
# JUDGMENTS and ORDERS

# OF THE NATO ADMINISTRATIVE TRIBUNAL

## 2021

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

# Judgments of the NATO Administrative Tribunal

## 2021

### 30th session (25-26 March 2021)

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| AT-J(2021)0005 Case No. 2020/1306 | A *et al*. | *v.* | NSPA |
| AT-J(2021)0008 Case No. 2020/1309 | D | *v.* | NSPA |
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## Orders of the NATO Administrative Tribunal

**2021**

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| AT(PRE-O)(2021)0001 Case No. 2020/1318 | S | *v.* | NATO IS |
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| AT(PRE-O)(2021)0004 Case No. 2020/1320 | A | *v.* | NATO IS |
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| AT(TRI-O)(2021)0001 Case No. 2019/1290-1298 | W | *v.* | NATO IS |
| AT(TRI-O)(2021)0002 Case No. 2020/1317 | R | *v.* | NSPA |

**2022**

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| AT(TRI-O)(2022)0001 Case No. 2020/1302 | V | *v.* | NCIA |

ADMINISTRATIVE TRIBUNAL
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5 May 2021 AT-J(2021)0005

**Judgment**

**Case No. 2020/1306**

**A *et al.***
**Appellants**

***v.***

**NATO Support and Procurement Agency**
**Respondent**

Brussels, 23 April 2021

Original: English

*Keywords: salary adjustment, Coordinated Organizations; salary scale; powers of the NAC; good administration; equality of treatment.*

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This judgment is rendered by a full Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún, Mr John Crook, Mr Laurent Touvet, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 26 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 26 June 2020 and registered on 30 June 2020, as Case No. 2020/1306, by Ms SA and 160 other named B and C grade staff members of the NATO Support and Procurement Agency (NSPA) in Luxembourg. The appellants challenge pay slips issued by the respondent in January 2020 implementing decisions by the North Atlantic Council (NAC) on 25 October 2019. At that time, the NAC made decisions resulting in significant increases in the salaries of A and L grade staff members in Luxembourg but did not authorize corresponding increases in the salaries of B and C grade staff members.

2. The respondent's answer, dated 30 September 2020, was registered on 16 October 2020, the appellants' reply, dated 30 November 2020 was registered on 10 December 2021. The respondent's rejoinder, dated 11 February 2021, was registered on 16 February 2021.

3. Having regard to Article 6.1.4 of Annex IX to the NATO Civilian Personnel Regulations (CPR), the President decided that the cases should be heard by a full Panel, consisting of the President and the four members of the Tribunal.

4. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 26 March 2021, utilizing facilities provided by NATO Headquarters. It heard arguments by representatives of both parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

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

6. The parties' submitted extensive evidence related to the methods for determining the compensation of NATO staff members in Luxembourg. To simplify, NATO is one of the so-called Coordinated Organizations, a cooperative mechanism involving six international organizations headquartered in Europe aiming at harmonization of rules and practices on salaries, allowances and pensions. Following the move of the respondent's predecessor agency to Luxembourg from France in 1968, it was decided to utilize for A and L staff in Luxembourg the same salary scales and method of adjusting salaries as those approved through the Coordinated Organizations process for NATO staff in Belgium. This linkage was reflected in the CPR, in particular in Article 5.1 of CPR Annex II, and was maintained for many years. This was initially advantageous for Luxembourg staff, as the local cost of living there was less than that in Belgium. However, over time, this changed, as the cost of living in Luxembourg rose relative to Belgium.

7. Different procedures were used over the years to make annual adjustments to the salaries of NAMSA's A and L staff and B and C staff in Luxembourg. Beginning in 1974, A and L staff received the same annual adjustments as corresponding NATO A and L staff in Belgium, whose salaries are adjusted by multiplying the evolution of salaries in national civil services in a number of reference countries by the rate of inflation in Belgium. However, until 1992, B and C staff salaries were annually adjusted on the basis of periodic surveys of the best local employment conditions. These local surveys were discontinued in 1992. Since that time, B and C staff in both countries have received the same percentage annual adjustments. However, because the percentage adjustments have accumulated from the higher basis of B and C staff salaries in Luxembourg existing in 1992, those salaries have been and remain higher than those of corresponding staff in Belgium. It was confirmed at the hearing that this relationship persists.

8. Notably due to higher housing costs, the compensation offered to A and L grades fell below that offered by other employers in Luxembourg and at other NATO locations, contributing to significant difficulty for NAMSA to attract and retain high quality professional staff. In 2018, NSPA's General Manager highlighted this difficulty in a letter to the NATO Secretary General, stating that "[o]ver the last fifteen years, the cost of living in [Belgium and Luxembourg] has evolved very differently and we are now facing considerable challenges in the recruitment and retention of the quality staff that we need."

9. The issue of "breaking the link" between Luxembourg and Belgium was a recurring subject of discussion in the Coordinating Committee for Remuneration (CCR). Ultimately, the CCR recommended, and the NAC in 2019 approved, elimination of the link between salary scales in Belgium and Luxembourg and creation of a new salary scale for Luxembourg A and L staff intended to bring their compensation into alignment with that of A and L staff in other NATO locations. This involved a one-time 16% average "catch up" increase in salary levels for NAMSA A and L staff in in Luxembourg that became effective in January 2020.

10. B and C staff in Luxembourg received an annual cost-of-living adjustment of 1.6% that was reflected in their January 2020 pay slips, but they did not receive the much larger "catch-up" increase received by A&L staff.

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

### *(i) The appellants' contentions*

11. In substance, the appellants contend that they should also have received a "catch up" salary increase corresponding to that approved by the NAC in October 2019 for NAMSA's A and L grade staff members.

12. The appellants contend that they utilized the appropriate procedures under the CPR to contest this difference in treatment. They all lodged a timely appeal of the first pay slip they received in late January 2020, the month when the NAC's decisions giving effect to the increased salaries of A and L staff in Luxembourg became effective. Following denial of their initial appeal, they then pursued the subsequent steps in the appeals process

within the required time limits. They ultimately lodged a complaint with the General Manager, which was denied.

13. As to the merits, the appeal develops a core claim involving several steps. First, the appellants contend that the NAC long ago determined the scales of salaries for A and L staff in Luxembourg pursuant to Article 22.2 of the CPR, which states that "[t[he scales of salaries and allowances of all members of the staff…are determined by the Council. Such scales are established for each member country in which NATO operates…" In the appellants' submission, "the NAC cannot lawfully re-establish a salary scale when this scale was already established. It could only adjust it." Instead, the NAC's initial determination of salary scales under Article 22.2 is permanent and binding, such that the NAC cannot now establish alternative salary scales.

14. The appellants next maintain that Article 5.2 of Annex II of the CPR establishes a uniform mechanism for annual adjustments to salaries that requires the NAC to adjust staff salaries for all grades in the same manner. In the appellants' view, the 16% increase for A & L staff in Luxembourg approved by the NAC was such a salary adjustment. It therefore had to be determined for all staff in the same way, using the methodology set in Article 5.2 of CPR Annex 2. Failure to do so violated the CPR.

15. Thus, for the appellants, "the salary scale applicable [to A and L grades] as of 1st January 2020 is not a new specific salary scale but a salary adjustment which needs to apply to all grades in the same way." Had the methodology applied to determine the 16% increase for A and L grades been applied to the appellants, they would have received a corresponding 16% increase in January 2020, rather than the 1.6% increase they received. Therefore, as the NAC approved a significant increase for A and L staff, but not a similar increase calculated in the same manner for B and C staff, its action was illegal.

16. The appellants add that in approving the increase for A and L staff, the NAC violated the principles of non-discrimination and equality of treatment. They contend in this regard that the salaries of A and L staff in Luxembourg were adjusted in a manner intended to attain purchasing power parity (PPP) between those staff members and corresponding staff in other NATO locations. Those for B and C staff were not. In the appellants' submission, this violates both the CPR and governing principles of international administrative law. In their view, "there is no objective reason to treat A/L and B/C grade differently. For all these reasons the different treatment is discriminatory."

17. The appellants urge that, prior to acting, the NAC, the CCR and others involved "should have first assessed the situation of the A and L grades, on the one side, and of the B and C grades, on the other side, in order to determine whether there was a "gap" between their remuneration and the cost of living in Luxembourg." Failure to do so reflected both unlawful discrimination, and a failure of good administration. "The NAC was …required in accordance with the principle of good administration, to examine the situation diligently for all grades…and to determine whether a correction was required for B&C grades as well."

18. The appellants also contend that the NAC committed a manifest error of assessment in increasing the salaries of A and L staff but not of B and C staff, and that

in doing so, the NAC misused its powers in violation of the principle of good administration and the duty of care.

19. As relief, the appellants request:
"a. the annulment of:
- the salary scale published on 6 January 2020
- the implementation of that salary scale to the appellants as revealed by their salary slips of January 2020
- the future implementation of that salary scale for each of the following months.
b. to have their basic salary fixed with a percentage which includes the PPP, like for A and L grades, retroactively since 1st January 2020."

***(ii) The respondent's contentions***

20. The respondent maintains that the appeal is inadmissible on multiple grounds. It first contends that "the appellants are challenging a regulatory decision of the NAC establishing new salary scales. This is a political decision not subject to judicial review." In the respondent's view, the disputed payslips did not reflect a discretionary decision properly subject to administrative review, because it was legally bound to implement the NAC's decision. The respondent notes in this regard the NATO Appeals Board's decisions in Appeals Nos 730 and 731, in which the Appeals Board dismissed the appeals as involving non-reviewable policy decisions by the NAC.

21. Second, the respondent contends that there has been no decision adversely affecting the appellants, as the impugned decision affects only A and L grade staff members. In the respondent's view, the appellants "do not have standing to challenge a decision that affects third parties." The respondent further contends that the requested relief asks the Tribunal to improperly exceed its jurisdiction by supplanting the established salary-setting framework.

22. Third, the respondent finds the appeal inadmissible because the appellants failed to present a properly articulated request on the basis of which it could take some responsive action; instead, "there is no evidence" that the appellants "made receivable requests to have their salaries re-established."

23. Fourth, the respondent contends that the appeal was not timely. The appellants were put on notice of the NAC decision and of the new salary scales in the fall of 2019. They should have appealed then, rather than waiting for their January 2020 pay slip reflecting the new salary scales. Hence, their appeals are not timely.

24. Finally, recalling its contention that it was powerless to provide the requested relief, the respondent contends that the appellants utilized an inappropriate procedural channel to bring their appeal. It submits that they should have utilized the procedures under Articles 6.3.1 and 6.3.2 of CPR Annex IX for decisions "for which there are no channels for submitting a complaint." The respondent observes that there is a 60-day time limit for bringing such appeals under Article 6.3.2, and that the appellant failed to act within this time limit.

25. Regarding the merits, the respondent prefaces its defense with substantial discussions of Purchasing Power Parities (PPP), salary scales and tables, and the methods for establishing and adjusting them. The respondent rejects appellants' contention that Article 22.2 of the CPR bars the NAC from establishing a new salary schedule for A and L grades in Luxembourg and only allows the NAC to authorize annual salary adjustments determined in the same manner for all grades. The respondent emphasizes in this regard the NAC's authority as NATO's supreme governing authority, insisting that it has authority to create a new salary schedule for A and L staff in Luxembourg and indeed did so. "[T]he NAC can always change its previous decisions. The NAC cannot be forever bound by a political decision in the 1970s to make A/L salary scales in Luxembourg identical to that of Belgium."

26. The respondent agrees that Article 5.2 of Annex II of the CPR requires that annual salary adjustments for all staff must be determined in the same manner, but contends that this was done in the form of a 1.6% annual adjustment received by all Luxembourg staff for 2020. However, this differs from the NAC's decision to end the connection between Luxembourg and Belgium for purposes of determining salaries and to approve a new salary scale for NAMSA A and L salaries, including a substantial "catch-up" adjustment, in order to gain parity with A and L salaries in other NATO duty locations.

27. As to the appellants' arguments that a 16% increase for A and L grades violated the obligation to accord equal treatment to B and C staff, the respondent agrees that the principle of equality requires that individuals in the same factual and legal situation be treated equally. It contends in this regard that the situations of A and L and B and C staff differ significantly, noting "different recruiting paradigms, different salary setting mechanisms, different minimum education requirements, different geographical distribution requirements." Given these differences, the respondent maintains that their salary schedules need not be set in the same way.

28. The respondent also rejects the appellants' argument that the principle of equality requires equal treatment of B and C grades in Luxembourg with corresponding staff in other NATO duty locations. In any event, the respondent observes that salaries of B grades in Luxembourg average almost 11% above those in Belgium.

29. As to the claim of manifest error of assessment, the respondent contends that a high standard is required for such a finding, and that the Tribunal cannot substitute its judgement for the NAC's "so long as the decision falls within the realm of possible decisions based on powers and factual evidence." The respondent similarly rejects the claims that it failed to exercise good administration or to satisfy the duty of care, arguing that the duty of care is not "the door by which all decisions, including decisions of policy and lawful management that affect other staff members…can be challenged."

30. For the respondent, the appellants' complaint goes to the fact that the NAC established, and NATO long utilized, different principles for determining salary scales for A and L staff and B and C staff. Salary scales for the first group, "are meant to be sufficiently remunerative to attract, often from foreign duty stations, qualified staff from different recruitment pools (private sector, public sector of member nations and other international organizations." In the respondent's view, this requires that these scales provide corresponding local purchasing power in different NATO duty stations. The connection was lost in Luxembourg, as A and L scales tied to Belgium came to provide

less local purchasing power than was provided in other NATO duty stations. On the other hand, the objective for B and C salary scales is not to attain equivalence across NATO duty stations, but to assure competitiveness on local labour markets. For the respondent, these distinctions are reasonable and appropriate and "there is no rule in international civil service law that prevents an international organization to define categories of staff and to set modalities for setting and adjusting salaries."

31. The respondent notes that the NAC has recently adopted a "Single Spine System" for NATO compensation to replace previous distinctions between staff members in different grades. The Single Spine will eliminate the different methods for determining compensation for different classes of employees and provide for determining annual salary adjustments for all classes using the same method. However, in the respondent's view, adoption of this system is distinct from and unrelated to the NAC's decision to eliminate the special regime for Luxembourg and to the manner of adjusting salaries for 2020.

## D. Considerations and conclusions

### *(i) Admissibility*

32. The respondent first contended that the claim was inadmissible because it contested the effects of NAC decisions determining salary scales, decisions that the respondent was bound to implement. The Tribunal does not agree. Article 6.2.1 of the CPR authorizes appeals of decisions by the Head of a NATO body "in application of a decision of the Council." This is such a case. The Tribunal has emphasized that it has jurisdiction to consider challenges implicating NAC decisions only where a decision has been applied in a manner affecting an appellant's personal interests (see AT Judgment in Joined Cases Nos 2020/1294-1295-1296, paragraph 75 *ff.*). Appeals are admissible where this requirement is met.

33. The respondent next contends that there has been no decision adversely affecting the appellants, as the impugned decision affects only A and L grade staff members. However, the appellants contend that they have been individually and adversely affected, in that the salary scale being applied to them as of January 2020 has been incorrectly and unlawfully determined. As such, their claims are admissible.

34. Third, the respondent maintains that the appeal is inadmissible because the appellants did not present a properly articulated request to which it could take some responsive action. The Tribunal does not accept this objection, which seems similar to the respondent's first objection, and fails for the same reason. The appeals submitted clearly set out the actions requested, including, inter alia, the annulment of the B and C grade salary scale. While the respondent could not take the requested action of its own authority, the appeal is admissible by way of exception under Article 6.2.1 of CPR Annex IX.

35. The respondent's fourth admissibility objection is that the appeals were not filed within the time limit set by the CPR. The respondent contends that the new salary scales and tables were notified to the appellants in a joint communiqué in October 2019 and a November 2019 "town hall" meeting. Hence, they knew or should have known of the new

regime at that time, and had to seek administrative review within the time limit required by Annex IX of the CPR. “By submitting their administrative reviews in January/February 2020, the appellants therefore failed to act within the prescribed time limits…”

36. The Administrative Tribunal does not agree. As noted *supra*, the Tribunal has clearly held that an administrative decision can only be appealed after it has been applied in a concrete manner that directly affects a staff member. Mere publicity or briefings regarding a NAC decision or other policy change are not a basis to seek administrative review (see AT Judgment in Joined Cases Nos 2017/1127-1243, paragraphs 93 *ff.*)

37. Finally, the respondent contests admissibility on the basis that the appellants used the incorrect procedure to bring their appeal, and should have utilized the procedures under Articles 6.3.1 and 6.3.2 of CPR Annex IX for decisions “for which there are no channels for submitting a compliant.” The respondent further contends that the appellants failed to comply with the time limit for bringing such appeals under Article 6.3.2.

38. The Administrative Tribunal finds this objection unconvincing in light of the respondent own conduct. The respondent did not interpose this objection in its ten-page communication of 2 March 2020 denying the appellants’ request for administrative review. It instead engaged vigorously in the administrative appeal process, raising other objections to admissibility and detailed arguments intended to rebut the appellants’ characterization of the situation. At a later stage, the respondent rejected a proposal by the Staff Association that the issue be submitted directly to the Administrative Tribunal, *inter alia*, because the Agency was raising (different) jurisdictional arguments and it feared such referral “may be perceived as an implied admission that the cases are receivable.”

39. Having vigorously engaged in the administrative review process without objection, the respondent cannot at this stage maintain that resort to that process was inappropriate and bars consideration of these appeals.

40. The appeal is admissible.

***(ii) Merits***

41. With respect to the merits of the appeal, the Tribunal does not accept the appellants’ contention that, having once established scales of salaries and allowances under Article 22.2 of the CPR, the NAC is perpetually barred from creating new scales and can only adjust existing salaries and allowances utilizing the process set out in the CPR. Nothing in the language of Article 22.2 suggests this result, and it flies in the face of fundamental principles of NATO governance. The NAC is NATO’s supreme policy-making organ. As such, it exercises the power to determine the scales of salaries and allowances, including the power to replace existing scales when judged appropriate by the collective will of member countries acting in the NAC.

42. The evidence shows that this is what the NAC did. On 25 October 2019, the NAC approved two separate CCR reports. The first, the 264$^{th}$ CCR Report, granted a 1.6% adjustment for all Luxembourg NATO staff for 2020, determined for the last time utilizing the mechanism providing for the same annual adjustments to salaries in Belgium and

Luxembourg. Annex 1 to that report, a table showing the annual adjustment indexes applied as of 1 January 2020, shows an identical adjustment of 1.6% for both Belgium and Luxembourg.

43. The second document approved by the NAC, the CCR's 259th Report, amended Annex II of the CPR and established a new salary scale for A and L grades in Luxembourg. Read in its entirety, the CCR's 259th Report makes clear that the intended action was to create a new salary scale for A and L staff in Luxembourg. Thus, the Report proposes, inter alia, "a specific salary scale for Luxembourg…established on the basis of PPP for those grades whose scale is determined by PPP." This intention is given concrete effect in Annex 2 of the Report, a draft salary scale captioned "MONTHLY (CO) BASIC SALARY SCALE DERIVED FROM THE APPLICATION OF PPP TO ALL A/L GRADES AT 1 JANUARY 2020." This is the proposal approved by the NAC, and the amounts indicated (increased by 1.6% to reflect the annual 1.6% adjustment for all grades in Luxembourg and Belgium) are those notified to NSPA staff on 6 January 2020 and that are reflected in the pay slips being appealed.

44. The Tribunal therefore does not accept the contention that the new salary scale applied to NSPA's A and L grades in Luxembourg was merely an adjustment to salary that under the Article 5.2 of CPR Annex II, had to be applied in the same manner to all grades. The NAC approved a new salary scale for A and L grades, not an adjustment.

45. The appellants' remaining arguments – of improper discrimination, unequal treatment, manifest error of appreciation, failure of good administration, failure of the duty of care, and misuse of powers by the NAC – all reflect in varying degrees the appellants' contention that it was improper and unlawful for the NAC to utilize a system for determining and adjusting salaries that distinguished between the treatment of A and L staff and B and C staff in Luxembourg.

46. The Tribunal does not accept this contention. The obligations of non-discrimination and equal treatment apply to treatment accorded to staff members in comparable situations. As the Tribunal held in Case No. 903, "there can be violation of the principle of equal treatment only when two categories of persons, whose factual and legal situations are essentially the same, are subject to different treatment, or when different situations are treated in the same way."

47. The record shows that the CPR and the NAC authorized and maintained a reasoned and never contested distinction between differently situated staff members. Compensation for A and L grade staff, often recruited internationally in competition with other prospective employers - including other NATO elements, aimed at providing corresponding purchasing power across NATO locations. By contrast, B and C salary scales were intended to assure competitiveness on local labour markets. The Tribunal views this distinction as reasonable and not contrary to the obligation to avoid improper discrimination. (As noted supra, the Tribunal was informed that the Organization is now moving to a different method of determining salaries for all staff utilizing a Single Spine applicable across the Organization. The NAC's policy decision to make this change does not affect the legality of the previous system.)

48. The record shows that, following detailed consideration in the Coordination process, the CCR and the NAC took a one-time action to address the respondent's

significant difficulty in recruiting and retaining qualified A and L staff due to the distorting effects of protracted linking of their compensation to compensation of A and L grades in Belgium. The obligations of non-discrimination and equality of treatment do not require that a solution designed to remedy a problem affecting some staff members must be applied across the board to others not similarly situated.

49. Moreover, the Tribunal finds that the NAC's decision to address the situation affecting A and L staff in Luxembourg did not reflect mal-administration. The NAC acted in response to a difficult situation identified as impacting the effective functioning of a NATO body. Doing so was not mal-administration.

50. In conclusion, the appeals are rejected in their entirety.

## E. Costs

51. Article 6.8.2 of Annex IX 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 [...].

52. 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 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 May 2021 AT-J(2021)0006

**Judgment**

**Case No. 2021/1323**

**SG**

**Appellant**

***v.***

**Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen**

**Respondent**

Brussels, 26 April 2021

Original: English

*Keywords: suspension; disciplinary action; dismissal, witnesses; Disciplinary Board reports; burden of proof; circumstantial evidence.*

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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 R. Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 15 April 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 29 January 2021 and registered on 1 February 2021, as Case No. 2021/1323, by Mr SG, against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK, or NAEW). The appellant requests, *inter alia*, the annulment of the Commander's decision to dismiss him following disciplinary proceedings.

2. The appellant requested an expedited hearing in accordance with Article 6.6.4 of Annex IX to the Civilian Personnel Regulations (CPR). The Tribunal's President forwarded the request to the respondent on 4 February 2021. On 15 February 2021, having taken into account the respondent's views submitted on 11 February 2021, the Tribunal issued Order AT(PRE-O)(2021)0002 granting the request for an expedited hearing and fixing the respective time-limits for the respondent's answer, the appellant's reply and the respondent's rejoinder.

3. The respondent's answer, dated 9 March 2021, was registered on the same day. The appellant's reply, dated 19 March 2021, was registered on 21 March 2021. The respondent's rejoinder, dated 31 March 2021 was registered on 1 April 2021.

4. In view of the prevailing public health situation the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 15 April 2021, utilizing facilities provided by NATO Headquarters. It heard the arguments by the representative of the appellant, who was accompanied by the appellant, and the arguments by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

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

6. The appellant started working with NAEW at the NATO Airbase Geilenkirchen (NAB GK) on 1 July 2007 as a Senior Technician (Fuselage), at B-4 grade.

7. From 2 to 12 March 2020, the appellant was on mission to Konya, Turkey. Having been in the same building as one of the mission members who tested positive for Covid-19, the NAEW's medical adviser instructed all other mission members upon their return to go home, not to return to work before Monday 16 March 2020, and to consult with their general practitioners (GP). The appellant's GP advised him to stay in quarantine until 29 March 2020. He informed his supervisor and the NAEW medical adviser thereof and returned to work on 30 March 2020 on a late shift.

8. On 31 March 2020, also on a late shift, the appellant received a phone call from his daughter informing him that she had lost the sense of taste and smell. He called the NAEW medical adviser for advice, who instructed him to return home and quarantine, and to contact his GP to get a sick note until 15 April 2020 to justify his absence from work.

9. On 1 April 2020, the appellant went to his GP and obtained a sick note as instructed by the NAEW medical adviser. On 8 April 2020, he experienced breathing difficulties and again contacted his GP. A Covid-19 test was taken on 15 April 2020. On 17 April 2020 the appellant received a negative test result. His GP informed him that he could, in view of the negative result, return to work on 20 April 2020. He contacted the NAEW medical service the same day, *i.e.*, 17 April 2020, and was advised not to return to work until after having spoken with NAEW's medical adviser, who would be back in the office on Monday 20 April.

10. In the morning of Monday 20 April 2020, the appellant spoke with Dr E, NAEW's medical adviser. She confirmed that the appellant could not return to work until 29 April 2020 since he had experienced symptoms which could be Covid-19 symptoms and asked him to contact his GP to get a sick note to cover his absence from work. Upon the appellant's request to confirm the conversation in writing, Dr E sent the following e-mail that morning:

> Classification NATO UNCLASSIFIED
>
> Good morning Mr. G
>
> As just discussed on the phone, I hereby certify that you are not supposed to come back to work until 14 days after your symptoms started are over (29.04.2020 in your case). You have to be without symptoms for 72h before you can come back to work. Symptoms are for example: fever, dry coughing, fatigues, etc.
>
> For further questions, please do not hesitate to contact me
>
> V/r,

11. On 22 April 2020, at the first available appointment, the appellant visited his GP who wrote a sick note until 1 May 2020. The GP confirmed to the appellant that he was not experiencing Covid-19 symptoms, but was instead suffering from asthma. On his way home, the appellant decided to go to the NATEX facility at the NAEW base to buy groceries.

12. On 27 April 2020, the Head, NAEW Personnel & Manpower Division wrote a disciplinary report addressed to the Appellant. He stated that the appellant was on 22 April 2020 witnessed entering NAB GK and then seen shopping at the NATEX Grocery Store. He observed that the appellant was not allowed to work or enter NAB GK until 29 April 2020 in accordance with the order of the medical adviser. Additionally, the sick note issued by the appellant's GP on 22 April instructed him not to leave his house. He added that since 26 February 2020, NAEW had implemented measures to prevent the spreading of the Coronavirus, and that the appellant was no doubt aware of these measures, as he was previously subject to quarantine twice. He concluded that by entering NAB GK for private reasons on 22 April 2020, the appellant violated NAEW&C

Force Staff Order No. 001 regarding the Coronavirus as well as Article 16.1 of the CPR. In his opinion the appellant deliberately disregarded the medical adviser's order to remain in quarantine and willingly accepted the severe risk he posed to the health of NATO staff members and the operational capability of the NAEW&C Force. He recommended dismissal, which he considered to be without alternative, balanced and proportionate. The appellant was given fifteen working days to submit comments.

13. On 28 April 2020, the NAEW&CF Force Commander wrote that the appellant was immediately suspended from his functions until a final decision was taken. Pending the outcome of the disciplinary procedure, his emoluments would be paid at the ratio of 50%, and tax-free privileges and access privileges to NAB Geilenkirchen would be suspended.

14. On 30 April 2020, the appellant was informed by his superior that he needed prior clearance before returning to work. The appellant called the medical service the same day to obtain this clearance.

15. When the appellant returned to work on 4 May 2020, he was summoned to meet Colonel B in the colonel's office. At that meeting, he was given the disciplinary report and the Force Commander's memorandum suspending him at half-pay during the disciplinary procedure.

16. Following the 4 May 2020 meeting, the appellant requested his GP to perform another Covid-19 antibody test. This again gave a negative result.

17. On 20 May 2020, the appellant submitted written comments on the disciplinary report. He attached the two negative Covid test results, dated 20 April 2020 and 6 May 2020, as well as a statement of his GP dated 10 May 2020 confirming the test results and stating that the GP's advice to the appellant not leave his house was due to the high density of pollen given the patient's asthma condition. The appellant also attached the first information message he received on 24 April 2020 from his Chief through the work WhatsApp group informing him of the regulations on base concerning Covid-19.

18. The appellant's comments noted that on the day he came to the base, *i.e.*, 22 April 2020, his GP had already concluded that he was not infected by the corona virus, and that he came there 15 days after his symptoms had started. His last asthma symptoms were on 18 April 2020, *i.e.*, more than 72 hours before 22 April 2020. He stated that the was not aware of the Covid regulations and that it was never his intention to pose a severe risk to the health of NATO staff members and the operational capability of the NAEW&C Force, since he knew he had asthma and not Covid-19.

19. On 8 June 2020 a Disciplinary Board (DB) was set up. It interviewed the appellant on 28 August 2020 and issued its report to the NAEW&C Force Commander on 8 October 2020. The report was not given to the appellant.

20. On 27 October 2020 the Commander decided to apply the disciplinary action of dismissal. To mitigate the social hardship of the termination of contract during the Covid pandemic, he authorized payment of full basic salary of 180 days in lieu of a regular notice period.

21. In his 27 October 2020 letter, the Commander concluded that the appellant had violated NAEW&C Force Staff Order No. 001 when he entered NAB GK for non-duty reasons contrary to the instruction of the medical adviser. He added that the appellant had the chance to familiarise himself with the relevant Staff Order and the related information messages, referring to his telephone conversation with Dr E, in which she personally informed the appellant that he was not supposed to come to the Component and that he needed to be cleared before returning. Based on that statement it was clear that the appellant was not allowed to come to NAB GK for any purpose prior to being cleared by the medical adviser (or hotline).

22. The Commander concluded that the appellant had replaced the medical adviser's instruction, judgment and advice with the advice of his GP in Belgium. In making this decision, the appellant had not acted transparently and had put his personal advantage above the common efforts of NAEW&C Force to minimise the potential of Coronavirus infections at the workplace. In the Commander's view, this constituted a serious breach of confidence, which, he considered, could not be remedied as to re-establish a trustful working environment, where mutual trust, integrity and compliance among all members of the team are required. He therefore considered the sanction of immediate dismissal appropriate.

23. On 26 November 2020, the appellant's counsel submitted a formal complaint against the dismissal decision of 27 October 2020. On 16 December 2020, the NAEW&CF Commander informed the appellant that he saw no reason to revise or revoke his earlier decision. This is the challenged decision.

24. On 29 January 2021 the appellant submitted the present appeal.

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

### *(i) The appellant's contentions*

25. The appellant introduces a number of procedural matters.

26. First, pursuant to Article 6.7.3 of Annex IX to the CPR the appellant requests the Tribunal to order production of the DB report dated 8 October 2020. He stresses that although communication of the DB report to an affected staff member is not foreseen in the CPR, his right of defense must be respected. The appellant argues that while the dismissal decision contains the reasons underlying such decision, it does not contain information on the DB's recommendation or the reasons for its recommendation, contrary to the requirements of Article 7.1 of Annex X to the CPR. The appellant contends that, without the DB report, he cannot assess whether the dismissal decision was adequately motivated.

27. The appellant maintains that the DB report is an essential part of the disciplinary proceedings, and that if there were adequate reasons not to share the entire report, he should at the very least be informed of the Board's full recommendation(s), the reasons underlying the recommendation(s), and the reasons why the entire report cannot be shared with him. The appellant refers to previous case-law of this Tribunal and of the International Labour Organization Administrative Tribunal (ILOAT) requiring staff

members to be provided with adequate information to exercise their rights of defense.

28. Second, the appellant requests an expedited procedure and an expedited hearing. The appellant informed the Tribunal that if he did not work at all in his function within a 12 months' period, his qualifications would lapse in accordance to the Log Wing Instruction applicable to his function. He notes that he was suspended on 4 May 2020 and the qualifications would thus be lost if he doesn't work anymore before that date in 2021. The appellant highlights that he studied intensively for four years before obtaining his qualification as Senior Technician (Fuselage) in 2015, and explains that to re-qualify for the position would require three specialization courses and 150 different practical steps. He emphasizes the burden this would represent should he be reinstated after that date.

29. Third, pursuant to Article 6.7.4 of Annex IX to the CPR, the appellant requests the Tribunal to call three witnesses. Two, Mr RT and Mr DH, are both military staff at NAEW&C who allegedly could testify that they had observed, knew of, or personally experienced several other situations when other staff had been on the base for non-essential reasons when this was prohibited, but without any disciplinary response. They could thus demonstrate discriminatory treatment and disproportionality towards the appellant. The appellant also requests that Mr AN, a NATO international civilian, be invited to testify on the character and reliability of the appellant as a colleague, and on the instructions given by the medical adviser by phone, which did not mention access to the base. The appellant does not object to have Dr E as a witness as requested by the respondent.

30. As regards the merits, the appellant submits two main arguments: 1. He did not violate the applicable Covid-19 regulations and medical instructions, and 2. Even had he violated them – *quod non* – imposing a disciplinary dismissal as a sanction is entirely disproportionate to the facts of the situation.

31. The appellant alleges that NAEW erred in its assessment leading to his dismissal. The appellant contends that the applicable Covid-19 regulations and the instructions of the medical adviser were not clear, specifically with regard to access to the Airbase and the need for prior clearance by the medical advisor.

32. The appellant further contends that the applicable Covid-19 regulations were not clearly communicated to staff. He alleges that upon his return from mission, and in the weeks thereafter, the limited instructions he was given about the applicable regulations was confusing. Staff Order No. 001 – the alleged violation of which justified his dismissal – was revised three times, resulting in four different versions between 6 March and 24 April 2020. The appellant submits that only the second revision, dated 9 April 2020, clearly instructed staff members to obtain instruction/clearance from the medical squadron before returning to work or entering the Airbase. He underlines that he was on sick leave and absent from work from 1 April until 1 May 2020, without access from home to his work mailbox or to NAEW's intranet. He therefore had access to the relevant revision only after the 22 April event for which he is being disciplined.

33. The appellant emphasizes that the regulations were approximately 30 pages long and could not be relayed by telephone or his home computer. Upon his return to work for two days beginning with a late shift on 30 March 2020, he was extremely busy

and could only quickly access an on-base computer to review all of the emails he had received since 2 March, the start of his mission to Konya. He underlines that Revision 1 of Staff Order No. 001, dated 18 March 2020, did not instruct staff members to obtain instruction/clearance. He adds that on his return to work on 30 March after having been in quarantine, he was also not cleared by the NAEW medical adviser. Moreover, He received Revision 3, dated 24 April 2020, through the work WhatsApp group on that same day, while the facts leading to his dismissal occurred before this.

34. The appellant contends that throughout March and April 2020, he was in contact with the NAEW medical advisers on multiple occasions, always at his own initiative. At no point, especially following his communication with Dr E on 20 April 2020 and the subsequent email instructing him to obtain a sick note from his GP, was he given any information on accessing the NAEW Airbase – Dr E's e-mail of 20 April only advises him not to return to work and doesn't mention access to the base - or on a requirement to obtain prior clearance before returning to work.

35. The appellant refers to his communication with his superior on 30 April 2020, as the first time he learned of the need to obtain a clearance before returning to work. He contends that it is the employer's responsibility to inform staff members of new rules coming into force, and that, failing this, a staff member cannot be held accountable for violating such rules. The appellant regrets that his superior did not communicate better with him and fears that such suboptimal communication might be due to a dispute that occurred between them a year and a half earlier.

36. The appellant insists that he followed all the indications given to him by the NAEW medical adviser at all times (he did not return to work, he consulted his GP to get sick notes, he called to report or to request advice). At no point, however, was he instructed by the medical adviser regarding access to the Airbase or told that he must obtain prior clearance before returning to work. He emphasizes that he went shopping at the NATEX on 22 April 2020, 14 days after he had experienced breathing difficulties on 8 April 2020, knowing that he was tested negative for Covid-19 and was diagnosed by his GP to suffer from asthma, not from Covid. He adds that he respected the social distancing rules. The appellant adds that he found it strange that the NAEW medical adviser instructed him not to return to work until 29 April 2020 because of breathing difficulties experienced on 8 April 2020. He notes that the general rule for quarantine in the different versions of the Staff Order No. 001 seems to be the observance of a quarantine for 14 days from the start of health complaints. The appellant concludes that since he experienced breathing difficulties on 8 April 2020, one could have expected the NAEW medical adviser to instruct him to respect a quarantine until 21 April 2020.

37. The appellant also highlights that he never intended to harm anyone and that the rules on quarantine (both in Germany and Belgium, and under the Staff Order applicable at the time) allowed departure from home when strictly necessary (*i.e.,* for grocery shopping in cases like his, a person living alone). He also underscores that the GP's sick note directing him not to leave home was due to a high pollen count detrimental to his asthma, so he was not in quarantine for Covid-19 symptoms. The appellant therefore rejects the respondent's contentions that he abused the "ambiguity of this situation," insisting that he simply did grocery shopping to acquire necessary supplies for his stay at home.

38. The appellant further contends that imposing a dismissal as a disciplinary sanction is entirely disproportionate. He finds it incomprehensible that his acts on 22 April 2020 – going grocery shopping at NATEX while respecting social distancing, doing so 14 days after experiencing breathing difficulties, following a negative PCR test and an asthma diagnosis by his GP – is considered to be a grave breach of trust. The appellant refers to previous case law of this Tribunal and of the ILOAT assessing the proportionality of disciplinary measures.

39. The appellant rejects the respondent's allegations that the dismissal was not based on a single shortcoming but a "systematic" disregard of the required transparency and integrity. He maintains that, on the contrary, he had been very diligent in taking initiatives to seek medical advice and taking the necessary Covid-19 tests. The appellant acknowledges that when working physically on an aircraft, the safety of the staff and the aircraft depend on the mutual trust and compliance of all team members, and annexes as evidence of his co-workers' continued trust in him a petition by a large number of his work colleagues.

40. Lastly, the appellant contends that he is treated differently from staff members in comparable situations who also had accessed the Airbase while in quarantine or not otherwise allowed there, without any consequences. The appellant bases these allegations on information received from other staff members, and considers this different treatment - that he has been subjected to a disciplinary procedure and sanctioned with the harshest penalty possible – to constitute unequal treatment and discrimination.

41. The appellant requests the Tribunal:

- to hold that the appeal is admissible;
- to hold that the appeal is well-founded;
- to hold that the dismissal decision and the challenged decision are unlawful and to annul the dismissal decision;
- to order the appellant to be reinstated in his function under his previous employment contract and conditions of employment, or in subsidiary order, if the Organization would validly invoke Article 6.9.3 of Annex IX to the CPR, to award compensation to the appellant equivalent to his remuneration until the age of 65;
- to the extent that the dismissal decision was applied to him, to order full compensation of the material damages (the loss of remuneration) that the disciplinary procedure has entailed;
- to award compensation for the moral damages suffered by the appellant, equivalent to six months of remuneration;
- to order the respondent to reimburse to the appellant the costs of retaining legal counsel as well as the travel and subsistence costs associated with his presence at the hearing(s), the amount of which is estimated at 15,000 Eur.

***(ii) The respondent's contentions***

42. The respondent has no observations regarding admissibility of the appeal.

43. Concerning the DB report, the respondent submits that the appellant's right of defense does not entitle him to the full text of the report. The respondent refers to Articles 5 and 7 of Annex X to the CPR, which outline in detail the procedures to be followed and

the specific documents a NATO body must disclose in order to enable a staff member to exercise his or her right of defense. It notes that access to the DB report is not mentioned in the CPR, and that not every internal step and deliberation of the decision-making process must be disclosed. It adds that Heads of NATO Bodies (HONB) are not bound by the considerations and recommendations of the DB, but take disciplinary decisions within their own authority.

44. The respondent underlines that the DB was properly composed in accordance with Annex X to the CPR, and that the appellant provided his comments on the April disciplinary report and was extensively heard. The respondent recalls that on 8 October 2020 the DB submitted its report to the Force Commander who took a decision on 27 October 2020 following its unanimous recommendations.

45. The respondent further underlines that the Force Commander provided the grounds of the dismissal in in detail in his disciplinary decision of 27 October 2020 and his decision of 16 December 2020 rejecting the appellant's complaint. It notes that the HONB followed the recommendation of the DB not just by reference, but fully displayed the underlying motivation of his decision in accordance with Art. 7.1 of Annex X to the CPR, adding that the recommendation of the DB was cited in the respondent's answer. It therefore contends that under these circumstances, the appellant had all information required for exercising his defense.

46. Concerning the appellant's request to call witnesses, the respondent doubts their relevance, as their potential testimony does not relate to the appellant's situation, they are not part of his disciplinary process, and what may or may not have been decided or discussed in different cases involving Airbase access cannot alter interpretation and application of the underlying rules. However, the respondent requests that Dr E, the acting medical adviser in the period the appellant was on sick leave, be invited to testify about the content of her telephone call with him. In its rejoinder respondent provided a copy of her 28 April 2020 witness statement in this regard, which was also part of the DB's file.

47. On the merits of the appeal, the respondent affirms that the appellant's dismissal is based on a violation of his duties of service under Article 12.1.1 of the CPR, whereby staff members "are answerable to the Head of the NATO body for the performance of [their] functions and for compliance with all applicable NATO rules and regulations". The respondent recalls that during the COVID-19 pandemic, the appellant entered NATO Airbase for non-duty reasons and was seen shopping at the NATEX grocery store on 22 April 2020. This, the respondent maintains, was against the acting medical adviser's instruction, by telephone on 20 April 2020, not to come to work and to the E-3A Component until 29 April 2020, advice said to be based on the appellant's specific medical situation as described by the appellant over the respondent's 'Corona Hotline'. The respondent explains that the acting medical advisor's instruction was taken in implementation of the version of NAEW&C Force Staff Order No. 001 in effect at that time, the purpose of which was to protect the operational readiness of HQ NAEW&CF GK and the health of its workforce against the effects of the pandemic.

48. The respondent disputes that the appellant was not and could not be aware of the Airbase access restrictions and clearance procedures. It explains that at the beginning of the pandemic, it had to act swiftly to implement the procedures contained in of Staff

Order No. 001, which had to be kept updated given the dynamic development of the host nation rules and the necessary refinement of procedures to protect the staff at the Airbase.

49. It contends that the appellant's argument that he did not know and could not have known the Staff Orders in effect on 22 April 2020, due to his inability to access duty email from 1 April 2020 to 1 May 2020, does not hold. It explains that when opening the intranet, the most current COVID-19 information is immediately accessible from the start page. The respondent further urges that, as a resident in the district of Heinsberg - and even more so in the town of Gangelt, the place of appellant's residence, and one of the first hotspots in Germany at that time - the appellant must have been aware of the restrictions imposed and the applicable COVID rules. The respondent adds that the appellant could have consulted colleagues, his line management, or the respondent's COVID Hotline, and that his ignorance of the applicable COVID regulations does not absolve him from being bound by them.

50. The respondent submits that by entering NAB GK on 22 April 2020 without clearance from the medical squadron/medical adviser, he violated the instruction given by the acting medical adviser, which was based on Staff Order No. 001-Revision 2, which clearly instructed staff members with Covid-19 like symptoms to self-isolate, to seek medical advice and to obtain permission to enter the base and/or return to work. Such clearance was to be obtained from the GK medical squadron.

51. The respondent argues that the appellant was well aware of the procedure in place at NAEW and contends that there was no basis for his personal interpretation of the medical adviser's statement of 20 April 2020, *i.e.,* permitting him to access the Airbase for non-duty related affairs while he was released from performing duties.

52. The respondent does not dispute that the appellant is free to select a GP in Belgium even if he resides in Germany, but submits that the appellant improperly used the ambiguity of this situation and of his GP's sick notes to his own advantage. It contends that the appellant did not fully disclose his case and was not transparent thereafter. In particular, the respondent maintains that in the telephone conversation on 20 April 2020, the appellant and the acting medical adviser discussed COVID protection measures he was to take until 29 April, regardless of his negative test results. Moreover, the appellant, after his 22 April visit with his GP, did not inform the medical adviser that his sickness was not Covid-related. While the sick note he was given by his GP on that day stated that it was issued "in connection with the COVID-19 pandemic" and contained a check in a box captioned "leaving home: prohibited," the appellant decided to enter the Airbase two hours later. The respondent notes that only later, on 10 May 2020, his GP wrote a letter re-interpreting his 22 April 2020 sick note, explaining that it was issued on account of the appellant's asthma and that he was allowed to leave his home for essential matters.

53. The respondent contends that the appellant's claim that the dismissal was not proportionate misses the crucial point that multiple elements of his behavior have led to an unrepairable loss of confidence in him. The respondent argues that the circumstances of the appellant's behavior indicate a grave failure to act with the transparency and integrity required in his role: he deliberately disregarded Dr. E's 20 April 2020 instruction when he accessed the Airbase on 22 April 2020, even though he held a sick note of his

GP stating that he was not to leave his home. He disregarded this, because he thought that he was not a COVID case and that the medical instruction was not binding on him. At the same time the appellant was ignorant of the German COVID protection measures in effect at his residence and those at the Airbase. He put his own assessment, or his interpretation of the GP's assessment, over that of the acting medical adviser. In doing so, he sought his own advantage and neglected the common effort of complying with precautionary measures for the protection of others during the pandemic.

54. The respondent adds that the Commander's loss of confidence in the appellant is rooted in the requirements of his specific post. It explains that the appellant worked in the Logistics Wing as a Fuselage Technician, working on E-3A aircraft. In this environment, the safety of the other staff and of the aircraft depend on the mutual trust and compliance of all team members. Maintenance staff, who work in teams and have to verify each other's actions, must work transparently, so that the others know what they have done. Whenever a member of the maintenance staff is not sure about a step of their work, flight safety requires that they communicate and seek reassurance. The respondent contends that the appellant, instead of familiarizing himself with the situation, seeking re-assurance, and aligning himself with the common effort, instead interpreted the situation to his own advantage.

55. The respondent submits that the appellant was not dismissed because of a single shortcoming, but his systematic disregard of the required transparency and integrity. During the dynamic developments of the COVID pandemic, he did not take his share of responsibility and did not pro-actively partake in the respondent's precautionary and safety oriented team effort. It also refers to the appellant's statement at the DB, in which it finds no display of understanding that he could have acted more transparently and with more integrity. The respondent therefore concludes that the appellant's behavior constitutes a grave breach of trust justifying his dismissal.

56. Lastly, concerning the violation of equal treatment and non-discrimination the respondent argues that the appellant's case cannot be compared with situations involving other staff members. It denies the relevance of any events involving military staff (who are not subject to its disciplinary authority), or entry exceptions for dependents on holidays. Any such situations are in its view not equal to the appellant's, as he was subject to quarantine and did not follow the given directions.

57. The respondent requests the Tribunal to dismiss the appeal in its entirety.

## D. Considerations and conclusions

*a. Admissibility*

58. The respondent has no observations regarding the admissibility of the appeal, and the Tribunal has no observations *sua sponte*. The appeal is admissible.

*b. Procedural matters*

*(i) Expedited procedure*

59. The appellant, in accordance with Article 6.6.4 of Annex IX to the Civilian Personnel Regulations (CPR), requested an expedited hearing in view of the fact that he would on 4 May 2021 loose his professional qualifications (*cf.* paragraph 28 *supra*). In its comments dated 11 February 2020 the respondent observed that losing professional qualifications does not constitute irreparable harm and that the risks of obtaining requalification training would lie with the respondent. On 15 February 2021 the Tribunal issued Order AT(PRE-O)(2021)0002 granting the request for an expedited hearing and fixing the time-limits for the respondent's answer, the appellant's reply and the respondent's rejoinder.

*(ii) Production of documents*

60. The appellant requests production of the DB report dated 8 October 2020, which he considers essential for the defense of his rights. The respondent submits that the appellant's right of defense does not entitle him to access to the full text of the DB's report. The respondent refers to Annex X to the CPR, which outlines the disciplinary procedure and does not require the NATO body to disclose the DB report to a staff member.

61. The Tribunal indeed held in Case No. 2019/1286 that such communication is not foreseen in the CPR, but it also noted that the report was in that case communicated during the proceedings. The Tribunal further notes that DB reports frequently are provided to an affected staff member and play in important role in the Tribunal's understanding of a situation involving contested disciplinary actions. In the more recent Cases Nos. 2020/1289 and 2020/1301, the DB report was communicated to the appellant for his comments before the HONB took a disciplinary decision. In case No. 2017/1104 the DB report was provided to appellant once the appeal was lodged. In Case No. 2017/1105 the appellant had received the DB report and attached it to his appeal.

62. In case No. 2017/1104 the Tribunal held:

> International administrative law requires that an international organization provide reasons for actions adverse to a staff member sufficient to allow the staff member to understand the rationale or justification for the adverse action and, as appropriate, to contest it.

63. As the Tribunal's conclusions in the present case show, the appellant sufficiently understood the reasons behind the disciplinary sanction of his dismissal and was adequately able to defend his rights. One may therefore conclude that the non-possession of the DB report was not crucial.

64. The Tribunal notes, however, that international administrative tribunals, and this Tribunal is no exception, heavily rely on the finding of facts by peer bodies, such as complaints committees and disciplinary boards. It cannot be assumed that it was the NATO legislator's intention that the Tribunal is expected to do its own fact-finding in

disciplinary cases, forensic or otherwise. Not providing a DB report without providing adequate reasons may deprive a tribunal of valuable information. It may furthermore give rise to suspicions that certain elements in a report should not be brought to the attention of a tribunal, or an appellant.

65. During the oral hearing the respondent offered to provide the DB report if the Tribunal so wished. This is very late in the proceedings and accepting it would have compromised the expedited procedure. Moreover, the Tribunal is of the view that it has in this particular case sufficient elements at its disposal to make an adequate assessment in law.

*(iii) Hearing of witnesses*

66. The appellant requests the Tribunal to hear three witnesses (*cf.* paragraph 29 *supra*) clearly indicating the matters to which these witnesses could testify. The respondent opposed hearing these witnesses.

67. The respondent proposed that the Tribunal hear Dr E as a witness, to which the appellant was not opposed. In its rejoinder the respondent, however, produced her witness statement reflecting an interview that took place on 28 April 2020 and that she signed on 11 May 2020.

68. The Tribunal has taken note of the elements that could have been addressed by the witnesses proposed by the parties, and the respondent's observations opposing the appellant's requests. It concludes that hearing the witnesses requested by the parties would not substantially alter the case file and that it has sufficient information to make a proper assessment of the underlying facts. Moreover, both parties had the opportunity to submit written witness statements, as the appellant did with some witnesses.

*c. Merits*

69. The appellant contends that he did not violate the applicable Covid-19 regulations and medical instructions. The respondent submits that he did. The Tribunal underlines that it adjudicates on the basis of the facts and the evidence before it, recalling that the parties have the responsibility to bring forward convincing evidence in support of their contentions.

70. The appellant submits, first of all, that the regulations in force were not clear and not clearly communicated to him. It is to be observed that during April and May 2020, everybody had to cope with the new situation of a rapidly expanding pandemic. Scientific data and scientific recommendations were rapidly evolving, as were the measures taken by central, regional and local authorities and by employers. Many of these measures differed, sometimes in significant detail, by country and by region. It was, and is, important to be as clear as possible in framing and communicating the regulations.

71. It is for this reason that Staff Order No. 001 (Order) and all its revisions explicitly tasked management to ensure that all personnel within their area of responsibility are made aware of and comply with the information in the Order. This responsibility goes well beyond merely publishing of information on the intranet accessible only to personnel on the Airbase with access to a limited number of computers. The appellant submits that

the first time he received a copy of the Order was on 24 April 2020, when his Chief forwarded to the whole team, via the WhatsApp group, the third revision of the Order. He added this message to the case file. This was two days after the incident of 22 April 2020. The appellant contends he did not receive the earlier versions of the Order, and the respondent has not provided evidence to the contrary.

72. The Commander, in his 27 October 2020 decision on disciplinary action, argues that the appellant "had a chance to familiarize [him]self with the Order and related information messages." The respondent repeats this in the pleadings, concluding that the appellant "must have been aware" of the Order and other rules in force, including local rules and that his claimed ignorance does not absolve him from being bound by them.

73. This argument must, moreover, be considered in the context of the specific facts of this case. The initial Staff Order No. 001 was issued on 6 March 2020, *i.e.*, when the appellant was on mission in Turkey. On their return on 12 March 2020, while still on the airplane or on a bus, he and his colleagues received a briefing on the different rules being applied to civilian staff and to military staff depending on their nationalities. The returnees were instructed to go home, to return to work on 16 March 2020, and to consult their respective GPs. They were not given a copy or details of the initial Order. The GP of the appellant advised him to stay home until 29 March and gave him a corresponding sick note, as he duly informed his supervisor and the NAEW medical unit.

74. On 18 March 2020 a first revision was issued of Staff Order No. 001, a second one on 9 April 2020, and a third on 24 April 2020. All three were published on the intranet. On each of these dates, the appellant was absent from work on certified sick leave. It is to be underlined in this respect that NAEW did not provide the appellant with a computer and that he cannot access NAEW's intranet from home with his personal computer. When at work he and his colleagues on the team share a small number of computers where they can, when the workload allows, consult their e-mails and the intranet. During the period under consideration, the appellant was only at his place of work for two days (on 30 and 31 March 2020, *i.e.*, four weeks after he left on mission).

75. The record also shows that the appellant scrupulously followed, apart from the disputed circumstances on 22 April 2020, the guidance given to him by NAEW's medical advisor or his own GP. He repeatedly asked for information and informed the Medical Service of his negative Covid test results. It may be that he could have done more in this respect, but the Tribunal considers that whatever shortcomings there may have been must be viewed in the context of the respondent's failure to timely, sufficiently and clearly advise the appellant of the regulatory framework around Covid-19, given that the appellant was on mission and then on sick leave and without access to intranet during all but a few hours during the entire period from 2 March until 4 May. This shortcoming weighs, on balance, heavier than any possible shortcomings on the part of the appellant. The Tribunal concludes that the appellant was not adequately and timely informed by the respondent on the details of the Covid regulations in force.

76. A very important element in this regard is the telephone conversations between the appellant and NAEW Medical Services on 17 and 20 April 2020. On 17 April the appellant learned from his GP that his Covid test was negative, that he was suffering from asthma and not Covid symptoms, and that he could go back to work. That same

day he phoned the Medical Service informing them of this very relevant information. The person answering the phone indicated that the appellant should contact the medical adviser upon her return on 20 April 2020. The appellant's recollections of this 20 April 2020 talk differs from that recorded in the medial adviser's short witness statement, in particular on two essential points: 1. Did they discuss that the appellant was tested negative and not suffering from Covid, but from asthma; and 2. Was he instructed not to come to NAB GK at all, or only not to come to work?

77. The Tribunal has before it Dr E's short witness statement prepared for her signature after she was interviewed on 28 April 2020. The respondent submitted this document late in the proceedings, *i.e.*, in its rejoinder, thus depriving the appellant of the possibility to react to it in the written procedure. The Tribunal also has before it the record of the appellant's interview by the disciplinary board on 28 August 2020, which he submitted to the file, as well as the appellant's and respondent's further submissions in the case file and arguments during the hearing.

78. The witness interview with Dr E on 28 April 2020 was conducted by Mr A, Head, Civilian Personnel Branch, who was subsequently appointed as a member of the disciplinary board. The witness statement records that Mr A consulted the appellant's supervisor the previous week who informed him that Dr E had been contacted by the appellant on 17 April 2020. The file does not reveal how the appellant's supervisor learned of this information. Dr E said that she had spoken with the appellant; the wording of her statement implies that she spoke with him on 17 April, although the actual date was 20 April. She stated that she had advised the appellant to consult his GP and to contact the medical squadron with the result. "And the result was that he was quarantined, for fourteen days." She added that she received "the result" (apparently the negative result of the appellant's recent Covid test) the same day or the following.

79. Dr E does not mention that the Medical Service knew since 17 April 2020 that the appellant was tested negative and was suffering from asthma and not Covid symptoms. It is recalled that also the 27 April 2020 disciplinary report stipulates that the appellant was tested negative on 16 April 2020. In other words, NAEW was aware of the negative test.

80. The appellant argues that he clearly mentioned to Medical Services on both 17 and on 20 April 2020 that he was tested negative and that his GP had concluded that he was not suffering from Covid symptoms but from asthma. These are essential elements in the present case. The respondent asserts that the issue of asthma symptoms was not discussed. The witness statement of Dr E, consisting of a few short questions aimed at confirming a narrow point, does not clarify this important element.

81. The appellant saw his GP on 22 April 2020, and was given a sick note until 1 May that the GP subsequently confirmed in writing related to his asthma symptoms. The appellant immediately sent this note to the Medical Services. The respondent disputes the GP's written account, which it characterizes as a "reinterpretation," but the Tribunal finds his explanation to be credible. The GP issued a brief and largely uninformative sick note on 22 April with wording applicable to Covid-related concerns, apparently prepared by filling in the blanks of a computerized form. Notwithstanding its *pro forma* wording, the tribunal is not persuaded that this note is evidence of Covid symptoms or constitutes a medical instruction to quarantine, as the respondent contends. The GP issuing a *pro*

*forma* note knew that the appellant tested negative the week before and that his patient was suffering from asthma.

82. It is recalled (*cf.* paragraph 10 *supra*) that on 20 April 2020 the appellant spoke on the telephone with Dr E. At his request, she confirmed by e-mail later that day that he was "not supposed to come to work until 14 days after your symptoms started are over (29.04.2020 in your case)." Dr E erred here in her calculations, as the appellant's symptoms started on 8 April and not on 15 April, which was the date he was tested. The appellant submits that he understood her e-mail to mean that he should not come to the component in order to resume work, but would be allowed to go to NAB GK, for example for administrative matters, including visiting the Medical Services, or to shop at the NATEX grocery store. He indeed did the latter on 22 April on his way home from visiting his GP.

83. On 28 April 2020, i.e., after the 22 April incident, Dr E gave, in her witness statement, a recollection of the 20 April conversation that differs in a significant respect from the e-mail she sent that day. She is recorded in the statement as saying "I told him that he could not come to the component and that he should stay at home." This may have indeed been her recollection, but it is not what she wrote on 20 April. The witness statement continues that she considered him to be in quarantine and that she never asked him to physically come back to the component. The respondent emphasizes her statement, urging that "[t[his context implies that the Respondent as his employer did not only want the Appellant to stay away from his individual workplace, but wanted him not to enter the compound ... for whatever activity until 29 April 2020."

84. The Tribunal cannot but conclude that the way this matter was handled by the respondent was not adequate. As noted above (*cf.* paragraph 75 *supra*), the appellant was not adequately and timely informed about the Covid regulations applicable at NAEW. The way the appellant, and some of his colleagues, were briefed and guided upon their return from mission on 12 March 2020 lacked clarity and precision. On 8 April 2020 the appellant developed symptoms, which, following a negative Covid test, were diagnosed as asthma, and he so informed NAEW. NAEW noted the information but apparently continued to treat the case as a Covid case.

85. Several statements in the case file, and in particular, the different recollections of what was said in Dr E's 20 April phone conversation with the appellant, are in conflict. It is a fact of life, but not uncommon, that parties have different recollections of their conversations. However, as the Tribunal recalled above, it can only base its assessment on facts supported by the weight of the evidence. Here, the Tribunal finds the weight of the evidence to support the appellant's contention that he did not know that he was prohibited from accessing the base, and that it was acceptable for him to go to the store, given his recent negative Covid test and his doctor's affirmation that same day that he was suffering from asthma, not Covid.

86. The respondent has in the proceedings countered the appellant's contentions largely on the basis of its understanding of what Dr. E told the appellant in the 20 April telephone call, which it characterized at the hearing as the mechanism by which the Order was implemented with respect to the appellant. These arguments were buttressed by a series of inferences and assumptions regarding the appellant's motives and character. These inferences as to what the appellant knew or should have known and

the nature of his character and motives essentially rest upon circumstantial evidence, as the respondent acknowledged at the hearing. Inferences and hypotheses do not outweigh the documentary and testimonial evidence. The appellant may well have had a lapse of judgment on 22 April 2020, but the submission that he knowingly, cynically and callously violated the regulations and instructions is not supported by the evidence. The respondent is therefore not justified to have the appellant pay for it with the loss of his job.

87. As a consequence, the Tribunal holds that the decision of 27 October 2020 dismissing the appellant must be annulled and that he must immediately be reinstated in his functions with effect from 27 October 2020.

88. A judicial review of a disciplinary sanction must take account of the process leading up to that decision. The disciplinary process here appears to have been initiated rapidly, and in order to achieve an ordained result. This was perhaps understandable in the circumstances of the spring of 2020. However, the process then continued for six months until the end of October, allowing time to collect and analyze the evidence in a more deliberate manner. The report of the Disciplinary Board might have provided some clarity in this regard, but it was not part of the record of the case.

89. The disciplinary procedure started with the 27 April 2020 disciplinary report completed by the Head, Personnel & Manpower Division. This report contains several statements that seem consistent with the appellant's version of events and inconsistent with the respondent's recurring claim that the appellant did not act with candor and transparency: "On 16 April 2020, Mr. G was tested negative for the Coronavirus. On 17 April 2020, he contacted the HQ NAEW&CF GK Medical Advisor. Based on this conversation, the Medical Advisor ordered Mr. G to quarantine until 29 April 2020 and not to return to work nor to enter the NATO Airbase Geilenkirchen (NAB GK). Furthermore, the Medical Advisor instructed Mr. G to contact his General Practitioner (GP)." It added that on 22 April 2020 the appellant submitted via e-mail a sick note from his GP covering the period 20 April until 1 May 2020.

90. The respondent has submitted a witness statement of the medical adviser (*cf.* paragraph 67 *supra*) of 28 April 2020, *i.e.*, one day after the disciplinary letter was signed. The disciplinary report itself refers in this regard to other input provided by the Medical Advisor that is not of record in this appeal. It was confirmed at the oral hearing that the appellant was not contacted at all between 22 and 27 April 2020 by the respondent for preliminary explanations.

91. On 28 April 2020, the NAEW&C Force Commander suspended the appellant from his functions with immediate effect. Pending the outcome of the disciplinary procedure his emoluments were reduced to 50% and his tax-free privilege and access privileges to NAB GK were suspended.

92. Article 60.2 CPR provides:

> 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.

93. The Tribunal notes that the HONB's 28 April 2020 decision did not address how the appellant's continuance in office during the investigation might prejudice the NAEW; his negative COVID test presumably should have allayed some concerns in this regard. Second, and although the HONB has discretion to determine whether a staff member is deprived of emoluments in whole or in part pending the results of the enquiry, he must properly motivate such a decision, particularly when emoluments are reduced to the detriment of the staff member. Absent appropriate justification, such a decision is arbitrary and constitutes an implied sanction imposed prior to conclusion of the disciplinary procedure. Third, Article 60.2 CPR does not provide for the suspension of privileges, so this part of HONB's decision contributes to the appearance of an arbitrary sanction.

94. The appellant was not immediately informed of the 27 April 2020 disciplinary report nor of the 28 April 2020 suspension decision. Only when he had returned to work on 4 May 2020 was he called in and handed the Disciplinary Report and his temporary suspension. The Tribunal considers this to be at variance with the principles of good administration and of the duty of care. In the circumstances, it would have been incumbent upon HR to call the appellant and inform him of the decisions.

95. Disciplinary proceedings must be thorough and careful, but also expeditious. It took the respondent a month and a half to constitute, on 8 June 2020, a disciplinary board. This disciplinary board heard the appellant only on 28 August 2020. It submitted its report on 8 October 2020 and the Commander took his disciplinary decision on 27 October 2020. The respondent has not provided convincing justifications for these long delays. The appellant was knowingly left in uncertainty with reduced pay for six months. The Tribunal considers this to be in violation of the principles of good administration and the duty of care. Although the appellant did not challenge the suspension decision proper in due time – he did not have counsel yet -, the Tribunal concludes that the appellant has suffered moral damages for which he must be compensated. The Tribunal considers the payment of three months' emoluments, *i.e.*, basic salary and allowances, an adequate compensation, together with his prompt restoration to his employment.

## E. Costs

89. Article 6.8.2 of Annex IX 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 [...].

90. The appeal being successful, appellant is entitled to reimbursement of justified expenses incurred.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 27 October 2020 dismissing the appellant is annulled.
- The appellant shall be fully reintegrated in his functions, with effect from 27 October 2020, on the day following notification of the present judgment.
- The appellant shall be compensated with an amount equivalent to three months' emoluments for non-material damages.
- The respondent shall reimburse the appellant's justified expenses and the costs of retaining counsel up to a maximum of €4,000.

Done in Brussels, on 26 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 May 2021 AT-J(2021)0007

**Judgment**

**Case No. 2020/1307**

**EM**

**Appellant**

***v.***

**Headquarters Allied Joint Force Command Brunssum**

**Respondent**

Brussels, 26 April 2021

Original: English

*Keywords: determining damages; material damages; non-material damages; res judicata; punitive damages.*

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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 Vassilopoulos having regard to the written procedure and further to the hearing on 15 April 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 2 July 2020, and registered on 3 July 2020, as Case No. 2020/1307, by Mr EM against the Headquarters Allied Joint Force Command Brunssum (JFCBS). The appellant appeals the respondent's decision to award €15,000 in settlement of his claims arising from an earlier judgment by the Tribunal.

2. The respondent's answer, dated 28 September 2020, was registered on 14 October 2020. The appellant's' reply, dated 16 November 2020 was registered on 23 November 2020. The respondent's rejoinder, dated 12 January 2021, was registered on 21 January 2021.

3. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 15 April 2021 utilizing facilities provided by NATO Headquarters. It heard arguments by representatives of the appellant and the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual and Legal background of the case

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

5. This is the appellant's third appeal to the Tribunal stemming from the respondent's January 2018 decision not to appoint him to a position following a selection process during which he was initially informed that he would be appointed. The Tribunal upheld his first appeal, annulled the respondent's decision not to appoint him, denied his claim for material damages, and awarded non-material damages of €10,000 and reimbursement of up to €4,000 of legal expenses. Judgment of 15 November 2018 in Case No. 2018/1267 (the first judgment).

6. The respondent then repeated the selection process and again determined not to appoint the appellant to the position. The appellant appealed a second time, initially seeking non-material damages of €20,000; his claim was amended at the hearing to request damages of €30,000 and punitive damages of €150,000. The Tribunal upheld this second appeal, annulling the decision not to appoint him, denying his claims for punitive damages and other damages, and awarding non-material damages of €20,000 and up to €4,000 of the expenses of retaining counsel. Judgment of 29 November 2019 in Case No. 2020/1282 (the second judgment).

7. Paragraph 47 of the second judgment read in relevant part: "The Tribunal requires that respondent avoid a repetition of the judicial controversy and calls upon both parties to reach a solution by themselves by means of a mutual agreement."

8. By letter of 4 December 2019 to JFCBS's Commander, the appellant's counsels requested that he be offered the post at issue (which by that time had been filled with another person) and pay the amounts awarded by the Tribunal in the second judgment as non-material damages and for legal expenses. The counsels' letter continued that "[w]e are at your disposal should you wish to discuss all possible avenues in order to execute the judgment."

9. By letter of 7 January 2021, the respondent's Chief Legal Advisor replied, stating *inter alia*:

> As implied by the Tribunal, I have invited you to a meeting at JFCBS Headquarters and requested you to provide us with possible dates to convene. In your most recent letter, you have asked us to provide our proposal in advance. I can inform you that a negotiated settlement of the present case could, in our opinion, be reached in financial terms and within the proportions of compensation previously awarded by the Tribunal.

10. The respondent's counsels replied by letter of 28 January 2021, indicating that discussions could proceed by correspondence without a physical meeting. They requested that the appellant be awarded "the equivalent of a loss of job indemnity," plus six months' salary, (which they calculated to total €231,504), together with unspecified additional amounts reflecting the mental toll on the appellant due to his inability to change his working environment; compensation for his diminished future job prospects said to result from the respondent's actions; removal costs; and his wife's loss of income due to relocation amounting to a further €30,500.

11. By letter of 11 February 2021, the respondent's Chief Legal Advisor expressed regret at the appellant's concern that the appeals procedure and related communications may have jeopardized his future career prospects and offered to conclude a non-disclosure agreement. His letter also set out the respondent's view of the legal parameters for a negotiated settlement, observing that the first and second judgements "did not compensate material damage due to any job loss or loss of advancement, since the refusal of hiring is not equal to a job loss" and that the appellant was currently employed by another NATO body "at the same grade and step as the position at JFCBS…".

12. The Chief Legal Advisor contended that compensation for non-material damages could not be determined on the same basis as material damages, and referred to the Tribunal's practice in the first and second judgements, in which it awarded, respectively, €10,000 and €20,000 for non-material damages. In this framework, the respondent offered a further €15,000 as a final financial settlement, which it regarded as "in line with the Tribunal's award practice."

13. By letter of 16 March 2020, the appellant by letter from his counsels rejected this proposal as "far from compensating the prejudice suffered" by the appellant. Instead, the settlement should reflect injury related to the appellant's wife's decision to leave her prior job (€30,500); injury related to the appellant's being "forced to remain" in his position with another NATO body which he "was advised to quit…on several occasions for medical reasons." In this regard, the letter continues that the appellant "does not know whether he will be able to work there until his retirement," observing that "[a] retirement at 55 vs 65 would cause a cumulative loss of income of 1 million euro." The letter renewed the

appellant's contention that the respondent improperly informed his current employer of the reasons for its decision not to engage him and otherwise failed to protect his privacy, suggesting that this was why he had not been properly considered for other posts for which he applied.

14. By letter of 14 April 2020 to the Tribunal, the respondent's Chief Legal Advisor informed the Tribunal that settlement negotiations between the parties "did not lead to success", and requested the Tribunal "to determine the amount of compensation to be paid to the appellant."

15. The Tribunal's Registrar responded by email on 16 April 2020 that the Tribunal could only determine the amount of compensation in the context of an ongoing proceeding, and could not do so after a proceeding was concluded.

16. By letter of 6 May 2020 to the appellant and his counsels, the respondent's acting Chief of Staff stated that the negotiations to determine a final settlement "did not lead to success" and awarded €15,000 as "the final settlement of the outstanding dispute." The letter continued that should the appellant wish to appeal this decision, "I hereby express my consent to submit the issue in dispute directly to the Administrative Tribunal for final resolution in order to determine the amount to be awarded by Appellant that is appropriate."

17. At the hearing, counsel for the respondent confirmed that the 6 May 2020 letter remains in effect.

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

### *(i) The appellant's contentions*

18. As to admissibility of the appeal, the appellant considers that it is a direct appeal of the respondent's 5 May 2020 decision which included the respondent's consent to an appeal to the Tribunal.

*Violation of Article 6.9.2 of Annex IX of the NATO Civilian Personnel Regulations (CPR)*

19. The appellant first contends that the respondent violated Article 6.9.2 of Annex IX of the CPR, which provides that:

> [W[here the Head of NATO body concerned or, as regards those bodies to which the Paris Protocol applies, the Supreme Commander concerned, affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal shall instead determine the amount of compensation to be paid to the appellant for the injury sustained.

20. The appellant maintains that, as the respondent was not prepared to carry out the Tribunal's direction to employ him, it was mandatory to follow the procedure set out in Article 6.9.2 of Annex IX, including submission of the requisite affirmation by the Supreme Allied Commander Europe (SACEUR). Not having done so, and not having

provided the requisite affirmation by SACEUR, the respondent violated Article 6.9.2 of Annex IX.

*Violation of Article 6.8.4 of Annex IX of the CPR and the principle of res judicata*

21. The appellant contends that the respondent failed to carry out the second judgment by failing to observe the Tribunal's admonition in the judgment to "avoid a repetition of the judicial controversy," and calling "upon both parties to reach a solution by themselves by means of mutual agreement."

22. In the appellant's view, the second judgment offered two options: either offering "the disputed position in JFCBS to the appellant" or "offering him an adequate compensation." As the respondent did not offer the position, it was obligated to "offer a fair compensation," but failed to do so.

23. The appellant contends that the respondent's failure to offer a fair compensation "seems to be in breach" of both Article 6.8.4 of Annex IX of the CPR, providing that the Tribunal's judgments are final, and the related provision in Rule 27.7 of the Tribunal's Rules of Procedure stating that judgments are "final and binding." For the appellant, the Tribunal's second judgment required the respondent to offer a fair compensation. Its failure to do so violated both of these provisions, as well as the legal principle of *res judicata.*

*Violation of the Duty of Care*

24. The appellant next contends that the 5 May 2020 decision to offer €15,000 violated the respondent's duty of care. The appeal notes in this regard that three reminders were required before the respondent paid the amount awarded in the second judgment for legal costs; that the respondent did not consider the impact of its failure to offer the position to the appellant in light of his compromised health resulting from his continued employment by another NATO body; and that it failed to make reciprocal concessions after the appellant dropped his request for the equivalent of a loss of job indemnity.

25. The appellant argues in this regard "in analogy with Article 6.8.3 of the NCPR" that the respondent intended to delay resolution of the case or 'intended abusive use of the appeals procedure." The appellant contrasts with this alleged misconduct by the respondent his own decision "as a sign of good will" to forego his claim for amounts equal to a loss of job indemnity and six additional months of salary, valued at €231,504.

*Payment of fair compensation*

26. The appellant maintains that in determining the appropriate compensation, the Tribunal should consider that not being recruited by the respondent made it necessary for him to remain in the employ of another NATO body, a circumstance previously assessed as deleterious to his health. In this regard, "given this fragile position, the Appellant does not know whether he will be able to work there until his retirement and might therefore leave before pension age." The appellant repeats in this regard the observation in his counsels' 16 March 2020 letter that retiring at 55 rather than 65 "would cause a cumulated loss of income of 1 million euros."

27. The appellant adds that, as a result of the respondent's actions, his "reputation has been highly tarnished preventing him from being recruited to a suitable position elsewhere," pointing to his unsuccessful efforts to obtain other positions. The appellant emphasizes in this regard a NATO UNCLASSIFIED letter sent by the respondent to the appellant's current employer, which he contends illegally informed that agency of the reasons for the failed recruitment. The appellant further urges that this letter "could be accessible to anyone" and that "copies of this letter could be stored anywhere across NATO.

28. Finally, the appellant urges that an award of compensation should reflect lost income of €30,500 incurred by his wife, who resigned from a position in anticipation of a move to the Netherlands, as well as unquantified removal costs.

29. The appellant requests the Tribunal to:
-annul the JFCBS Commander's decision of 6 May 2020 refusing to implement the Tribunal's judgement in case 2019/1282 insofar as it did not offer him the disputed position, and, on a subsidiary basis, to order the respondent pay €100,000 Euros as compensation for refusing to implement that judgment;
- award compensation for moral prejudice calculated *ex aequo et bono* at €10,000;
- conduct the procedure on an expedited basis; and
- "reimburse all the legal costs incurred, travel and subsistence costs and fees of the retained legal counsels."

***(ii) The respondent's contentions***

30. The respondent does not contest admissibility of the appeal or the Tribunal's jurisdiction.

31. The respondent denies the merits of the appeal. With respect to the appellant's claim involving Article 6.9.2 of Annex IX, the respondent contends that this provision describes a process, which it sought to invoke after settlement negotiations were unsuccessful. It was then informed by the Tribunal's Registrar that this could not be done after an appeal was decided, leading the parties to instead pursue the present appeal. The respondent adds that in its view, the conditions for application of Article 6.9.2 were not in any case met, as the Tribunal requested the parties to come to an agreement, which the respondent sought to do.

32. The respondent denies that the offered settlement reflects failure to carry out the Tribunal's second judgment or a failure to observe *res judicata*. It emphasizes in this regard its view of the proper bases for determining damages for the appellant's frustrated expectations. With respect to the claims for material damages, the respondent emphasizes that the appellant has not suffered any actual loss of grade or salary, and continues to be employed by another NATO body at the same grade as the position he sought with the respondent. It also disputes the appellant's initial claim for the equivalent of a loss of job indemnity plus six months of salary for essentially the same reason: the appellant remains employed at his current grade, and has not in fact lost any income. The respondent adds in this regard that, if accepted, this claim would result in double compensation, as the appellant would be compensated with amounts apparently

intended to reflect lost income while at the same time being paid by the other NATO body.

33. The respondent also refers to the Tribunal's first and second judgments, which both denied the appellant's claims for material damages, instead awarding non-material damages of €10,000 in the first judgment and €20,000 in the second. The respondent contends that in these judgments, "the Tribunal addressed all relevant complaints of Appellant that may have arisen in relation to his recruitment process and adjudicated them. Appellant now repeats these claims in the current appeal and requests compensation for the exact same issues for which he was already compensated."

34. The respondent urges that it is not responsible for the appellant's dissatisfaction with his current employment situation or for the health challenges said to result from this situation, and that his claims in this regard cannot be the predicate of an award of damages.

35. The respondent maintains that it sincerely sought to come to a reasonable agreed settlement within the framework of the Tribunal's earlier judgments and its instruction to seek an agreed resolution. However, it submits that this process was impeded by what it views as inconsistency in, and lack of justification for, varying amounts claimed by the appellant. It referred in this regard to:

- the appellant's references to a possible loss of future retirement income estimated at €1 million, should he be forced in the future to retire early due to his unsatisfactory employment situation;
- his claim in the first appeal (€180,000 for material damages determined *ex aequo et bono* and €20,000 as non-material damages);
- his inconsistent claim in the second appeal (€20,000 for moral damages, amended to €30,000 for damages including his wife's losses, "being put back in a position he did not want to hold," and damage to future career prospects, plus punitive damages of €150,000);
- his initial claim of a loss of job indemnity plus six months' salary in the recent negotiations, totalling €231,504;
- the claim in the current appeal for €100,000 as "a fair and equitable compensation for refusing to implement" the second judgment, plus non-material damages "evaluated approximately *ex aequo and bono* at €10,000";
- the lack of documentation for, inter alia, claims for alleged moving expenses; and
- an apparent inconsistency involving his wife's claimed loss of income, in light of evidence said to show that she submitted her written resignation after the appellant was informed of his unsuccessful application.

36. The respondent asks that the Tribunal uphold the JFCBS commander's decision of 6 May 2020, deny the appellant's requests for compensation for material and non-material damages, or, subsidiarily, determine the financial compensation to be awarded to the appellant.

## D. Considerations and conclusions

*(i) Admissibility and jurisdiction*

37. Jurisdiction and admissibility are not contested. The appeal was submitted on 16 June 2020, within the 60-day period for bringing appeals under Article 6.3.1 of Annex IX of the CPR, and is admissible.

*(ii) Merits*

*Article 6.9.2 of Annex IX of the CPR*

38. The appellant first claimed that the respondent violated Article 6.9.2 of Annex IX of the CPR by refusing to employ the appellant without invoking that provision and tendering the required affirmation by the Supreme Allied Commander Europe during the second appeal.

39. Had the respondent invoked Article 6.9.2, the Tribunal would have been authorized to determine the amount of compensation to be paid to the appellant, although in a procedural framework slightly different from that in the present appeal. However, the same issue is presented for decision by the Tribunal in both situations. The appellant did not explain what, if any, injury may have resulted as a consequence of the alleged breach of the CPR, and none is apparent to the Tribunal. Accordingly, this claim appears to be without consequence in the unusual circumstances of this appeal.

*Article 6.8.4 of Annex IX of the CPR*

40. The appellant next claimed that, by refusing to employ him or to offer a settlement he found acceptable, the respondent violated its legal obligation to carry out the second award under Article 6.8.4 of Annex IX of the CPR, Tribunal Rule of Procedure 27.7, and the legal principle of *res judicata*.

41. The Tribunal's judgments are indeed final and binding, and carry with them an obligation for parties to carry them out diligently and in good faith. In this regard, the present appeal involves an unusual situation. In paragraph 47 of the second judgment, the Tribunal called on the parties "to reach a solution by themselves by means of a mutual agreement," without resort to further litigation. This call by the Tribunal gave each party a role in seeking a mutually acceptable agreement; each needed to act in a manner conducive to reaching that end. The force of the appellant's claim that the respondent failed to carry out the second judgment thus depends on the Tribunal's assessment of the parties' approaches to the negotiations and the issue of fair compensation. These issues are addressed *infra*.

*Duty of Care*

42. The Tribunal does not accept the appellant's suggestion "in analogy with Article 6.8.3 of the NCPR" that the respondent intended to delay resolution of the case or 'intended abusive use of the appeals procedure." The Tribunal does not find support for this claim of misconduct or abusive conduct in the record in this appeal. As to the appellant's further arguments concerning the duty of care, the Tribunal again considers

that these arguments must be weighed in light of the parties' positions in their negotiations seeking an agreed settlement.

*What is Fair Compensation?*

43. In the correspondence in the file, the respondent set out the legal principles that it viewed as applicable in determining the appropriate compensation. For its part, the appellant typically did not address these issues, instead presenting substantial evolving claims without discussing the legal principles believed to justify them.

44. In considering the appellant's claim that the respondent did not offer fair compensation, the Tribunal first notes that the appellant's claims for damage in this appeal often appear similar, if not identical, to his claims for damage advanced in the two previous appeals and rejected in the Tribunal's judgments in those appeals. For example, in the second appeal, the appellant asserted a claim for damages that included material damages "consisting of his wife's need to quit her job." The Tribunal rejected the appellant's claim for material damages in that appeal, including the claim for his wife's losses.

45. In its reply, the appellant insists that the Tribunal's first and second judgments are not relevant here, as types of damage previously claimed and rejected by the Tribunal are being claimed again for a new alleged delict, the failure to implement the second judgment. The Tribunal is not persuaded. The repeated assertion of these claims in the present appeal is barred by the same principles barring re-litigation of decided issues as the appellant invokes in its claims, in particular the finality of Tribunal judgments under Article 6.8.4 of CPR Annex IX, Tribunal Rule of Procedure 27.7, and the legal principle of *res judicata*.

46. To the extent the appellant's current claims are not now barred by the finality and *res judicata* effects of the first and second judgments, the Tribunal has substantial doubts regarding their legal bases.

47. In this regard, the Tribunal does not believe that the respondent is obliged to offer compensation for injury said to stem from the appellant's difficulties related to his current employment with another NATO body. The Tribunal also does not accept that the possibility of future injury arising from a hypothetical future situation can support a valid claim of damages. In this regard, the Tribunal notes several references to the possibility that the appellant's fragile position might result in a premature retirement causing a loss of income amounting to €1 million. Whether or not this was ever intended as a compensable claim (as the respondent seems to have believed), these statements reflect only speculation about the possible consequences of possible future events.

48. Moreover, the Tribunal does not see the basis for what seem to be significant claims predicted upon loss of income, when none has been shown. The Tribunal recalls in this regard the appellant's claim in his counsel's letter of 28 January 2020 for an amount equivalent to a loss of job indemnity plus six months' salary, totaling over €231,000. This claim is not credible, given that the appellant continues to hold a position at his current grade in another NATO body. The appeal states that "one must notice that the Appellant gave up this request" in counsel's letter of 16 March 2020, an argument renewed in the appellant's reply. However, this change of position was not clearly evident

to the Tribunal in its reading of the 16 March letter, nor does it seem to have been evident to the respondent.

49. The appellant does not make clear the reasoning underlying its current claim for €100,000. It presumably does not reflect lost income for, as noted, he remains employed by another NATO body, receiving salary and allowances at the same grade as that in the position he sought with the respondent. The claim for his wife's losses appears to have been asserted and then dismissed in the earlier proceedings. Insofar as the claim for €100,000 is meant to reflect possible future losses, hypothetical future losses are not compensable.

50. For its part, in the decision under appeal, the respondent offered and subsequently awarded €15,000 in settlement of the parties' differences. The respondent indicates that it determined this amount with reference to the Tribunal's prior judgments and in the absence of legally and factually persuasive demonstrations of additional damages not previously rejected by the Tribunal. The respondent explained that this amount lies at the mid-point between the Tribunal's awards of non-material damages in the two prior judgments, and is thus broadly aligned with those judgments.

51. Given the unusual circumstances, the amount on offer does not conflict with the Tribunal's instruction in the second judgment to seek a mutually agreed settlement, or to be to be unreasonable or to demonstrate a lack of care.

52. Accordingly, the appellant's claim that the respondent failed to offer appropriate compensation is dismissed. The appellant's related claims that the respondent did not respect the finality of the second judgment, and failed to meet its duty of care, by failing to offer appropriate compensation, are also dismissed.

53. Any remaining claims are dismissed and the appeal is rejected in its entirety.

## E. Costs

54. Article 6.8.2 of Annex IX 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 [...].

55. 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 26 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 May 2021 AT-J(2021)0008

**Judgment**

**Case No. 2020/1309**

**GD**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 26 April 2021

Original: French

*Keywords: termination for unsatisfactory performance; loss-of-job indemnity; conditions; no negligence or deliberate intention on the part of the staff member; interpretation; need to initiate disciplinary action if the Administration cites this circumstance of negligence or intention.*

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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, Ms María-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the videoconference hearing on 25 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr GD, registered on 4 August 2020, seeking:
- annulment of the decision of 9 April 2020 whereby the General Manager of the NATO Support and Procurement Agency (NSPA) refused to grant him the loss-of-job indemnity following his termination, along with the decision of 5 June 2020 dismissing his complaint;
- compensation for the non-material damage suffered, assessed at €10,000;
- an order for the respondent to pay the costs.

2. The respondent's answer, dated 21 October 2020, was registered on 10 November 2020. The appellant's reply, dated 7 December 2020, was registered on 11 December 2020. The respondent's rejoinder, dated 15 January 2021, was registered on 27 January 2021.

3. Owing to the public health crisis, and with the parties' agreement, the Tribunal held the hearing on 25 March 2021 by videoconference using the NATO Headquarters system. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

6. The material facts may be summarized as follows.

7. The appellant joined the NSPA in 1989. As from 1 October 2007 he was a Senior Internal Auditor with the Agency's internal auditing division.

8. On 8 April 2020, the appellant was called to his manager's office for a routine reason. He went there the next day, on 9 April: his manager announced that he was being terminated effective immediately and not being paid the loss-of-job indemnity. He was ordered to leave the NSPA immediately, and was given just enough time to gather his personal effects. He would receive the six months' notice period as an indemnity. The written decision was sent to him that same day.

9. The appellant submitted a "complaint" on 7 May 2020 against the termination decision but only insofar as it refused him the loss-of-job indemnity. The complaint was dismissed by the NSPA General Manager on 5 June. On 4 August 2020, the appellant lodged the present appeal with the NATO Administrative Tribunal.

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

### *(i) The appellant's contentions*

10. To begin with, the appellant cites a violation of Article 1, paragraph 4 of Annex V to the Civilian Personnel Regulations on the loss-of-job indemnity. He asserts that the provisions of that article, whereby negligence and deliberate intention by the staff member authorize the Head of NATO body not to grant the indemnity, are disciplinary offences. If those circumstances are cited by the Administration, then it must initiate disciplinary proceedings prior to terminating the staff member's contract. The Administration not having qualified it as such, it could not legally refuse to grant the loss-of-job indemnity.

11. Moreover, even the Administration's assessments in the staff member's performance review for 2019, which found that the objectives had not been met, do not note any intention or deliberate act of wrongdoing by the staff member. On the contrary, the appellant did all he could to meet the objectives set by his head of service; it was the latter who, by putting excessive pressure on his staff, added to the obstacles that made those objectives even harder to reach.

12. Secondly, the appellant argues that in the case of a disciplinary decision, the procedure that must precede such a decision was not followed. In particular, a disciplinary board was not convened and the appellant was not heard by the Head of NATO body, as required by Article 59 of the Civilian Personnel Regulations and Annex X thereto.

13. Thirdly, the appellant rejects the Administration's power to terminate his contract based on the circumstance of his not having disputed the performance report that noted certain gaps in his performance. He justifies not having done so on grounds of the prevailing public health situation in the month of the first rapid spread of COVID-19, and of his personal state of health, because he was very tired and depressed owing to his manager's systematic demands.

14. Fourthly, the appellant asserts that there was a manifest error of judgment in the termination decision, an excessive step despite his mediocre performance, which was unsatisfactory mainly because of the stressful work environment in the service caused by the inordinate demands of the head of internal auditing.

15. Fifthly, the appellant argues that the Administration failed in its duty of care toward staff members. The appellant criticizes his line manager for not having enabled the success of his professional objectives by setting excessive objectives in too-short time frames and by preventing him from taking the necessary training. He had enquired about this difficult situation to several NSPA officials, but none had heeded his warnings: the Human Resources chain of command took no initiative to end the very poor, stressful working conditions the appellant was subjected to, while other staff in the same service were experiencing the same difficulties, and several had left the service in the months before.

16. For all these reasons, the appellant is seeking annulment of the decision refusing to grant him the loss-of-job indemnity, payment of that indemnity, and compensation for

the non-material damage suffered by him, which he assesses at €10,000, as well as an order for the respondent to pay the costs.

### *(ii) The respondent's contentions*

17. Firstly, the respondent argues that termination with no loss-of-job indemnity in accordance with Article 1, paragraph 4 of Annex V to the CPR does not require the initiation of disciplinary proceedings: contract termination by the Head of NATO body for unsatisfactory performance is possible, and the loss-of-job indemnity is in principle granted. But as an exception to that principle, the indemnity is not granted whenever the unsatisfactory performance, as opposed to a disciplinary offence, is the result of negligence or deliberate intention by the staff member, as is the case here.

18. The procedure that precedes termination was followed, because the staff member was afforded the possibility of disputing the performance review that is the immediate cause of the termination. It was the appellant's choice not to dispute that review, thus depriving him of the ability to dispute his termination which is directly connected to it. Reviews being preparatory acts, he can no longer claim that reviews that he did not dispute were illegal and go on to challenge the decision to terminate him. In the present case, the appellant took note of his 2019 performance review on 9 March 2020 and replied to it only on 1 April, after being asked to do so again, and made no written comment other than "I acknowledge receipt". He did not initiate the special conflict resolution procedure covered in Article 55.4 of the CPR.

19. The respondent argues that in any case, the staff member's 2019 performance review is not tainted by a manifest error of judgment. It underscores the appellant's delays in completing assigned tasks, his deliberately dilatory attitude, and his refusal to do training activities to fill his gaps despite the performance improvement plan (PIP) he was put on the previous year.

20. The respondent also rejects the argument that the Administration failed in its duty of care toward the appellant. It gave him the means of improving his performance; he might have discussed his personal situation with a trusted person such as a doctor, but never lodged a formal complaint with his line manager's superior, which shows the futility of the accusations he made only after having been terminated.

21. There is no evidence at all of the alleged harassment. The appellant had a bad experience when a new manager arrived in 2017, but there is no proof that the behaviour of the head of internal auditing was objectionable. On the contrary, it was his professionalism that was upsetting to the appellant, who suffered from professional shortcomings and a cavalier attitude.

22. The appellant is therefore seeking dismissal of the appeal.

## D. Considerations and conclusions

23. Even if the appellant has lodged another appeal, registered as Case no. 1316, originating in the incidents addressed in the present appeal, the Tribunal considers the two cases to be separate cases that should be addressed in two separate judgments.

*On the request for annulment of the decisions of 9 April and 5 June 2020 insofar as they refuse to grant the appellant the loss-of-job indemnity*

24. Under Article 1, paragraph 4 of Annex V to the Civilian Personnel Regulations on the loss-of-job indemnity:

> 1. The Secretaries-General of the Coordinated Organizations shall have power to award an indemnity for loss of employment to any staff member of the Coordinated Organizations:
> [...]
> (4) who holds a firm contract and whose services are terminated for persistent unsatisfactory service, other than through negligence or deliberate intention on the part of the staff member, as assessed under a system of performance management established by the Head of a NATO body in accordance with Article 55 of the Civilian Personnel Regulations [...].

25. The respondent criticizes appellant for unsatisfactory performance, i.e. an inability to meet the assigned objectives. Moreover, to justify not granting him the loss-of-job indemnity, it wrote in the letter of 9 April ("it is a deliberate failure to comply with ...") that he was guilty of negligence or intentionally gave poor professional performance. It mentions a "sanction" and "the deliberate nature of this unsatisfactory performance". The respondent even asserts that "even if the negligence or intentional nature of the unsatisfactory performance was considered a disciplinary offence, the Head of NATO body would not be bound to initiate disciplinary proceedings in order to terminate the contract." Thus, in its view, there were disciplinary offences that could justify termination without disciplinary proceedings.

26. The Tribunal does not subscribe to that analysis. The appellant argues that the Administration's citing negligence or deliberate intention makes this a disciplinary offence that requires the initiation of disciplinary proceedings. One of two things must be true: either the staff member was neither negligent nor intended any wrongdoing in the performance of his duties and the exclusion in Article 1 of Annex V does not apply, and he is entitled to the loss-of-job indemnity, or the staff member was negligent or intended to commit wrongdoing in the performance of his duties, which constitutes a disciplinary offence, so his termination must respect the guarantees that disciplinary proceedings provide.

27. In the Tribunal's view, it is not possible to find, as the respondent has done, an in-between case wherein the staff member was deliberately negligent without this constituting a disciplinary offence. Anyone who deliberately does bad work is committing an offence. Anyone who is cavalier to the point of doing bad work is committing an offence – it is no longer merely unsatisfactory performance.

28. In the present case, the performance reviews from 2018 and 2019, which the appellant did not dispute in due course but which can support his line of reasoning in disputing the termination decision, prove that the appellant's performance constituted unsatisfactory performance. Yet they do not reveal negligence or a deliberate intention of wrongdoing. On the contrary, the appellant tried to respond to sometimes contradictory orders from his manager in an effort to do his best; he tried to perform satisfactorily

despite the very short deadlines he was sometimes given to carry out the requested tasks, and he went to great lengths to find the training he was ordered to take.

29. There was therefore no negligence or deliberate intention within the meaning of Article 1(4) of Annex V. There are two consequences to this conclusion.

30. The first consequence is that the appellant was not covered by the exclusion in Article 1(4) of Annex V, and could not be denied the loss-of-job indemnity. The decision refusing to grant the appellant the loss-of-job indemnity must be annulled.

31. The second consequence is that the termination procedure is illegal insofar as it did not follow the essential steps of disciplinary proceedings, such as the convening of a disciplinary board and the staff member's right to be heard before a decision is taken, as the appellant explicitly argues.

32. However, the appellant is only seeking annulment of the decisions of 9 April and 5 June 2020 insofar as they refuse to grant him the loss-of-job indemnity. He is not seeking either to have his termination annulled or to be reinstated. The Tribunal may only rule on the submissions referred to it.

*On the claims for compensation*

33. Annulment of the impugned decisions insofar as they refuse to grant the appellant the loss-of-job indemnity entails the payment of that indemnity, calculated in accordance with Articles 6 and 7 of Annex V to the Civilian Personnel Regulations.

34. The appellant is quite ambiguous on the subject of the material damage. Although he notes that he was obliged to take early retirement and thus would receive a lower pension than he could have been paid had he not been terminated, he has not quantified in his reply the material damage suffered, nor has he provided the reasoning for his figures or any evidence for gauging the validity thereof. Moreover, he has not requested compensation for the loss of income he would have received had he served longer in the Agency. Consequently the Tribunal cannot award any compensation to him for that.

35. Given the difficulties the appellant experienced in his last months working at NSPA, the Tribunal is of the view that he should be paid €5,000 in compensation for the non-material damage suffered.

## E. Costs

36. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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. In the circumstances of the case, the submissions in the appeal being successful in their near-entirety, the appellant is entitled to be granted €4,000 as reimbursement of the costs of retaining counsel to appear before the Tribunal.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision of 9 April 2020 whereby the General Manager of the NATO Support and Procurement Agency (NSPA) refused to grant Mr D the loss-of-job indemnity following his termination, along with the decision of 5 June 2020 dismissing his complaint, are annulled.
- Mr D's non-material damage may be fairly assessed by ordering NSPA to pay him €5,000 in compensation.
- NSPA shall reimburse Mr D for the costs of retaining legal counsel, up to a maximum of €4,000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 26 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 May 2021 AT-J(2021)0009

**Judgment**

**Case No. 2020/1316**

**GD**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 26 April 2021

Original: French

*Keywords: payment of a financial benefit (step advancement); payment then confirmed twice after the staff member asked for an explanation; legitimate expectations; consequence; illegality of the request for reimbursement made eight months later.*

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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, Ms María-Lourdes Arastey-Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the videoconference hearing on 25 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr GD, registered on 4 August 2020, seeking:
   - annulment of the decision of 5 June 2020, whereby the NSPA General Manager asked him to reimburse €5,090.48 corresponding to the overpayments made for a step advancement from October 2019 to April 2020, along with the decision of 31 July 2020 rejecting the complaint of 3 July 2020;
   - repayment of the €5,090.48 that the appellant returned to the Administration;
   - an order for the Administration to pay the costs.

2. The respondent's answer, dated 3 December 2020, was registered on 10 October 2020. The appellant's reply, dated 10 February 2021, was registered on the same day. The respondent's rejoinder, dated 22 February 2021, was registered on 25 February 2021.

3. Owing to the public health crisis, and with the parties' agreement, the Tribunal held the hearing on 25 March 2021 by videoconference using the NATO Headquarters system. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The material facts may be summarized as follows.

5. The appellant joined the NSPA in 1989. From 1 October 2007, he was a Senior Internal Auditor with the Agency's internal auditing division.

6. On 8 April 2020, the NSPA General Manager decided to dismiss the appellant without payment of the loss-of-job indemnity. On 7 May 2020, the appellant filed a complaint against this decision, pointing out the contradiction between the decision to dismiss him for unsatisfactory performance in April 2020 and his step advancement in October 2019, which he believed was proof that his professional performance had been good.

7. On 5 June 2020, in replying to the appellant's complaint about the decision not to grant him the loss-of-job indemnity, the NSPA General Manager explained that the October 2019 step advancement was an administrative error and told the appellant that he would have to reimburse the Administration for the corresponding overpayment of €5,090.48.

8. On 3 July 2020, the appellant filed a complaint against this decision. This was rejected by the NSPA General Manager on 31 July. On 28 September 2020, the appellant filed the present appeal before the NATO Administrative Tribunal.

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

### *(i) The appellant's contentions*

9. First, the appellant cites a violation of the legitimate expectations that he had as a result of previous decisions.

10. In October 2019, the appellant was granted a step advancement, which he found out about from his payslip; he advanced from grade A3/10 to A3/11. The appellant duly noted this without reacting or speaking to his administration about it. The following month, in November 2019, his payslip showed the salary for grade A3/10. The appellant then asked the Head, Human Resources for an explanation. She realized that it was an error: his payslip for November 2019 had had to be modified to take account of the end of the education allowance for his children and his step had been modified by mistake. In December 2019, in accordance with the information he had been given, the appellant's payslip once again showed his grade as A3/11.

11. His salary was not affected by any other event until May 2020, when, in his complaint of 7 May to contest his dismissal of 8 April, the appellant pointed out that he was at grade A3/11. It was only then that the Administration changed the position it had indicated to the appellant in November 2019, mentioning an "internal administrative irregularity which remained undetected until the complaint was submitted". Therefore, it was only when the appellant exercised his right to contest an administrative decision affecting him that the Administration noticed an error that it had not detected and penalized the appellant for exercising his right of appeal.

12. Following this sequence of events, the appellant maintains that as a result of the decision to grant him a step advancement, he had legitimate expectations of benefiting from it permanently, especially since, on his own initiative, he had asked the Administration about it not long after this decision in his favour and it had confirmed the first decision taken in October 2019.

13. In response to the respondent's arguments, according to which the appellant should have realized that his step advancement must have been an error since it contradicted his performance review for 2019, the appellant maintains that there was no reason for him to think that. His performance review for 2019 was not done until March 2020, so it could not have been taken into consideration when granting the step advancement, which was decided in October 2019 and confirmed in December 2019. In addition, the performance review for 2019 was not unequivocal: it contained both positive and negative assessments and therefore did not automatically necessitate the refusal of the step advancement.

14. The appellant concludes from this that he had a legitimate expectation that the step advancement obtained in autumn 2019 would be confirmed and the respondent could not take it away from him in May 2020.

15. Second, the appellant argues that the Administration failed in its duty of care toward its staff members. This duty was especially important because the Administration knew that the staff member was suffering from psychological distress as a result of being dismissed on 8 April 2020. Therefore, it failed in its duty of care toward the appellant.

16. For these two reasons, the appellant is seeking annulment of the decision requiring him to reimburse the disputed sum.

17. In addition, although the appellant did make the requested reimbursement, he did so "without prejudice", stating that it did not mean that he agreed with the Administration's position, which he continues to contest with this appeal.

18. The appellant is asking the Administration to repay the €5,090.48 that he returned to it, and for the Administration to be ordered to pay the costs.

***(ii) The respondent's contentions***

19. The respondent points out that Article 56.2.1 of the Civilian Personnel Regulations (CPR) provides that staff members advance as long as their performance of duty so warrants. The appellant should therefore have referred to his most recent performance reviews, realized that they were not positive and concluded that his performance was unsatisfactory. It maintains that it was incumbent on the appellant, when he noticed that had been granted a step advancement in October 2019, to react immediately to have the obvious administrative error rectified. Knowing that he did not meet the conditions for obtaining this benefit, he should have told the Administration that his performance did not entitle him to it. His silence therefore constituted an error that was greater than that of the respondent, authorizing the latter to rectify, even six months later, its own administrative error. Furthermore, the appellant sought to obtain confirmation of what he knew to be an administrative error; therefore, he is directly responsible for this mistaken confirmation. Since the appellant is at fault, he must reimburse the amount he was overpaid.

20. The conditions for legitimate expectations are not met: he did not receive an unconditional assurance that he would benefit from this step advancement. The payroll department did not know the content of the appellant's performance reviews and therefore could not oppose the step advancement.

21. The respondent disputes that it has failed in its duty of care. On the contrary, it is required to ensure the regularity of its payments, and to obtain the reimbursement of overpayments to staff members.

22. Moreover, the amount of €5,090.48 is fairly modest, and does not put the staff member who has to reimburse it into financial difficulty.

23. The respondent concludes therefore that the submissions in the appeal should be dismissed and asks that the appellant be ordered to pay it damages.

## D. Considerations and conclusions

24. Although the appellant has submitted another appeal, registered as Case no. 1309, originating in the incidents addressed in the present appeal, the Tribunal considers the two cases to be separate cases that should be addressed in two separate judgments.

25. In accordance with Article 56.2.1 of the CPR:

> In principle, provided that their performance of duty so warrants, members of the staff will advance one step every 12, 18 or 24 months until they reach the highest standard step of their grade according to the incremental system approved by the Council.

26. The sequence of events is not disputed.

27. In October 2019, the appellant was granted a step advancement, which he found out about when he received his payslip: he advanced from grade A3/10 to A3/11. This represents around €400 more per month. He did not react to this step advancement.

28. In November 2019, his payslip stated that he had gone back down to grade A3/10. He then asked for an explanation from the Agency's Head, Human Resources. She realized that it was an error: the payslip had been modified to take account of the end of the education allowance for his children and his grade had been modified by mistake.

29. In December 2019, the appellant was returned to grade A3/11.

30. Nothing happened to change this step advancement until 7 May 2020, when, to contest his dismissal of 8 April, the appellant wrote in his complaint: “If the appellant’s performance had really been unsatisfactory in 2019, then one wonders why he was granted a step advancement in October”.

31. The Administration, which had been unaware until this point, answered on 5 June 2020: “this is purely and simply an internal administrative irregularity which remained undetected until the complaint was submitted. This should never have been granted (...). Consequently, you obtained without entitlement an additional sum of €5,090.48 and omitted to report this irregular situation to the Organization. If you do not reimburse the overpaid amount within 30 days of receiving this letter, we will instruct the competent authorities to withhold it from any sum that may be due to you from the Organization in the future. In any case, the same authorities will be informed of the irregularity immediately so that the situation can be corrected in the future”.

32. The appellant contests this step demotion and request for reimbursement. He maintains that the Administration violated his legitimate expectation of permanently benefiting from the 11th step of his grade.

33. It is necessary to determine the fault that is principally or exclusively at the origin of the disputed situation and upon whom the fault is incumbent: the Administration or the staff member. In particular, the staff member is required to inform the Administration of any error that it may have made in relation to his objective situation and that resulted in a salary overpayment.

34. In this case, it was in October that the appellant noticed an increase in his salary resulting from a step advancement. Since step advancements are provided for by the CPR, he could legitimately consider that the Administration's assessment of his individual situation, in particular his length of service and performance, had resulted in this step advancement.

35. Although the respondent claims that the staff member should have, as soon as he noticed this event that it called seven months later an "internal administrative irregularity", informed the Agency that it had made a mistake, no objective element obliged the appellant to think that he was not entitled to this advancement. In particular, although Article 56.2.1 of the CPR says that step advancement is dependent on performance, the appellant could not then have considered, based on just his performance review for 2018, which includes both positive and negative elements, that the Administration had clearly made a mistake.

36. It makes sense that the following month he contacted the Head, Human Resources of the Agency that employed him: he wanted to understand why the step advancement granted in October had been reversed in November. At this point the Agency's Head, Human Resources realized that the step demotion was an error and told him, orally then in writing, that the new step had been reinstated to him. The Administration confirmed this information by issuing his December payslip at grade A3/11, as in October, and confirmed this position when issuing each of his payslips until May 2020.

37. The respondent insists that the appellant should have reacted immediately because the step advancement was dependent on performance and he should have known that his performance was unsatisfactory. According to the respondent, he should have informed the Administration that his performance did not give him entitlement to this advancement.

38. The Tribunal does not agree with this argument, which imposes an obligation on the staff member based on mere supposition. It notes that the appellant informed the Administration by questioning Human Resources the month after the step advancement was granted, because he was surprised by the return to the previous situation. He thus gave the Administration the opportunity to perform an in-depth review of his entitlement to a step advancement. Yet, the Head, Human Resources herself told him that the demotion was a mistake and that he had been returned to grade A3/11.

39. It follows from the sequence of events that the fault lies with the respondent Administration, which is responsible for issuing payslips and ensuring they are correct. It made a mistake and did not realize it. It was the staff member who pointed out in November that there was a contradiction between the increase in October and the reduction in November. The Administration then confirmed its first decision. Moreover, it was not until the staff member once again commented upon it that the respondent Administration backtracked eight months after first granting the benefit. Whether there were grounds for the advancement or not, three consistent interventions by the Administration (the October payslip, oral information and a written message in November, and the December payslip), although they occurred over quite a short period of three months, gave the staff member a legitimate expectation of benefiting from this step advancement.

40. Without it being necessary to examine the appellant's second submission, the contested decision must therefore be annulled and the sum of €5,090.48, which the staff member reimbursed without accepting the principle for it, must be repaid to the appellant.

*On the submissions on indemnities*

41. The annulment of the contested decision requiring the reimbursement of the sum of €5,090.48, a decision that was executed by the appellant, means that the Administration must repay this indemnity to the appellant.

42. It is not admissible for the respondent to ask that the appellant pay damages, as this is not based on any provision in the CPR, and in any case is unfounded with regard to the solution of the dispute.

## E. Costs

43. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

44. In the circumstances of the case, the submissions in the appeal being successful, the appellant is entitled to be granted €2,000 as reimbursement of the costs of retaining counsel to appear before the Tribunal.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision of 5 June 2020 whereby the NSPA General Manager asked Mr D to reimburse €5,090.48 corresponding to the overpayment made for a step advancement from October 2019 to April 2020, together with the decision of 31 July 2020 rejecting the complaint of 3 July 2020, are annulled.
- The NSPA shall pay Mr D the sum of €5,090.48 as a consequence of this annulment.
- The NSPA shall reimburse Mr D for the costs of retaining legal counsel, up to a maximum of €2,000.
- The NSPA's submissions seeking the payment by Mr D of damages are dismissed.

Done in Brussels, on 26 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

14 May 2021 AT-J(2021)0010

**Judgment**

**Case No. 2020/1310**

**EB**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 10 May 2021

Original: English

*Keywords: salary adjustment, Co-ordinated Organizations, salary scale, powers of the NAC; interpretation of the CPR; legitimate expectations.*

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This judgment is rendered by a full Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún, Mr John Crook, Mr Laurent Touvet, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 26 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 12 August 2020 and registered on 13 August 2020 as Case No. 2020/1310, by Mr EB versus the NATO Support and Procurement Agency (NSPA). The appellant challenges the pay slip he received from the respondent in January 2020, contending that the amounts of the annual adjustments to his salary and household allowances for 2020 reflected on the pay slip were determined improperly and contrary to the requirements of the NATO Civilian Personnel Regulations (CPR).

2. The respondent's answer, dated 29 October 2020, was registered on 11 November 2020. The appellants' reply, dated 18 January 2021 was registered on 28 January 2021. The respondent's rejoinder, dated 26 February 2021, was registered on 1 March 2021.

3. Having regard to Article 6.1.4 of Annex IX of the CPR, the President decided that the case should be heard by a full Panel, consisting of the President and the four members of the Tribunal.

4. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 26 March 2021, utilizing facilities provided by NATO Headquarters. It heard arguments by representatives of both parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual and Legal background of the case

5. This appeal raises several of the same legal and factual issues as in Case No. 2020/1306, which also involves the determination of salaries of the respondent's staff in Luxembourg.

6. The background and material facts may be summarized as follows. The appellant is an A-grade NSPA staff member whose duty station is in Luxembourg. In late January 2020, he received a pay slip reflecting annual adjustments to his salary and household and dependent child allowances that were determined utilizing scales for salaries and allowances approved for 2020 by the North Atlantic Council (the NAC), in October 2019. He contends that these annual adjustments were incorrectly determined and were illegal.

7. The parties submitted extensive evidence related to the methods for determining the compensation of NATO staff members in Luxembourg. To simplify, NATO is one of the so-called Coordinated Organizations, a cooperative mechanism involving six international organizations headquartered in Europe aiming at harmonization of rules and practices on salaries, allowances and pensions. Following the move of the

respondent's predecessor agency to Luxembourg from France in 1968, it was decided to utilize for A and L staff in Luxembourg the same salary scales and methods of making annual adjustments as those approved for NATO staff in Belgium. Accordingly, beginning in 1974 and continuing through 2020, NAMSA's A and L staff in Luxembourg received the same annual adjustments to salaries and allowances as corresponding NATO A and L staff in Belgium.

8. This linkage was reflected in the NATO Civilian Personnel Regulations (CPR), in particular in Article 5.1 of Chapter III of CPR Annex II (annual salary adjustments) and Article 5.1 of CPR Annex III.K (annual adjustments to allowances), and was maintained for many years. This was initially advantageous for staff in Luxembourg, as the local cost of living was less than that in Belgium. However, over time, this changed, as the cost of living in Luxembourg rose relative to Belgium.

9. Notably due to higher housing costs, the compensation offered to A and L grades fell below that offered by other employers in Luxembourg and received by staff members of corresponding grades at other NATO locations. This contributed to significant difficulty for NSPA to attract and retain suitable professional staff. In 2018, the respondent's General Manager highlighted this difficulty in a letter to the NATO Secretary General and called for a solution.

10. The issue of "breaking the link" between Luxembourg and Belgium for purposes of salary scales and adjustments was a recurring subject of discussion in the Coordinating Committee for Remuneration (CCR).

11. The CCR and the NAC determined that linking annual adjustments of salaries and allowances of all grades in Luxembourg to those in Belgium did not assure Purchasing Power Parity (PPP) for staff in Luxembourg with staff in other NATO locations. PPP is a statistical tool utilized to assure that NATO staff in different duty locations enjoy purchasing power over time comparable to that available to corresponding staff in other NATO locations. PPP adjustments are calculated in various NATO locations in relation to the situation in Belgium, which provides the base or reference point for the system. Thus, PPP is not taken into account in annual adjustments in Belgium. As a result, it was not taken into account in annual adjustments in Luxembourg so long as salaries and allowances in the two countries were linked.

12. In October 2019 the CCR recommended, and the NAC approved, eliminating the link between salary scales and adjustments in Belgium and Luxembourg. In addition to a new salary scale for Luxembourg A and L staff (the subject of Case No. 2020/1306), the NAC decided that annual adjustments to salaries and allowances in Luxembourg would no longer mirror those in Belgium. They would instead be made in the same manner as the annual adjustments to salaries and allowances of NATO staff in locations other than Belgium.

13. On 28 January 2020, the appellant received his first pay slip for 2020, reflecting annual adjustments to both his salary and his family allowances. Believing that the amounts of the adjustments were not correctly determined, the appellant lodged separate requests for administrative review on 24 February 2020 contesting the adjustments to his salary and to his allowances. Following denial of his requests for review, he lodged a complaint pursuant to Article 4 of Annex IX of the CPR. This was denied by the General

Manager on 15 June 2020 and on 12 August 2020 the appellant lodged the present appeal.

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

### *(i) The appellant's contentions*

14. In brief, the appellant contends that the NAC's 25 October 2019 decision to change the methods for determining annual adjustments to pay and allowances of staff in Luxembourg should have been applied to determine his annual adjustments effective 1 January 2020, and that failure to do so was illegal. Counsel for the appellant confirmed at the hearing that the appeal concerns only the annual adjustments to salary and allowances for 2020.

*Admissibility*

15. The appellant contends that the appeal is admissible. He disputes the respondent's contention that the appeal is inadmissible because it was required to implement the NAC decision and had no discretion to do otherwise. He contends that he can challenge the legality of the NAC's decision determining his 2020 salary by way of exception, as it directly affects him.

16. The appellant adds that his adjustments violated Article 5 of Chapter III of Annex II and Article 5 of Annex III.K of the CPR, as those Articles were revised in implementation of the NAC's 25 October 2019 decisions, and were appealable on that ground as well. The appellant denies that his appeal could only be submitted utilizing the mechanism of Article 6..3.1 of CPR Annex IX, authorizing direct appeal to the Tribunal where there are "no channels for submitting complaint." He maintains that the normal procedures for seeking administrative review of a decision were available and were properly utilized.

17. The appellant denies that the appeal is time-barred, as an appeal can only be lodged against an action directly affecting a staff member. He maintains that he could only determine that he was directly affected when he received his first pay slip for 2020 on 28 January 2020. His requests for administrative review were then lodged on 24 February 2020, within the time required under Article 2.1 of CPR Annex IX.

*Merits*

18. The appellant contends that the 2020 salary adjustment for Luxembourg staff "breaches Article 5.1.2.of Annex II of the NCPR" and "commitments made by the CCR in its 244th and 264th reports, read together with the 259th report and the appellant's legitimate expectations." He maintains that his 2020 allowances were likewise improperly calculated in violation of Article 5.1.2 of Annex III of the NCPR and of "commitments made by the CCR" in its 242nd, 244th and 259th report and the appellant's "legitimate expectations."

19. The appellant urges that the NAC's October 25 decisions to "delink" Belgium and Luxembourg was given effect through Amendment 33 to the CPR, which removed language previously appearing in CPR Annexes II and III which applied to staff in Luxembourg the mechanisms for making annual adjustments to salaries and allowances

in Belgium. The appellant contends that on account of these changes, the January 2020 annual adjustments for salaries and allowances for staff in Luxembourg had to be determined in the same manner as for staff in all NATO locations outside of Belgium. Accordingly, in his view, salary adjustments for 2020 had to be determined based on a reference index reflecting changes in civil service salaries in certain countries "and the relevant consumer price index, corrected if necessary by the PPP." Adjustments to allowances had to be made utilizing a different formula applying purchasing power parities to adjustments to allowances in Belgium. The appellant maintains that the adjustments for 2020 were not made in accordance with these requirements of the CPR as amended.

20. In support of this contention, the appellant advances a complex argument related to a claim also made by the appellants in Case No. 2020/1306, which disputed the NAC's decision to create a new salary scale reflecting a substantial one-time increase to the salaries of A and L grade staff in Luxembourg effective in January 2020. The appellant contends that Article 22.2 of the CPR barred the NAC from creating a new salary schedule for A and L grades. Instead, the NAC could only authorize annual adjustments to the salaries of staff in all grades utilizing the methods specified in Articles 5.1.2 of Annexes II and III.K. He therefore contends that if the increases for A and L staff were effective as of January 2020, the revised "de-linked" versions of Annexes II and III had to be fully effective as well.

21. The appellant next claims that the 2020 adjustments violated Article 1.2.3 of Appendix 2 to Annex II of the CPR and Annex III of the CPR because "[t]he calculation of the PPP for Luxembourg was not based on the most recent family budget survey for Luxembourg as required" by Article 1.2.3 of Appendix 2. The appellant urges in this regard that there has been no recent family budget survey in Luxembourg, so that "the PPP applied to his salary – as well as the PPP which should have been applied to his family allowances" does not reflect actual purchasing power in Luxembourg, contrary to the cited CPR provisions. The appellant further complains that the methodology used to calculate the PPP is "obscure" and non-transparent.

22. The appellant urges that the respondent's conduct violates the principle of non-discrimination and equality of treatment, in that, as of January 2020, he is in the same position as other NATO staff members outside of Belgium. However, his salary and allowances were not adjusted in the same manner, so "his purchasing power is not equivalent to that of staff posted in other duty stations.

23. Finally, the appellant contends that the NAC committed a manifest error of assessment by determining his 2020 adjustments on the basis of Belgian data and without a PPP and family budget survey specific to Luxembourg. Further, he maintains that the NAC misused its powers and failed in the duty of care by failing to taking account of the interests of staff in Luxembourg.

24. By way of relief, the appellant requests:
- compensation for moral prejudice retroactive to January 2020, reflecting the difference between his salary as adjusted and as it should have been adjusted, an amount he appears to calculate as 0.2% of salary, plus interest for late payment;
- "Any loss in terms of salary and allowances resulting from a PPP calculation based on the relevant family budget survey," plus interest for late payment; and
- "The PPP for Luxembourg, calculated based on the relevant family budget survey, which should have been applied to the adjustment of his allowances," plus interest for late payment.

25. The appellant also requests:
- annulment of the salary scale published on 6 January 2020 and his January 2020 salary slip insofar as his 2020 salary "was adjusted in accordance with the Belgian adjustment index of 1.6% and a PPP which is not based on the most recent family budget survey,"
- annulment of the salary slip "insofar as it also revealed that the adjustment of the appellant's allowances did not include a PPP,"
- annulment of salary slips of the following months "insofar as they include the same illegalities;"
- compensation for material damages as listed above;
- reimbursement of "the cost of retaining counsels, travel and subsistence.

At the hearing, the Tribunal noted that the appellant was one of the staff members who received the substantial one-time increase in salary pursuant to the NAC decision contested in Case No. 2020/1306. The Tribunal requested clarification whether the relief requested by the appellant extended to annulment of the salary scale for A and L staff in Luxembourg pursuant to which he received a 16% salary increase beginning in January 2020. Counsel stated that it did.

### *(ii) The respondent's contentions*

*Admissibility*

26. The respondent maintains that the appeal is not admissible. It first contends that the appellant is challenging the Head of NATO Body's (HONB) actions in implementing the new adjustment methods and the associated method for determining PPP for Luxembourg adopted by the NAC. It contends that the HONB was obliged to carry out the NAC's decisions and had no discretion in the matter. The disputed measures are said in this regard to be "political and policy decisions by nature which are not subject to judicial review."

27. Second, the respondent contends that the appeal was not timely. It maintains that the appellant was put on notice of the NAC's decisions and of the approved adjustments to salaries and allowance in the fall of 2019, inter alia by a joint communiqué that he himself signed and at a November 2019 "Town Hall" meeting. The appellant therefore knew or should have known of contested measures at that time, and should have appealed within thirty days, rather than waiting for his January 2020 pay slip reflecting the new salary scales. Hence, his appeal was not timely.

28. Third, emphasizing that it could not provide the relief sought, the respondent contends that the appellant utilized the incorrect procedure to bring the appeal. In the respondent's view, he should have utilized the procedure under Articles 6.3.1 and 6.3.2 of CPR Annex IX for direct appeal to the Tribunal in the case of decisions "for which there are no channels for submitting complaints." The respondent observes that there is a 60-day time limit for bringing such appeals under Article 6.3.2, and that the appeal "should have been filed directly to the NATO AT within sixty (60) days of 25 October 2019." Accordingly, the appeal is not timely.

*Merits*

29. As to the merits of the appeal, the respondent prefaces its answer with a substantial discussion of Purchasing Power Parities, salary and allowances scales and tables, adjustments of salary scales, reference curves of purchasing power, and other matters bearing on the adjustment of salaries and allowances.

30. The respondent contends that the appellant mischaracterizes the effect of the NAC's October 2019 decision to "delink" Belgium and Luxembourg, and is incorrect in claiming that that the revised methods for making adjustments had immediate effect on 1 January 2020 rather than coming into full effect in January 2021. For the respondent, the breaking of the Belgium-Luxembourg link, and implementation of a new system for adjusting salaries in Luxembourg, were separate matters. "[A]ll Luxembourg salaries had first to be disaggregated from Belgium by way of Amendment 33 to the CPRs before salaries and allowances could be adjusted the following year on the basis of local data and corrections."

31. The respondent emphasizes that the CCR recommended, and the NAC approved, the specific amounts of the 2020 adjustments to salaries and allowances contested by the appellant. In the respondent's view, this shows the NAC's clear understanding and intent that the amended versions of Articles 5.2.1 of Annexes II and III.K (setting the methods for annual adjustments to salaries and allowances) have prospective effect and would be brought into operation over the course of 2020. For the respondent, "[t]he NAC approved the principle, the amounts, the tables and the budgets to put an end to the' Luxembourg exception' for adjustments. It did so in October 2019, for the CPR's to be amended from 1 January 2020, to produce effects on 1 January 2021. The same logic was followed for allowances."

32. The respondent disputes the appellant's claims that the adjustments for 2020 were improper because they did not include a PPP component calculated taking account of a recent family budget survey for Luxembourg. The respondent counters that "there is no obligation imposed by the adjustments method proposed by the CCR and accepted by the NAC to conduct such surveys on specific dates or when PPPs for a country are to be calculated for the first time." It contends that when family budget survey data are not available, the approved method allows for PPPs to be calculated using other consumption patterns as assessed by ISRP/Eurostat statisticians, adding that a family budget survey was planned for Luxembourg in the spring of 2021.

33. The respondent insists that all rules, including the CPRs have been followed in connection with the disputed 2020 adjustments, adding that in its view, the appeal rests upon "an erroneous and biased vision of NATO salary-setting mechanisms."

## D. Considerations and conclusions

*(i) Admissibility*

34. The respondent first contends that the claim is inadmissible because the appellant contests the effects of NAC political decisions determining the amounts of, and the methods for making, the 2020 adjustments to the appellant's salary and allowances. It insists that it was legally bound to implement these decisions. As it could not provide the relief sought by the appellant, the appeal is said to be inadmissible.

35. The Tribunal does not agree. Article 6.2.1 of CPR Annex IX authorizes appeals of decisions by the Head of a NATO body "…in application of a decision of the Council." This is such a case. The Tribunal has emphasized that it has jurisdiction to consider challenges implementing NAC decisions where a decision has been applied in a manner affecting an appellant's personal interests (see AT Judgment in Joined Cases Nos. 2020/1294-1295-1296, paragraph 75 *ff.*). This requirement is met in the present appeal.

36. Second, the respondent contends that the appeal was not brought within 30 days as required by the CPR and is therefore time-barred. It maintains that the appellant knew or should have known of the amount of the impending adjustments in the autumn of 2019, pointing to a joint communiqué signed by the appellant and a November 2019 "Town Hall" meeting. In the respondent's view, he was obliged to seek administrative review within thirty days of learning this information in the late fall of 2019, but he did not do so.

37. The Tribunal does not agree. As indicated *supra*, the Tribunal has clearly held that an administrative decision can only be appealed after it has been applied in a concrete manner that directly affects a staff member. Mere publicity or briefings regarding a NAC decision or other policy change are not a basis to seek administrative review (see AT Judgment in Joined Cases Nos 2017/1127-1243, paragraphs 93 *ff.*)

38. Finally, the respondent contests admissibility because the appellant used the incorrect procedure to bring his appeal, and should have utilized the procedures under Articles 6.3.1 and 6.3.2 of CPR Annex IX for decisions "for which there are no channels for submitting complaints." The respondent further contends that the appellants failed to comply with the time limit for bringing such appeals under Article 6.3.2.

39. The Tribunal finds this objection unconvincing. First, the appellant alleges conduct inconsistent with specific articles of the CPR, claims that are properly subject to administrative review. Further, the respondent did not interpose this objection in its communication denying the appellant's requests for administrative review. It instead engaged vigorously in the administrative appeal process, raising other objections to admissibility and detailed arguments intended to rebut the appellant's characterization of the situation. Having vigorously engaged in the administrative review process without objection, the respondent cannot at this stage maintain that resort to that process was inappropriate and bars consideration of these appeals.

40. The appeal is admissible.

*(ii) Merits*

*Legitimate Expectations*

41. The appellant's claims regarding the allegedly incorrect 2020 adjustments to his salary and allowances are said to rest in part on "commitments made by the CCR" in various reports and his resulting "legitimate expectations." The appellant does not explain how these recommendations can be a source of legal rights enforceable by the Tribunal within the scope of its competence under Article 6.2 of Annex IX of the CPR.

42. CCR reports are recommendations to the international organizations participating in the coordination process. Organizations may accept those recommendations or not, in accordance with their internal legal order. Thus, CCR reports may provide useful guides in interpreting or understanding NAC decisions taken on the basis of those reports. However, they are not "commitments" that are part of NATO's internal law, nor can they give rise to "legitimate expectations" binding on the organization. CCR reports are not "precise, unconditional and consistent assurances" to the appellant by an authoritative NATO source that might somehow give rise to protected expectations.

*Immediate Application, or Not?*

43. The heart of the appeal is the appellant's contention that the amended versions of the Annexes II and III.K of the CPR resulting from the NAC's October 2019 decisions delinking Belgium and Luxembourg had immediate effect, so that adjustments to salary and allowances effective as of 1 January 2020 had to be calculated in accordance with them. This was not done, says the appellant, so the respondent (and presumably the NAC) violated the CPR by not approving and paying the correct adjusted amounts for 2020.

44. On 25 October 2019, the NAC approved the CCR reports that have led to this appeal and the appeal in Case No. 2020/1306. The 259th Report, captioned "CREATION OF A SALARY SCALE FOR OFFICIALS SERVING IN LUXEMBOURG – NATO" established a new salary scale for NSPA's A and L staff. The second, the 264th CCR Report, granted a 1.6% annual salary adjustment for all Luxembourg NATO staff for 2020, determined for the last time utilizing the mechanism providing for the same annual adjustments to salaries in Belgium and Luxembourg. Annex 1 to the 264th report, showing the annual adjustment indexes to be applied as of 1 January 2020, shows an identical adjustment of 1.6% for both Belgium and Luxembourg; a note to that index states: "Belgium index also applied to Luxembourg in accordance with the 244th Report." Annex 3 to that report shows a Purchasing Power Parity for Luxembourg of 1, the same as for Belgium.

45. Thus, the 264th CCR report proposed, and the NAC subsequently approved, identical figures for Luxembourg and Belgium for 2020 adjustments to salaries (1.6%) and the indicated purchasing power parity of 1 (used to adjust allowances). These specific amounts – which are at the heart of the appellant's appeal - show that the NAC understood and intended that 2020 was to be a transitional year, during which the data needed to calculate adjustments to salaries and allowances for 2021 and after could be assembled.

46. The Tribunal finds compelling support for this understanding in the CCR's 272nd Report of 7 October 2020, which sets out the annual adjustments to salaries subsequently approved by the NAC for implementation in 2021. Annex 1 to the 272nd report for the first time shows separate adjustment indices for determining 2021 salary adjustments in Luxembourg (101.6) and Belgium (102.2). This makes clear that in 2021, unlike in 2020, the annual salary adjustment for Luxembourg was calculated separately from that for Belgium.

47. The amounts of the adjustments to the appellant's salary and allowances for 2020 contested in this appeal thus accurately reflect decisions by the NAC, NATO's supreme legislative authority.

48. The appellant further appears to contend, however, that the NAC determined these amounts in violation of the CPR, in particular Articles 5 of CPR Annexes II-6 and III.K dealing with annual adjustments to salaries and allowances.

49. The Tribunal does not agree. The appellant's arguments in this regard do not recognize that the interconnected provisions of CPR Annexes II and III dealing with annual adjustments must be interpreted as a whole and in a way that gives effect to all of their provisions. Taking annual adjustments to salary by way of example, these are in the first instance governed by Article 5.2.1.of Annex II. (Article 5.2.1. of Annex III.K, dealing with adjustment of allowances, is comparable, although somewhat simpler.) Prior to October 2019, this provision did not apply to staff in Luxembourg. Instead, their annual adjustments were calculated using the different method applied for staff in Belgium, which did not include a PPP component.

50. Article 5.2.1.of Annex II requires collection and analysis of various elements of data from the two years prior to a 1 January adjustment, stating in relevant part:

> 5.2.1 …the basic salaries for categories A, L, B and C …for staff posted in the other countries shall be adjusted at 1 January following the reference period by the salary adjustment resulting from the product of the final reference index referred to in Article 4.1.6.2 above, and the relevant consumer price index, corrected if necessary by the PPP as set out in Appendix 2, in order to guarantee a relative equivalency in purchasing power between the scales of the countries concerned.
>
> 5.2.2 These percentage adjustments shall apply to basic salaries in force at 31 December of the preceding year.

51. Article 4.1.6.1 and 4.1.6.2 of Annex II address calculation of the "final reference index." They provide in relevant part:

> 4.1.6.1 The reference index is the calculation mechanism which aims to reflect a parallel evolution of salaries in the CO with those of national civil servants in the reference countries.
>
> 4.1.6.2 The final reference index shall result from the calculation of the weighted average of the changes in percentage in real terms in the net remuneration of comparable grades in the [National Civil Service] of the reference countries, covering two reference periods with a weight of two-thirds for the reference period as defined in Article 4.1.3 and a weight of one-third for the preceding reference period. The changes in all comparable grades

> shall be aggregated by a simple average for each reference country…

52. Under Article 4.1.5 of Annex II, the eight reference countries are Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom. "Reference period" is then defined in Article 4.1.3 of Annex II to mean "the period from 1 July to 1 July preceding the 1 January annual adjustment, except for Spain…" Thus, the "final reference index" to calculate the salary adjustment for Luxembourg for 2020 first involved collecting data regarding the eight national civil service salaries for the two-year period July 2017 through 1 July 2019. This information would be available to the CCR in connection with calculating adjustments for other countries, and so presumably would not pose difficulty in calculating annual adjustments for Luxembourg.

53. The other required elements -- the "relevant consumer price index, corrected if necessary by the PPP" – are more problematic. Indeed, as considered infra, the appellant advances arguments that such data do not exist, that a PPP has not been correctly established for Luxembourg, and there has been no recent family budget survey there.

54. The appellant argues variously in its written materials and at the hearing that NATO should have anticipated the CCR's October 2019 recommendations delinking Belgium and Luxembourg and their subsequent approval by the NAC, and developed the required information beforehand in anticipation of the impending change on 1 January 2020; or that it should have assembled this information in the two months between the NAC's approval on 25 October 2019 and 1 January 2020; or that it could have made provisional adjustments in January 2020, subject to later refinement. The appellant argues in this regard that "[p]ractical difficulties are in no way a reason to waive the application of legal [sic] binding rules."

55. The Tribunal is not persuaded. The appellant's contentions – for example, that Article 5.2.1 of Annex II perhaps required NATO to assemble and analyze data in anticipation that the CPR would finally recommend delinking in October 2019 and that the NAC would agree – is unreasonable and has no basis in the text of that provision.

56. Further, the several provisions of the CPR dealing with annual adjustments must be read together, in a way that gives effect to the ordinary meaning of each provision and avoids manifestly unreasonable results. However, the appellant's selective interpretation fails to do so, rendering portions of Annex II inoperative.

57. Under CPR Annex II, after the relevant data and the PPP are determined and the required calculations performed, a proposed salary adjustment must be considered and approved through the Co-ordinated Organizations process in accordance with a schedule specified in the CPR. This procedure is set out in Article 3 of Annex II, which provides in relevant part:

> 3.1 Every year, the CCR shall examine the proposals for remuneration adjustment submitted by the Secretaries/Directors General in accordance with these rules.
>
> 3.2 The CCR shall make the recommendations necessary for the application of the present rules in accordance with sub-paragraphs (a), (b) and (c) of Article 6 of the Regulations concerning the Co-ordination system [154th CCR Report].

> Recommendations concerning the adjustment of remuneration at 1 January shall be made no later than 30 September of the preceding year referred to in Article 4.1.4 below (emphasis added).

58. Thus, Article 3 of Annex II requires that the elements needed to calculate the appellant's 1 January 2020 salary adjustment had to have been assembled and favourably considered by the CCR at some point prior to 30 September 2019. This was even before the CCR reached a contested decision to recommend "breaking the link" in October 2019. Compliance with Article 3 would not have been possible under the appellant's interpretation, which appears to assume that NATO could have determined the amount of the 2020 adjustments without engaging in the required Coordination process. The Tribunal does not accept an interpretation of the CPR that disregards significant provisions in this manner.

59. The appellant advances a further argument, urging that his 2020 adjustments violated Article 1.2.3 of Appendix 2 to Annex II of the CPR and Annex III of the CPR because "[t]he calculation of the PPP for Luxembourg was not based on the most recent family budget survey for Luxembourg as required" by Article 1.2.3 of Appendix 2. This provision states: "the consumption patterns used to calculate the PPP are those that are obtained from the most recent family budget surveys carried out by the ISRP and Eurostat. These surveys are carried out with the staff of international organizations every five to seven years."

60. The appellant does not explain how he may have been prejudiced by this alleged violation of the CPR.

61. In any case, this argument cannot be accepted. It again assumes that the 2020 adjustments were to be determined pursuant to Articles 5.2.1 of Annexes II and III and related provisions. As discussed supra, the Tribunal does not accept this argument.

62. Moreover, the appellant again reads the cited provision in isolation from related provisions. Appendix 1 to Annex III.G, captioned "Purchasing Power Parities" provides:

> 1.1.1 The PPP referred to in Article 2.1 of the Annex III.G, are adopted by the Governing bodies based on proposals from the CCR based on the calculations by the International Service for Remunerations and Pensions (ISRP) and in co-operation with the Statistical Office of the European Union (Eurostat) with reference to Brussels.
>
> 1.1.2 The PPP shall be calculated in accordance with the statistical methodology developed by statistical experts from the Member states of the European Union (″Article 64 Working Group″ – Eurostat).

63. Thus, the CPR authorizes bodies external to NATO – the ISRP and EUROSTAT – to determine the statistical methodology for determining the PPP to be factored into the CCR's annual salary adjustment recommendations. As recognized by 1.2.3 of Appendix 2 to Annex II, family buying surveys are conducted intermittently, every five to seven years; the respondent states that such a survey is planned for 2021. The respondent explains that "in the absence of such a survey for Luxemburg, the competent statistical bodies utilized alternative methods" and that "prices of goods and services collected by the national statistics institute in Luxembourg have indeed been used." The resulting calculation were accepted and approved by the NAC. Accordingly, this claim fails.

64. The appellant next maintains that the respondent's conduct violates the principle of non-discrimination and equality of treatment, in that, as of January 2020, his salary and allowances were not adjusted in the same manner as staff members in other locations outside of Belgium, so "his purchasing power is not equivalent to that of staff posted in other duty stations". As the Tribunal observed in Case No. 2020/1306, for many years, there was a long-standing and uncontested practice of adjusting salaries and allowances in Luxembourg in a manner different from adjustments to staff in other locations outside of Belgium. The 2019 NAC decisions to which the appellant takes exception launched a process to remedy this situation and to bring adjustments for staff in Luxembourg into alignment with the practice in other NATO locations. However, as explained supra, the Tribunal does not accept the appellant's contention that this was to be done with immediate effect. This claim is denied.

65. Finally, the appellant maintains that the NAC misused its powers and failed in the duty of care by failing to take account of the interests of staff in Luxembourg. The Tribunal does not accept this contention. The process approved by the NAC in 2019 to "de-link" adjustments to salaries and allowances in Luxembourg from those in Belgium was taken to remedy a situation that was perceived to be inappropriate and potentially inequitable. Taking these actions reflected proper administration, and not a misuse of powers or a failure to meet the duty of care.

66. In conclusion, the merits of the appeal are rejected in their entirety.

## E. Costs

66. Article 6.8.2 of Annex IX 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 [...].

67. 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 10 May 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

25 May 2021 AT-J(2021)0011

**Judgment**

**Case No. 2020/1320**

**VA**

**Appellant**

***v.***

**NATO International Staff**

**Respondent**

Brussels, 17 May 2021

Original: English

*Keywords: pre-litigation; time limits, summary dismissal.*

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO or Organization) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún and Mr John Crook, judges, and having regard to the written submissions and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2021)0004.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 8 December 2020, and registered on 11 December 2020, as Case No. 2020/1320, by Ms VA against the NATO International Staff (IS). The appellant requests the Tribunal to determine whether or not her complaint for retaliation is justified.

2. The respondent's answer, dated 15 March 2021, was registered on 31 March 2021. The appellant's' reply, dated 1 April 2021, was registered on 20 April 2021.

3. On 22 April 2021, the President of the Tribunal issued Order AT(PRE-O)(2021)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. The appellant submitted her additional views on 23 April 2021. The Tribunal deliberated on the matter at its session on 7 May 2021.

## B. Factual and Legal background of the case

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

5. The appellant joined the IS on 5 September 2010 under a definite duration contract, after having been previously employed with her country's Mission since April 2005. On 1 September 2013, the appellant signed an indefinite duration contract with the Organization, reconfirmed when, on 1 April 2015, she was transferred to the NATO Office of Resources (NOR).

6. On 16 July 2019, the appellant submitted a request for assistance to the Secretary General concerning matters of fraud and harassment allegedly perpetrated by IS staff members, including senior officials and her supervisor at the time.

7. The Organization undertook two separate investigations: it engaged an external investigator to look into the harassment claims and initiated an internal investigation to examine the other allegations.

8. On 16 April 2020, the Deputy Assistant Secretary General for Human Resources (DASG HR) informed the appellant of the outcome of the investigations. The letter read as follows:

> […] As you are aware, an external expert, Ms RS was engaged to undertake an independent investigation regarding the allegations of sexual and moral harassment, bullying, discrimination and abuse of authority that you expressed against the former Deputy Director of the NATO Office of Resources […]

> Ms S has delivered her report. In light of its findings, I consider that you were subjected to a hostile working environment. This was the result of a combination of factors, including your own relationship with your colleagues in the NOR Front Office and also the management style of the former Director NOR. I share the views of the investigator that the main responsibility lies, however with Mr V, whose management had been divisive, fostering and escalating the tensions and conflicts between you and your Front Office colleagues. Because his actions in this regard, and taken in their totality, would appear to amount to harassment, I am initiating several actions, including disciplinary proceedings against Mr V, to address the issue.
>
> Regarding the allegations in your letter of fraud and violation of the NATO Civilian Personnel Regulations and Code of Conduct in the handling of annual, special and home leave, I wish to inform you that an internal investigation was carried out, following which a certain number of corrective actions were approved, including appropriate disciplinary action against Mr V.
>
> Finally, it has been noted that certain documentation which you submitted in connection with your request appears to have been drawn from emails that were not directly addressed to you. I have recommended that the NATO Office of Security be asked to look into this.

9. On 11 May 2020, the Director, NATO Office of Security, (DNOS) contacted the appellant requesting a meeting with her regarding her use of emails that were not directly addressed or copied to her. The appellant met the DNOS on 15 and 20 May 2020.

10. On 21 May 2020, the appellant's counsel wrote to the DASG HR in reply to the 16 April 2020 letter, advancing concerns, *inter alia*, of retaliation, threat and intimidation with regard to the NOS investigation opened against the appellant. The DASG HR replied on 28 May 2020. He explained, *inter alia*, that the investigation conducted by the NOS was totally independent from the appellant's claims and had to be seen in the context of the security regulations that every staff member must abide by.

11. Also on 28 May 2020, the appellant was notified by DNOS of the outcome of his investigation:

> […] As a result of my investigation into the provenance of the email you obtained to support your complaint against a NATO staff member, I have come to the conclusion that you misused your access to this staff member's email account in order to find, and make copies of, emails you felt supported your complaint. I also found that you conducted an unauthorised search of your supervisor's physical files […]
>
> When you were given access to the Magellan, you signed a document stating that you would comply with the SecOps. Delegated access to Outlook is given for the specific purpose of assisting another employee in advancing with the work of the office. […] The fact that you had access should not be confused with your right to access; they are two different things.
>
> In light of these findings, I will be entering a record of a security infraction into your record (this will be your second documented infraction). I will also be notifying your national security authority regarding this infraction.

12. On 24 June 2020, the appellant's counsel requested an administrative review of the 28 May 2020 letter of DNOS. The Assistant Secretary General (ASG) of the Joint Intelligence and Security Division (JISD) replied on 14 July 2020, upholding the DNOS's decision.

13. On 2 October 2020, the appellant wrote to the Secretary General regarding the 28 May 2020 DNOS letter, and requesting an investigation to ascertain, *inter alia*, whether the action taken from 16 April 2020 onwards, and in particular the initiation of the security investigation, constituted retaliation. She added that, should the investigation confirm her claims, the security infraction against her must be expunged from the record and disciplinary action taken against the offenders.

14. On 23 October 2020, the ASG for Executive Management (EM) replied:

> […] In your letter you allege once again that you have been a victim of retaliation as a result of the investigation which was carried out by the Director of the NATO Office of Security (DNOS) about potential infringement of the security regulations in connection with a number of emails on which we were neither the sender nor the addressee.
>
> I wish to recall that you already made the same allegation of retaliation, firstly with your legal counsel's letter of 21 May 2020 to the DASG for Human Resources (DASG HR) and then in your legal counsel's letter of 24 June 2020 requesting administrative review of the decision by DNOS.
>
> On both occasions the allegation of retaliation was rejected, firstly by DASG HR in his letter EM(HR)(2020)0106 of 28 May 2020 in response to your legal counsel's letter of 21 May, and then by Assistant Secretary General for Joint Intelligence and Security (ASG JIS) in his letter of 14 July 2020 (JIS(2020)0086) informing you of the outcome of the administrative review.
>
> The allegation which you again put forward in your letter of 2 October to the Secretary General has therefore already been considered in depth, and the reasons for rejecting it were already communicated to you in detail by DASG HR and ASG JIS in their letters of 28 May and 14 July respectively. You did not contest either of these two decisions using the procedures foreseen by the Civilian Personnel Regulations (CPRs) for challenging the outcome of an administrative review. The possibility to invoke such procedures is time barred. […]

15. On 27 October 2020, the appellant wrote an email to the Secretary General pointing out, *inter alia*, that she had not yet been presented with the security infraction, and therefore the argument to deny her complaint as untimely could not stand. She requested that her complaint go forward in accordance with the established procedures.

16. The Director of the Private Office (DPO) replied on 3 November 2020 as follows:

> […] As mentioned by the ASG for Executive Management in his letter to you of 23 October, your allegations of retaliation were already twice rejected, firstly on 28 May 2020 and then, following an administrative review, on 14 July 2020. Detailed explanations of the decisions were provided on both occasions.
>
> I note that you did not contest either decision under the provisions foreseen for this purpose in the Civilian Personnel Regulations, and that your allegations on this topic have

already been extensively considered and fully addressed.

17. On 24 November 2020, the appellant wrote once more to the Secretary General:

> […] With this letter, I note your decision in DC(2020)0128 dated 3 November 2020 to deny my request to submit the complaint I sent you on 2 October 2020 to the Complaint Committee. I wish to inform you that, pursuant to the NATO CPRs, I intend to submit the matter to the NATO Administrative Tribunal.
>
> In addition, according to the NATO by-laws I am entitled to be provided with the report that was written by the external investigator, from which the security investigation sprung, in order to have an opportunity to respond and exercise my right of defence. Therefore, I would be grateful if you could send me this report or that you provide a legal justification for denying this request at your earliest convenience.
>
> Lastly, I am requesting again that, as regard my original request for assistance and in accordance with the NATO by-laws which state that "the complainant is to be informed of the outcome of the investigation of the elements that relate to the complainant and the measures that will be taken", you inform me of the measures that were taken against the main offender and his accomplices or that you provide a legal justification for denying this request at your earliest convenience.

18. The appellant submitted the present appeal on 8 December 2020.

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

### *(i) The appellant's contentions*

19. The appellant considers that she has exhausted all available channels to submit her complaint under Annex IX to the CPR (*i.e.* her 2 October 2020 letter to the Secretary General and the 3 November 2020 reply of the DPO denying her complaint), and she is consequently submitting her appeal to the Tribunal.

20. The appellant's main claim is for recognition of the retaliation to which she was allegedly subjected to following her request for assistance of 16 July 2019.

21. She refers to ON(2020)0057, section D, according to which:

> […] all persons who raise complaints of harassment, bullying, or discrimination in good faith […] will be protected against all forms of retaliation and reprisal as a consequence of such activity. […] any form of retaliation, in the form of adverse action of any kind, against anyone for engaging in a protected activity constitutes a form of misconduct that shall result in disciplinary action. […] the test of whether an adverse action is retaliatory is whether the action would have been taken, for separate and legitimate reasons, even in the absence of the protected activity. If not, the action would be considered as motivated by retaliation and thus invalid.

22. The appellant also refers to the letter she received from the Organization's Psychosocial Prevention Advisor dated 28 August 2020 stating:

> […] in analyzing the documentation that you have provided to me, I conclude that your

arguments that you have been victim of retaliation (secondary victimization by HR) are prima facie justified.

This means that I judge that, in the absence of an answer or justification from the alleged offender, I consider that your allegations and evidence in support of your issue are sufficiently weighty to entitle a reasonable man to decide the complaint in your favor.

I base this judgment on the fact that, prima facie, while you were engaged in a formal complaint (a protected activity), Mr B, in his role as initiator of the disciplinary proceedings against the offender(s) (as per the NCPRs Annex X-3, art. 5.2), initiated negative action against you that was directly related to the complaint you have filed – and that could potentially narrow your position as a party in the complaint.

This extraordinary action, which was requested by Mr B. and conducted in depth by the highest levels of the NATO Office of Security (I understand that you felt very intimidated), implied a threat for your security clearance and could have resulted in your termination with the Organization.

23. The appellant outlines the legal elements of the alleged retaliation in relation to the NATO policy quoted above and the CPR, as follows.

- on the request for assistance submitted in July 2019: she affirms that this is a protected activity and that in accordance with Article 5.3.1 of Annex IX to the CPR "no individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member";
- on the fact that the parties that took part in the security investigation had knowledge of the protected activity: the appellant underscores that both the EM letter of 16 April 2020 and the NOS letter of 11 May 2020 stated that "[…] certain documentation which you submitted in connection with your request [...]" and "[…] as a result of my investigation into the provenance of the emails you obtained to support your complaint against a NATO staff member […]";
- on the adverse security action that was taken: she reports that a security infraction was entered into her record of which the national authorities would be informed;
- on the fact that without the protected activity she would not have been subjected to the adverse security action: the appellant explains that the emails for which she was investigated were provided for the sole purpose of supporting her claims of harassment;
- on the fact that the adverse security action was arbitrary and discriminatory: the appellant underlines that she was the only party to be investigated while no actions were opened on the authors and recipients of the emails notwithstanding the fact the contents of which (conspiracy, bullying and slander) are according to her a violation of the NATO security rules.

24. The appellant stresses that she does not contest the fact that she produced the documentation used as evidence in her claims through the delegated access, nor does she contest the security rules framing access to such documentation, but she emphasizes that she has been very open about this from the onset and, yet, an investigation was opened in her regard. The appellant notes as well that this investigation was conducted nine months after the Organization had knowledge of the emails and at the same time that disciplinary proceedings against the main offender were initiated.

25. The appellant claims the following prejudice:
- to the harassment case: she considers that the inaction and adverse actions on the part of the Organization have stalled the process and unfairly impeded her right of defense, tainting her testimony and compromising her credibility;
- to the retaliation case: the appellant believes that the claim by the Organization to dismiss her case because she "did not contest either decision under the provisions foreseen for this purpose in the CPRs and that [her] allegations on this topic have already been extensively considered and fully addressed" is in bad faith and the dismissal of her complaint caused serious prejudice to the retaliation case. The appellant contends that it is the Organization that has unilaterally delayed the process and failed to comply with procedures;
- to herself: the appellant states that the Organization's failure to comply with procedures and its retaliatory effort caused serious moral prejudice, leaving her in fear for months about when the security infraction would be enacted. This would be a second offense and her security clearance could be withdrawn, entailing dismissal from NATO and potentially compromising her future career in institutions where a clearance is required. She also stresses that the adverse action took place while she was on sick leave, interfering with her recovery from the recognized acts of harassment she was exposed to;
- to the Organization: the appellant considers that the Organization's acts (denying its staff their right of defense, acting in bad faith and unfairly, stalling processes, disregarding procedures, retaliating employees) are effectively working against the policies it is supposed to enact in order to protect employees who expose wrongdoings.

26. The appellant requests the Tribunal:
- to take the necessary measures to ensure the resolution of her case within the prescribed framework and rules;
- to rule that the security infraction is motivated by retaliation and thus invalid;
- to rule that the Organization issues an official apology to her;
- to award € 50,000 as monetary compensation, the totality of which is to be paid to the Staff Association to be used solely to fund legal assistance through the Staff Association;
- that the Organization is instructed to provide her with the reports of the harassment investigation and the security investigation;
- to note that she reserves the right to ask the Organization to open investigations into security and retaliation matters against the alleged offenders; and
- to ask the Organization to authorize public disclosure of her case.

She added that she reserves the right to petition a court of law outside of NATO at a later stage.

27. In her comments to the Rule 10 Order, the appellant adds that the prolonged harassment and malicious retaliation have disrupted her life and livelihood and that she resigned from NATO. She continues by saying that she is not appealing to the Tribunal out of a wish for personal gain, vendetta or to outwit the Organization's lawyers, but in the hope that the decision of the Tribunal will help change the culture of silence and impunity existing at NATO.

***(ii) The respondent's contentions***

28. The respondent considers the appeal clearly inadmissible and requests its summary dismissal.

29. The respondent also considers that the appellant abuses the dispute resolution system as she voluntarily chose not to properly follow the procedure prescribed in the CPR.

30. The respondent points out that in accordance with the rules, the complaint made on 2 October 2020 should have been introduced within the timeframe for submitting a complaint *i.e.* within the 30-day period following the outcome of the administrative review of 14 July 2020. The appellant submitted the complaint three months after such outcome and it is therefore time-barred. The same applies to the request to establish a Complaints Committee, which was mentioned for the first time by the appellant in her letter of 24 November 2020, four months after the outcome of the administrative review.

32. The respondent highlights that the appellant seems to have confused the procedures to be followed and uses terminology that is inconsistent and confusing. For example, in her 2 October 2020 letter she makes a request to "to look into acts of retaliation" and in another letter the request is described as "complaint" and that "an investigation" is requested.

33. The respondent further considers that also the 2 October 2020 letter cannot be considered as a "complaint" within the meaning of the rules as the appellant deliberately omitted to mention that she had already alleged being a victim of retaliation on two occasions (21 May 2020 and 24 June 2020), that the allegation was rejected (on 28 May 2020 and 14 July 2020 respectively) and that neither of these decisions was further contested by the appellant, the time limits for doing so having elapsed in August 2020.

34. Should the request for summary dismissal not be upheld, the respondent requests that the appeal be dismissed on the grounds that the claims are time-barred, since the appellant chose not to formally challenge them at the appropriate time and in accordance with the procedures laid down in the CPR.

35. The respondent further alleges that the appeal is inadmissible because the Tribunal is not competent to hear the case, the claim being outside the Tribunal's jurisdiction. The respondent submits in this regard that the 28 May 2020 letter cannot be interpreted as constituting a decision within the meaning of the rules as it does not individually and adversely affect the appellant's situation.

36. The respondent explains that the decision is based on an assessment of facts, which the appellant does not contest: she failed to respect her obligation under the NATO security policy and was made aware of the consequences thereof. Moreover, the respondent contends, the appellant has not suffered any damage, no disciplinary action was taken against her, and her legal situation remained unchanged. Any concerns regarding her security clearance would have been a matter of the competent national authorities.

37. Finally, the respondent deems that the appeal is also devoid of merits.

38. The respondent recalls that in the context of the examination of her request for assistance, the appellant admitted having used a delegated access to her supervisor's Outlook account to collect information, without her supervisor or anyone else knowing that she had accessed such information in that way. The investigation by the NOS also showed that the appellant conducted an unauthorised search of her supervisor's physical files to find the hard copy of a document that she had not found in his emails.

39. The respondent notes that the appellant has been repeatedly informed that the security investigation carried out by the NOS was entirely separate from the request for assistance. The NOS's attention being drawn to the fact that a member of the IS may have acted at variance with the NATO Security Policy, an investigation was launched, as the NOS is required to do.

40. The respondent adds that all staff members, regardless of their grade or function, have an obligation to comply at all times with the Security Regulations and upon taking up employment, a declaration in this respect is signed. The appellant had done so. Moreover, the appellant, when given access to the Magellan network signed a document stating that she would comply with the Security Operating (SecOps) Procedures and each time she logs on her network this statement must be reaffirmed.

41. The respondent emphasises that one of the most basic principles of the security regulations is the need to know, "a principle according to which a positive determination is made that a prospective recipient has a requirement for access to, knowledge of, or possession of information in order to perform official tasks and services". The respondent states that the appellant's access to the email and hard copy was not in accordance with the need-to-know principle and that her accessing and use of these documents were not for official purposes. Nothing in the appellant's functions, tasks or position justified a systematic search of an electronic mailbox and of documents spread out on an office desk, even if she had physical or electronic access to the mailbox or desk in question. The respondent concludes that such a search constitutes a security breach.

42. The respondent reiterates that the role of the NOS, its mandate, and the measures to be taken in case of a security incident, are governed by the Security Regulations. The Magellan SecOps provide that any computer misuse "will be subject to a security investigation by the NOS and may constitute a security violation". The respondent therefore points out that the NOS investigation fell within its mandate, which also obliged it to notify the appellant's national security authorities of a security infraction.

43. The respondent rejects the other allegations made by the appellant. The respondent submits that at all stages leading up to the 24 June 2020 decision the appellant was properly informed, given ample opportunity to respond and personally heard on various occasions. The contentions that she was not able to exercise her rights of defence and that there was no due process are therefore rejected. On the allegations that the Organization might have failed to implement decisions within a reasonable time, the respondent notes that the security infraction was notified to the appellant two months after she was informed that the investigation would take place and only one month after she was heard by the NOS Director. Any decision taken by the national security authorities is not within the IS remit and is outside the Tribunal's jurisdiction.

44. The respondent also rejects any claim for monetary compensation in the absence of any factual or legal error committed by the Organization and the appellant not having suffered any damage. Finally, it notes that ordering an official apology by the Organization is not within the Tribunal's competence as stated by the Tribunal itself in its case law.

45. The respondent requests the Tribunal to dismiss the appeal in accordance with Article 6.5.1 of Annex IX to the CPR and Rule 10 of the Tribunal's Rules of Procedure. Should the appeal not be summarily dismissed, the respondent invites the Tribunal to declare the appeal inadmissible and, if not declared inadmissible, to dismiss it as being without merits in all respects.

## D. Considerations and conclusions

46. The respondent submits that the appeal is time-barred and should be summarily dismissed as clearly inadmissible. When given the opportunity to comment on this submission, the appellant did not provide convincing arguments to the contrary, but limited herself to general observations regarding the possible role that the Tribunal could play to change the culture within NATO.

47. It is well settled that time limits have to be respected and that non-respect of time limits including during the pre-litigation phase entails inadmissibility of an appeal (*cf.* Tribunal Judgment in Case No. 2019/1288, paragraph 37).

48. In the present case the pre-litigation procedure, during which the appellant was represented, started on 24 June 2020, when the appellant's counsel requested an administrative review of the 28 May 2020 letter (*cf.* paragraph 12 *supra*). This request met the time limit requirement laid down in Article 2.1 of Annex IX to the CPR. The Assistant Secretary General (ASG) of the Joint Intelligence and Security Division (JISD) replied on 14 July 2020, upholding the decision.

49. Article 4.2 of Annex IX to the CPR provides:

> A staff member or his/her legal successor, or a member of the retired NATO staff or his/her legal successor (hereinafter referred to as the claimant) wishing to contest the decision after pursuing an administrative review as prescribed in Article 2 of this Annex, or, where applicable, mediation as described in Article 3 of this Annex, or if no response has been received within the applicable time limit, may make a 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. In order to be considered by the Head of the NATO body, a complaint must be submitted to him/her within 30 days following the notification of the contested decision. The Head of NATO body shall respond to the complaint within 30 days unless a Complaint Committee is to be established. (underlining added)

50. The contested administrative decision was notified on 14 July 2020. However, the appellant did not contest that decision within the mandatory 30-day time limit given in Article 4.2 of Annex IX to the CPR. She instead waited until 2 October 2020 to write the Secretary General to request a further investigation. Even if that request is construed as

a complaint for purposes of the CPR's procedures, it was out of time.

51. The appellant not having respected the necessary time limits in the pre-litigation procedures, the Tribunal, as it has constantly held (*cf.*, for example, Judgments in Cases Nos. 2013/1008, 2014/1015, 2014/1018, 2016/1075, and 2019/1288), and in accordance with Rule 10, paragraph 2, of its Rules of Procedure, must conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the CPR. It must be summarily dismissed.

## E. Costs

52. Article 6.8.2 of Annex IX 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 [...].

53. The appeal being dismissed, no reimbursement of costs is due. None were requested.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 17 May 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

25 May 2021 AT-J(2021)0012

**Judgment**

**Case No. 2020/1311**

**LP**

**Appellant**

***v.***

**Centre for Maritime Research and Experimentation**

**Respondent**

Brussels, 18 May 2021

Original: English

*Keywords: occupational invalidity.*

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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 Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 16 April 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 22 August 2020, and registered on 10 September 2020, as Case No. 2020/1311, by Mr LP against the Centre for Maritime Research and Experimentation (CMRE or Centre). The appellant, a NATO retiree, appeals the respondent's decision not to recognise him as an occupational invalid.

2. The respondent's answer, dated 9 November 2020, was registered on 18 November 2020. The appellant's reply, dated 2 January 2021, was registered on 19 January 2021. The respondent's rejoinder, dated 12 February 2021, was registered on 17 February 2021.

3. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 16 April 2021 utilizing facilities provided by NATO Headquarters. It heard arguments by the appellant and representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual and Legal background of the case

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

5. This is the appellant's third appeal. The first two, Cases Nos. 2018/1266 and 2018/1271, were joined and dealt, respectively, with the appellant's claim for promotion to grade A5 and for compensation for damages he allegedly suffered as a result of persecutory and retaliatory acts by the former CMRE Director. The Tribunal declared the first case inadmissible and unfounded, and dismissed the second because of lack of convincing evidence in support of the claims.

6. The appellant is a NATO pensioner who retired from the CMRE on 28 February 2019 after attaining the age limit, following more than 20 years of work as a NATO International Civilian. He currently receives a NATO pension.

7. On 24 January 2019, following a period of extended sick leave, the appellant submitted a request to the CMRE Head of Personnel to initiate invalidity proceedings. On 28 January 2019 the CMRE Head of Personnel informed the CMRE Medical Advisor of the appellant's request and advised that, once the third doctor on the Board was named, he would start preparing the meeting of the Invalidity Board (IB or Board). The confidential medical file provided by the appellant was transmitted to the CMRE Medical Advisor on 6 February 2019.

8. On 18 February 2019, the CMRE Head of Personnel was informed that the appellant was scheduled to have a medical appointment two days later. The email was

in Italian and CMRE's Human Resources (HR) services understood this to be a meeting with the third member of the IB prior to the convening of the IB, whereas it turned out to be a meeting of the Board itself.

9. On 20 February 2019 the IB met at the offices of the third doctor. The appellant was present and was examined.

10. On 3 April 2019 this Tribunal rendered its judgment in Cases Nos. 2018/1266 and 2018/1271.

11. On 7 May 2019, the Invalidity Board delivered its report (dated 3 May 2019) stating that the appellant was "suffering from permanent invalidity which totally prevents him for performing the duties corresponding to his post" and that "[t]he invalidity finds its determining and direct cause in the exercise of the profession".

12. On 28 May 2019, the CMRE informed the Medical Advisor about inconsistencies in the process, *inter alia*, that the Centre had not had the chance to provide the Board with the required administrative file, its assessment of the appellant's condition or the appellant's job description. It also stressed that the Board did not provide reasons for its findings.

13. On 15 July 2019 the IB provided an epicrisis of its report, stating:

> The occupational risk factors that lead to the health conditions underlying the invalidity was no[t] due to harassments, discriminations o[r] wrongdoings occurred in the workplace but to general stressful conditions involving the staff member since 2014 and mainly determined by not clear communication and poor reports with the CMRE Director at the time.

14. On 12 September 2019, the CMRE Director wrote to the appellant informing him that the Centre questioned how the IB was able to reach its conclusion without CMRE's involvement or allowing it to provide comments. She therefore questioned the unilateral character of the Board's proceedings. She suggested giving the Board another chance to review the matter thoroughly and requested the appellant to provide comments and supporting elements.

15. The appellant provided written comments on 25 September 2019. In these comments he argued that the Centre had never recognized that he suffered from an occupational disease and that it contended that his claim in this regard was undermined by the negative decision of this Tribunal on his accusations of harassment. Nevertheless, he maintained that his request to be recognised as a permanent and total invalid had to be considered as a request for an occupational invalidity, since a "normal" invalidity would not make sense since the invalidity pension would be equal to his retirement pension. He noted that his request was accompanied by a confidential medical file, which explained in detail the detrimental treatment he had received from the previous Director of the Centre including the fact that his accusations of harassment had been deemed unfounded by an external investigator.

16. The Appellant's 25 September 2019 comments submitted further that the CMRE had accepted his formal application to be declared a permanent and total invalid by

submitting it to the CMRE medical advisor, who then brought his case before the IB. The causal link between the medical conditions and employment was then sufficiently established by the materials he submitted to the IB and was recognized by the IB.

17. He considered that the Tribunal's judgment could not be considered for the purposes of the invalidity procedure since the judgment came out one month after the IB's conclusions. In his opinion, the Tribunal confirmed the conclusions of the investigator that were already known to the IB and therefore did not bring forward new information. Moreover, he adds, the judgment was available to CMRE, including allegedly its medical advisor, who both apparently did not consider it necessary to have the IB review the matter.

18. He found the Director's point regarding the unilateral character of the IB's proceedings quite "unique" considering that the responsibility for organizing the Board's activities lies with the organization or its medical adviser.

19. He observed regarding the IB's failure to refer to the Belgian legislation that guidance in this regard should have been provided by the Centre. Moreover, the IB implicitly applied the Belgian legislation, and the CMRE medical advisor was aware of it following his involvement in previous disability cases.

20. He concluded that it was not necessary to give the Board another chance and that its 3 May 2019 decision must be considered final.

21. On 28 October 2019, the CMRE referred the case back to the IB in accordance with Instruction 13/4 (iii) of Annex IV to the CPR, together with the administrative file (which was not submitted prior to the IB's earlier proceedings), the appellant's comments, the Belgian list of Occupational Diseases, the appellant's job description as well as a copy of the Tribunal's judgment in Cases Nos. 2018/1266 and 2018/1271. The appellant was informed thereof the same day.

22. On 15 June 2020, after several reminders by the CMRE, the IB rendered its report. It stated:

> [T]he medical Board (sic) members examined files and consideration attached in order to re-assess, in a more accurate way, a correlation between the staff member health condition and occupational hazards […]
> The occupational disease in matter (i.e. Adjustment Disorder with mixed Anxiety and Depressed Mood) i[s] not enclosed in the list of occupational illnesses in accordance with Belgian legislation […]
> It is not possible to identify univoque (*sic*), determining and direct causes in the execution of the job as described in the General Job Description […]
> It's true that analysing Mr P's Job Sheet it is not possible to notice occupational risk factors other than those in a normal office environment.
> We confirm that there were not workplace harassment conditions in the determination of the illness […]; the illness in matter may have been caused by poor relationships and lack of communication between the staff member and previous CMRE Director.
> It is possible to state that NATO Group Insurance Contract criteria (points from "a" to "d") in order to determine an occupational disease are not completely met.

23. On 22 June 2020, the CMRE Director informed the appellant of her decision, based on the final findings of the IB, not to recognise him as an invalid within the meaning of the Rules.

24. On 16 July 2020, the appellant submitted a request for administrative review to the NATO Secretary General. No response was received.

25. On 22 August 2020, the appellant submitted the present appeal.

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

### *(i) The appellant's contentions*

26. The appellant alleges that the 22 June 2020 decision is based on procedural and merits defects.

27. Concerning the procedural defects, the appellant contends that the decision is the last act in a series of irregular acts and omissions committed by the CMRE after 3 May 2019 (the date of signature of the initial IB report), in particular involving failure to comply with Instructions 13/3 and 13/4 of Annex IV to the CPR.

28. The appellant observes that he did not receive any communication concerning the reconvening of the IB on 15 July 2019 and that he was not requested to provide written comments as required by the Instructions. He also contends that he never received the 28 October 2019 letter by which the Board was asked to meet for the third time, and that he never received an invitation to provide written comments prior to that meeting. He maintains that he was provided with a copy of the letter only on 3 July 2020, after having made himself the request to the CMRE.

29. The appellant states that following the receipt of the Board's report dated 3 May 2019, the CMRE did not take any decision on the invalidity nor did it notify him of the Board's findings. The same happened following the 15 July 2019 meeting. The appellant notes that he learned of the contents of the Board's 15 July 2019 epicrisis of its initial report in an informal manner only on 18 September 2019, several months after the occurrence of the events.

30. The appellant stresses that the entire invalidity process was managed by the Centre, liaising through its Medical Advisor, and he expresses therefore surprise when the CMRE questions the unilateral character of the Board's proceeding without having received its views. Also, he considers that the misunderstanding on the 20 February 2019 date of the IB meeting reflects the Centre's lack of knowledge of the rules governing the functioning of the IB and is an excuse for its failure to transmit to the Board the administrative file.

31. Concerning the merits defects, the appellant highlights that the IB met three times: on 20 February 2019, on 15 July 2019 and on 12 June 2020, and that the conclusions of 20 February and 15 July are the same. The third meeting resulted from a formal request from the CMRE, which contended that the Board acted beyond its authority by 1) finding that he was suffering from an occupational disease despite the lack of a clear mandate

from the CMRE; 2) not applying the relevant list of occupational diseases; 3) not verifying the non-medical claims regarding the working conditions within the CMRE; and 4) not providing a direct causal link between the disease and the organization.

32. The appellant considers that if the CMRE believed that his formal application to be declared by the IB as a permanent invalid was unacceptable, it should have rejected it without referring it to the Board. He notes that the Centre instead constituted the Board and carried out the activity through the responsible persons, *i.e.*, the Head of Personnel and the Medical Advisor. It can, therefore, not be claimed that the Board acted beyond its authority.

33. The appellant refers to the Belgian legislation (the Royal Belgian Decree of 28 March 1969) and its Article 30 *bis,* stating that this legislation:

> also gives rise to compensation under the conditions established by the King, the disease which, although not appearing in the list referred to in article 30 of these laws, finds its determining and direct cause in the exercise of the profession.

He considers that the Board did follow the Belgian legislation when it recognized that his disability found its determining and direct cause in the exercise of his profession, and that when it was asked to reassess the situation at its third meeting, it only did so in the light of the narrow terms imposed by the CMRE.

34. On the causal link between his illness and his exposure to his profession, the appellant advances that absolute proof is not legally required and that sufficient documentary evidence of his stressful working conditions was provided. He recalls his last four years of service with the CMRE during which he was removed from his position, was excluded from the Centre Management Board and from recruitment processes, was demoted and finally was dismissed.

35. The appellant highlights that the CMRE never contested recognition of his disability. It never requested re-examination of the case from a strictly medical point of view and therefore its decision rejecting recognition of the invalidity is clearly unfounded, as, in his view, is the CMRE's rejection of the link between his invalidity and the exercise of his profession.

36. He alleges a lack of professionalism and interest on the part of the CMRE, considering that the 22 June 2020 decision had the sole effect of postponing the resolution of the case for a further 12 months.

37. The appellant denies that his behavior amounts to an abusive use of the appeals procedure and that his appeal is solely motivated by financial reasons. The CMRE's reference to an extract of his email exchanges with the Centre, which he claims to be confidential, only shows a picture of his personal situation at the time of the events and does not affect the merits of the case. He clarifies that he is currently not in receipt of a pension from the Italian Air Force and that the appeal is not a form of retaliation against the CMRE but represents a legitimate effort to protect his interests.

38. The appellant concludes that the 22 June 2020 decision is not consistent with the IB decisions of 3 May and 15 July 2019 (finding the existence of an occupationally related

disability) or with the Board's re-assessment of 4 June 2020, in which the Board, while considering that the four criteria established by the NATO Group Insurance Contract to determine an occupational disease were not completely satisfied, did not deem it necessary to cancel or modify its conclusions in its 3 May and 15 July 2019 reports, which he considers to remain operational for all purposes.

39. The appellant requests the Tribunal to:
- annul the 22 June 2020 Director's decision and all the CMRE acts subsequent to the 3 May 2019 IB report;
- order CMRE to grant him, in accordance with the 3 May 2019 findings of the IB, an invalidity pension pursuant to Article 14, paragraph 2, of Annex IV to the CPR to take effect as of 20 February 2019 (the date of the first meeting of the IB).

***(ii) The respondent's contentions***

40. The respondent has no objections to the admissibility of the appeal.

41. The respondent denies the claims of lack of professionalism and of concern for the appellant's interests. It refers to numerous pieces of correspondence exchanged with the appellant, and urges that it cannot be held responsible for the time the procedure took. This was dependent upon the schedules of the physicians on the IB, which is an independent body of medical experts, and on the pandemic situation, especially in Italy, at the time.

42. The respondent observes that the 3 May 2019 report was very laconic and did not satisfy the requirements of points a) and b) of Instructions 13/3 (i) of Annex IV to the CPR. The Head of Personnel therefore wrote to the Medical Advisor requesting the IB to motivate its findings. It also quoted the NATO Appeals Board Decision No. 434, which states amongst other things:

> While doctor-patient privilege prevents medical information from being disclosed to persons not involved in the invalidity examination process, in no way does it exempt the Board from its obligation to provide the reasons for its findings.

43. The respondent explains that once the IB delivered the epicrisis of its decision, the two elements together constituting a full report, it became clear that it had acted *ultra vires*, for a number of reasons: lack of the administrative file provided by the administration, and lack of the CMRE's statement whether the Organization considered the appellant's condition likely to have arisen "from an accident in the course of performance of his duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being". Furthermore, the IB did not apply the Belgian List of Occupational Diseases, as required throughout all NATO bodies, had not verified non-medical claims regarding harassment and allegedly stressful working conditions, and did not provide evidence of a causal link between the alleged disease and the Organization.

44. The respondent stresses its obligation under Instruction 13/3 (viii)(a) of Annex IV to the CPR to submit an administrative file. In reply to the appellant's allegations of procedural defects, it notes that when it asked the IB to provide the reasoning behind its 3 May 2019 decision, it was simply to allow the CMRE to take an informed decision, *i.e.*,

there was no “new” administrative file to be provided, as the Board had not been requested to reconvene. Similarly, the respondent explains that the appellant was not provided with a decision within 30 days from the 3 May 2019 report, because the process was not concluded and the CMRE could not act solely on an extremely laconic report.

45. Concerning the list of occupational diseases, the respondent highlights that the IB used the List of Occupational Diseases applied in Italy, whereas Instruction 14.2 of Annex IV to the CPR, requires that in deciding whether a condition is an occupational disease within the meaning of the CPR, reference shall be made to the Rules applicable in the Organization for the definition of the risks of work accident and occupational disease, which is the Belgian List of Occupational Diseases.

46. It adds that the Belgian legislation allows for a finding of occupational disability for conditions not on the Occupational Diseases List if the criteria below are met (the burden of proof lying with the party benefiting from the procedure, *i.e*., the appellant):

- the illness finds its determining and direct cause in the execution of the job;
- the exposure to the harming influence is intrinsic to the execution of the job and is significantly higher than for the population in general;
- the exposure to the harming influence can, according to the medical science, cause the illness; and
- the causality between the illness and the exposure to the professional link can be proven.

47. The respondent considers that the appellant’s unilateral interpretation of these criteria is irrelevant, as it was the IB’s responsibility to interpret their application, and it found that they were not met in the appellant’s case.

48. The respondent further notes that the IB’s first report and its epicrisis included statements which contradicted the judgments rendered by this Tribunal on the appellant’s previous appeals. It was thus clear that the Board had not verified the appellant’s claims with the Organization and that it should not have relied only on the information provided unilaterally by one of the parties, *i.e*., the appellant. The CMRE Director therefore acted within her authority under Instruction 13/4 (iii) of Annex IV to the CPR by referring the case back to the IB, and providing it with the administrative file, the Tribunal’s judgment, the Belgian List of Occupational Diseases and the written comments provided by the appellant. The respondent states that the alternative would have been not to recognise the appellant as an invalid, which would have forced him to enter into a dispute immediately.

49. The respondent underscores that the transmission of all invalidity requests to the IB simply constitutes part of its administrative functions under the CPR and that it is not the role of the Centre to decide *ad hoc* whether someone is suffering from a disability or any other illness.

50. The respondent disagrees with the appellant’s allegation that his case was referred back to the IB for a third time. In its view it was done only once, in October 2019. The appellant’s effort to reconcile the 2019 report with the 2020 one is simply not possible, since the evidence clearly shows that after having applied the required NATO-wide criteria, the IB found that they were not met.

51. The respondent is of the view that the appellant's behaviour amounts to an abusive use of the appeals procedure within the scope of Article 6.8.3 of Annex IX to the CPR. It contends that the appellant attempts to extract as much money as possible from NATO, including through his earlier claims for a promotion to A5 and for a compensation package for alleged harassment, and through his present effort to try to obtain an occupational invalidity pension. The respondent provides calculations on how the appellant's financial situation would improve if he were granted the occupational related invalidity, as well as extracts from emails in which he tried to negotiate such a pension to meet his financial needs.

52. The respondent considers the appeal completely devoid of merit and requests application of Rule 10 of the Tribunal's Rules of Procedure.

53. Should the Tribunal not summarily dismiss the appeal, the respondent requests that the Tribunal:

- find the appeal devoid of merit and amounting to an abusive use of the procedure, as per Article 6.8.3 of Annex IX to the CPR; or
- should the appeal be admissible and well founded, find that the appellant is invalid due to non-occupational causes, as the ground for invalidity for occupational hazard are completely unsubstantiated, as judged by the Tribunal in Cases Nos. 2018/1266 and 2018/1271.

## D. Considerations and conclusions

### *(i) Admissibility*

54. The respondent does not raise an objection to the admissibility of the case and the Tribunal sees no issues. The appeal is admissible.

### *(ii) Merits*

55. At the core of the present case – the appellant's third case before the Tribunal - lie two questions: 1. Was the appellant subject to harassment? and 2. If so, is there an intrinsic link between this and his illness, to such an extent that his invalidity must be considered as having an occupational cause ?

56. It is recalled (*cf.* the Tribunal's judgment in Cases Nos. 2018/1266 and 2018/1271) that, on 9 November 2017, the appellant submitted a claim to the new CMRE Director, who had taken up duty a week earlier, for psychological, moral and existential damages resulting from harassment and abuse of authority allegedly perpetrated by the former CMRE Director. On 11 December 2017 he submitted a second claim in this respect. These complaints were taken seriously by the respondent. Following some exchanges, on 6 February 2018, an external investigator was appointed, who submitted a report on 13 April 2018. By letter dated 15 May 2018, the Director informed the appellant of the findings of the investigation and, based on its conclusions, rejected his allegations of harassment and abuse of authority by the former CMRE Director and his request for financial compensation. The appellant appealed this decision on 13 July 2018.

57. The Tribunal, in its Judgment in Cases Nos. 2018/1266 and 2018/1271 dated 3 April 2019, highlighted, in paragraph 63, that the appellant referred to events and situations that took place at the latest in 2017 including the decision to terminate his contract. The appellant did not dispute any of the decisions by the former CMRE Director at the time they occurred. Given these facts, the appellant's request for compensation had to be considered as out of time.

58. The Tribunal further noted, in paragraph 64, that the organization acted in accordance with the principle of good administration and fulfilled its duty to have regard to the interests of a staff member. It did not reject appellant's claim *prima facie* on the grounds of time limits. Instead, it initiated an investigation led by an external expert, which must be considered as a substantial effort to address appellant's concerns.

59. The Tribunal concluded that neither the evidence brought by the parties, nor the findings of the external investigator, supported the allegations of harassment.

60. In the context of the present appeal, the Tribunal notes that most of the appellant's claims regarding matters involved in his prior cases, including the termination of his appointment in 2017, were remedied by the new Director. These matters are now moot. Moreover, as a consequence of the Tribunal's judgment of 3 April 2019, the appellant is barred from raising them again and the Tribunal will not reconsider them. Its judgment of 3 April 2019 and in particular its conclusions that neither the evidence brought by the parties, nor the findings of the external investigator, supported the allegations of harassment, stand.

61. The appellant submits that the Tribunal's judgment in the matter is irrelevant since it was delivered after the IB's first conclusions in February.

62. The Tribunal cannot disagree more.

63. The appellant could have obtained a judgment of this Tribunal in his prior appeal earlier than in April 2019. He lodged the relevant appeal on 13 July 2018 seeking to overturn the conclusions of the external investigator, which were accepted by the Centre. He did not request an expedited hearing of his case, and when the Tribunal scheduled an oral hearing in December 2018, which nominally would result in a judgment by the end of January 2019, he asked for a postponement until March 2019.

64. In the meantime, the appellant started parallel proceedings in another setting, asking for convening an Invalidity Board. He then sought to convince the Board that he was victim of harassment to such an extent that he was entitled to an "occupational" invalidity irrespective of the contrary conclusions of the external investigator. These subject matters and the proceedings in this Tribunal and in the IB are thus intrinsically linked. It is, however, important to note that the IB did, in its 13 June 2020 report, for the first time refer to the conclusions of the independent external investigation "contained in [the] NATO Administrative Tribunal Judgment dated 3 April 2019."

65. The record before the IB does not show that the appellant informed the Board of the pending appeal before this Tribunal.

66. During the months of January and February 2019 the appellant was busy preparing his file for the IB and, ultimately, for his meeting with the Board on 20 February.

67. On 22 February 2019, *i.e*., two days after his meeting with the IB, the appellant informed the Tribunal that his health condition did not allow him to be present at the oral hearing of his cases scheduled to take place on 14 March 2019. He provided a three-page statement, which the Tribunal accepted as an additional pleading. This statement does not mention at all the IB proceedings that were underway. The hearing then took place in his absence and the Tribunal issued its judgment within three weeks. This judgment, and in particular the finding that there was insufficient evidence in support of the claim of harassment, is final and binding on both parties, including the appellant, who nevertheless pursued an inconsistent outcome in his 25 September 2019 letter, which was forwarded to the Invalidity Board.

68. The appellant submits that the Invalidity Board was, at the moment of signing the initial report on 3 May 2019, aware that the Tribunal had rejected his appeal and had confirmed the investigator's conclusions, but he does not put forward any evidence in support of this claim. As mentioned *supra* in paragraph 64, the Board referred for the first time to the Tribunal's 3 April 2019 judgment in its 13 June 2020 report.

69. It is appropriate to recall that the appellant was until rather recently the Head of the Centre's Human Resources services and the record indeed shows his intimate knowledge of the relevant rules and procedures.

70. The Tribunal cannot but conclude from this that, as a corollary, the appellant with his large experience in the matter must also have been, or at least should have been, aware that the documentation before the IB, which hastily met on 20 February 2019, not at the instigation of the respondent, was incomplete and thus imbalanced.

71. Instruction 13/3 (viii)(a) of Annex IV to the CPR is very explicit in this respect. It provides:

> viii) The Invalidity Board shall have at its disposal:
>
> a) an administrative file submitted by the Head of Personnel containing, in particular, an indication of the post occupied by the staff member in the Organization together with a description of his duties and of any duties proposed to him by the Organization corresponding to his experience and qualifications, so that the Board can give its opinion as to whether the staff member is incapable of carrying out those duties. This file shall also specify whether the application to be declared an invalid is likely to fall within the scope of Article 14, paragraph 2.
>
> Before being forwarded to the Invalidity Board, the foregoing particulars shall be communicated to the staff member by the Head of Personnel for his written comments, if any, to be sent by him to the Personnel Division within 15 calendar days following their receipt.

This did not happen.

72. The Centre was thus fully justified in referring the matter back to the Invalidity Board and seeking a further and more accurate finding from the Board on the basis of a

complete record, and in requesting the reasons for its finding.

73. The Board did not alter its view that the appellant was suffering from a permanent invalidity that totally prevented him from performing his occupational duties. This conclusion does, however, not financially impact on the appellant's current status as a former staff member in receipt a NATO retirement pension.

74. The Board, on the other hand, confirmed that there were no workplace harassment conditions and that the conditions to determine an occupational disease were not met.

75. This is the conclusion of medical experts. The powers of the Tribunal to review a medical opinion are very limited (*cf.* Tribunal Judgment in Joined Cases Nos 2019/1284,1285 and 1291, paragraph 190). The Tribunal has in the present case no indication, not to mention evidence, that the Invalidity Board manifestly erred in its assessment.

76. The Tribunal concludes that appeal is without merit and must be rejected in its entirety.

## E. Costs

77. Article 6.8.2 of Annex IX 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 [...].

79. The appeal being dismissed, no reimbursement of costs is due. None were requested.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 18 May 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

25 May 2021 AT-J(2021)0013

**Judgment**

**Case No. 2020/1317**

**MR**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 19 May 2021

Original: French

*Keywords: Suspension – a) Suspension on grounds of criminal charges against the staff member – Legal grounds for suspension (Article 60.2 of the Rules and Article 3.5 of Annex X); b) Proceedings – Suspension upon learning of the judicial act, even though that is a preliminary stage, given that the allegations were detailed therein; c) Deprivation of pay – Illegality of deprivation that is not necessary to protect the Organization's interests – Disproportionate nature and violation of the duty of care.*

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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 videoconference hearing on 7 May 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr MR, registered on 5 October 2020, seeking:
- annulment of the decision of 10 July 2020 whereby the General Manager of the NATO Support and Procurement Agency (NSPA) suspended him without emoluments, along with the decision of 7 August 2020 dismissing his complaint against the decision of 10 July;
- reinstatement in his duties;
- compensation for the non-material damage suffered, assessed at €20,000;
- an expedited hearing under Article 6.6.4 of Annex IX to the Civilian Personnel Regulations (CPR);
- confirmation by the Tribunal of the length of his suspension.

2. The respondent's answer, dated 7 December 2020, was registered on 11 December 2020. The appellant's reply, dated 10 February 2021, was registered on 11 February 2021. The respondent's rejoinder, dated 11 March 2021, was registered on 12 March 2021.

3. Following the appellant’s request for an expedited hearing under Article 6.6.4. of Annex IX to the CPR and an exchange of letters with the parties (President’s letter to the NSPA of 7 October, NSPA’s reply of 9 October 2020), the President decided not to grant that request.

4. Owing to the public health crisis, and with the parties’ agreement, the Tribunal held the hearing on 7 May 2021 by videoconference using the NATO Headquarters system. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

5. The material facts may be summarized as follows.

6. The appellant, an Italian Air Force Colonel, joined the NSPA on 17 September 2013 on a definite-duration contract, last renewed on 1 March 2020 and expiring on 23 February 2023.

7. As from 1 March 2017, the appellant was serving as Special Project Section Chief in the General Services Programme Office. He was responsible for preparing technical instructions, defining technical contractual requirements, providing technical evaluations of bids, ensuring obligations toward the Organization were fulfilled, and analysing contractor technical reports and testing results to ascertain conformity with technical and contractual requirements.

8. On 10 July 2020, the NSPA Office of Human Resources received an order issued by an Italian judge on preliminary criminal proceedings, containing specific allegations against the appellant and unlawful acts he was charged with having committed. The appellant was accused of having disclosed information about an NSPA clothing contract to an interested company.

9. On the same day, the NSPA General Manager suspended the appellant from his duties without emoluments. That was on a Friday evening.

10. The following reasons were given for the decision to suspend the appellant:

> On July 2020, I was informed that the Italian law enforcement authorities are investigating you in relation to allegations of corruption. In an order (No. 39445/2018 R.G.N.R./ No.°8379/2019 R.G.G.I.P.) issued by judge Tamara De Amicis, a judge responsible for preliminary investigation (*Giudice per le indagini preliminari*), it is alleged that on or around 8 February 2019, you misused your official position to gain personal advantage. In particular, the Order refers to allegations that you unlawfully disclosed information pertaining to a competitive bidding process to one specific bidder in exchange for an employment for your sister-in-law. If established, the alleged facts would constitute not only a very serious misconduct under the NATO Civilian Personnel Regulations but also a criminal offense in Italy.
>
> I am of the view that the allegations are *prima facie* well-founded within the meaning of Article 60.2 of the Civilian Personnel Regulations and that your continuance in office during the investigation by the Italian authorities will be highly prejudicial to NATO's and NSPA's reputation. Consequently, in accordance with Article 3.5 of Disciplinary Powers and Procedures (Annex X of the Civilian Personnel Regulations), I decided to suspend you immediately from your functions without emoluments while the criminal proceedings against you are taking place. I will revisit the decision and determine the most appropriate course of action once the Italian authorities complete their criminal proceedings against you.

11. Upon arrival at the office on Monday 13 July, the appellant was informed of his suspension and denied access to the NSPA. He was told to return all his work equipment.

12. Also on 13 July 2020, the appellant asked the General Manager to annul the decision to suspend him, which he had received by post that same day. He denied any wrongdoing and asserted that he was not facing any criminal charges in Italy. He complained that he had not been heard before the decision was taken. On 16 July, he asked the NSPA to send him a number of documents. The NSPA asked him whether his requests constituted a complaint.

13. On 5 August, the appellant lodged a complaint seeking annulment of the decision to suspend him and retroactive payment of his emoluments, and for certain documents to be made available. The complaint was rejected on 7 August 2020.

14. On 5 October 2020, the appellant lodged his appeal with the Tribunal.

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

### *(i) The appellant's contentions*

15. To begin with, the appellant argues that the impugned decision violated Article 60.2 of the CPR, which sets out three cumulative conditions for a decision to suspend a staff member to be valid.

16. The first is that a charge of serious misconduct is made. The appellant disputes this, claiming that there were no facts established by a court, only suspicions in a preliminary investigation.

17. The second is that the charge is prima facie well founded. In the appellant's view, the charges are hypothetical, as demonstrated by the fact that the Italian criminal court judge had not taken any provisional measures against him.

18. The third is that the staff member's continuance in office might prejudice the Organization. The appellant denies any such potential prejudice.

19. The appellant's second contention is a violation of Article 3.5 of Annex X to the CPR. He puts forward two arguments. The first is that that there was an error of fact in the decision (which he calls a "manifest error of judgment") insofar as it was written that he was facing "corruption" charges. He went on to explain the difference between corruption and the wrongdoing he was specifically accused of by the Italian justice system. The appellant also claims that he was not facing criminal charges, basing this on the term "procedimento penale" not being the same as "processo penale", which constitutes a later stage.

20. Thirdly, the appellant contends that the impugned decision was taken following an irregular procedure. That contention is divided into four arguments.

21. The first argument is that the NSPA obtained a copy of the judgment improperly and could therefore not use it.

22. The second argument is that the appellant's rights of defence were violated insofar at the Head of NATO body did not hear him before taking the decision, and insofar as the Agency refused to provide him with the documents he had requested on 16 July 2020 for preparing his defence.

23. The third argument is that the person who took the impugned decision also committed an irregularity by taking the decision without involving the appellant's line manager in the decision-making process; the latter could have, in his opinion, vouched for his merits and moral standards.

24. The fourth argument is that the Agency acted hastily in taking the decision to suspend the appellant on the very same day it received the order issued by the criminal court, without checking the facts.

25. The fourth contention concerns the reasons given for the decision. The appellant claims that the Administration could not use Article 60.2 of the CPR to justify suspending him insofar as it didn't provide the document describing the allegations, which are qualified as serious misconduct. The appellant takes issue with not having been provided with the court document that the Administration took as the basis for its decision to suspend him. He also claims that a document describing the allegations against him should have been provided with and at the same time as the decision to suspend him.

26. Fifthly, the appellant complains that the decision to suspend him was taken for an unlimited period of time, which was excessive.

27. Sixthly, the appellant asserts that the decision is disproportionate. The allegations against him cannot justify a penalty as harsh as suspension without pay. Even had the facts been established, it is disproportionate to deprive a staff member of all income before a final decision has been taken.

28. The seventh contention is the violation of the duty of care that the employer owes any staff member. The appellant takes issue with the harshness with which the Administration acted: the appellant was barred from entering his workplace, had his access pass confiscated, was escorted by a guard to his home to hand over documents, and received the decision by registered post. The violation of the duty of care is also shown in its having deprived of pay a staff member who had dependants and who had already served the Organization for over 15 years.

29. The eighth and final contention is that the impugned decision violated the Ottawa Agreement which protects NATO staff members from criminal prosecution. The appellant considers that no criminal prosecution should have been brought against him insofar as he was protected by the Ottawa Agreement, and that the Head of NATO body could not take a decision to suspend him on the basis of such improperly initiated criminal prosecution.

30. For all these reasons, the appellant is seeking annulment of the decision to suspend him without pay.

### *(ii) The respondent's contentions*

31. The respondent recalls that the decision to suspend the appellant was taken based on Article 60.2 of the CPR and Article 3.5 of Annex X thereto. One of the conditions of Article 3.5 is the existence of criminal proceedings. The respondent asserts that the appellant was indeed the subject of criminal proceedings in Italy, where it is known as a "procedimento penale". The situation applies here even though the appellant has not been indicted in Italy. The judicial decision on which the suspension is based is clearly directed at the appellant and sets out the charges against him, even though the facts have not yet been judicially established by a court. By using the word "corruption" in its decision to suspend him, the Administration was describing the overall behaviour of the appellant, and with that word he was able to understand perfectly well the allegations against him, even though another legal term might have been used.

32. The respondent denies that the previous Administrative Tribunal judgments that the appellant cites here are germane. Unlike in those cases, the Administration did not base its decision on rumours or information, but rather on an authentic document issued by the court of a NATO Member state. Therefore no further investigation was required before taking the decision to suspend the appellant.

33. Furthermore, without even citing Article 3.5 of Annex X, the Administration legally had the power to suspend the appellant pursuant to Article 60.2 of the CPR. The facts show that the appellant did indeed behave inappropriately: he disclosed information to a NATO supplier as a competitive bidding process was about to be launched. Moreover, he did so for personal gain, *i.e.* employment for his sister-in-law. These facts are credibly detailed in the Italian judgment.

34. In any case, a decision to suspend a staff member is not a disciplinary action, meaning that the arguments that the appellant's rights were violated are irrelevant.

35. In response to the claim that the decision to suspend him without pay was disproportionate, the respondent turns the argument around, stressing that the appellant has merely asserted that the decision was disproportionate without providing any proof. It highlights the significant reputational damage to the Organization and the anticipated length of the criminal proceedings in the Italian court.

36. As regards the indefinite duration of the suspension, the respondent rebuts this by noting that it had been decided that the suspension would run until the end of the criminal proceedings in Italy.

37. The respondent underscores that it is not obliged to reveal how it obtained the Italian criminal court judgment and asserts that it did not fail in its duty of care: a decision to suspend a staff member is necessarily unpleasant for that staff member, but the Administration used the powers conferred to it by the CPR prudently.

38. Thus the respondent is seeking dismissal of the submissions in the appeal.

## D. Considerations and conclusions

39. The impugned decision was taken on the basis of two provisions of the CPR: Article 60.2 of the CPR and Article 3.5 of Annex X on disciplinary procedures.

40. Under Article 60.2 of the CPR:

> 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."

41. Under Article 3.5 of the CPR:

> Where staff members are the subject of criminal proceedings, the Head of the NATO body may, in pursuance of Article 60.2 of the Personnel Regulations, suspend them from their functions while such proceedings are taking place. A final decision regarding the disciplinary action to be taken against such staff members for the same acts shall not be taken until the verdict of the court hearing the case has been confirmed.

42. On 10 July 2020, the NSPA's Office of Human Resources received a copy of an order issued by a judge in the criminal court of Rome, Italy, which in a preliminary proceedings ruling on 26 June 2020 set out accusations against dozens of people, including the appellant, who was charged with acting unlawfully in a competitive bidding process by contacting a company that might submit a bid for a call for bids that was about to be launched by the respondent Organization.

43. That same day, the appellant was suspended without pay for a length of time that was aligned with the verdict of the Italian justice system.

*On the submissions directed against the decision insofar as it ordered the suspension of the appellant*

44. The appellant claims that the Administration could not use Article 60.2 as grounds for suspending him insofar as it had not provided the document setting out the allegations, qualified as serious misconduct.

45. Article 60.2 provides that decisions to suspend a staff member require three cumulative conditions.

46. First, there must be a charge of serious misconduct. The appellant denies this, claiming that only suspicions in a preliminary investigation had been expressed. The Tribunal does not share that view. The appellant is accused of disclosing information to a company by telling it what price it should bid to win a clothing contract. This is clearly a charge of serious misconduct against him in the Italian criminal proceedings, all the more so as the appellant is also suspected of trying to gain a personal advantage, *i.e.* getting his sister-in-law hired by that company.

47. Second, the charge must be prima facie well founded. The appellant has minimized his involvement by noting that the judge did not take any provisional measures against him. But a second decision by an Italian criminal court on 31 July 2020, *i.e.* after the decision to suspend the appellant was taken, clearly shows that the judge had decided against ordering provisional measures not because the charges against him were insufficient but because NATO's ordering him suspended was sufficient to remove him from the service and avoid a repeat of the situation. The Italian judge had thus decided against placing additional constraints on the appellant. The Administration could therefore consider, as of the date of the decision and based on the Italian judicial act, that there were apparently good grounds for the allegations, all the more so as the indictment act of 26 June 2020 is precise and clearly concerns the appellant. As explained by the respondent in its rejoinder, there was no reason to call into question an official document issued by the judiciary power of a NATO Member state.

48. Third, the staff member's continuance in office might prejudice the Organization. The Tribunal is of the view that it truly is prejudicial to the Organization to keep a staff member in his post when that staff member is responsible for assessing bids from suppliers and has been accused of bias and of disclosing information to potential suppliers. Word of the acts of wrongdoing and the continuation in his post of their perpetrator could spread outside the Organization and make the Organization's contract-awarding decision in the weeks or months that followed less credible. This was also an issue of NATO's credibility with regard to its Member states. The respondent had good reason to believe that the staff member had to be temporarily removed from the service.

49. Thus the three conditions required for the suspension to be valid under Article 60.2 of the CPR were met. This claim is dismissed.

50. Under Article 3.5 of Annex X, for a staff member to be suspended there must be criminal proceedings against them. The appellant denies this for two reasons.

51. First, he claims that that there was an error of fact in the decision, which he calls a "manifest error of judgment", insofar as it was written that he was facing "corruption" charges. He explains at length the difference between corruption and the wrongdoing he is accused of by the Italian justice system. Yet the word "corruption" is a general term that covers several categories of criminal charges, including the quite specific charge of "disruption of an NSPA auction for the ITA MoD by acting as Italian Public Officer responsible for the descending contract and misuse of restricted information related to that auction". It was possible to employ the word "corruption" in the decision to suspend the appellant without that causing confusion insofar as it refers to several categories of behaviour which had not yet been qualified judicially by a court as of the date the suspension decision was taken.

52. The appellant then also explains at length that he was not facing criminal charges, based on the term "procedimento penale" not being the same as "processo penale", which constitutes a later stage. He is wrong about that: the preliminary proceedings act of 26 June 2020, which the respondent used as the basis for taking the impugned decision, is a judicial act at the beginning of the process that may lead to a criminal conviction. Even though the proceedings were not yet in the trial stage, these were still criminal proceedings that correspond to the criminal proceedings mentioned in Article 3.5 of Annex X. The lack of formal charges does not keep these proceedings from being qualified as criminal proceedings.

53. With regard to the proceedings, the appellant asked repeatedly how the NSPA received a copy of the judgment, and was of the view that the suspension could not be ordered based on a document obtained through unofficial channels. The legality of the decision is unaffected by those circumstances, however. Nowhere is it alleged that the document is a forgery, and the Administration could use this judgment from a court of a NATO Member state as the basis for ordering a suspension, regardless of the process whereby it had obtained it.

54. The appellant complains that he was not heard by the Head of NATO body before the latter took his decision. Yet a suspension decision is a conservatory act that is not disciplinary in nature, and nothing requires the relevant authority to hear the staff member before deciding to suspend them.

55. The appellant takes issue with the fact that the decision was taken without involving his line manager, who could have, in his opinion, vouched for his merits and moral standards. Yet there is no text that requires such consultation.

56. The appellant faults the respondent for its haste in taking a decision on the very same day it received the order issued by the criminal court, without checking the facts. In response the NSPA says that it made a quick check upon receiving the Italian judgment, and the appellant had indeed been travelling for work in Italy on the date when the Italian judge suspected him of having met with a candidate in a competitive bidding process. The Administration could use the elements of a factual nature in that Italian criminal court judgment to draw the consequences regarding the necessity of temporarily removing the perpetrator thereof from his service at NATO.

57. In the fourth contention, the appellant denounces the fact he was not provided with the judicial document on which the Administration based its decision to suspend him. While the suspension decision must be substantiated with respect to the charges against the staff member, the Administration is not required to include the specific documents that form the basis thereof.

58. He also claims that a document describing the allegations against him should have been provided with and at the same time as the decision to suspend him. The respondent rightfully states that the official document from the judiciary power of a NATO Member state establishes the facts unambiguously, and that the accusations are noted in the suspension decision. Unlike in Case no. 2019/1289 dated 19 January 2021, the factual circumstances of which differed in that they were based on mere allegations, the Administration was not bound in the present case to draft a specific document. The respondent did not hear a rumour of bad behaviour; it had received an official document from the criminal court of a NATO Member state. Consequently there was no further investigation to be conducted: as of the date of the suspension, the facts had already been sufficiently presented and substantiated.

59. In the present case, the impugned suspension decision notes the accusations in enough detail: information contained in an order issued by a criminal court, the number of which is given; type of infraction; date and nature of the events (using his position for personal gain, mentioned as getting employment for his sister-in-law); the legal grounds for the suspension (Article 60.2 of the CPR and Article 3.5 of Annex X thereto); and length of the suspension (until the end of the Italian criminal proceedings).

60. The argument that no reasons were given and no specific report produced is therefore rejected.

61. Fifthly, the appellant complains that the decision to suspend him was taken for an unlimited period of time, which was excessive. That is inaccurate: the decision clearly states that it would be revisited once the Italian criminal court proceedings were completed. The end date may not be set but it is expressed clearly. The Administration will have to reanalyse the situation each time it learns of a new stage in the Italian criminal proceedings. It is not for the Tribunal, however, to set a precise end date for the suspension ahead of time.

62. Sixthly, the appellant argues that the Administration failed in its duty of care. He criticizes the Administration for the harshness with which it acted: barring him from his workplace, confiscating his access pass, and having a guard escort him to his home to hand over documents. This was all the more a violation of the duty of care as the appellant had served NATO for fifteen years at that point. Depriving him of his pay was also part of that failure in the duty of care toward a staff member who had dependants.

63. In the Tribunal's view, with regard to the principle of the suspension, the respondent did not apply the CPR harshly toward the appellant, but instead used its authority to preserve the Organization's security and reputation. A decision not in a staff member's favour does not necessarily entail a violation of the duty of care, and none was committed here by a procedure that complied with the rules.

64. Lastly, the appellant argues that the impugned decision violated the Ottawa Agreement, which protects NATO staff from criminal prosecution. The appellant considers that no criminal prosecution should have been brought against him insofar as he was protected by the Ottawa Agreement, and that the Head of NATO body could not decide to suspend him based on such irregularly engaged criminal prosecution.

65. Here the appellant is on the wrong track. The purpose of immunity under the Ottawa Agreement, much like the agreements governing the status of the staff of other international organizations, is not to grant blanket immunity to its staff for all their actions – it is limited to the actions that they perform as part of their duties for the organization. As the NATO Appeals Board ruled (Case no. 344, *Gasparini*, 17 July 1997), the immunity from legal process of staff members without diplomatic status applies only to actions taken by them in their official capacity.

66. That is not the case here, because the allegations concern an attempt to take advantage of official duties fraudulently. Disclosing information to a third-party company outside of the staff member's professional duties is not an action carried out on behalf of a NATO Agency of which the appellant is a staff member. For actions that fall outside the staff member's duties, even if they are related to them, the staff member is not covered by any immunity.

67. For all these reasons, the appellant does not have grounds to seek annulment of the decision of 10 July 2020 and the decision of 7 August confirming it insofar as they ordered him suspended from his duties.

*On the submissions directed against the decision insofar as it deprived the appellant of his emoluments*

68. The impugned decision notes that the staff member will not receive any emoluments during the period of suspension from his duties. The staff member disputes this by citing the disproportionate nature of this deprivation which, in his opinion, demonstrates a violation of the Administration's duty of care toward him.

69. In support of its decision to suspend the staff member without pay, the respondent merely underscores the severity of the allegations against the appellant and the anticipated long duration of the criminal proceedings in the Italian court. But this is not sufficient to justify taking away the pay of a staff member who has served at NATO for

more than ten years, about whom there had been no concerns up to that point. Although the incidents are serious, it is the criminal proceedings that could result in his losing his income, yet at the suspension stage it is still too early to decide that. Regarding the argument of the long length of the Italian criminal proceedings that prompted the Administration not to run the risk of paying a staff member who has been removed from his duties for many years, that argument can be turned on its head: the Tribunal considers it disproportionate to deprive a staff member of all pay over an indefinite period, very likely more than one year, based on accusations that a court has not ruled on definitively. Such deprivation of all pay is not necessary to protect the Organization's interests. Furthermore, because doing so takes away the health insurance of the appellant, who moreover has dependants, this constitutes a failure by the Organization of its duty of care toward its staff.

70. For that reason, the decision of 10 July 2020, along with the decision of 7 August 2020 dismissing Mr R's complaint against that decision, must be annulled insofar as they deprived the staff member of his pay.

*On the claims for compensation*

71. In addition to compensation for material damage, which takes the form of the re-establishment of pay as from the date of suspension, the appellant is seeking compensation for non-material damage suffered. In the light of the conditions in which the appellant was evicted and the anxiety caused by being without any pay for ten months, the Tribunal considers that this may be fairly assessed by ordering NSPA to pay him €5,000.

## E. Costs

72. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

73. In the circumstances of the case, the appeal being successful only partially, the appellant is entitled to be granted €2,000 as reimbursement of the costs of retaining counsel to appear before the Tribunal.

## F. Decision

FOR THESE REASONS

The Tribunal decides:

- The decision of 10 July 2020 whereby the General Manager of the NATO Support and Procurement Agency (NSPA) suspended Mr R, along with the decision of 7 August 2020 dismissing his complaint against the decision of 10 July, insofar as they deprived Mr R of his remuneration, is annulled.
- The NSPA shall pay Mr R the sum of €5,000 in compensation for the non-material damage suffered by him.
- The NSPA shall pay Mr R the sum of €2,000 in compensation for the costs of retaining legal counsel.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 19 May 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 June 2021 AT-J(2021)0014

**Judgment**

**Case No. 2020/1303**

**G *et al.***
**Appellants**

***v.***

**NATO International Staff**
**Respondent**

Brussels, 1 June 2021

Original: French

*Keywords: Pensions – Annual adjustment of pensions payable – Adjustment method – Adjustment tied to inflation instead of being identical to the adjustment for salaries of serving staff – No upsetting of the balance of a contract, no violation of vested rights, and no violation of the principles of legal certainty and non-retroactivity.*

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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 Laurent Touvet, Vice-President, Ms María-Lourdes Arastey Sahún, Mr John Crook and Mr Christos Vassilopoulos, having regard to the written procedure and further to the videoconference hearing on 26 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr OG, Mr FI, Ms ML, Mr WR and Mr JV, dated 29 April 2020 and registered on 5 May 2020, seeking:

- annulment of the decision to apply to them the amendment to Article 36 of the Coordinated Pension Scheme Rules recommended in the 263rd Report of the Coordinating Committee on Remuneration, a decision that was made apparent by their January 2020 pension slip and confirmed by the decision to reject their requests for administrative review;
- a return to *status quo ante* with regard to their pension at 1 January 2020;
- application to their pension of an adjustment identical to the salary adjustment;
- compensation for the corresponding material damage, consisting of the difference between the pension they actually received and the pension to which they would have been entitled;
- in the alternative, if the decisions were not annulled, compensation for the damage to appellants in the form of a lump sum representing the loss of their pension rights as from 1 January 2020 and taking into account their life expectancy;
- an order for the respondent to pay €8,000 in costs.

2. The respondent's answer, dated 6 July 2020, was registered on 22 July 2020. The appellant's reply, dated 16 September 2020, was registered on 12 October 2020. The respondent's rejoinder, dated 12 November 2020, was registered on 18 November 2020. A new submission, dated 16 March 2021, was registered on 18 March 2021.

3. Owing to the public health crisis, and with the parties' agreement, the Tribunal held the hearing on 26 March 2021 by videoconference using the NATO Headquarters system. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The material facts may be summarized as follows.

5. NATO has two pension schemes, depending on whether the staff member was recruited before or from 1 July 2005. The Coordinated Pension Scheme is the one that applies to staff recruited before 1 July 2005; it is common to the six Coordinated Organizations (NATO, European Space Agency, Council of Europe, Organization for Economic Co-operation and Development, European Organisation for the Exploitation of Meteorological Satellites and European Centre for Medium-Range Weather Forecasts). Under the coordination system, the governing bodies of those organizations receive recommendations from dedicated experts about technical matters pertaining to the pay and allowances of their staff. One such coordination body, the Coordinating Committee

of Government Budget Experts (CCG, now the Coordinating Committee on Remuneration, or CCR), produces reports for the governing bodies of the Coordinated Organizations, which have sole legal competence to take decisions.

6. Following the CCG's recommendation in its 127th report, the North Atlantic Council adopted in 1978 its coordinated remuneration and pension scheme rules, Article 36 of which sets out the rules for the annual adjustment of pensions. Following the 150th report and after lengthy debate, the North Atlantic Council added a footnote to Article 36, which provided that pension adjustments were to be identical to salary adjustments.

7. This pension adjustment mechanism remained in place for nearly 40 years. The financial rules applicable to the pension scheme were often amended during that time, however. For example, the contribution rates were increased several times, and the Coordinated Pension Scheme was closed to staff recruited after 30 June 2005.

8. As from 2011, an initiative to enhance the financial stability of the scheme in a context of rising costs began. That initiative was met with strong reservations, and it was only in 2017 that the CCR formally decided "to initiate an overall review of the Coordinated Pension Scheme to bring it more in line with best practice in other pension systems, both in international organisations and more widely, and to improve the financial stability of a system whose costs have been rising significantly". Five measures were considered: suppression/reduction of the tax adjustment, reduction of the pension accrual rate, calculation of pension benefits based on average career salary instead of final salary, special levy on pensions, increase in the retirement age.

9. In January 2019, five of the six Coordinated Organizations, including NATO, submitted their final proposal to the CCR: to tie pensions to inflation instead of to the salary scales, and make the conditions for entitlement to the education allowance stricter for future pension beneficiaries.

10. On 26 September 2019, in its 263rd report the CCR proposed that pensions paid under the Coordinated Pension Scheme be adjusted on the basis of inflation as from 1 January 2020.

11. On 25 October 2019, the North Atlantic Council amended Annex IV to the Civilian Personnel Regulations (CPR), including Article 36 thereof. On 5 November, Office Notice ON(2019)0078 was sent to staff to inform them that pensions would henceforth by indexed on consumer prices and no longer on salaries. This new calculation method was communicated to retirees on 25 November 2019, with their November pension slip. The information appeared again in similar forms on 13 December 2019 and on 15 and 24 January 2020.

12. At the end of January 2020, the pensioners received their pension slip for January 2020. On 20 February 2020, five former NATO staff members, now pensioners – Mr V, Ms L, Mr G, Mr I and Mr R – submitted requests for administrative review of their pension slips to the Secretary General.

13. They received a reply on 26 May 2020. The Secretary General rejected their requests, on grounds that revising the pension adjustment rules was necessary for

sustainably ensuring the balance of the pension system and guaranteeing the real value of pensions payable. The rules on the education allowance would apply only as from 2030. Even though the Coordinated Pension Scheme had been closed since 2005, it still required adjustments to guarantee the real value of pensions. Never, in the 1994 Noordwijk Agreement or elsewhere, did the North Atlantic Council commit to not amend the pension calculation method. In the Secretary General's view there were no vested rights arising from a pension calculation method, and there was no obligation to have the same adjustment method for salaries and pensions. None of the benefits under Annex IV had been taken away. Lastly, there was nothing to say that the contested adjustment would cause financial prejudice to retired staff; that would depend on the trends in NATO salaries. In the immediate future, the change would not be a substantial one, and the balance of contracts would not be upset.

14. On 14 April 2020, the appellants informed the Organization that they would be submitting the matter directly to the Tribunal, pursuant to Article 4.4 of Annex IX to the CPR. Three days later, the International Staff took note of this, acknowledging that this was simple application of Article 4.4 of Annex IX to the CPR.

15. It was on 29 April 2020 that the pensioned staff lodged their appeal with the Tribunal. Even though the North Atlantic Council's decision of 25 October 2019 also amended Article 28 (on the education allowance), the appeal does not cover that issue or the contribution rate either It concerns only the pension adjustment rules, contested via the January 2020 pension slips.

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

### *(i) The appellants' contentions*

16. The appellants are challenging the impugned decisions by raising a plea of illegality with respect to the decision of the North Atlantic Council on the change to the pension adjustment calculation method as it appears in the new wording of Article 36 of Annex IV to the CPR.

17. Firstly, they assert that the North Atlantic Council violated the Noordwijk Agreement of 20–21 April 1994, which provides that the benefits are guaranteed for staff members. Any financial imbalances can be corrected only through adjustment of the rate of contribution. This position was asserted solemnly, and thus constitutes a vested right for staff members that the North Atlantic Council was not in a position to modify. As it was an agreement signed as part of the internal law of an international organization, the Administration is obliged to respect it, in accordance with the principles of legal certainty, legitimate expectations and the general principle of *pacta sunt servanda*.

18. The next contentions, presented under different headings, underline that the balance of staff members" contracts – and pensions, which form an integral part thereof – is upset by the new method of calculation for the annual adjustment of pensions.

19. Secondly, the appellants claim that the North Atlantic Council's decision violates the vested rights of staff. They do not dispute that the new method of calculation for the adjustment of pensions is a regulatory norm in the contracts. They underscore that the

pension is a substantial part of the contract and that the Administration cannot amend it without fulfilling a number of conditions.

20. To support this claim, the appellants put forward several arguments.

21. Specifically, the Administration did not conduct a serious impact study to objectively justify the need to amend the adjustment method. It has not proven that amending Article 36 was necessary. Furthermore, the new method entails a violation of vested rights insofar as it leads to pensions that are lower than with the previous calculation method. Lastly, there were no transitional measures.

22. Thus the amendment implemented in the impugned decisions affects a fundamental element that might have substantially influenced the pensioned staff's decision to join the Organization or to opt into the Coordinated Pension Scheme.

23. The appellants also highlight that there are vested rights in the solidarity between serving staff and pensioners, with pension adjustments aligned on salary adjustments for staff. There are also vested rights in the principle of parallel trends in the salaries of the staff of the Coordinated Organizations and of the civil servants in the eight reference civil services, as well as in the application of the purchasing power parity principle, which guarantees equal treatment for all NATO staff. These rules, in force for several decades, have taken the form of a customary rule, which the Administration was not in a position to depart from by amending Article 36 of Annex IV to the CPR.

24. While the appellants acknowledge that the pension adjustment rules may indeed be modified, these long-standing principles may not be done away with. Non-retroactivity means that the Administration could not apply new rules to existing situations, and had to establish a transitional period for implementing the adjustments gradually.

25. Thirdly, the appellants assert that the principle of legal certainty has been violated. They base this on the fact that the right to draw a pension is an essential component of the contract that each staff members signs with the Administration. The Administration was thus not in a position to unilaterally change the adjustment method for staff pensions. The staff members paid contributions throughout their entire careers on the basis of the benefits that they were expecting at that time. Amending the calculation method allows the Organization to make savings that constitute unjust enrichment in its favour.

26. Fourthly, the appellants claim that the amendment also constitutes an unlawful retroactive act as it changes the rule that was in place at the time the staff members signed their contract and then contributed to the pension scheme. As the triggering event occurred before the rule was amended, the rule may only apply to future situations and not to pensions acquired before the amendment.

27. Fifthly, the appellants contend that insufficient reasons were given for the measure adopted inasmuch as the only justification given is the conclusions of the 263rd CCR report, which contains only assertions about the remuneration adjustment method without any substantiation. The amendment of Article 36 was not preceded by in-depth studies showing that it was necessary and proportionate in nature. It is thus an arbitrary decision.

28. The appellants consider that the material damage to them consists of the difference between the pension they actually received and the pension to which they would have been entitled had pensions continued to be adjusted with the previous method. They are requesting compensation over the duration, taking into account their individual life expectancy.

29. In light of all the arguments regarding the unlawfulness of the decision of the North Atlantic Council to amend Article 36 of Annex IV to the CPR, the appellants are seeking annulment of the decision made apparent by their January 2020 pension slip.

***(ii) The respondent's contentions***

30. The respondent begins by raising four grounds of inadmissibility.

31. The first is that this is a single appeal being brought before the Tribunal by several people, yet collective actions are not admissible before the Tribunal.

32. The respondent then argues that the appeal has been entered late because it is directed at the January 2020 pension slips, whereas the appellants had already been informed of the new pension calculation method in an information note dated 5 November 2019, and subsequently in messages that accompanied their November and December 2019 pension slips. The request for administrative review was not made within the 30-day time frame foreseen by the CPR.

33. The respondent maintains as a third ground of inadmissibility that the decision by the North Atlantic Council is not a decision within the meaning of Article 61.1 of the CPR and cannot be challenged before the Tribunal.

34. Lastly, in the Administration's view, the impugned decision does not affect the appellants' material situation, which renders their appeal inadmissible.

35. The respondent then replies to the submissions in the appeal, refuting them one after the other.

36. Concerning the first submission, that the North Atlantic Council violated the Noordwijk Agreement, the respondent emphasizes that CCR reports are merely recommendations that the decision-making bodies of each organization may or may not apply. The decision-making body remains the North Atlantic Council, which is not bound by the CCR's recommendations. Furthermore, the Noordwijk Agreement noted a compromise reached by the three committees of the Coordinated Organizations, and suggested that no changes be made to it for five years; it did not bar later changes, however.

37. The respondent adds that at no time was it decided that the rules on pension adjustments would be set in stone. The succession of CCR reports on this topic show that this is a complex issue, and that the financial balance of the retirement scheme is the primary objective that determined the decisions that followed. Nobody can claim to have found a definitive system because it is based on a demographic and financial balance that requires periodic adjustment.

38. Concerning the other submissions, the respondent argues first of all that the pension adjustment rules defined by Article 36 of Annex IV to the CPR are in the nature of regulations and non-individual. They can therefore be modified at any time by the North Atlantic Council, provided the modifications are not retroactive and comply with the limitations imposed by the competent authority. It is only when changes to rules upset the balance of the contract that the staff member is entitled to compensation. By definition, regulatory provisions do not create vested rights that prevent them from being modified.

39. The vested rights of staff members and pensioners have not been violated because the link between salaries and pensions has long been a subject of debate within the Coordinated Organizations, with warnings that it could adversely affect pensioners if restrictive remuneration policies were applied to salaries. So on the contrary, calculating pension adjustments based on inflation, and no longer on salary adjustments, actually protects pensioners.

40. The principle of equal treatment has not been violated by eliminating the principle of purchasing power parities, given that pensioners can still settle in the country of their choice under the conditions in Article 33 of Annex IV to the CPR. The respondent rejects the argument that the pension adjustment method was a determining factor in staff members' decisions to join the Organization.

41. With regard to the reasons for the modification of Article 36, the respondent recalls the rapid rise in the cost of pensions as well as the savings made possible by modifying the method of calculation for the annual adjustment of pensions, which makes it possible to contain increases in contributions. Modifying Article 36 therefore protects future pensions for retired staff members. The alleged harm is not certain, can only be measured over the long term and will only have a very marginal effect that does not upset the overall balance of the contracts.

42. The principle of retroactivity has not been violated either, since Article 36 only applies in the future and does not modify the rights acquired by pensioners before 1 January 2020: the contributions made by staff members over their career created an entitlement to a pension, not to a specific pension adjustment mechanism. In particular, the principle of all social insurance schemes is to guarantee a right without guaranteeing that the later payment of benefits will be, for each beneficiary, equal to the amount of contributions they paid. It is a solidarity-based mechanism.

43. Lastly, the new calculation method was not determined arbitrarily. An impact study was conducted and produced before the Tribunal. Every effort was made to protect the interests of staff members and pensioners. This enabled compromises such as a lower-than-planned increase in contributions by serving staff members.

44. As for the alleged damage, this cannot be calculated in advance, since it is based on assumptions about salary increases in relation to inflation and life expectancy.

45. The respondent is therefore seeking dismissal of the submissions in the appeal, primarily on the grounds of inadmissibility, in the alternative as being without merit. It asks that the appellants be ordered to pay it damages.

## D. Considerations and conclusions

### *i) On the composition of the Tribunal*

46. The Tribunal's President considered that the scope of the appeal before it was such that it was preferable for the judgment to be rendered as a full court, and not as a panel of three judges.

47. However, as he himself is a Coordinated Pension beneficiary, the President recused himself pursuant to Article 6.1.5 of Annex IX, to avoid any conflict of interest. As per the last sentence of Article 6.1.4 of that same annex, the President was replaced by the Vice-President.

48. It is true that the CPR does not provide for the scenario of how a plenary should be formed when the President has recused himself. It is therefore for the Tribunal to interpret the CPR provisions in order to overcome this case of *force majeure*. For that reason, the Tribunal has decided to sit in the case by bringing together all its members apart from the recused judge, i.e. four members, chaired by the Vice-President.

### *i) On the admissibility of the appeal*

49. Firstly, the Tribunal heard the respondent's objections that the appeal is inadmissible.

50. The appeal is being brought by several appellants, but that does not make this a case of a collective appeal that is not foreseen by the CPR. The circumstance that Article 6.9.3 of Annex IX requires the Administration to cease applying a decision declared invalid by the Tribunal does not prevent the appeal from being qualified as an individual appeal, since each appellant is challenging the individual decision taken by the Administration as it affects him or her. The Appeals Board and the Administrative Tribunal have in the past both allowed a single appeal lodged by multiple appellants containing submissions that are each directed against similar acts and concern the same legal matters. This power is a measure to ensure the proper administration of justice by keeping the Tribunal from being inundated with multiple identical appeals that require a ruling on the same matter.

51. Secondly, the respondent argues that the appeal was entered late because it is directed at the January 2020 pension slips, whereas the appellants had already been informed of the new pension calculation method in a newsletter dated 5 November 2019, and subsequently in emails sent along with their November and December 2019 pension slips. The request for administrative review was not made within the 30-day time frame foreseen by the CPR.

52. The Tribunal notes that the information notes were general in nature and the emails that accompanied them announced an intention. The Tribunal has already ruled thus in its Judgments nos. 2014/1017 (§33–35) and 2017/1127-1242 (§81 and subsequent). Those were not individual decisions on implementation but rather information about a new general measure. Because under Article 6.2.1 of Annex IX the Tribunal may only rule on individual disputes, the Administration may not argue that the

appeal was lodged late on grounds that general information had been circulated earlier. Starting the time frames for lodging an appeal as from the date of circulation of such general information without permitting the staff to challenge an individual act that adversely affected them would in some circumstances be tantamount to taking away the power of serving or retired staff to challenge an individual decision on implementation that affected them. It is only from the time of knowledge of the individual decision that the time frame for lodging an appeal starts to run, i.e. in the present case the pension slip implementing, for the first time, the new version of Article 36 of Annex IV to the CPR. Consequently the petitions submitted on 20 February 2020 maintained the time frames for lodging appeals, and the appeal lodged on 5 May 2020 directed against the pension slips received by the appellants around 25 January 2020 is not late.

53. The respondent takes issue with the appeal for challenging a decision by the North Atlantic Council. It is true that an appeal cannot seek annulment of such a decision. But Council decisions may be challenged by pleas of illegality in a request for annulment of an individual decision implementing a Council decision. That is the case in the present appeal, given that the appellants are seeking annulment of their pension slip insofar as it implements for the first time the new version of Article 36 of Annex IV to the CPR. There are therefore not good grounds for the respondent's objection of inadmissibility. The Appeals Board (NATO AB, Cases nos. 893-894 of 30 May 2013) and the Administrative Tribunal (AT, Cases nos. 2020/1306 of 23 April 2021 and 2020/1310 of 10 May 2021) have previously ruled that appeals directed at salary slips or pension slips implementing decisions by the North Atlantic Council are admissible.

54. Fourthly, the respondent argues that the impugned decision has not affected the appellants' material situation, which renders their appeal inadmissible. But the concept of a decision constituting grounds for grievance does not require an immediate material alteration of the appellants' rights. Even if the change has not affected the amount of the pension in January 2020, implementation of the new rule could, in the short term, adversely affect the appellants. They are entitled to challenge the application to them of a new method for adjusting the amount of their pension.

55. Given that the four claims of inadmissibility have been rejected, and the Tribunal sees no grounds to enter one of its own, it declares the appeal admissible.

### *ii) On the merits of the submissions in the appeal*

56. The appellants challenge their January 2020 payslips exclusively on grounds of the supposed unlawfulness of Article 36 of Annex IV to the CPR, in the version thereof adopted by the North Atlantic Council on 25 October 2019, which those pension slips implement for the first time.

57. Article 36 of Annex IV to the CPR was drafted as follows until being modified by the North Atlantic Council decision of 25 October 2019:

> Should the Council of the Organization responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall grant at the same time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred. Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should

be made.

A footnote goes on to note that:

> Article 36 of the Pension Scheme Rules, relating to the arrangements for the adjustment of benefits, shall be interpreted, in all circumstances and whatever the current salary adjustment procedure, as follows: Whenever the salaries of staff serving in the Coordinated Organizations are adjusted – whatever the basis for adjustment – an identical proportional adjustment will, as of the same date, be applied to both current and deferred pensions, by reference to the grades and steps and salary scales taken into consideration in the calculation of these pensions.

58. The new version of Article 36 provides as follows:

> The Organization shall adjust pensions, every year, in accordance with the revaluation coefficients based on the consumer price index for the country of the scale used to calculate each pension. It shall also adjust them in the course of the year, for any given country, when prices in that country show an increase of at least 6%.

*On the insufficient justification and lack of reasons for the change to Article 36*

59. The appellants assert that insufficient justification was given for the change to Article 36 of Annex IV to the CPR, and that it was not preceded by a proper impact study.

60. In the Tribunal's view, the change to a regulatory standard, such as the change in the calculation method used for the annual pension adjustment so that henceforth it is indexed on consumer price indexes, does not mean that all the details must be explicitly noted in the impugned decision. It is enough for those affected to be in a position to understand the reasons why it was decided that the act concerning them would be adopted, the purpose thereof, and the method used to establish the amount of their pension rights.

61. In particular, the CCR's 263rd report clearly states that the pension adjustment method should be reformed so that in future it is indexed on inflation, that being the best way of protecting pensioners' incomes from the effects of increases in the cost of living and of securing the pensions system for the future, given that it was threatened by a sharp increase in costs owing to people living longer, among other factors.

62. Concerning the argument that the prior studies were insufficient, the Tribunal considers that there is enough information in the file to show that studies were effectively conducted, as justification for the change in the method for calculating the annual adjustment. The North Atlantic Council did not act arbitrarily. And it is not for the Tribunal to examine the validity of the change in the calculation method of the adjustment, nor to compare it with other solutions that could have been implemented.

63. Thus, given that the provision challenged as an exception is of the nature of a regulation, those responsible for drafting the Regulations were able to adopt it without explaining the full reasoning in order for it to be valid.

*On the supposed violation of the Noordwijk agreement*

64. Firstly, it is argued that the new wording of Article 36 violates the Noordwijk agreement signed on 20–21 April 1994, which states that the staff's contributions may be changed but the benefits paid may not; with this change the Council violated a principle of public international law, *pacta sunt servanda*.

65. In order to examine this argument we must first analyse the nature of that agreement: as opposed to what is alleged in the appeal, it is not an international treaty but rather an agreement between the organizations, the staff representatives and the Coordinating Committee on Remuneration (CCR) aimed at setting out the conditions for establishing and adjusting pensions. Securing the agreement of the organizations and the staff representatives is a smart way to handle a sensitive issue of labour relations, but it is not a legal obligation. Here, the only decision-maker is the North Atlantic Council. It can check whether there is general agreement on all the changes affecting personnel management, but it is not required to secure the staff's agreement prior to amending the Regulations: no provision of the CPR or principle of international law gives the staff representatives joint decision-making power.

66. Furthermore, as the NATO International Staff emphasizes, CCR reports are merely recommendations that the decision-making bodies of each organization may or may not apply. The decision-making body remains the North Atlantic Council, which is not bound by the CCR's recommendations. Lastly, in any event, that agreement acknowledged a compromise reached by the three committees of the Coordinated Organizations, and suggested that no changes be made to it in the five years that followed it; it did not bar later changes, however. At no time was it decided that the rules on pension adjustments would be set in stone.

67. The succession of CCR reports on this topic show that this is a complex issue, and that the financial balance of the retirement scheme is the primary objective that determined the decisions that followed. Nobody can claim to have found a definitive system because all pension systems are based on a demographic and financial balance that requires periodic adjustment.

*On the analysis of the other submissions in the appeal*

68. Before examining the other submissions in the appeal, let us first recall the case-law rules on changes to the conditions of employment of the staff.

69. The conditions of employment of international civil servants are usually laid down both in a contract containing certain clauses of a strictly individual nature and in the Personnel Regulations or Statutes to which the contract refers. The latter in fact contain two fundamentally different kinds of provision: those relating to organization of the international civil service and to impersonal and variable benefits, and those establishing the individual position of the staff member which were a determining factor in that staff member's decision to accept the post. The first are in the nature of regulations and can be modified at any time in the interests of the service, subject to the principle of non-retroactivity and the limitations that the competent authority has itself placed on these powers of modification; however, such modifications, should their effect be to upset the

balance of the contract, could entitle the staff member either to terminate the contract or to obtain compensation.

70. International tribunals have on many occasions been obliged to rule on the lawfulness of adjustments to serving and retired staff members' contributions and benefits. For NATO, both the Appeals Board (case no. 723, *Van der Laan,* 12 July 2007; no. 726, *Oudega*, 12 July 2007) and the Administrative Tribunal (case no. 2014/1017, October 2014, §44-45; nos. 2020/1294-1296, 23 October 2021, §102 *ff.*) have ruled similarly.

71. Most adjustments to the method of calculating salaries, contributions, benefits and pensions have been recognized as being modifications in the nature of regulations that did not require compensation provided that they were based on objective general-interest factors, such as longer lifespan and increased healthcare costs, and did not upset the balance of contracts.

72. That the new pension adjustment method is in the nature of a regulation is not disputed in the present appeal. The parties disagree, however, on the conclusions to be drawn from that, and in particular on the compensation to be awarded to staff members as a result of the change.

73. The appellants make several arguments disputing the change in the method for calculating the annual adjustment of pensions paid to the appellants. They see it as a violation of vested rights, an infringement of the principle of legitimate expectations and of legal security, unlawful retroactivity and unjust enrichment of the Organization.

*On the supposed violation of vested rights and the alleged upsetting of the overall balance of the contracts*

74. To determine whether a vested pension right has been violated, international tribunals agree that three elements must be examined: the fundamental, essential nature of the change to the conditions of employment, the objective nature of the new provisions, and the scope of the consequences of the measure.

75. With regard to the first criterion, the Tribunal concurs with the parties, who are in agreement that the principle of pension adjustment is indeed a general principle that must be upheld by Administrations. They disagree, however, on whether the Administration could change the calculation method as it did.

76. The appellants argue that the adjustment severs the principle of solidarity between serving and pensioned staff. It comes down to whether the change in calculation method for the annual pension adjustment, henceforth aligned with the price index and not with the salaries of the serving staff of the same organization, upsets the balance of contracts. No adjustment method has been formally enshrined in an overarching text. It is up to each organization, and for NATO the North Atlantic Council, to decide what is the most appropriate method of guaranteeing pensioners the income to which their contributions over their period of service entitles them. This choice derives from complex, technical economic factors, which by nature are prone to evolve in accordance with the Member countries' demographics and economic situation. The fact that, up until the disputed adjustment, the pension adjustment had been aligned with the salary adjustment may be

interpreted as the implementation of a principle of solidarity between serving and pensioned staff; that solidarity is a consequence of, and not the reason for, the chosen adjustment method. Moreover, there is an objective difference in situation between serving and pensioned staff that enables the Administration to adopt different rules for the adjustment of the salaries of serving staff and pensions.

77. The same reasoning applies to the parallelism in the trends of the pensions and salaries in the eight reference civil services. It was never framed as an intangible principle that trends in pensions and salaries had to remain parallel; such parallelism was the consequence of that, but could be modified if the financial and economic conditions of the pension scheme were changed.

78. With regard to purchasing power parity, the Tribunal observes that retirees' ability to settle in their home country, set out in Article 33 of Annex IV to the CPR, was not affected by the new Article 36. Moreover, this new Article 36 contains a paragraph 5 that adds the ability for a staff member who retired before 31 December 2019 to exercise an option for another country with the scale corresponding to the new country of residence. Thus retirees have not been deprived of the ability to choose or change their place of residence, under the same conditions as before.

79. In addition, the Tribunal considers that the new pension adjustment method is not disadvantageous to pensioners in principle. On the contrary, by guaranteeing their purchasing power, it aims specifically to protect them against financial loss and could prove more protective of their income than alignment on salaries. And the application of a given method over a long period does not give pensioners a vested right to have it made permanent, nor does it create a custom or a general principle that the Organization's competent bodies may no longer modify. The North Atlantic Council retains the power to introduce a new method if necessitated by circumstances; it is one of the ways of securing the future of the pensions system as economic and demographic trends that can affect the balance of the scheme arise.

80. The economic context has changed a great deal over the decades owing to the constant rise in pensions paid and much faster growth in the number of pensioners than of serving staff. Thus the North Atlantic Council could lawfully, without upsetting the balance of contracts or violating vested rights, change the rule on pension adjustment in future to ensure the financial stability of this pension system and guarantee the purchasing power of the pension paid to each pensioner. Furthermore, it was not required to arrange for a transitional period before the entry into force of the new provision.

*On the violation of the principle of legal security, non-retroactivity and no unjust enrichment*

81. The principle of legal security is based on the existence of clear, precise, stable rules to which the Administration is subject.

82. The appellants claim that the change to Article 36 affects legal security by unilaterally changing the pension adjustment method for staff. The staff members paid contributions throughout their entire careers on the basis of the benefits that they were expecting at that time.

83. When the staff members joined the Organization, their contract and the CPR guaranteed the existence of a future pension and pension adjustments for them. However, in the Tribunal's view, they were not given any entitlement to a specific pension adjustment method, which by nature depends on evolving criteria, particularly over the very long period that can elapse between a staff member joining, retiring and dying. The change in the pension adjustment method does not jeopardize the situation of the appellants, who are continuing to receive a pension, which is an integral part of their contract, and to have it adjusted annually. No pension rights were affected by the change to Article 36. Moreover, the purpose and effect of the new adjustment method is to guarantee that their purchasing power is not affected. Consequently the allegations of a violation of legal security must be dismissed.

84. The appellants also develop an argument suggesting that the change to Article 36 may produce effects prior to its entry into force. But that is not the case: the change to Article 36 applies only to pensions paid as from 1 January 2020, but in no way to those paid earlier.

85. The appellants see retroactivity in the fact that the change to Article 36 applies to staff who retired before 1 January 2020, and are thus seeing their pension calculation changed in future. But this is not retroactivity. The Coordinated Pension Scheme is based on the solidarity principle, wherein pension rights are not calculated as a deferred reconveyance of contributions paid by staff over the course of their career, but rather to maintain a standard of living in accordance with their past job and to secure the future of the system. The competent bodies of the Organization are therefore allowed to modify the pension calculation rules for the future by applying this new method to previously pensioned staff. Yet viewing that as retroactivity would make it impossible to change the pension calculation rules for staff who are already retired, and would give the Administration little room to manoeuvre, which would produce very slow, delayed effects that could threaten the financial balance of the system.

86. Lastly, there has been no unjust enrichment of the Organization, because the serving staff’s rates of contribution and the pension adjustment arrangements do not have the effect of retroceding any money at all to the Organization but rather of ensuring the internal balance of the pension scheme. It is not disputed that the chosen rate of contribution is necessary for the payment of retired NATO staff’s pensions.

87. All these contentions are therefore rejected.

88. For all the foregoing, the appellants do not have grounds to seek to have the new version of Article 36 of Annex IV to the CPR arising from the North Atlantic Council decision of 25 October 2019 declared unlawful. Consequently their submissions seeking annulment of their January 2020 pension slips must be rejected.

*On the claims for compensation*

89. The submissions seeking annulment of the impugned decisions having been rejected, the claims for compensation of the alleged harm caused by these decisions must consequently be rejected.

## E. Costs

90. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

91. In accordance with these provisions, the appellants' submissions having been unsuccessful, no reimbursement to them of any expenses is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides:

- The appeal is dismissed.

Done in Brussels, on 1 June 2021.

(signed) Laurent Touvet, Vice President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 June 2021 AT-J(2021)0015

**Judgment**

**Case No. 2020/1315**

**C *et al.***
**Appellants**

**v.**

**NATO International Staff**
**Respondent**

Brussels, 1 June 2021

Original: French

*Keywords: Pensions – Annual adjustment of pensions payable – Interest in action against such a decision – Serving staff – No. Education allowance – Change in conditions of entitlement for pensioned staff – Interest in action against such a decision – Serving staff – No, all the more so as the amendment will only enter into force in 10 years' time.*

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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 Laurent Touvet, Vice-President, Ms María-Lourdes Arastey Sahún, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the videoconference hearing on 26 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr GC, Mr MC, Mr PF, Mr WH, Mr CL, Mr JR and Mr CS, dated 28 August 2020 and registered on 16 September 2020, seeking:

- annulment of the decision to apply to them the amendment to Article 36 of the Coordinated Pension Scheme Rules recommended by the 263rd Report of the Coordinating Committee on Remuneration, a decision that was made apparent by their January 2020 salary slip and confirmed by the decision to dismiss their requests for administrative review, with regard to both the pension adjustment and the education allowance;
- in the alternative, compensation for the material damage suffered, in the form of a lump sum representing their loss of pension rights as from 1 January 2020 and of their entitlement to the education allowance, taking into account their life expectancy;
- an order for the respondent to pay the costs.

2. The respondent's answer, dated 16 November 2020, was registered on 19 November 2020. The appellant's reply, dated 20 January 2021, was registered on 29 January 2021. The respondent's rejoinder, dated 1 March 2021, was registered the same day. The comments by the International Staff Legal Adviser, dated 16 March 2021, were registered on 18 March 2021.

3. Owing to the public health crisis, and with the parties' agreement, the Tribunal held the hearing on 26 March 2021 by videoconference using the NATO Headquarters system. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The material facts may be summarized as follows.

5. NATO has two pension schemes, depending on whether the staff member was recruited before or after 1 July 2005. The Coordinated Pension Scheme is the one that applies to staff recruited before 1 July 2005; it is common to the six Coordinated Organizations (NATO, European Space Agency, Council of Europe, Organization for Economic Co-operation and Development, European Organisation for the Exploitation of Meteorological Satellites and European Centre for Medium-Range Weather Forecasts). Under the coordination system, the governing bodies of those organizations receive recommendations from dedicated experts about technical matters pertaining to the pay and allowances of their staff. One such coordination body, the Coordinating Committee of Government Budget Experts (CCG, now the Coordinating Committee on

Remuneration, or CCR), produces reports for the governing bodies of the Coordinated Organizations, which have sole legal competence to take decisions.

6. Following the CCG's recommendation in its 127th report, the North Atlantic Council adopted in 1978 its coordinated remuneration and pension scheme rules, Article 36 of which sets out the rules for the annual adjustment of pensions. Following the 150th report and after lengthy debate, the North Atlantic Council added a footnote to Article 36, which provided that pension adjustments were to be identical to salary adjustments.

7. This pension adjustment mechanism remained in place for nearly 40 years. The financial rules applicable to the pension scheme were often amended during that time, however. For example, the contribution rates were increased several times, and the Coordinated Pension Scheme was closed to staff recruited after 30 June 2005.

8. As from 2011, an initiative aimed at finding ways to enhance the financial stability of the scheme in a context of rising costs began. That initiative was met with strong reservations, and it was only in 2017 that the CCR formally decided "to initiate an overall review of the Coordinated Pension Scheme to bring it more in line with best practice in other pension systems, both in international organisations and more widely, and to improve the financial stability of a system whose costs have been rising significantly". Five measures were considered: suppression/reduction of the tax adjustment, reduction of the pension accrual rate, calculation of pension benefits based on average career salary instead of final salary, a special levy on pensions, and an increase in the retirement age.

9. In January 2019, five of the six Coordinated Organizations, including NATO, submitted their final proposal to the CCR: to tie pensions to inflation instead of to the salary scales, and make the conditions for entitlement to the education allowance stricter for future pension beneficiaries.

10. On 26 September 2019, in its 263rd report the CCR proposed that pensions paid under the Coordinated Pension Scheme be adjusted on the basis of inflation as from 1 January 2020. For the education allowance, it was suggested that the conditions of entitlement be restricted as from 1 January 2025 or 1 January 2030.

11. On 25 October 2019, the North Atlantic Council amended Annex IV to the Civilian Personnel Regulations (CPR), including Articles 36 and 28 thereof. On 5 November, Office Notice ON(2019)0078 was sent to staff to inform them that pensions would henceforth by indexed on consumer prices and no longer on salaries. This new calculation method was communicated to retirees on 25 November 2019, with their November pension slip. The information appeared again in similar forms on 13 December 2019 and on 15 and 24 January 2020.

12. At the end of January 2020, the staff received their salary slip for January 2020. From 20 to 25 February 2020, seven NATO staff members – Mr GC, Mr MC, Mr PF, Mr WH, Mr CL, Mr JR and Mr CS – sent the Secretary General a request for administrative review with respect to their salary slip.

13. They received a reply on 26 May 2020. The Secretary General rejected their requests on grounds that revising the pension adjustment rules was necessary for

sustainably ensuring the balance of the pension system and guaranteeing the real value of pensions payable. The rules on the education allowance would apply only as from 2030. Even though the Coordinated Pension Scheme had been closed since 2005, it still required adjustments to guarantee the real value of pensions. Never, in the 1994 Noordwijk Agreement or elsewhere, did the North Atlantic Council commit to not amend the pension calculation method. In the Secretary General's view there were no vested rights arising from a pension calculation method, and there was no obligation to have the same adjustment method for salaries and pensions. None of the benefits under Annex IV had been taken away. Lastly, there was nothing to say that the contested adjustment would cause financial prejudice to them; that would depend on the trends in NATO salaries. In the immediate future, the change would not be a substantial one, and the balance of contracts would not be upset. With regard to the change in the conditions of entitlement to the education allowance, the lengthy ten-year period between the decision and its entry into force gave its potential beneficiaries time to adjust their personal plans.

14. From 17 to 24 April 2020, each of the appellants submitted a complaint to the NATO Secretary General citing a violation of the Noordwijk agreement and of the principle of *pacta sunt servanda,* a violation of vested rights and of the principle of legitimate expectations, an upset to the balance of their contract, a violation of the principles of legal certainty, non-retroactivity and no unjust enrichment, insufficient justification, the arbitrary nature of the decision and the unlawfulness of taking away a benefit toward which they had contributed since joining the Organization.

15. After first having informed the appellants that their complaint would be submitted to a Complaints Committee, the International Staff went on to notify them on 1 July 2020 that the case would go directly before the Tribunal, in accordance with Article 4.4 of Annex IX to the CPR.

16. It was on 28 August 2020 that the staff lodged their appeal with the Tribunal. The case concerns both the pension adjustment rules established by the new wording of Article 36 adopted by the North Atlantic Council on 25 October 2019, which is being challenged on the basis of their January 2020 salary slips, and the education allowance, the conditions of entitlement to which were changed by the new wording of Article 28, adopted on the same day.

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

### *(i) The appellants' contentions*

17. The appellants are challenging the impugned decisions by raising a plea of illegality with respect to the decision by the North Atlantic Council regarding the change in the pension adjustment calculation method as it appears in the new wording of Article 36 of Annex IV to the CPR, and the change in the conditions of entitlement to the education allowance arising from the new wording of Article 28.

18. Firstly, they assert that the North Atlantic Council violated the Noordwijk Agreement of 20–21 April 1994, which provides that the benefits are guaranteed for staff members. Any financial imbalances can be corrected only through adjustment of the rate of contribution. This position was formally enshrined, and thus constitutes a vested right

for staff members that the North Atlantic Council was not in a position to modify. As it was an agreement signed as part of the internal law of an international organization, the Administration is obliged to respect it, in accordance with the principles of legal certainty, legitimate expectations and the general principle of *pacta sunt servanda*.

19. The next contentions, presented under different headings, underline that the balance of staff members' contracts – and pensions, which form an integral part thereof – is upset by the new method of calculation for the annual adjustment of pensions.

20. Secondly, the appellants claim that the North Atlantic Council's decision violates the vested rights of staff. They do not dispute that the new method of calculation for the adjustment of pensions is a regulatory norm in the contracts. They underscore that the pension is a substantial part of the contract and that the Administration cannot amend it without fulfilling a number of conditions.

21. To support this claim, the appellants put forward several arguments.

22. Specifically, the Administration did not conduct a serious impact study to objectively justify the need to amend the adjustment method. It has not proven that amending Article 36 was necessary. Furthermore, the new method entails a violation of vested rights insofar as it causes pensions to be lower than with the previous calculation method. Lastly, there were no transitional measures.

23. Thus the amendment implemented in the impugned decisions affects a fundamental element that might have substantially influenced the staff's decision to join the Organization or to opt into the Coordinated Pension Scheme.

24. The appellants also highlight that there are vested rights in the solidarity between serving staff and pensioners, with pension adjustments aligned on salary adjustments for staff. There are also vested rights in the principle of parallel trends in the salaries of the staff of the Coordinated Organizations and of the civil servants in the eight reference civil services, as well as in the application of the purchasing power parity principle, which guarantees equal treatment for all NATO staff. These rules, in force for several decades, have taken the form of a customary rule, which the Administration was not in a position to depart from by amending Article 36 of Annex IV to the CPR.

25. While the appellants acknowledge that the pension adjustment rules may indeed be modified, these long-standing principles may not be done away with. Non-retroactivity means that the Administration could not apply new rules to existing situations, and had to establish a transitional period for implementing the adjustments gradually.

26. Thirdly, the appellants assert that the principle of legal certainty has been violated. They base this on the fact that the right to draw a pension is an essential component of the contract that each staff members signs with the Administration. The Administration was thus not in a position to unilaterally change the adjustment method for pensions payable to staff. The staff members pay contributions throughout their careers on the basis of the benefits that they expect to receive. Amending the calculation method allows the Organization to make savings that constitute unjust enrichment in its favour.

27. Fourthly, the appellants claim that the amendment also constitutes an unlawful retroactive act as it changes the rule that was in place at the time the staff members signed their contract and then contributed to the pension scheme. As the triggering event occurred before the rule was amended, the rule may only apply to future situations and not to pensions that were a vested right prior to the amendment.

28. Fifthly, the appellants contend that insufficient reasons were given for the measure adopted inasmuch as the only justification given is the conclusions of the 263rd CCR report, which contains only assertions about the remuneration adjustment method without any substantiation. The amendment of Article 36 was not preceded by in-depth studies showing that it was necessary and proportionate in nature. It is thus an arbitrary decision.

29. The appellants quantify the damage to them as a lump sum based on actuarial methods that assume a probable retirement age of between 60 and 62 years of age and their individual life expectancy.

30. The appellants are challenging the new conditions of entitlement to the education allowance on the same basis, given that they have contributed to funding this benefit since they joined NATO.

31. In light of all the arguments regarding the unlawfulness of the decision by the North Atlantic Council to amend Articles 28 and 36 of Annex IV to the CPR, the appellants are seeking annulment of the decision made apparent by their January 2020 salary slip.

***(ii) The respondent's contentions***

32. The respondent begins by raising five grounds of inadmissibility.

33. The first is that this is a single appeal being brought before the Tribunal by several people, yet collective actions are not admissible before the Tribunal.

34. The respondent then argues that the appeal has been entered late because it is directed at the January 2020 salary slips, whereas the appellants had already been informed of the new pension calculation method in an information note dated 5 November 2019, and subsequently in messages that accompanied their November and December 2019 salary slips. The request for administrative review was not made within the 30-day time frame foreseen by the CPR.

35. The respondent maintains as a third ground of inadmissibility that the decision by the North Atlantic Council is not a decision within the meaning of Article 61.1 of the CPR and cannot be challenged before the Tribunal.

36. The fourth ground of inadmissibility is that by being directed against the new pension calculation method, the appeal is inadmissible for having been lodged by people who are not yet pensioners but instead are serving staff of the Organization. These are future retirees who are not yet pensioners, and as of the date of the appeal they are not about to begin drawing a pension. With regard to the education allowance, just one of the seven appellants is currently entitled to it, and there is nothing to indicate that he will continue to be entitled to it either in the immediate future or upon retiring. The decision

by the North Atlantic Council to amend Articles 28 and 36 therefore does not affect them individually.

37. Lastly, in the Administration's view, the impugned decision does not affect the appellants' material situation, which renders their appeal inadmissible.

38. The respondent then replies to the submissions in the appeal, refuting them one after the other.

39. Concerning the first submission, that the North Atlantic Council violated the Noordwijk Agreement, the respondent emphasizes that CCR reports are merely recommendations that the decision-making bodies of each organization may or may not apply. The decision-making body remains the North Atlantic Council, which is not bound by the CCR's recommendations. Furthermore, the Noordwijk Agreement noted a compromise reached by the three committees of the Coordinated Organizations, and suggested that no changes be made to it for five years; it did not bar later changes, however.

40. The respondent adds that at no time was it decided that the rules on pension adjustments would be set in stone. The succession of CCR reports on this topic show that this is a complex issue, and that the financial balance of the retirement scheme is the primary objective that determined the decisions that followed. Nobody can claim to have found a definitive system because it is based on a demographic and financial balance that requires periodic adjustment.

41. Concerning the other submissions, the respondent argues first of all that the pension adjustment rules defined by Article 36 of Annex IV to the CPR are in the nature of regulations and non-individual. They can therefore be modified at any time by the North Atlantic Council, provided the modifications are not retroactive and comply with the limitations imposed by the competent authority. It is only when changes to rules upset the balance of the contract that the staff member is entitled to compensation. By definition, regulatory provisions do not create vested rights that prevent them from being modified.

42. The vested rights of staff members and pensioners have not been violated because the link between salaries and pensions has long been a subject of debate within the Coordinated Organizations, with warnings that it could adversely affect pensioners if restrictive remuneration policies were applied to salaries. So on the contrary, calculating pension adjustments based on inflation, and no longer on salary adjustments, actually protects pensioners.

43. The principle of equal treatment has not been violated by eliminating the principle of purchasing power parities, given that pensioners can still settle in the country of their choice under the conditions in Article 33 of Annex IV to the CPR. The respondent rejects the argument that the pension adjustment method was a determining factor in staff members' decisions to join the Organization.

44. With regard to the reasons for the modification of Article 36, the respondent recalls the rapid rise in the cost of pensions as well as the savings made possible by modifying the method of calculation for the annual adjustment of pensions in payment, which makes

it possible to contain increases in contributions. Modifying Article 36 therefore protects the future pensions payable to retired staff members. The alleged harm is not certain, can only be measured over the long term and will only have a very marginal effect that does not upset the overall balance of the contracts.

45. The principle of retroactivity has not been violated either, since Article 36 only applies in future and does not modify the rights acquired by staff before 1 January 2020: the contributions made by staff over their careers create an entitlement to a pension, not to a specific pension adjustment mechanism for the future pension. In particular, the principle of all social insurance schemes is to guarantee a right without guaranteeing that the subsequent payment of benefits will be, for each beneficiary, equal to the amount of contributions they paid. It is a solidarity-based mechanism.

46. Lastly, the new calculation method was not determined arbitrarily. An impact study was conducted and produced before the Tribunal. Every effort was made to protect the interests of staff members and pensioners. This enabled compromises such as a lower-than-planned increase in contributions by serving staff members.

47. As for the alleged damage, this cannot be calculated in advance, since it is based on assumptions about salary increases in relation to inflation and life expectancy.

48. As for the change to Article 28, the respondent refers to the line of reasoning used in its defence of Article 36, and adds that this statutory change is only for the future, will only enter into force ten years after the decision, and is not retroactive.

49. The respondent is therefore seeking dismissal of the submissions in the appeal, primarily on the grounds of inadmissibility, in the alternative as being without merit.

## D. Considerations and conclusions

### *i) On the composition of the Tribunal*

50. The Tribunal's President considered that the scope of the appeal before it was such that it was preferable for the judgment to be rendered as a full panel, and not as a panel of three judges.

51. However, as he himself is a Coordinated Pension beneficiary, the President recused himself pursuant to Article 6.1.5 of Annex IX, to avoid any conflict of interest. As per the last sentence of Article 6.1.4 of that same annex, the President was replaced by the Vice-President.

52. It is true that the CPR does not provide for the scenario of how a plenary should be formed when the President has recused himself. It is therefore for the Tribunal to interpret the CPR provisions in order to overcome this case of *force majeure*. For that reason, the Tribunal has decided to sit in the case by bringing together all its members apart from the recused judge, i.e. four members, chaired by the Vice-President.

### *ii) On the admissibility of the appeal*

53. The Tribunal began by hearing the respondent's objections that the appeal is inadmissible.

54. On the one hand, Article 36 of Annex IV to the CPR was drafted as follows until being modified by the North Atlantic Council decision of 25 October 2019:

> Should the Council of the Organization responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall grant at the same time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred. Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should be made.

A footnote goes on to note that:

> Article 36 of the Pension Scheme Rules, relating to the arrangements for the adjustment of benefits, shall be interpreted, in all circumstances and whatever the current salary adjustment procedure, as follows: Whenever the salaries of staff serving in the Coordinated Organizations are adjusted – whatever the basis for adjustment – an identical proportional adjustment will, as of the same date, be applied to both current and deferred pensions, by reference to the grades and steps and salary scales taken into consideration in the calculation of these pensions.

55. The new version of Article 36 provides as follows:

> The Organization shall adjust pensions, every year, in accordance with the revaluation coefficients based on the consumer price index for the country of the scale used to calculate each pension. It shall also adjust them in the course of the year, for any given country, when prices in that country show an increase of at least 6%.

56. On the other hand, Article 28 of Annex IV, which sets out the conditions of entitlement to the education allowance for pension beneficiaries, introduces changes "to the recipients of pensions assessed from 1 January 2030".

57. With regard to the pension adjustment method, the Tribunal observes that at the time the appellants lodged their appeal, each of them was a serving staff member. None was consequently affected by the change in the calculation method for a pension that they are not yet drawing. Their January 2020 salary slip is in no way affected by the change in the pension calculation method. Even if their contributions to the pension scheme give them a future entitlement to a pension, they are not yet drawing one, and the rules on adjustment of that future pension have not yet had any effect on their income nor, more broadly, on their personal situation. They therefore have no interest in disputing their January 2020 salary slips, which are unaffected by the change in Article 36 with respect to the annual adjustment of pensions alone.

58. With regard to the new conditions of entitlement to the education allowance, six of the seven appellants are not receiving the allowance and do not claim to be entitled to it. They therefore have no capacity to dispute the application thereof to themselves. For

the seventh appellant, this statutory change will only enter into force ten years after the decision on it; there is nothing to indicate that he will still be entitled to this allowance, and in any case his January 2020 salary slip is not affected by this change. None of the appellants, therefore, has an interest in action against his January 2020 salary slip by invoking the future changes to Article 28 of Annex IV to the CPR.

59. There being no need to discuss the respondent's other objections of inadmissibility or the appellants' contentions, the Tribunal finds, in conclusion, that all their submissions seeking annulment of their January 2020 salary slips must be rejected as inadmissible.

*On the claims for compensation*

60. The submissions seeking annulment of the impugned decisions having been rejected, the claims for compensation of the alleged harm caused by these decisions must consequently be rejected.

## E. Costs

61. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

62. In accordance with these provisions, the appellants' submissions having been unsuccessful, no reimbursement to them of any expenses is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides:

- The appeal is dismissed.

Done in Brussels, on 1 June 2021.

(signed) Laurent Touvet, Vice President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 August 2021 AT-J(2021)0016

**Judgment**

**Case No. 2020/1321**

**ES**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 3 August 2021

Original: French

*Keywords: reimbursement of educational costs; inadmissibility; time-barred appeal.*

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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 Laurent Touvet and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 25 June 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr ES, an A3-grade staff member, against the NATO Support and Procurement Agency (NSPA) dated 10 December 2020 and registered on 11 December 2020 (Case No. 2020/1321). The appellant requests primarily the annulment of the respondent's decision of 14 October 2020 to apply the exceptional rate of 90% to his education allowance for the year 2019-2020 only and not to the previous periods starting from 2016.

2. The respondent's answer, dated 11 February 2021, was registered on 10 March 2021. The appellant's reply, dated 12 April 2021, was registered on 19 April 2021. The respondent's rejoinder, dated 7 May 2021, was registered on 11 May 2021.

3. Owing to the pandemic, and with the parties' agreement, the Tribunal held the hearing on 25 June 2021 by videoconference using the NATO system. The Tribunal heard arguments by the appellant's representative and the respondent's representatives, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant is an NSPA staff member. On 9 September 2016, he submitted a request to be granted the education allowance for the expenses incurred in relation to his son's university studies in France for 2016–2017. On 12 September 2016, the request was accepted and the appellant was awarded the reimbursement of 70% of the admissible educational costs. The appellant later submitted the same request for the academic years 2017–2018 and 2018–2019; the respondent awarded him the reimbursement of 70% of the admissible educational costs for those years also.

5. In December 2019, the appellant discovered that another NSPA staff member had been granted reimbursement of 90% of educational costs for an establishment similar to the one attended by his son. He therefore asked for information so that he could submit a request to have this rate applied to him.

6. The appellant received an email reply on 13 December 2019 informing him that he had to submit a specific request stating the exceptional reasons why this rate should be applied. By email sent on 17 December 2019, the appellant submitted a request and set out the reasons why, in his opinion, the costs for which he was requesting reimbursement were exceptional within the meaning of the applicable rules.

7. In an email sent on 23 January 2020, the respondent informed the appellant that his request had been accepted for 2019–2020. However, the email said that, in accordance with Article 24.6 of the NATO Civilian Personnel Regulations (CPR), requests for allowances submitted three months after the events could not be granted retroactively.

8. The appellant replied by email on 27 January 2020 and argued that he had submitted his request for 90% reimbursement in December 2019, when he had first been informed about the possibility of receiving this exceptional rate. He said that he had been informed of this not by the Administration but by one of his colleagues, whose child was in the same situation as his son. In that same email, the appellant explained that he was not asking for an allowance to be granted, but for the 90% rate to be applied for the preceding years, since he believed that the 70% rate that had been applied to him since 2016 was incorrect. He therefore requested the payment of the difference resulting from the application of the 90% rate instead of the 70% rate.

9. Following several exchanges during February 2020, on 9 March 2020, the respondent told the appellant that the exceptional rate of 90% could only be applied to him for 2019–2020. On 7 April 2020, the appellant requested an administrative review of the respondent's decision not to apply the 90% rate to him for 2016–2017, 2017–2018 and 2018–2019.

10. In its decision of 3 September 2020, the respondent rejected the appellant's request for an administrative review, advising him that he had not challenged the 70% rate granted in 2016 within the required timeframe and that, as explained during the pre-litigation procedure, his request to have the 90% exceptional rate applied from 2016 was time-barred.

11. On 2 October, the appellant lodged a complaint against the aforementioned decision and asked that his complaint be submitted to a Complaints Committee for review. This complaint was also rejected, on 14 October 2020. In this last decision (the impugned decision), the respondent argued that the appellant had not acted within the required timeframe to challenge the application of the 70% rate in 2016 and that it was not justified to convene a Complaints Committee to review his request since it was inadmissible.

12. It was in this context that the appellant filed the present appeal, on 10 December 2020.

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

### *(i) The appellant's contentions*

13. In the appellant's view, his appeal is admissible. It seeks the annulment of the decision of 9 March 2020 on the grounds that it was a new decision adversely affecting him and that it was different from the decision of September 2016. Article 24.6 of the CPR was mentioned for the first time in the decision of 9 March 2020, to justify the refusal to apply the exceptional rate of 90%.

14. As to the merits, the appellant argues that the impugned decision violates the principle of non-discrimination. The appellant's colleague was awarded the 90% rate directly, without asking for it, for a child doing the same kind of course; this was in contrast to what the appellant was required to do. The Administration has thereby established a practice, by which it is bound, which consists in granting reimbursement at a rate of 90% depending on the type of costs in question, without this having to be requested. In the present case, the difference in treatment is clearly unjustified. The key criterion to fulfil to be granted the reimbursement of educational costs is that the costs incurred be exceptional,

and there is nothing to suggest that the appellant's case differs from that of his colleague. Lastly, the appellant adds that the principle of good governance and the duty of care should have prompted the relevant service to inform him of the possibility of submitting a request for review or a request for application of the exceptional rate, which it never did.

15. In these circumstances, the appellant requests that the Tribunal:
- declare the appeal admissible and well-founded;
- annul as a consequence the decision of 14 October 2020, which consisted in rejecting the appellant's complaint of 2 October 2020 and confirming the decision to apply the exceptional rate of 90% to his education allowance for the academic year 2019–2020 only;
- if necessary, annul the decision of 3 September 2020, which consisted in rejecting the appellant's request for administrative review of 7 April 2020;
- if necessary, annul the initial decision of 9 March 2020 to apply the exceptional rate of 90% to his education allowance for the academic year 2019–2020 only;
- order the respondent to pay all costs.

### *(ii) The respondent's contentions*

16. The respondent contends that the appeal is clearly inadmissible within the meaning of Article 10 of the Tribunal's Rules of Procedure and must be summarily dismissed. It also contends that the appeal is inadmissible in that it is directed against a decision taken in 2016 that was not contested within the required timeframe. In the respondent's view, the appeal is, in any case, inadmissible in that it is formally directed against decisions that confirmed the decision taken in 2016, namely those of 23 January 2020 and 9 March 2020.

17. As to the merits, the respondent considers that the appeal is devoid of merit because Article 24.6 of the CPR clearly and unequivocally prohibits any NATO body from granting an allowance retroactively in response to a request submitted more than three months after the events to which it relates. Thus, the appellant could not request in 2019 that an allowance be granted for the academic years 2016–2017, 2017–2018 and 2018–2019. Interpreting the applicable provisions in this way would amount to authorizing staff members to challenge situations that have become definitive since they had not been the subject of an appeal within the timeframes required by the CPR; this would violate the principle of legal certainty. As for the existence of exceptional situations or circumstances, this is a new plea and, consequently, it is time-barred. In the respondent's opinion, the fact that one of the appellant's colleagues was granted 90% reimbursement of their educational costs does not constitute an exceptional circumstance within the meaning of Article 24.6 of the CPR.

18. This being the case, the respondent asks the Tribunal to dismiss the appeal as time-barred or, failing this, as unfounded.

## D. Considerations and conclusions

19. Article 1 of Annex III.C to the CPR stipulates:

> Staff members entitled to the expatriation allowance with dependent children as defined according to the Staff Rules of each Coordinated Organisation, regularly attending on a full-time basis an educational establishment, may request the reimbursement of educational costs […]:

20. Article 5 of Annex III.C, in its version applicable at the time of the events, lists the items of expenditure that should be taken into account for the reimbursement of educational costs. Article 6 of Annex III.C, also in its version applicable at the time of the events, provides that reimbursement of educational costs shall be made according to the rates, ceilings and conditions provided for, each case being treated individually and resulting in the reimbursement of educational costs at a standard rate of 70%, at a country of nationality rate (if different from country of duty) also of 70%, at an increased rate or at an exceptional rate of 90%. Concerning in particular the aforementioned exceptional rate, Article 6 d) of Annex III.C states:

> d) Exceptional rate: up to 90% of total educational costs up to a ceiling of 6 times the annual rate of the dependent child allowance provided that:
> i) educational costs as defined in Article 5 a) and b) are exceptional, unavoidable and excessively high, according to the judgement of the Secretary/Director-General of the Coordinated Organisation concerned;
> ii) such costs refer either to education up to completion of the secondary cycle or are costs as defined in Article 5 […] for the tertiary cycle; and,
> iii) costs are incurred for imperative educational reasons.

21. In the present case, it is not disputed that the appellant submitted, on 9 September 2016, a request to be granted the education allowance for costs related to his son's studies in an establishment in France for the academic year 2016–2017. This request was accepted by the respondent's decision of 12 September 2016, for the reimbursement of educational costs at a rate of 70%. Nor is it disputed that, in the following years, the appellant submitted requests for the reimbursement of educational costs incurred for the academic years 2017–2018 and 2018–2019. The respondent also accepted these requests and granted the appellant a reimbursement of 70% of educational costs for those periods also. The appellant did not challenge these decisions within the required timeframes. It was not until 17 December 2019, for academic year 2019–2020, that the appellant submitted a request for the application of the 90% rate in which he provided the justifications required by Article 6 d) of Annex III.C to the CPR; the respondent accepted this request.

22. In an email sent to the respondent on 27 January 2020, the appellant asked for the first time for the 90% rate to be applied for the previous periods (academic years 2016–2017, 2017–2018 and 2018–2019) instead of the 70% rate. These are the circumstances in which, after several exchanges, the pre-litigation procedure was initiated, resulting in the decision of 14 October 2020 to reject the appellant's request.

23. The Tribunal notes that it was in January 2020 that the appellant expressly requested that the 70% rate be corrected for the periods 2016–2017, 2017–2018 and 2018–2019 and that he did not, therefore, meet the deadlines provided for by the CPR (Articles 6.3.1 to 6.3.3 of Annex IX).

24. Given the provisions of Article 6 d) of Annex III.C to the CPR, from his first request in 2016, renewed in the following years, the appellant had, all the information needed to submit a request for reimbursement at the 90% rate by demonstrating that the educational costs for his son were exceptional, unavoidable, excessively high and incurred for imperative pedagogical reasons. Yet, after being notified of the decisions to grant him the 70% rate for the academic years 2016–2017, 2017–2018 and 2018–2019, the appellant did not challenge the application of this rate within the deadline of 60 days provided for by Article 6.3.1 of

Annex IX to the CPR, nor ask for the exceptional rate of 90% to be applied. He submitted a request for this in January 2020, *i.e.* after the deadline.

25. This being the case, and contrary to the appellant's claims, the respondent did not fail in its duty of care towards him on the grounds that it did not invite him at the time to submit a request to have the applied rate reviewed.

26. In light of the foregoing, there are grounds for the respondent's claim that the appellant's request is obviously inadmissible because time-barred and to reject that appeal as inadmissible.

## E. Costs

27. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

28. The appeal being dismissed as inadmissible, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS,

The Tribunal decides:

- The appeal is dismissed.

Done in Brussels, on 3 August 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
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10 August 2021 AT-J(2021)0017

**Judgment**

**Case No. 2020/1302**

**MV**

**Appellant**

***v.***

**NATO Communications and Information Agency**

**Respondent**

Brussels, 13 April 2021

Original: English

*Keywords: expatriation allowance; continuous residence; previous contractor at the same duty station; reiterates case law.*

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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, Ms María -Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 25 March 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 24 April 2020 and registered on 29 April 2020, as Case No. 2020/1302, by Mr MV, against the NATO Communications and Information Agency (NCIA). The appellant requests, *inter alia*, the annulment of the decision by the General Manager (GM) not to grant him the expatriation allowance.

2. The respondent's answer, dated 1 July 2020, was registered on 17 July 2020. Appellant's reply, dated 17 September 2020, was registered on 8 October 2020. The respondent's rejoinder, dated 7 November 2020, was registered on 10 November 2020.

3. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 25 March 2021, utilizing facilities provided by NATO Headquarters. It heard the appellant's statements and arguments by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

4. On 26 March 2021, after the hearing was closed,the appellant sent an email highlighting his arguments on privileges and immunities and on a difference of treatment with another agent. The appellant also demanded an additional hearing session.

## B. Factual background of the case

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

6. The appellant worked as a contractor with two different companies for the NCIA in Mons, under a series of contracts starting on 15 April 2016 and ending on 20 December 2018.

7. On 18 April 2016 the Commune of Mons granted appellant's right of residence as a EU citizen.

8. On 1 August 2018 the appellant applied for the post of Resource Manager in the Cyber Security Service Line and, following a successful selection process, on 17 October 2018 he was issued the Selection Letter. The standard salary simulation included in the Letter did not contain the expatriation allowance.

9. On 24 October 2018 the appellant signed the "Confirmation of Acceptance", and added the note:

> I hereby confirm that I would consider my employment of the NCI Agency under the conditions stated in the Selection Letter extended to me by email. I would appreciate if

> NCI Agency would re-evaluate my residence status and expatriation allowance eligibility, under the explanation given in the email attached.

In the email the appellant expressed his willingness to take the position and confirmed his agreement to proceed with the Health and Security checks while waiting for the Firm Offer. He also requested more clarity on the employment conditions, especially the expatriation allowance, stressing the importance it would have when considering whether to accept the Firm Offer.

10. On 9 November 2018, the administration replied that the appellant would not be considered eligible for expatriation allowance, as he did not fulfil the criteria under Article 28.4 of the Civilian Personnel Regulations (CPR) because he had been present in Belgium and working on the Agency's premises for more than a year at the time of the recruitment. The administration also informed him that he would not be entitled to the related allowances such as the education allowance, home leave, the installation allowance or reimbursement of removal expenses, since his place of residence was considered to be Mons, Belgium.

11. On 28 November 2018, the appellant wrote again to the administration asking for more explicit explanations and clarity on the applied rules and procedures in order to understand the legal grounds on which NCIA Human Resources (HR) took its decisions. He further asked NCIA HR to give more attention to evaluating his situation, as it was one of the major decisions he would have to make.

12. On 14 December 2018, the administration replied and reconfirmed the Agency's position that he would not be eligible for the expatriation allowance or the related entitlements. On the same day, the appellant reiterated that the information was not clear and asked for more details. On 17 December 2018, the administration answered the following:

> I appreciate that you were hoping for a different response, however we maintain our position that we will not offer you Expatriation Allowance or any of the related entitlements for the position offered. This is an important decision for yourself and your family and I understand that you are currently waiting for the Agency to make a firm offer of employment. I strongly recommend that when this is made, you carefully consider whether to accept under the conditions that we offer.

13. On 20 December 2018, upon expiration of his contract, the appellant left his temporary apartment in Mons, de-registered from the Commune and went back to his family in his home country.

14. On 19 March 2019, the appellant received the Firm Offer of employment from NCIA. On 20 March 2019 he replied to the offer informing HR, *inter alia*, that his current employment and professional residence place was not at the duty station anymore and asked whether the compensation package would include the expatriation and related allowances. On 27 March 2019, the appellant requested an updated salary table to include expatriation allowance and associated benefits, including two foster children.

15. On 28 March 2019 the administration replied the following:

> As mentioned in our tentative offer, the estimated salary statement is available only for your information. Please note that this is not legally binding salary calculation, and is subject to verification of relevant documentation and modification, if applicable, upon taking up duty at the Agency. The salary calculation is mainly based on the information provided in your application for, hence it cannot yet include the 2 foster children you mentioned. Regarding your wife's status, it is not specified if she is financially dependent or not, and this has an impact on the calculation as well. Regarding your stated departure from Belgium and expatriation status, these remain to be clarified. At the time of joining, if the requested paperwork will be provided, salary calculations can be adjusted accordingly.

16. On 29 March 2019 the appellant signed the "Confirmation of Acceptance of Firm Offer" and suggested 15 April 2019 as his starting date. On 15 April 2019 he signed the "Letter of Assignment" with NCIA and began his employment with the Agency.

17. On 13 June the administration, following further exchanges with the appellant, restated, *inter alia*, the following:

> Having reviewed the facts one last time, we do not consider that your temporary return to your home country leads to a different assessment. In particular, we see no evidence that it was your intent to settle permanently in hour home country. […] Our previous assessment is hereby reconfirmed. We do not consider you to be eligible for Expatriation Allowance or any of the related entitlements, such as Education Allowance or Home Leave. In addition, since we consider you to have been living locally during the period, you do not qualify for either Removal or Installation Allowance. […]

On the same day the appellant commented on the email received expressing his disagreement and asked for advice to escalate the matter.

18. On 10 July 2019 the Head of General Services and Human Resources provided a further explanation of appellant's situation:

> You suggest that HR's denial of expatriation allowance was based on opinion rather than on objective assessment and application of the NATO regulations. However, there was a very clear early decision based on the facts available, which was subsequently rigorously reassessed both before and after your appointment by several staff from the Human Resources office. This last reassessment was upon your request and specifically looked at the additional points that you raised and evidence provided, before we confirmed once more that we could still see no entitlement to expatriation allowance under the NCPR. […] Should you still consider that the decision not to grant you expatriation allowance does not comply with the terms and conditions of your employment, as well as the NCPRs, you may find it more appropriate to follow the formal dispute process and request Administrative Review as per NCPR Art 61.1 […]

The appellant was also invited to have a further discussion with a representative from the Human Resources office and a neutral party in attendance.

19. The meeting took place on 31 July and the appellant submitted additional comments on 1 August 2019. On 14 August 2019 the Head of General Services and

Human Resources confirmed that the Agency was not going to approve the allocation of additional allowances and informed the appellant that he would have the right, if he wished, to address the matter via an Administrative Review. On 3 October 2019 the appellant had a further meeting with the new Head of HR and a representative of the Legal Office.

20. On 13 September 2019, the appellant requested an Administrative Review on the basis that:

> Dispute subject is the disagreement between NCIA Human Resources Department (further NCIA HR) and MV (further Employee or I), on applying Administrative Tribunal (further AT) consistent case law and, in Employee opinion, non-procedural NCIA HR assessments/assumptions which lead to an unjustified reduction of the compensation package and extra allowances that were under Employee expectations. NCIA HR communicated the decision multiple times, however the decision always lacked clarity on the process applied and identification of legal sources that were taken in consideration which lead to such decision. Employee firmly believes additional allowances should be granted as he meets all of the requirements that are described in multiple NATO Civilian Personnel Regulations (further NCPR) articles (further Art.):
> a) Art. 26 – Installation allowance
> b) Art. 28 – Expatriation allowance
> c) Art. 30 – Education allowance
> d) Art. 38 – Travel expenses between established residence and the place of duty
> e) Art. 39 – Removal expenses
> f) Art. 44 – Home Leave

21. On 11 October 2019 the respondent informed the appellant that "(b)y means of this Administrative Review, the NCI Agency will once again assess your case" and concluded the following:

> The NCI Agency has spent an inordinate amount of time providing you with extensive explanations, both verbally and in writing, dating back to October 2018. While we understand the need for clarification, we consider the Agency decision fully supported by the NCPR and the existing case law of both the Administrative Tribunal and other tribunals of international organizations. Since the moment you received our tentative order you were aware that we considered you ineligible for expatriation allowance due to your previous contractor role in Mons for over two and half years. You had full knowledge of the conditions. I re-confirm once more that the NCI Agency considers you ineligible for expatriation allowance, education allowance, currency transfers and home leave. Furthermore, since the local residence is not considered interrupted, you are also not entitled to the installation allowance, removal and travel expenses. Should you wish to contest this decision, you have the right to submit a complaint in writing to the General Manager of the NCI Agency within 30 days of this letter as per Article 61.3 and Article 4 of Annex IX to the NCPR.

22. On 9 November 2019, the appellant submitted a formal complaint to the Agency's General Manager, requesting the case to be submitted to a Complaints Committee (CC).

23. The CC convened on 25 November 2019 and on 17 January 2020 rendered its report. The Committee deemed that the appellant acted in good faith in his proceedings and expectations for receiving the expatriate status. It also noted that the NCIA was consistent in informing the appellant throughout the recruitment process, at appointment

and subsequent to his appointment with regard to his non-eligibility for the expatriation allowance, installation allowance, and removal and travel expenses. The Committee concluded:

> The Complaints Committee recommends the NCI Agency General Manager not to consider Mr V eligible for Expatriation Allowance on the basis that, considering his on-site work presence, Mr V has been working as a full time contractor at NCI Agency in Mons during the period April 2016 to December 2018, this de facto making him continuously resident at his duty location for more than 1 year prior to his appointment.
> The Complaints Committee recommends the NCI Agency General Manager to re-evaluate the decision on the entitlement to Installation Allowance, Removal and Travel Expenses from Mr V and his recognised dependents.

24. On 25 February 2020, the GM informed the appellant that:

> [I] agree with the initial decision of my staff to consider you ineligible for expatriation and installation allowance as well as removal and travel expenses.
> Please note that the decision whether or not you are eligible to the Privileges and Immunities is taken by Host Nation Belgium in line with the Belgian legislation.
> The application of the NCPR is consistent with Agency's past practice and fully supported by the jurisprudence of the NATO Administrative Tribunal. Therefore, considering the clear case law, the NCI Agency would find an appeal on this question abusive and reserves all rights under the NCPR in that respect.

25. On 24 April 2020, the appellant submitted the present appeal.

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

### *(i) The appellant's contentions*

26. The appellant alleges the following violations of the CPR:
- Articles 28.4 and 4.6 (expatriation allowance)
- Articles 26.1.1 and 39.1 (installation allowance, removal expenses)
- Article 38.1 (travel expenses)
- preamble D, Articles (viii), (ix) and Annex 1A Articles 17 to 23 (privileges and immunities)

And also alleges:
- a breach of the principle of legal certainty, legitimate expectations and good administration
- a breach of the principle of the duty of care
- a breach of the principle of equal treatment
- a breach of the principle of non-discrimination

27. The appellant primarily contests the Agency's assessment of two main elements with regard to eligibility to the expatriation allowance: "time of appointment" and "continuous residence".

28. The appellant notes that on 7 December 2017 he had been offered a contract by Vector Synergy, an NCIA recruitment partner, for the period 1 January 2018- 31 July 2018, which he accepted. He intended to buy a car in Belgium and tried to register with

the Commune to get number plates, but received a first reply that he was a "non-resident". The appellant was able to register in April 2018 (with retroactive effect from 7 February) only after numerous email exchanges and visits to both the local police and the Commune. He further notes that on 1 August 2018 he applied for the position of Resource Manager through an online advertisement which directed him to a website that referred to a +10% on basic salary, education, removal and installation allowances. When he applied, taking into account his personal experience with the local authorities, he had legitimate expectations of being an expatriate. Moreover, the appellant received the Selection Letter on 17 October 2018 and at that time, in accordance with the CPR requirement of Article 24.8.1, he had "been continuously resident for less than one year on that State's territory", Belgium having considered him a foreign resident only from 7 February 2018, hence approximately nine months as of when he was selected for the position.

29. The appellant highlights the provisions of Article 4.6 of the CPR stating: "The appointment of a member of the staff is effected by the signature of a contract specifying the date from which it take effect", and notes that he was offered an appointment only on 19 March 2019 together with the Firm Offer letter and a form for its acceptance. It was the first time the appellant was asked for a starting date. He therefore argues that the "time of appointment" cannot refer to the Selection Letter, as at that stage there were no indications or requests for him to specify the date from which the contract would take effect. He further notes that when he received the appointment proposal on 19 March, he had been out of the country since de-registering from the Commune on 20 December 2018 and couldn't be considered a resident in Belgium anymore.

30. Moreover, the appellant emphasizes that the Selection Letter contained contradictory wording and couldn't be considered an appointment, but rather just an information letter that he was the selected candidate and was considered qualified for the post. The appellant refers in particular to the following wording of the letter:

> […] I am pleased to inform you that you are considered qualified, on technical and professions grounds for the position of Resource Manager. […]
> Before processing your application further, we should appreciated it if you would inform me whether you would consider employment at the NCI Agency […]
> Also, personnel, can only be appointed to the staff on the conditions that they fulfil the physical standards demanded by the exercise of the function offered […]
> This letter does not constitute a firm offer of appointment and is subject to the availability of funding. Therefore, you should not resign from your current employment.

The appellant therefore contents that it was clear that it was not an appointment at the time and that further procedural actions had to be carried out to be possibly appointed in the future, if certain conditions were met. Also, he stresses that he could not have a legitimate expectation of being offered employment, as the end result did not depend on his merits but on the NCIA, namely the availability of funding.

31. Additionally, the appellant refers to his contract clearly stipulating "This contract takes effect from 15 April 2019 […]", leaving no doubt as to its compliance with the criteria of Article 4.6 of the CPR, which states: "The appointment of a member of the staff is effected by the signature of a contract specifying the date from which it take effect". The appellant therefore asks the Tribunal to set the time of appointment to 1 April 2019, which

is the date when HR drafted the actual appointment document.

32. The appellant disagrees with the NCIA position that his case is in line with the previous case law of this Tribunal, in particular with the principles expressed in the AT Judgment in Case No. 2017/1103 and Case No. 2018/1268. The appellant notes that the difference with both those cases is that the candidates received the offers of appointment with the Firm Offer while they were still working for Agency, and they just had to indicate the joining date. The appellant stresses that in his case, throughout the recruitment process, he spent more time not in working relations with the Agency than having worked for it. He notes that he had been invited to a video interview for the position on 28 August 2018, 114 days later he had left Belgium, and he started to work as a NATO civilian on 15 April 2019 (117 days later).

33. Appellant refers to Appeals Board Decision no. 393 to support his understanding of what the date stipulating the initial contract between the parties, to be considered as the time of appointment, shall be, and to Decision no. 89 requiring the "residence interruption" for qualification for the expatriation allowance, noting that such interruption doesn't have to be of a permanent nature. The appellant rejects the respondent's quoted references to the case law of other international administrative tribunals holding that the Agency is required to follow the CPR. The appellant also adds that NCIA interpreted in *mala fide* the external case law to support their position and justify the unlawful decision.

34. With regard to the violation of Article 26.1.1 and 39.1 of the CPR, appellant contends that with the Selection Letter he was not offered employment and therefore he was not legally in a position to accept it. The wording "at the time of their appointment" of Article 26.1.1 should refer to the 19 March 2019 Firm Offer (received five months after the Selection Letter), a time when he was working and living in Lithuania. (With reference to the working relationship in Lithuania, the appellant annexes a business registration company in Lithuania dated 1 January 2019, bank statements proving expenses, documentation that he engaged in the search for a full-time job and research into a real estate investment.) The appellant also refers to the wording of the documentation received from the Agency on 17 October 2018, "Emoluments for Staff taking up Duty", which states that "Staff members whose established residence at the time of accepting employment is more than 100 km from the duty location […]" Consequently the appellant maintains that his established residence, when he actually accepted the employment, was more than 100 km away. The appellant further provides details of his removal and household expenses.

35. With regard to Article 38.1 the appellant stresses that the CPR do not refer to a "time of appointment" or "continuous residence" criteria, but simply the "time of taking up duties". In the light of this, the appellant considers that he took up duties formally on 29 March 2019, when he accepted the Firm Offer, and factually on 15 April 2019. On the "permanent residence" requirement, the appellant further notes that he couldn't have been considered a permanent resident of another European country on grounds that he lacked the five years residence requirement under the Directive 2004/38/EC of the European Parliament and the Council, and on the basis of declaration of the Mons Commune stating that he was not a "permanent resident".

36. The appellant asks this Tribunal to support him in understanding his Privileges and Immunities stemming from the CPR Preamble D Article (viii), (ix) and Annex 1, Articles 17 to 23, as he maintains that he was not given a clear response with a definite list of privileges that would apply in his case. He submits that SHAPE and the NCIA miscommunicated regarding such topics, carrying over wrongdoings for many years, and he seeks redress and clarity. The appellant considers that the Agency acted with negligent misconduct in administering the NCIA international staff in this respect.

37. On the principle of legal certainly and legitimate expectations, the appellant affirms that further to his various email exchanges with the administration he was given clear indications that the physical place of work, supported by "paperwork" and as much as possible evidence, was the major deciding element for the expatriation allowance, and wonders whether what he provided to the Agency was not enough. He notes that he had been misled by the HR communications, and knowing before that he would have not received the allowance most likely would have led him to choose another job offer.

38. On the principle of good administration, the appellant maintains that the administration took an inexcusable time (85 days) from when he left the country asking for expatriation allowance to when the decision was rendered, putting him and his family in considerable distress. He also feels that he has been discouraged and limited in his right to submit an appeal insofar as the 25 February GM letter stated: "[…]Therefore, considering the clear case law, the Agency would find an appeal on this question abusive and reserves all rights under the NCPR in that respect". The appellant notes that the Complains Committee in its findings suggested that his situation should have been re-evaluated and considers that he has full rights to submit an appeal asking for clarifications.

39. On the principle of the duty of care, the appellant underlines that he expressed several times the financial difficulties encountered in moving his family and the challenges of having to adapt to a new country (in particular, the kindergarten language issue for his four-year-old child, support of his foster children in Lithuania and his wife's job resignation) and yet the Agency, notwithstanding all the proofs and evidence provided, never acknowledged such hardships.

40. On the principle of equal treatment, the appellant notes that he's aware of other staff situations similar to his that received a favorable decision and consequently he deems that he should also be awarded the requested allowances on this basis. The appellant recalls that during his oral hearing with the CC, he asked for an audit on the decisions that were taken, but notes that such audit was never carried out. In his pleadings the appellant puts forward some concrete names/examples of other staff members he believes are in the same or a similar situation.

41. On the principle of non-discrimination, the appellant advances considerations regarding the different status of the workforce respectively hired by the NCIA as Interim Workforce Capacity, and by SHAPE as Temporary Personnel. The appellant compares and details provisions of employment directives applying respectively to the two categories of personnel, highlighting that payment, daily duties, roles and responsibility were the same for both. The appellant disputes that his assignment with Vector Synergy is not considered an international civilian assignment and stresses that he covered a vacant NATO civilian position, he was under the direct management of the Agency and

its hierarchical structure, and that Vector Synergy was only a monthly payroll intermediate company. The appellant considers unreasonable the refusal to acknowledge that he was carrying out duties for NATO and the work was de facto carried out for an international organization.

42. Furthermore, the appellant maintains that the NCIA, instead of addressing the legal arguments, made attempts to incorporate arguments *ad hominem*. The appellant notes that the Agency adopted a "dragging through the mud" strategy, he opposes various claims concerning his registration and advances that the exchanges constitute a defamation attempt to hurt his reputation and credibility in front of this Tribunal.

43. In the light of all the above, the appellant requests that the Tribunal:
- grant expatriation allowance retroactively from 15 April 2019, as well as installation allowance, education allowance and home leave;
- order compensation for material damages in the amount of EUR 6,000 for removal expenses, and EUR 600 for travel expenses;
- order compensation for moral damages in the amount of EUR 5,000, plus additional damages for the defamatory statements, at the discretion of the Tribunal;
- order reimbursement of EUR 1,291.37 in legal fees;
- grant him two additional weeks of paid leave to compensate for the amount of time in preparing the appeal; and
- in relation to the Agency's negligent misconduct, charge the Organization for punitive damages.

***(ii) The respondent's contentions***

44. On the admissibility of the appeal regarding expatriation and related allowances, the respondent does not dispute its procedural admissibility. However, with regard to the contentions regarding the privileges and immunities (P&I) awarded to appellant under the Ottawa Agreement, the respondent considers them inadmissible as P&I are granted in accordance with the host nation rules and are not a result of the decision of the Agency.

45. The respondent highlights that appellant, by his own admission, worked as a contractor for Vector Synergy from 18 April 2016 until 18 December 2018 for a total of two years and eight months. In August 2018 he applied for a NATO international civilian position with the Agency, he was successful in the recruitment process and the Agency issued a tentative offer on 17 October 2018. He continued to work until 18 December 2018. The respondent notes that the appellant only registered on 7 February 2018 with the Commune to register his new car, while Belgian regulations foresee that formalization of the stay is required after 30 days of arrival in the country.

46. The respondent recalls that it explained thoroughly to the appellant that a registration as such does not determine residence. It refers to this Tribunal's case law, in particular to AT Judgment in Case No. 2018/1268 highlighting that physical presence, i.e. working and living at the duty station, is the key element for establishing whether residence is continuous, and that a *de facto* presence does not need to be confirmed by fulfilling administrative prerequisites, nor it is hindered by keeping significant ties (taxation, social security benefits, maintenance of a home and its basic supplies, etc..) to the home country.

47. The respondent elaborates on the concept of interruption of residence by referring to various case law (in particular the jurisprudence of the ILOAT and this Tribunal) and stresses that at no time during his stay in Lithuania did he inform the HR department that he had changed his mind and no longer wished to join the Agency, on the contrary. His short stay consequently did not show an objectively and reasonably credible intention to sever the link with Belgium.

48. Concerning the "time of appointment" criteria under Article 28.4.1 of the CPR, the respondent refers to AT Judgments in Case No. 2018/1268 and Case No. 2017/1103 stating: "[…] the vital element to assess eligibility for the expatriation allowance remains whether that person was working and living in the country of the duty station when the recruitment procedure started". The respondent stresses that the appellant was continuously working and living in Mons for two years and three months by the time he applied for the position in August 2018 and the situation remained unchanged when he received the Selection Letter in October 2018, up to December 2018. Three months later, on 19 March 2019, following successful medical, security and reference checks, the appellant received the Firm Offer. The respondent notes that the majority of the recruitment process, including the entire selection phase, was conducted while the appellant was physically and continuously present at the duty station.

49. The respondent rejects the appellant's allegations that his previous employment with Vector Synergy should be considered as previous service with international organizations under the meaning of Article 28.1.1.ii of the CPR. It stresses that his contractual relationship was with that company and did not fall under the scope of the CPR.

50. The respondent submits that the appellant cannot be found eligible for the installation allowance due to his continuous residence. It refers in this respect to the dispositions of the AT Judgment in Case No. 2018/1263 which extended such criteria of continuous residence also to the installation allowance.

51. Similarly, the respondent rejects the request for eligibility of removal expenses as directly linked to the payment of the installation allowance, and the travel expenses as appellant was considered a long-time resident at the duty station.

52. On the matter of the P&I applicable, the respondent recalls that the appellant had been informed on numerous occasions that he falls under the provisions of the Ottawa Agreement and that the P&I granted him are laid down in the Host Nation agreement the Agency has with the Kingdom of Belgium. It recalls that the Belgian authorities consider the appellant a local resident and as such not entitled to hold a protocol ID card or to purchase a tax-free vehicle. The only privileges awarded are the tax-free salary and tax-free fuel, corresponding also to the grade appellant holds.

53. Finally, the respondent strongly objects to any allegations that it does not treat all personnel in the same manner and demands that this part of the appeal be deemed inadmissible and unfounded. The respondent emphasizes that each case is judged on its own merits as two situations are rarely exactly the same. With regard to the appellant's demand "to produce the full personnel file and provided detailed information" on six other staff members, the respondent advances that complying with such a request would constitute a violation of the Agency's duty to protect its staff.

54. On the principle of good administration and duty of care, the respondent highlights that it went above and beyond to provide an extraordinary level of detail in all of its ample correspondence, that the Agency is not aware of any conditions that would justify a hardship exception, and that the HR department took very active steps to ensure that the appellant's foster children were recognized as NATO dependants.

55. The respondent requests that the Tribunal declare the appeal inadmissible and unfounded. In addition, in view of the appellant's allegations about the Agency's *mala fide*, conspiracy and wrongdoings, the respondent requests the application of Article 6.8.3 of Annex IX to the CPR.

## D. Considerations and conclusions

### *(i) Admissibility*

56. The respondent contends that the appeal regarding the privileges and immunities is inadmissible as these are granted in accordance with host nation rules and are not a result of a decision of the Agency. The Tribunal notices, however, that this claim was not part of the pre-litigation process and not part of the remedies sought in the appeal. Although the matter of privileges and immunities was mentioned in the appeal, it was not until the appellant's reply that a formal claim was submitted for the first time. In fact, the appellant explicitly advances in the appeal that he would like "the Administrative Tribunal to help" in understanding "whether" his privileges and immunities "were not breached".

57. Privileges and immunities were clearly left out of the pre-litigation procedure, and also of appeal's requests for remedies. Moreover, no administrative decision was taken in this matter, and no claim was made by appellant except for his comments or considerations about the link of his status with the request for expatriation benefits.

58. The Tribunal cannot address mere legal consultations. Pursuant to Articles 6.2 and 6.3.1 of Annex IX of the CPR, the competence of the Tribunal requires a previous decision "taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council" as well as the exhaustion "of all available channels for submitting complaints under this Annex".

59. Under these circumstances and consistent with the above and the Tribunal's jurisprudence (*cf.* judgment in Joined Cases Nos. 2018/1256 and 2018/1257, para. 61), the request for punitive damages against the respondent for allegedly not ensuring the appellant's privileges and immunities guaranteed under the Ottawa Agreement is formally inadmissible.

### *(ii) Merits*

60. The main dispute in this case revolves around the interpretation of the rules granting allowances related to the move that newly recruited agents are expected to make at the time of their appointment.

61. Article 28.4.1 of the CPR states:

> The expatriation allowance shall be paid to staff in Categories A, L and B, who at the time of their appointment: i) were not nationals of the host State; and ii) had been continuously resident for less than one year on that State's territory, no account being taken of previous service in their own country's administration or with other international organizations; and iii) were recruited internationally from outside the Coordinated Organizations or from outside of the country of assignment; and iv) were recruited from outside the local commuting area of the duty station, which is defined as a radius of 100 kilometres from the duty station.

62. The appellant, a Lithuanian citizen, fulfils the condition of not being a national of the country where he is employed (Belgium). He also fulfils the condition of not being recruited from one of the Coordinated Organizations or from the country of assignment (Belgium). Since Mons (Belgium) was the duty station of the appointment, the Tribunal needs to assess whether the appellant could be considered resident for a minimum of one year on Belgian territory and, in any case, whether the appellant was recruited outside the area of local commuting as defined in the rule.

63. The appellant contends that he was not resident in Belgium, arguing that he had not been granted a permanent residency card by the host country. The Tribunal needs to reiterate its constant opinion that no matter what the nationality of the staff member, the vital element for assessing eligibility for the expatriation allowance remains whether that person was working and living in the country of the duty station when the recruitment procedure started. Therefore, for the purpose of Article 28.4.1 (ii) CPR, it is irrelevant that the newly recruited agent kept various links with his country of origin – i.e. taxation, social security benefits, maintenance of a home and its basic supplies, family, etc. – and even administrative residence in it (cf. NATO Appeals Board decisions no. 89, and no. 776, also quoted in Cases No. 2017/1103 and 2108/1268).

64. The Tribunal has to emphasize that the administrative conditions provided by Belgium to citizens of the European Union fall outside its competence. The interpretation of the expatriation status for the purpose of the allowances at stake do not interfere in any way with any of the fundamental rights that the appellant enjoys, in particular in relation to the freedom of movement between EU Member States, and that are guaranteed both by the Member States and the European Union institutions.

65. Regardless of fulfilling the different administrative requirements, it is beyond doubt that the appellant had been continuously working in Mons since April 2016. This was the appellant's situation on 17 October 2018, when he received the Selection Letter following his application on 1 August 2018; continued to be on 24 October 2018, when he accepted the offer (and indicated that he would be able to start in the new position on 1 January 2019); and on 14 and 17 December 2018, when after various previous exchanges on the matter, he was informed that the Agency understood that he "will accept the employment under the conditions explained" and recommended "strongly" that when the Firm Offer of employment was made he "carefully consider whether to accept under the conditions" that were offered. None of the subsequent messages from the appellant showed him declining the employment offer, which he finally accepted.

66. As a consequence, the residence at the duty station must be considered continuous at that time. It is clear that the appellant's claims regarding expatriation were already raised during the recruitment process although at that time he had undoubtedly been residing in Mons for more than a year. The Tribunal has stated that the purpose of the expatriation allowance is to partially compensate for the added costs for a staff member of having to live, because of his professional activities, in a given country while maintaining sentimental and, in some cases, material ties to the country of which he is a national (*cf.* the above-mentioned judgements recalling NATO Appeals Board Decision No. 420). It follows that at that point in time the Agency's information and proposal on the conditions of the contract were in accordance with the rules.

67. Although the appellant moved to Lithuania on 20 December 2018 and was staying there at the time of the Firm Offer (19 March 2019) and signature of the contract (15 April 2019), the Tribunal must confirm that the expatriation allowance cannot depend on a movement made by the recruited agent during a recruitment process, particularly when the process is successful and, more importantly, duly and constantly completed with detailed information on the economic conditions of the appointment. Whatever the appellant's reasons for awaiting the conclusion of his recruitment in his country of origin, it cannot be concluded that this period broke the link between his residence in Mons and his recruitment at the same duty station.

68. The Tribunal must finally recall that the outcome of the current case is reached after the examination of its particular circumstances. It cannot make an assessment of other cases in which expatriation allowances may have been granted. The Tribunal consequently concludes that the appellant was not eligible for expatriation allowance and that the respondent acted with due respect for all the principles of good administration. The request for moral damages must therefore also be dismissed.

69. The appellant's request for education allowance and home leave shall meet the same fate since Articles 30 and 44 CPR require entitlement to expatriation allowance as a prerequisite for these allowances. Furthermore, home leave is a benefit granted after a 2-year period of service.

70. Consistent with the residence criterion mentioned above, there was no move of the newly recruited agent. Therefore the installation allowance, subsequent removal allowance and travel expenses provided for in Articles 26.1, 39 and 38.1 CPR are not applicable to the appellant.

71. Finally, the Tribunal must dismiss the respondent's request regarding the application of Article 6.8.3 of Annex IX CPR because the conditions of this provision are not met. Neither an intention of delay, nor an abuse of the appeals procedure could be imputed to the appellant.

## E. Costs

72. Article 6.8.2 of Annex IX 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 [...].

73. As the appellant's claims have been dismissed, he is not entitled to reimbursement of costs.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 13 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 August 2021 AT-J(2021)0018

**Judgment**

**Joined Cases Nos 2019/1290 and 2020/1298**

**BW**

**Appellant**

***v.***

**NATO International Staff**

Brussels, 14 June 2021

Original: English

*Keywords: occupational Invalidity; harassment; intimidation; discrimination; witnesses.*

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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, Ms María-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the resumed hearing on 7 May 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of two appeals by Mr BW against the NATO International Staff (IS). The first appeal, ("the invalidity case") dated 6 September 2019 and registered on 9 September 2019 as Case No. 2019/1290, contests the respondent's decision not to recognize the occupational origins of the appellant's invalidity.

2. The second appeal ("the harassment case") dated 10 February 2020 and registered on 17 February 2020, as Case No. 2020/1298 contests the respondent's determination that the appellant did not experience harassment, bullying or age discrimination.

3. The respondent's answer in the invalidity case, dated 11 November 2019, was registered on 15 November 2019. The appellant's reply, dated 16 January 2020, was registered on 17 January 2020. The respondent's rejoinder, dated 12 February 2020, was registered on 18 February 2020.

4. By Order AT(PRE-O)(2020)002, of 19 February 2020, the two appeals were joined. The President's Order joining the cases specified that "[b]oth cases shall be heard once the written procedure in Case No. 2020/1298 is completed."

5. The respondent's answer in the harassment case, dated 17 April 2020 was registered on 23 April 2020. The appellant's reply, dated 20 May 2020, was registered on 6 June 2020. The respondent's rejoinder, dated 6 July 2020, was registered on 20 July 2020.

6. By letter dated 21 January 2021, the appellant's counsel requested the presence of fifteen witnesses to be examined at the hearing in the two cases then scheduled for 4 February 2021. The requested witnesses included the NATO Secretary General, the Deputy Secretary General, the Assistant Secretary General for Executive Management, two persons involved in investigating the appellant's harassment complaint, the chairperson of the Complaints Committee that considered that complaint, the appellant's former supervisor, the NATO Medical Adviser, a member of the Invalidity Board that considered his disability claim, and several other persons.

7. By letter of 29 January 2021, the respondent opposed the witness request and disputed the relevance of the requested testimony. The respondent urged that the request was not timely in light of Rule 25(3) of the Tribunal's Rules of Procedure, which requires a party to give notice of its requested witnesses within seven days of being notified of the expiration of the time limit for submitting written documents. The parties were notified of the expiration of that time limit on 20 July 2020.

8. The Tribunal did not request the presence of any witnesses at the hearing.

9. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing on the joined cases by videoconference on 4 March 2021. In his opening remarks, the appellant's counsel questioned the completeness of the file, in particular concerning medical documentation that counsel submitted should have been in the appellant's possession. Following consultations, the hearing was suspended in order for the appellant to obtain a copy of his medical file from the respondent's Medical Services.

10. The appellant subsequently received a copy of his medical file from Medical Services. The Tribunal and the respondent did not receive the file, which contains the appellant's personal medical information.

11. By memorandum dated 7 April 2021, the appellant requested additional documents, representing that his medical file was not complete and did not contain certain medical records that he believed should exist. He contended, *inter alia*, that the absence of these records was contrary to good medical practice and violated Belgian law and that, in their absence, the disputed issue of the origins of his invalidity should be decided against the respondent. The appellant's 7 April 2021 filing also recalled arguments regarding alleged shortcomings of the Invalidity Board and other aspects of the handling of his claims.

12. On 3 May 2021, four days before the scheduled renewed hearing in the cases, the appellant's counsel by letter insisted that the appellant be given a copy of NATO group insurance contract and copies of NATO's annual reports relating to harassment, bullying and discrimination prepared for 2018, 2019 and 2020.

13. The hearing was resumed by videoconference on 7 May 2021, utilizing facilities provided by NATO Headquarters. At the resumed hearing, the Tribunal heard arguments by the appellant and a representative of the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual and legal background of the case

14. The background and material facts of the two distinct but related cases may be summarized as follows.

15. The appellant became a NATO civilian employee in 2004 following 23 years of military service as an officer in his national armed forces, during which he served in a variety of locations including South Korea, Kosovo and other areas. At NATO, he was an A4 defense planner under an indefinite contract, serving as a senior member in an apparently active and intense working environment that was later described in a Complaints Committee report as combining "a very high workload and a low level of staffing with an extraordinarily high work ethic."

16. The record shows that at relevant times, the appellant faced multiple medical challenges, including a painful back condition, a heart condition, and other issues. These caused him to seek treatment from medical providers and to consult a private physician in Belgium. The appellant states that he was under medical orders to limit his working hours on account of his physical condition but that, despite this, his supervisor

increased his workload by 55%, requiring him to work long hours inconsistent with medical advice.

17. Among his duties, the appellant deployed several times to Iraq on NATO business between September 2015 and April 2018. The parties do not agree regarding the number of these deployments to Iraq; the appellant refers to a dozen, but the respondent refers to eight between February 2016 and March 2018. The appellant indicates, *inter alia*, that while in Iraq, he was exposed to dangerous and stressful conditions. He was quartered at the Embassy of a NATO country that came under fire and he was exposed to other threatening conditions, including at least one attack on Baghdad's Green Zone that caused him to fear for his safety.

18. As discussed *infra*, the appellant contends that these deployments to a threatening and dangerous environment were the cause of his Post-Traumatic Stress Disorder (PTSD), which is at issue in the disability case.

***Facts related to the harassment case***

19. The invalidity case was filed first, but matters involved in the harassment case are necessary background for an understanding of both cases. The first event cited in the harassment case occurred in January 2017, when the appellant's supervisor raised his middle finger in the appellant's direction at the end of business one evening, which the appellant viewed as a hostile gesture. The supervisor denied that the gesture was meant to be hostile, but later agreed that it was inappropriate. The supervisor maintained that the gesture was a response to the appellant's mode of address after he had asked not to be addressed as "boss." The appellant acknowledged that he did address his supervisor as "boss" but did not intend to be disrespectful.

20. The next events cited in this case involve statements made during two meetings between the appellant and his supervisor in late February and early March 2018 in connection with the appellant's annual Performance Review and Development (PRD) performance review. These meetings took place shortly after the appellant's return from a mission to Iraq, at a time when he states that he was under stress and in physical discomfort. What was said in the course of the performance review, and the intended implications of comments that were made, are subject to dispute. The appellant alleges that his supervisor knew at the time that he had been diagnosed with PTSD. The supervisor denied that he knew of the appellant's diagnosis at the time.

21. The record shows that the supervisor did make comments critical of the appellant's performance in the course of discussing his performance rating, and initially proposed to rate his performance as "good," a step down from his ratings in previous years. The appellant protested, and the rating was ultimately changed to "very good." However, in the course of their discussions, the supervisor made comments that the appellant construed as personally derogatory and as threatening his continued employment with NATO. Further, in the draft narrative portion of the proposed rating, the supervisor referred to the appellant's long service with NATO. The appellant understood this to show that he was being discriminated against on account of his age.

22. The appellant states that shortly after the February and March 2018 interactions with his supervisor, he raised his concerns, *inter alia*, with his supervisor's supervisor and with the respondent's Human Resources ("HR") personnel. He was initially referred

by HR to NATO's "Psycho-social Prevention Adviser and Mediator" ("the Adviser"). Key parts of what was said between them during a meeting on 19 March 2018 are disputed.

23. The appellant' states in his 4 July 2018 written complaint (see *infra*) that the Adviser informed him at the 19 March meeting that the first step would be a mediated meeting with his supervisor, but that he was unwilling to meet "as that would be harmful to my health." The appellant claims that the Adviser then told him to "just let them fire me because I would get loss of job indemnity", and that the Adviser discouraged him from pursuing a claim or hiring an attorney because doing so would be fruitless. The Adviser disputes the appellant's characterization of their conversation, but confirms that mediation was proposed but declined by the appellant.

24. On 4 July 2018, after being placed on medical leave (see *infra*), the appellant transmitted a ten-page memorandum to the Deputy Assistant Secretary General for Human Resources detailing his recollections of his interactions and conversations with his supervisor, his supervisor's supervisor, the Advisor, and others. The document states that it "constitutes a report of harassment, discrimination and bullying."

25. In accordance with established procedure, the appellant's claims of harassment and other violations of NATO standards were assigned to the Adviser for assessment. The Adviser apparently did not prepare a formal written report, but concluded on the basis of inquiries and interviews that the appellant's complaint did not show that harassment or other proscribed misconduct had occurred.

26. The appellant's charges of harassment and other misconduct were denied on 16 August 2018 in a letter from the Deputy Assistant Secretary General for Human Resources. The 16 August 2018 letter notes, *inter alia*, that harassment "follows a sequence of events and … is sustained over time," conditions not met in the cited circumstances. The letter also describes the appellant's supervisor's very different interpretation of comments made during the 2018 PRD discussion.

27. On 14 September 2018, the appellant requested administrative review of the denial of his charges. By letter of 5 October 2018, the Assistant Secretary General for Executive Management affirmed the contested conclusion of the 16 August 2018 letter. His letter concludes:

> I must emphasize that I would have preferred to see this situation resolved earlier and with due consideration for the professionalism, integrity and respect of all parties involved. I believe it is still not too late to achieve this. You should be aware that throughout your 14 years of service…your managers have regarded you as a highly competent, hard-working and dedicated professional. Your employment record is clear testimony to that. I hope we can continue to count on your excellent work once your health has improved and you are fit to take up your new duties. Please accept my best wishes for a prompt recovery.

28. On 28 October 2918, the appellant lodged a complaint with the Secretary General, reiterating his claims of harassment, alleging short-comings in the handling of his complaint by the Adviser, the Assistant Secretary General for Executive Management, and other persons, and requesting, *inter alia*, that the Secretary General find that harassment had occurred.

29. On 12 December 2018, the appellant was notified that the respondent had retained an outside expert ("the Investigator") to conduct an investigation of his harassment claim. The Investigator interviewed the appellant twice and interviewed eight other witnesses, including his supervisor; the Investigator's summaries of these interviews were reviewed and signed by the interviewees. In this regard, the record includes the appellant's 10-page "Supplementary Statement" addressed to the Investigator offering further views and explanations on matters raised or discussed in their 25 January 2019 interview. The record also includes an undated document written by the appellant setting out "a point by point rebuttals [sic] of what I consider false or misleading report of facts" in the Investigator's subsequent report. This document states that several statements are untrue or irrelevant, and that the Investigator appeared to be "stretching to find something negative to say about me."

30. The Investigator's report concludes that the supervisor's language and the 2018 gesture were "ill-judged" but did not establish a hostile working environment or support the appellant's allegations of harassment, intimidation or discrimination. The report states in this regard that "it therefore seems that [the appellant] misconstrued …[his supervisors'] conduct as intimidation and/or a threat, when it was not."

31. On 27 March 2019, the Deputy Secretary General rejected the appellant's claim of harassment, discrimination and bullying, noting the Investigator's conclusion that the supervisor's gesture and words were ill-judged and unprofessional but did not show a pattern of inappropriate behaviour "such as to create a hostile working environment…" On 26 April 2019, the appellant submitted a 20-page complaint to the Secretary General, containing multiple allegations of improper conduct by multiple persons involved in investigating his harassment claim; seeking annulment of the Deputy Secretary General's 27 March 2019 decision; and requesting constitution of a Complaints Committee.

32. On 10 April 2019, the appellant wrote a letter to the President of the NATO Staff Committee harshly criticizing the Investigator's conduct, stating, *inter alia*, that the Investigator "treated me like the suspect in a criminal prosecution."

33. In response to the appellant's 26 April 2019 request, a Complaints Committee was established. The Committee met several times between July and October 2019 and interviewed the appellant, his supervisor, the supervisor's supervisor, and other persons. The Committee's 18 October 2018 Report found that the events complained of by the appellant "do not constitute harassment, bullying or discrimination nor do they represent repetitive acts of ill intent."

34. The appellant subsequently addressed a lengthy critique of the Committee's report to the Secretary General, stating that "the failure of the Committee is substantial and grievous," that it would be a "great injustice" to rely on their recommendation, and that he would be "agreeable if [the Secretary General] were to vacate the Committee's report."

35. The Secretary General did not vacate the report and rejected the appellant's complaint by letter dated 12 December 2019.

***Facts related to the invalidity case***

36. Following the events of February and March 2018 that gave rise to the harassment claim, the appellant asked to report to a different line manager. On 3 May 2018, he met with the Deputy Assistant Secretary General responsible for his component to discuss possible reassignment to a different part of his division. During this meeting, the appellant referred to possible self-harm. He was immediately referred to the NATO Medical Adviser, who instantly placed him on medical leave.

37. While the appellant was on medical leave, the respondent on 18 May 2018 notified him of his assignment to another position in his division at the same grade but with a different supervisor. In the event, the appellant did not return to work and did not serve in the new position.

38. In July 2019, the appellant travelled to his home country for treatment. He later returned to Belgium where he cooperated in an extensive medical and psychological examination by Dr. D. arranged at NATO's behest on 15 November 2018. Only limited excerpts of Dr. D.'s detailed report of this examination were included in the file in the invalidity case; a much fuller version of the document was submitted in the harassment case. The report includes excerpts from reports by other physicians who examined the appellant dating back to 2005.

39. The appellant was notified, by telephone on 19 December 2018 and in writing on 7 January 2019 that his case would be considered by an Invalidity Board. By letter of 19 February 2019, the appellant was notified that the Board would meet on 1 March 2019.

40. The appellant submitted documents for consideration by the Medical Board, including a letter from a physician concluding that "he meets, within the margin of error of my profession" the criteria for PTSD and a letter from a licensed professional counsellor stating that she has been treating him for PTSD which in her professional opinion "is very specifically related to multiple trips to and from Iraq combat zones during 2015-2018, as part of his employment with NATO." The record before the Board also included a November 2016 clinical psychologist's Pre-Deployment screening report finding "no contraindications on the psychological level for deployment [of the appellant] to Bagdad (Iraq) for a period of 12 months."

41. By letter of 14 January 2019, the appellant was provided with a copy of the administrative file to be considered by the Invalidity Board and invited to comment. By letter of 28 January 2019, he commented on the file, *inter alia*, contesting the NATO Medical Adviser's conclusion that the appellant's condition was not occupationally related, noting that the Civilian Personnel Regulations (CPR) do not define occupational disease, and identifying other concerns and alleged deficiencies.

42. The Invalidity Board met on 1 March 2019 and unanimously concluded that the appellant was unable to return to work but that his invalidity was not occupationally related. The appellant was notified of the Board's conclusion on 19 March 2019. The member of the Board designated by the appellant, his personal physician, wrote a week later, on 26 March 2019, a letter indicating reservations about the Board's conclusion that his invalidity was not occupationally related and withdrawing her signature from that portion of the Board's report. Her letter stated that "his work at NATO is/was partly to the

origin" of the appellant's problems, referring specifically to "stress at work, burnout symptoms, and periods of almost bullying at work."

43. The appellant was separated from NATO as permanently disabled on 31 March 2019.

44. On 17 April 2019, the appellant requested "admin review of my notice of termination" contending that his disability was due to PTSD that originated from his experiences in Iraq. On 13 May 2019, the Assistant Secretary General for Management denied the appellant's request and confirmed the contested decision. *Inter alia*, the 13 May letter observed that the administration "is not and should not be privy to any medical information" related to a former staff member, and so could not provide the requested minutes of the Invalidity Board.

45. The appellant then submitted a detailed complaint to the Secretary General on 10 June 2019. The complaint contends, *inter alia*, that his case meets the requirements to establish occupational disability under Belgian law and further alleges that the Invalidity Board considered a possible medical issue for which there was no supporting evidence in the record.

46. The appellant's complaint was denied in a letter from the Deputy Secretary General dated 18 July 2019. The Deputy Secretary General's letter concludes that the appellant's arguments had not been substantiated, and observes, *inter alia*, that the appellant had reviewed and commented upon the administrative file considered by the Board and that the Board had before it the additional medical reports provided by the appellant.

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

### *(i) Invalidity case: the appellant's contentions*

47. The appellant seeks annulment of the respondent's acceptance of the Invalidity Board's finding that his invalidity was not occupationally related. The appellant contends that the appeal is admissible and raises five objections to the contested decision to accept the Board's determination.

*Failure to State Reasons*

48. The appellant first contends that the respondent was legally obliged to explain the reasons for the Board's finding that his disability was not occupationally related, but did not do so. Instead, the contested 19 March 2019 decision "does not reveal any elements of motivation since it simply indicates that the Agency decided to recognize the Appellant as invalid under the CPR." The appellant contends that he could not learn of the Invalidity Board's reasons, as he was unable to contact NATO's Medical Adviser, to discuss the matter. As to the respondent's argument that the Invalidity Board's proceedings involve medical confidentiality and are secret, the appellant contends that under Belgian law, his medical data belongs to him and he has a right to obtain it.

49. The appellant contends further that the Board considered certain matters regarding his medical history that were not factually correct.

*Violation of Legal Certainty, of Good Administration, and of the Duty of Care*

50. The appellant contends that "[t]he CPR do not provide for any definition of the occupational disease," and that as a result "both the staff member and the members of an invalidity committee are unaware of the notion in light of which they should assess whether an illness that causes disability is of occupational origin or not." The appellant continues that "neither I nor my doctor (and possibly the other members of the Invalidity Board) have been informed of the applicable rules…"

51. The appellant also cites matters connected with the conduct of the Board, including that certain of his requests received no responses, including requests to be provided with the terms of reference given to the Board, that he be given a copy of the Board's minutes, and that his lawyer be allowed prior review of any legal guidance given to the Board or be present at its meeting.

*Manifest Error of Appreciation*

52. The appellant contends that the Board's decision that his disability was not occupationally related reflected a manifest error of appreciation and "possible irregularity." He urges as the appropriate "benchmark" for consideration of occupational diseases the rules applicable to EU officials, including a rule to the effect that in complex situations involving multiple causes, the employee need not prove that performance of duties was the sole or preponderant cause of an occupationally based invalidity.

53. The appellant contends that his condition "clearly originated on the occasion of his exercise of his functions in the service of the Organization." He argues that he informed his supervisor and the NATO Medical Adviser, of his PTSD in 2017, but that he continued to be deployed to Iraq; that his workload was unreasonably increased at a time when, because of a heart condition, he was directed to limit his work hours; that he was subject to "prolonged harassment;" and that this harassment "was the trigger which caused a cascade of symptoms from the already-diagnosed PTSD."

54. The appeal lays particular emphasis on the appellant's deployments to Iraq "at the direction of the NATO chain of command and with the medical clearance and approval" of the NATO medical director "after they were both notified of my diagnosis of PTSD." The appellant specifically cites exposure to potential violence in Baghdad, including an incident where rioters breached the secure zone around the diplomatic facilities where the appellant was located.

55. In support of his claim of irregularity in the Invalidity Board's deliberations, the appellant refers to the 26 March 2019 letter from his personal physician purporting to withdraw her signature from the unanimous conclusion of the Board, which he contends shows that the Board incorrectly considered matters not reflected in his medical records that were said to be false.

56. The appellant also refers to a series of alleged defects in the Board's procedures, *inter alia*, that he did not receive various documents he requested, including a copy of any instructions given to the Board, any legal advice they were given, and a copy of the Board's minutes.

57. By way of remedy, the appellant requests:
- annulment of the 19 March 2019 decision, insofar as it did not recognize the occupational nature of his disability, and, insofar as necessary, annulment of earlier decisions in the course of administrative review;
- recognition of the occupational origin of his appellant's disability "and the compensation of the material and moral prejudices suffered; and
- reimbursement of the costs of retaining counsel.

58. An Annex to the appeal quantifies the appellant's claimed damages for early involuntary retirement and other claimed losses as USD 518,709.05.

***(ii) Invalidity case: the respondent's contentions***

59. The respondent emphasizes throughout its view that under the CPR, determining the existence and nature of a disability is a medical decision involving confidential medical information to be made by the Invalidity Board. As such, the determination of the origins of a disability "does not and should not involve the administration." Instead, the administration must assure that the Board is properly constituted and informed. The respondent contends this was done.

*Admissibility*

60. The respondent contends that the appeal is inadmissible insofar as is lodged against the findings of the Invalidity Board, as neither the administration or the Tribunal can substitute its views for the medical conclusions of the Board.

*Duty to provide reasons*

61. The respondent contends that the contested decision was based on the unanimous findings of the Medical Board, which included the appellant's personal physician and acted on the basis of a file that the appellant reviewed and that included medical reports he provided. The respondent further observes that, although the deliberations of the Board are not known to the administration, the appellant's representative on the Board disclosed information regarding them. It disputes the appellant's claim that the Board was provided with the incorrect job description for the position he held before going on medical leave.

*Violation of legal certainty*

62. The respondent maintains that, contrary to the appellant's contention, the CPR provide a definition of occupational disease that incorporates by reference the definition contained in Belgian law, and that the appellant was informed of this. It indicated at the hearing that the relevant definition and Belgian materials were provided to the Board.

*Errors of Appreciation*

63. The respondent emphasizes that determinations of invalidity are made by the Invalidity Board, and that the administration does not have access to the appellant's medical file or the ability or authority to assess invalidity. The administration can intervene only in case of "obvious factual errors." None were present here. As noted *supra*, the respondent disputes the appellant's claim to have disclosed his PTSD prior to being

deployed to Iraq, maintaining that the NATO Medical Adviser was not told of this until 3 May 2019.

64. The respondent contends that the appellant did not mention concerns related to PTSD in seven separate meetings with the NATO Medical Adviser during 2017 and in January 2018, and only did so at their 3 May 2018 meeting, after which the appellant was immediately placed on medical leave. It points out that a medical certificate issued by the appellant's personal physician that mentions PTSD and other conditions under "diagnosis" was written several days after the 3 May meeting.

*Irregular Proceedings by the Board*

65 The respondent observes that all three members of the Board initially concurred in and signed the contested decision. The subsequent request by the appellant's personal physician to withdraw her signature does not change the earlier decision. In any case, a majority of the Board concurred in the finding that the disability was not occupationally related.

*Violation of good administration and duty of care*

66. The respondent emphasizes it did not learn of the appellant's PTSD diagnosis until the 3 May 2018 meeting. It further points out that the appellant and his doctor were free to submit all of the evidence and documents they wished the Board to consider, and they did so.

*Remedy*

67. The respondent denies that any damages are due.

### *(iii) Harassment case: the appellant's contentions*

68. This appeal was initially presented by the appellant pro se, and contains lengthy recitations of his recollections and interpretations of the events described *supra*. As summarized in the appeal's Executive Summary, the appellant contends that he "was the object of harassment, intimidation and discrimination as a result of prolonged intentional acts by my supervisor in January 2017 and February and March 2018," conduct that he says was reported to relevant authorities.

69. The appeal emphasizes in particular statements made in the course of two meetings between the appellant and his supervisor in connection with his PRD review in late February and early March 2018. During the course of the proceedings, the appellant developed further arguments that his work load was significantly and improperly increased at a time when he was under medical orders to reduce his working hours.

70. The appellant contends that the "intentional acts of harassment were aggravated because I was at the time being treated for Post-Traumatic Stress Disorder" "which had been acquired through multiple NATO-ordered trips to Iraq." He states in this regard that his medical condition was known to the harasser, the chain of command, NATO HR and the NATO doctor.

71. The appellant contends that the respondent failed to respond properly to his concerns. He alleges he was obstructed from making a formal written complaint, and that a number of persons or NATO components involved in addressing his complaint engaged in various forms of misconduct or unprofessional behaviour.

72. The appellant asks that the Tribunal to find that:
- harassment did occur in violation of NATO policy;
- the prior investigations were flawed;
- NATO officials acted inappropriately;
- the established procedures were not appropriately followed in addressing his complaint;
- NATO officials erred by failing to remove him from an alleged harasser; and that
- NATO erred by sending him to Iraq in 2018 after he had been diagnosed with PTSD.

73. The appeal further asks the Tribunal to:
- annul the 16 August 2018 decision rejecting the appellant's claim of harassment;
- insofar as necessary, annul earlier antecedent decisions rejecting his claim;
- recognize the harassment he suffered;
- award compensation for his moral prejudice; and
- award reimbursement of the costs of retaining counsel, travel and assistance.

74. The appellant claims material damage for "loss of income from employment, reduced pension and unreimbursed expenses resulting from his needing to seek treatment" in his home country totalling USD 518,709.05.

***(iv) Harassment case: the respondent's contentions***

75. The respondent maintains that it responded appropriately to the appellant's 4 July 2018 memorandum. While the memorandum was not clearly framed as a request for any specific action, the administration initiated an investigation in accordance with NATO's harassment policy. The organization offered mediation, which was declined. Further, the appellant was offered and accepted a different post in his organization in order to be placed under a different supervisor.

76. The respondent contends that the fact that the appellant and his supervisor had different opinions concerning his rating in the PRD process did not constitute harassment. It notes that the PRD process envisions mediation to address differences, which the appellant declined. Further, the disputed rating was in fact increased to "very good" as the appellant requested.

77. The respondent points out that the Adviser, the investigator, and the Complaints Committee all concluded that the appellant was not the victim of harassment, bullying or discrimination. It adds that the appellant did not identify other incidents or events besides those initially cited in support of his claim.

78. The respondent denies that any damages are due.

## D. Considerations and Conclusions

### *(i) The invalidity case*

79. The respondent disputes admissibility of the appeal insofar as the appellant requests the Tribunal to set aside the decision of the Invalidity Board. The Tribunal addresses its competence in this regard *infra*.

*Introductory Observations by the Tribunal*

80. In the events at issue, a properly constituted Invalidity Board rendered and signed a unanimous decision that the appellant's invalidity was not occupationally caused. Under Article 13 of Annex IV to the CPR, such findings by an Invalidity Board "shall be final except in the case of obvious factual errors."

81. As noted *supra*, the appellant designated his personal physician to serve as a member of the Board. She joined the Board's unanimous decision, but later asked to withdraw her signature, stating that "his work at NATO is/was partly to the origin" of the appellant's problems, referring specifically to "stress at work, burnout symptoms, and periods of almost bullying at work." Assuming the third physician's withdrawal of her signature was legally effective – a matter on which the Tribunal makes no decision – her action does not affect the conclusive character of the Invalidity Board's decision. Article 13 of Annex IV to the CPR is clear that "[t]he findings of the Invalidity Board shall be determined by a majority vote."

82. The Tribunal sees the provisions on convening and conducting Invalidity Boards in Article 13 of Annex IV to the CPR as reflecting a balancing of the interests of staff members, of the organization, and of medical practitioners who agree to serve on such Boards. The interests of staff members are protected, *inter alia*, by their ability to name a trusted medical professional to the Board, to review and comment on the administrative file prior to its submission to the Board, and to submit additional medical reports or other materials to the Board. For its part, the administration is relieved of any requirement to access or assess staff members' confidential medical information, or to make medical decisions it is not qualified to make. The interests of independent medical practitioners serving on Boards are protected by the requirement that the Board's proceedings shall be secret.

83. The Tribunal considers that the appellant's claims involving the Invalidity Board's decision in his case should be assessed in light of this structure.

*Failure to provide reasons*

84. The appellant first contends that the respondent's decision to accept the Invalidity Board's determination should be annulled for failure to provide the reasons for that determination. The appellant does not dispute that the Board rendered its decision in the form required by the CPR, but contends that this is not legally sufficient.

85. The Tribunal does not accept that the principle that administrative decisions ought to be motivated allows it to set aside the careful balance of interests in the system for conducting Invalidity Boards adopted by the NAC and reflected in the CPR. As the

respondent points out, it does not know the details of the Invalidity Board's deliberations regarding the appellant's medical condition. Requiring the respondent to ascertain and provide the Board's reasons, or requiring the Board to do so itself, would fundamentally change the confidential nature of the Invalidity Board process established by the CPR. It is not the Tribunal's role to make such a change in the circumstances here.

86. The appellant contends that as a matter of Belgian law, he is entitled to the information he seeks regarding Invalidity Board's deliberations and decision. The Tribunal is not a Belgian court and cannot assess the merit of this contention. The Tribunal observes, however, that NATO is an international organization entitled to immunity and is not subject to host country legislation with respect to such matters. Whatever Belgian law may or may not provide is therefore not relevant.

87. In any case, the appellant was fully aware of the elements of the administrative file considered by the Board, having reviewed and commented on it beforehand. He was familiar with the several medical reports before the Board, including the detailed report of Dr. D.'s November 2017 comprehensive expertise and with the additional reports he provided from his own medical practitioners. Perhaps unusually, he also received important information regarding the Board's confidential deliberations from his designated member on the Board, his personal physician. The record includes a record of a 3 June 2019 conversation signed by his physician recording her answers to questions asked by the appellant.

88. The appellant complains that NATO's Medical Adviser did not respond to multiple requests for a meeting or conversation to discuss the Board's process and decision. The reasons for this apparent failure to communicate are not clear from the record. In any case, it is not apparent to the Tribunal how much the Medical Adviser could properly have explained, given the CPR's express requirement that the Board's proceedings "shall be secret."

89. The appellant also alleges that the Board considered certain matters regarding his medical history that were not reflected in the materials before it and that were factually incorrect. The appellant's physician's written responses to his questions suggests that the matters he refers to were discussed. However, the Tribunal notes that these matters were addressed in Dr. D.'s comprehensive November 2017 assessment, a document in the record before the Board and the Tribunal that is familiar to the appellant.

*Violation of legal certainty and failure of administration*

90. The appellant next contends that the CPR do not contain a definition of occupational disease, and that neither he, his doctor, or perhaps other members of the Invalidity Board knew of the applicable standards, contrary to the principle of legal certainty.

91. The respondent counters that Article 14.2 of Annex IV to the CPR refers to "the Rules applicable to the Organization" as defining an occupational disease, and that the relevant rules are those contained in the NATO Group Insurance Contract, which defines occupational disease by reference to the Belgian Royal Degree of 28 March 1969 and an associated list of specific disorders. The respondent maintains that the Board reached its decision in application of the relevant Belgian criteria. For his part, the appellant insisted at the hearing that the respondent could not testify as to what the Board knew,

while also maintaining that the Board did not apply the Belgian legal standard and that nothing in the record told the Board that it was to apply the Belgian standard

92. At the hearing, the Tribunal sought to clarify what information was given to the Board regarding the relevant definition. Counsel for the respondent stated that the Board was given the relevant portion of the NATO insurance contract, which cites and incorporates by reference the definitions of "maladie professionnelle" and "accident du travail" under Belgian law. This document is in the record. The materials in the record also include Belgium's lengthy list of covered illnesses and the standards for determining the occupational origins of other illnesses or injuries not listed. It appears that this material was also provided to the Board, although the record is not completely clear in this regard.

93. While the evidence as to which specific documents were provided to the Board could be clearer, the Tribunal finds unconvincing the appellant's contention that neither he nor the Invalidity Board knew of the definitions of occupational disability to be applied. The Tribunal recalls that NATO's Medical Adviser was a member of the Board, and was well acquainted with the relevant Belgian criteria. Further, the initial appeal in this claim was prepared and submitted with the assistance of Belgian counsel with extensive experience in the respondent's invalidity process.

94. The appellant also cites a number of perceived shortcomings in the preparations for and proceedings of the Invalidity Board that are said to demonstrate failures of administration. These included a typographical error that misidentified his gender; that the Board was given the job description for his prior position, and not for the new position to which he was reassigned in May 2018, but never filled; that he was not provided the Board's terms of reference or a copy of its minutes; and that his lawyer was not allowed to review any legal guidance given to the Board or be present at its meeting.

95. The Tribunal does not find in these objections convincing indications of poor administration. An obvious typographical error is just that; it caused the appellant no prejudice. Which job description should have been given to the Board was not clear in the circumstances. The choice might have been relevant if the issue before the Invalidity Board was whether the appellant was to be invalided at all, but his inability to perform his functions was not at issue. The issue was instead the origin of his invalidity. For this purpose, the job description given to the Board seems much more relevant to the Board's understanding than the description of a position the appellant never actually occupied. As to the appellant's request for the Board's minutes, the respondent knew of none and the appellant's physician confirmed in her 3 June 2019 document that none were kept. The respondent confirmed that the Board was given no terms of reference or separate legal guidance.

*Manifest Error of Appreciation*

96. The appellant next contends that the board's decision that his invalidity was not occupationally related reflected a manifest error of appreciation. The appellant urged in this regard that the Tribunal should adopt as a "benchmark" certain rules relating to determination of occupational invalidity under the internal law of the European Union. The Tribunal does not accept that it can apply the rules adopted by other international organizations in its decision-making. The rules it is bound to apply are those specified in Article 6.2.1 of Annex IX to the CPR. These do not include the internal rules of the

European Union.

97. Although not clearly formulated in the appeal as lodged, the Tribunal understands the appellant's argument to be, in substance, that the Invalidity Board erred, that the appellant's invalidity was occupational in origin, and that the respondent committed a manifest error of appreciation by failing to recognize the origin of his invalidity. The appeal repeats in this regard the appellant's contentions of harassment by his supervisor, of excessive and unreasonable work load, and of the dangerous and disturbing conditions experienced by the appellant in Iraq. In the appellant's submission, these show that the appellant's medical condition was the result of his NATO employment.

98. The respondent contends that the appellant's arguments along these lines are not germane to the Invalidity Board's decision, which is the subject of this appeal. The respondent observes that the invalidity Board's decision addressed the appellant's medical condition, a matter on which the Board was fully informed and professionally competent. In the respondent's view, the Tribunal cannot substitute its judgment for the Board's medical judgment regarding the nature of the appellant's invalidity.

99. The Tribunal agrees. As noted *supra*, the CPR's structure for determining invalidity places the relevant decisions in the hands of a Board of medical professionals, not in the hands of Secretariat officials or Administrative Tribunal judges. The appellant identified no obvious factual errors in the Board's decision, and none are evident to the Tribunal. The claim of manifest error of appreciation fails.

*Duty of Care*

100. In a number of documents in the record written by the appellant, and in his argument at the hearing, he in substance contends that the respondent failed to meet its duty of care. He maintains in this regard that he developed PTSD at some point after 2016 as the direct result of his stressful working conditions and his exposure to dangerous conditions in the course of multiple deployments to Iraq. He maintains that he informed his supervisor, others in his chain of command, the Medical Adviser, and other persons, of his condition. Nevertheless, while knowing of his PTSD, his supervisor harassed him and assigned an excessive and unreasonable work load, while the organization repeatedly required him to deploy to face hazardous conditions in Iraq.

101. It is undisputed that after his meeting with NATO's Medical Adviser on 3 May 2018, the appellant was immediately placed on medical leave and his impending mission to Iraq was cancelled. The appellant contends, however, that the respondent knew of his medical condition earlier, but failed to respond appropriately. The principal support for the appellant's claim that his supervisor, the NATO Medical Adviser, and others knew of his condition before 3 May 2018 are the appellant's own statements as reflected in various documents he or his lawyers submitted in the two cases, the Complaints Committee's 2019 record of what it was told by the appellant, and the Investigator's February 2019 report of the appellant's statement.

102. The Tribunal does not question the appellant's belief that he disclosed his diagnosis to his supervisor and others prior to 3 May 2018. The question is, however, whether the weight of the evidence is consistent with his recollection in this regard.

103. For its part, the respondent insists that the first time the appellant informed it of his PTSD diagnosis was during his 3 May 2018 meeting with NATO's Medical Adviser. In this regard, the Medical Adviser told the Complaints Committee that he first learned of the PTSD diagnosis on 3 May 2018.

104. The earliest document in the record referring to PTSD appears to be an undated "Memorandum of Record" prepared by the appellant to document his 9 March 2018 encounter with his supervisor. In this memorandum, the appellant refers to his "recent" diagnosis of PTSD. Internal evidence shows that this document was prepared at some time after 13 March 2018. A second document referring to PTSD, a note from the appellants doctor supporting his absence from work during May 2018, was written after the 3 May meeting.

105. The appellant's supervisor indicates that he was not aware of the appellant's PTSD diagnosis at the time of the disputed events.

106. Other evidence indicates that the appellant did not, prior to the events of February and March 2018, express PTSD-related concerns about deployments. The Complaints Committee report cites a statement by the supervisor "supported by his chain of command" that the appellant "actively and repeatedly sought to deploy to Iraq." Indeed, part of the appellant's disagreement with his supervisor over the 2018 PRD involved his wish to add a phrase highlighting his 62 days on mission in 2017, including 32 in Iraq, and stating that he "is noted for his willingness to take on difficult and sometime dangerous tasks." He did not raise concerns about deploying to Iraq with Human Resources. All but one of the Security Travel Records (STRs) filled out by the appellant prior to his missions – documents that require a staff member to list known medical conditions and current medication – did not mention psychological problems. The respondent states that the first such reference was contained in the appellant's STR prepared prior to his final mission in late March 2018, which referred to "Stress related Mild Depression. Under treatment since July 2017."

107. The Tribunal does not find that the evidence in the case files shows that the respondent failed to meet its duty of care by failing to understand and properly respond to the appellant's medical challenges prior to the 3 May 2018 intervention. The appellant's own Memorandum for the Record prepared at the earliest in mid-March 2018 refers to his "recent" PTSD diagnosis. Only in the STR prepared for a trip in late March, did the appellant record that he was being treated for psychological issues.

108. It may be that managers might have recognized and responded to the appellant's medical challenges earlier than actually occurred. Nevertheless, the Tribunal does not find a failure to meet the duty of care.

109. The appellant's claims in the Invalidity case are denied.

***(ii) The harassment case***

110. The respondent does not dispute admissibility of the appeal, and the Tribunal sees no issues in this regard. The appeal is admissible.

111. The Tribunal is mindful of the appellant's difficult personal situation related to his medical condition. It also agrees with views expressed in connection with earlier

assessments of the matters he cites: the raised finger incident in 2017 and some statements by the supervisor in the course of the appellant's PRD review were unprofessional and inappropriate.

112. The question before the Tribunal, however, is whether to annul the respondent's decision that the appellant's treatment did not constitute harassment, intimidation or discrimination within the meaning of the relevant NATO standards. This calls for assessment of the specific conduct complained of in relation to those specific standards. The Tribunal appreciates that the appellant feels keenly that he was "the object of harassment, intimidation and discrimination as the result of prolonged intentional acts by my supervisor in February and March 2018," but he is not the sole judge of the matter.

113. The standards most directly relevant at the time of the events in question are contained in NATO's policy on "Prevention and Management of Harassment, Discrimination and Bullying in the Workplace" (ON(2013) 0076). As relevant here, the policy provides:

> Definitions of Inappropriate Conduct:
>
> There is not, and there cannot be one single, all-encompassing definition which can adequately describe all forms of abusive behaviour or conduct, which take many and varied forms. However, for the purposes of this policy, the following definitions may serve as a useful guideline to identify inappropriate conduct. In each of the areas below, the focus is on patterns of recurring misconduct. Single or isolated incidents will not necessarily be considered as falling within the scope of the definitions below:
>
> Harassment:
>
> is defined as any improper and unwelcome visual, verbal, non-verbal or physical repetitive behaviour or conduct, that might be expected or perceived to unreasonably interfere with an individual's working performance, or which creates an intimidating, hostile or offensive work environment, or causes personal humiliation or embarrassment to a staff member.
>
> Disagreement on work performance or on another work related issue is not normally considered to be harassment. Such matters should normally be considered within the framework of staff appraisal/performance management.
>
> Intimidation:
>
> is defined as an intentional behavior that "would cause a person of ordinary sensibilities" fear of injury or harm. It's not necessary to prove that the behavior was so violent as to cause terror or that the victim was actually frightened.
>
> Discrimination:
>
> is defined as any unjustified treatment or arbitrary distinction based on a staff member's race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language or social origin. Discrimination may be an isolated event affecting one staff member or a group of staff members similarly situated, or may manifest itself through harassment or abuse of authority.

114. The Adviser, the Investigator, and the Complaints Committee all weighed the events cited in the appellant's 4 July 2018 memorandum against these definitions. They

all concluded that there was no harassment, intimidation or discrimination. After carefully reviewing the lengthy record, the Tribunal comes to the same conclusion.

115. The Tribunal recalls that the appellant's 4 July 2018 memorandum refers to a small number of interactions with his supervisor. The first, the raised middle finger incident, occurred "in early 2017," about a year before the other events. The more significant events involve interactions in late February and early March 2018 related to the appellant's performance review. These included written comments on a draft of his performance assessment and verbal comments made in the course of two face-to-face meetings – the appellant's 4 July 2018 memorandum cites meetings on 22 February 2018 and 3 March 2018 – where the appellant and his supervisor discussed the draft assessment.

116. ON(2013) 0076 is clear that "the focus is on patterns of recurring misconduct. Single or isolated incidents will not necessarily be considered as falling within the scope" of the defined forms of proscribed conduct.

117. The Tribunal does not believe that the 2017 raised middle finger incident – while unprofessional and deserving of criticism – can reasonably be merged with discussion of a performance assessment a year later as part of a "pattern […] of recurring misconduct."

118. The Tribunal also does not believe that exchanges between the appellant and his supervisor in two meetings over the course of less than two weeks in connection with his annual performance appraisal – an appraisal that ultimately incorporated several changes sought by the appellant and concluded with a "very good" rating - can reasonably be viewed as a "pattern of recurring misconduct." The process of personnel evaluation is not always smooth, and may be marked by irritation or dissatisfaction on both sides, but this does not necessarily entail harassment. The Tribunal notes in this regard that ON(2013) 0076 explicitly states that "[d]isagreement on work performance or on another work related issue is not normally considered to be harassment. Such matters should normally be considered within the framework of staff appraisal/performance management." In this regard, the PRD system includes procedures, including mediation, for addressing differences between staff and supervisors in the PRD process. The appellant elected not to utilize these procedures, as he likewise rejected the possibility of mediation to address his harassment and related complaints.

119. The appellant specifically alleges that he was subjected to intimidation, emphasizing a statement made by his supervisor during discussion of the performance appraisal to the effect that "we would hate to lose you." This, the appellant maintained, "directly threatened my continued employment," and "was an unambiguous threat to terminate my employment unless I agreed to the proposed rating." However, in his interview with the Investigator, the appellant's supervisor said that the remark was sincere and was intended to send a positive message. The supervisor's supervisor added that the remark may have reflected concern that one of the appellant's medical conditions – a back ailment affecting his ability to travel – might affect his continued employment.

120. Intimidation is defined as intentional behaviour that "would cause a person of ordinary sensibilities to fear injury or harm." The Tribunal does not accept that the supervisor's brief comment could cause a person of ordinary sensibilities to fear injury or

harm. In his physical and psychological state at the time, the appellant may have perceived it as such, but that is not the standard. Indeed, as a long-serving NATO employee, the appellant knew, and as the Adviser reminded him, the PRD system allows termination for poor performance only in case of a "fair" rating. Staff members with "very good" ratings are not terminated for performance-related reasons.

121. The appellant also contends that he was subjected to discrimination on the basis of age, referring to a statement in the narrative of his performance evaluation noting that he had been performing his functions for a long time. In the Tribunal's view, this statement does not show age discrimination. Indeed, as the Assistant Secretary General for Management observed in his 5 October 2018 letter, while the appellant was the oldest A4 staff member in his section, the majority of the A4s are aged 55 or over. Moreover, the respondent's willingness to reassign the appellant to a different position in response to his request to have a different supervisor suggests the respondent's wish to retain, rather than to lose, his services to the organization.

122. The Tribunal has sought to be understanding of the appellant's challenging medical and personal situation. Nevertheless, the specific facts of his interactions with his supervisor provide no basis to set aside the respondent's conclusion that there was no harassment, intimidation or age discrimination within the meaning of the relevant NATO standards.

123. In addition to claiming harassment, intimidation and age discrimination, the appellant advances multiple allegations of serious errors or even misconduct by persons involved in assessing his claims. The appellant contends, *inter alia*, that the Adviser's initial investigation of his complaint was "compromised by a conflict of interest" because the Adviser was named in his complaint; he complains further that the Adviser wrongly sought to discourage him from exercising his rights and failed to prepare a formal written report. He alleges that the Investigator's investigation was "tainted" because of the Investigator's "abusive interview techniques," and asserts that the Investigator (who had legal training and qualified as an English solicitor) acted illegally and in violation of Belgian law in claiming to be a lawyer. He dismissed the Complaints Committee Report, complaining to the Secretary General that "the failure of the Committee is substantial and grievous" that it would be a "great injustice" to rely on their recommendation…" For his part, the Secretary General is alleged to have made "incorrect statements" and to have reached "an insupportable conclusion" that there was no harassment. Indeed, in his written submissions, the appellant appears to suggest that NATO staff members could be subject to civil or even criminal liability in the courts of his country on account of their alleged misconduct.

124. While noting the appellant's negative characterizations of many of the persons and of the procedures involved in addressing his concerns, the Tribunal is mindful that his impressions of conversations and events can differ significantly from those of others involved. The Adviser, for example, complains of "the negative and twisted way" he portrays the advice he was given in their initial interview.

125. The Tribunal's role does not extend to assessing the appellant's numerous allegations of misfeasance or misconduct by persons involved in addressing his claim. The issue in this appeal is whether the specific circumstances cited by the appellant constitute harassment, intimidation or age discrimination within the meaning of NATO's relevant regulations. Based on of its own assessment of the record, the Tribunal

concludes that it does not. The record also shows that the respondent made significant efforts to investigate the appellant's concerns through successive inquiries by the Adviser, the Investigator, and the Complaints Committee. All three concluded that the circumstances did not violate relevant NATO standards. The Tribunal agrees.

126. The appellant's claims in the harassment case are denied.

## E. Costs

127. Article 6.8.2 of Annex IX 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 [...].

128. Both of the joined appeals 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 14 June 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 August 2021 AT-J(2021)0019

**Judgment**

**Case No. 2020/1312**

**RA**

**Appellant**

***v.***

**NATO Communication and Information Agency**

**Respondent**

Brussels, 8 June 2021

Original: English

*Keywords: admissibility; subject of the appellant's submissions; time limits for lodging an appeal.*

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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 A. Vassilopoulos, judges, having regard to the written procedure and the deliberations held on 16 April 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 21 August 2020, and registered on 16 September 2020, as Case No. 2020/1312, by Mr RA, against the NATO Communication and Information Agency (NCIA/Agency). The appellant challenges the respondent's decision dated 15 July 2020 rejecting his allegations of fraud, waste and abuse during a recruitment process, in violation of the Agency's Code of Conduct.

2. The respondent's answer, dated 16 November 2020, was registered on 27 November 2020. The appellant's reply, dated 28 November 2020, was registered on 10 December 2020. The respondent's rejoinder, dated 10 February 2021, was registered on 16 February 2021.

3. With the agreement of the parties, the Tribunal examined the above-mentioned case by written proceedings only on 16 April 2021, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant joined NCIA on 1 June 2016 under a fixed-term contract for three years as Senior Assistant, grade B4 with the Human Resources (HR) service's Talent Acquisition Team (TAT). At the end of the contract, the latter was renewed for a further period of three years, until 31 May 2022.

5. The TAT was composed inter alia of five B4 staff members, one of whom was the appellant. In September 2019, the NCIA decided to reorganise the TAT by merging and upgrading the five above-mentioned B4-grade positions into two positions at grade B5 (recruiter) and two positions at grade B6 (senior recruiter). In this respect, the respondent organised an internal competition. The five B4 staff members, including the appellant, applied for these positions. In particular, the appellant applied for one of the B6 positions.

6. The appellant was interviewed on 16 March 2020 by a panel of five members, including Mr A as an external member of the panel. As the record shows, only two of the five former members of the TAT were selected by the panel to join the restructured TAT, not including the appellant.

7. In a letter from the respondent dated 1 April 2020, the appellant was informed that he had been unsuccessful in his application, as the panel had found him not to be qualified for the B6 position. In this letter, while acknowledging the negative effects of this decision for the appellant, the respondent offered him four options which are formulated as follows:

> 1. You can continue to serve our Agency at the B4 level until your contract ends as previously communicated (in the HR Transformation people mapping guidelines, 17 December 2020). We will move/transfer you to one of the currently vacant posts in HR and allow you to continue in your current role as B4 recruiter until the end of your contract.
> 2. If option 1 does not appeal to you, you may choose to be transferred immediately to HR staff services to experience and perform a broader HR role at the B4 level, including some of the recruitment tasks that will be transferred to HR staff services, again until the end of your current contract.
> 3. During the time as per above and until your contract end date you may apply for other jobs within the Agency.
> 4. If you do not wish to remain with the Agency any longer we can terminate your contract which entitles you to Loss of Job Indemnity (LoJI) of 5 months' emoluments and 90 days' notice period.

8. After email exchanges, by email of 2 April 2020, the appellant accepted with some conditions the fourth option. In his email, the appellant noted that: "[…] I am happy to accept your offer of termination and LoJI on the basis of 1. My final working day will be 30 September 2020; 2. My repatriation costs back to the UK will be covered by the Agency in full [...]".

*9.* By letter dated 16 April 2020, the respondent formalised the appellant's choice to leave the Agency under the terms of the fourth option indicated in the aforementioned letter of 1 April 2020, also accepting the appellant's request to grant him repatriation rights (removal/travel) to his registered home leave address.

10. By letter dated 20 May 2020, the appellant and the two other former staff members of the TAT who were also not selected by the panel, Ms C and Ms K, sent the General Manager of the Agency and the Chief of Staff a so-called "formal group complaint" in relation to the appointment of an external consultant to one of the positions of the restructured TAT, and in this regard requested an independant investigation.

11. In this letter, the appellant, Ms C and Ms K complained about the appointment of Mr A, the member of their selection panel, to one of the vacant positions on the TAT, and stated that they were informed of this appointment on 18 May 2020, effective 1 June 2020. They set out elements that, in their view, demonstrate inter alia that Mr A did not have his contract of external consultancy renewed and participated in the selection procedure while having a direct interest in ultimately being appointed himself. This was confirmed by the fact that he was hired at the end of the selection process which ruled them out. The appellant, Ms C and Ms K concluded that there was a clear conflict of interest in breach of the Agency's Code of Conduct which affects the decision of the panel not to select them and which constitutes fraud, abuse and lack of diligence on the part of the respondent. The concluding paragraph of their complaint indicates:

> Resultantly, as per NCI Agency code of conduct art 4.4 (bullet 4) … it is the intent of this letter to report this circumstance and appointment (of Mr A) which came to our attention on 18th May 2020 … to the NCI Agency Fraud Detection and Prevention Manager and the NCI Agency Legal Office and if considered to be accurate, to initiate an official, indepedent and impartial investigation, so as to prevent any damage or risk to reputation or good standing of staff members involved in the process …

12. By letter dated 2 June 2020, the respondent acknowledged receipt of the appellant's complaint and stated that the Agency would follow up and investigate the matter.

13. By letter dated 19 June 2020, the appellant, Ms C and Ms K recalled that by their complaint dated 20 May 2020, they had drawn the respondent's attention to several issues concerning violations of the Agency's Code of Conduct (Article 4) in relation to the recent hiring of a consultant for the TAT. In this letter, they state that notwithstanding their request and despite the provisions of the NATO Civilian Personnel Regulations (CPR), a complaints committee was not set up to examine their complaint and they were not informed at all within the 30-day period provided for by the CPR of the procedural steps to be followed for the requested investigations. In this regard, they asked the respondent to provide an update regarding their complaint. In the absence of any response from the respondent, by a second letter dated 6 July 2020, the appellant, Ms C and Ms K reiterated their request.

14. By letter dated 15 July 2020, the respondent informed the appellant, Ms C and Ms K that the Fraud Prevention and Detection Manager had issued the investigation report which concluded that the allegations of bias in Mr A's decision-making as a member of the panel were unfounded and that there was no evidence that Mr A was in a conflict of interest. The same letter highlighted the fact that the panel's decisions had been taken by consensus with regard to the selection of applicants for the internal competition. Furthermore, the respondent recalled that the establishment of a complaints committee had not been requested in the complaint of 20 May 2020 and, under these circumstances, the respondent concluded that no further action was required.

15. It is in this context that the appellant lodged, on 21 August 2020, the present appeal.

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

### *(i) The appellant's' contentions*

16. The appellant requests that the Tribunal declare his action admissible. Contrary to the respondent's objections, he considers that several decisions taken by the respondent in the course of the selection procedure concerning him were challenged in an admissible manner in the present action. It is therefore not only the refusal to be qualified for the B6 position that is being challenged. In addition, and contrary to the respondent's allegations, he pursued the pre-litigation procedure with the complaint of 20 May 2020, which was, however, not properly dealt with by the competent services, in violation of the CPR. For this reason, he was obliged to reiterate his request (letters of 19 June and 6 July). It is in fact the respondent who has not pursued the pre-litigation procedure, in violation of the CPR and the applicable texts and to the detriment of the appellant's interests.

17. As regards the merits, firstly, the appellant challenges the respondent's decision to appoint Mr A to the restructured TAT, pointing out that this appointment was made with apparent bias, fraud, waste and a conflict of interest. Mr A was a member of the panel, which excludes the appellant from recruitment to the B6 post in the restructured

TAT. In the course of the selection process, Mr A was informed that his contract as an external consultant had come to an end, and he had a vested interest in the appellant not being qualified for the B6 position, to which he was eventually appointed without any competition. The appellant also argues that the respondent's confidentiality obligation was breached on several occasions throughout the selection process by disclosing the names of all candidates. In addition, the composition of the panel was modified just before the interviews with the candidates, without any information being given about this.

18. Secondly, the appellant contends that the selection process, as managed by the respondent, was irregular. In this regard, the appellant argues that his personal performance as a staff member was not taken into consideration and, in general, his examination by the panel was not based on objective criteria relating to his significant experience on the TAT. This also applies to the other two TAT members who did not qualify in the same selection process. In addition, the upgrading of the posts of TAT staff members was carried out in violation of the CPR and was implemented against the interests of these members. Indeed, this upgrade made it possible for other staff members who had the qualifications for a B6 position to apply for the same position, placing the former B4 staff members of the TAT in a difficult position to be qualified.

19. Thirdly, the appellant considers that the four options offered by the decision of 1 April 2020 were illegal. Those options violated the CPR and in particular Articles 4.1.1, Articles 57.2 to 57.4 and Article 1.2.b of Annex V to the CPR.

20. Finally, the appellant alleges a violation by the respondent of management ethics and values through the restructuring of the TAT. The appellant was subject to a clear lack of proper management by the respondent for a period of two years and suffered from an excessive workload, a high volume of travel and a high demand for business, causing health and welfare problems which affected his working conditions.

21. In these conditions, the appellant seeks:
- reimbursement after prejudicial changes were made to his working conditions by the Head of HR. The appellant calculates the amount of this reimbursement as his monthly pay at grade B4 for the entire duration remaining on the contract of employment from the time of the decision (April 2020) to the end date of his NIC contract. This calculation includes all emoluments and pay in lieu of annual leave;
- an order for the respondent to overturn all hiring decisions made by the General Manager of the Agency pursuant to the unsanctioned limited internal competition of B6 and in particular the decision concerning the appointment of Ms SG;
- an order for the respondent to overturn the decision to appoint Mr A to the TAT and that this employment be terminated forthwith;
- that the parties within HR involved in the selection process be reprimanded and in the case of Interim Workforce Consultants the contracts be terminated for failing to correctly advise the General Manager of the Agency in accordance with the CPR, the Agency directives and the Code of Conduct;
- payment of 15,000 euros in non-material damages;
- reimbursement of all costs of retaining counsel and of all other associated costs in relation to these proceedings.

***(ii) The respondent's contentions***

22. The respondent disputes the admissibility of the appeal. In this regard, on the one hand, the respondent considers that the only decision that could have affected the appellant's conditions of work was the decision dated 1 April 2020, which was not challenged under the provided time limits. On the other hand, the appellant did not pursue the applicable rules of the pre-litigation process. Indeed, the letter of 20 May 2020, referred to by the appellant as a "collective complaint", does not follow the rules for filing an administrative review under the CPR. With this complaint, the appellant reports to the respondent facts which, in his view, are constitutive of breaches of the NCIA code of conduct. It is only in his letter of 19 June 2020 that the appellant, for the first time, refers to Annex IX to the CPR without, however, establishing a clear link between a challenged act and the subject of his complaint.

23. As regards the merits, the respondent argues that in his appeal, the appellant's submissions are rather confused both in relation to the challenged act and to the specific pleas developed on a case-by-case basis to challenge that act. Moreover, the appellant develops certain claims for annulment and complaints which were never elaborated upon during the pre-litigation procedure initiated by the letter of 20 May 2020, in particular those concerning Ms SG, and which are therefore inadmissible. As for the claims for compensation, they are either inadmissible for the same reason or devoid of any basis in the absence of any illegality committed by the respondent.

24. This having been established, the respondent submits that all the appellant's allegations are unfounded. This is the case of those concerning the violation of the CPR for upgrading the TAT's positions, the communication of the candidates' confidential information, the modification of the composition of the jury, in particular in the context of the current COVID-19 pandemic, the failure to take into account the appellant's professional performance, the illegality of the options offered by the letter of 1 April 2020, which were formulated in a spirit of solicitude with regard to the former TAT candidates who had not been selected, and also the allegations concerning poor management violating the basic ethics and values.

25. As for the appointment of Mr A, the respondent considers that, in any event, it does not adversely affect the appellant because it took place after the end of the selection process and once the appellant had accepted one of the options proposed by the letter of 1 April 2020. As regards the alleged conflict of interest in which Mr A found himself as a member of the panel who was then selected for the B6 position referred to by the appellant, the respondent submits that there is no evidence that such a conflict existed during the selection process, which was confirmed by the report of the investigation carried by the official responsible for that purpose within the Agency.

26. Under these conditions, the respondent requests that the Tribunal declare the present appeal inadmissible and unfounded.

## D. Considerations and conclusions

27. To start with, the Tribunal observes that the appellant has submitted a series of submissions for annulment directed against various acts without necessarily developing, in each case, corresponding pleas and arguments. He further sets out a broad argumentation through which he aims to demonstrate a flawed selection process that led to his exclusion while a member of the selection panel, Mr A, was almost immediately hired by the Agency after the appellant's application was rejected. In the same context, the appellant questions the process which led to his leaving the Agency, on the basis of the options allegedly offered by the Agency in a spirit of concern for him, whereas all of these elements confirm that the process in question was opaque, irregular and contrary to all ethical and moral considerations applicable to the Agency.

28. In a spirit of openness and concern for the appellant, who is not assisted by a lawyer, the Tribunal considers that, on the basis of all the above elements, the appellant is in fact challenging the appointment of Mr A to the restructured TAT, stressing that by reason of his duties as a member of the selection panel, Mr A excluded the appellant from that selection and was subsequently selected by the Agency in his place without competition. The various other arguments and contentions put forward by the appellant in his appeal are mainly intended to consolidate this ground and must be read through this statement.

29. The Tribunal recalls that the period of sixty days for an appeal stipulated in Article 6.3.2 of Annex IX to the CPR is established with a view to ensuring the security of legal situations and avoiding any discrimination or arbitrary treatment in the administration of justice.

30. As the appellant expressly states in his complaint of 20 May 2020, he became aware of Mr A's appointment on 18 May, which constitutes an act which clearly adversely affected him.

31. It must be noted, however, that neither in this complaint of 20 May 2020, nor in the subsequent letters of 18 June and 6 July 2020, did the appellant request the annulment of the decision to appoint Mr A to the TAT. In fact, in his complaint and his subsequent submissions, read even in a spirit of openness, the appellant complains merely of the selection process, expressly denouncing facts prohibited by the Agency's Code of Conduct. The Tribunal also notes that the subsequent references to the establishment of a complaints committee are part of a set of general denunciations that the appellant stresses in order to conclude that the Agency's Code of Conduct was violated.

32. It is therefore only in the context of the present action dated 21 August 2020 that the appellant formally challenges before the Tribunal the appointment of Mr A, of which, as mentioned, he became aware on 18 May 2020. Consequently, the submissions seeking annulment of this appointment were made after the expiry of the 60-day time limit for lodging an appeal and must therefore be dismissed as inadmissible.

33. Concerning, finally, the submissions on compensation for material or moral

damage suffered by the appellant, the Tribunal states that these have to be rejected insofar as they are closely associated with the claims seeking annulment which have themselves been dismissed as inadmissible.

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

## E. Costs

35. Article 6.8.2 of Annex IX 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 [...].

36. 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 8 June 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 August 2021 AT-J(2021)0020

**Judgment**

**Case No. 2020/1313**

**SC**

**Appellant**

***v.***

**NATO Communication and Information Agency**

**Respondent**

Brussels, 8 June 2021

Original: English

*Keywords: admissibility; subject of the appellant's submissions; time limits for lodging an appeal.*

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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 A. Vassilopoulos, judges, having regard to the written procedure and the deliberations held on 16 April 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 21 August 2020, and registered on 16 September 2020, as Case No. 2020/1313, by Ms SC, against the NATO Communication and Information Agency (NCIA/Agency). The appellant challenges the respondent's decision dated 15 July 2020 rejecting her allegations of existence of fraud, waste and abuse during a recruitment process, in violation of the Agency's Code of Conduct.

2. The respondent's answer, dated 16 November 2020, was registered on 27 November 2020. The appellant's reply, dated 27 January 2021, was registered on 5 February 2021. The respondent's rejoinder, dated 8 March 2021, was registered on 10 March 2021.

3. With the agreement of the parties, the Tribunal examined the above-mentioned case by written proceedings only on 16 April 2021, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant joined NCIA on 20 August 2018 on a three-year fixed-term contract as Assistant, grade B4 with the Human Resources (HR) service's Talent Acquisition Team (TAT).

5. The TAT was composed inter alia of five B4 staff members, one of whom was the appellant. In September 2019, the NCIA decided to reorganise the TAT by merging and upgrading the five above-mentioned B4-grade positions into two positions at grade B5 (recruiter) and two positions at grade B6 (senior recruiter). In this respect, the respondent organised an internal competition. The five B4 staff members, including the appellant, applied for these positions. In particular, the appellant applied for both B5 and B6 positions.

6. The appellant was interviewed on 16 March 2020 by a panel of five members, including Mr A as an external member of the panel. As the record shows, only two of the five former members of the TAT were selected by the panel to join the restructured TAT, not including the appellant.

7. In a letter from the respondent dated 1 April 2020, the appellant was informed that she had been unsuccessful in her application as the panel had found her not to be qualified for the B5 or B6 positions. In this letter, while acknowledging the negative effects of this decision for the appellant, the respondent offered to the appellant four options which are formulated as follows:

> 1. You can continue to serve our Agency at the B4 level until your contract ends as previously communicated (in the HR Transformation people mapping guidelines, 17 December 2020). We will move/transfer you to one of the currently vacant posts in HR and allow you to continue in your current role as B4 recruiter until the end of your contract.
> 2. If option 1 does not appeal to you, you may choose to be transferred immediately to HR staff services to experience and perform a broader HR role at the B4 level, including some of the recruitment tasks that will be transferred to HR staff services, again until the end of you current contract.
> 3. During the time as per above and until your contract end date you made apply for other jobs within the Agency.
> 4. If you do not wish to remain with the Agency any longer we can terminate your contract which entitles you to Loss of Job Indemnity (LoJI) of 5 months emoluments and 90 days notice period.

8. The appellant, who was on sick leave when she received this letter, replied by email of 29 April 2020 that she had decided to accept option number 4 (loss of job indemnity), with her last day of work at the Agency on 31 August 2020.

9. By letter dated 15 May 2020, the respondent formalised the appellant's choice to leave the Agency under the terms of the fourth option indicated in the aforementioned letter of 1 April 2020 and with her last working day on 31 August 2020. With this letter, the appellant was informed that she was eligible to be given priority consideration for a vacant position of the same grade under the NATO Clearing House rules in accordance with Article 57.2 of the NATO Civilial Personnel Regulations (CPR).

10. By letter dated 20 May 2020, the appellant and the two other former staff members of the TAT who were also not selected by the panel, Mr AR and Ms K, sent the General Manager of the Agency and the Chief of Staff a so-called “formal group complaint” in relation to the appointment of an external consultant to one of the positions of the restructured TAT, and in this regard requested an independant investigation.

11. In this letter, the appellant, Mr AR and Ms K complained about the appointment of Mr A, the member of their selection panel, to the vacant position on the TAT, and stated that they were informed of this appointment on 18 May 2020, effective 1 June 2020. They set out elements that, in their view, demonstrate inter alia that Mr A did not have his contract of external consultancy renewed and participated in the selection procedure while having a direct interest in ultimately being appointed himself. This was confirmed by the fact that he was hired at the end of the selection process which ruled them out. The appellant, Mr AR and Ms K concluded that there was a clear conflict of interest in breach of the Agency's Code of Conduct which affects the decision of the panel not to select them and which constitutes fraud, abuse and lack of diligence on the part of the respondent. The concluding paragraph of their complaint indicates:

> Resultantly, as per NCI Agency code of conduct art 4.4 (bullet 4) … it is the intent of this letter to report this circumstance and appointment (of Mr A) which came to our attention on 18th May 2020 … to the NCI Agency Fraud Detection and Prevention Manager and the NCI Agency Legal Office and if considered to be accurate, to initiate an official, independent and impartial investigation, so as to prevent any damage or risk to reputation or good standing of staff members involved in the process …

12. By letter, dated 2 June 2020, the respondent acknowledged receipt of the appellant's complaint and stated that the Agency would follow up and investigate the matter.

13. By letter dated 19 June 2020, the appellant, Mr AR and Ms K recalled that by their complaint dated 20 May 2020, they had drawn the respondent's attention to several issues concerning violations of the Agency's Code of Conduct (Article 4) in relation to the recent hiring of a consultant for the TAT. In this letter, they state that notwithstanding their request and despite the provisions of the NATO Civilian Personnel Regulations (CPR), a complaints committee was not set up to examine their complaint and they were not informed at all within the 30-day period provided for by the CPR of the procedural steps to be followed for these investigations. In this regard, they asked the respondent to provide an update regarding their complaint. In the absence of any response from the respondent, by a second letter dated 6 July 2020, the appellant, Mr AR and Ms K reiterated their request.

14. By letter dated 15 July 2020, the respondent informed the appellant, Mr AR and Ms K that the Fraud Prevention and Detection Manager had issued the investigation report which concluded that the allegations of bias in Mr A's decision-making as a member of the panel were unfounded and that there was no evidence that Mr A was in a conflict of interest. The same letter highlighted the fact that the panel's decisions had been taken by consensus with regard to the selection of applicants for the internal competition. Furthermore, the respondent recalled that the establishment of a complaints committee had not been requested by the complaint of 20 May 2020 and under these circumstances the respondent concluded that no further action was required.

15. It is in this context that the appellant lodged, on 21 August 2020, the present appeal.

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

### *(i) The appellant's' contentions*

16. The appellant requests that the Tribunal declare her action admissible. Contrary to the respondent's objections, she considers that several decisions taken by the respondent in the course of the selection procedure concerning her were challenged in an admissible manner in the present action. It is therefore not only the refusal to be qualified for the B5 and B6 positions that is being challenged with the present appeal. In addition, and contrary to the respondent's allegations, she pursued the pre-litigation procedure with the complaint of 20 May 2020, which was, however, not properly dealt with by the competent services, in violation of the CPR. For this reason, she was obliged to reiterate her request (letters of 19 June and 6 July). It is in fact the respondent who has not pursued the pre-litigation procedure, in violation of the CPR and the applicable texts and to the detriment of the appellant's interests.

17. As regards the merits, firstly, the appellant challenges the respondent's decision to appoint Mr A to the restructured TAT, pointing out that this appointment was made with apparent bias, fraud, waste and a conflict of interest. Mr A was a member of the panel, which excludes the appellant from recruitment to the B5 or B6 positions in the

restructured TAT. In the course of the selection process, Mr A was informed that his contract as an external consultant had come to an end, and he had a vested interest in the appellant not being qualified for the B5 or B6 positions, to which he was eventually appointed without any competition. The appellant also argues that the respondent's confidentiality obligation was breached on several occasions throughout the selection process by disclosing the names of all candidates. In addition, the composition of the panel was modified just before the interviews with the candidates, without any information being given about this.

18. Secondly, the appellant contends that the selection process, as managed by the respondent, was irregular. In this regard, the appellant argues that her personal performance as a staff member was not taken into consideration and, in general, her examination by the panel was not based on objective criteria relating to her significant experience on the TAT. This also applies to the other two TAT members who did not qualify in the same selection process. In addition, the upgrading of the posts of TAT staff members was carried out in violation of the CPR and was implemented against the interests of these members. Indeed, this upgrade made it possible for other staff members who had the qualifications for a B6 position to apply for the same position, placing the former B4 staff members of the TAT in a difficult position to be qualified.

19. Thirdly, the appellant considers that the four options offered by the decision of 1 April 2020 were illegal. Those options violated the CPR and in particular Articles 4.1.1, 57.2 to 57.4 and Article 1.2.b of Annex V to the CPR.

20. Finally, the appellant alleges a violation by the respondent of management ethics and values through the restructuring of the TAT. The appellant was subject to a clear lack of proper management by the respondent the last years and suffered from an excessive workload, a high volume of travel and a high demand for business, causing health and welfare problems which affected his working conditions.

21. In these conditions, the appellant seeks:
- reimbursement after prejudicial changes were made to her working conditions by the Head of HR. The appellant calculates the amount of this reimbursement as her monthly pay at the grade of B4 for the entire duration remaining on the contract of employment from the time of the decision (April 2020) to the end date of her NIC contract. This calculation includes all emoluments and pay in lieu of annual leave;
- an order for the respondent to overturn all hiring decisions made by the General Manager of the Agency pursuant to the unsanctioned limited internal competition of B6 and in particular the decision concerning the appointment of Ms SG;
- an order for the respondent to overturn the decision to appoint Mr A to the TAT and that this employment be terminated forthwith;
- that the parties within HR involved in the selection process be reprimanded and in the case of Interim Workforce Consultants the contracts be terminated for failing to correctly advise the General Manager of the Agency in accordance with the CPR, the Agency directives and the Code of Conduct;
- payment of 15,000 euros in non-material damages;
- reimbursement of all costs of retaining counsel and of all other associated costs in relation to these proceedings.

### *(ii) The respondent's contentions*

22. The respondent disputes the admissibility of the appeal. In this regard, on the one hand, the respondent considers that the only decision that could have affected the appellant's conditions of work was the decision dated 1 April 2020, which was not challenged under the provided time limits. On the other hand, the appellant did not pursue the applicable rules of the pre-litigation process. Indeed, the letter of 20 May 2020, referred to by the appellant as a "collective complaint", does not follow the rules for filing an administrative review under the CPR. With this complaint, the appellant reports to the respondent facts which, in her view, are constitutive of breaches of the NCIA code of conduct. It is only in her letter of 19 June 2020 that the appellant, for the first time, refers to Annex IX to the CPR without, however, establishing a clear link between a challenged act and the subject of her complaint.

23. As regards the merits, the respondent argues that in her appeal, the appellant's submissions are rather confused both in relation to the challenged act and to the specific pleas developed on a case-by-case basis to challenge that act. Moreover, the appellant develops certain claims for annulment and complaints which were never elaborated upon during the pre-litigation procedure initiated by the letter of 20 May 2020, in particular those concerning Ms SG, and which are therefore inadmissible. As for the claims for compensation, they are either inadmissible for the same reason or devoid of any basis in the absence of any illegality committed by the respondent.

24. This having been established, the respondent submits that all the appellant's allegations are unfounded. This is the case of those concerning the violation of the CPR for upgrading the TAT's positions, the communication of the candidates' confidential information, the modification of the composition of the jury, in particular in the context of the current COVID-19 pandemic, the failure to take into account the appellant's professional performance, the illegality of the options offered by the letter of 1 April 2020, which were formulated in a spirit of solicitude with regard to the former TAT candidates who had not been selected, and also the allegations concerning poor management violating the basic ethics and values.

25. As for the appointment of Mr A, the respondent considers that, in any event, it does not adversely affect the appellant because it took place after the end of the selection process and once the appellant had accepted one of the options proposed by the letter of 1 April 2020. As regards the alleged conflict of interests in which Mr A found himself as a member of the panel who was then selected for the B6 position referred to by the appellant, the respondent submits that there is no evidence that such a conflict existed during the selection process, which was confirmed by the report of the investigation carried by the official responsible for that purpose within the Agency.

26. Under these conditions, the respondent requests that the Tribunal declare the present appeal inadmissible and unfounded.

## D. Considerations and conclusions

27. To start with, the Tribunal observes that the appellant has submitted a series of submissions for annulment directed against various acts without necessarily developing, in each case, corresponding pleas and arguments. She further sets out a broad argumentation through which she aims to demonstrate a flawed selection process that led to her exclusion while a member of the selection panel, Mr A, was almost immediately hired by the Agency after the appellant's application was rejected. In the same context, the appellant questions the process which led to her leaving the Agency, on the basis of the options allegedly offered by the Agency in a spirit of concern for her, whereas all of these elements confirm that the process in question was opaque, irregular and contrary to all ethical and moral considerations applicable to the Agency.

28. In a spirit of openness and concern for the appellant, who is not assisted by a lawyer, the Tribunal considers that, on the basis of all the above elements, the appellant is in fact seeking to challenge the appointment of Mr A to the restructured TAT, stressing that by reason of his duties as a member of the selection panel, Mr A excluded the appellant from that selection and was subsequently selected by the Agency in his place without competition. The various other arguments and contentions put forward by the appellant in her appeal are mainly intended to consolidate this ground and must be read through this statement.

29. The Tribunal recalls that the period of sixty days for an appeal stipulated in Article 6.3.2 of Annex IX to the CPR is established with a view to ensuring the security of legal situations and avoiding any discrimination or arbitrary treatment in the administration of justice.

30. As the appellant expressly states in the complaint of 20 May 2020, she became aware of Mr A's appointment on 18 May, which constitutes an act which clearly adversely affected her.

31. It must be noted, however, that neither in this complaint of 20 May 2020, nor in the subsequent letters of 18 June and 6 July 2020, did the appellant request the annulment of the decision to appoint Mr A to the TAT. In fact, in this complaint and the subsequent submissions, read even in a spirit of openness, the appellant complains merely of the selection process, expressly denouncing facts prohibited by the Agency's Code of Conduct. The Tribunal also notes that the subsequent references to the establishment of a complaints committee are part of a set of general denunciations that the appellant stresses to conclude that the Agency's Code of Conduct was violated.

32. It is therefore only in the context of the present action dated 21 August 2020 that the appellant formally challenges before the Tribunal the appointment of Mr A, of which, as mentioned, she became aware on 18 May 2020. Consequently, the submissions seeking annulment of this appointment were made after the expiry of the 60-day time limit for lodging an appeal and must therefore be dismissed as inadmissible.

33. Concerning, finally, the submissions on compensation for material or moral damage suffered by the appellant, the Tribunal states that these have to be rejected insofar as they are closely associated with the claims seeking annulment, which have themselves been dismissed as inadmissible.

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

## E. Costs

35. Article 6.8.2 of Annex IX 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 [...].

36. 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 8 June 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 August 2021 AT-J(2021)0021

**Judgment**

**Case No. 2020/1314**

**EK**

**Appellant**

***v.***

**NATO Communication and Information Agency**

**Respondent**

Brussels, 8 June 2021

Original: English

*Keywords: admissibility; subject of the appellant's submissions; time limits for lodging an appeal.*

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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 A. Vassilopoulos, judges, having regard to the written procedure and the deliberations held on 16 April 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 21 August 2020, and registered on 16 September 2020, as Case No. 2020/1314, by Ms EK, against the NATO Communication and Information Agency (NCIA/Agency). The appellant challenges the respondent's decision dated 15 July 2020 rejecting her allegations of existence of fraud, waste and abuse during a recruitment process, in violation of the Agency's Code of Conduct.

2. The respondent's answer, dated 16 November 2020, was registered on 27 November 2020. The appellant's reply, dated 26 January 2021, was registered on 5 February 2021. The respondent's rejoinder, dated 8 March 2021, was registered on 10 March 2021.

3. With the agreement of the parties, the Tribunal examined the above mentioned case by written proceedings only on 16 April 2021, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant joined NCIA on 20 April 2015 under a three-year fixed-term contract as an Assistant, grade B3 with the Human Resources (HR) service. This contract was renewed for three years (from April 2018 to April 2021). After the renewal of this contract, the appellant was promoted to a B4 position with the HR Talent Acquisition Team (TAT).

5. The TAT was composed inter alia of five B4 staff members, one of whom was the appellant. In September 2019, the NCIA decided to reorganise the TAT by merging and upgrading the five above-mentioned B-4 grade positions into two positions at grade B5 (recruiter) and two positions at grade B6 (senior recruiter). In this respect, the respondent organised an internal competition. The five B4 staff members, including the appellant, applied for these positions. In particular, the appellant applied for both B5 and B6 positions.

6. The appellant was interviewed on 16 March 2020 by a panel of five members including Mr A as an external member of the panel. As the record shows, only two of the five former members of the TAT were selected by the panel to join the restructured TAT, not including the appellant.

7. In a letter from the respondent dated 1 April 2020, the appellant was informed that she had been unsuccessful in her application as the panel had found her not to be qualified for the B5 and B6 positions. In this letter, while acknowledging the negative effects of this decision for the appellant, the respondent offered to the appellant four options which are formulated as follows:

> 1. You can continue to serve our Agency at the B4 level until your contract ends as previously communicated (in the HR Transformation people mapping guidelines, 17 December 2020). We will move/transfer you to one of the currently vacant posts in HR and allow you to continue in your current role as B4 recruiter until the end of your contract.
> 2. If option 1 does not appeal to you, you may choose to be transferred immediately to HR staff services to experience and perform a broader HR role at the B4 level, including some of the recruitment tasks that will be transferred to HR staff services, again until the end of you current contract.
> 3. During the time as per above and until your contract end date you made apply for other jobs within the Agency.
> 4. If you do not wish to remain with the Agency any longer we can terminate your contract which entitles you to Loss of Job Indemnity (LoJI) of 5 months emoluments and 90 days notice period.

8. The appellant, being on sick leave when she received this letter, replied by email of 8 May 2020 accepting option 4 and requesting, in addition to the 5 months of LoJI, an extended notice period, with her last working day on 31 December 2020. By e-mail on the same date, the respondent replied that an extended notice period of 7 months instead of the proposed 3 months was not feasible, and proposed a notice period running until 1 October 2020.

9. After exchanges with the appellant, by e-mail of 13 May 2020 the respondent offered the appellant the possibility of transferring to HR services as of 1 June 2020 in a B4 position (option 2). By e-mail of 14 May 2020, the appellant accepted this offer.

10. By letter dated 20 May 2020, the appellant and the two other former staff members of the TAT who were also not selected by the panel, Mr AR and Ms C, sent the General Manager of the Agenecy and the Chief of Staff a so-called “formal group complaint” in relation to the appointment of an external consultant to one of the positions of the restructured TAT, and in this regard requested an independant investigation.

11. In this letter, the appellant, Mr AR and Ms C complained about the appointment of Mr A, the member of their selection panel, to the vacant position on the TAT, and stated that they were informed of this appointment on 18 May 2020, effective 1 June 2020. They set out elements that, in their view, demonstrate inter alia that Mr A did not have his contract of external consultancy renewed and participated in the selection procedure while having a direct interest in ultimately being appointed himself. This was confirmed by the fact that he was hired at the end of the selection process which ruled them out. The appellant, Mr AR and Ms C concluded that there is a clear conflict of interest in breach of the Agency's Code of Conduct which affects the decision of the panel not to select them and which constitutes fraud, abuse and lack of diligence on the part of the respondent. The concluding paragraph of their complaint indicates:

> Resultantly, as per NCI Agency code of conduct art 4.4 (bullet 4) … it is the intent of this letter to report this circumstance and appointement (of Mr A) which came to our attention on 18th May 2020 … to the NCI Agency Fraud Detection and Prevention Manager and the NCI Agency Legal Office and if considered to be accurate, to initiate an official, independent and impartial investigation, so as to prevent any damage or risk to reputation or good standing of staff members involved in the process …

12. By letter, dated 2 June 2020, the respondent acknowledged receipt of the appellant's complaint and stated that the Agency would follow up and investigate the matter.

13 By letter dated 19 June 2020, the appellant, Mr AR and Ms C recalled that by their complaint dated 20 May 2020, they had drawn the respondent's attention to several issues concerning violations of the Agency's Code of Conduct (Article 4) in relation to the recent hiring of a consultant for the TAT. In this letter, they state that notwithstanding their request and despite the provisions of the NATO Civilian Personnel Regulations (CPR), a complaints committee was not set up to examine their complaint and they were not informed at all within the 30-day period provided for by the CPR of the procedural steps to be followed for these investigations. In this regard, they asked the respondent to provide an update regarding their complaint. In the absence of any response from the respondent, by a second letter dated 6 July 2020, the appellant, Mr AR and Ms C reiterated their request.

14. By letter dated 15 July 2020, the respondent informed appellant, Mr AR and Ms C that the Fraud Prevention and Detection Manager had issued the investigation report which concluded that the allegations of bias in Mr A's decision-making as a member of the panel were unfounded and that there was no evidence that Mr A was in a conflict of interest. The same letter highlighted the fact that the panel's decisions had been taken by consensus with regard to the selection of applicants for the internal competition. Furthermore, the respondent recalled that the establishment of a complaints committee had not been requested by the complaint of 20 May 2020 and under these circumstances the respondent concluded that no further action was required.

15. It is in this context that the appellant lodged, on 21 August 2020, the present appeal.

16. By letter dated 5 October 2020, the appellant resigned from the B4 position in HR (see paragraph 9 above) with effect from 1 January 2021. The respondent acknowledged receipt of this resignation by letter dated 12 October 2021.

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

### *(i) The appellant's' contentions*

17. The appellant requests that the Tribunal declare her action admissible. Contrary to the respondent's objections, she considers that several decisions taken by the respondent in the course of the selection procedure concerning her were challenged in an admissible manner in the present action. It is therefore not only the refusal to be qualified for the B5 and B6 positions that is being challenged with the present appeal. In addition, and contrary to the respondent's allegations, she pursued the pre-litigation procedure with the complaint of 20 May 2020, which was, however, not properly dealt with by the competent services, in violation of the CPR. For this reason, she was obliged to reiterate her request (letters of 19 June and 6 July). It is in fact the respondent who has not pursued the pre-litigation procedure, in violation of the CPR and the applicable texts and to the detriment of the appellant's interests.

18. As regards the merits, firstly, the appellant challenges the respondent's decision to appoint Mr A to the restructured TAT, pointing out that this appointment was made with apparent bias, fraud, waste and a conflict of interest. Mr A was a member of the panel, which excludes the appellant for recruitment to the B5 or B6 positions in the restructured TAT. In the course of the selection process, Mr A was informed that his contract as an external consultant had come to an end, and he had a vested interest in the appellant not being qualified for the B5 or B6 positions, to which he was eventually appointed without any competition. The appellant also argues that the respondent's confidentiality obligation was breached on several occasions throughout the selection process by disclosing the names of all candidates. In addition, the composition of the panel was modified just before the interviews with the candidates, without any information being given about this.

19. Secondly, the appellant contends that the selection process, as managed by the respondent, was irregular. In this regard, the appellant argues that her personal performance as a staff member was not taken into consideration and, in general, her examination by the panel was not based on objective criteria relating to her significant experience on the TAT. This also applies to the other two TAT members who did not qualify in the same selection process. In addition, the upgrading of the posts of TAT staff members was carried out in violation of the CPR and was implemented against the interests of these members. Indeed, this upgrade made it possible for other staff members who had the qualifications for a B6 position to apply for the same position, placing the former B4 staff members of the TAT in a difficult position to be qualified.

20. Thirdly, the appellant considers that the four options offered by the decision of 1 April 2020 were illegal. Those options violated the CPR and in particular Articles 4.1.1, 57.2 to 57.4 and Article 1.2.b of Annex V to the CPR.

21. Finally, the appellant alleges a violation by the respondent of management ethics and values through the restructuring of the TAT. The appellant was subject to a clear lack of proper management by the respondent the last years and suffered from an excessive workload, a high volume of travel and a high demand for business, causing health and welfare problems which affected his working conditions.

22. In these conditions, appellant seeks:

- reimbursement after prejudicial changes were made to her working conditions by the Head of HR. The appellant calculates the amount of this reimbursement as her monthly pay at the grade of B4 for the entire duration remaining on the contract of employment from the time of the decision (April 2020) to the end date of her NIC contract. This calculation includes all emoluments and pay in lieu of annual leave;
- an order for the respondent to overturn all hiring decisions made by the General Manager of the Agency pursuant to the unsanctioned limited internal competition of B6 and in particular the decision concerning the appointment of Ms SG;
- an order for the respondent to overturn the decision to appoint Mr A to the TAT and that this employment be terminated forthwith;
- that the parties within HR involved in the selection process be reprimanded and in the case of Interim Workforce Consultants the contracts be terminated for failing to correctly advise the General Manager of the Agency in accordance with the CPR, the Agency directives and Code of Conduct;

- payment of 15,000 euros in non-material damages;
- reimbursement of all costs of retaining counsel and of all other associated costs in relation to these proceedings.

***(ii) The respondent's contentions***

23. The respondent disputes the admissibility of the appeal. In this regard, on the one hand, the respondent considers that the only decision that could have affected the appellant's conditions of work was the decision dated 1 April 2020, which was not challenged under the provided time limits. On the other hand, the appellant did not pursue the applicable rules of the pre-litigation process. Indeed, the letter of 20 May 2020, referred to by the appellant as a "collective complaint", does not follow the rules for filing an administrative review under the CPR. With this complaint, the appellant reports to the respondent facts which, in her view, are constitutive of breaches of the NCIA code of conduct. It is only in the letter of 19 June 2020, that the appellant, for the first time, refers to Annex IX to the CPR without, however, establishing a clear link between a challenged act and the subject of her complaint.

24. As regards the merits, the respondent argues that in her appeal, the appellant's submissions are rather confused both in relation to the challenged act and to the specific pleas developed on a case-by-case basis to challenge that act. Moreover, the appellant develops certain claims for annulment and complaints which were never elaborated upon during the pre-litigation procedure initiated by the letter of 20 May 2020, in particular those concerning Ms SG, and which are therefore inadmissible. As for the claims for compensation, they are either inadmissible for the same reason or devoid of any basis in the absence of any illegality committed by the respondent.

25. This having been established, the respondent submits that all the appellant's allegations are unfounded. This is the case of those concerning the violation of the CPR for upgrading the TAT's positions, the communication of the candidates' confidential information, the modification of the composition of the jury, in particular in the context of the current COVID-19 pandemic, the failure to take into account the appellant's professional performance, the illegality of the options offered by the letter of 1 April 2020, which were formulated in a spirit of solicitude with regard to the former TAT candidates who had not been selected, and also the allegations concerning poor management violating the basic ethics and values.

26. As for the appointment of Mr A, the respondent considers that, in any event, it does not adversely affect the appellant because it took place after the end of the selection process and once the appellant had accepted one of the options proposed by the letter of 1 April 2020. As regards the alleged conflict of interests in which Mr A found himself as a member of the panel and who was then selected for the post B6 referred to by the appellant, the respondent submits that there is no evidence that such a conflict existed during the selection process, which was confirmed by the report of the investigation carried by the official responsible for that purpose within the Agency.

27. Under these conditions, the respondent requests that the Tribunal declare the present appeal inadmissible and unfounded.

## D. Considerations and conclusions

28. To start with, the Tribunal observes that the appellant has submitted a series of submissions for annulment directed against various acts without necessarily developing, in each case, corresponding pleas and arguments. She further sets out a broad argumentation through which she aims to demonstrate a flawed selection process that led to her exclusion while a member of the selection panel, Mr A, was almost immediately hired by the Agency after the appellant's application was rejected. In the same context, the appellant questions the process which led to her leaving the Agency, on the basis of the options allegedly offered by the Agency in a spirit of concern for her, whereas all of these elements confirm that the process in question was opaque, irregular and contrary to all ethical and moral considerations applicable to the Agency.

29. In a spirit of openness and concern for the appellant, who is not assisted by a lawyer, the Tribunal considers that, on the basis of all the above elements, the appellant is in fact seeking to challenge the appointment of Mr A to the restructured TAT, stressing that by reason of his duties as a member of the selection panel, Mr A excluded the appellant from that selection and was subsequently selected by the Agency in her place without competition. The various other arguments and contentions put forward by the appellant in her appeal are mainly intended to consolidate this ground and must be read through this statement.

30. The Tribunal recalls that the period of sixty days for an appeal stipulated in Article 6.3.2 of Annex IX to the CPR is established with a view to ensuring the security of legal situations and avoiding any discrimination or arbitrary treatment in the administration of justice.

31. As the appellant expressly states in the complaint of 20 May 2020, she became aware of Mr A's appointment on 18 May, which constitutes an act which clearly adversely affected her.

32. It must be noted, however, that neither in the complaint of 20 May 2020, nor in the subsequent letters of 18 June and 6 July 2020, did the appellant request the annulment of the decision to appoint Mr A to the TAT. In fact, in this complaint and the subsequent submissions, read even in a spirit of openness, the appellant complains merely of the selection process, expressly denouncing facts prohibited by the Agency's Code of Conduct. The Tribunal also notes that the subsequent references to the establishment of a complaints committee are part of a set of general denunciations that the appellant stresses to conclude that the Agency's Code of Conduct was violated.

33. It is therefore only in the context of the present action dated 21 August 2020 that the appellant formally challenges before the Tribunal the appointment of Mr A, of which, as mentioned, she became aware on 18 May 2020. Consequently, the submissions seeking annulment of this appointment were made after the expiry of the 60-day time limit for lodging an appeal and must therefore be dismissed as inadmissible.

34. Concerning, finally, the submissions on compensation for material or moral damage suffered by the appellant, the Tribunal states that these have to be rejected in

so far as they are closely associated with the claims seeking annulment which have themselves been dismissed as inadmissible.

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

## E. Costs

36. Article 6.8.2 of Annex IX 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 dismissed, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 8 June 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 January 2022 AT-J(2022)0001

**Judgment**

**Case No. 2021/1325**

**MT**

**Appellant**

***v.***

**Supreme Headquarters Allied Powers Europe**

**Respondent**

Brussels, 12 January 2022

Original: English

*Keywords: admissibility; Selection Board decision; alternate candidate; discretionary power; good administration.*

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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 Christos A. Vassilopoulos and Ms Seran Karatari Köstü, judges, having regard to the written procedure and further to the hearing on 17 December 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 8 February 2021, and registered on 15 February 2021, as Case No. 2021/1325, by Mr MT against the Supreme Headquarters Allied Powers Europe (SHAPE). The action seeks to annul the respondent's decision to re-advertise the vacancy for the position of Financial Controller, Director of Finance and Acquisition, for which appellant was shortlisted as alternate candidate. By the same action the appellant also requests the production of documentation by the respondent.

2. On 15 March 2021, SHAPE submitted a request for summary dismissal of the appeal under Rule 10 of Appendix 1 of Annex IX to the NATO Civilian Personal Regulations (CPR). The Tribunal denied the request and ordered the continuation of the written proceedings (AT(REG)(2021)0055).

3. The respondent's answer, dated 14 April 2021, was registered on 19 April 2021. The appellant's reply, dated 19 May 2021, was registered on 1 June 2021. The respondent's rejoinder, dated 1 July 2021, was registered on 23 July 2021.

4. The Panel held an oral hearing on 17 December 2021 at NATO Headquarters. It heard the appellant's statements and arguments by the appellant's representative and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

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

6. The appellant joined, first, the Allied Joint Force Command (JFC) South in Verona in August 2001. He subsequently served the JFC Naples, when he was appointed as financial controller there in 2009. His contract was renewed several times and ended on 31 January 2021.

7. Before the appellant's contract ended, he applied for SHAPE vacancy A04/0320 for the position of Financial Controller, Director of Finance and Acquisition, Grade A-6, (position of ACO FC) with a closing date of 14 June 2020.

8. The selection process for the above-mentioned vacancy was completed at the end of August 2020 and the Selection Board concluded that someone other than the appellant, Mr X, was the most qualified for the position in question and recommended his appointment.

9. By decision dated 14 September 2020, the respondent decided to follow this recommendation and requested the Budget Committee to approve the appointment of

Mr X and to take the appropriate steps to have this appointment approved by the North Atlantic Council. The appellant was not selected for this ACO FC position and therefore the Budget Committee was not asked to take any action with regard to him.

10. As reflected in the record, on 15 September 2020, the appellant contacted the respondent and was orally informed that Mr X had been selected for the position and that the appellant had been selected as the alternate for the position in question.

11. By decision dated 28 October 2020, the respondent withdrew the aforementioned 14 September 2020 recommendation to the Budget Committee.

12. By email sent on 3 November 2020 to the respondent, the appellant requested an update regarding the position of ACO FC for which he had applied.

13. By email and letter dated 5 November 2020, the respondent informed the appellant that the recruitment and the Selection Board report with its recommendations *"*has not been endorsed by the of the NATO body*"* and, therefore, the position of ACO FC would be reopened for competition (decision of 5 November 2020).

14. By letter dated 6 November 2020, the appellant requested the respondent to explain the apparent contradiction between the content of the decision dated 14 September 2020 and the previous email and letter dated 5 November 2020.

15. In the absence of any response to his request, the appellant filed a formal complaint on 1 December 2020 before the Head of NATO Body (HONB), requesting the rescission of the decision to re-advertise the position of ACO FC, despite the recommendation made by the Selection Board, recalling his status as an alternate for that position should the selected candidate not be appointed. In this regard, the appellant asked why the selection process had not been endorsed by the HONB and why it had been decided to re-advertise the selection process and to publish a new vacancy and not to propose him for the position.

16. The position of ACO FC was re-advertised by SHAPE vacancy No. A01/0121 with 17 January 2021 as the closing date for applications. The appellant applied for this position and was shortlisted.

17. It is in this context and in the absence of any answer by the respondent to his requests that, on 8 February 2021, the appellant brought the present action before the Tribunal. By email of 2 March 2021, the appellant was informed that his application for the vacancy No. A01/0121 had not been successful.

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

### *(i) The appellant's main contentions*

18. With regard to admissibility, the appellant maintains that his appeal is admissible for several reasons and that the arguments developed by the respondent to this effect are unfounded. Firstly, concerning his status, the appellant stresses that he never claimed to be a staff member when he lodged his appeal. Therefore, there is no violation of Rule 9 of the Rules of Procedure of the Tribunal (ROP) concerning the misrepresentation of material facts, which would render the action inadmissible. Secondly, and in the light of the requirements of Articles 61 and 62 of the CPR, the appellant maintains that he is qualified to bring an action directly before the Tribunal and not to follow the pre-litigation proceedings in respect of facts that occurred before the end of his contract. After the latter ended on 31 January 2021, the appellant became a former staff member and, therefore, can challenge the respondent's decision, which clearly had a negative impact on his working conditions.

19. As to the merits, the appellant submits, firstly, that following the non-appointment of Mr X, the respondent’s failure to reply to his requests reveals a blatant lack of motivation as to the real grounds for the decision to re-advertise the position of ACO FC. In fact, the respondent decided to re-advertise this position without examining the possible nomination of the appellant who had already been selected as alternate for this position and, above all, without having contacted and informed him of this decision.

20. Secondly, the appellant argues that the respondent exceeded its discretionary powers by failing to comply with the rules set forth in the CPR as well as the internal rules, in particular NCIA Directive AD 2.02 on recruiting, selecting and appointing NATO international civil staff (NCIA Directive AD 2.02). Indeed, point 10.5.2 of this directive states that a position will only be re-advertised if the alternative candidate for the position selected for this position declines a tentative offer. However, the appellant, after having been selected as alternate for the position of ACO FC, never received an offer after the first candidate was screened out. In this regard, the respondent violated the principle of legitimate expectations of the appellant who was waiting to receive an offer following the non-appointment of Mr X or, more generally, to be informed of the reasons justifying the decision to re-advertise the position in question in order to be able to preserve his rights.

21. Thirdly, the appellant argues that the decision to re-advertise the position was made in the context of an abuse of power, following a non-transparent and contradictory approach intended to place the appellant in a very uncomfortable situation. The appellant repeatedly asked the respondent to explain the reasons for the decision to re-advertise the position of ACO FC. The respondent preferred to remain silent. And this complete lack of communication continued when the appellant then asked the respondent to clarify its own contradictions. In addition to the evident abuse of power in justifying the adoption of the decision of 5 November 2020 to re-advertise the position in question, it is more than obvious that this decision confirmed solemnly by the HONB was taken in violation of the duty of care and the principle of good administration. Indeed, the respondent did not take any concrete action or contact the appellant to inform him about its intention, thus demonstrating a clear breach of its duty of care.

22. Finally, the appellant developed submissions for the hardship suffered because of the respondent's conduct in light of the legitimate expectations resulting from the manner in which the selection process was conducted, as well as the treatment undergone. Considering in addition the impact of this treatment on his professional reputation and image, he evaluates the non-material prejudice suffered at the sum of €40,000.

23. The appellant requests that the Tribunal:
- annul the decision taken by respondent to re-advertise the position of ACO FC urging the administration to implement the Selection Board's report as approved by the HONB;
- oblige the respondent to produce the Selection Board's report and explain the reasons for the HONB's withdrawal of the decision to endorse it particularly with regard to the position of the appellant;
- compensate the appellant for non-material damage suffered and evaluated at the sum of €40,000; and
- condemn the respondent to reimburse the appellant justified expenses and the costs of retaining counsel up to a maximum of €5,000.

***(ii) The respondent's main contentions***

24. The respondent makes several arguments contesting the admissibility of the appeal. Firstly, the respondent submits that the action was brought before the Tribunal in breach of Rule 9 of the ROP concerning the presentation of the relevant facts and, in particular, the fact that the appellant is not a staff member. Secondly, the respondent argues that the appellant has failed to comply with the requirement of Articles 61 and 62 of the CPR, as the challenged decision does not affect the appellant's working conditions and employment. Thirdly, the respondent argues that the appellant brought the action directly before the Tribunal despite the existence of a mandatory pre-litigation procedure under the CPR before bringing the action before the Tribunal. In this regard, according to the respondent, the emails and letters sent by the appellant to contest the decision to re-advertise the position of ACO FC did not comply with the CPR's requirement for pre-litigation procedures.

25. As regards the merits, the respondent contests and rejects all the pleas and arguments put forward by the appellant against the decision to re-advertise the position of ACO FC as well as the other submissions made in the present appeal.

26. Concerning the submissions for annulment, and firstly, the violation of the rules of procedure and the lack of motivation of the challenged decision, the respondent argues that the administration did not expressly take a position since the appellant's request was based on a total misunderstanding of the rules of procedure and was for this reason inadmissible and, in any case, unfounded. Furthermore, the failure to respond to the appellant's request is, at best, an implicit decision of rejection, which must be considered as a preparatory act and, as such, is not an act that can be challenged before the Tribunal. Therefore, no argument can be developed further to justify the lack of a statement of reasons.

27. With regard, secondly, to the excessive use of the respondent's discretionary power in not making an offer to the appellant as alternate candidate after the elimination

of the first candidate, the respondent considers that this plea is completely unfounded. In particular, with the reference to NCIA Directive AD 2.02, which provides for the obligation to make an offer to the alternate candidate in the case of a refusal of the job offer by the first candidate, the respondent points out that this directive is not applicable in this case. Indeed, SHAPE has its own internal rules in this matter, i.e. Directive 050-004, which do not set out the previous rule on the basis of which the appellant has developed his contentions. In addition, the respondent argues that the appellant's status, as an alternate candidate, did not confer to him any legitimate expectations to receive a tentative offer and to be appointed to the position of ACO FC as the selection process in question was discontinued, even before a job offer was made to the selected candidate. The respondent also claims that, as per the Financial Regulations, the decision on the appointment to the position is subject to dual approval by the Budget Committee and the North Atlantic Council.

28. Thirdly, the respondent also rejects the appellant's contentions concerning the abuse of power regarding the decision to re-advertise the position of ACO FC. Indeed, the appellant has not developed any concrete and plausible argument that the decision to re-advertise this position was tainted by abuse of power. There is no evidence in this case that, on the basis of objective, relevant and concordant evidence, the decision was made to achieve purposes other than those claimed in this case. According to the respondent, this decision was taken in full transparency without there being any evidence of bias in the handling of the appellant's file in the process of selecting the person responsible for the position of ACO FC. Under these circumstances, there is also no failure to comply with the principle of good administration and no breach of the duty of care that the appellant wrongly asserts in this case was committed by the adoption of this above-mentioned decision.

29. With regard to the claims for compensation for non-material harm, the respondent considers that the appellant's arguments are unjustified and unsubstantiated, and that the complaint for reputational damage is unjustified. In this respect, the respondent adds that, despite the adoption of the challenged decision, the appellant continued his work with JFC Naples and at the end of his contract with SHAPE, was appointed by the national authorities of his country as head of a division of the general Secretariat of Defense. These elements show that the assertions developed by the appellant concerning his non-material harm have no merit.

30. Finally, the respondent argues that, under the Tribunal's case law, the appellant's requests to order SHAPE to implement the first Selection Board's report already approved by the HONB at the time of the first vacancy announcement are inadmissible. The same conclusion also applies to the appellant's submission concerning the communication of the report of the Selection Board and of the reasons for withdrawing the first proposal for appointment. In any event, the respondent considers that the appellant was provided with all relevant information regarding the decision to re-advertise the ACO FC position.

31. In these circumstances, the respondent requests that the Tribunal dismiss the present appeal as inadmissible or as unfounded. In addition, the respondent also requests that the Tribunal order the appellant to pay compensation for the abusive use of the appeal procedure in light of Article 6.8.3 of Annex IX to the CPR.

## D. Considerations and conclusions

### *(i) Considerations on admissibility*

32. In its first objection of inadmissibility, the respondent, referring to Rule 9 of the ROP, complains that the appellant's action is essentially misguided as regards both his legal status to act before the Tribunal and the description of the relevant facts. With the same arguments, the respondent argues that the subject matter of the action remains vague and is based on the appellant's own actions aimed at bringing the dispute before the Tribunal by presenting the facts in a biased manner and out of any context in relation to reality. Moreover, the present action is abusive because the appellant has no right to preserve in the present case and he intends to establish a supposed dispute and for this reason he did not initiate the pre-litigation procedure. In the respondent's view, this is evidence of an abusive action. To this end, it asks the Tribunal to apply article 6.8.3 of Annex IX to the CPR, which provides that "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".

33. The Tribunal considers that, contrary to the respondent's allegations, the appellant has not hidden facts or presented facts with the aim of misleading the Tribunal both with regard to his status as a former agent of the Organization and with regard to the subject of the dispute. In this sense also, the present action does not constitute an attempt of the appellant to take advantage of a false situation created by his own actions, as a former agent of the Organization. The reading of the file allowed the Tribunal to understand the dispute between the appellant and the respondent as well as the reasons for which the appellant brought the present action.

34. Furthermore, the Tribunal concludes that the appellant's conduct as a whole does not make the present action abusive so that it should be dismissed. In fact, the elements contained in the present record do not make it possible to establish that the appellant had opted for the litigation channel without any valid justification. To this end, the Tribunal notes that the respondent did not take any official position regarding the appellant's requests, after the decision of 28 October 2020 (see infra para, 11) except for the one contained in the decision of 5 November 2020, a decision against which the appellant protested subsequently by bringing the action before the Tribunal.

35. It follows from the foregoing that the first objection of inadmissibility must be dismissed, as well as the related request concerning the application of Article 6.8.3 of Annex IX to the CPR.

36. By its second and third objection of inadmissibility, which must be examined together, the respondent contends, first, that the decision to re-advertise the position of ACO FC does not adversely affect the appellant and, second, that the appellant brought the present action without complying with the prior mandatory pre-litigation procedure by bringing the present action directly before the Tribunal. Consequently, on these two grounds, the present action is in any event inadmissible.

37. The Tribunal notes that, after the respondent's decision of 28 October 2020, withdrawing the proposal for appointment of the selected candidate for the position of ACO FC, the appellant started pre-litigation proceedings first with his email of 3 November 2020. After receiving the 5 November 2020 decision, he also challenged this decision by email on 6 November. In parallel and in accordance with Article 62.2 of the CPR and Article 1.4 of Annex IX to the CPR, on 1 December 2020, the appellant filed a complaint with the HONB, requesting to be proposed for appointment on the basis of his status as an alternate candidate for the position. At the end of his contract on 31 January 2021, the respondent had not taken a position on any of his claims.

38. Under these circumstances, as of 1 February 2021, continuation of the pre-litigation process was of no real interest for the appellant, since he was a former staff member. Therefore, the way for the appellant to preserve his rights and access to due process was to challenge the implicit decision of the HONB to deny his 1 December 2020 request. It is in this context that the appellant lodged admissibly the present appeal before the Tribunal.

39. Accordingly, the second and third objections of inadmissibility raised by the respondent must be rejected and, consequently, this appeal must be declared admissible.

***(ii) Considerations on the merits***

40. In his appeal, the appellant submits claims for annulment and compensation, and also makes a number of claims requesting the Tribunal to order the respondent to take specific measures.

41. By his submissions for annulment, the appellant contends, firstly, that the respondent unjustifiably exceeded its discretionary power by not offering him the position of ACO FC after the withdrawal of the proposal to appoint the first candidate, in violation of the principle of legitimate expectations. Secondly, the appellant considers that the respondent took the decision to re-advertise the position of ACO FC without offering him the post, as alternate, in clear violation of the principle of good administration and of the duty of care towards him, and this is the result, in particular, of the permanent denial of any reasoned response to his requests. Finally, he argues that the respondent's decision to re-advertise the position of ACO FC is based on an exercise of manifest abuse of power, according to non-transparent procedures, aimed at excluding him and denying him, in one way or another, a possible future appointment.

42. The Tribunal notes that in the context of his submissions for annulment, the appellant bases his aforementioned pleas exclusively on his status as an alternate candidate for the position of ACO FC which, he alleges, legitimately fell to him following the withdrawal of the proposal concerning Mr X, the first candidate selected.

43. It must be held that the appellant's claims for annulment are based on erroneous premises. It is clear from the file and the documentation submitted before the Tribunal that, regardless of informal statements or other indications by agents or persons who, in one way or another participated in the selection process for the position of ACO FC, the Selection Board selected only one candidate for the disputed position, Mr X, and not in addition an alternate candidate. Thus, only one name of one single candidate was

submitted to the Budget Committee for approval. The decision of 14 September 2020 (see infra para 9) is unambiguous in this respect and this was also confirmed at the hearing by the respondent following a question from the Tribunal. There is no record that the appellant was qualified and screened by the Selection Board as an alternate candidate for the position of ACO FC.

44. The appellant himself acknowledged at the hearing that he had not received, despite his requests, an official letter concerning his status as an alternative candidate for the same position, with the exception of declarations addressed to him orally, following his own initiatives.

45. The Tribunal does not question that such declarations may have taken place and that some agents of the respondent might have congratulated the appellant for his performance during the selection process by communicating to him the fact that he would be the alternate candidate of Mr X. The respondent does not dispute this either. However, as they did not come from the Selection Board as a collective body, and especially as they were informal, such statements and declarations cannot create any legitimate expectations for the appellant for a position where the formalities of this specific selection procedure are very strict and require approval at several stages. In these circumstances, no grievance can be drawn from the breach of the discretionary power or an alleged abuse of power committed by the respondent by its decision to re-advertise the position of ACO FC, without it being necessary to examine further in this case the conditions of application of the Directive 050 004.

46. In any case, the Tribunal recalls that for the position in question, the procedural requirements for the appointment of a selected candidate are stringent and depend on consequent approvals at different stages of the procedure by different decision-making authorities. This element differentiates the current procedure and the recruitment process therein from other selection procedures.

47. As for the duty of care and the principle of good administration, the Tribunal notes that, although it may appear regrettable to informally communicate to a candidate information concerning his status in the context of the selection procedure, such considerations, not provided by the Selection Board as a body, cannot in the present case vitiate the legality of the respondent’s decision to re-advertise the position of ACO FC following the decision of 28 October 2020.

48. In these circumstances, the appellant’s submissions for annulment and all the related submissions should be dismissed as unfounded in their entirety.

49. With respect to the appellant's submission for compensation, the Tribunal recalls that where the damage of which an appellant relies originates in the adoption of a decision which is the subject of a claim for annulment, the rejection of this claim for annulment entails, as a matter of principle, the rejection of the claim for compensation, the latter being closely linked to it. In the present case, the prejudice of which the appellant avails himself originates allegedly in the decision to re-advertise the position of ACO FC and the claims for annulment against this decision were all rejected. Consequently, the appellant’s claims for compensation should be also dismissed.

50. Finally, concerning the appellant's submission to order the respondent to produce the Selection Board's report and explain the reasons for the HONB's withdrawal of the decision to endorse it particularly with regard to the position of the appellant, the Tribunal considers that this submission must be rejected as inadmissible. Indeed, the Tribunal has no competence, without encroaching on the prerogatives of the administrative authority, to issue directions to the respondent by ordering it to take the measures requested.

51. It follows from the foregoing that the action must be dismissed in its entirety.

## E. Costs

52. Article 6.8.2 of Annex IX 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 [...].

53. 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 12 January 2022.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

31 January 2022 AT-J(2022)0002

**Judgment**

**Case No. 2021/1322**

**FP**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 19 January 2022

Original: English

*Keywords: disciplinary proceedings; manifest errors of assessment; investigation; rights of defence; duty of care.*

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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 A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 16 December 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 19 January 2021 and registered on 27 January 2021 as Case no. 2021/1322, by Mr FP, a B5 staff member, against the NATO Support and Procurement Agency (NSPA or Agency). The action seeks to annul the respondent's decision to dismiss the appellant with immediate effect.

2. The respondent's answer, dated 25 March 2021, was registered on 19 April 2021. The appellant's reply, dated 20 May 2021, was registered on 1 June 2021. The respondent's rejoinder, dated 28 June 2021, was registered on 23 July 2021.

3. The Panel held an oral hearing on 16 December 2021 at NATO Headquarters. It heard the appellant's statement and arguments by the appellant's representative and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant joined NSPA in 2016 as a Buyer in the Procurement Division. He occupied a definite duration position valid until 31 December 2022, with possible renewal.

5. In July 2019, an informal complaint was filed by a buyer deployed to Afghanistan against the appellant on the grounds that he had demanded a kickback in exchange for a contract with the Agency. The case was referred to the Senior Procurement Officer, who informed his manager. By email dated 10 July 2019, the Manager referred the matter to the Head of the Procurement Division, noting, however, that the allegations were not substantiated. It derives from the records that on 10 December 2019, the appellant also accessed a KAIA PP shared mailbox and sent the technical proposal of one bidder to a third party. The appellant stated that he had received verbal authorization to release this information to a third party.

6. Due to the seriousness of the allegations, the NSPA Human Resources Executive (HRE) tasked the NSPA Security Office (AS) with investigating the allegations regarding the appellant.

7. By e-mail dated 9 March 2020, the respondent informed the appellant that the Agency had received allegations that the appellant might have been involved in possible misconduct in violation of Articles 12 and/or 13 of the Civilian Personnel Regulation (CPR) and of the NATO Code of Conduct. In this respect, a disciplinary procedure was launched and further investigations were initiated. By the same email, the respondent also invited the appellant to an interview scheduled on 13 March 2020, informing him that the purpose of the interview was to hear his version of the alleged facts, provide new

information, and possibly identify witnesses. The interview took place on the proposed date and an investigation report was issued on 22 Avril 2020.

8. By letter dated 15 June 2020, the HRE informed the appellant of the investigation into his case. In this regard, and according to the respondent, there were four grievances with respect to the disciplinary proceedings. Firstly, the appellant's conduct was incompatible with his status as representative of the Agency within the meaning of Article 13.2 of the CPR. Secondly, the appellant disqualified a commercial firm or individual from doing business with the NSPA for non-objectively veritable and substantiated reasons in violation of paragraph 16.1 of the NSPA Operating Instruction 4200-01 (NSPA Procurement OI), of Articles 12.2.2 and 13.2 of the CPR and of the NATO Code of Conduct. Thirdly, by substantiated actions, the appellant compromised the integrity of the procurement process in violation of paragraphs 4.8, 16.1, 16.2.1, 16.2.2 of the NSPA Procurement OI, of paragraphs 8.1, 8.2, 8.3, 12.2, 12.3, 12.4, 12.5, 12.8, 13.1, 13.2 of the NSPA Operating Instruction 4400-11 (NSPA Ethics OI) of the Code of Conduct and of Articles 12.1.3, 12.2.2 and 13.2 of the CPR. Fourthly, the appellant disclosed proprietary or contract-related information, defined as proposal material, to an unauthorized party without the approval of the NSPA, in violation of several applicable rules. In particular, it concerned violation of paragraphs 4.8, 16.1, 16.2.1, 16.2.2 of the NSPA Procurement OI, of paragraphs 8.1, 8.2, 8.3, 12.2, 12.3, 12.4, 12.5, 12.8, 13.1, 13.2 of NSPA Ethics OI, of the NSPA annual non-disclosure agreement, of the NATO Code of Conduct and of Articles 12.1.3, 12.2.2. 12.2.3, 12.2.5a and 13.2 of the CPR. Considering that the appellant failed to fulfil his obligations in a frequent and prolonged manner and taking into account the fact that the alleged facts occurred under difficult conditions of deployment, the HRE proposed as a disciplinary sanction dismissal with reference to Article 59.3e of the CPR, invited the appellant to provide comments and communicated the investigation report to him.

9. By letter also dated 15 June 2020 (decision of 15 June 2020), and on the basis of the HRE proposal, the General Manager concluded that the four grievances and charges mentioned above against the appellant were *prima facie* well founded. Consequently, the appellant's continuance in office during the disciplinary proceedings could prejudice the Agency. Therefore, the respondent decided to suspend immediately the appellant from his functions without emoluments, pending the outcome of the disciplinary proceedings for an initial period of four weeks.

10. On 29 June 2020, the appellant provided his comments to the HRE letter dated 15 June 2020, challenging the statements of the four alleged charges against him. He provided additional comments on 10 July 2020.

11. On 10 July 2020, the appellant lodged a complaint against the decision of 15 June 2020 suspending him from his functions, alleging that this suspension was abusive and in violation of Article 60.2 of the CPR. By email dated 16 July 2020, the respondent informed the appellant that the decision of 15 June 2020 was lifted and consequently the complaint of 10 July 2020 should be considered moot.

12. By decision dated 28 July 2020, the respondent convened a Disciplinary Board (DB) and, by email of 17 August 2020, the Board Chair informed the appellant that the disciplinary action against him would be reviewed by this board and invited the appellant to indicate his availability for a hearing.

13. Before the appellant's hearing, the respondent provided, on 1 August 2020, documents to the appellant for comments. The latter commented on the content of the documents in question on 21 September 2020, expanding his position.

14. The appellant was heard by the DB on 1 October 2020 and given the opportunity to provide comments and evidence regarding the allegations. In addition, the DB requested comments from one witness, suggested by the appellant, regarding the alleged verbal authorization (see paragraph 5 *supra*) given to the appellant to disclose information to third parties. The DB heard five persons proposed by the appellant and three persons called by the DB. The appellant provided several comments on the draft minutes of this hearing.

15. The DB issued its recommendations on 21 October 2020; it found that two of the four charges against the appellant were supported by the evidence presented before this board and the hearing of witnesses. In particular, firstly, the appellant's conduct was incompatible with his status as representative of the Agency within the meaning of Article 13.2 of the CPR in relation to the purchase of specific equipment. The DB also concluded that the alleged facts constituted a breach of paragraph 16.1 of the NSPA Procurement OI. Secondly, the appellant disclosed proprietary information in the form of a proposal of a bidder to a third party without the approval of the NSPA, without providing any plausible rationale in violation of paragraphs 4.8, 16.1, 16.2.2 of the NSPA Procurement OI, of paragraphs 8.1, 8.2, 8.3, 12.2, 12.3, 12.4, 12.5, 12.8, 13.1, 13.2 of NSPA Ethics OI, of the NSPA annual non–disclosure agreement, of the NATO Code of Conduct and of Articles 12.1.3, 12.2.2, 12.2.3, 12.2.5a and 13.2 of the CPR. Thus, the DB supported the findings contained in the decision dated 15 June 2020 of the HRE and recommended dismissal as the most suitable disciplinary measure pursuant to Article 59.3 of the CPR.

16. By letter dated 9 November 2020, the General Manager of the Agency informed the appellant of the findings of the DB confirming the conclusions of the initial investigation and recommending the appellant's dismissal as the appropriate disciplinary action. The General Manager confirmed to the appellant his intention to adopt the disciplinary sanction of dismissal pursuant to Article 59.3 of the CPR. He therefore invited the appellant to submit oral and written comments according to Article 60.4 of the CPR. The appellant met the General Manager of the Agency on 17 November 2020 and submitted written comments on 18 November 2020.

17. By decision dated 20 November 2020, after examining the latest positions of the appellant, and having considered the whole file, the General Manager of the Agency considered that no mitigating circumstances could be retained to justify a different position from the one announced in his letter of 9 November 2020. Therefore, and in accordance with the DB's recommendations, the General Manager decided to dismiss the appellant on the basis of Article 59.3e of the CPR with immediate effect. This is the challenged decision.

18. By email dated 16 December 2020, the appellant requested the communication of the recommendations of the DB. They were sent by the respondent on 17 December 2020.

19. It is in these circumstances that the appellant has brought the present action before the Tribunal.

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

### *(i) The appellant's contentions*

20. The appellant raises four pleas against the challenged decision. The first alleges manifest errors of assessment in the allegations justifying the decision to dismiss him. The second plea alleges procedural irregularities in the adoption of the challenged decision in relation to Articles 5.2 and 5.3 of Annex X to the CPR. The third one is based on the violation of the appellant's rights of defence and of the procedural guarantees established by the CPR in the adoption of the challenged decision, in relation to Article 6.2 of Annex X to the CPR. The fourth is based on the respondent's breach of the duty of care towards the appellant and the violation of the principle of proportionality.

*On the manifest errors of assessment*

21. The appellant argues that the challenged decision is based on two different allegations to justify the disciplinary sanction: first, the purchasing of mountaineering equipment by a commercial company doing or seeking business with the Agency and, second, the disclosure of propriety information in the form of providing the proposal of a bidder to an unauthorized party. With regard to these two allegations, the appellant considers that the respondent committed a manifest error of assessment because none of the facts complained of lead to the conclusion that he acted in violation of his obligations under the CPR, the relevant rules of the NSPA OI, the NSPA annual non-disclosure agreement and the NATO Code of Conduct.

22. Firstly, regarding the alleged disclosure of proprietary information to an unauthorized party in the course of a procurement process, the appellant stresses that he did not communicate any information during the course of evaluation and consequently there is no violation of the NSPA Procurement OI and the NSPA annual non-disclosure agreement. The appellant, acting in good faith, shared a technical proposal to an individual in order to help local companies develop their skills. In addition, this action had no practical effect on the competition since the evaluation during the procurement process was over. When the appellant realized that sharing this technical proposal could lead to various questions, he reported it to his superiors.

23. Furthermore, he contacted Ms M., who was a Senior Contracting Officer of the Agency, in order to obtain guidance as to whether forwarding the proposal in question was acceptable. According the NSPA procurement OI, disclosure of information is possible with *"the prior written consent of the NSPA Contracting Officer"*. In this regard, the appellant pointed out that he had received prior verbal authorization from Ms M. to share the information in question. Ms M. also confirmed before the DB that she had given permission to the appellant. However, this statement was not taken into account by the DB, which therefore challenged the relevance of Ms M.'s position by making subjective assumptions without providing evidence. In addition, it was wrongly objected that Ms M. was not the NSPA Contracting Officer responsible, according to the relevant text, for

giving the authorization in question. For the appellant, this does not follow from the NSPA procurement OI and consequently the respondent made a manifest error of assessment when it considered that the appellant disclosed the alleged information without receiving authorization.

24. Secondly, concerning the purchasing of mountaineering equipment by a commercial company doing or seeking business with the Agency, the appellant argues that the respondent did not bring any concrete evidence about this grievance as required by the case law of the Tribunal. On the contrary, the challenged decision is based on a bundle of evidence, which in any event did not allow the conclusion of violation of Article 13.2 of the CPR and paragraph 16.1 of the NSPA procurement OI to be reached. In particular, the issue concerned the fact that the appellant allegedly purchased mountaineering equipment items on behalf of a company, that the appellant received for that purpose an email from the company in question, and that he transferred this email to his personal email account. According to the respondent during the investigations, the appellant did not give a plausible explanation about this purchase and his actions. The appellant considers that this conclusion is erroneous.

25. Indeed, the respondent did not take into account specifically that the company in question acknowledged that it was mistaken in sending this email and then stated that it has an exclusively professional relationship with the appellant. The respondent did not provide any evidence as to the alleged payment for all of the purchases in question and completely disregarded the fact that the appellant produced evidence that he made only certain purchases for private purposes and not for the company in question. In addition, the respondent did not at all take into account the statements of high-level staff members of the Agency attesting to the appellant's loyalty and professionalism. Consequently, the respondent also committed an error of assessment concerning this grievance.

*On the procedural irregularities*

26. By his second plea, the appellant claims that the investigation procedure carried out and initiated since the email of 9 March 2020 is vitiated by irregularities in violation of Articles 5.2 and 5.3 of Annex X to the CPR: the investigation report on which all the subsequent charges are based was not communicated to him until 15 June 2020, following the decision to temporarily suspend him from his duties, whereas this report was issued on 22 April 2020. By the 9 March 2020 email, the appellant was invited for an interview on 13 March 2020 as part of the investigations carried out in order to initiate disciplinary sanctions. The report having finally been communicated to the appellant in June 2020, a DB was convened in August 2020 and the recommendations of the DB issued in October 2020.

27. With this chain of proceedings, the respondent directly violated the provisions of the above-mentioned articles. Indeed, there is confusion as to when the investigations and disciplinary proceedings were actually initiated and when the appellant should have been invited for a hearing and to exercise his procedural rights in accordance with the provisions of the above-mentioned articles. It is more than obvious that if the appellant had had the investigation report at his disposal when he was invited to a hearing in March 2020, he could have adequately defended himself. In this case, he was precisely criticized, after the investigations were carried out, for remaining rather vague during the preliminary hearing, and his first statements were then used against him. The appellant

concludes that Articles 5.2 and 5.3 of Annex X to the CPR do not provide for the possibility of investigation of possible misconduct. Therefore, the opening of the disciplinary proceedings must coincide with the communication of the report to the staff member concerned, which was not the case in this instance.

*On the rights of defence and the procedural guaranties*

28. The appellant claims that his rights of defence were not safeguarded on several occasions during the investigations and therefore that the challenged decision should be annulled.

29. In the first place, the appellant has never had access to the complaint that gave rise to the investigations carried out in 2020, while the alleged complainants have clearly indicated that they have never lodged a complaint against him. This document is relevant in order to give the appellant the right to know the grievances against him and to exercise his rights of defence. In addition, and despite his requests, the appellant was never given any information as to how the respondent was able to obtain certain invoices from which it would appear that he had indeed made some of the disputed purchases, but only, and contrary to the respondent's conclusions, for personal purposes.

30. Secondly, the appellant never had access to the recommendations of the DB before meeting the General Manager of the Agency on 17 November 2020, but only one month later and therefore after the adoption of the challenged decision. This is a substantial infringement of his rights of defence because he never had the opportunity to know the elements on which the Agency based itself to adopt the challenged decision and to expose his point of view. In this regard, the appellant further argues that he was not aware of the content of the testimony of the witnesses before the DB and that the minutes of this testimony were not communicated to him with the recommendations of the DB.

31. Thirdly, the appellant observes that the DB Chair, after sending an email on 26 August 2020 to a company under the pretext of an ongoing audit, obtained the information regarding certain invoices paid by the appellant. The DB Chair did not mention to the company in question, which sold the equipment to the appellant, the ongoing investigation against him. This raises issues of personal data protection and violation of Articles 13.2 and 12.1.4 of the CPR. Furthermore, it is not clear on what basis the DB Chair acted in requesting this information by conducting investigations on his own initiative. Indeed, it is clear from Article 6.2 of Annex X to the CPR that the DB Chair did not have such investigative powers and that, therefore, the action taken was illegal.

32. Finally, the appellant claims that the disciplinary proceedings were conducted in violation of the principle of impartiality and good administration. He notes that the appellant's counsel assisted him during the disciplinary proceedings but was asked by the DB to sit aside during the interrogations, a fact that confirms the serious grounds for bias in the process and the violation of the rights of the defence. In the same connection, the minutes of the appellant's hearing were not corrected in accordance with the appellant's observations and several sentences were unamended and maintained in the minutes, changing the meaning of the conclusions reached to his detriment.

*On the duty of care and the principle of proportionality*

33. The appellant submits that the challenged decision was adopted in violation of the duty of care that the respondent should show towards him. Indeed, while it is amply demonstrated that the appellant is a committed and dedicated staff member, his case has been treated since the decision suspending him without any duty of care towards him. In addition, the respondent never took into account the fact that the state of health of the appellant was extremely fragile or his skills and devotion to the Agency. Thus, on two occasions, the respondent took with full knowledge of the facts decisions that had a direct and negative effect on his health condition. Indeed, in view of the first decision and of a procedure carried out against the appellant, the decision to dismiss him is an obvious violation of the duty of care towards a qualified and dedicated staff member and it is for this reason alone that it must be annulled. Finally, the appellant argues that the decision to impose the most important disciplinary sanction, namely dismissal, is, in this extremely specific context, disproportionate.

34. Appellant requests that the Tribunal:
- annul the respondent's decision dated 20 November 2020 dismissing the appellant pursuant to Article 59.3(e) of the CPR with immediate effect;
- order compensation for the damage suffered by the appellant;
- grant the appellant the benefit of the expedited procedure;
- reimburse all the legal costs incurred and fees of the retained legal counsels.

***(ii) The respondent's contentions***

*On the manifest errors of assessment*

35. The respondent contends that no errors of assessment were made in considering the facts on the basis of which it pronounced the disciplinary sanction of dismissal.

36. Firstly, with respect to the disclosure of proprietary information to an unauthorized party, the respondent considers first of all that the prohibition on disclosure of information relating to a procurement process is general in scope and applies to all staff members. It is therefore completely irrelevant when and with whom the document/information in question can or cannot be shared. Furthermore, the explanations and materials discussed before the DB did not support a finding that the appellant obtained the required prior written consent for such disclosure from the NSPA Contracting Officer. The statement of Ms M. before the DB was made for the first time at the end of the proceedings whereas, being a major issue, such an argument should be made right away in the investigation process. Ms M. does not actually confirm that she gave specific authorization in this sense but rather confirmed a discussion on the conditions of such a disclosure. Furthermore, the respondent disputes that such authorization took place at the time of the facts, as required by the regulations, because the requested authorization allegedly took place at a time when Ms M. was on leave.

37. In any event, Ms M. was not the NSPA Contracting Officer to give this authorization. Indeed, it is obvious that only the Contracting Officer in charge of the particular competition, and not any Contracting Officer, could deliver such authorization. Ms M. was not the Contracting Officer for the competition in question. In these

circumstances, by considering that the appellant had not obtained prior authorization for disclosure of the relevant information, the respondent did not commit an error of assessment that could vitiate the challenged decision.

38. Secondly, concerning the failure to demonstrate the purchasing of mountaineering equipment by a commercial company doing or seeking business with the Agency, the respondent stresses that the appellant was constantly changing his position. Initially, he claimed that he was surprised to receive the email about the purchase in question and that he forwarded it in a panic to his private email address and that in any case he did not make such purchases, only to recognize in the end that he bought this equipment in very small quantities. Furthermore, the appellant gave no convincing answer as to why he purchased the exact items requested by the local companies. In addition, he was compelled to admit that he had purchased certain equipment when his own purchase invoices for this item were sent to him for comment by the respondent. It is in this rather questionable context that he later clarified that he had indeed purchased the items in question for a member of his family.

39. On the basis of the foregoing, the DB unanimously concluded that the appellant made the purchases in question without giving any valid explanation during the investigation process and by providing implausible justifications as the process advanced. It is in these conditions – by confirming the unanimous recommendations of the DB – that the respondent considered that the facts were established without committing a manifest error of assessment. Therefore, the challenged decision is valid on this ground and the appellant’s plea must be rejected.

*On the procedural irregularities*

40. The respondent argues that, contrary to the appellant's assertions, a disciplinary proceeding can be initiated prior to the completion of the disciplinary report without violation of Articles 5.2 and 5.3 of Annex X to the CPR. Indeed, the CPR does not require that the disciplinary report be prepared on the day the proceedings are formally initiated. This is the case when serious allegations are made against a staff member, but further investigation is required to ascertain all relevant facts and to assess the extent of the alleged misconduct. In this regard, the CPR provide, for example, that a staff member may be suspended during the disciplinary process while charges are being investigated, i.e., prior to a disciplinary report being prepared and sent to the staff member concerned. In any event, it derives form Article 12.1 of the CPR that the administration has the authority to conduct at all times investigations related to alleged misconducts outside disciplinary proceedings and such practice has also been upheld by the case law of the Tribunal (Case no. 2017/1106). Therefore, the investigations conducted in March 2020 and the subsequent interview of the appellant were part of the investigation of the facts of potential misconduct and were lawful.

*On the rights of defence and the procedural guaranties*

41. The respondent argues, firstly, that, according to the Tribunal's case law (Case no. 2019/1286), non-communication of the disciplinary report does not constitute a violation of the CPR or of the applicant's right to be heard and to have access to his file. In any event, this report was provided to the appellant at his request.

42. Secondly, the respondent considers that the alleged complaint that prompted the investigations in March 2020 was not communicated to the appellant for the simple reason that, as it appears from the present proceedings, this complaint, which involved allegations of bribery and corruption, was never formalized by the complainant.

43. Thirdly, the respondent argues that the DB has the power to investigate if necessary and to obtain documents relevant to the resolution of the dispute, such as the invoice paid by the appellant. The absence of the word "investigation" in Article 6 of Annex X to the CPR does not mean that no investigation is possible by the DB. In its role, the DB is vested with the powers of investigation to bring the conviction that the alleged facts are established and justify the adoption of disciplinary sanctions. This interpretation is supported by the case law of the Tribunal (Case no. 2017/1105). In fact, after obtaining the invoices in question, the DB communicated them to the appellant for comment, who did not dispute their authenticity. Contrary to what was stated in his third plea, therefore, the appellant was entitled to exercise his rights of defence without the procedural guarantees provided for by the CPR being disregarded.

*On the duty of care and the principle of proportionality*

44. The respondent considers that this plea is completely unfounded. In this regard, it stresses that in disciplinary matters the reciprocal rights and obligations of the Organization and of its staff member are not in balance. In particular, and contrary to appellant's contentions, the duty of care does not prevent the Organization from sanctioning misconduct on the sole ground that the dismissal has adverse consequences for the staff member concerned. The respondent took into account the duty of care with respect to the appellant when handling the proceedings. As regards the breach of the principle of proportionality in relation to the adopted disciplinary sanction, the respondent considers that sanction is appropriate to the offence committed by the appellant and it would not have been possible to implement other disciplinary sanctions in the light of the irreparable breach of trust. In this context, and more generally, the ratings and performance evaluation given to the appellant are not relevant for reconsidering the sanction pronounced by the challenged decision.

45. In these circumstances, the respondent asks the Tribunal to dismiss the appeal on the merits.

## D. Considerations and conclusions

46. Since the admissibility of the present action is not disputed, the Tribunal will rule on the submissions for annulment made by the appellant in his appeal and will examine the pleas relied on to challenge the legality of the challenged decision.

*On the errors of assessment*

47. The Tribunal recalls that the legality of any disciplinary sanction requires that the veracity of the facts of which the person concerned is charged be established. Once the facts have been established, in view of the wide discretionary power enjoyed by the administration in disciplinary matters, judicial review must be limited to verifying the absence of a manifest error of assessment and misuse of power.

48. To this effect and with respect, firstly, to the allegation regarding the purchase of mountaineering equipment by a commercial company doing or seeking to do business with the Agency, the appellant considers that the facts are not established. In his view, the respondent was seeking in vain to establish the facts of the case solely on the basis of inferences and indications. It is in this context that the respondent concluded that the appellant had made the purchases in question.

49. The Tribunal recalls that under article 13.2 of the CPR:

> Members of the staff shall conduct themselves at all times in a manner compatible with their status as representatives of the Organization. They shall avoid any action or activity which may reflect adversely on their position or on the good repute of the Organization.

50. Paragraphs 16.2.1 and 16.2.2, first indent, of the NSPA procurement OI provide as a general rule that no NSPA staff member may solicit or accept, directly or indirectly any favour from anyone who was or is seeking to obtain NSPA business. In particular, no NSPA staff member shall ask for, accept or agree to receive directly or indirectly any money, gratuity, gift, favour, entertainment, loan or other thing or value from any officer, employee representative, agent or consultant. This includes services, conference fees, vendor promotional training, transportation, lodging and meals as well as discounts not available to the public.

51. The Tribunal notes that the respondent bases its allegation on the fact that the appellant received an offer for the purchase of the equipment by an email that was sent to him simultaneously with another email containing the offer of a commercial company doing or seeking to do business with the Agency. While claiming that this was an offer that was sent to him by error, the appellant later admitted that he had purchased some of these materials, but for personal reasons. Without it being necessary to establish whether the appellant did purchase all of the items that were featured in this email, and whether or not on behalf of the company in question, the Tribunal finds that this type of purchase alone constitutes a violation of the provisions mentioned above.

52. Therefore, in these circumstances, by stating in the challenged decision that the purchase of mountaineering equipment from a commercial company doing or seeking to do business with the Agency was established, the respondent did not commit an error of assessment vitiating the legality of the challenged decision.

53. Secondly, with regard to the allegations relating to the disclosure of confidential information in the form of a bidder's proposal to an unauthorized party, the appellant submits that the disclosure of the information in question complied with the requirements of the regulations. In any event, he argues, the respondent made also an error of assessment in considering that the appellant did not receive prior authorization to do so, as provided for by the applicable regulations.

54. Pursuant to Article 12.1.3 and 12.2.5 of the CPR:

> Members of the staff are bound to professional secrecy. They shall exercise the utmost discretion in all matters of official business and in giving information on matters in any way related to the aims and activities of the Organization.

55. Article 12.2.5 of the CPR provides that:

> [Members of the staff] shall not, except as authorized in the normal course of official duties or with the prior approval of the Head of the NATO body:
> (a) communicate to a third party classified information obtained during or by reason of the exercise of their official functions;…

56. Paragraph 16.2.2, third indent, of the NSPA procurement OI provides that no NSPA staff member shall disclose directly or indirectly any proprietary or contractor selection information regarding procurement to any person other than a person authorized by the Chief, Procurement Division or the Procurement Officer to revive such information. The NSPA annual non-disclosure agreement, annexed to the NSPA procurement OI indicates that staff members of the NSPA undertake not to use or to divulge or communicate either directly or indirectly to any third party any other information whether written or oral acquired during the course of the evaluation, except with the prior written consent of the NSPA Contracting Officer.

57. The appellant acknowledges having disclosed the concerned information. However, on the one hand, he states that, in any case, such disclosure had no practical impact on the ongoing competition, as the information disclosed was not made during the course of the evaluation, as required by the NSPA procurement OI, and the information as such concerned a company that was not technically compliant for the competition in question. The appellant's contention is mainly drawn from the NSPA annual non-disclosure agreement, which refers to information obtained during the course of the evaluation.

58. These arguments must be rejected. The Tribunal recalls that the NSPA procurement OI contained in this regard a general prohibition on non-disclosure of information. The reading of the above-mentioned provisions of the CPR and the NSPA procurement OI leaves no doubt to this effect. As for the reference related to information communicated during the course of the evaluation, contained in the NSPA annual non-disclosure agreement, the document annexed to the NSPA procurement OI and signed by the appellant makes it clear that any exception could only be made under the conditions provided. This agreement may not expand the general scope of the prohibition contained in the CPR and the NSPA procurement OI and interpreted in such a manner to provide an additional derogation.

59. On the other hand, the appellant acknowledges that he disclosed the information in question, albeit with the prior consent of the NSPA Contacting Officer as required by the regulations. Therefore, in view of the statements made by Ms M. during the investigations before the DB, the respondent could not conclude that the authorization was not valid without committing a manifest error of assessment vitiating the challenged decision.

60. The Tribunal recalls that according to the above-mentioned provisions of the CPR and the NSPA procurement OI, authorization for disclosure of information is required. In this regard, the NSPA annual non-disclosure agreement stipulates that such disclosure is subject to prior and written consent of the NSPA Contracting Officer.

61. Being an exception to the general prohibition of disclosure of information, the authorization in question must be interpreted narrowly and consequently must be in writing and prior to disclosure. In the present case, it is not disputed that there was no prior and written authorization for the appellant to disclose the information in question. On this point, the Tribunal emphasizes that this authorization must be in writing, because in this way it is possible to verify whether or not the authorization is prior to the disclosure of the information as required by the regulations.

62. In the absence of a written authorization, the appellant developed his position considering that he obtained a verbal authorization to this effect that is sufficient in this case. On the basis of this rationale, various questions were raised as to the content of the authorization and the time at which it was granted. The statements made in this respect by Ms M. during the investigations before the DB confirmed the fact that the trace of a written authorization was obviously missing. In addition, questions could have arisen as to the timing of this authorization and to other elements of the disclosure.

63. The Tribunal considers that, in the absence of any record of written evidence, prior to the disclosure of the information in question, the respondent did not commit a manifest error of assessment in considering that the disclosure of the information took place without the authorization required by the texts.

64. In these circumstances, this part of the present plea must also be rejected without it being necessary to rule on the other arguments developed in addition by the appellant, and, consequently, the first plea in its entirety.

*On the procedural irregularities and on the rights of defence*

65. In the second and third pleas, which must be examined together, the appellant complains that the respondent violated the procedure provided for in Articles 5.2 and 5.3 of Annex X to the CPR and that, as a result, he was unable to exercise his rights of defence on several occasions.

66. Firstly, the Tribunal observes regarding the investigations carried out since March 2020 and the hearing of the appellant to this effect that these were conducted by the administration with the aim of economy of the procedure in question in order to assess the relevance of the allegations made against a staff member and meet the requirements of good administration. It can therefore not be concluded that these were at variance with the procedure of Article 5.3 of Annex X to the CPR.

67. This being said, such investigations are valid if the staff member concerned is informed, and thus has the possibility to act if necessary when these investigations are likely to affect his rights of defence. This is precisely the case here: the appellant was formally informed of the existence of such allegations and was invited for a hearing to express his point of view.

68. To that end, and following an investigation report issued on 22 April 2020, the appellant was informed by letter dated 15 June 2020 of the results of the report in question and the grievances maintained by the respondent against him, and was invited to provide comments, which the appellant did on two occasions. Thus, on 28 July 2020, the respondent convened a DB under Article 5 to Annex X to the CPR and, by email of

17 August 2020, the appellant was invited by the DB to indicate his availability for a hearing.

69. In the context of the procedure thus followed, it cannot be objected to the respondent that the investigations carried out since March 2020 have been to the disadvantage of the appellant.

70. The Tribunal adds that, contrary to the appellant's contentions, the DB may continue its investigation if necessary, provided that the staff member concerned is invited to exercise his procedural rights if the administration intends to use the evidence obtained against him. This is also the case here. The appellant was asked to comment on the invoices paid by him and obtained by the respondent during the disciplinary proceedings, for the purchase of the mountaineering equipment.

71. Secondly, the Tribunal recalls in this respect that, with regard to the two claims against the appellant on which the challenged decision is based, the appellant was able to exercise his procedural rights at various stages of the proceedings by putting forward his points of view.

72. As for the argument that the appellant did not have access to the complaint accusing him of corruption, on the basis of which the investigations were initiated in March 2020, it should be noted that this claim was not retained in the challenged decision. Therefore, no claim of violation of his procedural rights and of his right to be heard in this respect can be upheld. Finally, concerning the allegations of partiality allegedly demonstrated by the respondent during the investigations, the Tribunal considers that the appellant has not put forward any plausible argument likely to substantiate such an allegation.

73. It follows from the foregoing that the second and third pleas must be rejected as unfounded.

*On the duty of care and the principle of proportionality*

74. It is to be recalled that the duty of care reflects the balance of reciprocal rights and obligations that the CPR has created in the relationship between the administration and the staff member concerned.

75. However, in this respect, the Tribunal considers that the protection of the rights and interests of a staff member must always find its limit in the respect of the applicable rules. Thus, the requirements of the duty of care cannot be interpreted as preventing the administration from initiating and conducting disciplinary proceedings against a staff member. Indeed, such a decision is taken in the interest of the administration with the aim that possible failures by a staff member to fulfil his obligations be identified and, as the case may be, sanctioned. In this context, the considerations invoked by the appellant in the present case to annul the challenged decision with regard to the duty to have regard for the welfare of staff members must be set aside.

76. With regard to the violation of the principle of proportionality, in response to a question from the Tribunal at the hearing regarding the proportionality of the sanction pronounced in relation to the alleged facts, the appellant reiterated that, on the whole,

the principle of proportionality had been violated in this case by applying the most severe sanction without taking into account the appellant's very fragile medical situation. In any event, the Tribunal concludes that, given the seriousness of the facts complained of, no lesser severe sanction could be pronounced.

77. It follows that the fourth plea and the submissions for annulment as a whole should be rejected.

78. The submissions for annulment having been rejected, the other submissions made by the appellant in his appeal should be rejected as being closely related to them, and the appeal should therefore be dismissed as a whole.

## E. Costs

79. Article 6.8.2 of Annex IX 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 [...].

80. As the appellant’s submissions have been dismissed, he is not entitled to reimbursement of costs.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 19 January 2022.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

31 January 2022 AT-J(2022)0003

**Judgment**

**Case No. 2021/1326**

**JB**

**Appellant**

***v.***

**NATO International Staff**

**Respondent**

Brussels, 20 January 2022

Original: English

*Keywords: suspension from duties; Complaints Committee; duty of care.*

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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 A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 17 December 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 16 February 2021 and registered on 23 February 2021 as Case No. 2021/1326, by Mr JB against the NATO International Staff (IS). The appellant requests the annulment of the decision dated 1 July 2020 to suspend him immediately from his functions.

2. The respondent's answer, dated 26 April 2021, was registered on 7 May 2021. The appellant's reply, dated 7 June 2021, was registered on 9 July 2021. The respondent's rejoinder, dated 9 July 2021, was registered on 15 July 2021.

3. The Tribunal's Panel held an oral hearing on 17 December 2021 at NATO Headquarters. It heard the arguments by the representative of the appellant, who was accompanied by the appellant, and the arguments by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

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

5. The appellant started working with the NATO IS Office of the Financial Controller in 2015. From 2019 until 30 September 2020 he was Head of the Finance, Accounting and Control Service at A4 grade. On 30 July 2020, following a successful recruitment process, the appellant received a firm job offer from Joint Force Command (JFC) Brunssum. On 4 August 2020, he submitted his resignation from the IS and on 1 October 2020 started his employment as Director of Finance and Financial Controller at JFC Brunssum at A5 grade.

6. On 1 July 2020, the appellant received a letter from the Deputy Assistant Secretary General for Human Resources (DASG HR) suspending him from his duties in the following terms:

> I have recently received a memo from the Financial Controller alleging serious misconduct by you in relation to the discovery, handling and correction of certain accounting discrepancies with respect to the 2019 NATO IS Financial Statements which put into doubt the reliability and integrity of the accounting and reporting operations in which you were involved as well as with regard to your behaviour towards your colleagues.
>
> I have to inform you that, in view of the seriousness of the allegations, and in application of Article 60.2 of the Civilian Personnel Regulations (CPRs) the Secretary General has decided to suspend you from your functions pending the outcome of an investigation and potential disciplinary proceedings, as he considers that your continuing presence during

> this time might prejudice the Organization. During the period of your suspension you will continue to be paid your emoluments in full.
>
> With respect to the investigation, it has been decided to task an independent external investigator to look into the matter. Once the necessary arrangements have been made you will be immediately informed. […]

7. On 13 and 15 July 2020, the appellant requested to be allowed to access his files, in particular the memo from the Financial Controller (FC) alleging his serious misconduct, and to the NATO compound in order to exercise his rights of defence.

8. On 17 July 2020, the acting DASG HR replied to the appellant:

> As soon as the investigator has been engaged, Mr B will be informed and will receive a copy of the allegations made against him by the Financial Controller in order to prepare any comments that he will be able to share with the investigator in due course. In order to prepare his comments, Mr B will be allowed access, with the support of the investigator, his correspondence and the files that are otherwise relevant to the investigation. Due to Mr B's suspension from duties, the manner in which Mr B will be able to access his files on site at the Headquarters will be clearly communicated to him.

9. On 31 July 2020, the appellant submitted a request for administrative review against the decision to suspend him.

10. On 6 August 2020, DASG HR wrote a letter to the appellant providing a "Summary of Allegations in Memo from Financial Controller to DASG HR dated 22 June 2020" enclosing copies of the supporting documentation referred to. The letter also informed the appellant that company X had been engaged to carry out an independent external investigation into the allegations and that "[…] with the support of the investigator, you will be allowed to access your correspondence and files that are otherwise relevant to the investigation."

11. On 10 August 2020, the acting Assistant Secretary General for Executive Management rejected the appellant's request for administrative review.

12. On 8 September 2020, the appellant submitted a complaint against the 10 August 2020 decision requesting that his complaint be submitted to a Complaints Committee.

13. On 27 November 2020, the Complaints Committee rendered its report. On 4 December 2020, the appellant provided his comments.

14. The Complaints Committee found that the suspension decision was in accordance with Article 60.2 of the CPR. This discretionary decision had been taken based on the available facts in the memorandum of the Financial Controller and a *prima facie* assessment pending further investigation. The Committee further recognized the need for NATO to preserve its ability to act to avoid any kind of prejudice to the Organization. The suspension decision is a preliminary, protective measure. The procedures inherent to disciplinary proceedings therefore do not apply in this context. The Committee emphasized, however, that, given the gravity of such a decision and its potentially far-reaching consequences, a suspension should be considered a last resort after having carefully considered other options.

15. The Committee emphasized that the complainant's rights needed to be carefully considered and preserved. It was the Committee's view that the implementation of the decision should have been accompanied by a set of tailored "duty of care" measures taking into account the possible short-, medium- and long-term implications for the complainant, including possible negative consequences on his mental health and professional reputation. The Committee concluded that, although the communication regarding the application and execution of Article 60.2 was appropriately carried out, the information that was provided to the complainant was insufficient to meet the minimum standard of the Organization's duty of care. It unnecessarily left the complainant with uncertainty and many questions unanswered about the rationale for the suspension, the next steps in the process and the impact on his professional situation. The letter provided to the complainant did not sufficiently indicate that it was considered a non-disciplinary and precautionary measure. The Committee made recommendations for improvement.

16. On 18 December 2020, the Deputy Secretary General rejected the appellant's complaint. He concluded that the rules had been correctly applied in this case. Regarding the recommendations for improvement, he informed the appellant that he had asked the Executive Management Division to consider how these could be taken into account in the administration of such cases in the future.

17. On 29 January 2021, the acting DASG HR informed the appellant of the outcome of the investigation by company X stating *inter alia*:

> […] In considering whether to initiate disciplinary proceedings I am mindful that, although the failings mentioned in the report would normally warrant such proceedings, the possibility for prescribing an appropriate level of disciplinary action is limited by the fact that you are no longer a member of the International Staff. In the circumstances I have decided not to initiate such proceedings and I consider the matter closed.

18. On 16 February 2021, the appellant submitted the present appeal.

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

### *(i) The appellant's contentions*

19. The appellant duly followed the pre-litigation procedure and considers his appeal to be admissible. The appellant holds that notwithstanding the fact that he ceased to be an IS member and that no disciplinary proceedings were initiated against him, the 1 July 2020 decision suspending him from his functions adversely affected his interests.

20. The appellant states that, regardless of whether his emoluments were fully paid, the decision left him for many months in a state of uncertainty without any visibility on his future, he suffered psychologically, his reputation had been affected and he was forbidden not only to work but also to use the NATO facilities on site.

21. The appellant considers that the 1 July 2020 decision cannot be repealed implicitly by the fact that he ceased to be employed by the IS, rather its reputational and psychological effects have not ceased as the decision remains in the legal order.

22. The appellant further adds that the 29 January 2021 letter deciding not to apply

disciplinary sanctions did not change the effect that the suspension had on him. On the contrary, by not stating clearly that he had been cleared of all the charges, it perpetuated the prejudice and the damage to his reputation, it permanently stigmatized him in front of the entire NATO financial establishment and it also weakened his stance in Brunssum.

23. Concerning the legal basis on which a staff member can be suspended, the appellant refers to the cumulative conditions of Article 60.2 of the CPR and alleges that such conditions were not met.

24. The appellant affirms that when the suspension decision was taken, the respondent was not in possession of any document that could constitute a charge of serious misconduct against him. The appellant points out that the decision to open an inquiry was taken at the same time as the suspension from duties and that the complaint made by the FC, on the basis of which he had been suspended, represented an accusation raised by one staff member against another, which had simply been endorsed without any assessment by the Organization.

25. The appellant also points out the delays in opening the investigation – Company X was hired one month after he had been suspended from duties – and the gap between the substance of the allegations and the absence of sense of urgency.

26. The appellant stresses that there was no charge or element in the file that could have qualified the alleged misconduct as being a serious misconduct. He notes that at the time of the suspension he was not in possession of the complaint made by the FC and that the allegations in the 6 August 2020 letter only referred to mistakes occurred in the budget execution, but surely did not report any misconduct, let alone forgery of accounting books, use of falsified documents or evidence of fraud, misappropriation of assets, or violation of a NATO regulation.

27. The appellant holds that the respondent did not give any sound reasons to support the extraordinary measure of his suspension nor explained why his continued presence in the office might have prejudiced the Organization. The appellant believes that if a precautionary measure had to be taken, there were other options than to suspend him from his duties, tailoring the measure to his particular case. The appellant deems that by doing so, the respondent breached the principle of proportionality.

28. The appellant also points out that the report of Company X concluded that he was free of charge regarding the allegations of serious misconduct, lack of integrity, general incompetence, forgery of accounting books, falsifying documents, and inappropriate behaviour, therefore rendering the challenged decisions tainted with manifest error of assessment.

29. For these reasons, the appellant considers that the IS's decision to suspend him was premature, that it followed an irregular procedure, and that the facts can only lead to the conclusion that the suspension was not a precautionary measure but a goal in itself.

30. Furthermore, the appellant alleges lack of motivation, violation of the duty to state reasons and violation of the rights of defense. The appellant refers to the initial suspension decision exposing the accusations in a succinct, insufficient manner and

advances that he was not put in a position to irrefutably and clearly identify the reasons for the suspension. He also refers to the 6 August 2020 letter and stresses that the information was late – he received it after the deadline to submit his request for administrative review – as well as incomplete since it was not supported by a copy of the FC memo that started the process.

31. The appellant also alleges violation of the right to be heard. He points out that he never had any type of communication, oral or written, with the FC asking him to clarify or explain any of the issues he had been accused of. He continues by saying that, had he been heard, he could at that time have raised the observations rather than submitting them in his administrative review request and subsequent complaint. The appellant recognizes that the AT does not consider that a staff member must be heard before a decision of suspension is taken. However, referring to EU civil service law, he stresses the importance for a staff member to be put in a position to provide his/her comments/position/documents before a decision adversely affecting him/her is taken.

32. In addition, the appellant alleges violation of the duty of care. He emphasizes that he has always been a committed and dedicated staff member in his 16 years of career with NATO, a renowned and respected member within the NATO financial community, and has been awarded for distinguished service on several occasions. He highlights that his performance management has always been very positive and none of his evaluations indicated any shortcomings or challenged his integrity.

33. The appellant emphasizes that he suffered psychologically and physically from the contested decision, and in particular the length of time (seven months) it took to solve the case and the Organization's ambiguous letter of 29 January 2021 not fully clearing him from all the accusations, only accentuating even further the prejudice and damage to his reputation.

34. The appellant states that reinstatement is not possible since in the meanwhile he had been recruited by JCF Brunssum and requests a letter by the respondent explicitly mentioning that his suspension was irregular, that no wrongdoings were proven and that he was acquitted of all charges. He considers the letter instrumental for his moral and reputational rehabilitation and a "reparation in kind" within the competence of the Tribunal.

35. The appellant also requests to be awarded a financial compensation evaluated *ex aequo et bono* to the amount of € 10,000 in reparation of his moral and reputational prejudice.

36. The appellant requests that the Tribunal:
- annul the 1 July 2020 decision suspending him pursuant to Article 60.2 of the CPR;
- annul the decision dated 10 August 2020 rejecting the administrative review of 31 July 2020;
- annul the decision dated 18 December 2020 rejecting the complaint of 8 September 2020;
- order reparation of moral and reputational prejudice, by the payment of damages evaluated *ex aequo et bono* to € 10,000;
- order the issuance of a letter stating that the suspension was irregular; and

- order the reimbursement of legal costs and fees for legal counsels.

***(ii) The respondent's contentions***

37. The respondent contends that the appeal is inadmissible. It advances that the appellant fails to identify a reviewable decision and that the 1 July 2020 decision to suspend him from his functions no longer individually and adversely affects his situation in accordance with Article 61.1 of the CPR and Article 2.1 of Annex IX to the CPR.

38. The respondent recalls that since 1 October 2020, the date on which the appellant took up duties with JFC Brunssum, the contested decision was implicitly repealed since a measure of suspension can only apply to serving IS staff members. The respondent considers that the appellant has no longer an interest in seeking the annulment of the decision, since it no longer engenders any effect. As a consequence, there is no longer a decision to be rescinded or modified, rendering the appeal devoid of purpose.

39. The respondent considers that the appellant did not suffer any material or moral damages. It recalls that the appellant continued to have his emoluments paid in full, that the reputational prejudice is not demonstrated and that the suspension did not prevent him to be appointed to the A5 grade in JFC Brunssum – an appointment which required the approval of the Budget Committee that was obtained after the decision of suspension.

40. The respondent also rejects any other related prejudice and observes that the NATO facilities were closed due to the public health crisis, that similar facilities are widely available outside the HQ premises and that he did not suffer any restrictions, including being able to travel to his home country over the summer as long as he remained available during the investigation.

41. Furthermore, the respondent rejects any claim related to the 29 January 2021 letter, noting that the decision it contained was not timely disputed by the appellant. It is now time-barred.

42. On the merits, the respondent considers the appeal unfounded in its entirety, contending that the decision to suspend the appellant was taken in conformity with the CPR as well as with general principles of law.

43. The respondent affirms that the cumulative conditions set under Article 60.2 of the CPR were fulfilled, namely: 1) a charge of serious misconduct was made; 2) the charge was *prima facie* well-founded; and 3) the staff member’s continuance in the office during the investigation of the charge might prejudice the Organization.

44. Concerning the charges of serious misconduct, the respondent refers to the 22 June 2020 memo it received from the Financial Controller alleging serious misconduct in relation to the discovery, handling and correction of certain accounting discrepancies with respect to the 2019 IS Financial Statements, and also with regard to the appellant’s behaviour vis-à-vis colleagues.

45. The respondent advances that the allegations potentially concerned grave violations of the NATO Financial Rules and Regulations, the CPR as well as the NATO Code of Conduct, and could have had serious implications for the Secretary General. It

can therefore not be claimed that there was no charge of serious misconduct. Further, considering the behaviour vis-à-vis colleagues, the respondent affirms that any contravention of the obligation stemming from Article 12.1.4 of the CPR is taken very seriously by the Organization.

46. Concerning the second condition defined by Article 60.2 of the CPR, the respondent observes that the condition is not that the charges are eventually well founded but that they are only *prima facie* well founded, i.e. at a first glance.

47. The respondent states that the *prima facie* assessment conducted by the Organization consisted in an initial and limited review of the elements made available, taking into consideration the circumstances of the case, the seriousness of the allegations, the nature/substantiation of the evidence, the context in which those allegations were made and the individuals concerned. It maintains that the Secretary General considered that the charges were *prima facie* well founded in view of the above elements, the involvement of the FC and the position of the appellant.

48. The respondent further highlights that the outcome of the thorough investigation that followed the suspension is not *per se* relevant to retrospectively assess whether the charges were *prima facie* well founded or not. Moreover, the respondent stresses that the investigation identified a number of shortcomings and aspects of unacceptable behaviour that would have warranted disciplinary action if the appellant had still been an IS staff member.

49. Concerning the third condition, the respondent considers that in view of the seriousness of the allegations, of the nature of the post held requiring absolute integrity, and of the charges of misbehaviour towards colleagues, the appellant's continued presence in office entailed both a reputational financial risk and a requirement to ensure the protection of those who might have been adversely affected by his behaviour.

50. The respondent therefore concludes that all three conditions were met and that the decision to suspend the appellant was fully within the discretion of the Secretary General, that no abuse of discretion was committed and that the measure was proportionate to the alleged facts and circumstances.

51. The respondent rejects the claim of lack of substantiation, and notes that the decision makes clear reference to the allegations made by the FC as well as the context of such allegations. It states that the 6 August 2020 document shows that the appellant and the FC had the opportunity to discuss her findings and/or disagreement before she wrote to the DASG HR on 22 June 2020. The respondent makes reference to previous case law of this Tribunal where it is stated that "[I]t is sufficient that the staff member can irrefutably and clearly identify the reasons of the decision" and considers that this was the case for the appellant.

52. Concerning the breach of the rights of defence and of the right to be heard, the respondent notes that a suspension decision is based on Article 60.2 of the CPR and is not a disciplinary measure. A prior hearing is therefore not required and the decision is not subject to completing adversarial proceedings. It also remarks that the appellant, in the context of the investigation and of the pre-litigation procedure, was given the

opportunity to express his views on the allegations made against him, both orally and in writing.

53. The respondent rejects the alleged violation of the duty of care, asserting that there is no factual or legal basis to support it. It advances that it acted with due diligence, that the suspension was proportionate to the alleged facts and that the appellant was not deprived of his emoluments during the suspension period. It recalls that he was allowed to access his office and the IT equipment in the context of the investigation and that the IS also facilitated his transfer to his new position, forfeiting the 90 days notice period, agreeing on an earlier separation date and authorising him to collect his personal belongings in the office in view of his resignation from the IS.

54. Lastly, the respondent stresses that the prejudice cause by the length of the investigation is not only unsubstantiated but it is irrelevant for assessing the lawfulness of the measure of suspension.

55. Lastly, the respondent rejects any request for indemnities, it being unrealistic and not taking into account that there was no loss of remuneration. It also requests that the request to issue a letter of apology be dismissed, as this is not within the remit of the Tribunal.

56. The respondent requests the Tribunal to declare the appeal inadmissible and, if not declared inadmissible, to dismiss it as being without merits in all aspects.

## D. Considerations and conclusions

*Admissibility*

57. The respondent contends that the appeal is inadmissible. It submits that the suspension decision ceased to exist when the appellant transferred to another Agency. Moreover, the fact that he was subsequently retained for another post, with a promotion, indicates that he was not adversely affected by the suspension decision. The appellant, on the other hand, holds that the fact that he ceased to be an IS staff member and that no disciplinary proceedings were initiated against him, did not alter the fact that the 1 July 2020 decision suspending him from his functions adversely affected his interests.

58. The Tribunal recalls that it held in Case No. 2016/1073 that a decision to suspend is a decision that causes grievance against which an appeal can be lodged. The question before the Tribunal is whether the 1 July 2020 suspension decision was regular and lawful or not, and whether the appellant at that time was adversely affected by it and suffered damages or not. These are legal questions that the Tribunal is competent to answer.

59. As a consequence, the plea of inadmissibility is rejected.

60. On the other hand, it is reiterated that the appellant lodged an appeal against the decision to suspend him from his duties as well as against the decision to reject his complaint in this respect. In his reply, he additionally requests the Tribunal to order the issuance of a staff notice stating that the suspension was irregular and that, following an

investigation, the appellant has been cleared of all charges. The Tribunal, first of all, notes that this matter was not part of the original appeal and not the subject of pre-litigation. Secondly, it recalls that it has no competence, without encroaching on the prerogatives of the administrative authority, to issue directions to the respondent by ordering it to take the measures requested. This submission must be rejected as inadmissible.

61. The Tribunal concludes that the appeal is admissible only in so far as it concerns the decision to suspend the appellant from his duties pending an investigation and possible disciplinary proceedings.

*Merits*

62. The Tribunal recalls at the outset, as the Complaints Committee did too, that the impugned decision is a discretionary decision. It repeats its constant jurisprudence that a discretionary decision is subject to only limited review by the Tribunal. The Tribunal can only interfere with a decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was abuse of authority. It has also constantly held that it will not substitute its own view for the Organization's assessment in such cases.

63. As the Tribunal held in paragraph 50 of Cases Nos. 2014/1034 and 1042:

> 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.

64. The Complaints Committee in the present case concluded that the suspension decision was regular and in accordance with Article 60.2 of the CPR. It held that the discretionary decision was taken based on the available facts in the memorandum of the Financial Controller and a *prima facie* assessment pending further investigation. The Committee further recognized the need for NATO to preserve its ability to act to avoid any kind of prejudice to the Organization. The Tribunal will below explain why it does not share these conclusions, but before doing so it deems important to note that the Committee made additional observations.

65. The Committee, first of all, emphasized that, given the gravity of a suspension decision and its potentially far-reaching consequences, a suspension should be considered a last resort after having carefully considered other options. It thus seriously questioned the advisability of the suspension. Secondly, it emphasized that the complainant's rights needed to be carefully considered and preserved. It was the Committee's view that the implementation of the decision should have been

accompanied by a set of tailored ”duty of care” measures taking into account the possible short-, medium- and long-term implications for the complainant, including possible negative consequences on his mental health and professional reputation. The Committee concluded that, although the communication regarding the application and execution of Article 60.2 was appropriately carried out, the information that was provided to the complainant was insufficient to meet the minimum standard of the Organization’s duty of care. It unnecessarily left the complainant with uncertainty and many questions unanswered about the rationale for the suspension, the next steps in the process and the impact on his professional situation. The letter provided to the complainant did not sufficiently indicate that it was considered a non-disciplinary and precautionary measure.

66. The respondent did not address these issues in the impugned decision. It limited itself to observing that any improvements in the procedure would apply to future cases.

67. This Tribunal and other tribunals have constantly held that where a decision-making authority intends to disregard the conclusions and recommendations of an advisory body it has itself created, it must state clearly in its decision the objective grounds that led it to opt for a divergent conclusion. (Cf. Case No. 2017/1104, paragraph 41, and Joined Cases Nos. 2019/1284, 2019/1285 and 2019/1291, paragraph 135).

68. By ignoring the conclusions and recommendations referred to in paragraph 65 *supra* without any motivation the respondent has failed in its obligations. The giving of reasons is a fundamental requirement for good administration as well as for the good administration of justice.

69. Article 60 of the CPR (“Disciplinary powers and procedures”) provides as follows:

> 60.1 Disciplinary action is taken under the authority of the Heads of NATO bodies in accordance with the procedures to be prescribed by them (Annex X).
>
> 60.2 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.
>
> 60.3 No disciplinary action may be taken until staff members or former staff members have been informed of the allegations against them.
>
> …

70. Both Article 60 and Annex X to the CPR make it clear that disciplinary action is taken under the authority of the Heads of NATO Bodies (HONB) and the same applies to decisions to suspend a staff member. A charge of serious misconduct must therefore be made by the HONB concerned. It cannot be brought by another staff member, whatever his or her status. Staff members can be officers reporting alleged misconduct, but they are not prosecutors.

71. As the Tribunal held in paragraph 33 of Case No. 2016/1073:

> As Article 60.2 of the CPR provides, a staff member may not be suspended until a charge of serious misconduct has been made against him. This charge of serious misconduct must be substantiated in a document drafted by the Administration and brought to the attention of the staff member concerned before or at the same time as the decision on suspension, and must indicate what charges against him justify the order to bar him from the service.

(Cf. also Case No. 2019/1289).

72. The 1 July 2020 letter in which the Human Resources Deputy Assistant informed the appellant of his suspension provided as follows:

> I have recently received a memo from the Financial Controller alleging serious misconduct by you in relation to the discovery, handling and correction of certain accounting discrepancies with respect to the 2019 NATO IS Financial Statements which put into doubt the reliability and integrity of the accounting and reporting operations in which you were involved as well as with regard to your behavior towards your colleagues…

73. The appellant was also informed that an external investigator would be appointed.

74. On 17 July 2020, the appellant was advised that he would, as soon as the investigator had been engaged, receive a copy of the allegations made against him by the Financial Controller in order to prepare any comments that he might wish to share with the investigator. Again, this letter shows that there was not a charge from the Administration, but only a memo with allegations made by a fellow staff member. Secondly, the respondent does not explain why a copy of this memo can only be handed once an external investigator is engaged. A mere reference to a document without providing a copy thereof is not sufficient information.

75. The 1 July 2020 letter was unnecessarily succinct and, as also the Complaints Committee observed, the information that was provided to the complainant was insufficient to meet the minimum standard of the Organization's duty of care. It unnecessarily left the complainant with uncertainty and many questions unanswered about the rationale for the suspension, the next steps in the process and the impact on his professional situation.

76. Moreover, the decision does not properly motivate why the appellant's continued presence in the office would hamper the investigation or otherwise be prejudicial to the Organization. Suspension is a very serious decision and should be a decision of last resort. The main reasons for a suspension are the risks that a staff member may temper with evidence or influence witnesses, although the latter he could also do so from outside the office. The risk that the appellant would, or even could, temper with accounts that were already settled was, however, minimal and does not outweigh the adverse effect that the suspension had on him.

77. The Tribunal concludes that the suspension decision was not only irregular but also disproportionate and must be annulled.

78. Lastly, the respondent argues that no harm was done, since the impugned decision had ceased to exist and the appellant had been appointed to another post. The Tribunal disagrees. It is true that the suspension ceased to exist, but this was not by a decision of the Administration but following the appellant's resignation. More importantly, the appellant was at a particular moment in time, i.e. during the month of July 2020, as from the date of the suspension until the date of his resignation, unduly put in a position of uncertainty and anxiety and was exposed to his colleagues as a (potential) perpetrator of serious misconduct.

79. The appellant has thus suffered non-material damages, for which he must be compensated. The Tribunal considers an amount of € 5,000 appropriate in this respect.

## E. Costs

80. 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 [...].

81. The appeal being successful, appellant is entitled to reimbursement of justified expenses incurred.

## F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 1 July 2020 suspending the appellant from duties is annulled;
- The appellant shall be compensated with an amount of € 5,000 for non-material damages;
- The respondent shall reimburse the appellant's justified expenses and the costs of retaining counsel up to a maximum of € 4,000.

Done in Brussels, on 20 January 2022.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

31 January 2022 AT-J(2022)0004

**Judgment**

**Case No. 2020/1308**

**TF**

**Appellant**

***v.***

**NATO International Staff**

**Respondent**

Brussels, 20 January 2022

Original: French

*Keywords: disciplinary proceedings – disciplinary action – a) disproportionate disciplinary action – b) relief – administration's refusal to reinstate illegally dismissed staff member – payment of damages – compensation set at 24 months' final salary.*

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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 Laurent Touvet and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 17 December 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr TF, registered on 11 August 2020 as Case No. 2020/1308, seeking:
- annulment of the NATO Secretary General's decision of 8 June 2020 to dismiss him;
- communication of the Disciplinary Board's report and of the outcome of the investigations conducted;
- removal from the appellant's file of all documents concerning the dispute;
- compensation for material damage equal to five years' salary plus contributions to the pension scheme and health insurance;
- payment of the costs incurred by the appellant for his defence.

2. The respondent's answer, dated 29 October 2020, was registered on 9 November 2020. The appellant's reply, dated 7 January 2021, was registered on 19 January 2021. The respondent's rejoinder, dated 18 February 2021, was registered on 22 February 2021.

3. An oral hearing was held on 17 December 2021 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant joined NATO's Interpretation Service in 1997. He was awarded an indefinite duration contract in 1998 and became the Head of Interpretation and Conference Services in 2011. He was still in that position at the time of the alleged acts.

5. On 25 November 2019, whilst leaving an informal meeting between colleagues, he came across a female member of the NATO Parliamentary Assembly in a dark corridor. He kissed her on the cheek, put his arm around her waist and whispered in her ear, taking her by surprise.

6. The next day, that staff member, Ms G., lodged a complaint with the Secretary General, who decided to take disciplinary action against the appellant.

7. On 29 January 2020, the appellant was suspended, and the respondent notified him of the allegations against him. The appellant commented on those allegations on 3 March 2020.

8. A Disciplinary Board was convened on 19 March 2020 and heard the appellant on 28 April. On 7 May 2020, the appellant was invited to provide his comments, which he did on 22 May. The appellant asked to be sent the recommendations of the Disciplinary

Board, then provided his comments on 22 May, without having received that document.

9. The impugned decision was taken on 8 June 2020, when the NATO Secretary General terminated the appellant's contract with immediate effect. His 180-day notice period was paid to him, and there was no reduction in his pension rights.

10. The appellant lodged an appeal with the Administrative Tribunal on 8 August 2020.

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

### *(i) The appellant's contentions*

11. The appellant sets out six pleas.

12. Firstly, he alleges that the decision is tainted by an error of fact insofar as the allegations have not been established, since the administration has not provided sufficiently convincing proof. In particular, the accusations are based only on the testimony of the complainant and of the two people she talked to about the situation. The appellant denies speaking and acting in the way he is accused of in the disciplinary proceedings. The kiss could not have come as a surprise to the complainant, as it was something they had been doing frequently for the past 14 years and had done that same day at the start of the small ceremony. In addition, the complainant could not remember what the appellant had said exactly. Lastly, there were no eyewitnesses to what happened on 25 November 2019.

13. In the appellant's view, since the facts were not established with certainty, no action could be taken against him. According to the case law of the International Labour Organization Administrative Tribunal and the NATO Tribunal, it is not enough for facts to be presumed – they need to be established with a sufficient degree of certainty, and it is up to the administration to establish them.

14. The appellant also contests the past events on which the decision is based. He disputes the materiality of the 2016–2018 events. He alleges that this was a fabricated case, a plot to thwart his plans to reorganize the service. He acknowledges that he was subject to disciplinary action, without his having been informed of the reasons or allegations leading to it: an oral reprimand on 21 March 2018 and a written censure on 29 June 2018. He rejects any accusation of sexual wrongdoing, arguing that sexual harassment would have resulted in much more serious disciplinary action. He did not contest the disciplinary action as his manager had pressured him not to. He also criticizes the 2018 procedure, saying it was all pieced together by easily influenced staff members who went on to retract their stories, and that it was biased insofar as the administration refused to take account of counter-testimonies.

15. Secondly, the appellant asserts that the decision is tainted with an error of legal characterization. A kiss on the cheek cannot be considered as harassment or discourteous behaviour. This is something that is customary in Belgium and at NATO,

including for its leaders. The complainant never indicated she did not want a kiss on the cheek – she had accepted one a few hours earlier; she overreacted, influenced by the "me too" movement and rumours about the appellant's management style.

16. The appellant adds that the support of 35 members of his service shows that the administration is wrong in saying that he "always" acts disrespectfully. Similarly, the administration had already attempted to initiate procedures for harassment in the past, but then had to reverse course and recategorize those acts as "discourteous behaviour", which goes to show that no harassment took place.

17. Thirdly, the appellant claims that the disciplinary proceedings were not conducted properly. He criticizes the respondent for not sending him all the interviews on which the disciplinary proceedings were based and for not asking the complainant the right questions. Furthermore, since the allegations were not justified, the appellant was not in a position to respond to them, and the respondent did not take account of some of his arguments regarding the weakness of the accusations levelled against him in 2016–2018.

18. The appellant also argues that the respondent refused to send the recommendations of the Disciplinary Board to him, and that failing to do so was a material error which should entail the disciplinary action against him being annulled, as ruled by the International Labour Organization Administrative Tribunal. Even though the NATO Administrative Tribunal's case law does not set out such an obligation, communicating those recommendations is essential for establishing the facts in the present case, and failing to do so deprived the appellant of the possibility of defending himself.

19. Regarding the grounds pertaining to past events, the appellant holds that those events should not be taken into consideration without a new disciplinary report being established.

20. Fourthly, the appellant claims that the impugned decision is insufficiently substantiated, depriving him of the possibility of contesting the decision appropriately. In particular, he criticizes the fact that he was not told the name of his accusers, nor the exact content of the accusations against him.

21. Fifthly, the appellant asserts that the disciplinary action is manifestly disproportionate to the alleged events.

22. He puts forward two arguments to support that claim. First, giving a colleague a cheek kiss, once, in a festive context at that, is not sexual harassment and cannot justify the most severe punishment, dismissal. Second, the 2016–2018 events, which were not qualified as harassment, cannot be added to those of 2020 to justify a disciplinary action.

23. Sixthly and lastly, the appellant asserts that the respondent failed in its duty of care towards him. He rejects the decision to suspend him, saying it was not taken in the interest of the service but rather in an attempt to prejudge the disciplinary matter. The suspension harmed him by unnecessarily undermining his reputation.

### *(ii) The respondent's contentions*

*Admissibility of the appeal*

24. The respondent acknowledges that the appeal is admissible only insofar as it concerns the decision of 8 June 2020, but rejects any possibility for the appellant to criticize previous decisions, in particular those taken after the events of 2016–2018.

*On the merits of the appeal*

25. To start with, the respondent underscores the severity of the allegations, which the appellant is trying to downplay. The complainant was in a dark, empty corridor when the appellant put his arm around her waist, kissed her and whispered in her ear, against her will. While initially denying the events, the appellant ultimately acknowledged them. The circumstances of the kiss – given by surprise to an unwilling recipient – are very different from the version put forward by the appellant, who explained that these were professional partners exchanging a kiss as a mark of respect, voluntarily and in public.

26. Furthermore, this is not the first time the appellant has behaved in this way. He had already been warned and disciplined twice for inappropriate behaviour, and the impugned decision could legitimately draw on those precedents too.

27. The respondent considers there was no obligation or need to send to the staff member the recommendations of the Disciplinary Board, which are in no way binding for the Head of NATO Body's decision-making.

28. The respondent denies that the impugned decision is insufficiently substantiated, insofar as it describes in detail the events of 25 November 2019, the previous administrative procedures, and the rules that the appellant violated. All the relevant information was mentioned. The appellant was made perfectly aware, at each step of the procedure, of the accusations levelled against him.

29. Regarding the proportionality of the disciplinary action, the respondent recalls all the serious circumstances that led to the dismissal: inappropriate behaviour, bad management, involvement of another organization, past behaviour and disciplinary action, warnings from managers.

30. The respondent considers that it did not violate its duty of care. It complied with all the applicable rules, and continued to pay the appellant's salary until he was dismissed.

31. The respondent requests that all the submissions be dismissed.

## D. Considerations and conclusions

*On the merits of the appeal*

32. To begin with, in the Tribunal's view, events that occurred in 2016 and were subject to disciplinary action in 2018 could not be taken as grounds for the disciplinary action in question because they were not among the allegations notified to the appellant at the start of the proceedings. The discussion of the circumstances whereby the appellant may challenge the decision by criticizing the procedure that took place in 2016–2018 in respect of events dating back to 2016 is thus, in the present case, without merit.

33. With regard to the events of 25 November 2019, the Tribunal notes that the appellant acknowledged having kissed his colleague in a dark, empty corridor and whispered a few insignificant words in her ear. He denies that he put his arm around her waist, which would have been impossible given that he was carrying things. Since there was no other witness than the complainant's husband, who was on the telephone with her, it is difficult to re-establish the full sequence of events. The Disciplinary Board found that the complainant's testimony was credible, sincere and convincing, since she had no reason to fabricate a tale to harm the appellant. For the Disciplinary Board, given the high likelihood of the complainant's testimony being accurate, the version put forward by the appellant must not be. Under such circumstances, the Tribunal considers that at least the surprise kiss in the dark is established, and it is very probable that the appellant whispered words in the complainant's ear, although the tenor of those words cannot be determined with any certainty.

34. Those events having been proven, the question of their legal characterization remains to be addressed.

35. In the Disciplinary Board's view, the appellant's conduct on 25 November 2019 constituted sexual harassment, and violated NATO's Code of Conduct and Articles 12.1.4 and 13.2 of the CPR. The appellant challenges this, and denies that a kiss on the cheek, which he considers customary in professional relations at NATO, can be qualified as harassment or discourteous behaviour.

36. A kiss on the cheek is neither a sexual act nor sexual harassment. But as the Disciplinary Board found, by kissing the complainant without her consent, the appellant made her feel very uncomfortable, given the element of surprise and the darkness at that time. This was therefore a failure by him of the duty to treat one's colleagues with respect and courtesy, as required by Article 12.1.4 of the Civilian Personnel Regulations (CPR). Given that the act was in no way public, it did not reflect adversely on the good repute of the Organization, which is protected by Article 13.2 of the CPR. The act with which the appellant is charged therefore violated only the provisions of Article 12.1.4 of the CPR.

37. With respect to the disciplinary procedure initiated by the respondent, the appellant complains that he had been prevented from preparing his defence by not having been sent all the interviews on which the procedure was based.

38. A staff member who is the subject of disciplinary action must, after having been informed of the allegations against them, be in a position to discuss those allegations and provide any information they feel is useful. Contrary to what the appellant claims, however, the administration that drafts a report to initiate a disciplinary procedure is not bound to send him all the interviews on which the disciplinary procedure was based, nor does it have to submit to the appellant the questions the complainant is asked. Moreover, once the Disciplinary Board has met, the administration is not required to send the appellant the Disciplinary Board's recommendations either; in the circumstances of the case, the non-communication of those recommendations, which were only submitted to the appellant in the appeal phase, did not deprive him of the possibility of discussing each of the events with which he was charged. Regardless of the substance of those recommendations, the administration may not order disciplinary action on the basis of events that were not in the initial report.

39. In the present case, the initiation of disciplinary proceedings on 29 January 2020 was backed up by a report that detailed the testimonies of the parties who had been present, and enabled the appellant to both know the accusations against him and respond to them. With regard to the events in 2019, the impugned decision is not based on events other than those covered in that report. The appellant therefore does not have grounds to claim that the disciplinary proceedings were flawed.

40. With regard to the argument of insufficient grounds for the impugned decision, the Tribunal notes that substantial grounds were provided for the decision, which describes the allegations over two pages and gives their legal characterization. Even the name of his accusers is given, since a summary of their testimony is in the report attached to the email of 29 January 2020.

41. The appellant's final argument is that the punishment is disproportionate to the alleged events.

42. For serving staff, there are five levels of disciplinary actions set out in Article 59.3 of the CPR: reprimand, written censure, postponement of a salary increment, temporary suspension from duties (with emoluments partly or wholly withheld), and dismissal. By all the parties' admission, the appellant has reached the last step of his grade, so postponing a salary increment was not possible. Thus four possible disciplinary actions remained.

43. The administration chose the most serious disciplinary action. However, although the action in question shows a lack of respect toward a colleague as well as a lack of self-control, it was done in private, not publicly, and did not inflict physical harm on his colleague. It was a routine, frequent act that the two protagonists had done frequently under other circumstances, in particular at the start of the informal meeting they had just left at the time of the incident. A kiss on the cheek of a colleague, even by surprise and accompanied by a few words whispered in her ear, does not justify terminating a more-than-20-year working relationship between the appellant and the respondent. Even noting that two years earlier the appellant had already received two warnings about behaving too familiarly with his colleagues, the most serious disciplinary action – dismissal – was clearly disproportionate to the appellant's actions.

44. Consequently the Tribunal finds that ordering dismissal as disciplinary action was both unlawful and disproportionate, and must be annulled.

45. Annulment of a decision on dismissal in principle entails reinstatement of the illegally dismissed staff member in his previous duties, or in equivalent duties if reinstatement is not possible.

46. The administration does, however, have the power to invoke Article 6.9.2 of Annex IX to the Civilian Personnel Regulations, which provides: “Nevertheless, where the Head of NATO body [...] affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal shall instead determine the amount of compensation to be paid to the appellant for the injury sustained.” The respondent invoked those provisions at the hearing on 17 December 2021.

47. In accordance with Article 6.9.1 of the same Annex IX, annulment of a decision enables the staff member who was the subject thereof to seek compensation for the injury caused by that irregularity. Given the circumstances in which the dismissal was ordered, the duties that the appellant had been fulfilling as Head of Interpretation and Conference Services for nine years, the harm to his standing in the small world of international organizations, the respondent’s refusal to reinstate him, and the significant loss of income to him since his dismissal, the material and non-material damage to him may be fairly assessed overall by ordering the NATO International Staff to pay the appellant 24 months of his final salary.

48. Lastly, there is no need to order the appellant to provide either the Disciplinary Board’s report, which was attached to the answer, or the outcome of the investigations conducted, as they are not germane to resolving the present case. Furthermore, it is not for the Tribunal to order that all the documents pertaining to the case be removed from the appellant’s file.

## E. Costs

49. Article 6.8.2 of Annex IX 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.

50. In the circumstances of the case, the submissions in the appeal being successful in their near-entirety, the appellant is entitled to be awarded €4,000 as reimbursement of the costs incurred to appear before the Tribunal.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 8 June 2020 whereby the NATO Secretary General ordered the dismissal of Mr F is annulled.
- The NATO International Staff is ordered to pay Mr F an amount equal to 24 months of his final salary in compensation for the damage caused by the decision.
- The NATO International Staff shall reimburse Mr F for the costs of retaining legal counsel, up to a maximum of €4,000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 20 January 2022.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

31 January 2022 AT-J(2022)0005

**Judgment**

**Case No. 2021/1324**

**SM**

**Appellant**

***v.***

**NATO Support and Procurement Agency**
**Respondent**

Brussels, 26 January 2022

Original: French

*Keywords: termination – termination before the end of six months' notice period, replaced with compensation in lieu of notice – annulment for misuse of power – early termination of contract that prevented the staff member from applying to other Agency posts to which he could have been reassigned.*

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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 Laurent Touvet and Ms Seran Karatari Köstü, judges, having regard to the written procedure and further to the hearing on 16 December 2021.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr SM, registered on 5 February 2021 (Case no. 2021/1324), seeking:
- annulment of the decision by the NATO Support and Procurement Agency (NSPA) General Manager of 6 October 2020 insofar as it replaces part of the contractual notice period with compensation in lieu of notice, and of his decision of 4 December 2020 to dismiss the complaint against the first decision;
- compensation for the material damage suffered, assessed at €744,000, and for the non-material damage suffered, assessed at €30,000;
- payment of the costs incurred by the appellant for his defence.

2. The respondent's answer, dated 9 April 2021, was registered on 19 April 2021. The appellant's reply, dated 20 May 2021, was registered on 1 June 2021. The respondent's rejoinder, dated 1 July 2021, was registered on 23 July 2021.

3. An oral hearing was held on 16 December 2021 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant, who is 43 years of age, joined the NSPA in 2002. He had been employed as a technician with the Internal Audit Service, grade B6, step 3 since 10 March 2017.

5. On 8 June 2020, when he was returning from extended sick leave that began on 28 September 2018, his manager informed him that his post had been proposed for deletion on 30 June 2020. That decision was rectified and materialized on 19 June 2020: the planned reorganization had been pushed back by a few months, and postponed to 31 December 2020. Although the appellant’s contract would be terminated as of that date, he would be considered for any vacant post of the same grade matching his qualifications.

6. On 6 October 2020, however, the NSPA General Manager decided to replace part of the contractual notice period with compensation in lieu of notice, on the grounds that no post matching his qualifications would be available in the Agency between then and 31 December 2020. Thus the contract was terminated that same day, on 6 October 2020. This is the decision being challenged.

7. The appellant initiated a complaint procedure based on the missed prospect of being recruited to another job between 6 October and 31 December. That complaint was rejected on 4 December 2020.

8. The appellant submitted an appeal to the Administrative Tribunal on 2 February 2021.

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

### *(i) The appellant's contentions*

9. The appellant puts forward three contentions.

10. First, he claims that that there was an error of fact in the decision, which he calls a "manifest error of judgment". The decision wrongly claims that it was unlikely any post would become vacant by 31 December 2020. The appellant cites posts that became available after 6 October to which he could have applied.

11. The establishment contains two posts for which the appellant claims to have the necessary qualifications.

12. The first is post AQ006 at grade B5/B6, the job description for which precisely matches the duties he was performing at the time: the two job descriptions have identical responsibilities, and while post AQ006 was filled on 5 November 2020 by a former colleague of appellant's who is another NSPA staff member, Mr H., the latter went on to tell the NSPA that he did not have the required qualifications and did not feel capable of accepting that role, in particular because he had been serving as a Staff Association delegate for 16 years and had been relieved of 80% of his duties.

13. The second is post LQ-39, which he explained he was fully qualified for because he had been successfully carrying out those same duties until 2017.

14. The appellant's second contention is that the impugned decision is tainted by a misuse of power: he ought to have been given priority consideration for vacant posts throughout his full notice period, from 1 July to 31 December 2020. The impugned decision deprived him of that chance, whereas as of 6 October two posts matching his qualifications were possibilities. The decision intentionally destroyed that chance by taking him off the list of eligible candidates prematurely, which is characteristic of a misuse of power. The appellant drew a comparison with his colleague Mr H., who since January 2019 had had the same job description as he did, and whose contract had also been slated for termination on 31 December 2020, but who had received a job offer on 5 November. Furthermore, it was thought that another job matching the appellant's qualifications, LQ0039, was still vacant at the end of 2020.

15. The impugned decision violates the provisions of Article 4.1.1 of the Civilian Personnel Regulations because the Administration did not seek to transfer the appellant to another post in the same geographical location.

16. The appellant's third contention is a failure of the duty of care, characterized by five facts.

17. First, the Administration did not provide sufficient information about the options available to him.

18. Second, it treated his extended sick leave brutally, making mistakes in how the Invalidity Board was run, in particular a violation of medical confidentiality, attempts to prevent him from returning to work, and threats not to fall ill again. For the appellant, the initial cause of these difficulties is his extended sick leave. The respondent did not want to recognize him as suffering from permanent invalidity, which would have been costly, and instead opted to terminate his contract on grounds of extended sick leave. But as the staff member returned to work and termination on those grounds was therefore impossible, the respondent sought to terminate him for a disciplinary offence. That did not work either, given how weak the accusations against him were, and so on 24 September 2020 the respondent withdrew the termination procedure. The respondent then sought to terminate him with immediate effect, depriving him of his notice period to keep him from being reassigned to another post.

19. Third, the respondent proposed terminating him with no indemnity, for having misrepresented his medical condition and cheated on his sick leave. These accusations proved to be untrue, and the disciplinary procedure was dropped.

20. Fourth, the respondent did not prepare the payment of his loss-of-job indemnity in a timely manner, as it had not been paid to him by the day he left.

21. Lastly, the appellant was brutally deprived of access to his work computer on the day his contract was terminated without notice.

22. In compensation for the material damage arising from the termination of his contract, the appellant is seeking compensation equal to his salary up to retirement at 65 years of age and to his pension up to 83 years of age, the life expectancy he anticipates. On top of that, he is making a request for compensation for non-material damage.

### *(ii) The respondent's contentions*

*Admissibility of the appeal*

23. The admissibility of the appeal is not challenged.

*Arguments regarding the merits of the appeal*

24. With regard to the vacancy of the posts to which the appellant claims he could have been appointed, the respondent replies that as of 6 October 2020, the Human Resources department in charge of transfers had already determined that there was nothing to offer the appellant.

25. For post AQ006, filled on 5 November 2020 by another NSPA staff member and a former colleague of the appellant's, Mr H., the respondent explains that although both candidates were eligible, it had chosen Mr H. over respondent because of his longer

experience (nearly 40 years), and in particular his ongoing auditing experience since 2007. It went on to say that it had chosen Mr H. because his duties as Staff Association Chair showed his commitment to the Agency.

26. For post LQ-39, the respondent explained that the appellant did not have the required qualifications or the professional experience sought. The training he would have had to take in order to acquire the necessary skills would have been too onerous. Lastly, there was no urgency to fill that post before the end of 2020.

27. Regarding the contention of a misuse of power, the respondent restated the argument that it had already decided to assign Mr H. to post AQ-006 because that would require minimal training for him, whereas a great deal of training would have been required in order to transfer the appellant to post LQ-039. So there was no vacant post for the appellant prior to 31 December 2020, and there was no point keeping him working until then.

28. With regard to the duty of care, the respondent explained the path to reintegrating the appellant after his sick leave, which had not been straightforward. The appellant initially wanted to be recognized as unfit to work, but a change in his medical treatment had done away with the side effects he had been suffering up to then and he felt better, at which point he wanted to return to work. Three successive Invalidity Boards had met, such was the difficulty of their reaching a conclusion. Some confusion about the date of the change in medical treatment (May, and not March as was first indicated) suggested to the Administration that the appellant had been trying to cheat the system. This misunderstanding was the reason for the disciplinary proceedings, which were withdrawn once the appellant provided clear information. With regard to payment of the indemnity, the respondent recalled that the Tribunal allowed this payment to be made within a few days of leaving, and in this case the payment was made less than three weeks after the appellant had left the Agency. Finally, the removal of the work computer, on grounds of data security for the Organization, is standard when a staff member ceases working.

29. In all, the respondent considers that it did not fail in its duty of care, and followed the applicable rules.

30. It asks that all the submissions in the appeal be rejected.

## D. Considerations and conclusions

*On the merits of the appeal*

31. On 19 June 2020, the Administration informed the appellant about a reorganization of the service where he worked: the four technicians in the service were to be replaced with grade A2 officers. His post would therefore be deleted on 31 December 2020, the planned date for implementation of that reorganization. The appellant was told, however, that he would be considered for any vacant post of the same grade matching his qualifications. The respondent thus indicated its intention to apply Article 4.1.1 of the Civilian Personnel Regulations, whereby: “When it is in the interests of the service, the Head of NATO body, having consulted with the staff member

concerned, may transfer the staff member to another post in the same geographical location."

32. That same decision of 19 June 2020 terminated the appellant's contract as of 31 December 2020, which left him six months to look for another job within the respondent Organization.

33. But on 6 October, the appellant took a decision that modified the decision of 19 June. The date of contract termination was brought forward from 31 December to 6 October. In its view it was taking a decision that was of little actual consequence, since the period of notice in which the appellant would have received his emoluments was being replaced with compensation in lieu of notice in the same amount, in accordance with Article 10.5 of the CPR.

34. The appellant does not see things quite as favourably, however. In his opinion, the reason for the early termination of his contract was a desire to deprive him of opportunities to find a vacant post of the same grade in the respondent Organization.

35. The appellant explains that as of 6 October, it was uncertain whether any post that could be offered to him would be available by 31 December.

36. The appellant has identified two posts. One, AQ006, had not yet been filled as of 6 October, because it was filled on 5 November. The appellant explains that the job description for this post matched his skills and qualifications perfectly, so he was eligible to be selected for it. The respondent presents the reasons why it chose another person, Mr H., whom it deemed more qualified.

37. The Tribunal notes that the skills of the chosen candidate were not a perfect match for those of the post on offer, since training was being offered to give him the right qualifications. Furthermore, that staff member had been serving as Chair of the Staff Association for thirteen years, which had taken him off the work he was being called on to perform. Overall the respondent has not provided a convincing explanation of the reasons why it had opted for a staff member who was out of practice doing auditing work over the appellant, whose aptitudes and recent experience made him much more qualified for the post. In any event, as of 6 October 2020 that post had not been filled, and respondent had not yet notified the appellant of its choice not to recruit him, which left him still in a position to be transferred to it.

38. With regard to the other post for which the appellant claims to have been eligible, post LQ-39, the respondent notes that he did not have the required skills and would have had to take long, complex training in order to be able to be capable of performing the duties thereof. The file submitted to the Tribunal does not allow it to confirm or negate this assertion, but it notes that the vacancy notice was posted just after the appellant's contract was terminated, whereas the respondent told the Tribunal that there was no urgency to fill the post before 31 December. The date by which the requirement had to be fulfilled had therefore not yet been set when the Agency General Manager took his decision of 6 October 2020 to terminate the appellant's contract with immediate effect.

39. From this the Tribunal concludes that for at least one of those two posts, the respondent could not claim on 6 October that there was no prospect for the appellant to be appointed before 31 December. This decision is therefore tainted by an error of fact. Furthermore, the possibility remained that another post that matched the appellant's skill set would open up between 6 October and 31 December, for instance if a staff member in a given post on 6 October were to resign or accept a transfer.

40. What is more, the Administration has not explained in its decision, in its written submissions or in the oral hearing before the Tribunal the reasons why it decided to terminate the appellant's contract early. The salary cost of a staff member serving out his six-month notice period and of a staff member who leaves the service early with compensation in lieu of notice is the same. The Tribunal does not see the reason of general interest for terminating the staff member's contract early if he did not want that, had not committed any offence and wanted to serve out the six-month period. No reason of general interest has been advanced by respondent to justify why the contract suddenly had to be terminated early – neither the interests of the service, nor the financial interests of the Organization. While the respondent is claiming that it took this decision "in the appellant's interest", this is clearly untrue; on the contrary, what the appellant wanted was to stay as long as possible in order to have the chance to apply to other posts, and early termination was of no financial benefit to him.

41. All the evidence in the case file and the oral hearing makes it clear that the Agency General Manager terminated the contract early to keep the appellant from being able to apply to other posts. The respondent took advantage of the reorganization of the service to terminate his work in the Agency – first by deleting his post, and then by not reassigning him to another post. In order to remove the appellant from the service, the respondent had to shorten the time frame for him to apply to other posts and be given priority consideration. This is what it did by deciding on 6 October 2020 to terminate the contract that same day, whereas a prior decision had set a deadline of three months later, i.e. 31 December 2020.

42. The impugned decision of 6 October 2020 is therefore annulled for misuse of power insofar as it brought forward the effective date of contract termination.

43. The annulment of a decision on termination in principle entails reinstatement of the illegally dismissed staff member in his previous duties, or in equivalent duties if reinstatement is not possible. However, in accordance with the decision of 19 June 2020, which was not contested, the appellant's contract was due to be terminated on 31 December 2020, which means that it had been terminated as of the date of the Tribunal's ruling. In any event, the appellant has explained here that he refused to be reinstated in the Agency.

44. In accordance with Article 6.9.1 of Annex IX to the CPR, annulment of a decision enables the staff member who was the subject thereof to seek compensation for the injury caused by that irregularity.

45. As a result of the impugned decision, annulled by the present Tribunal judgment, the appellant missed out on the prospect of finding another job in the Agency. That material damage must be compensated. Given the circumstances in which the

termination was ordered, the lack of certainty that the staff member would be appointed to another post, the arbitrary period for him to remain a salaried Agency employee, and the replacement income he declared to the Tribunal, the material and non-material damage suffered may be fairly assessed overall by ordering the NSPA to pay the appellant €60,000 in compensation for the missed opportunity to be appointed to another post at NATO and the non-material damage caused by the early termination of his contract.

## E. Costs

46. Article 6.8.2 of Annex IX provides:

> 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.

47. In the circumstances of the case, the majority of the submissions in the appeal being successful, the appellant is entitled to be granted €4,000 as reimbursement of the costs of retaining counsel to appear before the Tribunal.

## F. Decision

FOR THESE REASONS,

the Tribunal decides:

- The decision of 6 October 2020 whereby the NSPA General Manager replaced part of Mr M's contractual notice period with compensation in lieu of notice, and his decision of 4 December 2020 to dismiss the complaint against the first decision, are annulled.
- The NSPA shall pay Mr M €60,000 in compensation for the damage suffered as a result of this decision.
- The NSPA shall reimburse Mr M for the costs of retaining legal counsel, up to a maximum of €4,000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 26 January 2022.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2021)0001

# Order

## Case No. 2020/1318

**WS**
**Appellant**

***v.***

**NATO International Staff**
**Respondent**

Brussels, 18 January 2021

Original: English

*Keywords: withdrawal.*

North Atlantic Treaty Organization - Organisation du Traité de l'Atlantique Nord
B-1110 Bruxelles - Belgique
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The President of the NATO Administrative Tribunal,

- Considering that Mr WS submitted an appeal with the NATO Administrative Tribunal (AT) on 19 October 2020, and registered under Case No. 2020/1318, against the NATO International Staff (IS);

- Considering that the AT Registrar office received, on 21 December 2020, appellant's communication that he decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President

> […] may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional.

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

**DECIDES**

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 18 January 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2021)0002

# Order

**Case No. 2021/1323**

**SG**

**Appellant**

***v.***

**Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen**
**Respondent**

Brussels, 15 February 2021

Original: English

*Keywords: expedited hearing.*

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The President of the NATO Administrative Tribunal,

- Considering that Mr SG submitted an appeal with the NATO Administrative Tribunal (AT) on 29 January 2021, and registered under Case No. 2021/1323, against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK);

- Considering the request made by the appellant for an expedited hearing, in accordance with Article 6.6.4 of Annex IX to the Civilian Personnel Regulations (CPR), on the basis of exceptional circumstances;

- Having regard to Article 6.6.4 of Annex IX to the CPR, which stipulates:

  6.6.4 The Tribunal shall have discretion, in exceptional circumstances, to depart from the time limits laid down both in the preceding paragraph and in Article.6.3 above. Either party may request an expedited hearing on the basis of exceptional circumstances, in particular the need to avoid irreparable harm, in which case the request will be decided by the President, taking into account the views of the other party on the matter.

- Noting the views presented by the respondent on 11 February 2021 in reply to the communication sent by the AT President on 4 February 2021;

**DECIDES**

- The request for an expedited hearing is granted.
- The respondent shall provide its answer **before 9 March 2021 COB**.
- The appellant shall have ten days from the receipt of the answer to introduce, if he so wishes, his reply.
- The respondent shall have ten days from the receipt of the reply to introduce, if it so wishes, its rejoinder.

Done in Brussels, on 15 February 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2021)0003

**Order**

**Case No. 2020/1319**

**JH**
**Appellant**

***v.***

**Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen**
**Respondent**

Brussels, 13 April 2021

Original: English

*Keywords: withdrawal.*

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The President of the NATO Administrative Tribunal,

- Considering that Mr JH submitted an appeal with the NATO Administrative Tribunal (AT) on 20 November 2020, registered under Case No. 2020/1319 on 3 December 2020, against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK);

- Considering that the AT Registrar office received, on 6 April 2021, appellant's communication that he decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President:

> […] may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional.

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

**DECIDES**

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 13 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2021)0004

# Order

## Case No. 2020/1320

**VA**
**Appellant**

***v.***

**NATO International Staff**
**Respondent**

Brussels, 22 April 2021

Original: English

*Keywords: Rule 10.*

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The President of the NATO Administrative Tribunal,

- Having regard to Chapter XIV of the NATO Civilian Personnel Regulations (CPR) and Annex IX thereto, both issued as Amendment 32 to the CPR;

- Considering the appeal lodged by Ms VA against the NATO International Staff (IS) dated 8 December 2020, and registered on 11 December 2020 under Case No. 2020/1320;

- Considering the answer provided by the respondent, dated 15 March 2021, and the reply provided by the appellant, dated 1 April 2021;

- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear individual disputes concerning the legality of a decision taken by the Head of a NATO body;

- Having regard to Rule 10 of the Rules of procedure of the Administrative Tribunal, which provides:

    1. Where the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, he/she may instruct the Registrar to take no further action. Such an instruction by the President shall suspend all procedural time limits.
    2. After notifying the parties and considering any additional written views of the appellant, and if the Tribunal considers that the appeal is clearly inadmissible, outside its jurisdiction, or devoid of merit, the Tribunal shall dismiss the appeal, stating the grounds therefor.
    3. If the Tribunal considers the appeal admissible, within its jurisdiction, or not manifestly devoid of merit, the parties will be notified and the case will proceed in the normal way.

**DECIDES**

- The Registrar is instructed to take no further action on the case until the next session of the Tribunal.
- All procedural time limits are suspended.
- The appellant may submit additional written views in accordance with Rule 10, paragraph 2, which should reach the Tribunal's Registry **no later than 7 May 2021**.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

Done in Brussels, on 22 April 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2021)0005

# Order

## Case No. 2021/1331

**MS**
**Appellant**

***v.***

**Centre for Maritime Research and Experimentation**
**Respondent**

Brussels, 18 October 2021

Original: English

*Keywords: withdrawal.*

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The President of the NATO Administrative Tribunal,

- Considering that Mr MS submitted an appeal with the NATO Administrative Tribunal (AT) on 27 July 2021, registered under Case No. 2021/1331 on 3 August 2021, against the Centre for Maritime Research and Experimentation (CMRE);

- Considering that the AT Registrar received, on 8 October 2021, communication that the appellant decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President:

> […] may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional.

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

**DECIDES**

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 18 October 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2021)0006

# Order

## Case No. 2021/1328 and Case No. 2021/1334

**JE**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 12 November 2021

Original: English

*Keywords: joining cases.*

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The President of the NATO Administrative Tribunal,

- Considering that Ms JE submitted a first appeal with the NATO Administrative Tribunal (AT) against the NATO Support and Procurement Agency, on 7 June 2021 and registered under Case No. 2021/1328;

- Considering that Ms JE submitted a second appeal, on 18 October 2021 and registered under Case No. 2021/1334;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Case No. 2021/1328 and Case No. 2021/1334 are joined.
- Both Cases shall be heard once the written procedure in Case No. 2021/1334 is completed.

Done in Brussels, on 12 November 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2021)0001

# Order

**Joined Cases Nos 2019/1290-2020/1298**

**BW**

**Appellant**

***v.***

**NATO International Staff**
**Respondent**

Brussels, 5 February 2021

Original: English

*Keywords: suspension of proceedings.*

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The present Order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún and Mr John R. Crook, judges.

## A. Factual background and procedure

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") scheduled the oral hearing in Joined Cases Nos 2019/1290-2020/1298 on 4 February 2021 before a Panel composed as stated above.

2. The hearing convened as scheduled. In his opening remarks, the appellant's counsel expressed concern about the completeness of the file before the Tribunal, in particular concerning medical documentation that should have been in possession of the appellant. The appellant himself further confirmed that it was his demand to obtain from NATO International Staff a copy of the medical file it kept on him in order to better prepare his case. The representative of the respondent confirmed that the appellant has access to his medical file.

3. The President adjourned the hearing to allow for consultations among the Panel members.

4. When the hearing was resumed, the President announced that, if it was the appellant's request to suspend the session in order to obtain the documents concerned, the Tribunal was prepared to allow for such a suspension. He emphasized that it would be the appellant's responsibility to contact the respondent's medical office. He requested the respondent's representative to inform the medical office and to support the appellant where necessary.

5. The appellant agreed on this way forward and requested the suspension of the hearing.

## B. Decision

FOR THESE REASONS

The Tribunal decides that:

- The hearing is suspended until further notice;

- The appellant shall inform the Tribunal of the status of his request to the respondent's medical services and make suggestions on how to proceed with the proceedings not later than 19 February 2021 COB. He shall in particular indicate whether he wishes to supplement his case file or not;

- The respondent shall comment thereon not later than 26 February 2021 COB;

- The President of the Tribunal shall determine time limits, if necessary; and

- The hearing in Joined Cases Nos 2019/1290-2020/1298 will resume as soon as practicable.

Done in Brussels, on 5 February 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2021)0002

# Order

## Case No. 2020/1317

**MR**
**Appellant**

**v.**

**NATO Support and Procurement Agency**
**Respondent**

Brussels, 28 June 2021

Original: French

*Keywords: request for clarification (Article 30).*

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This order 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 respondent's request of 4 June 2021 seeking clarification of the judgment in Case no. 2020/1317.

## A. Factual background of the case

1. On 19 May 2021, a Panel of the NATO Administrative Tribunal (hereinafter "the Tribunal") composed of the aforementioned members rendered its judgment in the present case, in which it annulled the decision of 10 July 2020 whereby the NSPA General Manager had suspended the appellant, insofar as it deprived the appellant of pay.

2. The respondent then submitted, pursuant to Article 30 of the Tribunal's Rules of Procedure, a document dated 4 June 2021 requesting that the Tribunal clarify its judgment of 19 May 2021 in Case no. 2020/1317, and more specifically that it specify whether the suspension decision had been annulled insofar as it deprived the appellant of his emoluments in whole, and whether the respondent's interpretation that it could implement the judgment by taking a new decision consisting in deprivation of emoluments in part for a set period was correct.

3. In the document, the respondent considered its request to be admissible as per the provisions of two paragraphs in Article 30 of the Tribunal's Rules of Procedure, and asked the Tribunal to allow it, so as to resolve the difficulties – qualified as serious – it was having in regularizing the suspension decision. The respondent claimed that, in the light of paragraphs 69 and 70 of the judgment of 19 May 2021, it was not in a position to establish whether annulment of the suspension decision, ordered insofar as it deprived the appellant of emoluments, was a final decision on the matter of payment to the appellant of his emoluments, or whether it allowed the administration to take another decision on that matter. According to the respondent, annulment of the suspension permits the General Manager to determine, in the exercise of his discretionary powers on behalf of the Agency, whether a deprivation of emoluments in part would be appropriate and proportional.

4. In a letter dated 9 June 2021, the Tribunal's registrar invited the appellant to present his views on the request by 16 June at the latest, as per Article 30.3 of the Tribunal's Rules of Procedure, which provides that "The Tribunal shall, after giving the other party or parties a reasonable opportunity to present views on the matter, decide whether to admit the request for clarification (...)".

5. In a letter dated 16 June 2021, the appellant argued that the operative provisions of the judgment were not obscure, incomplete or inconsistent, the condition laid down in Article 30 of the Tribunal's Rules of Procedure, and as such the request for clarification had to be deemed inadmissible. The appellant wrote that the request was based on an incorrect premise and that the respondent was not required to take a further decision, as a judgment by the Tribunal ordering annulment did not entail the obligation to take a new decision retroactively. The appellant also wrote that the NSPA's interpretation was incorrect as the Tribunal had ruled in no uncertain terms that the deprivation of emoluments was illegal and that the pay had to be re-established retroactively from the

date of the suspension. In its conclusions, the appellant regretted that the requester had considered it was in a position to refer a request for clarification to the Tribunal and had expressed a desire to take another decision, this time aimed at depriving him of a part of his pay.

## B. Legal background of the case

6. Article 6.8.3 of Annex IX to the CPR stipulates:

> 6.8.3 (a) The judgments of the Tribunal shall be final and not subject to any type of appeal by either party, except that the Tribunal may be requested by either party within 30 days from the date of the judgment to rectify a clerical or arithmetical mistake in a judgment delivered.
>
> (b) Either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. Petitions for a re-hearing must be made within 30 days from the date on which the abovementioned fact becomes known, or, in any case, within 5 years from the date of the judgment. With the consent of the parties, the Tribunal may decide in a given case that no oral hearing is required and a decision can be taken on the basis of the written record before it.

7. Rule 30 of the Rules of Procedure of the Tribunal stipulates that:

> 1. After a judgment has been rendered, a party may, within 90 days of the notification of the judgment, request from the Tribunal a clarification of the operative provisions of the judgment.
>
> 2. The request for clarification shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent.
>
> 3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present views on the matter, decide whether to admit the request for clarification. If the request is admitted, the Tribunal shall issue its clarification, which shall thereupon become part of the original judgment.

8. Paragraph 7 of Article 27 of the Rules of Procedure of the Tribunal stipulates that:

> Subject to Article 6.8.4 of Annex IX, judgments are final and binding.

## C. Considerations and conclusions

9. Annex IX to the CPR provides that the judgments of the Tribunal are final and not subject to any type of appeal. It follows from this that neither party may enter into a discussion with the Tribunal concerning its reasoning and conclusions. The only exception is that the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment, which is not the case here.

10. Annex IX further provides that either party may petition for a re-hearing. It then clearly stipulates that petitions for a re-hearing may only be made should a determining fact not have been known by the Tribunal and by the party requesting re-hearing at the time of the Tribunal's judgment, which is not the case here either.

11. On 19 May 2021, the Administrative Tribunal rendered a judgment in which it decided that:

- The decision of 10 July 2020 whereby the General Manager of the NSPA suspended Mr R., along with the decision of 7 August 2020 dismissing his complaint against the decision of 10 July, insofar as they deprived Mr Rinaldi of his remuneration, is annulled.
- The NSPA shall pay Mr R. the sum of €5,000 in compensation for the non-material damage suffered by him.
- The NSPA shall pay Mr R. the sum of €2,000 in compensation for the costs of retaining legal counsel.
- The remaining submissions in the appeal are dismissed.

12. Articles 69 and 70 of the judgment of 19 May 2021 provide that:

> 69. In support of its decision to suspend the staff member without pay, the respondent merely underscores the severity of the allegations against the appellant and the anticipated long duration of the criminal proceedings in the Italian court. But this is not sufficient to justify taking away the pay of a staff member who has served at NATO for more than ten years, about whom there had been no concerns up to that point. Although the incidents are serious, it is the criminal proceedings that could result in his losing his income, yet at the suspension stage it is still too early to decide that. Regarding the argument of the long length of the Italian criminal proceedings that prompted the Administration not to run the risk of paying a staff member who has been removed from his duties for many years, that argument can be turned on its head: the Tribunal considers it disproportionate to deprive a staff member of all pay over an indefinite period, very likely more than one year, based on accusations that a court has not ruled on definitively. Such deprivation of all pay is not necessary to protect the Organization's interests. Furthermore, because doing so takes away the health insurance of the appellant, who moreover has dependants, this constitutes a failure by the Organization of its duty of care toward its staff.
>
> 70. For that reason, the decision of 10 July 2020, along with the decision of 7 August 2020 dismissing Mr Rinaldi's complaint against that decision, must be annulled insofar as they deprived the staff member of his pay.

13. In its present request for clarification, the Administration explained to the Tribunal which aspects of the operative provisions of the judgment it found obscure, regarding the scope of the annulment of the deprivation of emoluments for the appellant. However, it is clear from the operative part and the reasoning in Judgment no. 2020/1317 of 19 May 2021 that the Tribunal ruled that the decision to deprive the appellant of his emoluments was illegal. There is no scope for the Agency to take a new decision on this matter. Consequently, pursuant to the judgment, the NSPA is required to pay the appellant the full emoluments he would have been paid had he not been suspended, and to continue to pay his emoluments in whole until such time as the contract is terminated or disciplinary action is taken depriving him of his emoluments.

## D. Decision

FOR THESE REASONS,

the Tribunal decides:

- The respondent's request for clarification is allowed.
- The operative part of Judgment no. 2020/1317 of 19 May 2021 is supplemented as follows: "the Tribunal rules that the decision to deprive the appellant of his emoluments is illegal. There is no scope for the Agency to take a new decision on this matter. Consequently, pursuant to the judgment, the NSPA is required to pay the appellant the full emoluments he would have been paid had he not been suspended, and to continue to pay his emoluments in whole until such time as the contract is terminated or disciplinary action is taken depriving him of his emoluments."

Done in Brussels on 28 June 2021.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2022)0001

# Order

## Case No. 2020/1302

**MV**

**Appellant**

***v.***

**NATO Communications and Information Agency**

**Respondent**

Brussels, 12 January 2022

Original: English

*Keywords: Rule 30 – clarification of judgments.*

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This Order 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 appellant's request dated 12 July 2021 and having considered the matter at its December 2021 session.

## A. Proceedings

1. On 13 April 2021, the NATO Administrative Tribunal (hereinafter the "Tribunal") rendered a judgment in Case No. 2020/1302 on the appeal submitted by Mr MV against the NATO Communications and Information Agency (NCIA). The Tribunal dismissed his appeal seeking, inter alia, the annulment of the General Manager's decision of 25 February 2020 not to grant him the expatriation allowance.

2. On 12 July 2021, the appellant wrote to the Tribunal requesting for "clarifications of operative provisions".

3. In this letter, the appellant challenged several points of the AT rendered judgment, and in particular:

> […] [paragraph 57] I would like to understand, why do I need to head back to General Manager once again if HONB view is that organization is not responsible for their staff and their privileges and immunities. I have challenged this decision via appeal giving multiple reasons of why the decision is erroneous […]
>
> […] I disagree with the ruling as it is set out in paragraph 63 which is highlighting that is vital to assess if I was living and working in the country when the recruitment procedure started. […]
>
> […] I respectfully disagree with ruling set out in paragraph 68 that Respondent acted with respect for all the principles of good administration. […]
>
> […] In relation to ruling paragraph 67 […] I strongly disagree that it was duly and constantly completed with ecomomic conditions […]
>
> […] I would like to see for clarification of why Administrative Tribunal did not address the new pleading of defamation […]
>
> I would like to seek for clarification of why Administrative Tribunal did not address the pleading of discrimination as it addressed multiple organization governance documents […]
>
> I would like to seek clarification of why Administrative Tribunal disregarded my written communication with colleague in the same position but treated differently, why Administrative Tribunal did not support with requested documents discovery process, nor request to invite witness to the hearing for me to be able to prove the unqual treatment across the organization.
>
> I would like to, hereby, reiterate my request for additional hearing sessions […]

4. By letter dated 2 August 2021, the AT Registrar, in accordance with the provisions of Rule 30 of the AT Rules of Proceures (ROP) providing that "The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the request for clarification […]", requested the respondent to provide its views on the request by 9 September 2021.

5. By letter dated 8 September 2021, the responded stated, inter alia, that:

> […] the Appellant's contentions in fact no not constitute requests for clarifications of the operative provisions of the judgment. On the contrary, throughout his submissions, the Appellant repeatedly states that he "disagree(s) with the ruling" on various points. The Appellant is thereby attempting to contest the judgment of the Administrative Tribunal.
>
> […] it should be noted that the Appellant re-produces the same arguments that were already in the record of the proceedings and which were contested at the hearing. He is therefore attempting to re-open the debate on the conclusion of the Tribunal.
>
> […] the Appellant requests "additional hearing sessions" […] The Appellant did not provide any new determining facts that should have been known by the Tribunal at the time of the judgment.
>
> […] Respondent considers the Tribunal judgment in Case No. 2020/1032 sufficiently clear, complete and consisten, therefore not requiring clarificaitons. Respondent also views this request as an attempt by the Appellant to re-open the case and continue to contest the consideration developed by the NATO Administrative Tribunal […[

## B. Legal Background

6. Article 6.8.3 of Annex IX to the NATO Civilian Personnel Regulations (CPR) provides:

> (a) The judgments of the Tribunal shall be final and not subject to any type of appeal by either party, except that the Tribunal may be requested by either party within 30 days from the date of the judgment to rectify a clerical or arithmetical mistake in a judgment delivered.
>
> (b) Either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. Petitions for a re-hearing must be made within 30 days from the date on which the above- mentioned fact becomes known, or, in any case, within 5 years from the date of the judgment. With the consent of the parties, the Tribunal may decide in a given case that no oral hearing is required and a decision can be taken on the basis of the written record before it.

7. Rule 27(7) of the Tribunal's ROP provides:

> Subject to Article 6.8.3 of Annex IX, judgments are final and binding.

8. Rule 29 of the Tribunal's ROP provides:

> In accordance with Article 6.8.3 of Annex IX, either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment.

9. Rule 30 of the Tribunal's ROP provides:

> 1. After a judgment has been rendered, a party may, within three months of the notification of the judgment, request from the Tribunal a clarification of the operative provisions of the judgment.
>
> 2. The request for clarification shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent.
>
> 3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the request for clarification. If the request is admitted, the Tribunal shall issue its clarification, which shall thereupon become part of the original document.

## C. Considerations and conclusions

10. Annex IX to the CPR provides that judgments of the Tribunal are final and are not subject to any type of appeal by either party. It follows from this that neither party may enter into a discussion with the Tribunal concerning the latter's reasoning and conclusions. The only exception is that the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment rendered, which is not the case here.

11. Annex IX further provides that either party may petition the Tribunal for a re-hearing. Annex IX then stipulates clearly that petitions for a re-hearing may only be made should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment.

12. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature, which existed prior to the judgment and which were unknown at that time by the Tribunal and by the appellant, and which, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. The Tribunal observes, first of all, in this respect that all elements put forward by the appellant in his letter dated 12 July 2021, were known by him at the time of the Tribunal's judgment. Secondly, the appellant has not established that these elements were not known by the Tribunal. In fact, they were.

13. The Tribunal observes that none of the elements put forward by the appellant would either justify a request for a re-hearing in accordance with Article 6.8.3 of Annex IX, or a request for clarification. The appellant has failed to identify “in which respect the operative provisions of the judgment appear obscure, incomplete or inconsistent”, as required in Rule 30.2. He rather submits contentions, which were in the record of the proceedings or have been debated at the hearing. The Tribunal is of the view that the appellant is, in fact, seeking none other than a re-opening of a debate on the conclusions of the Tribunal, which is at variance with the rule that the Tribunal’s judgments are final and not subject to appeal and with the purpose of a re-hearing. The Tribunal’s rulings in its judgment in Case No. 2020/1302, in particular its paragraphs 56-71, are clear and unambiguous. The Tribunal therefore concludes that the conditions for Rule 30 have not been met and that the request for clarification must be denied.

## D. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The request is dismissed.

Done in Brussels, on 12 January 2022.

(signed) Chris de Cooker, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia