JUDGMENTS and ORDERS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2022

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2022

35th session (28-29 April 2022)

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North Atlantic Treaty Organization
B-1110 Brussels - Belgium

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 May 2022 AT-J(2022)0006

Judgment

Case No. 2021/1332

JT
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 12 May 2022

Original: French

Keywords: Invalidity Board, error of assessment; obvious factual error, duty of care, partiality of members, new plea.

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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 29 April 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 27 July 2021 and registered on 3 August 2021, by Mr JT (Case no. 2021/1332) against the NATO Support and Procurement Agency (NSPA) seeking annulment of the respondent's decision not to recognize him as suffering from permanent invalidity.

2. The respondent's answer, dated 26 October 2021, was registered on 8 November 2021. The appellant's reply, dated 7 December 2021, was registered on 14 December 2021. The respondent's rejoinder, dated 8 February 2022, was registered on 10 February 2022.

3. An oral hearing was held on 29 April 2022 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 was an NSPA staff member on an indefinite duration contract since 2013. The case file shows that he had been on sick leave since 12 August 2019.

5. At the request of the respondent's group insurance company, a physician prepared a report dated 17 September 2020 on the appellant's state of health, concluding that he was unfit to resume working, even part-time. According to this report, the appellant has suffered from health problems (serious psychological depression) since 2013, and is receiving medical treatment. The report also says that, in the past (2014), the appellant had been hospitalized on a psychiatric ward for these same problems.

6. On 26 November 2020, at the request of the NSPA Medical Advisor, a second medical report was drawn up by an independent physician, who also concluded based on the medical history in the appellant's medical file that he could not be expected to return to work, even part-time. This report concluded that the appellant should continue medical treatment and be examined again in six months' time.

7. On 27 January 2021, the respondent decided to convene an Invalidity Board to determine whether the appellant was suffering from permanent invalidity that totally prevented him from performing his duties. In this context, each party appointed a representative, the two of whom then jointly appointed the third member of the Invalidity Board.

8. By letter dated 10 February 2021, the NSPA Medical Advisor informed the respondent's Head of Human Resources that any invalidity from which the appellant was suffering did not arise from an accident in the course of the performance of his duties, an

occupational disease, a public-spirited act or from risking his life to save another human being.

9. On 11 February 2021, the appellant received his administrative file in order to submit any written comments he might have and, on 17 March 2021, the administrative and medical files comprising the medical reports, various documents and certificates were forwarded to the members of the Invalidity Board.

10. On 25 March 2021, the Invalidity Board met and found by a majority decision that the appellant was not suffering from permanent invalidity and was not totally prevented from performing his work or duties offered to him by the Organization corresponding to his experience and qualifications. In its findings, the Invalidity Board indicated that the appellant's medical situation was not settled and was still evolving.

11. By a letter dated 6 April 2022, the respondent informed the appellant of its decision not to recognize him as an invalid, in accordance with the findings of the Invalidity Board.

12. On 28 April 2021, the appellant filed a complaint against this decision, indicating that he was unfit to work owing to his state of health, and presented another medical certificate attesting to his incapacity for work up until 31 May 2021.

13. On 18 May 2021, the respondent reminded the appellant that he had been on sick leave since 12 August 2019 and on extended sick leave since 12 November 2019. Pursuant to Article 45.7.3 of the NATO Civilian Personnel Regulations (CPR), extended sick leave (21 months) may be regarded as grounds for termination of a staff member's contract. In this respect, the respondent explained that if his sick leave were to be extended beyond this period, given his statements regarding his incapacity to resume working, his contract would be terminated on 12 August 2021.

14. By a letter dated 28 May 2021, in response to the appellant's complaint, the respondent said that the Invalidity Board's decision could only be reviewed in the event of an obvious factual error and that the arguments put forward by the appellant in this respect to contest the decision, i.e. that he had a chronic illness, could not lead to the conclusion that here had been an obvious factual error in this case, as required by Instruction 13/3 (xi) of Annex IV to the CPR. In these circumstances, the respondent rejected the appellant's complaint.

15. On 31 May 2021, the appellant submitted another medical certificate attesting to his incapacity for work, covering the period from 1 to 30 June 2021.

16. By a letter dated 22 June 2021, the respondent informed the appellant that if he presented another medical certificate upon expiry of the previous certificate he had submitted, his contract would be terminated pursuant to Article 45.7.3 of the CPR.

17. On 30 June 2021, the appellant was hospitalized and presented another medical certificate attesting to his incapacity for work, covering the period from 30 June to 31 July 2021.

18. By a decision dated 6 July 2021, the respondent terminated the appellant's contract in accordance with Article 45.7.3 of the CPR on the grounds that he had exceeded the extended sick leave provided for by the CPR, referring to its previous letters on this subject.

19. These are the circumstances whereby the appellant lodged this appeal on 27 July 2021.

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

(i) The appellant

20. In his appeal, the appellant, firstly, develops submissions seeking annulment directed against both the Invalidity Board's decision of 25 March 2021 and the respondent's decision of 28 May 2021 (the contested decision). In this respect, he puts forward three pleas.

21. The first plea is an error of assessment by the respondent, insofar as the contested decision is allegedly based on the Invalidity Board's erroneous findings concerning the appellant's state of health. In the light of the appellant's chronic illness and given that he has been hospitalized on several occasions, it is obvious that the Invalidity Board was wrong to conclude that the appellant's medical situation was not settled and still evolving. The information in the case file, i.e. the medical reports and certificates, clearly demonstrate that the appellant can be considered to be suffering from permanent invalidity, rendering him completely incapable of performing his work or duties. Without developing further arguments, the appellant also asserts that the Invalidity Board made an obvious factual error in this respect, which would justify the respondent's dismissing the Invalidity Board's findings and convening it again for another opinion. Furthermore, the appellant considers that the Invalidity Board's findings are also erroneous since his depression was caused by a hostile work environment and is therefore an occupational illness that should be recognized as such by the Invalidity Board. Therefore, by following the Invalidity Board's findings as they stand without taking a position on this point, the respondent made an error of assessment that justifies the annulment of the contested decision.

22. Without explicitly saying so, the appellant also invokes, as a second plea, a violation of the respondent's duty of care to him as, throughout his illness, the respondent never reviewed his medical condition as a whole. He alleges that the respondent simply used the Invalidity Board's findings as an excuse to terminate his contract on the grounds of extended sick leave.

23. In his reply, the appellant invokes a third plea of a violation of the principle of impartiality, on the basis that the appointment of the third physician on the Invalidity Board did not comply with the CPR since, he claims, it was actually imposed by the respondent. Insofar as this physician was on the NSPA's list of physicians, the principle of impartiality and the duty of neutrality were not respected. The fact that the Invalidity Board took a decision by a straight majority vote, and that the vote of the third physician was decisive for the refusal to recognize the appellant as suffering from permanent invalidity, implies that the vote of the physician in question taints the Invalidity Board's

conclusions with illegality. For the appellant, this is an obvious factual error of procedure and is likely to taint with illegality the Invalidity Board's findings and, consequently, the contested decision. In response to a question from the Tribunal during the hearing, the appellant also said that, at the Invalidity Board meeting, the third physician asked the appellant questions about his state of health, after having taken him for a one-on-one interview with nobody else present. Such behaviour clearly shows that the physician in question acted in breach of the principle of neutrality when giving their opinion on the appellant's medical condition, in that they were privy to information that they alone could assess with no possibility for it to be refuted in the Invalidity Board at a later point.

24. Secondly, the appellant argues that the contested decision caused him damage by not recognizing him as suffering from permanent invalidity, which resulted in the termination of his contract on the grounds of extended sick leave; this damage is assessed at €250,000.

25. In these circumstances, the appellant requests that the Tribunal:
- declare the appeal admissible;
- conclude that the Invalidity Board made an error in its findings of 25 March 2021;
- rule, as primary relief, that there are no grounds for the contested decision;
- rectify the contested decision by ordering that the appellant be recognized as an invalid and that he be entitled to an invalidity pension;
- in the alternative, annul the contested decision and order the respondent to pay the appellant compensation of €250,000, without prejudice, including to the right to increase that amount, for the consequent termination of his contract;
- refer the case to the competent authority so that it may reconvene the Invalidity Board on account of the error made;
- reserve to the appellant all rights and claims; and
- confirm to his lawyer that this appeal is based on supporting evidence, while also reserving the right to produce other documents.

(ii) The respondent

26. The respondent argues, firstly, that the appellant's submissions seeking annulment of the Invalidity Board's findings are inadmissible because it is not for the Tribunal to substitute its judgment for that of the Invalidity Board, nor to order the administration to recognize a staff member as invalid or valid. In any case, the respondent argues that the claims for annulment of the Invalidity Board's assessments in the framework of the contested decision are also without grounds.

27. Regarding the appellant's first plea, the respondent counters that the Invalidity Board's findings can only be reviewed at the request of the administration if they are tainted by an obvious factual error. However, the Invalidity Board's findings do not contain any such errors. There is no contradiction between, on the one hand, the Invalidity Board finding that the appellant's medical situation is not settled and, on the other hand, the fact that the appellant has been suffering from depression for years. In the respondent's view, the determination of a staff member's permanent invalidity is not necessarily dependent on whether the staff member suffers from episodes or chronic symptoms of depression. In addition, the fact that depression may be grounds for total incapacity for work, according to national regulatory considerations, is irrelevant in this case. Such considerations, assuming there to be grounds for them, in no way prove that the Invalidity

Board made an obvious factual error or that the respondent should be required to make a new decision in this regard.

28. Regarding the allegations that the appellant is suffering from an occupational illness caused by the constant harassment he purportedly endured, the respondent considers that the contested decision is not based on these grounds. Moreover, the appellant did not put forward any arguments or facts to show that he was harassed by his managers or colleagues.

29. With regard to the second plea that the respondent violated its duty of care, the respondent points out that it regularly informed the appellant of what his legal situation would be if he were to extend his incapacity for work on medical grounds for more than 21 consecutive months.

30. Regarding the third plea, the respondent argues that there was nothing irregular about the composition of the Invalidity Board. Contrary to the appellant's allegations, and as shown by the documents in the case file, the third physician was jointly appointed by the two other physicians. Indeed, the appellant's physician explicitly agreed to the third physician's joining the Invalidity Board. Therefore, this plea is groundless.

31. Concerning, secondly, the appellant's submissions seeking compensation, the respondent considers them to be entirely without grounds, since no fault was committed that could give rise to compensation for any damage allegedly suffered.

32. In these circumstances, the respondent submits that the present appeal should be dismissed as groundless.

D. Considerations and conclusions

On the submissions seeking annulment

33. Firstly, the Tribunal notes that the submissions seeking annulment are formally directed against the respondent's decision of 28 May 2021, rejecting the appellant's complaint and confirming that the Invalidity Board's findings (of no permanent invalidity) are valid and that no obvious factual error was made. The appellant is not, therefore, considered to be suffering from permanent invalidity and so is not entitled to an invalidity pension beyond the 21-month period of absence for extended sick leave. In these circumstances, the Tribunal considers that the submissions seeking annulment must be interpreted as being inevitably directed against the decision of 6 July 2021 terminating the appellant's contract on these grounds. Consequently, the present appeal must be considered as directed against these two decisions. It is in this context that the appellant develops various grievances directed against the Invalidity Board's findings, which provide the basis for taking the contested decisions. In light of the foregoing, the Tribunal will examine the three pleas developed by the appellant.

On the plea of an error of assessment by the respondent

34. The Tribunal recalls that under the terms of Instruction 13/3 xi) to Articles 13.1 and 14.2 of Annex IV to the CPR, the findings of the Invalidity Board are determined by a majority vote; they are final except in the case of obvious factual errors. Instruction 13/4 i) to the same articles, provides that “in accordance with the findings of the Invalidity Board and without prejudice to the competence of the [...] Administrative Tribunal, the Secretary/Director-General of the Organization shall decide either: a) to grant to the staff member concerned an invalidity pension under Article 13, paragraph 1, or Article 14, paragraph 2; [...]; or, b) not to recognize the staff member as an invalid within the meaning of the [CPR].” Instruction 13/4 iii) states that “in the event of an obvious factual error, the Secretary/Director-General shall again refer the case to the Invalidity Board.”

35. In light of the aforementioned provisions and its case law in this matter, the Tribunal examines, on the one hand, whether a factual error tainted the assessment of the Invalidity Board and, on the other hand, whether it is an obvious factual error. These are the circumstances in which the obvious factual error could taint the Administration’s decision based on the Invalidity Board’s findings with illegality. Therefore, the Tribunal has limited oversight of the Invalidity Board’s findings and reports (see paragraph 190, Joint Cases nos. 2019/1284, 2019/1285 and 2019/1291).

36. In this plea, the appellant actually alleges that the physicians on the Invalidity Board made an error of assessment regarding him in considering that his medical condition was not settled and was still evolving, when in fact he had been suffering from depression for several years. The appellant is of the view that the Invalidity Board did not examine his medical situation correctly because, on the basis of the information provided, the physicians would have logically had to recognize that the appellant’s illness was chronic and therefore “settled”, and, furthermore, that it was an occupational illness. By not taking this view, the Invalidity Board made an error of assessment that tainted the contested decisions with illegality.

37. However, the appellant’s arguments do not invoke any factual error that would affect the Invalidity Board’s assessment. Moreover, none of the appellant’s allegations demonstrate that such an error is obvious, as required by the CPR and the case law. He merely contests the findings of the physicians/experts but, as indicated above, the Tribunal only has oversight of the legality of these if there has been an obvious factual error.

38. As for the appellant’s claim that the respondent did not recognize him as suffering from an occupational illness, the Tribunal notes that the Invalidity Board did not refuse to recognize the appellant as suffering from permanent invalidity on the grounds that he was not suffering from an occupational illness; therefore, this claim must be rejected.

39. Consequently, this plea must be rejected.

On the plea of a violation of the duty of care

40. The Tribunal recalls that the Organization’s services are bound by the duty of care and the principle of good administration; these imply in particular that when taking a decision on a staff member’s situation, the Organization must take into consideration all the elements to weigh in its decision, and thus take account of not only the interests of the service but also those of the staff member concerned.

41. In his submissions, the appellant does not complain that the respondent failed to carry out due diligence when it compiled his administrative and medical files for the proceedings before the Invalidity Board. The appellant generally reproaches the defendant for not handling his case with more care, given his state of health.

42. Yet the case file for these proceedings does not contain any submissions demonstrating that the respondent failed in its duty of care. On the contrary, as shown by the factual elements of the case (see paragraphs 13 and 16 above), the respondent warned the appellant that he risked having his contract terminated on account of extended sick leave if he were to exceed a period of 21 months’ consecutive absence, given that the Invalidity Board had not recognized him as suffering from permanent invalidity.

43. Therefore, this plea must also be rejected.

On the plea of irregular composition of the Invalidity Board

44. The Tribunal notes that this plea is put forward for the first time in the reply, that it is time-barred and that it must therefore be rejected as inadmissible. In any case, the Tribunal notes that the evidence shows that the appointment of the third physician to the Invalidity Board was decided with the agreement of the appellant’s physician, who did not object that there was a risk of bias with the third physician. In these circumstances, there can be no argument that the Invalidity Board had an irregular composition.

45. Therefore, this plea must be rejected, as must the submissions seeking annulment and the complaints developed in connection with these submissions in their entirety.

On the claims for compensation

46. The Tribunal recalls that where the damage alleged by an appellant arises from the adoption of a decision whose annulment is sought, the rejection of the submissions seeking annulment entails, as a matter of principle, the rejection of the claims for compensation, as those claims are closely linked.

47. In this case, the appellant’s alleged damage stems from the contested decisions and the submissions seeking annulment were all rejected. Consequently, the appellant’s claims for compensation is also rejected.

48. It follows from all the foregoing that this appeal must be dismissed as unfounded in its entirety.

E. Decision

FOR THESE REASONS,

The Tribunal decides that:

– The appeal is dismissed.

Done in Brussels, 12 May 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 May 2022 AT-J(2022)0007

Judgment

Case No. 2021/1333

SS

Appellant

v.

Centre for Maritime Research and Experimentation

Respondent

Brussels, 12 May 2022

Original: English

Keywords: CMRE; restructuring plan; suppression of post; good administration and duty of care; refusal by the administration to reinstate the illegally evicted agent.

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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 28 April 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 13 September 2021 and registered on 17 September 2021 as Case No. 2021/1333, by Ms SS, a former NATO staff member under an indefinite duration contract, against the Centre for Maritime Research and Experimentation (CMRE). The action seeks to annul the respondent's decision of 1 June 2021 to terminate, with immediate effect, the appellant's contract, as well as the respondent's decision not to pay for untaken leave accrued from 1 January to 1 June 2021.

2. The respondent's answer, dated 17 November 2021, was registered on 29 November 2021. The appellant's reply, dated 31 January 2022, was registered on 7 February 2022. The respondent's rejoinder, dated 9 March 2022, was registered on 11 March 2022.

3. The Panel held an oral hearing on 28 April 2022 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 the NATO Undersea Research Centre (now the CMRE) in 2007. From 2014 to 2017, she was assigned temporary extra duties (Head of the HR Section, Deputy Head of the Personnel and Administration department, and acting Head of the General Services and Real Estate Maintenance Section), in addition to her duties as Head of the Procurement and Customs Section (A3 post 350A01).

5. On 5 March 2018, the respondent requested that the NATO Defence Manpower Audit Authority (NDMAA) reclassify post 350A01, Office Head, Contacts and Host Nation Relations, the post held by the appellant. In its request, the respondent focused on the fact that *"rationalisation and consolidation of administrative functions is sought in order to achieve leaner and more agile organisation while reducing overhead as part of the CMRE's ongoing strive for continuous increased efficiencies in the support services area. CMRE's manpower strategy envisions the deletion of two A4 posts … and re-assignment of key duties to other posts"*. In this regard, the respondent stressed in its requests that the A3 post 350A01 was to be revised and upgraded in order to add key duties and responsibilities and a selection of duties from the deleted posts connected with Host Nation relations. The revised post was entitled Head, Contacts and Host Nation Relations Office.

6. By a decision on 9 April 2018, the NDMAA upgraded post 350A01 from A3 to A4. By the respondent's decision of 23 April 2018, the appellant was appointed to the revised

post mentioned above (now post DPCX 0A10), and her contract was modified consequently.

7. In the appellant's performance appraisal for 2020 (March 2021), it is indicated that *"although the Brach is still going through rebuilding from the reorg of lately, [appellant] was able to quickly focus the needs of the Directorate and the whole Centre, ensuring the correct functioning and the achievement of the objectives assigned to her"*. In section 4 of this appraisal, devoted to the professional development of the staff member concerned, it is also mentioned that the appellant *"has successfully completed the NEDP and she will now have plenty of opportunity to apply the gained knowledge to the improvement of the branch she leads and to the Centre in any area of work she is involved"*.

8. As a reminder, with the NATO Agencies Reform in 2012, the NATO Science and Technology Organization (STO) was established as a subsidiary body to the North Atlantic Council (NAC). According to Article 3 of the Charter establishing the NATO STO (Charter), its mission is to help position the Nations' and NATO's science and technology investments as a strategic enabler of the knowledge and technology advantage for the defence and security posture of NATO Nations and partner Nations. Governance of the NATO STO is vested in the Science and Technology Board (STB) (Articles 15.1 and 16.1 of the Charter). Pursuant to Articles 18.1 and 18.4 of the Charter, the CMRE is one of the three executive bodies of the NATO STO. According to Article 18.5, the Head of the CMRE will implement the decisions of the STB and incorporate the policies established by the STB into operating procedures; prepare for STB approval, plans and the associated budget for organization and operation; and prepare budget estimates, execute approved budgets and prepare financial reports to the STB.

9. On 11 May 2021, the Financial and Audit Sub-Group (FASG) recommended specific actions to the STB, including, among other things, that it note the CMRE Financial Update report (which included the financial performance in 2020, the outlook for 2021 and the proposed restructuring plan for 2022 for the administrative staff) and that it support the CMRE Director's decision to restructure the CMRE and consolidate its four administrative branches into two administrative branches. Concerning the restructuring plan, the CMRE financial report indicates that *"six posts [have been] identified to be suppressed"* and that the criteria for identifying these posts *"were based on a thorough assessment of the Centre's current and future needs"*.

10. In an email dated 17 May 2021, entitled *"11 May Management Meeting Action Items"*, sent by the CMRE Director to the CMRE management team, including the appellant, the following is indicated for item 1 (Best practices for purchase orders): *"Sara to send training materials to all management. Managers reply with questions/suggestions. Sara organizes a round table to discuss."*

11. On 1 June 2021, the actions recommended by the FASG were approved by the STB under the silence procedure.

12. By decision dated 1 June 2021, the respondent informed the appellant that her post DPCX 0A10 was being suppressed on that same date, in the context of the restructuring of the CMRE. In this decision, the respondent underlined that the suppression in question was not related to her professional performance but to the need

to restructure the CMRE by combining and eliminating some posts to reduce the CMRE workforce because of the deteriorating financial situation. This decision was accompanied by a question and answer sheet regarding issues related to the suppression of a staff member's post. Point IV of this sheet indicates that, as a general rule, no payment can be made for any leave that still remains at the time of the staff member’s departure. The respondent informed the appellant by telephone and email on the same date of the above-mentioned decision.

13. On 30 June 2021, the appellant lodged a formal complaint against the respondent’s decision to suppress her post and terminate her contract and the connected decision not to pay her for untaken leave that she had accrued from 1 January 2021 to 1 June 2021.

14. By decision of 16 July 2021, the respondent rejected the appellant’s complaints against the two above-mentioned decisions.

15. By letter addressed to the Director of the STO CMRE, the Confederation of NATO Civilian Staff Committees (CNCSC) expressed several concerns regarding the ongoing reorganization of the STO CMRE, focusing in particular on the non-compliance of this reorganization with the Human Resources Principles which apply during Organizational Reorganization. The so-called NATO-wide reorganization framework contains HR principles that build on the experience gained through previous reorganizations (maintain mission effectiveness, minimize the financial impact and the number of staff made mandatory redundant, limit the effects on staff who are forced to leave NATO, minimize relocation, create support and understanding for the reorganization, harmonize the NATO-wide structural reform effort).

16. In its reply, dated 3 September 2021, the respondent detailed why the decision made on 1 June 2021 complies with the NATO Civilian Personnel Regulations (CPR) and the relevant applicable rules.

17. It is in these circumstances that, on 13 September 2021, the appellant brought the present action before the Tribunal.

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

(i) The appellant’s contentions

18. In the present action, the appellant develops submissions for annulment and compensation.

19. With regard to the claims for annulment, firstly, the appellant challenges the legality of the decision of 1 June 2021 to terminate her contract following the immediate suppression of her post and, in this respect, she develops five pleas.

20. The first alleges manifest errors of assessment in the justifications for the decision to suppress the appellant’s post, with a significant failure to state reasons. According to the appellant, using the restructuration to justify the suppression of the appellant’s post

is questionable. The actions approved by the STB concerning the restructuration of the CMRE do not give any indications or explanations for why the appellant's post in particular was suppressed. The respondent develops the rationale of restructuring needs in order to justify suppressing the appellant's post with immediate effect, but no real reasons are given, except the statement regarding the critical financial situation of the CMRE in recent years and more generally after the Agency Reform in 2012. Furthermore, the appellant points out that having suppressed her post, the respondent then merged it with the post of Head of Budget and Finance without providing any justification.

21. Furthermore, the hearing before the Tribunal was the first time that the appellant had been informed of an established team within CMRE whose mission was to identify the positions to be eliminated by considering first whether the post should be evaluated as non-critical and second whether the essential functions of the post could be legally reassigned to the remaining staff members. There are no CMRE documents indicating what a non-critical post is and in general no indication of why the appellant's position should be considered non-critical. On the other hand, several elements relating to the NATO Financial Regulations (NFR) and the Financial Rules and Procedures (FRP) lead to the conclusion that the appellant's post is to be considered as "critical", in particular in view of the decisions to be taken with respect to the applicable financial rules.

22. The second plea alleges that the decision of 1 June 2021 violates the NFR and FRP because these rules provide for the segregation of duties and the delegation of procurement contracting duties to a qualified staff member. Consequently, the decision to suppress the appellant's post and to merge this post with the Head of Budget and Finance is illegal. In addition, the staff member assuming purchasing and contracting duties must be specifically qualified for this. This is not the case here, as the person who has now assumed these duties following the suppression of the appellant's position does not have the required qualifications; this represents a major risk for the Organization, with potential legal and financial liabilities in the event of procedural mistakes.

23. The third plea is based on the violation by the decision of 1 June 2021 of Articles 4.1.1 and 57.2 of the CPR and the non-compliance with the Clearing House scheme. Indeed, the possibility of transferring or reassigning the appellant within the same or a different NATO body was not discussed at all when the respondent terminated the appellant's contract with immediate effect, nor was it discussed in the weeks and months before such decision was communicated to the appellant and implemented. For instance, several managerial posts (Head of General Services and Real Estate and Head of HR) for which the appellant had served ad interim in the past, and which corresponded to her qualifications and experience, were still vacant when the respondent adopted the decision to suppress her post. With regard to the option of being deployed to another NATO body, the appellant stressed that it was illegal for her not to be treated as a redundant staff member and included in the NATO Clearing House scheme when the decision was adopted on 1 June 2021. However, the respondent realized that this was problematic and proposed on 25 June 2021 that the appellant be treated as a redundant staff member and included in the NATO Clearing House scheme, i.e. after the disputed decision of 1 June 2021. In addition, after the CMRE issued a second call for voluntary departures in October 2021, the appellant proposed as an alternative, with reimbursement of her loss-of-job indemnity, that she take up one of two posts corresponding to her profile (Chief of Contracts and HN Relations or Senior Contract

Officer). The respondent did not discuss this proposal at all.

24. Finally, the appellant argues that the decision to replace the six months' notice by an indemnity under Article 10.5 of the CPR was not reasoned and in no way based on her interests or the interests of the service. Moreover, the rationale advanced by the respondent for the challenged decision, namely the need to protect the classified and sensitive NATO information stored and processed by the CMRE, is completely irrelevant and unfounded regarding the appellant's situation.

25. The fourth plea is based on the respondent's breach of the duty of care towards the appellant and the violation of the principle of good administration. In particular, the appellant argues that prior to the adoption of the decision dated 1 June 2021, she had received no indication or notice from her superiors or the Head of NATO Body that her post had been identified for suppression. In contrast, the appellant's performance appraisal for 2020, adopted on 17 March 2021, and in particular the email sent by the CMRE Director on 17 May 2021 (see paragraphs 9 and 10), i.e. less than two weeks before the decision of 1 June 2021, show that the appellant was a very good manager, was useful to the CMRE and had been entrusted with several duties for the near future. However, the 1 June 2021 decision testifies that the respondent knew that the appellant would not be attending any further meetings due to the suppression of her post and chose not to inform the appellant of this decision. This is a clear violation of the principle of good administration and the duty of care. This violation is further aggravated by the fact that the appellant had 14 years of continuous and loyal service to the respondent. It is more than obvious that there is no valuable justification or evidence of good administration in relation to the fact that the respondent informed the appellant of the termination of her contract by phone call on 1 June 2021, the same date that the decision was taken.

26. In addition, the appellant considers that the respondent did not comply with the NATO-wide reorganization framework despite its statement to the contrary. This is also evidenced by the CNCSC's letter sent on 2 August 2021 to express its concern that the restructuring plan did not comply with this framework. Unlike previous reorganization and restructuring plans, no policy documents or related information were transparently shared or adopted by the respondent.

27. With the fifth plea, the appellant considers that the decision of 1 June 2021 is tainted by a misuse of power and discrimination based on sexual orientation. In fact, the decision adopted is not based on any rational element and clearly suggests that other motives than those exposed justified the decision adopted, demonstrating in this case excessively arbitrary and discriminatory behavior towards the appellant. In this respect, the appellant notes that the respondent's approach towards her changed profoundly when she informed her superiors of her intention to enter into a civil partnership. Being discreet, the appellant had never previously communicated any information about her personal life. After the appellant had the discussion on this subject, she was never able to have a bilateral meeting with her supervisor and discuss business or performance issues face to face. A feeling of uneasiness was thus established and this became very visible and perceptible during the appellant's performance appraisal for 2019. The respondent's overall attitude in this context clearly demonstrates a wish to find a way to discard a staff member by suppressing her position, and to do so in an unjustified, abusive and discriminatory manner.

28. With respect to the justifications provided by the respondent to deny the allegations of discrimination and abuse of power, the appellant replies that her participation in the NEDP is evidence of the high regard that the Head of the NATO agency had for her professional contribution to the CMRE but it is not evidence of non-abuse of power and non-discrimination. In any event, this occurred before the appellant communicated her intention to enter into a civil partnership.

29. The appellant also challenges the legality of the decision of 1 June 2021 not to pay for the untaken leave she had accrued from 1 January to 1 June 2021. The appellant considers that Article 42.3.3 of the CPR does not justify the decision taken in this regard. Furthermore, in the absence of any prior communication or notice with regard to the abrupt termination of her contact, the appellant could not reasonably know that she had to exhaust her accrued leave by 1 June 2021. In any event, the appellant notes the respondent's intention to compensate her for this specific claim by reconsidering the decision of 1 June 2021 to that effect.

30. As regards the submission for compensation, and in the event that she is not reintegrated within the CMRE, the appellant seeks, firstly, compensation for the material damage resulting from the decision of 1 June 2021 in the amount of the remuneration she would have received as an employee of the NATO CMRE until reaching the retirement age. In this regard, the damage is estimated at €1,600,000.00 (including salaries, allowances, and benefits after deduction of the amount of loss-of-job indemnity received).

31. Secondly, the appellant seeks compensation for the material damage suffered as a result of the sudden loss of insurance for medical coverage; the interruption to her service with NATO, which would prevent her from benefiting from her seniority in service in the event of re-employment; and the interruption of contributions to the pension scheme without the possibility to plan an exit strategy to mitigate financial losses. With specific regard to insurance for medical coverage, the appellant recalls that the CMRE's HR section mandated that the insurance company cancel the 12-month period of the continuation policy, which is normally offered, after the termination of the appellant's contract. The material damage for the above three cases is evaluated at €50,000.00.

32. Thirdly, the appellant considers that she has also suffered non-material damage because of the conduct of the Head of NATO Body, which constitutes a serious breach of its obligations in accordance with the principle of good administration and the duty of care. The appellant also considers that the way she was treated was unnecessarily humiliating and caused non-material damage, also given the fact that she was a staff member with long service and recognized professional merit. In addition, the appellant has suffered obvious reputational damage. The appellant evaluates that the total non-material damage suffered is to be compensated at €100,000.00.

33. Appellant requests that the Tribunal:

- annul the respondent's decision dated 1 June 2021 to terminate her contract with immediate effect;
- reintegrate her within the CMRE with retroactive effect and pay her remuneration (increased by late interest) after deduction of the amount of the loss-of-job indemnity received;
- compensate her for the material damage suffered in the event that she is not reintegrated within the CMRE, evaluated at €1,600,000.00;
- compensate her for further material damages, evaluated at €50,000.00;
- compensate her for non-material damage, evaluated at €100,000.00;
- pay her for the unused accrued annual leave, including the Organization's contributions to the Defined Contribution Pension scheme, calculated as at the date of her separation from the Organization;
- reimburse all the legal costs incurred and the cost of retaining legal counsel and grant her anonymity under Rule 11 of the Tribunal's Rules of Procedure, Appendix 1 of Annex IX to the CPR.

(ii) The respondent's contentions

34. As regards, first, the submissions for annulment of the decision of 1 June 2021 and the first plea put forward by the appellant, the respondent argues that no error of assessment was committed because the suppression of the appellant's post was justified for financial reasons requiring the inevitable restructuring of the CMRE and therefore the suppression of several posts including the appellant's. In particular, to address the worsening financial situation, the CMRE initially applied financial limits to all projects, including cost-cutting measures for travel, training, and infrastructure, hiring freezes, no new positions, no recruitment and no renewal of definite duration contracts. However, these measures were not sufficient to improve the CMRE's financial outlook and, as a result, a voluntary early retirement programme was initiated. Ten volunteers applied for this early retirement programme, four of whom were eventually accepted and three of whom were selected later (November 2021) under a second programme phase (a total of seven staff members). Even then, the planning of cost reductions was not sufficient and further cost reductions were necessary. Only at this stage, and as a final solution, was the suppression of a number of posts, including the appellant's, considered in order to ensure the viability of the CMRE's activities in the future.

35. As a result, the restructuring of the CMRE was critical and a team made up of the Director, Deputy Director, Head of Human Resources, and Head of Finance of the CMRE was put in place to identify posts for suppression. This team also gathered information from CMRE senior management and identified 12 positions to be suppressed through voluntary or involuntary departure. After acceptance of seven volunteer departures, there were still five posts to be deleted, including the appellant's. There were therefore no errors of assessment or a targeted choice to suppress exclusively the appellant's post. The decisions made in this regard are part of an objective plan to restructure the CMRE, given the deterioration of its financial situation over the past three years.

36. With respect to the second plea of violation of the rules contained in NFR and FRP, the respondent argues that this plea is completely unfounded. Indeed, these rules could not be raised to challenge a post suppression, which is part of a restructuring plan approved by the Nations through the STB. Under these conditions, no risk can be invoked to question this decision, a risk that in any event has been evaluated and accepted by the decision of the Nations taken in the frame of the restructuration of the CMRE.

37. With regard to the third plea, the respondent considers that no violation of articles 4.1.1 and 57.2 of the CPR could be asserted. On the one hand, no possible transfer to another post was probable given the aim of the restructuration plan. In addition, and in contrast to the appellant's allegations, the posts indicated for a possible transfer were either not vacant or military. In addition, no new equivalent posts have been created and there is no possibility of covering the responsibilities of the suppressed post by outsourcing to consultants or contractors, whose number is also due to be reduced in the framework of the restructuring. On the other hand, with regard to the possibility of applying for vacancies through the Organization in case of redundancy, the appellant could not benefit from this scheme given the termination of her contract with immediate effect. However, the Organization offered the appellant by way of derogation the possibility, two weeks after the termination of her contract, to be included in the Clearing House scheme, a proposal accepted by the appellant.

38. With respect to the argument of the illegal substitution of an allowance for the notice period, respondent considers that this is in line with article 10.5 of the CPR which provides that the Head of NATO body may substitute for all or part of the contractual period of notice an allowance. In this regard, the decision to substitute an allowance for the six-month notice period was taken balancing the interests of appellant and the CMRE risk tolerance.

39. The respondent also considers that the fourth plea is unfounded. Indeed, the appellant does not put forward any valid argument to justify that there was in this case a violation of the principle of good administration or a breach by the CMRE of its duty of care. All the agents concerned were informed of the critical financial situation of the CMRE and of the necessity of the restructuring with the consequences which would result from it. In order to inform directly the concerned agents and given that 2 June 2021 was a non-working day, it was decided to inform directly the concerned agents by phone the evening before, i.e. 1 June 2021. Furthermore, and contrary to what the appellant maintains, the instructions given not to return to the office and to return the badge are part of the procedure applicable in the event of departure for all and are in no way intended to target the appellant and punish and humiliate her.

40. Finally, with regard to the plea of abuse of power and discrimination, the respondent rejects all the allegations made by the appellant as unfounded. The procedure for terminating contacts for restructuration was applicable to all the agents concerned and at no time was there an abuse of power that can be established against the respondent. With particular reference to discrimination on the grounds of the appellant's sexual orientation, the respondent states that this argument was never put forward in the pre-contentious proceedings, nor was it put forward even before these proceedings before the administration. These are assertions without any evidence. As

for the argument of non-compliance with the NATO-wide reorganization framework, and even though this framework is not applicable to a non-customer funded organization, the CMRE has clearly adhered to the best practices provided. The CMRE maintained mission effectiveness while minimizing the financial impact to the Nations and while limiting the number of staff that had to be reduced. In addition, no staff relocation took place and all measures were discussed with the staff via email.

41. With respect to the annulment submissions relating to the legality of the decision of 1 June 2021 not to pay for untaken leave from 1 January 2021 to 1 June 2021, respondent has acknowledged the need to compensate the appellant for the leave she was unable to take due to the termination of her contract effective immediately and steps are underway to pay appellant for such leave.

42. With regard to the submissions for compensation, the respondent considers, first of all, that the claim for the material damage suffered, valued at €1,600,000.00 is completely unfounded. In fact, the appellant considers that she is entitled to compensation until she retires, whereas the continuity of her employment depends on several other factors that are not set in advance, such as her performance, the existence of the post and the business needs. Such an argument is not valid. Moreover, the respondent considers this claim to be totally unfounded because it is based on the assumption that the staff member concerned will never find another job until retirement age, although there is nothing to exclude the opposite. Besides, it is precisely in order to compensate for the negative effects inherent in the suppression of the position in question that the CPR provides for the possibility of the indemnity for loss of job.

43. Secondly, the respondent considers that the claim for compensation for additional material damage valued at €50,000.00 is also unfounded. The appellant believes that this compensation is necessary to partially offset the material harm resulting from the appellant's loss of medical coverage. According to the respondent, this is not correct because in any event, the appellant is covered for a maximum of 12 months under certain conditions after her contract ends, if so chosen. The respondent also believes that if hired by another NATO body, the appellant's full profile and experience would be taken into account in order to provide an appropriate position. Finally, with regard to the financial impact of the termination of the appellant's contract on the Defined Contribution Pension Scheme (DCPS), the respondent considers that the Organization has paid the corresponding contributions in any case. In this regard, the appellant may withdraw the holdings, transfer them or keep them in the scheme before making a decision at an insignificant cost. In these conditions, the respondent concludes that, contrary to the assumptions of the appellant, no additional material damage can be considered and assessed at €50,000.00 for the three specific claims mentioned above and developed in present action.

44. Thirdly, the respondent rejects any claim to establish any moral harm suffered by the appellant. Contrary to all the allegations made by the appellant, the respondent never treated her in a discriminatory manner in comparison with the other agents and did everything possible to find a solution, as in the case of the derogatory possibility of bringing the appellant into the Clearing House scheme. There was no intention to humiliate the appellant for any reason. Therefore, the claim for compensation of €100,000.00 must also be rejected as unfounded.

45. In these circumstances, the respondent asks the Tribunal to dismiss the appeal on the merits. The decision to supress the appellant's post was taken in accordance with the CPR and the discretionary powers of the CMRE in this regard.

D. Considerations and conclusions

On the anonymity request

46. The appellant requests anonymity and asks the Tribunal to protect her privacy from public disclosure given the personal information discussed in the appeal. Appellant has not demonstrated good grounds that could justify granting anonymity in the present appeal. It follows that the appellant's request for anonymity must be rejected.

47. The Tribunal recalls, however, that in accordance with its case law, it ensures that each of its judgments, compendia, and collections of judgments indicate that, in the event of reproduction of any judgment, even if only partial, the name of the appellant must not appear (see AT judgment in Case No. 2019/1286, paragraph 45).

On the submissions against the decision of 1 June 2021 to terminate, with immediate effect, the appellant's contract

48. It should be noted that the present appeal originates in the restructuring of the CMRE following the STB's 1 June 2021 approval of the actions recommended by the FASG regarding this restructuration. It is following the decision restructuring the CMRE and the suppression of the appellant's post that the respondent terminated, with immediate effect, the appellant's contact.

49. In that regard, the appellant puts forward several pleas, in particular that the decision terminating her contract infringes the principle of good administration. Furthermore, the challenged decision does not comply with the principles deriving from the NATO-wide reorganization framework, which is obviously applicable in this case and specifically provided for in this scenario.

50. It results from the case law of the Tribunal that during the course of the reorganization of a NATO structure, an apparently serious and coherent process must be followed to meet the requirements of a changing and downsized environment (see para 46, Joined Cases Nos 2016/1086 and 2016/1093). Thus the decisions taken in the course of this process must regularly take in the exercise of discretionary powers of the authorities concerned without any abuse of powers nor indication of arbitrariness.

51. It also follows from the Tribunal's case law that when the Organization suppresses posts as part of a plan to reorganize and restructure a NATO structure, the staff member concerned must be properly informed by the competent NATO body, in this case the CMRE. In addition, the staff member must be informed of the consequences of the termination of his or her contract, with information on the notice period and the granting of compensation for the loss-of-job indemnity in the absence of a new offer for employment (see para 61 and 62, Joined Cases Nos 2016/1090 and 2016/1095).

52. The Tribunal recognizes that in the context of the proposed restructuring, the Organization has broad discretionary power. The Tribunal also notes that the disputed restructuring of CMRE was planned for several years before the adoption of the challenged decision for financial reasons. It is not for the Tribunal to review the choices made by the Organization to ensure the financial sustainability of the CMRE.

53. However, in this restructuring process, the Tribunal considers that when the administration has to resort to the suppression of posts to face a financial crisis and to balance its operating budget, it must, firstly, identify the posts likely to be abolished. In fact, as it appears from the jurisprudence of the Tribunal (see cases Nos 2016/1076 to 2016/1096), the identification of the posts that are likely to be suppressed must be included in the plan of this restructuring and in this framework. Secondly, the persons concerned must be informed. The Tribunal will consider whether these two conditions are met in the present case

54. The Tribunal notes that the decision of the STO, by which the restructuring plan proposed was approved on 1 June 2021, contains no indication of the specific posts to be suppressed. In fact, apart from a general reference to the suppression of six posts, there is no concrete indication of the posts in question, nor is there any other information on this subject or that the appellant's post is one of those posts.

55. It is true that the recommendations for this restructuring are dated May 2021, and were certainly prepared before that date. This shows that an internal debate has already taken place within the CMRE, but there is no evidence of which posts are to be suppressed, including the post of the appellant. The respondent even acknowledged this situation.

56. It is also apparent from the record of the proceedings that discussions about the possible suppression of certain posts were taking place within a senior management team. But again, there is no documentation showing that the appellant's position was to be suppressed on the basis of an express recommendation of this team and before the STO approval date of 1 June 2021.

57. In the absence of information concerning the suppression of the appellant's post, it is necessary to examine, secondly, whether the appellant was duly informed of the suppression of her post.

58. The Tribunal finds that there are no elements and documents in the present proceedings that would allow it to be concluded that the appellant was duly informed of the possibility that her position would be suppressed in the context of the approval of the restructuring plan by the STO on 1 June 2021. Nor did the respondent provide the Tribunal with any document indicating that, prior to that date, the appellant had information that her post was likely to be suppressed.

59. By contrast, several facts over the last three years show that in the context of the restructuring that had been going on for years, the appellant was an indispensable element for the management of the CMRE, which had entrusted her on several occasions with the performance of various management tasks. In addition, in 2018, her position was upgraded and the appellant was promoted (see paragraphs 5 and 6). In 2021, the assessment of her professional performance clearly suggests that she will contribute in the future in the CMRE to carry out its tasks (see paragraph 7). Again, when the recommendations for the restructuring of the CMRE were issued in May 2021, the appellant was still considered by her hierarchy as an essential element in the future management of the CMRE's tasks (see paragraph 10).

60. It is therefore clear that the appellant, despite the fact that her position was not identified as likely to be suppressed, was not informed in any direct or indirect way that this would be the case. In this respect, the Tribunal must recall that even the respondent has never indicated that the appellant was informed before the date of 1 June 2021 that her post would be suppressed. On the other hand, the elements mentioned in the previous paragraph created expectations in the appellant's view that despite the ongoing restructuring plan the appellant would continue to perform her duties within the CMRE.

61. It follows from the above, and in view of the professional and personal consequences of the suppression of a post with immediate effect, that the respondent has a duty to provide information about this suppression in accordance with the principle of good administration.

62. In the present case, the date of termination of the appellant's contract coincides with the date of approval of the CMRE's restructuring plan, namely 1 June 2021. Therefore, under these conditions, in the absence of any consultation with the respondent, the appellant was not in a position to react and propose to the administration measures to mitigate the negative effects of such an exceptional situation. The only explanation given by the respondent that it contacted the appellant on the same day, i.e. on 1 June 2021, by e-mail and by telephone after 5 p.m., does not support the contention that the respondent fulfilled its obligation deriving from the principle of good administration. The Tribunal recalls that, in the past the decision to suppress a number of posts in the context of a restructuring of a NATO structure has been followed by a period of time during which negotiations are held in order to consider appropriate solutions. It is at the end of these negotiations that, as a result of the suppression of posts, the termination of the contract is decided (see Cases 2016/1076 and 2016/1078 to 2016/1096).

63. In response to a question from the Tribunal as to why the appellant’s contract had to be terminated in the absence of any information on the same day as the approval of the restructuring plan, the respondent considered that such a decision was conceivable in the light of article 10.5 of the CPR and the discretionary power left to the administration in this respect.

64. The Tribunal does not dispute the possibility of resorting to the article in question, especially for security purposes. But this is not the case here, and the respondent recognized this during the hearing. Thus, a decision, such as the one in this case, to terminate a staff's contract with immediate effect due to the suppression of this post is not in line with the respondent's obligation under the principle of good administration.

Indeed, such a decision is likely to have harmful consequences for the staff member concerned, especially in the absence of any prior information and in the absence of any prior indication for the suppression of the post in question in the restructuring plan.

65. In these circumstances, the Tribunal considers that the challenged decision should be annulled without it being necessary to consider the other grounds for annulment put forward by the appellant.

66. The annulment of a decision of termination of employment entails, in principle, the reinstatement of the illegally dismissed staff member in his or her last position, or in an equivalent position if this is materially impossible. Thus, the respondent shall pay the full amount of the emoluments due to the appellant from the period from 1 June 2021 until the date of the ruling of the present judgment plus interest at the latest European Central Bank rate increased by two points.

67. However, the administration may invoke Article 6.9.2 of Annex IX of the CPR, which states that:

> where 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.

Following a question of the Tribunal, the respondent invoked these provisions at the hearing held on 28 April 2022.

68. Pursuant to Article 6.9.1 of the Annex IX of the CPR, annulment of a decision allows a staff member who has been the subject of the decision to claim compensation for the prejudice suffered as a result of this illegality. In view of the circumstances of the dismissal, the functions held by the appellant and the respondent's refusal to reinstate her, and the significant loss of income she has suffered since her dismissal, a fair and comprehensive assessment will be made of the damage suffered, both material and non-material, by ordering the CMRE to pay the appellant 12 months of her last emoluments.

69. The appellant shall receive the amounts set forth in paragraphs 66 and 68 after deducting the amounts already received under the decision of 1 June 2021.

On the submissions against the decision of 1 June 2021 not to pay the appellant for untaken leave accrued from 1 January to 1 June 2021

70. It results from the written procedure that the respondent expressed its intention to review the decision of 1 June 2021 on this point and to pay the appellant the amount corresponding to the days of leave accumulated during this period and not taken. At the hearing and in response to a question from the Tribunal, the respondent indicated that the amount in question had indeed been paid to the appellant. The appellant also confirmed at the hearing that the amount in question had been paid in full.

71. It follows that the submissions for annulment against the decision of 1 June 2021 on this point are without object and that there is, therefore, no need to adjudicate on these submissions.

72. The remainder of the appeal is dismissed.

E. Costs

73. 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 [...].

74. In the circumstances of the case, the conclusions of the appeal being granted for the most part, it is appropriate to reimburse the appellant's justified expenses and the costs of retaining counsel up to a maximum of €4,000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The challenged decision is annulled.
- The CMRE shall compensate the appellant (i) with a sum equal to the entirety of her emoluments for the period from 1 June 2021 to the date of the present judgment plus interest at the latest European Central Bank rate plus two points and (ii) with a sum equal to 12 months of her last salary as compensation for the damage suffered as a result of the challenged decision. These sums will be paid to the appellant after deduction of the sum already paid under the decision of 1 June 2021.
- There is no need to adjudicate on the submissions against the decision of 1 June 2021 not to pay the appellant for untaken leave accrued from 1 January to 1 June 2021.
- The respondent shall reimburse the appellant's justified expenses and the costs of retaining counsel up to a maximum of €4,000.
- The remainder of the appeal is dismissed.

Done in Brussels, on 12 May 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

20 May 2022 | AT-J(2022)0008

Judgment

Case No. 2021/1330

HG
Appellant

v.

NATO AGS Management Agency
Respondent

Brussels, 20 May 2022

Original: French

Keywords: a) staff member whose contract was illegally terminated – determination of material damage – difference between the emoluments that the staff member would have received at NATO and the net wage income actually received over that period. b) period considered – duration of contract still to run, as the Tribunal previously ruled, as the basis for calculating this damage.

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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 29 April 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr HG, registered on 17 July 2021, seeking:

- annulment of the implicit decision by the General Manager of the NATO AGS Management Agency (NAGSMA) to reject the claims he submitted on 29 April 2021 concerning the determination of the material damages suffered as a result of the decision of 17 February 2020 terminating his contract effective 29 February 2020, which was annulled by the Tribunal in its Judgment No. 2020/1301, dated 18 January 2021;
- annulment of the implicit decisions by the NAGSMA General Manager rejecting his other requests seeking the same relief;
- compensation for the material damage suffered, assessed at €280,258.05;
- compensation for the non-material damage suffered as a result of the administration’s lack of care in its replies to his requests, which he estimates at €10,000;
- payment of the costs incurred by the appellant for his defence.

2. The respondent's answer, dated 18 October 2021, was registered on 28 October 2021. The appellant's reply, dated 29 November 2021, was registered on 14 December 2021. The respondent's rejoinder, dated 14 February 2022, was registered on 16 February 2022. By order of 18 April 2022, the Tribunal’s President asked each party to produce the appellant’s pay slip for January 2020. The respondent replied on 20 April 2022 and the appellant on 21 April 2022.

3. An oral hearing was held on 29 April 2022 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. Mr G, a member of the German armed forces who was employed at NAGSMA as a seconded staff member, was the subject of a suspension decision and then a decision terminating his contract.

5. He submitted two appeals to the Tribunal. Under No. 2019/1289, he requested annulment of the suspension ordered on 6 June 2019. Under No. 2020/1301, he requested annulment of the decision of 18 February 2020 to terminate his contract.

6. In a judgment dated 18 January 2021, the Tribunal joined the two appeals and annulled both decisions. The decision to suspend the appellant was annulled on the grounds that the decision was taken on the same day that the letter of accusation was received, which showed that the administration had not investigated the credibility of the accusations. The decision to terminate the contract was annulled on two grounds: the

failure to provide the appellant with the report that should have been presented to the Discipline Committee for the proceedings, and the improper composition of the Discipline Committee.

7. Concerning compensation, the Tribunal awarded the appellant €4,000 in legal costs and €5,000 in non-material damage. With regard to the material damage, the Tribunal referred the appellant to the administration to obtain compensation for this damage, since the Tribunal did not have a sufficiently complete case file to rule on this in its first judgment: *"As the Tribunal does not have all the material elements necessary to assess the amount of material damage suffered by the appellant, it invites him to approach the administration about getting this. In any event, given that the end date of the contract, set by that contract as 31 December 2020, has passed, reinstatement of the appellant in the Agency is no longer possible.*"

8. The order for NAGSMA to pay €4,000 in legal costs was executed on 26 May 2021. The compensation for non-material damage was paid on 7 April 2021. These two issues are therefore no longer in dispute. Consequently, this judgment does not mention the exchanges between the appellant and the respondent on these points.

9. The present Case No. 2021/1330 follows on from the two previous cases: the former NATO staff member is seeking compensation for the material damage resulting from the illegal termination of his contract, which took effect on 29 February 2020 instead of 31 December 2020.

10. On 5 February 2021, the appellant asked the administration to execute the judgment of 18 January 2021, also mentioning that the respondent had extended the contracts of all of its personnel until 30 June 2021. He therefore asked that the compensation for material damage include the first six months of 2021. On 15 February 2021, the respondent denied such an extension, since there had been no generalized extension of contracts.

11. On 9 March 2021, the appellant supplied the respondent with information on his remuneration in the German Air Force since March 2020, reiterated his request that the guaranteed extension of his contract until June 2021 be factored in, and added a request for payment of the indemnity for loss of job and pension contributions. On 22 March 2021, the respondent turned down all of these requests and asked for more information concerning his remuneration since March 2020.

12. On 6 April 2021, the appellant provided some information regarding his remuneration since March 2020 and repeated his previous arguments. On 29 April, he announced that he would be appealing to the Tribunal to resolve the dispute.

13. On 28 April 2021, for the first time, the respondent provided a figure, assessing the damage at €48,190.98, the difference between the salary of €110,083.93 that he would have received at NATO and that of €62,482.32 that he had received in the German Air Force. With regard to his pension rights, the respondent proposed a lump sum of €4,655.05. It refused to pay the indemnity for loss of job.

14. On 11 May 2021, the appellant again requested that the extension of his contract, which should have happened, be factored in, and indicated the net remuneration that he had received since March 2020. He reiterated all of his previous claims. On 18 May 2021, the respondent contested the calculation of the net amount received since March 2020. On 3 June 2021, the appellant once again repeated his previous requests.

15. On 9 July 2021, having received no reply from the respondent, the appellant submitted an appeal to the Tribunal.

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

(i) The appellant's contentions

16. The appellant accuses the respondent of failing to comply with the scope of Judgment No. 2020/1301, thereby violating the principle of *res judicata*. He cites a violation of Article 6.8.3 of Annex IX to the Civilian Personnel Regulations (CPR).

17. More specifically, the appellant requests that the respondent pay the difference between the total remuneration that he would have received had he remained in his position at NATO, i.e. €110,839.30 (and not €110,083.93 as was mistakenly indicated by the respondent) and the net remuneration received from the German Air Force, which totals €42,398.97. For the ten months from 1 March to 31 December 2020, he asks for €68,440.33, corresponding to this difference. He contends that these are the two net remunerations that must be compared.

18. To this, the appellant adds €41,064.18, corresponding to the same calculation for the period running from 1 January to 30 June 2021, since he believes that his contract would certainly have been extended had he remained in his position in the Organization.

19. He also asks for payment of the indemnity for loss of job as per Annex V to the CPR, which should be awarded to any staff member who loses their job involuntarily. In the present case, this indemnity comes to €110,839.30. To this, he adds payment of the employer's contributions to the pension scheme, which he calculates at €1,800.27 per month, i.e. a total of €28,804.32 for the sixteen months in question. Similarly, he calculates the employer's payments to the health insurance scheme as totalling €31,109.92.

20. The total amount of the material damage resulting from the illegal decision of 17 February 2020 is therefore calculated at €280,258.05, which he asks the Tribunal to order the respondent to pay him.

21. The appellant also invokes non-material damage resulting from the respondent's lack of care in handling his requests for application of the Tribunal's judgment of 18 January 2021. He assesses this damage at €10,000.

(ii) The respondent's contentions

Admissibility of the appeal

22. The admissibility of the appeal is not challenged.

Arguments regarding the merits of the appeal

23. The respondent denies the alleged violation of the principle of *res judicata*. It stresses that the judgment to be applied did not rule on the specific points under dispute, since the Tribunal did not have the precise information required to determine the amount of the material damage.

24. The respondent reproaches the appellant for the piecemeal way in which he provided the documents and information needed to calculate the damage for which he is seeking compensation. Although it admits a minor typographical error and acknowledges that the remuneration the appellant would have received is €110,839.30, it contends that the German remuneration that has to be factored in is the gross salary of €62,648.32, before deductions for income tax and contributions to a private health insurance scheme.

25. The respondent rejects the appellant's request for the period after 31 December 2020 to be taken into consideration. It bases this firstly on the judgment of 18 January 2021, which, in paragraph 66, mentions 31 December 2020 as the end date of the contract. It then explains that although the contracts of some of the Organization's staff members were extended until 30 June 2021 and then until 31 December 2021 as the NAGSMA's existence was extended from 31 December 2020 to 31 December 2021, this was not a general measure; such decisions were made on a case-by-case basis, and there is no certainty that the appellant's contract would have been extended.

26. Regarding the indemnity for loss of job, the respondent refuses to pay it on the basis of Article 1 (3) (c) of Annex V to the CPR, which implies that staff members seconded to the Organization from a national civilian or military administration return to their national administration at the end of this secondment and are not entitled to the indemnity for loss of job.

27. The respondent refuses to pay the appellant its pension contributions, on the grounds that his reintegration in the German Air Force entitles him to pension rights for the period after 1 March 2020 and that contributions cannot be paid by two entities simultaneously. It applies the same reasoning with regard to the contributions to the health insurance scheme.

28. Concerning the non-material damage cited, the respondent denies any lack of care, emphasizing that the appellant himself prolonged the resolution of this dispute by only gradually and partially supplying the information required to calculate the amount of the material damage suffered.

29. It concludes from all of the foregoing that the material damage decided in principle by the judgment of 18 January 2021 comes to €48,190.98.

D. Considerations and conclusions

On the merits of the appeal

30. Firstly, the Tribunal rejects the plea of a violation of Article 6.8.3 of Annex IX to the CPR. This plea is irrelevant since paragraph a) of this article sets out the terms for requesting rectification of a factual error and paragraph b) sets out the terms for requesting a re-hearing. Neither of these apply, since the aim is to calculate the amount of the damage decided by a previous judgment, not to modify the terms thereof.

31. To determine the compensation for material damage, the difference between the emoluments that the staff member would have received if he had remained in his position at NATO and the wage income that he actually received over that period must be calculated. His contract with NATO, where he had been on secondment, ended on 29 February 2020, and the following day the appellant was reintegrated into his original military administration, the German Air Force.

32. To determine the amount of the material damage that the Tribunal, in its judgment of 18 January 2021, had asked the respondent to determine and pay, seven successive matters must be examined.

33. Firstly, to calculate this difference, comparable amounts must be compared, i.e. either the two gross remunerations or the two net remunerations. Since the remuneration received by NATO staff members is exempt from income tax under Article 19 of the Ottawa Agreement of 20 September 1951, the amount of the emoluments received from NATO, which are the subject of this discussion, is the net remuneration. Therefore, the remuneration that the appellant would have received if the illegal decision of 17 February 2020 had not been taken must be compared with the wage income he actually received, net of income tax and other taxes, and net of social security contributions.

34. The second matter concerns the monthly salary that the appellant would have received at NATO. The two parties rightly agree to apply the remuneration for January 2020, i.e. €11,083.93, which is a net amount. For the period from March to December 2020 inclusive, the emoluments that the appellant would have received at NATO are therefore equal to ten times this monthly amount, i.e. €110,839.30.

35. The third matter is the determination of the wage income received by the appellant from the German Air Force for the period from March to December 2020. It is not disputed that the gross amount received was €62,648.32; to determine the net amount received by the appellant, one must deduct income tax (€17,184.12) and the associated solidarity tax (€851.93) from this, as well as the compulsory contribution to a health insurance scheme (€1,583.30), which is equivalent to the amount deducted from the emoluments received by NATO staff members. For the whole of 2020, i.e. in the appellant’s case for the period from 1 March to 31 December 2020, the net remuneration actually received was €42,398.97.

36. The fourth matter concerns whether 2021 should be factored in for calculating the damage; the appellant argues that it should, but the respondent refuses. It is undisputed that as of the date when the appellant's contract was terminated, the end date was given as 31 December 2020. This is what the Tribunal noted in paragraph 66 of its judgment of 18 January 2021, concluding moreover that reinstatement of the appellant was not possible since the end date of the contract had passed. The appellant asks for 2021 to be factored in, arguing after the fact that the contracts of many of the respondent's staff members were extended because the organization had its existence extended by one year, until 31 December 2021. The respondent points out that the Board of Directors decided to extend the duration of the positions by one year, but that did not necessarily mean that all contracts would be extended. It does not dispute that many contracts were actually extended by one year for this reason, but explains that the extensions were decided on a case-by-case basis rather than applied to everyone. Therefore, the Tribunal considers that only the guaranteed period of employment with the respondent can apply. This is also what the Tribunal said in its Judgment No. 2020/1301, in paragraph 66, which is the necessary basis for its ruling that the illegally terminated contract should have ended on 31 December 2020. Therefore, 2021 cannot be factored in when determining the material damage ordered by the Tribunal in its Judgment No. 2020/1301.

37. The indemnity for loss of job is the fifth matter put to the Tribunal in order to determine the material damage. Under Article 1(3)(c) of Annex V to the CPR, which sets out the conditions that the staff member must meet to be awarded an indemnity for loss of job by the administration, public officials who are immediately reintegrated in their national civil or military administration may not be awarded an indemnity for loss of job. This is the case for the appellant, who was seconded to NATO by the German Air Force and was immediately reintegrated into it on 1 March 2020 when the illegal decision to terminate his NATO contract took effect. The amount of this indemnity must not, therefore, be included in the material damage ordered by the Tribunal in its Judgment No. 2020/1301.

38. Concerning pension rights, which are the sixth matter, the appellant asks the respondent to pay him the amount of the contributions that it would have paid into the Defined Contribution Pension Scheme (DCPS) if he had been employed at NATO during the period in question. The pension system to which the appellant was affiliated is a system for gradually building up capital to which the employer contributes so that the staff member receives cash or an annuity at a later stage. The employer must pay this sum into the DCPS so that the staff member acquires pension rights for that period. However, this does not mean that these sums should be paid to the appellant himself. Therefore, the Tribunal rules that since the appellant is affiliated to the German military's pension scheme for the same period, the respondent must pay into the appellant's DCPS account the amount of the contribution that it would have paid into the DCPS if the appellant had remained in position from 1 March to 31 December 2020, i.e. €18,002.70 in total.

39. The seventh and final matter put to the Tribunal in order to determine the compensation for material damage decided in its Judgment no. 2020/1301 concerns the payment of contributions into NATO's health insurance scheme, which is sought by the appellant. In contrast to affiliation to a pension scheme, one cannot be affiliated to two different health insurance schemes simultaneously. Furthermore, the employer's

contribution to this scheme does not constitute income for the staff member. Since the appellant received health coverage from the German military from March to December 2020, and he does not claim that this protection was markedly different from that which he would have received under NATO's health insurance, the difference in health insurance contributions paid in the two different positions cannot be factored into the comparison of the net emoluments for the two positions.

40. Based on all the foregoing, the amount of material damage that results from the illegality of the decision of 17 February 2020 terminating the appellant's contract, and that the respondent must pay him in application of Judgment no. 2020/1301 of 18 January 2021 and of this judgment which completes it, totals €68,440.33. In addition, NAGSMO (in liquidation) is ordered to pay €18,002.70 into the DCPS, which will top up the appellant's acquired rights for his pension.

41. Lastly, the appellant invokes non-material damage resulting from the administration's behaviour in the present case and the discussions leading to it, which he claims show a breach by the respondent of its duty of care. The Tribunal also deplores the numerous exchanges that slowed down the definitive settlement of the dispute decided by Judgment no. 2020/1301. But it notes that the many back-and-forths were caused by the appellant just as much as the respondent, neither of whom were clear about their expectations, instead getting bogged down in ambiguous communications; neither party sought to bring about a quick conclusion by providing all the documents in their possession or setting out their arguments. It follows that the appellant should not be awarded any compensation for non-material damage that, even if it were to exist, can also be attributed to his behaviour.

E. Costs

42. 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.

43. In the circumstances of the case, the submissions in the appeal being partially successful, 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 implicit decision by the NAGSMA General Manager rejecting Mr G's claims of 29 April 2021 concerning the determination of the material harm suffered as a result of the decision of 17 February 2020 to terminate his contract effective 29 February 2020, which was annulled by the Tribunal in its Judgment No. 2020/1301 of 18 January 2021, and the implicit decision by the NAGSMA General Manager of rejecting his other requests seeking the same relief are annulled.
- The material damage ordered in Judgment No. 2020/1301 of 18 January 2021 is set at €68,440.33, which NAGSMO (in liquidation) will pay to Mr G.
- NAGSMO (in liquidation) will pay €18,002.70 into the DCPS to top up the appellant's acquired rights for his pension.
- NAGSMO (in liquidation) will reimburse Mr G 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 May 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 May 2022 AT-J(2022)0009 REV

Judgment

Case No. 2021/1327

UK
Appellant

v.

NATO International Staff
Respondent

Brussels, 24 May 2022

Original: English

Keywords: taxation of DCPS holdings in a Member State; liability of the Organization; compensation for damages suffered.

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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 Seran Karatari Köstü and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 28 April 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 10 May 2021 and registered on 20 May 2021 as Case No. 2021/1327, by Mr UK, against the NATO International Staff (IS). The appellant requests, *inter alia*, compensation for damage suffered following the taxation by the German fiscal authorities of his holdings in the Defined Contribution Pension Scheme (DCPS), which he withdrew as a lump sum upon his retirement.

2. The respondent’s answer, dated 20 July 2021, was registered on 4 August 2021. The appellant’s reply, dated 22 September 2021, was registered on 6 October 2021. The respondent’s rejoinder, dated 8 November 2021, was registered on 23 November 2021. In accordance with Rule 16 of the Tribunal’s Rules of Procedure (ROP), on 17 February 2022, 24 March 2022, and 14 April 2022, the Tribunal’s President allowed the submission of additional documents at the request of the appellant and the respondent respectively.

3. The Panel held an oral hearing on 28 April 2022 at NATO Headquarters. It heard the appellant’s statements as well as arguments by the appellant’s representative and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar. In view of the geopolitical situation, two judges participated by videoconference, using facilities provided by NATO Headquarters.

B. Factual background of the case

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

5. The appellant is a former NATO Supply and Procurement Agency (NSPA) staff member who joined NSPA on 1 August 2005 and retired on 30 September 2017. He was affiliated to the DCPS and upon retirement requested that his holdings be paid to him in the form of a lump sum, in accordance with the provisions of Article 12.1 of Annex VI to the NATO Civilian Personnel Regulations (CPR). A sum of € 216,346.49 was paid out by the insurer to the appellant on 20 October 2017.

6. In October 2018 the appellant submitted his income tax return to the German fiscal authorities (Finanzamt Soest). On 14 May 2019, after having unsuccessfully contested the tax assessment he had received, the appellant was made to pay € 34,700, as the lump sum was considered by the fiscal authorities to be subject to income tax.

7. The appellant continued to engage with the German fiscal authorities and the NATO International Staff (IS) administration on the matter.

8. On 3 November 2020 the Assistant Secretary General for Executive Management (ASG EM) wrote to the Permanent Representative of Germany on the North Atlantic Council (NAC) to request that he call on his national authorities to uphold the tax-exempt nature of DCPS lump sum payments in accordance with the provisions of the Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff of 20 September 1951 (the Ottawa Agreement) and the DCPS provisions.

9. On 10 November 2020 the *Finanzamt Soest* rendered a final decision informing the appellant that its position on the taxation was maintained. In particular it stated:

> […] when deciding on the objection, the tax office has the task of checking the contested decision for errors in legal and factual terms. […] During this review based on the file situation, the tax office also found no reason to change the contested tax assessment. […] The amount paid out was taxed as a reduced taxable pension for several years of activity […] as the prerequisite for an exemption according to BMF (*Bundesministerium für Finanzen*) […] due to the entitlement to pension rights are not met […]

10. On 15 November 2020 the appellant wrote to the Secretary General requesting to be compensated for the Organization's failure to implement the DCPS provisions which stipulate that its holdings are exempt from taxation.

11. On 8 December 2020 the Acting Deputy Assistant Secretary General for Human Resources (DASG HR) informed the appellant of the possibility of submitting an appeal to the Finance Court in Germany. She confirmed that the Organization was prepared to support him by funding legal counsel on his behalf.

12. On 17 December 2020 the appellant wrote to the DASG HR repeating the request made in his letter of 15 November 2020 to be compensated for his loss resulting from taxation of the DCPS.

13. On 2 February 2021 the DASG HR replied as follows:

> I confirm that the redemption process including payment of the entire amount of your DCPS holdings to your account in October 2017 was executed in line with NATO rules. The International Staff takes very seriously the position you find yourself in, and will both continue to engage with the German Permanent Representation, and to support your case before the German Court. However, the decision to levy tax of EUR 34,700 on your DCPS holdings was taken by the German tax office, and not by NATO IS (which in any event was not your employer), and ultimately the ability to address the situation lies with the German authorities. We also note that under Article 2.1 of Annex IX of the NATO Civilian Personnel Regulations, the process for a retired member of NATO staff to challenge a decision affecting conditions of work or of service must be initiated in the NATO body in which the member of the retired NATO staff was appointed, so long as the Head of NATO body has authority to rescind or modify the contested decision. As I say, we will continue to support your in this matter but, in light of the above, I am not able to provide you a positive reply with regard to your request for compensation by NATO IS for the taxes levied by the German tax office.

14. On 5 March 2021 the appellant requested an administrative review of the 2 February 2021 decision. He reiterated his request for compensation of the financial loss, alleging at the same time shortcomings in DCPS management and a breach of his acquired rights, his legitimate expectations and the Organization's duty of care.

15. On 12 April 2021 the Assistant Secretary General Executive Management (ASG EM) replied to the appellant and said that he was not in a position to accept his request for administration review. In addition to the points expressed by the DASG EM, he added:

> A failure by a domestic authority to take such provisions into account cannot be presented as a breach by the Organization of any alleged acquired rights or legitimate expectations, or as invalidating the information which is provided to DCPS affiliates on this point. Besides, in actively supporting your case, both at a political level and before the court, the Organization is demonstrating duty of care, and attempting precisely to safeguard equal treatment of affiliates regardless of their country of residence.
>
> Similarly the assertion that NATO has failed to inform affiliates in a transparent and timely matter about the restrictions and limitations of the annuity process cannot be accepted. Regardless of the fact that you never asked for an annuity when leaving the NSPA nor raised the matter before, there has been extensive communication with affiliates over the years on a NATO wide basis, including via briefings given by the Pension Unit in individual NATO bodies. The ongoing discussions with nations on the DCPS Review, including on the topic of annuities, have been extensively reported and discussed in meetings of the DCPS Management Board and the JCB, in which serving and former staff are represented.

16. On 29 April 2021 the appellant wrote to the NSPA General Manager seeking guidance on whether the request for compensation should be addressed by the IS or the NSPA, in accordance with Article 2.1 of Annex IX to the CPR ("in cases of doubt, staff members or retired NATO staff should consult with the human resources management in the NATO body in which they are or were last employed for guidance").

17. On 20 May 2021 the appellant submitted the present appeal.

18. On 21 May 2021 the NSPA Human Resources Executive replied to the appellant that the ASG EM reply of 12 April 2021 had dismissed his request on the merits by reiterating the 2 February 2021 points made by the DASG HR. The NSPA therefore agreed with the position taken by the NATO IS that the impugned decision is exclusively within the remit of the German authorities, over which the Organization has no control. It informed the appellant that should he "introduce any claim, contestation, request or recourse with the NSPA, it would be considered inadmissible."

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

(i) The appellant's contentions

19. The appellant considers the appeal to be admissible because it was submitted within 60 days of ASG EM's decision rejecting his request for administrative review. The appellant emphasizes that the appeal is not directed against a decision taken by a Member State – Germany in this case – but against the respondent's decision not to

compensate him for a considerable sum of money he has lost. He stresses that the legal case in Germany could take many years before a final verdict is reached, and he would have to bear the consequences of the financial loss for all those years. In the appellant's view, the respondent's decision to refuse to award compensation is entirely within its remit, and is therefore a decision within the Tribunal's jurisdiction.

20. The appellant rejects the respondent's submissions that it would not be competent to deal with his case as his former employer was the NSPA. Quoting former AT case law (Case No. 2019/1281) on pension matters, the appellant stresses that the IS is competent to deal with pension issues and that the Secretary General (SG) is responsible for the administration of the DCPS, and the DCPS Management Board for assisting the SG in carrying out this task, in accordance with Articles 2 and 3 of Annex VI to the CPR.

21. The appellant also notes that he wrote to the NSPA but received no reply before submitting the present appeal. Referring to the Agency's reply received subsequently, he highlights that the NSPA in any case considered the matter inadmissible.

22. The appellant expresses gratitude for the support received from the respondent in the pending proceedings before the national judicial authorities. He reiterates, however, that such assistance does not compensate him for the damage suffered and also serves the IS's own interests by having the matter defended before the German courts.

23. The appellant recognizes that the decision to levy tax is a decision of the German authorities and not of the Organization; however, the fact that Germany did not comply with the regulations that it approved is not something that he is liable for. The fact that there are ongoing discussions between Germany and the Organization is irrelevant and has no bearing on the legal issue at stake – that is something to be resolved outside the scope and remit of the present appeal.

24. The appellant alleges that the respondent has breached Articles 5 and 12 of Annex VI to the CPR and Article 19 of the Ottawa Agreement. It has also breached his legitimate expectations and acquired rights, and infringed its duty of care and good administration; it has not respected the principle of non-discrimination and equal treatment.

25. The appellant notes that it is a fact and not disputed by the Organization that the contribution to the staff member's account in the DCPS must be considered to be part of emoluments and thus net of tax, as are contributions covered either by Article 19 of the Ottawa Agreement or by Article 7 of the Paris Protocol, as appropriate. Based on the information he had received, he therefore legitimately believed that his DCPS holdings would not be subject to any taxation. Instead, he was made subject to income tax and lost €34,700, preventing him from carrying out projects and making investments for himself and his family. He highlights that he would have chosen a different path had he known that the lump sum was to be taxed. He advances that he had an acquired right, in particular through his contract and its references to the CPR, to DCPS holdings that were not subject to taxation.

26. The appellant considers that the IS is liable because it gave wrong information and took wrong commitments towards him. He believes that the fact that Germany has wrongly subjected the DCPS holdings to taxation does not alleviate the liability of the respondent. He considers that the IS should have agreed to pay him the amount assessed by Germany, and thereafter or in parallel it could seek reimbursement from Germany either directly or by assisting the appellant in the national proceedings. He affirms his full commitment to reimbursing the Organization fully once the situation has been resolved satisfactorily.

27. The appellant informs that over the years until his retirement there was continuous communication from NATO that an annuity would be available at the moment of retirement. He recalls, however, that contrary to the information received, upon retirement he was not offered a choice between a lump sum or an annuity, as there was no commercial annuity provider under contract when he retired. The appellant considers this a breach of the Organization's duty of care, as it did not comply with the duty to inform and offer a choice between a lump sum and annuities, a failure to protect the interests of the staff, and non-compliance with the duty of diligence and of good administration. He stresses, however, that this is not the main issue at stake and he does not claim any compensation in this respect.

28. The appellant advances that the respondent did not safeguard equal treatment of members of the same pension scheme regardless of their country of residence. By moving to Germany the appellant lost 16% of his DCPS holdings, unlike retired colleagues who moved to other countries. The respondent failed to inform the appellant properly in order for him to make an informed decision when exercising his rights, and by choosing to retire to Germany he was discriminated against in comparison to colleagues who opted to retire to countries other than Germany.

29. Further, the appellant states that there is no valid reason to consider that the appeal should be stayed. In his view, the outcome of the national proceedings has no bearing on his claim insofar as he is seeking to be compensated for a loss that has existed since 2019.

30. The appellant requests that the Tribunal:

- annul the ASG EM decision of 12 April 2021 rejecting the request for administrative review and, insofar as necessary, the decision of the Acting DASG HR rejecting the request for compensation;
- compensate the material damage;
- reimburse legal, travel and subsistence costs.

(ii) The respondent's contentions

31. The respondent considers that the appeal should be summarily dismissed as the claim is clearly inadmissible and outside the Tribunal's jurisdiction. It requests that the Tribunal do so in accordance with Article 6.5.1 of Annex IX to the CPR and Rule 10 of the Tribunal's ROP.

32. In the respondent's view, given that the decision to levy a tax is a decision of the German authorities and not of the Organization, the appeal is not directed against a decision taken by the Organization but in relation to the tax regime applied to the appellant by Germany. It states that the contested decision rests exclusively within the remit of the German authorities and no IS official has taken any decision regarding what the appellant considers to be the source of his damage. It also recalls that Article 19 of the Ottawa Agreement is an obligation for the Allies, not for the Organization.

33. The respondent considers that the refusal to compensate the appellant for the damage caused by the German tax authorities cannot be interpreted as constituting a decision within the meaning of Article 61.1 of the CPR and Article 2.1 of Annex IX to the CPR, and deems that the appellant is abusing the dispute resolution system.

34. The respondent advances that considering that the matter relates to the tax regime applied to the appellant by Germany, any concerns in that regard are a matter for the competent national authorities. The IS has therefore no authority to modify or rescind the decision made by Germany, and the Tribunal, in accordance with Article 6.2 of Annex IX to the CPR, is not competent to decide on the tax legislation of NATO Member States.

35. Furthermore, the respondent states that the appeal should be dismissed on the grounds that the claim was not directed to the proper NATO body, the appellant never having been employed or having entered into a contractual relationship with the IS. As the request was made by a former NSPA staff member, the respondent affirms that it should have been directed to the Agency in accordance with Article 2.1 of Annex IX to the CPR. The respondent notes that the mere fact that the IS handles the administration of pensions on behalf of all the NATO bodies and voluntarily took upon itself, in view of the seriousness of the situation and potential repercussions, to rapidly step in and provide political and legal assistance cannot change the legal reality.

36. Regarding the claims that the Organization failed to provide the appellant with an annuity provider when he retired, the respondent holds that these claims are not only without merit but also time-barred, since the appellant chose not to formally challenge them at the appropriate time (i.e. upon retirement), in accordance with the procedure laid down in the CPR.

37. The respondent also contends that the appeal is devoid of merits. It advances that, as recognized by the appellant himself, the damage suffered results from the taxation by the German authorities of his holdings in the DCPS. The IS therefore bears no responsibility, and cannot and should not be held liable for the failure of a domestic authority to abide by its international obligations.

38. In particular, the respondent states that it is not contested that lump sum payments made by the Organization from the DCPS to its staff members as withdrawals from the scheme are to be considered as emoluments, in accordance with Article 19 of the Ottawa Agreement read together with Article 12.1 of the DCPS rules, and the Organization expects them not to be taxed by Allies.

39. The respondent adds that actively supporting the appellant's cause, both at the political level and before the German courts, is going above and beyond what can reasonably be expected from it to encourage Allies to abide by their international duties and thereby provide equal treatment vis-à-vis potentially affected individuals and affiliates, regardless of their country of residence.

40. Referring to the 12 April 2021 letter by ASG EM, the respondent also maintains that the assertion that the IS failed to inform affiliates in a transparent or timely manner about the annuity process should be dismissed.

41. Further, the respondent states that the redemption process itself, including the payment of the full amount of the appellant's holdings in 2017, was executed in line with the applicable rules.

42. The IS considers that given the circumstances and in the absence of any fault by the Organization, there is no reason or basis for awarding the appellant any form of financial compensation for the decision taken by Germany.

43. The respondent also believes that the Tribunal should consider staying the proceedings of the present appeal. Considering that the core substance of the appeal is the decision of the German authorities to tax the appellant, that such decision is *sub judice* before another judicial forum and that since a decision in favour of the appellant of the said judicial forum would dispose of the appeal against the IS or render it academic, the respondent advances that the present appeal should be stayed pending the outcome of the collateral proceedings.

44. The respondent requests that the Tribunal:

- dismiss the appeal in accordance with Article 6.5.1 of Annex IX to the CPR and Rule 10 of the Tribunal's ROP as clearly inadmissible and devoid of merit;
- reject the appeal as unfounded.

D. Considerations and conclusions

(i) Admissibility

45. The respondent contends that the appeal is inadmissible essentially for two reasons.

46. Firstly, it argues that the claim is clearly inadmissible and outside the Tribunal's jurisdiction, since the appeal is directed not against a decision taken by the Organization but in relation to the tax regime applied to the appellant by Germany. It requests that the Tribunal summarily dismiss the appeal or, alternatively, stay the proceedings pending the outcome of the case in the German courts.

47. The Tribunal disagrees. The appeal is not lodged against the decision of the German authorities but against the IS decision not to grant compensation. Without at this stage entering into the merits of the case, the Tribunal notes that the case before it challenges the legality of a decision taken by the Head of a NATO body (HONB). This matter is thus clearly within the competence of the Tribunal as laid down in Article 6.2.1 of Annex IX to the CPR, and the respondent's request for summary dismissal on this ground therefore cannot be granted.

48. Nor can the Tribunal grant the request to stay the proceedings pending the outcome of the case in the German courts. That case concerns taxation of the payment under the DCPS, but that question is not before this Tribunal.

49. In a second argument the respondent contends, with reference to Article 2.1 of Annex IX to the CPR, that the appeal must be held inadmissible, since the claim was not directed to the proper NATO body, the appellant never having been employed or having entered into a contractual relationship with the IS.

50. Here again the Tribunal disagrees. Article 2.1 (on administrative review) indeed provides that the process of review and appeal must be initiated in the NATO body in which the retiree was appointed. But the same Article then goes on to also provide: *"… so long as the Head of that NATO body has authority to rescind or modify the contested decision. Otherwise, the process shall be initiated in such other NATO body that has the authority to rescind or modify the contested decision."* The Head of NSPA obviously does not have the authority to rescind or modify the decision not to grant compensation, and the respondent has not established the contrary.

51. The Tribunal cannot but repeat what it already held in Case No. 2019/1281:

> 38. The Tribunal does not accept respondent's contention that the appeal is inadmissible because it was directed to the wrong NATO body. The appeal centers on appellant's treatment during his retirement. A benefit that he valued, and for which he continued to pay premiums after retiring, was terminated years after his active service ended. This cannot reasonably be seen to involve *"a work or career-related matter that arose during*" appellant's employment, such that Article 2.4 of CPR Annex IX would require him to appeal to LF HQ. Appellant correctly directed the appeal to the respondent, which was obliged to address it on its merits.

52. This case law is hereby confirmed. It is a unit of the IS, within HR, that handles all pension matters. It made simulations for the appellant regarding lump sums and annuities. It facilitated the payment of holdings from the DCPS. ASG EM sent letters to the German delegation, and ASG EM rejected the request for compensation on 12 April 2021. DASG HR informed the appellant of the possibility of submitting an appeal to the Finance Court in Germany. She also confirmed that the Organization, i.e. the IS, was prepared to support him by funding legal counsel on his behalf. She erred in law, however, when she wrote on 2 February 2021 that the appellant should direct his enquiry to the Head of NSPA, given that the latter did not have the required authority, thereby disregarding the Tribunal's case law; ASG EM did likewise in his letter of 12 April 2021.

53. The Tribunal further concludes that the appeal is not time-barred, with the exception of one point. The initial decision by the German tax authorities was indeed taken on 6 May 2019, but the appellant engaged with both the tax authorities and the IS on the matter thereafter. On 10 November 2020 the *Finanzamt Soest* rendered a final decision, on 15 November 2020 the appellant requested compensation, which was rejected on 2 February 2021, and the decision rejecting a request for administrative review was taken on 12 April 2021. This substantial part of the appeal is thus not time-barred.

54. However, the appellant is making claims regarding the availability of annuities. He was provided with estimates in 2014. The Tribunal understands that annuities are calculated and ultimately provided on an ad hoc basis. Any appeal against this is at this stage time-barred. Subject to this, the appeal is admissible.

(ii) Merits

55. It is important to note from the outset that there is agreement between the parties about the interpretation to be given to the relevant provisions of the Ottawa Agreement and of the CPR. Both parties conclude that the lump sums that are paid out under the DCPS are not subject to national income tax in the NATO Member States. This point is thus not in dispute before this Tribunal, and the Tribunal is not required to express its opinion on this matter.

56. It is also not in dispute that the issue behind the present case is the tax levied by the German authorities. This entails a dispute between the Organization and one of its Member States. This Tribunal is an international administrative tribunal which hears appeals on employment disputes between the Organization and its serving and retired staff. It does not hear disputes between the Organization and its Member States, as, for example, the Court of Justice of the European Union may do. The Tribunal cannot and will not go outside its remit.

57. It is not in dispute that the appellant is currently suffering damage, a matter that may be resolved in the German courts. The question before the Tribunal then is whether this damage is the consequence of an act or omission by the Organization entailing its liability and entitling the appellant to compensation. In other words, the question is not whether the appellant should bear the consequences of the fact that Germany did not respect the regulations that it itself had approved. The question is thus whether the respondent acted (or omitted to act) in violation of its obligations towards the appellant.

58. In this respect the appellant alleges that the respondent breached Articles 5 and 12 of Annex VI to the CPR and Article 19 of the Ottawa Agreement, also breached his legitimate expectations and acquired rights, infringed its duty of care and good administration and, lastly, did not respect the principle of non-discrimination and equal treatment.

59. The appellant submits that the respondent gave wrong information when it advised staff that DCPS holdings would not be taxed. The Tribunal does not share this point of view. The Organization provided the best information it had at the time. Moreover, the appellant, with the legal, financial and diplomatic support of the respondent, is contending before the German courts that this was, and still is, the correct information and the correct legal interpretation of the rules. He cannot contend the opposite before this Tribunal.

60. The Organization could not anticipate that one German tax office would decide to tax the DCPS holdings. It was confirmed at the hearing that dozens of retirees living in Germany did not see their DCPS holdings taxed, confirming the understanding and expectations that the Organization and the appellant had. It ultimately remains the responsibility of each individual, however, to deal with the application of the tax laws in the country where he or she takes up residence. The appellant cannot shift this responsibility to the respondent. He has indeed consulted a German tax adviser.

61. Even if the general understanding and expectation was, and is, that the DCPS holdings would not be taxed, it is useful to recall in this respect that tax laws and practices differ by country. For example, some countries apply the so-called progression proviso, others do not. The plea of discrimination amongst retirees depending on the country of residence therefore does not hold. As far as the alleged discrimination within Germany is concerned, this is a matter for the German authorities to harmonize and for the German courts to resolve.

62. Exercising its duty of care, the respondent has over the years provided the best information available at the time to its staff and retirees. A change in approach by one tax office does not retroactively alter this.

63. The appellant has suffered damage, but not as a consequence of an act or a failure to act by the respondent. The respondent has not breached Articles 5 and 12 of Annex VI to the CPR or Article 19 of the Ottawa Agreement. It is alleged by both parties, in fact, that it is the German authorities that have done so. As a consequence, the respondent is not liable and is not obliged to compensate the appellant for damage incurred in one of NATO’s Member States. No irregularity has been committed by the HONB and, as a consequence, there is no ground for the Tribunal to order compensation (*cf.* Article 6.9.1 of Annex IX to the CPR) or to annul the decision denying the request for compensation.

64. The appellant is of the view that he had, and still has, legitimate expectations. But again, these expectations concern the approach of the German authorities, not that of the respondent.

65. The Tribunal fully understands the impact that the situation has on the appellant and may have on future retirees but must conclude that the appeal before this Tribunal is unfounded in its 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 appellant submits that he raised important legal issues, and requests that the Tribunal order reimbursement of legal costs as well as of travel and subsistence costs, even if the Tribunal finds that there are no good grounds for this appeal. The Tribunal must reiterate what it held in Cases Nos. 2020/1294-1296:

> 131. Without entering in a discussion on the force of these arguments, the Tribunal must note that in accordance with Article 6.2.3 of Annex IX to the CPR it does "not have any powers beyond those conferred under this Annex." The wording of Article 6.8.2 of Annex IX quoted *supra* being clear and unambiguous, the appellants' request cannot be granted.

The request is denied.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 24 May 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 June 2022 AT-J(2022)0010 REV

Judgment

Case No. 2021/1329

AB
Appellant

v.

NATO International Staff
Respondent

Brussels, 14 June 2022

Original: English

Keywords: taxation of DCPS holdings in a Member State; liability of the Organization; compensation for damages suffered

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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 Seran Karatari Köstü and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 28 April 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 8 July 2021 and registered on 16 July 2021, as Case No. 2021/1329, by Mr AB, against the NATO International Staff (IS). The appellant requests, *inter alia*, compensation for damage suffered following the taxation by the German fiscal authorities of his holdings in the Defined Contribution Pension Scheme (DCPS), which he withdrew as a lump sum upon his retirement.

2. The respondent's answer, dated 18 October 2021, was registered on 19 October 2021. The appellant's reply, dated 30 November 2021, was registered on 3 December 2021. The respondent's rejoinder, dated 1 February 2022, was registered on 7 February 2022. In accordance with Rule 16 of the Tribunal's Rules of Procedure (ROP), on 17 February 2022, 24 March and 14 April 2022, the Tribunal's President allowed the submission of additional documents at the request of the appellant and the respondent respectively.

3. The Panel held an oral hearing on 28 April 2022 at NATO Headquarters. It heard arguments by the appellant's representative and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar. In view of the prevailing geopolitical situation, two judges participated by videoconference, using facilities provided by NATO Headquarters.

B. Factual background of the case

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

5. The appellant is a former NATO Medium Extended Air Defense System Management Agency (NAMEADSMA) staff member who joined NAMEADSMA on 1 August 2008 and retired on 31 January 2015. He was affiliated to the DCPS and upon retirement requested that his holdings be paid to him in the form of a lump sum, in accordance with the provisions of Article 12.1 of Annex VI to the NATO Civilian Personnel Regulations (CPR). A sum of €154,391.04 was paid out by the insurer to the appellant.

6. On 19 June 2017, when carrying out the income tax assessment for 2015, the German fiscal authorities informed the appellant that the lump sum would be subject to income tax. The decision was further confirmed on 13 August 2020 by the Finanzamt Singen of Baden Württemberg. The financial impact for the appellant amounted to €64,188.28. He challenged the decision before the German judicial authorities and the case is currently still pending there.

7. On 18 April 2021, the appellant wrote to the NATO Secretary General (SG). His

letter stated, *inter alia*:

> […] I had declared the amount as a tax-free withdrawal in the German tax return. However, the amount was fully taxed by German tax authorities as income from non-independent work […] In Germany, there is no judicial suspension of the execution of the tax assessment ex officio. An application for a stay of execution is subject to high requirements. If the action for annulment before the tax court were unsuccessful, high suspension interest would have to be paid (0.5% per month or 6% per year) even if a suspension of enforcement is granted. In this respect, I had to pay the taxes and could not invest the amount elsewhere. […] I was led to believe on the part of NATO that the payment was tax-free. I had received a corresponding confirmation from NATO Pension Unit dated 06.02.2015 and again dated 03.12.2019. In the meantime I have involved in a very cost-intensive legal dispute against the local tax office. I see that tax exemption as a guarantee granted by NATO. NATO is responsible under labor law for ensuring that the regulations are observed in the member countries as treaties under international law. Therefore, I request NATO, as my former employer, to bear the costs of my legal actions, to pay my interest damages based on the tax payment already made and, in the even of a negative outcome of the financial proceedings, to settle the tax debt. […] In any case, there is an obligation under labor law to indemnify me against my substantial financial losses. In this respect, I am asking you Sir for a statement and declaration that NATO will compensate for my financial losses as well as for my court and legal costs.

8. On 11 May 2021, the Acting Deputy Assistant Secretary General for Human Resources (DASG HR) replied to the appellant. Her letter stated, *inter alia*:

> […] I wish to assure you that the International Staff takes very seriously the position you find yourself in, and we maintain our view that your lump sum payment should not be taxed. In this respect we are actively engaged with the Permanent Representative of Germany to NATO with a view to resolving the matter.
> It appears from your letter that you have already embarked on legal proceedings against the decision of the tax authorities, and that lawyers are already acting for you in the litigation. We will keep you appraised of the outcome of our engagement with the German authorities to the extent that it would impact on your own proceedings, and would be grateful if you could keep us informed on these. At the same time, I am afraid that, given that your proceedings are already well advanced, we are not in a position to fund their cost.
> I note your request to compensate you for the tax and additional interest which the German tax office has demanded from you, but regret that we are not in a position to give a positive response. The decision to levy tax on your DCPS holdings was taken by the German tax authorities and not by the International Staff (which in any event was not your employer), and ultimately the ability to address the situation lies with Germany. I note that the redemption process itself, including payment of the entire amount of your DCPS holdings to your account in January 2015, was executed in line with NATO rules.

9. On 8 July 2021, the appellant submitted the present appeal.

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

(i) The appellant's contentions

10. The appellant considers the appeal to be admissible because it was submitted within 60 days of Acting DASG HR's decision rejecting his request for compensation. He also refers to Article 4.4 of Annex IX to the CPR, which states that "*Claimants who are retired staff may submit the matter directly to the Administrative Tribunal*".

11. The appellant emphasizes that the appeal is not directed against a decision taken by a Member State - Germany in this case – but against the respondent's decision not to compensate him for a considerable sum of money he has lost. He stresses that the legal case in Germany could take many years before a final verdict is reached, and he would have to bear the consequences of the financial loss for all those years. In the appellant's view, the respondent's decision to refuse to award compensation is entirely within its remit, and is therefore a decision within the Tribunal's jurisdiction.

12. The appellant rejects the respondent's submissions that it would not be competent to deal with his case as his former employer was NAMEADSMA. Quoting former AT case law (Case No. 2019/1281) on pension matters, the appellant stresses that the IS is competent to deal with pension issues and that the Secretary General (SG) is responsible for the administration of the DCPS, and the DCPS Management Board for assisting the SG in carrying out this task, in accordance with Articles 2 and 3 of Annex VI to the CPR.

13. The appellant also notes that he tried to seek guidance from NAMEADSMA, to no avail.

14. The appellant recognises that the decision to levy tax is a decision of the German authorities and not of the Organization; however, the fact that Germany did not comply with the regulations that it approved is not something that he is liable for and it should not affect him. The fact that there are ongoing discussions between Germany and the Organization is irrelevant and has no bearing on the legal issue at stake – that is something to be resolved outside the scope and remit of the present appeal. He also stresses that notwithstanding the stated "considerable efforts" undertaken by the IS since November 2020, no significant results have been achieved yet with respect to the German position.

15. The appellant alleges that the respondent has breached Articles 5 and 12 of Annex VI to the CPR and Article 19 of the Ottawa Agreement. It has also breached his legitimate expectations and acquired rights, and infringed its duty of care and good administration; it has not respected the principle of non-discrimination and equal treatment.

16. The appellant notes that it is a fact and not disputed by the Organization that the contribution to the staff member's account in the DCPS must be considered to be part of emoluments and thus net of tax, as are contributions covered either by Article 19 of the Ottawa Agreement or by Article 7 of the Paris Protocol, as appropriate. Based on the information he had received, he therefore legitimately believed that his DCPS

holdings would not be subject to any taxation. Instead, he was made subject to income tax and his family has suffered considerable hardship and anxiety. He highlights that he would have chosen a different path had he known that the lump sum was to be taxed.

17. The appellant states that the rule of protection of the confidence means that staff can expect the Organization to respect the CPR, their contract and the commitments given. He therefore had an acquired right, in particular through his contract, that his DCPS holdings would not be subject to taxation, and a legitimate expectation that his DCPS holdings would not be reduced by approximately €64,000.

18. The appellant considers that the IS is liable because it gave wrong information and took wrong commitments towards him. He believes that the fact that Germany has wrongly subjected the DCPS holdings to taxation does not alleviate the liability of the respondent. He considers that the IS should have agreed to pay him the amount assessed by Germany, and thereafter or in parallel it could seek reimbursement from Germany either directly or by assisting the appellant in the national proceedings. He affirms his full commitment to reimbursing the Organization fully once the situation has been resolved satisfactorily.

19. The appellant advances that the respondent did not safeguard equal treatment of members of the same pension scheme regardless of their country of residence. By moving to Germany the appellant lost 39% of his DCPS holdings, unlike retired colleagues who moved to other countries. The respondent failed to inform the appellant properly in order for him to make an informed decision when exercising his rights, and by choosing to retire to Germany he was discriminated against in comparison to colleagues who opted to retire to countries other than Germany. Further, the IS agreed to bear the legal costs of another former DCPS member in similar circumstances, but did not agree to do the same for him, meaning he is entitled to compensation for the legal costs to which he has been unduly exposed.

20. In the light of all the above, the appellant calculates his damage in the amount of €64,188.28, to be increased by compensatory interest and the cost of the legal proceedings, estimated at €7,672.17 plus €2,664 for estimated court costs.

21. Further, the appellant states that there is no valid reason to consider that the appeal should be stayed. In his view, the outcome of the national proceedings has no bearing on his claim insofar as he is seeking to be compensated for a loss that has existed since 2020.

22. The appellant requests that the Tribunal:

- annul the Acting DASG HR’s decision of 11 May 2021 rejecting the request for compensation made on 18 April 2021;
- compensate the material damage;
- reimburse legal, travel and subsistence costs.

(ii) The respondent's contentions

23. The respondent considers that the appeal should be summarily dismissed as the claim is clearly inadmissible, devoid of merits, and outside the Tribunal's jurisdiction. It requests that the Tribunal do so in accordance with Article 6.5.1 of Annex IX to the CPR and Rule 10 of the Tribunal's ROP.

24. In the respondent's view, given that, as stated by the appellant, the decision to levy a tax is a decision of the German authorities and not of the Organization, the appeal is not directed against a decision taken by the Organization but in relation to the tax regime applied to the appellant by Germany. It states that the contested decision rests exclusively within the remit of the German authorities and no IS official has taken any decision regarding what the appellant considers to be the source of his damage.

25. The respondent also recalls that the obligation enshrined in Article 19 of the Ottawa Agreement is an obligation for the Allies, not for the Organization, rendering the appeal clearly inadmissible.

26. Further, the respondent considers that the refusal to compensate the appellant for the damage caused by the German tax authorities cannot be interpreted as constituting a decision within the meaning of Article 61.1 of the CPR and Article 2.1 of Annex IX to the CPR, and deems that the appellant is abusing the dispute resolution system.

27. Equally, the appellant's request is evidently time-barred, considering that the damage caused by the German authorities dates back to 2017. The respondent states that the appellant's logic, according to which any staff member can trigger the rules laid down in the CPR and establish the Tribunal's competence in order to seek financial compensation from the Organization for the adverse consequences of a decision made by a third party, simply cannot stand.

28. The respondent continues by saying that considering that the matter relates to the tax regime applied to the appellant by Germany, any concerns in that regard are a matter for the competent national authorities. The IS has therefore no authority to modify or rescind the decision made by Germany, and the Tribunal, in accordance with Article 6.2 of Annex IX to the CPR, is not competent to decide on the tax legislation of NATO Member States, thus the appeal is clearly outside the Tribunal's jurisdiction.

29. In addition, the respondent states that the appeal should be dismissed on the grounds that the claim was not directed to the proper NATO body, the appellant never having been employed by or having entered into a contractual relationship with the IS. As the appellant is a former NAMEADSMA staff member, the respondent believes that his request should have been directed to the Agency in accordance with Article 2.1 of Annex IX to the CPR, as the appellant did. It notes that the mere fact that he did not get a response from the NAMEADSMA Liquidator does not and cannot imply that the IS is competent. In any case, the respondent considers that the fact that the IS handles the administration of pensions on behalf of the NATO bodies and voluntarily took upon itself, in view of the seriousness of the situation of former staff members being taxed in Germany and the potential repercussions thereof, to rapidly step in and engage with the German authorities cannot change the legal reality. Such assistance cannot and should

not be held against the IS and the decision to support staff in their dealing with Member States cannot be framed as the result of an earlier failing of the Organization itself.

30. The respondent also contends that the appeal is devoid of merits. It advances that, as recognized by the appellant himself, the damage suffered results from the taxation by the German authorities of his holdings in the DCPS. The IS therefore bears no responsibility, and cannot and should not be held liable for the failure of a domestic authority to abide by its international obligations.

31. In particular, the respondent states that it is not contested that lump sum payments made by the Organization from the DCPS to its staff members as withdrawals from the scheme are to be considered as emoluments in accordance with Article 19 of the Ottawa Agreement read together with Article 12.1 of the DCPS rules, and the Organization expects them not to be taxed by Allies.

32. The respondent recalls that considerable efforts are being taken by the IS, the matter has been brought to the attention of the German delegation and the IS remains actively engaged on the matter. It informs that the IS is currently supporting a legal action introduced by another former staff member before a German court, providing all necessary advice and information to the law firm which has been engaged and paying for the individual's legal expenses in full. The respondent stresses that it will keep the appellant appraised of the outcome of its engagements with the German authorities.

33. The respondent considers that, as a consequence, the decision of a German tax authority vis-à-vis the appellant cannot be presented as a breach by the IS of any acquired rights or legitimate expectations.

34. The respondent adds that in actively providing support on the issue, the IS is going above and beyond what can reasonably be expected from it to encourage Allies to abide by their international duties and thereby provide equal treatment vis-à-vis potentially affected individuals and affiliates, regardless of their country of residence.

35. The IS considers that given the circumstances and in the absence of any fault by the Organization, there is no reason or basis for awarding the appellant any form of financial compensation for the decision taken by Germany.

36. The respondent also believes that the Tribunal should consider staying the proceedings of the present appeal. Considering that the core substance of the appeal is the decision of the German authorities to tax the appellant, that such decision is *sub judice* before another judicial forum and that since a decision in favour of the appellant of the said judicial forum would dispose of the appeal against the IS or render it academic, the respondent advances that the present appeal should be stayed pending the outcome of the collateral proceedings.

37. The respondent requests that the Tribunal:

- dismiss the appeal in accordance with Article 6.5.1 of Annex IX to the CPR and Rule 10 of the Tribunal's ROP as clearly inadmissible and devoid of merit;
- reject the appeal as unfounded.

D. Considerations and conclusions

(i) Admissibility

38. The respondent contends that the appeal is inadmissible essentially for two reasons.

39. Firstly, it argues that the claim is clearly inadmissible and outside the Tribunal's jurisdiction, since the appeal is directed not against a decision taken by the Organization but in relation to the tax regime applied to the appellant by Germany. It requests that the Tribunal summarily dismiss the appeal or, alternatively, stay the proceedings pending the outcome of the case in the German courts.

40. The Tribunal disagrees. The appeal is not lodged against the decision of the German authorities but against the IS decision not to grant compensation. Without at this stage entering into the merits of the case, the Tribunal notes that the case before it challenges the legality of a decision taken by the Head of a NATO body (HONB). This matter is thus clearly within the competence of the Tribunal as laid down in Article 6.2.1 of Annex IX to the CPR and the respondent's request for summary dismissal on this ground therefore cannot be granted.

41. Nor can the Tribunal grant the request to stay the proceedings pending the outcome of the case in the German courts. That case concerns taxation of the payment under the DCPS, but that question is not before this Tribunal.

42. In a second argument the respondent contends, with reference to Article 2.1 of Annex IX to the CPR, that the appeal must be held inadmissible, since the claim was not directed to the proper NATO body, the appellant never having been employed or having entered into a contractual relationship with the IS.

43. Here again the Tribunal disagrees. Article 2.1 (on administrative review) indeed provides that the process of review and appeal must be initiated in the NATO body in which the retiree was appointed. But the same Article then goes on to stipulate: *"… so long as the Head of that NATO body has authority to rescind or modify the contested decision. Otherwise, the process shall be initiated in such other NATO body that has the authority to rescind or modify the contested decision."* The Head of NAMEADSMA obviously does not have the authority to rescind or modify the decision not to grant compensation, and the respondent has not established the contrary. Moreover, the appellant lodged a direct appeal with the Tribunal.

44. The Tribunal cannot but repeat what it already held in Case No. 2019/1281:

> 38. The Tribunal does not accept respondent's contention that the appeal is inadmissible because it was directed to the wrong NATO body. The appeal centers on appellant's treatment during his retirement. A benefit that he valued, and for which he continued to pay premiums after retiring, was terminated years after his active service ended. This cannot reasonably be seen to involve *"a work or career-related matter that arose during"* appellant's employment, such that Article 2.4 of CPR Annex IX would require him to appeal to LF HQ. Appellant correctly directed the appeal to the respondent, which was

obliged to address it on its merits.

45. This case law is hereby confirmed. It is a unit of the IS, within HR, that handles all pension matters. It facilitated the payment of holdings from the DCPS. The Acting DASG HR, on 11 May 2021, rejected the request for compensation. She informed the appellant that IS was taking very seriously the situation the appellant found himself in and that it was actively engaged with the German Permanent Representative to NATO.

46. The Tribunal further concludes that the appeal is not time-barred, with the exception of one point. The initial decision by the German tax authorities was indeed taken in 2017, but the appellant engaged with the tax authorities on the matter thereafter. On 13 August 2020 the *Finanzamt Singen of Baden Württemberg*r rendered a decision and on 18 April 2021 the appellant requested compensation, which was rejected on 11 May 2021. This substantial part of the appeal is thus not time-barred.

(ii) Merits

47. It is important to note from the outset that there is agreement between the parties about the interpretation to be given to the relevant provisions of the Ottawa Agreement and of the CPR. Both parties conclude that the lump sums that are paid out under the DCPS are not subject to national income tax in the NATO Member States. This point is thus not in dispute before this Tribunal, and the Tribunal is not required to express its opinion on this matter.

48. It is also not in dispute that the issue behind the present case is the tax levied by the German authorities. This entails a dispute between the Organization and one of its Member States. This Tribunal is an international administrative tribunal that hears appeals on employment disputes between the Organization and its serving and retired staff. It does not hear disputes between the Organization and its Member States, as, for example, the Court of Justice of the European Union may do. The Tribunal cannot and will not go outside its remit.

49. It is not in dispute that the appellant is currently suffering damage, a matter that may be resolved in the German courts. The question before the Tribunal then is whether this damage is the consequence of an act or omission by the Organization entailing its liability and entitling the appellant to compensation. In other words, the question is not whether the appellant should bear the consequences of the fact that Germany did not respect the regulations that it itself had approved. The question is thus whether the respondent acted (or omitted to act) in violation of its obligations towards the appellant.

50. In this respect the appellant alleges that the respondent breached Articles 5 and 12 of Annex VI to the CPR and Article 19 of the Ottawa Agreement, also breached his legitimate expectations and acquired rights, infringed its duty of care and good administration and, lastly, did not respect the principle of non-discrimination and equal treatment.

51. The appellant submits that the respondent gave wrong information when it advised staff that DCPS holdings would not be taxed. The Tribunal does not share this point of view. The Organization provided the best information it had at the time. Moreover, the appellant contends before the German courts that this was, and still is, the correct

information and the correct legal interpretation of the rules. He cannot contend the opposite before this Tribunal.

52. The Organization could not anticipate that one German tax office would decide to tax the DCPS holdings. It was confirmed at the hearing that dozens of retirees living in Germany did not see their DCPS holdings taxed, confirming the understanding and expectations that the Organization and the appellant had. It ultimately remains the responsibility of retirees, however, to deal with the application of the tax laws in the country where they take up residence. The appellant cannot shift this responsibility to the respondent. The respondent, moreover, is providing another appellant with legal and financial support to appeal in Germany (*cf.* Case No. 2021/1327). It is logical that the IS did so with a lawyer and with legal arguments chosen by itself. The appellant's case before the German courts is different: it was and is well advanced, with a lawyer and legal arguments chosen by the appellant himself. The plea of discrimination can therefore not stand.

53. Even if the general understanding and expectation was, and is, that the DCPS holdings would not be taxed, it is useful to recall in this respect that tax laws and practices differ by country. For example, some countries apply the so-called progression proviso, others do not. The plea of discrimination amongst retirees depending on the country of residence therefore does not hold. As far as the alleged discrimination within Germany is concerned, this is a matter for the German authorities to harmonize and the German courts to resolve.

54. Exercising its duty of care, the respondent has over the years provided the best information available at the time to its staff and retirees. A change in approach by one tax office does not retroactively alter this.

55. The appellant has suffered damage, but not as a consequence of an act or a failure to act by the respondent. The respondent has not breached Articles 5 and 12 of Annex VI to the CPR or Article 19 of the Ottawa Agreement. It is alleged by both parties, in fact, that it is the German authorities that have done so. As a consequence, the respondent is not liable and is not obliged to compensate the appellant for damages incurred in one of NATO's Member States. No irregularity has been committed by the HONB and, as a consequence, there is no ground for the Tribunal to order compensation (*cf.* Article 6.9.1 of Annex IX to the CPR) or to annul the decision denying the request for compensation.

56. The appellant is of the view that he had, and still has, legitimate expectations. But again, these expectations concern the approach of the German authorities, not that of the respondent.

57. The Tribunal fully understands the impact that the situation has on the appellant and may have on future retirees but must conclude that the appeal before this Tribunal is unfounded in its entirety.

E. Costs

58. 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 [...].

59. The appellant submits that he raised important legal issues, and requests that the Tribunal order reimbursement of legal costs as well as of travel and subsistence costs, even if the Tribunal finds that there are no good grounds for this appeal. The Tribunal must reiterate what it held in Cases Nos. 2020/1294-1296:

> 131. Without entering in a discussion on the force of these arguments, the Tribunal must note that in accordance with Article 6.2.3 of Annex IX to the CPR it does "not have any powers beyond those conferred under this Annex." The wording of Article 6.8.2 of Annex IX quoted *supra* being clear and unambiguous, the appellants' request cannot be granted.

The request is denied.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 14 June 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

21 June 2022 AT-J(2022)0011

Judgment

Case No. 2021/1335

GD

Appellant

v.

NATO AGS Management Agency

Respondent

Brussels, 15 June 2022

Original: English

Keywords: NATO body dissolved, non-renewal of contract, Financial Controller.

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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 Seran Karatari Köstü and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 29 April 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 28 October 2021 and registered on 29 October 2021 as Case No. 2021/1335, by Ms GD, against the NATO Alliance Ground Surveillance Management Agency (NAGSMA) which is replaced by the NATO Alliance Ground Surveillance Management Organization in Liquidation (NAGSMOiL), Office of the Liquidator (OotL). The appellant challenges NAGSMA's decision reflected in an e-mail dated 6 October 2021 informing her that her contract as NAGSMA Financial Controller/Resource Manager (FC/RM) would not be renewed on 31 October 2021, after her exceptional one-month contract extension, and that her appointment as Financial Controller/Director of Finance at NAGSMOiL was de facto withdrawn.

2. The respondent's answer, dated 31 January 2022, was registered on 2 February 2022. The appellant's reply, received on 2 March 2022, was registered on the same day. The respondent's rejoinder, dated 1 April 2022, was registered on the same day.

3. The Panel held an oral hearing on 29 April 2022 at NATO Headquarters. It heard the appellant's statements as well as arguments by the appellant's representative and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar. In view of the geopolitical situation, two judges participated by videoconference, using facilities provided by NATO Headquarters.

B. Factual background of the case

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

5. The appellant, having been on sick leave since 23 October 2021, is currently serving in Post Number 300 as RM with functions as FC muted under a one-month contract extension until 31 October 2021. She holds an indefinite duration contract as the respondent's FC/RM, having served at NATO for more than 10 years, as per Article 5.4.2 of the NATO Civilian Personnel Regulations (CPR). However, this position was for a definite duration due to the limited duration of NAGSMA until dissolution and the limits placed by the NATO Financial Regulations (NFR) on the tenure of FCs' of a NATO Body.

6. The new NFR and NATO Financial Rules and Procedures (FRP), which came into effect on 1 May 2015, provide that "the Financial Controller of a NATO body shall be appointed for a period of three years which may be renewed one time only for a further three year period" and " the total period of the appointment as Financial Controller in the NATO body concerned shall not extend beyond a maximum period of six consecutive years". When the NFR and FRP came into effect, the appellant was already serving as the respondent's FC/RM under a definite contract of three years (2013-2015).

7. The appellant received the following contracts at NAGSMA:

January 2016-30 September 2018: indefinite contract (A.5) with a limited duration
October 2018-31 December 2018: indefinite contract (A.5) with a limited duration
1 January 2019-31 December 2020: indefinite contract (A.5) with a limited duration

8. The record shows that, as the starting date for the liquidation of NAGSMA was reassessed and postponed several times, the appellant received the following contract extensions:

1 January 2021-30 June 2021 (six months)
1 July 2021-30 September 2021 (three months)

9. As the liquidation date of 30 September 2021 was postponed to 31 December 2021 for the last time, the NAGSMA General Manager (GM) wished to offer her a contract extension until 31 December 2021 when her previous contract extension expired on 30 September 2021.

10. However, under Article 9.2 of the NFR and Article 9.2 of the NAGSMO Financial Management Procedures Document and Financial Rules and Procedures, appointments to FC positions are not under the sole control of the NAGSMA GM. Pursuant to those provisions, for an effective appointment and contract renewal, the NAGSMA FC shall be selected and nominated by the NAGSMA GM but prior approval from the North Atlantic Council (NAC), based on the recommendation of the NAGSMO Board of Directors (BoD), is required.

11. On 30 August 2021, based on the NAGSMO BoD’s decision, the GM sent a request to the Secretary General's Liaison Officer to NAGSMO (SGLO) to obtain the NAC’s approval for the extension of the appellant’s contract through 31 December 2021.

12. On 16 September 2021, NAGSMA received the response from the SGLO, who had sought expert advice on the situation from the Office of Legal Affairs (OLA), NATO Office of Resources (NOR), and Executive Management Human Resources (HR). The SGLO’s response advised that the requested FC extension breached the NFR, specifically Article 10 addressing the six-year limit on appointments of NATO FCs. Article X of the FRP provides that the total period of the appointment as FC in the NATO body concerned shall not extend beyond a maximum period of six consecutive years.

13. The GM, on his own initiative, requested that the BoD approve (by 27 September) exceptionally a one-month contract extension for the appellant until 31 October 2021 as there was insufficient time to resolve open issues related to this staff member and to arrange NAGSMA out-processing by 30 September 2021. Following this, one NAGSMO Nation broke silence on the request and asked for an agenda item to discuss this matter during the BoD meeting on 5 October. The GM submitted a modified proposal to the BoD (for consideration and decision by 29 September) to provide exceptionally a one-month contract extension, until 31 October 2021, to the appellant in her position as RM with functions as FC muted, taking into account that the appellant’s employment and mandate would expire on 30 September. The BoD approved the GM's requests under silence and a specific agenda item was added to the 5 October 2021 BoD meeting.

14. At the NAGSMO BoD meeting of 5 October 2021, the record indicates that the Nations discussed “further extension of Ms GD, and in what capacity” as a stand-alone agenda item, as specifically requested by one Nation. Considering the SGLO’s advice stating that the request for extension of the FC violated the NFR, at the BoD meeting, in response to the Chair's inquiry of whether there was a desire to offer the staff member a three-month extension, no extension was requested by any Nation, there was no consensus on creating a new position and the NAGSMO BoD's previous decision on the one-month exceptional extension remained with no changes requested. According to the decision, no further extension beyond 31 October 2021 would be offered to the appellant.

15. On 6 October 2021, by the contested e-mail, the GM informed the appellant about the decision of the 5 October BoD meeting and the fact that her contract would expire on 31 October 2021 and would not be renewed.

16. The appellant’s complaints were rejected by e-mails dated 20 and 22 October 2021.

17. In parallel to the facts mentioned above, within the context of preparations regarding the Liquidation Phase, at the NAGSMO BoD meeting on 4 December 2019, the NAGSMO Nations approved the OotL’s functions for NAGSMO in Liquidation and approved the Staffing Plan for NAGSMO (in liquidation) to include a position "Director of Finance, grade A.5 (Post 109)”, as per organizational needs.

18. The main discussion that ensued and continued all through the year 2020 revolved around the position of FC/Director of Finance, its title, and grade. To ensure the required impartiality, independence, and autonomy to fulfil the required financial responsibility and a smoother transition, the job description for Post 109 was coordinated and signed in November 2020 and NAGSMA launched a recruitment process to fill the position in December 2020.

19. The sole candidate for the post was the appellant, who held the post of NAGSMA FC/RM and also had redundant status in line with Article 57.2 of the CPR. In December 2020, the Interview Panel found her qualified and suitable for Post 109 (Director of Finance) and unanimously recommended that Post 109 should be offered to her.

20. On 8 January 2021, the BoD decided the post responsible for administrative and financial services in the OotL should be an “FC, A.5 grade”. Post 109’s advertised responsibilities fully matched those of the new FC post.

21. On 26 January 2021, the GM asked for BoD approval to offer the appellant a contract of employment as FC of NAGSMOiL for the period from 1 July 2021 to 31 December 2023. On 5 February 2021, under silence procedure, the NAGSMO BoD approved the request and the request was submitted to the NAC for approval on 18 February 2021.

22. On 5 October 2021, at the BoD meeting, the Liquidator selected specifically briefed the BoD and proposed decreasing the original 14 proposed staff positions in the Liquidation team to 12 by deleting the FC/Director of Finance position and the NSPA Liaison Officer position.

23. On 6 October 2021, a revised NAGSMO Staffing Plan 2022-2023 was formally approved and this approved version did not contain the post of FC/Director of Finance.

24. No formal notification had been received by the appellant concerning her appointment as FC/Director of Finance at NAGSMOiL.

25. The record indicates that the appellant submitted consecutive doctor's notes covering the period of sick leave from 23 October to 28 February 2022. The appellant also confirmed at the hearing that she is still on sick leave.

26. On 28 October, the appellant lodged an appeal directly with the Administrative Tribunal under Article 1.4 of Annex IX to the CPR.

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

(i) The appellant's contentions

27. The appellant challenges the legality of two decisions and one de facto decision of the NAGSMA General Manager, who is the Head of NATO Body as per the CPR. The appellant argues that her pleas are admissible under Article 62.2 of the CPR and Article 4.4 of Annex IX to the CPR, considering that she can submit the appeal to the Tribunal without requesting an administrative review.

28. As to the merits, since she has not been informed of any decision formally terminating her contract of indefinite duration, the appellant maintains that the notice period of 180 days has not started and she must still be considered as an active NATO staff member under a contract of indefinite duration. Besides, the appellant contends: 1) a manifest error of assessment 2) a breach of legitimate expectations; 3) a violation of the duty of care; and 4) on a subsidiary basis, a breach of rights and entitlements deriving from the end of the employment contract.

On the manifest error of assessment by deciding not to further extend the appointment of the appellant

29. The appellant asserts that, as it has no retroactive effects, the new NFR's six-year rule should be applicable to her as from 1 January 2016, the first time her appointment was renewed after the NFR came into effect in May 2015. Therefore, she considers that she should have been allowed to work as NAGSMA FC until 31 December 2021 and that the GM manifestly erred in law when deciding that the appellant could not work as FC after 31 September 2021. In the appellant's view, even the NFR's six-year rule should be considered applicable as of May 2015; if the GM had not decided to revert to the BoD with the SGLO's opinion instead of making the request for approval to the NAC, the latter might have decided to grant an exception for the appellant. Thus, this rule could have been easily waived so that she could perform her RM duties, taking into consideration the allocation of her duties (FC 20-30% of her working time and RM 70-80% of her working time).

On the manifest error of assessment by deciding de facto to withdraw the appointment of the appellant as FC at NAGSMOiL

30. Having accepted that she did not receive any formal decision of the GM withdrawing her appointment as FC at NAGSMOiL, the appellant claims that the e-mail of 6 October 2021 from the GM could be classified as a de facto decision to withdraw her appointment as FC at NAGSMOiL. The appellant notes that her appointment as FC at NAGSMOiL is still legally possible as her role at NAGSMOiL would have been different from her role at NAGSMA and, in any case, it must be considered as a decision vitiated by an error of law and a manifest error of assessment.

On the breach of legitimate expectations by not extending/renewing the appellant's appointment as NAGSMA FC/RM from 1 November to 31 December 2021

31. The appellant stresses that she received reasonable assurances, such as the NAGSMA Staffing Plan approved until October 2021, from reliable sources, namely the GM and the BoD, that NAGSMA would continue its activities until 31 December 2021 and, therefore, she maintained her legitimate expectations that her appointment as FC/RM would be extended until 31 December 2021. She claims that the GM's decision, reflected in his e-mail of 6 October 2021, to not further extend her appointment breached her legitimate expectations.

On the breach of legitimate expectations by deciding de facto to withdraw the appointment of the appellant as FC at NAGSMOiL

32. The appellant alleges that she received reasonable assurances from reliable sources that she would be appointed as NAGSMOiL Director of Finance/FC as from 1 January 2022. Based on the BoD decision of 5 February 2021 endorsing her appointment as FC, which was also reflected in the NAGSMOiL Staffing Plan until October 2021, she maintained her legitimate expectations of being appointed as NAGSMOiL Director of Finance/FC. Her legitimate expectations were breached by the GM's de facto decision to withdraw her appointment to NAGSMOiL.

On the violation of the duty of care

33. Concerning the duty of care, the appellant holds that NAGSMA did not take into consideration her interests as a staff member. The appellant contends that she was systematically excluded from all relevant correspondence about her professional life and future career. She asserts that having received assurances about the renewal of her contract with NAGSMA, she was not even informed of the decision to the contrary until 6 October, only 25 days before the end of her appointment as FC/RM. She further notes that her rights and entitlements as an indefinite contract holder were not recognized. She stresses that with six months' advance notice she could have found another job in NATO due to her redundant status. The appellant emphasizes that she missed professional opportunities during the period November 2020 to May 2021, due to the assurances she had received that she would be appointed as FC at NAGSMOiL until 31 December 2023: she declined one job offer and several invitations to participate in selection and recruitment procedures within NATO.

On the breach of rights and entitlements deriving from the end of the employment contract

34. Finally, on a subsidiary basis, if the Tribunal finds the GM's contested decisions to be lawful, the appellant asks for her rights under an indefinite contract to be respected.

35. The appellant requests that the Tribunal:

- annul the contract letter of 28 September 2021, insofar as it offers a "non-renewable contract of definite duration" of one month, and annul the GM's decision not to extend/renew her appointment as NAGSMA FC/RM until 31 December 2021;
- annul the GM's de facto decision to withdraw her appointment as NAGSMOiL FC/Director of Finance from 1 January 2022 to 31 December 2023;
- order her reinstatement without delay, or pay her remuneration in full from 1 November 2021 to 31 December 2023 and all her entitlements in accordance with the CPR for indefinite duration contracts;
- compensate her for the additional non-material and material damage, evaluated at €75,000;
- order reimbursement of all the legal costs.

alternatively:

- find that Ms D's indefinite duration employment contract has not been terminated;
- order the respondent to comply with its duties by properly terminating the appellant's employment contract and comply with her rights and entitlements deriving from the end of the contract of employment, including:
  - payment of full remuneration as a NATO staff member, grade A.5, including pension contributions, until proper notification in writing of the termination of her contract is given;
  - notification in writing of the termination of her indefinite duration employment contract;
  - application of a notice period of 180 days starting from the notification in writing of the termination of her contract, or payment of an equivalent compensation, including pension contributions;
  - payment of an indemnity for loss of job equal to 18+ months, including pension contributions;
  - payment of financial compensation corresponding to 55 days of remuneration, for untaken leave, including pension contributions;
  - payment of the education allowance for her children for the 2021/2022 school year and all other allowances and financial rights she is entitled to.
- compensate for the non-material and material damage suffered, evaluated at €75,000;
- order reimbursement of all the legal costs.

(ii) The respondent's contentions

36. The respondent maintains that the appeal is partly inadmissible. The respondent first contests the appellant's claims concerning a decision by the Head of NATO Body (HONB), regarding the de facto withdrawal of the appellant's appointment to NAGSMOiL.

The respondent reiterates that the HONB neither took the alleged decision nor had the authority to even take such a decision and adds that a contract of appointment, in this regard, was never formally issued to the appellant. As for the admissibility of the appellant's arguments, it also indicates that there exists no mutual agreement between the parties to submit the matter directly to the Tribunal under Article 62 of CPR. The respondent also objects to the appellant's allegations that the GM's e-mail of 6 October 2021 was a decision concerning the appellant's employment at NAGSMOiL and emphasizes that the decision against which the grievance is directed is, in fact, the NAGSMO BoD decision deleting the FC/Director of Finance position at NAGSMOiL, which falls outside of the Tribunal's defined competence.

37. Second, the respondent also contests the admissibility of the pleas raised by the appellant concerning payment of the indemnity for loss of job, compensation for untaken leave, and payment of the education allowance. Since the appellant is still on sick leave and would only be entitled to such payment when she is declared fit and separates from the Organization, the respondent asserts that those claims of the appellant should be considered inadmissible. The respondent further notes that the appellant continues to receive her full salary and emoluments, including the education allowance, until separation from NAGSMA can take place.

38. The respondent does not contest the admissibility of the rest of the pleas under this appeal.

39. As to the merits, the respondent states that the appellant held an indefinite duration contract with definite duration and denies the rights asserted by the appellant, except the obligation to pay the indemnity for loss of job under Annex V of the CPR and the right to benefit from redundant status by being listed in the NATO Clearing House. The respondent maintains that the appellant's assertion that her contract cannot expire is completely without legal basis. The respondent notes that, in expectation of the liquidation date, the NAGSMA GM issued to all NAGSMA staff members, including the appellant, individual notification of non-renewal of their employment contracts dated 10 July 2020 to comply with the requirement of 180 days' notification. This letter also informed the appellant of the intent concerning payment of the indemnity for loss of job. The respondent further argues that the appellant's subsequent extensions contained explicit statements of non-renewal on the expiration date. Hence, she was on notice that there would be no further renewals when her contract expired.

40. In reply to the appellant's assertions concerning the alleged manifest error of assessment in not providing a further extension, the respondent points out that the decision that is alleged to be a manifest error was not taken by the NAGSMA GM. The decision was taken by the BoD based on the SGLO's letter, which, following appropriate consultation with the Office of Legal Affairs (OLA), NATO Office of Resources (NOR), and Executive Management Human Resources (HR), indicated the illegality of the appellant's further tenure as NAGSMA FC. The respondent emphasizes that the BoD discussed the SGLO's arguments extensively and made its decision accordingly. According to the decision, any further renewal of the appellant in the position of NAGSMA FC would have violated the new NFR that came into effect on 1 May 2015, in particular Article 10 concerning the six-year limit on appointments. The respondent also adds that the BoD only took a decision to authorize an extraordinary one-month extension for the appellant. Thus, the NAGSMA GM acted appropriately based on the BoD decision and

had no authority to unilaterally extend the appellant's contract, in any capacity, contrary to the appellant’s assertions.

41. Moreover, the respondent states that the appellant’s appointment is always subject to prior NAC approval on the basis of the recommendation of the BoD. The NAGSMA GM acted appropriately upon receiving the BoD’s approval and correctly sought NAC approval through the SGLO, which is NAGSMO’s gateway to the NATO Secretary General and the NAC as per Articles 51-54 of the NAGSMO Charter. In this regard, contrary to the appellant’s allegations, the GM does not have any right to access the NAC directly and ask for their decisions to be adjudicated, whenever required. In the same vein, they cannot demand that the SGLO put the issue in front of the NAC for discussion, particularly if there are legal concerns. In any case, the GM did not have grounds to renew the appellant's contract as FC/RM due to the lack of NAC approval.

42. The respondent finds the appellant’s argument on the working time allotted to each of the functions of FC and RM to be speculative and irrelevant since the Post Description is for FC/RM, and insists that there are no grounds to allege a manifest error of assessment in the context of non-renewal of the appellant's contract because the GM complied with all procedural and statutory requirements in this regard.

43. The respondent disagrees with the appellant's assertions that her legitimate expectations were breached by the failure to extend/renew her appointment as NAGSMA FC/RM. The respondent points out that the appellant cannot derive legitimate expectations and assurance of her renewal by referring to an approved NAGSMA Staffing Plan because it is not the only condition that needs to be met in her position as FC. She had to obtain prior NAC approval and the BoD’s recommendation to be offered a renewal by the GM. Even though the GM proceeded appropriately with requesting the required authorizations, the NAC approval did not materialize. Moreover, taking into account the fact that the notification of 10 July 2020 and subsequent extensions contained explicit statements of non-renewal, the respondent reiterates that the appellant knew her legal situation very well and she cannot infer any legal expectations of her renewal.

44. As to the appellant’s assertions concerning the manifest error of assessment and breach of legitimate expectations based on the GM’s de facto decision to withdraw the appointment of the appellant as FC at NAGSMOiL, the respondent maintains its position and reiterates its objections on the admissibility.

45. In answer to the appellant’s allegations regarding a breach of the duty of care, the respondent states that it was in full compliance with the duty of care and good administration in adopting the decision not to renew the appellant's appointment as NAGSMA FC. After receiving feedback on their request to seek respective NAC approval, the GM twice addressed the issue to the NAGSMO BoD seeking their guidance despite there being no explicit obligation or requirement to do so. Taking into account that the NAGSMO BoD Nations agreed to discuss this issue during their upcoming meeting on 5 October 2021 (i.e. five days after the expiry of the appellant's employment contract on 30 September 2021), the respondent, with BoD approval, provided an exceptional one-month extension to the appellant in a limited capacity with her functions of FC muted. The respondent reiterates that the appellant was aware of all applicable

limitations concerning her employment extension as NAGSMA FC and of the SGLO's response. As to the alleged "missed professional opportunities", the respondent stresses that this was purely the appellant's personal decision.

46. In response to the points raised by the appellant concerning the breach of rights and entitlements deriving from the end of her employment contract, the respondent recalls that, in compliance with 180 days' notice, the appellant received notification of non-renewal and subsequent contract extensions contained explicit statements of non-renewal upon expiry, and that the appellant does not have grounds to contest untaken decisions on payment of financial entitlements as she cannot be separated from the Organization while she is still on sick leave. The plea concerning the education allowance should be rejected as inadmissible as well as the pleas concerning payment of financial entitlements, on the grounds that those alleged decisions were never taken by the NAGSMA GM.

D. Considerations and conclusions

(i) Admissibility

As to the pleas of the appellant regarding the non-extension of her contract until 31 December 2021

47. The appellant lodged a timely direct appeal to the Tribunal concerning the NAGSMA GM's e-mail of 6 October 2021 notifying her that her contract as NAGSMA Financial Controller/Resource Manager would not be renewed on 31 October 2021, after the exceptional one-month contract extension. Accordingly, the appeal satisfies the CPR's procedural requirements.

48. The appeal was directed against NAGSMA replaced by NAGSMOiL, which has appeared and filed written submissions as the respondent. However, as discussed *infra,* the appeal at its heart concerns actions and decisions by the BoD, a body of national representatives that is not represented in these proceedings. This raises significant issues bearing on the Tribunal's capacity or authority to adjudicate the claims raised. For clarity and convenience, these will be addressed in connection with the Tribunal's consideration of the merits.

As to the pleas of the appellant regarding the de facto withdrawal of her appointment as Financial Controller/Director of Finance at NAGSMOiL, from 1 January 2022 to 31 December 2023

49. Article 6.2.1 of Annex IX to the CPR states as follows: "The Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal successor concerning the legality of a 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."

50. Despite the allegations of the appellant regarding the de facto withdrawal of her appointment as Financial Controller/Director of Finance at NAGSMOiL, the record indicates that no contract was issued to the appellant regarding such employment at

NAGSMOiL in the first place. The Tribunal records that the appellant accepted at the hearing that she had not received any formal decision of the GM on the withdrawal of her appointment.

51. The Tribunal also notes that the appellant cannot clearly identify the administrative decision that is contested as the de facto decision of the GM. As to the appellant's argument on whether the GM's e-mail of 6 October 2021 could be classified as the de facto decision to withdraw her appointment as FC at NAGSMOiL, the record states that the aim of the contested e-mail of 6 October 2021 was to inform the appellant of the outcome of the discussion "*on her further extension and in what capacity*". A one-month exceptional extension of the appellant's contract with NAGSMA (post 300 FC/RM) with the FC duties muted was discussed as well as the reasons for this extention. Since there exists no decision concerning the appellant's employment with the OotL at NAGSMOiL under that item of the agenda or in the GM's e-mail of 6 October 2021, the Tribunal finds that there is no administrative decision related to the appointment of the appellant to NASGMOiL, within the meaning of the CPR, subject to judicial review by the Tribunal. Thus, the submissions related to the de facto withdrawal of the appointment of the appellant as Financial Controller/Director of Finance at NAGSMOiL, must be dismissed as inadmissible.

(ii) Merits

52. As to the contract type and the rights of the appellant at NAGSMA, she requests that her employment status as an indefinite duration contract holder and her corresponding rights and entitlements, notably her redundant status, be recognized and respected without delay. The appellant maintains that the respondent's views on "an indefinite duration contract with definite duration" are legally erroneous, hence all the consequences drawn from this premise should be found illegal.

53. The Tribunal observes that following the start of her service at NATO in 2003 and her transfer to NAGSMA in 2013 with a definite duration contract, the appellant's contract was renewed as an indefinite duration contract on 1 January 2016 as per Article 5.4.2 of the CPR. Her definite duration appointment to the FC/RM position was subject to subsequent renewals and extensions until 30 September 2021. Considering her contracts submitted to the file and her service of more than 10 years, the Tribunal recognizes the appellant's status as a holder of an indefinite duration contract and records the respondent's statements, at the hearing, that her entitlements and rights based on her indefinite contract will be granted as soon as she separates from the Organization at the end of her sick leave period.

54. As to the argument on '"an indefinite duration contract with definite duration", the Tribunal observes that, in the particular situation of NAGSMA, namely the limited duration of the Agency and NFR limits on FCs' tenure at a NATO Body, the appellant's indefinite duration contract of 2016, as well as her subsequent contract renewals and extensions, included a clause that her appointment to that post would be for a limited period. The Tribunal firstly notes that the term "indefinite duration contract" does not mean that a contract is valid for an unlimited time, but indicates that the period of employment continues indefinitely until either employer or employee terminates the contract. Secondly, the Tribunal considers that the clause used in the appellant's contracts refers to a legal agreement between the parties and binds them, and also

draws attention to the appellant's signature on each contract, demonstrating her awareness and willingness to serve in a definite duration position, despite having the right to sign an indefinite duration contract with no such clause for any other position at NATO.

55. In light of the foregoing, the Tribunal finds that the appellant's appointments to the FC/RM position at NAGSMA were for definite periods although she is an indefinite duration contract holder.

56. The appellant claims that the new NFR's six-year rule should be applicable to her as from 1 January 2016, the first time her appointment was renewed after the NFR came into effect in May 2015, so she should have been provided with a further two-month contract extension until 31 December 2021. She asserts that the GM manifestly erred in law when deciding that the appellant could not work as FC after 31 September 2021.

57. Pursuant to Article 9.2 of the NFR, the effective appointment and contract renewal of the FC to the staff of the Secretary General, the Supreme Commander, or the other Heads of NATO bodies shall be subject to prior approval by the Council based on the recommendation of the relevant finance committee or appropriate governing body. In parallel, pursuant to Article 9.2 of the NAGSMA Financial Management Procedures Document and Financial Rules and Procedures, the effective appointment and contract renewal of the NAGSMA FC to the staff of the NAGSMA GM shall be subject to prior approval by the Council based on the recommendation of the NAGSMO BoD.

58. Under Article 37(b) of the NAGSMO Charter, the GM will, within the authority delegated to him/her by the BoD, be responsible for the execution of the AGS Programme including being responsible for the selection and appointment of individuals to fill positions in NAGSMA, except the PM position, in accordance with the establishment and the staffing plan approved by the BoD, and shall submit in due time the selection for positions at and above the A.5 level to the BoD for approval.

59. Under Article 34 of the NAGSMO Charter, the BoD, as the directing organ of NAGSMO, is also solely responsible for the approval of the overall organization of NAGSMA, the staffing plan of the Agency, and the selections of personnel of grade A.5 and above as well as budgetary, financial and contractual approvals.

60. With regard to the contract extension of the appellant, on the basis of the BoD's decision, the GM sent a request to the SGLO to obtain the NAC's approval for the extension of the appellant's contract until 31 December 2021; however, following the SGLO's advice that the requested FC extension violated the NFR, in particular Article 10 concerning the six-year limit on appointments of NATO FCs, the contract renewal was discussed extensively by the BoD. Such approval was not forthcoming, so the GM modified the request and offered the appellant an exceptional one-month extension instead of three months in her position as RM with functions as FC muted. The BoD approved the GM's request under silence and no further extension was requested by any Nation at the following BoD meeting on 5 October.

61. Considering the regulations and facts mentioned above, appointments to FC positions are not under the sole control of the NAGSMA GM. The record shows that the GM hoped to retain the appellant's services, and sought the required approvals to permit

this, however, he did not have unlimited discretion to offer a further extension, he could only do so with the prior approval of the NAC based on the recommendation of the BoD. The NAGSMA GM acted appropriately based on the BoD's decision and, in this regard, the Tribunal considers that it is not the GM's decision but the BoD's decision that constitutes the core of the appeal.

62. In Case No. 2020/1305, the Tribunal held that the BoD – a body composed of national representatives – is not represented in these proceedings and is not a NATO body within the scope of Article A(v)(a) of the Preamble to the CPR. However, despite not being competent to annul a decision of the BoD, the Tribunal may rule on such a decision's legality, as on that of all regulatory decisions by Heads of NATO bodies or by any other administrative authority, when a Head of a NATO body takes an individual decision implementing the BoD decision. In this regard, it has been consistently concurred that a decision in the exercise of an organization's discretion is subject to only limited review by the Tribunal (Case No. 885, paragraph 33–36). The Tribunal can only interfere with the impugned 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 an abuse of authority or manifest abuse of discretion. In view of this, the Tribunal has also consistently held that it will not substitute its own view for the organizations' assessments in such cases.

63. The appellant asserts that even the NFR's six-year rule is considered applicable as of May 2015; the Council might have decided to grant an exception for the appellant, if the GM had not decided to revert to the BoD with the opinion of the SGLO in lieu of making the request for approval to the NAC.

64. The SGLO's authority and duties are defined by Article 52 of the NAGSMO Charter. Article 52 provides that the NATO Secretary General shall designate as liaison officer a suitably qualified member of his/her staff who shall have the right to attend all meetings, without the right to vote, of the NAGSMO BoD. Such officer shall, inter alia, provide advice and recommendations regarding NATO administrative procedures and practices.

65. The Tribunal also points out that the role and function of the SGLO were also discussed at the BoD meeting of 5 October and the SGLO made the statements below:

> The SGLO is a staff function and it does not have decision power, it rather has an advisory role. All decision authority lies with the Nations. … This BoD was asking the NAC to appoint the FC, approve an exceptional extension, and to eliminate the 6 year time limit. The actions would create a precedent, which could be seen as a reversal of the entire NFR FC time limit statutory guidance. SGLO appreciates the BoD desire that a request was to be handled by the NAC, but that desire involves some challenges, especially due to the nature of exemptions required to be waived. The SGLO function is to staff requests across the entire International Staff and make sure that requests are in accordance with the NFRs. This is to ensure decisions achieve consensus @30. If a request requires a complete distancing from NFR, either in normal or exceptional NAC process, it is the staff function and a duty to inform the BoD that the individual selected for a FC function does not meet NFR rules. Therefore, the BoD should propose an individual who meets the NFR rules. In a particular case of previous FC, the staff has gone through this process in the past, back in March 2021. At that time, it was difficult to support an extension. To return to the NAC again with a similar

request, the International Staff's advice is that it would be impossible to bridge the number of exceptions required and therefore likely would not achieve consensus@30...

66. Given the article and statements above, and also the GM's direct responsibility to the BoD for NAGSMA's operations, as per the NAGSMO Charter, the Tribunal considers that, especially concerning the legality of the appellant's situation, the GM's conduct did not violate the CPR or any other NATO policies or regulations, and the appellant's submissions in this regard must be rejected.

67. The appellant further claims that, as she did not receive any decision formally terminating her indefinite duration contract, the notice period of 180 days has not started and she must still be considered as an active NATO staff member. According to the document submitted to the case file, on 10 July 2020, in expectation of the liquidation date, the GM issued to the appellant an individual notification of non-renewal of the employment contract due to the closure of the Agency, to comply with the requirement of 180 days' notification and to inform her about payment of the indemnity for loss of job if the holder of an indefinite contract is not offered a post in the Organization and her eligibility to be listed in the NATO Clearing House as a redundant staff member. The respondent also remarks that the appellant had the opportunity to exercise her rights on the basis of that letter and even took advantage of her redundancy status with her application for the position of Chief of Financial Strategy Policy, Process and Continuous Improvement Office at the NCI Agency. The Tribunal, therefore, considers that the appellant was given formal notice six months prior to contract expiration that she would not be offered a new contract, and also that she was provided with multiple notifications about the non-renewal of her contract on the expiration date due to the closure of the Agency, with the contract extension letters of 14 April 2021 and 28 September 2021. Given these circumstances, the appellant was duly informed of the non-renewal of her contract and the above-mentioned submissions of the appellant must be rejected.

68. With regard to the appellant's submissions, on a subsidiary basis, for payment of the indemnity for loss of job, financial compensation for untaken leave, and payment of the education allowance, the respondent declared that no decision had been taken on any of the items because of the appellant's continuing sick leave period, and that the appellant would only be entitled to such payment when separated from the Organization. At the hearing, the parties also agreed that the appellant's rights under the indefinite duration contract would be respected, including her indemnity for loss of job. The respondent also remarks that the appellant herself has not requested payment of the education allowance for this year and, therefore, asserted that non-receipt is her own decision, not the decision of the GM. At the hearing, the appellant confirmed the continuity of her sick leave period and also admitted not having requested payment of the education allowance for this year. In the circumstances, no payment is warranted under the appellant's submissions.

69. The appellant asserts that she received assurances from reliable sources that her appointment as FC /RM would be extended until 31 December 2021. Therefore, the GM's decision, reflected in his email of 6 October 2021, not to further extend her appointment breached her legitimate expectations.

70. The respondent submits that the appellant cannot derive any legitimate expectation and assurance by referring to an approved NAGSMA Staffing Plan because

it is not the only condition that needs to be met in her case. Due to her position as FC, NAC approval and the BoD's recommendation are required for the GM to be able to offer an extension to the appellant. Moreover, the respondent alleges that the appellant should have known that because her tenure as NAGSMA FC had already exceeded six years, there were risks with regard to obtaining NAC approval.

71. The Tribunal has held in Case No. 2014/1028 that the principle of protection of legitimate expectations "applies to any individual in whom the administration has instilled justified and clear hopes by giving specific assurances in the form of precise, unconditional and consistent information from authoritative and reliable sources." And in Case No. 887 it held that three conditions must be fulfilled: (1) "precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the NATO body", (2) "those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed", and (3) "the assurances given must comply with the applicable rules."

72. The case file does not show any precise and unconditional assurance given to the appellant by a NATO authority, since there has never been any guarantee that a FC would be issued an additional contract as it always requires the three steps from the HONB, the BoD and the NAC. As none of them can ever be assumed as an entitlement, asserted assurances from reliable sources cannot give rise to a legitimate expectation.

73. Moreover, as provided by Article 10 of the NFR, the FC of a NATO body shall be appointed for a period of three years, which may be renewed one time only for a further three year period, and, as provided by Article X (1) of the FRP, the initial appointment of an FC to a NATO body shall be for a period of three years. The appointment of that FC can be renewed one time only for a further three-year period. The total period of the appointment as FC in the NATO body concerned shall not extend beyond a maximum period of six consecutive years. Pursuant to Article 36.2 of the NFR, these Regulations took effect in all NATO bodies immediately upon approval by the Council. As the silence procedure ended on 4 May 2015, the new NFR was approved and took effect on 1 May 2015, meaning that from the date when it entered into force, the six consecutive years rule was also applicable. As the asserted assurances received and/or expectations of the appellant did not comply with the applicable rules, the Tribunal finds that the plea of violation of the principle of legitimate expectations fails.

74. As the submissions seeking annulment of the impugned decision have been rejected, the submissions on compensation for material damage suffered by the appellant due to this decision must also be rejected.

75. The appellant is also seeking compensation for non-material damage suffered. Indefinite duration contracts are mainly used by organizations to boost loyalty and build a stable organizational structure by maintaining the same employees over the years and to provide employees with stronger rights and entitlements. But more importantly, with those contracts, employees also gain more certainty and stability over their position and financial security. The Tribunal considers that taking into consideration the particular circumstances of the present case, the appellant could not take advantage of the benefits of certainty and stability due to NAGSMA's liquidation date, which is constantly changing. Although it is clear from the case file that the GM did his best within the legal framework, his last modified proposal of an exceptional one-month contract extension, submitted to

the BoD for consideration and decision by 29 September, reveals that the appellant was unsure whether her contract would be extended beyond 30 September or not, even the day before the end date of her contract. It should also be considered that her uncertain and ever-changing situation played an important role in her not proceeding with job applications.

76. Moreover, as a good administrative practice, in order to decrease the stress levels of staff members and avoid them having to face difficulties when leaving the Organization, sufficient measures are expected to be put in place to provide advice and assistance. In the appellant's case, the Tribunal finds that no measures were taken except for the instruction of the impugned e-mail of 6 October 2021 asking the appellant to coordinate with HR to begin her out-processing. It was also recorded at the hearing that because the appellant's uncertain situation has created great distress, she missed the deadline to apply for this year's education allowance.

77. Given the circumstances to which the appellant was subjected in her sensitive situation, and the state of anxiety and uncertainty, the Tribunal considers that the non-material damage that she suffered can be fairly assessed at €15,000.

E. Costs

78. 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. 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 that:

- The appellant is entitled to €15,000 in non-material damages.
- NATO shall reimburse the appellant the costs of retaining counsel, up to a maximum of €2,000.
- All other claims are dismissed.

Done in Brussels, on 15 June 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

14 November 2022 AT-J(2022)0012

Judgment

Case No. 2022/1339

MC
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 2 November 2022

Original: English

Keywords: appeal against general Office Notice on COVID-19 measures; admissibility.

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This judgment is rendered by a full Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Ms Seran Karatarı Köstü, Mr Thomas Laker, Mr Laurent Touvet and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 29 September 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 10 March 2022 and registered on 30 March 2022 as Case No. 2022/1339, by Mr MC, against the NATO Support and Procurement Agency (NSPA). The appellant requests, *inter alia*, the suspension of an Office Notice (ON) that the NSPA issued on 1 December 2021, outlining the Agency's measures with regard to Covid-19 and financial compensation for each month it was in force.

2. On 19 April 2022, the respondent submitted a request for a summary dismissal in accordance with Article 6.5.1 of Annex IX to the Civilian Personnel Regulations (CPR) and Rule 10 of the Tribunal's Rules of Procedure. On 28 April 2022, the Tribunal issued order AT(PRE-O)(2022)0001 denying the request for summary dismissal.

3. The respondent's answer, dated 13 June 2022, was registered on 16 June 2022. The appellant's reply, dated 18 July 2022, was registered on 18 July 2022. The respondent's rejoinder, dated 31 August 2022, was registered on 1 September 2022.

4. The full Panel held an oral hearing on 29 September 2022 at NATO Headquarters. It heard the appellant's statements as well as 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. On 1 December 2021, the NSPA issued Office Notice ON-COS-004-021 ("NSPA COVID MEASURES"), which was to apply, as of 3 January 2022, to all NSPA personnel, including international civilian personnel, consultants, temporary personnel and seconded staff. The purpose of the ON was a) to ensure that adequate health and safety conditions exist in NSPA; b) to ensure continuity of service; and c) to mitigate risks for its staff members by identifying vaccinations or inoculations that are required for the proper execution of their duties.

7. On 2 December 2021, the appellant challenged the ON through a request for administrative review in accordance with Article 2 of Annex IX to the CPR. He considered that the ON was affecting his conditions of work or service, did not comply with the terms and conditions of his employment and contract, and did not comply with Operating Instruction (OI) 4400-05 ("NSPA Policy against inappropriate behaviour"). He introduced

the following arguments:

- I consider that this ON collides with basic human rights, on top of the host nation constitutional principles and European rights. It also vulnerates the data protection law if I have to upload medical information upon teleworking. And the guard at the entrance could link my medical data to my badge, also against medical privacy.
- The COVID-19 jab is still at experimental stage and it is not proven safe, nor effective, for human beings.
- It is not practical to queue up every day to get a certified rapid test, and its cost will be a burden too, so this implies pressure to receive the COVID-19 jab.
- By applying the Covid pass, you are assuming that vaccinated people are not contageous, not sick. But as we can see vaccinated agents contracted the sickness too, also recognized by CDC.
- Having hundreds of cars queuing up at the gate while the guards check the validity of the covid pass might increase risk of terrorist attacks.

He also considered that the ON was "contrary to several NATO principles, including the North Atlantic Treaty, CPR and NATO code of conduct, Universal Declaration of Human Rights, European Human Rights, Council of Europe resolutions, UNESCO Universal Declaration on Bioethics and Human Rights, Oviedo convention on Human Rights and Biomedicine, The Nuremberg Code, host nation constitutional principles and European Data Protection Regulation."

8. On 15 December 2021, the NSPA issued ON-COS-005-21 ("NSPA COVID MEASURES") superseding ON-COS-004-21 and entering into force on 15 January 2022. The purpose and the scope of ON-COS-005-21 were the same as of ON-COS-004-21, but some measures slightly differed. It, for example, introduced a temporary partial vaccination status, modified teleworking requirements and postponed the entry into force of some other measures.

9. On 16 December 2021, the NSPA General Manager replied to the appellant, requalifying the request for administrative review as a complaint within the meaning of Article 61 of the CPR. She considered the complaint not receivable and unfounded stating, *inter alia*, the following:

> In accordance with the NATO Civilian Personnel Regulations, only administrative decisions that affect one's conditions of work and do not comply with the terms and conditions of their employment may be challenged. You are taking issue with the ON announcing new Covid measures without specifying how it affects your conditions of work or of service and does not comply with the terms and conditions of your employment. Similarly, you do not indicate the remedies that you seek. Consequently, your Complaint is not receivable as you are not challenging a reviewable administrative decision.
>
> I have also determined that your grievance is unfounded in fact and in law. The measures set forth in the ON for minimizing the risk of transmission are based on widely available scientific evidence. They are also consistent with measures adopted by all host nations where NSPA has offices. Your statement that the vaccines against COVID-19 are experimental and not proven to be safe of effective is inaccurate. The vaccines have been approved as safe and effective by competent health authorities and their safety and efficacy are further corroborated by available statistical data.

10. On 17 December 2021, the appellant submitted a further request for administrative review seeking annulment of ON-COS-005-21 (ON-005) as prejudicial to him “on several levels”. He contended *inter alia*:

- First plea: infringement of the general principles relating to the processing of personal data
    - First branch: Violation of the principles of purpose limitation and lawfulness
    - Second limb: breach of the principles of fairness, transparency and minimisation
- Second plea in law: infringement of the right to work, the right to privacy and personal data, the right to physical integrity, the right to liberty and security and the right to equality before the law and to non-discrimination

    - Second limb: the infringement of the rights and principles referred to in the present plea by the contested decision does not satisfy the principle of proportionality laid down in Article 52(1) of the Charter
- Third plea: infringement of the Community law – Principles – Right to effective judicial protection

In his “Final Conclusions” he stated:

- The World Council for Health Calls for an Immediate Stop to the Covid-19 Experimental “Vaccines”.
- The Luxembourg COVID law doesn’t make mandatory vaccination, therefore you cannot use the excuse of the Luxembourg Law to request mandatory vaccination.
- The Luxembourg Law does not say that as long as your certificate is valid upon entering the workplace you have guaranteed access during the whole day, contrary to the paragraph 11 of the contested Law.
- I consider that this ON clashes with basic human rights, on top of the host nation constitutional principles and European rights. It also vulnerates the data protection law if I have to upload medical information upon teleworking. And the guard at the entrance could link my medical data to my badge against medical privacy.
- The COVID-19 jab is still at experimental stage and it is not proven safe, nor effective, for human beings. With 80% vaccinated population we have similar contagion figures to last year.
- It is not practical to queue up every day to get a certified rapid test, and its cost will be a burden too, so this implies pressure to receive the COVID-19 jab.
- By applying the Covid pass, you are assuming that vaccinated people are not contagious, not sick. But as we can see vaccinated agents contracted the sickness too, more and more every day, this also recognised by CDC.
- The best method to keep NSPA a safe environment is to continue with the COVID measures and self test every agent every day.

I therefore ask the NSPA to annul the contested decision that is prejudicial to me and the whole staff.

[…]

11. On 11 January 2022, the NSPA General Manager replied to the appellant, requalifying the request for administrative review as a complaint within the meaning of Article 61 of the CPR, dismissing it. She stated, *inter alia*:

In accordance with the CPRs, staff members may only contest administrative decisions that affect their conditions of work and do not comply with the terms and conditions of their employment. You take issue with the ON without identifying an administrative decisions and without specifying how the ON affects your conditions or work or of service and does not comply with the terms and conditions of your employment. Moreover, the only remedy you seek in your Complaint is the annulment of the ON for being "prejudicial to [you] and the entire staff". This approach is inconsistent with the rules governing requests for administrative review or complaints set out in the CPRs. Consequently, your Complaint in inadmissible.

I have also determined that your grievance is unfounded in law and fact. Specifically, in support of your grievance, you rely on European Union regulations relating to the processing of personal data and on the Charter of Fundamental Rights of the European Union. These legal instruments do not apply to NATO or NSPA. In any event, the ON is aligned with the measures adopted by many EU Member States, including the countries hosting NSPA offices that are bound by the EU legal instruments you rely on. Therefore, your Complaints has no legal basis.

In addition, your statement that the vaccines against COVID-19 are experimental and not proven to be safe or effective is factually inaccurate. The measures set forth in the ON are based on the most recent medical evidence. The available evidence demonstrates that vaccines are very effective at presenting severe illness, hospitalization and death from COVID-19 and reduce the transmissibility of the virus.

In conclusion, the Agency will continuously monitor the evolution of the situation in all duty stations and, if required, will adjust its policy and approach

For all these reasons, your grievance is inadmissible and unfounded.

12. On 10 March 2022 the appellant submitted the present appeal.

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

(i) The appellant's contentions

13. Regarding the admissibility of the appeal, the appellant considers that the issuing by the respondent of ON-005 constitutes an administrative decision affecting his conditions of work and service and does not comply with the terms and conditions of employment. He states that he has initiated and exhausted the administrative review within the 30 days after the decision was notified, in line with Article 61.1 of the CPR and Article 2.1 of Annex IX thereto.

14. He requests the Tribunal for *"l'admission de la cause"* stating that ON-005 caused "unquantifiable damage, difficult to repair retroactively" and in particular caused:

- Negative effects on the applicant's physical integrity (including nosebleeds caused by the practice of mandatory antigenic tests),
- COVID contamination most likely by a vaccinated, contaminated, contagious and untested colleague who was able to enter the compound thanks to the "Fast Pass",
- Disclosure of private information to alien sub-contractors,
- Discrimination towards promotion,
- Psychological damages, unrest and stress cause during the effectiveness of this

illegitimate ON which still continue until the case is closed.

15. The appellant considers that this Tribunal is competent to decide any individual dispute brought by an appellant concerning the legality of the decisions taken by the respondent and affirms that ON-005 is the impugned illegal decision.

16. In his pleadings the appellant also reports two incidents that occurred since the issuing of the ON. A first incident occurred on 17 January 2022: he claims that he was discriminated against when he wanted to enter the Agency "due to the lack of a discriminatory 'Fast Pass' and was obliged to show personal medical data to a non-medical external contractor in order to exercise his right to work." A second event occurred on 25 January 2022 whereby he was denied access to the NSPA due to the fact that he did not possess a "3G Covid-Check QR code". He pursued action with the administration regarding both incidents - through a request for mediation and a request for administrative review respectively. He confirms that these claims are outside the scope of the present appeal, since the problem was not the security guards but the ON itself they were applying. The appellant further reports that on 27 January 2022 a Covid test swab provoked a hemorrhage inside his nose.

17. The appellant submits a series of allegations concerning Covid vaccinations. In a non-exhaustive list of several allegations, he principally considers that: the vaccines are experimental gene therapy; they are still not fully approved; Allianz medical insurance does not cover secondary effects coming out of medical experimentation; the vaccination certificate is not a tool to protect health but to discriminate; polymerase chain reaction (PCR) tests are also discriminatory as they cannot differentiate Covid from a flu; and the respondent has no authority to mandate vaccines, to impose medical experimentation or to impose daily PCR tests or rapid antigen tests considered as risky medical interventions.

18. The appellant asserts that the implementation of ON-005 affects his conditions of work up to the point that when he is not able to produce a Covid check (or does not want to show it to a non-medical person) he is not allowed to work. Further, as the ON requires him to endure a medical intervention every day in order to be allowed to work, it does not comply with the terms and conditions of his contract. The appellant notes that it is not written in the policy that an "alien" person shall check his private data and adjudge his right to work based on a certificate. He states that showing his medical data and his identification to the guards attacks his privacy under the Universal Declaration of Human Rights and the EU General Data Protection Regulation. He also asserts that having to present a daily Covid-19 test certificate, unlike the majority of his (vaccinated) colleagues, violates his dignity by creating an intimidating, humiliating and hostile environment against him; that being tested every day implies a non-negligible expenditure in time and money; and that the stress, unrest and worries caused by the application of the NSPA measures have led to lack of sleep and hypertension, degrading his health.

19. The appellant also claims discrimination, arguing that his refusal to be vaccinated deprives him, alongside the denial of access into the NSPA premises, of a number of possibilities, such as to travel on duty, to apply for certain vacancies and even to be promoted.

20. The appellant adds that the respondent must, as part of its duties, ensure that the workplace is as safe as possible. He alleges that by allowing on site people who are vaccinated, but Covid-positive and non-tested, it has failed to meet its duty of care. He refers to the provisions in the CPR regarding infectious diseases and to the obligation for staff in Article 46.5 to communicate information and undergo vaccinations/inoculations if required for the proper execution of their duties. He emphasizes that experimental inoculations are not required for the proper execution of his duties and being a "guinea pig" in medical experimentation affects his conditions of work and service and does not comply with the terms and conditions of his employment.

21. The appellant concludes by saying:

- The laws and regulations related to Human Rights and European Human Rights are not there to be chosen optionally by the NATO body or the head of the NATO body. My Human Rights accompany me during all my life; they do not stop outside NSPA gate. My European Human Rights also come with me in my pocket, it is not something that a manager can take and leave outside NSPA premises. Therefore, I consider an attack against basic Human Rights principles the fact that our General Manager does not apply RGDP inside NSPA, this is not a choice, it is a right granted by law!
- Coercion to take the experimental "vaccine" infringes Nuremberg Code, and it discriminates non-vaccinated people.

22. The appellant seeks the following:

- I request a compensation of twice my monthly salary per each month the ON-COS-005-21 was enacted (still on-going) plus the cost of the process;
- I request the immediate suspension of the ON-COS-005-21, and guarantees that this type of abuse of power will not continue;
- I request a clarification: Which Luxembourgish laws are applicable inside NSPA premises?
    a. Luxembourg Penal Code
    b. Luxembourg Labour Code
    c. Luxembourg Covid Law
    d. Luxembourg Constitution
    e. Luxembourg LGDP (Luxembourg transposition of GDPR) ;
- An answer to this question is paramount, because the lack of legal frame collides with the Right to Effective Judicial Protection, It seems that our Legal advisor is going "Forum Shopping", but applying only part of the law leads to unavailability to be defended;
- My doubts arose because our General Manager answered to my administrative review: "*These legal instruments do not apply to NATO or NSPA*";
- Therefore I need to know the official position of NATO with respect to the laws applicable by our host Nation to be able to defend my case especially because they decided to apply the Covid Law, although with forum shopping only taking the parts that arranged them, which also creates lack of effective judicial protection; and
- If the Administrative Tribunal determines that Luxembourg Covid Law has precedence above the NATO laws and regulations mentioned beforehand, Human Rights and European Human Rights, I request proof or confirmation that those laws are revoked within NATO.

(ii) The respondent's contentions

23. The respondent contends that the appeal should be dismissed on grounds of inadmissibility. The respondent questions whether by directly challenging ON-005 the appellant is challenging a reviewable administrative decision within the meaning of Article 2.1 of Annex IX to the CPR.

24. It notes that two cumulative conditions must exist for the Tribunal to be competent to hear an appeal: 1) an administrative decision affecting a staff member’s conditions of work or service; and 2) the exhaustion of the pre-contentious process. The respondent refers to this Tribunal’s case-law and affirms that while staff members may disagree with the rules and policies enacted through office notices generally, or other instruments, they nevertheless do not constitute reviewable administrative decisions and cannot be challenged unless and until they affect the conditions of work or service of the staff members in a concrete manner.

25. It observes that the appellant sought to force the suspension of ON-005 in its entirety regardless of which measure would have applied to him or not and that, therefore, the appeal stems from a premature and general contestation of the ON. Inadmissible requests for administrative review cannot form the valid basis for an appeal.

26. The respondent also adds that ON-005 was superseded by ON-22 from 25 March 2020 onwards, with the former statutory issuance no longer producing any effect in relation to the appellant, leaving his main conclusion without object and the appeal moot.

27. On the merits, the respondent argues that the only question to decide is whether it could, within the NATO/NSPO (NATO Support and Procurement Organization) legal framework modulate access to the NSPA premises in the pandemic circumstances by requiring staff members to take antigen tests equated to mandatory vaccination.

28. The respondent recalls that when the first Covid infections were reported in Luxembourg in March 2020, the NSPA Head of NATO body (HONB) used the powers entrusted to him by the NSPO Charter and the CPR to manage the activities of the Agency and the workforce, applying substantial restrictions to staff members (these included for example mandatory teleworking, prohibition for the vast majority to be on site, closing of the common areas, social distancing, restrictions of travel on duty, etc….). Those measures, without being an overlay with the measures taken by the Host Nation at the time, followed their general direction and reflected the state of scientific knowledge at that point, the lack of available treatment, transmissibility levels and observed the security of the consequences of an infection. In the months that followed, the Agency adapted its response on the basis of the evolution of the pandemic situation, an analysis of the legal and health response of the Host Nation and an independent assessment of the operational needs of the Agency.

29. In October 2021, the Government of Luxembourg amended its legislation that created Covid-related restrictions to allow the public and private sectors to require a “3G Covid-Check” to gain access to the worksite in Luxembourg from 15 January 2022. Although the NSPA was not bound by the Luxembourg legislation in matters related to its workforce, the underlying reasoning and nature of the measures were taken into

consideration by the HONB to adjust the measures applicable at NSPA. The HONB issued therefore the corresponding ON-004 and ON-005 containing the requirement of the “3G Covid Check” to gain access to the NSPA premises and to protect the health of the staff members in line with the Host Nation’s restrictions in the work place. The respondent highlights that when the pandemic situation no longer justified the application of the “3G Covid Check”, the HONB adapted the Agency’s response and lifted the measures.

30. Concerning the mandatory vaccination, the respondent explains that only certain categories of staff members were under such an obligation (staff members with a deployment clause in their employment contract and the NSPA Medical Office), as required for the proper performance of their duties. It stresses that the appellant does not fall in any of those categories and that the choice to vaccinate remains a personal one as it is also a personal choice to bear the inconvenience arising from regular testing.

31. In reply to the appellant’s various arguments concerning the Covid vaccines, the respondent observes, to the extent that it is relevant for the present appeal, that it recognizes that they are not and have never been a panacea against the pandemic, but remain the most effective tool available in the fight against the virus. There is a scientific consensus that the Covid vaccines reduce the severity and the duration of symptoms and drastically reduce the risk of hospitalization and death following an infection.

31. The respondent rejects the allegations of discrimination as not founded in fact and in law. It notes that not all differences created among categories of people necessarily and automatically equate to discrimination, discrimination existing when differences are made on the basis of illegal grounds and result in prejudicial differences. Vaccination may be required to ease the freedom of movement and the fact that non-vaccinated individuals are subject to additional restriction (quarantine periods, testing, showing of documents as evidence) never constituted discrimination in the context of the global pandemic. The right to enter the NSPA premises was always the same for all staff members, no access was denied based on vaccination status for staff members who had no obligation to vaccine for the performance of their duties.

32. Concerning the communication of medical information and the breach of the appellant’s right to medical privacy, the respondent highlights that the NSPA has a general obligation of discretion, non-dissemination and proper handling of data, that it is not collecting data as part of the scanning exercise and that the control form part of a legitimate purpose, which is to protect the health of staff members. *In fine*, it stresses that the form of control is minimal, ensuring that a name of a security badge matches with the name of a green or positive QR code, which does not indicate the actual medical status. It notes with regard to the two incidents in January 2022 (*cf.* paragraph 16 *supra*) that in both cases the appellant was admitted to the premises once he complied with the ON.

33. The respondent concludes by saying that it is apparent that the appellant failed to respect the procedural rules applicable to requests for administrative review, complaints and appeals, rendering the appeal inadmissible. It affirms that even if the appeal were to be deemed admissible, the grounds for contestation are based on an inappropriate understanding of the legal environment in which the NSPA operated and, lastly, that the decision to adopt the “3G Covid-Check” regime was entirely legal, grounded in science

and justified by the circumstances, leaving the opinions of the appellant (such as calling vaccines “genetic experimental treatments”) irrelevant.

34. The respondent requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

(i) Considerations on admissibility

35. The appellant challenges the legality of NSPA Office Notice ON-COS-005-21 (“NSPA COVID MEASURES”). He seeks suspension of this instruction to staff, financial compensation and clarification about applicability of national (Luxembourg) law.

36. The Tribunal must, however, first consider the admissibility of the appeal.

37. The appellant challenges the content of the impugned ON and seeks its suspension. Although some of the provisions in the ON provide for direct consequences in possible situations, and the appellant refers to incidents on 17, 25 and 27 January 2022, he indicates in his reply that they do not form part of the appeal and confirmed this at the hearing. Thus what remains before this Tribunal is the ON itself, which is a general instruction to staff.

38. In cases 2018/1262 and 2018/1263 this Tribunal confirmed its constant jurisprudence that staff members or former staff members cannot challenge general rules or decisions but only implementing decisions directly and adversely affecting them (*Cf.* Cases 2016/1080, 2016/1081, 2016/1092, and 2016/1096, as well as Joined Cases Nos. 2017/1127-1242 and 2017/1114-1124; see also ILOAT Judgment 4274, Consideration 4). The appellant has failed to do so in this appeal.

39. In these circumstances, the Tribunal concludes that the impugned ON-005 is a general instruction and not an implementing administrative decision directly and adversely affecting him. The appellant has failed to make a claim based on an implementing decision. As a consequence, the appeal challenging the general rule is inadmissible.

40. The Tribunal concludes that the appeal is inadmissible in its entirety.

(ii) Considerations on the merits

41. Given that the appeal is inadmissible, it is not necessary for the Tribunal to examine the validity of the submissions.

E. Costs

42. 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 [...].

43. 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 2 November 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

14 November 2022 AT-J(2022)0013

Judgment

Case No. 2022/1336

FB

Appellant

v.

NATO International Staff

Respondent

Brussels, 9 November 2022

Original: French

Keywords: 1) claim for compensation based on the supposed illegality of previous decisions – Inadmissibility; 2) request for acknowledgement of harassment and discrimination – none in this case.

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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 Thomas Laker, judges, having regard to the written procedure and further to the hearing on 29 September 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 4 January 2022 and registered on 14 January 2022, by Mr FB (Case no. 2022/1336), seeking:

- annulment of the NATO Secretary General's decision of 4 November 2021;
- removal of the "I" report from the proceedings;
- compensation for the material damage he suffered from not being appointed to the role of close protection team leader or second-in-command, and the ensuing medical and legal expenses, totalling €1,320,759;
- payment of €10,000 in costs incurred by the appellant for his defence.

2. The respondent's answer, dated 17 March 2022, was registered on 30 March 2022. The appellant's reply, dated 2 May 2022, was registered on 20 May 2022. The respondent's rejoinder, dated 24 May 2022, was registered on 13 June 2022.

3. An oral hearing was held on 29 September 2022 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. Mr B joined NATO in January 2003 as a security guard. He joined the NATO Secretary General's Close Protection Unit (CPU) in 2005.

5. In 2009, with the arrival of a new secretary general who was [nationality A], the Close Protection Unit was reorganized. The service's 27 guards were put through fitness tests, which the appellant passed. It was planned that four close protection teams would be formed (three for escort duties and one for the residence), each led by a team leader.

6. Despite having passed the tests for selection of the team leaders, the appellant was not appointed to that role. On 3 December 2010, the Head of Recruitment informed the appellant that despite his having passed the tests, he would not be made a team leader but instead would join one of the three teams until such time as a fourth team was set up. In 2013 a second-in-command ("2IC") post was created for each team, but the appellant was not appointed to that role either.

7. Over the years, a number of events occurred that had no repercussions at the time but are being cited in the present case. On 30 November 2018, the appellant informed the head of his service that he felt he was being discriminated against in the assignment of tasks and jobs, in favour of his [nationality A] colleagues. The head of service reproached him for not fitting in the service well, raised questions about his private travel to China, criticized his having an outside occupation, and launched an inquiry into that occupation.

8. In February 2019 the appellant fell ill after his performance review, in which he had been given a lower rating for the first time. He was faulted for having poor shooting results and subpar physical fitness. On 25 March 2019, he was placed on sick leave, following which there was a procedure that ended with the appellant leaving his service on 1 January 2021 with an invalidity pension. The end of his service is not disputed here.

9. The present case, registered as 2022/1336, concerns a different procedure.

10. On 6 November 2019, while he was on sick leave, the appellant submitted a request to the Secretary General to initiate a harassment inquiry. He was informed on 12 December that an external, independent consultancy would be involved. On 21 February 2020, the Deputy Assistant Secretary General for Executive Management (DASG/EM) informed the appellant that the procedure had been initiated and was in the hands of Ms VZ from the consultancy "I". She submitted her report on 16 September 2020, which found that the inquiry did not provide proof of harassment or discrimination, and made recommendations for better human resource management in that service.

11. On 19 October 2020, DASG/EM acted on the consultant's findings and told the appellant that the information presented did not corroborate that there had been harassment or discrimination within the meaning of the NATO policy on the prevention, management and combating of harassment, bullying and discrimination in the workplace. The "I" report was then shared with the appellant.

12. The appellant challenged that decision in a request for administrative review on 20 November 2020. The Deputy Secretary General confirmed the decision denying the harassment on 18 December 2020, however.

13. On 7 January 2021, the appellant submitted a complaint to the Secretary General and asked him to convene a Complaints Committee. In a second letter that same day, he made a claim for compensation for not having been appointed a team leader in 2013.

14. The Complaints Committee was formed, held its meeting, and issued its report on 22 September 2021, in which it found that "even if there is no clear, unequivocal proof of harassment or discrimination, the unfortunate sequence of events in the CPU has had major repercussions on the appellant's mental state that made him feel discriminated against." The appellant, having received a copy of it, made his observations on it.

15. On 4 November 2021, the Deputy Secretary General confirmed the denial of any harassment, discrimination or bullying. This is the decision being challenged.

16. On 4 January 2022, the appellant submitted an appeal to the Tribunal seeking annulment of the decision.

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

(i) The appellant's contentions

17. The appellant sets out two contentions.

18. First, he contends that there was a violation of the principles of witness anonymity and of the independence of the inquiry. The appellant submits, as he did during the administrative procedure, that the witnesses should have been able to provide their testimony anonymously. In his view, such anonymity was necessary for the inquiry to be independent. He invokes a Belgian law and NATO policy guidance that form the basis for a general principle of the independence, impartiality and confidentiality of inquiries. From that he surmised that in order for inquiries to be fully impartial and independent, the witnesses must be heard confidentially. The appellant explains that this impartiality was breached by NATO's having been given the witnesses' identities and by those witnesses' having been convened by NATO. He notes that the human resources service, which was a party to the dispute, thus managed to gather information in a privileged manner, influence the testimonies, intimidate witnesses or make it possible for them to be consulted beforehand.

19. This way of convening the witnesses tainted the inquiry procedure by biasing its outcome, at the expense of the necessary impartiality.

20. The second contention concerns the decision-maker's assessment of the incidents reported by the appellant, which in his view should have been qualified as harassment and discrimination. The appellant recalls Article 12.1.4 of the Civilian Personnel Regulations and lists several incidents and behaviours to which he was subjected.

21. To begin with, the appellant reports discrimination in promotions. From 2013 onward he was systematically left out of appointments and promotions that were instead given to [nationality A] citizens. He recalled the facts and gave his interpretation of them. In 2010, he was not appointed as a team leader despite having passed the tests. In 2013, he was not selected as the team leader for the residence. Again in 2013, he was not appointed 2IC, allegedly because the two [nationality A] team leaders blocked it. That prevented him from being appointed as a team leader later on, since when a team leader post became vacant, it was naturally filled by that person's second-in-command. To support his allegations of discrimination, the appellant reports that there was a purge of [nationality B] staff and manipulation of the criteria leading to the selection of [nationality A] nationals, creating a [nationality A] hegemony around the Secretary General.

22. Next, the appellant reports the harassment that he suffered, which took the form of unwarranted accusations and reprimands. He notes the criticism he received over the previous years. In 2010, he was criticized for having "smiled too much" and having talked back to the Secretary General when asked a question. In 2013, he was blamed for having pushed a trainer into the water during a physical fitness exercise. He emphasizes that the accuser deliberately lied in relating that event.

23. In the appellant's view, the administration's many initiatives created a climate of distrust from his managers. He was questioned multiple times about his driving school

company, whereas other guards who also had outside occupations were not subject to such inquiries. He was also questioned at length about his trip to China, even though he had told his managers about it in advance and they had not opposed it. He had the impression that his every action and gesture was being watched, generating continual suspicion and distrust.

24. The appellant also saw proof of his harassment in his 2019 performance review. His previous ratings had always been "very good", whereas he was given only "good" in 2019, when a decline in his service – in particular his driving and shooting – was observed.

25. The appellant also complains of false testimonies that were designed to undermine him. He submits that NATO's leadership were aware that a witness had lied in order to bring him down but had done nothing. The Deputy Secretary General agreed with the findings of the Complaints Committee's report without indicating that he had read the appellant's contentions.

26. Finally, the appellant considers that the contested decision is illegal because it refused to qualify this accumulation of hostile actions against him as harassment and discrimination benefiting [nationality A] nationals.

27. Consequently he is of the view that he suffered material damage from not having been appointed 2IC in 2013, which was the reason for his not being promoted in the years that followed. He is therefore seeking compensation for the damage arising from not having been appointed 2IC, which he calculates as the difference between the remuneration for the post to which he would have been entitled to be appointed and the post he actually had, over the period up to retirement at 65 years of age. With medical and legal costs, this comes to a total of €1,320,759.

(ii) The respondent's contentions

a) Admissibility of the appeal

28. The respondent disputes the admissibility of the appeal as being time-barred. The events that the appellant is citing extend across a long period from 2010 to February 2019, but he submitted his appeal only in November 2019. The appellant has repeatedly commented on past procedures and decisions that up to now he never challenged: the creation of teams in 2009 and the appointment of team leaders, the decision to reprimand him in 2010, the results of a physical fitness test in 2013, the creation of the 2IC post and the failure to appoint him to that post in 2013. As he did not challenge those decisions in a timely manner and has not invoked any *force majeure* situation that prevented him from acting within the deadlines, the appellant has submitted his appeal late and it must therefore be rejected.

29. Consequently the respondent does not accept the admissibility of the appeal insofar as it is directed against the Deputy Secretary General's decision of 4 November 2021.

b) Arguments regarding the merits of the appeal

30. The respondent refutes the appellant's arguments one after the other, recalling that it took his request into consideration by holding an external inquiry. Thus it did not violate its duty of care.

31. The respondent recalls that the appellant had been informed of the decision not to appoint him as team leader, on grounds that the plans to set up a fourth team for the Secretary General's Close Protection Unit were abandoned. The post of team leader for the fourth team was converted shortly after into a post of training coordinator but the appellant did not apply for it. The same happened in 2014 when a team leader post did open up.

32. With regard to the criticism of the appellant, the respondent noted that the appellant had acted too familiarly with the Secretary General and did not dispute the verbal reprimand he had received in 2010.

33. The incident from 2013 when he is thought to have pushed a colleague into the water was seen by the respondent as evidence of an inability to control his stress sufficiently.

34. With regard to the appointment of a 2IC, the procedure at the time was an interview-based internal competition. Acknowledgement that the appellant was fit to become a team leader three years previously did not necessarily mean that he would be selected as a 2IC in 2013.

35. Furthermore, the administration had a duty to question the appellant about his outside occupation in order to better understand the scope of it, in accordance with the provisions of Article 12.2.1 of the Civilian Personnel Regulations. The same was especially true of the appellant's trip to China. If the appellant felt he was being harassed or bullied in his performance review, he could have made use of the mediation mechanism, which he did not do.

36. The respondent also recalled that everyone who had looked into the appellant's situation and the allegations he had made (an external, independent consultancy, a Complaints Committee, the appellant's managers) had come to the same conclusion, that there was no harassment or discrimination. It emphasized the efforts it had made to preserve potential witnesses' anonymity.

37. With regard to the procedure followed, the respondent recalled that Belgian law did not apply to NATO, it had involved an external consultancy to ensure impartiality, and it had taken care to ensure the witnesses' discretion. In its view, it had fully complied with its duty to provide assistance.

38. Dismissal of submissions seeking annulment of a decision must entail dismissal of the claims for compensation which, moreover, were calculated based on unrealistic assumptions.

D. Considerations and conclusions

On the admissibility of the submissions in the appeal

39. The claims for compensation in the appeal are clearly stated as compensating for damage arising from the appellant’s not having been appointed as a team leader in 2013. Those claims are based on the illegality of the decision, which predates the request for compensation by six years.

40. The principle of legal certainty precludes administrative decisions from being challenged indefinitely. The same goes for the financial consequences arising from such decisions. If that were not the case, every administrative decision could be challenged over very long periods of time; anyone could get around the deadline for submitting an appeal by making a claim for compensation solely based on the supposed illegality of a decision for which annulment can no longer be requested.

41. The appellant's claims for compensation are therefore clearly time-barred.

42. The same does not apply, however, to the admissibility of requests to acknowledge harassment or discrimination. It is true that the incidents that the appellant criticizes NATO’s leadership for in some cases predate the introduction of the procedure for acknowledgement of harassment by nearly ten years. Yet harassment can be brought to light by an accumulation of incidents or the repetition of abusive behaviour, some of which may date back a long time. Requiring each incident to be challenged within a short time frame would make it impossible to observe an accumulation of incidents over a long period, which is often characteristic of harassment.

43. Thus the appeal is admissible insofar as it seeks annulment of the decision of 4 November 2021 refusing to characterize the appellant's allegations as harassment and discrimination, even though the incidents date back several years – some of them took place nine years before the request was submitted to the administration.

On the regularity of the procedure

44. With regard to the inquiry procedure, the appellant cites the office notice of 4 November 2020 (ON(2020)0057) entitled “NATO policy on the prevention, management and combating of harassment, bullying and discrimination in the workplace”, which provides that: “The objective of this stage is to conduct full fact-finding and consider the relevant evidence as to whether misconduct has occurred. [...] The inquiry ... will be impartial and independent [...]. All persons working at NATO have a duty to participate and be truthful, and not interfere in the process of inquiry, e.g., by trying to influence or intimidate the witnesses in the matter. They also have a duty to keep confidential the existence of an ongoing inquiry ...”.

45. It does not follow from these rules or from any other provision of the Civilian Personnel Regulations that the witnesses must, as the appellant claims, be heard anonymously. Further, such a procedure could be criticized for making it difficult to verify the authenticity of testimony. The administration explained that it had taken every precaution to ensure the independence and impartiality of the inquiry. This independence was provided specifically by having tasked an external consultancy with gathering the testimonies. The administration then took care to ensure the discretion of the list of witnesses that could be heard, and the appellant provided no tangible, specific evidence suggesting that the witnesses had agreed among themselves to give insincere depositions.

46. The claim of an irregular procedure is therefore rejected.

On the merits of the impugned decision

47. The appellant has cited several incidents that arose over the previous years to seek annulment of the decision refusing to acknowledge harassment and discrimination.

48. With regard to the procedures for appointment to the team leader posts in 2010 and then the 2IC post in 2013, the physical fitness test in 2010 on which the appellant bases a large part of his arguments made him eligible, but not entitled, to be appointed to a team leader post. It was within the administration's discretionary power not to create as many teams as it had initially planned and not to appoint a fourth team leader. While the appellant claims that the appointments systematically gave priority to [nationality A] applicants, it was likewise not questioned that [nationality A] applicants outnumbered those of other nationalities, and there was no evidence that candidates of other nationalities were discouraged from applying for that reason.

49. The Tribunal underscores that the above decisions were taken by the International Staff's leadership and were within its discretionary power. It is settled jurisprudence, including by this Tribunal, that decisions taken in the exercise of such discretion are subject to only limited review by a tribunal. Tribunals only interfere if a decision 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 an abuse of authority. It is also settled jurisprudence that tribunals will not substitute their own views for the organizations' assessments.

50. The procedure followed in 2013 to choose 2ICs for the team leaders may not have been widely publicized, but the decisions that followed from it were not disputed by the appellant. It is not a given that the appellant had had serious chances back then; in particular, his physical fitness level of three years before was no guarantee that he still had the same qualifications and skills. The same applies to the subsequent choice of a team leader to replace one who retired.

51. With regard to the questions and inquiries in connection with the appellant, they were not abusive in character and it is not proven that different rules were followed in applying them to him than to other staff members. Specifically, even though the appellant had followed the applicable rules by informing his manager in advance of his planned trip to China, the administration did have grounds to check that a close protection officer of the Secretary General had not been approached during that trip with attempts at intimidation or blackmail that could have endangered the safety of the Secretary General.

The same goes, to a lesser extent, with regard to the appellant's outside occupation, which the administration could legitimately check was not undermining his commitment to the performance of his duties at NATO.

52. Nor can a slightly lower performance rating than the previous year's one constitute harassment. The reason given for the appellant's rating in 2019 was less investment in his work, and the rating was not challenged using the mediation procedure that is available to all staff in such a situation. That is all the more true as in 2019 half the staff in that service received a lower rating, for a better distribution of ratings across the full spectrum.

53. Regarding the incident that arose during a training session in 2013, the inaccurate testimony of a manager about the events and the judgement of the appellant's ability to manage his stress cannot, on their own, be characterized as harassment, which in order to be proven presupposes an accumulation of ongoing, planned incidents that are perceived by the victim as disrupting his professional performance or creating a hostile working environment or causing a humiliating situation.

54. The Tribunal observes that the incidents cited by the appellant occurred over a period of nearly ten years. As the outside inquiry and the Complaints Committee have already noted, this succession of events spaced out over a long period and of relatively minor importance prove neither discrimination in the attribution of duties nor harassment toward the appellant, even though he might have felt that way.

55. The submissions in the appeal seeking annulment, removal of the report from the proceedings and compensation must therefore be rejected.

E. Costs

56. 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.

57. In the circumstances of the case, the submissions in the appeal having been rejected, the request for reimbursement of the costs to appear before the Tribunal must consequently be rejected.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

– The appeal is dismissed.

Done in Brussels, on 09 November 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

14 November 2022 AT-J(2022)0014

Judgment

Case No. 2022/1338

WK
Appellant

v.

NATO Helicopter D&D Production and Logistics Management Agency
Respondent

Brussels, 10 November 2022

Original: English

Keywords: secondment, termination of contract during sick leave.

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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 Seran Karatarı Köstü and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearing on 30 September 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 2 February 2022 and registered on 10 February 2022 as Case No. 2022/1338, by Mr WK against the NATO Helicopter D&D Production and Logistic Management Agency (NAHEMA). The appellant challenges the General Manager's (GM) decision dated 1 February 2022, informing him that his secondment contract was terminated and the relative provisions stipulated in Article 45.6 of the NATO Civilian Personnel Regulations (CPR) had ceased.

2. The respondent's answer, dated 4 April 2022, was registered on 14 April 2022. The appellant's reply, dated 17 April 2022, was registered on 20 May 2022. The respondent's rejoinder, dated 16 June 2022, was registered on 24 June 2022.

3. The Panel held an oral hearing on 30 September 2022 at NATO Headquarters. It heard statements and arguments by both parties, 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 was seconded from the German Armed Forces to fill the A5-grade post of Section Leader General Systems, Production Evaluation NATO Helicopter D&D Production and Logistics Management Agency (NAHEMA).

6. He was recruited by the NAHEMA on the basis of a three-year definite duration secondment contract running from 1 December 2016 to 30 November 2019. The contract was extended twice, for periods of one year each time, and the last extension was up to 30 November 2021.

7. On 12 May 2021, he was formally notified that his contract would terminate on 30 November 2021 and that, unless unforeseen circumstances arose, he would not be offered an extension.

8. Shortly before the end of his contract, and while he was on annual leave, he submitted a medical certificate owing to specific medical treatment; the certificate covered the period from 22 November to 29 November 2021.

9. Upon the submission of several medical certificates extending the appellant's sick leave until 20 December 2021, 10 January 2022 and 24 January 2022, respectively, the GM informed Human Resources (HR) twice, on 20 December 2021 and on 14 January 2022, that the appellant's contract could not be terminated because of his medical

certificate and that his status would remain unchanged and he would be considered a NAHEMA staff member until the end of his sick leave (10 January 2022, and then 24 January 2022) pursuant to Article 45.6 of the CPR.

10. However, when the appellant submitted a new medical certificate valid until 14 February 2022, the GM asked the German Federal Ministry of Defence (MoD) on 24 January 2022 to confirm if the appellant's secondment had been revoked on 30 November 2021, which was the end date of his secondment contract.

11. On 27 January 2022, the German MoD confirmed that the appellant's official NAHEMA secondment had ended with the end of his active duty within the German Armed Forces on 30 November 2021.

12. On 1 February 2022, the GM informed HR that:

> 1.The contract of Mr. K was due to end on 30/11/2021, but he subsequently submitted several medical certificates, the last of which is valid up to 14/02/2022.
> 2. With the letter at Ref. [E], the German MoD confirmed that Mr. K's secondment has been revoked. Therefore, starting from the date of this letter and according to Art. 7.1 (vii) CPRs, Mr. K's contract shall be considered terminated and all the relative provisions specified in Art. 45.6 CPRs (salary, accrued leave) shall cease.

13. On 1 February 2022, the GM also notified the appellant regarding the termination of his contract and offered HR support for extended healthcare coverage options. This is the decision challenged by the appellant in the present case.

14. The appellant subsequently submitted two medical certificates valid until 18 March 2022 and 8 April 2022, respectively.

15. On 13 June 2022, the German MoD, referring to its previous letter, also confirmed that, as a retired member of the armed forces, the appellant was adequately covered (in case of sickness, etc.) through the national pension system and the ending of his secondment had not automatically caused any negative impact on his health or social coverage.

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

(i) The appellant's contentions

16. The appellant requests the annulment of the GM's decision dated 1 February 2022, notifying him that his secondment contract was terminated and all the relative provisions stipulated in Article 45.6 of CPR had ceased; in that respect, he sets out several pleas. He asserts that the GM decision violated the provisions of Articles 45.6 and 45.8 of the CPR concerning the termination of the contracts of staff members on sick leave and further alleges that revocation of secondment could not be a valid reason to terminate a contract and all its benefits. Stating that his current health state requires him to continue the current medical treatment, he requests that his healthcare be reinstated. He alleges that he received unfair treatment due to being abruptly left without healthcare

coverage. Moreover, the appellant claims that the non-implementation of the articles mentioned above constituted a misuse of power that might even justify appropriate compensation.

(ii) The respondent's contentions

17. The respondent alleges that it is clearly stated in the CPR that the duration of the contract shall not exceed the period of secondment and that the withdrawal of the secondment is one of the reasons for separation from the Organization.

18. Relying on Articles 45.6 and 45.8 of the CPR, which are intended to safeguard staff members in the event of illnesses developed during their employment within NATO bodies, the respondent contends that there were no grounds for the implementation of the above-mentioned articles in the appellant's specific situation, stating that he worked in NATO as a "seconded" employee and therefore was adequately covered in the event of sickness through his national pension system.

19. The respondent also underlines that the NAHEMA is a body composed of staff members from national ministries of defence, each of whom has to be seconded. It, therefore, alleges that this matter is extremely delicate, and an improper application of the relevant articles, which does not take into account the specific conditions, could pave the way for potential abuses with significant impacts, especially on small agencies like the NAHEMA.

D. Considerations and conclusions

20. The crucial issue of the present case is whether the respondent correctly terminated the appellant's secondment contract during the period of sick leave and whether the relative provisions provided by Article 45 of the CPR were legally ceased, accordingly.

21. Articles 45.6 and 45.8 of CPR regarding "absence for health reasons and sick leave" provide:

> 45.6 The first 3 months of sick leave are considered as normal service with the Organization and the member of the staff concerned continues to receive salary increments and to accrue leave.
> 45.8 The provisions of Article 45 shall apply notwithstanding the fact that the staff member's contract might otherwise have come to an end or been terminated during the period of sick leave.

22. The Tribunal recalls Decision No. 678 of the Appeal Board regarding contract extensions to cover staff members' sick leave by interpreting the relevant provisions of Article 45 of the CPR. The Appeals Board made it clear that when a staff member's contract is terminated on a date on which the staff member is absent due to ill health, the said contract is automatically extended until the end of the sick leave.

23. The Tribunal, however, underlines that the appellant is a "seconded staff member", which is defined in the Preamble section B. (v) (f) (i) of the CPR as follows:

> […] (f) Seconded staff - means those international civilian personnel recruited, with the concurrence of the national authorities concerned :
> i. from a national administration, public institution or the armed forces of a NATO member state, who retain a formal link with the administration, institution or armed forces from which they were recruited; […]

24. The Tribunal points out that secondment is, in essence, an agreement between the person seconded and the receiving organization, but it also involves the concurrence of the national authority concerned. According to the secondment contract, an employee is transferred temporarily from their substantive post in their national organization to another post in the receiving organization and is expected to return to their old post at the end of the secondment. Thus, in cases of secondment, an employee does not lose their service lien with the national organization, their contractual relationship with this organization is merely suspended until the expiry of the agreed period of secondment, or until such earlier date as the parties may agree. As a consequence, when an employee returns to their old post, the terms and conditions of the substantive post, including health and social coverage, generally remain as they were prior to the secondment.

25. The procedure for termination of secondment contracts/separation of seconded staff, therefore, follows specific rules in the CPR, as stipulated in Article 5.2 regarding definite duration contracts and in Article 7.1 regarding general provisions for separation:

> Article 5.2 Definite duration contracts
> Definite duration contracts not exceeding 5 years shall be offered to staff appointed or reappointed to the Organization if:
> - they are seconded, in which case such a definite duration contract shall not exceed the length of the approved secondment; or …"
> Article 7 General provisions
> 7.1 A staff member may be separated from the Organization for any one of the following reasons: …
> (vii) for seconded staff, if secondment is withdrawn by one of the entities specified in CPR Preamble section B. (v) (f) (i).

26. The Appeals Board has also consistently held that the length of the contract of a member of staff seconded from their national administration cannot exceed the length of secondment, whatever the contractual terms relating to length, valid grounds for termination or conditions of notice may be. Therefore, when informed of the decision by a national administration to terminate the secondment of a member of staff, the Organization is required to limit the length of the contract in force to the length of secondment (*cf.* Appeals Board Decision No. 118 dated 13 May 1980, Decision No. 255 dated 17 May 1990 and Decision No. 337 dated 25 October 1996).

27. Given the relevant provisions and the jurisprudence above, the Tribunal considers that the GM was obliged to terminate the contract between the appellant and the Organization, upon receipt of the letter from the German MoD confirming that the appellant's secondment had been revoked with the end of his active duty within the German Armed Forces, without regard to the sick-leave period. The decision is therefore free from any taint of illegality and the appellant's submissions in this regard should be dismissed.

28. With regard to the appellant's argument based on his healthcare, the Tribunal draws attention to the letter from the German MoD dated 13 June 2022, which was submitted to the case file by the respondent. Although the appellant asserts that he was left without healthcare coverage due to the contested decision, the letter clearly confirms that the appellant, as a former member of the *Bundeswehr*, was adequately covered in case of sickness through his national pension system and that the end of his secondment had not automatically caused any negative impact on his health or social coverage. The appellant's argument is therefore unfounded.

29. The Tribunal considers that, in the circumstances of the case and in light of the foregoing considerations, the termination of the appellant's secondment contract with all rights deriving from Article 45 of CPR is lawful. Therefore, the appellant's submissions for annulment and all the related submissions should be dismissed as unfounded in their entirety.

E. Costs

30. 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 [...].

31. 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 10 November 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

25 November 2022 AT-J(2022)0015

Judgment

Case No. 2022/1337

TP
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 14 November 2022

Original: English

Keywords: NCIA Contract Policy; admissibility.

North Atlantic Treaty Organization – Organisation du Traité de l'Atlantique Nord
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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 Seran Karatarı Köstü and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 30 September 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 26 January 2022 and registered on 4 February 2022, as Case No. 2022/1337, by Mr TP against the NATO Communications and Information Agency (NCIA). The appellant mainly challenges the General Manager’s decision dated 28 November 2021, which rejected his “Request for Revision of Performance Report 2019”; he extends the appeal also to the respondent’s decision not to offer him an indefinite duration contract, alleging that this was the direct legal consequence of the “fair” rating in the Report.

2. The respondent’s answer, dated 5 April 2022, was registered on 14 April 2022. The appellant’s reply, dated 17 May 2022, was registered on 27 May 2022. The respondent’s rejoinder, dated 27 June 2022, was registered on 5 July 2022.

3. The Panel held an oral hearing on 30 September 2022 at NATO Headquarters. It heard the appellant’s statements and arguments by the appellant’s representative and by 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 joined the NATO Air Command and Control System Management Agency (NACMA), as Grade A5, in 2012, with a definite duration contract of three years. After NACMA was incorporated into the NCIA, his post was transferred to the latter agency in 2015 and he was granted successive definite duration contracts of three years, starting respectively from 2015 and 2018, as Grade A4.

6. His performance rating fell from “very successful” in 2013 to “successful” in 2014, and for the period 2015-2018, all the performance reports that he received were rated “good”.

7. The appellant submitted a document entitled “2016 Internal Memorandum” to the case file. In this document he states that the respondent had failed to respond to his complaint of 12 February 2016 regarding his 2014 performance assessment. The appellant did not provide any proof of delivery or acknowledgement of receipt from the recipients.

8. In 2017, he was informed that his performance remained at the current level and that this might be his last contract extension (from 1 June 2018 to 31 May 2021) in his current post.

9. On 22 April 2020, he received his performance report for 2019, which was rated "fair".

10. On 4 June 2020, he sent an e-mail to his line manager stating his non-acceptance of the "fair" rating in 2019 and his intention to submit an official complaint. Informal discussions were initiated in June with no result.

11. On 30 September 2020, he submitted a "Request for Revision of PR 2019" by e-mail to his Director.

12. On the same date, since his contract would be expiring on 31 May 2021, the appellant also requested a contract extension of 14 months, for personal reasons.

13. On 28 October 2020, per the NATO Civilian Personnel Regulations (CPR) and the Directive 2.1 Contract Policy, the appellant was formally notified that his contract would not be renewed upon its expiry (on 31 May 2021). The notification letter provided specific reasons for the decision as follows:

> The Workforce Management Board has reviewed the need for business continuity and operational requirements within your work area, as well as your performance and skill set plus the future requirements of the Agency. In addition, they have taken into consideration your performance, which was rated as fair in the last year and good in the previous years. Your supervisors have noted a lack of initiative, proactivity to anticipate issues, and independence necessary to achieve your tasks as would be expected. At this point in time the Agency had to decide whether you would become a long term employee. In accordance with NCI Agency Directive 2.1 Contract Policy, only those staff who are consistently high performers may be asked to stay on as long-term employees.
> I am therefore writing to inform you that your contract will not be renewed on expiry.

14. On the same day, he was also offered an exceptional six-month extension until 30 November 2021. The offer letter included an amendment regarding the new contract expiry date, set out in a codicil. On 3 November 2020, the appellant signed the offer letter as well as the codicil to his contract with no reservations. Thus, the contract expiry date "31 May 2021" was amended to "30 November 2021".

15. On 17 May 2021, by e-mail, Human Resources (HR) informed the appellant that the management cycle had ended on 31 March 2021 and asked him to complete his self-assessment by 31 May so that the report could be finalized and closed out. In response, the appellant reminded HR of his official complaint in September regarding his 2019 Performance Report. As he had received no response so far, he asked for advice for further action.

16. On 21 May 2021, HR advised the appellant to remind the Director about the status of his request.

17. On 3 November 2021, the appellant sent an e-mail entitled "Request for Revision of Performance Report 2019" to the General Manager (GM) to escalate his official complaint. For the first time, he stated that the Report was the reason he had not been offered an indefinite duration contract and asked for final settlement of this complaint.

18. On 28 November 2021, referring to the lengthy periods between the release of the Report (9 June 2020), the appellant's memo initially disputing the rating to his Director (30 September 2020), the appellant's first question to HR (17 May 2021), and his e-mail dated 3 November 2021, the GM declined to review the assessment, as there was no reason to do so, and stated that the conciliation phase of the performance dispute was thereby completed.

19. On 26 January 2022, the appellant lodged the present appeal.

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

(i) The appellant's contentions

20. The appellant requests the annulment of the GM's decision rejecting his "Request for Revision of Performance Report 2019" and of the NCIA decision not to offer him an indefinite duration contract; in that respect, he sets out several pleas. He asserts that the 2019 performance appraisal, which constituted one of the main reasons for not being offered an indefinite duration contract, does not contain a clear and factual justification for the "fair" rating; that the respondent abused its powers by keeping his performance assessments intentionally lower than they were; and that he has never been supported by a personal development plan or a coaching procedure to achieve the higher performance rating expected by the Agency. He also argues that the respondent breached CPR rules by not initiating any official action regarding his complaints in 2016 and 2020 concerning his performance reports, and alleges the unlawful exercise of calibration in the performance management system in the respondent Agency. With regard to all of the above-mentioned allegations, the appellant asks to be granted access to the Agency's restricted intranet in order to download evidence.

21. The appellant further argues that he suffered both material and non-material damage from the above-mentioned contested decisions.

22. On the basis of the above, the appellant requests that the Tribunal:

- annul the 2019 annual performance appraisal and uphold the ratings proposed by him;
- order the respondent to offer him an indefinite duration contract, effective from 1 December 2021 or, if that is not possible, to pay him material and non-material damages evaluated at €1,843,633;
- revise his performance ratings from 2014 to 2018 to align ("equivalize") with his 2013 Performance Report rating.

(ii) The respondent's contentions

23. The respondent argues, firstly, the inadmissibility of the appeal regarding the request for annulment of the 2019 Performance Report. In that respect, the respondent draws attention to the long periods between the dates of the appellant's several revision requests for his 2019 Report (rated "fair") and considers that the appellant did not follow the pre-litigation process in a timely manner as prescribed in the CPR and the NCIA Directive 02.09 Staff Performance Management.

24. Concerning the decision not to offer him an indefinite duration contract, the respondent argues that the appellant failed to pursue the pre-litigation process prescribed in the CPR, which requires staff members to go through administrative review and complaint procedures prior to submitting an appeal. Therefore, the appeal must be declared inadmissible.

25. The respondent refutes the appellant's submissions regarding the 2014 performance assessment, as there is no evidence to support his submission that it was duly received but not acted upon by the Agency. Moreover, the respondent contends that had the appellant in fact submitted the Internal Memorandum and not received a response as he so claims, he should have exercised his right to urge his managers to prioritize the resolution of the conflict or to initiate a mediation process.

26. In any case, the respondent submits that there is no merit to the appellant's pleas regarding contract renewal, calibration and performance reports. It also maintains that the appellant cannot be granted access to the restricted intranet, as he is no longer an employee of the Agency.

27. Finally, the respondent considers that the requests for damages are unsubstantiated, and it refutes the requests in their entirety.

28. The respondent requests that the Tribunal declare the appeal inadmissible and unfounded.

D. Considerations and conclusions

(i) Considerations on admissibility

29. In its statement of defence, the respondent alleges that the two main pleas of the appeal are inadmissible.

30. The Tribunal must, therefore, first consider the admissibility of the appeal in regard to the respondent's contested decisions: the decision not to offer the appellant an indefinite duration contract and the decision to reject the appellant's "Request for Revision of Performance Report 2019".

With regard to the respondent's decision not to offer an indefinite duration employment contract

31. The Tribunal points out that Article 61.1 of the CPR, along with Articles 2.1, 4.1 and 6.3.1 of Annex IX to the CPR, subordinate the admissibility of an appeal brought before the Tribunal to the condition of having properly gone through the prior administrative procedure set out in these articles (see AT judgment in Case No. 2014/1016, paragraph 23).

32. With respect to the first dispute, given the fact that the appellant was formally notified on 28 October 2020 that he would not become a long-term employee and that his contract would not be renewed upon its expiry, the Tribunal observes that the appellant was informed, at least six months prior to the expiration of his contract, that a subsequent contract would not be offered to him. This was in accordance with the CPR and NCIA Contract Policy.

33. The Tribunal also notes that the term “long-term employee” is described by the NCIA Directive 2.1 on Contract Policy, which is applicable to the appellant’s contract, alongside the NATO Security Regulations and the CPR. Article 4.7 of the Directive provides “Long term employees are considered to be all staff with at least 10 years of continuous service within the Coordinated Organizations and/or holding a contract of indefinite duration, as well as staff who have been offered a contract which would take them over 10 years of continuous service…” Article 4.2 of the Directive, also provides: “…c) Only those staff members who are consistently high performers may be asked to stay on as long term employees (as per 4.7)…”

34. As seen from the Articles cited, the appellant, having served the Organization for 9 years, was notified on 28 October 2020 that he would not become a long-term employee due to not being a high performer; this also meant that he would not be offered an indefinite duration contract according to the above-mentioned contract policy.

35. It is apparent from the case file that the appellant, having requested a contract extension of 14 months for personal reasons, was offered only an exceptional 6-month extension on 28 October 2020. The contract expiry date “31 May 2021” in the formal notification letter was amended to “30 November 2021” when the appellant signed the offer letter as well as the codicil to his contract with no reservations, on 3 November 2020. Thus, the Tribunal considers that, on 3 November 2020, it came to the knowledge of the appellant, once again, that his contract would not be renewed, and so he would not be offered an indefinite duration contract.

36. The Tribunal also observes that the appellant’s first and only reference to the respondent’s decision not to offer him an indefinite duration contract was when he escalated his official complaint about the 2019 Performance Report, in an e-mail to the GM entitled “Request for Revision of Performance Report 2019” on 3 November 2021. While contesting the performance report for 2019, he only stated in the e-mail that the Report was the reason given in the relevant HR document not to offer him an indefinite duration contract extension, without raising any claims or objections to the respondent’s decision not to renew his contract and/or not to offer an indefinite duration contract.

37. The Tribunal further notes that the GM’s reply dated 28 November 2021, challenged in the present case, was directly related to the appellant’s submissions concerning the 2019 Performance Report, but not to the decision not to offer him an indefinite duration contract.

38. Since there is nothing in the case file indicating that the appellant pursued the necessary pre-litigation procedures required by the CPR and exhausted all available channels to challenge the respondent’s decision not to offer an indefinite duration contract, as from 28 October or 3 November 2020, it is not possible for the Tribunal to

consider that the appellant complied with the CPR's administrative review procedure before lodging the appeal.

39. Therefore, the claims of the appellant regarding the first plea must be rejected as inadmissible.

With regard to the 2019 Performance Report

40. With respect to the second plea, it is clear from the Tribunal's settled case-law that submissions seeking annulment of a staff member's performance report are inadmissible because such a report is not in itself a decision that constitutes grounds for grievance; it is a preparatory act and can only be challenged as being illegal in support of submissions directed against a subsequent act causing the appellant harm, such as a disciplinary action, a refusal to renew a contract or a decision to terminate a contract, as the Tribunal has ruled (see AT judgment in Case No. 2013/1005, paragraph 24).

41. The Tribunal observes that the appellant seeks, inter alia, the annulment of the 2019 Performance Report with the submissions directed against the respondent's decision not to offer him an indefinite duration contract, by alleging that the latter was a subsequent act causing him harm. However, due to the fact that the appellant failed to comply with the CPR's pre-litigation procedures for challenging the respondent's decision not to offer him an indefinite duration contract, the Tribunal finds the submissions regarding that decision to be inadmissible. As a result, the merits of the submissions will not be examined by the Tribunal. The appellant's submissions concerning his performance report must therefore be rejected as inadmissible as the Report itself cannot be challenged alone before the Tribunal, in accordance with the above-mentioned jurisprudence.

42. On the basis of the above-mentioned considerations, the appellant's submissions for annulment of the performance ratings must be rejected.

43. The other claims developed by the appellant in his appeal, directly related to his performance rating, must also be declared inadmissible.

44. The Tribunal concludes that the appeal is inadmissible in its entirety.

(ii) Considerations on the merits

45. Given that the appeal is inadmissible, it is not necessary for the Tribunal to examine the validity of the submissions.

E. Costs

46. 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 [...].

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

F. Decision

FOR THESE REASONS,

48. The Tribunal decides that:

 - The appeal is dismissed.

Done in Brussels, on 14 November 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 November 2022 AT-J(2022)0016

Judgment

Joined Cases Nos. 2021/1328 and 2021/1334

JE
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 21 November 2022

Original: French

Keywords: 1) request for compensation for damage arising from now final decisions – inadmissibility; 2) harassment and discrimination – not established in the present case.

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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 Anne Trebilcock and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 29 September 2022.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of two appeals by Ms JE.

2. The first appeal, registered on 16 June 2021 as case 2021/1328, seeks:
- annulment of the refusal of the General Manager of the NATO Support and Procurement Agency (NSPA) to acknowledge that Ms E had been subjected to poor management, causing damage to her;
- compensation for the material damage suffered as a result of the missed opportunity to apply for an LK-PM position, estimated at €40,000;
- compensation for the material damage suffered as a result of her not being appointed to a deployed position, assessed at €30,000;
- compensation for the non-material damage to her career and health, assessed at €10,000;
- reimbursement of the cost of retaining counsel and of her travel and subsistence expenses.

3. The respondent's answer, dated 16 September 2021, was registered on 21 September 2021. The appellant's reply, dated 2 November 2021, was registered on 11 November 2021. The respondent's rejoinder, dated 13 December 2021, was registered on 5 January 2022.

4. The second appeal, registered on 28 October 2021 as case 2021/1334, seeks:
- annulment of the NSPA General Manager’s decision of 18 August 2021 whereby he stated that none of the actions of the appellant’s manager, Mr M, had been inappropriate in nature;
- annulment of the investigation report;
- acknowledgement that Mr M had acted inappropriately;
- convocation of the people not interviewed by the investigator to testify;
- compensation for the non-material damage suffered, assessed at €20,000;
- reimbursement of the cost of retaining counsel and of her travel and subsistence expenses.

5. The respondent's answer, dated 28 January 2022, was registered on 31 January 2022. The appellant's reply, dated 31 March 2022, was registered on 14 April 2022. The respondent's rejoinder, dated 18 May 2022, was registered on 27 May 2022.

6. An oral hearing was held on 29 September 2022 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

7. The appellant joined the NSPA on 28 November 2011. She was appointed to position LO-94 on a three-year contract ending on 28 November 2014. However, uncertainty about the lasting nature of the deployment mission to Afghanistan led to the administration's not renewing the position. The appellant was thus made redundant in the course of 2014.

8. The appellant signed a new three-year contract for position LW-076 as from 18 August 2014. She found that position unsatisfactory and looked for a new one.

9. In January 2016, she applied for position LK-24, but was unsuccessful. In April 2016, she applied for position LK-57. She was invited to an interview, but was also ultimately unsuccessful. In May 2016, she applied for position L10, but was unsuccessful there too.

10. In spring 2016, the respondent offered her position LK109 at NSHQ. She accepted it on 28 June 2016. She was offered a three-year contract, but was then asked not to sign it as financial agreement for it was not yet in place. The contract was finally signed on 29 and 30 September 2016 and entered into force on 3 October. According to the appellant, she was then asked to perform duties that were different to the ones specified for position LK109.

11. On 24 May 2017, the appellant was informed that position LK109 was to be deleted. An official letter was sent to her on 29 May. On 7 August 2017, she accepted contract LK022 at SHAPE, but found the culture there stressful.

12. In the summer of 2018, the appellant found out that positions LK-PM and LK-57 were to become vacant and looked into them. The process was a long one. It was only in October 2019 that the vacancy notice for position LK-PM was published. At that point, the appellant decided not to apply as she thought she had no chance of being successful since she had discovered that, the previous year, two positions had been vacant but neither of them had been offered to her. Position LK-PM was filled in September 2020. Furthermore, the appellant also decided not to apply for position LK-57 to avoid putting herself through the ordeal of being rejected again.

13. A new development occurred in January 2019, when she applied for a position as a financial analyst at SHAPE.

14. In April 2019, the appellant was approached about a position representing the NSPA at SACT in the US. On 12 April 2019, she accepted what she had understood to be a firm proposal, but two weeks later she was told that the move had been put on hold. The appellant then withdrew her application in May 2019, considering there to have been a breach of trust with her managers.

15. On 1 September 2019, she accepted position OI002 with SHAPE and signed a three-year contract ending 31 August 2022.

16. Already in October 2019, the Head of Operations, Mr M, offered her a transfer to a position as NPTL Office Head in Luxembourg. She agreed, but was told she would have to interview for it. Soon after that, in December 2019, Mr M changed his mind and asked her to stay at SHAPE, with the possibility of being deployed soon thereafter. But in January 2020, that deployment was no longer on the table.

17. In a new attempt to find a job that was a good fit for her, she applied for an O-6 position in Capellen in February 2020 but was unsuccessful. She asked for explanations as to why she had not been selected, but the administration refused to provide them.

18. On 6 January 2021, the appellant requested that her Head of NATO body:

- firstly, acknowledge that the Organization was responsible for the damage done to her career and for the ill effects on her health, compensate the material damage caused by her non-appointment to the LK-PM position and the fact that she was not able to deploy as provided for in her contract, and compensate the non-material damage caused by the stress that adversely affected her health;
- secondly, in line with the NSPA instruction on inappropriate behaviour, initiate an investigation into the behaviour of Mr M, the NSPA's Director of Support to Operations Business Unit, towards her.

19. The first head of claim was rejected by the NSPA General Manager on 3 February 2021, leading the appellant to submit a complaint on 6 March 2021. That complaint was rejected on 6 April 2021 by the NSPA General Manager, who declared it inadmissible insofar as it concerned past decisions that had become final, in addition to being groundless. This is the decision that led the appellant to lodge an appeal with the Tribunal requesting its annulment. That appeal was registered under number 2021/1328.

20. Regarding the second head of claim, the requested investigation was conducted on 3 February–17 August 2021, following which the investigator submitted their final report to the NSPA. On 18 August, the NSPA General Manager endorsed the findings of the investigation, which established that although some of the allegations were wholly or partly established, none of them constituted inappropriate behaviour within the meaning of the NSPA's instruction of 2 June 2015. He therefore rejected the claim and stated that no disciplinary action would be taken against Mr M. This is the decision that led the appellant to lodge an appeal with the Tribunal requesting its annulment. That appeal was registered under number 2121/1334.

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

(i) The appellant's contentions

Admissibility of appeal 2021/1328

21. The appellant contends that her claim is admissible even though it is not directed against a specific decision. The damage done to her is the result of an accumulation of events that, taken together, constitute poor management of her career. This means that her request for annulment of the decision whereby the poor management was not acknowledged is admissible.

Arguments regarding the merits of appeal 2021/1328

22. After detailing her career path from 2014 to 2020, including her many unsuccessful attempts to be appointed to various positions that she thought would be a good fit, the appellant highlights that the respondent did not take the appropriate steps to make the atmosphere and her workload bearable.

23. For many of the positions she applied for, the appellant considers the selection process to have been biased, unclear and lacking transparency, with unexpected and unexplained events occurring that prevented the selection process from being regular. There had been no objective reason for not selecting her. She also underscores that the administration seems to have, on several occasions, used the excuse that she was about to be appointed to one position to turn her down for another. There were also occurrences of the administration offering her insubstantial positions that were deleted soon afterwards, and of the selection process being suddenly stopped and resumed differently. Regarding the LK-PM position, she reproaches the administration for not having conducted the recruitment in accordance with due process but rather in a biased, disloyal manner. In the case of the O-006 position in Capellen, she claims that she was improperly rejected because of her British nationality.

24. Regarding her requests for a deployment, she underlines that she had been offering to deploy since 2014. She states that she had received assurances that she would be able to go, but her managers had opted to send other staff members instead. She argues this was because she was a woman.

25. The appellant also complains of having been given an excessive workload, especially between April and September 2018, when she was performing the duties of two positions simultaneously, in breach of the administration's obligation to ensure staff well-being.

26. She sees all this poor management as the root cause of her career issues. She missed out on an opportunity to be appointed to an A5 position, which deprived her of a chance to move to a higher pay grade, and was denied the opportunity to be deployed. Her management's attitude had such an effect on her health that she had to go out on sick leave for three months, between the end of April and the end of July 2020.

27. She is thus seeking compensation of the damage done: €30,000 for the damage caused by her not being appointed to an A5 position, €40,000 for the damage caused by her not being deployed and €10,000 for non-material damages.

Arguments regarding the merits of appeal 2021/1334

28. The appellant contends that the investigation into the behaviour of the Head of Operations, Mr M, was biased and the findings manifestly erroneous. This prevented the General Manager from making a well-informed decision.

29. First of all, the investigation was not conducted with due care and diligence. The appellant reproaches the investigator for not having heard all the witnesses she had put forward. In particular, some of the errors that formed the basis of some of the criticisms could have been avoided if all the proposed witnesses had been interviewed. The

administration could not use the fact that some of the proposed witnesses no longer worked for the Organization to leave them out of the investigation.

30. Furthermore, the investigator did not obtain from the administration the interview panel reports, which would have been instructive for establishing whether harassment had indeed occurred. And in their report, the investigator does not provide any evidence that they verifed the allegations of some of the witnesses. Lastly, the investigator did not look into the appellant's claim of an excessive workload.

31. Secondly, the appellant claims that the investigator made an manifest error of judgment in their report by finding that the director had neither harassed the appellant, nor abused his authority, nor based his recruitment decisions on subjective, biased positions.

32. Regarding some of the allegations, the investigator came up with findings that were clearly wrong.

33. In the case of the recruitment process for position LK-24 in 2016, it is clear that Mr M was the only person not to recommend her. The investigator does not explain how it was possible that the final decision not to select the appellant, who professed to be fully qualified for the position, was not influenced by Mr M.

34. The appellant claims that she had been misled during the recruitment process for the SHAPE position, with Mr M deliberately concealing some information about it. By not establishing Mr M's manipulation, the investigator made a manifest error in their report.

35. The appellant is also of the view that she was subjected to discourteous behaviour by Mr M during the processes to recruit the interim holders of positions LK-PM and LK-57, who were selected subjectively. The view in the report is manifestly erroneous insofar as it considers Mr M had the power to simply offer those posts to the appellant; the investigator did not look into that sufficiently.

36. The investigator did not establish why the appellant was initially approached for the position of NSPA representative at SACT, then told that she would have to go through a competitive selection process.

37. Regarding the appointment to an NPTL Head of Office position in Luxembourg, the report should have found that Mr M had played a negative role inasmuch as he discarded the idea without discussing it with the General Manager.

38. The report contains another manifest error in that it validates the failure to invite the appellant to the selection interviews for position O-006 in Capellen.

39. Lastly, the missed deployment opportunities were, in the appellant's view, sufficiently substantiated to prove discrimination, which the investigator and the General Manager refused to acknowledge.

40. All this should have led the investigator to conclude that the appellant experienced an abuse of authority, bullying and harassment within the meaning of NSPA Operating Instruction 4400-05 at the hands of Mr M. He manipulated the recruitment procedures to serve his own interests, at the expense of the appellant's. On several occasions, he made

promises to the appellant that he did not keep. The appellant was not well-liked by Mr M and paid a heavy price for that. She felt worthless, humiliated and unwanted.

(ii) The respondent's contentions

Admissibility of appeal 2021/1328

41. The respondent disputes the admissibility of appeal 2021/1328 as being time-barred. The events that the appellant is citing extend across a long period from 2014 to 2020, but she submitted her request to the administration only in January 2021. On several occasions, the appellant criticizes old decisions and procedures that she did not contest at the time, in particular the last criticized decision, of 27 October 2020. As she did not challenge those decisions in a timely manner and has not invoked any *force majeure* situation that prevented her from meeting the deadlines, the appellant has submitted her appeal late and it must therefore be rejected.

Admissibility of appeal 2021/1334

42. The respondent does not dispute the admissibility of appeal 2021/1334.

Arguments regarding the merits of appeal 2021/1328

43. The respondent rejects the appellant's arguments one after the other. Overall, the respondent notes that the appellant makes allegations without a shred of evidence and that many of the decisions she criticizes were not contested in a timely manner.

44. Regarding the appellant's appointment in 2014, the respondent underscores that it gave priority, as required, to supernumerary staff, and legally transferred the appellant to a position that matched her skills.

45. As regards position LK-24, the appellant does not demonstrate in what way she was the best-qualified person for the job. The respondent refutes the allegations that the procedure was biased. It also refutes the appellant's theory that she was rejected for position LK-57 because she had applied for position LK-109. The two selection procedures were distinct from each other and, on the contrary, it was because she had been recognized as being qualified for position LK-57 that she was chosen for position LK-109, which, furthermore, was a promotion. When position LK-109 was deleted, the appellant was transferred to position LK-22. She neither challenged that transfer nor mentioned any damage it caused her, since she herself had wanted to work in Mons, Belgium.

46. Regarding the positions that were open in the summer of 2018 (LK-PM and LK-57), the respondent underscores that her being qualified for the LK-57 position in 2016 when it had been previously open gave her no right to be appointed to any other position of the same grade in 2018. The respondent also denies any promises to appoint the appellant to certain positions; those were simply intentions or possibilities that did not materialize in the end. In particular, no promises of deployment were made since deployment is not dependent on a position, but rather on a range of contingent conditions and situations. The fact that a staff member is "deployable" does not mean that they have a right to actually be deployed. In particular, there is no proof that the appellant was

discriminated against because of her gender, as shown by the fact that many women have been deployed over the past years.

47. Regarding the work atmosphere at SHAPE that the appellant complains about, the respondent highlights that it made sure to provide guidance to the appellant, to adjust how she was managed and to support her when she was subjected to improper behaviour by a colleague. The overtime that the appellant complained about was partially compensated for with compensatory leave, in line with Article 17.3.3 of the Civilian Personnel Regulations.

48. The fact that the appellant was not offered an indefinite-duration contract even though she had reached 10 years of service does not violate Article 5.4.2 of the Regulations since the 10 year condition needs to have been met on the date of the contract renewal, and a further contract has to be offered.

49. The administration did not fail in its duty of care towards the appellant. Duty of care does not mean that staff members are to be transferred to any other position they want when they are not satisfied with the previous one. The respondent states that it did everything it could to find positions that matched both the appellant’s wishes and the service’s requirements.

50. Ultimately, the respondent provides no evidence of any damage she suffered by not being appointed to position LK-PM. She has no right to any kind of compensation for not having been deployed either, since she did not have the risks and pressures of deployment, which, in any event, was not a right.

Arguments regarding the merits of appeal 2021/1334

51. To start with, the respondent underscores that the case law of the courts of international organizations requires that harassment claims be backed up by specific facts, to be presented by the staff member who feels discriminated against. NATO’s Appeals Board and Administrative Tribunal follow that logic.

52. If the appellant thought that some witnesses *had* to be heard, it was up to her to explain why that was necessary for backing up her theories, or to ask them to put their testimonies in writing so that she could submit them to the investigator. In any event, the investigator was free to interview any witnesses they deemed useful for proving or disproving the allegations they had been tasked with investigating. The appellant does not provide any evidence as to why the witnesses designated by her and not interviewed by the investigator would have been useful in that respect.

53. Similarly, it has not been established why the interview panel reports were supposedly necessary: an applicant may be qualified for a position but not selected if similarly qualified applicants were deemed more suitable for the position in the given context. The investigator was in their right to deem it unnecessary for those reports to be produced. Overall, the appellant does not provide any evidence that interviewing other witnesses would have led to different findings.

54. In the respondent's view, the appellant is basing her arguments on her own perception of events and decisions, without backing them up with substantiated evidence.

55. Regarding the appointment process for position LK-24, the Head of Human Resources did not change their mind under Mr M's influence: what happened was simply that the manager of the person who issued the initial recommendation made a different choice. Furthermore, the administration is not obliged to appoint all the qualified applicants to a position. They have to choose just one person, based on their suitability for the job. It is not illegal for qualified people to not be appointed, as was the case of the appellant.

56. The respondent rejects the claim that Mr M went against the interests of the service by appointing the appellant to position LK-22 and freeing up a position for another person. First of all, it was the General Manager and not Mr M who took the decision. Secondly, managing jobs in order to try to find the best match between positions and staff members is in no way illegal.

57. Regarding the recruitment process for positions LK-PM and LK-57, the respondent underlines that it was not obliged to seek out all potential applicants to tell them the positions were open. Furthermore, the fact that the appellant did not apply to those jobs confirms the investigator's findings that no manifest error of judgment was made.

58. Regarding the position that might have been created at SACT, the respondent notes that the appellant herself had underlined its hypothetical nature. Therefore, she cannot reasonably claim that the administration went back on a firm commitment. Nothing in the file proves that Mr M had an influence on the creation of the position.

59. Regarding position O-006, the respondent repeats the arguments it already presented when analysing the previous applications: the administration was under no obligation to interview all the qualified applicants, and it has not been established that Mr M played a part in wrongly rejecting the appellant's application.

60. As for the appellant's requests to be deployed, the respondent noted that the investigator had found good grounds for Mr M's stance of not sending her on deployment: by not wishing to deplete SHAPE's staff, he had acted in the interests of the service. Furthermore, the decision not to deploy the respondent is based on an individual assessment, not a principled position not to deploy women. The investigator thus found that Mr M could not be accused of acting in a discriminatory manner.

61. In light of this, the General Manager's decision not to find Mr M's behaviour discriminatory, based on the findings from the investigator's report, is in no way illegal.

62. Regarding the submissions seeking compensation, it has not been established that the damage the appellant is seeking compensation for was caused by decisions by the administration, in particular Mr M. Those submissions must therefore be rejected too.

D. Considerations and conclusions

On the admissibility of the submissions in the appeal 2021/1328

63. In appeal 2021/1328, it appears clearly that the appellant is seeking firstly the annulment of the decision of the General Manager to refuse to acknowledge damage resulting from the administration's decisions and secondly compensation for the damage suffered as a result of not being able to apply for an LK-PM position and not being appointed to a deployed position, as well as compensation for the non-material damage to her career and health. Those submissions are based on the illegality of the decisions, which predate the request for compensation by several months.

64. The principle of legal certainty precludes administrative decisions from being challenged indefinitely. The same goes for the financial consequences that might arise from such decisions. If that were not the case, every administrative decision could be challenged over very long periods of time; anyone could get around the deadline for submitting an appeal by making a claim for compensation solely based on the supposed illegality of a decision for which annulment can no longer be requested (see Administrative Tribunal judgment of 9 November 2022 in case no. 2022/1336).

65. The appellant's missed opportunity to apply to position LK-PM predated her claim for compensation by two and a half years, and the decision to appoint another person to that position by over one year. The decision not to deploy the appellant was taken in October 2020, over two months before the claim for compensation, and was not challenged within the timeframe set out in the Civilian Personnel Regulations.

66. The appellant's claims for compensation for the damage arising from now final decisions are therefore clearly time-barred. The appeal must therefore be rejected.

On the merits of appeal 2021/1334

67. Article 12.1.4 of NATO's Civilian Personnel Regulations provides as follows: "Members of the staff shall treat their colleagues and others, with whom they come into contact in the course of their duties, with respect and courtesy at all times. They shall not discriminate against them on the grounds of gender, race or ethnic origin, religion or belief, age or sexual orientation. […] The Head of the NATO body may establish local implementation policies in application of this article." Local implementation policies were established by the NSPA General Manager on 2 June 2015 (NSPA OI4400-05).

68. An allegation of harassment must, as recalled by the Administrative Tribunal of the International Labour Organization (cases no. 20637, Annabi (No. 2) of 12 July 2001 and no. 2100, Guastavi (No. 2) of 30 January 2002) and as already ruled by the NATO Appeals Board (decisions no. 690 of 29 June 2006, no. 762 of 12 March 2010, no. 824 of 9 March 2012 and nos. 839-863-864 of February 2013), be borne out by specific facts, the burden of proof being on the person who pleads it, and an accumulation of events over time may be cited to support an allegation of harassment.

69. In the present case, the allegations of harassment presented by the appellant often derive from her own perception of events and are not borne out by sound evidence.

70. The appellant reproaches her hierarchical superior, Mr M, whose behaviour was the object of the investigation that led to the decision that is being challenged before the Tribunal, for having abused his authority and harassed her. This behaviour was supposedly evidenced by five types of decisions.

71. Firstly, Mr M is said to have unduly weighed in on selection processes to reject the appellant's applications for certain positions. But the appellant provides no evidence of partial behaviour or biased decisions. That a person applies for a position in no way implies that they have the right to be appointed to that position, even if they consider that they have all the required qualifications. The interview panel may recommend – and the administrative authority select – another applicant if that person appears, on the basis of all the applications and the entire recruitment process, better suited for the professional context and the position. The fact that Mr M took part in certain selection processes and does not hold the appellant in esteem does not vitiate the decision insofar as the decisions did not entirely rest upon him, as it has not been established that his observations were based on criteria other than an assessment of the appellant's suitability for the positions, and as other people involved in the process were in a position to nuance Mr M's observations and form their own opinions. To consider that Mr M was in a position to single-handedly block the appellant's recruitment on several occasions is to overestimate his power.

72. Secondly, the appellant complains about Mr M's partiality in refusing to deploy her despite her asking and being told it would be possible. However, the fact that a staff member is deployable does not mean that they have a right to actually be deployed. The decision to deploy a staff member is a complex one that depends on the circumstances of the operation and the staff member's ability to adapt to an unusual environment. In the present case, there is no evidence that Mr M acted in a discriminatory manner towards the appellant. In particular, he was not in principle opposed to deploying women, since several other female staff members of the Agency had been deployed in recent years, albeit to other places. The appellant's claim in the hearing that the facilities are such that there is no separate housing for men and women yet is not evidence of gender-based discrimination. In the present case, the appellant has not demonstrated that this was a decisive factor in not deploying her.

73. Thirdly, the appellant complains about promises that were supposedly made to her but not kept. However, the way the offers were made to her show that they were intentions or possibilities that were subject to the recruitment procedures' being successful. The appellant misunderstood them to be firm commitments when in fact they were only aimed at getting her feedback or encouraging her to apply. Nothing in the case file shows that Mr M had a hostile or discriminatory attitude towards the appellant.

74. Fourthly, the overtime that the appellant complained about was not excessive in nature and was partially compensated for with compensatory leave, in line with Article 17.3.3 of the Civilian Personnel Regulations. The appellant was not subjected to hostility or discrimination.

75. Fifthly and lastly, the appellant complains that she was not offered an indefinite-duration contract. But when her contract was last renewed in September 2019, having joined the Organization in November 2011, she had not yet reached 10 years of service, which was a prerequisite. The provisions of Article 5.4.2 of the Regulations were not violated, and the allegations of discrimination/harassment are unfounded.

76. Ultimately, the appellant does not provide any evidence that based on the findings of the investigation, the General Manager made a manifest error in considering that Mr M did not subject the appellant to an abuse of authority or harassment. The appellant's submissions seeking annulment of the decision by the NSPA General Manager and requesting that Mr M's behaviour be declared inappropriate are therefore rejected.

77. Furthermore, the Tribunal is not in a position to cancel an investigation report, which does not constitute a decision that can be appealed – it can only be assessed when examining a decision based on its findings, which is the case here. The submissions seeking annulment must therefore be rejected.

78. However, the Tribunal notes that the appellant had sent the investigator a list of several people she was putting forward to be interviewed to back up her allegations. The investigator used that information only partly, by interviewing four people, one of whom was taken from the appellant's list. Even though the investigator had quite some leeway in choosing the witnesses to be heard as part of the investigation, the Tribunal is of the view that for the sake of avoiding criticism it would have been better to add the witnesses suggested by the appellant. The investigator could have asked for written statements to avoid complicating the procedure. The failure to add those witnesses generated doubt, but that cannot be resolved by the Tribunal, all the more so as it is not certain that such additional information would have brought about a different, more suitable assessment. This error of judgment in the way the investigation was handled caused the appellant non-material damage, which can be assessed at €10,000. The respondent is therefore ordered to pay that amount to the appellant as compensation for the damage.

E. Costs

79. 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.

80. In the circumstances of the case, the submissions in the appeal having been rejected for the most part, the request for reimbursement of the costs to appear before the Tribunal must also be rejected.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The NSPA shall pay Ms E the sum of €10,000 in compensation for the non-material damage suffered by her.
- Appeal 2021/1328 and the remainder of the submissions in appeal 2021/1334 are rejected.

Done in Brussels, on 21 November 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2022)0001

Order

Case No. 2022/1339

MC
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 28 April 2022

Original: English

Keywords: Rule 10 request denied.

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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 Mr MC against the NATO Support and Procurement Agency (NSPA) dated 10 March 2022, and registered on 30 March 2022 under Case No. 2022/1339;

- Considering the letter dated 5 April 2022 and the “Motion for summary dismissal of an appeal and stay of proceedings” dated 19 April 2022, provided by the respondent;

- 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 request for a summary dismissal is denied without prejudice to the AT's position in law on admissibility and merits of the present case.
- The proceedings shall continue and the respondent provide its answer **no later than 16 June 2022**.

Done in Brussels, on 28 April 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2022)0002

Order

Case No. 2022/1340

RC
Appellant

v.

NATO International Staff
Respondent

Brussels, 22 August 2022

Original: English

Keywords: withdrawal.

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The President of the NATO Administrative Tribunal,

- Considering that Mr RC submitted an appeal with the NATO Administrative Tribunal (AT) on 22 May 2022, registered under Case No. 2022/1340 on 3 June 2022, against the NATO International Staff (IS);

- Considering that the AT Registrar received, on 18 August 2022, 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 22 August 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2022)0003

Order

Case No. 2022/1346

MC
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 2 December 2022

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 Mr MC against the NATO Support and Procurement Agency dated 19 October 2022, and registered on 14 November 2022 under Case No. 2022/1346;

- Considering the answer provided by the respondent, dated 17 November 2022;

- 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 14 December 2022**.
- 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 2 December 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2023)0001

Order

Case No. 2023/1355

RC
Appellant

v.

NATO International Staff
Respondent

Brussels, 3 March 2023

Original: English

Keywords: withdrawal.

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The President of the NATO Administrative Tribunal,

- Considering that Mr RC submitted an appeal with the NATO Administrative Tribunal (AT) on 10 February 2023, registered under Case No. 2023/1355 on 16 February 2023, against the NATO International Staff (IS);

- Considering that the AT Registrar received, on 18 February 2023, 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 3 March 2023.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2023)0002

Order

Case No. 2023/1347

TP
Appellant

v.

NATO International Staff
Respondent

Brussels, 3 March 2023

Original: English

Keywords: withdrawal.

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The President of the NATO Administrative Tribunal,

- Considering that Mr TP submitted an appeal with the NATO Administrative Tribunal (AT) on 20 January 2023, registered under Case No. 2023/1347 on 2 February 2023, against the NATO International Staff (IS);
- Considering that the AT Registrar received, on 27 February 2023, 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 3 March 2023.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2022)0002

Order

Case No. 2021/1333

SS

Appellant

v.

Centre for Maritime Research and Experimentation

Respondent

Brussels, 10 October 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, Ms Seran Karatarı Köstü and Mr Thomas Laker, judges, having regard to the appellant's request dated 27 June 2022 and having considered the matter at its September 2022 session.

A. Proceedings

1. On 12 May 2022, the NATO Administrative Tribunal (hereinafter the "Tribunal") rendered a judgment in Case No. 2021/1333 on the appeal submitted by Ms Sara G.S. Stephens against the Centre for Maritime Research and Experimentation (CMRE). The Tribunal upheld the appeal annulling the decision of the CMRE Director to terminate the appellant's contract with immediate effect, following the approval of the suppression of her post.

2. In its judgment the Tribunal stated:

> […]
> 66. The annulment of a decision of termination of employment entails, in principle, the reinstatement of the illegally dismissed staff member in his or her last position, or in an equivalent position if this is materially impossible. Thus, the respondent shall pay the full amount of the emoluments due to the appellant from the period from 1 June 2021 until the date of the ruling of the present judgment plus interest at the latest European Central Bank rate increased by two points.
>
> 67. However, the administration may invoke Article 6.9.2 of Annex IX of the CPR, which states that:
>
> where 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.
>
> Following a question of the Tribunal, the respondent invoked these provisions at the hearing held on 28 April 2022.
>
> 68. Pursuant to Article 6.9.1 of the Annex IX of the CPR, annulment of a decision allows a staff member who has been the subject of the decision to claim compensation for the prejudice suffered as a result of this illegality. In view of the circumstances of the dismissal, the functions held by the appellant and the respondent's refusal to reinstate her, and the significant loss of income she has suffered since her dismissal, a fair and comprehensive assessment will be made of the damage suffered, both material and non-material, by ordering the CMRE to pay the appellant 12 months of her last emoluments.
>
> 69. The appellant shall receive the amounts set forth in paragraphs 66 and 68 after deducting the amounts already received under the decision of 1 June 2021.
>
> […]
>
> The Tribunal decides that:
> - The challenged decision is annulled.
> - The CMRE shall compensate the appellant (i) with a sum equal to the entirety of her

emoluments for the period from 1 June 2021 to the date of the present judgment plus interest at the latest European Central Bank rate plus two points and (ii) with a sum equal to 12 months of her last salary as compensation for the damage suffered as a result of the challenged decision. These sums will be paid to the appellant after deduction of the sum already paid under the decision of 1 June 2021.

- There is no need to adjudicate on the submissions against the decision of 1 June 2021 not to pay the appellant for untaken leave accrued from 1 January to 1 June 2021.
- The respondent shall reimburse the appellant's justified expenses and the costs of retaining counsel up to a maximum of €4,000.
- The remainder of the appeal is dismissed.

3. On 27 June 2022, the appellant wrote to the Tribunal requesting clarification of this judgment pursuant to Rule 30 of the Tribunal's Rules of Procedure (ROP) concerning, *inter alia*, the amount of the compensation to be received.

4. In her letter the appellant stated, *inter alia*:

> 12. It is the Appellant's understanding that the Tribunal did not intend to deduce from the sums awarded the loss of job indemnity (LOJI) paid to her (approximately equal to 14 months of salary) as well as the amount received in lieu of the notice period (equal to 6 months of salary).
>
> 13. Indeed, requesting the Appellant to return the LOJI after it was clearly stated by the Tribunal that her contract was illegally terminated would appear to be contrary to the spirit of the judgment and the reasons which justified the operative part of the judgment.
>
> 14. It would also be greatly unfair since the LOJI is returned only if one is reinstated, which is not the case here since the Defendant explicitly objected to such a reinstatement.
>
> 15. Additionally, as expressed above, the HONB made it clear that it was not willing to reintegrate the Appellant despite the illegality of the decision to terminate her contract. The Appellant should therefore be compensated in a fair manner.
>
> 16. Deducing the LOJI and the amount received in lieu of a notice would amount to award the Appellant only less than 4 months of salary.
>
> 17. This cannot be regarded as fair compensation.
>
> 18. The Appellant's understanding rather is that she is expected to return such amounts because they are to be recalculated and paid as of 12 May 2022 (new date by which her employment contract ceases) instead of 1 June 2021.
>
> […]
> 21. Furthermore, the Defendant's 7 June letter exposes amounts to be paid to the Appellant which appear to be totally inconsistent with the Appellant's pay grade and step and allowances as per her May 2021 salary slip (annex 4) and NATO 2022 Salary Scale for Italy (annex 5).
>
> 22. Given this disagreement, the Appellant respectfully requests the Tribunal to clarify this point and possibly confirm the Appellant's view ordering the Defendant to pay the sums due.

> 23. In a spirit of transparency, and so to avoid the need for any future request for clarification and/or appeals on this case, the Appellant respectfully provided a clear breakdown of the amounts due, as done at the time of calculation of the LOJI and notice period indemnity (annex 6).
>
> 24. As can be seen from the calculation, the amounts are very different from those expressed by the Defendant (approximately 313 000 euros versus 12 000 euros).

5. By letter dated 6 July 2022, the Tribunal's Registrar, in accordance with the provisions of Rule 30 stating 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 which were circulated to the parties on 27 July 2022.

6. In its letter the respondent stated, *inter alia*:

> […]
> 10. There can be no doubt that the NATO Administrative Tribunal specifically intended for the deduction of the sums already paid to Ms Stephens to be made from the total compensation granted to her, including LOJI, as evident from the second point (*tiret*) of Section F and paragraph 69 of the judgment.
> 11. As per Rule 27.2, judgments are adopted by majority vote, in this case by three judges, including the President of the Tribunal. We therefore find it beyond the realm of possibility that the Tribunal might not have intended to deduct the sums already paid to the Appellant from the total compensation awarded, as it very clearly ordered this action in two distinctive parts of the judgment.
>
> 12. Respondent also noted that the role of the Tribunal is to assess fair compensation and to avoid awarding compensation of an excessive nature. The provisions put forward by the Appellant would lead to an unprecedented overcompensation of Ms Stephens, completely inconsistent with the case law of the NATO Administrative Tribunal and that of its' [*sic*] predecessor, the NATO Appeals Board. It would also not correspond to the damage suffered by the Appellant for which she had already received 228,028.60 EUR.
>
> 13. The decision of the Tribunal that the compensation granted to the Appellant should be reduced by the sum paid under the decision of 1 June 2021 are [*sic*] in line with its own case law whereupon it stated on numerous occasions that an indefinite duration contract is not a guarantee of employment for life.
>
> 14. While the Appellant was not properly informed about the upcoming suppression of post, the Appellant's counsel now proposes to award her more than double of what she has already received under the Loss of Job Indemnity and the 6-months allowance in lieu of the notice period. It would clearly lead to overcompensation.
>
> 15. The Respondent therefore fully disagrees with the Appellant's clarification request and respectfully requests the Administrative Tribunal to declare it without merit.

7. On 1 September 2022, under Rule 16 of the Tribunal's ROP, the Tribunal requested from the respondent a detailed breakdown of the amounts paid to the appellant. This additional documentation was distributed to the parties on 16 September 2022.

B. Legal background

8. 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.

9. Rule 27(7) of the Tribunal's ROP provides:

> Subject to Article 6.8.3 of Annex IX, judgments are final and binding.

10. 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

11. Annex IX to the CPR provides that judgments of the Tribunal are final and binding 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.

12. Parties may, however, ask for clarification of a judgment in accordance with Rule 30. In this respect the appellant has failed to identify "in which respect the operative provisions of the judgment appear obscure, incomplete or inconsistent", as required in the second paragraph of Rule 30.

13. On the contrary, the Tribunal considers that the payments the appellant received are fully in line with the dispositions of the judgment rendered. 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. The Tribunal's rulings in its judgment in Case No. 2021/1333, in particular its paragraphs 66-69, 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.

14. The rest of the submissions raised by the parties in their exchanges are also outside the scope of this Rule 30 request and must be dismissed.

D. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The request for clarification is dismissed.

Done in Brussels, on 10 October 2022.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2022)0003

Order

Case No. 2021/1327

UK
Appellant

v.

NATO International Staff
Respondent

Brussels, 18 October 2022

Original: English

Keywords: Rule 29 – request for a re-hearing.

North Atlantic Treaty Organization - Organisation du Traité de l'Atlantique Nord
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The present order is rendered by a full Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Ms Seran Karatarı Köstü, Mr Thomas Laker, Mr Laurent Touvet and Ms Anne Trebilcock, judges.

A. Factual background and procedure

1. On 24 May 2022, the NATO Administrative Tribunal (hereinafter “Tribunal”) rendered a judgment in Case No. 2021/1327, dismissing the appeal of Mr UK against the NATO International Staff’s refusal to compensate the prejudice he suffered following the taxation by local German fiscal authorities of his holdings in the Defined Contribution Pension Scheme (DCPS), which he withdrew as a lump sum upon his retirement.

2. On 18 June 2022, the appellant wrote to the Tribunal requesting a re-hearing in accordance with Rule 29 of the Tribunal’s Rules of Procedure.

3. On 14 July 2022, the respondent presented its comments.

4. In his letter the appellant asserts that the Tribunal’s judgment was tainted by an error of law. He submits that the respondent has misled him by not "providing its best information," as the Tribunal had held. The “best information” available was - as experts have told him after the Tribunal’s hearing - that the DCPS lump sum was not covered by Article 19 of the Ottawa Treaty (Paris Protocol) as the privileges and immunities of the Treaty are limited to active staff and do not extend to retirees, a fact well known to the respondent. He further refers to opinions expressed at the oral hearing by the respondent and also comments on the Tribunal’s considerations and conclusions. He submits that he has come across new evidence that supports his case and joins documents and minutes of meetings of, amongst others, the Joint Consultative Board, a body set up for consultations between management and representatives of active and retired staff.

5. The Tribunal considered the request at its 36th session held on 29 and 30 September 2022.

B. Considerations

6. Article 6.8.3(a) of Annex IX to the Civilian Personal Regulations (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 its reasoning. The appellant seeks to do this on a number of occasions in his request. The Tribunal will not entertain these points.

7. Article 6.8.3(a) of Annex IX permits an exception: the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment. That is not the case here.

8. Annex IX further provides that either party may petition the Tribunal for a re-hearing in very limited circumstances.

9. Article 6.8.3(b) of Annex IX 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.

10. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature that existed prior to the judgment and that were unknown at that time by the Tribunal and by the party seeking a re-hearing. These facts must be of a nature that, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. Article 6.8.3 (b) further provides that petitions for a re-hearing must be made within 30 days from the date on which the fact becomes known.

11. The appellant has not indicated when he became aware of the supposedly new facts, nor has he provided supporting evidence in this respect. He has also not indicated why he could not have had that information before lodging the appeal. Results of talks with experts after the hearing cannot be considered to be new facts. It is the responsibility of an appellant to seek expert advice before lodging an appeal and during the proceedings. It is to be noted in this respect that the appeal was prepared with the support of representatives of active and retired staff.

12. More to the point, the documents produced indeed show that the Administration and representatives of active and retired staff discussed different scenarios, which is, in fact, their responsibility. The overall outcome of these discussions was, however, not what the appellant maintains. It was, and remains, the official position of the respondent that the lump sums in question are not subject to national taxation and it continues to defend this position at the highest legal and diplomatic levels, in support of the appellant. In other words, had the Tribunal been able to take into consideration the new elements that have now been produced, it could not have led it to a different conclusion.

13. In addition, the appellant comments on points raised by the respondent during the hearing on 28 April 2022. He had ample opportunity to react during that hearing. That discussion is closed.

14. The appellant's request for a re-hearing is thus nothing more than an attempt to reopen his case, which the Tribunal is not allowed to do.

15. The Tribunal concludes that the conditions for a re-hearing have not been met and that the request for a re-hearing must be denied.

C. Decision

FOR THESE REASONS

The Tribunal decides that:

- The request for a re-hearing is denied.

Done in Brussels, on 18 October 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

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ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2022)0004

Order

Case No. 2021/1329

AB
Appellant

v.

NATO International Staff
Respondent

Brussels, 18 October 2022

Original: English

Keywords: Rule 29 – request for a re-hearing.

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The present order is rendered by a full Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Ms Seran Karatarı Köstü, Mr Thomas Laker, Mr Laurent Touvet and Ms Anne Trebilcock, judges.

A. Factual background and procedure

1. On 14 June 2022, the NATO Administrative Tribunal (hereinafter “Tribunal”) rendered a judgment in Case No. 2021/1329, dismissing the appeal of Mr AB against the NATO International Staff’s refusal to compensate the prejudice he suffered following the taxation by local German fiscal authorities of his holdings in the Defined Contribution Pension Scheme (DCPS), which he withdrew as a lump sum upon his retirement.

2. On 4 July 2022, the appellant wrote to the Tribunal requesting a re-hearing in accordance with Rule 29 of the Tribunal’s Rules of Procedure.

3. On 14 July 2022, the respondent presented its comments.

4. In his letter the appellant asserts that the Tribunal’s judgment was tainted by an error of law. He submits that the respondent has misled him by not "providing its best information," as the Tribunal had held. The “best information” available was - as experts have told him after the Tribunal’s hearing - that the DCPS lump sum was not covered by Article 19 of the Ottawa Treaty (Paris Protocol) as the privileges and immunities of the Treaty are limited to active staff and do not extend to retirees, a fact well known to the respondent. He further refers to opinions expressed at the oral hearing by the respondent and also comments on the Tribunal’s considerations and conclusions. He submits that he has come across new evidence that supports his case and joins documents and minutes of meetings of, amongst others, the Joint Consultative Board, a body set up for consultations between management and representatives of active and retired staff.

5. The Tribunal considered the request at its 36th session held on 29 and 30 September 2022.

B. Considerations

6. Article 6.8.3(a) of Annex IX to the Civilian Personal Regulations (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 its reasoning. The appellant seeks to do this on a number of occasions in his request. The Tribunal will not entertain these points.

7. Article 6.8.3(a) of Annex IX permits an exception: the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment. That is not the case here.

8. Annex IX further provides that either party may petition the Tribunal for a re-hearing in very limited circumstances.

9. Article 6.8.3(b) of Annex IX 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.

10. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature that existed prior to the judgment and that were unknown at that time by the Tribunal and by the party seeking a re-hearing. These facts must be of a nature that, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. Article 6.8.3 (b) further provides that petitions for a re-hearing must be made within 30 days from the date on which the fact becomes known.

11. The appellant has not indicated when he became aware of the supposedly new facts, nor has he provided supporting evidence in this respect. He has also not indicated why he could not have had that information before lodging the appeal. Results of talks with experts after the hearing cannot be considered to be new facts. It is the responsibility of an appellant to seek expert advice before lodging an appeal and during the proceedings. It is to be noted in this respect that the appeal was prepared with the support of representatives of active and retired staff.

12. More to the point, the documents produced indeed show that the Administration and representatives of active and retired staff discussed different scenarios, which is, in fact, their responsibility. The overall outcome of these discussions was, however, not what the appellant maintains. It was, and remains, the official position of the respondent that the lump sums in question are not subject to national taxation. In other words, had the Tribunal been able to take into consideration the new elements that have now been produced, it could not have led it to a different conclusion.

13. In addition, the appellant comments on points raised by the respondent during the hearing on 28 April 2022. He had ample opportunity to react during that hearing. That discussion is closed.

14. The appellant's request for a re-hearing is thus nothing more than an attempt to reopen his case, which the Tribunal is not allowed to do.

15. The Tribunal concludes that the conditions for a re-hearing have not been met and that the request for a re-hearing must be denied.

C. Decision

FOR THESE REASONS

The Tribunal decides that:

- The request for a re-hearing is denied.

Done in Brussels, on 18 October 2022.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2023)0001

Order

Case No. 2017/1104

MK
Appellant

v.

Allied Air Command Ramstein
Respondent

Brussels, 23 January 2023

Original: English

Keywords: request for revision.

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This order is rendered by a full Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Ms Seran Karatarı Köstü, Mr Thomas Laker, Mr Laurent Touvet and Ms Anne Trebilcock, judges, having regard to the appellant's request for revision dated 4 September 2022.

A. Proceedings

1. On 4 September 2022, the appellant requested a revision of a judgment of 21 November 2017 that the NATO Administrative Tribunal (hereinafter the "Tribunal") rendered in Case No. 2017/1104. The request was submitted under Rule 29 of the Tribunal's Rules of Procedure (ROP).

2. On 23 September 2022, the Tribunal's Registrar wrote an email to the appellant stating, *inter alia*, as follows:

> I have to revert to the documentation you sent. Please be informed that this Office cannot process classified documentation ("Geheim") of NATO member states without authorization or without following a specific procedure which is not in the remit of this Office.
> Therefore, if you wish to pursue with your request for revision before the Administrative Tribunal, I have to ask you to send only documentation which is not classified.
> Please also be informed that such "Geheim" documentation you have sent so far has been deleted.

3. On 26 September 2022, the appellant replied to the email disputing the above position and affirmed that *"there is either a severe lack of security knowledge and legal qualification or ordered proceedings in favor of the organization."* He continued by saying that:

> […] Since a security conflict has been recognized by your office in the enclosures, clarification is requested. The refusal to pass the documents in conflict to security experts for investigating would signify the intentional acceptance of illegal activities by the tribunal in the proceedings of the reporting of potentially stolen secret data by HQ AIRCOM staff members to the German investigators. A non-pursuance would be considered as a confirmation of the fraudulent theft of my pension by the tribunal. […]

4. On 3 October 2022, the Registrar replied as follows:

> […] Let me add that an acknowledgement of receipt of a documentation does not mean that such documentation is fully accepted for processing. The process is not automatic: Rule 9.6 of the Tribunal's Rules of Procedures tasks this Office to review the documentation and send it back to the appellant if required. *Inter alia*, this Office can only accept documentation in one of the official languages of the Organizations, English or French. This is what happened in your case as the documentation provided was not fully compliant with these dispositions.
>
> Further, Article 6.7.5 of Annex IX to the CPR provides as follow: "Classified material originating from a Member state shall not in any event be disclosed without the consent of the Member state concerned", which is not the case here as there is no authorization

> appended from Germany that would allow use and further distribution of the documentation provided. As an appellant, the burden of proof of your allegations lays with you as well as ascertaining that procedures are met.
>
> In the lack of a specific authorization by the concerned authorities, this Office cannot be a recipient/distributor of classified information and therefore your previous documentation has been deleted.
>
> I have therefore to repeat that if you wish to pursue with your request for revision, a complete package (and not only some pages), containing only unclassified material in either EN or FR (or with certified translations of German documentation) of your submissions has to be provided to this Office.

5. On 4 October 2022, the appellant resubmitted a full package stating that "[your] objections are outside of your authority" and requested to pass the package to the Tribunal.

6. On 25 October 2022, the Registrar distributed the appellant's submissions with the following information:

> As explained before, documents marked "Geheim" (Annexes A03 and A05), a national classification, cannot be stored/processed by this Office and therefore have not been included.

7. On 3 December 2022, the appellant addressed an unsolicited e-mail to the President and judges of the Tribunal via their respective private accounts. In his email the appellant states, *inter alia*, as follows:

> […] Now, the Registrar simply deleted some evidences on her own before forwarding it to the Respondent without informing me. Whether she had been ordered to do so by the Honorable Tribunal, I do not know.
> However, thanks to the NAT's Portal it is visible that instead of 150 pages, only 110 pages had been forwarded to the Respondent in my case. In particular when the subject relates to "Security", it is only the Registrar who decides on it and simply deletes evidences on her own. NATO has well-trained experts on Security who are responsible for examining the status but the NAT refused and refuses to ask for their support but illegally decides by themselves in order to yield the wanted judgment. […]
> I am retired since 2012 and had been sentenced to 7 years in jail for HQ AIRCOM's criminal security manipulations and had been deprived of my NATO pension. All the illegal activities had been blessed by the Honorable Tribunal.
> …

8. In accordance with the dispositions of Rule 29 ROP and following an extension granted on operational grounds, the respondent submitted its views on 5 December 2022. It requests that the application be dismissed for want of meeting the procedural requirements of Rule 29 and that the applicant bear the costs of these proceedings.

9. On 1 January 2023 the appellant submitted another document to the attention of the Tribunal stating, *inter alia*, as follows:

> […] The Respondent had been provided with the Appellant's request for his revision submitted 4 Sep 2022 and a complaint dated 30 Oct 2022. However, the request and apparently

the complaint were illegally sent without significant enclosures. Details have not been explained and are not known by the Appellant and not by the Respondent. This must be seen as an unlawful intervention by the Registrar, invalidating the proceedings. Clarification is being sought by an Administrative Review to the Secretary General as the head of the NATO Counsel. Until a solution has been agreed for legal proceedings, the current process is to be put on hold.

B. Factual Background

10. It is recalled that in, its judgment of 21 November 2017, the Tribunal decided that:
- the decision to reduce the appellant's pension by 67%, instead of 60% as recommended by the Disciplinary Board, is annulled for failure to give reasons;
- the appellant's other claims are denied; and
- the respondent shall reimburse appellant's justified expenses, as well as the costs of retaining counsel up to a maximum of €1.000.

11. On 14 December 2017, the appellant requested "a revision of the appeal 1104 with a rehearing in accordance with Rule 29, Annex IX, Appendix 1, NCPR / Article 6.8.4 (b) Annex IX, NCPR, *"due to the fact that a determining fact and evidence had been ignored at the hearing and had not been known by the Tribunal and the appellant at the time of the Tribunal's judgment".*"

12. In an Order dated 26 March 2018, the Tribunal denied the appellant's request for revision of the judgment in Case No. 2017/1104 and for a rehearing.

13. On 4 September 2022, the appellant made a second request for revision of the judgment of 21 November 2017. He requested in particular that the Tribunal annul the disciplinary decision of COMAIRCOM, communicated to him by letter dated 7 November 2016, reducing the appellant's pension permanently and which the Tribunal corrected only partly; that the Tribunal order COMAIRCOM payment of the full NATO-Pension to the appellant as of 1 November 2016; that he be compensated for the damage caused by the malicious application of the disciplinary procedure; and that he be reimbursed the costs of retaining counsel, travel and subsistence. He submits that he has recently become aware of the fact that falsified documents were given by the respondent to the German authorities, which he claims lie at the basis of his seven-year prison term.

C. Legal Background

14. 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.

15. Rule 29 of the Tribunal's ROP provides:

1. In accordance with Article 6.8.4 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.
2. 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. The Registrar shall transmit the petition to the President, and transmit copies to the HONB and OLA. The HONB will have fifteen days to submit comments.
3. 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.

C. Considerations and Conclusions

16. This is the appellant's second request under Rule 29 for a re-hearing in the case in which the Tribunal delivered a judgment on 21 November 2017.

17. Judgments of the Tribunal are final and are not subject to any type of appeal by either party. The Tribunal has constantly held that it follows from this that neither party may enter into a discussion with the Tribunal concerning the latter's reasoning. 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.

18. As the Tribunal already recalled in its Order dated 26 March 2018, the above-quoted texts governing revision of Tribunal judgments make clear that revision is available only in narrowly defined circumstances. First, the party seeking revision must demonstrate the existence of a previously unknown "determining fact", that is, a fact that would have led to a different outcome in the case had it been known. Further, the fact must be something that was not previously known to either the Tribunal or the party requesting revision. Moreover, petitions for a re-hearing must be made within 30 days from the date on which the above-mentioned fact becomes known. Thus, revision is an exceptional remedy, available only in the unusual situation in which a newly discovered fact might have led to a different outcome had it been known to the requesting party and the Tribunal when a judgment was rendered.

19. The appellant, first of all, challenges the legality of the disciplinary procedure, which resulted in the disciplinary sanction of 7 November 2016. The Tribunal notes that the appellant had ample opportunity to make this submission during the proceedings that led to the Tribunal's judgment of 21 November 2017. This new argument is nothing more than a re-opening of a debate on the conclusions of the Tribunal; this is at variance with the rule that the Tribunal's judgments are final and not subject to appeal as well as with

the purpose of a re-hearing. It is not a new fact. This matter is thus inadmissible.

20. The appellant on numerous occasions refers to a recently discovered fact. He has failed to show, however, that this was not known or could not have been known to him at the time of the earlier proceedings. Moreover, he has not shown when, where and how he discovered this allegedly new fact. The Tribunal recalls that petitions for a re-hearing must be made within 30 days from the date on which the above-mentioned fact becomes known. The appellant has failed to do so and also for this reason the request is inadmissible.

21. The appellant submits that with the allegedly new fact or facts he would not have been sentenced to a seven-year term of imprisonment by the German courts. But this is for the German courts, not this Tribunal, to determine as the appellant observed in his letter of 7 December 2018 (corrected by hand into 2020). The case file does not contain evidence that the appellant has taken the necessary steps with the German courts.

22. The appellant has in his request attached a number of documents in German. Rule 9 of the ROP provides:

> …
> 3.1 The appeal, the supporting evidence, and any other documents being produced that are essential for the appeal must be submitted in one of the official languages of the Tribunal.
> 3.2 If such an essential document is not in one of the official languages, the appellant shall attach a certified translation into one of these official languages. Any translations into the other of these languages shall, if necessary, be prepared under the responsibility of the Registrar.

23. The Registrar invited the appellant to comply with the CPR dispositions at different occasions. The appellant did not do so.

24. Moreover one document carries a national (German) security classification "Geheim" ("Secret").

25. In accordance with the CPR dispositions a document marked "secret" cannot be distributed or handled without the consent of the member state concerned. It is for the appellant to obtain such consent. He has failed to do so.

26. The appellant contends that the above-mentioned classification was falsified. Only the national security authorities can establish this, not this Tribunal. The case file does not contain evidence that the appellant has taken the necessary steps with the German authorities.

27. The Tribunal holds that the Registrar of the Tribunal acted correctly and in accordance with the relevant rules when refusing to process or distribute said document.

28. In any case, regardless of the discussion on the completeness of the file, the analysis of which would enter into the merits of the case, the Rule 29 request is inadmissible for the reasons explained above. As a consequence, the appellant's

demand of 1 January 2023 to suspend the proceedings is therefore irrelevant and denied.

29. Further, the appellant complains that the Tribunal's portal was not accessible. The Tribunal recalls that the portal's functioning is constantly monitored and that updates, including security updates are regularly carried out. As a consequence, access can temporarily be suspended for users. It is to be noted that the portal is a tool and a service to the tribunal and the parties. It does not replace the proceedings, which in the present case is limited to a single request for revision, in other words it is not an adversarial process.

30. The Tribunal therefore concludes that the conditions for a re-hearing of appellant's case have not been met and that the request for a re-hearing must be denied.

31. The appellant has sought *ex parte* access to the President and the judges of the Tribunal and has resorted to insulting language. This is at variance with the decorum of this Tribunal and its proceedings and cannot be accepted.

D. Decision

FOR THESE REASONS

The Tribunal decides that:

- the appellant's request for revision of the Judgment in Case No. 2017/1104 and a rehearing is denied.

Done in Brussels, on 23 January 2023.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2023)0002

Order

Case No. 2022/1339

MC
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 6 February 2023

Original: English

Keywords: request for rectification of error.

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This order is rendered by a full Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Ms Seran Karatarı Köstü, Mr Thomas Laker, Mr Laurent Touvet and Ms Anne Trebilcock, judges, having regard to the appellant’s request for rectification dated 1 December 2022.

A. Request and submissions

1. On 1 December 2022, the appellant requested a rectification of a judgment of 2 November 2022 that the NATO Administrative Tribunal (hereinafter the “Tribunal”) rendered in Case No. 2022/1339. In this judgment the Tribunal considered the appeal inadmissible since it challenged general rules and not implementing decisions directly and adversely affecting the appellant. The request was submitted under Rule 28 (“Rectification of error”) of the Tribunal’s Rules of Procedure (ROP).

2. Although Rule 28 of the Tribunal’s ROP does not explicitly provide for this and having regard to the principle of transparency as well as of the adversarial character of the Tribunal’s proceedings, the appellant’s request was forwarded to the respondent for information on 9 January 2023.

3. The appellant submits that he had in his appeal also challenged the office notice of 13 January 2022 implementing ON-COS-005-21 on Covid measures across the NATO Support and Procurement Agency (NSPA) as from 17 January 2022 and that the implementation thereof raised all the consequences when applied to him. He reiterates a number of incidents and expresses disagreement with some of the Tribunal’s considerations.

4. The appellant requests the Tribunal to:

- decide on the legality of the decision taken by the Head of the NSPA on 11 January 2022, in reply to his request for administrative review;
- decide on the legality of the implementation of the ON-COS-005-21 in document CCO-2022.01.13;
- decide on the legality of the denial of access to the premises of NSPA on Tuesday 25 January 2022;
- grant compensation; and
- “let me know if I am authorized to bring my case to the European Court of Human Rights while still in service, or on the contrary, I shall wait until separation due to my commitment of Loyalty to the Organization.”

B. Considerations and conclusions

5. 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.

6. The appellant submitted his request in accordance with Rule 28 of the Tribunal's ROP ("Rectification of error"), which provides:

> Clerical and arithmetical errors in the judgment may be corrected by the Tribunal on its own initiative or at the request of a party.

7. Article 6.8.3 of Annex IX to the CPR clearly provides that judgments of the Tribunal are final and not subject to any type of appeal by either party. The Tribunal has constantly held that it follows from this that neither party may enter into a discussion with the Tribunal concerning the latter's reasoning. The appellant on numerous occasions expresses disagreement with the Tribunal's considerations and conclusions in its judgment of 2 November 2022. As said, the Tribunal does not enter into a discussion on the content of its judgments. The Tribunal will thus not consider these arguments.

8. The Tribunal may, however, in accordance with Rule 28 of the Tribunal's ROP, be asked by either party to rectify a clerical or arithmetical error in a judgment rendered. The Tribunal, first of all, holds that the submission made by the appellant in this respect cannot be considered as relating to a "clerical or arithmetical" error.

9. The appellant essentially argues that the Tribunal had not ruled on or taken into consideration the office notice of 13 January 2022 that implemented the general measures laid down in ON-COS-005-21. The Tribunal in this respect underlines that its judgment of 2 November 2022 was based on an analysis of the entire case file and the hearing of the parties. No documents or attachments were ignored. It suffices to note that the case file included the 13 January 2022 office notice, which is, in fact, another general instruction to staff and not an implementing decision directly and adversely affecting the appellant.

10. Having regard also to the remedies requested, the Tribunal concludes that the appellant seeks no other than reopening his case. This runs counter to the letter and purpose of Rule 28 of the Tribunal's ROP and the finality of the Tribunal's judgments.

11. For these reasons the Tribunal concludes that the request for correction of clerical and arithmetical errors in its judgment of 2 November 2022 must be denied.

C. Decision

FOR THESE REASONS

The Tribunal decides that:

- the request for rectification of clerical and arithmetical errors in the judgment of 2 November 2022 is denied.

Done in Brussels, on 6 February 2023.

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

Certified by
the Registrar
(signed) Laura Maglia