Case No. 2014/1017, paragraph 65). As a consequence, appellant's contentions regarding a failure of a legal duty to engage in collective bargaining cannot be accepted.

34. Almost all international organizations have established mechanisms for addressing management-staff relations; in NATO's case, these are reflected in Chapter XVIII of the NCPR. The Tribunal considers that Article 89.1 of NCPR does not *expressis verbis* confer an obligation on the NATO bodies to consult the staff representatives' committee prior to the adoption of a decision such as the challenged decision. Indeed, this provision provides only the establishment of appropriate "working procedures" and does not refer to any obligation for the NATO body concerned to obtain the opinion of the staff representatives before the adoption of such decision. Moreover, the Tribunal was during the oral hearing informed that regular meetings did take place between the Head of Human Resources and staff representatives to discuss the matter.

35. Consequently, the plea relating to the violation of the fundamental right to consultation and negotiation must be rejected.

36. Regarding the fourth plea, the Tribunal recalls that the principle of good administration and the duty of care mean, in particular, that the administration adopting a decision must take into account all the factors which may influence such decision, including the interest of the service and also the interest of the staff member concerned. No breach of these obligations can be observed in this case. Appellant was informed of the proposed suppression seven months in advance to the entering into effect of the measure.

37. Considering that appellant's post has disappeared, as announced by the challenged decision, and taking into account the above considerations on the lawfulness of this decision, the Tribunal must determine the extent of the respondent's obligation with redundant staff (first plea).

38. With the adoption of the contested decision, *i.e.* the suppression of the post, respondent was indeed as from 5 May 2014 bound to apply Article 57.2 as well as to

respect the additional obligation that it imposed on itself to consider the applicant for all vacant posts.

39. According to article 57.2 of NCPR:

> staff members who become redundant shall be given the opportunity to apply for the vacant posts through the Organization and the candidature of such staff member for a post of their own grade shall be considered before other recruitment is put in hand.

The Tribunal observes that the rule does not give redundant agents the right to have a new offer. According to Article 57.2 of NCPR, respondent only had the obligation to consider appellant's applications in priority but not to accept them. Indeed, this provision does not give those concerned any preference in relation to access to vacant posts in their grade but confers only a procedural advantage by requiring respondent to consider their candidature for such post before other recruitments (see Appeals Board Decisions No. 141 of 3 December 1981; No. 142 of 3 December 1981; Nos. 161(b)-168 of 1 March 1984; No. 306 of 16 November 1994; and No. 725 of 14 December 2007). Furthermore, the priority must be preceded by the agent's application for the new post. Consequently, no priority may be automatically implemented without a declaration of will from the redundant staff member.

40. Notwithstanding the foregoing, in the present case the HONB put in place a rule of conduct that the organization imposed upon itself, assuring appellant – and all other agents whose posts were suppressed for the same reasons - automatic consideration for any vacant posts of the same grade, in all NSPA locations, until 31 December 2014. As a result, appellant was considered for any vacant post of the same grade until the date the appeal was lodged. However, appellant was not re-assigned and the vacancies of his grade were filled with other redundant agents. Contrary to appellant's contentions, the respondent fully complied with the rule of conduct it imposed upon itself. Appellant has not challenged any decision appointing another staff member to a post for which he had applied or was considered.

41. Whatever the case, the Tribunal must emphasize that the question of the procedure to reassign the appellant raises a number of issues that are not part of the present procedure and of the challenged decision. Appellant disputes a range of decisions that are subsequent to the decision dated 5 May 2014 and 3 July 2014, rejecting the previous complaint. These disputes therefore fall outside the scope of the current appeal, and the Tribunal is unable to judge any further disagreement that may have arisen between the parties, even if they stem from implementation of the challenged decision. Appellant seeks to expand the subject matter of the dispute from the framework of the challenged decision, which the Tribunal cannot allow. Appellant has not only not convincingly established that respondent has not respected its obligations, but, and more importantly, he has not established how the alleged non-observance of these obligations, which occurred after the adoption of the contested decision and even after the lodging of the present appeal, could have affected the content of the contested decision or could have made that decision illegal, requiring its annulment. The Tribunal cannot therefore decide on the accuracy and legality of the

different decisions of the respondent, which have not properly been challenged by appellant.

42. The claim must be rejected.

43. The appeal being dismissed no compensation for material or non-material damage can be awarded.

44. The appeal is dismissed as a whole.

E. Costs

45. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

46. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 25 March 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 April 2015 AT-J(2015)0004

Judgment

Cases Nos. 2014/1026 and 2014/1039

PK,

Appellant

v.

NATO Support Agency (NSPA)

Respondent

Brussels, 16 March 2015

Original: French

Keywords: retroactive rescission of a contract – illegality; termination based on deletion of the post held by the staff member – error of fact in this case given that the deleted post was recreated starting from the same date under another title.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter at the hearing on 23 February 2015.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of two appeals by Mr K. The first, dated 29 August 2014 and registered as no. 2014/1026 the same day, is seeking as primary relief cancellation of the decision to terminate his contract as of 31 December 2014. The second, registered as no. 2014/1039 and dated 27 October 2014, is seeking as primary relief cancellation of the decision to declare his employment contract null and void from the outset.

2. The appellant is currently a former staff member of the NATO Support Agency (hereinafter "NSPA").

3. In respect of the first appeal, the defence, dated 24 October 2014, was registered on 5 November 2014. The reply, dated 25 November 2014, was registered on 1 December 2014. The rejoinder, dated 16 December 2014, was registered on 19 December 2014.

4. In respect of the second appeal, the defence, dated 17 December 2014, was registered on 19 December 2014. The reply, dated 16 January 2015, was registered on 19 January 2015; to it was added a request to hear a witness, dated 6 February and registered on 13 February 2015. The rejoinder, dated 11 February 2015, was registered on 12 February 2015.

5. In a ruling on 25 November 2014, the Tribunal's President decided to consolidate the hearing of the two appeals.

6. The Tribunal's Panel held an oral hearing on 23 February 2015 at NATO Headquarters. The Tribunal heard arguments by the representatives of the appellant and the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

7. The appeals were lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst other things, establishing the Administrative Tribunal. The Tribunal is required to rule in accordance with the new version of the provisions of Annex IX.

B. Factual background

8. The material facts may be summarized as follows.

9. Mr PK joined the NSPA in May 2010 as a finance officer under a three-year

definite duration contract. This contract was renewed by an indefinite duration contract with effect from 25 March 2013. Mr K was deployed to Afghanistan for two months in 2010–11.

10. On 5 July 2013, appellant was informed by respondent that owing to the end of the ISAF mission in Afghanistan, planned for 31 December 2014, it was likely that his post would be deleted by 31 December 2014 at the latest. The NSPA assured appellant that in the event that his post was in fact deleted, he would be so informed at least six months in advance, and support would be offered. Moreover, if his post was deleted, appellant would be entitled to the indemnity for loss of job under the conditions laid out in Annex V of the NATO Civilian Personnel Regulations.

11. On 5 May 2014, appellant was informed by the NSPA that his post, no. FF091, would be deleted on 31 December 2014 and consequently his contract would be terminated as of that date. That same day, a letter from the NSPA Human Resources Division Chief informed him of the support and assistance for finding a new job within NATO that would be offered to him until the end of his contract.

12. Appellant disputes the decision of 5 May 2014 whereby the NSPA General Manager decided to terminate his contract. He entered a petition on 3 June, to which respondent replied on 3 July 2014 with confirmation of the initial decision. Appellant's appeal was registered by the Tribunal on 29 August; this is Appeal No. 2014/1026.

13. There is a second case being brought in parallel to the first one. Appellant happened to be placed on sick leave at his family doctor's request on 10 April 2014. The NSPA wished to check the validity of that leave, and on 15 April requested a medical control in line with Article 45.2 of the NCPR. This control was performed on 16 April by Dr G, who confirmed that appellant could not resume working. Consequently appellant never returned to work at the NSPA.

14. In his report dated 22 April, Dr G writes: "his medical history includes psychiatric treatment during adolescence following a major depressive phase". Responding to this report on 27 May, the NSPA then wrote that appellant had concealed this illness at the time of his recruitment, when he claimed to have no history of psychiatric illness, and asked him to offer proof that he had never received any psychiatric treatment during his adolescence.

15. Appellant denies that he underwent the slightest psychiatric treatment prior to his time spent in Afghanistan, but the NSPA maintained its opposing opinion and next threatened appellant, in a letter dated 1 August 2014, with terminating his contract retroactively. That same day, 1 August 2014, a second medical control examination was performed at the NSPA's request by another doctor, Dr M. According to his report, appellant's psychiatric disturbances undoubtedly did not originate from his time spent in Afghanistan, and appellant's psychiatric situation worsened from April to August 2014; this report was communicated to appellant on 25 September 2014.

16. On 2 September 2014 came the decision challenged in Appeal no. 2014/1039, wherein the NSPA General Manager declared the contract null and void from the

outset. The payment of any remuneration was suspended.

C. Summary of parties' principal contentions, legal arguments and relief sought in Case No. 2014/1026

(i) Appellant's submissions:

17. The appellant seeks:
- cancellation of the decision of 5 May 2014, confirmed on 3 July 2014, to terminate his contract as from 31 December 2014;
- compensation for the material damage suffered;
- compensation for the non-material damage suffered, assessed at €30.000;
- reimbursement of the expenses incurred for his defence, in particular the cost of retaining counsel, travel and subsistence.

(ii) Appellant's contentions:

17. Appellant puts forward four contentions in support of his appeal. Firstly, he maintains that the NSPA should have worked actively to appoint him to a new post and thus failed in its duty of care. Secondly, he alleges that the decision was insufficiently substantiated. Thirdly, he claims an error of fact, which he also refers to as a "manifest error of judgment": he argues that he was not the holder of post FF091, the deletion of which is the official cause of his termination. Owing to previous reorganizations, he had also been performing the tasks previously assigned to post FF082, which was officially deleted but created again as of 1 January 2015, to which it was foreseen that he would be reassigned. Finally, it is claimed that the contested decision was illegal because it had not been preceded by consultation with the Staff Association and therefore violated Articles 89.1 and 90 of the Civilian Personnel Regulations.

18. Appellant is claiming material damage for which he is seeking compensation in the amount of the remuneration he ought to have received had he remained in his post, and compensation for being deprived of the chance to be deployed to Afghanistan again. He is also claiming non-material damage owing to his employer's failure to demonstrate the duty of care.

(iii) Respondent's contentions:

20. Respondent is seeking dismissal of the appeal.

21. It responds that in July 2013 appellant received a letter informing him that his post would probably be deleted at the end of the ISAF deployment in Afghanistan, and that the Human Resources Division Chief informed him, on the day of the disputed decision, of the various actions the Organization would take to support him in helping him to find a job at NATO.

22. With regard to the insufficient substantiation, respondent replies that the Administration substantiated its decision by citing the deletion of post FF091 held by

the staff member, which is sufficient grounds because it refers to one of the reasons foreseen in Article 9.1 of the Civilian Personnel Regulations.

23. With regard to the job whose deletion is given as grounds for the decision on termination being kept, respondent did not provide the slightest response in its written submissions. It is only at the oral hearing that it explained that job FF082 had been deleted as of 1 January 2014, and its reappearance in the personnel establishment as of 1 January 2015 shows that it is another job, decided on once the Organization was able to determine precisely which actions it still had to have the capacity to perform after the ISAF mission in Afghanistan ended.

24. Finally, respondent denies the existence of any right to negotiation or consultation of staff representation bodies before a decision is taken to terminate a staff member's contract.

D. Summary of parties' principal contentions, legal arguments and relief sought in Case No. 2014/1039

(i) Appellant's submissions:

25. Mr K is seeking:
- cancellation of the decision of 2 September 2014 to declare his contract null and void from the outset;
- compensation for the material damage suffered;
- compensation for the non-material damage suffered, assessed at €50.000;
- reimbursement of the expenses incurred for his defence, in particular the cost of retaining counsel, travel and subsistence.

26. The NSPA is seeking dismissal of the appeal.

(ii) Appellant's contentions:

27. Appellant argues, firstly, that the decision violates Articles 7.1 and 9.1 of the Civilian Personnel Regulations, which do not give a Head of NATO body the option of declaring a contract null and void. Such rescission of a contract is not covered by any provision of the NCPR; only termination is possible.

28. Next he maintains that the Administration took its decision based on erroneous information because, contrary to what Dr G wrote in the medical certificate of 16 April, he had never undergone psychiatric treatment prior to his time in Afghanistan, in particular not during adolescence.

29. He also presents an alternative argument that the Administration violated Articles 10.4 and 45.8 of the Civilian Personnel Regulations by setting the end date of the contract prior to the end of the period of 21 months foreseen in these Regulations for staff on extended sick leave.

(iii) Respondent's contentions:

30. Respondent argues that appellant lied in his interviews and statements preceding signature of his contract when he confirmed that he had never undergone psychiatric treatment. These lies constituted fraud that allowed the contract to be signed and without which the contract never would have been signed, since Article 3 of the Civilian Personnel Regulations prevents the appointment of a person who does not fulfil the physical standards demanded by the exercise of the functions to which he aspires.

31. Respondent challenges that there was an error of fact by referring to the medical certificate by Dr G and by requesting that appellant provide proof – which he did not do – that there had been no prior psychiatric treatment. It also noted that the second medical report requested, which was prepared by Dr M, proved that appellant's condition was not recent and that he had concealed its past history.

32. Regarding the question of the end date of the contract, the Administration considers the implementing arrangements in Articles 10.4 and 45.8 to be inapplicable insofar as the disputed decision is not a termination but a rescission of the contract from the outset.

E. Admissibility

33. The Tribunal observes that both appeals are admissible; moreover this admissibility is not disputed.

F. Considerations and conclusions

(i) Submissions seeking cancellation in Appeal No. 2014/1039

34. The Tribunal first examined the submissions in Appeal No. 2014/1039, because were this appeal to be dismissed (if it was found that appellant's contract of employment never existed), the submissions in the other appeal would become inapplicable.

35. Appeal No. 1039 is directed against a decision taken on 2 September 2014 pronouncing the contract void from the outset on the grounds that appellant lied when he stated that he had no psychiatric illness in his medical history.

36. The reasons a Head of NATO body may terminate a contract are given in Article 7.1 of the Civilian Personnel Regulations; there are seven of them. For five of them – expiration of contract (i), resignation by the staff member (ii), attainment of the age limit (v), death (vi) or end of secondment (vii) – neither of the parties is claiming applicability to the case. Two other reasons listed in Article 7.1 are discussed in the present appeal: dismissal on disciplinary grounds (iv) and termination by the Head of NATO body under Article 9.1 (iii). But these two reasons can only cause the contract to be terminated for

the future; they cannot erase or render null and void any periods of employment already performed in the Organization.

37. Certainly the disputed decision is based on Article 3 of the Civilian Personnel Regulations, which provides:

> Staff members are appointed to and hold posts on the establishment of a NATO body only on condition that:. [...] (d) they fulfil the physical standards demanded by the exercise of their functions and they are recognized as being free from or definitely cured of any disease which might constitute a risk to others.

Appellant was acknowledged as fulfilling this requirement of physical fitness at the time of his recruitment, however. In any event, while making fraudulent medical statements at the time of recruitment might justify disciplinary action (Article 9.1(v)) or termination on grounds of being "incapacitated for service" (Article 9.1(ii)), nothing in the Regulations authorizes a Head of NATO body to rescind a contract for a past period.

38. The Tribunal also rejects respondent's argument drawing on the International Labour Organization Administrative Tribunal's judgment No. 542, which concerns only the withdrawal of an offer of employment, not of a contract.

39. The decision of 2 September 2014 declaring the contract null and void from the outset must therefore be cancelled for lack of legal grounds. Therefore the Tribunal does not have to examine the other submissions in the appeal, in particular regarding the existence or absence of psychiatric treatment prior to the employment in Afghanistan.

(ii) Submissions seeking cancellation in Appeal No. 2014/1026

40. Next the Tribunal examined the submissions in Appeal No. 2014/1026, directed against the decision to terminate appellant's contract as of 31 December 2014.

41. Appellant claims an error of fact, which he also refers to as a "manifest error of judgment": he argues that he was not the holder of post FF091, the deletion of which is the official cause of his termination. Owing to previous reorganizations, he was also performing the tasks previously assigned to post FF082, which was officially deleted but created again as of 1 January 2015, to which it was foreseen that he would be reassigned.

42. The two parties agree that Mr K was the holder of post FF091. This post was deleted effective 31 December 2014 by the disputed decision. The parties also agree that post FF082 had been deleted one year earlier.

43. The Tribunal observed that in autumn 2013, the NSPA prepared its personnel establishment for 2014, expressly planning that the tasks assigned to the incumbent of post FF082 would be grouped with the tasks of post FF091, the incumbent of which would have to split his or her time between the requirements of the two services providing the funding for it.

44. The establishment table for 2015, however, deletes post FF091 but makes a post FF123 reappear. Appellant claims a misuse of power that consisted of pretending to delete one post and then recreating it without interruption under a new number.

45. The NSPA, which did not respond in writing to this argument by appellant, explained in the oral hearing that while the two posts FF091 and FF123 appear to be connected, the first was deleted by the disputed decision and the second only started to be given consideration in November 2014, when it became clear that the end of the ISAF mission would not end all the financial operations being performed for that mission. That is when the decision was taken to create post FF123, the tasks of which are similar to those of the post held by appellant.

46. The Tribunal thinks that this situation does not explain the deletion of post FF091, which was deleted with 122 other posts in May 2014, at a time when it could have been foreseen that the financial operations for the ISAF mission would not come to a halt the day after NATO's operational engagement in Afghanistan ended. Moreover, having observed that the tasks in post FF091 had not disappeared, the NSPA had the power to defer the disputed decision so that it could try to continue to employ the people who were serving in that kept post, even under a different name.

47. Furthermore, to accept respondent's reasoning would encourage misuses of power wherein the Administration could delete the post of a staff member it wished to get rid of and create another with similar or identical tasks with a view to hiring another person.

48. Thus the Tribunal observes that the reason given for termination of appellant on 31 December 2014, *i.e.* deletion of his post as of that date, is based on materially inaccurate information. The disputed decision must therefore be cancelled for that reason.

49. Consequently it is not necessary to examine the other submissions in the appeal seeking cancellation of the decision of 5 May 2014.

(iii) Submissions seeking compensation

50. The present judgment cancelled the decisions of 5 May 2014 and 2 September 2014 whereby, respectively, appellant's contract was terminated on 31 December 2014 and then was rescinded retroactively, without drawing all the consequences of that retroactivity, however, since his emoluments were suspended as of 2 September 2014 but he was not asked to reimburse the remuneration corresponding to the previous period.

51. As of the date of the judgment, appellant is therefore still the holder of a contract of employment with the NSPA. For the material damage suffered, he is entitled to an indemnity in the amount of the remuneration he would have received had he remained on the staff of the NSPA, taking into account his extended sick leave status. This indemnity shall be calculated by deducting any professional revenue that appellant might have received over the same period (see in particular the Tribunal's judgment in

Case No. 883, and Appeals Board decisions No. 406 of 27 September 2000, No. 703(a) of 9 November 2006, No. 733 of 14 March 2008 and No. 870 of 7 February 2013).

52. This indemnity compensating for the material damage shall bear interest at the Central European Bank key rate.

53. For the future, given that appellant is, as stated above, the holder of his contract, he shall be remunerated in line with the Civilian Personnel Regulations and the terms of that contract.

54. Beyond the material damage, the Tribunal is of the view that appellant has suffered non-material damage caused by the Administration's suspicion of his previous statements about his health, and by the decision taken to deny his working relationship with the Organization effective immediately, as if it had never existed. All the damage claimed in the two appeals can be fairly assessed by ordering €10.000 in compensation.

G. Costs

55. Article 6.8.2 of Annex IX to the NATO Civilian Personnel Regulations provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant [...].

56. In the circumstances of this case, given that Mr K's two appeals were granted, the NATO Support Agency shall reimburse him for the costs of retaining counsel, up to a maximum of €4.000, and for any substantiated travel and subsistence costs.

H. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 2 September 2014 to declare Mr K's contract null and void from the outset is cancelled.
- The decision of 5 May 2014, confirmed on 3 July 2014, to terminate Mr K's contract as from 31 December 2014 is cancelled.
- The NATO Support Agency shall pay Mr K, in compensation for the material damage suffered, an amount equal to the emoluments of all kinds that he would have received had he remained in his post within NATO beyond 1 January 2015, in his status of being on extended sick leave at that date, minus any professional income that Mr K may have received as from that date.

- The NATO Support Agency shall pay Mr K the sum of €10.000 in compensation for the non-material damage suffered by him.
- The NATO Support Agency shall reimburse Mr K for the costs of retaining counsel, up to a maximum of €4.000, and for any substantiated travel and subsistence costs.

Done in Brussels, on 16 March 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 April 2015 AT-J(2015)0005

Judgment

Case No. 2014/1031

SG,

Appellant

v.

NATO Communications and Information Agency (NCIA),

Respondent

Brussels, 21 April 2015

Original: English

Keywords: Article 59.1 NCPR; disciplinary action; grounds; evidence; compensation for non-material damage.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 23 February 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal dated 4 September 2014, by Mr SG, against the NATO Communications and Information Agency (NCIA), which was registered on 5 September 2014 as Case No. 2014/1031. The appellant seeks annulment of the respondent's disciplinary decision dated 3 July 2014 in which the General Manager decided, on the basis of the conclusions of the Disciplinary Board, not to renew appellant's contract which was due to end on 31 August 2015.

2. The answer of the respondent, dated 4 November 2014, was registered on 10 November 2014. The reply of the appellant, dated 5 December 2014, was registered on 12 December 2014. The rejoinder of the respondent, dated 20 January 2015, was registered on 22 January 2015.

3. The Tribunal's Panel held an oral hearing on 23 February 2015 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

4. The appeal was lodged after the coming into force on 1 July 2013 of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending the NCPR's Chapter XIV and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

5. The background and material facts of the case may be summarized as follows.

6. In August 2011, the NATO Communication and Information Systems Agency (NCSA) offered the appellant a definite duration contract for one year taking effect from 1 September 2011. Under this contract, appellant held the post of Engineer (COMPUSEC) at A2 grade.

7. On 18 March 2012, appellant's contract was renewed for three years taking effect from 1 September 2012. Under this new contract, appellant continued to fill the same position of Engineer at A2 grade.

8. Appellant's position was transferred to the NCIA after the NATO Agency reform.

9. Appellant was appointed to the Directorate Information Assurance Technical Center (NIATC) in the Computer Security branch of the Computer Incident Response Capability (NCIRC) Technical Center (COMPUSEC Engineering Section – CIS Protection Services Cell).

10. The COMPUSEC Engineering Section is responsible for providing NATO-wide COMPUSEC including direction, support and advice, and the CIS Protection Services Cell is responsible for providing NATO-wide direction and support on all malware matters and provides direction and support on CIS security solutions used for the protection of NATO CIS.

11. According to the appellant's post description, he provided NATO-wide support on all malware (malicious software), anti-malware, anti-virus, anti-spyware, workstation access control, disk wiping and hard-drive encryption solutions. Appellant also advised and provided direction and support on CIS security solutions used for the protection of NATO CIS, and oversaw and participated in the development of configuration, installation and user guidelines in direct support to all NATO sites.

12. In 2013, NCIA issued Vacancy Notice n°A133(2013)(MON) for an A3 post of Cell Head (CIS Protection Services) limited to serving NATO International Civilian Staff Members.

13. On 11 December 2013, appellant sent an email to his superior informing him that he had put an "explicit deny" for his account on the superior's mailbox.

14. The same day, in a second email sent to the System Administrators, appellant informed them that he had implemented an explicit deny rule for the accounts which he had in the NCIRC NU network to prevent access to his superior's mailbox. In this email, appellant stressed that the above explicit deny had been done to be *"in line with vacancies application process handling"*.

15. Appellant applied for the above-mentioned vacancy on 1 January 2014.

16. In a report dated 23 January 2014, a staff member reported to respondent various suspicious activities of the appellant during December 2013 and January 2014.

17. In this report, the staff member declared, firstly, that, on 11 December 2013, he clearly saw that the mailbox of appellant's superior was attached in the NATO "Outlook client" of appellant. The staff member immediately reported the event to appellant's superior.

18. In the same report, the same staff member declared, secondly, that, on 13 January 2014, approximately one month after the first incident, he had seen a recruitment Excel spreadsheet on the NATO unclassified monitor of appellant; according to the same staff member, appellant confirmed having knowledge of the number of the applications and other important information in relation to the above-mentioned vacancy notice from third parties. The same staff member, who had become suspicious of the appellant's activities, declared also having seen, on the same

day, a Word document containing a table with a grey header on appellant's monitor. Appellant's supervisor subsequently confirmed that he had sent a similar document by email earlier that day.

19. The above incidents were reported as security incidents in accordance with relevant texts and a forensic investigation into appellant's workstation was requested on 28 January 2014 by appellant's superior in order to examine whether the appellant had violated his System Administrator duties and had illegal access to the supervisor's mailbox.

20. After permission was given by respondent on 6 February 2014, the investigator commenced collecting data from appellant's workstation.

21. In the forensic examination report dated 11 February 2014 (first forensic report), the investigator was provided with two documents from the workstation to which appellant allegedly had illegal access. The aim of the analysis was to find on the "evidential media" these or other documents to which appellant should not have had access.

22. The first forensic report concluded that one document was found as one of the attachments to an e-mail that was saved on the appellant's workstation.

23. According to the same report, the other document was not found on the evidential media, but a likely updated version of the same document was located in different paths. The presence of the files indicates that an e-mail containing this attachment was opened twice on 28 January 2014 and 30 January 2014.

24. In its conclusion the first forensic report stated that *"traces of accessing documents in question were found on the evidential media".*

25. By letter dated 21 March 2014, respondent transmitted the first forensic report to appellant and informed the latter that, given the seriousness of the implied allegations, a Disciplinary Board was to be convened. Appellant was invited to provide written comments by 11 April 2014. In the same letter, respondent informed appellant that the sanctions to be recommended by the Board could include termination of employment.

26. In his written comments dated 25 March 2014, appellant strongly disagreed with the allegations made and the conclusions of the forensic report. In particular, he stressed that he had not accessed his superior's mailbox and that, concerning the second document, no trace was found on his workstation. In addition, no traces of access to documents were found in his superior's mailbox. In conclusion, appellant considered that the traces found in his workstation were justified by the fact that, in the performance of his duties, he had to have access to some documents, but not to the mailbox of his superior.

27. By respondent's decision dated 24 March 2014, the Disciplinary Board was established and, given the seriousness of the allegations, was requested to provide a recommendation by 11 April 2014, including the potential termination of appellant's

employment. The General Manager added that the Disciplinary Board retained the possibility of recommending a lesser sanction, or no sanction at all, if it concluded that the allegations in the report were not substantiated.

28. In an email sent on 4 April 2014, appellant requested that the Disciplinary Board call a witness who could confirm his statements and explain the existence of the evidence file found named "Updated Actions". In the same email, appellant stressed that there were many witnesses available who could confirm granted privileges and the technical explanation given in the comments.

29. The first hearing of the Disciplinary Board took place on 9 April 2014. The appellant's witness was not invited to the hearing. The Disciplinary Board listened to the explanations of events and interviewed experts. However, the Disciplinary Board members decided to investigate two questions further before discussing recommendations for actions. For this purpose, appropriate staff members were assigned in order to report back to the Disciplinary Board.

30. The answers to the above questions were formulated in a forensic report dated 15 April 2014 (second forensic report) in which the assigned persons presented the findings of their follow-up. In particular, the answer to the first question – whether the existence of the two investigated files could be explained as a result of archiving/copying/moving a bulk of items from the mailbox of appellant's superior – was that *"it was very unlikely"*. In addition to this comment, it was stated that the location where the two investigated files were found did not contain any other files that seemed to come from the mailbox of appellant's superior.

31. On the second question – concerning which mailboxes were connected to appellant's account on the last occasion he was working with Outlook before the (disk) image was taken (by the investigator) – the answer was that Microsoft Outlook-related registry keys indicated that appellant had had general access to his superior's mailbox as well as to that of another person on 7 February 2014 before the disk image was taken.

32. On 28 April 2014, the Disciplinary Board met a second time; again, the witnesses proposed by appellant were not invited to testify.

33. The Disciplinary Board delivered its conclusions on 16 May 2014 as follows:

1. (Appellant) accessed (Superior's) email inbox intentionally and on multiple occasions, even (at least once) after an explicit verbal direction from its superior not to do so;
2. (Appellant's) action violated the NCIRC user agreement, prohibiting a user from accessing information which they have no need to access;
3. (Appellant's) behavior was unacceptable, especially considering the position of trust granted to him as a system administrator. Syadmins are granted a special, higher level of privilege and access on networks. As they have the ability to view emails and stored data of other users, they must be especially trustworthy. Appellant's violation of this trust was deliberate and willful, contrary to the core principles of NATO and of the NCIA.

34. On the basis of the above-mentioned findings, the Disciplinary Board unanimously recommended the termination of appellant's employment, stressing that, through his action, appellant had demonstrated a serious breach of trust and called into question his ability to perform future duties in a professional and confidential manner.

35. Before the adoption of the decision relating to the recommendation of the Disciplinary Board, respondent invited appellant to a meeting on 10 June 2014 and informed him of the proposed decision. In that meeting, appellant recalled that his request to bring witnesses had not been accepted by the Disciplinary Board. Respondent invited the Disciplinary Board to a third meeting in order to hear appellant's witnesses.

36. In an email sent on 10 June 2014, appellant asked the Disciplinary Board to hear three witnesses. In the same email, appellant claimed that no digital evidence had been presented to him which would prove the Board's finding that he had accessed his superior's mailbox.

37. The Disciplinary Board met a third time on 22 June 2014 in order to hear the witnesses called by appellant. The Board, in fact, called only one witness, who was heard by the Board.

38. On 26 June 2014, the Disciplinary Board asserted that it did not acquire any new insight with the limited testimony provided by appellant's witness and consequently restated its findings (*cf* paragraph 33 *supra*).

39. In this context, the Disciplinary Board, on 26 June 2014, unanimously recommended the termination of appellant's employment, stressing that, through his action, appellant had demonstrated a serious breach of trust and called into question his ability to perform future duties in a professional and confidential manner.

40. By decision dated 3 July 2014 (contested decision), respondent informed appellant that the Disciplinary Board had confirmed its first findings and that the presence of the emails between his line manager and Human Resources on his workstation could not be explained by the official tasks requested of him by the NCIA, but resulted from a violation of his System Administrator privileges. Considering that the appellant's behaviour breached the trust that respondent had put in him, respondent withdrew all appellant's privileges and decided that his contract would not be renewed upon expiry, although, exceptionally and for reasons of his previous good performance, he would be allowed to complete his current contract until the end. The same decision mentioned that the findings of the Disciplinary Board would be transmitted to the appellant's national security authorities.

41. On 5 August 2014, appellant lodged a complaint against the above-mentioned decision pursuant to Article 61.2 of the NCPR and Article 4 of Annex IX to the NCPR. He requested the submission of his complaint to a Complaints Committee, the annulment of the contested decision, the withdrawal of all the related documentation from his personal file, the communication of the disciplinary reports dated 16 May and

26 June 2014 and the postponement of the forwarding of the findings of the Disciplinary Board to the national authorities until the NATO appeal procedure was exhausted.

42. In a letter sent to appellant on 1 September 2014, respondent explained that the complaint had not been forwarded to the Complaints Committee because the contested decision had been adopted by the General Manager of the NCIA and, consequently, appellant could lodge an appeal directly with the Tribunal.

C. Summary of parties' principal contentions and relief sought

(i) Appellant's contentions

On the submission seeking cancellation

43. Appellant requests the annulment of the decision dated 3 July 2014 and, if necessary, the implicit decision rejecting his complaint dated 5 August 2014 not to convene a Complaints Committee following his request.

a. The decision of 3 July 2014

44. Appellant presents five pleas against the decision of 3 July 2014. The first plea concerns the violation of Article 59.1 of the NCPR. The second plea is related to the violation of Articles 3.2 and 5.2 of Annex X to the NCPR in relation to the obligation to pursue fair proceedings. With his third plea, appellant maintains that, with the contested decision, respondent failed to comply with its obligation to state reasons. The fourth plea concerns the violation of Article 59.3 of the NCPR and Article 3 of Annex X to the NCPR in relation to the principle of proportionality, in particular by deciding to exclude appellant from any further renewal of his contract and this notwithstanding his "good performance up to the incident". With the fifth plea, appellant seeks the annulment of the contested decision insofar as this decision mentions that the findings of the Disciplinary Board would be forwarded to appellant's national Authorities until the exhaustion of the appeal procedure.

On the first plea of violation of Article 59.1 of the NCPR

45. Appellant argues that the contested decision must be annulled because it has not been proven that he violated his System Administrator privileges and illegally accessed the superior's mailbox. In this respect, appellant stresses that the fact that he had access to some of his superior's documents does not necessary imply that he had access to his superior's mailbox, as is concluded in the report of the Disciplinary Board of 16 May 2014 and restated in the second report of 26 June 2014. In this context, several facts explained why traces of the alleged documents could be found on his workstation.

46. In particular, concerning the document entitled *"Shortlist Matrix1.xlsx",* found as an attachment in an email saved on his workstation, appellant argues that this results from the fact that he had to be connected to an interface in which he found various

emails from different staff members. In order to save them and preserve their authenticity, appellant had to copy/paste them in blank emails of his mailbox. For that reason, in the first forensic report, the investigator mentioned that only traces of accessing documents were found on the evidential media of appellant. This conclusion does not imply that appellant had access to his superior's mailbox.

47. In relation to the document entitled *"Applications Update – Outstanding Actions – Alex update.docx"*, appellant recalls that this document was not found on his workstation as such. In addition, the updated versions of this document to which the investigator made reference in the first forensic report were issued not by his superior but by a third person with the same initials (VP).

48. Appellant also stresses that several lists of documents of third persons are copied-pasted in his workstation because of its connection to an interface (Clearswift Mimesweeper Appliance). Appellant observes that, following the respondent's reasoning, all these documents copied in his workstation would constitute evidence of illegal access to all the mailboxes of the Agency's staff. In this respect, appellant recalls that, in the second forensic report, the investigator pointed out the existence of the two above-mentioned documents and ignored other documents which were saved in the appellant's workstation.

49. Furthermore, appellant argues that he could not reverse his "explicit deny", or get back his System Administrator rights, or neutralize the auditing function. Indeed, after 11 December 2013, appellant did not enjoy his System Administrator rights and respondent did not demonstrate that appellant maintained an open access to his line manager's mailbox.

50. Finally, appellant argues that respondent does not have the expertise to demonstrate technically the existence of the breach of the System Administrator privileges, a fact also recognized by his superior.

On the second plea of violation of Article 3.2 and 5.2 of Annex X to the NCPR in relation to the obligation to pursue fair proceedings

51. Appellant considered that he was sanctioned for alleged facts which were not those which initially gave rise to the disciplinary procedure. In particular, there is a lack of consistency between the first forensic report (accessing superior's mailbox) and the final disciplinary decision (violation of System Administrator privileges). It is clear that the initial suspicion against appellant (illegally accessing supervisor's mailbox) was neither proven nor even alleged against him at the end of the procedure. Indeed, the contested decision it is also not claimed that appellant illegally accessed his superior's mailbox. This is the alleged wrongful act which triggered the disciplinary procedure.

On the third plea of the violation of the obligation to state reasons

52. The challenged decision makes no link between the violation of appellant's Systems Administrator privileges and the findings of emails in his workstation. An acceptable justification of the contested decision would emphasize the concrete

materialization of the breach of the System Administrator privileges. The contested decision refers only to the alleged violation of appellant's System Administrator privileges.

On the fourth plea of the violation of article 59.3 of the NCPR in relation to the violation of the principle of proportionality

53. Appellant argues that the list of sanctions mentioned in article 59.3 of the NCPR is exhaustive and consequently the exclusion of a staff member from a future recruitment process or from the possibility of obtaining contract renewal (although the contract would allow it), not being part of the specified sanctions, is illegal. Therefore, by deciding to exclude him from any further renewal of his contract, respondent exceeded the scope of article 59.3 of the NCPR which lists six different sanctions which may be pronounced against a staff member.

54. In addition, the disciplinary action taken against appellant is disproportionate insofar as respondent recognized that appellant performed his duties satisfactorily and, despite the alleged fault, his presence within the NCIA was not detrimental. In this context the interests of the service required his continuing work for the Agency; consequently, his contract of employment was not terminated with immediate effect.

55. Furthermore, the Disciplinary Board did not identify any fraudulent motive for the alleged fault, nor did appellant impede the interests and properties of the NCIA; for these reasons appellant pleads for a lesser and more clement sanction, given, in particular, his very satisfactory performance during his contract.

On the fifth plea on the violation of the duty of care insofar as the findings of the Disciplinary Board would be forwarded to the national authorities

56. With the fifth plea appellant seeks the annulment of the challenged decision insofar as this decision stated that the findings of the Disciplinary Board would be forwarded to appellant's national authorities. Appellant had requested suspension of this decision until the exhaustion of the appeals procedure. Indeed, in order to avoid the suspension or withdrawal by these authorities of the appellant's security clearance before the judgment of the Tribunal, respondent could refrain from forwarding this decision to these authorities. By refusing to do so, respondent breached its duty of care.

b. The implicit decision rejecting the appellant's request to establish a Complaints Committee

57. Appellant considers that Article 4.2 of Annex IX to the NCPR leaves no margin of appreciation to the Head of NATO Body (HONB) concerning the establishment of such a committee, if the staff member requests it. Consequently, by not convening a Complaints Committee following the appellant's request, respondent proceeded in an incorrect manner and infringed Article 4.2 of Annex IX to the NCPR. Respondent could not base its decision on the jurisprudence of the NATO Appeals Board.

On the submission for compensation

58. Appellant requests compensation for the non-material damage caused to him by the contested decision and in particular by the violations of his rights and the violation of the duty of care. The existence of a disciplinary procedure also caused non-material harm to appellant. In this respect, he evaluates his non-material damage *ex aequo et bono* at €5.000.

59. Appellant seeks:
- annulment of the decision dated 3 July 2014;
- if necessary, annulment of the implicit decision rejecting his complaint dated 5 August 2014;
- compensation for non-material damage evaluated *ex aequo et bono* at €5.000; and
- reimbursement of the costs of retaining counsel, travel and subsistence.

(ii) Respondent's contentions

On the submission seeking cancellation

a. The decision of 3 July 2014

On the first plea of violation of Article 59.1 of the CPR

60. To start with, respondent recalls that appellant held System Administrator rights, enjoying the highest possible level of access to IT systems. The System Administrators are covered by a specific security document which defines the conditions under which they may access the network. For these reasons, System Administrators, such as appellant, require a Cosmic Top Secret Clearance.

61. In this context, respondent considers, firstly, that the fact that appellant denied himself the possibility of accessing his superior's mailbox does not mean that he no longer had access to this mailbox in reality. Indeed, appellant could use his System Administrator rights to regain access to his superior's mailbox at any time, without any alert or notification. In addition, as results clearly from his email sent to the System Administrators, he was the only person who implemented technically this so-called "explicit deny" to accessing his superior's mailbox. Furthermore, his action was not voluntary, as appellant submits, but the consequence of a request made by his superior.

62. Secondly, respondent objects to the argument set out by appellant according to which appellant's illegal access to his superior's mailbox was not clearly evidenced by the investigations carried out in relation to the disciplinary procedure. In addition, the first forensic report revealed that appellant opened emails from his superior containing information relating to recruitment for the post A(133)MON. Along the same lines, in the second report it is indicated that appellant had access to the mailbox of his superior. Furthermore, a screenshot of Exchange System Manager shows that appellant had access through his account to the mailbox of his superior. In addition,

respondent argues that the auditing setting of his superior's mailbox had been set to "none" and not to "maximum", therefore preventing anybody from being informed if a System Administrator was accessing his mailbox. More generally, respondent argues that there is a wide array of evidence ranging from eye witnesses to written evidence and forensic investigations confirming the illegal access to the mailbox of appellant's superior.

63. Thirdly, respondent contests the claim that appellant's access to some of the information in emails of his superior was part of a request from a colleague to assist with alleged troubleshooting of email issues and was the result of the use of an interface (Clearswift Mimesweeper Appliance). In particular, appellant provides no evidence that there was a request for support or that he had actually been called by a colleague for assistance. However, even in this context, appellant gives no explanation as to why the only emails found on his workstation are the alleged emails of his superior concerning the recruitment process for the post A(133)(MON). In addition, respondent points out that troubleshooting does not require the System Administrator to open the attachment or read the content of the emails, such as was clearly demonstrated during the investigation.

On the second plea of violation of Articles 3.2 and 5.2 of Annex X to the NCPR in relation to the obligation to pursue fair proceedings

64. Respondent argues that the forensic reports fully complied with the requirements of Articles 3.2 and 5.2 of Annex X to the NCPR. The forensic reports stated that appellant accessed his superior's mailbox on multiple occasions and the findings in these reports resulted directly from the facts alleged in the letter initiating the disciplinary procedure.

On the third plea of the violation of the obligation to state reasons

65. Respondent considers that there is no contradiction between the facts mentioned in the letter initiating the disciplinary proceedings and the findings that appellant has abused the System Administrator privileges granted to him. The initial forensic report did mention potential abuse of appellant's System Administrator privileges and in the second report it was clearly indicated that appellant had had access to his superior's mailbox. According to respondent, the challenged decision shows the link between the violation by appellant of the System Administrator privileges and the presence of emails between his line manager and Human Resources on his workstation.

On the fourth plea of the violation of article 59.3 of the NCPR in relation to the violation of the principle of proportionality

66. Respondent considers that the list of sanctions mentioned in Article 59.3 of the NCPR is not exhaustive and that the competent authority retains a level of appreciation in the determination of the disciplinary measures. In this respect, in determining the proportionality of the disciplinary measure to adopt, the good performance of appellant is irrelevant, because, holding a Cosmic Top Secret Clearance and System

Administrator privileges, appellant was required to behave in a manner that would never put his trustworthiness in doubt.

67. In addition, respondent argues that the contested decision did not exclude appellant for any further recruitment process.

On the fifth plea on the violation of the duty of care insofar as the findings of the Disciplinary Board would be forwarded to the national authorities

68. According to the relevant regulations, appellant's actions constituted unauthorized activities with respect to communication and information systems, and are among those incidents that must be immediately reported to the competent authorities. Given that the assessment of a staff member's trustworthiness is related to the level of his or her clearance, and given the high level of appellant's security clearance (Cosmic Top Secret),security infractions are subject to the lowest level of tolerance. Therefore, respondent argues that it did not violate the duty of care by forwarding the findings of the Disciplinary Board to the relevant national authorities.

b. The implicit decision rejecting appellant's request to establish a Complaints Committee

69. Respondent considers that, according to the NATO Appeals Board case law (Decision no. 720), a Complaints Committee does not constitute a proper forum for appeal against a recommendation of the Disciplinary Board and therefore the contested decision must be challenged directly with the Tribunal. Consequently there is no violation of Article 4.2 of Annex IX to the NCPR.

<u>On the submission for compensation</u>

70. Respondent has not formulated specific arguments on the appellant's submission for compensation of the appellant but simply argues that the contested decision is lawful and consequently cannot cause any damage to appellant.

71. Respondent requests the Tribunal to declare that the appeal is admissible but lacks merit.

D. Considerations

(i) On the submission seeking cancellation

a. The decision of 3 July 2014

On the first plea of violation of Article 59.1 of the NCPR

72. Pursuant to Article 59.1 of the NCPR:

> Any failure by staff members or former staff members to comply with their obligations under the Civilian Personnel Regulations, whether intentional or through negligence on their part, shall make them liable to disciplinary action.

Under Article 3.2 of Annex X to the NCPR:

> The grounds on which disciplinary action is taken must be specified and the staff members concerned informed of the grievance against them.

73. The Tribunal recalls that, in accordance with the above provisions of the NCPR and Annex X thereto, staff members who are subject to disciplinary proceedings must be properly and clearly informed of the allegations against them by being given access to the file on the basis of which the respondent intends to prescribe disciplinary action. In particular, the information required aims to establish whether the allegations are true and, consequently, proven. In this context, it is for the Tribunal to determine whether the action thus taken was warranted by the nature of the alleged misconduct.

74. Firstly, the Tribunal observes that the first forensic report refers to two documents from the superior's workstation that appellant allegedly had illegal access to. In particular, respondent argues that a first document was found as one of the attachments to an email saved on the appellant's workstation, and updated versions of a second document of his superior were located in the appellant's email account. Concerning the latter document, the first forensic report expressly states that the document in question was not exactly the alleged document but an updated version of it.

75. At the first meeting of the Disciplinary Board, however, the examination of the first forensic report did not enable the Board to clearly establish that appellant did have access to his supervisor's mailbox, and therefore further investigations needed to be carried out in order to clarify if the presence of the investigated files in the appellant's work station was the result of authorized activities or a violation of his System Administrator privileges. The conclusions of these investigations contained in a second forensic report confirmed that the above-mentioned documents were found in the appellant's workstation.

76. After hearing one of the appellant's witnesses, the Disciplinary Board (third meeting) concluded that appellant had accessed his superior's email box intentionally, and on multiple occasions was violating his signed NCIRC user agreement, which

prohibits a user from accessing information which he or she has no need for. In this context, the Disciplinary Board recommended that respondent terminate appellant's employment, stressing that, through his action, appellant had demonstrated a severe breach of trust and called into question his ability to perform future duties in a professional and confidential manner.

77. The contested decision pointed out that the presence of emails between the line manager and Human Resources on the appellant's workstation could not be explained by the official tasks requested of him by respondent and resulted "*from violation of his System Administrator privileges"*.

78. It results from the foregoing that the disciplinary proceedings were based on the premise that appellant had illegally accessed his superior's mailbox, in particular because traces of two different categories of documents of his superior were found in the appellant's workstation. For respondent, the existence of these documents should be regarded as proof that appellant had illegal access to his superior's mailbox and to some categories of information.

79. The Tribunal considers that the existence of the traces of the above-mentioned documents (see paragraph 21) as such could not lead to the conclusion that appellant had access to his superior's mailbox. Indeed, the factual elements on which the disciplinary findings are based must not be presumed.

80. In this respect, respondent recognizes that there is no single piece of evidence that appellant had illegal access to his superior's mailbox, but stresses that there is a matching array of evidence which proves that appellant had illegal access to his superior's mailbox in violation of his System Administrator privileges. This argumentation must be rejected.

81. Given the seriousness of the alleged facts and the consequences that may arise from a disciplinary decision based on appellant's breach of confidence, the alleged facts cannot be presumed and the administration must demonstrate the alleged contentions clearly, efficiently and indisputably in order for the Disciplinary Board to recommend the appropriate sanction.

82 Secondly, the Tribunal observes that, during the disciplinary proceedings, respondent had hesitated about the consistency of evidence in relation to the alleged facts. Indeed, after its first meeting on 9 April 2014, the Disciplinary Board decided to investigate further in order to clearly establish the violation by the appellant of his Administrator privileges and consequently his illegal access to his superior's mailbox. This demonstrates that, at this stage, it was not clear to respondent whether the alleged facts constituted a violation of the System Administrator privileges or that appellant had illegal access to the mailbox of his superior.

83. Thirdly, respondent contests appellant's argument that the information and the documents found in his workstation were the result of the accomplishment of his duties when he was invited to be connected to an interface (Clearswift Mimesweeper Appliance). Respondent's position must be overruled. Indeed, during the disciplinary

proceedings, it was not disputed that appellant participated and exercised his duties in this interface. This is also confirmed by the testimony provided at the Disciplinary Board meeting of 22 June 2014.

84. Finally, regarding respondent's argument that appellant had Cosmic Top Secret clearance combined with his System Administrator privileges and could have access to his superior's mailbox, despite the "explicit deny" sent on 11 December 2013, the Tribunal states that this argument must also be rejected. It is for the administration to bring full evidence, in particular in such sensitive matters.

85. The proceedings leading up to the contested decision are tainted with an error regarding the facts on the basis of which the recommended sanction was adopted. It follows from the above that the first plea must be upheld.

86. As a consequence, the decision of 3 July 2014 is annulled, without the need to rule on the other pleas and contentions of appellant in support of his request for annulment and the other heads of relief sought by appellant.

(ii) On the submission for compensation

87. Appellant claims to have suffered non-material damage as a result of the adoption of the contested decision and asks for compensation for that damage in the amount of €5.000.

88. The Tribunal recalls that the annulment of an unlawful measure may in itself constitute appropriate and, in principle, sufficient compensation for any non-material damage that measure may have caused, unless the appellant shows that he or she has suffered non-material damage which is separable from the unlawfulness justifying the annulment and which is not capable of being entirely remedied by that annulment.

89. In the present case, as a result of the annulment of the decision of 3 July 2014, the appellant will be awaiting a new decision in the same matter. Such a continuation of this situation of waiting and uncertainty, caused by the unlawfulness of the above decision, constitutes non-material damage which cannot be entirely remedied by the annulment of the contested decision. In addition, the contested act contains an expressly negative assessment of appellant's abilities, which is likely to cause him damage.

90. In view of these circumstances and, in particular, the seriousness of the defect by which the contested decision is vitiated, fair compensation for this non-material damage will be afforded by the Tribunal by ordering the respondent to pay the appellant €5.000.

E. Costs

91. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

92. Under the circumstances of this case, it is appropriate for appellant to be reimbursed the costs of retaining counsel up to a total of €4.000.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision of 3 July 2014 is annulled.
- Appellant is entitled to €5.000 in damages.
- The action is dismissed concerning the remainder of the claims.
- Respondent refunds appellant the costs of retaining counsel, up to a maximum of €4.000.

Done in Brussels, on 21 April 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

22 July 2015 AT-J(2015)0006

Judgment

Case No. 2014/1036

AM,

Appellant

v.

NATO Communications and Information Agency,

Respondent

Brussels, 15 June 2015

Original: English

Keywords: reorganization; acting; post description; contract modification.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey-Sahùn and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 29 May 2015.

A. Proceedings

1. The NATO Administrative Tribunal was seized of an appeal, dated 29 September 2015, and registered on 2 October 2015, by Mr AM, against the NATO Communications and Information Agency (NCIA). The appeal seeks annulment of the 31 July 2015 decision of NCIA's General Manager rejecting the appellant's administrative appeal and other relief.

2. The respondent's answer, dated 1 December 2015, was registered on 4 December 2015. The appellant's reply, dated 5 January 2015, was registered on 12 January 2015. The respondent's rejoinder, dated 11 February 2015, was registered on 17 February 2015.

3. The Tribunal's Panel held an oral hearing on 29 May 2015 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, all in the presence of a representative of the Office of Legal Affairs and Mrs Laura Maglia, Registrar *a.i.*

4 The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV of the NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

5. The material facts of the case may be summarized as follows. This summary is only a partial recounting of the extensive communications between the parties.

6. The appellant, an engineer, joined NATO in 2005, and has an indefinite contract as A4 Senior Systems Architect/Engineer in what has become the Requirements Management Branch (RMB) of the Air C2 Program Office. In January 2014, he was informed by his line manager of an impending restructuring of RMB, providing for four sections (including the appellant's current section, the Future Requirements Section located in Brussels), with three acting chiefs of section. (The chief of the fourth section was already serving in that capacity.) The appellant opposed the reorganization, although he proposed that it could be improved by adding a fifth section that he would head. His proposal was not accepted.

7. On 17 February 2014, the appellant sent a strongly worded memorandum to his Branch chief detailing his objections to the reorganization. The memorandum contended that the reorganization involved "*good chances to lead to disaster,*

inefficiency, failure and confusions" [sic], and disputed its compliance "*with Civilian Personnel Regulations...NATO Code of Conduct...and equally some national labour standards rule and rights from some nations that contribute to NATO including Canada (Code Canadien du Travail)..."*

8. Four days later, prior to any reply from the Branch Chief, the appellant also sent his memorandum to the Air C2 Program Director. The Branch Chief and AirC2 Program Director subsequently provided written responses to the appellant's memorandum; inter alia, the reply of the Program Director indicated that the appellant's functions were not changed by the reorganization and his post description did not need to be changed.

9. The appellant was called to a meeting regarding the reorganization on 27 February 2014 that was attended by several more senior staff members. His request to be accompanied at this meeting by a representative of the Staff Association was denied. He subsequently alleged that at this meeting he was "*subject to threats and bullying that made me most uncomfortable in my workplace impacting my efficiency*." He also later alleged that he had been harassed by being removed from work on an important project on which he previously had a lead role, and that he was directed to participate in a lunch with a contractor that the appellant judged to be improper or unethical.

10. On 14 March 2015, the appellant submitted his first administrative appeal, writing to the NCIA General Manager "*submitting to you my case as directed by the Agency Code of Conduct.*" This letter alluded to the appellant's objections to the reorganization, alleged that he was intimidated and threatened at the 27 February meeting, and referred to a request that "*HR to be immediately notified of any changes in my TORs...*"

11. The appellant had an apparently unproductive meeting with the NCIA Chief of Staff on 30 April 2014. He then sent his "Second Administrative Complaint Regarding the AirC2 Requirement Management Branch Reorganization" to the General Manager on 5 May. This communication addressed numerous matters. *Inter alia*, it affirmed the appellant's prior complaints; posed procedural questions about the status of his earlier appeal; characterized the creation of the new section chief positions as a breach of his contract and protested the naming of the (acting) section chiefs without an open recruitment procedure; objected to the new organizational structure "*as unfair, non-transparent, and non-objective*" and contended that his new functions did not match his post description.

12. Pursuant to a 14 May 2015 communication from the Chief of Staff to the appellant, an unsuccessful mediation was attempted on 20 May. The record of the mediation meeting suggests that the session was heated and did not lead to resolution of the appellant's concerns.

13. On 31 July, the General Manager wrote the appellant a three-page letter denying his earlier administrative appeals, and setting out the reasons for denial. The appellant

replied with a further letter reiterating and elaborating on his complaints. This appeal was then lodged on 29 September 2014.

C. Summary of the parties' principal contentions, legal arguments, and relief sought

(i) The appellant's contentions

14. The appellant contended that the pre-litigation procedures under the NCPR were fully complied with and that his appeal was admissible.

15. As to the merits, the appellant contended that:
- the acting chiefs of the newly created sections were appointed without proper notice and an open recruitment process, in violation of Articles 1.1, 1.2, 57.1 and 57.3 of the NCPR and Articles 4.1 and 8.2 of NCIA's Directive 2.2 on staff appointment. In response to the Tribunal's question at the hearing, the appellant's counsel confirmed that in appellant's view, the respondent was obliged to conduct an open, advertised process for selection of the acting section chiefs prior to initiation of the reorganization;
- the reorganization violated his contract. In this regard, the appellant contended that, as a result of the reorganization, he had been moved to a new organizational unit and was being tasked to do work different from that indicated in his post description, with lesser responsibilities, while being denied the right to work on matters that do fall within his post description. In this regard, the appellant submitted as an exhibit a copy of his post description on which several functions were crossed out, allegedly reflecting his current responsibilities; and
- the Agency violated NCPR Article 12.1.4, the principle of good administration and its duty of care, by failing to respond properly to the harassment and abuse he allegedly suffered, *inter alia*, in the form of pressure by his superiors at the 27 February 2014 meeting, by reducing his responsibilities, by causing him confusion and uncertainty by not responding properly to his administrative complaints, and by contesting the admissibility of his appeal.

16. As a result of these violations, the appellant alleged that he had been subjected to stress and to injury to his private and family life, entitling him to moral damages.

17. The appellant seeks:
- annulment of the General Manager's 31 July 2014 decision denying his administrative appeal;
- annulment of a 19 June 2014 decision assigning the appellant and his post to its present organizational location in RMB under the supervision of a named individual;
- annulment of the reorganization of the AirC2 PO&S division, insofar as it reorganized RMB and named chiefs of the newly created sections in that branch
- €10.000 in moral damages; and
- legal, travel, and subsistence costs and legal fees.

(ii) The respondent's contentions

18. The respondent contested admissibility of the appeal, contending in its written submissions that the appellant has not exhausted the pre-litigation procedures prescribed for appeals under the NCPR. In the respondent's view, the parties entered into a mediation process that was still underway when the appeal was lodged. It contended further that it had made "*tremendous*" efforts to respond to Appellant's many letters and inquiries and that "*the grievances of the Appellant had been changing over time.*" At the hearing, respondent's counsel did not press the contention that the mediation process was continuing, instead emphasizing respondent's view that appellant did not pursue the pre-litigation process in good faith.

19. The respondent disputed the appellant's contention that the new section chiefs in the reorganized branch were appointed without proper notice and an open recruitment process. The respondent maintained that the three section chief appointments were only in an acting capacity and that those temporarily designated were experienced staff members who simply assumed additional duties without a change in grade or pay pending a recruitment process to identify permanent appointments. In its reply, the respondent indicated that a formal, open selection process was underway for one of the section chief positions. At the hearing, the respondent's counsel stated that a corresponding process was underway for a second section chief position, and that the appellant had not applied for either position.

20. The respondent also disputed the appellant's second claim, contending that his section had not been changed as part of the reorganization, and that his professional responsibilities as indicated in his post description had not changed. According to the respondent, the appellant was removed managing from the IFF project because of poor relations with the customer, but he was not excluded from the project, and had been asked to perform professional tasks related to it.

21. The respondent made further arguments relating to the appellant's alleged work performance regarding these and other tasks following the lodging of this appeal, arguments to which the appellant responded. The Tribunal has not taken these arguments by either party into account. Issues regarding matters occurring after the lodging of this appeal are not relevant to the Tribunal's task, which involves assessing the legality of the respondent's actions at the time they were done.

22. With respect to the appellant's third claim, the respondent denied that he was improperly threatened or harassed by his superiors. Further, the respondent contended that the appellant never documented or supported his claims, and that incidents described by the appellant did not involve improper conduct.

23. Alleging harassment of the agency and its staff, sustained bad faith behavior, and false and defamatory statements by the appellant, the respondent lodged a counterclaim under Article 6.8 of Annex IX. This provision authorizes the Tribunal to order an appellant to pay reasonable compensation in cases of intentional abuse of the appeals process. The Agency sought the maximum allowed under the NCPR, 50% of one month's salary.

D. Considerations and conclusions

(i) Considerations and conclusions on admissibility

24. As indicated above, the respondent's position on admissibility appeared to evolve during the proceedings. In its written pleadings, the respondent urged that the pre-litigation procedures had not been completed because the mediation was continuing. However, at the hearing, the respondent's counsel acknowledged that mediation necessarily requires the consent of both parties, and the appellant's lack of consent to continuation of the mediation was apparent in the circumstances. In the alternative, the respondent contended that the appellant had not pursued the pre-litigation procedures in good faith.

25. The appellant's communications and actions following the attempted mediation in May 2014 make clear that he did not consent to the continuation of the process. He perhaps pursued the pre-litigation procedures in a manner that was not conducive to finding a mutually agreeable solution to his complaints. Nevertheless, the record does not demonstrate the absence of good faith.

26. The appeal is admissible.

(ii) Considerations on the merits

27. The appellant initially contended that the acting chiefs of three of the newly created sections were appointed without proper notice and an open recruitment process, in violation of Articles 1.1, 1.2, 57.1 and 57.3 of the NCPR and Article 4.1 and 8.2 of NCIA's Directive 2.2 on staff appointment.

28. The record shows that these three individuals were appointed to perform in an acting capacity, and that the respondent has since carried on open competitive recruitment processes for at least two of the three positions, processes in which the appellant did not participate. It also appears that the acting section chiefs performed their supervisory responsibilities in addition to their existing duties, and without change in grade or additional compensation.

29. The appellant has not established that the decision to appoint the three acting section chiefs adversely affected him, directly or indirectly. Moreover, the Tribunal does not accept the appellant's contention that the NCPR and NCIA's internal directive obliged the respondent, while planning a major reorganization, to also conduct an open competitive recruitment process to identify persons to temporarily assume additional supervisory roles on an acting basis during that reorganization. In the circumstances here, the temporary designation of acting supervisors during a period of transition, if followed by open and transparent recruitment processes to select permanent incumbents, is a reasonable management practice that does not conflict with the NCPR or the NCIA's staff appointment directive.

30. This head of the appellant's claim is dismissed.

31. The appellant next contended that the respondent's actions violated his contract in that, following the reorganization, he was moved to a new organizational unit and tasked to do work different from that indicated in his post description, with lesser responsibilities. The respondent denied that he had been moved to a new unit or that his responsibilities had changed, maintaining that he remained responsible to perform the professional duties indicated in his post description.

32. Regarding the appellant's claim that he was moved to a wholly new organizational unit, the respondent urged that the appellant and his post remained in the Future Requirements Section both before and after the reorganization. The record supports this contention. *Inter alia*, Agency phone listings in the record show the appellant as a member of the Future Requirements Section both before and after the reorganization.

33. The appellant contended that the respondent admitted that his functions no longer matched his post description, referring to an 18 July 2014 letter he received from the Chief of Staff in which the Chief of Staff "*recognize[d] your concern that your job description may not longer fully reflect your current roles and responsibilities*." While the appellant's counsel viewed this letter as an admission by the respondent, the Tribunal does not understand it as such. Rather, read in context, the statement appears to reflect an effort by the Chief of Staff to address the appellant's concerns in a reasonable and professional manner.

34. The Tribunal concludes that the appellant has failed to prove this element of his claim. A staff member, particularly a professional in an organizational component that deals with evolving requirements, cannot expect his specific tasks and responsibilities to remain static. This head of the appellant's claim is also dismissed.

35. Finally, the appellant contended that the respondent violated NCPR Article 12.1.4, the principle of good administration and its duty of care, in multiple respects, *inter alia*, by not responding properly to the harassment and abuse he allegedly suffered the form of pressure by his superiors at the 27 February 2014 meeting, by reducing his responsibilities, by causing him confusion and uncertainty by not responding clearly and properly to his administrative complaints, and by contesting the admissibility of his appeal. The respondent denies these claims, contending, *inter alia*, that the appellant failed to document his allegations of harassment, and that his charges of misconduct by other staff members were unfounded and indeed libelous.

36. The record here shows substantial efforts by the respondent to address the appellant's evolving concerns, including efforts by senior members of Agency management. The fact that the appellant found these efforts wanting does not render them less substantial. And, as presented in the appeal, the appellant's unsupported allegations of abuse and misconduct by other staff members are not clear or convincing. While the respondent might have taken further steps to inquire into his allegations, the Tribunal cannot find on this record that the respondent failed to meet its responsibilities to a staff member. This final head of claim is also dismissed.

37. As the appellant's legal claims have failed, his claims for relief must likewise fail. However, the Tribunal observes that in any case, the appellant's second and third requests for relief -- that the Tribunal annul a decision assigning the appellant and his post to its present organizational location under the supervision of a named individual, and the reorganization of the AirC2 PO&S division as it affected RMB -- would fail in any event. The authority to structure and organize a NATO body to implement decisions of the NATO Council is a discretionary management responsibility that is subject to only limited review by the Tribunal in cases involving an abuse of discretion that directly and adversely affects a staff member (*cf* AT judgment in Case No. 885 paragraphs 33 *ff.*). The appellant has not established any such abuse of discretion in connection with the challenged reorganization.

(iii) Considerations regarding the counterclaim

38. Contending that the appellant did not pursue his complaints in good faith and acted in an abusive manner, the respondent invited the Tribunal to consider applying Article 6.8.3 of Annex IX of the NCPR. The Tribunal does not find that the circumstances of this case warrant the exercise of this power. While the appeal has been denied, the Tribunal does not regard it as having been brought for abusively or for purposes of harassment.

E. Costs

39. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

40. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 15 June 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

22 July 2015 AT-J(2015)0007

Judgment

Case No. 2014/1040

ME,

Appellant

v.

NATO Support Agency

Respondent

Brussels, 10 July 2015

Original: English

Keywords: termination of contract; admissibility; exhaustion of pre-litigation procedure; staff performance report.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 29 June 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal dated 28 October 2014, by Mr ME, against the NATO Support Agency (NSPA), which was registered on 17 November 2014 as Case No. 2014/1040. The appellant seeks annulment of the respondent's decision, dated 30 September 2014, not to appoint him to an NSPA position and of his last staff report.

2. The answer of the respondent, dated 12 January 2015, was registered on 23 January 2015. The reply of the appellant, dated 29 January 2015, was registered on 17 February 2015. The rejoinder of the respondent, dated 16 March 2015, was registered on 27 March 2015.

3. The Tribunal's Panel held an oral hearing on 29 June 2015 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

4. The appeal was lodged after the coming into force on 1 July 2013 of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV of the NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

5. The background and material facts of the case may be summarized as follows.

6. In July 2007, NATO Maintenance and Supply Agency (NAMSA), offered appellant a definite duration contract for a period of three years ending on 15 July 2010. On the basis of this contract, appellant filled the post of Technician, Grade B5.

7. Before the termination of this first contract, NAMSA offered appellant a second definite duration contract taking effect from 16 July 2010 for a new period of three years. The second contract ended on 15 July 2013.

8. In December 2012, on the basis of the staff report concerning appellant, dated 5 December 2012, his superiors recommended to NSPA not to offer him a new contract after 15 July 2013, in particular because of the appellant's "mediocre" performance.

9. By letter sent to respondent on 13 December 2012, appellant contested these conclusions and the rating given in the 2012 staff report.

10. By letter dated 14 January 2013, respondent informed appellant of the decision to terminate his contract on 15 July 2013.

11. On 15 March 2013, appellant lodged an appeal before the NATO Appeals Board (Case No. 898) seeking the annulment of the above-mentioned decision of 14 January 2013 according to which his contract would not be renewed after 15 July 2013. In this appeal, appellant also contested the rating given in his 2012 staff report.

12. By letter dated 30 April 2013, respondent informed appellant that, after having studied the appellant's contentions, he was being offered a new three-year contract on condition that he renounced all the claims formulated in appeal Case No. 898.

13. By letter dated 17 May 2013, appellant's legal counsel informed the Appeals Board Secretariat of the appellant's withdrawal of his appeal in view of the NSPA's decision to renew his contract.

14. On 21 May 2013, appellant signed a new contract taking effect from 16 July 2013 for a new period of three years. Under this contract, appellant continued to fill the post of Technician, Grade B5.

15. By decision of the President of the NATO Appeals Board, delivered on 29 May 2013, the withdrawal of the appeal in Case No. 898 was accepted.

16. Appellant applied for various vacant posts and, by e-mail on 13 May 2013, he was informed that, for posts at the same grade, his application would be automatically considered by respondent.

17. By letter dated 5 July 2013, NSPA informed appellant that the ISAF mission, as well as the support provided by NSPA to this mission, would end on 31 December 2014. In the absence of any precise information concerning the role assigned to the NSPA team after the end of this mission, respondent indicated to appellant that his post would be deleted no later than 31 December 2014. It was underlined that the intention of this letter dated 5 July 2013 was to keep appellant informed and that it did not constitute a formal notification of the deletion of his post. In the same letter, respondent indicated that in any case appellant would receive notification of the suppression of his post. This letter also indicated that *"there is [a] standard Agency process which will be followed to support* [*appellant*] *taking care to understand what [appellant] wants in terms of personal situation and career"* and *"doing everything to find an alternative post in NSPA, or elsewhere in NATO"*.

18. In the above-mentioned letter, respondent also indicated to appellant that if he were to receive formal notification of the deletion of his post, he would be provided with more information at a personal interview. As a last resort, if NSPA were unable to reassign appellant to another post, appellant might be entitled to an indemnity for loss of job, in accordance with the relevant provisions of the NCPR.

19. By letter dated 5 May 2014, appellant received the formal notification of the decision to delete his post and consequently the termination of his contract. In this

letter, respondent reiterated that, if the NSPA were unable to find another suitable position for appellant, the latter would be entitled to an indemnity for loss of job provided that the conditions laid down in the NCPR were fulfilled.

20. In another letter dated the same day (5 May 2014), respondent advised appellant to contact Human Resources to set up a career interview and to post his curriculum vitae on the NATO Clearing House for the attention of other NATO bodies. In addition, this letter indicated that appellant had priority for all posts in his grade in all NSPA locations and that the Selection Committee would try to find a suitable match for his qualifications. If it were not possible to make an offer of employment, contract termination arrangements would be initiated and the potential loss of job indemnity would be clarified.

21. Before and after receiving the letter of 5 May 2014 mentioned above, respondent informed appellant by several emails that his file had been examined for various posts, competing with other candidates but, after a careful evaluation of the applications received, it had been decided not to call him for an interview.

22. Appellant lodged a formal complaint pursuant to Article 61.2 of the NCPR and Article 4 of Annex IX to the NCPR contesting the above-mentioned decision, dated 5 May 2014, by which he was informed that his definite duration contract would be terminated on 31 December 2014 due to the deletion of his post.

23. NSPA responded to appellant by letter dated 3 July 2014, arguing that the decision of 5 May 2014 was fully compliant with the terms and conditions of his employment.

24. In an email sent on 20 June 2014, respondent informed appellant of the decision not to call him for interview for post LM-108, Grade A2.

25. In an email sent to respondent on 16 July 2014, appellant declared his wish to contest the respondent's decision contained in the above-mentioned email, under the conditions provided for in Article 61.1 to the NCPR. In that respect, he requested the launch of an administrative review such as that provided for in Article 2 of Annex IX to the NCPR.

26. On 8 August 2014 appellant received a response from the HR Executive, who stressed that the decision not to call him for interview for post LM-108 was sound and justified, since he did not meet the qualifications required for the post.

27. In an email sent on 20 August 2014 to respondent, appellant continued to request a "further administrative review" of the decision concerning post LM-108 and in this email he also referred to the selection process for post LM-190, Grade B5.

28. For in parallel with the selection process concerning post LM-108, appellant had also applied for post LM-190, Grade B5. In an email sent on 29 July 2014, respondent called appellant for an interview and written tests in relation to this post.

29. By letter dated 5 September 2014, respondent informed appellant that no further administrative review could be brought against the above-mentioned decision contained in the email of 20 June 2014, which is not the subject of the appellant's appeal.

30. In an email sent on 30 September 2014, respondent informed appellant that given the results he achieved during the selection process for post LM-190 he could not be appointed to this post (decision of 30 September 2014).

31. In an email sent to respondent on 20 October 2014, appellant declared his wish to contest the respondent's decision contained in the email dated 30 September 2014 (contested decision) under the conditions provided for in Article 61.1 to the NCPR. In that respect, he requested the launch of an administrative review such as that provided for in Article 2 of Annex IX to the NCPR.

C. Summary of parties' principal contentions, legal arguments, and relief sought

(i) Appellant's contentions

32. Appellant requests the annulment of the NSPA decision dated 30 September 2014 not to appoint him to post LM-190 and of his 2012 staff report; in that respect, he sets out six pleas. First, the violation by the NSPA of the duty to state reasons for the challenged decision; second, the violation of the principle of the right of defence in relation to the irregular evaluation procedure employed for his performance report; third, the violation of the duty of care; fourth, the violation by the contested decisions of the NSPA's obligation to look for a suitable post; fifth, the violation of the principles of good administration and of due care in relation to his unfair treatment; sixth, appellant alleges several manifest errors of judgment in relation to the adoption of the contested decisions.

33. Appellant further argues that he suffered both material and non-material damage from the above-mentioned contested decisions. Appellant evaluates the material damage on the basis of his last basic salary during the three-year contract after his reintegration in the NSPA. Concerning the non-material damage, appellant argues that this results from the anxiety and stress caused since 2011 during his second definite duration contract, which he evaluates *ex aequo et bono* at €50.000.

34. On the basis of the above, in his appeal to the Tribunal, appellant seeks:
- the annulment of the decision dated 30 September 2014;
- the annulment of his last staff report;
- his reintegration in a similar post on the basis of an indefinite duration contract or, as a minimum, a new three-year contract;
- failing this, the payment of material damages corresponding to his salary until his retirement or, as a minimum, over a period of three years;
- the payment of moral damages evaluated at €50.000; and
- the reimbursement of his travel and subsistence costs.

(ii) Respondent's contentions

35. Respondent argues, firstly, the inadmissibility of the appeal regarding the decision contained in the email of 30 September 2014. In that respect, respondent considers that this decision was not directly taken by the Head of the NATO Body and that appellant had not followed the full pre-litigation process and exhausted all available channels for submitting his complaint under Annex IX to the NCPR.

36. Concerning the request for annulment of the appellant's last staff report, respondent argues that this report cannot be considered as a decision directly taken by the Head of the NATO Body. This is clearly stated in Article 55.4 of the NCPR. Therefore, the appeal must be declared inadmissible.

37. In any case, respondent also considers that the pleas developed in the appeal have no connection with the contested decisions and should therefore be disregarded as a whole.

38. Finally, concerning the request for damages, respondent considers that appellant did not suffer any non-material or material damage as a result of any of the contested decisions.

39. Respondent asks the Tribunal:
- to declare the appeal inadmissible;
- failing that, to declare all appellant's requests to be without merit; and
- to dismiss appellant's appeal.

D. Considerations

(i) Preliminary remarks

40. The Tribunal observes that appellant contests, firstly, the legality of a number of decisions taken by respondent, in particular concerning the rejection of his applications for several category A and B posts, secondly, the decision of 5 May 2014 deleting his post and, thirdly, the conclusions of the 2012 staff report in which his superiors did not recommend that the NSPA renew appellant's second three-year definite duration contract.

41. The Tribunal also states that – despite the formal complaint against the decision dated 5 May 2014 by which he was informed by respondent that his definite duration contract would be terminated on 31 December 2014 due to the deletion of his post, and the NSPA response to this complaint, dated 3 July 2014 – appellant does not formulate any clear claim in this respect, either in his pleadings or during the hearing. In contrast, he repeatedly alleges a kind of intentional practice of respondent rejecting all his applications for several posts.

42. Since the pre-litigation procedure is informal in character and the persons concerned act, in general, without the assistance of a lawyer, the Tribunal has examined all appellant's pleadings and arguments in a spirit of openness and concern.

43. In this respect, the Tribunal considers that the present appeal exclusively addresses, firstly, a decision contained in an email of 30 September 2014, in which respondent informed appellant of its decision not to appoint him to post LM-190 and, secondly, the conclusions of his 2012 staff report.

44. This is confirmed also by the fact that, even if appellant restated the pleadings he developed before the NATO Appeals Board in Case No. 898, his arguments mainly concern the legality of the decision of 30 September 2014. In this context, also, appellant stressed the negative impact of his 2012 staff report, which he considers to be the main reason for the constant rejection by respondent of his applications for A- and B-grade posts.

(ii) Admissibility

45. In its statement of defence respondent alleges the first two heads of claim of the appellant's action are inadmissible.

46. Concerning the first head of claim against the decision of 30 September 2014, the Tribunal points out that Article 61.1 of the NCPR, and Articles 2.1, 4.1 and 6.3.1 of Annex IX to the NCPR subordinate the admissibility of an appeal brought before the Tribunal to the condition of having properly gone through the prior administrative procedure set out in these articles (see AT judgment in Case No. 2014/1016, paragraph 23).

47. In the present case, appellant's criticisms against the decision of 30 September 2014 are limited to general comments and it is established that appellant has not followed the procedural requirements provided for by the NCPR.

48. In addition, respondent pointed out to the appellant several times the need to follow the procedural steps in order for his complaint to be examined under the full conditions provided for by the NCPR. Nevertheless, appellant continued to contest the decision of 30 September 2014 concerning the rejection of his applications in a general way, so that it is not possible for the Tribunal, even in a spirit of openness, to consider that the procedural requirements in the above-mentioned provisions have been fulfilled.

49. Therefore, the first head of claim must be rejected as inadmissible.

50. Concerning the second head of claim of the appellant's action, it can be seen from the Tribunal case-law that submissions seeking annulment of a staff member's performance report are inadmissible because such a report is not in itself a decision that constitutes grounds for grievance; it is a preparatory act and can only be charged as being illegal in support of submissions directed against a subsequent act causing the appellant harm, such as a disciplinary action, a refusal to renew a contract or the

decision to terminate a contract, as the Tribunal has ruled (see AT judgment in Case No. 2013/1005, paragraph 24).

51. In addition, the Tribunal observes that appellant lodged appeal No. 898 before the NATO Appeals Board seeking the annulment of the decision of 14 January 2013, presenting arguments concerning the rating given in his performance report. However, appellant withdrew his appeal No. 898 in view of the NSPA decision to renew this contract and signed a new three-year contract.

52. This being the case, the second head of claim for annulment of the appellant's performance report for 2012 must be rejected as inadmissible.

53. The two above-mentioned submissions on annulment must therefore be dismissed, as must the submissions seeking the appellant's reinstatement in the respondent's services.

54. Finally, concerning the submissions seeking compensation, the Tribunal points out that where the damage on which an appellant relies arises from the taking of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, the rejection of the claim for damages, as those claims are closely linked.

55. In the present case, appellant's claims for compensation, submitted jointly with the claims for annulment, are based on the alleged illegality of the contested decisions and are therefore closely linked to the claims for annulment; therefore they must be also declared inadmissible.

56. It follows from the foregoing considerations that the appeal must be dismissed as inadmissible.

E. Costs

57. Article 6.8.2 of Annex IX to the NCPR provides as follows

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, with reasonable limits, justified expenses incurred by the appellant.

58. As the appeal has been dismissed in respect of all the submissions therein, appellant cannot be paid any sums under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed as inadmissible.

Done in Brussels, on 10 July 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

22 July 2015 AT-J(2015)0008

Judgment

Case No. 2014/1035

D *et al.*,
appellants

v.

NATO Communications and Information Agency,
respondent

Brussels, 13 July 2015

Original: French

Keywords: admissibility of the appeal; lateness.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 28 May 2015.

A. **Proceedings**

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 26 September 2014 and registered on 1 October 2014, by Mr ED, Mr FD and Mr FP, seeking:

- cancellation of the decision of 28 July 2014 whereby the General Manager of the NATO Communications and Information Agency (NCIA) dismissed their complaint against the decisions of the Director of Human Resources, SHAPE, dated 13 November 2012, informing each of them that their application for post NSCA SMD/MDS SPS (CCC CSS 0010) was not being taken forward;
- compensation for the material damage suffered;
- compensation for non-material damage suffered, assessed at €5.000 each; and
- reimbursement of the travel and subsistence expenses incurred for their defence and the cost of retaining counsel.

2. The appellants are A3 grade staff members of the NCIA.

3. The comments of the respondent, dated 1 December 2014, were registered on 3 December 2014. The reply of the appellants, dated 30 December 2014, was registered on 8 January 2015. The rejoinder of the respondent, dated 5 February 2015, was registered on 17 February 2015. Finally, the appellants submitted new comments on 22 April 2015.

4. The Tribunal's Panel held an oral hearing on 28 May 2015 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar *a.i.*

5. The appeal was lodged with the Administrative Tribunal on 26 September 2014, *i.e.* after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst other things, establishing the Administrative Tribunal. However, the first paragraph of the new Annex IX provides as follows:

> "Any proceedings initiated before that date under the previous Regulations will continue to be governed by the previous Regulations until they are settled in a final manner."

The present appeal seeks the cancellation of the decision of the Director of Human Resources, SHAPE, dated 13 November 2012, informing each of the appellants that their application for a specific post in the organization was not being taken forward. Consequently the Tribunal shall rule in accordance with the provisions of Annex IX in effect prior to the coming into force of the new regulations (Regulations governing

complaints and appeals, approved by the North Atlantic Council on 20 October 1965 and modified by PO(73)151 on 22 November 1973).

B. Factual background of the case

6. In April 2012, Mr ED, Mr FD and Mr FP, A3 grade staff members of the NCIA, applied for post CCC CSS 0010 in the organization. The post was advertised at A4 grade.

7. On 13 November 2012, they were individually informed that their application would not be taken forward as the post was reserved for redundant staff members and this was not their case.

8. The appellants did not react at that point. In March 2013, they learned that the post they had applied for had been offered to an A3 grade redundant staff member. They then entered into written exchanges with the administration, contesting the fact that, like them, the selected candidate was an A3 grade, although the post had been open to A4 grade staff members.

9. On 11 June 2013, Mr ED, Mr FD and Mr FP lodged a complaint against the decision not to take their applications forward. They specifically stressed the fact that they were not requesting cancellation of the candidate's appointment. The administration then sent them only holding replies, and did not announce any new decision. On 8 October 2013, the Head of Recruitment told them that the examination of their request had taken some time and that he would reply to them shortly. On 26 November 2013, the administration informed them that a meeting would be held very soon. On 6 January 2014, the appellants received another holding reply, followed the next day by a letter informing them that their complaint was going to be examined. Finally, on 7 May 2014, another holding reply was sent to them.

10. On 3 July 2014, the appellants sent another letter to the administration, asking for a formal explicit reply and stating that they would otherwise refer the matter to the NATO Administrative Tribunal. On 15 July, the appellants met the administration to discuss the matter.

11. On 28 July 2014, the NCIA General Manager wrote to the appellants in response to their complaint, informing them that he did not intend to revisit his decision to select a redundant staff member for the post in question. This is the decision that Mr ED, Mr FD and Mr FP referred to the NATO Administrative Tribunal on 26 September 2014. They have stressed the fact that they are not seeking cancellation of the appointment of the person selected for the post in question.

C. Summary of parties' principal contentions, legal arguments and relief sought

(i) The appellants' main contentions

12. The appellants maintain that their complaint is admissible, since the time taken to

lodge it was due to the dilatory replies of the administration before its formal decision was announced.

13. They further maintain that this decision is illegal as the administration failed to follow the procedure set out in Article 57.2 of the CPR, according to which the priority of applications of redundant staff members is limited to those who have the grade required for the post in question. They also claim that the administration failed in its duty of care towards its staff members.

14. The compensation sought by the appellants arises from the loss of opportunity to be appointed to this post and is assessed by each of them at 50% of all the emoluments they could expect until the date of their retirement. The compensation requested is therefore €191.554,37 for Mr ED, €132.379,97 for Mr FD and €139.020,97 for Mr FP.

15. The appellants also seek compensation for non-material damage, assessed at €5.000 each.

(ii) The respondent's main contentions

16. The respondent maintains that the appeal is inadmissible on the ground of lateness:
- the complaint was lodged after the "reasonable time" stated in former Article 61.3 of the CPR;
- the appeal was lodged after the 60 day period stated in Article 4.3.2 of the former Annex IX to the CPR.

17. Secondarily, the respondent argues that there are no grounds for the appeal. The recruitment was based on a special temporary procedure in the interests of reorganizing the NATO agency. The transfer effected by the contested decisions had its legal basis in Articles 4.1.1 and 4.1.2 and not Article 57.2 of the CPR. It was organized under Article 7 of the NSCA civilian consultation and transfer plan (CCTP) which gives priority to redundant staff members.

18. Furthermore, the administration claims that it was attentive to the situation of each staff member, particularly the appellants, two of whom were offered a post and transferred on 1 August 2013.

19. As regards compensation, the administration disputes the view that the appellants had a 50% chance of being selected. The non-material compensation is excessive since the delay in giving the decision is mitigated by the appellants' lack of diligence in obtaining a decision from the administration.

D. **Considerations and conclusions**

(i) Considerations on admissibility

20. The appeal is inadmissible for two reasons.

21. The complaint of 11 June 2013 was late; Article 61.3 of the Civilian Personnel Regulations, applicable at that time, states as follows:

> members of the staff shall be entitled to submit in writing and within a reasonable time their complaints to the Head of the NATO body concerned.

The Appeals Board has already judged that the assessment of this "reasonable time" should take account of the timeframes for lodging an appeal (Article 4.3.2 of the old Annex IX) and for claiming an allowance (Article 24.6), and that rulings should be made on a case-by-case basis. There are several precedents indicating that a period of three months is reasonable if the staff member has been ill (Decision no. 827) but that periods from eight months to six years are beyond a reasonable time (Decisions nos. 819, 820, 825, 826, 830, 831 & 833, and 837).

22. In the present case, the appellants did not lodge their complaint until 11 June 2013, i.e. seven months after being notified of the contested decision. The appellants stress that it was not until March 2013 that they discovered the irregularity in the procedure, when they learned that the successful candidate was at a lower grade than the one offered. However, they then had the chance to contest the decision to recruit Mr HP to this post, and they did not do so. In any event, they have not invoked any circumstance which would explain why they lodged their complaint more than two months after this event.

23. The appeal is also late. Following the lodging of the complaint on 11 June 2013, an implicit rejection arose 30 days later, on 11 July 2013, pursuant to Article 4.3.1 of the old Annex IX to the CPR. As Article 4.3.2 of the old Annex IX establishes a 60-day period for lodging an appeal, the deadline for lodging the appeal in this case was 10 September 2013. In fact it was not lodged until 26 September 2014, which is more than a year later.

24. The successive holding replies which the appellants received from the administration after lodging their request did not have the effect of interrupting this period, particularly as they did not react before the expiry of the two-month period at the end of which the implicit rejection decision is considered to have taken place. The subsequent letters could not override this rejection decision arising from the silence on the part of the administration. While the administration saw fit to pursue its exchanges of correspondence with the appellants, this did not have the effect of cancelling the implicit rejection decision which arose on 11 July 2013 and which the appellants should have referred to the Administrative Tribunal in good time. The conditions set by Article 4.3.2 of the old Annex IX for the admission of late appeals "*in very exceptional cases and for duly justified reasons*" have not been met.

25. For these reasons the appeal is inadmissible.

(ii) Examination of the substance

26. Given that the appeal is inadmissible, it is not necessary to discuss further the validity of the submissions of Mr ED, Mr FD and Mr FP.

E. Costs

27. Article 4.8.3 of Annex IX to the NATO Civilian Personnel Regulations, in the version that applies to this dispute, provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Board shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

28. As the appeal of Mr ED, Mr FD and Mr FP has been dismissed owing to the inadmissibility of all the submissions therein, they cannot be paid any sums under this head.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 13 July 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

22 July 2015 AT-J(2015)0009

Judgment

Case No. 2014/1037

FE,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 15 July 2015

Original: English

Keywords: rent allowance; rent indemnity; finality of Tribunal decisions.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook, and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 27 May 2015.

A. Proceedings

1. The NATO Administrative Tribunal was seized of an appeal, dated 10 October 2015, and registered on 13 October 2015, by Ms FE against the NATO International Staff. Inter alia, the appeal seeks annulment of the appellant's March 2014 pay slip insofar as it does not reflect the full amount of indemnity *in lieu* of rent allowance she regards as due.

2. The respondent's answer, dated 12 December 2014, was registered on 22 December 2014. The appellant's reply, dated 21 January 2015, was registered on 23 January 2015. The respondent's rejoinder, dated 23 February 2015, was registered on 3 March 2015.

3. The Tribunal's Panel held an oral hearing on 28 May 2015 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, all in the presence of Mrs Laura Maglia, Registrar *a.i.*

4 The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV of the NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

5. The material facts of the case may be summarized as follows.

6. This is a further appeal growing out of the North Atlantic Council's decision to revise the allowance structure for civilian staff members, and, in particular to revise the rent allowance (PO(2013)0238, 17 May 2013).

7. The appellant joined the NATO Secretariat in 2008. She began to receive rent allowance in May 2012. At that time she was grade B3, step 6. On 1 March 2014, she was promoted to a new position at grade B5, with a corresponding increase in her remuneration. Concurrently, her indemnity *in lieu* of rent allowance was reduced from what she anticipated would be €169.45 per month to €32.78. The reduction resulted from the respondent's application of transitional measures intended to bring about the eventual elimination of the rent allowance for many staff members previously receiving it, but without reducing their nominal compensation. (The system of transitional measures is described in the Tribunal's judgment in Case No. 2014/1017 (27 October 2014).)

C. Summary of the parties' principal contentions, legal arguments, and relief sought

(i) The appellant's contentions

8. The appellant contended that she had properly pursued to conclusion the pre-litigation procedures required by the NCPR and that her claim is admissible. The respondent does not contest admissibility.

9. Regarding the merits, the appellant's first two heads of claim involved arguments considered – and rejected - by the Tribunal in its judgment in Case No. 2014/1017, which was decided after this appeal was filed. However, the appellant's third head of claim involved issues not previously considered by the Tribunal.

10. In her first head of claim, the appellant contended, inter alia, that her March 2014 payslip and the NATO Council's decision on which it is based are illegal in that they violated her acquired rights and the balance of her contract; her right to legal security; the principle of good administration and of solicitude for staff members; and the respondent's obligation to give reasons. While there is no acquired right to the amount of an indemnity or to the manner of its calculation, its elimination impermissibly changed an acquired right and an essential element of her contract.

11. Further, in the appellant's view, the purpose of Council's action regarding the rent allowance was to gain economies; doing so at the expense of staff members violated the principles of good administration and of solicitude, and her right to a stable, objective and transparent regime. The respondent' actions upset the economy of her contract, impairing both the remuneration to which she was entitled and her right to promotion. The appellant also disputed the legality of adoption of the transitional allowances regime, in that the NATO Council did not approve the note providing for it, and the note and its mode of adoption lacked clarity and juridical security.

12. The appellant's second head of claim was that the respondent's actions violated the social contract, in that the Council decided to alter the rent allowance without appropriate participation by affected persons. She contended in this regard, first that the right to collective bargaining is a fundamental right that the respondent was obliged to respect in making this decision, and, subsidiarily, that the decision was made without proper consultation with staff representatives, contrary to relevant provisions of the NCPR.

13. The appellant's third head of claim involved a matter not presented in Case No. 2014/1017. This involved application of the transitional regime intended to mitigate the effects of the revised rent allowance by assuring that staff members' nominal compensation is not reduced. The appellant contended that the relevant decision documents establishing the transitional regime authorized its application only in cases involving increases in compensation due to annual or step increases. In her view, application of the transitional regime to increased compensation attributable to her new position at a higher grade is not legally authorized.

14. The appellant's reply, lodged after the Tribunal's judgment in Case No. 2014/1017, essentially invited the Tribunal to reconsider and revise that judgment. The appellant contended, inter alia, that the earlier judgment did not examine the distinction between essential and non-essential elements of the contract in light of relevant jurisprudence of the ILO Administrative Tribunal, and failed to examine the doctrine of acquired rights in light of jurisprudence of the European Court of Justice. The reply also observed that the respondent did not address the appellant's contention that application of the transitional measures was not authorized in her case.

15. The appellant seeks:
- annulment of her March 2014 pay slip and all subsequent payslips that do not reflect the full amount of indemnity *in lieu* of rent allowance regarded as due;
- €137,67 per month beginning in March 2014, plus interest at the European Central Bank rate plus 2%; and
- legal costs and attorney's fees.

(ii) The respondent's contentions

16. The respondent agreed that the claim is admissible.

17. Regarding the merits, the respondent contended that the appellant's claims mirror the claims in Case No. 2014/1017, which were considered and dismissed by the Tribunal. The respondent recalled elements of the Tribunal's earlier judgment specifically considering and rejecting arguments advanced in this appeal. In the respondent's view, nothing in the current appeal warranted reconsideration or revision of the Tribunal's earlier judgment.

18. The respondent's answer did not address the appellant's third claim challenging the legality of applying the transitional regime to her situation. The respondent's rejoinder addressed this matter in a conclusory way, stating that *"[f]rom a normal reading of the documents on file it is clear that it has always been the intention that any reduction in the rent allowance (or any other allowance) had to be off-set against any changes in the basis salary regardless of the nature or cause of such change*."

D. Considerations and conclusions

(i) Considerations on admissibility

19. Admissibility is not contested. The appeal is admissible.

(ii) Considerations on the merits

20. In her reply and at the hearing, the appellant invited the Tribunal to reconsider its judgment in Case No. 2014/1017, advancing new claims, *inter alia*, that the Tribunal failed to consider certain issues in light of jurisprudence of other courts and tribunals. These claims, introduced at a late stage in the proceedings are not admissible. In any case, the Tribunal is not prepared to reconsider its prior judgment. The Tribunal

decided these issues in Case No. 2014/1017, following full written and oral proceedings in which the previous appellant was represented by the current appellant's counsel and others from her law firm.

21. However, as noted, this appeal also involves an issue not present in Case No. 2014/1017: the appellant's contention that application of the transitional measures to her increased compensation reflecting a new position at a higher grade was not legally authorized. This issue was received limited treatment in the parties' written submissions, but was examined in greater depth at the hearing.

22. In response to the Tribunal's questions at the hearing, counsel for the respondent confirmed that document AP-WP(2013)0003-Final, which sets out detailed guidelines on implementation of the NATO Council decision regarding the review of allowances, had been approved with respect to the NATO International Staff, and that its provisions should govern administration of the transitional measures with respect to International Staff members. In this regard, paragraph 15 of that document states that the indemnity to be provided in lieu of rent allowance "*would be reduced over time, beginning 1 July 2013 and in lieu of those concerned receiving the full benefit of their periodic step increments or annual remuneration adjustment"* (emphasis added).

23. Thus, AP-WP(2013)0003-Final, the governing document, authorizes the transitional rent indemnity to be reduced only in the case of staff members receiving periodic step increases or annual adjustments to remuneration. The document's terms do not sanction offsets against increases in staff members' compensation due to changes in a staff member's grade or to assuming a new post at a higher grade. The respondent did not identify any other legal basis for such offsets in the relevant documents authorizing the transitional measures.

24. The record shows that the administration based its calculations of the appellant's indemnity *in lieu* of rent allowance on the increase in her compensation following her assumption of a new post at a higher grade. The 14 August 2014 letter from the Deputy Secretary General to the appellant contains a calculation clearly confirming this.

25. At the hearing, the respondent advanced a further line of argument not previously examined in the written submissions. This was that, with the increase in the appellant's compensation reflecting her new position and grade in March 2014, her rent allowance under the prior system would have been substantially smaller, €169,45 per month, rather than €301,30. The parties agreed that, had the NATO administration used this lesser figure in applying the transitional measures in its calculations, the appellant would have received no indemnity in lieu of rent allowance whatsoever. In fact, however, she received an indemnity of €31,78 per month.

26. Counsel for the respondent explained that this reflected an administrative decision to apply the appellant's previous rent allowance, rather than the reduced allowance reflecting her new higher salary. The parties agreed that there was no relevant legal restriction on the administration's ability to take such an action for the benefit of a staff member.

27. The Tribunal appreciates the respondent's intention to give the staff member the "benefit of the doubt" in administering the transitional measures in this manner. Nevertheless, the arguments regarding this issue advanced only at the hearing, are both inadmissible and irrelevant to the issue presented by the appeal. This is that, in applying those transitional measure to the appellant, the respondent did so on the basis of her increased compensation attributable to her new post and grade. This action not legally authorized by AP-WP(2013)0003-Final, the principal source of standards governing implementation of the transitional measures, or by any other legally relevant document identified by the respondent.

28. Accordingly, the appeal is allowed. The appellant's March 2014 pay slip is annulled to the extent it does not reflect indemnity *in lieu* of rent allowance in the amount of € 169,45 a month. The appellant is also entitled to receive an additional €137,67 per month for the period beginning in March 2014 and ending when her monthly compensation is adjusted to reflect the full amount of indemnity due her under the applicable regulations, or until such date as she is no longer entitled to the indemnity, plus interest at the European Central Bank rate plus 2%.

E. Costs

29. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

30. The appeal being allowed, appellant is entitled to reimbursement of the costs of retaining counsel up to a maximum of €4.000.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appellant's March 2014 pay slip is annulled to the extent it does not reflect indemnity *in lieu* of rent allowance in the amount of €169,45 a month.
- The appellant is entitled to receive an additional €137,67 per month for the period beginning March 2014 and ending when her monthly compensation is adjusted to reflect the full amount of indemnity *in lieu* of rent allowance due her under the applicable regulations and procedures, or until such date as she is no longer entitled to the indemnity, plus interest at the European Central Bank rate plus 2%.
- NATO shall reimburse the appellant for the costs of retaining counsel up to the maximum of €4.000.

Done in Brussels, on 15 July 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 September 2015 AT-J(2015)0010

Judgment

Cases Nos. 2014/1034 and 2015/1042

CS,

Appelant

v.

NATO Alliance Ground Surveillance Management Agency,

Respondent

Brussels, 7 August 2015

Original: English

Keywords: suspension during disciplinary actions; limits to the discretionary powers; extraordinary measure.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs María-Lourdes Arastey-Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter at the hearing on 29 June 2015.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of two appeals by Mr CS. The first, dated 26 September 2014 and registered as No. 2014/1034 on 30 September 2014, is seeking as primary relief the annulment of the decision to suspend him. The second, dated 22 December 2014 and registered as No. 2014/1042 on 6 January 2015, is seeking as primary relief the annulment of the decision to maintain this suspension.

2. At the time of submitting the appeals, appellant was a staff member of the NATO Alliance Ground Surveillance Management Agency (hereinafter "NAGSMA").

3. In respect of the first appeal, the answer, dated 25 November 2014, was registered on 1 December 2014. The reply, dated 2 January 2015, was registered on 9 January 2015. The rejoinder, dated 5 February 2015, was registered on 13 February 2015.

4. In respect of the second appeal, the answer, dated 6 March 2015, was registered on 31 March 2015. The reply, dated 23 April 2015, was registered on 30 April 2015. The rejoinder, dated 28 May 2015, was registered on 1 June 2015.

5. By Order AT(PRE-O)(2015)0002 dated 24 February 2015, the Tribunal's President decided to join the two cases and to have the oral hearing once the written procedure in Case No. 2015/1042 was completed.

6. In accordance with Rule 16 of the Tribunal’s Rules of Procedure and upon request of the appellant, on 15 June 2015, the Tribunal’s President approved the inclusion of an addendum to the submission provided by appellant’s counsel and dated 12 June 2015.

7. The Tribunal's Panel held an oral hearing on 29 June 2015 at NATO Headquarters. The Tribunal heard arguments by the representatives of the appellant and the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

8. The appeals were lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Annex IX thereto and, amongst other things, establishing the Administrative Tribunal. The Tribunal is required to rule in accordance with the new version of the provisions of Annex IX.

B. Factual background

9. The material facts, common to both appeals, may be summarized as follows.

10. Appellant joined NAGSMA in April 2010, under a three-year contract in accordance with the "Arrangement for United States Staff on Loan". His appointment with the Agency was renewed by three further contracts until the last assignment ended on 11 April 2015.

11. On 28 July 2014, during the course of a meeting, appellant received a communication from the NAGSMA General Manager, dated 25 July 2014, notifying him of the decision to impose administrative leave due to repeated security violations.

12. On 21 August 2014 appellant was notified of the General Manager's (GM's) decision of the same day to dismiss him, based on the outcome of the security investigation.

13. On 28 August 2014 appellant submitted a complaint against the 25 July 2014 decision. On 3 September 2014, the GM rejected the complaint.

14. On 24 September 2014 appellant was notified of a new decision by the GM, dated 23 September 2014, maintaining the suspension and informing him that his assignment with NAGSMA would not be terminated until further notice and was subject to the outcome of disciplinary and other investigations.

15. On 24 October 2014 appellant submitted a complaint against the 23 September 2014 decision. On 28 October 2014 this complaint was rejected.

C. Summary of parties' principal contentions, legal arguments and relief sought

(i) Appellant's submissions

16. Appellant contends the following:
   a) violation of the rights of defence;
   b) violation of the obligation to state reasons;
   c) breach of the principle of proportionality; and
   d) breach of the duty to have regard for the interests of officials.

17. With respect to the violation of the rights of defence, appellant quotes the jurisprudence of the EU Civil Service Tribunal and of the ILOAT enshrining the principle of the right to be heard for the person who has been suspended. The right of defence extends to the entitlement to have access to the information held by the authority taking such a decision. Appellant contests that he was never heard before the challenged decision of 25 July 2014 was taken. Appellant states that he only had a meeting on 6 November 2013 with the NAGSMA Programme Manager and the HR Manager, followed by a note given to him on 2 December 2013, concerning "repeated security violations" without further indications about any disciplinary action that could eventually be taken in accordance with the provisions of the NCPR.

18. On 21 August 2014 appellant was notified of the GM's decision to dismiss him, based on the outcome of the security investigation. In letters dated 29 August 2014, and 3 and 5 September 2014 appellant asked to have access to the complete file on the basis

of which the decision to dismiss him was taken. Appellant considers such requests to have been refused by the GM in the latter's replies to his letters of 3 and 8 September 2014 and in an email received from the administration on 22 August 2014 to which some documentation, but nothing constituting an investigation or disciplinary file, was attached.

19. On 11 September 2014 appellant submitted his comments on the 21 August 2014 dismissal decision stating "*NCPRs and the procedures have been blatantly breached. The rights of defence of Mr S have been dramatically disregarded. NAGSMA failed to provide Mr S with the grounds for the discussed disciplinary action and the grievances against him; it did not at all follow Annex X to the NCPRs; it did not enable Mr S to understand the grounds and grievances of the decision or to properly submit his comments during a regular procedure*". Appellant alleged the manifest violation of Article 60.1 and Annex X of the NCPR, as according to him such proceedings were never opened.

20. On 24 September 2014, appellant was notified of the GM's decision of 23 September 2014, whereby further to his statements of 11 September 2014, he had decided not to terminate appellant's employment *"until further notice and subject to the outcome of disciplinary and other investigations*". The suspension was maintained "until further notice" as well as the denial of access to the NAGSMA facilities. The NATO badge would be kept in NAGSMA (with access to other NATO facilities in accordance with the general rules applicable thereto.)

21. With respect to the violation of the obligation to state reasons, appellant refers to the jurisprudence of this Tribunal in case nos. 889, 890 and 897 whereby:

> The aim of the obligation for substantiation is, on the one hand, to provide the interested party with enough information to allow him/her to determine whether the contested decision is justified or otherwise is tainted by an error that makes its legality questionable, and on the other, to enable the Tribunal to perform judicial oversight thereof. Thus the obligation for substantiation implies that the person who is the subject of a decision that constitutes grounds for grievances must be put in a position to clearly and unequivocally understand the decision-maker's reasoning; the scope of this obligation must be viewed in terms of the practical circumstances of each case.

22. According to appellant, the reference in the 25 July 2014 letter to "repeated security violations" is flawed by a violation of the obligation to state reasons.

23. Concerning the breach of the principle of proportionality, appellant states that no options other than the suspension were considered, *i.e.* options which would have been less harmful for him while at the same time guaranteeing that the investigation was conducted properly.

24. Concerning the breach of the duty to have regard for the interests of officials, appellant contends that his rights have been breached by the failure to explain the facts and charges against him; by denying him an opportunity to express his views; by the GM's refusal to meet with him; by the non-respect of the presumption of innocence; by the withdrawal of his NAGSMA badge, thereby preventing him from accessing the NATO facilities (including his bank, his national post office, the Staff Centre, etc.); and by the

damage caused to his reputation by having all NAGSMA staff informed by electronic means of his administrative leave.

25. With the second appeal appellant challenges the 23 September 2014 and 23 October 2014 decisions.

26. Appellant maintains that he was never heard, be it before the challenged decision, during an investigation or disciplinary proceedings prior to administrative leave being imposed, or prior to the 21 August 2014 dismissal decision. Appellant notes that such proceedings were only opened by a disciplinary report sent to him on 8 December 2014. Appellant alleges a misuse of the procedure and maintains that respondent attempted to revise *ex post facto* a decision that was final, closing the unilateral assessment of appellant's situation.

27. In his appeal, appellant further maintains the violation of Article 60.2 of the NCPR in particular with regard to 1) non-compliance with the requirement for prima facie well-founded charges against him, and 2) respondent's failure to demonstrate that his continuance in office during the investigation of the charge might prejudice the Organization.

28. Appellant argues in detail facts supporting such breach of Article 60.2 of the NCPR as well as putting forward additional examples of violations of the principles outlined in his previous appeal (see supra, paragraphs 16 *ff.*).

29. Appellant also stresses in particular the situation that arose when his contract status was not converted from "Staff on loan" to "Direct hire", for want of the Agency's agreement, leaving him with no other option than to exercise his return rights.

(ii) Appellant's contentions

30. Appellant requests that:
- the GM's decision of 25 July 2014 to suspend him from duty be annulled;
- the GM's decision of 8 September 2014 rejecting his complaint be annulled; and
- the compensation of the non-material damage be evaluated *ex aequo et bono* at €50.000.

Appellant also requests that the Tribunal:
- annul the GM's decision of 23 September 2014 to maintain the suspension from duties;
- annul the GM's decision of 23 October 2014 rejecting his complaint;
- compensate the non-material damage evaluated *ex aequo et bono* at €50.000;
- compensate the material damage; and
- reimburse travel, subsistence and cost of counsel.

31. With the submission of the reply, appellant adds that his suspension from duty had the consequence of leaving him with no other contractual option than to "exercise" his right to return to his national Administration, thereby causing him damage.

32. Appellant leaves it to the Tribunal to decide whether the request for the compensation of such damage results from the decisions challenged in Case No. 2014/1034 or in subsequent Case No. 2015/1042 also submitted to the AT.

33. Upon appellant's request, and further to the approval of the AT President, an addendum to the submissions was included in the file of the present case. This addendum is an internal memorandum, dated 14 July 2014, from the NAGSMA Security Manager to the General Manager making an official report of a seventh IT security infringement by appellant.

(iii) Respondent's submissions

34. Respondent submits that it was informed by the NCIA of eight attempts made by appellant to transmit information classified as "NATO Restricted" between 22 September 2011 and 10 July 2014.

35. Respondent notes that the 25 July 2014 letter was handed over, on 28 July 2014, to appellant in the presence of the NAGSMA Programme Manager (who, according to the AGS Programme Memorandum of Understanding, assumes the GM's functions in his absence), appellant's supervisor and the HR Manager. Respondent claims that appellant was informed about the reasons for the decision and that he knew of at least seven of the security infractions which happened between 22 September 2011 and 11 April 2014 as the NCIA network protection mechanism intercepted emails with attachments possibly having a NATO classification. In such cases, the sender is informed by an automated email that the original message has been quarantined, is subject to an investigation and will not be released until the investigation is concluded. Respondent stresses that appellant, during the meeting on 6 November 2013, was informed that his behavior was considered to be of a "severe nature" and that any possible repetition "may lead to serious disciplinary actions in the future". Respondent also states that appellant was shown a document describing the violations and clearly stating "5th occurrence".

36. Respondent refers to the letter sent to appellant on 21 August 2014 which clarifies the nature of the 25 July 2014 decision (*i.e.* that the suspension was in accordance with Article 60.2 of the NCPR), stating that "the decision was not final and pending the final review of the NAGSMA General Manager" and giving appellant the opportunity to provide a statement by 28 August 2014 (further extended by the GM's letter of 3 September 2014 until 11 September 2014). Respondent claims that the information provided to appellant with the 25 July 2014 letter and the 22 August 2014 email gave appellant sufficient basis to prepare his statement. Respondent further affirms that appellant will have the possibility to see relevant documentation, within the limits of the NATO Security Regulations, in the context of the disciplinary proceedings which are ongoing against him.

37. Respondent notes that based upon the statement provided by appellant on 11 September 2014, it decided on 23 September 2014 that the employment assignment to NAGSMA was not terminated and that the suspension was maintained until further notice and subject to the outcome of disciplinary actions and other investigations. Respondent affirms that the decision to maintain the suspension was taken against the background of five security infractions which happened between 22 September 2011 and 30 July 2013

and, despite appellant having been informed during the meeting on 6 November 2013 that similar occurrences would lead to disciplinary actions, three additional infractions were reported between 11 April 2014 and 10 July 2014. Respondent contends that those actions gave grounds to assume that appellant would continue to disregard the security rules under Articles 18.2(a) and (b) of the NCPR as well as the NAGSMA Standards of Conduct (as signed by appellant) and the annual briefings given on the NATO Security Regulations.

38. Respondent contends that despite the wording of the 21 August 2014 letter, it was clarified subsequently in the 3 and 23 September 2014 letters that appellant's assignment was not terminated pending the ongoing disciplinary proceedings and as such the actions were not final disciplinary actions.

39. With respect to the violation of the rights of defence, respondent states that appellant, before being given the 25 July 2014 letter, was given the opportunity to make a statement in the presence of the Deputy GM, was made aware of the security breaches that had taken place and was given the opportunity to provide his comments by 11 September 2014.

40. Concerning the violation of the obligation to state reasons, respondent affirms that appellant was informed by the automated system each time the security violation occurred and that the note appellant received on 2 December 2013 informed him that the security occurrences were considered severe. Respondent contends that appellant was well aware that he violated the security regulations and that such a breach, in particular if it is repetitive, constitutes serious misconduct.

41. Concerning the allegations of breach of the principle of proportionality and the duty to have regard for the interests of officials, respondent rejects such claims, affirming that the suspension was proportional; that the nature of the work performed by the Agency and the number of its staff members did not make it possible to entrust appellant with tasks in which security was less critical during the investigations and therefore less harmful measures were not possible; and that the withdrawal of appellant's badge did not imply denial of access to the NATO compound, this being governed by the general NATO regulations in this respect.

42. Respondent declares that the second appeal is not admissible as the 23 September 2014 decision was not a new decision, adding that appellant has requested double compensation for the same damage.

43. Respondent rejects appellant's claims on the basis of the abovementioned comments (see supra, paragraphs 35 *ff.*).

(iv) Respondent's contentions

44. Respondent considers that the 25 July 2014 decision was in line with Article 60.2 of the NCPR providing the Heads of NATO Bodies with the legal tools to immediately react to serious misconduct by a staff member. Respondent rejects the claim for non-material damage as lacking justification, the suspension being the consequence of the proceedings

undertaken against appellant.

45. Respondent further rejects the claim for material damage concerning the exercise of appellant's return rights with his national government in the absence of a direct-hire contract with NAGSMA, such claim being based on speculative assumptions.

46. Respondent also requests that the Tribunal dismiss the second appeal.

D. Considerations and conclusions

47. As regards the preliminary question, it becomes necessary for the Tribunal to indicate that despite the wording repeatedly used by the parties, 'administrative leave' (*e.g.* in paragraph 11) is not a term that corresponds with the NATO legal framework, which refers to 'suspension'.

The rule applicable to this question is Article 60.2 of the NCPR. It provides as follows:

> Members of the staff against whom a charge of serious misconduct is made may be suspended immediately from their functions if the Head of the NATO body considers that the charge is prima facie well-founded and that the staff members' continuance in office during investigation of the charge might prejudice the Organization. The order for suspension from office will stipulate whether or not such members of the staff shall be deprived of their emoluments in whole or in part pending the results of the enquiry.

48. Appellant was suspended on 28 July 2014 in accordance with the abovementioned Article 60.2 of the NCPR. This provision gives the Organization the legal power to take an immediate decision once the conditions are in place. This is not subject to prior and complete adversarial proceedings and the Tribunal cannot accept allegations in this respect.

49. Regarding the right of defence of the staff member concerned, it can be considered fulfilled if the Organization provides an opportunity to make the staff member aware of the misconduct in which he/she has been involved. A distinction must be made between two very different situations. One is the adoption of the precautionary measure of suspension, and the other is the disciplinary proceeding opened because of the conduct alleged against the staff member. Although in both cases the right of defence of the staff member must be guaranteed, it is obvious that the suspension has essential peculiarities that are not consistent with the requirement of prior hearings. It is sufficient that the staff member can irrefutably and clearly identify the reasons for the decision.

50. The possibility afforded by Article 60.2 of the NCPR to suspend a staff member is not intended as a final disciplinary measure against that person but to enable respondent to adopt a precautionary measure ensuring the good functioning of the ongoing inquiry. Suspension is an extraordinary measure insofar as it involves the temporary removal of the staff member from his/her regular professional activity. Therefore, the authority of the Organization to suspend a staff member is limited by the legal requirements stated in the NCPR. Thus, the following conditions should be met: a) serious misconduct; b) a prima facie well-founded charge; and c) presumed prejudice to the Organization. Further, the

suspension is inextricably linked with the initiation of disciplinary action (Article 60 of the NCPR and Article 3.4 of Annex X thereto). It follows from this that the discretionary decision-making powers of the Organization are not absolute.

51. Neither the decision nor the explanations submitted in the file and at the hearing allow the Tribunal to assess the seriousness of appellant's misconduct. In the decision of 25 July 2014 the alleged misconduct is referred to only as "repeated security violations". It follows from the file that appellant must undoubtedly have known that the issue was centered on attempts by him to transmit "NATO Restricted" classified information via email. However, regardless of what may have been considered in the disciplinary proceeding, the Organization has not given sound reasons to support the adoption of this extraordinary measure, in particular the way it was applied. The measure should always be tailored to the particular circumstances of the particular case, but there is a lack of rational connection and proportionality between the facts and the measure adopted.

52. For these reasons, the decision of 25 July 2014 must be annulled.

53. The annulment of this first contested decision precludes any ruling on the also contested decision of 23 September 2014, since it was limited to maintaining the suspension until further notice, without further circumstances or motivations.

54. The Tribunal considers that appellant has suffered non-material damage as a result of the suspension imposed by the annulled decision, which cannot be entirely remedied by the annulment itself. In view of these circumstances and, in particular, the seriousness of the situation created as from the same day on which the suspension took immediate effect, fair compensation for this non-material damage will be granted by the Tribunal by ordering the respondent to pay the appellant €10.000.

E. Costs

55. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

56. Under the circumstances of this case, it is appropriate for appellant to be reimbursed the costs of retaining counsel up to a total of €4.000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 25 July 2014 is annulled.
- Appellant is entitled to €10.000 in damages.
- It is unnecessary to give judgment on the appeal in Case No. 2015/1042.
- Respondent shall refund appellant the costs of retaining counsel, up to a maximum of €4.000.

Done in Brussels, on 7 August 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar a.i.
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0011

Judgment

Case No. 2015/1046

TC,
appellant

v.

NATO Support Agency (NSPA)
respondent

Brussels, 23 October 2015

Original: French

Keywords: no causal link between the allegations against the administration and the alleged damage.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 22 September 2015.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 16 February 2015 and registered on 6 March 2015, by Mrs TC, seeking:
- cancellation of the decision of 11 December 2014 whereby the General Manager of the NATO Support Agency (NSPA), which has succeeded the NATO Maintenance and Supply Agency (NAMSA), refused payment of her invalidity pension for a period of sixteen months and nine days; and
- payment of the invalidity pension for a period of sixteen months and nine days owing to the delay on the part of NAMSA in starting the invalidity procedure.

2. The appellant is a former staff member of NAMSA.

3. The comments of the respondent, dated 27 April 2015, were registered on 8 May 2015. The reply of the appellant, dated 15 May 2015, was registered on 27 May 2015. The rejoinder of the respondent, dated 26 June 2015, was registered on 2 July 2015. Finally, the appellant submitted new comments on 17 July 2015.

4. The Tribunal's Panel held an oral hearing at NATO Headquarters on 22 September 2015. The Tribunal heard arguments by the parties, in the presence of the appellant's representative and Mrs Laura Maglia, Registrar *a.i.*

5. The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the CPR, amending Chapter XIV and Annex IX and, amongst other things, establishing the Tribunal. The appeal is therefore governed by these provisions.

B. Factual background of the case

6. Mrs C was recruited to NAMSA as a temporary staff member on 2 May 2005. She was given an initial contract on 21 March 2006, which was renewed on 21 March 2009 for a further three-year period.

7. Mrs C was put on sick leave on 18 May 2010 and subsequently on extended sick leave. She never returned to work. She then tried to establish that her illness was caused by her difficult working relationship with her colleagues.

8. On 6 November 2010, she lodged a complaint against the NAMSA General Manager in order that he might acknowledge the harassment she believed she had suffered in the workplace. The General Manager dismissed this complaint on 8 April 2011. Mrs C tried to have this dismissal cancelled by the NATO Appeals Board (Case No. 839), which dismissed her appeal on 7 February 2013.

9. Mrs C, on extended sick leave, then underwent medical tests to establish whether her invalidity was permanent. She was examined by several doctors, following which the Van Breda insurance company informed NAMSA that her condition was stable and permanent as from 4 July 2011 and that her rate of permanent invalidity was less than one third. Consequently, the NAMSA General Manager decided to refuse to grant Mrs C an invalidity pension and terminated her contract. Mrs C also contested these two decisions, referring them to the Appeals Board (Case no. 863), which dismissed her appeal on 7 February 2013.

10. Thirdly, on 16 November 2011 Mrs C asked the NAMSA General Manager to take action on her request for acknowledgement of professional invalidity owing to problems with her back and with her hearing, which she thought had been caused by her professional activity. The General Manager refused, and Mrs C took this matter to the Appeals Board (Case No. 864). On 7 February 2013, the Appeals Board upheld her submissions and ruled that the NAMSA General Manager could not legally invoke the recent completion of the invalidity procedure on the basis of a psychiatric disorder as grounds for refusing to examine a request on the basis of other illnesses. The Appeals Board instructed the NAMSA General Manager to investigate the two requests made by Mrs C on 16 November 2011.

11. On 25 March 2013, the NSPA, which had succeeded NAMSA, began the procedure on the basis of Article 13 of the group insurance policy, as Mrs C had asked on 16 November 2011. On 16 October 2013, Allianz stated that it could not acknowledge Mrs C's illnesses as occupational diseases. On 6 November 2013, the NSPA concluded from this that the matter was closed: the request of November 2011 had been considered and had resulted in a negative response. Mrs C did not contest this decision.

12. Mrs C then began a new request with a view to obtaining acknowledgement of permanent invalidity, and referred to Article 12 of the group insurance policy in her letter dated 6 December 2013. On 23 January 2014, the NSPA refused her request on the grounds that it was not part of its obligations as laid down by the Appeals Board in Case no. 864, which consisted in investigating the requests made by Mrs C on 16 November 2011, i.e. the requests for acknowledgement of professional invalidity.

13. Allianz subsequently re-examined Mrs C's state of health and decided, under its sole responsibility (*i.e.* outside any professional context related to a NATO body) to grant Mrs C a pension as from 13 June 2014. This pension was not linked to any occupational illness or industrial accident.

14. It was on the basis of this interval of 16 months and nine days (from 16 November 2011 to 25 March 2013) that Mrs C lodged appeal No. 2015/1046. She maintains that she would have received her invalidity pension earlier if NAMSA had not initially given a refusal.

C. Summary of parties' principal contentions, legal arguments and relief sought

(i) The appellant's main contentions

15. Essentially, the appellant invokes the initial refusal by the NAMSA General Manager to investigate her request for an invalidity pension and claims that she would have obtained this pension 16 months and nine days earlier if her request had been investigated as soon as it was made and not after the Appeals Board had instructed the administration to do so. She maintains that her pension is part of her contractual rights with NAMSA.

(ii) The respondent's main contentions

16. The respondent maintains that the appeal is inadmissible because it was lodged too late: Mrs C is seeking the cancellation of a decision which is in fact that of 6 November 2013, which she did not contest until 24 November 2014. The appeal was lodged after the 60 day period stated in Article 6.3.1 of Annex IX to the Civilian Personnel Regulations.

17. Secondarily, the respondent argues that there are no grounds for the appeal. The respondent maintains that there is no link between the procedure for acknowledging professional invalidity, which was the subject of the request of November 2011 investigated in March 2013 after the Appeals Board decision, and the permanent invalidity pension granted for a non-professional reason, which was the subject of Allianz's decision.

D. Considerations and conclusions

18. In its ruling in Case No. 864, the Appeals Board cancelled the decision to refuse to acknowledge professional invalidity and asked the NSPA to investigate these requests. Allianz gave a ruling on this matter on 16 October 2013 and its negative response gave rise to the refusal on the part of the NSPA. The question of professional invalidity was therefore closed on 6 November 2013 as Mrs C did not contest this decision.

19. Mrs C then approached Allianz directly to try to obtain an invalidity pension. She obtained it on 13 June 2014. However, this was a new procedure and distinct from the one begun in 2011; the requests of November 2011 sought acknowledgement of professional invalidity on the basis of Article 13 of the group insurance contract, which was the sole reference made by the appellant. Her requests of November 2014 were made on a different legal basis - Article 12 of the same group insurance contract, concerning the acknowledgement of permanent invalidity for a non-professional reason.

20. The two requests had a distinct legal basis, and there is no causal link between the decisions and conduct of the administration in refusing to grant her a professional invalidity pension, on the one hand, and the delay which Mrs C claims occurred in her receipt of a non-professional invalidity pension on the other hand.

21. The appeal is dismissed in terms of its substance and so there is no need to consider its admissibility.

E. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 23 October 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0012

Judgment

Case No. 2015/1047

WK,

Appellant

v.

Supreme Allied Command Transformation,

Respondent

Brussels, 28 October 2015

Original: English

Keywords: Dependent Children's allowance; Other Dependents' allowance; special hardship.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook, and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 22 September 2015.

A. Proceedings

1. The NATO Administrative Tribunal was seized of an appeal, dated 5 March 2015, and registered on 23 March 2015, as Case No. 2015/1047, by Mr WK against the Supreme Allied Command Transformation. In substance, the appeal seeks annulment of the respondent's rejection of the appellant's requests to be granted a special hardship exception under NATO Civilian Personnel Regulations (NCPR) Article 29.5, and to be authorized payment of Other Dependants' Allowance (ODA) in respect of his son, who would otherwise be ineligible for that allowance.

2. The respondent's answer, dated 20 May 2015, was registered on 27 May 2015. The appellant's reply, dated 25 June 2015, was registered on 3 July 2015. The respondent's rejoinder, dated 24 July 2015, was registered on 31 July 2015.

3. The Tribunal's Panel held an oral hearing on 22 September 2015 at NATO Headquarters. It heard arguments by the appellant and by representatives of the respondent, all in the presence of Mrs Laura Maglia, Registrar *a.i.*

4 The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NCPR, amending Chapter XIV of the NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

5. There is some uncertainty regarding the specific allowance sought by the appellant. At the hearing, the tribunal understood him to say that his request was for a special hardship exception to allow payment of Dependent Children's Allowance (DCA) in respect of his son, and not ODA. The appeal and the appellant's communications with the respondent refer ambiguously to "Dependent Allowance." The respondent's Chief of Staff understood the appellant's request to involve ODA, and that seems the most plausible construction of the appellant's written submissions. However, the difference is not material for purposes of this appeal.

6. The material facts of the case may be summarized as follows.

7. The appellant, who is not a U.S. citizen, has lived in the United States while working as a NATO staff member for thirteen years. At the time the appeal was lodged, the appellant's son was over the age of 21 years, lived with the appellant and his family, and was not in school or university or receiving vocational training. The son has limited connections with his home country, has not mastered its language, and intends to remain in the United States. Under U.S. law, while he was a non-resident, the son could not lawfully work in the United States after attaining the age of 21. (In February 2015, the

month before the appeal was filed, the son received a U.S. ”Green Card”, establishing him as a lawful permanent U.S. resident and permitting him to work in the United States.)

8. On 1 September 2014, the appellant submitted a request to receive ODA with respect to the son pursuant to NCPR Article 29.3, which provides that the Head of a NATO body (HONB) may grant this allowance:

> …in respect of ascendants and other close relatives by blood or marriage dependent for their main and continuing support on a member of the staff by virtue of legal or other obligations, the proof of which devolves upon the staff member concerned.

9. On 4 September 2014, the Respondent's Civilian Human Resources Manager (CHRM) denied the appellant's request, stating that "children of a staff member cannot be considered for this allowance." On 1 October 2014, the appellant requested the Executive Assistant of the respondent's Deputy Chief of Staff for Resources and Management to seek reconsideration of the CHRM's decision by the CHRM'S superior, the Branch Head HRM. In the alternative, the appellant requested that the HONB authorize an exception pursuant to NCPR Article 29.5, which provides:

> In cases where the application of these provisions would cause special hardship in individual cases, Heads of NATO bodies may authorize an exception.

10. So far as appears from the record, the appellant provided limited substantiation for either his initial claim for ODA or for his subsequent requests for a special hardship exception. The 1 September 2014 request for the allowance lists monthly expenses of $450 attributable to his son, without further explanation or substantiation. His subsequent requests for a hardship exception instead emphasized that persons in the son's position in the United States "are not entitled to social benefits" and that "privately procured health insurance is almost unaffordable." In the reply and at the hearing, the appellant stressed his potential risk of uninsured medical expenses should his son incur some future medical misfortune.

11. As requested, the Executive Assistant raised the denial of the appellant's request for ODA with the CHRM's superior, who declined to change the initial decision. The appellant was informed of this by an e-mail dated 28 October 2014.

12. Following the negative response to the first stage of administrative review under NCPR Annex IX Article 2.2(a), the appellant did not request further administrative review as required by NCPR Annex IX Article 2.2(b), which requires that such a request be initiated within 21 days of the outcome of the initial administrative review. He instead directed a document to the HONB that described itself as "a formal complaint i.a.w. NCPR Article 61." (NCPR Article 61.2 authorizes staff members to submit a complaint to the HONB "after pursuing administrative review." Under NCPR Annex IX Article 4.1 a "formal complaint" must be submitted within 30 days of the outcome of the administrative review.)

13. The appellant's complaint was dated 26 November 2014. However, it was hand-delivered by the appellant to his line manager only on 2 December 2014. The principal

thrust of this document was to urge that the HONB grant a special hardship exception pursuant to NCPR Article 29.5, so as to allow payment of ODA in respect of the appellant's son.

14. By memorandum dated 9 December 2014, the respondent's Chief of Staff, writing for the HONB, informed the appellant that his 26 November/2 December 2014 communication was "invalid", as under Annex IX of the NCPR, it should have been submitted within 21 days of learning the outcome of administrative review, that is by 18 November 2014. The Chief of Staff continued, however, that, notwithstanding the untimely submission, he had looked at the circumstances outlined by the appellant. However, he was "not able to see where any decision taken by NATO relating to your son, positive or negative, has caused you special hardship."

C. Summary of parties' principal contentions, legal arguments and relief sought

(i) The appellant's contentions:

15. The appellant maintained that the appeal was admissible. His reply contended that he did not receive a response to his initial request for administrative review of the denial of ODA within the 21 days required for such a response by NCPR Annex IX Article 2.2(a). (He received the response on the 27th day.) Because of this six-day delay, the appellant maintained that he could lodge a formal complaint with the HONB under NCPR Annex IX Article 4.1, which authorizes such a complaint within 30 days after pursuing administrative review "or if no response has been received within the applicable time limit." Thus, in the appellant's view, the respondent's six-day delay in responding to his initial request for administrative review relieved him of any need to pursue "further administrative review" under Annex IX Article 2.2(b), so that the 21-day deadline under Article 2.2(b) does not apply. Instead, the applicable deadline is the 30-day period for lodging a formal complaint under NCPR Annex IX Article 4.1.

16. The appellant urged that his failure to comply with the 30-day time limit under NCPR Annex IX Article 4.1 stemmed from causes for which he should not be held responsible, in particular absences due to travel and the U.S. Thanksgiving holiday. In the appellant's view, the delay in submitting his formal complaint to the HONB involved "*special circumstances that would allow for the exception of the mandatory respect of the time lines. I deemed that the complaint was submitted on time*."

17. The appeal did not precisely set out how the disputed actions were inconsistent with the NCPR, the appellant's contract, or other terms and conditions of employment, as specified in NCPR Article 61.1. However, its essence appears to be that the appellant's circumstances involved conditions of special hardship, so that the organization acted illegally or improperly or abused its discretion by denying a special hardship exception and not authorizing payment of ODA in respect of his son.

18. In this regard, the appellant stressed in his appeal to the HONB and at the hearing that the cost of medical insurance for his son was “prohibitive”, leaving the appellant at risk of significant financial injury should the son have an expensive medical emergency.

19. In his reply, the appellant advanced for the first time several additional arguments not presented in his initial appeal to the Tribunal. *Inter alia*, he contended that the Chief of Staff (a Lieutenant General) was not properly delegated authority to act on behalf of the HONB in relation to the appellant’s request for review, or that any such delegation had not been “officially communicated to me;” that the matter should have been handled by the HONB personally; that the review of his formal complaint was in some manner tainted by involvement of the respondent’s Human Resources Management Personnel in determining the response; and that the reasons for adverse decisions were not made with sufficient transparency and accountability or accompanied by justifications and explanations.

20. The appellant requests the tribunal to determine that:
- “This appeal is submitted within the time limits and is admissible,”
- “That the applicability of the provisions causes special hardship,”
- “That the administration has not taken into account the special circumstances,” and
- “That appellant would be granted dependent allowance from 1 November 2013 through 31 July 2015.”

(ii) The respondent's contentions:

21. The respondent urged that the claim is inadmissible. In the respondent’s view, the appellant’s communication addressed to the HONB constitutes a request for further administrative review pursuant to NCPR Annex IX Article 2.2(b). As such, it had to be lodged within 21 days of the response to the initial request for administrative review. As the document was not hand delivered until 2 December 2014, it was lodged well after the relevant date (18 November 2014).

22. Regarding the merits of the decision not to authorize ODA for the appellant’s son, the respondent emphasized the wording of NCPR Article 29.3, which does not list staff member’s children among those potentially eligible for the allowance. The respondent also referred to the NATO Appeals Board’s Decision No. 78 (17 March 1977) holding that staff member’s children are not eligible to receive the allowance, and to the Implementing Guidelines for NATO Administrators on Other Dependents’ Allowance, which are to the same effect. According to the respondent’s answer, the appellant was shown these guidelines at the time of the initial denial of his request for ODA.

23. The respondent also disputed the appellant’s claim of “special hardship” stemming from appellant’s son’s immigration status and resulting inability to legally work in the United States after the age of 21. In the respondent’s view, these circumstances were of the appellant’s own making, because he could have sought adjustment of the son’s status to U.S. Lawful Permanent Resident Status five years before actually doing so. The respondent also contended that, even if the NCPR could be modified or interpreted

in a manner to permit ODA for a staff member's child, the appellant had not presented or documented circumstances indicating a unique or particularly difficult situation.

D. Considerations and conclusions

(i) Considerations and conclusions on admissibility

24. The Tribunal initially notes an issue bearing upon admissibility that was not addressed during the proceedings. The contention at the heart of this appeal – that the respondent erred by not authorizing a hardship exception in connection with appellant's request for ODA – was only raised in the course of the administrative review process. It was not mentioned in the appellant's initial 1 September 2014 request for the allowance, which was denied on other grounds.

25. The review process established by NCPR Chapter XIV and NCPR Annex IX builds from the premise that a specific decision affecting a staff member's conditions of work or service "does not comply with the terms and conditions of their employment." The staff member then has the opportunity to seek correction of that decision through a structured system of administrative appeals.

26. Here, however, the decision at the core of the appeal – the respondent's refusal to authorize a special hardship exception under NCPR Article 29.5 – was made at a later stage, during the administrative review process itself. This presents a significant issue regarding admissibility of the appeal. The Tribunal is asked to reverse the NATO body's decision not to authorize ODA for a reason that was not initially presented to, or decided by, that body.

27. However this admissibility issue was not raised during the proceedings, and the parties have not had opportunity to address it. In the interests of fairness, and given other features of the appeal, the tribunal makes no decision in this regard.

28. It is clear that the appeal was not lodged within the required time period, whether the 21 days specified NCPR Annex IX Article 2.2(b) or the 30 days specified in Annex IX Article 4.1. The appellant's claim that the 30-day period applies rests on his contention that the respondent's six-day delay in replying to his initial request for administrative review entitled him to bypass further administrative review under NCPR Annex IX Article 2.2(b) and lodge a formal complaint directly with the HONB. The Tribunal is skeptical of the logic of this argument, where the appellant indeed received a response and then largely based his formal complaint to the HONB on the contents of that response.

29. Nevertheless, giving the appellant the benefit of the doubt, and assuming (but without deciding) that his submission to the HONB was a "formal complaint" subject to Annex IX Article 4.1, it still was not submitted within the required 30-day period. The appellant learned of the failure of his initial request for administrative review on 28 October 2014. His "formal complaint" was hand-delivered on 2 December 2014, 35 days later. Under NCPR Annex IX Article 1.5, "respect for time limits is mandatory, except in exceptional cases, such as staff members on a probationary period." There has been

no showing here that normal and foreseeable events in the life of a staff member, such as travel and well-known national holidays, involve "exceptional cases" justifying disregard of mandatory time limits.

30. Because the appellant did not comply with even the most generous time period potentially applicable to submission of his request for review by the HONB, the appeal is inadmissible.

(ii) Considerations on the merits

31. While the appeal is inadmissible, the Tribunal is mindful that the respondent's Chief of Staff, while dismissing the appellant's request as untimely, nevertheless reviewed the merits of his claim. The Chief of Staff found no basis to grant a special hardship exemption under NCPR Article 29.5.

32. In this regard, so far as appears from the record, the appellant provided little substantiation for either his initial claim for ODA or for his subsequent requests for a special hardship exception. His 1 September 2014 request for the allowance listed monthly expenses of $450 in respect of his son, without further explanation or substantiation. His later requests for a special hardship exception instead emphasized that persons in the son's position in the United States "are not entitled to social benefits" and the expense of privately procured health insurance in the United States. At the hearing, the appellant stressed his potential exposure to uninsured medical expenses should his incur some future medical misfortune.

33. The authority to grant exceptions in individual situations under NCPR Article 29.5 necessarily involves a large measure of discretion. The HONB may (but need not) authorize an exception, but only if he or she determines that application of certain allowances provisions "would cause special hardship in individual cases." This places a significant burden on the staff member concerned to show that circumstances involved in his or her case do indeed involved "special hardship". The evidence of record in this appeal falls well short of doing so.

34. As noted above, the appellant's reply introduced a battery of new arguments not presented in the initial appeal. Inter alia, the appellant contended that the Chief of Staff was not properly delegated authority to act on behalf of the HONB in relation to his request for review, or that any such delegation had not been "officially communicated" to him; that review of his formal complaint was tainted by advice given to the Chief of Staff by the respondent's Human Resources Management personnel; and that the reasons for adverse decisions were not made with sufficient transparency and accountability or accompanied by justifications and explanations.

35. As the appeal is inadmissible, it is not necessary for the Tribunal to address these arguments, or the respondent's replies to them. However, the tribunal observes that it is not appropriate or fair for either party to an appeal to raise significant new arguments at a late stage in the process, absent a satisfactory explanation of the reason for not doing so earlier.

E. Costs

36. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

37. The appeal being found inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is inadmissible.

Done in Brussels, on 28 October 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0013

Judgment

Cases Nos 2014/1041 and 2015/1045

ZS,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 28 October 2015

Original: English

Keywords: consultancy contract; requalification; admissibility; competence of Tribunal.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 23 September 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO International Staff, dated 31 October 2014, and registered on 7 November 2014 as Case No. 2014/1041, by Mrs ZS, seeking in particular the requalification of her consultancy contracts and the granting of an indefinite duration staff contract. At the time of submitting the appeal, appellant was a consultant at the NATO International Staff (IS).

2. The respondent's answer, dated 5 January 2015, was registered on 5 January 2015. The appellant's reply, dated 3 February 2015, was registered on 16 February 2015. The respondent's rejoinder, dated 17 March 2015, was registered on 27 March 2015.

3. On 27 February 2015 appellant introduced a second appeal, registered on 6 March 2015 as Case No. 2015/1045, contesting the non-renewal of her contract. At the time of submitting the referenced second appeal, appellant's last contract with the Organization had expired.

4. The respondent's answer, dated 5 May 2015, was registered on 8 May 2015. The appellant's reply, dated 5 June 2015, was registered on 10 June 2015. The respondent's rejoinder, dated 14 July 2015, was registered on 16 July 2015.

5. By Order AT(PRE-O)(2015)0003 dated 16 March 2015, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2015/1045 was completed.

6. The Panel held an oral hearing on 23 September 2015 at NATO Headquarters. It heard arguments by appellant's counsels and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.* At the hearing the Tribunal took good note of appellant's counsels' confirmation that the staff members who were part of the counsel team appeared in their personal capacity, and not as staff representatives.

7. The above-mentioned appeals were lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV NCPR and Annex IX thereto and, *inter alia*, establishing the Tribunal. The present appeals are therefore governed by the above-mentioned provisions.

B. Factual background of the cases

8. The present judgment concerns two appeals, one seeking reclassification of a series of consultancy contracts, and the second seeking a new such contract. In both appeals appellant argues that her contracts are governed by the NCPR and that, by analogy with jurisprudence of the European Union (EU), she has the right at any time to put a question to the administration, and to treat an adverse answer – or an absence of a reply – as an administrative decision subject to appeal.

9. The background and material facts of the two cases may be summarized as follows.

10. Appellant, a former consultant within the IS, served as medical adviser in the NATO Headquarters Medical Service under the following contracts:

- 1 January 2009 – 31 December 2011 (8 hours per week);
- 1 July 2009 – 31 December 2011 (19 hours per week);
- 1 January 2012 – 31 December 2012 (19 hours per week); and
- 1 January 2012 – 31 December 2014 (19 hours per week).

11. On 24 April 2014, the Tribunal delivered a Judgment in an earlier case (Case No. 2013/1008) between the same parties, in which appellant sought reclassification of her consultancy contracts into an initial contract, followed by an indefinite duration contract. The Tribunal summarily dismissed that appeal for failure to comply with the pre-litigation processes in compliance with the new provisions of the NCPR and Annex IX thereto.

12. On 7 May 2014, appellant introduced a request for Administrative Review with her direct supervisor within the Human Resources Division concerning the reclassification of her contractual situation with the Organization. By letter dated 28 May 2014 the (Acting) Deputy Assistant Secretary General for Human Resources denied the request, indicating that the contracts concerned were not governed by the NCPR, that appellant could thus not avail herself of the NCPR, particularly its dispute resolution system, and that she had failed to identify a specific administrative decision being challenged.

13. On 18 June 2014 appellant introduced a request for Further Administrative Review with the NATO Secretary General. This contended that her contracts fall under the NCPR and requested, by analogy with provisions in the legislation of the European Union, that the Secretary General take a decision regarding her request that the contracts be reclassified, so as to create an administrative decision subject to possible challenge under the NCPR. The request was rejected by the (Acting) Assistant Secretary General for Executive Management on 9 July 2014, with the arguments that the contracts concerned were not governed by the NCPR; that appellant could not avail herself of the NCPR, particularly its dispute resolution system; that she had failed to identify a specific administrative decision; and that the contracts had been tailored to her wishes in order to take account of her parallel employment with a private firm outside the Organization.

14. On 4 August 2014 appellant introduced a complaint with the NATO Secretary General in accordance with Article 61.2 NCPR, with the same arguments as in the administrative reviews. The Deputy Assistant Secretary General, on behalf of the Secretary General, rejected it on 1 September 2014, also with the same arguments.

15. Appellant submitted an appeal against this decision. This is Case No. 2014/1041, the first appeal.

16. On 7 October 2014 appellant introduced another request for Administrative Review with her direct supervisor within the Human Resources Division. This request concerned the renewal of her contract, which was due to expire on 31 December 2014. The appellant inquired about the employer's intention to offer a new contract. Appellant submitted that she should, in accordance with Article 5 NCPR, have been informed six months before the end date of the contract, and that the successor contract should be for an indefinite duration. On 27 October 2014 the Head of Personnel Services replied that the existing contract would terminate on 31 December 2014, and that no new decision had been taken in this respect. He added that appellant had not identified any decision that she was challenging in the administrative review.

17. On 30 October 2014 appellant replied to the Head of Personnel Services, expressing the view, with reference to EU jurisprudence, that the 27 October 2014 answer constituted a decision adversely affecting her. Appellant concluded that this was a ground for a Further Administrative Review. Appellant asked to be informed if the Head of Personnel Services held another view. In reply to the observation that no decision was referred to, appellant asked to be advised how to obtain one.

18. On 13 November 2014 appellant lodged a request for Further Administrative Review with the same arguments.

19. On 22 November 2014 the Head of Personnel Services answered the letters dated 30 October 2014 and 13 November 2014, in which he considered that both requests for review were inadmissible, since no new decision had been identified. He observed that the other requests were already subject of an appeal before the Tribunal.

20. On 27 November 2014 appellant requested the Secretary General to agree to submit the matter directly to the Tribunal, in accordance with Article 62.2 NCPR.

21. This request was rejected by the Deputy Assistant Secretary General for Human Resources on 10 December 2014.

22. On 12 December 2014 appellant introduced a complaint with the NATO Secretary General, in accordance with Article 61.2 NCPR, which was rejected on 20 January 2015.

23. Appellant submitted an appeal against this decision on 27 February 2015. This is the second appeal.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submission in Case No. 2014/1041

24. In the first appeal, appellant seeks requalification of her consultancy contracts into an initial staff contract as of 1 January 2009, followed by an indefinite duration staff contract; the compensation of material damages (including social security, family allowances, step increments and pension rights); compensation for moral damages evaluated at €30.000; and compensation for legal costs.

25. Concerning the admissibility of the appeal, appellant submits that the consultancy contracts are covered by the NCPR, and that the Organization's position that the NCPR do not apply to her contracts is unclear and contrary to the principle of good faith. In appellant's view, the respondent has taken contradictory positions, first rejecting appellant's complaint as not in conformity with certain dispositions of the NCPR but then, changing position, contending that the NCPR do not apply. Appellant affirms that juridical security and good faith have also been infringed with respect to the arbitration clause contained in her contract, the respondent not having brought it to her attention in a timely way, nor having invoked itself during the previous procedure in Case No. 2013/2008.

26. Regarding the NCPR's requirement to identify a precise decision against which the appeal is introduced, appellant considers that the purpose of the request for administrative review is to require such a decision to be taken, in particular concerning the illegality of the initial qualification of her contracts. Not allowing this would restrain appellant's right of access to justice, limiting such access only to cases where a decision giving rise to a grievance has been taken vis-à-vis staff members. Appellant refers in this respect to the regulations for EU officials and to the jurisprudence of the EU Civil Service Tribunal.

27. With respect to her employment under consultancy contracts, appellant contends the violation of Article 68 NCPR regarding her qualifications, functions and employment conditions. In particular, appellant stresses that her medical services are of such a general and widely practiced nature that they cannot be said to fall under the requirements of Article 68, which require an "expert or specialist".

28. Concerning the functions of the occupational health service, appellant maintains that such functions are required daily and are of a permanent nature. Appellant further claims the applicability to NATO of the "*Arrêté royal du 27 mars 1998 relatif au Service interne pour la Prévention et la Protection au Travail*". She refers in this respect to Article 16 NCPR, which she contends renders Belgian legal dispositions applicable to NATO, by providing that "*The Head of the NATO body shall ensure that adequate health and safety conditions exists, based on host nation standards*". Appellant claims that, given this legal obligation and the size of NATO Headquarters, her employment contract should have been a fulltime one. Further, appellant remarks that her contracts make clear the permanent nature of her functions, referring to general, rather than specific, services required as long as the Organization would employ personnel.

29. Appellant notes that in view of the financial aspects of the consultancy contract an international bidding process should have been followed in accordance with the IS Financial Regulations. The fact that this was not done, or even considered by the Organization, further indicates the intention to never offer a real consultancy contract but instead one of regular employment, as defined by Article 5 NCPR.

30. Appellant also claims violation of Article 69 NCPR, which provides that consultancy contracts "*shall not normally exceed a period of 90 consecutive days*. […] *Where, in exceptional and well-defined cases, the services of a consultant are known to be required for a period longer than 180 days, specific budgetary provision shall be made*". Appellant submits that, contrary to these requirements, her contracts did not contain a specific date by which the tasks had to be performed. They also provide for paid annual leave and sick leave absence.

31. Appellant further advances that her external occupation as medical consultant was of no impact on her employment with the Organization, but was driven by the uncertainty of her employment with NATO.

32. Appellant therefore affirms that her contractual situation is comparable to the one of indefinite duration contract holders. Consequently, her employment should be re-qualified as such, retroactively as of 1 January 2009, to include social security benefits under the Allianz scheme, child allowances, step increases and pension rights.

33. Appellant requests the Tribunal to order:
- annulment of the 1 September 2014 decision rejecting her complaint;
- reparation of her material damages;
- reparation of her moral damages evaluated at €30.000; and
- reimbursement of the legal costs and expenses without application of any ceiling.

(ii) The respondent's contentions in Case No. 2014/1041

34. Respondent contests the admissibility of the appeal, referring to the Tribunal's Judgment in Case No. 2013/2008, which stated both that the proper procedures were not followed and, in paragraph 44 of the Judgment, that it was for appellant to identify any decisions, facts or elements that affected her conditions of work or service and did not comply with the terms and conditions of her employment.

35. Respondent remarks that appellant initiated a new procedure claiming the same relief as in Case No. 2013/1008 without indicating a new decision.

36. Respondent notes that appellant's contracts do not refer explicitly to the application of the provisions of the NCPR, referring in this regard to the arbitration clause they contain. It also In addition, *quod non*, stresses that the legal basis to initiate a proper procedure under the NCPR is lacking, appellant having failed to advance any new decision.

37. Respondent also affirms that the appeal must be considered time-barred, as grievances relating to the nature of the contract had to be raised after the signing of the contract or during its execution, not at the end of the second three year contract.

38. Respondent submits that the consultancy contracts are not covered by the NCPR and that no violations of its provisions could have occurred at any time. Respondent contends that the labeling of the contract *"Contrat de consultant"* refers only to the title and not to the operative provisions of the contract. Furthermore, respondent states that appellant did not demonstrate a violation of any provision or aspect of the contracts' terms and conditions which could have been brought to the attention of the Organization by invoking its relevant provision, namely its arbitration clause.

39. Respondent further emphasizes the provisions of appellant's consultancy contracts regarding the content of the work to be performed and the services and functions to be exercised by appellant. In respondent's view, these show the appellant's role to be that of an "independent adviser" with specific tasks as described in the contract.

40. Respondent firmly rejects the submission that the host nation's legislation applies to NATO, denying any legal basis for this submission and referring to the relevant international agreements to which also Belgium is a party. Respondent underlines that the host nations' standards, as defined in Article 16 NCPR, are only to serve as a basis of the Organizations' internal rules.

41. Respondent also rejects any claim for damages, contending that appellant's claim for material damages lacks precise definition and merit, and that the claim for moral damages (inflated in amount from €5.000 to €30.000 during the course of the procedure) lacks of merit.

42. Respondent requests the Tribunal:
- to declare the appeal inadmissible; and
- to the extent that it would be declared admissible, to dismiss with as without merits.

(iii) Appellant's submissions in Case No. 2015/1045

43. Appellant's second appeal, No. 2015/1045, involves a claim for renewal of her contract. Appellant contends that the Organization's refusal to take a position on her request for such a renewal constitutes a decision adversely affecting her. Appellant again refers to the jurisprudence of the EU Civil Service Tribunal, which allows a staff member to request the requalification of his/her employment at any moment, including after its expiry.

44. Appellant maintains that the two appeals are distinct and occur in a subsidiary order, the first one about the past, *i.e.* the requalification of the contracts, and the second one about the future and the contract renewal. Appellant rejects the applicability of the arbitration clause contained in the contracts, since it was not invoked in time and, moreover, in appellant's views, a medical arbitrator can only arbitrate on medical - not

administrative – matters. Appellant further stresses the administration's contradictory positions with respect to her functions as consultant, by first defining them as such in the title of the contract, but then denying her status as a consultant when she sought to invoke the NCPR's provisions regarding consultants.

45. Appellant remarks that should an effective judicial remedy not be found within the Organization, she would have no other choice than to refer to the Belgian justice system.

46. With respect to the merits, appellant underlines the permanent functions of the occupational health service within NATO HQ and the continued requirement for such services in accordance with the Belgian legislation. Appellant concludes that the nature of the occupational health function would justify the offer of an indefinite duration contract. She adds that the non-renewal constitutes also a violation of the obligation to state reasons.

47. Appellant submits that the breach of the principle of good faith and the duty of care, as well as the contradictory positions by the Organization taken during the procedures, have caused a moral damage evaluated at €10.000.

48. Appellant requests the Tribunal to order:
- annulment of the 20 January 2015 decision to reject her complaint;
- reparation of moral damages evaluated at €10.000; and
- reimbursement of juridical costs and expenses without the application of a ceiling.

(iv) Respondent's contentions in Case No. 2015/1045

49. Respondent contends that the two appeal cases are confusing and inconsistent, one seeking an indefinite duration contract and the other seeking a renewal of the current contract, leaving appellant's final intentions unclear.

50. Respondent states that it has no obligation to inform the appellant whether it does or does not intend offer a further contract, and that appellant confuses NCPR requirements with the applicable provisions of her contract, creating confusion about the applicable rules.

51. Respondent reiterates that neither Case No. 2014/1041 or Case No. 2015/1045 is based on a concrete administrative decision taken with respect to appellant, as required by the Tribunal's judgment in Case No. 2013/1008.

52. Respondent further stresses the nature of appellant's contracts as "service contracts" with a determined end date, mutually agreed by both parties in signing the contracts, most recently in February 2012. Respondent stresses that it is firm jurisprudence that the renewal of a staff contract is and remains a discretionary decision to be taken by the Head of the NATO body concerned.

53. Respondent contends that the appeal is inadmissible, in view of the failure to follow the proper procedure, either under the contract or the NCPR (should it apply – *quod non*). It also submits that the Tribunal does not have competence both *ratione personae* and *ratione materiae*.

54. Respondent firmly reiterates the rejection of the applicability of Belgian law.

55. Respondent affirms that at no occasion and in no manner have any rules, regulations or appellant's rights been violated, and therefore rejects appellant's claims for the award of indemnities.

56. Respondent requests the Tribunal:
- to declare the appeal inadmissible; and
- to the extent it is declared admissible, to dismiss it as being without merit.

D. Considerations and conclusions

57. Before entertaining the questions of admissibility and merits of these cases, it is opportune to recall that the Tribunal, in Case No. 2013/1008, summarily dismissed appellant's previous appeal for failure to comply with the pre-litigation processes laid down in the new provisions of the NCPR and Annex IX thereto that took effect on 1 July 2013. Assessing whether the pre-litigation procedures were exhausted is the first check that any Tribunal must make before any other assessment of admissibility or merits. If those procedures were not exhausted, the Tribunal could not entertain any other questions, the case file still being incomplete. The Tribunal could not, and did not, at that stage of the proceedings in Case No. 2013/1008 take a position on, for example, the status of appellant under the NCPR or on the question whether an administrative decision did or did not exist. It made it clear, however, in paragraph 44, that the pre-litigation process was designed to entertain these issues as well as to identify the grounds of agreement or disagreement thereon between the parties.

58. Appellant refers to the rules for staff in the European Union, which provide for the possibility for a staff member to request, at any time, that the employer take an administrative decision that can subsequently be challenged, and suggests that NATO should apply this provision by analogy. Suffice it to say that this or a similar provision does not exist in NATO, nor in hundreds of other international organizations. It is therefore a specific statutory provision for a very specific organization, and does not constitute customary international civil service law. It can also not be applied by analogy and without qualification, since it may seriously upset the overall system and the principle of legal certainty. This Tribunal is bound by the rules as they stand.

59. Appellant, moreover, submits that the administrative review process can be used for the purpose of soliciting an appealable decision where one does not otherwise exist. This submission must also be rejected. Administrative review is part and parcel of the overall justice system under which a staff member can challenge an existing decision, but the staff member cannot through this process solicit a decision that did not yet exist.

60. In Case No. 2014/1041, the Tribunal cannot but conclude that appellant has failed to identify a specific decision or event that was in violation of the NCPR or the terms of her contracts.

61. The first appeal must therefore be dismissed.

62. The Tribunal held in paragraph 37 of its Judgment in Case No. 902 that, where there is a succession of temporary contracts with no intervals between them, a dispute about the classification of the employment relationship can appear whenever the termination of the parties' contractual link becomes evident and definite.

63. Appellant approached the Organization on 7 October 2014, through a request for administrative review, enquiring about the future of their contractual relationship. The full pre-litigation in the second appeal, Case No. 2014/1045, ensued shortly thereafter, *i.e.* just before the end of the end of the contract. The contract had ended when the appeal was lodged. It is understandable that appellant was seeking clarification about a renewal or not of her contract, whatever the outcome of the first appeal. A positive outcome for appellant in the first appeal would indeed have rendered the second appeal moot. The reply to her queries was that no decision had been taken concerning a renewal, and in the end no new contract was offered, which is within the discretion of the Organization.

64. The Tribunal will, therefore, in light of its jurisprudence mentioned above, consider whether the classification of the employment and the type of contracts were the appropriate ones and, as a corollary, whether the appellant's final contract ended correctly or, if not, whether, for example, end of contract indemnities have to paid.

65. As the Tribunal already observed in paragraph 19 of Case No. 2013/1008, appellant's first appeal:

> Appellant is a consultant with NATO IS. Her contract(s) do not make any reference to the NCPR. It is recalled that contracts with, for example, temporary staff do specify which chapters of the NCPR are applicable and which ones are not (*cf* NATO AT judgment in Case No. 902). In the past, contracts with consultants also referred to the NCPR (*cf* NATO Appeals Board, Decision No. 666(a)). Appellant's contracts specify that parties agree that in case of dispute the matter shall be referred to arbitration.

66. The Tribunal cannot but conclude from the wording of the contracts between appellant and IS that they are not governed by the NCPR. Unlike other cases before this Tribunal or its predecessor, there is no reference in these contracts to the NCPR indicating, for example, which provisions of the NCPR are applicable and which ones are not. On the contrary, the contracts contain provisions, for example on social security and

on leave, that are clearly different from the NCPR. By the nature of the functions and the length of the contracts, the contractual relationship could, moreover, by definition not fall under Chapter XVI of the NCPR. Both parties appear to agree to this, understandably for different reasons.

67. The contracts are therefore *sui generis* contracts for the provision of services, which are governed by their own provisions. International organizations indeed regularly procure services this way, either directly with individuals or through firms, as it is also common in national systems, and this irrespective of the contracts' duration. There are no statutory provisions requiring that NATO's workforce, or any portion of it, is to be exclusively contracted under the NCPR.

68. In addition, the contracts contain a specific dispute resolution clause, *i.e.* that of arbitration. No legal vacuum therefore exists in this respect. Arbitration is a well-recognized and often used judicial remedy that *prima facie* meets national and international rule of law and due process standards (*cf* European Court of Human Rights in Application no. 415/07).

69. Article 6.2.1 of Annex IX to the NCPR provides that the Tribunal is competent to decide any individual dispute brought by a staff member or a member of the retired NATO staff. Article 1 of Annex IX then stipulates that the term "staff member" refers to the personnel included in the categories listed in paragraph B(v)(c),(d),(e) and (f) of the Preamble to the CPRs. The consultants mentioned in paragraph B refer to the consultants covered by Chapter XVI of the NCPR. The Tribunal having concluded that appellant is not a consultant under Chapter XVI, the Tribunal finds itself not competent to hear Case No. 2015/1045.

70. The second appeal must therefore be dismissed.

E. Costs

71. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

72. The appeals in both cases being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 28 October 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0014

Judgment

Case No. 2014/1033

DA,

Appellant

v.

NATO Support Agency,

Respondent

Brussels, 30 October 2015

Original: English

Keywords: time limit for appeals; date of effective lodging at the AT; inadmissibility.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 21 September 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Support Agency (NSPA), dated 28 August 2014, and registered on 19 September 2014 as Case No. 2014/1033, by Mrs DA, a former NSPA staff member.

2. The respondent's answer, dated 21 November 2014, was registered on 1 December 2014. The appellant's reply, dated 23 December 2014, was registered on 9 January 2015. The respondent's rejoinder, dated 2 February 2015, was registered on 16 February 2015.

3. After several postponements at the request of appellant, the Panel held an oral hearing on 21 September 2015 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

4. The above-mentioned appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV NCPR and Annex IX thereto and, inter alia, establishing the Tribunal. The present appeal is therefore governed by the above-mentioned provisions.

B. Factual background of the case

5. The background and material facts of the case may be summarized as follows.

6. Appellant entered into service with the NSPA in November 1986. Since 1 January 2014 she occupied a B5 post as technician under an indefinite duration contract.

7. On 12 May 2014, appellant was notified, in a letter dated 5 May 2014 by the General Manager (GM), that her contract with the NSPA would be terminated on 31 December 2014 owing to the suppression of her post in accordance with the Agency's 2015 Organizational and Personnel Establishment proposal, subject to Agency Supervisory Board (ASB) approval by the end of December 2014.

8. On 26 May 2014 appellant sent a letter to the GM contesting the termination of her contract and on 4 June 2014 she submitted a complaint in line with Article 61.3 and Article 4 of Annex IX NCPR. Such complaint was rejected by the GM on 3 July 2014.

9. On 28 August 2014 appellant submitted the present appeal, received by this Tribunal on 19 September 2014.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submissions

10. Appellant submits that her termination of contract was abusive and argues that the post suppression was not based on due and valid reasons in accordance with Article 9 NCPR.

11. Appellant claims that such termination was also premature because it was based on an event that would occur in the future, namely the approval of the Agency's 2015 Organizational and Personnel Establishment proposals by the competent authorities (the ASB). Appellant affirms that such subordination to an uncertain event makes the termination aleatory and therefore cannot be considered to be in line with the provisions of Article 9 NCPR.

12. Further, appellant notes that only on 4 December 2014 was she informed that the termination would be effective, giving very little time to try to continue to organize a professional life. She alleges that the notice period should have started on 1 January 2015, to give sufficient time in accordance with what a proper "notice" is considered to be, in the legal sense.

13. In addition, appellant holds that there are not grounds for such a suppression in view of the fact that she had a considerable amount of work, which, during her sick leave from 7 April to 24 June 2014, moreover had to be assigned to colleagues of a higher grade. It is further added that insofar as the NCPR allow for post suppression, not to state the reasons therefor is contrary to the general principles of law.

14. Appellant further claims that the suppression was driven by personal matters, and she recalls the mobbing/harassment issues she had in the past. Appellant also submits that, after a check-up, the NSPA psychiatrist forced her to return to work (on 24 June 2014) while on sick leave under the medical certificate issued by her practitioner.

15. Appellant requests that the Tribunal:
- declare appellant's termination of contract abusive;
- order the NSPA to pay €85.217,18 (or more, if determined), plus legal interest, corresponding to the notice period (including the children's allowances) and non-material damages in the amount of €50.000;
- recognize appellant's rights as being reserved with respect to the mobbing/ harassment matters and the reassignment of her work to higher graded staff; and
- reimburse the legal costs.

(ii) The respondent's contentions

16. Respondent contests the admissibility of the appeal owing to late filing. During the hearing all parties agreed, on the basis of the evidence and justifications provided, that a postal issue between Luxembourg and Belgium was responsible for the delays in question.

17. Respondent rejects the claim of a premature termination of contract and refers to Appeals Board case law ruling that a decision to suppress a post cannot be considered illegal if the date on which it is set to take effect is not prior to the date on which the post is suppressed. Consequently, respondent affirms that the letter dated 5 May 2014 cannot be considered premature.

18. Respondent affirms that Article 9 NCPR, in particular at 9.1(iii), determines that the suppression of a post constitutes a "due and valid" reason for termination. At the hearing respondent further stated that the suppression of this appellant's post was part of the major cutbacks in 2014–2015, which included the suppressions of ISAF-related posts, the agency's reform, the 20% economic effort imposed by the Council and the yearly internal restructuring which, in this specific case, included the merger of two programmes.

19. Respondent further notes that appellant does not put forward any element proving that the decision to terminate her contract was based on an irregular procedure or was founded on facts that are materially inaccurate or tainted by error of law, obvious error of assessment or misuse of powers and which could give rise to her allegations of termination of contract for "personal matters". Respondent also rejects the claims of mobbing/harassment as these were not properly addressed in accordance with the NCPR provisions.

20. Respondent further stresses that appellant has automatically been considered for any vacancies corresponding to her grade and duties in all NSPA locations and that, in addition, appellant never pursued the offer made by the Human Resources Division of an interview to discuss her professional objectives.

21. Respondent rejects any claim for non-material or material damages.

22. Respondent requests that the Tribunal:
- declare the appeal inadmissible; and
- *quod non*, declare the appeal unfounded and reject all of appellant's claims.

D. Considerations and conclusions

23. Pursuant to Article 6.3 of Annex IX of the NCPR, the Tribunal can only entertain appeals where the appellant has exhausted all available pre-litigation channels and the appeal has been submitted within 60 days of the date when the appellant was notified by

the Head of the NATO body concerned that the relief sought or recommended would not be granted.

24. The current appeal contests the decision of 3 July 2014 rejecting appellant's complaint against the previous decision of the NSPA GM concerning the termination of her contract. However, the current appeal was lodged on 19 September 2014. Therefore, in the case at hand, the conditions for the application of the above-mentioned rule are not met. The circumstances of the failures by the postal services cannot allow us to disregard the date on which the appeal was effectively recorded and filed in the Tribunal Registry. Compliance with this deadline is a matter for the appellant. It is apparent from the case file that a first submission from the appellant's counsel was posted on 28 August but was returned by the postal services. Even so, the Tribunal cannot consider that as a lodged appeal, since no real and effective notice of the submission could be obtained until the documents sent out on 12 September were lodged and then registered at the NATO Administrative Tribunal on 19 September.

25. Furthermore, appellant should be reminded that it was entirely her responsibility to check that the appeal had been lodged properly, and that the rules require submission by e-mail as well, which was not done. Consequently the appeal must be dismissed.

E. Costs

26. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

27. The appeal being dismissed, no reimbursement of costs is ordered.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 30 October 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0015

Judgment

Case No. 2015/1044

AF,

Appellant

v.

Joint Force Training Centre,

Respondent

Brussels, 9 November 2015

Original: French

Keywords: staff member whose contract is terminated with immediate effect: 1) compensation for untaken annual leave; 2) calculation of the loss of job indemnity.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 22 September 2015.

A. **Proceedings**

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 2 February 2015 and registered on 13 February 2015, by Mr AF, a former staff member of the Joint Force Training Centre (JFTC), seeking:

- cancellation of the decision of 27 November 2014 whereby the JFTC Commander terminated his contract with immediate effect and informed him that he would receive no compensation for untaken annual leave;
- compensation for untaken annual leave;
- an increase in the calculation of his loss of job indemnity, by adding the unworked notice period of six months to his length of employment, which is the basis for the indemnity; and
- compensation for the damage he claims to have suffered by not receiving these indemnities on the day he left but only on 22 December 2014.

On 23 March 2015 he provided additional arguments seeking, in particular, cancellation of the decision of 27 November 2014 terminating his contract with immediate effect.

2. The comments of the respondent, dated 26 April 2015, were registered on 8 May 2015. The reply of the appellant, dated 22 May 2015, was registered on 27 May 2015. A rejoinder, dated 22 June 2015, was produced by the respondent on 2 July 2015.

3. The Tribunal's Panel held an oral hearing on 22 September 2015 at NATO Headquarters. It heard arguments by the parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

4. The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the Civilian Personnel Regulations (CPR), amending Chapter XIV and Annex IX and, amongst other things, establishing the Tribunal. The appeal is therefore governed by these provisions.

B. **Factual background of the case**

5. Mr AF, born in 1968, joined NATO on 1 August 2005 as a staff member of the JFTC (Joint Force Training Centre) in Bydgoszsz, Poland. He was employed there on an indefinite duration contract with effect from 1 August 2005. At the time of the events under dispute, he held the grade of A3.

6. On 14 July 2014, the JFTC was informed by the Polish internal security authorities that Mr F was the subject of an investigation. On 17 July, therefore, the JFTC suspended Mr F from his position as head of the Budget and Finance Division as a precautionary

measure. He was suspended on full salary pending the results of the investigation. This suspension was extended three times, on 22 September, 22 October and 24 November 2014.

7. On 25 November 2014, the Polish authorities informed the JFTC that Mr F's security clearance had been withdrawn with immediate effect. On 27 November 2014, the JFTC General Manager terminated Mr F's contract with immediate effect. In the same letter he was also informed as follows: 1) that he would receive an indemnity equal to the salary he would have received during his six-month notice period; 2) that he would receive a loss of job indemnity; 3) that he would not be paid any compensation for untaken annual leave. Financial statements were enclosed showing 177,686 zlotys as his indemnity and 276,154 zlotys as loss of job indemnity, *i.e.* a total of 453,840 zlotys.

8. Mr F contested this decision the following day (28 November 2014). He asked that his contract only be suspended pending the result of the appeal that he had lodged with the Polish Prime Minister. He also asked for compensation for his untaken annual leave.

9. The Head of the Human Resources Division replied to him on 3 December 2014, informing him that he was not entitled to compensation for untaken annual leave as Article 42.3.3 of the CPR made provision for such compensation only in the two specific cases indicated, which did not apply to him. On 17 December 2014, the JFTC informed him that he had been overpaid by three days (28 to 30 November 2014). There was no further mention of this in the case.

10. Mr F sent another letter to the JFTC on 30 December 2014, requesting:
- compensation for untaken annual leave;
- an increase in the calculation of his loss of job indemnity, by adding the unworked notice period of six months to his length of employment, which is the basis for the indemnity; and
- compensation for the damage he claims to have suffered by not receiving these indemnities on the day he left but only on 22 December 2014.

These requests were dismissed by the Head of the Human Resources Division, on behalf of the Head of NATO body, on 27 January 2015.

11. On 2 February 2015, Mr F approached the NATO Administrative Tribunal seeking cancellation of the decision of 27 November 2014. On 23 March 2015, he sent the Tribunal additional arguments seeking, for the first time, cancellation of the decision of 27 November 2014 to terminate his contract.

C. Summary of parties' principal contentions, legal arguments and relief sought

(i) The appellant's main contentions:

12. In contesting the decision to terminate his contract, the appellant claims that the facts used as justification are inaccurate and that the procedure was tainted by discrimination on the grounds of his nationality.

13. In respect of compensation for untaken annual leave, the appellant claims that the CPR do not exclude compensation in the case of a staff member whose contract is terminated with immediate effect owing to the withdrawal of his or her security clearance. He refers to the intentions of the authors of the CPR and the spirit of these Regulations, according to which compensation is given for untaken paid leave when the staff member is forced to leave his or her post prematurely.

14. In respect of the amount of loss of job indemnity, the appellant claims that the calculation is wrong because it does not take account of the entire duration of his contractual relationship. He asks that the unworked notice period of six months be added to the length of time taken into account by the administration. He maintains that Article 10.5 of the CPR allows the Head of the NATO body to substitute an equivalent indemnity for the period of notice, but not to exclude this period of service from being taken into account in calculating the loss of job indemnity.

15. Finally, the appellant claims that there was a delay in paying his indemnities and that this caused him damage. He bases this argument on Article 8 of Annex V to the CPR, which states that the indemnity shall be paid to the staff member at the time he or she leaves the Organization.

(ii) The respondent's main contentions:

a) on the admissibility of the submissions:

16. To begin with, the respondent contests the admissibility of some of the appellant's submissions.

17. Firstly, the respondent claims that the NATO Administrative Tribunal does not have the power to assess the legality of decisions made by national authorities or the procedure followed by them - in this case the Polish authorities when they decided to withdraw the appellant's security clearance.

18. The respondent also claims that the submissions seeking cancellation of the decision of 27 November 2014 are too late, as they were made more than 60 days after the appellant was notified of this decision.

b) on the merits of the submissions:

19. In respect of compensation for untaken annual leave, the respondent points out that Article 42.3.3 of the CPR provides for only two exceptions to the regulation that there is no compensation for untaken days of annual leave: when the staff member has worked in support of a Council-approved operation or mission or has been absent on extended sick leave. In the opinion of the respondent, the regulation is limited to these two specific cases and they do not apply to the appellant.

20. The respondent further points out that the appellant was suspended for four and a half months on full salary and that it was to his advantage to have been paid, with no attendance or work requirements, from 17 July to 27 November 2014.

21. In respect of the length of employment taken into account in calculating the loss of job indemnity, the respondent stresses the fact that the contractual relationship came to an end on 27 November 2014 with immediate effect, thereby breaking the relationship on that date. The payment of an indemnity has no effect on this contract expiry date, which is the last day of service performed by the staff member and the date when all links with NATO are severed.

22. In respect of the claim that there was a delay in paying the appellant his indemnities, the respondent states that payment of the indemnities 25 days after the appellant's departure does not constitute a delay. The respondent explains that there is an irreducible period between the decision by an organization's accountant to make a payment and the actual transfer to the account of the staff member or former staff member. In this case, moreover, a few days were needed to calculate the exact amounts due and also to find available funds at the end of the budget year.

D. **Considerations and conclusions**

23. Firstly, the appellant's submissions seeking cancellation of the decision of 27 November 2014 terminating his contract with immediate effect, which was notified to him the same day, were presented for the first time on 23 March 2015. Pursuant to Article 6.3.1 of Annex IX to the Civilian Personnel Regulations, which establishes that an appeal must be submitted within 60 days of notification of the decision, the submissions are too late and, moreover, were not preceded by the administrative appeal procedure. These submissions are therefore inadmissible.

24. In any event, the JFTC, having been informed of the Polish authorities' decision to withdraw the appellant's security clearance, was obliged to terminate his contract with immediate effect and could not assess the merits of this withdrawal (see Appeals Board decisions no. 125 dated 29 October 1980, no. 200 dated 18 July 1985, no. 286 dated 26 May 1993, no. 442 dated 8 October 2002, no. 729 dated 10 July 2008 and no. 881 dated 26 June 2013, and Administrative Tribunal decision in Case No. 899, § 36, *DV v. Communications and Information Agency*, dated 9 January 2014). The reasons for the decision taken by the Polish authorities can be contested only by initiating a procedure

with the Polish administrative or judicial authorities.

25. Secondly, the question of compensation for untaken annual leave is governed by Article 42.3.3 of the CPR, in the form resulting from amendment 17 which replaces the former Article 42.3.7, applicable to staff members who leave their posts permanently after 31 December 2012:

> There will be no compensation for annual leave not taken. Exceptionally, where the Head of a NATO body determines that it has not been possible to allow members of the staff to take all their leave entitlement before their final departure from the Organization, due to supporting a Council approved operation/mission, or an extended period of sick leave, such staff members shall receive a corresponding payment [...]

26. The appellant refers to the intentions of the authors of the CPR and the spirit of these Regulations, according to which compensation is given for untaken paid leave when the staff member is forced to leave his or her post prematurely. But the letter of Article 42.3.3 of the CPR is detailed and precise: by stipulating two exceptions to the regulation on the non-payment of untaken leave, it establishes that there are only two specific cases, and these do not include the case of a staff member whose contract is terminated owing to the withdrawal of the security clearance issued by his or her national authorities. The appellant's submissions on this matter are therefore dismissed.

27. Thirdly, in respect of increasing the calculation of his loss of job indemnity, by adding the unworked notice period of six months to his length of employment, which is the basis for the indemnity, this matter is governed by Article 6 of Annex V to the CPR, which states as follows:

> The amount of the indemnity [...] shall be one month’s emoluments for each year of service from the date when the staff member joined the Organization...

The indemnity is therefore calculated on the basis of the length of service carried out for the Organization. The appellant would like to add to this length of service the six-month notice period, which he did not work.

28. When a contract is terminated with immediate effect, the staff member is paid an indemnity, in lieu of notice, equivalent to the salary he or she would have received during the notice period, but the period of employment is not extended by that period. The contractual relationship ends on the date when the staff member ceases work and is not postponed to the date when the period of notice would have ended. The six months following the end of the contract are not an extension of employment which is paid without any physical attendance requirement (as was the case, for example, with the period of the appellant's suspension from 17 July to 27 November 2014), but a period during which the person is no longer a NATO staff member. As the staff member is no longer working for the Organization, this period cannot be taken into account in calculating the period of time on which the loss of job indemnity is based.

29. The JFTC therefore applied Article 6 of Annex V correctly when it calculated the loss of job indemnity solely on the basis of the length of time actually worked, from the appellant's first day of service (1 August 2005) until the day when his contract was terminated with immediate effect (27 November 2014).

30. Fourthly, in respect of the damage the appellant claims to have suffered by not receiving the indemnities on the day he left (27 November 2014) but only on 22 December 2014, this matter is governed by Articles 7 and 8 of Annex V to the CPR.

31. Article 7 states as follows:

> The emoluments to be taken into account in calculating the amount of the indemnity shall be those received by the staff member at the date of leaving the Organization.

Article 8 states as follows:

> The indemnity shall be paid to the staff member in full at the time he leaves the Organization.

32. In any organization, a payment for expenses cannot be made on the same day the relevant decision is taken. There is inevitably a lapse of time between the decision by the authorized official to make a payment and the actual transfer of the sum involved, by the accountant, to the account of the staff member or former staff member. In this case, moreover, it is understandable that a few days were needed to calculate the exact amounts due and to find available funds at the end of the budget year. As the decision to terminate the contract was taken on 27 November 2014, the fact that the indemnities were paid on 22 December 2014 - *i.e.* only 25 days later - does not represent a delay. The administration acted diligently and made every effort to pay the indemnities in good time. The wording of Article 8 of Annex V, which states that the loss of job indemnity shall be paid "at the time he leaves the Organization", does not mean the exact day that the staff member leaves the Organization. As the administration is not at fault, these submissions are dismissed.

33. The appeal is dismissed in terms of its substance and so there is no need to consider its admissibility.

E. Costs

34. Article 6.8.2 of Annex IX to the CPR states as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant [...].

The dismissal of the appellant's submissions means that his submissions under this head must also be dismissed.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 9 November 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0016

Judgment

Combined Cases nos. 2014/1027 and 2015/1043

DW,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 9 November 2015

Original: French

Keywords: admissibility decision dismissing an administrative review; action giving grounds for grievance; intermediate measure; abuse of procedure; request for conversion of contract; temporary staff contracts; CPR Article 5; permanent duties.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 21 September 2015.

A. **Proceedings**

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of a first appeal by the appellant, a former member of the NATO International Staff (Communications Officer at the Staff Centre), dated 29 August 2014 and registered on 1 September 2014 as Case no. 2014/1027. In this first appeal, the appellant principally sought the cancellation of the implicit decision by the respondent to dismiss his request for the conversion of his contract. The appellant lodged a second appeal on 26 January 2015, registered on 11 February 2015 as Case no. 2015/1043. In this second appeal, the appellant sought, in particular, cancellation of the respondent's refusal to offer him a definite duration contract instead of converting his employment relationship to an initial contract followed by an indefinite duration contract.

2. In Case No. 2014/1027, the respondent presented comments in defence on 12 November 2014, registered on 14 November 2014. The appellant presented his reply on 11 December 2014, registered on 18 December 2014. In this appeal, the written procedure was concluded on 20 January 2015, date on which the respondent's rejoinder of 19 January 2015 was registered.

3. In Case No. 2015/1043, the respondent presented comments in defence on 13 April 2015, registered on 17 April 2015. The appellant presented his reply on 15 May 2015, registered on 18 May 2015. The respondent's rejoinder of 16 June 2015 was registered on 18 June 2015.

4. By order of the President of the Tribunal on 12 February 2015, the two appeals were combined for the purposes of the oral hearing.

5. The appeals were lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst other things, establishing the Administrative Tribunal, which will give a ruling in accordance with the new version of Annex IX.

6. The Tribunal's Panel held an oral hearing on 20 September 2015 at NATO Headquarters in Brussels. It heard arguments by the parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

7. At this hearing, the Tribunal was informed by the appellant's counsels that the staff members who formed part of the team of advisers were present in their personal capacity and not as staff representatives.

B. **Factual background of the case**

8. The appellant began working on the NATO International Staff as Communications Officer for the Staff Centre under the terms of a three-month temporary contract which took effect from 1 April 2010.

9. After this first contract came to an end (30 June 2010), the appellant concluded with the respondent seven successive temporary contracts, each of six months, which lasted up to 31 December 2013. He was subsequently engaged, for the same duties, on the basis of two successive three-month contracts from 1 January 2014 to 31 March 2014 and from 1 April 2014 to 30 June 2014. His final temporary contract covered the period from 1 to 31 July 2014.

10. As can be seen from the documents submitted in this case, the appellant's letter of 12 March 2014 addressed to his manager requested the conversion of his employment contract to an indefinite duration contract, on the basis of the combined application of Articles 77.1 and 78.1 of the CPR and Article 2.2 of the Guidelines for temporary staff and consultants dated 17 March 2010, and invoked the indisputably permanent nature of his employment relationship with the respondent since the signature of his first employment contract. In this letter, the appellant also asserted that, in the light of the applicable legal framework, he should have been employed on the basis of an initial contract as from 1 April 2010, the date when his first contract took effect, and then on the basis of an indefinite duration contract. In his view, the conversion of his contract would serve as compensation for the material and non-material damage suffered.

11. No reply was made to this request of 12 March 2014, described by the appellant as the "first administrative review". On 17 April 2014, therefore, the appellant initiated the process for a second administrative review, as set out in Article 61.1 of the CPR and Articles 2.1 and 2.2(b) of Annex IX to the CPR, contesting the implicit dismissal decision (hereinafter referred as the "second administrative review of 17 April 2014"). In this review, the appellant repeated the same arguments, *i.e.* the permanent nature of his duties from the time he was recruited and the subsequent violation of Articles 77.1 and 78 of the CPR by the respondent; in this second administrative review, he also put forward the same arguments in respect of material and non-material damage.

12. In a letter dated 5 May 2014, the respondent replied with an express request for additional time, until 29 May 2014, to adopt a position.

13. In a letter dated 8 May 2014, the appellant acknowledged the respondent's request and agreed not to lodge a complaint before 29 May 2014 (the deadline for making a complaint in the absence of any response by that date).

14. On 4 June 2014, having received no response by the agreed date of 29 May 2014, the appellant lodged a complaint against the implicit decision to dismiss the second administrative review of 17 April 2014, based on Article 61.2 of the CPR and Article 4 of Annex IX (hereinafter referred to as the "complaint of 4 June 2014").

15. In a letter of the same date (4 June 2014), the respondent offered the appellant a definite duration contract expiring on 31 December 2016 and proposed that he be appointed to a vacant C5 post, subject to various administrative procedures.

16. In a letter dated 23 June 2014, the appellant accepted the respondent's offer under certain conditions owing to the fact that this offer did not meet his request for the retroactive award of an initial contract followed by an indefinite duration contract and a category A grading on the grounds of his qualifications. Nevertheless, the appellant specified explicitly in this letter that the conditions he had set were "*without any prejudicial recognition"* and did not affect "*the admissibility and merits of his complaint of 4 June 2014"* referred to above.

17. In a letter to the appellant dated 1 July 2014, the respondent replied that it was not possible to accept the specific conditions demanded in his letter of 23 June, with the exception of the condition concerning his title of "Communications Officer". These were the conditions under which, on 10 July 2014, the respondent offered the appellant a definite duration contract from 14 July 2014 to 31 December 2016.

18. The appellant accepted this offer in an e-mail of the same date (10 July 2014), specifying, however, that *"this acceptance does not signify any prejudicial recognition or any renunciation of the right to invoke the provisions of the CPR"*.

19. In the contract which was signed on 15 July 2014, the appellant added a note to his signature to the effect that he was signing "*without any prejudicial recognition"*.

20. On 4 August 2014, on the basis of Article 61.1 of the CPR and Articles 2.1 and 2.2(a) of Annex IX to the CPR, the appellant initiated the process for a first administrative review against the decision contained in the contract of 15 July 2014 in that this contract was of definite duration and not indefinite duration (hereinafter referred to as the "administrative review of 4 August 2014"). In this administrative review, the appellant referred to the respondent's violation of Articles 77.1 and 78 of the CPR and laid emphasis on his request for the conversion of his employment relationship with the respondent as from 1 April 2010, the date when his first contract took effect. He also asserted that Article 5.1 of the CPR, as amended, did not apply in this case, as his duties did not come under any of the categories specified in this new version.

21. In an appeal lodged with the Tribunal on 29 August 2014, the appellant sought, in particular, cancellation of the implicit decision to dismiss his complaint of 4 June 2014 (Case No. 2014/1027).

22. In the absence of any response in the above-mentioned administrative review of 4 August 2014 concerning the decision contained in the contract of 15 July 2014 in that this contract was not of indefinite duration, on 12 September 2014 the appellant initiated the process for a second administrative review on the basis of Article 61.1 of the CPR and Articles 2.1 and 2.2(b) of Annex IX to the CPR (hereinafter referred to as the "second administrative review of 12 September 2014"). In this administrative review, the appellant repeated the arguments already put forward in the context of the pre-litigation

procedure which ended in the dismissal of his complaint of 4 June 2014 referred to above.

23. As the second administrative review of 12 September 2014 was subject to an implicit dismissal decision, on 30 October 2014 the appellant lodged a complaint on the basis of Article 61.2 of the CPR and Article 4 of Annex IX to the CPR against the implicit decision to dismiss this administrative review (hereinafter referred to as "the complaint of 30 October 2014"). In this new complaint, the appellant put forward the same arguments as those invoked in the procedure which led to appeal Case No. 2014/27.

24. As the complaint of 30 October 2014 was also subject to an implicit dismissal decision, on 26 January 2015 the appellant lodged a second appeal with the Tribunal (Case no. 2015/43) seeking, in particular, cancellation of the decision whereby the respondent did not, in substance, agree to his request for the conversion of his contract into an initial contract followed by an indefinite duration contract.

C. **The parties' submissions**

25. In his appeal in Case No. 2014/1027, the appellant requests that the Tribunal should:

- cancel the implicit decision to dismiss his complaint of 4 June 2014;
- cancel the implicit decision to dismiss the second administrative review of 17 April 2014;
- convert his employment relationship to an initial contract followed by an indefinite duration contract;
- compensate him for the material damage suffered;
- compensate him for the non-material damage suffered, estimated *ex æquo et bono* at €10.000; and
- reimburse his legal costs, travel and subsistence expenses and the cost of retaining counsel with no ceiling.

26. The respondent requests that the Tribunal should:

- dismiss the appeal as inadmissible or, at least, as unfounded.

27. In his appeal in Case No. 2015/1043, the appellant requests that the Tribunal should:

- cancel the implicit decision to dismiss the second administrative review of 12 September 2014;
- cancel the implicit decision to dismiss his complaint of 30 October 2014;
- insofar as necessary, cancel the implicit decision to dismiss the first administrative review of 4 August 2014 and Article 3 of the appellant's contract in that this Article specifies a definite duration up to 31 December 2016;
- compensate him for the material damage suffered;
- compensate him for the non-material damage suffered, estimated *ex æquo et bono* at €5.000; and
- reimburse his legal costs, travel and subsistence expenses and the cost of retaining counsel with no ceiling.

28. The respondent requests that the Tribunal should:
- dismiss the appeal as inadmissible or, at least, as unfounded.

D. **Parties' main contentions and arguments in Case No. 2014/1027**

(i) Considerations on admissibility

29. Firstly, the respondent maintains that the submissions seeking cancellation of the implicit decision to dismiss the administrative review of 17 April 2014, concerning the appellant's request for the conversion of his contract, are inadmissible in that this decision is not a contestable measure.

30. Secondly, the submissions seeking cancellation of the implicit decision to dismiss the complaint of 4 June 2014 are also inadmissible, as there is no such decision. Since 4 June 2014, when the appellant lodged his complaint, the respondent has made him an offer which he initially accepted on certain conditions, and then contested; therefore, he cannot claim that there was any implicit dismissal decision constituting grounds for grievance.

31. Thirdly, the respondent states that the appeal as a whole should be declared inadmissible, because the appellant has acted improperly in the exercise of his rights and contrary to the spirit of the dispute resolution procedure defined by the CPR.

32. The appellant acknowledges that his appeal is admissible only inasmuch as it is directed against the implicit decision to dismiss the complaint of 4 June 2014.

33. As regards the respondent's allegations of misuse of the dispute resolution procedure defined by the CPR, the appellant takes the view that this system is intended to reach solutions that are satisfactory to both parties, provided that the pre-litigation procedure is complied with in full, failing which the appellant would find him or herself in an unfavourable position with probable dismissal of the case. As no agreement or mutually acceptable solution was found, the appellant decided to initiate the procedure, without committing any abuse of procedure.

34. In particular, the appellant recalls signing the contract offered to him, but absolutely did not acknowledge that this offer met his requests. In accepting it, he specifically entered provisos, both in the e-mail of 10 July 2014 and in the contract signed on 15 July 2014, where he stipulated that his signature was "*without any prejudicial recognition*".

35. Furthermore, there was nowhere any indication, either in the respondent's proposals or by the appellant himself, that the appellant would withdraw from the pre-litigation procedure already underway.

36. In addition, the appellant points out that the most essential conditions specified in his letter of 23 June 2014 in order to reach an agreement were expressly rejected in the

respondent's letter of 1 July 2014. This confirms that there was never any agreement breached by the appellant by improper conduct in pursuing the pre-litigation procedure.

(ii) Considerations on the merits

37. In his submissions on cancellation, the appellant advances two arguments against the implicit decision to dismiss his complaint of 4 June 2014 seeking the conversion of his contract to an initial contract followed by an indefinite duration contract.

38. The first argument is founded on violation of Articles 77 and 78 of the CPR and Article 2.2 of the internal Guidelines for temporary staff and consultants dated 17 March 2010 and the Implementing Arrangements; the combined application of the provisions in question leads to the conclusion that temporary staff may be employed to replace absent staff or to take on duties and tasks of a temporary nature. That was never the situation in this case.

39. The appellant was recruited on the basis of several successive contracts for a period of more than four and a half years, and this would certainly confirm the permanent nature of his duties. During this period, he was never informed that his duties were of a temporary nature and that he was replacing an absent staff member. Furthermore, the respondent never invoked any exceptional circumstances to justify the extension of his contracts beyond the prescribed period of 180 days.

40. As regards the arguments put forward by the respondent to the effect that the appellant cannot legitimately invoke the permanent nature of his duties because he was an employee of an external service provider, and therefore knew that the provision of the services in question was not of a permanent nature, this allegation has no basis in law or in fact. The appellant never had any kind of contractual relationship with such a company. Moreover, the contractual arrangements that such a company might have had with the NATO Staff Centre and International Staff, even if invoked legitimately, would have no effect on the personal situation of the appellant, who was recruited by the respondent on the basis of a temporary staff contract.

41. Furthermore, it cannot be legitimately argued that the appellant was recruited to deal with an alleged increase in activities, of an entirely temporary nature, arising from the start of new activities in the NATO Staff Centre. In fact, the appellant was recruited as a Communications Officer, and there is no link with the fact that various Staff Centre activities were launched after his recruitment.

42. As the conditions of Article 77.1 of the CPR are not met, the appellant's employment relationship should be covered by an initial contract followed by an indefinite duration contract, in accordance with Article 5.1.1. of the CPR, backdated to 1 April 2010.

43. The second argument is based on violation of the obligation for substantiation and the duty of care. The appellant claims that the respondent never informed him of the reasons why his request for conversion had to be dismissed, although he had put several detailed requests to his managers on this subject. In the light of the appellant's requests, the respondent offered him a definite duration contract without explaining this decision

or the reasons why the appellant's request could not be met. This, in itself, is a violation of the duty of care incumbent on the respondent and constitutes damage suffered by the appellant.

44. In his submissions on indemnification, the appellant seeks compensation for the material damage suffered as a result of the illegal decision to refuse the conversion of his contract into an indefinite duration contract. This damage includes back pay arising from the award of a permanent post as from 1 April 2010, insurance benefits, step increases and pension rights. The appellant assesses this damage at €163.312,20, to be re-assessed at the time of the ruling and supplemented by interest due to late payment at the European Central Bank rate plus two percentage points.

45. In addition, the appellant claims to have suffered non-material damage, distinct from the material damage, owing to the permanent uncertainty of his professional situation, which prevented him from planning other professional or family activities or to make certain investments. He maintains that this damage was aggravated by the respondent's conduct and failure to give an explicit reply to his requests during the pre-litigation phase. This damage suffered by the appellant is assessed at €50.000.

46. The respondent argues, first of all, that the appellant cannot invoke Articles 77.1 and 78 of the CPR because his initial contract was in the framework of services provided by an external operator which whom the appellant had a contractual relationship.

47. Under the terms of an agreement with NATO to develop the Staff Centre's services, it was agreed that the appellant would continue to provide services with this operator and would be paid €1.000 to cover half the salary agreed by the respondent in the framework of his temporary staff contract. The appellant, aware of this agreement, cannot invoke Article 77.1 of the CPR since he knew from the start that he would not be recruited to provide services on a permanent basis.

48. More generally, the respondent asserts that no-one in a contractual relationship with a service provider for NATO can seek an indefinite duration contract; this would be an infringement of various provisions of the CPR and the code of conduct. These were the conditions under which the respondent, having considered the appellant's request, offered him a definite duration contract.

49. The respondent therefore sees no error in its contested decision to refuse the conversion of the appellant's contract into an initial contract followed by an indefinite duration contract.

50. Secondly, as regards the submissions on compensation for alleged damage, the respondent argues that the appellant has not suffered any material or non-material damage. Furthermore, the respondent argues that the appellant's calculation of material damage takes as its baseline a very high sum which does not correspond to his qualifications; moreover, he mixes various payments made by the respondent in respect of pension rights or social security.

E. Parties' main contentions and arguments in Case No. 2015/1043

(i) Considerations on admissibility

51. The respondent pleads the inadmissibility of the appeal and considers that, firstly, no action against the appellant's employment contract would be admissible. Such a contract, offered by the respondent and signed by the appellant, cannot be analysed as an administrative decision which constitutes an action subject to examination by the Tribunal, under the conditions set out in the CPR. If the appellant is not satisfied with this contract, he should challenge the unilateral steps taken in his case in the framework of the performance of this contract; this is not the case here.

52. Secondly, the respondent considers that, by lodging this appeal, the appellant is abusing his procedural rights, as his appeal in this case is combined with his previous appeal, in which the same facts were contested and the same grievances and requests were advanced; the appellant has used all his procedural rights, negotiating with the respondent in bad faith.

53. The appellant replies, firstly, that his appeal is admissible because it is directed solely against a stipulation in his employment contract concerning its duration, and the legality of the other provisions of the contract is not being called into question. An appeal seeking the partial cancellation of an action which gives grounds for complaint and is enshrined in a contract is, in general, deemed to be admissible by most international administrative tribunals.

54. Secondly, the appellant considers that his appeal is not improper because he has exercised all his procedural rights in compliance with the phases specified by the CPR and there is no provision preventing him from lodging this appeal. As regards the respondent's argument that the appellant has used the same allegations in both appeals, the appellant maintains that the subject of the dispute and the contested decisions are different in the two appeals.

(ii) Considerations on the merits

55. In his submissions on cancellation, the appellant puts forward three arguments against the contested decision which is enshrined in the contract in that this is a contract of definite duration and not indefinite duration. In the same submissions, the appellant also seeks the conversion of his employment relationship from the date of his recruitment, 1 April 2010.

56. Firstly, he claims that this decision is in breach of Article 77.1 of the CPR in that his duties were permanent from the time he signed his first contract on 1 April 2010 and he was not recruited to replace an absent staff member or to deal with a temporary increase in activities. Under these conditions, with contract conversion backdated to 1 April 2010, the contract offered on 15 July 2014 must necessarily be covered by this conversion and should be converted into an indefinite duration contract, in the same way as his previous temporary contracts.

57. Secondly, the appellant considers that, by making the contested decision, the respondent has violated Article 5.2 of the CPR, as the appellant does not fall into the categories which are specified in this Article and give rise to an entitlement to an indefinite duration contract. As the appellant carried out the same duties from the date of his recruitment (1 April 2010) without any change, it is untenable to claim, as the respondent does, that he was recruited solely and necessarily for a limited period given the life expectancy of the NATO HQ. Consequently, the limited nature of the appellant's duties would have been evaluated when he took up his post; thus Article 5.2 of the CPR applies in its previous version - before the 2012 amendment - and not the new version of this Article.

58. Thirdly, the appellant claims that, in making the contested decision, the respondent violated the obligation for substantiation and the duty of care, never having explained the reasons and the grounds for offering the appellant a definite duration contract and refusing to convert his employment contract. In fact, the grounds for the respondent's refusal to grant the appellant's requests appear for the first time in the written procedure, and this runs counter to the requirements of the obligation for substantiation.

59. In his submissions on compensation, the appellant claims that the contested decision caused him material damage arising from the refusal to convert his definite duration contract, owing to the required change in his grade to A with payment of the difference in salary between A grade and his current grade of C and with interest due to late payment at the ECB rate plus two percentage points. The respondent's constant practice of not responding to the appellant's requests, without providing the least substantiation or taking the steps needed to comply with its duty of care, caused him distinct non-material damage which he assesses at €5.000.

60. As regards the appellant's submissions on cancellation, the respondent takes the view that, firstly, the appellant knew as from his recruitment on 1 April 2010 that he was going to carry out temporary and not permanent duties, and therefore no request for conversion of his contractual situation could be justified. His post was offered to him in the framework of ongoing services provided by a company which had a contract with the respondent for the provision of such services.

61. Secondly, the respondent replies, in substance, that no argument based on violation of Article 5.2 of the CPR can succeed. The respondent further considers that the former version of Article 5.2 of the CPR cannot apply in this case and that, in his appeal, the appellant is seeking the cancellation of a stipulation in his contract setting a specific date for his employment contract which was signed in 2014, subsequent to the amendment of Article 5.2 of the CPR in 2012. Having agreed to sign his contract, the appellant cannot invoke any violation.

62. Thirdly, the respondent maintains that no grievance can be successfully claimed on the basis of violation of the obligation for substantiation or the duty of care because the pre-litigation procedure was based on the premise that there was an agreement between the appellant and the respondent and, consequently, there could be no appealable decision constituting grounds for grievance.

63. As regards the submissions on compensation, the respondent considers that, in any event, inasmuch as it did not commit any error of judgement or any violation of the articles of the CPR when the disputed definite duration contract was offered and signed, no request for compensation for material or non-material damage can be successfully put forward. As a result, the requests concerning material and non-material damage cannot be granted.

F. Ruling of the Tribunal

(i) Case No. 2014/1027

Considerations on admissibility

64. Firstly, the respondent pleads the inadmissibility of the appeal in that it is directed against the implicit decision dismissing the administrative review of 17 April 2014.

65. The Tribunal recalls that, unlike the regulation applicable to European Union officials and staff, the pre-litigation system defined by the CPR does not does not offer a staff member the possibility of asking the NATO service concerned to take a decision about him or her and subsequently contesting it and, if need be, taking the dispute to the Tribunal (see combined Cases Nos. 2014/1041 and 2015/1045, paragraphs 58 and 59).

66. In the present case, and regardless of the fact that the appellant describes his request of 12 March 2014 as the "first administrative review", it should be noted that the appellant made this request in the absence of any decision taken about his contractual situation. In fact, in making this request the appellant was asking the respondent, for the first time, to take a decision on his case in order that he could contest it in accordance with the relevant provisions of the CPR.

67. In the absence of any decision taken against the appellant in respect of his contractual situation, therefore, there was no implicit dismissal decision which the appellant could subsequently contest via the alleged second administrative review of 17 April 2014 in accordance with the provisions of the CPR.

68. This is also confirmed by the respondent's letter of 5 May 2014 seeking additional time before taking a position on the appellant's requests. It is clear from this letter that, at this same date, the respondent had absolutely not taken any decision which could give the appellant grounds for grievance.

69. In these conditions, and in the absence of any decision taken against the appellant before or after his requests of 12 March 2014 and 17 April 2014 concerning the conversion of his contractual situation, no decision of the respondent can be considered to have implicitly dismissed the appellant's requests at these stages, in accordance with the pre-litigation procedure defined by the CPR.

70. The appellant's submissions on cancellation, as set out in his motion to institute proceedings seeking the cancellation of the alleged implicit decision to dismiss his so-

called second administrative review of 17 April 2014, are groundless and must therefore be dismissed as inadmissible.

71. Secondly, the respondent claims that the appeal against the implicit decision to dismiss the complaint of 4 June 2014 is also inadmissible, since the respondent took a decision on 10 July 2014 to dismiss the appellant's request but to offer him a definite duration contract.

72. It should be pointed out straight away that, in the framework of Case No. 2014/1027, the appellant is basing his grievances on an erroneous premise, *i.e.* compliance with the pre-litigation procedure during which the respondent constantly and implicitly dismissed his administrative reviews and, finally, his complaint of 4 June 2014.

73. In the absence of any decision taken against the appellant, his submissions on cancellation of the alleged implicit decision to dismiss his complaint of 4 June 2014 are also groundless.

74. Moreover, it must be borne in mind that, as can be seen from the correspondence exchanged between the appellant and the respondent since the appellant's request of 12 March 2014, the respondent did in fact study the grievances put forward by the appellant in respect of the conversion of his contract to an initial contract followed by an indefinite duration contract. In its letter of 10 July 2014, the respondent did not grant these requests for conversion, but offered instead just one definite duration contract. The decision of the respondent, set out in its letter of 10 July 2014 and contested by the appellant in Appeal Case No. 2015/1047, must therefore be regarded as the adoption by the respondent of a position concerning the appellant's requests.

75. It follows that the submissions on cancellation of the alleged implicit decision to dismiss the appellant's complaint of 4 June 2014 must, in any event, be declared inadmissible.

76. It results from the foregoing that all the submissions on cancellation in Case No. 2014/1027 must be dismissed as inadmissible; there is no need to rule on the other claims of inadmissibility in the context of this appeal.

77. As regards the submissions on compensation, the Tribunal points out that, if these submissions are closely linked with the submissions on cancellation, the dismissal of the latter as inadmissible results also in the dismissal of the submissions on compensation.

78. In the present case, the appellant's submissions concerning his alleged material and non-material damage are closely linked with the submissions on cancellation, which have been dismissed as inadmissible; consequently, they must also be dismissed.

79. The submissions on compensation set out in Case No. 2014/1027 must therefore be dismissed, as must all the other submissions in this case.

(ii) Case No. 2015/1043

Considerations on admissibility

80. Firstly, the respondent pleads the inadmissibility of the appeal inasmuch as it is directed against a stipulation in a contract which, by its very nature, cannot be subject to an appeal to the Tribunal for cancellation.

81. It is certainly true that, in his submissions on cancellation in support of his appeal, the appellant seeks the partial cancellation of the contract of 15 July 2014 and, in particular, of Article 3 of this contract, which establishes a definite duration and not an indefinite duration.

82. However, even though the appellant seeks, in appeal Case No. 2015/1043, the cancellation of a contractual stipulation (specifically, Article 3 of the contract of 15 July 2015), the Tribunal considers that this appeal is in fact directed against the decision of 10 July 2014 (hereinafter referred to as "the decision of 10 July 2014") in that this decision dismissed his request for the conversion of his contract to an initial contract followed by an indefinite duration contract and offered instead just one definite duration contract. In these circumstances, therefore, it is the decision of 10 July 2014 that is the real subject of the third submission on cancellation put forward by the appellant in appeal Case No. 2015/1043.

83. An appeal against the decision of 10 July 2014 in the above-mentioned context is admissible if the appellant has complied with the preliminary pre-litigation formalities set out in the CPR.

84. That is precisely the situation in this case; in order to challenge the decision of 10 July 2014, as reflected in the contract of 15 July 2014, the appellant initiated a first administrative review on 4 August 2014, inasmuch as this contract was not of indefinite duration and his request for the conversion of the contract had been dismissed; then, on 12 September 2014, he initiated a second administrative review, repeating the same grievances. As the second administrative review was subject to an implicit dismissal decision, on 30 October 2014 the appellant lodged a complaint on the basis of the relevant articles of the CPR, putting forward the same requests.

85. As this complaint was also subject to an implicit dismissal decision, the appellant lodged appeal No. 2015/1043 in admissible manner, seeking, in substance, cancellation of the decision of 10 July 2014 whereby the respondent did not agree to his request for the conversion of his contract to an initial contract followed by an indefinite duration contract, and offered him instead a definite duration contract.

86. It follows that the first argument of inadmissibility put forward by the respondent in Case No. 2015/1043 must be dismissed.

87. Secondly, the Tribunal points out that appeals may be brought against decisions producing binding legal effects with an impact on the interests of the staff member

concerned, altering his or her legal situation and establishing definitively the position of the relevant NATO body.

88. In the case of a decision which is developed in several phases, specifically at the end of an internal pre-litigation procedure such as that provided for in Article 61 of the CPR and Articles 2 and 4 of Annex IX to the CPR, appeals may be brought against only those measures which, at the end of the procedure, establish definitively the position of the NATO body.

89. In the present appeal, the appellant is also seeking cancellation of the implicit decisions to dismiss his administrative reviews of 4 August 2014 and 12 September 2014, inasmuch as the contract offered by decision of the respondent on 10 July 2014 was not of indefinite duration and his request for conversion of his contract to an indefinite duration contract had been dismissed.

90. In this context, it should be noted that the implicit decision to dismiss the appellant's first administrative review, as well as the implicit decision to dismiss his second administrative review, may be reviewed by the head of NATO body in accordance with the conditions set out in the CPR. The appellant contested the dismissal of his first administrative review of 4 August 2014 by initiating a second administrative review, and then the implicit dismissal of this second administrative review of 12 September 2014 in the framework of a complaint lodged on 30 October 2014.

91. It follows that the implicit decisions to dismiss the administrative reviews in the framework of the pre-litigation procedure provided for in the CPR do not in any way establish the definitive position of the relevant NATO body and are intermediate measures with a view to the preparation of the final decision. They are therefore preparatory actions which cannot be the subject of an appeal to the Tribunal.

92. It follows that the submissions on cancellation of the implicit decisions to dismiss the appellant's administrative reviews of 4 August 2014 and 12 September 2014 must be dismissed as inadmissible.

93. Finally, the respondent pleads the inadmissibility of the appeal on the grounds that, during the pre-litigation phase, the appellant committed abuses of procedure. In particular, the appellant's acceptance of the offer of 10 July 2014 and signature of his contract on 15 July 2014 give rise, *de facto*, to an obligation on his part not to pursue his case at litigation level; otherwise, he would be committing a blatant abuse of procedure.

94. It is certainly true that, following the appellant's request for conversion of his contract, the parties to the dispute negotiated on the next steps to be taken concerning the appellant's employment relationship with NATO. This emerges clearly from the correspondence exchanged between the appellant and the respondent on 23 June 2014 and 1 July 2014. However, it can also be seen from this same correspondence that the parties never reached a definitive agreement on the employment relationship in question.

95. As regards the respondent's argument that, in any event, the appellant signed the contract in question and that this bears witness to the existence of an agreement between

the parties, it should be noted that, when signing on 15 July 2014, the appellant specifically entered provisos as to the pursuit of the procedure, with the precise objective of preserving his rights as guaranteed by the CPR.

96. Furthermore, as can be seen from the file and in response to a question from the Tribunal, the appellant emphasized the fact that, faced with the critical possibility of being out of work, he had no choice but to sign the contract offered by the respondent, on 15 July 2014, in the above-mentioned conditions and entering provisos as to the pursuit of the procedure.

97. As regards the fact that the appellant pursued two different procedures in which he put forward the same grievances contesting the alleged actions and lodged two separate appeals with the Tribunal, these considerations do not lead to the conclusion that the appellant committed abuses of procedure which might render his appeal inadmissible in the present case.

98. Therefore, in the absence of any agreement between the parties on the employment relationship to be established, and in the absence of any explicit commitment on the part of the appellant to give up the pursuit of the case, he cannot be accused of having followed the pre-litigation procedure in an improper manner by lodging the appeal in Case No. 2015/1043, after signing his contract on 15 July 2014.

99. It follows that the argument of inadmissibility put forward by the respondent on the grounds of abuse of procedure must be dismissed.

100. Appeal No. 2015/43 must therefore be declared admissible inasmuch as it seeks the cancellation of the decision of 10 July 2014 not to agree to his request for the conversion of his contract to an initial contract followed by an indefinite duration contract and to offer him instead a definite duration contract.

Considerations on the merits

On the submissions seeking cancellation

101. In his submissions, the appellant claims, in substance, that the respondent committed an error of law in respect of the combined application of the provisions of Articles 77.1, 78.1 and 78.2 of the CPR.

102. In this respect, the Tribunal points out that, in accordance with Article 77.1 of the CPR:

> Temporary personnel may be engaged by the Head of the NATO body when necessary to replace members of the staff who are absent or to undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned.

Articles 78.1 and 2 of the CPR state as follows:

> The duration of employment of temporary personnel... shall not normally exceed a period of 90 consecutive days. However, if required by circumstances, such contracts may be extended by one further period not exceeding 90 days.
> Where, in exceptional cases, the services of temporary personnel are required for a period exceeding 180 days, the Head of the NATO body shall seek prior budgetary approval to the extension.

103. In accordance with Tribunal case law, these provisions taken together show that, when taking on temporary staff, the NATO service concerned intends to replace absent staff or allocate tasks which are of a temporary nature and cannot be carried out by the existing personnel. This recruitment of staff on a temporary basis may exceed the 180-day period only in exceptional cases and provided budgetary approval has been requested and given (see AT judgment in Case No. 2014/1022, paragraphs 44 and 45).

104. In the present case, it is clear that the appellant performed the same duties (as part of the development of NATO Staff Centre activities) from the time he signed his first contract on 1 April 2010 until 13 July 2014, on the basis of eleven successive temporary contracts.

105. It is also established that the appellant was not recruited to replace absent staff members or to take on temporary tasks.

106. It is also clear that the appellant did not perform his duties in exceptional circumstances following approval by the budgetary authorities within the meaning of the above-mentioned provisions of the CPR.

107. As regards the respondent's arguments concerning the appellant's previous activities with a service-providing company to the effect that, from the date of signature of his first contract in April 2010, the appellant was assigned temporary activities and that, in these conditions, he cannot claim any permanent employment relationship with the respondent, these must be dismissed.

108. Even if this line of argument were valid, the contracts signed by the appellant with the respondent do not in any way establish that the appellant performed his duties on the basis of a contractual relationship with an external service-providing company.

109. At the hearing, the respondent asserted that the appellant had been recommended by a service-providing company in the framework of the development of Staff Centre activities, and that this clearly demonstrated that there was no certainty for the appellant that he was going to carry out permanent duties.

110. This consideration, even if it were well-founded, would in no way prejudge the appellant's contractual regime, which is very largely governed by the CPR. Moreover, it has absolutely not been established, with supporting evidence, that the appellant's contracts were signed in the framework of an agreement with this company for the provision of services to NATO.

111. The arguments based on the fact that, owing to the permanent restructuring of the Staff Centre, no final decisions could be taken concerning staff recruitment and the management of personnel had to remain flexible by means of the employment of temporary staff throughout the period of more than four years during which the appellant was contractually linked with the respondent, must also be dismissed.

112. Even if the respondent's invocation of these circumstances were valid in this case, this is not one of those situations which authorize a NATO body to recruit temporary staff on the basis of Articles 77 and 78 of the CPR.

113. It follows from the foregoing that the duties performed by the appellant from 1 April 2010 to 13 July 2014 on the basis of several successive contracts were of a permanent nature and must be covered by Article 5 of the CPR and not by Articles 77 and 78 of the CPR.

114. The appellant's request for the conversion of his contractual situation must therefore be examined in the light of the provisions of Article 5 of the CPR.

115. In this context, the Tribunal points out that Article 5.2 of the CPR, in the version in effect since 1 April 2012, provides as follows: "*Staff appointed or reappointed to the Organization are offered definite duration contracts, not exceeding 5 years"* (5.2.1) and *"Definite duration contracts may be renewed for a period of up to 5 years and subject to* [specific] *factors being met*" (5.2.3).

116. It follows from the above that, initially, definite duration contracts may not exceed five years, but that renewal for another period of up to five years may be possible in certain conditions.

117. It follows that, in accordance with the new terms of Article 5 of the CPR, a request for the conversion of a definite duration contract to an indefinite duration contract comes into force after a total period of ten years of service and subject to the performance of permanent duties as set out in paragraphs 105 to 109 above.

118. In the present case, it is clear that the appellant was in a contractual relationship with the respondent from 1 April 2010 to 13 July 2014 on the basis of eleven successive temporary contracts.

119. Article 5 of the CPR therefore applies to the appellant and, as a result, his temporary contracts must be converted, since he performed his duties on a permanent basis. It has to be recognized, however, that the appellant cannot claim the conversion of his contractual situation to a definite duration contract followed by an indefinite duration contract. Contrary to his assertions since his first administrative review of 4 August 2014 and throughout the pre-litigation procedure in the framework of appeal No. 2015/1043, the appellant has not performed his duties for the length of time necessary under Article 5.4.2 of the CPR in order to then claim the conversion of his contract to an indefinite duration contract.

120. Therefore, even though the appellant's contractual situation is among the cases which are covered by Article 5 of the CPR and in which a staff member's contractual situation must be converted to a definite duration contract, he cannot claim the conversion of his contract to a definite duration contract followed by an indefinite duration contract.

121. As regards the appellant's grievance on the grounds that the decision of 10 July 2014 violated the provisions of Article 5 of the CPR in that the contract offered did not fall within the scope of this Article and, consequently, the contract offered as a result of this decision was tainted with blatant illegality, it must be dismissed. This grievance is put forward by the appellant to justify his claims in the context of the conversion of his contract to an indefinite duration contract which are, in any event, dismissed.

122. It results from the foregoing that the appellant's permanent employment at NATO should have taken the form of an initial contract as from 1 April 2010, followed by a definite duration contract pursuant to Article 5.2 of the CPR for the period during which the appellant was employed by the respondent in the framework of several temporary contracts.

123. It follows that the decision of 10 July 2014 dismissing the appellant's request for the conversion of his contractual situation to a definite duration contract as from 1 April 2010 followed by an indefinite duration contract, and offering him just one definite duration contract, must be cancelled on the grounds of an error of law in the application of the terms of Articles 77 and 78 of the CPR in refusing only the conversion of his contractual situation to an initial contract followed by a definite duration contract from 1 April 2010 to 13 July 2014, which is the period during which he was employed by the respondent in the framework of several temporary contracts.

On the submissions seeking compensation

124. The appellant seeks compensation for material and non-material damage suffered as a result of the illegal refusal to convert his contract to an initial contract followed by an indefinite duration contract owing to the adoption of the illegal decision of 10 July 2014.

125. As regards the material damage caused by the adoption of the cancelled decision, it should be pointed out that the conversion of the appellant's contract for the period from 1 April 2010 to 13 July 2014 entails compensation for the material damage suffered.

126. The appellant's entitlement to the remuneration, allowances and benefits provided for in the CPR for staff members in his situation must therefore be recalculated for the period from 1 April 2010 to 13 July 2014. In this regard, he should be paid the new sums to which he is entitled, minus the sums already received (see, in this respect, decision no. 879 of 13 March 2013) under his temporary contracts with the respondent.

127. As regards the appellant's claims concerning non-material damage arising from the illegal decision, owing to the short duration of his contracts which placed him in a permanent state of uncertainty and prevented him from planning professional or family activities and from making certain investments, these should be dismissed.

128. The Tribunal points out that the cancellation of an action tainted with illegality, as is the case with the decision of 10 July 2014, can in itself constitute the appropriate compensation which, in principle, is sufficient for any non-material damage which this action may have caused the appellant.

G. Costs

129. Article 6.8.2 of Annex IX to the CPR states as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant; provided that the appellant shall not be entitled to recover the expenses incurred by reason of being assisted by another staff member or a member of the retired NATO staff in respect of his/her own time incurred in pursuing the appeal.

130. As Case No. 2014/1027 has been dismissed in respect of all the submissions therein, the appellant cannot be paid any sums under this head.

131. In Case No. 2015/1043, as the appellant was partially unsuccessful in his requests, he should be reimbursed €2.000 for the costs of retaining counsel.

H. Decision

FOR THESE REASONS,

the Tribunal decides that:

- Case No. 2014/1027 is dismissed as inadmissible.
- The decision of 10 July 2014 is cancelled inasmuch as it refuses to acknowledge the permanent nature of the appellant's employment relationship in the framework of a definite duration contract.
- The appellant's contract is converted to an initial contract followed by a definite duration contract from 1 April 2010 to 13 July 2014.
- The respondent shall pay the appellant, for the period from 1 April 2010 to 13 July 2014, all the amounts payable to permanent staff members in respect of the remuneration, allowances and benefits provided for in the CPR for staff members in his situation, minus the sums received under the contracts concluded with the respondent over the same period.
- The remaining submissions in Case No. 2015/1043 are dismissed.
- In Case No. 2015/1043, the respondent shall reimburse the expenses incurred by the appellant for retaining counsel, up to a limit of €2.000.

Done in Brussels, on 9 November 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 December 2015 AT-J(2015)0017

Judgment

Case No. 2015/1051

JT,
Appellant

v.

NATO Communication and Information Agency,
Respondent

Brussels, 28 October 2015

Original: English

Keywords: education allowance; exceptional rate; imperative educational reasons; summary dismissal.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written submissions of the parties and having deliberated the matter further to Tribunal Order AT(PRE-O)(2015)0004.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the General Manager of the NATO Communications and Information Agency (NCIA), dated 12 May 2015, and registered on 15 May 2015 as Case No. 2015/1051, by Mr JT. The appeal concerns denial of appellant's request that education costs for his son's expenses in earning a second masters degree be reimbursed at the higher "exceptional" rate.

2. The respondent's answer, dated 14 July 2015, was registered on 17 July 2015. The appellant's reply, dated 8 September 2015, was registered on 11 September 2015.

3. On 6 August 2015, the President of the Tribunal issued Order AT(PRE-O)(2015)0004 in accordance with Rule 10, paragraph 1 of the Tribunal's Rules of Procedure. This Order suspended the procedural time limits and authorized the appellant to submit additional written views. Apparently *in lieu* of specifically responding to this authorization, the appellant submitted the above-mentioned reply dated 8 September 2015.

B. Factual background of the case

4. The background and material facts of the case may be summarized as follows.

5. Annex III.C to the NATO Civilian Personnel Regulations (NCPR) governs reimbursements for dependent children's educational costs. Under Article 6(a) of that Annex, the standard rate of reimbursement is for 70% of educational costs up to a ceiling of 2.5 times the annual amount of dependent child allowance. However, under Article 6(d)(iii), reimbursement shall be made at an exceptional rate for up to 90% of total educational costs, up to a ceiling of six times the annual rate of the dependent child allowance, if the costs are "exceptional, unavoidable and excessively high" and are incurred for "imperative educational reasons."

6. On 31 July 2012, appellant applied for reimbursement of his son's educational expenses at the exceptional rate for the son's study for the 2012-2013 year. The expenses at issue involved the son's enrollment in a program to obtain a second masters degree at a university in a third country. (Appellant previously received education allowance at the standard rate for the years 2008-2012 while his son was pursuing his first masters degree at a different institution in the third country.) Appellant urged that there were imperative educational reasons justifying payment at the exceptional rate because his son had been unable to secure employment in his desired field after receiving his first masters degree. Accordingly, in appellant's submission, a second

degree from a prestigious institution in the third country was necessary in order to provide "unique career qualifications" enabling his son to compete a highly competitive field.

7. On 9 August 2012, respondent's Payroll and Benefits Manager denied the appellant's request for reimbursement at the exceptional rate, stating that the General Manager had disapproved the request *"[a]s the tuition fee is not unavoidable because of possible alternative studies*." (Appellant did receive reimbursement at the standard rate for 2012-2013.) Following further discussions and written exchanges between the parties regarding the reasons for respondent's decision, appellant lodged a document styled as a "Complaint" on 6 February 2014. This disputed respondent's reasons for denying his request and requested constitution of a complaints committee. This was constituted in March 2014, concluding in a June 2014 report that the exceptional rate "is fully justified." On 28 August 2014, following further correspondence between appellant and respondent's General Manager, the General Manager rejected the complaints committee report, noting, *inter alia*, that the committee had not addressed the NCPR's requirement that expenses be required for imperative educational reasons. In this communication, the General Manager also confirmed the 2012 decision to deny appellant's request for reimbursement at the exceptional rate.

8. Respondent then submitted a "2nd Complaint" in September 2014, alleging, inter alia, that it was 'highly questionable for the Agency to apply this criteria" (*i.e*., of imperative educational need) after two years of discussion, urging that the NCPR do not contain a clear definition of imperative educational reasons, and requesting another complaints committee. The General Manager denied this second complaint on 22 September 2014. There followed further exchanges of correspondence between the parties. In these, respondent reiterated its belief that the circumstances advanced by appellant did not constitute imperative educational reasons warranting payment at the exceptional rate, while appellant reiterated his disagreement with respondent's position and implied (without evidence) improper discrimination by respondent. The correspondence between the parties includes an 11 March 2015 memorandum to appellant in which respondent's Head of Human Resources recalled that the General Manager's decision had been notified to appellant on 28 August 2014 and confirmed on 22 September 2014.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submission

9. Appellant contends that his son's need to acquire a second masters degree at a prestigious third country institution in order to be more competitive in seeking employment in a highly competitive professional field constitutes imperative educational reasons satisfying NCPR Annex III.C Article (6)(iii). He disputes respondent's contrary assessment and complains, inter alia, that a second Complaints Committee should have been constituted and of the lack clarity regarding the definition of imperative educational reasons. He also appears to suggest, without supporting explanation or evidence, discriminatory application of the criterion of imperative educational reasons in his case.

10. Appellant requests the Tribunal to provide him with "*a resolution whereby I am granted reimbursement of educational cost for our son's study in 2012-2013 according to the exceptional rate*."

(ii) The respondent's contentions

11. Respondent contests admissibility of the appeal, contending that it was not filed within the time periods required by the NCPR. Respondent notes that under Art. 6.3.2 of NCPR Annex IX, appeals must be lodged within 60 days of notification of the disputed decision. Here, respondent observes, the disputed decision to deny appellant's request was originally notified in 2012, and then confirmed on 11 February 2014 and again on 28 August 2014. However, the appeal was not filed until 12 May 2015.

12. Respondent also observes that under the previous provisions of the NCPR applicable prior to 1 July 2013, appeals had to be filed within "a reasonable time." The appeal here was filed many months after the contested decision, much more than a reasonable time.

13. With respect to the merits, respondent denies that the NCPR allows appellant to demand a second Complaints Committee on the same topic; in respondent's view, appellant's renewed complaint and request to constitute a Complaints Committee was simply a reiteration of his previous one.

14. Respondent also presented detailed defenses of its conclusion that reimbursement at the exceptional rate was not justified under the NCPR, citing, *inter alia*, relevant provisions of Guidelines prepared by the Advisory Panel on Administration. In respondent's view, the costs incurred by appellant were avoidable, did not stem from imperative educational reasons, and did not satisfy the requirements of NCPR Annex III.C. Respondent disputed appellant's apparent claim of discrimination, observing that no staff member had ever previously sought reimbursement at the exceptional rate for study leading to a second masters degree in a third country. Respondent also recalled that since August 2012, it had engaged in a continuous dialogue with appellant involving numerous e-mails, letters and telephone calls, many of which respondent annexed to its answer.

15. Respondent requests the Tribunal to declare:
- that the appeal is time-barred and inadmissible; and
- that on the merits, the appeal is unfounded, as the standard rate has already been paid.

D. Considerations and conclusions

16. The dispute at the heart of this appeal involves denial of a request for educational allowance at the exceptional rate for the 2012-2013 academic year. The decision to deny the request was taken and notified to appellant in August 2012. However, the appeal was dated 12 May 2015.

17. Under Article 6.3.1 of NCPR Annex IX, appeals must be submitted within 60 days after the Head of a NATO body (HONB) notifies the appellant that the relief sought or recommended will not be granted. Here, under the most realistic appreciation of the underlying facts, this notification occurred in 2012. Under the relevant provisions of the NCPR in force at that time, an appeal had to be brought within a reasonable time. The more than two year time span prior to filing of this appeal is far beyond a reasonable time.

18. Notwithstanding the HONB's denial of his request, appellant persisted, continuing to press his claim for reimbursement at the higher rate over the course of many months. Respondent continued to engage with him, reiterating and explaining the 2012 decision. These multiple exchanges between the Parties do not fit neatly into the sequence and time limits for administrative review established by Article 2 of NCPR Annex IX. However, giving appellant the benefit of the doubt in this regard, he was again notified by the General Manager on 28 August 2014 that his request was denied, a decision that the General Manager confirmed on 22 September 2014.

19. There comes a time when the Head of a NATO body is entitled to have the categorical denial of a staff member's request taken as final. In this case, that certainly occurred on 28 August 2014, if not two years before. This appeal was not filed until 12 May 2015, long after the 60 days for appeal required by Article 6.3.1 of NCPR Annex IX.

20. As it was not filed within the mandatory time period, the appeal is inadmissible.

E. Costs

21. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

22. The appeals being inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal, being inadmissible, is summarily dismissed.

Done in Brussels, on 28 October 2015.

(Signed) Chris de Cooker, President
(Signed) Laura Maglia, Registrar *a.i*.

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 February 2016 AT-J(2016)0001

Judgment

Case No. 2015/1050

EB

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 15 January 2016

Original: English

Keywords: resignation; medical arbitration; overpayment; reimbursement.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 15 December 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Support and Procurement Agency (NSPA) dated 17 April 2015, and registered on 23 April 2015 as Case No. 2015/1050, by Mr EB.

2. The respondent's answer, dated 18 June 2015, was registered on 3 July 2015. The appellant's reply, dated 23 July 2015, was registered on the same day. The respondent's rejoinder, dated 21 August 2015, was registered on 3 September 2015.

3. The Panel held an oral hearing on 15 December 2015 at NATO Headquarters. It heard appellant and arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

4. Following conclusion of the written procedure in the case, on 14 Sept 2015, appellant's counsel requested, pursuant to Article 16(a) of the Rule of Procedure, to submit two additional documents said to respond to the Respondent's Rejoinder. By its Order AT(TRI-O)(2015)0002 of 2 October 2015, the Tribunal denied this request.

B. Factual background of the case

5. The background and material facts of the case may be summarized as follows.

6. The appellant joined NSPA (NAMSA at that time) in February 1984. His contract was renewed several times and then was extended for an indefinite duration. In May 2014, while appellant was on sick leave, which was contested by NSPA and the insurance company, Allianz, it was decided to go to medical arbitration.

7. After considerable delay in organizing and reporting the outcome of the arbitration proceedings, the physician-arbitrators reported on 13 October 2014 that "*it has been determined that [appellant] was fit to return to work at 50% from 19/05/14...*"

8. On that same day, a senior human resources officer of the respondent wrote a letter to appellant informing him of the result of the medical arbitration. The letter requested that he report to work half-time by 16 October 2014, and stated that he must reimburse respondent for overpayment of salary during the period of unjustified absence as determined by the arbitrators. By e-mail on 16 October 2014, appellant responded that he could not resume work, and indicated two options: legal proceedings to contest the outcome of the arbitration, or early retirement. On 19 October 2014, the respondent's

General Manager wrote that if appellant did not return to work, his contract would be terminated as of 31 October 2014.

9. On 21 October 2014, appellant sent an e-mail to the senior Human Resources officer captioned "Request for termination of employment contract and start of retirement". The e-mail stated, *inter alia*:

> My current state of health does not allow me to resume professional activities even part-time, since I cannot know when my more positive periods [without pain] will occur.
>
> The circumstances require me to end my employment contract with NSPA after only 30 years, in the manner that is best for you - dismissal by you, or my resignation as mentioned during our telephone conversation.
>
> For insurance coverage reasons, I would like this to be effective at the end of the month. For the same reason, please do everything necessary for my pension application.
>
> ...
> Please send me the documents pertaining to termination of my contract as soon as possible and immediately initiate the procedure for placing me in retirement..."

10. On 22 October 2014, a senior administrative officer wrote to appellant, referring to Article 8.2 of the NATO Civilian Personnel Regulations (CPR), accepting his resignation, and transmitting the forms relating to his separation from the Organization, his pension and continuation of his insurance. The next day, 23 October 2014, respondent sent an e-mail explaining its calculation of the amount of €5.160,82 claimed as reimbursement for salary overpayment.

11. As confirmed at the hearing, the appellant filled out the necessary forms, ended his employment with NSPA at the end of October 2014, and began his retirement.

12. On 21 November 2014, appellant submitted two requests for administrative review. The first sought annulment of respondent's 22 October 2014 communication accepting appellant's purported offer of resignation. The second sought annulment of respondent's 13 October 2014 letter "completed October 23" that announced the outcome of the arbitration, called for appellant to resume work half-time, and requested reimbursement for overpayment during the period when the arbitrators found he was fit to resume work half-time.

13. On 11 December 2014, respondent denied the first request on the merits, contending that the appellant's 21 October 2014 e-mail demonstrated his intention to resign, that his resignation was accepted, and that his resignation could not be withdrawn. Respondent denied the second request as untimely and inadmissible, as it was based on the 13 October 2014 letter announcing the outcome of the arbitration and seeking reimbursement of overpayment. Respondent also provided a detailed explanation of the calculation of the amount claimed as reimbursement.

14. On 18 December 2014, appellant requested review of the denial of both requests for administrative review. The agency affirmed its earlier actions and denied the request on 6 January 2015. On 2 February 2015, appellant requested administrative review of the 6 January 2015 denial; this request was also denied.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submission

15. The appellant submits that the appeal is admissible, as both of his requests for administrative review were submitted within the required time limit. The request for review of the respondent's acceptance of appellant's purported resignation on 22 October 2014 was lodged on 21 November 2014, the thirtieth day following the contested decision. While the second appeal (also lodged on 21 November 2014) in part related to respondent's 13 October 2014 letter demanding reimbursement, appellant contended that the details of the amount demanded were not communicated until 23 October 2014. In appellant's submission, he could not contest the decision to demand reimbursement until this additional information was made available on that date.

16. Regarding the merits, appellant argues that his 21 October 2014 e-mail was ambiguous and did not reflect the legally required unequivocal, explicit intention to resign. In this regard, he contends that an act of resignation must be made freely, without pressure or coercion, and that he was placed under inappropriate pressure by the respondent's demands, *inter alia,* that he return to work or face termination. At the hearing, appellant's counsel also argued that he was given false information regarding the options available to him, apparently in reference to respondent's communications calling for appellant either to return to work or face termination of his contract. In any case, appellant contends that his 21 October 2014 e-mail resulted from improper pressure or coercion, and not a freely made choice.

17. Appellant further argues that the purported resignation was ineffective because it was not submitted in compliance with Article 8.1 and 8.2 of the CPR, as it was not communicated to Human Resources through his immediate superior. In this regard, Article 8.1 and 8.2 provide:

> 8.1. Members of the staff wishing to resign in accordance with the terms of their contracts must notify the Personnel Service of their decision in writing through their immediate superior.
>
> 8.2. On behalf of the Head of the NATO body, the Personnel Service shall acknowledge receipt of the resignation. This resignation is then irrevocable unless otherwise mutually agreed.

18. Appellant disputes respondent's demand for reimbursement on grounds, *inter alia,* that the amount claimed is improperly calculated; that respondent's calculations are unclear and lack transparency; and that three months of the period for which respondent

seeks reimbursement involve delays in the medical arbitration for which appellant is not responsible.

19. Appellant seeks:
- annulment of the NSPA General Manager's decision dismissing his complaint of 2 February 2015;
- if needed, annulment of the decision of 6 January 2015 dismissing the appellant's second administrative review of 18 December 2014;
- compensation for material damage;
- €10.000 as compensation for non-material damage; and
- reimbursement of all legal, travel and subsistence costs, and lawyer's fees, without limitation.

20. At the hearing, the Tribunal sought clarification of the intended effect of the requested relief, in particular whether respondent sought to end his retirement and resume his status as a staff member. Appellant's counsel stated that the consequence of annulling these decisions was for respondent to determine, but that the proper course of action for it to have taken initially was to either terminate appellant's contract or to bring disciplinary action against him. Counsel later affirmed that appellant did not seek reinstatement or lost salary. Instead, he sought non-material damages and not to be required to reimburse the agency.

(ii) The respondent's contentions

21. Respondent does not dispute admissibility of the appeal as it relates to its communication of 22 October 2014 accepting appellant's resignation. However, appellant argues that the second portion of the appeal, regarding the demand for reimbursement, is inadmissible. In appellant's view, the appellant was given notice of its decision to require reimbursement in its communication of 13 October 2014. Accordingly, appellant's 21 November 2014 request for administrative review was not made within the thirty-day period required by the CPR.

22. Regarding the merits, respondent contends that the caption and text of appellant's 21 October 2014 e-mail show that it is a clear expression of his intent to resign, and that respondent properly regarded it as such. In this regard, respondent notes that appellant promptly filled out the forms associated with his resignation and retirement, and that his contract ended on 31 October 2014 and his retirement began on 1 November 2014, just as appellant requested in his 21 October 2014 e-mail. Respondent is dismissive of the claimed violation of Article 8.1 and 8.2 of the CPR, noting that appellant had communicated directly with the competent persons in the Human Resources Division.

23. Regarding its claim for reimbursement, respondent argues, *inter alia,* that appellant was not entitled to the full compensation he received for the substantial period when the physician-arbitrators concluded he could work half-time, and that appellant was responsible in part for the long period required for the medical arbitration. In respondent's view, salary requires work by a staff member, and appellant made clear that he did not intend not to work.

24. Respondent asks the Administrative Tribunal:
- to declare inadmissible the part of the appellant's appeal pertaining to the claim for reimbursement of salary overpayment;
- to declare the rest of the appeal and the appellant's claims to be groundless and to reject them; and
- to order the appellant to reimburse €5.160,82 to the NSPA.

D. Considerations and conclusions

25. The respondent does not contest admissibility of the portion of the appeal concerning respondent's 22 October 2014 letter regarding appellant's resignation. The Administrative Tribunal agrees that this portion of the appeal is admissible.

26. Regarding respondent's 13 October 2014 demand for reimbursement, appellant argues that he could not seek administrative review of the demand until he received details regarding the amount claimed, which did not occur until 23 October 2014.

27. Nevertheless, the terms of respondent's 13 October 2014 communication are quite straightforward:

> As you have received 100% emoluments since 19 May 2014, you are required to reimburse us for the over-payment or take all your days of leave and/or a mixture of these two possibilities. Please give us your response by 23 October 2014 at the latest.

28. This is a clear statement of respondent's decision. Appellant understood it as such, and quickly acted to dispute respondent's position. His 21 October 2014 e-mail argued against the need to make reimbursement, stating, *inter alia,* that he had been on sick leave with physicians' certificates throughout the period of his absence; that he was not responsible for the long delay in the medical arbitration; and that he was undergoing regular, frequent medical and therapeutic visits throughout the period in question. Thus, within eight days of learning of the respondent's demand, appellant was contesting it.

29. Accordingly, the Tribunal is not persuaded that appellant was insufficiently informed to seek administrative review of the respondent's 13 October 2014 decision within thirty days of that decision, but could only do so later after receiving additional information. As the request for administrative review of this decision was not lodged within the mandatory thirty-day period established by the CPR, the claim is inadmissible.

30. Regarding the second element of the appeal, the Tribunal does not see the appellant's 21 October 2014 e-mail as ambiguous or insufficient. It clearly reflects the appellant's wish to cease to be a staff member at the end of October 2014, and then to retire immediately. Furthermore, the Tribunal does not accept appellant's contention that he was subjected to inappropriate pressure or coercion. He agreed to participate in a binding medical arbitration. The physician-arbitrators did not agree with his position, and found him able to return to work half-time. Appellant could not claim that he did not understand the obligations arising from the arbitration's outcome (nor in the circumstances could he have made such a claim). To the extent that the situation was difficult for the appellant, the difficulty followed on from the outcome of the medical

arbitration and his judgment not to return to work in compliance with the arbitrators' decision.

31. The Tribunal also finds appellant's invocation of Article 8.1 of the CPR unpersuasive. At the time of the events of October 2014, the appellant had been on extended sick leave continuously for many months, apparently including all of 2014 and much of 2013. During this lengthy period, so far as the available documents show, appellant was in regular contact with members of respondent's Human Resources Division, which indeed appears to have become his primary, if not sole, point of official contact with the respondent. Given appellant's non-attendance at his duty station for a period of many months, the Tribunal cannot find that his decision to communicate directly with his customary interlocutors renders his resignation ineffective.

32. The Administrative Tribunal must also dismiss respondent's request that it order appellant to pay it the €5.160,82 claimed as reimbursement. Respondent's written materials identify no legal basis for the Tribunal to order such payment; in response to the Tribunal's question at the hearing, respondent's counsel cited only general principles of law. These do not provide a sufficient legal basis for the requested order. The Administrative Tribunal is not a tribunal of general jurisdiction. It can order an appellant to pay compensation only in the limited and exceptional circumstances indicated in Article 6.8.3 of Annex IX to the CPR. Respondent made no claim that such circumstances exist here, nor would the record justify such a claim.

E. Costs

31. Article 6.8.2 of Annex IX to the CPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

32. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.
- Respondent's request for an order directing appellant to reimburse it the amount of €5.160,82 is dismissed.

Done in Brussels, on 15 January 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 February 2016 AT-J(2016)0002

Judgment

Case No. 2015/1052

EA

Appellant

v.

NATO International Staff

Respondent

Brussels, 15 January 2016

Original: French

Keywords: conversion of a temporary staff contract; admissibility; late initiation of the pre-litigation stage; understanding of the terms of the CPR.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2015.

A. **Proceedings**

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal by the appellant, a former member of the NATO International Staff, dated 19 June 2015 and registered on 2 July 2015 as Case No. 2015/1052. In this appeal, the appellant seeks, in substance, annulment of the respondent's implicit decision dismissing his request for conversion of his contract and, in this connection, makes several claims for compensation.

2. Following notification of the appeal, the comments of the respondent in the present case were presented on 21 August 2015, registered on 31 August 2015. The appellant presented his reply on 13 October 2015, registered on 19 October 2015. The respondent's rejoinder of 18 November 2015 was registered on 19 November 2015.

3. The Tribunal's Panel held an oral hearing on 15 December 2015 at NATO Headquarters in Brussels. It heard arguments by the parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. **Factual background of the case**

4. The appellant began working as a tennis instructor on the NATO International Staff under an initial temporary staff contract from 21 April 2010 to 30 June 2010.

5. After this first contract came to an end, the appellant concluded with the respondent several successive temporary contracts of six months' duration, which ran through to 31 December 2013. He was subsequently engaged for the same duties on the basis of a three-month contract from 1 January 2014 to 31 March 2014.

6. Under these successive temporary staff contracts concluded with the respondent, the appellant was not employed full-time but was paid on an hourly basis according to demand and the Staff Centre's requirements.

7. It is apparent from the case file and the documents submitted to the Tribunal in the written procedure that after 31 March 2014, the appellant continued to perform the same duties under a service contract with NATO.

8. It is also apparent from the case file and the appellant's statements at the hearing that the latter had sent registered letters to the respondent, in particular a letter dated 10 November 2014, regarding the conversion of his contractual situation. The respondent did not respond to that letter.

9. In a letter dated 10 February 2015, the appellant invoked the permanent nature of his employment relationship with the respondent since the signature of his first employment contract on 21 April 2010 to request the conversion of his employment contract into an indefinite duration contract on the basis of the combined application of Articles 5, 77 and 78 of the NATO Civilian Personnel Regulations (CPR).

10. In response to this request – which appellant refers to as an "administrative review" submitted in accordance with the provisions of Article 61 of the CPR – the respondent sent him a letter dated 2 March 2015 stating that the said request had been submitted too late. In the respondent's view, the appellant, in making this request, was in substance disputing the fact that his temporary staff contract had ended on 31 March 2014 and was seeking a review of that decision by making a request for conversion of his contractual situation during the full period in which he had been employed under several successive temporary staff contracts. According to the respondent, the appellant's request for an administrative review should have been made within 30 days of notification of the decision in question, in accordance with Article 2.1 of Annex IX to the CPR; this request for an administrative review, dated 10 February 2015, was therefore not lodged within the time frame prescribed by the CPR.

11. In a letter dated 10 March 2015, presented as a complaint submitted in accordance with Article 4 of Annex IX to the CPR, the appellant firstly requested that his complaint be submitted to a Complaints Committee and secondly reiterated his request for conversion of his employment contract into an individual (*sic*) contract followed by an indefinite duration contract within the meaning of Article 5 of the CPR. In that same letter, the appellant argued that the lateness of his request for an administrative review was due to the fact that he had only managed to obtain a complete copy of the CPR at the end of January 2015.

12. In a letter dated 13 March 2015, the appellant criticized the respondent for not having convened a Complaints Committee in spite of his request.

13. These are the circumstances in which the appellant lodged this appeal on 19 June 2015.

14. Having been informally told that as of 3 October 2015 the respondent would no longer require his services, the appellant sent an e-mail dated 5 October 2015 protesting this decision strongly. He argued, in that connection, that his service contract had been severed without the required notice period and, in any case, this decision by the respondent had been motivated by the fact that the dispute over conversion of his contractual situation had been brought before the Tribunal (the present appeal).

C. **The parties' submissions**

15. In his appeal, the appellant requests that the Tribunal should:
- annul the implicit decision to dismiss his complaint;
- acknowledge the permanent nature of his contractual relationship with the respondent;

- convert his employment relationship into an individual (*sic*) contract followed by an indefinite duration contract starting from 21 April 2010;
- order compensation for material damage suffered for the period from 21 April 2010 to 2 October 2015 by awarding an amount equal to the difference between the remuneration, allowance and benefits package to which he would be entitled under the CPR on the basis of an individual (*sic*) contract followed by an indefinite duration contract and the amounts he received over the same period with respect to paid leave under Article 84 of the CPR;
- order compensation for non-material damage, provisionally assessed at €5.000, suffered as a result of the succession of definite duration contracts and the uncertainty of his professional situation;
- order reimbursement of the Belgian income tax paid and still to be paid starting from the beginning of his employment on the basis of temporary staff contracts and service contracts; and
- order reimbursement of the costs incurred for his defence.

16. In his reply, the appellant also asks to be reinstated in NATO's employ or, alternatively, to be compensated for the illegal termination of his contract.

17. The respondent requests that the Tribunal should:
- dismiss the appeal as inadmissible or, at least, as unfounded.

D. **Parties' main contentions and arguments**

(i) Considerations on admissibility

18. The respondent argues that the appeal is inadmissible insofar as neither the procedure nor the time frames foreseen by the CPR for disputing acts allegedly constituting grounds for grievance have been respected.

19. Firstly, the appellant never disputed the legal basis of his contractual relationship by expressing any reservations, despite the succession of several temporary staff contracts. In reality it was only one year after the end of his last contract that he formally submitted a request for conversion of his contractual situation.

20. Secondly, the appellant cannot claim to have had no knowledge of the CPR or the procedures within to justify filing his request for an administrative review late, on 10 February 2015. The appellant had information establishing to the requisite legal standard that he must have been aware of the CPR provisions since, in all his successive temporary staff contracts, reference was clearly made to the applicability of the CPR.

21. Finally, supposing that the appellant did learn of the pre-litigation procedures in the CPR belatedly, *i.e.* in January 2015, in no way did he follow or comply with the procedural steps or the time frames foreseen for them. In reality he merely requested that a Complaints Committee be convened by sending his request directly to the NATO Secretary General.

22. The appellant replies, firstly, that he never received a complete copy of the CPR and therefore NATO cannot avail itself of a text that was never brought to his attention. Such an assertion cannot be put forward owing to the fact that in the appellant's successive temporary staff contracts, express reference was made to various CPR provisions.

23. Secondly, the appellant argues that he followed the procedural steps by requesting an administrative review in line with Article 2 of Annex IX to the CPR and then a complaint in accordance with Article 61 of the CPR. Moreover, he requested that his complaint be submitted to a Complaints Committee first. It was only after his reminders and many letters, and in the absence of a reply from the respondent, that the appellant lodged the present appeal, having exhausted all available channels for submitting complaints in accordance with Article 6.3.1 of Annex IX to the CPR.

(ii) Considerations on the merits

24. Firstly, in his submissions seeking annulment, the appellant puts forward three arguments against the implicit decision to dismiss his request for conversion of his contract into an initial contract followed by an indefinite duration contract.

25. To begin with, the appellant makes the argument of a violation of Articles 77 and 78 of the CPR, the combined application of which leads to the conclusion that temporary staff may be employed to replace absent staff or to take on duties and tasks of a temporary nature. Moreover, the contracts in question must not normally exceed a period of 90 consecutive days, yet the appellant was hired on the basis of several successive contracts, for more than four years, to perform duties of a permanent nature. In his view, an abusive practice of renewing and extending temporary staff contracts exists, in spite of the CPR stipulations against doing so.

26. In this framework the appellant argues that the respondent was aware of this situation and had promised him that it would remedy it. As the conditions of Articles 77 and 78 of the CPR have not been met, the appellant's employment relationship should be covered by an initial contract followed by an indefinite duration contract, in accordance with Article 5 of the CPR, retroactively from 21 April 2010. In this connection, and in response to a question by the Tribunal, the appellant said that owing to his partial employment in NATO's service, his request actually concerned conversion of his temporary staff contract into an initial contract followed by a part-time indefinite duration contract.

27. In his reply, appellant pleads, next, that more generally, the respondent's recourse to temporary staff contracts is abusive in the present case and a direct violation of the applicable social law, because temporary staff members are not affiliated to the national (Belgian) social security system, nor are they entitled to the social security apparatus that covers NATO's other staff. In this respect, they are paid an extra 12% in salary intended for setting up their own pension and contracting private insurance coverage. This system is thought to be a violation of the Belgian national social security legislation applicable in the present case to NATO's locally hired staff.

28. Finally, in his reply, the appellant argues that his employment under several successive temporary staff contracts violates the applicable tax legislation. In this respect, the appellant submits that the respondent never supplied the required forms or certificates for the tax declarations or complied with the provisions in them, with respect to the withholding tax on professional income in particular.

29. Secondly, in his submissions seeking annulment, the appellant argues that under his service contract he continued to perform the same duties and give lessons to the same people under the same conditions. Thus, by concluding this contract, the respondent was continuing to violate the NCPR and the applicable legislation on the provision of services. This violation became blatant with the respondent's decision to terminate the contract immediately, without the legal notice period or notification in a timely manner that the service contract would be ending.

30. Thirdly and finally, the appellant submits that the respondent's decisions and behaviour caused him, on the one hand, non-material damage assessed provisionally at €5.000 owing to the succession of his temporary staff contracts and the uncertainty of his professional situation generated by this type of contract. On the other, he argues that those same decisions and behaviour caused him material damage equal to the difference between the remuneration, allowance and benefits package to which he would be entitled under the CPR and the amounts he received over the same period. With respect to this, furthermore, it is irrelevant that the hourly rate applied in line with the appellant's contracts was much higher than what would have been applied to a staff member under an indefinite duration contract.

31. The respondent replies, firstly, that the fact of giving tennis lessons was unlikely to create any kind of legitimate expectations about the permanent nature of his duties. On the contrary, this type of service depended on the demand for lessons as part of the activities offered by the Staff Centre, which remained uncertain rather than steady. This was also confirmed by the fact that the appellant worked between 10 and 20 hours a week on average, except during the vacation period. It was under specific circumstances and after budgetary authorization that the disputed temporary staff contracts were concluded. Thus they clearly come under the provisions of Article 77.1 of the CPR, as can be seen from the case law of the Tribunal. In addition, the respondent submits that as the appellant is retired, he cannot invoke these provisions. Consequently the argument based on a violation of Article 5 of the CPR cannot, in any case, succeed.

32. Furthermore, following the appellant's statements that his request for the conversion of his contract actually concerned an initial contract followed by a part-time indefinite duration contract, the respondent said that such a request must in any case be dismissed because the CPR does not provide for the conclusion of part-time indefinite duration contracts.

33. Regarding the appellant's allegation that NATO must re-examine his contractual situation owing to irregularities committed in concluding his contracts, the respondent immediately dismisses this, replying that such a re-examination was never sought by appellant, who moreover never made any objections about this throughout his temporary staff contracts with NATO.

34. With regard to the contentions and arguments regarding a violation of social security legislation, the respondent objects, on the one hand, that these are new contentions being developed for the first time in the framework of the reply which are therefore inadmissible; on the other, it argues that in any case, NATO is not subject to the requirements arising from national social security legislation, and therefore no violation of this legislation may validly be claimed.

35. With regard to the grievances related to the violation of tax provisions, the respondent argues that, as Article 79.2 of the CPR states, temporary staff are not exempt from taxation.

36. In these circumstances, and in the absence of any irregularity committed when concluding the successive temporary staff contracts, the respondent asks that all requests for compensation made by the appellant be rejected. Additionally, the respondent submits that the hourly rate paid to the appellant in line with his contracts was much higher than what he would have received under an indefinite duration contract; therefore his request for compensation for material damage suffered is in fact groundless.

E. Ruling of the Tribunal

Considerations on admissibility

37. The respondent pleads inadmissibility of the appeal because the pre-litigation procedure was initiated late by the appellant. In this respect, the appellant in substance justifies this by invoking the fact that he was unaware of the relevant rules of the CPR since the latter had not been given to him in a timely manner.

38. Such a justification cannot be accepted. The Tribunal observes that, in the present case, the appellant is merely indicating that he was never given the CPR either before or after the establishment of the Tribunal, whereas, from the time he signed his first contract, he was perfectly aware of the fact that some provisions of the CPR governed his contractual situation before undertaking the pre-litigation procedure on 10 February 2015.

39. This is confirmed in particular by his letter dated 10 November 2014, sent to the respondent by registered mail, which makes it apparent that, as of that date at least, the appellant was perfectly aware of the relevant provisions of the CPR governing his contractual situation. This letter – the content of which is not disputed by the appellant, as he affirmed in response to a question by the Tribunal – shows to the requisite legal standard that the appellant cannot invoke a late communication of the CPR or the fact that despite his requests to be sent the CPR the respondent did not comply with his requests in a timely manner.

40. In addition, during the full period in which the appellant was employed by the respondent under several successive temporary staff contracts, he had never protested that he had not been made aware of the relevant provisions of the CPR that might apply to him or, generally speaking, the CPR.

41. Thus it was for the first time in the context of the present procedure that the appellant, wrongly, invokes the circumstance that he was unaware of the CPR to justify his lateness in initiating the pre-litigation procedure, as laid down by the CPR since the establishment of the Tribunal.

42. Moreover, and in response to a question by the Tribunal, the appellant did not say that he had requested to be given the CPR or that the respondent had refused to give it to him. He merely said that the respondent had not replied to his requests regarding the provisions applicable to temporary staff.

43. In any case, assuming that in his request dated 10 February 2015 the appellant was entitled to initiate the pre-litigation procedure, it must be acknowledged that he did not meet the requirements of the CPR either.

44. It is apparent from the case law of the Tribunal that, unlike the regulation applicable to European Union officials and staff, the pre-litigation system defined by the CPR does not offer a staff member the possibility of asking the NATO service concerned to take a decision about him or her and subsequently contesting it and, if need be, taking the dispute to the Tribunal (see combined Cases Nos 2014/1041 and 2015/1045, paragraphs 58 and 59; Nos 2014/1027 and 2015/1043 paragraphs 65 and 66).

45. In the present case, regardless of the fact that the appellant refers to his request of 10 February 2015 as an "administrative review", it should be noted that the appellant made this request in the absence of any decision having been taken about his contractual situation. Along the same lines, in his letter referred to as a "complaint", the appellant argues that defendant's usual practice is tainted with numerous irregularities justifying his request for conversion of his contract.

46. The respondent's plea of inadmissibility must therefore be upheld and, consequently, the submissions seeking annulment of a supposed implicit decision rejecting the appellant's complaint must be dismissed as inadmissible.

47. As regards the submissions on compensation, the Tribunal recalls that according to its case law in this area (see in particular combined Cases Nos 2014/1027 and 2015/1043), if these submissions are closely linked with the submissions on annulment, the dismissal of the latter as inadmissible results also in the dismissal of the submissions on compensation.

48. In the present case, the appellant's submissions concerning his alleged material and non-material damage are closely linked with the submissions on annulment, which have been dismissed as inadmissible; consequently they must also be dismissed, as must all the other submissions put forward by the appellant in the present appeal.

49. Therefore appeal No. 2015/1052 must be dismissed in its entirety.

F. Costs

50. Article 6.8.2 of Annex IX to the NCPR states as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

51. As the appeal has been dismissed in respect of all the submissions therein, the appellant cannot be paid any sums under this head.

G. Decision

FOR THESE REASONS,

the Tribunal decides that:

- - Appeal No. 2015/1052 is dismissed.

Done in Brussels, on 15 January 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 February 2016 AT-J(2016)0003

Judgment

Case No. 2014/1032

AA

Appellant

v.

NATO International Staff

Respondent

Brussels, 15 January 2016

Original: English

Keywords: competence of the Tribunal; admissibility.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 16 December 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO International Staff, dated 8 September 2014, and registered on 12 September 2014 as Case No. 2014/1032, by Mr AA, seeking the annulment of the decision to terminate his appointment following the non-renewal of his security clearance.

2. In a submission dated 15 October 2014, respondent raised an objection of inadmissibility against the appeal and requested the Tribunal to summarily dismiss the case without hearing arguments on the merits, alleging that the appeal was time-barred.

3. By Order AT(TRI-O)(2014)0004 dated 6 November 2014, the Tribunal denied the request for summary dismissal, considering that the objection of inadmissibility raised by respondent should be reserved for the final judgment and that the proceedings should continue, while emphasizing that the Order was without prejudice to the Tribunal's position in law concerning the admissibility or the merits of the case. It ordered that the proceedings should resume, with the complete written answer by respondent to be received not later than 17 November 2014.

4. The respondent's answer, dated 17 November 2014, was registered on 17 November 2014. The appellant's reply, dated 16 December 2014, was registered on 22 December 2014. The respondent's rejoinder, dated 21 January 2015, was registered on 22 January 2015.

5. By letter dated 23 February 2015, appellant requested a postponement of the scheduled hearing in order to gather additional information and obtain declassification of documents, which, with the agreement of the other party, the Tribunal accorded. The Panel held an oral hearing on 16 December 2015 at NATO Headquarters. At the hearing, appellant provided additional documentation, which the Tribunal accepted with respondent's consent. It heard arguments by both parties, in the presence of Mrs Laura Maglia, Registrar *a.i.*.

B. Factual background of the cases

6. The material facts of the case may be summarized as follows.

7. Appellant joined NATO on 1 October 1996 under a definite duration contract. He held an indefinite duration contract as from 1 October 1999.

8. On 8 October 2013, appellant was informed by respondent that his contract was terminated with immediate effect on the basis of the NATO Civilian Personnel

Regulations (CPR), as respondent had not received the renewal of his security clearance.

9. On 13 February 2014, appellant requested a "reexamination of his termination". Respondent replied on 5 March 2014 that the request was time-barred.

10. On 26 March 2014, appellant submitted a request for Further Administrative Review. On 23 April 2014, respondent informed appellant that as a former staff member he had exhausted the Administrative Review provisions and that, at best, the letter could be considered as a complaint in accordance with the relevant CPR articles.

11. On 8 July 2014 respondent rejected appellant's complaint.

12. On 8 September 2014 appellant submitted the present appeal.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submission

13. Appellant first raises doubts on the competence of the present Tribunal, considering that its procedural system is in breach of the principles of a fair trial as enshrined in Article 6 of the European Convention of Human Rights, and that a national judge should hear the case.

14. Concerning admissibility and the time limits for submitting appeals, appellant considers the appeal admissible. He states that following the notification of the termination of contract he fell into a very difficult emotional state from which he could recover only after a few months. He considers this to be *force majeure* justifying a derogation of the prescribed time limits.

15. In accordance with the general principles of international administrative law and its case law, appellant alleges violation of the obligation to motivate the decision to terminate his contract on the sole basis that the national authorities had not renewed his security clearance. Appellant affirms that the national authorities had only delayed the sending of the required clearance due to a procedural impasse.

16. Appellant also maintains that respondent violated the principle of good administration in so far as it did not solicit the national authorities to act more speedily. Also, before proceeding to the termination of contract, respondent did not investigate the possibility of appellant covering another post for which security clearance was not a requirement.

17. Appellant further contends that respondent committed a manifest error of judgment when it did not take into consideration the fact that the lack of a clearance was a temporary matter that was due not to a refusal by the national authorities, but to a delay in its emission. Appellant therefore strongly rejects the applicability of Article 3(g) CPR

as the legal basis for terminating his contract; he observes that the present case does not concern the withdrawal of a clearance, but its non-renewal.

18. *In fine*, appellant alleges the violation of the right of defence, as he was not given any opportunity to be heard or to present his views before the decision to terminate his contract was taken.

19. Appellant does not seek reinstatement but compensation for damage suffered, assessed as the total of the emoluments he would have been paid until the retirement age of 65 years, minus the loss of job indemnity he has received.

20. Appellant requests:
- annulment of the decision of 8 October 2013 whereby respondent terminated his contract (as well as annulment of the decisions of 5 March 2014 and 8 July 2014);
- payment of €372.993,52 as compensation for material and non-material damage (plus interest at legal rates); and
- reimbursement of legal fees.

(ii) The respondent's contentions

21. Respondent rejects appellant's denial of the Tribunal's competence, noting that appellant held an indefinite duration contract governed by the CPR and was therefore subject to its dispute resolution mechanism, excluding any resort to a national court.

22. Respondent maintains that the appeal is inadmissible as time-barred. Respondent notes that appellant was notified of the decision to terminate his contract on 8 October 2013 and that he requested a review of this decision on 13 February 2014. Respondent further notes that appellant was also informed of the failure to comply with the time limits when lodging the request for Administrative Review in the Organization's letter of 5 March 2014. Respondent does not accept the *force majeure* argumentation, as it is inconsistent with the steps appellant undertook vis-à-vis his national authorities during the period of alleged distress.

23. Respondent emphasizes that, in accordance with Article 3(g) of the CPR, the absence of a security clearance entails the immediate termination of the contract of the staff member concerned, in accordance with the relevant conditions laid down in the CPR. Respondent also recalls that this principle is supported by solid case law of the NATO Appeals Board and the present Tribunal. Respondent further notes that the present case is identical to the one ruled on by the Tribunal in Case No. 899.

24. Respondent observes that the International Staff is only provided with a positive or negative reply regarding the security clearance by the national authorities. It is not made aware of the reasons why it is granted or refused, this being a process governed by the laws of the respective member states. Respondent notes that it is not, and never was, aware of any reasons for the failure of appellant's national authorities to renew his security clearance. It is therefore not in a position, nor obliged, to take them into account

and to notify them to appellant. On this basis, respondent rejects the submissions of violation of the principle to motivate the termination decision. On the same basis, respondent also rejects the allegations of a manifest error of judgment, further stressing that the request for renewal follows a standard process in the Organization which ultimately leads to either delivery or non-delivery of the clearance.

25. Respondent also holds that Article 3(g) of the CPR is clear and unequivocal in respect of the requirement to hold a clearance certificate as a condition for continued employment with the Organization. It emphasizes that appellant, at the moment of the termination of his contract, was not in possession of such a certificate.

26. Respondent denies violation of the principle of good administration in that it failed to act faster vis-à-vis the national authorities or to inform them of the negative consequences of a delay. Respondent recalls that member states are fully aware of what the non-renewal of a security clearance entails and that the Organization is under no obligation to urge them to respond. Further, the Organization is aware of national practices and issues requests for renewal in due time. In the present case, appellant's clearance expired in 2011 and the NATO Office of Security (NOS) as early as 2009 asked appellant to complete and sign the documents required in order to request a renewal from the national authorities. Appellant complied and the documents were forwarded to the national authorities. NOS furthermore sent reminders to the national authorities in 2010 and 2011.

27. Respondent reiterates that, with respect to the right of defence, appellant's rights were safeguarded through the national procedures governing the issuing of the clearance, which gave him the opportunity to make observations or to be heard. It reiterates that the Organization does not participate in this process, but is only provided with a final positive or negative answer. Respondent therefore affirms that it has acted in accordance with its internal rules as established by the NATO Council, and rejects any allegation of violation.

28. Respondent rejects the award of any compensation.

29. Respondent requests that the Tribunal should:
- declare the appeal inadmissible or alternatively to dismiss it as unfounded.

D. Considerations and conclusions

30. The Tribunal first of all observes a paradox in appellant's claims, in which he submits that the Tribunal has no competence in the matter and then seeks relief from it. In the interests of the course of justice, however, the Tribunal deems it appropriate to adjudicate on both.

31. First of all, appellant raises doubts about the competence of the Tribunal. He submits that international organizations can only enjoy immunity from jurisdiction by national courts if this pursues a legitimate purpose. He contends in this respect that, as a manual worker, he cannot be considered to be promoting international cooperation.

He adds that the procedure before the Tribunal may impair his fundamental right of access to the courts as guaranteed by Article 6, paragraph 1, of the European Convention on Human Rights. Appellant concludes that a national judge should hear the case.

32. The Tribunal disagrees with these contentions. It first of all observes, concerning the concept of legitimate purpose, that neither doctrine nor practice draws a distinction on the basis of the functions of an individual staff member. It adds that appellant worked at the residence of the Secretary General, where the highest level of confidentiality and security reigns. As far as appellant's right of access to a court is concerned, the Tribunal deems it useful to analyse the relevant jurisprudence of the European Court of Human Rights in the matter.

33. It is not in dispute that an internal justice system of an international organization such as NATO must respect the fundamental right "*to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*", as is guaranteed by Article 6, paragraph 1, of the European Convention on Human Rights (the Convention).

34. This principle was confirmed in two landmark decisions by the European Court of Human Rights (the Court) of 18 February 1999, in which it ruled on the issue of immunities of international organizations, on the one hand, and the right of access to a court, on the other, in cases concerning another international organization, the European Space Agency (ESA) (*cf* Waite and Kennedy *v.* Germany, Application No. 26083/94, Judgment of 18 February 1999; Beer and Regan *v.* Germany, Application No. 28934/95, Judgment of 18 February 1999).

35. The Court pointed out that the attribution of privileges and immunities to international organizations was an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments and therefore had a legitimate objective. However, the Court deemed it proper to satisfy itself that the limitations in question did not restrict access to the courts "*in such a way or to such an extent that the very essence of the right is impaired*", that these limitations had a legitimate goal, and that the means used were proportionate to the goal sought. As to the issue of proportionality, the Court then assessed the contested limitation placed on Article 6 in the light of the particular circumstances of the case. The Court ruled that states are not absolved from their responsibilities under the European Convention when setting up international organizations and according them immunities. This was particularly true with respect to the right of access to the courts. A determining factor for the Court, therefore, was whether reasonable alternative means were available to the applicants to protect effectively their rights under the Convention. The Court observed that ESA had an Appeals Board, which was "independent of the Agency" and had jurisdiction "*to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member*". The ESA Appeals Board therefore met the criteria of an independent tribunal.

36. In 2000, *i.e.* a year later, the Court ruled in a case concerning NATO (*cf* A.L. *v.* Italy, Application No. 41387/98, Judgment of 11 May 2000). The Court, referring to its

jurisprudence of the previous year mentioned *supra*, observed that the NATO Council had created an Appeals Board to adjudicate labour disputes between the organization and its civilian staff. The Court disagreed with the contention of the appellant that the Appeals Board was not independent. It held that under NATO's staff regulations the members of the Appeals Board were neither members of NATO nor of the national delegations, that they were independent in the exercise of their functions, and that they were appointed for a period of three years from amongst persons of recognised competence. The Court observed that the procedure before the Appeals Board was adversarial and that the Board's decisions were motivated. Regarding the fact that the NATO's Appeals Board met *in camera,* the Court held that excluding the public and the press may be justified under Article 6 of the Convention in the interest of public order and national security, and noted that NATO was an organization with activities in the military domain. The Court concluded that the NATO Appeals Board met the requirements of Article 6 on essential points and that there were no reasons to doubt that the Board was not a reasonable alternative means of protecting effectively the claimant's rights to an equitable procedure. As a consequence, the impossibility of going to a national court, because of NATO's immunities, had not deprived the claimant of his right of access to court.

37. In another and more recent case concerning NATO (*cf* Gasparini *v.* Italy and Belgium, Application No. 10750/03, Judgment of 12 May 2009), the Court, referring to its jurisprudence in the matter, recalled that states, when creating an international organization, had the duty to set up an internal justice system that was "equivalent" to the one provided for in Article 6. The Court then analysed, in the light of its jurisprudence, whether the member states, when creating NATO, had manifestly violated the European Convention. Regarding the fundamental right to public hearings, the Court recalled that exceptions to this principle did exist. It noted that, although the NATO staff regulations provided that hearings were not public, this provision was strongly mitigated by the following article of the rules, which provided that both parties may participate in the hearings and be represented. It concurred with the NATO Appeals Board about the reasons behind the private character of the Board's proceedings. It concluded that the member states, when approving the NATO staff regulations in the NATO Council, had good reason to believe that the proceedings of the Appeals Board would adequately respect the equality of arms, even if its hearings were not public.

38. The Tribunal concludes from the jurisprudence of the European Court of Human Rights that the NATO Appeals Board, the predecessor of the Tribunal, met the standards of the Convention. It should also be noted that NATO substantially changed its internal justice system with effect from 1 July 2013. One of the changes was the creation of the present Tribunal as successor to the NATO Appeals Board. The provisions in the amended Annex IX to the CPR not only enhanced the Tribunal's independence, but also introduced a number of procedural improvements, one being that in principle oral hearings are to be held in public, as was done in the present case. As a consequence, the Tribunal meets *a fortiori* the standards of the European Convention on Human Rights.

39. In light of the foregoing, the Tribunal is fully satisfied that appellant's fundamental right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, as guaranteed by the European Convention on Human

Rights, has not been impaired and has been fully respected in the present proceedings. It rejects the submission that the Tribunal is not competent to hear the present case.

40. The Tribunal will now address the admissibility of the present case.

41. Article 6.3.1 of Annex IX to the CPR (Annex IX) provides that the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints. Complaints can, under Article 4.1 of Annex IX, only be submitted after an administrative review has been pursued as prescribed in Article 2 of Annex IX.

42. Article 2 of Annex IX then establishes the procedures to be followed. Article 2.1 stipulates:

> Staff members or retired NATO staff who consider that a decision affecting their conditions of work or of service does not comply with their terms and conditions of employment and decide to contest the decision, may, within 30 days after the decision was notified to them, initiate the process for seeking an administrative review of the decision. As provided in Articles 2.2-2.4, the process shall be initiated in the NATO body in which the staff member is appointed or member of the retired NATO staff was appointed, so long as the Head of that NATO body has authority to rescind or modify the contested decision; otherwise, the process shall be initiated in such other NATO body, if any, that has the authority to rescind or modify the decision in question. In cases of doubt, staff members or retired NATO staff should consult with the human resources management in the NATO body in which they are, or were last employed for guidance.

43. It is to be emphasized that the new regulations provide for strict deadlines that must be adhered to in the interest of an expeditious resolution of a dispute. The internal regulation no longer provides that complaints may be submitted "within a reasonable time," and the Tribunal is no longer required – or, in general, empowered – to assess what constitutes a "reasonable time" for requesting administrative review or lodging a complaint in particular cases (*cf* NATO AT judgments in Cases No. 897, 902 and 2013/1008).

44. Appellant, first of all, submits that the time limit of 30 days is too short as compared with other jurisdictions. The Tribunal cannot but observe that it is in this respect bound to apply the regulation as it stands, and that appellants in dozens of other cases have hitherto been able to meet the deadlines laid down in Annex IX.

45. Secondly, appellant contends that he was in shock and depressed after receiving the 8 October 2013 decision to terminate his appointment, and that it was only in January or February 2014 that he was able to start attending to his legal defence rights. He concludes that this constitutes exceptional circumstances justifying a waiver of the time limits.

46. Appellant produces in this respect a medical certificate dated 12 February 2014, signed by a medical practitioner, who, as was confirmed at the hearing, had not seen, and *a fortiori* not treated, appellant prior to that date and who merely reproduced a statement made by appellant *("à ses dires"*).

47. The Tribunal cannot accept this as conclusive evidence. It observes, moreover, that the record shows that appellant indeed was assisted by another counsel towards the end of 2013 to attend to his rights. It therefore sees no exceptional circumstances justifying a waiver of time limits.

48. For these reasons the Tribunal concludes that the time limits in the pre-litigation procedure were not complied with, rendering the present appeal inadmissible.

49. The inadmissibility of the appeal entails the dismissal of all other submissions.

E. Costs

50. Article 6.8.2 of Annex IX to the CPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

51. The dismissal of the appeal means that appellant's submissions under this head must also be dismissed.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 15 January 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 February 2016 AT-J(2016)0004

Judgment

Case No. 2015/1053

TW

Appellant

v.

NATO International Staff

Respondent

Brussels, 4 February 2016

Original: English

Keywords: Article 29.2 of the CPR; children's allowance; conditions; main and permanent maintenance.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to their deliberations following the hearing on 16 December 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal by Mr TW against the NATO International Staff dated 29 June 2015 and registered on 6 July 2015, under Case No. 2015/1053. Appellant seeks the annulment of respondent's decision of 6 May 2015 rejecting his appeal of respondent's denial of allowances provided for by the NATO Civilian Personnel Regulations (CPR).

2. The respondent's answer, dated 4 September 2015, was registered on 9 September 2015. The appellant's reply, dated 9 October 2015, was registered on 19 October 2015. The respondent's rejoinder, dated 18 November 2015, was registered on 19 November 2015.

3. The Tribunal's Panel held an oral hearing on 16 December 2015 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence of Mrs Laura Maglia, Registrar *a.i.* At this hearing, the Tribunal was informed by the appellant's counsels that a staff member who formed part of the team of advisers was present in his personal capacity and not as a staff representative.

4. On 3 December 2015, the Tribunal received a request from the appellant to have a witness heard at the hearing. Respondent did not object to this request. Considering the request and comments of the parties, the Tribunal decided to agree to it.

5. Before the hearing, appellant declared to the Tribunal that the witness could not attend the hearing because of a scheduling conflict. The Tribunal took note of this declaration.

B. Factual background of the case

6. The background and material facts of the case may be summarized as follows.

7. Respondent offered appellant a three-year definite duration contract taking effect from 3 December 2012.

8. Appellant, who is unmarried, was since 2011 in a relationship with Mrs N, who is a divorced mother of two children and was also residing in the United Kingdom (UK). Appellant and Mrs N did not register a civil partnership. Following the contract offer, Mrs N requested the father of the children to give consent for her to take the children with her to Belgium for the duration of appellant's contract.

9. As the children's father did not give his consent, Mrs N made an application on 16 November 2012 under the Children Act 1989 before the competent Country Court in the UK, requesting judicial permission to move to Brussels with her children.

10. By Order dated 29 November 2012, the County Court, and with the father's consent, authorized the mother to remove the children from the jurisdiction of the Court in order to live in Brussels for a period of three years. The Court's Order further determined specific conditions of this arrangement, such as contact and visiting rights for the father.

11. As authorized by the Court, Mrs N moved to Belgium with her children on 2 January 2013 and took up residence with appellant.

12. Appellant recorded with the competent NATO administrative services Mrs N and the two children as "partner" and "partner's child" respectively. He also mentioned in the relevant administrative documentation that the children were financially dependent on him.

13. By an email sent to Human Resources on 23 May 2013, appellant requested household, dependent children and installation allowances, at the rate applied to a staff member with two or more dependent children.

14. The Deputy Assistant Secretary General, Human Resources rejected appellant's request, by a decision dated 5 July 2013 (decision of 5 July 2013). According to this decision, *"the payment of dependent children's allowance is contingent on a staff member having a direct legal connection with the child for which allowance entitlement is claimed and demonstrating that the child is being mainly and permanently maintained by him"*. For respondent, the first condition (direct legal connection) is not met "*for the child of a partner coming from a previous relationship"*, as in the case of appellant's partner. This legal connection would have existed if the child was the natural or adopted child of the staff member or of his or her spouse. In this decision, respondent also indicated that the same reasoning precluded payment of the household and installation allowances.

15. Appellant lodged on 26 July 2013 a request for administrative review against the decision of 5 July 2013 before the Assistant Secretary General (ASG), Executive Management Division.

16. In his answer dated 14 August 2013 to this request for administrative review, the Head of Staff Services reminded appellant that, in accordance with Article 2.2(a) of Annex IX to the CPR, a staff member is required to seek the review *via* his or her immediate supervisor. In this letter, respondent restated the reasons given for the denial of the benefits in the decision dated 5 July 2013, indicating that granting of the requested allowances is contingent on the existence of a "direct legal link" between the child and the staff member concerned.

17. Considering that, through this letter, respondent rejected the first request for administrative review under Article 61.1 of the CPR and Article 2.2(a) of Annex IX thereto,

appellant lodged a second request for administrative review before the NATO Secretary General on 23 August 2013, under Article 61.1 of the CPR and Article 2.2(b) of Annex IX.

18. Responding to this second request for administrative review, by letter dated 13 September 2013, the acting Deputy ASG for Human Resources reminded appellant of the requirement to address his request for administrative review through his immediate supervisor.

19. Considering that this letter, dated 13 September 2013, constituted a decision rejecting the second request for administrative review, appellant lodged on 11 October 2013 a complaint before the NATO Secretary General against this decision, pursuant to Article 4.1 of Annex IX. There was no reply to this complaint.

20. Considering that his complaint was implicitly rejected, on 12 December 2013, appellant brought an action before the Tribunal against the implicit decision rejecting his complaint (Case No. 2013/1009). The Tribunal subsequently delivered on 30 June 2014 a judgment dismissing the appellant's action, appellant not having previously pursued the necessary pre-litigation procedures.

21. Following the dismissal of his appeal in Case No. 2013/1009, by letter dated 6 August 2014, appellant once more lodged a request for administrative review of the above-mentioned decision dated 5 July 2013 before his immediate supervisor.

22. In its answer, by letter dated 27 August 2014, respondent indicated that the issue had been decided by the judgment of the Tribunal in Case No. 2013/1009 rejecting his appeal and, consequently, that appellant was barred from requesting a new decision on the same case. In any event, appellant's request for administrative review dated 6 August 2014 against the decision dated 5 July 2013 was submitted too late, that is to say after the 30-day period provided for by the CPR.

23. On 3 September 2014, appellant lodged a second request for administrative review against this decision, under Article 61.1 of the CPR and Article 2.2(b) of Annex IX to the CPR. In this regard, appellant objected that, according to the Tribunal's judgment in the Case No. 2013/1009, he was not barred from lodging a request for administrative review of the decision of 5 July 2013. Appellant argued that, in any case, by his first request for administrative review dated 26 July 2013 and the dispute brought before the Tribunal in Case No. 2013/1009, the 30-day period provided for to lodge the first request for administrative review had in fact been suspended.

24. By the same request dated 3 September 2014, appellant informed respondent that his relationship with his partner had definitely come to an end in August 2014 and consequently he requested the grant of the corresponding allowances provided for by the CPR (the household allowance – Article 29.1 of the CPR, the children's allowance – Article of the 29.2 CPR and the higher rate of installation allowance – Article 26.2.2 of the CPR) for the period from January 2013 to August 2014.

25. In this context, by an order dated 1 September 2014, the Court of First Instance of Brussels recognized that appellant had expressed several times his personal moral duty to financially assist his partner for a limited period in order to help her settle separately in Brussels with her children and find employment. According to this Court, this duty constitutes a moral duty recognized as such by the "collective consciousness" (*conscience collective*). The Court did not rule on support for the children.

26. By letter dated 30 September 2014, respondent rejected, after the time limit set by the CPR, the appellant's second administrative review. Respondent stressed that the Tribunal's judgment in Case No. 2013/1009 had rejected appellant's complaint, but also recalled that, in any event, respondent had no obligation to pay allowances attributable to the partner's children in the absence of any legal connection between appellant and the children.

27. The second administrative review dated 3 September 2014 having been rejected by respondent, appellant lodged on 20 October 2014 a complaint before the NATO Secretary General against this decision, pursuant to Article 61.2 of the CPR and Article 4.1 of Annex IX.

28. This complaint to the Secretary General requested the establishment of a Complaints Committee pursuant to Article 4.2 of Annex IX to the CPR.

29. The Complaints Committee delivered its report on 9 March 2015. In its recommendation, the Complaints Committee considered that *"there were no management practices for further action since the rejection decisions laid down by the different decision-makers are deemed justified and compliant with the NATO CPR"*.

30. Appellant submitted written comments on this report by letter dated 14 April 2015, clearly expressing his disagreement about the statements it contained.

31. By decision dated 6 May 2015 (challenged decision), respondent rejected appellant's complaint.

32. This decision pointed out that *"in order to have been entitled to the allowances concerned there would have needed to be a direct legal connection between you and the children of your former partner"*. In addition, respondent stressed that *"it cannot be considered that the children of your former partner were mainly and permanently maintained by you, as required by Article 29.2.1 of the CPR because you have not provided evidence of a legal requirement to do so or evidence that you have done so on a permanent basis"*.

33. This decision is challenged before the Tribunal in the present appeal No. 2015/1053.

C. Summary of parties' principal contentions, legal arguments, and relief sought

(i) Admissibility

(a) The appellant's contentions

34. Appellant submits that the appeal is admissible.

35. Firstly, appellant argues that in its judgment in Case No. 2013/1009, the Tribunal only ruled on the procedural aspects of the case. Accordingly, it remained feasible for appellant, complying with the procedural requirements provided for by the CPR, to obtain a judgment on the substance of the dispute.

36. Secondly, appellant considers that the request for administrative review dated 6 August 2014 – that is to say after the Tribunal judgment in Case No. 2013/1009 – against the decision of 5 July 2013, is not time-barred. In appellant's view, it clearly results from the Tribunal's judgment that the pre-litigation proceedings were not exhausted and the review process still *"remains available"*. According to the wording used in this judgment, the pre-litigation proceedings against the decision of 5 July 2013 are not closed. In the hearing, appellant confirmed that he sought for a second time review of the decision of 5 July 2013, in line with the guidance delivered by the Tribunal in the judgment of 30 June 2014 and having in mind that the pre-litigation proceedings are still ongoing.

(b) The respondent's contentions

37. In its statement of defence, respondent argues that the present action is inadmissible.

38. Firstly, respondent considers that, in the judgment in Case No. 2013/1009, the Tribunal ruled the action inadmissible, without any further reservation. In this regard, appellant cannot restart pre-litigation proceedings on the same issues. This is confirmed by the operative part of the judgment in the prior case, which simply dismisses the appeal and in no way orders NATO to restart any proceedings or the concerned staff member to start a new appeal. Otherwise, it would be possible for a potential applicant, under whatever pretext, to initiate a new pre-litigation procedure on the same dispute and get a new ruling. In this regard, respondent stresses that appellant was twice informed by respondent's letters dated 14 August 2013 and 13 September 2013 that he had to restart the procedure correctly by addressing the request for administrative review to his immediate superior. Despite this advice, appellant decided to ignore respondent's recommendation and, consequently, he is to be held exclusively responsible for his own failing.

39. Secondly, respondent argues that the present appeal does not comply with the procedural requirements provided for by the CPR, nor with the relevant time lines, because the present pre-litigation procedure against the decision dated 5 July 2013 did not start within 30 days following the notification of this decision, but almost one year later. In that respect, no convincing argument can be put forward to show that the pre-

litigation procedure was suspended by the first request for administrative review dated 26 July 2013 and the judgment of the Tribunal on 30 June 2014 in Case No. 2013/1009.

(ii) Merits

(a) The appellant's contentions

40. Appellant requests, firstly, annulment of the decision dated 6 May 2015 which rejected his complaint of 20 October 2014. In this regard, he puts forward two pleas.

41. The first plea concerns the violation of Articles 26.2.2, 29.1 and 29.2 of the CPR. However, in his analysis, appellant focuses mainly on the violation by the challenged decision and the decision of 5 July 2013 of Article 29.2.1 of the CPR.

42. In this respect, appellant argues that the decision of 5 July 2013, as confirmed by the challenged decision, is based on two cumulative conditions, only one of which is provided by the relevant provisions of the CPR: (i) the need for a legal connection between the child and the staff member and (ii) the permanent maintenance of this child by the staff member. The first of these conditions is not authorized by the CPR. Instead, under Article 29.2.1 of the CPR, the sole condition to grant the requested allowances is the staff member's main and permanent maintenance of the concerned child.

43. Appellant argues that decision No. 395 of the NATO Appeals Board mentioned by respondent, where the Board referred to the need for a legal connection with the child for whom entitlement to the allowance is claimed, is not applicable in the present litigation. According to appellant, the factual background in that case differed significantly from that in the current dispute, because the children in the prior case were those of the NATO staff member's former spouse and did not reside with the NATO staff member.

44. In any event, appellant believes that the condition relating to an existing legal connection is established *de jure* here. Indeed, the order, dated 29 November 2012, of the competent British Court (see infra para 10) allowed the removal of the children from the UK and the setting-up of their residence in Brussels with appellant, thus creating a legal obligation binding for him.

45. In addition, this obligation is also recognized by the order of the Court of First Instance of Brussels (see infra paragraph 27), which created a legal connection between the children and appellant. Indeed, this Court recognized that appellant expressed by his behaviour a personal moral duty accepted by the "collective consciousness", to assist his partner for a limited period in order to help her settle in Brussels with her children and seek employment.

46. The above-mentioned orders of the national courts create the necessary legal obligation binding on the appellant. In this context, appellant and his former partner's children were a "family" and the requested allowances, in particular the dependent children's allowances, were family allowances.

47. Furthermore, appellant argues that it is undisputable that he mainly and permanently maintained his partner's children financially whilst they lived together in Brussels. He paid school bills and contributions for holiday activities, as well as other payments including, *inter alia*, medical bills not covered by health insurance and a permanent weekly transfer to his partner as a kind of "household allowance". The fact that this maintenance was only provided between January 2013 and August 2014 does not modify his right to be granted the allowances provided for by the CPR.

48. The second plea concerns the violation by the decision of July 2013 and the challenged decision of the general principle of non-discrimination. Appellant submits that these decisions imposed a difference of treatment between married and non-married couples which is not justified by objective reasons. It is clear for respondent that appellant would have been eligible to the requested allowances if he had been married with his partner. Such difference of treatment also constitutes a violation of appellant's right to privacy.

49. Finally, appellant seeks to be compensated for the material damage caused to him by the challenged decision. In that respect, he contends that the annulment of the challenged decision must lead to the payment of the household, dependent children's and installation allowances at the rate of the staff members with two children from the period between 1 January 2013 and 30 August 2014, with late interest.

50. Concerning the non-material damage he suffered, appellant considers that respondent discriminated against him on the basis of information that belongs to his private life, causing indisputable non-material damage; in addition, the attitude of respondent during the pre-litigation process, caused non-material damage, as the examination of his request for administrative review of the challenged decisions violated the principle of sound administration and the duty of care; further non-material damage follows from the unreasonable time period of the Complaint Committee procedure. Appellant assesses the non-material damage at €5.000.

51. In this context, appellant seeks:
- annulment of the decision dated 6 May 2015 rejecting his complaint of 20 October 2014;
- compensation for material damage;
- compensation for non-material damage; and
- reimbursement of the cost of retaining counsel, travel and subsistence.

(b) The respondent's contentions

52. Respondent rejects, firstly, applicant's arguments concerning violation of Article 29.2.1 of CPR.

53. According to respondent, in order to be eligible to the allowances provided for by this provision, a legal link must exist between the child and the staff member concerned. Such link is established when the staff member is the natural parent of the child concerned or, for example, has officially adopted this child. There is no social security system where a child allowance can be paid on the grounds that an individual has

decided, by his own free will, to materially support a child. Otherwise, this could lead to abuse of such systems.

54. This interpretation of Article 29.2.1 of CPR clearly results from the Appeals Board's decision No. 395, in which this principle is fully expressed and is applicable in the present case as well.

55. Concerning in particular the claim that the necessary legal link between appellant and his partner's children was created *de jure* by the order of the national competent court in the United Kingdom, respondent stressed that this order allowed solely, on the basis of the consent of both parents, that the children concerned temporarily reside in Belgium. In this judgment, the mother of the children remained fully responsible for the whereabouts of her children, also vis-à-vis their natural father. The national judge did not recognize that the appellant had a specific role, leaving the children dependant on their two natural parents. No other documents were offered by appellant concerning legal responsibility for the education and maintenance of the children in order to justify his action.

56. The same conclusion also follows from the order of the Court of First Instance of Brussels. This judgment confirms that the obligation of the appellant to financially assist his partner for a limited period following their separation, in the very specific and limited context of the case, results from his own choice and free will. In this order, the national judge did not recognize that the appellant had any other legal obligation concerning the maintenance of his partner's children.

57. According to respondent, the natural parents remain legally responsible for their children in the framework of their divorce. Therefore, appellant *de facto* cannot provide, the "main" maintenance on the one hand and "permanent" maintenance on the other for the children concerned, as foreseen under Article 29.2.1 to CPR.

58. In particular, respondent observes that appellant claimed the requested allowances for the period from January 2013 to August 2014 and, consequently, appellant recognizes not having any dealings with these children before and after these dates. This means that the support of the children results from his free choice. This attitude does not comply with the notion of "permanent" maintenance provided for by Article 29.2.1 to CPR.

59. Furthermore, respondent objects that appellant failed to indicate that he "mainly" ensured the maintenance of the children, as he did not provide sufficient proof in that respect. For instance, the payment of school bills and of the contribution to holiday activities did not match the notion of "main" maintenance. As indicated during the hearing, this is also the case for the expenses covered by appellant during his relationship with his partner.

60. Secondly, concerning the plea relating to the infringement of the general principle of non-discrimination, respondent argues that there is no inappropriate difference of treatment, because the status of the partner's children is not legally the same as the

children of a staff member married or having entered into an official partnership or where children have been adopted.

61. Finally, respondent considers that, in the absence of any faults or errors committed by NATO in connection with the challenged decision, there is no legal basis to award damages.

62. On the basis of the above, respondent invites the Tribunal to reject the appeal as inadmissible or, if it is declared admissible, to reject it as being without any merit.

D. Considerations

(i) Admissibility

63. In the statement of defence, respondent contests the admissibility of the present appeal because appellant did not comply with the pre-litigation time limits provided for by the CPR. In this regard, according to respondent, no argument could be drawn from the judgment in the Case No. 2013/1009 according to which the pre-litigation procedure was in fact suspended and consequently the time limits were preserved.

64. In this judgment, the Tribunal stated that "*the first request for administrative review, dated 26 July 2013, was not lodged before the immediate supervisor as he was later twice requested but before the Head of Staff Services. Therefore with such request for administrative review, appellant did not comply with the requirement provided by Article 2.2(a) of annex IX to the CPR. The failure to comply with this procedural requirement affects the entire pre-litigation process"* (see AT judgment in Case No. 2013/1009, paragraph 62).

65. Nevertheless, appellant argues that he has the right to restart the pre-litigation procedure because, in the same judgment, the Tribunal considered that *"it is clear from the form and content of the above-mentioned letters (14 August and 13 September 2013) that both letters are intended to clarify matters of procedure and invited appellant to direct his request to the competent authority (…) The language of both letters indicates that the administration did not regard the administrative review process as having been initiated. Both letters also necessarily imply that in the administration's view, the review process remains available to appellant if the follows the specified procedure to initiate it"* (see AT judgment in Case No. 2013/1009, paragraph 69).

66. It must be recalled that, in paragraphs 67 to 69 of the earlier case, the Tribunal declared as inadmissible the appellant's requests for annulment of the above-mentioned letters of 14 August 2013 and 13 September 2013.

67. In particular, the Tribunal pointed out that these two letters are only informative preparatory measures that do not alter the appellant's legal position (see AT judgment in Case No. 2013/1009, paragraph 68). On the basis of this consideration and in the light of the request for annulment of these informative letters, the Tribunal concluded in

paragraph 69 that *"in the administration's view, the review process remains available to appellant if he follows the specified procedure to initiate it".*

68. However, given the wording used in paragraph 69 of this judgment, one could reasonably argue that, by the judgment delivered on 30 June 2014, the Tribunal in fact invited appellant to restart the pre-litigation procedure. Considering from this perspective that the time limits were preserved, by letter dated 6 August 2014, appellant requested administrative review of the decision dated 5 July 2013 before his immediate supervisor.

69. Therefore, given this particular factual context and the procedural situation following judgment in Case No. 2013/1009, and in the interest of sound administration of justice and the efficient conduct of the proceedings, the Tribunal gives appellant the benefit of the doubt and will first consider the merits of the case without at this stage formally ruling on the admissibility of the case.

(ii) Merits

70. In accordance with the complaint procedure set out in Article 61 of the CPR, appellant formally requests annulment of the decision dated 6 May 2015 rejecting his complaint of 20 October 2014. Simultaneously, he claims that the decision dated 5 July 2013 was illegal, based on the same pleas, and criticizes the subsequent rejection of the appellant's complaint against that decision.

71. The Tribunal observes that in the decision dated 6 May 2015, respondent expanded upon the reasons given in the above-mentioned decision dated 5 July 2013 according to which appellant could not have been entitled to the requested allowances because of the absence of direct "legal connection" between him and his partner's children. Indeed, in the decision dated 6 May 2015, respondent included, inter alia, the same reasons as previously given in the earlier decision dated 5 July 2013 and stressed in addition that appellant cannot argue that he mainly and permanently maintained his partner's children because he did not provide evidence of a legal requirement to do so or at least evidence of doing so on a permanent basis.

72. Accordingly, appellant's request for annulment is directed against the decision of 6 May 2015 dismissing his complaint. In this decision, respondent rejected appellant's request to be granted dependent children's allowance under Article 29.2 of the CPR and, consequently, the allowances requested and provided for under Article 29.1 of the CPR (household allowance) and Article 26.2.2 of the CPR (high rate of installation allowance).

73. Appellant claims the above decision is contrary to the conditions established in Article 29.2.1 of the CPR concerning the grant of the children's allowance. In a more general context, he claims that the principle of non-discrimination was violated. For appellant, the respondent's position, according to which such allowance could be provided if appellant was married with his partner, establishes a clear discrimination between married and non-married couples that is not justified by any objective reason.

74. The title of Article 29.2 of the CPR is *"Dependent children's allowance"*. According to Article 29.2.1 of the CPR:

> this allowance shall be paid to staff members, whether married or not, for each child under 18 years of age who is mainly and permanently maintained by the unmarried staff or by the household of the married staff member.

Article 29.2 of the CPR is part of Article 29 entitled *"Family allowances".*

75. It results from these provisions that in order to receive the children's allowance the following matters are relevant.

76. Firstly, the staff member concerned can be married or not. Consequently, respondent's arguments that granting the children's allowance under Article 29.2.1 of the CPR requires that the staff member be married to his partner must be rejected.

77. In the same context, no argument can be put forward by appellant to argue that the challenged decision discriminates between dependent children of married staff member and those of non-married staff members.

78. Secondly, the wording of Article 29.2.1 of the CPR is clear and cannot be interpreted to say that entitlement to the allowance is limited to only natural children of the staff member. It stipulates that the allowance can be granted in respect of children who are "mainly and permanently" maintained by the unmarried staff member. This includes, therefore, the possibility to grant this allowance for children of the partner of the staff member concerned in appropriate circumstances.

79. In this regard, respondent argues that the allowance provided for by Article 29.2.1 of the CPR is not granted for any child of a staff member, but only for dependent children. In this regard, the challenged decision does not refer to the notion of dependent children. Instead, it refers to the requirement for a direct legal connection between appellant and his partner's children, in order to grant the requested allowance. According to respondent, this does not exist in the present case.

80. The Tribunal observes that the challenged decision refers – in addition to the main and permanent maintenance of the children concerned – to a necessary direct legal connection between these children and the staff member. This condition is not provided for by Article 29.2.1 of the CPR.

81. It results from Article 29.2.1 of the CPR that the granting of the allowance concerns only dependent children who are mainly and permanently maintained by the concerned staff member. If the respondent erroneously imposed a further requirement not contained in the CPR – an issue on which the Tribunal does not here rule – the challenged decision can be annulled only if the respondent has not properly applied the further grounds for denying appellant's request, that is, that the children at issue were not mainly and permanently maintained by the concerned staff member.

82. Appellant considers that the challenged decision must be annulled because he had ensured, as provided for by Article 29.2.1 of the NCPR, the main and permanent maintenance of his partner's children throughout the relevant period, that is to say from January 2013 to August 2014.

83. The Tribunal observes, from the wording used by Article 29.2.1 of the CPR, that this maintenance must be cumulatively provided both "mainly" and "permanently" by the staff member vis-à-vis the children concerned.

84. Concerning the main maintenance of the children, this implies the duty to cover all or the largest portion of the children's basic needs, in particular in relation to board and lodging, clothing, education, medical care and expenses.

85. In that respect, appellant provided documentation according to which he claims to have provided the main maintenance of his partner's children, and consequently to have satisfied this aspect provided for by the CPR.

86. Despite the respondent's argumentation that appellant did not bring significant evidence in this regard, the Tribunal recognizes that the expenses incurred by appellant did, in principle, appear to meet important aspects of his partner's children's basic needs, in particular, renting a house with considerable charges. This maintenance also includes major expenses for board and other expenses that are not contested. The evidence thus is sufficient to satisfy the requirement that appellant "mainly" supported the children during the relevant period within the meaning of Article 29.2.1 of the CPR.

87. The "main" maintenance of the children concerned does not entail their exclusive maintenance; consequently, for the same children, an appellant's partner can receive allowances according to the national relevant legislation as is the case in the present dispute and as appellant declared before the Tribunal.

88. The Tribunal next considers whether appellant also provided permanent maintenance for these children.

89. In Case No. 2013/1009, appellant stressed in his statement before the Tribunal at the hearing in May 2014 that he and his partner had created and maintained a stable and permanent familial situation with her children since they moved to Brussels in January 2013. At that hearing, he mentioned several times that he provided permanent maintenance for the children concerned and, for that reason, he rented a comfortable house in order to create a desirable and stable family situation for them.

90. However, in the present case, appellant, first, acknowledged that his relationship with his partner was broken with a direct consequence on the children concerned; second, that he had voluntarily provided maintenance for his partner's minor children only during the period of their relationship and for a limited period thereafter.

91. In addition, it results from the file and inter alia from the order of the Court of First Instance, mentioned above in paragraph 25, that before the official end of their relationship in August 2014, appellant informed his partner already in May 2014 that their

relation was in any event over. Appellant omitted to inform the Tribunal of this major factual element at the hearing of 26 May 2014. Appellant carries the responsibility for this failure to adequately inform the Tribunal.

92. This factual situation does not correspond to the permanent maintenance of the children as required by Article 29.2.1 of the CPR. Appellant's decisions to maintain his partner's children for a short given period, and his decision to end this maintenance, result from his own personal choices in connection to his relationship. The circumstances do not indicate the required permanent maintenance of these children.

93. In this regard, the orders of national courts mentioned above in paragraphs 10 and 25 of the present judgment provide no basis for claiming that appellant permanently maintained these children. Neither order contains any provision to this effect.

94. In the Order dated 29 November 2012 (see paragraph 10), the national judge authorized Mrs N to take her children to Brussels for a period of three years. In this regard, the judge did not establish any obligation on appellant to provide main and permanent support for these children, as appellant wrongly submits.

95. The same conclusion derives also from the order dated 1 September 2014 (see paragraph 25). In this order, the national judge recognized that appellant only voluntarily agreed to incur an obligation to provide his partner with the financial means for a limited period so as to find accommodation in Brussels after the end of their relationship. In this order, no mention is made to the fact that appellant has to maintain permanently these children.

96. Therefore, the challenged decision rejecting appellant's request to grant children's allowance is in line with the requirement provided for by Article 29.2.1 of the CPR, because appellant provided main maintenance but not permanent maintenance for the children concerned.

97. As the partner's children could not be considered as dependent children who were mainly and permanently maintained by appellant, within the meaning of Article 29.2.1 of the CPR, respondent was not wrong in making the challenged decision which, on this basis, rejected appellant's request for granting the requested allowance and, consequently, the household allowance provided for by Article 29.1 of the CPR as well as the rate of installation allowance provided for in Article 26.2.2 of the CPR.

98. It results from the above that the pleas put forward by appellant in the present action against the challenged decision must be dismissed, as must the submissions seeking cancellation.

99. As regard the submissions seeking compensation, in accordance with its settled case law, the Tribunal points out that the submissions seeking compensation must be dismissed when they are closely linked with submissions seeking cancellation which have themselves been dismissed as groundless (see AT judgment in Case No. 2015/1052, paragraph 57).

100. The appeal being dismissed on the merits, it is not necessary to rule on the claim of the inadmissibility of the present action.

E. Costs

101. Article 6.8.2 of Annex IX to the CPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant; provided that the appellant shall not be entitled to recover the expenses incurred by reason of being assisted by another staff member or a member of the retired NATO staff in respect of his/her own time incurred in pursuing the appeal.

102. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal of Mr TW is dismissed.

Done in Brussels, on 4 February 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 February 2016 AT-J(2016)0005

Judgment

Case No. 2015/1049

JF

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 15 January 2016

Original: English

Keywords: pre-litigation review; non-extendable deadlines; appeals time limit; inadmissibility.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs María-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 14 December 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (former E-3A Component), dated 30 March 2015 and registered on 2 April 2015 as Case No. 2015/1049, by Mr JF.

2. The respondent's answer, dated 26 May 2015, was registered on 27 May 2015. The appellant's reply, dated 24 June 2015, was registered on 2 July 2015. The respondent's rejoinder, dated 23 July 2015, was registered on the same date.

3. After a postponement at the request of appellant, the Panel held an oral hearing on 14 December 2015 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

4. The background and material facts of the case may be summarized as follows.

5. Appellant started working at the NATO Air Base in Geilenkirchen (NAB GK) in November 1997 as a B3 AWACS Crew Chief. From 2010 he served as a B-5 Principal Technician (Instructor).

6. Appellant deployed to Afghanistan three times: a) during July/August 2012, after which five weeks of sick leave were prescribed. He was then moved temporarily to another post as Jet Engine Technician Grade B-4 at his request; b) from 12 to 26 September 2013, after which sick leave was prescribed from 2 to 24 November, during which he travelled to the United States from 4 to 24 November 2013; and c) from 5 December 2013 to 16 January 2014.

7. Appellant has been on sick leave since 28 January 2014.

8. On 6 March 2014, appellant informed the Organization of his plans to travel to the United States. On 12 March 2014, appellant flew to the United States seeking diagnosis of his medical condition. In particular, he consulted a medical professional in Boise, Idaho, prior to returning to Germany on 18 April 2014. He informed the E-3A Component of the results of the medical assessment he had received and of his intention to initiate treatment in the United States with no end date, beginning in the third week of May. He

informed the E-3A Component at the same time of his plan to stay in the United States for a 90-day period.

9. On 30 April 2014, the NATO civilian administration informed him that its medical consultant should assess his case. Following meetings with the Component Medical Advisor and the Occupational Health Officer, appellant was informed by letter on 11 June 2014 that his medical condition had no occupationally related indication and that he was free to travel to the United States.

10. On 24 October 2014, appellant initiated a request for administrative review, seeking annulment of the decision of 11 June 2014 not to recognize the occupational nature of his illness. He also sought recognition of the Organization's liability, compensation for non-material damage resulting from alleged illegalities relating to this decision, estimated *ex aequo et bono* at €50.000, and the release of his three post-deployment questionnaires. The request was rejected as time-barred by respondent's decision of 13 November 2014. Appellant submitted a second request on 4 December 2014, which was rejected by decision of 16 December 2014. Appellant then lodged a further request on 16 January 2015, which was rejected by decision of 29 January 2015.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submission

11. Appellant maintains that neither the 16 December 2014 decision nor the 29 January 2015 decision explained respondent's reasons for not extending the 30-day period for him to request administrative review of the 11 June 2014 decision. Appellant concludes that respondent thus violated the obligation to state reasons and its duty of care. Appellant also alleges that respondent violated the principle of good administration and the rights of defense by not providing information on some previous medical opinions. Appellant further asserts a violation of the duty of care and of the principle of good administration because respondent took more than three months to provide him with the documentation supporting the decision of 11 June 2014.

12. In disputing respondent's conclusion that his medical condition was not occupationally indicated, appellant maintains that there is no legal basis for asserting that the determination of any occupational illness must be confirmed by the Organization, or that it can overrule the medical opinion of the specialist treating the staff member. Further, appellant considers that respondent's findings concerning the absence of occupational indication conflict with the applicable definitions of occupational connection and that this is in breach of his contract and of Belgian law, which he submits to be applicable to the present case.

13. In addition, appellant maintains that the doctors who examined him on behalf of the Organization were not specialists and that they did not take into account his doctor's opinion. Appellant adds that there is a manifest error of assessment and absence of any

comprehensible link between the medical findings of the report that supported the 11 June decision and the decision itself.

14. In conclusion, appellant submits that the Organization did not address properly his request for administrative review, did not undertake appropriate medical follow-up of his situation, causing his health to deteriorate, and failed to remedy a hostile work environment.

15. Appellant requests that the Tribunal should:
- annul the decision of 29 January 2015 rejecting the complaint of 16 January;
- annul the decision of 16 December 2014 rejecting the request of 4 December 2014 for administrative review;
- order compensation for non-material damage (€50.000); and
- reimburse his legal costs.

(ii) The respondent's contentions

16. Respondent contests the admissibility of the appeal on the grounds of late filing, considering that the impugned decision is contained in the letter of 11 June 2014 and that appellant's request for administrative review was not lodged until 24 October 2014.

17. On a subsidiary basis, respondent rejects the claim on the merits, noting that appellant does not contest the decision of 11 June 2014 authorizing his travel as such, but only the underlying explanation that there is no occupationally related indication.

18. Respondent affirms that the Organization is not bound by the medical assessment of the medical practitioner and psychologist treating the staff member and recalls Article 45.2 of the CPR as well as the NATO Administrative Tribunal judgment on Case No. 2014/1021.

19. Respondent further notes that on 29 May 2015 appellant requested the convocation of an invalidity board in accordance with Article 13 of Annex IV of the CPR.

20. Respondent further stresses that the principal remedy sought by the present appeal is a claim for monetary compensation, which is not explained or substantiated.

21. Respondent rejects any claim of material or non-material damage.

22. Respondent requests that the Tribunal should:
- summarily dismiss the appeal in accordance with Rule 10;
- postpone further proceedings until the Invalidity Board has taken a decision on the appellant's invalidity; and
- dismiss the appeal as inadmissible.

D. Considerations and conclusions

23. As the Tribunal has recalled in previous judgments, in particular in Case No. 2014/1021, filed at the request of the same appellant, the internal dispute settlement system obliges complainants to follow a number of steps before they may lodge an appeal. In particular, Article 61.1 of the CPR states:

> Staff members [...] who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment [...] and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations.

24. The above mentioned Article 2 of Annex IX to the CPR provides in its first paragraph that the process for seeking an administrative review must be initiated within 30 days following notification of the decision to the staff member concerned.

25. Article 4.1 of Annex IX to the CPR states:

> Claimants wishing to contest the decision after pursuing an administrative review as prescribed in Article 2 of this Annex [...] may make a formal complaint in accordance with the provisions of Article 61 of the Civilian Personnel Regulations. Such complaints shall be submitted to the Head of the NATO body in which the administrative review was conducted.

26. Finally, pursuant to Article 6.3.1 of Annex IX to the CPR, an appeal submitted to the Tribunal shall only be entertained after the appellant has exhausted all available channels for submitting complaints under this Annex.

27. It follows from the foregoing provisions that an appeal is admissible only if the staff member concerned has duly followed the prior administrative procedure set out therein.

28. Appellant claims that the Organization should have addressed the possibility of extending the time limits for his complaint, and considers that its failure to do so indicates a lack of motivation. The fact is, however, that the first decision issued in response to appellant's initial complaint clearly established the reasons for the rejection: the complaint had been submitted after the time limit provided for by the CPR. If the complaint was not lodged within the stipulated time limit, the complainant cannot expect the Organization to provide any further explanation of its position on the merits.

29. Appellant knew that the decision of 11 June 2014 was not consistent with his claim that his medical condition was occupationally related. He claims that the decision did not give him enough information concerning the grounds on which the Organization justified its decision. This could have been the basis for a timely request for administrative review, since it goes directly to the issues underlying his disagreement with the respondent's conduct.

30. The established time frames cannot be left to the whim of the parties. Under the principles of legal security, legal deadlines are non-extendable. Once deadlines for seeking administrative or legal review have passed, a decision becomes final.

31. The appeal is inadmissible in so far as it is directed against the HONB's decisions of 16 December 2014 and 29 January 2015, repeatedly rejecting the recurrent complaints against the decision of 13 November 2014. The aim of the complaints is the decision of 11 June 2014, which was acquiesced by appellant till 24 October 2014, the date of his first reaction against it.

E. Costs

32. Article 6.8.2 of Annex IX to the CPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

33. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 15 January 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 March 2016 AT-J(2016)0006

Judgment

Case No. 2015/1054

NP,

Appellant

v.

NATO Support and Procurement Agency,

Respondent

Brussels, 23 February 2015

Original: English

Keywords: claim for compensation; termination of contract after extended sick leave; compensation to respondent for misuse of proceedings.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 15 December 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal, dated 3 July 2015, and registered on 7 July 2015 as Case No. 2015/1054, by Mrs NP, against the NATO Support and Procurement Agency (NSPA).

2. The respondent's answer, dated 28 August 2015, was registered on 4 September 2015. The appellant's reply, dated 2 October 2015, was registered on 6 October 2015. The respondent's rejoinder, dated 29 October 2015, was registered on 31 October 2015.

3. The Tribunal's Panel held an oral hearing on 15 December 2015 at NATO Headquarters. It heard arguments by the appellant and by the three representatives of the respondent, all in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

4. The material facts of the case may be summarized as follows.

5. Appellant joined the NSPA (formerly NAMSA) on 29 January 1990 as a temporary staff member. On 1 February 1994 she was offered a one-year contract as a permanent staff member and, on 1 February 1995, her contract was renewed as an indefinite duration one. Appellant's last position was at B3 grade.

6. From 1 April to 30 June 2006 appellant worked part-time at 80%, renewed several times. On 1 January 2011 the percentage of part-time work was reduced to 70% through 31 December 2011.

7. From 1 September 2011 to 31 August 2012, appellant requested and was granted unpaid leave for family reasons, extended by an additional month to 30 September 2012.

8. On 1 October 2012 appellant went on sick leave. During the sick leave period different medical evaluations were carried out, which led to a first medical arbitration proceeding pursuant to which, on 10 July 2013, appellant was asked to return to work full-time as of 2 September 2013.

9. On 12 August 2013, appellant sought an Administrative Review against this decision and requested a new medical arbitration proceeding. On 26 August 2013 respondent rejected the said Administrative Review on procedural grounds. However, on 29 August 2013, after receiving a further sick leave certificate, respondent offered to initiate another medical arbitration proceeding.

10. On 30 August 2013, appellant sought a second Administrative Review which was also rejected by respondent, on 17 September 2013, on procedural grounds.

11. Following other medical evaluations conducted in October 2013, respondent considered appellant able to work 70% as of 25 November 2013, at a time when she was still covered by her most recent sick leave certificate.

12. On 18 December 2013, the insurance company concluded that they considered appellant fit to work as of 1 October 2013. Responded informed appellant thereof on 19 December 2013. On 21 January 2014 respondent informed appellant that she was not required to reimburse the emoluments covering the period 1 October-31 December 2013, but that she would no longer be entitled to her emoluments as of 1 January 2014, pending the results of an ongoing arbitration.

13. On 27 August 2014, appellant was informed of the outcome of the medical arbitration. The medical arbitrators subsequently concluded that she was able to work 50% as of 1 September 2014.

14. On 1 September 2014 appellant requested initiation of an invalidity procedure.

15. On 8 September 2014, the NSPA General Manager (GM) informed appellant that, on the basis of the extended sick leave, her contract would be terminated as of 30 September 2014.

16. On 14 January 2015 respondent informed appellant that the Invalidity Board did not consider her to be an invalid.

17. On 13 February 2015 appellant submitted a request for compensation on grounds respondent's liability for alleged misconduct during her sick leave. The NSPA GM rejected this request on 13 March 2015. Appellant entered a complaint on 9 April 2015, which was rejected by the NSPA GM on 5 May 2015. The present appeal was submitted on 3 July 2015.

C. Summary of parties' principal contentions, legal arguments and relief sought

(i) The appellant's contentions:

18. Appellant, submitting her request for compensation, introduces the principle of the Organization's liability for its alleged misconduct.

19. Appellant's reasoning concerning admissibility is based on the general principle of liability for misconduct. Appellant refers to Article 6.9.1 of Annex IX to the NATO Civilian Personnel Regulations (CPR) whereby *"It [the Administrative Tribunal] may also order the NATO body to pay compensation for the injury resulting from any irregularity committed by the Head of the NATO body*". In appellant's view, this principle has been recalled in the case law of the present Tribunal and the Appeals Board. Moreover,

appellant refers to the case law of the International Labour Organization (ILOAT) Administrative Tribunal, whereby a claim directed not at a decision but at recognizing negligence has been considered admissible.

20. Appellant contends that the admissibility of her request, in the absence of a decision by the administration, has to be allowed to preserve the staff member's right to an effective remedy and access to a court.

21. Appellant notes that during her 24 months of sick leave, both respondent and the insurance company conducted five medical checks and two arbitration procedures, with an average of one check every three and a half months, following a pattern of counterchecks, and did not take into consideration the conclusions of the medical reports.

22. Appellant observes that during this sick leave period, respondent notified her three times to go back to work, notwithstanding appellant's health conditions and the medical certificates.

23. Appellant stresses that all the medical certificates were unanimous in declaring that appellant required a change in her working conditions to allow her to be able to work again. She therefore considers that respondent's conduct in disregarding the professional cause of her sickness and failure to take any steps to consider a possible reintegration to work resulted in liability of the Organization as well as breach of the principle of the duty of care.

24. Appellant contends that such misconduct caused her both material and moral damages. Appellant quantifies her material damage at €1.046.015,55, corresponding to the emoluments that she would have received until retirement age (without considering a possible grade promotion) had NSPA changed her working conditions. This amount would be reduced to take account of the reduced retirement pension appellant would receive as of 60 years of age, bringing the claim to a total of €940.405,35. Further, appellant demands that NSPA conduct an evaluation of the full retirement pension appellant could have received, and compensate accordingly.

25. Appellant quantifies her moral damage at €50.000, on the basis of her employer's lack of trust in her after many years of devoted service, the breach of the principles of proportionality (the excessive number of medical controls) and the duty of care, the lengthiness of the procedures, and the lack of possible legal redress other than the present appeal.

26. Appellant requests that the Tribunal:
- annul the GM's decision of 5 May 2015 rejecting appellant's complaint of 9 April 2015;
- annul the GM's decision of 13 March 2015 rejecting appellant's request for compensation of 13 February 2015;
- order that she be compensated for material damage;
- order that she be compensated for moral damage, evaluated at €50.000; and
- order reimbursement of her legal costs, without the applicability of a ceiling.

(ii) The respondent's contentions:

27. Respondent raises the question of the admissibility of appellant's compensation request, and asks that the Tribunal summarily dismiss the appeal on the basis of Rule 10 of its Rules of procedure.

28. Respondent stresses that appellant's request for compensation lacks a proper legal basis, as it is not linked to a decision subject to appeal in accordance with the CPR. Respondent further maintains that such request for compensation is appellant's pretext for either reopening a debate on matters that were discussed in the past or discussing matters that can no longer be contested because they are time-barred.

29. Respondent affirms that it did everything possible to try to handle appellant's serious absenteeism issue (which it determines to be since 2005, with repetitive absences notwithstanding her part-time employment), and that it undertook all necessary efforts to allow her to go back to work. Respondent notes the extreme flexibility shown to appellant, with part-time employment and unpaid leave, and therefore rejects any accusation of wrongful conduct. It also stresses that its requests to return to work were based on medical evaluations that considered appellant fit to work.

30. Respondent also rejects any claim of a hostile and toxic working environment, stressing that no claims for harassment were ever introduced by appellant vis-à-vis her hierarchy. Moreover, respondent affirms that appellant simply did not intend to return to work and that, should the harassment allegations not be withdrawn, they will be considered, conversely, as a form of harassment against NATO and appellant's former managers. It further challenges the accusations of not having taken into consideration appellant's work situation, as the only transfer appellant ever requested, in 2010, was later withdrawn following a re-organization of her service.

31. Respondent rejects any claim for compensation of moral and material damages.

32. Respondent requests that the Tribunal:
- summarily dismiss the case;
- order appellant to compensate the Organization on the basis of Article 6.8.3 of Annex IX to the CPR;
- declare the appeal inadmissible as detached from any HONB decision; and
- declare the appeal unfounded.

D. Considerations and conclusions

(i) Considerations on admissibility

33. Respondent considers that the appeal is manifestly inadmissible because it is detached from any decision by the Organization. The Tribunal has a different opinion, however. On 13 February 2015 appellant submitted a request for compensation based on the claimed responsibility of the Organization for its behaviour throughout the period of her sick leave. The breaches asserted against the NSPA are based on the medical

evaluations and controls it required, since appellant remains of the view that they caused the loss of her contract in addition to moral damage. That request was rejected by the letter of 13 March 2015, and appellant introduced a subsequent complaint, which was rejected by the decision of 5 May 2015. It follows that appellant took the necessary steps provided by Article 61 of the CPR and Articles 2, 4 and 6.3 of Annex IX thereto.

34. It is not of particular relevance that the decision by the Organization was adopted with regard to issues raised in a previous request by the staff member. In the light of a possible failure to act by the Organization, the staff member concerned can request a favourable decision. In such a case, it becomes obvious that the decision that rejects the staff member's request in whole or in part acts as the one that initiates the administrative procedure. For those reasons, Rule 10 of Appendix 1 to Annex IX of the CPR was not applicable at the appropriate procedural moment, and the Tribunal considers at this stage that the pre-litigation procedure has been observed and the appeal is admissible insofar it is directed against a first decision – the one rejecting a request for compensation – that was contested by the appropriate complaint.

(ii) Considerations on the merits

35. Appellant argues that the respondent's mismanagement of her situation caused the termination of her contract, with the economic consequences that should follow, and moral damage.

36. In order to establish the respondent's accountability, the Tribunal needs to determine what kind of conduct the Organization should have had. To put it another way, what exactly was the misconduct that could come under criticism in the light of the appellant's situation? Appellant's submission must be justified both by evidence of an irregularity or a violation of a legal rule, and by the link between the alleged conduct and the existence of real damage. However, appellant does not provide either a clear description of the claimed misconduct or evidence in this regard.

37. Accountability does not exist in the abstract. It must be based on a demonstrated breach of legal or contractual obligations. Even a failure to act could entail liability if any damage occurred as a consequence. However, despite the unfortunate track record of the last period of the parties' relationship, the extensive, detailed account of the facts given by both of them allows the Tribunal to conclude that the Organization dealt with this situation in a manner consistent with the regulations. In particular, the record shows that NSPA made substantial efforts to accommodate the appellant's situation in arranging the reductions of her working time, the medical evaluations, the arbitration procedures (twice), the maintenance of her emoluments from 1 October to 31 December 2013, etc.

38. There is no connection between the unspecified mismanagement of the appellant's health and the termination of her contract. The latter comes as a legal consequence of the duration of absence pursuant to Article 45.7 of the CPR, not as the result of actions by respondent. Therefore, whatever the discrepancies in the assessment of appellant's state of health, the truth is that she exceeded the maximum period of sick leave. The Tribunal notes that at this point the legal approach of work absenteeism includes even excused absences due to illness should they extend for more than 21 months.

39. Furthermore, the present appeal does not raise the question of unfair termination of the contract, just compensation for termination thereof. The Tribunal must recall that the subject matter of appellant's submission is limited to a claim for compensation, and does not call into question the underlying facts of Article 45.7 of the CPR applicable to extended sick leave.

40. Appellant tries to sum up a list of grievances involving different moments and situations in the past (*e.g*. the Organization did not react when a change of position was demanded; the Organization did not address the risk of harassment properly; the Organization did not follow some medical indications about this change; etc.). However, these circumstances were not challenged by the appellant at the earlier times when they allegedly occurred. Therefore all of them must be barred from the current dispute.

41 It follows from all the foregoing considerations that this appeal must be dismissed.

42. However, the dismissal of the appeal does not provide a basis for the respondent's claim regarding compensation. Article 6.8.3 of Annex IX of the CPR reads as follows:

> In cases where the Tribunal finds that the appellant intended to delay the resolution of the case or harass NATO or any of its officials, or that the appellant intended abusive use of the appeals procedure, it may order that reasonable compensation be made by the appellant to the NATO body in question. If so ordered, the amount awarded by the Tribunal shall be collected by way of deductions from payments owed by NATO to the appellant or otherwise, as determined by the Head of the NATO body in question.

43. The respondent did not offer consistent grounds for its request, and the record does not show any misuse of legal remedies by appellant.

E. Costs

44. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

45. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 23 February 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
ORGANISATION DU TRAITÉ DE L'ATLANTIQUE NORD

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 March 2016 AT-J(2016)0007

Judgment

Case No. 2015/1048

JF

Appellant

v.

NATO Airborne Early Warning and Control Force E3-A Component Geilenkirchen

Respondent

Brussels, 1 March 2016

Original: English

Keywords: disciplinary procedure; right to hearing and defence; Disciplinary Board: composition; burden of proof; military training on sick leave.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 14 December 2015.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Airborne Early Warning and Control Force E-3A Component Geilenkirchen (E-3A Component), dated 6 March 2015 and registered on 13 March 2015, as Case No. 2015/1048, by Mr JF.

2. The respondent's answer dated 11 May 2015 was registered on 15 May 2015. The appellant's reply, dated 12 June 2015, was registered on 18 June 2015. The respondent's rejoinder, dated 20 July 2015 was registered on 23 July 2015.

3. After a postponement at the request of appellant, the Panel held an oral hearing on 14 December 2015 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

4. By Order AT(TRI-O)(2015)0003 dated 17 December 2015, the Tribunal, in line with Article 6.7.3 of the NATO Civilian Personnel Regulations (CPR), requested that appellant provide a complete and un-redacted copy of a document that was part of his submissions, and allowed respondent to provide its comments.

5. On 18 January 2016 appellant produced the requested documentation, and on 2 February 2016 respondent provided its comments on it.

B. Factual background of the case

6. The background and material facts of the case may be summarized as follows.

7. Appellant started working at the NATO Air Base in Geilenkirchen (NAB GK) in November 1997 as a B3 AWACS Crew Chief. From 2010 onward he served as a B5 Principal Technician (Instructor).

8. Appellant deployed to Afghanistan three times: a) during July/August 2012, after which five weeks' sick leave was prescribed, followed by a temporary transfer at his request to another post as B4 Jet Engine Technician; b) from 12 to 26 September 2013, after which sick leave was prescribed from 2 to 24 November, during which he travelled to the United States from 4 to 24 November 2013; and c) from 5 December 2013 to 16 January 2014.

9. On 20 January 2014, appellant returned to NAB GK after his deployment and was informed by the Branch Head, Civilian Human Resources, that disciplinary proceedings, proposing dismissal, had been initiated against him on grounds that he had, without prior authorization, performed reserve duties with the US Army in the United States on 4–24 November 2013 while on sick leave. Appellant was also provided at the same time with the disciplinary report drawn up by the official responsible for personnel management. On 24 February 2014, appellant submitted his comments on that report.

10. On 28 January 2014, appellant went on sick leave/extended sick leave.

11. On 13 March 2014, the Component Commander, in accordance with the relevant CPR articles, nominated a Disciplinary Board (DB) tasked with reviewing appellant's dismissal as proposed by the official responsible for personnel management.

12. On 30 October 2014, the E-3A Component Commander informed appellant that the DB, in its report dated 26 September 2014, recommended that he terminate appellant's contract. On 24 November 2014, appellant provided his comments on this report.

13. On 9 January 2015, appellant was informed, by a letter dated 7 January 2015 from the Commander, E-3A Component, that as a result of the disciplinary action, his contract would be terminated after the 180 calendar days' notice period and an extension of the ongoing sick leave, in accordance with the relevant CPR articles (first contested decision).

14. On 20 January 2015, appellant lodged a complaint against the Commander's 9 January decision. The complaint was rejected on 4 February 2015 (second contested decision) and, on 6 March 2015, appellant submitted the present appeal.

C. Summary of parties' contentions, legal arguments and relief sought

(i) The appellant's submission

15. Appellant submits that his rights of defence and Article 6.2 of Annex X to the CPR have been violated insofar as the DB closed its proceedings without hearing appellant and without awaiting the results of a medical examination it had itself requested.

16. Appellant refers to an e-mail dated 21 April 2014, whereby his medical doctor informed his counsel that appellant's diagnosis and current impairments would have a negative impact on his ability to represent and defend himself properly in a setting such as disciplinary proceedings. Appellant stresses that such an inability, as described by his doctors, extended to both a hearing in person and answering written questions, which had therefore affected his capacity to answer the written questions the DB had put to him in the exchanges during the proceedings.

17. Further, appellant notes that the DB had requested that an assessment of such incapacity to answer the written questions be confirmed by the Medical Advisor of the E-

3A Component. Appellant stresses that while he complied with the request to meet with the Medical Advisor on 16 May 2015, he was never informed of the results of that examination or received a report.

18. Appellant observes that it was only on 24 September 2014 that he received some "recommended documents" from the Medical Advisor which did not contain any information or notes about the 16 May 2015 meeting. He further observes that on the same day, before he could take any action himself to inform the Board, he received the information that the DB had decided to close its proceedings and send a report to the E-3A Component Commander.

19. Appellants claims a violation of Article 6.1 of Annex X to the CPR and of the principle of impartiality concerning the composition of the Board.

20. Appellant states that he had requested that the DB be composed of members from other headquarters than the E-3A Component, and had also requested recusal of two members on grounds of a lack of impartiality and objectivity. Both requests were rejected by the Board; appellant considers its composition was therefore irregular and its decisions illegal.

21. Appellant alleges a violation of the obligation of motivation and of the rights of defence. Appellant maintains that he was not given access to all the items in his case file before the DB. In particular, he refers to specific annexes and exhibits referred to in the 30 October 2014 report by the DB, copies of which he requested in his letter dated 24 November 2014.

22. Appellant contends that he was not placed in a position in which he could effectively make known his views on the truth and relevance of the facts, charges and circumstances relied on by the authority. He therefore considers that the contested decisions must be annulled on these grounds.

23. Appellant also considers that the 7 January 2015 decision, by failing to address all the points raised in his comments, lacks proper motivation and leaves him unable to understand how the evidence could justify the dismissal. Likewise, he argues that the 4 February 2015 decision simply endorses the previous one without giving him any further explanation or motivation.

24. Further, appellant submits that the "compelling evidence" on which the 7 January 2015 dismissal is based does not indicate which evidence is referred to or why his arguments should be dismissed. Appellant notes that there is no proof, in any case not beyond a doubt, that he participated in US Army Reservist activities while on sick leave and that there is no direct testimony from the US Army to confirm it. He affirms that the only alleged breach of his obligations, under Article 59.1 of the CPR, is based on an e-mail that draws on hearsay/second-hand testimony.

25. Appellant claims a manifest error of assessment and a breach of the principle of proportionality, in violation of Article 3.3 of Annex X to the CPR. He states that it was not for the DB to determine whether there was a contradiction between him being unable to

perform his job duties for medical reasons and his alleged attendance of a course for which, moreover, there was no medical contraindication.

26. He also notes that it is not explained how, even if it were proven that he had attended the course, a sick leave stemming from unresolved issues at work and post-deployment issues would affect the core area of his work contract and irreparably damage the relationship of mutual trust between employer and employee.

27. Appellant stresses that the contested decisions and the disciplinary report did not address the plea of retaliation and misuse of powers detailed in his comments of 24 February 2014. He therefore maintains that the contested decisions were taken with a lack of objectivity and impartiality by the DB and, in any case, reflect manifest negligence in the investigations and assessment by the DB and the E-3A Component.

28. *In fine*, appellant stresses that the violation of the right to be heard, the lack of care and consideration of his health conditions after 16 years' devoted employment, and the lack of proof of the alleged fault caused him moral harm evaluated *ex aequo et bono* at €50.000.

29. Appellant requests that the Tribunal:
- annul the E-3A Commander's disciplinary decision dated 7 January 2015;
- annul the E-3A Commander's decision dated 4 February 2015 rejecting appellant's complaint;
- compensate him for moral harm, evaluated *ex aequo et bono* at €50.000; and
- reimburse his travel, subsistence and legal costs.

(ii) The respondent's contentions

30. Respondent maintains that the disciplinary action was conducted in accordance with the provisions of Articles 59 and 60 of the CPR and Annex X thereto.

31. Respondent highlights the different phases of the procedure whereby appellant was assured of his rights of defence. In particular:
- on 20 January 2014 the official responsible for personnel management submitted a report to appellant establishing the facts complained of and the relevant circumstances;
- on 24 February 2014 appellant (through his counsel) provided his comments;
- as the proposed disciplinary action was dismissal, the E-3A Component Commander convened a DB which issued its report on 26 September 2014;
- on 24 November 2014 appellant (through his counsel) submitted his comments; and
- on 7 January 2015 the Commander rendered his decision about the disciplinary action.

32. Respondent affirms that appellant was given the opportunity to be heard and to defend himself, and that the CPR requirements were met insofar as appellant submitted extensive comments that were passed to the Board, he was represented during all the disciplinary proceedings by his counsel, and that the DB made numerous attempts – six letters between March and June 2014 – to invite appellant to respond to written questions, offering all available means of communication.

33. In respondent's view, only after appellant failed to provide any comments on the substance of the case, instead continually insisting that he was unable to do so and thereby delaying the entire procedure, did the DB decide to conclude the fact-finding mission.

34. Respondent rejects the claim of irregular composition of the Board. It notes that the request for the recusal of two members could not be met because appellant failed to substantiate the presumed lack of impartiality, and that the request to appoint members from other NATO bodies is not covered by the regulations.

35. Respondent contends that evidence supporting the disciplinary action was properly established and assessed. It notes that appellant provided a sick leave notice for the period of 4–24 November 2013 indicating the need for therapy and diagnostic sessions, and determines such therapies as being incompatible with concurrent army training.

36. Respondent further affirms that the evidence of appellant's participation in military training did not stem from "hearsay" but was given by the US National Support Unit at NAB GK base, and thus the official interface between it and the US forces. It also stressed that this was the official channel for obtaining such information from the US forces.

37. Respondent sets forth, as grounds for the disciplinary action, the:
- violation of Article 45 NCPR: appellant having misused sick leave for attending US Army reserve training;
- violation of Article 43.3 NCPR: appellant having failed to obtain prior approval from the E-3A Component Commander for attending US Army reserve training;
- violation of Article 13 NCPR: appellant's disloyalty having put the national reserve training above his obligations toward NATO;
- violation of the principle of integrity of the NATO Code of Conduct: appellant concealing his national reserve training during sick leave and creating a conflicting situation between the interests of NATO and other obligations.

38. Respondent rejects that appellant's sick leave was caused by problems at his workplace, and notes that all the issues appellant raised were properly addressed by his line management and extensively discussed with him at different levels. Respondent further notes that the root of many of appellant's problems was his demands for overly long periods of absence to fulfil US Army Reserve duties (including requests for weeks of special leave). The absorption of the workload during his absences led to conflicts with his co-workers (hence, also the transfer to another section maintaining a "personal grade" so that he continued to be paid as a B5).

39. Respondent also rejects the claimed lack of proportionality of the disciplinary action, noting that the sanction proposed by the civilian personnel officer had been considered too severe by the DB, hence appellant was dismissed with the regular notice period of 180 days.

40. Finally, respondent denies any accusation of retaliation and misuse of powers, insisting that the disciplinary action was solely based on appellant's participation in US Army training during sick leave.

41. *In fine*, respondent rejects the claim for financial compensation as being unproven and lacking factual and legal grounds.

42. Respondent requests that the Tribunal:
- dismiss the appeal in its entirety.

D. Considerations and conclusions

43. The appeal is firstly based on procedural flaws, such as the failure to hear the appellant, the irregular composition of the DB, and the lack of motivation of its report. The Tribunal finds that there was no failure in this respect.

44. Disciplinary procedure is addressed under Article 60 NCPR and Annex X. It follows from these rules that dismissal – as a disciplinary action – shall not be taken until the staff member has been informed of the allegations against him (Article 60.3). "*The grounds on which disciplinary action is taken must be specified and staff members concerned informed of the grievances against them*" (Article 3.2 of Annex X to the CPR). Furthermore, the agent is entitled to submit oral or written comments before the final decision is taken (Article 60.4). Following the opening of the procedure by the competent official, respondent adhered strictly to the outline provided by the above-mentioned rules: a) a report setting out the facts complained of and the circumstances in which they occurred, and proposing one of the penalties provided for by the CPR, was produced. In this case the proposal of 17 January 2014 was to dismiss without prior notice; b) the report was sent to the concerned staff member, i.e. appellant, on 20 January 2014; c) appellant had 15 working days to submit written or verbal comments (Article 5.3 of Annex X, in line with Article 60.4 CPR). Appellant submitted written comments on 24 February 2014. The Tribunal considers that respondent complied with the obligation to inform the agent of the basis of the problem and to give him an opportunity to put forward his case in response before any decision was taken.

45. Pursuant to Articles 4.1, 5.4 and 5.5(e) of Annex X to the CPR, the DB shall be convened in case of dismissal. The DB may require – "should it see fit" – any member of the staff to appear before it; it may also invite anyone else to testify. Furthermore, in accordance with Article 6.2 of Annex X to the CPR, "*The Board must hear the staff member, who may also submit written or verbal comments and ask that certain witnesses be heard.*" Appellant was invited to be heard by the DB on two scheduled occasions and, finally, was sent three short questions that could be answered in writing. Appellant was represented throughout by his counsel, who submitted comments on his behalf during the disciplinary proceeding. Nevertheless, appellant did not attend any hearing, invoking medical reasons, and cited the same reasons for his failure to answer the three questions mentioned above. Thus the DB gave the staff member the ability to set out his case orally and in writing, to ask questions, and to raise points about any relevant information. The agent (or his representatives/counsel) could have met with the DB. The

right to be heard gives rise to an obligation of cooperation. The Tribunal stresses in this regard that the DB allowed appellant not only to be accompanied but also represented by his retained legal counsel. An analysis of the text of the applicable rules does not lead to an obligation for the DB to entertain an on-site meeting. The right of appellant was fully satisfied and the arguments about the lack of a hearing as a violation of the right of defence must be rejected.

46. Appellant also submits that the DB was irregularly composed, his request for a composition of members from other headquarters having been denied. Pursuant to Article 6.1 of Annex X to the CPR:

> The Disciplinary Board shall be composed of three members: the official responsible for personnel management or such other official as the Head of the NATO body may appoint (Chair), the Head of Division or independent service to whom the staff member is responsible(1), and a staff member nominated by the Staff Committee holding in so far as possible a grade not lower than the staff member who is the subject of disciplinary procedures.

47. It follows from the above that the agent is not empowered to decide on the composition of the Board. It is also clear that the two first members named above shall be chosen as a result of their position and functions which, moreover, are linked to the location of the concerned agent's post. The Tribunal cannot find any irregularity in the DB's composition and considers that the appellant's suspicions of partiality are not sustained.

48. On 24 September 2014 the DB decided to conclude the proceedings and submitted unanimous recommendations.

49. The DB's recommendations were received by appellant and were commented on by his counsel on 24 November 2014. Those comments contained no submissions about the lack of motivation; the argumentation instead concerned the lack of a hearing, the allegedly irregular composition of the DB, and other questions on the merits. Therefore, this allegation appears in the appeal as an emerging issue that the Tribunal cannot address. Notwithstanding the foregoing, a mere reading of the DB's report shows the lack of basis for this request. Appellant was duly informed of the DB's reasoning and was given a range of opportunities to participate in the disciplinary procedure, even through his representatives.

50. The rest of appellant's submission relates to the merits. The Tribunal recalls that dismissal is one of the disciplinary sanctions included in Article 59.3(e) of the CPR. The Tribunal also observes that disciplinary decisions are within the discretionary power of the Head of the Organization and that there is consensus among international administrative tribunals that a decision in the exercise of this discretion is subject to only limited review by a tribunal (*cf*. AT judgment No. 891). The Tribunal must therefore analyse the impugned decision on dismissal with this limited standard of review in mind. This standard includes the principle of proportionality, *i.e.* does the gravity of the facts justify the disciplinary sanction of dismissal (*cf*. Article 3.3 of Annex X to the CPR).

51. The relevant facts are reported by the DB to be the participation of appellant in national military activities while on sick leave. Article 43.3 of the CPR provides as follows:

> Members of the staff must obtain the authorization of the Head of the NATO body to attend all voluntary military training, and must show that this training is essential to enable them to keep abreast of progress in a highly specialized technical field.

52. There is no doubt that facts cannot be presumed and the Organization must demonstrate any alleged contentions clearly, efficiently and indisputably in order for the Disciplinary Board to recommend the appropriate sanction. The Tribunal recalls that each party shall have the burden of proving the facts relied on to support its claim or defence. But here, it is worth emphasizing that the facts were never denied by appellant, nor did he adduce any contrary evidence. In that context, appellant's allegation about the paucity of evidence becomes unpersuasive. In any event, the statements of the sole witness are corroborated by the content of the full text of the e-mail mentioned in paragraphs 5 and 6 *supra*, as provided by appellant following the Tribunal's request.

53. In view of these circumstances and, in particular, the seriousness of the facts with a failure of the agent's duty of good faith, respondent took a fair final decision, weighing the circumstances as recommended by the DB.

54. The dismissal of the main claim gives rise to the dismissal of the subsidiary claims. Moreover, appellant's submissions of retaliation and misuse of power were not the subject matter of the pre-litigation procedure.

55. The dismissal of the main request of the appeal entails the dismissal of the request for compensation of damages.

E. Costs

56. Article 6.8.2 of Annex IX to the NCPR provides as follows:

> In cases where it is admitted that there were good grounds for the appeal, the Tribunal shall order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant.

57. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 1 March 2016.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar *a.i.*

Certified by
the Registrar *a.i.*
(Signed) Laura Maglia