



JUDGMENTS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2014

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal 2014

2014

2nd session (12-13 and 16-17 December 2013)

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

20 December 2013

AT-J(2013)0009

Decision

Case No. 905

MN,

Appellant

v.

**NATO Helicopter Design & Development,
Production and Logistics Management Agency,**

Respondent

Brussels, 20 December 2013

Original: English

Keywords: suspension of oral hearings; settlement.



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This decision is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 13 December 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 14 June 2013 and registered on 24 June 2013, by Mr MN, against the NATO Helicopter for the 1990s (NH90) Design and Development, Production and Logistics Management Agency (NAHEMA), concerning his staff report covering the period 16 December 2011 – 31 December 2012. He alleges procedural flaws in the process of preparing his staff report and submits that, in view of the assessments of each of the elements rated in his report, the overall assessment should have been “very good”.

2. The Comments of the respondent, dated 25 July 2013, were registered on 17 September 2013. The Reply of the appellant, dated 25 September 2013, was registered on 8 October 2013.

3. The appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal (Tribunal). Pursuant to the Transitional Provisions contained in Article 6.10 of (“new”) Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to the new regulations’ entry into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

4. The Tribunal’s Panel held an oral hearing on 13 December 2013 at NATO Headquarters. It heard arguments by Mr N, representing himself, and Mr GL, Personnel Budget and Finance Section Leader, representing the respondent, in the presence of Mr EG, Deputy NATO IS Legal Adviser and Mr BS, Assistant Legal Adviser, Office of the NATO IS Legal Adviser, as well as Mrs Laura Maglia, Registrar *a.i.*

5. During the hearing both parties requested a suspension of the hearing and of the proceedings in order to discuss the terms of a possible settlement of the appeal. Such a settlement agreement was subsequently agreed by the parties, and was signed on 19 December 2013 and received by the Tribunal on the same day.

B. Decision

- Taking note of the parties’ settlement agreement dated 19 December 2013, which is incorporated herein as Annex A;
- Taking note of the attestation by the General Manager of NAHEMA attached to the settlement agreement, which is incorporated herein as Annex B; and
- Taking note of appellant’s request to withdraw the appeal on the terms stated in the settlement agreement;

The Tribunal decides that:

- The request to withdraw the appeal is granted with final effect.
- NAHEMA shall reimburse Mr N for any substantiated travel and subsistence costs incurred by him to appear before the Tribunal, within the travel expense limits laid down for staff members of his grade.
- The security deposited by Mr N shall be reimbursed.

Done in Brussels, on 20 December 2013.

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

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



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

27 January 2014

AT-J(2014)0001

Judgment

Case No. 899

DV,

Appellant

v.

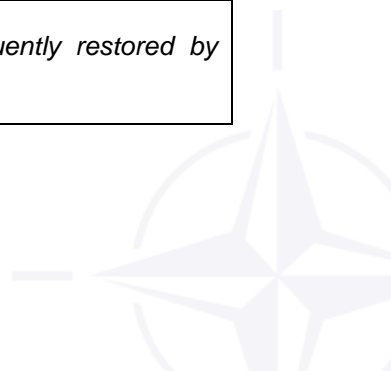
NATO Communications and Information Agency,

Respondent

Brussels, 9 January 2014

Original: English

Keywords: termination of appointment; security clearance withdrawn and subsequently restored by national authorities; effect of subsequent events.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 12 December 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 19 April 2013 and registered on 26 April 2013, by Mr DV, against the NATO Communications and Information Agency (NCI Agency) (NC3A, until 30 June 2012). The appellant is a former staff member of the NCI Agency.

2. The comments of the respondent, dated 19 June 2013, were registered on 28 June 2013. The reply of the appellant, dated 31 July 2013, was registered on 8 August 2013.

3. The appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal (Tribunal). Pursuant to the Transitional Provisions contained in Article 6.10 of ("new") Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to the new regulations' entry into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

4. The Tribunal's Panel held an oral hearing on 12 December 2013 at NATO Headquarters. It heard arguments by Maîtres TA, WH, and VV, representing the appellant, Mrs SR, NCIA Legal Adviser, and Mr VR, NCIA Assistant Legal Adviser, representing the respondent, in the presence of Mr EG, Deputy NATO IS Legal Adviser and Mr BS, Assistant Legal Adviser, NATO IS, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. Staff members of a NATO body must have a security clearance. Article 3 of the NCPR provides, *inter alia*, that staff members are appointed on condition that the NATO body has received a security clearance certificate from the government of the country or countries of which the staff member is a national. It further stipulates that the withdrawal of this certificate entails the immediate termination of the contract or the immediate dismissal of the staff member concerned, in accordance with Articles 9 or 59 of the NCPR, as appropriate.

7. Article 9 of the NCPR, which is relevant in the present case, provides, *inter alia*, that the Head of NATO body has the right to terminate contracts for due and valid reasons, *e.g.* if the country of which the staff member is a national withdraws or does not renew the security clearance.

8. Appellant, a Belgian citizen, joined NC3A in 2005, first as a Senior Technician at grade B4 based in Brussels and subsequently as a Principal Technician at grade B5 based in The Hague, the Netherlands. He held definite duration contracts, the last one for a duration of three years starting on 1 November 2011. As his post entailed full and unrestricted access to NC3A networks, appellant required a Cosmic Top Secret security clearance, which he obtained in 2005. On 27 February 2012 the Belgian national security authorities renewed it for a further five years.

9. On 16 December 2011 appellant sent an e-mail from his NATO e-mail account to his private Gmail account. The e-mail was labeled NATO UNCLASSIFIED. Security services discovered, however, that the e-mail contained sensitive information, including NATO RESTRICTED and NATO SECRET information.

10. A security investigation was initiated, during which appellant was suspended from duty. Appellant was interviewed. The investigation concluded that appellant had tried to disguise the contents of his e-mail, that this was premeditated and that he had on at least ten occasions also taken home removable storage devices containing NATO classified information, which he processed on his private computers.

11. On 21 March 2012 appellant received a formal written security warning from his General Manager. The warning observed that appellant's security reliability and personal integrity were in serious doubt and that his performance would be closely monitored for twelve months. He was allowed to return to work but on low-level IT duties until management was satisfied that he was fully rehabilitated and willing to follow applicable security procedures and processes. The General Manager added that a report of the security infraction was sent to the Belgian National Security Agency for inclusion in the national security file. Management further explained the matter to appellant in a talk on 29 March 2012.

12. By letter dated 19 June 2012 the Belgian National Security Agency informed the Security Manager of NC3A that the Belgian National Security Authorities had decided to withdraw appellant's security clearance. It added that the person concerned could appeal this decision within 30 days of receipt of the notification.

13. By letter dated 22 June 2012 the General Manager forwarded to appellant a copy of the letter of the Belgian National Security Agency. He informed appellant that he was suspended from duty with immediate effect with pay.

14. On 18 July 2012 appellant lodged an appeal with the Belgian Appeal Body for Security Clearances (Appeal Body). He informed the NCI Agency thereof by e-mail dated 31 July 2012.

15. By letter dated 31 July 2012 the General Manager informed appellant of the decision to terminate the latter's appointment with effect from 31 July 2012 on the basis of Articles 3(g) and 9.1(iv), of the NCPR which provide, as outlined in paragraphs 6 and 7 *supra*, that NATO staff are appointed on condition that the NATO body has received a security clearance certificate from the government of the country of which the staff member is a national, that the withdrawal of this certificate entails the immediate termination of the contract or the immediate dismissal of the staff member concerned, and that the Head of the NATO body has the right to terminate contracts if the country of which the staff member

is a national withdraws the security clearance. The period of notice of 90 days would be paid in an allowance. Appellant would also be entitled to a loss-of-job indemnity.

16. On 19 September 2012 the Belgian Appeal Body heard appellant's appeal. In its decision dated 21 February 2013 the Appeal Body concluded that no classified information was made public and that the withdrawal of the clearance was disproportionate. It ordered the Belgian Security Authorities to grant a security clearance for a reduced period of two years.

17. By an e-mail dated 14 March 2013 appellant contacted the NCI Agency's Payroll and Benefits manager mentioning that he would like to talk about the options for a return to the NCI Agency. The latter replied on 5 April 2013 that guidance was being sought from the Legal Department.

18. On 19 April 2013 appellant lodged the present appeal.

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

(i) The appellant's contentions

19. As far as the admissibility of the appeal is concerned appellant observes that Article 4.3.2 of ("old") Annex IX of the NCPR provides that exceptionally and for duly justified reasons appeals may be admitted that were lodged after the time limit of 60 days. Appellant invokes the latter provision with the argument that the decision of the Belgian authorities of 21 February 2013 constitutes a duly justified reason.

20. Appellant observes that the impugned decision is the decision to terminate the appointment. He submits that this decision was solely based on the fact that his security clearance was withdrawn and that with its restoration by the Belgian authorities the decision to terminate his appointment was taken on no longer existing grounds and must be reviewed and annulled. He further contends that NATO could not have terminated the contract on other grounds in view of his immaculate record, this being the first security infraction.

21. Appellant submits that the termination of appointment was disproportionate and that respondent should have kept appellant suspended until the outcome of the appeals procedure before the Belgian authorities.

22. Appellant further contends that it is not the role of the Agency Security manager to report infractions to national security authorities.

23. In his Reply appellant adds that he had requested reintegration in March 2013 and that he had not received a reply within 30 days. He submits that this is, in accordance with Article 4.3.1 of ("old") Annex IX of the NCPR, to be considered equivalent to the rejection of the complaint or request.

24. Appellant alleges that the loss of employment caused both immediate injury and long-term injury not covered by the loss-of-job indemnity of five months' emoluments. The termination of the contract also meant the loss of the possibility to obtain an indefinite

duration contract which would have provided employment security for another 25 years, with an estimated income of one and a half million Euro. Alternatively, appellant requests payment of income until the end of his contract, *i.e.* 21 months of emoluments in addition to the loss-of-job indemnity. In his Reply appellant requests, in addition to the 21 months of emoluments, payment of pension rights and compensation of € 100.000 *ex aequo et bono* for the loss of the chance to obtain an indefinite duration contract.

(ii) The respondent's contentions

25. Respondent submits that the appeal is inadmissible on the grounds that there is no prior decision of the Head of the NATO Body (HONB) before the appeal was initiated and that such a decision was not requested.

26. Respondent further contends that the decision to grant, renew or withdraw a security clearance is taken by national authorities and not by NATO. Such decisions do have an impact on the NATO employment relationship, as Article 3(g) of the NCPR provides that withdrawal of a security clearance automatically entails immediate termination of contract. The HONB has no margin of discretion in this respect.

27. Respondent submits that appellant has not requested from the HONB compensation or reintegration following the 21 February 2013 decision of the Belgian authorities, but immediately lodged an appeal.

28. Respondent observes that appellant did not challenge the 31 July 2012 decision within sixty days. The fact that a decision was taken by the Belgian authorities more than six months later should not constitute a valid ground for reopening the possibility of an appeal against the original decision. This would violate the principle of legal security.

29. Respondent contends that the Agency Security manager fully acted in accordance with NATO security regulations when he reported the security infractions to national security authorities.

30. As to the merits respondent repeats that the NCPR leaves no choice to the HONB when a security clearance is withdrawn. The HONB had no margin of discretion and the appointment had to be terminated.

31. Respondent disagrees with appellant's submission that the 31 July 2012 decision must be reviewed because the Belgian authorities restored the clearance in February 2013. It submits that the legality of the 31 July 2012 decision must be evaluated as of the date it took effect.

32. Respondent contends that any grievances that appellant may have concerning the process under which the Belgian authorities withdrew and then restored the security clearance must be addressed to the latter. Respondent underlines that the clearance was withdrawn following an investigation by the Belgian authorities, in which NATO did not participate. It is incorrect to say that their conclusions were solely based on a NATO report.

33. Respondent concludes that the appeal is inadmissible and unfounded.

D. Considerations and conclusions

Considerations on admissibility

34. The present appeal raises a number of admissibility issues.

35. When respondent received the withdrawal of the security clearance on 22 June 2012, it immediately suspended appellant from duty, with pay, pending an analysis of all aspects of the matter. This measure did not contravene the NCPR and appellant was certainly not adversely affected by it.

36. On 31 July 2012 respondent terminated appellant's appointment on the grounds of Articles 3(g) and 9.1(iv) NCPR, which, it is recalled, provide that NATO staff are appointed on condition that the NATO body has received a security clearance certificate from the government of the country of which the staff member is a national, that the withdrawal of this certificate entails the immediate termination of the contract or the immediate dismissal of the staff member concerned, and that the Head of the NATO body has the right to terminate contracts if the country of which the staff member is a national withdraws the security clearance. The Tribunal cannot but conclude that the termination of appellant's appointment was regular (*cf* NATO Appeals Board, Decisions Nos. 200 and 442).

37. Appellant did not contest this decision. The argument put forward at the hearing that appellant could not appeal the decision because an official of the respondent might be called upon as a witness by the Belgian security authorities and would then be influenced by an ongoing appeal is not convincing. It throws, moreover, inappropriately and without any supporting evidence, doubt on the professionalism of respondent's personnel.

38. Appellant did also not seek a preservation of his rights, if any. The file does not show any agreement or proposal for an agreement between the parties, for example suspending time limits for an appeal or otherwise. Insofar as the present appeal challenges the 31 July 2012 decision it is time-barred.

39. The decision by the national authorities in February 2013 to restore the security clearance for a limited duration certainly is a new event. It cannot, however, alter the decision of 31 July 2012 to terminate the appointment, which can only be evaluated as of the date it took effect. The fact that the clearance was restored by the national authorities more than eight months after its withdrawal has no bearing on the legality of the impugned decision. The submission that the decision must be annulled because it was taken on no longer existing grounds does not hold (*cf* NATO Appeals Board, Decision No. 442).

40. Article 4.3.2 of "old" Annex IX to the NCPR indeed provides that appeals must be lodged with the Appeals Board within 60 days from the date of notification of the decision appealed against. Nevertheless, in very exceptional cases and for duly justified reasons, the Appeals Board may admit appeals lodged after the time allowed. As mentioned *supra*, the restoration of the clearance certificate may be a new event. It does, however, not alter the 31 July 2012 decision, unless otherwise agreed between the parties, which is not the case here. It therefore does not constitute a very exceptional situation to waive time limits for challenging the 31 July 2012 decision.

41. It is to be added that appellant has not submitted any request or petition to the Head of the NCI Agency to review the earlier decision or to take a new decision (*cf* Article 4.3.1 of “old” Annex IX to the NCPR and NATO Appeals Board, Decision No. 755).

42. In his Reply appellant adds that he had requested reintegration in March 2013 and that he had not received a reply within 30 days. He submits that this is, in accordance with Article 4.3.1 of (“old”) Annex IX of the NCPR, to be considered equivalent to the rejection of the complaint or request. It is true that appellant sent an e-mail to the Human Resources services inquiring about a possible reintegration. This cannot, however, be considered a request for official action, and the fact that the matter was not immediately followed up cannot be considered an implicit rejection, as appellant submits. It should be added that the latter submission was not part of the initial appeal and is for that reason inadmissible in any event.

43. Lastly, the file does not contain any commitment by respondent that the matter would be reviewed after a positive outcome of the appeal before the Belgian authorities or a request to that effect by appellant. The NCPR do not provide for this as a matter of right. They do also not provide that a staff member in the situation as the present one is to be suspended rather than have his contract terminated, as appellant submits. On the contrary: Articles 3(g) and 9.1(iv) stipulate very clearly that the contract is to be terminated.

44. For these reasons the appeal is inadmissible.

E. Costs

45. Article 4.8.3 of Annex IX to the NCPR provides as follows:

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

46. The appeal being inadmissible and appellant not having submitted any claim for costs, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is inadmissible.
- The security deposited by Mr V shall be reimbursed.

Done in Brussels, on 9 January 2014.

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

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



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

29 January 2014

AT-J(2014)0002

Judgment

Case No. 901

RN,

Appellant

v.

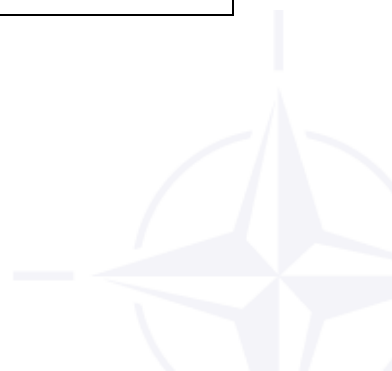
NATO International Staff,

Respondent

Brussels, 14 January 2014

Original: English

Keywords: retiree; medical cover; RMFC; Supervisory Committee.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr John Crook, presiding (the President having recused himself), Mrs Maria-Lourdes Arastey Sahùn and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 13 December 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 29 April 2013 and registered on 6 May 2013, by Mr RN, a former NATO staff member.
2. The comments of the respondent, dated 2 July 2013, were registered on 15 July 2013. The reply of the appellant, dated 14 August 2013, was registered on 26 August 2013.
3. The appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal. Pursuant to the Transitional Provisions contained in Article 6.10 of (“new”) Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to when the new regulations entered into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.
4. The Tribunal's Panel held an oral hearing on 13 December 2013 at NATO Headquarters. It heard arguments by the appellant and his counsel, Maître AB, on the one hand and, on the other, by Mr EG, Deputy NATO IS Legal Adviser, Mr BS, Assistant Legal Adviser, NATO IS, Mrs MS, Head Personnel Support, and Mr PV, Insurance Contracts and Medical Reimbursements, representing the respondent, in the presence of Mr CS and Mr PL, NATO IS Staff Association, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

5. The material facts of the case may be summarized as follows.
6. The appellant is a retired NATO employee who receives a pension calculated on the basis of his earnings while in service. He also receives retiree medical insurance coverage as described in the following paragraphs.
7. There is some inconsistency in the appellant's papers regarding the nature of his medical insurance coverage. The appeal initially sought annulment of a decision “to apply to the Applicant an increase of the premium under the ‘bridging cover scheme’.” The “bridging cover scheme” does not apply to the appellant; it is funded in a different manner and applies to retirees in a different age cohort. The appellant's Reply indicates that he is among those retirees covered by a footnote to NCPR Article 51.2.

This provides that staff members recruited before 1 January 2001 “who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.”

8. Article 51.2 of the NCPR authorizes continuing medical care of NATO retirees under a group insurance scheme. It provides:

staff members who leave the Organization having completed a minimum of 10 years of uninterrupted service and who have reached the age of 55 shall be permanently entitled to the reimbursement of medical expenses for themselves and their recognized dependents within prescribed limits. They shall be required to pay a premium towards this benefit, applying the cost share formula as stipulated in Article 50.2 above.

9. NCPR Article 50.2 provides that contributions to group insurance schemes are paid two-thirds by NATO and one-third by staff members. Such contributions paid by current NATO staff and participating retirees go into the Retirees' Medical Claim Fund (RMCF), financing and operation of which are governed by NCPR Annex XIII. Current staff must contribute 1.5% of current salary to the RMCF; prior to the change involved in this appeal, retirees contributed 1%. Under Article 1 of Annex XIII, “the RMCF only concerns retirees from the age of 65: staff members between the ages of 55 and 65 are covered under the terms of the “bridging cover”, which is not dealt with herein.”

10. The RMCF makes monthly payments toward the annual insurance premium for covered retirees. It also retains and invests excess funds to pay part of future premiums. Excess funds are managed and invested by a private fund manager, subject to objectives and restrictions in its contract with NATO. Article 3 of Annex XIII creates an advisory Supervisory Committee “to oversee the management of the RMCF.” The committee is to meet twice a year “at which time they shall be briefed by the [investment] Managers on investment strategy and results.” Article 4 specifies the committee's membership, which includes representatives of the International Staff and staff and retiree groups, including two members appointed by the Confederation of Retired Civilian Staff Associations.

11. Under Article 5.1 of Annex XIII, the Supervisory Committee “is a consultative body.” Under Article 5.2, it advises the Secretary General and represents the interests of the Organization, its staff, and retirees “with the object of ensuring that sufficient funds will always be available to cover medical costs until the last NATO pensioner or his/her recognized dependents die.”

12. Article 5.6 of Annex XIII requires that the Committee be kept informed regarding the fund managers' present and intended investment policy and “shall convey their thoughts on the investment to the Managers.” Under Article 5.3, the Committee “is authorized to propose to the Secretary General that the annual premium be adjusted as appropriate in the light of the long-term financial situation of the Fund.”

13. A commercial insurance company, currently Allianz Worldwide Care (AWC), provides medical cover for retirees pursuant to a contract with NATO.

14. In January 2013, the appellant and other similarly situated retirees received a two-page e-mail dated 15 January 2013 from AWC. The second page was a short letter on NATO letterhead dated 20 December 2012 and signed by the Assistant Secretary General for the Executive Management Division. This letter notified recipients that their premiums for medical cover were increased from 1% to 1.67% of base salary at the time of retirement as of 1 January 2013, with a corresponding increase for NATO's contribution.

15. The Appeal indicates that on 29 January 2013, the appellant mailed a letter to the Secretary General protesting the increase and calling for it to be rescinded. There was no reply. The Respondent maintains that it did not receive this letter.

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

(i) *The appellant's contentions*

16. The appellant contends that his appeal was filed in a timely manner and is admissible. On the merits, he contends that the decision to increase his medical insurance premium was improperly made, improperly communicated, and insufficiently justified. Citing the case law of other international jurisdictions, notably the courts of the European Union, he maintains that the respondent violated, *inter alia*, the duty of the right of information, of the duty of good administration and due care, and of the duty to state reasons.

17. In particular, the appellant contends that the respondent's action should be annulled in that:

- the premium increase should have been communicated to the appellant directly and not by AWC;
- there was an unacceptable delay between the date of the "apparent" decision to increase the premium (20 December 2012) and the date notification was sent (15 January);
- the reasons for the increase were not communicated. In this connection, the appellant cited alleged past failures of communication between NATO and retirees, said to show a lack of solicitude for retirees' interests;
- people over 65 receive more in reimbursements than they pay in premiums in all national health insurance schemes, and such an imbalance alone cannot justify a 67% increase in premium.
- NATO has taken insufficient steps to contain costs, for example by requiring former German civil servants to turn first to the German "*beihilfe*" system before obtaining reimbursement under the NATO insurance contract.

18. The appellant further alleges procedural irregularities in connection with the decision to raise the insurance premium, in that:

- the decision was taken by the Executive Management Division, and not by the Secretary General as "laid down in article 5.3 of annex XIII to the [N]CPR.";

- the Supervisory Committee was not consulted before the decision was taken, contrary to Article 5 of Annex XIII of the NCPR; and
- Article 26 of NATO's Group Insurance Contract with AWC provides that the annual premium increase under the policy cannot exceed 25%.

19. Accordingly, the appellant seeks annulment of an implicit decision to reject his appeal dated 29 January 2013, of the 20 December 2012 "to apply to the Applicant an increase of the premium that he is requested to pay under the bridging cover scheme", €5.000 as moral damages, and travel and legal costs.

(ii) The respondent's contentions:

20. The respondent initially contends that the appeal is inadmissible in that:
- NATO never received the letter allegedly sent by the appellant, so the Secretary General could take no decision of the kind required to sustain an appeal under the NCPR;
 - the appeal is time-barred, in that the decision complained of was communicated on 15 January 2013 and the appeal was not lodged until 29 April 2013; and
 - subsidiarily, that the appeal seeks annulment of a decision to apply to the appellant an increase in the premium for the bridging scheme, but the appellant does not participate in the bridging scheme.
21. As to the merits of the appeal, the respondent maintains, *inter alia*, that:
- the purported principles of administrative law asserted by the Appellant on the basis of the case law of the EU Administrative Tribunal do not apply to NATO;
 - the disputed decision is within Organization's competence under Appeals Board Case No. 723, in that it was taken by proper authority, is not retroactive, and does not exceed any prescribed limit;
 - the decision was taken by the Secretary General, the proper authority; and
 - the Group Insurance Contract does not confer any rights upon the appellant. It limits what the insurance company can charge the Organization, and is not relevant.
22. Accordingly, the respondent submits that the appeal must be dismissed.

D. Considerations and conclusions

(i) Considerations and conclusions on admissibility

23. The respondent's first and second objections to admissibility rest upon its contention that NATO did not receive the appellant's 29 January 2013 letter requesting suspension of his premium increase. Consequently, the Secretary General could take no decision on that request as required to sustain an appeal. Further, the respondent contended that the appeal submitted on 29 April 2013 involved a decision notified to the appellant on 15 January 2013, and therefore was not timely.

24. The appellant's principal argument regarding the undelivered letter was that a large number of similar communications from retirees in Germany seeking suspension of the increase were submitted to the Secretary General by mail, courier, and even by hand delivery at almost the same time as the appellant's letter. None received a reply. The implication of this argument seems to be that the appellant's letter was received, but, like other similar communications, was simply ignored.

25. At the hearing, in response to the Tribunal's question, the appellant affirmed that he had deposited his letter to the Secretary General in the German postal system. Counsel for the respondent acknowledged that NATO had received multiple communications from retirees in Germany of the kind the appellant described, but stated that it had not been possible to respond to them because of the pendency of this appeal. However, counsel also reiterated that the appellant's letter had not been received.

26. The Tribunal is persuaded on the basis of the copy of the appellant's letter in the record and his testimony at the hearing that he indeed mailed a properly addressed letter to the Secretary General on 29 January 2013, asking that the decision to increase his insurance premium be suspended.

27. In considering the respondent's contention that this letter was never received, the Tribunal has taken into account that many national legal systems contain rebuttable presumptions that a properly prepared and addressed letter introduced into the national postal system has been delivered to and received by the recipient. These presumptions under national law are not controlling here, but they provide a useful reference point in weighing the issue presented.

28. The Tribunal also notes that the provisions of the NCPR and the Appeals Board Rules that apply in this case do not require that appeals be communicated by any particular method of delivery or class of postal service. (The Tribunal observes, however, that the new rules and procedures governing appeals involving proceedings initiated after 1 July 2013 require that appeals be submitted via e-mail in addition to paper submission by other means).

29. The Tribunal does not doubt that the representations by respondent's counsel regarding the appellant's letter are made in good faith, nor does it doubt that his letter failed to reach the officials in the organization responsible for advising the Secretary General in the matter. Nevertheless, the Tribunal also notes that inside all large organizations, written communications go astray. NATO is not immune from this, as the Tribunal has seen in its own brief existence.

30. A body of consistent evidence shows that the appellant's letter was effectively addressed to the Secretary General on 29 January 2013. Given this, and in the absence of any rebuttal evidence, the Tribunal concludes that the appellant's letter must be presumed to have been received by NATO, and that any failure to respond appropriately to it, either by accepting or rejecting his request, is the result of circumstances attributable to the Organization and not to the appellant. Accordingly,

the lack of a response by the Agency within 30 days of the request satisfies the requirements for lodging an appeal under NCPR. The appeal is therefore timely.

31. The Organization's first and second objections to admissibility are therefore rejected.

32. The Organization's third and subsidiary objection to admissibility lay in the fact that the appellant's specific requests for relief in the appeal and reply sought annulment of a decision requiring an increase of the premium "that he is requested to pay under the bridging cover scheme." As indicated above (paragraph 7), the appellant is not covered by the bridging cover scheme. His medical insurance coverage is under the RMCF, an entirely separate program.

33. Nevertheless, fairly read in their entirety, the appellant's papers show that the appeal concerns the increase in premium by reason of his participation in the RMCF. The respondent's comments clearly recognized that the appeal involves the appellant's coverage under the RMCF, not under the bridging scheme. The comments addressed in detail legal and factual considerations related to the increase in premium for coverage under the RMCF. It is thus clear that the respondent understood the nature of the appeal and suffered no prejudice on account of the appellant's incorrect references to the bridging scheme. This objection to admissibility cannot be sustained.

34. For the foregoing reasons, the Tribunal finds the appeal admissible.

(ii) *Considerations and conclusions on the merits*

35. The appellant invoked the jurisprudence of courts of the European Union, notably the jurisprudence of the European Union's Civil Service Tribunal, in contending that the respondent was in breach of general principles of administrative law, notably the right of information, the duty of good administration and due care, and of the duty to state reasons. The respondent denied the relevance of this jurisprudence and the force of the asserted principles. In the respondent's view, the relevant rules are to be found in the NCPR and similar normative documents adopted by the Organization and in the decisions of the NATO Appeals Board. The respondent emphasized Appeals Board Decision No. 723 as particularly relevant to this case.

36. The Tribunal considers that the legal principles it is to apply are generally those rules established or confirmed by the competent NATO organs, notably the NCPR, and those that follow from decisions of the Appeals Board and of this Tribunal in applying the NCPR and similar authorities.

37. The fundamental role of the NCPR and similar normative documents is clearly reflected in the present version of Article 6.2.1 of Annex IX of the NCPR, which directs that:

the Tribunal shall make decisions according to the Civilian Personnel Regulations, other pertinent rules, contracts or other terms of appointment, as well as their interpretation and application to the staff in individual cases.

Under footnote 1 to that Article, the Tribunal shall have authority to rule on the Civilian Personnel Regulations only if a provision “seriously violates a general principle of international public service law”. No such claim is made here.

38. Many general principles of international public service law find expression in the NCPR, as in provisions requiring notice to and consultation with staff members prior to actions affecting their interests. Other related principles, such as NATO’s duty to honor its contracts with staff members, are clearly established in the practice of NATO and other international organizations. (These often reflect general principles of law common to developed legal systems). Still other propositions may be articulated and applied in the context of particular international or intergovernmental institutions, but are not so clearly defined or generally accepted as to be general principles of international public service law.

39. Based on the general principles it invokes, the appellant alleges several forms of misconduct by NATO involving both the substance of the decision to raise the appellant’s insurance premium and the manner in which this decision was made. The respondent denied these allegations.

40. The appellant first contended the respondent’s action should be annulled because the premium increase should have been communicated to him directly by NATO and not by AWC. This objection was not related to any provisions of the NCPR or other NATO documents, and the Tribunal sees no legal basis for it. The e-mail sent to the appellant included as its second page a letter on NATO letterhead, signed by a senior NATO official, notifying him of the increase. The respondent contended that this method was adopted as a cost saving device, as the expense of the mailing was borne by AWC and not by NATO. NATO was under no legal obligation to circulate this letter to the appellant in any different manner, particularly if indeed the Organization could effect a savings by having AWC circulate it.

41. The appellant next contended that there was an unacceptable delay between the date of the decision to increase the premium (Thursday, 20 December 2012) and the date the notification was sent (Tuesday, 15 January). Again, the claim was not related to the NCPR or other relevant document and must be dismissed. In any event, given the substantial slowing of business and the absence of personnel typical of the Christmas and New Years holidays, the delay in notification does not appear unreasonable.

42. The appellant's next contention was that the reasons for the increase were not communicated. In this connection, the appellant referred to alleged past failures of communication between NATO and its retirees, said to show a lack of solicitude for retirees' interests. Again, no reference was made to the NCPR or other potentially relevant normative documents.

43. For the reasons previously indicated, this claim cannot be sustained. In any case, the Tribunal notes that the 20 December 2012 letter from the Assistant Secretary for the Executive Management Division giving notice of the premium increase provided a brief explanation of the reason for the increase: *"l'ajustement de la prime couverture médicale du contrat groupe est devenu inévitable à cause de la différence constatée entre les primes et les remboursements concernant les bénéficiaires de l'assurance médicale continuée."*

44. The appellant's complaint is that this explanation was insufficient, and that NATO was required to provide him with detailed facts and figures to justify this increase. This is not a complaint this Tribunal can remedy; it must be dismissed.

45. However, the Tribunal notes that among the documents in the record was a 17 September 2012 document captioned "The Retirees' Medical Claims Fund. Report on the Administration of the Fund" that was marked NATO Unclassified. This is the 2012 Report of the RCMF Supervisory Committee required by Article 5.9 of Annex XIII. While this report did not explain the details of the increase, it contained information useful in understanding the RCMF's financial circumstances that led to the increase. In response to the Tribunal's questions, counsel for the respondent indicated that the fact that the report was marked NATO Unclassified did not mean that it could be freely disseminated. However, counsel also indicated that the report had been provided to the members of the Supervisory Committee appointed by the Confederation of NATO Retired Civilian Staff Associations; this is as envisioned by Article 5.9 of Annex XIII. (The appellant stated that he had not seen the report and was not aware of its contents).

46. The appellant next contended that people over 65 receive more in reimbursements than they pay in premiums in all national health insurance schemes, and the imbalance between premiums paid by this population and the benefits it receives cannot justify a 67% increase in premium. This is a policy argument that cannot be decided by this Tribunal. This claim also must be dismissed.

47. The appellant's final substantive criticism of the decision to increase his premium was that NATO has taken insufficient steps to contain costs, for example by requiring former German civil servants to turn first to the German *"beihilfe"* system before obtaining reimbursement under the NATO insurance contract. Counsel for the respondent agreed that coverage under the NATO program is supplemental to coverage under national systems, and pointed out that claimants seeking reimbursement under NATO's insurance cover must affirm on the claims form that they have sought such reimbursement from national programs in the first instance. Whether more might be done, as appellant asserts, involves issues beyond the remit of this Tribunal. This claim is dismissed.

48. The appellant next alleged a series of procedural irregularities in connection with the decision to raise the insurance premium. The first is that the decision was taken by the Executive Management Division, and not by the Secretary General as “laid down in article 5.3 of annex XIII to the CPR.” Article 5.3 states that the RMCF Advisory Committee

is authorized to propose to the Secretary General that the annual premium be adjusted as appropriate in light of the long-term financial situation of the Fund.

49. The Tribunal first notes that this text does not logically entail that the Secretary General, and only the Secretary General, can make a decision to increase premiums. It states that the Advisory Committee, a body created to advise the Secretary General, can propose an increase to him. This is logical, given the advisory relationship between the committee and the Secretary General. However, this does not require that only the Secretary General can act in this regard. It may well be that a decision of such importance and affecting many persons should be made at the highest levels of the organization, but the language of Article 5.3 does not compel this result.

50. In any event, the Tribunal is persuaded by the documents of record that the impugned decision was indeed made by the Secretary General.

51. The second procedural irregularity alleged by the appellant was that the Supervisory Committee was not consulted prior to the decision. This was again said to violate Article 5 of Annex XIII. In the Tribunal’s view, this argument again asks the words of Article 5 to carry more weight than they can bear. A formal process of consultation regarding the premium increase in the Advisory Committee during one of its twice-yearly meetings would have been consistent with the committee’s consultative role under Article 5.1. The Tribunal cannot say that it was required.

52. The committee was created to serve an advisory role “with the object of ensuring that sufficient funds will always be available to cover medical costs” during the lifetimes of covered persons. To this end, the bulk of the committee’s role under Articles 3.1, 5.5, 5.6, 5.9 and 6.1 involves interaction with the Fund Managers and oversight of manner in which the RCMF’s funds are invested. Nothing in the text dictates that consultation with the committee is a necessary precondition for an increase in any group’s insurance premiums. This claim must be dismissed.

53. Finally, the appellant alleges that the increase of his premium violates Article 26 of NATO’s Group Insurance Contract provides that the annual premium increase under the policy cannot exceed 25%. However, it is clear from the text of that provision that it affects only the contractual relationship between NATO and the insurer and that it has no relevance to, and confers no rights upon, the appellant. This claim also must be dismissed.

54. The appellant’s claims of substantive and procedural defects in the decision relating to the increase of his insurance premium having been dismissed, his claim for €5.000 as moral damages is also dismissed.

E. Costs

55. Article 4.8.3 of Annex IX to the NCPR provides as follows:

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

56. The dismissal of appellant's claims gives rise to the dismissal of his claims under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The submissions in the appeal are dismissed.
- The security deposited by appellant shall be reimbursed.

Done in Brussels, on 14 January 2014.

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

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



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

3 March 2014

AT-J(2014)0003

Judgment

Case No. 900

BE,

Appellant

v.

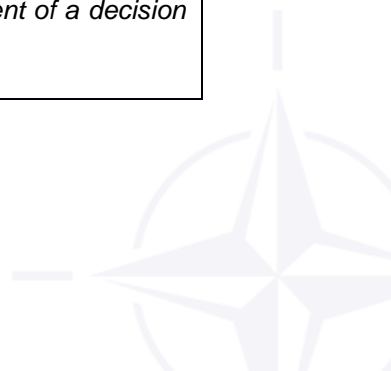
NATO Support Agency (NSPA),

Respondent

Brussels, 12 February 2014

Original: French

Keywords: Admissibility of the appeal: inadmissibility of an appeal seeking not annulment of a decision by a Head of NATO body but rather renegotiation of staff member's contract.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 16 December 2013.

A. Proceedings

1. The Appeals Board of the North Atlantic Treaty Organization (hereinafter "NATO") was seized of an appeal, dated 22 April 2013 and registered the same day, by Mrs BE. The appellant is currently a former staff member of the NATO Support Agency (hereinafter "NSPA").

2. The comments of the respondent, dated 25 June 2013, were registered on 27 June 2013. The reply of the appellant, dated 26 July 2013, was registered on 8 August 2013.

3. The above-mentioned appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst other things, establishing the NATO Administrative Tribunal (hereinafter "the Tribunal").

4. Pursuant to the Transitional Provisions contained in Art. 6.10 of the "new" Annex IX to the CPR, appeals pending before the NATO Appeals Board on 30 June 2013 shall be transferred to the Tribunal, which shall rule on them in accordance with the provisions of Annex IX in effect prior to when the new regulations entered into force (Regulations governing complaints and appeals, approved by the North Atlantic Council on 20 October 1965 and modified by PO(73)151 on 22 November 1973).

5. The Tribunal's Panel held an oral hearing on 16 December 2013 at NATO Headquarters in Brussels. It heard arguments by the appellant and her counsel, Maître L, on the one hand and, on the other, by Mr SL, NSPA Assistant Legal Adviser and Mr FP, Head of the NSPA Human Resources Division, representing the respondent, in the presence of Mr EG, Deputy Legal Adviser, NATO IS, Mr BS, Assistant Legal Adviser, NATO IS, and Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

7. On 1 June 2010 Mrs BE was recruited by the NSPA on a three-year definite duration contract as a procurement officer. Mrs E is the mother of a very young child, born in early 2010, whom she is raising on her own in Luxembourg, since her partner works in Potsdam, near Berlin.

8. Mrs E's contract contained a clause providing for mandatory deployment in support of Council-approved operations/missions. Under the application of that clause,

Mrs E was deployed to Afghanistan for 4 months from March to July 2011, and then again for one week in May 2012.

9. Mrs E had several performance reviews:
 - the first in November 2010, which concluded that her probationary period should be extended so that Mrs E's performance in a deployment could be reviewed;
 - the second in May 2011, which concluded that contract should be confirmed provided that she continued to agree to be deployed.
10. Mrs E then sought a change of assignment in order to avoid being deployed again, but she was unsuccessful in her applications to other NSPA posts.
11. On 27 November 2012, Mrs E was informed that her contract would not be renewed beyond 31 May 2013 in the light of her last performance review and the recommendations of her managers.
12. On 28 January 2013 Mrs E submitted a petition against that decision, supplemented by a letter on 11 February 2013. The NSPA General Manager replied to the petition on 14 March 2013 by saying that it was prepared to offer Mrs E a renewal of her contract if she did not persist in refusing to be deployed for longer than one or two weeks. It is that decision, which Mrs E interpreted as confirming the decision of 27 November 2012, which Mrs E asked the Appeals Board to annul on 22 April 2013.

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

(i) *The appellant's contentions:*

13. Appellant seeks from the Tribunal:
 - annulment of the decision of 27 November 2012 whereby the General Manager of the NATO Support Agency (NSPA) decided not to offer her a new contract when the one ending on 31 May 2013 expired;
 - annulment of the decision of 14 March 2013 whereby the NSPA General Manager dismissed her petition;
 - to be offered a new contract from 31 May 2013 onward to serve as a procurement officer, without a deployment clause;
 - as ancillary relief, to be granted compensation for the damage resulting from the lost chance to be awarded a new contract, equal to 80% of the emoluments she would have received had that contract been awarded to her;
 - compensation for non-material damage suffered, assessed at €15,000 in all;
 - reimbursement of the travel and subsistence expenses associated with her defence, and the cost of retaining counsel.
14. Appellant submits that:
 - the reason for non-renewal of the contract is illegal, and the decision is disproportionate to the reason behind it;

- the rules on deployment in Articles 3.1 and 3.3 of Annex XIV to the Civilian Personnel Regulations were not followed;
- the administration failed in its duty of care;
- the decision is discriminatory toward appellant because it is based on her situation as a young mother raising a child on her own;
- the decision was not taken in the interests of the service and is tainted with a manifest error of judgement;
- Mrs E had serious chances of getting her contract renewed, which justifies seeking redress for the material damage suffered in the form of compensation equal to 80% of what she would have earned if that contract had been awarded to her; and
- her non-material damage should be redressed by €15,000 in compensation.

(ii) *The respondent's contentions*

15. Respondent submits that:
- the NSPA General Manager, after reviewing the petition, offered Mrs E a new contract identical to the previous one on 14 March 2013, but appellant rejected this offer and requested a different contract from the first, without the deployment clause. Thus the appeal had been voided of substance prior to being referred to the Appeals Board and was therefore inadmissible;
 - Mrs E had never indicated a refusal to be deployed when completing the formalities prior to joining the NSPA, and had signed a contract containing a deployment clause in full knowledge of the facts;
 - her contract had only been confirmed in May 2011 on the condition that Mrs E agreed to the deployment clause; and
 - the reason for the contested decision was Mrs E's refusal to be deployed, under the application of the clauses of her contract.

D. Considerations and conclusions

Considerations on admissibility

16. Respondent disputes the admissibility of the appeal against the NSPA General Manager's decision of 14 March 2013 on the grounds that appellant is thought to have abused the legal remedies at her disposal to obtain a change in her conditions of employment.

17. Article 4.2.1 of Annex IX to the NATO Civilian Personnel Regulations, in the version that applies to this dispute, provides as follows:

The Appeals Board shall decide any individual dispute arising out of a decision taken by the Head of a NATO body either on his/her own authority or in application of a decision of the Council and which a staff member, or former staff member or his/her legal successors consider constitutes grounds for grievance. In this respect the Appeals Board shall have jurisdiction to resolve all questions regarding the interpretation and application of the Civilian Personnel Regulations, contracts or other terms of appointment.

Article 4.2.2 of the same Annex provides:

The Appeals Board may annul such decisions of the Heads of NATO bodies as are contrary to the contracts or other terms of appointment of the staff member concerned or to the relevant provisions of the Civilian Personnel Regulations ...

18. The contract signed on 1 June 2010 between the NSPA and Mrs E contains, at paragraph 3, a clause providing for mandatory deployment in support of Council-approved operations/missions. The NSPA, in the decision of 27 November 2012, decided not to renew that contract. In disputing that decision, Mrs E could only seek to have that decision on refusal annulled, i.e. to get her initial contract extended.

19. It appears, however, that her request has another aim: as she herself wrote when confirming the notification of the disputed decision, she wishes to remain employed by the NSPA but asks not to be deployed any more owing to her family situation. Her letters of 28 January 2013 and 11 February 2013, which she presented as a petition against the decision not to renew her contract, do not seek renewal of the contract of 1 June 2010 (which would be equivalent to annulment of the decision of 27 November 2012) but rather to sign a different contract in which the clause on mandatory deployment has been withdrawn.

20. Thus Mrs E is using the channel of a petition followed by an appeal not to get a decision by the Administration annulled, but rather to enter into discussions with it on the clauses of her contract. In so doing, she is no longer seeking annulment of the decision of 27 November 2012: this is confirmed by the exchange of memoranda before the NATO Administrative Tribunal: on 14 March 2013 the NSPA agreed to withdraw its decision of 27 November 2012 and offered to renew Mrs E's contract of 2010 under the same terms; thus the NSPA fully satisfied Mrs E's initial request. The circumstance of Mrs E not accepting this offer confirms that she was not seeking annulment of the decision of 27 November 2012 but rather renegotiation of her initial contract.

21. Furthermore, it is apparent from the case file that appellant never disputed the validity of the Administration's decisions to send her on a deployment in support of operations.

22. However, Mrs E's submissions seeking a different contract from the one on which she had been employed are not directed against a decision by a Head of NATO body and are therefore not admissible.

23. Given that the appeal is inadmissible, it is not necessary to discuss the validity of Mrs E's submissions.

E. Costs

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

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

25. Dismissal of Mrs E's appeal entails dismissal of all appellant's claims for expenses.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- Mrs E's appeal is dismissed.
- The security deposited by Mrs E shall be reimbursed.

Done in Brussels, on 12 February 2014

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

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



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

3 March 2014

AT-J(2014)0004

Judgment

Case No. 902

BT,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 17 February 2014

Original: English

Keywords: admissibility; complaint; reasonable time; successive temporary contracts; permanent functions; termination of contract; previous notice.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 16 December 2013.

A. Proceedings

1. The NATO Administrative Tribunal was seized of an appeal against the NATO International Staff, dated 16 May 2013, by Ms BT, a former temporary member of NATO staff, seeking in particular the annulment of the International Staff's decision to terminate her contract on 28 February 2013.

2. The comments of the respondent in the present case, dated 29 July 2013, seek the dismissal of the appellants' submissions. The appellant presented her reply to the comments on 29 August 2013.

3. The above-mentioned appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal (hereinafter "the Tribunal").

4. Pursuant to the Transitional Provisions contained in Article 6.10 of ("new") Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to when the new regulations entered into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

5. The Tribunal's Panel held an oral hearing on 16 December 2013 at NATO Headquarters. It heard arguments by the appellant and her counsel, Maître L, of Lallemand & Legros, Brussels, representing the appellant, and Mr BS, Assistant Legal Adviser, NATO IS, Mr AS, Head Staff Services, and Mrs GN, Head Engagement section, Public Diplomacy Division, representing the respondent, in the presence of Mr CS, President NATO IS Staff Association, Mr PL, NATO IS Staff Association, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

7. On 30 July 2010 an Interim Job Opportunity in the Corporate Communication Department within the Public Diplomacy Division, was distributed and advertised among interns for the temporary replacement of a staff member on maternity leave (expected to end on 11 March 2011). After a selection procedure, appellant was selected for the vacant position and signed a temporary contract from 1 October 2010 until 21 December 2010.

8. The staff member being replaced was subsequently granted special leave and unpaid leave. On 11 January appellant signed a second temporary contract for the period 3 January – 31 March 2011.

9. Appellant further signed five consecutive temporary contracts, always within the Public Diplomacy Division of the International Staff (IS), for the period 4 April - 3 July 2011 (further extended till 3 October 2011), 5 October – 20 December 2011, 2 January – 29 March 2012 (further extended till 29 June 2012), 3 July – 28 September 2012 (further extended till 21 December 2012), and 3 January – 28 February 2013.

10. On 11 February 2013, appellant was informed by her supervisor that her temporary contract with the Organization would expire at its due date, on 28 February 2013. On 21 February 2013 appellant sent an e-mail to her Head of Division and the Deputy Assistant Secretary General for Human Resources complaining about her contractual situation and requesting to pursue the matter further. On 28 February 2013, failing a response to her 21 February e-mail, appellant submitted a formal complaint to the Secretary General. The complaint remained unanswered and therefore was implicitly rejected by the Secretary General in accordance with the NCPR. Appellant lodged an appeal with the Appeals Board on 16 May 2013.

12. Since 25 March 2013, appellant has been employed with the UK civil service.

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

(i) The appellant's contentions

13. Appellant submits that her temporary contracts were renewed and extended several times without ever stating any reasons for their being temporary. She was employed for 29 months in the same post performing the same tasks. Appellant considers that the said tasks were clearly of a permanent nature and therefore she should have been employed on the basis of a permanent contract, pursuant to Article 5 of the NCPR, since 1 October 2010.

14. Appellant also submits that there was no due and valid reason to terminate her contract in accordance with Article 9 of the NCPR. Under the provisions of that Article contracts can only be terminated for due and valid reasons such as unsatisfactory performance or suppression of the post concerned, both of which criteria, according to appellant, did not apply in this case. Appellant therefore requests that the decision to terminate her contract be annulled.

15. Appellant requests compensation for material damage caused by the refusal to reclassify or to renew her temporary contract in accordance with Article 5 of the NCPR. Taking into account her employment in the UK, appellant reckons that the prejudice caused by such illegal action should be evaluated on the basis of the difference between the salary she would have received at NATO and the current salary received

in the UK until retirement age or, in consideration of the eventuality that such a contract is terminated before retirement, 85% of that amount.

16. The material damage should also include the difference between what she received from NATO during her period of employment and what she would have received as a permanent staff member for that period in terms of salary, allowances and other benefits (such as expatriation, rent and installation allowance, travel and removal expenses, steps increments and pension contributions). Further, in accordance with the above parameters of calculation, the compensation should also cover the period between 28 February and 25 March 2013, during which appellant had no a professional activity.

17. Furthermore, in subsidiary order, in case appellant should be considered to hold a contract of definite duration instead of indefinite duration (three-year contract) from 1 October 2010, the date of expiry of the contract would be 30 September 2013. Therefore, compensation for the period 28 February – 30 September 2013 (minus the emoluments received from the UK civil service) should be given in addition to the compensation due to violation of the provisions of Article 5.5.1 NCPR. Appellant also adds that consideration should be given to her loss of the chance to obtain an indefinite duration contract with NATO.

18. In addition, appellant claims compensation for non-material prejudice, caused by the distress of spending almost three years in a situation of professional uncertainty, evaluated at €30.000.

19. In sum, appellant requests the Appeals Board:

- to annul the implicit decision to reject appellant's complaints;
- to recognize the permanent nature of her contract since 1 October 2010 and the entitlement to all rights of permanent staff members from that date;
- to annul the decision to terminate her contract on 28 February 2013 and, as a consequence, to assign the corresponding financial compensation calculated on the basis of rejoining the staff for an indefinite duration or at least until 30 September 2013, with a reassessment of the possibility of offering her a contract of indefinite duration;
- to compensate her moral prejudice caused by the lack of stability and security of employment, evaluated at € 30.000; and
- to order the reimbursement of counsel and travel costs.

(ii) *The respondent's contentions:*

20. Respondent submits that the appeal has to be considered inadmissible as the proper channels for referral of complaints were not respected in that the procedural steps foreseen in the regulations (referral to the immediate hierarchy first and the Head of the NATO body after) were initiated only 3.75 working days apart, thus not allowing the administration to address the complaint properly.

21. Respondent also states that the appeal should be considered inadmissible because it was not filed within a reasonable time as foreseen in Article 61.3 of the

NCPR. In support of this argument respondent advances the fact that appellant addressed her complaint regarding the reclassification of the contract 29 months after having signed her first temporary contract. It is also added that the request to rejoin the staff should also be seen as improper in consideration of appellant's current employment in the UK.

22. Respondent stresses that Articles 77 and 78 of the NCPR are the correct legal framework for the temporary contracts that appellant is challenging. It is noted by respondent that appellant was fully aware of the temporary nature of her assignment since, as part of each of her contracts, she signed the corresponding Undertakings, by which the temporary nature of the employment is clearly acknowledged.

23. Moreover, respondent also notes that the temporary circumstances under which appellant was hired were also well known to her; also, the requests for the temporary positions were properly supported by the necessary agreement and endorsement of the competent authorities.

24. Respondent outlines the temporary circumstances as follows: firstly the maternity leave, special leave and unpaid leave of a staff member in the Public Diplomacy Corporate Communication Section (CCS) for whose post appellant was selected, after participating in an Interim Job Opportunity procedure, for the period 1 October 2010 – 31 March 2011. Secondly, the NATO operation in Libya, which commenced on 25 March 2011, led to a dramatic increase of the workload in the Press and Media Section. Appellant replaced a staff member in the CCS, temporarily assigned to work in the Press section, for the period 4 April – 20 December 2011. Further, due to an increase of tasks for, and in the aftermath, of the Chicago Summit, appellant was employed for the period 2 January – 29 June 2012. Finally, appellant replaced a CCS staff member who was granted unpaid leave of absence to pursue, in the interest of the Organization, an academic assignment abroad, for the period 3 July – 21 December. After this period, the budgetary approval for the temporary staff could only be secured until March 2013 and therefore appellant was offered a final temporary contract from 3 January to 28 February 2013.

25. In reply to appellant's claims outlining the continuation of the same functions and duties in accordance with almost identical job descriptions, respondent replies that the description of duties annexed to temporary contracts are drafted to define a general framework of tasks to be performed (especially for administrative posts). Such descriptions should therefore not be considered as an indication of the exact functions which are then performed as daily activities.

26. Respondent contests the request for requalification of the temporary contracts as an indefinite duration contract and stresses that the Organization did not commit any error or fault in not responding to such a request; respondent therefore rejects any claim for monetary compensation and denies any prejudice to appellant. In addition, the claim of illegal contract termination is rejected, noting that appellant's last contract came to its natural end on the due date.

27. Furthermore, respondent points out that, in case the Tribunal should consider the contracts not to be covered by Articles 77 and 78 of the NCPR, appellant would

have been entitled not to an initial contract under Article 5 of the NCPR, but in application of the 2007 contract policy, to a definite duration contract. Moreover respondent adds that, in accordance with Appeals Board case law, on expiry of a definite duration contract there is no obligation to give reasons for non-renewal.

28. Respondent rejects any claim with regard to possible indefinite duration employment with the Organization until retirement age (Article 5.4.1 of the NCPR) and any related financial compensation. Further, respondent rejects any claim for the granting of the various allowances and benefits, as the conditions of their entitlement would have to be demonstrated.

29. In sum, respondent requests the Appeals Board:
- to declare the appeal inadmissible; and
- to the extent that it is admissible, to reject the appeal as unfounded.

D. Considerations and conclusions

(i) Considerations on admissibility

30. In its answer respondent pleads the inadmissibility of the appeal on the grounds that the complaint to the HONB was filed on 28 February 2013, only 3.75 working days after her previous complaint to the head of her office, preventing the Organization from responding in such a short period.

31. Old Article 61.1 of the NCPR states:

Members of the staff shall, in the first instance, refer any complaint affecting their work or their conditions of work or of service to the head of their division or office, through their immediate supervisor.

Article 61.3 of the same Regulations further states:

(a)fter recourse to the procedures in paragraphs 1 and 2 of this article, members of the staff shall be entitled to submit in writing and within a reasonable time their complaints to the Head of the NATO body concerned in accordance with the provisions of Articles 2 and 3 of Annex IX to these regulations.

32. In the terms of old Article 2 of Annex IX to the NCPR:

1. Members of the staff making a written complaint in accordance with the provisions of Article 61 of the Civilian Personnel Regulations shall submit the complaint to the Head of the NATO body to which they belong through the official responsible for personnel management (...) 2. Members of the staff making a complaint shall be entitled to request that, before a decision is taken, the complaint be submitted to a Complaints Committee (...) 3. Alternatively, Heads of NATO bodies may decide to submit a complaint to the Committee on their own initiative.

33. To ensure legal certainty the notion of reasonable time must be assessed in the light of Article 4.3.2 of Annex IX and Article 24.6 of the NCPR where longer delays are accepted in exceptional and justified situations (*cf* NATO Administrative Tribunal, case No. 897, and those of the NATO Appeals Board mentioned there).

34. Respondent considers that the appeal was lodged within too short a time after the first complaint was submitted by appellant. However, it is the opinion of the Tribunal that in a case like the present one the employee could only react against the Organization's decision after the termination of his/her contract has been notified. It is of the utmost importance to highlight that the decision was to come into effect just a few days later (on 28 February). Appellant could not be obliged to wait beyond her final day at work to be allowed to make a formal complaint. Reasonable treatment would also require a quick answer when the challenged decision had the necessary consequence of the person losing a job in the Organization. It was the Organization's decision to notify appellant of the termination of her contract at such short notice that gave rise to appellant's need to react rapidly. A complaint from the appellant could have been expected within the remaining period of her employment.

35. The appeal can therefore not be declared inadmissible on the above- mentioned grounds.

36. Respondent also submits that the appeal is inadmissible because it seeks reclassification of the appellant's former contracts, as from 1 October 2010, while she only addressed the matter to her hierarchy on 21 February 2013.

37. The decision of the Organization implied the end of a relationship between the parties based on different but successive contracts. The Tribunal judgment is that, where there is a succession of temporary contacts with no intervals between them, a dispute about the classification of the employment relationship can appear whenever the termination of the parties' contractual link becomes evident and definite.

38. The appeal is therefore admissible.

(ii) Considerations on merits

39. Article 77.1 of the NCPR provides:

Temporary personnel may be engaged by the Head of the NATO body when necessary to replace members of the staff who are absent or to undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned.

40. Appellant was engaged for the first time on 1 October 2010 to replace another staff member who went on maternity leave and subsequent additional leave, as mentioned in the Interim Job Opportunity. This kind of absence satisfied the necessity of replacement by means of a temporary contract and was, in principle, in accordance with the above-mentioned provisions of the NCPR. The temporary staff member employed in these circumstances is not, in legal terms, in a permanent post; the staff member replaced remains in this post, even though he or she is not physically present.

41. Article 78.1 of the NCPR establishes the maximum duration of temporary employment, which shall not normally exceed a period of 90 consecutive days, extendible by one further period not exceeding 90 days. However, these limits can be exceeded in exceptional cases, as permitted by Article 78.2 of the NCPR. In any case, the prolongation of the leave taken by the staff member being replaced, due to similar circumstances such as maternity and child care, would give grounds for considering the situation to be exceptional (*cf* NATO Appeals Board No. 878). Therefore, the Tribunal concludes that from 1 October 2010 until 31 March 2011 appellant was legitimately employed on a temporary basis and fully aware of the reasons for her appointment.

42. The Libya crisis, starting on February 2011 with UN Security Council resolutions 1970 and 1973 in support of the Libyan people, led to NATO participation from 31 March until 31 October 2011. It is easily understandable that such dramatic and sudden events could result in a specific increase of the tasks to be performed in many departments of the Organization, including PDD's Corporate Communication Section, and appellant could not be unaware of this. The Tribunal can therefore admit the need for additional personnel in a temporary situation that overloaded the regular capacity of this Section. Appellant's contract of 4 April 2011 could cover those extra commitments, even if the Administration was not fully precise in formulating the reasons for the appointment.

43. Nevertheless, as already said, the duration of temporary employment is limited to the maximum periods established in Article 78.1 and 2 of the NCPR. The exceptional situation allowed the extension of the contract up to 20 December 2011. But it must be said that the temporary status became unsustainable beyond that date. The rules did not permit the Organization to prolong the temporary status any further.

44. It is clear to the Tribunal that appellant continued doing the same work from the very beginning, also performing similar tasks during the subsequent period (from 2 January to 29 June 2012) in spite of the observations by respondent about preparations for the Chicago Summit. The Summit took place on 20 and 21 May 2012. However, appellant was in the same job with no gap or interruption from the above-mentioned date of 20 December 2011, when the temporary status should have expired.

45. Finally, although respondent submits that appellant replaced as from June 2012 a staff member of the CC Division who was granted unpaid leave of absence, no evidence has been laid before the Tribunal to assess the justification for the contracts from 3 July 2012, after the alleged Chicago Summit' requirements. The work done by appellant was a continuous whole and its division into different contractual periods became fictitious from the completion of the maximum legitimate period after the Libya requirement. At that moment it could be considered that her duties were of a lasting nature.

46. Pursuant to Article 5.1 of the NCPR staff appointed to the Organization shall be offered contracts, known as initial contracts – definite duration contracts for staff appointed on or after 1 April 2012 - of between one and 3 years' duration. Accordingly, appellant's contractual relationship with the Organization cannot be based on Article 77

of the NCPR and has to be qualified as an initial contract from 2 January 2012, after the expiration of the maximum temporary contractual period.

47. An initial contract gave the Organization the possibility of terminating it after giving notice or, as provided in Article 10.5 of the NCPR, by substituting an allowance equal to the emoluments for the period of notice. Thus, the decision of 11 February 2013 to terminate the working relationship should be considered as a dismissal giving appellant the right to receive the applicable allowances.

48. Regarding Article 10.2 of the NCPR, should the Organization decide to terminate the initial contract before the expiry of the contractual period, a 90 calendar day's notice shall be given to the member of the staff. It follows from the designation of the contract as an initial one that it could not be terminated on 28 February 2013 without previous notice and justified grounds. Hence, accepting that there was no longer a requirement in the Division for additional manpower, the decision to put an end to the relationship could not come into force before 11 May 2013, entitling appellant to keep all her rights up to that date, together with a sum equal to the emoluments, corresponding to the period of notice not worked, including all the applicable emoluments and indemnities provided for in Article 10.9 and Article 3 of Annex V of the NCPR. Nevertheless, as appellant secured another job from 25 March 2013, the amount of the resulting payments shall be diminished by the income from this new employment.

49. Appellant argues that her succession of temporary contracts deprived her of the possibility of obtaining an indefinite duration contract, and requests compensation under this head, but it has not been shown that she would have had serious chances of obtaining such jobs. Appellant has not provided any proof for her submission and the Tribunal cannot deal with hypothetical situations.

50. Appellant requests entitlement to all rights of permanent staff members. She in particular submits a number of claims for allowances and benefits. It is to be observed, first of all, that a staff member is only entitled to allowances and benefits if he/she meets specific conditions laid down in the NCPR. It is up to the staff member to request the granting of allowances and benefits and to provide the corresponding justification, or as Article 24.3 NCPR provides: "members of the staff shall furnish all information necessary for the determination of their eligibility for allowances". Secondly, when claims concerning allowances and benefits are submitted to the Tribunal an appellant must duly substantiate them and provide conclusive evidence in support of each claim. The Tribunal will analyze the respective claims against this background.

51. Appellant claims to be entitled to a rent allowance in the amount of € 498.53. Article 33 NCPR provides that a rent allowance may be granted to members of the staff in the B and C categories and in the A and L categories up to and including grades A.2/L.2 in accordance with the provisions of Annex III.E. Annex III.E ("Regulations concerning the rent allowance") stipulates that a staff member may be entitled to a rent allowance if he/she is the tenant or sub-tenant of furnished or unfurnished premises suitable to his grade and family circumstances and if the rent paid, excluding all charges, exceeds 22% of the emoluments of all officials of grades A.1 and A.2.

Appellant states that she no longer has her rental contract. The Tribunal cannot but conclude that the claim is not substantiated and must be denied.

52. Appellant claims to be entitled to an installation allowance in the amount of € 721.52. Article 26.1.1 NCPR provides that an installation allowance is only granted to members of the staff whose established residence was more than 100 km from the place of employment at the time when they accepted employment and who move their established residence in order to take up appointment. Appellant contends that she qualifies for this allowance since she had taken up residence in Cambodia again after her internship with NATO ending on 31 August 2010 and moved her residence to Brussels again in order to take up appointment on 1 October 2010. This submission lacks credibility. Appellant was officially resident in Brussels, Belgium, during her internship as from 1 March 2010 and was registered with the Belgian authorities. She gave a Denbighshire, UK, address as her last address before arriving in Belgium. The Tribunal observes that the Interim Job Opportunity was issued on 30 July 2010, that applicants were interviewed and that appellant was selected and signed a contract on 1 October 2010. The record does not show when appellant was informed of her selection. The appeal does not provide proof that appellant officially ended her residence in Belgium on or after 31 August 2010, for example by giving notice under a rental agreement, or that she took up official and registered residence for less than a month in Cambodia. Unless there is compelling proof to the contrary – and the burden of proof lies with appellant in this respect - a relatively short absence from Brussels cannot be considered as a taking up of official residence elsewhere. The claim for an installation allowance must be denied.

53. Appellant claims to be entitled to an expatriation allowance in the amount of €15.200,99. Article 28.2.1 NCPR provides that the expatriation allowance shall be paid to staff who, at the time of their appointment by the Organization, were not nationals of the host state and had not been continuously resident on that state's territory for at least one year. The Tribunal having concluded that appellant was resident in Belgium at least since 1 March 2010, *i.e.* more than one year before she can be considered a staff member holding an initial contract, the claim for an expatriation allowance must be denied.

54. Appellant claims to be entitled to travel and removal expenses. Appellant has, however, not substantiated her claim. The claim must be denied.

55. Appellant also request compensation of moral prejudice caused by a lack of stability and security of employment. Tribunal has established that the instability in her situation emerged clearly only after the expiration of the maximum period of a justified temporary contract. The uncertainty of permanent employment is bound to cause inability to plan personal and familiar life, but taking in consideration the duration of this uncertainty, the damage that appellant suffered can fairly be assessed at € 2.500.

E. Costs

56. Article 4.8.3 of Annex IX to the NCPR provides as follows:

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

The appeal being successful appellant is entitled to the reimbursement of the costs of retaining counsel, up to a maximum of € 4.000 (four thousand Euro) and travel and subsistence costs to be present at the hearing held in Brussels.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- Ms T was employed under an initial contract from 2 January 2012.
- Ms T is entitled to emoluments and indemnities for unlawful termination of the contract on 28 February 2013, under the conditions set down above.
- Ms T is also entitled to €2.500 for damages.
- NATO shall reimburse Ms T the costs of retaining counsel up to a maximum of €4.000 and any substantiated travel and subsistence costs incurred by her to appear before the Board, within the travel expense limits laid down for staff members of this grade.
- The security deposited by appellant shall be reimbursed.
- All other claims are denied.

Done in Brussels, on 17 February 2014.

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

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



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

3 March 2014

AT-J(2014)0005

Judgment

Case No. 903

BC,

Appellant

v.

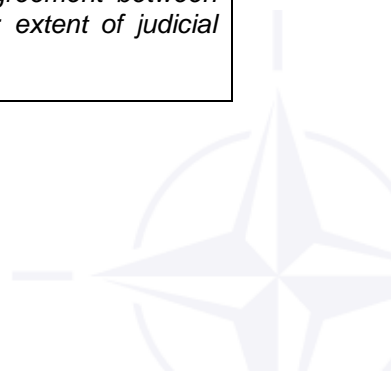
NATO International Staff,

Respondent

Brussels, 17 February 2014

Original: French

Keywords: Definite duration contract; NCPR Article 5.5; NCPR Article 55.5; NCPR Annex VIII.B; PRD Implementing Directive; Annual Review (AR); decision not to renew; settlement agreement between parties; inadmissibility; plea of illegality; equal treatment; performance assessment; extent of judicial oversight.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey-Sahùn and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 17 December 2013.

A. Proceedings

1. On 3 June 2013, the Appeals Board of the North Atlantic Treaty Organization (hereinafter referred to as "the Appeals Board") was seized of an appeal by Mr BC, a former member of the NATO International Staff, seeking in particular cancellation of the decision of the International Staff not to renew his contract and the subsequent decision on the details of the conclusion of his contractual situation at NATO.

2. The comments of the respondent in the present case were presented on 9 August 2013. The appellant presented his reply to the Comments on 6 September 2013.

3. The above-mentioned appeal was lodged prior to the entry into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst other things, establishing the NATO Administrative Tribunal (hereinafter "the Tribunal").

4. Pursuant to the Transitional Provisions contained in Article 6.10 of the "new" Annex IX to the CPR, appeals pending before the NATO Appeals Board on 30 June 2013 shall be transferred to the Tribunal, which shall rule on them in accordance with the provisions of Annex IX in effect prior to the entry into force of the new regulations (Regulations governing complaints and appeals, approved by the North Atlantic Council on 20 October 1965 and modified by PO(73)151 on 22 November 1973).

5. The Tribunal's Panel held an oral hearing on 17 December 2013 at NATO Headquarters. It heard arguments by the appellant and his counsel, Maître AB, on the one hand and, on the other, by Mr EG, Deputy NATO IS Legal Adviser, Mr BS, Assistant Legal Adviser, NATO IS, Mr EW, Head of Talent Management and Organizational Development, and Mrs BC, HR Adviser, Management and Organizational Support, representing the respondent, in the presence of Mr PL and Mr MB, NATO IS Staff Association, and Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

6. Under his initial contract, the appellant was recruited to the NATO International Staff, Executive Management Division/Headquarters Support. He was recruited to this Division for a period of three years with effect from 18 October 2010.

7. Articles 5.5.1 to 5.5.3 of the CPR state as follows:

The staff member shall be informed in writing not less than 6 months before the expiry of a contract whether or not it is intended to offer a further contract.

Following satisfactory performance during (an) initial contract(s) or a reassignment contract, the Head of the NATO body may offer an indefinite duration contract (...).

Following satisfactory performance during a definite duration contract, the Head of the NATO body may, in the interests of the service, offer: - the renewal of the definite duration contract under the conditions of Article 5.2; or - an indefinite duration contract under the conditions of Article 5.4 if the staff member has completed at least 3 years continuous service under a definite duration contract or contracts.

8. Article 55.5 of the CPR provides as follows:

In the event that the Head of the NATO body establishes a system of performance management, the performance assessment criteria shall be set out in Annex VIII.B.

9. As explained in the Office Notice issued by the Deputy Assistant Secretary General for Human Resources on 8 April 2010, a Performance Review and Development (PRD) Handbook was adopted in accordance with the above-mentioned provisions of the CPR.

10. An Implementing Directive on PRD (hereinafter referred to as "the PRD Directive") established the conditions governing the system for assessing staff members' performance. As set out in paragraph 6 of the PRD Directive, this system consists of three cycles/phases: firstly Objective Setting (OS), secondly the Mid-Term Review (MTR), and finally the Annual Review (AR) of the staff member. The last phase takes place between December of the year of evaluation and March of the following year (PRD Directive paragraph 7 and Annex 5).

11. Paragraph 1.3 of Annex 2 ("Personnel Decisions") to the PRD Directive states as follows: "Inter alia, a subsequent indefinite duration contract will require final ratings of "Good" and at least one final rating better than "Good" (*i.e.* "Very good" or above) in the most recent PRD AR reports".

12. As set out in the instructions to managers in respect of performance review, and particularly in Annex 2, the purpose of the calibration process is to enable the manager to enrich his or her view with input from peers and superiors. These instructions also state that the process begins in March for each reference year and, in this framework, a staff member's evaluation may be changed during a calibration meeting. In this case, a Supplement to Annual Review Form is completed, giving the reasons for the change.

13. Under the above-mentioned procedure, a staff member's evaluation becomes final after approval by the HQ Management Board (HQMB) or by the body responsible for the final calibration.

14. In accordance with the aforementioned regulations, the appellant underwent an annual assessment from the time of his recruitment and for the three years of his contract, and a report was drawn up for the relevant periods in 2010, 2011 and 2012.

15. The appellant's performance report for 2010 stated that he *"produced good quality work within his team and demonstrated willingness"* and that he *"should show a little more initiative, given his skills"*. *"Good performance"* was noted in the section on the appellant's general assessment.

16. The file presented to the Tribunal shows that the appellant's managers gave him the same assessment for 2011.

17. In 2012, the appellant's performance report showed that he had *"produced good quality work throughout the year"*. This report also mentioned *"a slight lack of initiative within the team"*. His managers proposed a rating of *"very good"*.

18. The file shows that on 4 April 2013 the appellant was informed by those in charge of his service that, during the calibration process, his performance rating was downgraded from *"very good"* to *"good"*.

19. In a letter to the appellant dated 4 April 2013, the Assistant Secretary General *a.i.* for Executive Management, acting on the authority of the Secretary General, reminded him that:

the award of an indefinite duration contract requires final ratings of "Good" and at least one final rating better than "Good" (i.e. "Very good" or above) in the most recent (...) AR reports.

In the same letter, the signatory informed the appellant that in his most recent performance reports, *i.e.* those of 2011 and 2012, his *"final ratings were only "good" and therefore did not meet the criteria necessary for the award of an indefinite duration contract."* In these circumstances, the appellant was told that the Organization did not intend to offer him a new contract upon expiry of his current contract and that his employment would, in any event, be terminated on 17 October 2013 (hereinafter referred to as *"the contested decision"*).

20. In a letter to the appellant dated 8 May 2013, the Deputy Assistant Secretary General for Human Resources informed him that, at a meeting held on 29 April involving, on the one hand, staff and advisers from Human Resources and, on the other hand, the President of the Staff Committee, it had been agreed that the appellant would not be required to perform his duties after 29 April 2013 and that he would receive a one-off payment to cover his emoluments for the remaining period of his contract. This letter also informed the appellant that his holdings in the Defined Contribution Pension Scheme would be paid to him at the end of the contractual period and that, in accordance with the applicable regulations (Article 42.3.7 of the CPR), there would be no compensation for annual leave not taken. Finally, the letter asked the appellant to comply with all the administrative formalities related to his departure from NATO.

21. On 3 June 2013, in accordance with the applicable regulations, the Head of Infrastructure and Facilities Management addressed a letter to the appellant informing him that, following the calibration process, *"a change was made to the proposed*

assessment" by his manager for his 2012 performance and that the HQMB had approved and finalized this change; the appellant was thus invited to carry out the formalities necessary to take account of this change.

22. On the same day, and in these circumstances, the appellant decided to lodge directly with the Appeals Board a request for the cancellation of the contested decision and the above-mentioned letter of 8 May giving details of the conclusion of his contractual situation.

23. On 5 June 2013, the appellant acknowledged receipt of the Supplement to Annual Review Form, which stated as follows:

the assessments and the evaluation of overall competencies are strictly at the required level but are not in excess of those required for the post and do not justify the proposed rating. A rating of "good" is more appropriate in the light of these facts and also a slight lack of initiative, motivation and involvement in his objectives. His work has been good; on the other hand, it is unfortunate that he performs his work very slowly compared with other colleagues (...).

In this Supplement, the appellant's final rating was changed to "good".

24. Having acknowledged receipt of the Supplement to Annual Review Form for 2012 on 5 June 2013, the appellant formally contested the assessments and indicated on this Supplement that he had already lodged an appeal on the matter with the NATO Appeals Board.

C. Parties' contentions, arguments and relief sought

(i) On the admissibility of the appellant's submissions

25. The respondent submits a plea of inadmissibility on the second point in the appellant's submissions, claiming that the agreement of 8 May 2013 on the details of the conclusion of his contractual situation - described by the appellant as a decision - was not a measure taken by a head of a NATO body. It is claimed that this was actually a note informing the appellant of the agreement that had been reached following a meeting between Human Resources personnel and the President of the Staff Committee concerning his case and establishing the details of the conclusion of his contract. The appellant's submissions seeking cancellation of this measure should, therefore, be declared inadmissible.

26. The appellant's reply is that his appeal is admissible both in respect of the decision of 4 April 2013 on the non-renewal of his contract and in respect of the decision of 8 May 2013 on the details of the conclusion of his contractual situation with the respondent. According to the appellant, the latter decision is a measure implementing the decision of 4 April 2013 and is ancillary to it. In any event, the two decisions are indissociable.

(ii) On the submissions seeking cancellation

27. The appellant requests cancellation of the decision of 4 April 2013 on the non-renewal of his definite duration contract upon its expiry, *i.e.* 17 October 2013, and, as a corollary, of the decision of 8 May 2013 on the details of the conclusion of his contractual situation with the respondent.

28. In this respect, he first of all pleads the illegality of the PRD rules and Implementing Directive on the basis of which the contested decisions were taken, asserting that the deciding authority for these rules (*i.e.* the Head of Human Resources and not the Secretary General) was not competent in the matter and that they were in direct violation of Annexes VIII.A and VIII.B of the CPR.

29. The appellant claims that, under Article 4.2.2 of Annex IX to the CPR in the version applicable to this case, the Appeals Board could rule on such grievances and consequently declare his action admissible for this reason (see Decisions 338, 424, 437 and 784 to 794, 797 to 804, 807 to 809, 893 and 894). In the same context, Article 6.2.1 of Annex IX to the CPR now states as follows:

the Tribunal shall have the authority to rule on the (CPR) in the event that a CPR provision seriously violates a general principle of international public service law.

30. As regards the substance, the appellant asserts that there is a lack of transparency in the system established by the PRD Handbook and its Implementing Directive. The individual assessment of staff members loses all its significance since it is carried out in accordance with an overall plan, while the assessment system provided for in the CPR is based on the individual nature of performance and the importance of dialogue between the staff member and his or her direct manager. He claims, furthermore, that this system gives rise to a large divergence in the assessment of staff of different grades; statistics show that staff in higher grades are clearly over-assessed as compared with staff in other grades, particularly C grade (that of the appellant). With this system, the Organization is actually establishing a hidden quota policy, in violation of the principle of non-discrimination and equal treatment of staff.

31. The appellant goes on to claim that the respondent committed an error of judgement since, assuming that the PRD rules are legal, in the last two years of his assessment the appellant received two ratings of "good" for 2011 and "very good" for 2012, in line with the regulatory requirements for the offer of an indefinite duration contract. In these circumstances, and taking account of his three years working for the Organization, the renewal of his contract was, moreover, justified in the interests of the service.

32. In any event, the appellant claims that the respondent committed an error of judgement by downgrading his performance since, in respect of his work and his superiors' reports and comments, his performance in 2012 could only be classed as "very good". According to the appellant, it is clear that he met the conditions required by the applicable regulations by accomplishing, quickly and effectively, the tasks given

to him. Furthermore, his superiors had praised his involvement in a training session given in November 2012, for which he had prepared a full presentation although this type of work was not part of his duties. By downgrading the appellant's performance for the period under dispute, therefore, the respondent committed a manifest error of judgement based on assumptions which were clearly wrong and inaccurate, in violation of the interests of the service.

33. Finally, according to the appellant, the regrading of his performance for 2012 from "very good" to "good" was irregular in several respects, in clear violation of the PRD system and its Implementing Directive.

34. Firstly, the appellant was never informed that his performance report was going to be downgraded, and never signed the Supplement to Annual Review Form; this information reached him on 4 April 2013 with the contested decision. His superiors had already decided on 26 February 2013 to propose downgrading his assessment and had not indicated anything to him at his mid-term review in summer 2012, although it was crucial for him to be warned that his work no longer met the requirements of the applicable regulatory framework and that his contract was at stake.

35. Secondly, while the evaluation process had not been completed, the contested decision anticipated that the appellant's performance would, in any event, be downgraded; the decision to downgrade was taken on 29 April 2013, while the information concerning the revision of his performance rating was formally sent to him on 4 April 2013.

36. Thirdly, the contested decision was taken even though Annex VIII.B also offered him the possibility of going to mediation in order to assert his rights and avoid, in substance, contentious reassessment. However, as he received on the same day both the information that his 2012 rating had been downgraded and the decision that his contract would not be renewed, there was no sense in asking for the mediation procedure to be launched. Moreover, he was not told that he had the right to go to mediation.

37. Fourthly, the respondent never gave the appellant the opportunity to address his alleged performance problems as early as possible, in particular at the mid-term review for the year in question, and to take corrective action or, as provided for in paragraph 12.2 and Annex 2 of the PRD Directive, to take up the assistance provided for in the event of unsatisfactory performance.

38. As regards the submissions directed against the decision of 8 May 2013 on the details of the conclusion of his contractual situation, the appellant asserts that, in making this decision, the respondent violated the provisions of Article 42.3.7 of the CPR, as the days of untaken leave should have been subject to financial compensation not exceeding the equivalent of 15 days' emoluments.

39. The respondent argues firstly that, under Article 4.3.1 of Annex IX to the CPR, the Tribunal is not competent to rule on pleas of illegality submitted by parties

contesting the legality of regulatory acts of the NATO authorities. Therefore, and in the light of Appeals Board case law and in particular the decision on case 781, the appeal should be declared inadmissible in that it seeks to declare the acts in question illegal.

40. In any event, the respondent considers that the PRD system and Implementing Directive were adopted by the Secretary General and that the complaint of incompetence is therefore unfounded.

41. As for violation of the principle of non-discrimination, alleged in the same context, the respondent rejects the allegation that the PRD Directive aims, in substance, to secretly institute a policy of quotas. Furthermore, the appellant did not put any specific argument forward in support of his assertion; on the contrary, this Directive was designed to ensure equal and non-discriminatory treatment of staff by applying the same reference criteria for staff ratings in all services, while the isolated application of qualifying references could favour certain staff members over others. The plea of illegality should therefore be dismissed in any event as unfounded.

42. Secondly, the respondent has replied that it has not committed any error of judgement in the assessment of the appellant's performance and the applicable provisions as regards the question of offering an indefinite duration contract. Furthermore, as the respondent was obliged to inform the appellant of its intentions six months before his contract expired, it could only base its decision on the known performances for 2010 and 2011, which were rated as "good". On the basis of the reports for these two years of assessment and in the light of the performance ratings given, the appellant could not aspire to an indefinite duration contract under the applicable regulations.

43. As regards the grievance based solely on the fact that the staff member had had a contract with the respondent for a long time and was familiar with the workings of the service, these grounds alone could not justify the offer of a contract, in the interests of the service, to the person concerned upon expiry of his first contract (as in the appellant's case).

44. Finally, the respondent claims that the reassessment and downgrading of the appellant's performance conformed with the applicable provisions and were not in breach of any rule.

45. Firstly, although the appellant formally acknowledged receipt of the notification of his final performance rating on 5 June 2013, he had known since 4 April 2013 at least that his performance rating would be downgraded. In any event, the appellant knew that the proposal on his performance could be revised during the calibration process and that his rating was not definitive.

46. In this respect, the respondent rejects any grievance concerning a change in the appellant's rating *in tempore suspecto*. As the calibration process was carried out in several phases, the appellant was informed on 4 April 2013 of the downgrading of his rating, which had, however, actually been established on 26 February 2013 and

formalized on 22 March 2013, the date on which all definitive ratings for all performances were formalized. During this process, the respondent never attempted to conceal information on the appellant's performance rating. Furthermore, the respondent considers, in any event, that it is not obliged to consult or inform staff in the framework of this process.

47. Secondly, the respondent rejects the appellant's argument that, in the light of his unsatisfactory performance, it was obliged to undertake remedial measures to help him improve; these arrangements would apply to individuals whose performance was formally unsatisfactory under the PRD system. This was not the appellant's case, as his ratings were "good" but not sufficient in terms of the applicable regulations governing the award of an indefinite duration contract.

48. Thirdly, the respondent stresses the fact that the appellant never requested mediation in the framework of his assessment process.

(iii) On the submissions for compensation

49. The appellant requests compensation for the material and non-material damage suffered as a result of the respondent's violation of its obligations towards him.

50. According to the appellant, his material damage is, first and foremost, of a professional nature, as the contested decisions bring his career to an abrupt end. This material damage is also of a financial nature, since the appellant now finds it impossible, given his age and the current crisis, to find a job. Finally, the contested decisions have caused him additional unexpected expenses, and given rise to various costs such as his lawyer's fees. Therefore, unless he is integrated in a service appropriate to his skills and offered an indefinite duration contract, which would be possible as the respondent has advertised a vacant post of grade C3 electrician, the appellant requests fair compensation for his material damage which, in his view, should correspond to the remuneration payable for an indefinite duration contract until retirement age. Under this head, he provisionally assesses the damage he has suffered at €545.081,29 without taking account of changes in NATO staff salaries for the future.

51. In respect of the non-material damage suffered, the appellant believes that this results from the negligent and even poor way in which the respondent has treated him, whereas he thought he would be able to devote himself to his work and complete his career at NATO. The appellant assesses this damage, provisionally and *ex aequo et bono*, at €10.000.

52. As pointed out during the hearing, the respondent has adopted the general position that the submissions in question must be dismissed as unfounded, as no illegal action was taken in respect of the appellant and the decision not to offer him a new contract upon expiry of his first contract on 17 October 2013.

D. Conclusions

53. In his appeal to the Tribunal, the appellant seeks:
- cancellation of the decision of 4 April 2013 by the Deputy Assistant Secretary General for Human Resources not to renew his contract upon its expiry on 17 October 2013;
 - consequently, cancellation of the decision of 8 May 2013 on the details of the conclusion of his contractual situation with the Organization;
 - an order for the respondent to pay compensation for the material and non-material damage suffered by the appellant; and
 - an order for the respondent to reimburse all the legal costs incurred, travel and subsistence costs, and lawyer's fees.
54. The respondent seeks from the Tribunal:
- dismissal of the appeal as inadmissible, inasmuch as it seeks cancellation of the alleged decision of 8 May 2013;
 - dismissal of the appellant's submissions on the illegality of the PRD Directive, in that they are either inadmissible or unfounded; and
 - dismissal of all the other submissions of the appellant as unfounded.

(i) Considerations on admissibility

55. In a plea of inadmissibility submitted in its defence, the respondent maintains that the appeal is inadmissible inasmuch as it is directed against the letter of 8 May 2013 sent to the appellant by the Deputy Assistant Secretary General for Human Resources concerning the details of the conclusion of his contractual situation with the Organization.

56. The Tribunal points out that the only measures which can be the subject of an appeal are those which have binding legal effects impacting on the appellant's interests by changing his or her legal situation in a significant way.

57. In this context, it should be noted that the letter of 8 May 2013 informs the appellant that, at a meeting on 29 April 2013, a number of questions had been "*agreed upon*" in respect of the Organization's decision not to offer him a new contract upon the expiry of his first contract on 17 October 2013. This letter refers, in particular, to the one-off advance payment of the appellant's emoluments for the remaining period of his contract, during which he would not be required to work.

58. At the hearing, the appellant did not challenge the validity of the contents of the letter of 8 May 2013 and confirmed that he had received a one-off payment of his emoluments for the remaining period of his contract.

59. It follows that the letter of 8 May 2013 sets out an agreement reached by the parties on 29 April 2013 following the adoption of the contested decision. In these circumstances, while this letter does have binding legal effects for the appellant, it in no

way affects his interests by changing his legal situation in a significant way. The letter in question does not, therefore, contain any grounds for grievance.

60. In this context, the appellant replies, nevertheless, that this letter constitutes a decision by the respondent and that it should be considered as forming a whole with the contested decision of 4 April 2013 not to offer him an indefinite duration contract. In his opinion, it is actually a decision subsequent to the contested decision, as it contains, in substance, the details of the decision ending his contractual situation with the respondent.

61. Such an argument cannot succeed; the letter of 8 May 2013 does not contain any unilateral decision by the respondent in respect of the appellant. It is an agreement between the parties concerned, aimed at resolving the issues involved in the conclusion of the appellant's contractual situation, and taking an overall view.

62. In these circumstances, the appellant is also unable to claim violation of Article 42.3.7 of the CPR on the grounds that he has not received compensation for days of untaken leave, since, in any event, the terms of this agreement stated, as shown by the letter of 8 May 2013, that he would receive all his emoluments for the remaining period of his contract without being required to work.

63. It follows that the letter of 8 May 2013 does not contain any contestable measure and, consequently, the submissions on cancellation in respect of this letter should be dismissed as inadmissible.

(ii) Examination of the substance

On the submissions seeking cancellation

64. In the first point of his submissions, the appellant contests the legality of the decision of 4 April 2013, putting forward three arguments. In his first argument, the appellant pleads the illegality of the PRD Directive, claiming that it was adopted in violation of the CPR and general principles such as that of equality of treatment, and the contested decision based on the PRD system should therefore be cancelled. The second argument is based on a manifest error of judgement under the PRD system and Implementing Directive, committed by the respondent in respect of the appellant's performance assessment, on several counts. The third and last argument is based on irregularities in the application of the PRD system and its Implementing Directive.

On the first argument based on the plea of illegality of the PRD system and its Implementing Directive

65. To begin with, the respondent claims that the grievance of illegality raised by the appellant against the PRD Directive is inadmissible because the Tribunal is not competent to rule on and assess the legality of regulatory provisions adopted within the framework of the CPR system.

66. In this respect, it should be recalled that, in the light of Article 4.2.1 of Annex IX to the CPR (in the version in effect at the time of the events), the Tribunal is not competent to rule, beyond any challenge to an individual decision taken in respect of the appellant, on the appellant's submissions on the legality of an applicable regulatory provision or on the general conditions of the functioning of NATO bodies. In any event, however, the Tribunal is competent to rule on the legality of a regulatory provision if this provision could conflict with a general principle of the international public service.

67. In the present case, the appellant is not asking the Tribunal to rule directly on regulatory measures such as the PRD system and its Implementing Directive; in the context of the decision taken by the respondent not to renew his contract upon its expiry, the appellant pleads the illegality of the PRD Directive on the grounds that the deciding authority was not competent in the matter, on the one hand, and, on the other hand, that it violates the principle of equal treatment.

68. The appellant is thus able to plead the illegality of the PRD Directive in the framework of his individual dispute with the respondent; the respondent's claim of inadmissibility must therefore be dismissed and the validity of the grounds put forward in the context of this contention must be examined.

69. As regards the first of these grounds, *i.e.* the claim that the deciding authority was not competent in the matter, the appellant's allegations must immediately be dismissed; the PRD Directive was drawn up and adopted in the framework of the implementation measures for the PRD system which was established by the Secretary General in accordance with the legal procedure provided for in Article 55 of the CPR and Annex VIII.B of the CPR.

70. As for the second of these grounds, *i.e.* the alleged violation of the principle of equal treatment of staff and officials by the establishment, via the PRD Directive, of a system to re-evaluate performance by means of a non-transparent calibration process, this, likewise, cannot be justified.

71. First of all, there can be violation of the principle of equal treatment only when two categories of persons, whose factual and legal situations are essentially the same, are subject to different treatment, or when different situations are treated in the same way.

72. In the present case, by merely making general affirmations, the appellant does not put forward any comparative argument to show that he has been subjected to discrimination as compared with other staff members with the same ratings and in the same conditions under the PRD Directive.

73. Secondly, as regards his argument that staff members of certain grades are over-assessed in comparison with staff members of other grades, including that of the appellant, it cannot, as such, establish that the appellant himself has been treated less fairly than another staff member in the framework of his performance rating for 2012.

74. Finally, and contrary to the appellant's allegations in his submissions, the PRD system is intended precisely to avoid any difference in treatment, by means of a calibration process for ratings and by setting rating criteria which are more or less analogous for all staff and services. This process, as provided for by the PRD system and established by its Implementing Directive, is actually designed to avoid subjective assessments of staff members' performance which could potentially disadvantage some staff as compared with others.

75. It follows from the foregoing that the grievance of illegality invoked by the appellant against the PRD Directive, on the grounds that the deciding authority was not competent in the matter and that it violates the principle of equal treatment for NATO staff, must be dismissed.

On the second argument based on a manifest error of judgement in the appellant's performance rating in the light of the PRD system and its Implementing Directive

76. First of all, the appellant claims, in substance, that the contested decision should be cancelled because, in the light of the requirements of paragraph 1.3 of Annex 2 to the PRD Directive and for the two last reference years, he had ratings of "good" (2011) and "very good" (2012). In his view, therefore, in taking the contested decision the respondent has committed a manifest error of judgement by informing him that his performance did not meet the criteria for the award of an indefinite duration contract.

77. This argument by the appellant, developed at length in his appeal, is based on an erroneous premise. The rating of "very good" given to the appellant for 2012 was not final; the Annual Review Form for 2012 shows that the "very good" rating was merely a proposal. In the same context, it was also clearly indicated in the note concerning this rating proposal for 2012 that:

Once the HQMB (or highest level calibration board for other NATO bodies) has reviewed and approved, proposed ratings which have not been modified during calibration will be considered final.

78. It follows from the foregoing that, in the light of the points set out above, the appellant cannot invoke the rules in paragraph 1.3 of Annex 2 to the PRD Directive to obtain an indefinite duration contract from the respondent; the appellant's final rating for the last two reference years did not meet the conditions established by the system in question, *i.e.* a "good" rating and at least one "very good" rating.

79. Secondly, the appellant nevertheless maintains that, in any event, he could invoke paragraph 1.3 of Annex 2 to the PRD Directive, since he has the professional qualities needed for an assessment of his performance, in accordance with these regulations, as "very good"; for the year under dispute (2012) in respect of his rating, the appellant's personal and professional performance would undoubtedly place him among those individuals who meet the conditions for the award of an indefinite duration contract. He also claims to have carried out duties beyond his contractual obligations, such as those involved in the training of other staff.

80. This argument must also be set aside. It should be noted that, within the PRD system and its Implementing Directive, the Administration has broad discretion in the assessment of the abilities of a staff member or official. In this context, it is not up to the Tribunal to substitute its own judgement for that of the Administration in respect of the assessment and abilities of the staff member concerned; the judge's role is merely to rule on any manifest error of judgement or misuse of power.

81. An error of judgement by the Administration in the present context may be described as "manifest" only if it is easily visible and evident. Therefore, in order to establish that the Administration committed a manifest error of judgement which could justify cancellation of the contested decision, the proof to be provided by the appellant must be sufficient to deprive the Administration's assessments of plausibility.

82. In the arguments put forward in this case, the appellant, in substance, invites the Tribunal to revise the respondent's assessments of his performance, in the light of the criteria set out in the PRD Directive. The appellant does not provide any specific evidence of a manifest error of judgement in the downgrading of his rating for 2012 from "very good" to "good" when the respondent assessed his performance.

83. This conclusion cannot be called into question by the appellant's argument that the respondent, taking account of his experience, could have offered him a contract based on the interests of the service; the conclusion of an initial three-year contract in no way guarantees *per se* that the staff member's performance will, in the light of the applicable regulations, be of a nature to justify offering him a new contract. Furthermore, the PRD system and its Implementing Directive are intended precisely to frame the criteria used in assessing whether or not the renewal of a contract is really justified in the interests of the service.

84. In the light of the foregoing, the second argument must also be dismissed as groundless.

On the third argument based on irregularities in the implementation of the PRD system and its Implementing Directive

85. In this argument, the appellant claims that, in the framework of the PRD system and its Implementing Directive, the respondent committed several irregularities in adopting the contested decision, and this invalidated the process of revising his performance rating for 2012.

86. In this context, the Tribunal considers, to begin with, that the PRD system and its Implementing Directive must, as such, be regarded as rules establishing a course of action which the Administration has imposed on itself and cannot deviate from without specifying the reasons, failing which it would infringe the principle of equal treatment of NATO staff.

87. In the present case, the appellant claims, firstly, that he was not informed of the respondent's reasons for revising his performance rating in good time so that he could

contest them. In this argument, the appellant is actually reproaching the respondent for having notified him on 4 April 2013 and having communicated to him the decision to revise his rating on 3 June 2013, although this decision was actually taken on 26 February 2013.

88. This allegation must be set aside. It is clear that the process of calibrating the ratings given to NATO staff was carried out in accordance with the timetable established by the PRD system and that the Administration notified the appellant on 4 April 2013, the date on which the calibration of ratings was completed in terms of substance, while the formal decision concluding the process was still pending.

89. In this way, the respondent actually notified the appellant in good time and in accordance with Article 5.5.1 of the CPR, which states that the staff member "shall be informed in writing not less than 6 months before the expiry of a contract (...)". As the respondent informed the appellant of its decision not to renew his contract upon its expiry in accordance with the terms of the CPR cited above, the appellant cannot advance any interpretation of the PRD system and its Implementing Directive to call this fact into question. In these circumstances, the respondent furthermore gave the appellant the opportunity to prepare his defence in the period until the formal decision to revise his rating was taken.

90. Secondly, the appellant's argument that the respondent informed him of the downgrading of his rating while the calibration process was in progress should also be dismissed. It was made clear during the hearing that, although from a formal point of view the decision on revising the appellant's rating was still pending, the calibration process in respect of the substance of staff ratings was formally completed on the date when the appellant learned of the revision of his rating, *i.e.* 4 April 2013, as can be seen from the file presented to the Tribunal.

91. In any event, even if the respondent had committed a procedural irregularity in the contested decision, the Tribunal points out that such an irregularity could be penalized by cancellation of the contested decision only if it were established that this irregularity could have influenced the content of the contested decision.

92. That is not the situation in this case; in the light of the phases of the calibration process established by the PRD system and its Implementing Directive, as the appellant was notified on 4 April 2013 of the revision of his rating for 2012 which had been fixed by that date, this could not have had any effect on the content of the final formal decision.

93. In addition, the appellant reproaches the respondent for making the contested decision without giving him an opportunity to go to mediation as provided for by the CPR in the framework of the performance review. It is indeed true that the appellant did not use the mediation procedure. However, the file presented to the Tribunal shows that there was no reason why he should not have done so.

94. Finally, as regards the appellant's argument that, in the contested decision, the respondent violated paragraph 12.2 and Annex 2 of the PRD Directive by not undertaking the remedial measures provided for in the case of unsatisfactory performance, this argument should be regarded as based on an erroneous premise; these measures are intended for certain staff members, but not for those who, like the appellant, have in any event been rated as "good".

95. It follows from the foregoing that the third argument must also be dismissed, as no violation can be seen in the framework of the appellant's rating calibration process in the light of the PRD system and its Implementing Directive.

96. The other arguments also having been set aside, the appellant's submissions on cancellation of the decision of 4 April 2013 must all be dismissed.

On the submissions seeking compensation

97. Under this head, the appellant claims to have suffered material damage due to the non-renewal of his contract and, separately, non-material damage due to the respondent's conduct throughout the process aimed, in substance, at revising his rating.

98. The Tribunal points out that submissions on compensation must be dismissed when they are closely linked with submissions on cancellation which have themselves been dismissed as groundless.

99. In the present case, study of the arguments put forward by the appellant to support his submissions on cancellation in his appeal has revealed no illegal action by the respondent and thus no misconduct for which the respondent could be held liable.

100. Therefore, the submissions on compensation for the material and non-material damage the appellant claims to have suffered owing to alleged irregularities in respect of the decision of 4 April 2013 to end his contractual relationship must also be dismissed as groundless.

101. It follows from the foregoing considerations that the appeal must be dismissed as a whole.

E. Costs

102. Article 4.8.3 of Annex IX to the CPR states as follows:

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

103. Hence the appellant, whose submissions on cancellation and compensation have all been dismissed, cannot be awarded any sum under this head.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- Mr C's appeal is dismissed.
- The security deposited by the appellant shall be reimbursed.

Done in Brussels, on 17 February 2014

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

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



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

6 March 2014

AT-J(2014)0006

Judgment

Case No. 904

CP,

Appellant

v.

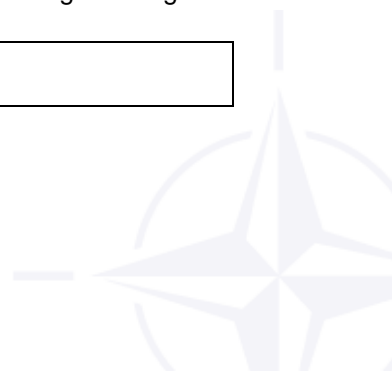
NATO Support Agency,

Respondent

Brussels, 17 February 2014

Original: English

Keywords: sick leave; medical control; medical certificate.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, having regard to the written procedure and further to the hearing on 16 December 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 14 June 2013 and registered on 18 June 2013, by Mr CP against the NATO Support Agency (NSPA).
2. The comments of the respondent, dated 19 August 2013, were registered on 27 August 2013. The reply of the appellant, dated 27 September 2013, was registered on 1 October 2013.
3. The appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, inter alia, establishing the NATO Administrative Tribunal. Pursuant to the Transitional Provisions contained in Article 6.10 of ("new") Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to when the new regulations entered into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.
4. The Tribunal's Panel held an oral hearing on 6 December 2013 at NATO Headquarters. It heard arguments by Maître L, of Lallemand & Legros, Brussels, representing the appellant, Mr SL, NSPA Assistant Legal Adviser, and Mr. FP, NSPA Chief of Human Resources Division, representing the respondent, in the presence of Mr and Mrs CP, Mr EG, Deputy NATO IS Legal Adviser, Mr BS, NATO IS Assistant Legal Adviser, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

5. The material facts of the case may be summarized as follows.
6. Article 45.2 of the NATO Civilian Personnel Regulations (NCPR) provides in relevant part:

Members of the staff absent owing to sickness or accident for more than 2 consecutive calendar days shall be required to obtain a medical certificate within 4 days of ceasing work and to submit it to the Personnel Service as soon as possible thereafter...The Organization may require a staff member to undergo a medical control before recognizing any certificate as valid.

7. Article 45.7.1 of the NCPR provides in relevant part:

Members of the staff who are absent for more than 3 consecutive months owing to sickness or accident duly recognized under Article 45.2 above shall be entitled to paid extended sick leave for a maximum period of 21 consecutive months, or until they are recognized either as fit to resume their duties or as being permanently incapacitated under the terms of the group insurance policy...whichever is the sooner.

8. The appellant was recruited as a quality assurance technician by the NATO Maintenance and Supply Agency (NAMSA, the predecessor of NSPA) in 2007 and received two successive three-year contracts. Beginning sometime in 2009, he began to receive harassment from a supervisor. The continuing harassment ultimately led to an appeal by the appellant to the NATO Appeals Board, which on 6 July 2012 found in his favor in Decision No. 860. The Board ruled that NAMSA had failed to provide reasons for its decision to reject his complaint alleging harassment and discrimination. *Inter alia*, the appellant was awarded €30.000 “in compensation for the damage suffered as a result of this decision.”

9. The Appeals Board’s decision cited and relied upon the report a Complaints Committee established in 2011 to consider the appellant’s complaint of harassment. That report concluded that the harassment of the appellant “had a serious effect on his health, his self-confidence and his ability to use his skills in his professional environment.”

10. It appears that following the events giving rise to Decision No. 860, the appellant experienced recurring ill-health, ultimately leading to the events involved in this appeal.

11. Between 21 May and 22 June 2012, the appellant was absent from work in Luxembourg for thirty days pursuant to a physician’s medical certificate. On Saturday 23 June 2013, the appellant’s brother drove him from Luxembourg to a ferry to Sardinia. The following day, Sunday 24 June 2012, a physician in Cagliari, Sardinia examined the appellant and provided a medical certificate in Italian describing serious symptoms and prescribing medication and rest for 45 days. The appellant e-mailed this certificate to NAMSA the following day, 25 June 2012.

12. Prior to his departure for Sardinia, the appellant had been scheduled to appear for a medical control appointment with NSPA’s medical advisor in Luxembourg on Tuesday, 26 June 2012. He was in Sardinia on that day and did not appear for the appointment or inform NSPA of his reasons for not attending.

13. On 4 June 2012, the appellant was notified that his contract would be terminated on 31 December 2012 owing to the deletion of his post. He was advised that the Human Resources Division “will do their utmost to reassign you to another position that meets your profile and qualifications” and was “invited to call us to discuss the way ahead.” The appellant unsuccessfully sought cancellation of the decision to terminate his contract, lodging a second appeal with the Appeals Board on 24 October 2012. The Appeals Board dismissed this appeal in Decision No. 882 of 19 April 2013.

14. On 3 July 2012, the Chief of NSPA's Human Resources Division wrote a memorandum to the appellant noting that he had not appeared for the scheduled 26 June medical appointment; recalling an agency instruction requiring that staff members on sick leave not leave their country of residence without special permission from the General Manager; and requesting that the appellant contact NSPA's medical services to arrange a new appointment "and regularize your situation." This memorandum was e-mailed to the appellant's Hotmail address on 4 July 2013. There was no response.

15. On 8 August 2012, NSPA's medical services e-mailed the appellant reminding him of the 3 July 2012 memorandum and that his 24 June 2012 certificate had expired. Later that same day, the appellant submitted by e-mail a further medical certificate written in Italian and dated 6 August 2012. This certificate again described the appellant's symptoms and prescribed a 60-day medical absence.

16. On 14 August 2012, a senior official in the respondent's Human Resources Division e-mailed the appellant, recalling NSPA's July 4 and 8 August communications, again urging him to contact the medical services urgently, and warning that "[f]ailure to do so may result in administrative and/or disciplinary actions."

17. On 16 August 2012, the appellant sent an e-mail to the author of the 14 August e-mail expressing "surprise and astonishment at the attitude that the Agency is still showing in this issue;" indicating that if the missed June appointment was important to NSPA, the appellant could be visited by NSPA's medical adviser in Italy, and explaining that he had moved to Italy "for better conditions of treatment." The appellant observed that he could access e-mail only through an Internet point "on an unscheduled and limited basis" and that "he did not "have the time and the willingness to scroll through all the hundreds of messages accumulated in the system."

18. Several unsuccessful attempts to arrange a medical examination followed. On 17 August 2012, NSPA notified the appellant of another appointment in Luxembourg with its medical adviser on 24 August. On 22 August, the appellant's counsel responded, *inter alia*, asking the reason for the scheduled examination, recalling that the appellant was on sick leave in Italy, and proposing that if NSPA insisted on an examination, it identify a physician in Italy. Further e-mails between NSPA and the appellant's counsel ensued. NSPA persisted in asking the appellant to appear for the 24 August examination. The appellant's counsel responded that the appellant could not fly to Luxembourg, submitting a medical certificate to this effect, and reiterating the suggestion that an examination be arranged in Italy. NSPA's proposal of alternative appointments on 29 or 31 August likewise drew objections from counsel and came to naught.

19. In a 31 August e-mail to the appellant's counsel, NSPA confirmed that it sought a medical control of the appellant for purposes of NCPR Article 45.2 prior to recognizing the validity of his medical certificates, and requested the address where he could be reached in order to arrange a medical control in Italy.

20. In August 2012, the respondent's health insurer Allianz Worldwide Care (AWC) unsuccessfully sought to arrange a medical examination of the appellant. His counsel

sent e-mails to AWC affirming her authority (*“L’avocat dispose d’un mandat général pour assister et représenter son client”*), questioning the insurer’s reasons for seeking information regarding the appellant, and stating that he could not appear for a medical examination requested on 7 September 2012.

21. On 5 November 2012, NSPA sent an e-mail to the appellant’s counsel, with a copy to the appellant, requesting that she do the necessary for the appellant to appear for an appointment with a physician in Cagliari on 7 November. The appellant did not respond or appear for the appointment.

22. On 26 November 2012, the Chief of the respondent’s Human Resources division wrote to the appellant, with a copy to his counsel, recalling that the agency “has repeatedly requested you to undergo a medical examination i.a.w. ref. Article 45.2”, that neither he nor his counsel had responded to the request to attend the examination in Cagliari on 7 November, and stating that “the Agency is not prepared to recognize the validity of any of the medical certificates you have sent us since 22 May 2012.” The appellant was invited to contact the Human resources Division “[w]henever you are prepared to cooperate with the Agency and make yourself available for undergoing a medical examination.” He was warned that unjustified sick days will be deducted from his annual leave and that, if these were insufficient, “reimbursements of previously received emoluments may have to be considered.”

23. Also on 26 November 2012, the appellant’s co-counsel replied to the 5 November e-mail, apologizing for the late response and stating that because of the short notice, it had not been possible to contact the appellant and for this reason, he had not been able to keep the 7 November 2012 appointment. Counsel added that the appellant wished to be informed of such important information by registered mail.

24. On 4 December 2012, the Chief of respondent’s Human Resources Division sent a registered letter to the appellant at his address in Cagliari requesting that he appear for a medical examination by a physician in Cagliari on 11, 12 or 17 December. This information was also e-mailed to the appellant and to his counsel on 4 December 2012. The Reply indicated that the counsels’ representation of the appellant was only *ad litem*, so that notification to counsel of the three possible medical appointments in December 2012 did not constitute notification to the appellant. However, in response to a question at the hearing, the appellant’s counsel indicated that her office would in any event have forwarded the 4 December e-mail to the appellant.

25. On 31 December 2012, the appellant’s contract was terminated.

26. On 11 January 2013, the appellant wrote a registered letter to the respondent’s General Manager. This letter recalled the harassment that led to his first appeal, and expressed dissatisfaction regarding the manner of his removal from the NSPA Staff Association, the rejection of his applications for a lateral transfer, and the failure to pay his emoluments “without any justification or valid reason.” The letter continued that “I have always stated my willingness to undergo any medical check that the agency deemed necessary, inviting NSPA HR Division to agree, in writing, via registered letter

with acknowledgement receipt, on a date and location in Italy.” By registered letter dated 8 February 2013, the NSPA Director General rejected the complaints in the appellant’s letter and explained his reasons for doing so.

27. On 12 January 2013, the appellant sent a registered letter to the Chief of respondent’s Human Resources Division enclosing documentation showing that the agency’s 5 December 2012 registered letter had arrived in Cagliari on 20 December and was delivered in early January, and proposing that the appellant contact the physician in Cagliari directly in order arrange “an appointment on a suitable, agreed upon, date, to accomplish the desired goal.” The appellant did not refer to the e-mails sent to him (and apparently also forwarded to him by his counsel) regarding the three proposed December appointments.

28. By letter dated 18 January 2013, NSPA informed the appellant that his post had been suppressed as of 31 December 2012, that NSPA did not recognize the validity of his medical certificates because of the agency’s inability to have him undergo a medical control, and that he was obliged to reimburse the agency € 25.590,31, reflecting sums paid to him during his absence, adjusted to reflect annual leave and loss of job indemnity.

29. On 15 March 2013, the appellant’s counsel wrote to NSPA’s General Manager petitioning against the decisions contained in the 18 January 2013 and 8 February 2013 letters. The petition contended that the appellant “has never been willing to escape from his obligations stemming from article 45.2 of the CPR.” Rather, the failed appointments in Cagliari “at the very least...are the consequences of a lack of diligence on the part of the NSPA...”

30. On 15 April 2013, the General Manager of NSPA wrote to the appellant’s counsel, rejecting the March 15 appeal, recounting the events described above, and expressing his belief that the appellant “systematically and intentionally avoided and refused to accept to be medically controlled...”

31. Throughout this period, the appellant regularly e-mailed to the respondent additional physicians’ medical certificates written in Italian describing his symptoms and prescribing substantial periods of rest. These included the initial certificate issued immediately following his arrival Cagliari on 25 June 2012, as well as certificates dated 6 August 2012 (prescribing 60 days of rest), 5 October 2012 (30 days of rest); 26 October 2012 (30 days); 19 November 2012 (60 days); 17 January 2013 (60 days); 15 February 2013 (5 days); 15 March 2013 (90 days¹); and 4 June 2013 (six months at home).

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

(i) *The appellant's contentions*

32. The appellant contends that the appeal is timely and admissible, and that he was on extended sick leave in conformity with NCPR Article 45.7. Accordingly, the respondent acted wrongly in refusing to recognize his medical certificates and in terminating his contract. In this regard appellant's papers frequently emphasize that his poor health is directly attributable to the workplace harassment he experienced and which give rise to his successful appeal in Decision No. 860.

33. The appellant seeks:

- annulment of the NSPA General Manager's decision dated 15 April 2013, "rejecting the Appellant's petition/complaint dated 15 March 2013";
- annulment of the NSPA's Chief of Human Resources Division decision dated 18 January 2013;
- annulment of the NSPA's General Manager's decision dated 8 February 2013; and by consequence
- recognition of the validity of the appellant's medical certificates since 22 May 2013;
- suspension of the termination of the appellant's contract until one of the conditions laid down in Article 45.7.2 of the Civilian Personnel Regulations occurs;
- payment of all the appellant's salaries since November 2012;
- compensation for moral harm evaluated *ex aequo et bono* at € 30.000; and
- reimbursement of the costs of retaining counsel, travel and subsistence.

(ii) *The respondent's contentions*

34. The respondent contends that the appeal is inadmissible in that the appellant was notified of the decision appealed against on 16 April 2013, while the appeal was not lodged until June 18, 2013.

35. The respondent observes that under Article 45.2 of the NCPR, a staff member may be required to undergo a medical control before any medical certificate is recognized as valid. In the respondent's view, it went to exceptional lengths to attempt to arrange such a medical control. However, the appellant failed to cooperate and to attend any of the appointments that were arranged for this purpose, including the four proposed appointments in Cagliari, Italy, where the appellant was residing.

36. Given these circumstances, the respondent maintains that it was not required to recognize the validity of the medical certificates submitted by the appellant for the period beginning 22 May 2012. The appellant's absence from duty was therefore unauthorized, and the Organization was entitled to take measures to seek to compensate for or recover salaries paid to him during the period of unauthorized absence.

D. Considerations and conclusions**(i) Considerations on admissibility**

37. The evidence shows that the entire appeal was transmitted by fax to Secretary of the Appeals Board on 14 June 2013, less than sixty days from the date the appellant was notified of the action appealed from (16 April 2013). The appeal is therefore admissible.

(ii) Considerations on the merits

38. Under Article 45.2 of the NCPR a staff member absent owing to sickness for more than two consecutive calendar days must promptly obtain a medical certificate and submit it to the Personnel Service. The Organization then “may require a staff member to undergo a medical control before recognizing any certificate as valid.”

39. As a staff member may be required to undergo a medical control as a condition for recognition of the validity of his or her medical certificates, it is in the staff member’s interest to cooperate in this process. In their communications with the respondent, the appellant and his counsel frequently affirmed the appellant’s willingness to appear for the required medical control. Despite these assurances, however, no such control ever took place.

40. The appeal stated that the appellant “went to Italy for the weekend, as he is allowed to do during his spare time, but felt ill again while over there.” However, the declaration of the appellant’s brother and other evidence clearly establishes that his transfer to Sardinia was pre-planned and carried out in order to obtain what the appellant hoped would be better conditions of care.

41. Thus, in June 2012, the appellant voluntarily left Luxembourg and did not appear for a medical appointment previously scheduled during the week following his departure. In July 2012, the appellant was urged to contact the medical service, but did not respond. In August 2012, he was again encouraged to regularize his situation. He responded two days later with an e-mail recounting his poor state of health and indicating that he read e-mail intermittently and ignored many messages. Later in August 2012, the organization sought to have him return to Luxembourg on several possible dates for a medical control. This led to a substantial correspondence with his counsel explaining that appellant could not travel for medical reasons, but that NSPA should arrange for a medical control in Italy.

42. Beginning in August 2012 and continuing throughout the fall, the appellant did not respond to the insurer’s requests that he make himself available for a medical visit.

43. In November 2012, NSPA arranged a medical appointment in Cagliari, but the appellant did not appear. His counsel explained that the appellant learned of the appointment too late and called for significant communications to be sent to the appellant by registered mail. In December 2012, NSPA communicated three possible dates for appointments in Cagliari to the appellant and his counsel by e-mail and by

registered letter. The appellant did not appear for any of the scheduled appointments. While the registered letter arrived too late, the appellant's counsel at the hearing stated her belief that her office would have forwarded its copy of the e-mail to the appellant.

44. Throughout this sequence of events, the record suggests that the appellant was able to deal with important aspects of his personal affairs. He presumably cooperated with his counsel in preparing the October 2012 appeal seeking annulment of NSPA's decision to terminate his contract. He regularly obtained new medical certificates and e-mailed them to the agency at the times required to assure an unbroken chain of medically prescribed absences from work. In several instances, for example, in responding to NSPA's August 12 e-mail and its subsequent requests that he return to Luxembourg for a control in August 2012, the appellant clearly read e-mail from the agency and coordinated with his counsel regarding responses.

45. The record also shows that NSPA made substantial efforts to accommodate the appellant's situation in arranging the medical control, including efforts to arrange medical controls by a physician in Cagliari on four alternative dates in November and December 2012. The agency regularly reminded the appellant of the need for a medical control and of the possible adverse consequences if it could not be arranged. The relevant correspondence from the respondent in the record is polite and professional in tone.

46. Particularly after he left his duty station and relocated to Italy, the appellant had a responsibility to maintain reliable communication with the agency and to cooperate with reasonable efforts to arrange the medical control required by NCPR Article 45.2. As the events described above show, he did not do so.

47. The Administrative Tribunal does not put in doubt the appellant's medical condition. Nevertheless, the respondent had the right under NCPR Article 45.2 to require that he undergo a medical control.

48. As noted (paragraph 28 above), by letter dated 18 January 2013, NSPA informed the appellant that his post had been suppressed as of 31 December 2012, that NSPA did not recognize the validity of his medical certificates, and that he was obliged to reimburse the agency for sums paid to him during his absence, adjusted to reflect annual leave and loss of job indemnity. In the absence of the medical control foreseen by Article 45.2, the respondent was not obliged to recognize the appellant's medical certificates and could take appropriate measures in response to his extended and unexcused absence from work. Accordingly, the appellant's claims must be dismissed.

E. Costs

Article 4.8.3 of (“old”) Annex IX to the NCPR provides as follows:

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

The dismissal of the appellant’s claims gives rise to the dismissal of the appellant’s claims under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appellant’s claims are dismissed.
- The security deposited by the appellant shall be reimbursed.

Done in Brussels, on 17 February 2014.

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

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



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

23 May 2014

AT-J(2014)0007

Judgment

Case No. 2013/1007

TV,

Appellant

v.

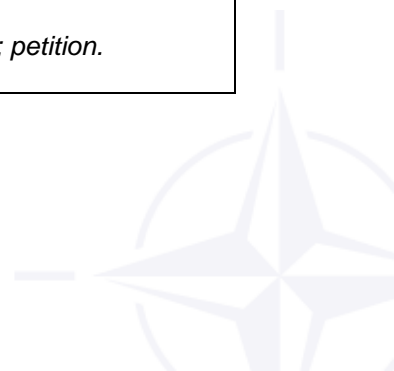
NATO Communications and Information Agency,

Respondent

Brussels, 14 April 2014

Original: English

Keywords: non-renewal of a contract; post subject to rotation; admissibility; time frames; petition.



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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 14 March 2014.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal, dated 15 September 2013 and registered on 20 September 2013, by Mr TV, former staff member of the NATO Communications and Information (NCI) Agency, against the NCI Agency, concerning the non-renewal of his contract.

2. The comments of the respondent, dated 8 November 2013, were registered on 20 November 2013. The reply of the appellant, dated 24 December 2013, was registered on 14 January 2014.

3. The proceedings in this case were initiated before the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, inter alia, establishing the Tribunal. The preamble to the new Annex IX provides that any proceedings initiated before 1 July 2013 under the previous Regulations will continue to be governed by the previous Regulations until they are settled in a final manner. As a consequence, the present case will be decided by the Tribunal in accordance with the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

4. The Tribunal's Panel held an oral hearing on 14 March 2014 at NATO Headquarters. It heard arguments by both parties, in the presence of representatives of the Office of the IS Legal Adviser and of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. The appellant is a former staff member of the NATO C3 Agency and, since July 2012, the NCI Agency.

7. Initially, the appellant was appointed as Principal Scientist by the respondent for a period of three years, from 1 October 2005 to 30 September 2008. This contract was extended for a further period of three years from 1 October 2008 to 30 September 2011.

8. At the end of this second period, the appellant's contract was extended for an additional year from 1 October 2011 to 30 September 2012. On 12 January 2012, the respondent informed the appellant of its decision not to renew the above-mentioned

contract on its expiry. The justification for this non-renewal was the staff turnover policy of the NATO C3 Agency.

9. However, in a letter dated 1 February 2012, the respondent informed the appellant of its decision to extend his contract of employment for a supplementary year from 1 October 2012 to 30 September 2013, on an exceptional basis and in the light of particular events justifying this extension. Consequently, the respondent informed the appellant that its previous decision not to renew this contract, contained in the letter of 12 January 2012 mentioned above, was withdrawn.

10. In the same letter dated 1 February 2012, the respondent reminded the appellant that, given the NATO Agencies Reform effective on 1 July 2012 and the rotation rule applied by the NATO C3 Agency in its contractual policy, it was not possible to offer him a longer term commitment.

11. In a letter dated 28 January 2013, the respondent informed the appellant of the decision not to renew the above-mentioned contract on its expiry and reminded the appellant that this decision was justified by the requirement for turnover of the NCI Agency Staff. This is the challenged decision which was notified to the appellant on 1 February 2013.

12. In response to the challenged decision, on the same date (1 February 2013), the appellant sent an e-mail to the respondent requesting a short meeting concerning his contractual situation.

13. After various exchanges with the respondent, the appellant sent an e-mail to the Human Resources Administration on 19 March 2013 repeating his request to discuss his "earlier petition" to reconsider his contract renewal.

14. In an e-mail sent to the applicant on 3 April 2013, the Human Resources Administration confirmed the challenged decision not to offer a further contract upon the expiry of the appellant's last contract of employment on the basis of the grounds invoked in the challenged decision, that is to say, the requirement for turnover of the NCI Agency Staff.

15. In an e-mail sent to the respondent on 25 April 2013, the appellant emphasized and focused on the premise that the "turnover reasons" were not elaborated further in the challenged decision not to renew his contract and that such legal justification was not compatible with his contract.

16. In an e-mail sent to the respondent on 20 May 2013, the appellant expressed his regret at the above-mentioned position adopted by the respondent on 3 April 2013 and reiterated his request concerning the rationale on which the challenged decision was based.

17. As may be seen from the documentation submitted to the Tribunal, on 21 May 2013 the appellant sent an e-mail to the General Manager of the NCI Agency requesting that he review the challenged decision. The Head of the Human Resources

Administration, on behalf of the General Manager, confirmed the challenged decision in an e-mail dated 23 May 2013 and indicated that the reason for the non-renewal of the appellant's contract of employment was the staff turnover requirement.

18. The appellant exchanged various e-mails with the respondent requesting explanations about the requirement for turnover of NCI Agency staff and contested the justifications put forward by the respondent.

19. Appellant reiterated his allegations regarding the issue, in an e-mail dated 19 June 2013 in which he repeated his "petitioning" for a change to the challenged decision relating to the non-renewal of his contract upon its expiry. In this e-mail, the appellant requested a last meeting with the respondent before the latter finally confirmed the challenged decision.

20. In an e-mail sent to the appellant on 18 July 2013, the respondent confirmed the challenged decision once again and reminded the appellant of the efforts made by the NCI Agency to find alternative solutions – outside the framework of his contract – which were, however, not successful.

21. Under these circumstances, the appellant brought the present action before the Tribunal on 15 September 2013.

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

(i) The appellant's contentions

22. Firstly, the appellant argues that his action is a timely appeal, within the requirement of the NCPR. He claims that his petition, initiated on 1 February 2013 and concluded on 18 July 2013 with the final declaration of the respondent confirming the challenged decision not to renew his contract of employment on its expiry on 30 September 2013, preserved the appeal period. Therefore, his action brought before the Tribunal on 15 September 2013, within the provided time limit of sixty days after the end of the petition proceedings, is to be considered as admissible.

23. In addition, the appellant asserts that the initiated petition procedure is undisputed. This consideration allegedly clearly results from various documents submitted by the appellant before the Tribunal. Indeed, the appellant emphasized several times in his e-mails that his request to modify the challenged decision was part of the ongoing petition proceedings. In the same line, he claims that the respondent met the appellant in several meetings, planned before July 2013, in order to discuss the review of the challenged decision.

24. Moreover, according to the appellant, it results from the documents submitted before the Tribunal that the respondent never refuted the existence of the petition proceedings, which were initiated on 1 February 2013 and concluded on 18 July 2013,

and participated voluntarily in the meetings which took place during the various phases of these proceedings from January to July 2013.

25. Secondly, the appellant requests the anonymity of the present appeal because public disclosure of his name and the names of the staff in the present litigation may affect the professional standing of all the parties concerned.

26. Thirdly, the appellant seeks the cancellation of the challenged decision, arguing that this decision based on the rationale for non-renewal infringes Article 5 of the NCPR.

27. In particular, he considers that, in accordance with Articles 5.2 and 5.4 of the NCPR, a person is appointed to a post previously identified by the NATO body as being required for a limited period or to a post for which turnover is desirable for political or technical reasons. In the appellant's case, these conditions are not met. Indeed, the appellant's post description did not include any stipulation on the basis of which one could argue that the appellant's post was covered by the rotation rule. This conclusion is consistent because in other post descriptions of the NCI Agency, the applicability of the turnover requirement is clearly mentioned. Under these conditions, the challenged decision is based on an illegal premise concerning the contractual situation of the appellant and therefore this decision must be cancelled.

28. This conclusion could not be negated by the respondent's assertion that the NCI Agency is a scientific establishment as it is clear from the NCI Charter and Mission statement that the NCI Agency is not such an establishment. In this respect, the appellant stresses that the NATO nations are strongly opposed to the institution of scientific establishment and the NCI agency has fully recognized such views in its business model, strategy and mission arrangements.

29. In addition, the appellant asserts that, given his satisfactory performance, his contract of employment should be renewed on the basis of Article 5.5.2 of the NCPR which provides that, following satisfactory performance during an initial contract or a reassignment contract, the Head of the NATO Body may offer an indefinite duration contract as defined in Article 5.4 of the NCPR. In this respect, and in accordance with Decision 368 of the Appeals Board, a succession of definite duration contracts, as in the case of the appellant, is considered by jurisprudence as abusive. Therefore, the appellant is justified in expecting renewal of his contract of employment.

30. In sum, the appellant argues that, in any case, the challenged decision is vitiated by the failure to state reasons regarding the applicability of Article 5.2 of the NCPR.

31. On the other hand, the appellant pointed out that the challenged decision is in breach of the rules to be applied by the Civilian Personal Management Board, which is responsible for ensuring that decisions concerning staff are made in a fair, consistent and coordinated manner. This is also confirmed by the practice followed by the respondent against other NCI Agency staff. In some cases, the respondent has proposed an indefinite duration contract to persons who had only a light workload or whose performance had been poor. This confirms the inconsistency of the

management contractual policy applied by the Civilian Personal Management Board which is at the origin of the adoption of the challenged decision.

32. In this respect, the appellant asserts that this process was unfair and inconsistent because he was never informed about the evaluation and the conditions of his contract renewal prior to the Board meeting and he never knew the reasons why the challenged decision was finally adopted.

33. In the same line, the appellant stressed that he did not have access to a conflict and mediation process as the Agency did not initiate such a process at that time, in breach of Article 4 of Annex VIII.

34. Finally, and more generally, the appellant asserts that the respondent has failed to adhere to the NCPR requirements, breaching its contractual policy as determined by the Agency Administrative Directives on Contractual Policy, Article 5 of the NCPR. In particular, the respondent adopted an apparent distinction between the treatment of staff with less than ten years' service and those with more than ten years' service. This arbitrary decision, contained in the internal legal framework elaborated by the respondent, constitutes evidence of an unequal and unfair application of the process in terms of non-renewal and termination of contracts of the respondent's staff.

35. Under these circumstances, the appellant seeks:

- cancellation of the challenged decision dated 28 January 2013, delivered by hand on 1 February, confirmed after a petition dated 17 July 2013;
- reinstatement;
- award of an indefinite duration contract in accordance with Article 5.4 of the NCPR;
- reimbursement of costs associated with this appeal;
- €10.000 in compensation for physiological, moral and professional damage;
- failing reinstatement, compensation of not less than €98.008,48, the equivalent of one month's emoluments per year worked at the NCI Agency;
- an independent review of the contract renewal process and the associated Personnel Management Board at the NCI Agency; to include assessment of its transparency, openness, fairness and unbiased execution; examination of the statistics of renewals and non-renewals per category of staff will assist the review process; and
- anonymity, in accordance with Administrative Tribunal Rule 11.

(ii) The respondent's contentions

36. Firstly, the respondent asserts the inadmissibility of the action brought before the Tribunal because the appellant did not file his appeal within the required period of sixty days stipulated in Article 4.3.2 of Annex IX to the NCPR. In particular, the challenged decision was adopted on 28 January 2013 and notified on 1 February 2013, and the appeal is dated 15 September 2013, that is to say more than seven months after the notification of the challenged decision.

37. In this respect, the respondent strongly contests the appellant's argument that the appeal period has been preserved because of the introduction of a petition on 1 February 2013. The respondent did not dispute the fact that the appellant tried to solve the dispute amicably with the respondent following the adoption of the challenged decision, but argued that the applicant never made any concrete and formal petition in accordance with the requirements of the NCPR. Indeed, the applicant exchanged various e-mails with the services of the respondent, and only in his e-mail of 25 April 2013 did he formally contest the rationale given for the non-renewal of his contract and assert that the justification concerning the rotation policy of the NCI Agency was not compatible with his contract. However, even in this context, the appellant's request was filed after the deadline for appealing against a decision of the NCI Agency.

38. In any event, in answer to a question of the Tribunal, the respondent asserted the view that, despite the various declarations of the appellant concerning the initiation of a petition proceeding on 1 February 2013 during the written procedure, his e-mail and request cannot be considered as a valid petition proceeding. Indeed, given the effect of the petition on the time limit for bringing an action before the Tribunal, the requirement for the formulation of such a petition must be interpreted restrictively.

39. In this context, the respondent points out that the applicant never submitted a petition in line with the requirements of Annex IX to the NCPR. In contrast, since the adoption of the challenged decision, the applicant engaged in a permanent discussion with the respondent concerning the non-renewal of his contract of employment, and considered that these discussions confirmed the existence of a petition proceeding and, accordingly, that the appeal period had been preserved.

40. In addition to the provisions of the NCPR mentioning the "very exceptional cases and the duly justified reasons" allowing an appeal after the sixty-day period, combined with the principles of legal security and good administration, in the present case, the respondent observes that the appellant did not invoke any exceptional fact justifying the late introduction of his action.

41. Therefore, the appeal must be dismissed as inadmissible.

42. Secondly, the respondent refutes the appellant's submissions on the granting of anonymity in the present appeal, as these are not justified by any relevant argument to protect his privacy from public disclosure.

43. Thirdly, the respondent argues that the appeal is to be considered to be groundless and that the challenged decision is in conformity with the NCPR and the NCI Agency Directives on Contract Policy.

44. According to the respondent, the challenged decision does not violate Article 5 of the NCPR. The appellant does not have any right to an indefinite duration contract because he has worked less than the period of ten consecutive years required by the NCI Agency Directives. Furthermore, as a Principal Scientist, he falls within the category for which the turnover policy is, in any case, applied to NCI Agency staff. In

addition, the respondent has no obligation to renew his employment contract, even if his professional performance has been considered to be satisfactory.

45. Concerning the rotation requirements in particular, the respondent considers that the NCI Agency is a customer-funded agency for which the rotation plan ensures the acquisition of new skill sets. In order to support the NATO nations in very specialized fields, the respondent must rely on a staff rotation procedure and not increase its staff constantly in specific and new technical areas. The validity of this rotation rule is also confirmed under these circumstances by the jurisprudence of the Appeals Board (see Decisions 136, 138 and 778).

46. The respondent also rejects the allegation that the appellant's post was not identified, in contrast to other post descriptions, as being required for a limited period and subject to the rotation policy. In addition, the respondent replies that the rotation policy requirement has been met by the NCI Agency Directives on Personnel Contract Policy since 2001; given the clarity of this legal framework and the reference to the said directives in the appellant's contract, the latter could not reasonably be unaware that his post was subject to the turnover requirement.

47. Furthermore, as a customer-funded organization, the respondent follows its own contractual policy and is not required to emulate practices established by other NATO entities. In this respect, the respondent considers that the case law of the Appeals Board mentioned by the appellant (Decision 368) in support of his submissions – according to which the succession of definitive duration contracts is considered as abusive – is not relevant. Indeed, this case law is applicable to a NATO entity not subject to customer funding (see Decision 716).

48. The respondent also contests the appellant's submissions concerning violation by the Personnel Management Board of its own policy requirements in the adoption of the challenged decision. It clearly results from this decision that the appellant was informed of the reasons justifying the non-renewal of his contract of employment. In addition, the appellant did not request any review of his annual review assessment, nor did he indicate that he disagreed with his performance report.

49. Regarding the appellant's allegation concerning the absence of a mediation process for the review of his Performance Report, the respondent asserts that the appellant's mediation request was formulated on 8 May 2013, too late for consideration and initiation of the mediation procedure.

50. Finally, the submissions of the appellant concerning an independent review of the process of contract renewals and the examination of the statistics of renewals and non-renewals per category of staff must be rejected, as they have no link with the dispute concerning the challenged decision.

51. In sum, the respondent concludes that the appeal must be dismissed either as inadmissible or as groundless.

D. Considerations

Anonymity request

52. The appellant requested anonymity in accordance with Rule 11 of the Administrative Tribunal's Rules of Procedure, asking that his name and the names of the persons involved in the current dispute should not appear in the Tribunal judgment.

53. Despite the appellant's reference to the Administrative Tribunal's Rules of Procedure, his request must be considered with reference to the provisions of Annex IX, in effect prior to the entry into force of the new regulations, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

54. In this respect, it must be observed that, in his submission on anonymity, the appellant does not establish how mentioning his name in the judgment might cause him damage, particularly as, in accordance with Appeals Board case law, the latter ensures that each of its decisions, compendia and collections of decisions indicate that, in the event of reproduction, of any decision, even if only partial, the name of the appellant must not appear (see Decision 795).

55. In any event, save the general consideration concerning the appellant's privacy and that of the staff members involved in the current litigation, the appellant has not demonstrated good grounds for protecting the privacy of an individual which could justify the granting of anonymity.

56. It follows from the foregoing that the appellant's request for anonymity must be rejected.

Admissibility

57. Article 4.3.2 of Annex IX to the NCPR provides that:

Appeals shall be lodged with the Secretariat of the Appeals Board within 60 days from the date of notification of the decision appealed against. Nevertheless, in very exceptional cases and for duly justified reasons, the Appeals Board may admit appeals lodged after the time allowed.

58. The time frame for an appeal stipulated in Article 4.3.2 of Annex IX to the NCPR is established with a view to ensuring the security of legal situations and avoiding any discrimination or arbitrary treatment in the administration of justice (see Tribunal judgment in Case No. 903, paragraph 33).

59. The application of the NCPR with respect to the time frames stipulated by Article 4.3.2 may be waived only in very exceptional circumstances. Such circumstances consist of an objective element, *i.e.* unusual circumstances outside the appellant's control, and a subjective element, *i.e.* the obligation for the appellant to guard against the consequences of an unusual event by taking the appropriate steps. In these

conditions, anyone who is planning to lodge an appeal with the Tribunal must take extra care to comply with the time frame for doing so (see Tribunal judgment in Cases No. 889-890, paragraph 34).

60. In the present case, the challenged decision was adopted by the General Manager of the NCI Agency on 28 January 2013 and notified to the appellant on 1 February 2013. Consequently, the appellant was entitled to bring his action before the Tribunal within sixty days of the date of notification of the challenged decision, or, before doing so, to submit a petition to the person who adopted this decision.

61. In this respect, it must be remembered that the Appeals Board case law shows that a petition of this kind, if made within the period prescribed for appeals, has the effect of preserving that period intact until such time as the petition is rejected, when the period begins to run again (see Decisions 101 and 367).

62. As is clear from the documentation submitted before the Tribunal, the challenged decision was notified to the appellant on 1 February 2013 and the latter immediately engaged in a discussion with the respondent and mainly with the Human Resources Administration in order to review this decision.

63. In particular, in an e-mail sent to the respondent on 19 March 2013, the appellant mentioned his request to discuss his earlier petition to reconsider his contract renewal. The respondent confirmed the challenged decision in an e-mail dated 3 April 2013 and, on 25 April 2013, the appellant sent an e-mail to the respondent asking to be given a definite duration contract within five working days, alleging the rationale given in the challenged decision. In reply to the above mentioned e-mails, on 23 May 2013 the Human Resource Administration, on behalf of the General Manager of the NCI Agency, reconfirmed the grounds on which the challenged decision was made.

64. It must be observed that the appellant did not formally submit a petition after the notification of the challenged decision on 1 February 2013. However, his initiatives since this date, interpreted not restrictively but with an open mind, permit the conclusion that the appellant submitted a petition on 19 March 2013, that is to say within the period of sixty days prescribed for his appeal after 1 February 2013.

65. Under these circumstances, the petition filed by the appellant against the contested decision had the effect of interrupting the sixty-day period, set out in Article 4.3.2 of Annex IX to the NCPR, available to the appellant for the submission of his appeal (see Decision 680).

66. Nevertheless, the Tribunal considers that the respondent formally rejected this petition in the e-mail dated 23 May 2013 confirming the challenged decision. The rejection of this petition initiated a new sixty-day period expiring on 22 July 2013. Consequently, the additional initiative and request of the appellant from May to July 2013 to re-examine the position of the respondent and to confirm the challenged decision are not part of the ongoing petition proceedings and do not preserve the appeal period.

67. The Tribunal points out that the submissions on annulment of the challenged decision were filed on 15 September 2013, that is to say after the expiry of the new sixty-day period initiated with the rejection of the appellant's petition. These submissions must therefore be dismissed as inadmissible.

68. Concerning the submissions on compensation for material or moral damage suffered by the appellant, the Tribunal states that these have to be rejected in so far as they are closely associated with the claims seeking annulment which have themselves been dismissed as inadmissible.

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

E. Costs

70. Article 4.8.3 of Annex IX to the NCPR provides as follows:

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

71. The dismissal of the appeal gives rise to the dismissal of the submissions under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 14 April 2014.

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

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



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

23 May 2014

AT-J(2014)0008

Judgment

Case No. 2013/1006

SS,

Appellant

v.

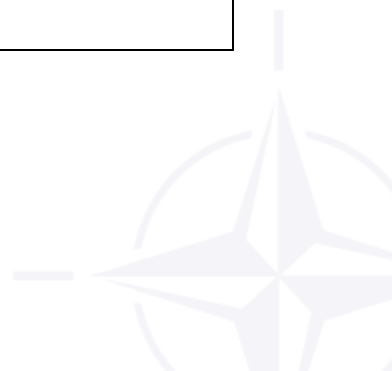
Joint Forces Command Headquarters Brunssum,

Respondent

Brussels, 17 April 2014

Original: English

Keywords: Status of Forces Agreements; civilian staff; immunity; criminal jurisdiction; deployment; uniforms.



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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún, and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 12 March 2014.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal, dated 12 September 2013 and registered on 20 September 2013, by Mr SS against Joint Forces Command Headquarters Brunssum (JFCBS). The appellant, a staff member at JFCBS, seeks annulment of the respondent's replies to his inquiries regarding jurisdiction over deployed NATO civilians and the wearing of uniforms, related changes in NATO policies, and substantial monetary relief.

2. The comments of the respondent, dated 18 November 2013 were registered on 5 December 2013. The reply of the appellant, dated 30 December 2013, was registered on 14 January 2014.

3. The proceedings in this case were initiated before the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, inter alia, establishing the Tribunal. The preamble to "new" Annex IX provides that any proceedings initiated before 1 July 2013 under the previous Regulations will continue to be governed by the previous Regulations until they are settled in a final manner. As a consequence, the present case will be decided by the Tribunal in accordance with the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

4. The Tribunal's Panel held an oral hearing on 12 March 2014 at NATO Headquarters. It heard arguments by both parties, in the presence of representatives of the NATO Office of the Legal Adviser and Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. The appellant is a civilian operational analyst who has been has been deployed to the International Security Assistance Force (ISAF) in Afghanistan three times.

7. Paragraphs 7.3 and 7.4 of C-M(2005)0041, NATO's policy document on Deployment of NATO Civilians in NATO Council-Approved Operations and Missions, specify that:

7.3 Prior to assignment or appointment to a post outside the territory of NATO member States, a proper status under law should be accorded to civilian staff serving on foreign territory.

7.4. Whatever concrete form or legal technique is used to provide such status it should address the following elements in a satisfactory manner:

...
- jurisdiction and legal process;
....

8. On 4 January 2002 ISAF and the Interim Administration of Afghanistan concluded the Military Technical Agreement (MTA). At the hearing the Tribunal was informed that NATO was not involved in ISAF when the MTA was concluded; command of ISAF was not shifted to NATO until August 2003.

9. The MTA includes Annex A, captioned "Arrangements Regarding the Status of the International Security Assistance Force." Article VI of Annex A, captioned "Identification" provides in relevant part:

1. ISAF personnel will wear uniforms and may carry arms if authorized by their orders.

10. Article VII of Annex A, captioned "Final Authority to Interpret" provides:

1. The ISAF Commander is the final authority regarding interpretation of this Military Technical Agreement.

11. Following ISAF's shift to NATO command in 2003, on 22 November 2004, NATO and Afghanistan concluded a further agreement that, *inter alia*, provided that the MTA shall apply *mutatis mutandis* to "NATO personnel." "NATO Personnel" are defined to mean "the military and civilian personnel assigned or attached to or employed by the North Atlantic Treaty Organization."

12. On 25 March 2013, the appellant, pursuant to the procedures specified in "old" Article 61.1 of the NCPR submitted through his immediate supervisor a request for clarification of the legal status of NATO civilian personnel deployed in out-of-area operations. The request sought clarification or explanation of two issues: the jurisdictional status of deployed NATO civilian personnel and the wearing of uniforms by such personnel while deployed. That same day, the JFCBS Office of the Legal Advisor provided legal advice in response to the appellant's inquiry that was forwarded to and discussed with him. The appellant found the reply to his inquiry to be unsatisfactory, and on 11 April 2013 requested further clarification. His 25 March 2013 request was answered by letter dated 26 April 2013.

13. The appellant remained dissatisfied with the answers to his inquiries. On 6 June 2013, he forwarded a request to the JFCBS official responsible for personnel management, again seeking answers satisfactory to him on the questions he previously raised.

14. On 14 June 2013, the appellant sent a lengthy written complaint to the Commander of JFCBS, the relevant Head of NATO Body (HONB). The complaint again sought answers satisfactory to the appellant to questions regarding deployed civilians' jurisdictional status and their wearing of uniforms while deployed. The complaint included memoranda explaining the appellant's views that JFCBS's earlier

answers to his questions were not satisfactory from the perspective of the ISAF MTA, the legal status of national deployed personnel, Just War Theory, the rule of law, and the state's monopoly on the use of violence. The complaint also requested that a complaints committee be convened, a request subsequently withdrawn.

15. On 1 July 2013, JFCBS's Acting Assistant Chief of Staff forwarded to the appellant a letter giving additional clarification on the status of deployed NATO international civilians. On 8 July 2013, the acting HONB at JFCBS reviewed the appellant's complaint and directed the JFCBS Legal Advisor to answer the appellant in writing within 14 days. This was done. On 17 July 2013, the Legal Advisor provided the appellant with a 13-paragraph heavily footnoted memorandum analyzing the issues he raised. This was subsequently discussed in an extensive e-mail exchange between the appellant and the JFCBS Office of the Legal Advisor.

16. On 26 July 2013, the acting HONB at JFCBS, after reviewing the answers given to the appellant, concluded that his requests for explanation and clarification had been adequately and extensively answered.

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

(i) The appellant's contentions

17. The appellant contends that his appeal is admissible and requests that the Administrative Tribunal annul:

- an implicit decision rejecting his complaint dated 14 July 2013;
- a decision by the JFCBS Deputy Commander dated 17 July 2013; and
- an undated decision by the JFCBS Deputy Commander received 29 July 2013.

18. Further, "[a]s a consequence and a remedy to the annulment of the contested decisions and the recognition of the defendant's liability, the appellant first seeks the adoption of proper legal arrangements which address the legal status of deployed NICs in a satisfactory manner, i.e. jurisdiction and the wearing of uniforms."

19. Thus, the essence of the appeal is that the appellant was not satisfied with the substance of NATO's position regarding the legal issues he raised. The appeal recites that the appellant:

...indeed considered that the legal status of deployed NICs [NATO International Civilians] had not been addressed in a satisfactory manner by the defendant prior to his deployment, as required by the applicable rules and that this situation was in breach of international law, in particular the NIC Deployment Policy, the ISAF MTA and the rule of law. He also considered that a legal contradiction existed regarding the wearing of uniforms which the defendant was responsible to resolve.

20. Appellant's counsel confirmed at the hearing that the appeal concerned the substance of JFCBS's responses to his questions, and that the appellant was given answers to his questions "that are not legally acceptable."

21. The complaint and the appeal explain at length the appellant's concerns regarding NATO's status of forces agreements with non-NATO countries to which NATO military and civilian personnel are deployed (SOFAs). These agreements typically guarantee the immunity of NATO's personnel's from host country jurisdiction in criminal and disciplinary matters. In the appellant's view, this results in an unsatisfactory situation because the home countries of many deployed NATO civilians, including the appellant's, do not exercise criminal jurisdiction over the conduct of their nationals abroad, or do so only with respect to a few serious offenses. The combination of immunity from host country jurisdiction under NATO's SOFAs, and some NATO countries' election not to exercise criminal jurisdiction over their nationals abroad, can result in situations where no country exercises criminal jurisdiction over offenses committed by deployed NATO civilian personnel. In appellant's view, this contravenes "the rule of law, the general principle of legal certainty and of the general principle of law of access to justice."

22. The appellant's second concern involved the wearing of uniforms by NATO civilian personnel deployed to Afghanistan. In his view, Article VI of Annex A of the MTA required that all deployed civilian NATO personnel wear uniforms. He therefore concluded that NATO's procedures and regulations barring deployed civilians from wearing uniforms place the organization in breach of its international obligations to Afghanistan and violate international law.

23. By way of relief, in addition to the annulment of the decisions and changes in NATO policy and practice described above, the appellant seeks substantial monetary compensation:

- for NATO's failure "to establish a satisfactory legal status" for persons in his situation, resulting in an "accountability deficit" giving rise to a form of "moral austerity," compensation equaling either €15.642,00 or €3.270,60.
- for NATO's failure "to establish a satisfactory legal status and to clarify the legal obligations regarding the wearing of uniforms" and thus exposing him to increased physical risks, additional compensation of either €20.847,20 or €4.358,96.
- for NATO's policies that "resulted in a jurisdictional dislocation," additional compensation of either €25.655,20 or €4.053,12.
- for NATO's "deliberate evasion" of his requests for clarification, additional compensation of either €23.694,00 or €2.154,00.
- for "non-specific emotional trauma," additional compensation of €1.000.

24. Thus, the appellant's total claim for compensation "is estimated at €86.848,56, or at least, on a subsidiary basis, at €14.836,68" The appellant also asks the Tribunal to order that the defendant "pay the entire costs, even if the appeal was not to be successful."

(ii) The respondent's contentions

25. As preliminary matters, the respondent contends that the appellant's compensation claims were not submitted to the Head of NATO body in his complaint, and that those claims were therefore inadmissible. Further, the appeal was inadmissible because

“[t]he Head of NATO body did not make any formal decisions affecting the Appellant in his capacity as deployed NATO International Civilian.” The respondent also contends that the Status of Forces agreements criticized by the appellant reflected decisions by the North Atlantic Council in approving them, decisions as to which the Administrative Tribunal has no jurisdiction in the circumstances presented by appellant’s claim. In addition, the respondent maintains that it lacked international legal personality, and so was not bound by the international legal obligations invoked by the respondent.

26. As to the merits of the appellant’s claim regarding jurisdictional issues, it was explained at the hearing that longstanding NATO policy, insisted upon by member countries, is that NATO personnel deployed outside the NATO area must be assured of immunity from host country jurisdiction. However, in the respondent’s contention there is no “legal vacuum.” NATO staff members remain subject to possible disciplinary action by the organization for misconduct. Their home countries can exercise criminal jurisdiction over the extraterritorial misconduct of their civilian nationals if they choose to do so; several NATO members have enacted statutes providing for such jurisdiction over significant offenses by their nationals. Further, immunity can be waived if NATO deems this appropriate in a particular case.

27. The respondent further describes how the appellant several times requested clarification and explanation of the issues he raised. These were provided, repeatedly and in detail. Thus, in the respondent’s view, “the administrative review was fully focused on providing the Appellant with the clarification before his deployment, and as such providing the Appellant what he requested.”

28. As to the appellant’s contentions regarding the wearing of uniforms, the respondent believes that appellant misunderstood Article 6 of the MTA Annex . In the respondent’s view, this provision provides for the wearing of uniforms and carrying of arms only by personnel whose orders so provide, as the appellant’s did not. The respondent further observes that under the international law of armed conflict, uniforms are an identifying characteristic of a combatant and lawful target. Thus, the relevant NATO documents precluding the wearing of uniforms by the appellant “protect them and preserving [sic] their position and make sure they are not being confused for taking direct part in hostilities and would be mistakenly regarded as lawful targets.”

D. Considerations and conclusions

29. It is to be recalled that Article 4.2.2 of “old” Annex IX, which is applicable in this case, limits the competence of the Tribunal. The Tribunal may annul such decisions of the Heads of NATO bodies as are contrary to the contracts or other terms of appointment of the staff member concerned or to the relevant provisions of the Civilian Personnel Regulations. It may also order the Organization to repair the damage resulting from any irregularity committed by the Head of a NATO body

30. The appellant first of all seeks the adoption of proper legal arrangements which address the legal status of deployed [NATO International Civilians] in a satisfactory manner. The appeal does not clearly explain what jurisdictional arrangements the

appellant would regard as “satisfactory.” His earlier complaint suggests, however, that the proper response to his concern would be for NATO to deploy only NATO civilians from countries that would exercise criminal jurisdiction over their conduct while deployed. This request for a significant change in NATO policy is manifestly outside the scope of the Tribunal’s jurisdiction.

31. The appellant further seeks the annulment of a series of the respondent’s responses to his requests for “clarification” of NATO policies with respect to jurisdiction and wearing of uniforms by deployed civilians. The appellant sought clarifications and explanations on matters of concern to him. The respondent provided these in a series of documents giving detailed and reasoned explanations of international law and NATO policy addressing the issues raised. The appellant’s belief that these were not “satisfactory” does not convert them to “decisions” that are contrary to his contract of employment or other terms of his appointment or to the relevant provisions of the CNPR. This claim is therefore to be dismissed.

32. Notwithstanding the fact that the central relief sought by the appellant is outside of the Tribunal’s jurisdiction, the Tribunal deems it in this particular case appropriate to make some observations on the substance. The appellant’s central contention is that it is not in his view “satisfactory” for deployed NATO civilian personnel to be immune from host country jurisdiction under SOFAs, if their native country or some other jurisdiction will not exercise criminal jurisdiction over any misconduct while they are deployed.

33. The relevant status of forces arrangements between NATO and Afghanistan reflect a considered judgment by the appropriate NATO authorities regarding the need for NATO military and civilian personnel deployed outside the NATO area to be immune from host country jurisdiction. This judgment is consistent with many years of practice under SOFAs concluded by NATO and by many countries. It is also in harmony with many others areas of international law and practice, such as diplomatic immunity and the immunity of UN Experts on Mission. The fact that the appellant regards this longstanding international practice as “unsatisfactory” does not make it illegal or bring it within the Tribunal’s mandate.

34. Also the appellant’s complaints regarding the wearing of uniforms likewise would fail on the merits. The ordinary meaning of the language of Article VI of Annex A of the MTA is consistent with the interpretation offered by the respondent, *i.e.*, that uniforms are to be worn, and weapons carried, only by those personnel whose orders so provide. This is evidently the view of the ISAF Commander, who under Article VII of Annex A is the final authority regarding interpretation of the MTA.

35. Were there any doubt regarding the proper construction of Article VI, the normal rules of treaty interpretation would require that it be construed in accordance with the rules of international law in force between the parties, including the international law of armed conflict. This requires that combatants discriminate between military and civilian targets, and for this reason members of regular armed forces wear uniforms in order to identify themselves as combatants - and thus as lawful targets. It would be inconsistent with these fundamental rules for NATO to require its deployed civilian personnel – who

are non-combatants - to wear uniforms and thus render themselves indistinguishable from military personnel.

36. The non-combatant status of civilians working in support of NATO operations is clearly reflected in ACO Directive 50-11 on Deployment of Civilians. Article 4-1(a) of that directive provides that they “are non-combatants as defined in the international law of armed conflict and should refrain from any activity endangering that status.” Article 3(d) of Annex C-1 of Directive 50-11 thus requires that in circumstances where NATO provides equipment to civilians, “neutral equipment colors, rather than camouflage pattern, have been selected to ensure that civilians are not mistaken for military personnel and targeted as such.”

37. In addition, the 2004 agreement by which NATO and Afghanistan agreed to extend the 2002 MTA to NATO personnel did so “*mutatis mutandis*,” that is, with the necessary changes having been made. This agreement makes doubly clear that the 2002 MTA, as extended to NATO civilian personnel in 2004, does not require that these non-combatant personnel wear uniforms.

38. Finally, while the appellant’s counsel at the hearing alleged “emotional injury” and “moral injury” from the respondent’s alleged failure to answer his questions to his satisfaction, he has not shown any actual harm to support his large claim for damages, or any portion thereof. The Panel notes that the claimed amounts were calculated based on theories of quantification that are entirely of the appellant’s invention and are not supported by past precedent or other legal authority.

E. Costs

39. Article 4.8.3 of “old” Annex IX to the NCPR provides as follows:

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

40. The dismissal of the appellant’s claims gives rise to the dismissal of the appellant’s claims under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appellant's claims are dismissed.

Done in Brussels, on 17 April 2014.

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

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



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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

23 May 2014

AT-J(2014)0009

Judgment

Case No. 2013/1008

ZS,

Appellant

v.

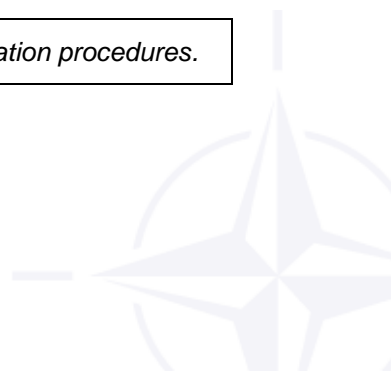
NATO International Staff,

Respondent

Brussels, 24 April 2014

Original: English

Keywords: consultancy contract; new dispute resolution system; exhaustion of pre-litigation procedures.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written submissions by the parties and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2014)0001.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO International Staff, dated 19 November 2013, and registered on 29 November 2013 as Case No. 2013/1008, by Mrs ZS, a consultant at the NATO International Staff, seeking in particular the requalification of her consultancy contract and the granting of an indefinite duration staff contract.

2. The respondent submitted a request for summary dismissal on 8 January 2014, registered on 21 January 2014. The President of the Tribunal issued Order AT(PRE-O)(2014)0001 on 21 January 2014 in accordance with Rule 10, paragraph 1, of the Tribunal's Rules of Procedure. The appellant presented additional comments to the Order on 29 January 2014.

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

B. Factual background of the case

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

5. Appellant is currently a consultant with the NATO International Staff (IS). She is since 1 January 2009 a medical adviser in the NATO Headquarters Medical Service under the following contracts:

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

6. On 5 September 2013, appellant wrote to the NATO Secretary General requesting the requalification of her first consultancy contract into an initial contract and, consequently, her following contracts into an indefinite duration contract.

7. On 18 September 2013, the Acting Assistant Secretary General for Executive Management (ASG EM), on behalf of the Secretary General, replied that, according to the new procedure in force since 1 July 2013, the Secretary General was not the

appropriate authority to refer such matters to and invited appellant to submit a request for Administrative Review.

8. On 4 October 2013, appellant replied to the ASG letter expressing disagreement with the Administrative Review procedure that was indicated and informing that without a reply from the administration on the matter within two weeks, the request would be considered as rejected and be challenged with the Tribunal.

9. The administration did not reply to the 4 October 2013 letter and appellant did not seek administrative review.

10. On 19 November 2013 appellant submitted the present case with the Tribunal.

11. On 8 January 2014, respondent provided the President of the Tribunal with a request for summary dismissal of the case under Rule 10 of the Rules of Procedure of the Tribunal.

12. On 21 January 2014, the President of the Tribunal issued Order AT(PRE-O)(2014)0001 which provides as follows :

- 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.
- Appellant may submit additional written views.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

13. Appellant submitted additional written views on 29 January 2014, which were considered by the Tribunal.

C. Summary of parties' contentions on admissibility

(i) The appellant's contentions

14. Appellant submits that the appeal was lodged within the 60 day time limit of the contested decision dated 25 September 2013.

15. As far as the arbitration clause in appellant's contract(s) is concerned, appellant submits that she may, through an application of this clause, not be deprived of statutory rights given in the NCPR.

16. Appellant disagrees with respondent's point of view that an administrative review should be requested with the argument that an administrative review can only concern an administrative decision. The purpose of her letter was to obtain a decision of the Secretary General, in the absence of a decision on her situation. She alleges that only the Secretary General can take such a decision.

(ii) *The respondent's contentions*

17. Respondent submits that appellant did not exhaust the procedural requirement of exhausting administrative review and did not initiate the complaints procedure, as is foreseen in Chapter XIV of the NCPR and Annex IX thereto. It maintains that the Secretary General was not the appropriate person to be addressed in this respect.

18. Respondent observes that appellant had set an arbitrary deadline for it to reply.

D. Considerations

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

20. The NCPR, both in the version in force when the contracts were signed and in the version when the appeal was lodged, stipulate in the Preamble that the NCPR apply to, amongst others, consultants. Annex IX, both in the old and in the new version, although with slightly different wording, provides that the regulations concerning internal dispute resolution are also applicable to consultants. Both parties refer exclusively to Chapter XIV NCPR and Annex IX thereto. In addition, neither party has invoked the existence of the arbitration clause in the contract(s) as an exception to the present procedure. As a consequence, the Tribunal will apply the procedures in the NCPR in the present case.

21. It is appropriate to recall that the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The establishment of the Tribunal is only one aspect of this new system. The new system puts major emphasis on pre-litigation procedures. It provides for a thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately the Heads of the NATO bodies (HONB), to address, and wherever possible, to resolve, issues instead of leaving them for resolution by the Tribunal through a contested legal proceeding. The new internal justice system is therefore substantially different from the previous one.

22. NATO's legislators followed in this respect the recommendations made in the "Report of the External Panel on the Modernization of the NATO Appeals Board and Dispute Resolution System" of November 2011. The experts on this Panel observed that in their opinion, many issues that were brought to the Appeals Board for decision "could and should have been resolved at an earlier phase." The External Panel emphasized in this regard that international organizations increasingly make use of

graduated systems of administrative review to facilitate resolution of disputed issues more quickly and at an earlier stage, resulting in less disruption and expense for all concerned.

23. The Tribunal has in accordance with the transitional provisions of new Annex IX adjudicated a number of cases where the proceedings had started before the entry into force, on 1 July 2013, of the new system.

24. The case under consideration is, however, one of the first cases in which the provisions of new Chapter XIV of the NCPR and Annex IX thereto fully apply. The present case must therefore be reviewed taking into account all aspects of the new internal dispute resolution system and the Tribunal must in particular be satisfied that the *ensemble* of the pre-litigation process has been respected. Article 6.3.1 of Annex IX is unambiguous in this respect. It stipulates:

...the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex.

25. It also follows from this that new jurisprudence regarding the Administrative Tribunal's jurisdiction and the admissibility of claims will develop over time, which may or may not be different from that of the Tribunal's predecessor, the NATO Appeals Board. Or, as the United Nations Appeals Tribunal put it when the new internal justice system in the United Nations took effect in 2009: "...the jurisprudence of the former Tribunal, though of persuasive value, cannot be binding precedent for the new Tribunals to follow. We can understand the argument that the earlier judgments provide consistency, clarity and continuity of jurisprudence, but binding precedents they are not." (*Sanwidi*, 2010-UNAT-084, paragraph 37).

26. In this context and in view of the *ensemble* of the new dispute resolution system reference, in cases such as this, to the jurisprudence of this Tribunal's predecessor, which functioned in a different context, must be subject to significant qualifications.

27. As mentioned, both Chapter XIV of the NCPR and Annex IX thereto have been changed substantially. It is opportune to reproduce here those elements that are relevant to the present case.

28. Article 61.1 of the NCPR requires in its new version that:

(s)taff members, consultants, temporary staff or retired NATO staff, who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment, including their contracts, NATO regulations governing personnel and other terms of appointment, and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations...

29. Article 1 of Annex IX ("Definitions and calculation of time limits in the present annex") provides that the term "staff member" in Annex IX refers to the personnel included in the categories listed in paragraph B(v)(c),(d),(e) and (f) of the Preamble to

the CPRs. Paragraph B(v)(d) concerns consultants.

30. Article 2 of Annex IX then establishes the procedures to be followed. Article 2.1 stipulates:

Staff members or retired NATO staff who consider that a decision affecting their conditions of work or of service does not comply with their terms and conditions of employment and decide to contest the decision, may, within 30 days after the decision was notified to them, initiate the process for seeking an administrative review of the decision. As provided in Articles 2.2-2.4, the process shall be initiated in the NATO body in which the staff member is appointed or member of the retired NATO staff was appointed, so long as the Head of that NATO body has authority to rescind or modify the contested decision; otherwise, the process shall be initiated in such other NATO body, if any, that has the authority to rescind or modify the decision in question. In cases of doubt, staff members or retired NATO staff should consult with the human resources management in the NATO body in which they are, or were last employed for guidance.

31. And Article 2.2 provides:

In cases where an administrative review is to be conducted within the NATO body to which the staff member is appointed, the following steps shall apply:

(a) they shall, through their own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. The staff member's immediate supervisor shall respond within 21 days, except that this period may be extended with the consent of the staff member.

(b) those wishing to contest the decision of the immediate supervisor shall, within 21 days of receiving a response pursuant to Article 2.2(a) of this Annex, refer the matter to the Head of NATO body concerned, requesting a further administrative review and indicating the reasons for the measure(s) or other outcome they are seeking by way of remedy. The Head of NATO Body shall review the matter, including the gathering of any information he/she deems necessary to consider whether to agree to the measures or other outcome sought. The Head of NATO Body shall, within 21 days from receipt of the staff member's request, make known his/her position and shall either confirm, rescind or modify the contested decision.

32. It is clear from these provisions that the new procedures for administrative review constitute an important and innovative element in the package of reforms of NATO's internal justice system.

33. Moreover, Article 61.1 NCPR stipulates that staff may also ask to submit their grievances to mediation under the conditions described in Article 3 of Annex IX.

34. Following these steps, staff members, consultants, temporary staff or retired NATO staff who wish to contest the decision after pursuing administrative review and, if applicable and requested, mediation are, in accordance with Article 61.2, entitled to submit a complaint in writing to the HONB possessing the authority to rescind or modify the challenged decision as prescribed in Article 4 of Annex IX to these Regulations.

Such complaints must, under Article 4.1 of Annex IX, be submitted to the HONB in which the administrative review was conducted. In order to be considered by the HONB, a complaint must be submitted to him/her within 30 days following the outcome of the administrative review or mediation, where mediation is pursued.

35. Claimants may, in accordance with Article 4.2 of Annex IX, also request that, before a decision is taken, the complaint be submitted to a Complaints Committee. The HONB shall accept the request to submit the complaint to the Complaints Committee unless, within 15 days of receiving the complaint, he/she agrees to rescind or modify the contested decision. HONBs may also decide to submit a complaint to the Complaints Committee on their own initiative.

36. Claimants may, however and in accordance with Article 61.3, submit a complaint in writing to the HONB without a prior administrative review only if the contested decision was taken directly by him or her. Challenges concerning decisions that are not taken directly by the HONB, but on a lower level, including on the latter's behalf, must therefore follow the full pre-litigation process, including administrative review.

37. Article 62.1 provides that following the administrative and complaints procedure under Article 61, the complainant or his or her legal successor may appeal to the Administrative Tribunal.

38. Only if the grievance is the result of a decision taken directly by the HONB may the aggrieved party lodge an appeal directly with the Tribunal in accordance with Article 1.6 of Annex IX. The words "taken directly by the HONB" are new compared to the old text and must be read in conjunction with the *ensemble* of the provisions of the new dispute resolution system. As was mentioned above, the HONB has specific responsibilities under the new dispute resolution system. These may be delegated but only by an express decision (*cf* Article 61.4 NCPR). The HONB is him/herself involved and is expected to take a considered final decision in the pre-litigation process. One consequence of such a decision may after all be that the case is submitted to the Tribunal.

39. Neither party can unilaterally waive the *ensemble* of these pre-litigation procedures. Parties may only by mutual agreement submit a matter directly to the Tribunal only as provided in NCPR Annex IX Article 6.3.1. This is not the case in the present dispute.

40. The above-mentioned provisions constitute a complete set of pre-litigation and litigation procedures. The new procedures adopted by the Council, and in particular those concerning administrative review, place significant new responsibilities on both the administration and on staff members and other covered persons. Both sides are bound to act in good faith in seeking an administrative adjustment of disputed issues wherever possible. This includes the responsibility for management to explain to staff the correct procedure to follow, or the correct person or instance to address.

41. The new rules must be understood, applied and interpreted in a coherent way and like all provisions of the NCPR, the language of Article 61.1 is to be read in good

faith, in accordance with its ordinary meaning, and in a manner that seeks to assure that all provisions are construed consistently and in harmony with their purpose and the Council's objectives in adopting them. On the other hand, NCPR Article 61.1 is not, and should not become, an excuse for intransigence and delay.

42. In the present case, appellant contends that Article 61.1 does not apply because there was no decision triggering its application, that a new decision had to be requested and that only the Secretary General can offer indefinite term staff contracts. In addition, appellant submits that the non-reply by the Secretary General is equivalent to the implicit rejection of the request.

43. The Tribunal disagrees with these submissions.

44. First of all, the file shows that the most recent decision concerning appellant's contractual situation was taken on 15 February 2012, when the Head of Human Resources services offered to alter the running one year contract into the current three year consultancy contract. This was accepted by appellant. It is then for appellant to identify to respondent in an understandable manner any subsequent decisions, facts or elements affecting her conditions of work or of service which do not comply with the terms and conditions of her employment warranting a complaint and, ultimately, an appeal. As a first step appellant must, through her own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. Articles 2 - 4 of Annex IX are applicable in this regard.

45. It is also to be emphasized that the new regulations provide for strict deadlines that must be adhered to in the interest of expeditious resolution of a dispute. The internal law no longer provides that complaints may be submitted "within a reasonable time," and the Tribunal is no longer required – or, in general, empowered – to assess what constitutes a "reasonable time" for requesting administrative review or lodging a complaint in particular cases (*cf* NATO AT judgments in Cases No. 897 and 902).

46. The Tribunal has already referred to Article 6.3.1 of Annex IX (see *supra*, paragraph 24), according to which the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints. The Tribunal has pointed out that such channels were available in the present case. An appeal must then be submitted within 60 days of the latest of the following to occur:

- (a) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will not be granted; or
- (b) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will be granted, but such relief has not been granted within 30 days after receipt of such notice; or
- (c) the Head of the NATO body concerned has failed to notify the staff member or a member of the retired NATO staff within 30 days of receiving the report and recommendation of the Complaints Committee in the matter, which shall be considered as equivalent to a decision that the relief sought will not be granted.

47. It results from the above that a prior administrative review is one of the procedural conditions to bring any action before the Tribunal except in the very limited situations identified in Articles 61.3 and 62.2 NCPR. This procedural requirement aims to solve any dispute amicably before a formal judicial litigation and contributes to the good administration of justice in order to avoid that any dispute evolves into a formal litigation.

48. The appellant not having previously introduced the necessary request for administrative review, the Tribunal, in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible for failure to comply with the requirements of Article 61.1 of the NCPR and must be summarily dismissed.

49. The Tribunal cannot anticipate the conclusions of the pre-litigation process, the subsequent decision of the HONB, or any other resolution that parties may find for the dispute.

50. No material or immaterial damages may be assessed at this time. The question of any damages or other relief can be addressed in case appellant's complaint is resubmitted to the Tribunal if her complaint cannot be resolved through the pre-litigation process.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 24 April 2014.

(Signed) Chris de Cooker, President

(Signed) Laura Maglia, Registrar *a.i.*

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



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

23 May 2014

AT-J(2014)0010

Judgment

Cases Nos. 906 and 2013/1004

LV,

Appellant

v.

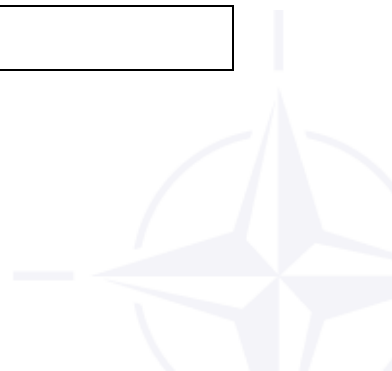
NATO International Staff,

Respondent

Brussels, 25 April 2014

Original: English

Keywords: successive temporary contracts; admissibility; reasonable time.



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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO) composed of Mr Chris de Cooker, President, Mr John Crook, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 12 March 2014.

A. Proceedings

1. The NATO Appeals Board (Board) was seized of an appeal, dated 24 June 2013 and registered under No. 906, by Mr LV, formerly a temporary staff member of the NATO International Staff, seeking requalification of his short-term contracts from 24 October 2007 until 31 May 2013 into an initial contract followed by a contract of indefinite duration.
2. The NATO Administrative Tribunal (Tribunal) was seized of a second appeal by Mr LV, dated 29 August 2013 and registered under No. 2013/1004, seeking annulment of the termination of his appointment on 31 May 2013.
3. By Order AT(PRE-O)(2013)0002 dated 20 November 2013, the President of the Tribunal joined the two cases to be heard together In accordance with Rule 13.3 of the Tribunal's Rules of Procedure.
4. The comments of the respondent, dated 23 August 2013 and 5 November 2013 seek the dismissal of the appellant's submissions. The appellant presented his replies to the comments on 17 September 2013 and 9 December 2013.
5. Appeal No. 906 was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the (Tribunal). Pursuant to the Transitional Provisions contained in Article 6.10 of ("new") Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. The proceedings in Appeal 2013/1004 were also initiated before the coming into force of amendment 12 to the NCPR. The preamble to "new" Annex IX provides that any proceedings initiated before 1 July 2013 under the previous Regulations will continue to be governed by the previous Regulations until they are settled in a final manner. As a consequence, both appeals will be decided by the Tribunal in accordance with the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.
6. The Tribunal's Panel held an oral hearing on 12 March 2014 at NATO Headquarters. It heard arguments by both parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

7. Article B(v)(e) of the Preamble of the NATO Civilian Personnel Regulations provides:

(e) Temporary personnel or temporary staff – means personnel engaged from among nationals of the members of the Alliance either to replace members of the staff who are absent or to undertake tasks temporarily in excess of the establishment approved for the NATO body concerned.

8. Article 77.1 of the NCPR provides:

77.1 Temporary personnel may be engaged by the Head of the NATO body when necessary to replace members of the staff who are absent or to undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned.

9. Articles 78.1 and 78.2 of the NCPR provide:

78.1 The duration of employment of temporary personnel shall be stipulated in the contract and shall not normally exceed a period 90 consecutive days. However, if required by circumstances, such contracts may be extended by one further period not exceeding 90 days.

78.2 Where, in exceptional cases, the services of temporary personnel are required for a period exceeding 180 days, the Head of the NATO body shall seek prior budgetary approval to the extension.

10. Appeals Nos. 906 and 20013/1004 both involve the same facts. For most of the period between 24 October 2007 and 31 May 2013, the appellant was employed in various capacities in the Bureau of Security at NATO Headquarters on a succession of 15 temporary contracts. The details and durations of these contracts and the appellant's duties under them are described below.

11. On 19 April 2013, by letter from his counsel to the Secretary General, the appellant requested the requalification of his contracts since 24 October 2007 into an initial contract followed by a contract of indefinite duration. This request appears to have received no reply.

12. On 24 June 2013, by letter from his counsel to the Secretary General, the appellant maintained that the termination of his employment by reason of expiry of his final temporary contract must be seen as the improper termination of a contract of indefinite duration. This letter appears to have received no reply.

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

(i) The appellant's contentions

13. In Appeal No. 906, the appellant contends that the appeal is admissible and that his contracts did not satisfy the requirements of Article 77.1 NCPR. The appellant observes that he was employed by NATO for five years and seven months on the basis of fifteen successive contracts, of which eight were extended. During this period, he carried out functions in NATO's Office of Security under contracts specifying the same duties, subject only to minor amendments. In the appellant's contention, the continuing nature of the tasks described in his contracts shows that they were not related to an exceptional event satisfying Article 77.1 NCPR. Instead, his work involved ongoing tasks necessary for the functioning of NATO's international secretariat.

14. Accordingly, in Appeal No. 906, the appellant seeks:

- annulment of the Secretary General's implicit decision of 18 May 2013 rejecting his request to reclassify his successive temporary contracts as an initial contract followed by an indefinite duration contract;
- retroactive granting of all advantages accruing to permanent employees of NATO since 24 October 2007;
- moral damages evaluated *ex aequo et bono* at € 30.000, and
- expenses, including attorney's fees and travel costs.

15. Appeal No. 2013/1004 grows out of the same fifteen contracts, but rests on a different legal theory. The appellant contends that, given the permanent nature of his functions, he should be deemed to have been employed pursuant to an initial contract followed by an indefinite duration contract, and that his "deemed" indefinite duration contract was improperly terminated by the organization.

16. Accordingly, in Appeal No. 2013/1004, the appellant asks the Tribunal to:

- order his reintegration into his prior employment, or his reassignment to a new position under his indefinite duration contract; or subsidiarily
- award material damages equal to all his wages until his pension, his pension rights, and his group insurance benefits; or subsidiarily, payment in lieu of notice equal to 180 days of salary and a payment for loss of employment equal to "cinq mois et 7/12 de mois" of salary; and
- moral damages *ex aequo et bono* of € 50.000.

(ii) The respondent's contentions

17. As to the first appeal, the respondent contends that the appeal involving contracts in effect prior to 3 July 2011 is inadmissible because it was not filed within a reasonable time as required by Article 61.3 NCPR. The respondent contends that the concept of "reasonable time" should be interpreted in light of Article 4.3.2 of Annex IX to the NCPR, which sets a sixty-day deadline for lodging an appeal against a decision by the Head of a NATO Body.

18. As to the merits of the first appeal, the respondent maintains that all of the appellant's temporary contracts were entered into in compliance with the requirements of Article 77.1 NCPR. In this regard, the respondent views the appellant's temporary contracts as having been concluded four distinct periods. During the first and last periods the appellant "filled in" for short-staffed organizations in the absence of identified individuals. During the second and third, the appellant's services were required to assist the Headquarters Pass Office in meeting unusual non-recurring requirements. The first of these involved a large-scale program to update and replace several thousand passes allowing access to NATO premises. The second involved clearances for large numbers of non-NATO personnel involved in the construction of the new NATO Headquarters building.

19. Accordingly, in the respondent's view, the appeal relating to the appellant's contracts prior to 3 July 2011 should be dismissed as inadmissible, and that any claims the Tribunal finds to be admissible should be dismissed as groundless.

20. As to the second appeal, the respondent contends that there was no administrative decision that could be contested, as appellant's final contract came to an end pursuant to its agreed terms on 31 May 2013. The respondent further contends that the appeal is inadmissible because appellant failed to observe the requirements of Article 61.3 NCPR, providing that a complaint may be filed only after a staff member in the first instance refers any complaint affecting their conditions of work or of service to the head of their division.

21. Finally, the respondent contends that the appeal should be dismissed as inadmissible because it duplicates the appellant's appeal in Case No. 906, involving precisely the same facts.

D. Considerations and conclusions

(i) Considerations on admissibility

First appeal – arguments of the parties

22. The respondent contends that appellant's appeal with regard to his contracts in force prior to 3 July 2011 is inadmissible because it was not submitted within a reasonable period as required by Articles 24.6 and 61.3 NCPR and Article 4.3.2 of Annex IX.

23. The appellant responds by observing that in cases involving a succession of temporary staff contracts, the Board has several times ruled that appeals with respect to earlier contracts are admissible, even as to contracts signed years prior to the bringing of the appeal.

First Appeal – ruling of the Tribunal

24. The Board and the Tribunal have both addressed appeals alleging the illegality of a succession of temporary contracts concluded over substantial periods. The respondent does not appear to have disputed admissibility in some of these (*cf* NATO Appeals Board Decisions Nos. 878, 779, 811 and 879). In others, respondents disputed admissibility because the claims were not raised within a “reasonable time” pursuant to Article 61.3 NCPR and other relevant NCPR provisions. The Board and the Tribunal have rejected this objection, finding admissible claims alleging the illegality of a succession of short-term contracts over protracted periods (*cf* NATO Appeals Board Decisions Nos. 822, 852 & 861, and 897).

25. While the reasoning of past decisions finding such claims admissible is not always clear, both the Board and the Tribunal have viewed the “reasonable time” requirement as applying to the limited periods after employment ends, or following a request for reclassification of a staff member’s contracts, and not to the longer period covered by a succession of short-term contracts. The Tribunal recently affirmed this view, observing “where there is a succession of temporary contracts with no intervals between them, a dispute about the classification of the employment relationship can appear whenever the termination of the parties’ contractual link becomes evident and definite.” (*cf* NATO AT judgment in Case No. 902, para. 37).

26. Taking into account the prior practice of the Board and its own recent practice in a similar situation and the circumstances presented here, the Tribunal finds the first appeal admissible.

Second appeal – ruling of the tribunal

27. The appellant’s second appeal rests on the theory that he was constructively serving on a fixed-term and then an indefinite contract under Article 5 NCPR throughout his short-term contracts, and that his contract was wrongfully terminated when his final temporary contract ended on 31 May 2013.

28. The Tribunal finds the second appeal inadmissible. It involves only a slight revision of the first appeal, claiming additional relief based on a new legal theory applied to the same facts. The proper administration of justice requires that appellants include in their appeals all of the forms of relief to which they believe themselves entitled on account of the disputed events. It is not appropriate to attempt to engage the Tribunal multiple times on multiple theories involving the same facts. Doing so wastes the time and resources of the parties and the Tribunal. It also unfairly requires respondents to answer multiple times to claims involving a single set of facts.

(i) Considerations on the merits

29. In some past cases involving multiple short-term contracts, respondent NATO bodies have not sought to relate the disputed contracts to the requirements of Article 77.1 NCPR, instead unsuccessfully asserting other justifications. It has been argued, for example, that staff had to be employed through multiple short-term contracts

because a NATO body's ongoing restructuring made its future staffing requirements uncertain. In contrast, the respondent here maintains that each of the appellant's short-term contracts fully satisfies Article 77.1 NCPR, because he was temporarily employed to meet either temporary staff shortages or non-recurring requirements that could not be met with the normal establishment.

30. The appellant denies that the evidence sustains this interpretation of events. Thus, the issues here are essentially factual: does the evidence show that these contracts complied with the requirements of Article 77.1 NCPR? In this regard, the evidence is not extensive. Neither party introduced statements of witnesses or other evidence that might shine additional light on the reasons for the appellant's recurring contracts or the nature of the work he actually performed.

31. The bulk of appellant's evidence consists of copies of his fifteen short-term contracts, supplemented by documents extending some of them. Each contract is signed by the appellant and is conspicuously captioned "*Contrat Temporaire*" in boldface capital letters. While their terms evolved over time, all fifteen include provisions indicating that the parties did not regard the contractual employment relationship as permanent. All of them also incorporated brief and generally worded statements of the appellant's duties referring to him as as "*l'agent temporaire*".

32. The brief descriptions of the appellant's duties accompanying his contracts and extensions in many cases were carried forward and reproduced verbatim from contract to contract. No effort was made to update them to reflect the changing nature of his duties, or to relate those duties to the requirements of Art. 77.1 NCPR. Indeed, read alone, these contract documents support appellant's claim that he performed essentially consistent tasks over a long period, and that his work was not related to the special circumstances required by Article 77.1 NCPR.

33. However, for roughly half of the fifteen contracts, the respondent introduced copies of related four-page documents captioned "Request for Temporary Staff or Consultant." These appear to be the documents by which a NATO entity wishing to engage temporary staff seeks and documents approval by the responsible financial and human resources officials. They set out in varying detail the justification for the intended temporary hire and the nature of the temporary employee's duties.

34. There is no dispute regarding the authenticity of the documents introduced by either party.

35. The first two contracts, covering 24 October 2007 - 20 December 2007 and 7 January - 6 March 2008, are identical in substance. Both were for part-time (50%) work in NATO's "Service Sécurité Technique/Informatique, Bureau de Sécurité". Both authorized compensation at an hourly rate and specified that the appellant was not entitled to paid vacation and was responsible for his own health and accident insurance. The accompanying descriptions of duties briefly list various administrative tasks related to information security.

36. The respondent contends that the appellant's part-time employment during this period was necessary to replace an absent staff member who was identified by name. The respondent submitted a "Request for Temporary Staff or Consultant" form dated 18 December 2007 requesting approval of the second of the two contracts and identifying the person whose duties had to be temporarily filled. The totality of the evidence – the language and short term of the contracts, the fact that they are for part-time employment, and the documentation showing that the respondent was temporarily filling a vacant post, establish that these contracts satisfy the requirements of Article 77.1 NCPR.

37. The respondent contends that beginning in 2008, and continuing for some time thereafter, NATO's Pass Office carried out an extensive project to renew the all passes allowing access to NATO Headquarters and the NC3A Agency. This project involved several thousand passes or badges. According to the respondent, the Headquarters Pass Office required additional staff to implement this project while also carrying out its normal duties.

38. The appellant's third contract, covering 10 March 2008 - 9 June 2008, was related to this project, and assigned him to NATO's "Bureau des Laissez-passer du Siège, Branche Sécurité de Protection, Bureau de Sécurité". It provided for a monthly rate of compensation and authorized 2.5 days of vacation per month; the respondent remained responsible for his own health and accident insurance. The annexed description of the appellant's duties differs substantially from those under the first two contracts. It emphasizes tasks related to preparation, delivery and renewal of different types of identification cards.

39. The "Request for Temporary Staff or Consultant" form submitted by the respondent states that the temporary employee is required to "[r]einforce the current establishment of the NATO Pass Office during renovation of the passes for the entire NATO HQ." It further specifies that the temporary employee is required to "temporarily perform tasks not covered by the establishment" and notes "the temporary nature of the requirement." After this contract ended in June 2008, the appellant left NATO's employ for about three months during the summer of 2008. The evidence is again sufficient to show that the third contract conforms to the requirements of the NCPR.

40. Following the three-month gap during summer 2008, the appellant was again employed in NATO's Pass Office for periods totaling over twenty-one months under five temporary contracts. These covered 11 September 2008 - 10 December 2008 (extended to 19 December 2008), 5 January 2009 - 3 April 2009, 1 April 2009 – 30 June 2009, 2 July 2009 – 1 October 2009 (extended to 22 December 2009), and 4 January 2010 – 2 April 2010 (extended to 2 July 2010).

41. The appellant's monthly compensation was slightly increased in the contract beginning 5 January 2009, and beginning with the contract commencing 1 April 2009, he also received a supplementary payment equaling 12% of salary to be invested in a pension, as well as limited insurance coverage. For all five contracts in this group, the description of duties was identical to that accompanying the third contract and emphasized tasks related to identification cards.

42. The record includes only two “Request for Temporary Staff or Consultant” forms associated with conclusion or extension of the six contracts the respondent identified as related to the pass modernization project. In addition to the form for the contract covering 10 March 2008 - 9 June 2008 (discussed above), the respondent submitted the form for the contract covering 5 January 2009 - 3 April 2009. Both are consistent in substance, referring to the “project for renovation of the security passes for the entire NATO HQ.” Both specify that the appellant’s duties involved tasks related to the “development, preparation, issuance and renewal of various types of identification cards” in order to “reinforce the current establishment of the NATO Pass Office during renovation of the passes for the entire NATO HQ.”

43. The evidence might have been more compelling had it included request forms for more than two contracts during this period. In its written comments on the appeal and at the hearing, the respondent offered to make the appellant’s full personnel file, presumably including additional requests for funding approval, available to the Tribunal on request. The Tribunal does not find this an appropriate mode of procedure. It is for a party – appellant or respondent - to determine the evidence necessary to show the truth of its contentions and to submit that evidence for assessment by the Tribunal and possible rebuttal by the opposing party. The two forms that were submitted must be read together with the justifications for subsequent contracts that also emphasize the challenges of the pass modification project. Taken as a whole, the evidence shows that the appellant’s short-term contracts in force between 10 March 2008 and 2 July 2010 complied with Article 77.1 NCPR, in that they provided for the appellant’s temporary employment to “undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned.” The appeal in respect of these contracts through the period ending 2 July 2010 is therefore denied.

44. The respondent contends that beginning in summer 2010, the NATO Office of Security was faced with additional challenges, stemming from the need to clear the personnel of contractors engaged in constructing the new NATO Headquarters building. According to the respondent, the appellant was engaged under two short-term contracts during this period to supplement the work of the Section of the Visits and Works Coordinator of the Office of Security. These contracts covered 6 July 2010 to 5 October 2010 (extended until 21 December 2010) and 3 January 2011 to 31 March 2011 (extended to 30 June 2011).

45. These contracts and their annexed descriptions of duties specify that the appellant is to perform temporary services in the “Bureau de Sécurité”, but provide no further detail. The related descriptions of duties repeat those annexed to the six prior contracts, and relate to issuance and renewal of identification cards.

46. However, the “Request for Temporary Staff or Consultant” form associated with the first contract supports the respondent’s contention. It states that the appellant is to be assigned to a different element in the Bureau of Security, the Visits and Works Coordinator. Further, he is required to “temporarily perform tasks not covered by the establishment.” The request specifies in some detail the justification for the temporary contract:

With the start of the construction of the new NATO HQ, there is a pressing additional requirement for the execution of the security vetting of all workers from firms engaged in the construction of the new NATO HQ;In addition, since the permanent establishment of the NATO Pass Office is still not adequate this temporary will also be used to continue to assist in the renewal of passes for the entire NATO HQ... Finally, with the scheduling of the additional ministerial in October and the Lisbon summit in November, his support will be precious in order to reduce overtime generated by those events.

47. The respondent did not submit a corresponding document regarding the second temporary contract ending 30 June 2011. However, in the absence of any rebuttal evidence, the Tribunal concludes that the record is sufficient to show that the appellant's two contracts for the approximately one-year period ending 30 June 2011 met the requirements of Article 77.1 NCPR.

48. A final group of five contracts covers the appellant's service in NATO's pass office during all but a few days of the twenty-three month period from 4 July 2011 through 31 May 2013. The respondent contends that these temporary contracts were necessary because of short staffing in NATO's Pass Office due the extended sick leave of the office's head and of the unexpectedly long time required to recruit and install an eventual successor.

49. The statement of duties accompanying the first three of these contracts is identical to that annexed to the appellant's previous contracts during the previous period. The statement for the last two contracts also assigns the appellant responsibility for managing certain databases related to construction of the new NATO Headquarters.

50. The respondent's evidence relating to the five contracts concluded during this period includes four "Request for Approval" forms. All four refer to staffing shortages in the NATO Pass Office, initially on account of the protracted absence on sick leave of a staff member, and then on account of the time required to recruit and install a replacement for a second absent staff member. These forms also refer in generally similar language to continuing staffing pressures on the Pass Office associated with security vetting of increasing numbers of workers involved in constructing the new NATO Headquarters and to issuing new family and press passes as part of the project to renew all NATO HQ passes.

51. Given this evidence, and absent any rebuttal evidence, the Tribunal finds that the appellant's short-term contracts during this period satisfy the requirements of Article 77.1 NCPR, as "necessary to replace members of the staff who are absent or to undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned."

52. The appellant's claims as to these and all of his other temporary contracts are therefore dismissed.

E. Costs

53. Article 4.8.3 of ("old") Annex IX to the NCPR provides as follows:

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

54. The dismissal of the appellant's claims gives rise to the dismissal of the appellant's claims under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appellant's claims are dismissed.
- The security deposited by Mr V shall be reimbursed.

Done in Brussels, on 25 April 2014.

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

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



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

23 May 2014

AT-J(2014)0011

Judgment

Case no. 2013/1005

BP,

Appellant

v.

NATO Support Agency,

Respondent

Brussels, 28 April 2014

Original: French

Keywords: admissibility of the appeal; inadmissibility of an appeal seeking nullification of a performance report.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 14 March 2014.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 26 August 2013 and registered on 27 August 2013, by Mr BP, seeking:

- cancellation of the decision of 28 June 2013 whereby the General Manager of the NATO Support Agency (NSPA) dismissed his complaint seeking a step increase and nullification of his performance report;
- communication of the Complaints Committee's report;
- compensation for non-material damage suffered, assessed at €10.000 in all; and
- reimbursement of the travel and subsistence expenses associated with his defence, and the cost of retaining counsel.

2. Appellant is currently an employee of the NSPA who has been on long-term sick leave since 20 November 2012.

3. The comments of the respondent, dated 24 October 2013, were registered on 31 October 2013. The reply of the appellant, dated 2 December 2013, was registered on 19 December 2013.

4. The Tribunal's Panel held an oral hearing on 14 March 2014 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar *a.i.*

5. The proceedings in this case were undertaken prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst others, establishing the Tribunal. The preamble of Annex IX provides that any proceedings initiated before that date under the previous Regulations will continue to be governed by the previous Regulations until they are settled in a final manner. Consequently the Tribunal shall rule on them in accordance with the provisions of Annex IX in effect prior to the coming into force of the new regulations (Regulations governing complaints and appeals, approved by the North Atlantic Council on 20 October 1965 and modified by PO(73)151 on 22 November 1973).

B. Factual background of the case

6. Appellant, who was born in 1956, began his career at NATO in 1976. He climbed the rungs until he reached grade B4 where he was, at the time of the events covered by the present dispute, a junior technician with the NATO Support Agency (NSPA, formerly NAMSA), on an indefinite duration contract.

7. Starting in 2008 or 2009, he sensed a deterioration in his working conditions and his management noticed a decrease in the quality of his work. On 26 July 2010, a formal letter with comments was sent to him by the Head of the Transportation and Warehousing Division, asking him to start taking his work seriously and respond to the warnings he had been given, in particular to perform the duties arising from his job as his unit's assistant, improve the technical quality of his work, increase his low productivity and clean up his desk, which was terribly messy. He was then told that, unless his behaviour changed, actions up to termination could be taken against him.

8. On 15 October 2010, appellant responded in part by blaming the administration for some of his apparently poor professional performance. On 8 August 2011, the Head of the Transportation and Warehousing Division wrote to appellant again acknowledging some of the efforts he had made since the previous letter but noting that he had quickly given them up, and again making the same demands that he change his behaviour at work. These demands were made one more time on 3 May 2012, with the addition of other complaints including his apparent inactivity, irregular presence at work, failure to follow procedures, and antagonism toward his section head. He was again ordered to improve his performance. In November 2012, NAMSA tried to get appellant to acknowledge his intention to change his professional behaviour, but he refused to sign the draft letter prepared by the administration.

9. On 4 December 2012 appellant lodged a complaint seeking nullification of the decisions that had previously refused his step increase as well as of his performance report. He added a request for compensation for the non-material damage he claimed to have suffered. Even if the disputed decisions are difficult to identify, the administration, taking care not to allow allegations of harassment to flourish, treated his complaint as a complaint, and convened the Complaints Committee requested by appellant.

10. That Committee held wide-ranging, in-depth hearings, and on 26 March 2013 it recommended:

- the granting of step 10 retroactively to appellant with effect from 1 July 2012;
- dismissal of his request for nullification of his performance report, which was inadmissible and moreover lacking in merit insofar as the report did not contain any inaccuracies;
- action by management to take more care in how it managed conflicts involving the Agency's staff;
- transfer of appellant to another section of the Agency; and
- training in conflict management for appellant and his manager.

11. In the view of the Complaints Committee, the allegations of harassment were not established. The hostile atmosphere that grew in the section over the previous three years arose from management's lack of trust in appellant as well as appellant's sometimes provocative and aggressive behaviour.

12. Appellant was then received by the NSPA General Manager on 23 May 2013. The General Manager's decision consisted in granting appellant the requested step increase, refusing to acknowledge the alleged harassment situation, and declaring the

staff member's other requests inadmissible.

13. It is this decision dated 28 June 2013 that appellant is disputing before the Administrative Tribunal.

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

(i) *The appellant's contentions:*

14. Appellant argues that his complaint is admissible since it was taken by a Head of NATO body and causes him harm.

15. He argues in particular that insufficient grounds were given for the decision, since a decision to dismiss the complaint of a staff member who claims to have suffered harassment must give the grounds on which it is based. Furthermore, he argues that the decision was taken at the end of an irregular procedure, since the written warning he received has no legal basis and is not mentioned in Annex VIII.A of the Civilian Personnel Regulations.

16. The decision is thought to be based on materially inaccurate events: the harassment situation is said to be proven since the reports concerning him dropped off dramatically from 2009 to 2011, the General Manager granted him the requested step increase, appellant was subject to reprisals and had some of the tasks in his job description taken away from him.

17. He also argues that the administration failed in its duty of care and good governance by not looking for an appropriate way out of a bad situation.

18. Finally, appellant argues that the only possible way of compensating for this scheming that affected his health is financial compensation, which he evaluates as €10.000 in non-material damage. He does not quantify the financial damage to him.

(ii) *The respondent's contentions*

19. Respondent argues that the appeal is inadmissible inasmuch as:

- it concerns the step increase, given that the administration satisfied his request for this;
- it seeks nullification of a performance report, which is covered by Article 55.4 of the Civilian Personnel Regulations; and
- with regard to compensation for damage, no request was first made to the administration.

20. The part of the complaint seeking communication of the Complaints Committee's report has become irrelevant because that report was attached to the NSPA's reply.

21. Secondly, respondent argues that there are not good grounds for the complaint:

- the appeal contains no tangible evidence of the claimed harassment;
- the disputed decision contains the necessary information for understanding the grounds therefor;
- appellant is subject to the hierarchical authority of his superiors, who made good use of that authority by taking the appropriate decisions after having upheld the adversarial principle of the proceedings; and
- the alleged harm has not been proven.

D. Considerations and conclusions

(i) Considerations on admissibility

22. There are three parts to the disputed decision.

23. The submissions seeking the granting of a step increase are inadmissible insofar as the disputed decision grants this increase. The submissions on that in the appeal are consequently inadmissible.

24. The submissions seeking nullification of his performance report are also inadmissible. A performance report is not in itself a decision that constitutes grounds for grievance (Appeals Board Decision No. 266 of 13 November 1991); it is a preparatory act and can only be charged as being illegal in support of submissions directed against a subsequent act causing the appellant harm, such as a disciplinary action, a refusal to renew a contract or the decision to terminate a contract, as the Appeals Board has constantly ruled (Decisions No. 680 of 13 September 2005, No. 724 of 25 October 2007, No. 745 of 31 October 2008, No. 782 of 29 October 2010, No. 824 of 9 March 2012 and No. 842 of 24 February 2012).

25. As respondent produced the Complaints Committee's report in its reply, appellant's submissions seeking communication thereof are no longer relevant.

26. Finally, the submissions seeking compensation for harm he claims to have suffered are inadmissible because they were not preceded by a request to the administration (see Appeals Board Decisions No. 9 of 23 October 1968, No. 20 of 4 March 1971, No. 46 of 21 March 1973, No. 92 of 14 August 1978, No. 95 of 8 December 1978, No. 352 of 5 June 1997, No. 673 of 26 May 2005, No. 676 of 30 June 2004, No. 681 of 12 September 2005, No. 743 of 10 July 2009 and No. 755 of 30 October 2009). Moreover, there are no grounds for these submissions: it is apparent from the case file, and in particular the Complaints Committee's report, that the NSPA, formerly NAMSA, took particular care to help appellant regain the professional performance that had changed. The many requests, first informal and then formal, made to appellant by his managers from 2009 to 2012 do not, as he claims, constitute harassment by his managers but rather valid, constructive requests that he improve his

behaviour and his professional performance.

27. For these reasons the appeal is inadmissible.

(ii) Examination of the substance

28. Given that the appeal is inadmissible, it is not necessary to discuss the validity of appellant's submissions further.

E. Costs

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

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

30. Because the appeal has been dismissed owing to the inadmissibility of all the submissions therein, it is not appropriate to reimburse appellant for any costs.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 28 April 2014.

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

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



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

23 May 2014

AT-J(2014)0012

Judgment

Case No. 2013/1003

GC,

Appellant

v.

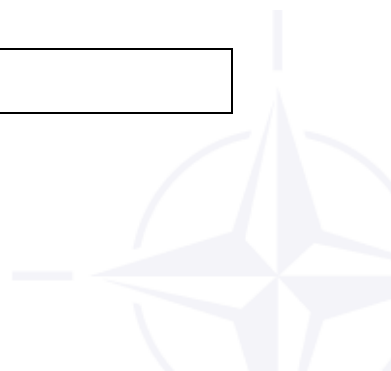
NATO International Staff,

Respondent

Brussels, 30 April 2014

Original: English

Keywords: change in job description; resignation.



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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 12 March 2014.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal, dated 28 August 2013 and registered on 30 August 2013 as Case No. 2013/1003, by Mr GC against the NATO International Staff.

2. The comments of the respondent, dated 5 November 2013 were registered on 12 November 2013. The reply of the appellant, dated 9 December 2013 was registered on 19 December 2013.

3. The proceedings in the present case were initiated with a complaint dated 14 June 2013. Council decision PO(2013)0004-REV 1 approving amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal, with effect from 1 July 2013, provides that “any proceedings initiated before that date under the previous Regulations will continue to be governed by the previous Regulations until they are settled in a final manner.” As a consequence, the present case shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to the new Regulations’ entry into force, *i.e.* the Regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

4. The Tribunal’s Panel held an oral hearing on 12 March 2014 at NATO Headquarters. It heard both parties, in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. Appellant joined NATO on 1 February 1999 as an Air Defence Analyst in the Defense Investment Division, at grade A3. He received an indefinite duration contract with effect from 1 January 2003. He had good performance reviews during his employment with NATO.

7. An updated post description was issued on 27 April 2011.

8. In a letter dated 26 April 2013 and following a number of discussions, appellant was provided by his Section Head with an updated post description to better reflect the needs and requirements of the Section and to take into consideration the decrease in analytical work over the past few years. He added that the revised tasks of the post had been established within the current post family, working level and competency

requirements for which appellant had demonstrated over the past years that he possessed the required skill set and subject-matter expertise as recorded in his performance reports. He expressed the belief that appellant had the required attributes to continue to perform well in these functions.

9. On 14 May 2013 appellant informed his Section Head by e-mail that he had contacted the Staff Association who would consult with their lawyers about this matter. He reserved his rights. He expressed the view that in his opinion his post had either been suppressed and replaced with another one or changed to such an extent that he no longer possessed the necessary qualifications.

10. On 14 June 2013 appellant submitted a complaint to the Secretary General against the changes in his employment and the new job description. Appellant requested annulment of the decision to deprive him of his functions, the payment of a loss-of-job and notice period indemnities, as well as €20.000 in compensation for moral damages.

11. By letter dated 1 August 2013, and with reference to a talk on 30 July 2013, the Deputy Secretary General rejected appellant's complaint. He emphasized that functions are subject to change to respond to the evolution in the role and the needs of the Organization, and that management was confident that appellant would be able to meet the requirements of the post.

12. In a letter dated 26 August 2013 appellant resigned from the Organization. He submitted that most of the functions for which he had been recruited had disappeared and that he did not possess the necessary qualifications for the new tasks entrusted to him. He took note of the breach of his contract obliging him to resign with effect from 31 December 2013. He reserved his right to challenge the 1 August 2013 decision in an appeal.

13. NATO's Human Resources department accepted this resignation by letter dated 3 September 2013, wishing appellant a long and happy retirement.

14. On 28 August 2013 appellant lodged the present appeal.

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

(i) The appellant's contentions

15. Appellant submits that both the vacancy notice and his job description show that he was recruited as an analyst and that throughout his career he had performed technical and scientific analyst duties. The new duties as imposed on him are of a more general character (follow-up, coordination, etc.). He claims not to have the professional qualifications for these tasks. He discussed the matter with his superiors and requested assignment to other duties. He contends that he was obliged to lodge a

complaint to seek annulment of the decision to deprive him of his functions and that such a decision could only be taken through a suppression of his post and the granting of a loss-of-job indemnity.

16. His complaint being rejected, appellant submits that he was forced to note the termination of his employment by his employer, leaving him no further choice than to resign.

17. Appellant contends that the appeal is directed against the decision refusing him indemnities and to recognize his post suppression and that the appeal was lodged within the time limits. The appeal is on these grounds admissible.

18. Appellant submits that his duties were modified substantially, changing a scientific post into an administrative post, and that the remaining scientific part was no longer in the air defence field but in the space and missile defence field. These unilateral changes were initially proposed as new objectives, which he refused. Such changes could legally only be changed through a new contract following suppression of the old post.

19. Appellant maintains that he does not have the necessary qualifications and experience for these new duties.

20. Appellant requests that the Tribunal:
- annul the decision of 1 August 2013 rejecting the complaint of 14 June 2013;
 - to the extent necessary, annul the decision to deprive him of his functions laid down in the new job description of post DI0065 as well as in the letter from his Section Head dated 26 April 2013;
 - order the payment of indemnities for loss of job, calculated based on his last emoluments, as well as for the notice period;
 - order compensation for moral damages estimated *ex aequo et bono* at €40.000; and
 - order reimbursement of all costs.

(ii) The respondent's contentions

21. Respondent agrees that the appeal is admissible.

22. Respondent submits that the determination of a staff member's duties is at the broad discretion of the HONB and as such is subject only to limited review by the Tribunal. In this respect respondent observes that the decision was taken by the appropriate authority and in conformity with rules and procedures in force.

23. Respondent maintains that there are no significant differences between the 2011 and 2013 post descriptions.

24. Regarding the alleged lack of qualifications, respondent observes that applicant had in 2006 applied for a more generalist post and had underscored that he had the necessary qualifications. Moreover, management regularly confirmed that appellant had the required qualifications and experience.

25. Respondent concludes that the Organization had merely adjusted and updated appellant's post description, matching the duties therein to its needs. In doing so it did not commit an error of fact or law, nor had it overlooked some essential fact, drawn some obviously wrong inference from the evidence or misused its authority. The Organization had responded to the natural evolution of the work and updated and adjusted appellant's post description accordingly.

26. On a subsidiary basis, and in the case the Tribunal finds that the 2013 post description is significantly different from the 2010 one, respondent submits that appellant is not entitled to a loss-of-job indemnity, since the Tribunal should then refer the matter back to the Administration for further handling.

D. Considerations and conclusions

(i) Considerations on admissibility

27. The Appeal challenges the decision by the Deputy Secretary General dated 1 August 2013. It was lodged on 30 August 2013. The appeal is admissible.

(ii) Considerations on the merits

28. In essence appellant makes two different claims that cannot easily be reconciled. On the one hand, he requests annulment of the decision to deprive him of his old functions, which, if granted, would logically result in reinstatement in these former functions. On the other hand, he seeks confirmation of the suppression of his post and corresponding loss-of-job and other indemnities. It was confirmed at the hearing that appellant in fact only seeks indemnities.

29. Appellant submits that his duties were modified in a substantial way, changing it from a scientific post into an administrative post, which should in his opinion have been brought about through a suppression of the old post, the creation of a new one and the offer of a new contract. The Tribunal observes that appellant has shown himself not to be interested in a new contract and that, following appellant's resignation, this discussion has become moot.

30. Respondent contends that the job description of 2013 was similar to that of 2011, which was not challenged. Respondent adds that duties are subject to evolution and that an HONB has broad discretion in the matter and is as such subject to only limited review by the Tribunal.

31. The Tribunal agrees that decisions concerning duties and job descriptions are within the discretionary power of the HONB. There is consensus among international administrative tribunals that a decision in the exercise of such discretion is subject to only limited review by a tribunal and that a tribunal will not substitute its own view for the organization's assessments in such cases (*cf* NATO AT judgment in Case No. 885, paragraph 33ff.).

32. It is to be observed in this respect that employment in general, and employment in an international organization in particular, is not static. The employing organization has to adapt almost constantly to a changing environment. NATO is a striking example of an organization that has had to adapt to dramatic changes in the overall environment, both in wartime and in peacetime. Its staff had, and has, to do the same. Functions and tasks evolve over time, sometimes as part of a regular process, sometimes more abruptly. In addition, decisions to limit resources have come into play. This entails a responsibility for the employing organization to try and seek continued employment opportunities for serving staff. As a corollary, it requires from staff the necessary flexibility.

33. Having considered all aspects of the matter, the Tribunal concludes that the decisions to amend appellant's duties in 2011 and 2013 were regular. They were taken by the appropriate authority, respecting the rules and procedures in force. The Organization did not err in fact or in law and did not abuse its authority.

34. NATO exercised its discretion reasonably and in doing so guaranteed appellant continued employment during a period of major budget limitations.

35. Appellant submits that he does not possess the required qualifications for the amended duties. His management, on the other hand, has repeatedly expressed the opposite view and shown confidence that appellant had the required attributes to continue to perform well in these functions. The Tribunal tends to agree with respondent. The likelihood that a scientist can satisfactorily perform more general administrative duties is greater than the opposite. Appellant has not proven not to possess the required qualifications, in theory or in practice. This matter will remain unresolved, however, since appellant has chosen to resign.

36. Appellant concludes that there was a breach of contract and a suppression of his post. It is in this respect to be underlined that it is for the appointing authority, and not for the staff member, to determine when a post is suppressed or an appointment terminated.

37. Even assuming that the post was suppressed, this does not give an automatic entitlement to a loss-of-job indemnity. Article 1(3) (a) and (b) of Annex V to the NCPR limit the entitlement to staff members who are not offered a post of the same grade in the same Organization or who are not appointed to a vacant post in one of the other Coordinated Organizations at comparable remuneration.

38. Instead of remaining on the staff and exercising his right of appeal to seek a reversal of the impugned decision, appellant has through his resignation placed himself voluntarily and intentionally in a situation where the Organization could no longer pursue alternative solutions, such as an assignment to another post. He has deprived himself of the possibility to prove the contrary. Appellant has by doing so also sought to limit the remedies that are available to the Tribunal. Appellant carries the sole responsibility for the consequences of the steps he has taken. He is, for example, barred from seeking a loss-of-job indemnity and has deprived himself of entitlement to certain remedies.

39. Appellant claims the payment of an indemnity for the notice period. During the hearing appellant confirmed that the notice period had been worked and that he had received the corresponding emoluments. The claim for an indemnity in this connection was withdrawn.

40. In his complaint to the Secretary General in June 2013, appellant claimed €20.000 in moral damages. In the appeal the amount claimed for this doubled to €40.000. No quantification or justification has been given for either amount. The Tribunal cannot accept this. Any claim brought before it must be substantiated and detailed, and reasons must be given. Appellant submits that he was forced to resign. Although the Tribunal cannot conclude that resignation was the only solution in this situation, the file reveals a lack of proper communication between management and appellant. Appellant explained during the hearing the complete absence of any appropriate reaction for months, if not years, on the part of management concerning appellant's queries and concerns. Respondent did not deny this. These events, or rather lack of events, may well have influenced appellant in taking such a drastic decision as resignation. The Tribunal concludes that the situation that had arisen and the lack of proper management in this case have caused appellant unnecessary and avoidable moral damages. The Tribunal considers the amount of €10.000 (ten thousand euros) an appropriate compensation for the injury caused to appellant in this respect.

E. Costs

41. Article 4.8.3 of "old" Annex IX to the NCPR provides as follows:

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

42. The appeal being only partially successful, appellant is entitled to reimbursement of €2.000 under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- Mr C is entitled to €10.000 in damages.
- NATO shall reimburse Mr C the costs of retaining counsel, up to a maximum of € 2.000.
- NATO shall reimburse Mr C for any substantiated travel and subsistence costs incurred by him to appear before the Tribunal, within the travel expense limits laid down for staff members of his grade.
- All other claims are rejected.

Done in Brussels, on 30 April 2014.

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

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



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

23 May 2014

AT-J(2014)0013

Judgment

Case No. 2013/1002

JN,

Appellant

v.

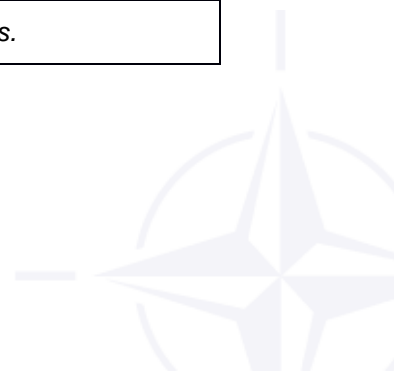
NATO Communications and Information Agency,

Respondent

Brussels, 5 May 2014

Original: English

Keywords: definite contract; staff turnover; contract policy previously set out in Directives.



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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 14 March 2014.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 28 June 2013 and registered on 2 July 2013, by Mr JN, against the NATO Communications and Information Agency (NCI Agency; NC3A until 30 June 2012) concerning the non-renewal of his contract. The appellant is a former staff member of the NCI Agency.

2. The comments of the respondent, dated 9 September 2013, were registered on 20 September 2013. The reply of the appellant, dated 18 October 2013, was registered on 30 October 2013.

3. The appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal (Tribunal). Pursuant to the Transitional Provisions contained in Article 6.10 of ("new") Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to the new regulations' entry into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

4. The Tribunal's Panel held an oral hearing on 14 March 2014 at NATO Headquarters. It heard arguments by both parties in the presence Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. Appellant began working for the NC3A as a freelance consultant in October 2000. In May 2004 he joined NC3A as a B5 Principal Scientific Assistant, in February 2006 as an A2 Scientist and, in October 2007, as an A3 Senior Scientist.

7. Appellant's last contract, as an A3 Senior Scientist, was a definite duration appointment of three years' duration, taking effect on 1 November 2007 and terminating on 31 October 2010. On 1 November 2010 the NC3A offered him a new definite duration appointment of one year, terminating on 31 October 2011, and on 1 November 2011 he was offered a further definite duration appointment of two years, terminating on 31 October 2013.

8. On 6 March 2013 the NC3A General Manager (GM) informed appellant that his contract would not be renewed on expiry due to the Agency's requirement for turnover of staff. On 29 April 2013 appellant wrote to the NC3A General Manager requesting to be offered an indefinite duration contract as of 1 November 2008 and, consequently, to requalify his end of employment as termination and not as non-renewal of contract. On 13 May 2013 the Head of Human Resources, on behalf of the GM, confirmed the qualification of appellant's contract and the content of the GM's letter.

9. On 28 June 2013 appellant lodged the present appeal.

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

(i) *The appellant's contentions*

10. Appellant challenges the compliance of NCI Agency Directive 2.1 "Contract Policy", effective as of 1 January 2013, with the relevant NCPR provisions establishing the Organization's legal framework for contracts.

In particular, appellant states that the NCI Agency Directive should be considered illegal insofar as it identifies all NCI Agency posts as being subject to rotation. This is in contradiction to Article 5.5 of the NCPR which leaves it up to the discretion of the HONB to renew a contract based on satisfactory performance and the interests of the service. Appellant adds that neither his job description nor his contract mentioned that his post was rotational.

11. Appellant further submits that even if there is no automatic right to renewal of a definite duration contract, based on recognized case law, the administration has the obligation to state the reasons justifying the decision not to renew. Appellant claims that in his specific case the HONB's decision not to renew the contract was not based on valid and genuine grounds for the following reasons:

- the Agency's requirement for turnover of staff applies to scientific posts, a qualification that did not cover appellant's functions at the NCI Agency, which consisted mainly in training and exercises. Moreover, the Agency does not appear in its charter to be a scientific establishment;
- the turnover of staff does not justify non-renewal of contract; in fact it is appellant's view that the rotational nature of a position, at least below 10 years' duration, is determined by the performance of the holder of the position; and
- the real reason behind the non-renewal was the Agency's need for a reduction in staff, and according to appellant, this was demonstrated by the fact that his, and similar positions, have not been advertised after the departure of the holder of the posts.

12. Appellant asks the Tribunal to requalify his post as non-scientific, and therefore to be granted an indefinite duration contract, if not after his initial contract, then after his subsequent contract. Appellant cites in support of his statements the case law of the NATO Appeals Board (AB) likening holders of a definite duration contract to holders of

an indefinite duration contract with regard to the obligation to give grounds for the decision not to renew a contract and noted that his performance has been consistently outstanding.

13. Appellant adds that the non-requalification into an indefinite duration contract prevented him from benefiting from healthcare coverage, a retirement pension and the loss-of-job indemnity.

14. Appellant further submits that the Agency is in violation of the duty of care inasmuch as it did not examine the possibility of reassigning appellant to another programme or offering appropriate training to comply with the requirements of his job, which likens the non-renewal to a post suppression.

15. Appellant requests annulment of the NCI Agency's decision not to renew his contract after the expiry thereof, reinstatement in his or a similar post on an indefinite duration contract or, *quod non*, the payment of the loss-of-job indemnity as well as reimbursement of counsel and subsistence costs.

(ii) The respondent's contentions

16. Respondent disputes the admissibility of the appeal as it was not filed within the 60-day time frame foreseen by the NCPR from the date of notification of the decision, which was 6 March 2013. Respondent rejects appellant's argument that the 29 April 2013 letter is to be considered a "petition". Also, according to respondent, the letter in question was in fact merely expressing appellant's opinion that he should be offered an indefinite duration contract and was asking the GM to provide the reasons behind the non-renewal of his contract. The Agency affirms that its reply letter of 13 May 2013 did not constitute a new decision but was merely a confirmation of the GM's decision of 6 March 2013.

17. Respondent rejects the allegations of illegality of the NCI Agency's Directive against the provisions on contracts in the NCPR. Respondent argues that the provisions of NCPR Articles 5.2 (for staff joining prior to 1 April 2012), 5.4 and 5.5 provide that:

- the specific regime of rotation of posts applies not only to staff appointed to research posts in scientific establishments but also to staff appointed to political or technical posts;
- staff members filling a research post in a scientific establishment are specifically barred from being offered indefinite duration contracts; and
- the renewal of a definite duration contract is discretionary and based on the interests of the service, a principle also confirmed by AB case law, and moreover the granting of an indefinite duration contract is also discretionary for staff members who do not have 10 years of consecutive service.

18. Respondent continues defending the legality and compliance of the various NCI Agency Directives with the NCPR, referring in particular to the NC3A Administrative Directive on Personnel Contract Policy dated 12 February 2001, the NC3A Administrative Directive 2-1 on Contract Policy dated 1 July 2005 and the NCI Agency

Directive 2-1 on Contract Policy dated 1 January 2013. The common principles of these Directives are the rotational character of the Agency's posts, the requirement for the Agency to keep skills and competencies up to date (which makes turnover necessary), the existence of a small nucleus of staff that exceptionally are asked to stay longer than 10 years and the customer funding regime of the Agency, which impacts personnel management.

19. Respondent further states that appellant did not have an intrinsic right to an indefinite duration contract, nor he did meet the criteria, as:

- he did not work for 10 consecutive years with the Agency;
- the AB case law confirms that the decision not to renew a definite duration contract, even if the staff member's performance has been satisfactory, is at the discretion of the HONB, and also confirms the validity of the rotational policy for the turnover of scientific staff;
- appellant's job descriptions clearly stated the scientific/technical character of his functions and those qualifications had never been disputed before; and
- the customer funding regime of the Agency requires the Agency to adapt the skill set of its workforce to the workload and the evolving technical needs of its customers.

20. Respondent adds that appellant was fully aware that his post was subject to the turnover policy of the Agency, that this was clearly referred to in his contracts, and the Agency never created false expectations to the contrary. Moreover respondent notes that the GM's letter of 6 March 2013 states that "the Agency requirement for turnover of staff, together with the reference to the contract policy in appellant's employment contract, provided adequate justification for the non-renewal".

21. Respondent also rejects the likening of the non-renewal of contract to a suppression of post/redundancy as this does not meet the NCPR criteria; it further notes that appellant had neither requested any training which was subsequently denied nor applied for other posts since 2007.

22. Respondent requests that the appeal be considered inadmissible and declared unfounded with regard to the merits.

D. Considerations and conclusions

(i) Considerations on admissibility

23. Article 4.3.2 of Annex IX to the NCPR provides that:

Appeals shall be lodged with the Secretariat of the Appeals Board within 60 days from the date of notification of the decision appealed against. Nevertheless, in very exceptional cases and for duly justified reasons, the Appeals Board may admit appeals lodged after the time allowed.

24. The Tribunal does not concur with respondent's submission regarding the inadmissibility of the appeal. On 29 April 2013 appellant sent a letter to the General Manager of the NCI Agency claiming he should be considered as an indefinite duration staff member as of 1 November 2008, asking for reasons for the termination of his employment and offering to accept a transfer to other areas of the Agency's activities. This letter was a petition – in response to the previous announcement by the Organization – that included various submissions, to which a negative reply by the Agency (on 13 May 2013) shall be considered as the decision contested by the current appeal. The petition was lodged within the period laid down for appeals; therefore it had the effect of preserving the time limit. The period began to run again and, consequently, appeal was duly lodged within the legally stipulated time frame.

25. The appeal fulfils the requirements for admissibility.

(ii) *Considerations on the merits*

26. Article 5.2 of the NCPR (applicable to staff appointed before 1 April 2012) provides as follows:

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 definite duration contract shall not exceed the length of the approved secondment; or
- they are appointed to posts previously identified by the Head of NATO body as being required for a limited period; or
- they are appointed to posts previously identified by the Head of NATO body as posts in which turnover is desirable for political or technical reasons; or
- they are appointed to research posts in scientific establishments.

27. It follows from the abovementioned provision that the duration of a contract may be limited, among other circumstances and even if the establishment in which the staff member performs his/her duties is not a scientific one, whenever the post has been previously identified as one in which rotation is desirable either for political or for technical reasons. Hence justified rotation shall be fixed as a characteristic of the post. But it is a privilege of the Organization to decide on the activities where staff turnover is advisable according to its own aims and management policies. Limits on such a capacity appear clearly in Article 5.2 of the NCPR: a) previous identification of the posts, and b) political or technical justification.

28. Respondent developed its own specific contract policy by means of successive Directives where a turnover general clause was always included as an essential requisite for the Agency "to keep skills and competencies up to date", and established different rates of rotation depending on the area (Directive on Personnel Contract Policy dated 12 February 2001; Directive 2-1 on Contract Policy dated 1 July 2005; and Directive 2-1 on Contract Policy dated 1 January 2013). Throughout the evolution of these directives it became clearly established that all the staff at the Agency were subject to rotation owing to its core competencies, and non-turnover of the staff was the exception. There is no contradiction with the provisions of the NCPR since political and

technical reasons for rotation may be settled on the basis of general and reasonable criteria. The implementation of the NCPR shall imply the adoption of a previous policy permitting the identification of posts referred in Article 5.2, paragraph three. As a result, the general directives of the Organization's bodies and agencies are in principle a consistent means of the defining staff rotation policies provided they contain adequate parameters to identify the affected posts and offer thorough and assessable justification.

29. The requirement of legality is an essential element for the enforceability of a contract, and contracts, which, for example, are in violation of regulations or public policy may be ruled illegal. The freedom of parties to negotiate is therefore limited in this respect. The Tribunal notes in this particular case, however, that the contracts signed by appellant included the clause that the Directive was applicable. That prevents any misunderstanding about the type of relationship maintained with the Agency, since the posts held by appellant were clearly defined as rotational.

30. Accordingly, the Tribunal considers that appellant's situation was covered by the said status of a definite duration contract from the outset, subject to the rotation policy.

31. Thereafter, appellant was not entitled to an automatic renewal of his contract, so the decision not to renew it after its expiration was not unlawful. For the said reasons, the Tribunal also rejects the submission regarding reinstatement or payment of the loss-of-job indemnity.

E. Costs

32. Article 4.8.3 of Annex IX to the NCPR provides as follows:

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

33. The dismissal of the appellant's claims gives rise to the dismissal of the appellant's claims under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appellant's claims are dismissed.

Done in Brussels, on 5 May 2014.

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

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



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

23 May 2014

AT-J(2014)0014

Judgment

Case No. 2014/1014

SM,

Appellant

v.

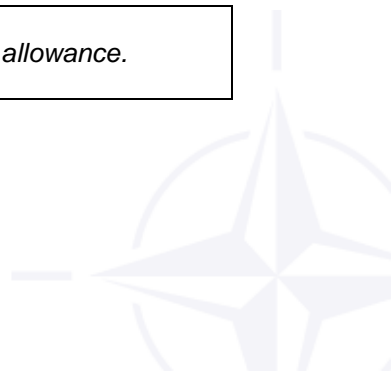
NATO Support Agency,

Respondent

Brussels, 30 April 2014

Original: English

Keywords: new dispute resolution system; exhaustion of pre-litigation procedures; rent allowance.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written submissions by appellant and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2014)0004.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Support Agency (NSPA) by Mr SM dated 13 March 2014 and registered on 19 March 2014 under Case No. 2014/1014, seeking annulment of his November 2013 payslip in which his rent allowance was reduced as well as annulment of the decision to reject his complaint.

2. The President of the Tribunal issued Order AT(PRE-O)(2014)0004 on 28 March 2014 in accordance with Rule 10, paragraph 1, of the Tribunal's Rules of Procedure. The appellant submitted additional written views with regard to the Order on 4 April 2014.

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

B. Factual background of the case

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

5. Appellant is currently a staff member with the NSPA. He is graded B3 and is entitled to a rent allowance.

6. In May 2013 the NATO Council, following a detailed review, decided to abolish a number of allowances and to amend the conditions of entitlement to other allowances. The corresponding changes in the NCPR and Annexes took effect on 1 July 2013. Staff were advised thereof by Office Notice ON(2013)0038 dated 20 June 2013 to which amendment 13 to the NCPR was attached. Transitional measures were agreed under which the measures would be phased in for those staff who were in receipt of allowances. Accordingly, overall remuneration would not be adversely affected, for example by waiting for a salary increase before implementing the new measures.

7. The rent allowance is one of the allowances concerned. ON(2013)0038 explains in this respect:

The rent allowance has been suppressed and will not therefore be paid after 30 June 2013. Staff members who are currently receiving this allowance will instead receive a

non-pensionable indemnity in future. The amount of the indemnity will reduce, if the staff member receives a salary step increment or if there is an increase in the annual remuneration adjustment. The amount of this reduction to the indemnity will be adjusted to avoid an adverse effect on the nominal value of the net salary, when comparing the revised payslip with the payslip of the previous month.

8. Appellant received an annual step increase with effect from 1 November 2013, entailing a nominal salary increase of €113,62. Until October 2013 the amount of his rent allowance was €341,58. In November 2013 this became €250,68. His net remuneration increased by €6,90.

9. On 20 December 2013, appellant submitted a complaint to the Head of the NATO Body in which he was employed (HONB) against his November 2013 payslip, and more specifically the amount of the rent allowance granted to him. Two grounds were advanced: 1. Illegality of the Council's decision – Violation of the vested rights and of the employment contract – Violation of the principle of legal certainty – Violation of the principle of good administration and of the duty of care, and 2. Violation of the social dialogue.

10. NSPA's Chief of Staff replied on 16 January 2014. He recalled that the rent allowance was suppressed with effect from 1 July 2013, but that staff in receipt of the allowance did as a transitional measure from that date receive a non-pensionable indemnity on a progressively diminishing basis. The amount of the indemnity would be reduced until eroded by salary step increments and/or remuneration adjustments. He reminded appellant that staff were duly informed of these changes, by an HR briefing at the 24 June General Assembly of the Staff Association among other occasions. An individual letter outlining the modification had been sent to appellant directly at the end of June 2013. Information was also posted on the NSPA HR portal and announced on "NSPA Today". He observed that appellant's net salary had not been reduced in November 2013. He concluded that the challenged decision was sound, and that appellant had been informed well in advance of Council's decision and of the transitional measures. It was therefore not his intention to cancel the contested decision or to reimburse appellant or otherwise grant him money.

11. On 13 March 2014 appellant submitted the present case to the Tribunal.

12. On 28 March 2014, the President of the Tribunal issued Order AT(PRE-O)(2014)0004 which provides as follows :

- 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.
- Appellant may submit additional written views.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

13. Appellant submitted additional written views on 4 April 2014, which were considered by the Tribunal.

C. Summary of appellant's contentions on admissibility

14. Appellant submits that the appeal was lodged within the prescribed 60 day time limit from the date the contested decision was taken, *i.e.* on 16 January 2014.

15. Appellant contends that the impugned decision, the November payslip, was an act adversely affecting him and was adopted by the HONB. He adds, with reference to Decisions of the NATO Appeals Board, that, although the Tribunal is not competent to annul a decision of the NATO Council, it may rule on the legality of such a decision.

16. Appellant concludes that he was neither obliged nor entitled to introduce an administrative review prior to the lodging of his complaint.

D. Considerations

17. As the Tribunal recalled in its Judgment in case No. 2013/1008, the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The establishment of the Tribunal is only one aspect of this new system. The new system puts major emphasis on pre-litigation procedures. It provides for thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately on the Heads of NATO bodies (HONB), for addressing and wherever possible resolving issues, instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings. The new internal justice system is therefore substantially different from the previous one.

18. NATO's legislators in this respect followed the recommendations made in the "Report of the External Panel on the Modernization of the NATO Appeals Board and Dispute Resolution System" of November 2011. The experts on this Panel observed that, in their opinion, many issues that were brought to the Appeals Board for decision "could and should have been resolved at an earlier phase." The External Panel emphasized in this regard that international organizations increasingly make use of graduated systems of administrative review to facilitate resolution of disputed issues more quickly and at an earlier stage, resulting in less disruption and expense for all concerned.

19. The Tribunal has, in accordance with the transitional provisions of the new Annex IX, adjudicated a number of cases where the proceedings had started before the entry into force, on 1 July 2013, of the new system.

20. The case under consideration is, however, one of the first cases in which the provisions of the new Chapter XIV of the NCPR and Annex IX thereto fully apply. The present case must therefore be reviewed taking into account all aspects of the new internal dispute resolution system, and the Tribunal must in particular be satisfied that the entire pre-litigation process has been respected. Article 6.3.1 of Annex IX is

unambiguous in this respect. It stipulates that:

...the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex.

21. In this context, and in view of the entirety of the new dispute resolution system, in cases such as this reference to the jurisprudence of this Tribunal's predecessor, the NATO Appeals Board, which functioned in a different context, must be subject to significant qualification.

22. As mentioned, both Chapter XIV of the NCPR and Annex IX thereto have been changed substantially. It is opportune to reproduce here those elements that are relevant to the present case.

23. Article 61.1 of the NCPR requires in its new version that:

Staff members, consultants, temporary staff or retired NATO staff, who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment, including their contracts, NATO regulations governing personnel and other terms of appointment, and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations..."

24. Article 2 of Annex IX then establishes the procedures to be followed. Article 2.1 stipulates that:

Staff members or retired NATO staff who consider that a decision affecting their conditions of work or of service does not comply with their terms and conditions of employment and decide to contest the decision, may, within 30 days after the decision was notified to them, initiate the process for seeking an administrative review of the decision. As provided in Articles 2.2-2.4, the process shall be initiated in the NATO body in which the staff member is appointed or member of the retired NATO staff was appointed, so long as the Head of that NATO body has authority to rescind or modify the contested decision; otherwise, the process shall be initiated in such other NATO body, if any, that has the authority to rescind or modify the decision in question. In cases of doubt, staff members or retired NATO staff should consult with the human resources management in the NATO body in which they are, or were last employed for guidance.

25. And Article 2.2 provides that:

In cases where an administrative review is to be conducted within the NATO body to which the staff member is appointed, the following steps shall apply:

(a) they shall, through their own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. The staff member's immediate supervisor shall respond within 21 days, except that this period may be extended with the consent of the staff member.

(b) those wishing to contest the decision of the immediate supervisor shall, within 21

days of receiving a response pursuant to Article 2.2(a) of this Annex, refer the matter to the Head of NATO body concerned, requesting a further administrative review and indicating the reasons for the measure(s) or other outcome they are seeking by way of remedy. The Head of NATO Body shall review the matter, including the gathering of any information he/she deems necessary to consider whether to agree to the measures or other outcome sought. The Head of NATO Body shall, within 21 days from receipt of the staff member's request, make known his/her position and shall either confirm, rescind or modify the contested decision.

26. It is clear from these provisions that the new procedures for administrative review constitute an important and innovative element in the package of reforms of NATO's internal justice system.

27. Moreover, Article 61.1 NCPR stipulates that staff may also ask to submit their grievances to mediation under the conditions described in Article 3 of Annex IX.

28. Following these steps, staff members, consultants, temporary staff or retired NATO staff who wish to contest the decision after pursuing administrative review and, if applicable and requested, mediation are, in accordance with Article 61.2, entitled to submit a complaint in writing to the HONB possessing the authority to rescind or modify the challenged decision as prescribed in Article 4 of Annex IX to these Regulations. Such complaints must, under Article 4.1 of Annex IX, be submitted to the HONB in which the administrative review was conducted. In order to be considered by the HONB, a complaint must be submitted to him/her within 30 days following the outcome of the administrative review or mediation, where mediation is pursued.

29. Claimants may, in accordance with Article 4.2 of Annex IX, also request that, before a decision is taken, the complaint be submitted to a Complaints Committee. The HONB shall accept the request to submit the complaint to the Complaints Committee unless, within 15 days of receiving the complaint, he/she agrees to rescind or modify the contested decision. HONBs may also decide to submit a complaint to the Complaints Committee on their own initiative.

30. Claimants may, however, in accordance with Article 61.3, submit a complaint in writing to the HONB without a prior administrative review only if the contested decision was taken directly by him or her. Challenges concerning decisions that have not been taken directly by the HONB, but on a lower level, even if on the latter's behalf, must therefore follow the full pre-litigation process, including administrative review.

31. Article 62.1 provides that, following the administrative and complaints procedure under Article 61, the complainant or his or her legal successor may appeal to the Administrative Tribunal.

32. Neither party can unilaterally waive the entirety of these pre-litigation procedures. Parties may only submit a matter directly to the Tribunal by mutual agreement, as provided in Article 6.3.1 of Annex IX to the NCPR. This is not the case in the present dispute.

33. The above-mentioned provisions constitute a complete set of pre-litigation and litigation procedures. The new procedures adopted by the Council, and in particular those concerning administrative review, place significant new responsibilities both on the administration and on staff members and other persons covered by these rules. Both sides are bound to act in good faith in seeking an administrative settlement of disputed issues wherever possible. This includes the responsibility of management to explain to staff the correct procedure to follow, and the correct person or instance to address.

34. The new rules must be understood, applied and interpreted in a consistent way and, like all provisions of the NCPR, the language of Article 61.1 is to be read in good faith, in accordance with its ordinary meaning, and in a manner that seeks to ensure that all provisions are construed consistently and in harmony with their purpose and the Council's objectives in adopting them. On the other hand, Article 61.1 NCPR is not, and should not become, an excuse for intransigence and delay.

35. In the present case, appellant contends that Article 61.1 does not apply because the impugned decision, the November payslip, was adopted by the HONB.

36. The Tribunal disagrees.

37. Payslips are generally prepared by payroll officers and are subsequently endorsed by their superiors, most likely the Head of Human Resources, when the latter approve the payroll. Appellant submits that the impugned payslip was adopted by the HONB, but he does not bring forward compelling evidence for this submission. As the file shows, it was the Human Resources Division that issued the payslip concerned. It can therefore not be accepted, or even assumed, that the payslip was adopted by the HONB.

38. The underlying decision amending the rules that were implemented in the November payslip may well have been adopted by the HONB following a Council decision, but no direct appeal stands against such decisions. As appellant himself correctly observed with reference to the NATO Appeals Board Decisions, most recently Decision No. 784, the Tribunal is not competent to annul a regulatory decision. The Tribunal does, however, have jurisdiction to determine the legality of such a decision when an appeal is directed against an individual decision implementing it (*cf* NATO AT judgment in Case No. 903, paragraphs 66 to 68). In this context, the fact that the Tribunal may rule on the legality of such a decision does not alter the requirement that appellant must, if he wishes to challenge a decision, challenge the decision that directly affects him and follow the appropriate pre-litigation steps under Annex IX. This means that, as a first step, appellant must, through his own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. Articles 2 - 4 of Annex IX are applicable in this regard.

39. Appellant submits a number of documents in support of his claims, which the Tribunal either does not consider convincing or deems inadmissible. He, for example, submits an Internal NSPA Instruction on the Delegation of Authority in Personnel

Matters, which the HONB signed on 18 February 2014, i.e. after the impugned decision. Furthermore, the Tribunal observes that in this document the HONB very specifically does not delegate his powers and authorities concerning the internal dispute resolution system. Appellant also submits a redacted and anonymous e-mail allegedly sent to another staff member, i.e. not to appellant, or a memorandum by an HONB replying to a staff member in another Agency, i.e. not to appellant. The Tribunal does not find this an appropriate mode of procedure.

40. The Tribunal has already referred to Article 6.3.1 of Annex IX (*cf* paragraph 20 *supra*), according to which the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints. The Tribunal has pointed out that such channels were available in the present case. An appeal must then be submitted within 60 days of the latest of the following to occur:

- (a) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will not be granted; or
- (b) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will be granted, but such relief has not been granted within 30 days after receipt of such notice; or
- (c) the Head of the NATO body concerned has failed to notify the staff member or a member of the retired NATO staff within 30 days of receiving the report and recommendation of the Complaints Committee in the matter, which shall be considered as equivalent to a decision that the relief sought will not be granted.

41. It results from the above that a prior administrative review is one of the procedural conditions to bring any action before the Tribunal except in the very limited situations identified in Articles 61.3 and 62.2 NCPR. This procedural requirement aims to solve any dispute amicably without formal judicial litigation and contributes to the good administration of justice by preventing disputes from evolving into formal litigation.

42. The appellant not having previously introduced the necessary request for administrative review, the Tribunal, in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the NCPR and must be summarily dismissed.

43. The Tribunal cannot anticipate the conclusions of the pre-litigation process, the subsequent decision of the HONB, or any other resolution that parties may find for the dispute.

44. No material or immaterial damages may be assessed at this time. The question of any damages or other relief can be addressed in case appellant's complaint is resubmitted to the Tribunal if his complaint cannot be resolved through the pre-litigation process.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 30 April 2014.

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

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



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

23 May 2014

AT-J(2014)0015

Judgment

Case No. 2014/1013

UG,

Appellant

v.

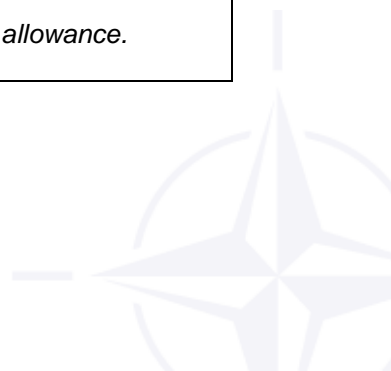
NATO Communication and Information Agency,

Respondent

Brussels, 19 May 2014

Original: English

Keywords: new dispute resolution system; exhaustion of pre-litigation procedures; rent allowance.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written submissions by appellant and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2014)0003.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Communication and Information Agency (NCI), dated 14 February 2014 and registered on 21 February 2014 under Case No. 2014/1013, by Mr UG, a staff member of NCI. Appellant seeks the annulment of his October 2013 payslip and more specifically the amount of rent allowance granted to him as well as annulment of the decision to reject his complaint.

2. The President of the Tribunal issued Order AT(PRE-O)(2014)0003 on 4 March 2014 in accordance with Rule 10, paragraph 1, of the Tribunal's Rules of Procedure. The appellant submitted additional written views with regard to the Order on 31 March 2014.

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

B. Factual background of the case

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

5. Appellant joined NATO on 1 October 2009. He is graded B5. He receives a rent allowance.

6. In May 2013 the NATO Council, following a detailed review, decided to abolish a number of allowances and to amend the conditions of entitlement to other allowances. The corresponding changes in the NCPR and Annexes took effect on 1 July 2013. Staff were advised thereof by Office Notice ON(2013)0038 dated 20 June 2013 to which amendment 13 to the NCPR was attached. Transitional measures were agreed under which the measures would be phased in for those staff who were in receipt of allowances. Accordingly, overall remuneration would not be adversely affected, for example by waiting for a salary increase before implementing the new measures.

7. The rent allowance is one of the allowances concerned. ON(2013)0038 explains in this respect:

The rent allowance has been suppressed and will not therefore be paid after 30 June 2013. Staff members who are currently receiving this allowance will instead receive a non-pensionable indemnity in future. The amount of the indemnity will reduce, if the staff member receives a salary step increment or if there is an increase in the annual remuneration adjustment. The amount of this reduction to the indemnity will be adjusted to avoid an adverse effect on the nominal value of the net salary, when comparing the revised payslip with the payslip of the previous month.

8. Appellant received a step increase at 1 October 2013, which entailed a monthly salary increase of €133,91. This was also the moment when the negative impact of the changes in the rent allowance was implemented. In September 2013 the indemnity for rent allowance amounted to €238,84. The indemnity was with the undated October pay slip reduced to €131,71. The net emoluments for October were €7,59 higher than in September 2013.

9. On 11 November 2013 appellant wrote an e-mail to the Human Resources, Payroll and Benefits mailbox querying about the change in the amount of the rent allowance.

10. Appellant received a reply the same day from HR advising him that the rent allowance had been converted into a non-pensionable indemnity with effect from 1 July 2013, but that the amount of the allowance would be reduced only in case of a salary step or increase in the annual remuneration. The amount was adjusted to avoid an adverse effect on the nominal value of the net salary, when comparing the revised pay slip with the one of the previous month. It would reduce by no more than 80% of any increase to the basic salary. It was recalled that staff had been informed of this through routine order 11/2013.

11. By letter dated 25 November 2013 a complaint was lodged on behalf of appellant. The complaint was directed against the October payslip, which was allegedly received on 25 October 2013, and specifically the rent allowance. Two grounds were advanced: 1. Illegality of the Council's decision of 24 May 2013 – Violation of the vested rights and of the employment contract – Violation of the principles of legal certainty – Violation of the principle of good administration and of the duty of care and 2. Violation of the social dialogue.

12. Complainant requested the annulment of the contested decision, the reimbursement of the full amount of the rent allowance increased by interest, and compensation in the amount of €10.000 because of the failure in proper information.

13. By memorandum dated 19 December 2013 the General Manager of NCI answered complainant. He drew attention to the fact that, in accordance with the NCPR, staff members wishing to contest a decision may submit a complaint after pursuing administrative review. He observed that complainant had not pursued administrative review and had not been seeking further guidance on this issue prior to raising the complaint.

14. He recalled that per Council Decision PO(2013)0238 dated 24 May 2013 the rent allowance previously received by staff was suppressed and consequently not paid

anymore as of 1 July 2013. Instead, as a transitional measure, serving staff continued to receive an indemnity on a progressively diminishing basis, until eroded by salary adjustment/step increment. The amount of reduction to the indemnity was adjusted to avoid an adverse effect on the nominal value of the net salary as per Office Notice ON(2013)00038 of 20 June 2013.

15. He added that the NCI Agency staff was informed by Routine Order No. 11 of these changes to the NCPR and of the fact that transitional measures would be implemented. Agency staff are alerted to the fact that Routine Orders must be read. If questions persist staff are free to contact the appropriate authorities within the Agency. In addition, further information concerning details of the transition measures was available on the Agency portal.

16. He concluded by saying that the NCI had taken the decision to reduce the indemnity in line with the NCPR as amended by the Council Decision and in accordance with the Advisory panel implementing instructions and did not have the authority to rescind or modify such regulations. He informed complainant that the Agency would not cancel the contested decision nor reimburse the full amount of the rent allowance as requested.

17. The present appeal was lodged by letter dated 14 February 2014 and registered on 21 February 2014.

18. On 4 March 2014, the President of the Tribunal issued Order AT(PRE-O)(2014)0003 which provides as follows:

- 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.
- Appellant may submit additional written views.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

19. Appellant submitted additional written views with regard to the Order on 31 March 2014, which were considered by the Tribunal.

C. Summary of appellant's contentions on admissibility

20. Appellant submits that the appeal was lodged within the prescribed 60 day time limit from the date the contested decision was taken, *i.e.* on 19 December 2013.

21. Appellant contends that the impugned decision, the October payslip, was an act adversely affecting him and was adopted by the HONB. He adds, with reference to Decisions of the NATO Appeals Board, that, although the Tribunal is not competent to annul a decision of the NATO Council, it may rule on the legality of such a decision.

22. Appellant concludes that he was neither obliged nor entitled to introduce an administrative review prior to the lodging of his complaint.

D. Considerations

23. As the Tribunal recalled in its Judgment in Case No. 2013/1008, the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The establishment of the Tribunal is only one aspect of this new system. The new system puts major emphasis on pre-litigation procedures. It provides for thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately on the Heads of the NATO bodies (HONB), for addressing, and wherever possible, resolving, issues, instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings. The new internal justice system is therefore substantially different from the previous one.

24. NATO's legislators in this respect followed the recommendations made in the "Report of the External Panel on the Modernization of the NATO Appeals Board and Dispute Resolution System" of November 2011. The experts on this Panel observed that in their opinion, many issues that were brought to the Appeals Board for decision "*could and should have been resolved at an earlier phase.*" The External Panel emphasized in this regard that international organizations increasingly make use of graduated systems of administrative review to facilitate resolution of disputed issues more quickly and at an earlier stage, resulting in less disruption and expense for all concerned.

25. The Tribunal has, in accordance with the transitional provisions of the new Annex IX, adjudicated a number of cases where the proceedings had started before the entry into force, on 1 July 2013, of the new system.

26. The case under consideration is, however, one of the first cases in which the provisions of the new Chapter XIV of the NCPR and Annex IX thereto fully apply (*cf* NATO AT Judgment in Case No. 2013/1014). The present case must therefore be reviewed taking into account all aspects of the new internal dispute resolution system, and the Tribunal must in particular be satisfied that the entire pre-litigation process has been respected. Article 6.3.1 of Annex IX is unambiguous in this respect. It stipulates that:

...the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex.

27. In this context, and in view of the entirety of the new dispute resolution system, in cases such as this reference to the jurisprudence of this Tribunal's predecessor, the NATO Appeals Board, which functioned in a different context, must be subject to significant qualifications.

28. As mentioned, both Chapter XIV of the NCPR and Annex IX thereto have been changed substantially. It is opportune to reproduce here those elements that are relevant to the present case.

29. Article 61.1 of the NCPR requires in its new version that:

Staff members, consultants, temporary staff or retired NATO staff, who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment, including their contracts, NATO regulations governing personnel and other terms of appointment, and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations.

30. Article 2 of Annex IX then establishes the procedures to be followed. Article 2.1 stipulates that:

Staff members or retired NATO staff who consider that a decision affecting their conditions of work or of service does not comply with their terms and conditions of employment and decide to contest the decision, may, within 30 days after the decision was notified to them, initiate the process for seeking an administrative review of the decision. As provided in Articles 2.2-2.4, the process shall be initiated in the NATO body in which the staff member is appointed or member of the retired NATO staff was appointed, so long as the Head of that NATO body has authority to rescind or modify the contested decision; otherwise, the process shall be initiated in such other NATO body, if any, that has the authority to rescind or modify the decision in question. In cases of doubt, staff members or retired NATO staff should consult with the human resources management in the NATO body in which they are, or were last employed for guidance.

31. And Article 2.2 provides that:

In cases where an administrative review is to be conducted within the NATO body to which the staff member is appointed, the following steps shall apply:

(a) they shall, through their own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. The staff member's immediate supervisor shall respond within 21 days, except that this period may be extended with the consent of the staff member.

(b) those wishing to contest the decision of the immediate supervisor shall, within 21 days of receiving a response pursuant to Article 2.2(a) of this Annex, refer the matter to the Head of NATO body concerned, requesting a further administrative review and indicating the reasons for the measure(s) or other outcome they are seeking by way of remedy. The Head of NATO Body shall review the matter, including the gathering of any information he/she deems necessary to consider whether to agree to the measures or other outcome sought. The Head of NATO Body shall, within 21 days from receipt of the staff member's request, make known his/her position and shall either confirm, rescind or modify the contested decision.

32. It is clear from these provisions that the new procedures for administrative review constitute an important and innovative element in the package of reforms of NATO's internal justice system.

33. Moreover, Article 61.1 NCPR stipulates that staff may also ask to submit their grievances to mediation under the conditions described in Article 3 of Annex IX.

34. Following these steps, staff members, consultants, temporary staff or retired NATO staff who wish to contest the decision after pursuing administrative review and, if applicable and requested, mediation are, in accordance with Article 61.2, entitled to submit a complaint in writing to the HONB possessing the authority to rescind or modify the challenged decision as prescribed in Article 4 of Annex IX to these Regulations. Such complaints must, under Article 4.1 of Annex IX, be submitted to the HONB in which the administrative review was conducted. In order to be considered by the HONB, a complaint must be submitted to him/her within 30 days following the outcome of the administrative review or mediation, where mediation is pursued.

35. Claimants may, in accordance with Article 4.2 of Annex IX, also request that, before a decision is taken, the complaint be submitted to a Complaints Committee. The HONB shall accept the request to submit the complaint to the Complaints Committee unless, within 15 days of receiving the complaint, he/she agrees to rescind or modify the contested decision. HONBs may also decide to submit a complaint to the Complaints Committee on their own initiative.

36. Claimants may, however, in accordance with Article 61.3, submit a complaint in writing to the HONB without a prior administrative review only if the contested decision was taken directly by him or her. Challenges concerning decisions that have not been taken directly by the HONB, but on a lower level, even if on the latter's behalf, must therefore follow the full pre-litigation process, including administrative review.

37. Article 62.1 provides that following the administrative and complaints procedure under Article 61, the complainant or his or her legal successor may appeal to the Administrative Tribunal.

38. Neither party can unilaterally waive the entirety of these pre-litigation procedures. Parties may only submit a matter directly to the Tribunal by mutual agreement, as provided in Article 6.3.1 of Annex IX to the NCPR. This is not the case in the present dispute.

39. The above-mentioned provisions constitute a complete set of pre-litigation and litigation procedures. The new procedures adopted by the Council, and in particular those concerning administrative review, place significant new responsibilities both on the administration and on staff members and other persons covered by these Rules. Both sides are bound to act in good faith in seeking an administrative settlement of disputed issues wherever possible. This includes the responsibility of management to explain to staff the correct procedure to follow, and the correct person or instance to address.

40. The new rules must be understood, applied and interpreted in a consistent way and like all provisions of the NCPR, the language of Article 61.1 is to be read in good faith, in accordance with its ordinary meaning, and in a manner that seeks to ensure that all provisions are construed consistently and in harmony with their purpose and the Council's objectives in adopting them. On the other hand, Article 61.1 NCPR is not, and should not become, an excuse for intransigence and delay.

41. In the present case, appellant contends that Article 61.1 does not apply because the impugned decision, the November payslip, was adopted by the HONB.

42. The Tribunal disagrees.

43. Payslips are generally prepared by payroll officers and are subsequently endorsed by their superiors, most likely the Head of Human Resources, when the latter approve the payroll. Appellant submits that the impugned payslip was adopted by the HONB, but he does not bring forward compelling evidence for this submission. As the file shows, it was the NATO Payroll Service that issued the payslip concerned. It can therefore not be accepted, or even assumed, that the payslip was adopted by the HONB.

44. The underlying decision amending the rules that were implemented in the November payslip may well have been adopted by the HONB following a Council decision, but no direct appeal stands against such decisions. As appellant himself correctly observed with reference to the NATO Appeals Board Decisions, most recently Decision No. 784, the Tribunal is not competent to annul a regulatory decision. The Tribunal does, however, have jurisdiction to determine the legality of such a decision when an appeal is directed against an individual decision implementing it (*cf* NATO AT Judgment in case No. 903, paragraphs 66 to 68). In this context, the fact that the Tribunal may rule on the legality of such a decision does not alter the requirement that appellant must, if he wishes to challenge a decision, challenge the decision that directly affects him and follow the appropriate pre-litigation steps under Annex IX. This means that, as a first step, appellant must, through his own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. Articles 2-4 of Annex IX are applicable in this regard.

45. The Tribunal has already referred to Article 6.3.1 of Annex IX (*cf* paragraph 26 *supra*), according to which the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints. The Tribunal has pointed out that such channels were available in the present case. An appeal must then be submitted within 60 days of the latest of the following to occur:

(a) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will not be granted; or

(b) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will be granted, but such relief has not been granted within 30 days after receipt of such notice; or

(c) the Head of the NATO body concerned has failed to notify the staff member or a member of the retired NATO staff within 30 days of receiving the report and recommendation of the Complaints Committee in the matter, which shall be considered as equivalent to a decision that the relief sought will not be granted.

46. It results from the above that a prior administrative review is one of the procedural conditions to bring any action before the Tribunal except in the very limited

situations identified in Articles 61.3 and 62.2 NCPR. This procedural requirement aims to solve any dispute amicably without formal judicial litigation and contributes to the good administration of justice by preventing disputes from evolving into formal litigation.

47. The appellant not having previously introduced the necessary request for administrative review, the Tribunal, in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the NCPR and must be summarily dismissed.

48. The Tribunal cannot anticipate the conclusions of the pre-litigation process, the subsequent decision of the HONB, or any other resolution that parties may find for the dispute.

49. No material or immaterial damages may be assessed at this time. The question of any damages or other relief can be addressed in case appellant's complaint is resubmitted to the Tribunal if his complaint cannot be resolved through the pre-litigation process.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 19 May 2014.

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

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



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

15 July 2014

AT-J(2014)0016

Judgment

Case No. 2014/1010

TS,

Appellant

v.

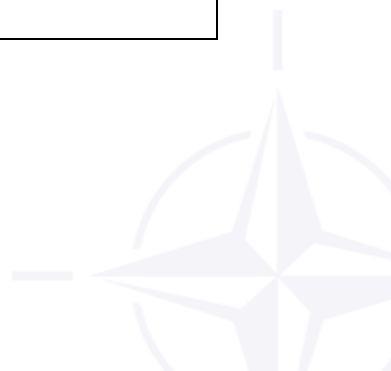
NATO E-3A Component,

Respondent

Brussels, 30 June 2014

Original: English

Keywords: new dispute resolution system; exhaustion of pre-litigation procedures; knowledge of new rules and publication of law; termination of contract.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written submissions by appellant and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2014)0002.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO E-3A Component (Geilenkirchen, Germany), dated 15 January 2014 and registered on 11 February 2014 under Case No. 2014/1010, by Ms TS, a former staff member of the NATO E-3A Component. Appellant seeks the annulment of the decision of the Commander of the E-3A Component dated 10 July 2013 to terminate her employment contract.

2. On 28 February 2014 the President of the Tribunal issued Order AT(PRE-O)(2014)0002 in accordance with Rule 10 of the Tribunal's Rules of Procedure. The appellant submitted additional written views with regard to the Order on 2 May 2014. The respondent submitted comments on 14 May 2014.

3. The above-mentioned appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV NCPR and Annex IX thereto and, *inter alia*, establishing the Tribunal. At issue now before the Tribunal is whether the present appeal is governed by the above-mentioned provisions.

B. Factual background of the case

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

5. Appellant joined the NATO AIRBORNE EARLY WARNING AND CONTROL FORCE (NAEW&CF) E-3A Component on 1 February 2005, as Staff Assistant (Administration). She holds a B2.

6. On 10 July 2013, the Acting Commander of the NAEW&CF E-3A Component (E-3A Component), having received an Invalidity Board report establishing that appellant was not suffering from permanent invalidity and following a review of her attendance and health status, decided to terminate appellant's employment contract in accordance with Articles 45.4, 45.7.3 and 9.1 of the NCPR. Separation from the E-3A Component became effective immediately, with a payment in lieu of the 180 days' notice period in accordance with Article 10.5 of the NCPR. The decision was taken on the grounds of the frequent recurrence of short periods of appellant's absence on sick leave since 2005 and her extended sick leave since 14 September 2011. Lastly, it was announced in the decision that a Disciplinary Board would be convened because of appellant's unauthorized absence from work at that moment.

7. On 17 October 2013 appellant's legal representative submitted a complaint against the above mentioned decision, contending that the termination of her employment was not valid.

8. The complaint was dismissed by the E-3A Component Commander on 18 November 2013 for the following reasons:

- i. the complaint was time barred since it was submitted roughly three months after the termination of the contract;
- ii. the termination of employment for recurrent sick leave was in accordance with Articles 45.4, 45.7.3, and 9.1 of the NCPR;
- iii. the Head of a NATO body (HONB) lacks authority to cancel or change the substance of a medical decision of a NATO Invalidity Board;
- iv. the Invalidity Board was properly set up in accordance with Article 13.2 of Annex IV to the NCPR;
- v. there were no irregularities in the procedure of the Invalidity Board and all three members had detailed knowledge of the medical case; and
- vi. the proceedings of an Invalidity Board are secret, and in its report does not enclose a detailed medical diagnosis but only determines whether the staff member suffers from a permanent invalidity, as required by Article 13 of Annex IV to the NCPR.

9. Appellant lodged her appeal on 11 February 2014 seeking:

- the annulment of the decision of the Commander of the E-3A Component dated 10 July 2013 to terminate her employment contract;
- the recognition of appellant's entitlement to all the privileges and payments on the basis of her employment contract since August 2005;
- the reimbursement of travel and subsistence costs and the costs of her counsel in this case, and
- the reimbursement of the security deposit.

10. On 28 February 2014, the President of the Tribunal issued Order AT(PRE-O)(2014)0002 which provides as follows :

- 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.
- Appellant may submit additional written views.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

11. Appellant submitted additional written views with regard to the Order on 2 May 2014, which were considered by the Tribunal.

12. On 14 May 2014, respondent also submitted written views on the alleged facts presented by appellant.

C. Summary of appellant's contentions on admissibility

13. Appellant submits that her complaint was not time barred.

14. Appellant contends that respondent did not give her any information about the procedural rules governing administrative review complaints and appeals applicable as of 1 July 2013. Appellant alleges she was not present at NATO Air Base Geilenkirchen during the first six months of 2013 and had not received any documentation about the fact that new regulations governing administrative review, mediation, complaints and appeals entered in effect on 1 July 2013. Appellant adds that, as a result of this lack of information, her complaint was based on Article 61 NCPR and Article 2 Annex IX NCPR as they were in effect before 1 July 2013. Lastly, appellant emphasizes that the rules of the NCPR are not published for persons who are not NATO personnel and that her lawyer can only get this information if brought by his client. As a result, appellant demands that her complaint must be considered as filed within a reasonable time and proceed in the normal way.

15. In its written submission on 14 May 2014 respondent states that the Civilian Personnel's Office forwarded all relevant information to staff members on long term sick leave, including Ms S, by surface mail. Respondent provides a Memorandum signed by a personnel officer who certifies the distribution of packages with the NCPR updates, including specifically to staff on long term sick leave, appellant being on the list of the mailing recipients.

D. Considerations

16. As the Tribunal recalled in its judgments in Cases No. 2013/1008, 2014/1013 and 2014/1014, the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The new system puts major emphasis on pre-litigation procedures. It provides for thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately on the Heads of NATO bodies (HONB), for addressing and wherever possible resolving issues, instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings.

17. The Tribunal can, in accordance with Article 6.3.1 of Annex IX, only entertain appeals where the appellant has exhausted all available pre-litigation channels. This requirement is waived, in whole or in part, only when the impugned decision was taken directly by the HONB or when parties have agreed to submit the case directly to the Tribunal. Neither party can unilaterally waive the entirety of these pre-litigation procedures.

18. In the present case, appellant contends that new rules do not apply because of her lack of information regarding their entry into force.

19. The Tribunal disagrees.

20. The Tribunal considers that the principle of *ignorantia legis neminem excusat* is applicable in this case. Presumed knowledge of the law derives from the assumption, however, that the law in question has been properly published and distributed. It is the obligation of the Organization to fulfill the right of all current and former staff members to have access to the law and jurisprudence that governs their relationships. The Tribunal is satisfied that this requirement was met in the present case. The updated version of the NCPR was timely and adequately published and distributed internally and made available on the intranet. It was, in addition, timely distributed by surface mail to staff members on sick leave. It may be true that persons, who do not belong to NATO staff, including counsel, may have some difficulties in obtaining the necessary information and improvements can be made in this respect. Counsel can, however, enquire with NATO's management either directly or through their clients both regarding any query and to ensure that both counsel and clients are in possession of the latest version of the rules. The Tribunal observes that this was not done in the present case. The Tribunal concludes that in the present case any alleged lack of information is to be attributed to appellant and not to respondent.

21. Therefore, appellant not having previously pursued the necessary pre-litigation procedures in due time, the Tribunal, in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the NCPR. It must be summarily dismissed.

22. No material or immaterial damages may be assessed at this time.

23. As far as the request for reimbursement of the security deposit is concerned, the Tribunal observes that such a deposit is no longer required under Annex IX as in force since 1 July 2013 and that appellant had not deposited one. This request is therefore without a cause.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 30 June 2014.

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

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



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

15 July 2014

AT-J(2014)0017

Judgment

Case No. 2013/1001

PS,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 30 June 2014

Original: French

Keywords: Submission of documents after the end of the written procedure; reasonable period of time; implementation of an Appeals Board decision; Article 9.1(i) of the NCPR; dismissal; assessment of a staff member's performance; Improving Performance Action Plan; misuse of powers



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 26 May 2014.

A. Proceedings

1. The Appeals Board of the North Atlantic Treaty Organization was seized of an appeal, dated 22 June 2013, by Mr PS, a former member of the NATO International Staff, where he was employed as a translator.
2. The comments of the respondent in the present case were presented on 6 September 2013. The appellant presented his reply to the comments on 21 October 2013 and the written procedure was closed on 8 November 2013.
3. The above-mentioned appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (CPR), amending Annex IX thereto and, amongst other things, establishing the NATO Administrative Tribunal (hereinafter "the Tribunal").
4. Pursuant to the Transitional Provisions contained in Article 6.10 of Annex IX to the CPR, "Appeals pending before the NATO Appeals Board on 30 June 2013 shall be transferred to the NATO Administrative Tribunal. Appeals that were submitted to the Appeals Board prior to the date when these regulations enter into force, but not decided by that date, shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to when these regulations enter into force."
5. In an e-mail dated 18 May 2014, the appellant informed the Tribunal Registrar that he wished to endorse the letter, with several annexes, that his wife had sent to the NATO Secretary General on 12 May 2014. The respondent commented on this letter on 22 May 2014.
6. The Tribunal's Panel held an oral hearing on 26 May 2014 at NATO Headquarters in Brussels. It heard arguments by the parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

7. The appellant began to work as a translator on the NATO International Staff on 1 September 2005 under the terms of an initial three-year contract. When his contract ended on 1 September 2008, the respondent offered him an indefinite duration contract.

8. In accordance with the applicable regulations, the appellant was subject to the Performance Review and Development (PRD) system for NATO staff members. It consists of three phases: objective setting, the mid-term review and the annual review.
9. The appellant's mid-term review for 2009 indicated that he was behind schedule on three of the six defined objectives. In his annual review for 2009, the appellant was given an overall rating of "good", as the six objectives had all been met.
10. The appellant's mid-term review for 2010 indicated that he was behind schedule on three of the six defined objectives and that he should "*remain motivated and continue his efforts to improve, so as to meet his objectives by the end of the cycle*".
11. In his annual review for 2010, it was stated that two of the three objectives flagged as not met in the mid-term review were still considered to be unmet. The rating proposed for his performance in 2010 was, therefore, "fair".
12. Following the appellant's last assessment, on 31 March 2011, an Improving Performance (IP) Action Plan was set up for him, starting with a preliminary phase of three months (April to June 2011) that included a monthly assessment.
13. At the end of this phase, in the light of the results achieved by the appellant, the IP Action Plan itself was initiated on 18 July 2011 at the request of his manager. This Plan included six meetings to assess the appellant's progress and these took place between August and November 2011.
14. In a letter to the Head of the Translation Service dated 29 September 2011, the appellant contested the process of the IP Action Plan in several respects and, in an e-mail dated 10 October 2011, he asked his managers to allow him to change teams and to cancel the current Action Plan.
15. In a letter dated 18 November 2011, the appellant repeated his requests; in particular, failing the complete cancellation of the IP Action Plan, he asked that it should be extended for three months after the last assessment, scheduled for 28 November 2011.
16. As these requests were not granted, the final assessment of the appellant's IP Action Plan was made on 9 December 2011, and it was stated that the programme had concluded with "*unsatisfactory results*". In the light of the above, it was recommended that the appellant's contract be terminated.
17. In a letter from the Deputy Assistant Secretary General for Human Resources dated 19 December 2011, confirmed by the Secretary General on 9 March 2012, the appellant was informed of the decision to terminate his contract as from 31 December 2011 in accordance with the provisions of Article 9, paragraph 1(i) of the CPR.
18. The appellant contested the legality of this decision in an appeal lodged with the NATO Appeals Board on 7 May 2012.

19. In Decision no. 870 dated 7 February 2013, on the grounds of insufficient substantiation, the Appeals Board cancelled the above-mentioned decision of 19 December 2011 to dismiss the appellant, and ruled that the NATO International Staff should compensate the appellant for the material and non-material damage he had suffered. In the same decision, the Appeals Board pointed out that cancellation of the contested decision necessarily involved the reinstatement of the appellant as a member of the NATO staff, in his own post or in another equivalent post, with effect from the date of his dismissal.

20. In a decision dated 25 March 2013 (the contested decision), the respondent told the appellant that it had re-examined his situation in the light of Appeals Board Decision no. 870 and that his contract was terminated on 25 March 2013. The respondent stated that the contested decision was justified on the grounds of the appellant's unsatisfactory performance in 2010 and the fact that his IP Action Plan – which had begun with a preliminary phase followed by a period during which the appellant's work had been assessed by various members of the service – had ended with an unfavourable result, as his performance had not progressed sufficiently in the light of the requirements set out in the applicable regulations.

21. On 16 May 2013, the appellant lodged a complaint against the contested decision; this complaint was dismissed by the respondent on 4 June 2013. These are the circumstances in which the appellant lodged this appeal with the Tribunal against the contested decision.

C. The parties' submissions

22. In his appeal, the appellant requests that the Tribunal should:

- acknowledge that the respondent illegally refrained from implementing all the measures set out in Appeals Board Decision no. 870;
- cancel the contested decision;
- order the respondent to reinstate the appellant as a translator or team leader in Belgium or France, with the same emoluments;
- failing that, provide him with compensation:
 - in the amount of €2.052.841,08, which is equivalent to his emoluments as a NATO International Staff translator up to retirement age;
 - in the amount of €143.082, which is equivalent to the costs of education for his children up to baccalaureate level;
 - in the amount of €127.282,36, in respect of the enforced sale of his house, bought in July 2011 when he was employed under an indefinite duration contract with the respondent;
 - in the amount of €39.456, which is equivalent to the cost of family health insurance;
 - in the amount of €107.253,96, in respect of damage suffered for dismissal without genuine and serious grounds;
 - in the amount of €107.253,96, in respect of damages for wrongful breach of his employment contract;

- in the amount of €214.507,92, in respect of non-material damage and damage to his professional reputation;
 - in the amount of €107.253,96, in respect of damage to family life; and
 - in the amount of €2.196.025, which is equivalent to the emoluments his wife would have received up to retirement age when she resigned from her management post in France following the signature of appellant's indefinite duration contract;
 - clarify and validate the healthcare coverage of all his family members by Allianz;
 - order the reimbursement in real time of his children's school education costs.
23. The respondent requests that the Tribunal should:
- dismiss the appeal, in respect of all its submissions, as unfounded.

D. Parties' main contentions, arguments and relief sought

(i) *The appellant*

24. In his appeal, the appellant firstly complains that the respondent did not take all the measures necessary for the implementation of Appeals Board Decision no. 870.

25. In this respect, he requests, first of all, the payment of €10.150,22 in reimbursement of his costs of dual residence; secondly, the recalculation of all his emoluments (salaries, allowances and indemnities) on the basis of the adjustment of NATO salaries and allowances in 2013; and, finally, reimbursement of the sum of €2.148,38, equivalent to income not received in March 2013, as well as the sum of €1.049,52, equivalent to the health insurance costs incurred as a result of his dismissal, which occurred in December 2011 and was cancelled by Appeals Board Decision no. 870.

26. Furthermore, the appellant contests the respondent's position as set out in writing, according to which the first point of the appellant's conclusions is partially inadmissible as he has received in full the sums payable in accordance with this decision. He considers that the respondent should also have paid him, in implementation of Appeals Board Decision no. 870, the sums of €17.070,23 (Defined Contribution Pension Scheme), €2.387,20 (adjustment of the amount for March 2013), €1.354,56 (application of new scales for 2013), €3.429,61 (school education costs) and €570.01 (health costs).

27. Secondly, the appellant complains that the respondent took a second decision which was clearly tainted with illegality. In this respect, the appellant puts forward, in substance, three arguments.

28. The first argument is founded on an error of judgement on the part of the respondent concerning the appellant's performance review, after examination of his file following cancellation of the first decision on his dismissal in December 2011.

29. In this respect the appellant claims, firstly, that he has the professional skills required by the applicable regulations, as shown, in particular, by the fact that the respondent offered him an indefinite duration contract at the end of his initial three-year contract.

30. Furthermore, the alleged professional inadequacy of the appellant for the 2010 assessment period and his rating of "*fair*" are at odds with the fact that, throughout the period of his contract with the respondent and particularly during the previous year, his performance was assessed by the same persons as "*good*". Such a difference in judgement between one year and the next in the assessment process, with the consequences that may result, shows clearly that there was an error in the appellant's final rating.

31. Secondly, the appellant points out that, following his dismissal in December 2011, he was recruited as head of the French translation section of the International Baccalaureate Organization, which testifies to his skills not only as a translator, but also as a section head with responsibility for revision. In addition, he passed the written and oral tests of the European Union Translation Centre and was included in the reserve list for forthcoming recruitment to an EU post involving the same kind of work he had performed for six years at NATO.

32. The appellant asserts that these facts demonstrate in the most objective way that he has the skills needed to work as a translator, contrary to the recommendations made by his manager at the end of the IP Action Plan, *i.e.* that his contract be terminated owing to his unsatisfactory professional performance. Moreover, there is no evidence confirming the alleged unsatisfactory performance of the appellant which would corroborate the conclusions and recommendations of his managers.

33. The second argument is founded on violation of the assessment procedure as such, during which there were various irregularities and which, in any event, did not conform to the applicable regulations. According to the appellant, this conclusion can also be drawn from the documentation submitted to the Tribunal by the respondent, in which the latter no longer claimed that the procedure had conformed to the applicable regulations.

34. In this respect the appellant claims, firstly, that, during his 2010 assessment procedure, the respondent's view that the objectives considered to be "not met" were the most important ones is essentially arbitrary. The appellant never received any explanation of this, nor even any indication that some of the objectives that had been set were of greater importance and must necessarily be met. Such an omission on the part of the respondent would mean that the appellant's assessment process and his subsequent IP Action Plan were tainted by an error. On this matter, in reply to a question from the Tribunal, the appellant stated that, as four of the six objectives had been met, he was entitled to think that his performance could not and should not be rated as "*fair*".

35. Secondly, the appellant claims that his assessment was carried out by persons with neither the qualifications nor the skills required by the regulations. In addition, the persons in question had their own reasons for seeking the appellant's dismissal and therefore had no intention of assessing him objectively.

36. The third argument is founded on misuse of powers. According to the appellant, his dismissal case included documents, procedures and assessment interviews with the ultimate aim of achieving objectives other than those alleged, *i.e.* the improvement of his professional performance. This arrangement was necessary to enable the respondent to take appropriate decisions in the light of requirements to restructure its services and reduce staff levels.

37. Finally, the appellant claims, in substance, that the documentation used by the respondent in the context of his final assessment contains, in general, significant signs of manipulation in order to camouflage the fact that the appellant's performance assessment was actually based on a covert decision concerning his dismissal.

(ii) *Respondent's main contentions and arguments*

38. Firstly, the respondent objects that the letter sent to it on 12 May 2014 should not be included in the legal proceedings because the written procedure in this case had already been closed and also because the author of the letter is not a party to the dispute.

39. Secondly, the respondent submits a plea of inadmissibility on the first point in the appellant's submissions, inasmuch as this seeks the reimbursement of the sums resulting from the recalculation of all his emoluments (salaries, allowances and indemnities) on the basis of the adjustment of NATO salaries and allowances in 2013, as well as the sum of €2.148,38, equivalent to income not received in March 2013.

40. In reply to a question from the Tribunal, and contrary to the contention of the appellant in his written pleadings, the respondent claims to have implemented Appeals Board Decision no. 870 in full in respect of the appellant's financial demands.

41. As regards the appellant's request for the reimbursement of €1.049,52, which is the amount of the health insurance costs incurred as a result of his dismissal in December 2011, the respondent replies that, firstly, this request is not substantiated, and, secondly, the costs arising from the appellant's decision to take out additional health insurance are not part of the expenses which fall to the Organization.

42. Thirdly, the respondent claims that no irregularity was committed in the appellant's performance assessment procedure which could invalidate the result of this assessment.

43. First of all, the 2010 mid-term review showed that the appellant was behind schedule for three of his six objectives and, in the context of the annual review, two of these objectives were again judged not to have been met. When countersigning the

2010 mid-term review and annual review, the appellant never objected that he had actually met the objectives in question.

44. The same also applies to the appellant's IP Action Plan, during which assessments were based on a transparent process enabling him to defend himself and express his point of view freely. As regards his final assessment, the procedure was not tainted with any irregularity, nor was there any manipulation of the documentation used in the Tribunal procedure.

45. Finally, the respondent rejects the appellant's arguments that, ever since he joined NATO, his performance – especially for 2009 – had always been satisfactory in the light of the applicable regulations. In this respect, the respondent points out that, since the period when the appellant was working under his initial contract, reservations had been expressed regarding the consistency of his performance, and it was in these circumstances that the probationary period of his initial contract was extended for six months before he was offered an indefinite duration contract. Furthermore, no argument concerning the adequacy of the appellant's performance can be based definitively on the fact that he had signed an indefinite duration contract with the respondent.

46. Fourthly, the respondent categorically rejects the arguments put forward by the appellant to demonstrate that, in the present case, the contested decision should be cancelled on the grounds of misuse of powers. Under this head, the appellant has not produced any specific argument or evidence that this is the case; on the contrary, on the basis of the procedure that was followed, as amply documented, it can be seen that the respondent did everything possible and required by the regulations to enable the appellant to improve his performance.

E. Ruling of the Tribunal

(i) *On the inclusion in the file of documents presented after the end of the written procedure*

47. The respondent opposes the inclusion in the file of a letter sent by the appellant's wife to the NATO Secretary General on 12 May 2014.

48. In this respect, it should be pointed out that documents and other items relating to an ongoing case and presented after the deadlines established by the CPR and the Tribunal's Rules of Procedure shall be included in the file for the case in question only if they are sent to the party concerned within a reasonable period of time (see, by analogy, the AT judgment in Case No. 2013/0005, paragraph 37).

49. This is clearly not the case here; the documents in question were sent to the respondent two weeks before the case hearing.

50. As no explanation has been offered in justification for this late presentation of the documents in question, the respondent's request must be upheld.

51. It follows that the documents sent to the respondent on 12 May 2014 shall not be included in the file for this case.

(ii) On the submissions on the illegality of the respondent's non-implementation of Appeals Board Decision no. 870 in respect of the appellant's financial entitlement

52. The respondent argues that this point in the submissions is inadmissible in that the appellant seeks payment of the difference arising from the recalculation of all his emoluments (salaries, allowances and indemnities) on the basis of the adjustment of NATO salaries and allowances in 2013, and the reimbursement of the sum of €2.148,38, equivalent to income not received in March 2013.

53. The respondent's argument must be accepted; as the documents in the file show, and as the appellant admitted in his written pleadings, the appellant has received a sum equivalent to the recalculation of all his emoluments, including the revised amount of €2.387,20 – and not €2.148,38 – in respect of the adjustment of this income for March 2013.

54. As regards the other financial rights of the appellant as a result of the cancellation of the decision of 19 December 2011, it should be recalled that, in order to comply with the Appeals Board's decision on cancellation and implement it in full, the person responsible for the cancelled action must comply with the operative provisions of this decision and the reasons for it; this person is required to take all necessary measures to eliminate the consequences of the illegal actions brought to light.

55. The appellant claims, firstly, that this is not the case here, and complains that the respondent has not yet paid him the sum of €17.070,23 in respect of the Defined Contribution Pension Scheme.

56. This argument must be dismissed; as can be seen from the documents presented for the appeal, and as the appellant admitted during the hearing, this sum is paid as part of the pension scheme.

57. Secondly, the appellant claims in his written pleadings that the final sums paid to his account did not correspond to the entirety of his financial entitlement resulting from implementation of Appeals Board Decision no. 870.

58. In reply to a question from the Tribunal, and uncontested by the appellant, the respondent stated that his entitlement had been paid in full and finally, with the legitimate exception of the sum of €1.049,52, equivalent to the health insurance costs incurred as a result of his dismissal in December 2011. The reimbursement of this sum is not part of the compensation that the respondent is required to pay the appellant owing to the cancellation of the decision of 19 December 2011 to dismiss him.

59. It results from the foregoing that the point in the appellant's submissions which is founded on the alleged illegality of the respondent's failure to implement in full Appeals Board Decision no. 870 in respect of his financial entitlement must be dismissed.

(iii) On the appellant's submissions on cancellation of the decision of 25 March 2014

60. To begin with, it should be noted that the contested decision sets out the respondent's reasoning clearly and unequivocally and provides the appellant with sufficient information and substantiated factual considerations, enabling him to understand how the measures taken in his case are justified. These elements must be set out, particularly in the case of a staff member's dismissal for inadequate professional performance, as such a decision may have serious consequences for the person concerned (see Appeals Board Decision no. 870).

61. It was in this context, and in a detailed factual statement, that the appellant raised various grounds for the illegality of the contested decision, putting forward three arguments: the first is founded on an error of judgement on the part of the respondent concerning the appellant's performance; the second on illegal actions carried out in the framework of the PRD system and the appellant's IP Action Plan; and the third (and last) on the misuse of powers.

On the argument founded on an error of judgement in respect of the appellant's performance

62. In this argument, the appellant claims that his professional skills are actually those required by the PRD system and the applicable regulations and that, in rating his performance as insufficient, the respondent has committed an error of judgement.

63. In this context, the Tribunal points out that it cannot substitute its own judgement for that of the Administration in respect of the assessment and abilities of a staff member; the judge's role is merely to verify the absence of any manifest error of judgement or misuse of power (see AT judgment in Case No. 2014/0005, paragraph 80, on this issue).

64. In the present context, an error of judgement by the Administration concerned may be described as "manifest" only if it is easily visible and evident. In this respect, the evidence which the appellant must provide must be sufficient to deprive the respondent's judgements of all plausibility (see AT judgment in Case No. 2014/0005, paragraph 81, on this issue).

65. In his argument, the appellant is actually asking the Tribunal to revise the respondent's judgement of his professional performance, without providing any evidence that there was a manifest error of judgement in rating his performance as "fair".

66. This conclusion cannot be called into question by the appellant's argument that, since joining NATO, his performance had always been rated as "*good*" and not as "*fair*"; in the PRD system, each staff member's assessment is carried out annually on the basis of defined criteria and objectives, by means of a mid-term review and final assessment for that year without reference to other years. It is precisely in order to avoid stagnation of performance that this system exists – to supervise and monitor staff members' progress in the interests of the service.

67. The PRD system and the applicable regulations contain a set of rules which are intended, before a decision with serious consequences (such as dismissal) is taken, to guarantee the rights of the staff member concerned by means of several additional ad hoc phases of assessment, such as the IP Action Plan, so that the staff member can demonstrate his or her skills and express his or her point of view during this procedure.

68. In the present case, in the context of the implementation of these arrangements, the appellant does not put forward any manifest error of judgement on the part of the respondent, but merely contests his managers' assessment which, moreover, was established as part of an uncontestable transparent process.

69. As regards the appellant's argument that his skills meet the requirements of the PRD system and the applicable regulations, enabling him to remain in post, in the light of his translation duties in another organization or the fact that he passed the translation competition of the EU Translation Centre, this argument must also be rejected.

70. The fact of holding such a post outside NATO cannot call into question the Administration's judgements in the light of a staff member's PRD review, which took into account the appellant's length of service – more than six years – with the respondent.

71. The same applies to his success in the European Union translation competition. Moreover, on the basis of information supplied by the appellant, it should be noted that passing this competition does not automatically mean that the person concerned will be appointed to a permanent post; furthermore, recruitment in these conditions would not mean that certain professional requirements (in particular, average daily output) would be met once the person was working in this post.

72. It follows from the foregoing that the first argument must be dismissed as unfounded.

On the argument founded on irregularities in the implementation of the PRD system and the IP Action Plan

73. In his second argument the appellant claims that there were various irregularities on the respondent's part, invalidating his assessment process and thus the IP Action Plan.

74. The Tribunal points out that the PRD system and the applicable regulations must be regarded as rules establishing the course of action which the Administration has imposed on itself and from which it cannot deviate without specifying the reasons, failing which it would infringe the principle of equal treatment of staff (see AT judgment in Case No. 2014/0005, paragraph 86, on this issue).

75. In this respect, the appellant claims, firstly, that he was never informed that some of his objectives took priority over others, and that no-one told him during his performance assessment about this apparently decisive factor for his final rating. In these circumstances, he claims, the respondent was in breach of the PRD system and the applicable regulations.

76. This argument must be dismissed. On the appellant's annual review form, the comments on the objectives which were not met do indicate that these objectives were the most important ones, but this is not the basis on which the appellant was assessed.

77. It can be seen from the manager's observations and from the general observations in respect of the first objective which was not met that the respondent gave an adequate explanation of the genuine grounds for his assessment; in particular, *"the number of texts with an excessive number of serious mistakes in meaning is much higher than we would expect from a (staff member) who has been working here for more than five years."* The same applies to the third objective, which was also unmet: *"too many of his translations still need an excessive level of modifications and revision work."*

78. It was in the same circumstances that the respondent explained the grounds for assessing the appellant as *"fair"*, stating on the above-mentioned form that *"despite progress on the analysis of texts, efforts still have to be made on overcoming persistent problems of sentence structuring in French and on his command of English."* It was also stated that *"his rereading work is somewhat erratic and absolutely must be improved."* The appellant cannot, therefore, claim that his performance should not be assessed as *"fair"* because he met four of his six objectives, as he indicated in his observations on the assessment form and repeated during the hearing.

79. Secondly, the appellant claims that the procedure followed for his assessment and IP Action Plan was flawed because he was appraised by persons who were not competent, as they had personal reasons for assessing him below his capabilities. In this context, the appellant contested the different phases of the IP Action Plan.

80. This argument must also be dismissed. Apart from general unsubstantiated allegations which cannot call into question the competence of the aforementioned staff members who assessed him, the appellant has not put forward any specific argument to support his claim that both the decision to set up an IP Action Plan and also the different phases of this plan, including the preliminary phase, were tainted with irregularities which could give rise to cancellation of the contested decision.

81. It should be noted that, during the IP Action Plan, the respondent followed the phases established by the regulations and the appellant had the opportunity to comment on the results. Consequently, contrary to the appellant's allegations, it does not emerge from the assessments made during the IP Action Plan that any kind of procedural irregularity occurred or that the grounds on which the respondent described the appellant's progress as insufficient during this plan were biased. In this respect, it should be pointed out that, as can be seen from the documents submitted in the present case, the appellant was assessed during the IP Action Plan by various people who expressed reservations about his performance.

82. On the basis of the considerations set out above, therefore, the second argument must also be dismissed as unfounded.

On the argument based on misuse of powers

83. In his last argument, the appellant claims, in a substantiated factual statement, that the respondent's grounds for taking the contested decision are tainted by misuse of powers or procedures.

84. In this context, the Tribunal points out that the concept of misuse of powers means that the person undertaking an action uses his powers for a purpose other than that for which they were conferred. Therefore, a decision can be tainted by misuse of powers (of which misuse of procedures is one manifestation) only if it can be seen, on the basis of precise, objective and corroborating evidence, that it was taken in order to achieve an objective other than that required. It is therefore not sufficient to put forward certain facts in support of such allegations; specific evidence must be provided to show that they are true.

85. In the present case, it should be noted that, apart from unsubstantiated submissions, the appellant has not produced any significant evidence that a misuse of powers or procedures has taken place. In particular, there are no grounds for asserting that the respondent intended to assess the appellant's performance as insufficient with the sole aim of dismissing him.

86. On the contrary, the documents submitted for the present case show that, from the time the appellant joined NATO, the respondent used the processes provided for in the PRD system and the regulations which apply to all staff in order to guide and assess his progress and performance. It was as part of this process that the respondent concluded, on the basis of evaluation of the appellant's performance, that his contract should be terminated.

87. In this respect, as can be seen from the documents included in the file for the present case, the appellant had the opportunity to express his point of view by sending various letters to his managers and even asking for an extension of the IP Action Plan.

88. Nevertheless, the appellant claims that, in the light of his previous performance, his 2010 assessment taken on its own clearly shows that the respondent wanted to

dismiss him on a personal basis in the framework of the restructuring of the NATO services. He claims that this is confirmed by the fact that the respondent tried to recruit other people to the Translation Service after his dismissal.

89. This allegation must be set aside. As can be seen from the documents submitted to the Tribunal, the respondent had stressed the need for the appellant to make constant progress and improve his level ever since he joined NATO and not only for the 2010 assessment year.

90. In addition to the six-month extension of the probationary period under his initial contract, so that he could remedy "his main weaknesses", as indicated in the report on his initial contract, it was clearly stated in the context of his 2009 assessment that, in the light of his experience in the service, his performance was not satisfactory.

91. The annual assessment form for 2009, signed by the appellant without any comment, stated that *"the shortcomings observed in relation to the level expected of a junior translator with nearly four years' experience... have been dealt with partially"* and that *"nevertheless, progress needs to be made to cut down the mistakes in meaning, inappropriate constructions and careless errors, which are still a bit too numerous."* On the same form, and despite the general comments about the progress that had been noted, it was stated that the appellant *"ABSOLUTELY must improve the quality of his rereading as instructed..."*

92. In these circumstances, contrary to the appellant's assertions, the 2010 assessment cannot be regarded as demonstrating the respondent's intention to take a decision and achieve an objective other than that required by the PRD system and the applicable regulations.

93. Finally, the same applies to the appellant's allegations that the respondent manipulated the documents in the legal proceedings in order to conceal information or give validity to its position.

94. It follows from the foregoing that the third argument must also be dismissed. The submissions on cancellation must therefore be dismissed in their entirety, as must the submissions seeking the appellant's reinstatement in the respondent's services.

(iv) On the submissions seeking compensation

95. In the framework of his appeal, the appellant puts forward several grievances, claiming that he and his family have suffered serious material and non-material damage as a result of the contested decision.

96. The Tribunal points out that, in accordance with its case law, submissions on compensation must be dismissed when they are closely linked with submissions on cancellation which have themselves been dismissed as groundless (see AT judgement in Case No. 2014/0005, paragraph 98).

97. In the present case, study of all the arguments put forward by the appellant to support his submissions on cancellation of the contested decision has revealed no illegal action by the respondent and thus no misconduct for which the respondent could be held liable.

98. Therefore, the submissions on compensation for the material and non-material damage the appellant claims that he and his family have suffered owing to alleged irregularities in respect of the contested decision must be dismissed as groundless.

99. It follows from all the foregoing considerations that this appeal must be dismissed as a whole.

F. Costs

100. Article 4.8.3 of Annex IX to the CPR states as follows:

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

101. The Tribunal finds that these provisions prevent the appellant, whose submissions have all been dismissed, from being awarded any sum under this head.

G. Decision

FOR THESE REASONS,

The Tribunal decides that:

- Mr S' appeal is dismissed.

Done in Brussels, on 30 June 2014.

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

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



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

15 July 2014

AT-J(2014)0018

Judgment

Case No. 2013/1009

TW,

Appellant

v.

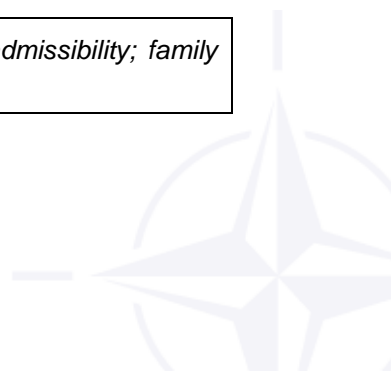
NATO International Secretariat,

Respondent

Brussels, 30 June 2014

Original: English

Keywords: New dispute resolution system; exhaustion of pre-litigation procedures; admissibility; family allowances.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 26 May 2014, as called for by Tribunal Order AT (TRI-O) (2014)0001.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO International Secretariat, dated 12 December 2013 and registered on 19 December 2013 under Case No. 2013/1009, by Mr TW, a member of the NATO International staff. Appellant seeks the annulment of respondent's decision of 5 July 2013 rejecting his request for family allowances.

2. Respondent submitted a request for summary dismissal on 8 January 2014, registered on 21 January 2014.

3. On 21 January 2014 and in accordance with Rule 10, paragraph 2, of the Tribunal's Rules of procedure, the President of the Tribunal issued Order AT(TRI-O)(2014)0001 providing that the objection of inadmissibility should be reserved for the final judgment and that the proceedings should continue.

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

5. The Tribunal's Panel held an oral hearing on 26 May 2014 at NATO Headquarters. It heard both parties, in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

7. Respondent offered a definitive duration contract to appellant for three years taking effect from 3 December 2012.

8. In his "application for employment" form, appellant recorded his partner and her two children as "cohabitant and children". He also mentioned that only the children are financially dependent on him.

9. Appellant's partner and her children resided previously in the United Kingdom.

10. When appellant was recruited, his partner requested that the father of her children give consent for her to take them with her while she accompanied appellant to Belgium for the duration of his contract.

11. As the children's father did not give his consent, appellant's partner made an application on 16 November 2012 under the applicable national law (Children Act 1989) before the competent country court, requesting judicial permission in the matter.

12. By Order on 29 November 2012, the said court authorized the children of appellant's partner to live with their mother in Brussels together with appellant for the duration of the latter's three year contract. The court's Order determined the specific conditions of this arrangement, such as contact and visiting rights for the father.

13. As authorized by the court, appellant's partner moved to Belgium and joined him with her children on 2 January 2013. Since that time, the children have been enrolled in school in Belgium.

14. Since the establishment of his partner and her children with him in January 2013, appellant pays the children's monthly school fees and for their holiday activities.

15. By email to Human Resources, dated 23 May 2013, appellant requested household, dependent children and installation allowances at the rate applied to a staff member with two or more dependent children.

16. The Deputy Assistant Secretary General, Human Resources (DASG) rejected appellant's request by a decision dated 5 July 2013. According to this decision, the payment of dependent children's allowance is contingent on a staff member having a direct legal connection with the child for whom entitlement to the allowance is claimed; therefore, this condition is not fulfilled as to the child of a partner from a previous relationship, as in the case of appellant. Respondent indicated that the same reasoning precluded payment of the household and installation allowances.

17. Appellant lodged on 26 July 2013 a request for administrative review against the decision of 5 July 2013 before the Assistant Secretary General, Executive Management Division.

18. In his answer dated 14 August 2013 to the above request for administrative review, the Head of Staff Services reminded appellant that, in accordance with Article 2.2(a) of Annex IX to the NCPR, in force as of 1 July 2013, a staff member is required to seek the review through his or her immediate supervisor. The letter restated the reasons given for the denial of the benefits in the decision dated 5 July 2013, by indicating that the granting of the requested allowances is contingent on the existence of a "direct legal link" between the child and the staff member concerned.

19. Considering that, with this letter, respondent rejected the first request for administrative review under Article 61.1 of the NCPR and Article 2.2(a) of Annex IX thereto, appellant lodged a second request for administrative review before the NATO

Secretary General (Secretary General) on 23 August 2013, under Article 61.1 of the NCPR and Article 2.2(b) of Annex IX.

20. Responding to this second request for administrative review, by letter dated 13 September 2013, the acting DASG for Human Resources reminded appellant of the requirement to address his request for administrative review through his immediate supervisor.

21. Considering that this letter dated 13 September 2013 was a decision rejecting the second request for administrative review, appellant lodged on 11 October 2013 a formal complaint before the NATO Secretary General against this decision pursuant to Article 4.1 of Annex IX. This complaint received no reply.

22. Considering that his complaint was implicitly rejected, appellant lodged on 12 December 2013 the present appeal against this implicit decision.

23. By letter dated 14 May 2014, appellant transmitted to the Tribunal a statement of his immediate supervisor, dated 12 May 2014, in relation to his allowances request. Respondent objected to consideration of this statement on 21 May 2014.

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

(i) Admissibility

(a) The appellant's contentions

24. Appellant submits that the appeal is admissible.

25. Firstly, appellant argues that even if his requests for administrative review were not lodged through his immediate supervisor, this does not make the appeal inadmissible.

26. In particular, appellant considers, referring to the previous version of Article 2.1 of Annex IX to the NCPR, that submission of a request through the immediate supervisor of the staff member concerned is not an essential procedural requirement non-compliance with which renders the appeal inadmissible. This is confirmed by the fact that, in the decision of 13 September 2013 rejecting his second request for administrative review, respondent reminded appellant of the need to address the request to the immediate supervisor with no further explanation.

27. Appellant also contends that an additional consideration shows that submission of the request through the staff member's immediate supervisor, as provided in Article 2.2(a) of Annex IX, is not an essential procedural requirement. The fact that appellant's request was not submitted through his immediate supervisor did not prevent the official who received it from forwarding it to the official responsible for conducting the administrative review required by Article 2.2(a) of Annex IX. Even though the request

was not submitted through the staff member's supervisor, it was referred to and acted on by the appropriate official.

28. In this respect, appellant emphasizes that while he lodged his request for administrative review of the 5 July 2013 decision on 26 July 2013, respondent informed him only on 14 August 2013 of his mistake in addressing the request to the wrong person. The appellant is therefore of the view that respondent sought to use its power during the process in order to have the appeal ultimately declared as time-barred, because Article 2.1 of Annex IX requires that a request for administrative review be lodged within thirty days of notification of the contested decision. In appellant's view, this clearly demonstrates respondent's bad faith.

29. Secondly, appellant argues that in any event, his immediate supervisor was aware of his grievances. He notes in this regard that the request, sent by e-mail on 23 May 2013 to the DASG was also sent to an administrative officer responsible for personal management of appellant's division.

30. Thirdly, appellant observes that the second request for administrative review dated 23 August 2013 and the complaint dated 11 October 2013 were lodged with the Secretary General who chose not to formally answer to either, amounting to an implicit decision to reject appellant's grievances. Therefore, notwithstanding respondent's contrary position, the Secretary General had the opportunity to rule on the matter, even if he took no action. Consequently, the appeal is admissible in so far as it is directed against the Secretary General's implicit decisions rejecting appellant's second request for administrative review and his subsequent complaint.

31. Finally, appellant believes that respondent breached its duty of care because the appeal was lodged only three weeks after the entry into force of new Annex IX to the NCPR and the new rules and, *inter alia*, Article 61.1 of the NCPR and Article 2.2(a) of Annex IX to the NCPR were in force for the first time.

(b) *The respondent's contentions*

32. Respondent considers that, in accordance with Article 61.1 of the NCPR, before challenging the 5 July 2013 decision rejecting his allowances request, appellant must exhaust administrative review by first addressing his demand through his immediate supervisor. This requirement of the NCPR is not merely a procedural formality. It is a formal condition for the request to be considered. In this respect, it is not sufficient that the immediate supervisor was in fact made aware of appellant's grievance by the fact that his e-mailed request was copied to the Executive Office of his Division. The request for administrative review must be formally addressed to the immediate supervisor of the concerned staff member. In case of non-compliance with this requirement, the subsequent action brought before the Tribunal against the decision rejecting appellant's allowances requests must be declared inadmissible.

33. In the present case, firstly, respondent informed appellant of his procedural error in not addressing his two requests for administrative review to his immediate superior and invited him by letters dated on 14 August and 13 September 2013 to correct this

procedural error. Additionally, respondent observed that the Appellant acknowledged in his written submissions to the Tribunal that he addressed his request to the person he considered competent, not to his immediate supervisor.

34. Secondly, respondent indicates that its letters dated 14 August and 13 September 2013 did not pronounce on the merits of the appellant's two requests for administrative review of the 5 July 2013 decision. In both letters, respondent mainly invited appellant to correct his error and address his request to the competent authority in accordance with the NCPR. The letters simply recalled the reasons for rejecting appellant's 5 July 2013 requests.

35. Thirdly, since the first appellant's request for administrative review dated 23 July 2013, respondent demonstrated its full cooperation by inviting appellant to correct his error. When appellant sent his second request for administrative review on 23 August 2013 to the Secretary General and not to his immediate supervisor, as provided for by the NCPR. Respondent again informed appellant by letter dated 13 September 2013 of his initial procedural mistake, offering once more the possibility to correct this error. Accordingly, there can be no argument that respondent somehow manipulated the whole process to maneuver appellant into a position where his request would be rejected as time-barred. In contrast, respondent followed good management practices and sought to assist the appellant in following the NCPR's requirements concerning the administrative review.

36. Fourthly, respondent considers that, absent compliance with the procedural requirement for proper review, appellant's complaint of 11 October 2013 is also inadmissible. Notwithstanding appellant's arguments, his complaint was never rejected by the Secretary General; consequently, the request to annul the so called "implicit decision" of the Secretary General rejecting this complaint is also inadmissible.

37. On the basis of the above, respondent invites the Tribunal to declare the appeal inadmissible for failure to comply with Article 61.1 of the NCPR and Article 2.2 of Annex IX to the NCPR.

(ii) Merits

(a) The appellant's contentions

38. Appellant requests the annulment of: (i) the decision dated 5 July 2013 which rejected his application for household, dependent children and installation allowances, (ii) the decisions rejecting his first and second requests for administrative review dated respectively 14 August and 13 September 2013 and (iii) the Secretary General's implicit decision rejecting his complaint. In this respect, he invokes three pleas.

39. The first plea concerns violation of Articles 26, 29.1 and 29.2 of the NCPR. Appellant argues that the challenged decision of 5 July 2013 must be annulled because his application for the requested allowances was rejected on the basis of an illegal condition. In particular, the challenged decision indicated that the granting of the requested allowances was contingent on a direct legal connection between the staff

member and the child for whom entitlement to the allowance was claimed. However, Article 29.1 of the NCPR indicates only that this allowance “*shall be paid to staff members whether married or not, for each child under 18 years of age who is mainly and permanently maintained by the unmarried staff member...*”. For appellant, the sole relevant condition under this provision is the actual and permanent maintenance of the children by the staff member concerned. This condition is fully satisfied in the present case and is not contested by respondent. This is also confirmed by Article 6 of Annex III.F to the NCPR which does not require a legal link between the staff member concerned and the dependent child, instead providing that:

[a] child deemed to be dependent is a child within the meaning of the Staff Rules and Regulations who is mainly and permanently maintained by an unmarried official...

40. In this respect, appellant submits that the statements of NATO Appeals Board in Decision n°395 of 25 February 2000 are not applicable in the present case. Indeed, in that case, the Appeals Board referred to the existence of a legal connection with the child for which entitlement to the allowance is claimed. However, the factual background in such litigation differed significantly from that in the current dispute. In the prior Appeals Board case, *inter alia*, the children were those of the NATO staff member’s former spouse and did not reside with the NATO staff member.

41. In appellant’s view, no argument could be drawn from Article 25 of Annex IV to the NCPR against the above position. Indeed, in contrast to Article 29.1 of Annex IV, which does not state that a specific legal link must exist between the child and the concerned staff member, Article 25 of Annex IV to the NCPR sets out the specific legal relationships required to establish entitlement to orphan’s and dependent’s pensions. This confirms that the legislator did not require any supplementary condition for granting allowance under Article 29.1 of the NCPR as respondent submits.

42. In any event it must, according to appellant, be considered that the legal connection between the staff member and the children, insisted upon by respondent, is fulfilled in the present case. Here, the competent national court issued an order specifically allowing the removal of his partner’s children from their previous residence in the United Kingdom and the setting-up of their residence to Belgium with appellant and his partner. The order of this national court creates the necessary legal obligation binding the appellant.

43. With his second plea, appellant maintains that, with the challenged decision of 5 July 2013, respondent failed to respect the general principle of non-discrimination. Indeed, this decision imposed a difference of treatment between married and non-married couples that is not justified by any objective reason. It is apparent that, for respondent, appellant would be eligible to the requested allowances if he was married with his partner. Such difference of treatment also constitutes a violation of appellant’s right to privacy.

44. The third plea concerns the challenged decisions’ violation of the obligation to state reasons and of the duty of care. Indeed, appellant argues that in all the challenged decisions adopted in relation to his requests, respondent adopted the same

motivation – *i.e.* the lack of the necessary direct legal connection. This has deprived appellant's initial request for administrative review of any practical effect. Furthermore, the challenged decisions are problematic in terms of duty of care. Indeed, respondent did never reconsider its position during the process, instead continually focusing on the procedural issues of the dispute.

45. Finally, appellant seeks to be compensated for his moral damage caused by the challenged decisions mentioned under point 39. In that respect, he evaluates his moral harm *ex aequo at bono* at €5.000.

46. Appellant seeks:

- annulment of the decision of the DASG HR, dated 5 July 2013 which rejected his application for household, dependent children and installation allowances dated 22 May 2013;
- annulment of the 14 August 2013 decision rejecting the first request for administrative review dated 26 July 2013;
- annulment of the 13 September 2013 decision rejecting the second request for administrative review dated 23 August 2013;
- annulment of the NATO Secretary General implicit decision rejecting his complaint dated 11 October 2013;
- recognition of appellant's partner's children as his dependents;
- the granting of the household, dependent children and installation allowances, retroactively since the first day employment of appellant increased by the latest interest at the European Central Bank rate + 2 points;
- compensation for his moral harm evaluated *ex aequo et bono* at €5.000; and
- reimbursement of the costs of retaining counsel, travel and subsistence.

(b) The respondent's contentions

47. Respondent rejects, firstly, applicant's contentions concerning violation of Article 29.1 of Annex IV to the NCPR. According to respondent, in order to be eligible for the allowances provided for by this provision, two conditions must cumulatively be satisfied: first, the child must have a legal connection with the staff member concerned and, second, the child must be mainly and permanently maintained by the staff member. This interpretation of Article 29.1 of Annex IV clearly results from the Appeals Board's Decision n°395 of 25 February 2000 in which the factual background is comparable to the current litigation.

48. In the present case, respondent considers that appellant does not fulfill the first of the two required conditions because his partner's children do not have the necessary legal link with him. Therefore, the challenged decision of 5 July 2013 does not violate Article 29.1 of the NCPR.

49. This interpretation is confirmed by Article 25.1 of Annex IV to the NCPR, dealing with orphan's pensions, which provides for the possibility of allowances for the children of a staff member drawing a retirement pension only if there is a specified legal connection between the children and the concerned staff member. The same conclusion is also confirmed by Article 29.3 of Annex IV to the NCPR.

50. Respondent considers that the legal connection established by the Order of a national court allowing the partner's children to move to Belgium does not concern appellant. This Order determines the arrangement between appellant's partner and her former husband concerning, *inter alia*, the custody of the partner's children. It does not establish any legal connection between appellant and his partner's children and establishes rights and obligations exclusively between appellant's partner and her former husband.

51. In connection to the second plea related to the infringement by the challenged decision of 5 July 2013 of the general principle of non-discrimination, respondent argues that there is no difference of treatment in the present case. The partner's children are not legally in the same situation with the children who could have the necessary legal connection with the concerned staff member. This interpretation is precisely confirmed by the Appeals Board in the above mentioned Decision n°395.

52. Finally, respondent rejects the plea alleging violation of the duty to state reasons and of the duty of care. Having in mind that appellant does not meet the requirements of Article 2.2 (a) of the Annex IX to the NCPR, there was no need to elaborate further the issues discussed in the challenged decision. Respondent only invited appellant to address his request for review to the right person. In addition, respondent never rejected appellant's requests for administrative review or his complaint. In the absence of any decision on the merits of the appellant's claims, there was no occasion for respondent to advance further reasons to explain the challenged decision.

53. On the basis of the above, respondent invites the Tribunal to reject the appeal as not founded.

D. Considerations

(i) On the request to remove from the file a document submitted by appellant

54. Respondent objects to inclusion of a letter sent by appellant after the time limits established in Annex IX of the NCPR concerning the written procedure in the case file. Respondent considers that this letter must be removed from the file.

55. In this respect, the Tribunal underlines that documents in relation to a case under examination filed after the expiration of time limits set forth by the NPCR and the Tribunal's Rules of Procedure can be part of the case file only following application to, and approval by, the Tribunal and if this application has been addressed to the Tribunal in a reasonable time limit.

56. Appellant addressed to the Tribunal his demand for the submission of the documentation after the expiry of time limits. However, in the absence of any explanation given by appellant or of relevant circumstances justifying the late submission of the document submitted, the respondent's request must be accepted.

(ii) On admissibility

57. The Tribunal recalls that appellant demands the annulment against four distinct acts which he qualifies as decisions. In particular with his appeal appellant requests, firstly, annulment of the decision dated 5 July 2013 rejecting his application for household, dependent children and installation allowances; secondly, annulment of the decision rejecting his first request for administrative review dated 14 August 2013 of the Head Staff Services; thirdly, annulment of the decision rejecting his second administrative review dated 13 September 2013 taken by the acting DASG for Human Resources; and, fourthly, the Secretary General's implicit decision rejecting his complaint.

58. Concerning the decision dated 5 July 2013, rejecting the appellant's allowances request, the Tribunal considers that this constitutes an act which could be challenged before the Tribunal in accordance, however, with the specific requirements provided in Article 2 of Annex IX to the NCPR.

59. As the Tribunal recalled in its Judgments in Cases No. 2013/1008, 2014/1013 and 2014/1014, the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The new system puts major emphasis on pre-litigation procedures. It provides for thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately on the Heads of NATO bodies (HONB), for addressing and wherever possible resolving issues, instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings.

60. The Tribunal can, in accordance with Article 6.3.1 of Annex IX only entertain appeals where the appellant has exhausted all available pre-litigation channels. This requirement is waived, in whole or in part, only when the impugned decision was taken directly by the HONB or when parties have agreed to submit the case directly to the Tribunal. Neither party can unilaterally waive the entirety of these pre-litigation procedures.

61. In that respect, appellant, firstly, argues that he complied with the requirements provided under Article 2.2 (a) and (b) of annex IX to the NCPR having lodged, on 26 July 2013, a first request for administrative review against the decision of 5 July 2013 and, on 23 August 2013, a second request before the competent authority as requested by these provisions.

62. The Tribunal finds that the first request for administrative review, dated 26 July 2013, was not lodged before the immediate supervisor as he was later twice requested but before the Head of Staff Services. Therefore with such request for administrative review, appellant did not comply with the requirement provided by Article 2.2 (a) of annex IX to the NCPR. The failure to comply with this procedural requirement affects the entire pre-litigation process.

63. Secondly, appellant believes that in any event, and even though he did not formally lodge his first request for administrative review before his immediate supervisor, the latter was made aware in practice of the substance of appellant's request.

64. This contention must be rejected; the economy and the *ratio legis* of Article 61.1, of the NCPR and Article 2 (a) of Annex IX require that the immediate supervisor of the staff member concerned be the direct addressee of such a request. This obligation ensures both that front line managers know of concerns arising in their area of responsibility, and that all requests of NATO staff members receive uniform treatment through consistent application of the procedures provided by the above-mentioned provisions.

65. In contrast to the appellant's contentions and in the light of the above-mentioned considerations the Tribunal considers that the obligation to submit his request for administrative review through the immediate supervisor constitutes an essential procedural requirement.

66. Finally, concerning the appellant's contention that the new set of rules became applicable only three weeks before the lodging of the present action and, consequently, the procedural requirement in question should be liberally interpreted and applied, the Tribunal observes that no transitional provisions to this effect are authorized by the applicable texts and, further, that respondent sought to assist the appellant in complying with the new requirements.

67. Insofar the current appeal is directed against the position taken by the Head of Staff Services on 14 August 2013, responding to the appellant's first request for administrative review, and the position taken by the acting DASG for Human Resources on 13 September 2013, responding to the appellant's second request for administrative review, appellant's action must be declared inadmissible.

68. The positions reflected in the above-mentioned 14 August and 13 September 2013 letters are informative preparatory measures which do not alter the appellant's legal position.

69. Indeed, it is clear from the form and content of the above-mentioned letters, and from the identity of their authors, that both letters are intended to clarify matters of procedure, and invited appellant to direct his request to the competent authority, as provided in Article 2.2 (a) of Annex IX to the NCPR and following the specified procedure, *i.e.* through his direct supervisor. The language of both letters indicates that the administration did not regard the administrative review process as having been initiated. Both letters also necessarily imply that in the administration's view, the review process remains available to appellant if he follows the specified procedure to initiate it.

70. The appellant's action against the Secretary General's implicit decision rejecting his complaint must also be rejected as inadmissible. Under Article 4.1 of Annex IX, claimants may contest a decision and submit a complaint to the Head of NATO Body

only “after pursuing an administrative review as prescribed in Article 2 of this Annex.” In the present case, this was not done.

71. As just discussed, the 14 August and 13 September 2013 letters do not constitute “decisions” for purposes of Article 2 of Annex IX. Accordingly, the Secretary General’s implicit decision rejecting appellant’s complaint does not constitute an act producing a legal effect affecting appellant that can be separately challenged before the Tribunal.

72. Therefore, appellant not having previously pursued the necessary pre-litigation procedures, the Tribunal concludes that the current appeal is inadmissible by reason of failure to comply with the requirements of Article 61.1 of the NCPR and must therefore be dismissed.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal of Mr W is dismissed.

Done in Brussels, on 30 June 2014.

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

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



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

15 July 2014

AT-J(2014)0019

Judgment

Case No. 2014/1016

LP,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 3 July 2014

Original: French

Keywords: Inadmissibility; failure to comply with the procedure preceding litigation.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter at the hearing on 27 May 2014 further to Tribunal Order AT(PRE-O)(2014)0007.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 24 March 2014 and registered on 28 March 2014, by Mrs LP, seeking:

- cancellation of the decision of 27 November 2013 whereby the Deputy Assistant Secretary General for Human Resources informed her that her contract would not be renewed when it ended on 6 June 2014;
- cancellation of the decision of 5 February 2014 rejecting her complaint;
- conclusion of a contract of indefinite duration upon the expiry of her initial contract;
- compensation for material damage, consisting of the loss of the salary and allowances that would have been paid to her and, should she not be reinstated, for being deprived of the chance to obtain an indefinite duration contract, and for various expenses for changing housing; and
- compensation for non-material damage, assessed at €10.000.

2. On 1 April 2014, Mrs P requested an expedited hearing of her appeal by the Tribunal on the basis of Article 6.6.4 of Annex IX to the Civilian Personnel Regulations (CPR).

3. On 24 April 2014, respondent entered a request for summary dismissal on the basis of Article 10 of the Rules of Procedure. This request was registered on 24 April 2014.

4. On 2 May 2014, the Tribunal's President issued order AT(PRE-O)(2014)0007 on the basis of Article 10 of the Rules of Procedure, which states:

[where] the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, the President may instruct the Registrar to take no further action on it until the next session of the Tribunal.

5. In line with Article 10.2 of the Rules of Procedure, appellant presented additional views on the Order on 8 May 2014.

B. Factual background of the case

6. Mrs P joined NATO on 7 June 2011 when she signed an initial contract of three years for the post of assistant in the office of the Deputy Assistant Secretary General

for Headquarters Support and Transformation (HQST) in the Executive Management Division. This contract therefore covered the period from 7 June 2011 to 6 June 2014.

7. On 21 November 2013, Mrs P refused to sign the performance review proposed to her by her line manager. Faced with his refusal to modify the draft performance review, Mrs P requested mediation.

8. On 27 November 2013, the Deputy Assistant Secretary General for Human Resources decided that Mrs P's initial contract, which was due to expire on 6 June 2014, would not be renewed. That decision was notified to her the next day, on 28 November 2013; it is this decision that is being contested in the present appeal.

9. On 23 December 2013, Mrs P submitted a complaint against the decision of 27 November 2013, which in her view had been taken by the relevant of NATO Body.

10. On 5 February 2014, the Secretary General dismissed this complaint as inadmissible since it had not been preceded by an administrative review. On 24 March 2014, Mrs P asked the Tribunal to cancel the decision to dismiss as well as the decision of 27 November 2013.

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

(i) The appellant's contentions

11. Appellant argues that her complaint is admissible since it is directed against a decision taken by a Head of NATO body and causes her harm. After having lodged a complaint, appellant has grounds to enter an appeal seeking cancellation of the dismissal of her complaint.

12. She argues that the contested decision, even though it was signed by the Deputy Assistant Secretary General for Human Resources, had been taken on behalf of the Secretary General by virtue of his delegation to the signatory of the act. From this appellant deduced that she could lodge a complaint directly against this decision and then go before the Administrative Tribunal, without having to follow the procedure preceding litigation laid down in the CPR.

13. She argues in particular, with regard to the internal legality of the contested decision, that by limiting the discretion of the of NATO body in reviewing staff, Article 1.3 of Annex 2 to the implementing directive contravenes the CPR, and especially Article 5.5.2 thereof.

14. She moreover argues that by terminating her contract before the conclusion of the staff member's performance review procedure (which includes the obligation for the staff member to meet with his or her manager), without taking account of the staff member's request for mediation, the contested decision violated Article 2.7 of Annex

VIII and the arrangements in Annex VIII.B to the CPR. The same irregularity is also alleged to have affected the mediation procedure, thereby making it pointless.

15. She argues that the contested decision violates Article 1.3 of Annex 2 to the implementing directive, according to which a staff member's performance review must be based on his or her mid-term review. Appellant's very good mid-term review was expected to result in a satisfactory review and to renewal of the contract. Because the contested decision was based on an additional review, drafted a few days earlier with the aim of lowering the rating in the mid-term review, it is alleged to be vitiated by an error of fact, a manifest error of judgment and misuse of powers.

16. In her additional views on the AT President's order of 2 May 2014, appellant argues that the Deputy Assistant Secretary General for Human Resources had necessarily been acting on behalf of the NATO Secretary General and that the decision of 27 November 2013 must be considered as a decision by the Secretary General in line with Article 61.4 of the CPR.

(ii) *The respondent's contentions*

17. Respondent argues that the appeal is inadmissible insofar as the internal remedies of the administrative review process were not exhausted, as is required by Article 61.1 of the CPR. The only exception to the obligation to seek an administrative review concerns decisions taken by the Head of NATO body himself, against which a complaint may be submitted. The appeal was sent directly to the Tribunal, in violation of the Civilian Personnel Regulations, and may be regarded as a misuse of the appeal procedures with a view to obtaining an expedited judgment.

D. Considerations and conclusions

(i) *Considerations on admissibility*

18. The question of admissibility concerns the regularity of the procedure followed by appellant to contest the decision of 27 November 2013, signed by the Deputy Assistant Secretary General for Human Resources.

19. Before lodging her appeal with the Tribunal, Mrs P asked the signatory of the decision on 12 December 2013 whether the decision had been taken by himself or by the Secretary General. On 19 December 2013 the Deputy Assistant Secretary General for Human Resources replied that the decision had been taken on the basis of delegation by the Secretary General.

20. Then on 23 December 2013 Mrs P lodged a complaint with the NATO Secretary General asking him to revisit his decision. On 5 February 2014, the Secretary General replied, stating that this complaint was inadmissible since it had not been preceded by an administrative review.

21. As the Tribunal recalled in its Judgment no. 2013/1018, the NATO Council adopted a new internal dispute settlement system in January 2013, which took effect on 1 July 2013. Under the new system, complainants must follow a number of steps before they may lodge an appeal. Article 61.1 of the CPR states:

Staff members [...] who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment [...] and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations.

Article 6.3.1 of Annex IX to the CPR states that an appeal submitted to the Tribunal shall only be entertained after the appellant has exhausted all available channels for submitting complaints under this Annex.

22. Article 2.1 of Annex IX to the CPR states:

Staff members or retired NATO staff who consider that a decision affecting their conditions of work or of service does not comply with their terms and conditions of employment and decide to contest the decision may, within 30 days after the decision was notified to them, initiate the process for seeking an administrative review [...].

Article 4.1 of Annex IX to the CPR states:

Claimants wishing to contest the decision after pursuing an administrative review as prescribed in Article 2 of this Annex [...] may make a formal complaint in accordance with the provisions of Article 61 of the Civilian Personnel Regulations. Such complaints shall be submitted to the Head of the NATO body in which the administrative review was conducted.

23. It follows from the foregoing that the above-mentioned provisions subordinate the admissibility of an appeal to the condition of having properly gone through the prior administrative procedure set out in these articles.

24. The decision of 27 November 2013 is signed by the Deputy Assistant Secretary General for Human Resources, who is not a Head of NATO body. For members of the International Staff, the Head of NATO body, as defined in the Civilian Personnel Regulations, is the NATO Secretary General.

25. As the Deputy Assistant Secretary General for Human Resources said on 19 December 2013, the decision on 27 November 2013 had been taken on the basis of authority delegated by the Secretary General in line with Article C(vii)(b) of the preamble to the CPR, like all the decisions taken by the Deputy Assistant Secretary General for Human Resources in the performance of his duties. It does not follow from the terms of that decision, however, that the Deputy Assistant Secretary General for Human Resources had thereby communicated a decision taken by the Secretary General himself.

26. In particular, it is not apparent from the case file that the Secretary General had applied Article 61.4 of the CPR which allows him expressly to designate another person to take, for administrative reviews, complaints and appeals, decisions on his behalf, in which case that person is considered as the Head of NATO body for the purposes of the CPR.

27. Consequently the decision of 27 November 2013 was not a decision taken by a Head of NATO body within the meaning of Articles 2 and 4 of Annex IX. In order to dispute it, the staff member first had to seek an administrative review, in line with Article 2.1, by the hierarchical superior of the Deputy Assistant Secretary General for Human Resources – *i.e.* the Assistant Secretary General for Executive Management – and then dispute any refusal thereof in a complaint to the NATO Secretary General in line with Article 4.1. Only once these channels of administrative review have been exhausted may the staff member lodge an appeal with the Administrative Tribunal.

28. So because appellant failed to follow the steps that precede the submission of an appeal, her appeal, which was lodged without an administrative review having been pursued on the basis of Article 2 of Annex IX to the CPR, is premature and therefore inadmissible.

(ii) Examination of the substance

29. Given that the appeal is inadmissible, it is not necessary to discuss the validity of Mrs P's submissions, nor her request for an expedited hearing of her appeal.

E. Costs

30. Article 6.8.2 of Annex IX to the CPR states as follows:

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

31. Because Mrs P's appeal has been dismissed owing to the inadmissibility of all the submissions therein, it is not appropriate to reimburse appellant for any costs.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- Mrs P's appeal is dismissed.

Done in Brussels, on 3 July 2014.

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

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



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

18 July 2014

AT-J(2014)0020

Judgment

Case No. 2014/1015

TK,

Appellant

v.

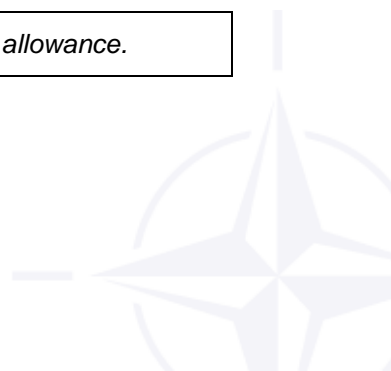
NATO Support Agency,

Respondent

Brussels, 16 June 2014

Original: English

Keywords: new dispute resolution system; exhaustion of pre-litigation procedures; rent allowance.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook, and Mr Laurent Touvet, judges, having regard to the written submissions by appellant and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2014)0006.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Support Agency (NSPA) by Mr TK dated 21 March 2014 and registered on 28 March 2014 under Case No. 2014/1015, seeking annulment of his February 2014 payslip in which his rent allowance was reduced.

2. The President of the Tribunal issued Order AT(PRE-O)(2014)0006 on 17 April 2014 in accordance with Rule 10, paragraph 1, of the Tribunal's Rules of Procedure. The appellant submitted additional written views with regard to the Order on 15 May 2014.

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

B. Factual background of the case

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

5. Appellant is a staff member with the NSPA since 1 July 2005. He is graded B4 and was entitled to a rent allowance.

6. In May 2013 the NATO Council, following a detailed review, decided to abolish a number of allowances and to amend the conditions of entitlement to other allowances. The corresponding changes in the NCPR and Annexes took effect on 1 July 2013. Staff were advised thereof by Office Notice ON(2013)0038 dated 20 June 2013 to which amendment 13 to the NCPR was attached. Transitional measures were agreed under which the measures would be phased in for those staff receiving allowances so that their overall remuneration would not be adversely affected. Accordingly, for example, the amount of the transitional indemnity (being paid for a transitional period in lieu of an allowance) will be reduced if a staff member received a salary step increase.

7. The rent allowance is one of the allowances concerned. ON(2013)0038 explains in this respect:

The rent allowance has been suppressed and will not therefore be paid after 30 June 2013. Staff members who are currently receiving this allowance will instead receive a

non-pensionable indemnity in future. The amount of the indemnity will reduce, if the staff member receives a salary step increment or if there is an increase in the annual remuneration adjustment. The amount of this reduction to the indemnity will be adjusted to avoid an adverse effect on the nominal value of the net salary, when comparing the revised payslip with the payslip of the previous month.

8. Appellant received an annual step increase with effect from 1 February 2014, entailing a nominal salary increase of €128,76. Until January 2014 the amount of his rent indemnity was €165,18. In February 2014 this became €62,17. His net remuneration increased by €14,96.

9. Submitting that the impugned decision was taken directly by the Head of the NATO body (HONB) and that one of his colleagues had been advised to appeal directly to the Tribunal, appellant lodged the present appeal directly with the Tribunal on 21 March 2014.

10. Appellant seeks:

- the annulment of the his February 2014 payslip - more specifically, the rent allowance granted to him - and all following payslips insofar they reveal a decision reducing his rent allowance;
- the reimbursement of the full amount of the rent allowance as of February 2014, increased by a late interest (at the European Central Bank rate + 2 points) until full reimbursement;
- the granting of 4.000 Euros because of the failure in proper information; and
- the reimbursement of all the legal costs incurred, travel and subsistence costs and fees for retaining legal counsels.

11. On 17 April 2014, the President of the Tribunal issued Order AT(PRE-O)(2014)0006 which provides as follows:

- 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.
- Appellant may submit additional written views.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

12. Appellant submitted additional written views on 15 May 2014, which were considered by the Tribunal.

C. Summary of appellant's contentions on admissibility

13. Appellant submits that the appeal was lodged within the prescribed 60 day time limit from the date the contested decision was taken, *i.e.* on 24 February 2014.

14. Appellant contends that the impugned decision, the February payslip, was an act adversely affecting him and was adopted by the HONB. He adds, with reference to Decisions of the NATO Appeals Board, that, although the Tribunal is not competent to annul a decision of the NATO Council, it may rule on the legality of such a decision.

15. Appellant concludes that he was not obliged to follow the administrative review channel prior to the lodging of his appeal, since the impugned decision was directly taken by the HONB.

D. Considerations

16. As the Tribunal recalled in its Judgments in Cases No. 2013/1008, 2014/1013 and 2014/1014, the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The new system puts major emphasis on pre-litigation procedures. It provides for thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately on the Heads of NATO bodies (HONB), for addressing and wherever possible resolving issues, instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings.

17. The Tribunal can, in accordance with Article 6.3.1 of Annex IX, only entertain appeals where the appellant has exhausted all available pre-litigation channels. This requirement is waived, in whole or in part, only when the impugned decision was taken directly by the HONB or when parties have agreed to submit the case directly to the Tribunal. Neither party can unilaterally waive the entirety of these pre-litigation procedures.

18. In the present case, appellant contends that Article 61.1 does not apply because the impugned decision, the February payslip, was adopted by the HONB.

19. The Tribunal disagrees.

20. A staff member's submissions seeking annulment of his/her payslips must be regarded as contesting the individual decisions determining the total amount of his/her emoluments

21. Payslips are generally prepared by payroll officers and are subsequently endorsed by their superiors, most likely the Head of Human Resources, when the latter approves the payroll. Appellant submits that the impugned payslip was adopted by the HONB, but he does not bring forward compelling evidence for this submission. As the

file shows, it was the Human Resources Division that determined the amount due to appellant and issued the payslip concerned. It can therefore not be accepted, or even assumed, that the payslip was adopted by the HONB.

22. The HONB may well have made a decision that NSPA's payroll practices should be revised to carry out the May 2013 Council decision. However, no direct appeal stands against either the HONB's or the Council's decisions. Any general policy decision taken by the HONB regarding NSPA's payroll practices did not specifically address or directly affect the appellant. NSPA's Human Resources Division, not the HONB, decided the amount of his February 2014 payslip.

23. Further, the Tribunal is not competent to annul a decision by the Council to amend the NCPR. The Tribunal does, however, have jurisdiction to determine the legality of such a decision when an appeal is directed against an individual decision implementing it (*cf* NATO AT Judgment in Case No. 903, paragraphs 66 to 68). In this context, the fact that the Tribunal may rule on the legality of a Council decision does not alter the requirement that appellant must, if he wishes to challenge the Council decision, challenge it as it has been directly applied to him, following the appropriate pre-litigation steps under Annex IX. This means that, as a first step, appellant must, through his own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. Articles 2 - 4 of Annex IX are applicable in this regard.

24. The Tribunal has already referred to Article 6.3.1 of Annex IX (*cf* paragraph 17 *supra*), according to which the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints. It is recalled that under Article 4.1 of Annex IX complaints can be made only after pursuing administrative review, which should not be confused with complaints and appeals procedures proper. Such channels were available in the present case.

25. The appellant not having previously or timely introduced the necessary pre-litigation procedures, the Tribunal, in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the NCPR. It must be summarily dismissed.

26. The Tribunal cannot anticipate the conclusions of the pre-litigation process, the subsequent decision of the HONB, or any other resolution that parties may find for the dispute.

27. No material or immaterial damages may be assessed at this time. The question of any damages or other relief can be addressed in case appellant's complaint is resubmitted to the Tribunal if his complaint cannot be resolved through the pre-litigation process.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 16 June 2014.

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

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



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

18 July 2014

AT-J(2014)0021

Judgment

Case No. 2014/1018

DS,

Appellant

v.

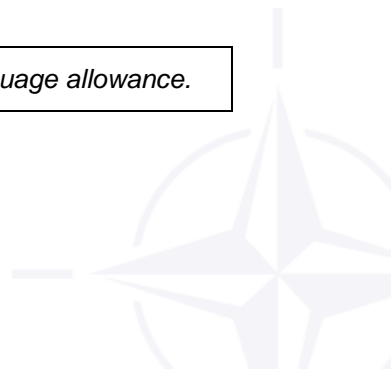
NATO Support Agency,

Respondent

Brussels, 16 June 2014

Original: English

Keywords: new dispute resolution system; exhaustion of pre-litigation procedures; language allowance.



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written submissions by appellant and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2014)0005.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Support Agency (NSPA), dated 27 March 2014 and registered on 28 March 2014 under Case No. 2014/1018, by Mr DS, a staff member of NSPA. Appellant seeks the annulment of his January 2014 payslip and more specifically the amount of the language allowance granted to him.

2. On 17 April 2014 the President of the Tribunal issued Order AT(PRE-O)(2014)0005 in accordance with Rule 10, paragraph 1, of the Tribunal's Rules of Procedure. The appellant submitted additional written views with regard to the Order on 30 April 2014.

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

B. Factual background of the case

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

5. Appellant joined NSPA on 5 January 2012. He is graded C3, step 6. He received a language allowance.

6. In May 2013 the NATO Council, following a detailed review, decided to abolish a number of allowances and to amend the conditions of entitlement to other allowances. The corresponding changes in the NCPR and Annexes took effect on 1 July 2013. Staff were advised thereof by Office Notice ON(2013)0038 dated 20 June 2013 to which amendment 13 to the NCPR was attached. Transitional measures were agreed under which the measures would be phased in for those staff receiving allowances so that their overall remuneration would not be adversely affected. Accordingly, for example, the amount of the transitional indemnity (being paid for a transitional period in lieu of an allowance) will be reduced if a staff member received a salary step increase.

7. The language allowance is one of the allowances concerned. ON(2013)0038 explains in this respect:

... and Language Allowance have been suppressed and will not be paid after 30 June 2013. Staff members currently in receipt of one of these allowances will instead receive a non-pensionable indemnity replacing the suppressed allowance. It is expected that the indemnity will cease if the staff member transfers to another position, or by 31 December 2015 at the latest. The amount of the indemnity will be reduced, if a staff member receives a salary step increment or if there is an increase in the annual remuneration adjustment. The amount of this reduction will be calculated so as to avoid an adverse effect on the nominal value of the net salary, when comparing the revised payslip of the previous month.

8. Until December 2013, appellant received a language indemnity amounting to €83,05. With effect from 1 January 2014 appellant received a step increase passing from grade C3/05 to C3/06, entailing a salary increase of €73,49 per month. With the January 2014 payslip, the language indemnity amounted to €16,81. His gross remuneration increased in January 2014 by €6,50.

9. Submitting that the impugned decision was taken directly by the Head of the NATO body (HONB) appellant lodged the present appeal directly with the Tribunal on 27 March 2014.

10. Appellant seeks:

- the annulment of his January 2014 payslip - more specifically, the language allowance granted to him - and all following payslips insofar they reveal a decision reducing his language allowance;
- the reimbursement of the full amount of the language allowance as of January 2014, increased by a late interest (at the European Central Bank rate + 2 points) until full reimbursement; and
- the reimbursement of all costs incurred.

11. On 17 April 2014, the President of the Tribunal issued Order AT(PRE-O)(2014)0005 which provides as follows :

- 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.
- Appellant may submit additional written views.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

12. Appellant submitted additional written views with regard to the Order on 30 April 2014, which were considered by the Tribunal.

C. Summary of appellant's contentions on admissibility

13. Appellant submits that the appeal was lodged within the prescribed 60 day time limit from the date the contested decision was taken, *i.e.* on 28 January 2014 when the payslip was received.

14. Appellant contends that the impugned decision, the February payslip, was an act adversely affecting him. He concludes that he was not obliged to follow the administrative review channel prior to the lodging of his appeal, since the impugned decision was directly taken by the HONB. He refers in this respect to the NSPA decision of 18 February 2014 "Delegation of Authority in Personnel Matters". With reference to Decisions of the NATO Appeals Board, appellant submits that, although the Tribunal is not competent to annul a decision of the NATO Council, it may rule on the legality of such a decision.

D. Considerations

15. As the Tribunal recalled in its Judgments in Cases No. 2013/1008, 2014/1013 and 2014/1014, the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The new system puts major emphasis on pre-litigation procedures. It provides for thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately on the Heads of NATO bodies (HONB), for addressing and wherever possible resolving issues, instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings.

16. The Tribunal can, in accordance with Article 6.3.1 of Annex IX, only entertain appeals where the appellant has exhausted all available pre-litigation channels. This requirement is waived, in whole or in part, only when the impugned decision was taken directly by the HONB or when parties have agreed to submit the case directly to the Tribunal. Neither party can unilaterally waive the entirety of these pre-litigation procedures.

17. In the present case, appellant contends that Article 61.1 does not apply because the impugned decision, the January payslip, was adopted by the HONB.

18. The Tribunal disagrees.

19. A staff member's submissions seeking annulment of his/her payslips must be regarded as contesting the individual decisions determining the total amount of his/her emoluments.

20. Payslips are generally prepared by payroll officers and are subsequently endorsed by their superiors, most likely the Head of Human Resources, when the latter approves the payroll. Appellant submits that the impugned payslip was adopted by the

HONB, but he does not bring forward compelling evidence for this submission. As the file shows, it was the Human Resources Division that determined the amount due to the appellant and issued the payslip concerned. It can therefore not be accepted, or even assumed, that the payslip was adopted by the HONB.

21. The HONB may well have made a decision that NSPA's payroll practices should be revised to carry out the May 2013 Council decision. However, no direct appeal stands against either the HONB's or the Council's decisions. Any general policy decision taken by the HONB regarding NSPA's payroll practices did not specifically address or directly affect the appellant. NSPA's Human Resources Division, not the HONB, decided the amount of his January 2014 payslip.

22. Further, the Tribunal is not competent to annul a decision by the Council to amend the NCPR. The Tribunal does, however, have jurisdiction to determine the legality of such a decision when an appeal is directed against an individual decision implementing it (*cf* NATO AT Judgment in Case No. 903, paragraphs 66 to 68). In this context, the fact that the Tribunal may rule on the legality of a Council decision does not alter the requirement that appellant must, if he wishes to challenge the Council's decision, challenge it as it has been directly applied to him, following the appropriate pre-litigation steps under Annex IX. This means that, as a first step, appellant must, through his own immediate supervisor, seek administrative review by the official who is the immediate supervisor of the manager or other official who took the contested decision. Articles 2 - 4 of Annex IX are applicable in this regard.

23. The Tribunal has already referred to Article 6.3.1 of Annex IX (*cf* paragraph 16 *supra*), according to which the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints. It is recalled that under Article 4.1 of Annex IX complaints can be made only after pursuing administrative review, which should not be confused with complaints and appeals procedures proper. Such channels were available in the present case.

24. The appellant not having previously or timely introduced the necessary pre-litigation procedures, the Tribunal, in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the NCPR. It must be summarily dismissed.

25. The Tribunal cannot anticipate the conclusions of the pre-litigation process, the subsequent decision of the HONB, or any other resolution that parties may find for the dispute.

26. No material or immaterial damages may be assessed at this time. The question of any damages or other relief can be addressed in case appellant's complaint is resubmitted to the Tribunal if his complaint cannot be resolved through the pre-litigation process.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 16 June 2014.

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

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



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

12 November 2014

AT-J(2014)0022

Judgment

Case No. 2014/1011

RR,

Appellant

v.

NATO AEW&C Programme Management Agency,

Respondent

Brussels, 10 October 2014

Original: English

Keywords: *Fixed term contracts; secondment; contract renewal; age discrimination.*



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 23 September 2014.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal dated 21 February 2014, and registered on 7 March 2014, by Mr R.C.R. against the NATO Airborne Early Warning and Control (AEW&C) Programme Management Agency (NAPMA). The appeal seeks renewal of the appellant's fixed-term contract for two additional years.

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

3. Article 4.3 of Annex IX of the NCPR provides:

The Head of the NATO body and the claimant may agree to submit the matter directly to the Administrative Tribunal, for example, where the issues(s) in dispute are purely legal in nature, and both parties agree in their written submissions that there are not material facts in dispute.

By letter dated 30 January 2014, the appellant and NAPMA's General Manager agreed to lodge the appeal directly with the Tribunal "as there are no material facts in dispute."

4. The answer of the respondent, dated 16 April 2014, was registered on 30 April 2014. The appellant's reply, dated 2 May 2014, was registered on 8 May 2014. The respondent's rejoinder, dated 2 June 2014, was registered on 12 June 2014.

5. Although the parties' 30 January 2014 letter stated that no material issues are in dispute, in preparation for the hearing, the Tribunal determined that the factual record was insufficient in important respects. Accordingly, on 31 July 2014, pursuant to Rule 16 of the Tribunal's Rules of Procedure, the President of the Tribunal asked NAPMA's General Manager to provide written statements of persons identified in NAPMA's Rejoinder as possessing relevant knowledge. The President's letter noted:

I must recall that it is up to the parties to bring forward compelling evidence in support of their submissions. In accordance with Rule 16 of the Rules of Procedure, I should therefore ask you herewith to submit written statements of [three identified persons] ...setting out their personal knowledge, if any, regarding the decision not to offer [the appellant] an extension of his secondment.

6. As described below, the three persons provided written responses. These responses were provided to the parties prior to the hearing.

7. The Tribunal's Panel held an oral hearing on 23 September 2014 at NATO Headquarters. It heard arguments by both parties in the presence of representatives of the Office of the Legal Adviser and of Mrs Laura Maglia, Registrar *a.i.*.

B. Factual background of the case

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

9. The appellant, a retired military officer, was seconded by his national authorities to serve as the A-4 Executive Secretary of the Board of Directors of the NATO AEW&C Programme Management Organization (NAPMO), a body composed of representatives of national governments with authority for the management of NATO's Airborne Early Warning and Control Programme. On 1 August 2011, he entered onto duty as the Board's Executive Secretary pursuant to a three-year fixed-term contract that expired on 31 July 2014.

10. NAPMA's A-Grade Contract Policy requires that: "*All A-Grade posts should be occupied by seconded personnel and their term of secondment will be coordinated with the affected nation in accordance with their national policies and expectations.*" Thus, only persons seconded by their national authorities can occupy the A-4 Executive Secretary position; the sending nation must approve the Executive Secretary's secondment and any renewal.

11. NCPR Article 5.2 provides that staff members seconded by their national authorities shall be offered fixed term contracts for terms not exceeding the term of their secondment, stating in relevant part:

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. ...

12. NCPR Article 5.5.3 regulates renewal of definite duration contracts:

5.5.3 Subsequent Contracts

Following satisfactory performance during a definite duration contract, the Head of the NATO Body may, in the interests of the service, offer:

- the renewal of the definite duration contract under the conditions of Article 5.2. ...

13. As explained by the appellant, "[a]lthough my administrative authority, to include contract renewal, is with the HONB, my functional responsibility, as defined in my post description, is with the Chairman of the NAPMO Board of Directors...". The appellant performed his duties as Executive Secretary to the satisfaction of the Chairman of the NAPMO Board, who stated that he was "pleased with [appellant's] performance" of tasks he was given.

14. The appellant wished to remain in his position for an additional two years until reaching NATO's mandatory retirement age of 65 years in mid-August 2016. However, he did not personally request that the relevant national government authorities authorize extension of his secondment. When asked at the hearing, the appellant confirmed that he did not do so, reflecting his understanding and expectation that the Board of Directors Chairman would provide what the appellant characterized as "top cover" to accomplish the things necessary for renewal of his contract.

15. In late July 2013, the Senior National Representative of his national government told the appellant that NAPMA did not intend to renew his contract after it expired at the end of July 2014.

16. Although the dates do not appear in the record, in late 2013 and early 2014, both the appellant and the Chairman of the Board of Directors had discussions with the NAPMA Managing Director regarding the appellant's situation. The Managing Director told the appellant during one of these conversations that, as of that time, NAPMA's continued existence and funding were uncertain, potentially requiring the agency to end operations in 2018. Given this, to assure stability and continuity of support for the NAPMO Board and to avoid the need to recruit a new Secretary during a potentially challenging and unsettled period, the Managing Director believed it necessary for the Board's Executive Secretary to have a three-year contract, rather than a two-year contract ending in July 2016.

17. By a letter dated 6 January 2014, the General Manager notified the appellant "in compliance with Article 5.5.1 of the Civilian Personnel Regulations and in accordance with the terms of your employment with NAPMA, that your present contract will end on 31 July 2014."

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

(i) The appellant's contentions

18. The appellant, who was not represented by counsel, contended that the General Manager's decision not to renew his fixed-term contract for two years involved an "abuse of power" and age discrimination, both contrary to NATO's December 2013 policy on "Prevention and Management of Harassment, Discrimination and Bullying in the Workplace."¹

19. The appellant's reply, inter alia, disputed the HONB's reasons for not extending his contract, contending that future funding should be available to NAPMA, and that failure to renew his contract "will have unavoidable negative consequences" for the Board's work. He also alleged various forms of bias, contending that the NAPMA General Manager's consultations with the Board of Directors member from appellant's nation while the latter was a candidate for a senior position in NAPMA "could be

¹ Document JCD-D(2013)0001, 3 December 2013.

considered biased”; that a Board of Director’s member should have “refused” himself from matters involving the appellant because he was not familiar with the appellant’s performance; and that a person proposed by the appellant’s national authorities as his possible replacement was a friend of NAPMA’s Deputy General Manager.

20. By way of relief, the appellant stated that “[m]y request for a 2-year extension to my current contract remains the desired outcome of my plea to the Administrative Tribunal.”

(ii) The respondent’s contentions

21. Inter alia, the respondent contended, citing past decisions of the NATO Appeals Board, that staff members like the appellant with definite duration contracts do not have a right to renewal of those contracts and that HONB’s have broad discretion not to renew them; that the HONB’s decision was taken for sound management reasons that were unrelated to the appellant’s age and were fully explained to him; that the appellant’s national authorities did not indicate a wish to extend his secondment; and that those authorities had nominated a person to succeed the appellant as Board Secretary.

22. The respondent’s rejoinder objected to the appellant’s invocation of events after the filing of the appeal in support of his arguments, inter alia, that future funding should be available; and disputed his allegations of bias and criticisms of various individuals.

D. Considerations and conclusions

(i) Considerations on admissibility

23. No objection has been raised regarding admissibility of the appeal. However, the appeal involves issues implicating both the authority of the Tribunal to decide the case and the proper conduct of its proceedings. These issues may be raised by the Tribunal on its own motion.

24. As noted above, this is a direct appeal pursuant to the parties’ agreement under Article 4.3 of Annex IX. The 30 January 2014 document recording this agreement states that “there are no material facts in dispute.” As discussed below, this is not accurate. While Article 4.3 refers to the absence of material fact issues as a possible reason for an agreement to lodge a direct appeal, this is not a prerequisite for such an agreement. Nevertheless, the Tribunal observes that a direct appeal, where significant facts are in dispute (contrary to the parties’ initial statement when they seized the Tribunal), reflects a regrettable and undesirable way of proceeding. On the other hand, the case at hand concerns a decision of the HONB rejecting the appellant’s request, and many important facts are not in dispute. Under these circumstances the Tribunal finds the appeal admissible and will consider the merits.

(ii) *Considerations on the merits*

25. The appeal poses two core issues: (1) Did appellant's national authorities authorize extension of his secondment, so that his fixed-term contract could be renewed for a further two years, and (2) if his contract could be renewed, was the respondent's decision not to renew it improper because it was an "abuse of power" or involved impermissible age discrimination.

26. Regarding the first issue, the appellant confirmed at the hearing that he did not ask his national authorities to approve a further two-year secondment and that he expected the Chairman of the Board to arrange extension of his secondment in the course of providing "top cover". The evidence shows that no such extension was approved. According to both parties' written submissions and the appellant's explanations at the hearing, the relevant official of his national government for purposes of approving continued secondment was that government's representative on the NAPMO Board of Directors. However, according to the respondent, the Board of Directors member from the appellant's nation "never approached NAPMA with a plan to extend the secondment of [the appellant]."

27. This is confirmed by written statements of two persons who represented the appellant's nation on the NAPMO Board at relevant times that were submitted in response to the President's request. These indicate that the writers did not authorize continued secondment or endorse renewal of appellant's contract.

28. The first former representative stated that he originally identified the appellant to NAPMA as his nation's nominee for the Executive Secretary position. However, in subsequent conversations with the respondent's Deputy General Manager, the writer "voiced my support to NAPMA's decision not to offer [the appellant] a contract extension." While the writer left the NAPMO Board prior to the January 2014 written notice to the appellant, he stated that he "would have concurred with NAPMA's decision" had he remained a member of the Board. The second former representative likewise expressed agreement with the decision not to renew the appellant's contract.

29. The Tribunal also received an e-mail from the former Senior National Representative of the appellant's nation at NAPMA at the time of the preliminary decision not to renew his contract. The writer was the first person to inform appellant that he would not receive a renewal. There is no indication in his e-mail that appellant's national authorities wished to extend his secondment or supported renewal of his contract.

30. Thus, the evidence indicates that the appellant's national authorities did not authorize extension of his secondment. For this reason alone, he was not eligible to have his contract renewed for two further years, and the appeal must be rejected.

31. Assuming, however, that appellant was eligible to have his fixed-term contract renewed, the appeal would also fail. The appellant's primary contention is that the respondent's decision not to renew his contract for two more years was an "abuse of

power.” In this connection, the appellant emphasized that his supervisor, the Chairman of the NAPMO Board endorsed his work and supported renewal of his contract.

32. In numerous prior cases, NATO’s Appeals Board concluded that (1) a staff member does not have a right to renewal of a fixed term contract, provided that (2) a decision not to renew was made by a competent authority in accordance with proper procedures, *“and that it was not based on errors of fact, errors of law, obvious errors of judgment, or an abuse of power.”*² The Tribunal regards this as a sound principle that is in harmony with the NCPR and is well founded in international administrative law. As the Tribunal observed in a recent judgment which reviewed relevant jurisprudence of several international administrative tribunals, *“[t]here is consensus among international administrative tribunals that a decision in the exercise of discretion is subject to only limited review by a tribunal.”*³

33. Thus, the appellant had no right to renewal of his fixed term contract, and the respondent had broad discretion whether or not to renew it. In this regard, NCPR Article 5.5.3 provides that the Head of a NATO Body *“may”* offer renewal of a definite duration contract if doing so is *“in the interests of the service.”* (There is no corresponding reference to the interests of the service in the related NCPR provision regarding indefinite duration contracts). The relevant NCPR text thus indicates that decisions regarding fixed-term contracts involve case-by-case determinations, reflecting managers’ assessments of the needs and interests of the Organization.

34. However, the decision not to renew a contract cannot be based on errors of fact or law, obvious errors of judgment, or an abuse of power. The appellant contended that the failure to renew his contract for two more years was an abuse of power, both in general terms and because it involved discrimination based on age.

35. In arguing that the HONB engaged in an abuse of power, the appellant invoked the definition of abuse of power contained in NATO’s December 2013 policy on “Prevention and Management of Harassment, Discrimination and Bullying in the Workplace,”⁴ i.e., *“the act of using one’s position or organizational or social power in an unreasonable or abusive way”* including *“to improperly influence the career or employment conditions of another.”*

36. The appellant clearly did not agree with the HONB’s decision in his case, but the appeal falls far short of showing any proscribed abuse of power in terms of the case law of NATO’s Appeals Board or of NATO’s December 2013 policy on harassment, discrimination and bullying. The record shows that the respondent’s Managing Director made a reasoned decision not to renew the appellant’s contract for the two years he sought based on the Managing Director’s judgment that continued funding was not assured and that the period 2016-2017 – when appellant would reach mandatory retirement age -- could involve significant turmoil and difficulty in the organization. In the Managing Director’s judgment, these circumstances would make it inopportune to recruit

² See e.g., NATO Appeals Board Decisions Nos. 47, 59(b), 63, 72, 680 and 745.

³ See e.g., NATO AT judgment in Case No. 885.

⁴ Document JCB-D(2013)0001, 3 December 2013.

a replacement to assume the duties of Board Secretary in 2016, or for any replacement to step in quickly to support to the Board during a potentially turbulent and difficult period.

37. The appellant disputed the Managing Director's reasoning and essentially asked the Tribunal to substitute its judgment for his. The Tribunal will not do so. The Managing Director made a reasoned decision in light of circumstances at that time, explaining his reasons to the appellant and to the Chairman of the Board. The appellant's competent national authorities endorsed the Managing Director's decision, indicating that they did not regard it as an abuse of power.

38. The appellant alleges that conversations between the Managing Director and officials of his national government during the Managing Director's visit to the national capital somehow reflected improper bias, but he offered no substantiation for this or other similar allegations, which the respondent vigorously refuted. For its part, the Tribunal sees nothing questionable about the Managing Director discussing with national officials his requirements for staffing an important position.

39. At the hearing, the appellant emphasized the further argument that the decision not to renew his contract was an abuse of power because it involved impermissible age discrimination.⁵ He offered no evidence to support this contention, and there is no support for it in the record. To the contrary, the respondent insisted at the hearing that in the circumstances presented by the appellant's request for a two-year renewal, the Managing Director would have made the same decision whatever the age of the requesting staff member.

40. It is not sufficient for the appellant to make allegations in support of his claims; he must also adduce evidence of a sufficiently specific, objective and consistent nature to support their truth or, at the very least, their probability, failing which the material accuracy of the respondent's claims cannot be called into question. The appellant has failed to show that the challenged decision was an abuse of power because it involved discrimination on account of age and therefore its plea alleging misuse of powers on this basis must be rejected as unfounded.

41. It follows from all the foregoing that the appeal must be dismissed.

⁵ NATO's Harassment, Discrimination and Bullying Policy, *supra* note 4, defines discrimination to include "any unjustified treatment or arbitrary distinction based on a staff member's ...age..."

E. Costs

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

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

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 10 October 2014.

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

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



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

12 November 2014

AT-J(2014)0023

Judgment

Case No. 2014/1019

**IF,
Appellant**

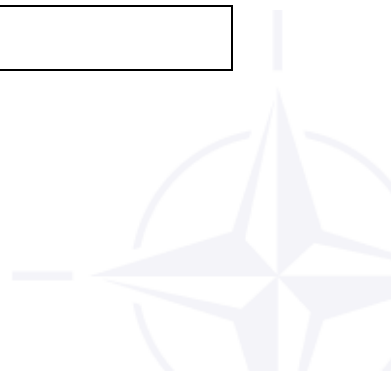
v.

**NATO International Staff,
Respondent**

Brussels, 24 October 2014

Original: English

Keywords: Complaints Committee report; discretionary selection of high level posts.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 22 September 2014.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal registered on 14 April 2014, by Mrs IF, against the NATO International Staff (IS).

The appellant, a member of the IS, seeks annulment of the respondent's decision rejecting her application for the A6 post of Director, Defence Policy and Capabilities, Defence Policy Planning Division.

2. In the appeal, appellant requested an expedited hearing in accordance with Article 6.6.4 of Annex IX to the NATO Civilian Personnel Regulations (NCPR) in order to put an end to "a situation of continued uncertainty". On 24 April 2014 the Registrar of the Tribunal invited respondent to submit its views on such a request. These views were received on 5 May 2014. By Order AT(PRE-O)(2014)0008 dated 23 May 2014, the President of the Tribunal concluded that, in the interest of an expeditious hearing of the case, but subject to the Tribunal's decision on whether the old or the new rules apply, no special circumstances had been established that would justify an expedited hearing and that alleged delays in proceedings would be assessed by the Tribunal in due course, but did not warrant in themselves an expedited hearing. The request was denied.

3. The answer of the respondent, dated 23 June 2014, was registered on 24 June 2014. The reply of the appellant, dated 23 July 2014, was registered on 28 July 2014. The rejoinder of the respondent, dated 26 August 2014, was registered on 26 August 2014.

4. By letter dated 3 September 2014 addressed to the Tribunal, appellant took issue with the statement made by Respondent in the rejoinder that the Organization was in constant dialogue with her client regarding appellant's reinsertion and that appellant's claim that's she was in a state of uncertainty regarding the insertion was without merit. Appellant then referred to an exchange of e-mails between 18 February 2013 and 25 October 2013, which appellant would like to submit to the Tribunal pursuant to Rule 16.1 of the Tribunal's Rules of Procedure. The e-mail exchanges concerned were annexed to appellant's letter.

In his reply dated 10 September 2014 the President of the Tribunal, first of all, recalled Rule 16.1 which provides:

In exceptional cases, and if necessary, the President may, *sua sponte*, or at the request of a party, call upon the parties to submit additional written statements or additional documents within a period which he shall fix. The additional documents shall be

furnished in the original or in an unaltered copy and accompanied by any necessary certified translations.

He then explained to appellant that he could not grant the request for the following reasons. He, first of all, observed that the written procedure was closed and that parties had ample opportunity to submit documents in support of their pleas. The fact that one party considers that a statement of the other party was inaccurate was not sufficient ground for reopening or extending the written procedure.

He added that Rule 16 is an important rule. It allows the President to see to it that the file is complete and call on the parties to submit additional statements and documents, whenever necessary. He may do so on his own initiative or at the request of a party. Requesting that the President calls on parties to submit documents and submitting them at the same time amounted, however, to an improper use of Rule 16.

He regretted not to be able to give a more favorable reply but trusted that appellant would have the opportunity to make her points during the oral procedure.

5. The Tribunal's Panel held an oral hearing on 22 September 2014 at NATO Headquarters. The Tribunal heard arguments by Counsel representing the appellant and representatives of the Office of the NATO IS Legal Adviser in the presence of Mrs Laura Maglia, Registrar *a.i.*

6. The proceedings in this case (*cf* NATO AT Case No. 892) were initiated prior to the coming into force on 1 July 2013 of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal. The preamble to amendment 12 provides that such cases will continue to be governed by the previous Regulations until they are settled in a final manner, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.

B. Factual background of the case

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

8. Appellant joined the NATO International Staff on 17 August 1998 with a definite duration contract, occupying an A4 post. In 2002 she was offered an indefinite duration contract, which she accepted in 2003. In October 2004 Mrs François was appointed to the post of A5 Director of the NATO Information Office in Moscow.

9. In view of the strained relationship between NATO and Russia, appellant had to return urgently to Brussels.

10. Appellant then applied for the post of Head of the NATO Liaison Office in New York, which is also at A5 level, but was not retained. In a letter dated 28 August 2009, the Director of the Private Office explained that the (former) Secretary General was of the opinion that, since NATO does not have a diplomatic service, staff should return to

Headquarters after an assignment abroad before taking another assignment. Secondly, he observed that the position in New York was rather a liaison position, which did not have the representational character of the one in Moscow or the policy incentives for someone at appellant's career level. He added that no A6 positions were available at the moment. However, appellant was informed that, should she wish to apply for an A6 post in future, the Organization would look favourably on such application, provided the standard recruitment procedures at NATO were complied with.

11. Appellant was, as of 1 October 2009, offered an indefinite duration contract as Head of the Central Asia and Caucasus section of the Political Affairs and Security Policy Division, at grade A5, step 7. On 23 February 2011 appellant applied for a one-year unpaid leave of absence to take up an assignment with the Centre for Transatlantic Security Studies (CTSS) at the National Defence University in Washington DC. The unpaid leave was extended until 31 May 2013.

12. In November 2011 appellant applied for the A6 post of Director, Defence Policy and Capabilities, Defence Policy and Planning Division (A52(2011)). Appellant participated in an on-line selection test on 26 January 2012 and on 15 February was informed by the Recruitment Service that she had not been successful. As no other qualified candidate was found, the Organization started a new recruitment procedure (A 16(2012)). Appellant applied for the new vacancy in May 2012 and was informed on 9 July 2012 by the Recruitment Service that her application had not been successful.

13. On 22 August 2012 the appellant's counsels filed a complaint against the decision communicated on 9 July 2012, requesting cancellation of the decision, the issue of a renewed shortlist, and the submission of her case to a Complaints Committee.

14. The Assistant Secretary General for Executive Management (ASG EM) replied on 20 September 2012 as follows:

...it was entirely legitimate not to pursue the application of candidates from the first recruitment process for further participation in the recruitment process for the re-advertised post"; "...a thorough review took place of the recruitment process and decisions taken, including the initial recruitment process, and it has to be found that procedures were properly followed and that the competent authorities reaches their decisions correctly. Furthermore, I would like to inform you that the recruitment process for this post has been completed and that the decision to offer the post was taken well before the receipt of your letter. As a result, the request made in your letter cannot be accommodated. In such circumstances there would be no purpose in establishing a complaints committee.

15. On 10 October 2012 appellant's counsels sent another letter to the Secretary General stating that neither they nor their client had received an acknowledgment of receipt of the complaint, nor had they been informed of any steps initiating formation of the Complaints Committee.

16. On 10 December 2012 the Human Resources department forwarded the letter dated 20 September 2012 to counsels by e-mail.

17. On 12 December 2012 the appellant reiterated the request to submit her complaint to a Complaints Committee and highlighted the lack of justification in the 20 September letter.

18. In a letter dated 7 January 2013 ASG EM apologized for the apparently incomplete address on the 20 September 2012 letter. He stated that he stood by the content of that letter, which, in his opinion, replied in full to the concerns expressed in the letter of 22 August 2012. He also remained of the view that under the NCPR the circumstances of appellant's case did not call for the establishment of a Complaints Committee.

19. In a letter dated 8 February, appellant lodged an appeal against the decision to reject her complaint (Case No. 892).

20. In its Judgment in Case No. 892 dated 8 November 2013, the Tribunal annulled the decision of 20 September 2012 rejecting the appointment of a Complaints Committee and granted appellant €2.000 for damages, as well as the reimbursement of the costs of retaining counsel up to a maximum of €4.000.

21. A Complaints Committee was established on 17 December 2013. Its report was issued to the Secretary General on 31 January 2014. Appellant did not receive a copy and was not informed of any decision by the Secretary General.

22. Since her return from unpaid leave, appellant has occupied the A4 post of Defence Economist since 10 February 2014. She is being paid at A5 level.

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

(i) The appellant's contentions

23. Appellant requests the annulment of the implicit decision of 3 March 2014 rejecting her complaint. Appellant claims violation of the obligation to state reasons, recalls the doctrine that was supported by this Tribunal in Case No. 897, also states that there is a violation of Article 5.2.5 of Annex IX of the NCPR since she was not provided with the Complaints Committee's recommendations, and, thirdly, claims violation of the duty of care for having been kept in a state of uncertainty.

24. Appellant requests the annulment of the decision of 9 July 2012 rejecting her application to the above-mentioned A6 post, claiming misuse of authority, lack of transparency, violation of the principle of equal treatment and illegality of the justification. Appellant also argues a manifest error of assessment and violation of Articles 57.1 and 57.2 of the NCPR.

25. Appellant requests the offer of an A6 post matching her competencies, interests and level of responsibilities.

26. Appellant seeks compensation for material damage (loss of income since 9 July 2012) in addition to non-material damage evaluated *ex aequo et bono* at €20.000.

27. Appellant seeks to be provided with the Complaints Committee's recommendations dated 31 January 2014 and reimbursement of the costs of retaining counsel, travel and subsistence.

28. Appellant requests:

- the annulment of the implicit decision of the Secretary General dating from 3 March 2014 at the latest, rejecting her complaint;
- the annulment of the 9 July 2012 decision rejecting her application to the A6 post of Director, Defence Policy and Capabilities, Defence Policy Planning Division;
- in any event, the offer of an A6 post matching her competencies, interests and level of responsibilities;
- compensation for the material damage arising from her loss of income since the 9 July 2012 decision rejecting her application to the A6 post of Director, Defence Policy and Capabilities, Defence Policy Planning Division;
- compensation for non-material damage, evaluated *ex aequo et bono* at €20.000;
- provision of the Complaints Committee's recommendations dated 31 January 2014; and
- reimbursement of the costs of retaining counsel, travel and subsistence.

(ii) The respondent's contentions

29. Respondent submits that the appeal should be considered inadmissible in that it requests the offer of an A6 post.

30. Respondent argues that the appeal is also inadmissible in that it requests compensation for moral damage due to loss of income, since this request was not made in the previous complaint and appellant was already awarded compensation for non-material damage in Case No. 892.

31. Thirdly, respondent considers that the appeal is inadmissible since it is directed against the NATO Support Agency and the appellant is not a member of its staff.

32. Regarding the merits, respondent recalls that the Complaints Committee was convened following appellant's request and observes that appellant's complaint had to be examined under the "old" Annex IX to the NCPR, and Article 5.2.5 of the new rules of procedure was therefore not applicable.

33. Respondent denies that there was a breach of the duty of care in providing appellant with a post that she could occupy on her return from leave of absence.

34. Respondent considers that the challenged decision clearly outlined the reasons and observes that the current appeal cannot circumvent the Tribunal's decision on Case No. 892.

35. Respondent points out that the Organization is under no obligation to provide an A6 grade post.

36. Respondent requests:

- that the appeal be declared inadmissible to the extent that it requests appointment to a suitable A6 post and compensation for material and non-material damage; and
- that, to the extent that the appeal is admissible, it be rejected as not founded.

D. Considerations and conclusions

(i) Considerations on admissibility

37. Appellant seeks the annulment of the decision of 9 July 2012, implicitly confirmed, whereby she was informed that her application to the A6 post of Director, Defence Policy and Capabilities, Defence Policy Planning Division, had been rejected. In its judgment in Case No. 892, the Tribunal declared appellant's submission for annulment of the appointment of another staff member inadmissible, since it was not part of the initial complaint.

38. Appellant now adds a new request, *i.e.* the offer of an A6 post matching her competencies, interests and level of responsibilities. The Tribunal concurs with respondent. The administrative decision of 9 July 2012 was challenged by appellant's complaint of 22 August 2012 claiming its annulment and the issue of "a renewed shortlist". The question of the offer of an A6 post was not raised before. Although appellant eventually announced that she could accept any suitable A6 position, this cannot be understood as a proper claim. Appellant did not ask for an A6 position and, consequently, there is no administrative decision rejecting such a claim. According to Article 4.2.1 of the "old" Annex IX to the NCPR, the competence of the Appeals Board, and of the Tribunal in the present case, is determined by the existence of a previous decision of the Head of a NATO body. This request is therefore based on new grounds for appeal and must be dismissed.

39. Respondent also submits that the request for compensation is inadmissible. The Tribunal, however, observes that the award of compensation is linked to the Tribunal's conclusion on the merits and, for that reason, must be analysed if appellant's other main requests are accepted. The Tribunal recalls that its competence to award compensation is based on Article 4.2.2 of the "old" Annex IX to the NCPR. The decision to award compensation is independent of any decision the Tribunal may take on the annulment of an administrative decision. It also follows from this that the Tribunal's competence is not dependent on whether the Organization has taken a decision concerning a request for compensation or expressed itself otherwise in the matter. Respondent having chosen not to reply to the complaint, which is its right, it is

estopped from invoking this point now (*cf* NATO AT Judgment in Case No. 896).

40. Respondent also submits that the appeal is inadmissible because it is directed against the NATO Support Agency. The Tribunal cannot concur with this allegation since the reference to this Agency must be considered as a clear typing error with no procedural consequences.

41. Therefore, the appeal is admissible in so far as it is directed against the 9 July 2012 decision not to shortlist the appellant for the re-advertised post, followed by the confirmatory decision of 20 September 2012 and the implicit decision of 3 March 2014.

(ii) Considerations on the merits

42. In its Judgment in Case No. 892, the Tribunal concluded that the Administration was obliged to convene a Complaints Committee in accordance with Article 3 of the “old” Annex IX to the NCPR. The decision of the Tribunal has been implemented and the Complaints Committee has issued its recommendations. Appellant now alleges that the recommendations were not communicated, in violation of Article 5.2.4 of Annex IX to the NCPR.

43. Article 5.2.4 of the “new” Annex IX to the NCPR indeed states that the claimant shall receive a copy of the report of the Complaints Committee at the same time it is provided to the Head of the NATO body. However, this rule entered into effect on 1 July 2013 and, as observed in paragraph 4 *supra*, proceedings initiated before that date are governed by the previous Regulations until they are settled in a final manner. Appendix 3 of the applicable (“old”) Annex IX states that a copy of the Complaints Committee’s report is to be provided to the claimant only if the dispute is referred to the Appeals Board.

44. Appellant can be considered properly informed of the conclusions of the Complaints Committee, having been provided with the report as produced by respondent in its comments. The information has been obtained in the adversarial proceedings before the Tribunal, with all procedural safeguards. As a consequence, the request to be provided with this report is groundless.

45. However, the Tribunal wishes to remark that, although it is formally true under the old rules that a copy of the Complaints Committee report does not have to be provided and that the Secretary General is not obliged to take a decision, under the principles of good administration a staff member may expect a decision to be taken duly and on time and to be informed thereof. The Tribunal recalls that damages were already awarded in this respect in its previous judgement.

46. The essence of the appeal refers to the alleged illegality of the decision of 9 July 2012. The Tribunal observes that the rejection of appellant’s application followed a previous competition where she was not successful, and that this was the second competition for the same post. Taking into account that none of the previous candidates were retained in the second competition and that appellant did not increase her merits for the second competition, it is easy to conclude that a candidate not

retained in the first competition had very little chance of being shortlisted in the second one. Thus, appellant cannot invoke a preferential right for eligibility based on the fact that she had been shortlisted in the first competition; neither can she request a review of the first competition proceedings (*cf* NATO AT judgement in Case No. 896).

47. The post for which the competition was held required a high level of full confidence from the top of the Organization. Owing to the political characteristics of this type of post, the selection cannot be based merely on merits, but is also subject to a certain amount of discretion. The respondent has wide discretion in comparing the candidates' merits and reports, particularly as the recruitment procedure concerns a high-level management position. It is not possible for the Tribunal to assess the suitability of the appellant to be shortlisted and, potentially, retained for the post. In this case the function of the Tribunal is limited to reviewing the formalities of the competition in order to assess any error that may have resulted in violation of appellant's rights.

48. However, although the Tribunal observes a certain lack of adequate information on the part of the Administration, the above-mentioned nature of the post for which the competition was held gives sufficient justification concerning the impugned decision. Even if the exact cause for the rejection of the appellant's application was not made known, both the failure to succeed in the first round and the level of the post justified the rejection of appellant's candidature.

49. The appeal must be dismissed. It follows from this conclusion that no compensation for material or non-material damage can be awarded.

E. Costs

50. Article 4.8.3 of the "old" Annex IX to the NCPR provides as follows:

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

51. The dismissal of the appeal gives rise to the dismissal of the submissions under this head.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 24 October 2014.

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

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



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

12 November 2014

AT-J(2014)0024

Judgment

Case No. 2014/1012

**DL,
Appellant**

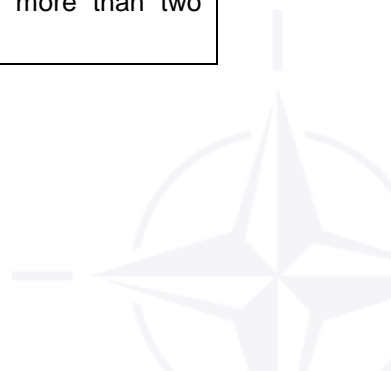
v.

**NATO Support Agency,
Respondent**

Brussels, 27 October 2014

Original: French

Keywords: admissibility; confirmatory decision; inadmissibility of an appeal lodged more than two months after the first decision.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter at the hearing on 22 September 2014.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 3 February 2014 and registered on 11 February 2014, by Mr DL, seeking, principally, the cancellation of the NSPA General Manager's decision not to renew his contract when it came to an end.

2. The appellant is now a former employee of the NSPA. He rejoined the French armed forces after his secondment.

3. The defence, dated 8 April 2014, was registered on 18 April 2014. The reply, dated 15 May 2014, was registered on 22 May 2014. In a communication dated 19 June 2014, the NSPA stated that it would not lodge any rejoinder. This communication was distributed to the parties on 1 July 2014.

4. The Tribunal's Panel held an oral hearing on 22 September 2014 at NATO Headquarters in Brussels. It heard arguments by the representatives of the appellant and of the respondent, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar *a.i.*

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

B. Factual background of the case

6. The appellant, seconded from the French armed forces, was recruited by the NATO Support Agency (NSPA) on the basis of a 35-month contract running from 30 November 2010 to 31 October 2013. This first contract was amended on 30 April 2012 to cover the performance of other tasks; the expiry date of this second contract was still 31 October 2013. However, the three-month probation period, which came to an end on 31 July 2012, had to be extended for three more months. When this period ended on 26 October 2012, his contract was confirmed for the year that was left to run, but an internal note recommended that the contract should be renewed when it came to an end only if the appellant showed progress in the performance of his duties.

7. On 14 January 2013, the appellant went on sick leave, initially for a period of six weeks, but at the beginning of March this period was extended for another four months, up to 28 June 2013, when the appellant returned to work.

8. From 29 July to 18 August 2013, the appellant took annual leave. He then went on sick leave from 19 August until 31 October 2013, when his contract ended.

9. During this interval, the Administration had to take a decision on the renewal of his contract. It did so on 23 April 2013, writing to the appellant to inform him that it did not intend to renew his contract when it came to an end:

As you have been absent from the Agency for health reasons since 14 January this year, it has not yet been possible to complete all the tasks involved in drawing up your performance report. However, in the light of the recommendations made by your managers, and in accordance with the reference articles [articles 7.1(i) and 5.5 of the Civilian Personnel Regulations], I hereby inform you that I do not intend to offer you another contract after 31 October 2013. You may rest assured, however, that everything will be done to complete the rating procedure upon your return. As soon as it is completed, I shall inform you of my final decision.

10. It was only when he returned from sick leave that the appellant initiated written exchanges with the Administration, which sent him his performance report on 9 July 2013. On 10 July, the appellant asked the Administration to inform him of the factual and objective elements justifying the comments and assessments in his performance report, followed by new documents on 17 and 24 July. The appellant was granted an interview with his line manager and his programme manager on 24 July to discuss his performance report. He was then given 15 days to provide his comments in writing; he did not do so.

11. On 7 October, the appellant asked the Administration what decision had been taken on the renewal of his contract. On 9 October, the NSPA General Manager replied that his contract would not be renewed beyond 31 October 2013.

12. On 8 November 2013, the appellant lodged a complaint with the NSPA General Manager against this decision. On 6 December 2013, the Chief of Staff, on behalf of the General Manager, confirmed the decision not to renew the appellant's contract.

13. The appellant's appeal to the Administrative Tribunal challenges both the decision of 6 October 2013 and that of 6 December confirming it.

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

(i) *The appellant's contentions:*

14. The appellant seeks from the Tribunal:
- cancellation of the decision of the NSPA General Manager of 9 October 2013, informing him that he would not be offered a new contract when his current contract came to an end on 31 October 2013;
 - cancellation of the decision of 6 December 2013 whereby the NSPA General Manager dismissed his complaint;
 - compensation for material damage, estimated at €60,960, and for non-

- material damage, estimated at €5,000; and
- reimbursement of all legal, travel and subsistence costs incurred for his defence in the present case.

15. The appellant maintains that the Administration is in breach of the principle of due hearing, the right of defence and the duty of care by removing him from his post before drawing up the performance report, which it could have sent him before his sick leave ended. Furthermore, this performance report was not drawn up after due hearing of the parties and the appellant was not able to give his comments.

16. He also maintains that his removal from post was based on improper reasons as the criticisms made of him were due to the conduct of the Administration, which did not provide him with his own office or training, and he had to carry out tasks which were not specified in his job description. The criticism that he did not achieve all his tasks is unfounded, as it does not take account of his absence on sick leave. Furthermore, his professional performance was satisfactory, as shown by his performance report.

17. As regards damage suffered, the appellant maintains that the contested decision caused him to lose a very good chance - which he estimates at 80% - of having his contract renewed. He requests compensation calculated on the basis of the difference between the remuneration he would have received if he had stayed at NATO and the remuneration he actually received in his post in the French armed forces after leaving NATO. This sum is estimated at €60,960.

(ii) *The respondent's contentions:*

18. The respondent argues that the decision to remove the appellant from his post was legal. It maintains, firstly, that it had to take this step because the French armed forces had not renewed the appellant's secondment.

19. In response to the appellant's arguments, the NSPA states that, in the appellant's absence on sick leave, it had to pursue the rating procedure on its own and decide in good time not to renew his contract. It maintains that the due hearing took place but that its duration was attributable to the appellant alone, who did not respond in good time to the information communicated to him on the proposed rating.

20. As regards the reasons for removing the appellant from his post, the Administration responds that he had everything he needed to perform his duties but that he proved not to be very effective; he was not suitable for this post, for which his performance was unsatisfactory.

D. Considerations and conclusions

(i) *Considerations on admissibility*

21. Neither of the parties contests the admissibility of the appeal. Nevertheless, the appeal raises questions which the Tribunal must answer in order to establish its

competence to rule on the case and thus ensure that the procedure goes ahead as it should. These questions may be raised by the Tribunal as a matter of course (*cf* Tribunal ruling in Case No. 2014/1011, paragraph 23).

22. The decision not to renew the appellant's contract when it came to an end on 31 October 2013 was stated several times. In addition to the two contested decisions of 6 October and 9 December 2013, the General Manager had indicated on 23 April 2013 (just before the deadline of six months before the expiry of the contract, which is set out in Article 5.5 of the Civilian Personnel Regulations) that he did not intend to renew the contract.

23. Article 5.5.1 of the Civilian Personnel Regulations states that:
The staff member shall be informed in writing not less than 6 months before the expiry of a contract whether or not it is intended to offer a further contract.

24. It is true that the decision of 23 April 2013 used the term "intend", which could appear to be simply a thought leading to a subsequent decision which could either confirm or invalidate the initial intention. However, the terms used in the letter of 23 April, stating that the Administration did not "intend" to renew the contract, are exactly those used in Article 5.5.1 of the Civilian Personnel Regulations. Six months before the expiry of a contract, the Administration must inform the staff member either that his or her contract will be renewed – thereby providing a guarantee – or that no new contract will be offered, thus giving the staff member a period of six months to take the necessary steps and find a new post outside the Organization. Although the Civilian Personnel Regulations require the Administration to indicate its "intention", this does in fact mean a decision. It is this decision that must be contested by the staff member who has been informed by the Administration that it does not "intend" to renew his or her contract, *i.e.* that it has decided, pursuant to Article 5.5.1 of the Civilian Personnel Regulations, to end the employment relationship in six months' time.

25. Elsewhere in his written pleadings, the appellant himself uses the word "decision" to describe the letter of 23 April 2013, thus showing that he had understood it as such.

26. This regulation had to be applied even though the staff member was on sick leave at the time; a staff member who is absent for health reasons must enjoy the same guarantee as a working staff member as regards being informed in due time that his or her contract will not be renewed upon expiry. In this case, only the question of completing the rating procedure (*cf* Appeals Board Decision 782 dated 29 October 2010), made difficult or impossible owing to the staff member's absence, could have a different outcome. However, this question, raised by the appellant, does not affect the admissibility of the appeal.

27. Although it was not raised by the parties in their written submissions, but was discussed by them at the oral hearing at the Tribunal's request, the Tribunal considers that the decision of 9 October 2013 confirms that of 23 April 2013 which was made final by the appellant's failure to contest it in due time. The appeal is, therefore, inadmissible.

(ii) Examination of the substance

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

E. Costs

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

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

30. As Mr L's appeal is inadmissible, he cannot be paid any sums under this head.

F. Decision

For these reasons,

The Tribunal decides that:

- Mr L's appeal is dismissed.

Done in Brussels, on 27 October 2014.

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

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



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

12 November 2014

AT-J(2014)0025

Judgment

Case No. 2014/1017

NZ,

Appellant

v.

NATO Support Agency,

Respondent

Brussels, 27 October 2014

Original: English

Keywords: *Modifications to Allowances; balance of the contract; acquired rights; staff members' compensation; reduction of rent indemnity; nominal guarantee.*



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written submissions of the parties and the observations of the Office of Legal Adviser (OLA), further to the hearing on 22 September 2014, and having deliberated on the matter.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal dated 27 March 2014 and registered on 28 March 2014 by Mr NZ against the NATO Support Agency (NSPA). The appeal seeks annulment of the appellant's January 2014 pay slip and subsequent payslips insofar as they reflect reductions in the amount of his rent indemnity.
2. The answer of respondent, dated 23 May 2014, was registered on 6 June 2014.
3. The reply of appellant, dated 4 July 2014, was registered on 10 July 2014.
4. The rejoinder of respondent dated 29 July 2014, was registered on 4 August 2014.
5. This appeal is one of several related to changes in NATO's rent allowances potentially affecting many staff members. Given the issue's importance, and acting in accordance with NATO Civilian Personnel Regulations (NCPR) Article 6.7.8, on 14 July 2014, the President of the Tribunal requested the written observations of the Office of the Legal Adviser of the International Staff in this and a similar appeal. Those observations were submitted on 12 August 2014 and were provided to the appellant.
6. The Tribunal's Panel held an oral hearing on 22 September 2014 at NATO Headquarters. It heard arguments by appellant's counsel (the appellant was not present) and by representatives of the respondent, as well as observations by representatives of OLA, all in the presence of Mrs Laura Maglia, Registrar *a.i.*.
7. The appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NCPR, amending Chapter XIV NCPR and Annex IX thereto and, *inter alia*, establishing the Tribunal. These provisions therefore govern the appeal.

B. Factual background of the case

8. The background and material facts of the case may be summarized as follows.
9. Appellant joined NSPA in January 2010 and is currently at Grade B-5, Step 5. At all relevant times, he has received either Rent Allowance or Rent Indemnity.
10. In May 2013, following a detailed review by the Deputy Permanent Representatives Committee (DPRC), composed of the deputy permanent

representatives of each NATO country, of allowances paid to NATO international civilian staff, the North Atlantic Council (NAC) adopted a package of measures modifying some allowances and eliminating others. According to the DPRC's Report, the objective was that allowances

...should be modernized to ensure that they remain relevant to the needs of the Organization and as necessary, adjusted to ensure that NATO maintains its position as an attractive and competitive employer in the context of other good employers and International Organizations.

11. The DPRC concluded, and the NAC agreed, that the Secretarial and Language Allowances were obsolete and should be suppressed. Modifications were made to the Dependent Children's, Rent, Home Leave, and Maternity Allowances. Some allowances were made less advantageous to staff. For example, the Child Dependency Age limit was reduced from 26 to 24 years, subject to transitional measures to avoid adverse effects for students over 24 or about to turn 24. Other allowances were made more advantageous. Maternity leave was, for example, extended to 20 weeks, from 16. The corresponding changes in the NCPR and its Annexes took effect on 1 July 2013.

12. In the process leading to the Council's action, the DPRC called for changes in allowances to apply to both current and newly recruited staff. The possible application of any changes in allowances to current staff members appears to have been extensively discussed prior to the NAC's decision. The issue was the subject of consultations between representatives of the Organization and of the Staff Association, in which the Association representatives urged that any changes not apply to current staff members.

13. The Secretary General and Strategic Commanders were of the view that the remuneration of serving staff should not be adversely affected by changes in allowances. In submitting the DPRC's proposed changes to the Council for approval on 17 May 2013, the Secretary General wrote:

Transition measures are foreseen where staff currently receive allowances which will be phased out or adapted, without adversely affecting their remunerations. Administrations NATO-wide are now in the process of customizing the payroll systems to the effect.

14. The DPRC's Report and Recommendations as approved by the NAC accordingly recorded:

Changes to allowances would ...apply to staff newly recruited to the Organization in the future, consistent with other decisions which have been applied to NATO personnel over the years. For service staff, obsolete allowances would be phased out and other allowances revised without adversely affecting their remuneration, in line with the advice and request of the Secretary General.

15. With respect to the rent allowance, the transitional measures for current staff referred to by the Secretary General were designed to work as follows. A rent indemnity was substituted in the amount of the rent allowance. This indemnity would then be reduced if the staff member received a step increment, in an amount equal to 80% of the

increment. Similarly, if compensation increased on account of annual indexation, the indemnity would be reduced by 80% of the increase. The indemnity would continue until it is totally absorbed with step increments or indexation.

16. The changes in allowances approved by the NAC were explained to NSPA's staff members through a briefing at the June 2013 General Assembly of the Staff Association (which briefing remains available on NSPA's internal website), a message with links to additional information on NSPA's internal e-mail system, and an individual letter sent to staff members. With respect to the modification of the rent allowance, the letter to staff stated that *"[i]f you have any question, please contact your Personnel file administrator who will give you all the required information."*

17. The changes to the rent allowance became effective on 1 July 2013. In each subsequent month through December 2013, the appellant received a Rent Indemnity of €256,23 per month. In January 2014, he received a step increase from Step 4 to Step 5, and his monthly basic salary increased by €131,06, and his Rent Indemnity declined by €124,53. His Net Salary was essentially unchanged from December 2013 to January 2014; his January 2014 Net Salary was about €8 less than December's.

18. In fact, appellant's NSPA payslips list 6 items together constituting "Gross Salary" as well as five deductions related to insurance and pension coverage and other deductions for Staff Association dues and other charges and adjustments. Several of these items fluctuated, usually by small amounts, from month to month. As a result of these fluctuations, the amount of the appellant's final monthly payment always varied from month to month. In addition, a small "negative salary adjustment" was applied to his compensation in 2014.

19. On 17 February 2014, the appellant sent an email to the NSPA's General Manager stating that he wished to challenge the reduced rent allowance reflected in the January 2014 pay slip he received on 27 January. The General Manager replied in a short e-mail on 20 February, followed the next day by a more detailed letter dated 19 February, affirming the correctness of the amount indicated in the payslip. The General Manager's February 19 letter stated that *"[s]hould you wish to contest my decision further, you are entitled to submit an appeal directly to the NATO Administrative Tribunal, in accordance with the NATO civilian Personnel Regulations..."*

20. On 25 February 2014, without referring to the General Manager's 21 February letter, the appellant's counsel lodged a request for administrative review with the respondent's supervisor. On 11 March 2014, the respondent's Human Resources Executive wrote to the appellant referring to the 25 February appeal and stating that *"[t]his matter has already been dealt with in the letter to you from the General Manager dated 19 February, in response to your email of 17 February 2014..."*

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

(i) *The appellant's contentions*

21. The appellant contended that the appeal is admissible, on two, and perhaps three, theories. The appellant first contended that the disputed pay slip involved a decision made directly by the respondent's Managing Director, so that a direct appeal is authorized under Article 1.6 of Annex IX to the NCPR. Second, he contended that the Managing Director's 19 February letter constitutes an appealable action. The appellant also referred to NSPA's Human Resources Executive's 11 March 2014 communication, referring to and rejecting appellant's 25 February appeal. However, it is not clear whether the appellant offered this as a third possible basis for admissibility.

22. With respect to the merits, the appellant contended that the Council's decision to amend the housing allowance was illegal because it violated:

- the appellant's vested rights and his employment contract;
- the principle of good administration and of the duty of care; and
- the social dialogue, in particular the duty of collective bargaining, and subsidiarily the right of consultation.

Each of these contentions is discussed in greater detail below.

23. At the hearing, appellant's counsel emphasized a further argument to the effect that the transitional measures adopted by the organization failed to maintain the nominal value of his net salary.

24. As relief, the appellant seeks:

- annulment of his January 2014 payslip - specifically, his rent allowance - and all subsequent payslips reflecting a decision reducing his rent allowance;
- reimbursement of the full amount of the rent allowance as of January 2014, with interest (at the European Central Bank rate + 2 points) until reimbursement;
- €4.000 for the "failure in proper information"; and
- reimbursement of all legal, travel and subsistence costs and counsel fees.

(ii) *The respondent's contentions*

25. The respondent did not contest admissibility of the appeal, viewing it as having been filed within the prescribed 60-days following the 19 February 2014 decision refusing to cancel the errors alleged in the January 2014 payslip.

26. As to the merits, the respondent noted that as of July 2013, the appellant received rent indemnity, rather than rent allowance. The respondent explained the calculation of that indemnity, contending that on account of the transitional measures implemented by NSPA, there was no "adverse effect on the nominal value of his net salary as a result of the changes to the rent allowance system." The respondent also maintained that the change in the rent allowance system was fully explained to its staff members.

27. In the respondent's view, the modification of the rent allowance was adopted by the appropriate organ, the NAC. Such allowances, established by regulatory provisions adopted by the NAC, can be modified at any time in the interests of the service. Further, the modification of the allowance regime did not violate the appellant's vested and acquired rights, or upset the balance of his employment contract.

(iii) Office of Legal Adviser Observations

28. In its observations responding to the President's 14 July 2014 request, OLA questioned the admissibility of the appeal, contending that the appellant should have initiated dispute settlement procedures when he first was notified of the modifications in allowances in the summer of 2013, rather than waiting until they first affected his January 2014 payslip.

29. As to the merits, OLA believed that NATO had no legal obligation to enter into collective bargaining with its staff members, and that there were proper consultations with staff prior to the changes to the allowances regime. OLA further submitted that the disputed measures did not violate any acquired right, maintaining that international administrative law establishes a distinction between provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. In OLA's view, the NCPR's provisions relating to allowances are statutory provisions of a general character that can be altered at any time in the interest of the service.

30. OLA was of the view that entitlement to rent allowance was not a crucial factor in inducing the appellant to join NATO, as evidenced by the fact that he interposed no objection when first informed of the change, instead acting only in February 2014. OLA also disputed appellant's contention that the change disturbed the balance of his contract, emphasizing the transitional measures approved by the NAC to preserve staff's nominal remuneration.

D. Considerations and Conclusions

(i) Considerations on admissibility

31. The Tribunal must initially assess whether the claim is admissible, that is, whether it was submitted in compliance with the NCPR's requirements and is otherwise appropriate for decision. In making this assessment, the Tribunal first considers a possible objection to admissibility referred to in OLA's response to the President's 14 July 2014 letter.

32. As noted above, OLA believed that the claim should be found inadmissible because the appellant should have initiated administrative review, the prerequisite to this appeal, within 60 days of learning of the changes to the rent allowance during the summer of 2013.

33. NCPR Article 61.1 provides for administrative review of “a decision affecting [a staff member’s] conditions of work or service...” The Tribunal believes that this entails more than just adoption of a policy or change in regulations by a competent NATO organ. The policy or change must be applied in a concrete way by means of a “decision” “adversely affecting” the staff member in some direct and ascertainable way. The possibility that a new policy or rule potentially may affect the staff member in some way at some future time does not provide a sufficiently clear and concrete basis for the Tribunal to assess an appeal.

34. It would be unreasonable and unrealistic to require every staff member to assess the impact of every new rule or policy on his or her situation at the time the new rule or policy is announced, but before it is applied to the staff member. Moreover, it is difficult to see how the administrative review process established by Article 2 of Annex IX could assist in the pre-litigation resolution of controversies or concerns if neither staff member nor supervisor knows of the concrete consequences of a new policy for the concerned staff member.

35. In Decision No. 328, the NATO Appeals Board rejected a similar argument that an appeal was not timely because the appellant should have appealed when he received an Office Notice informing him of new medical insurance rules. Instead, the appellant was allowed to appeal “*against the decision whereby the administrative authority applies them to his particular case.*” It is also recalled that in Decision No. 851, in which a staff member sought annulment of a decision by the Secretary-General not to submit to the Council a proposal relating to collective bargaining, the Appeals Board concluded that such a matter concerned all NATO staff and “*can not be considered in terms of an individual dispute*” appealable under the NCPR. This reflects a sound principle that will be followed here. As a leading writer on international administrative law has observed in connection with the practice of the World Bank, “[t]here must be an administrative decision made vis-à-vis a staff member... in order to trigger jurisdiction. The mere existence of a rule or policy before it is applied to staff does not enable the tribunal to exercise its jurisdiction.”¹

36. Turning to the appellant’s arguments regarding admissibility, the appellant first urged that the appeal is admissible as a direct appeal of a decision by the Head of a NATO body under Article 1.6 of Annex IX to the NCPR, contending that the disputed payslip reflected a decision made directly by the General Manager. The appellant cited decisions of the NATO Appeals Board applying now-superseded provisions of the NCPR in support of this position.

37. The Tribunal does not share appellant’s understanding of Article 1.6. Article 1.6 provides:

Where the grievance is the result of a decision taken directly by the Head of a NATO body, the aggrieved party may lodge an appeal directly with the Administrative Tribunal.

¹ cf Amerasinghe, Developments in the Jurisprudence of the World Bank Tribunal since 1987, in: International Administration. Law and Management Practices in International Organizations, 921, 923 (Martinus Nijhoff, 2009).

The appellant maintains that Article 1.6's requirement that a decision be made "directly" by the HONB extends to decisions by subordinates exercising delegated authority. However, this renders the word "directly" largely meaningless, and for that reason cannot be accepted. A subordinate official's decision made while exercising authority delegated by the HONB is not made "directly" by the HONB. In the Tribunal's view, Article 1.6 covers only contested decisions taken personally by the Head of the NATO body.

38. As this Tribunal observed in Case No. 2014/1013:

Payslips are generally prepared by payroll officers and are subsequently endorsed by their superiors, most likely the Head of Human Resources, when the latter approve the payroll. Appellant submits that the impugned payslip was adopted by the HONB, but he does not bring forward compelling evidence for this submission. As the file shows, it was the NATO Payroll Service that issued the payslip concerned. It can therefore not be accepted, or even assumed, that the payslip was adopted by the HONB.

39. The context provides compelling reasons to interpret Article 1.6 so as to give meaning to the wording adopted by the NAC. The comprehensive revision of Chapter XIV and Annex IX contained in Amendment 12 to the NCPR was intended to create a new system for resolving disputes, a system emphasizing recourse to less formal and confrontational procedures of administrative resolution prior to resorting to litigation. However, the appellant's analysis seems to equate any exercise of delegated powers (and presumably sub-delegated powers as well) by any official – no matter how high or low his or her position in the hierarchy - with a decision by the Head of the NATO Body that can be directly appealed. This would preclude recourse to administrative review in many cases and defeat a fundamental objective of Amendment 12 to the NCPR.

40. The Appeals Board case primarily relied upon by the appellant, Decision No. 670, involved a decision by the head of the civilian personnel administration service of the International Staff exercising personnel management authority expressly delegated by the Secretary General, and under regulations that did not require that a contested decision be made "directly" by the HONB. This case and others cited by the appellant are not on point in the new situation. The appellant's first argument for admissibility is rejected.

41. Appellant's second argument was that the Managing Director's 19 February letter was a decision within the meaning of Article 2.1 of Annex IX, and that the appeal was filed within the requisite 60 days of that decision. The respondent accepted that the claim was admissible on this basis. The Tribunal agrees.

42. The Appeal is admissible.

(ii) Considerations on the merits

43. Article 6.2.3 of Annex IX to the NCPR provides that the Annex does not

limit or modify the authority of the Organization or the head of NATO body, including the lawful exercise of their discretionary authority to establish and amend the terms and conditions of employment of staff.

Under Article 6.2.1 of Annex IX, the Tribunal is to decide individual disputes by staff members

concerning the legality of a decision taken by the Head of a NATO body ... in application of a decision of the Council.

In this regard, Note (1) to Article 6.2.1 affirms that:

it is understood that the Tribunal shall have the authority to rule on the Civilian Personnel Regulations in the event that a CPR provision seriously violates a general principle of international public service law.

44. Thus, a threshold legal issue is whether or to what extent an international organization may take measures revising or reducing allowances or other elements of staff members' total emoluments without entitling the staff members to compensation. This has been a recurring issue in international administrative law. Different organization's administrative tribunals have adopted different analytical approaches.

45. However, as the appellant pointed out, in numerous cases the NATO Appeals Board has joined with other administrative tribunals in adopting an approach that distinguishes between provisions of general application to staff members that are contained in the personnel regulations, and provisions specific to the individual contained in the contract (see, for example, Decisions Nos. 174, 328 and 723). In general, as the Appeals Board decisions quoted by the appellant show, provisions of the first type "*can be modified at any time in the interests of the service, subject to the principle of non-retroactivity and limitations that the competent authority has itself placed on these powers of modification.*" However, should such modifications "upset the balance of the contract," the staff member may be entitled to compensation.

46. The appellant, respondent and OLA all appear to agree that this is the appropriate analytical approach. Indeed, the appeal affirms that "the employer may modify unilaterally the employment contract as long as it does not change the essential elements of the contract or touch the acquired rights of its employee." Further, according to appellant:

The possibility to amend the employment relationship is framed by the following safeguards:

- The modification considered must be in the interest of the service;
- it cannot apply retroactively;
- it must respect the possible limitations the competent authority placed on these powers of modification;

-- in case the modification upsets the balance of the contract it may entitle the staff member either to terminate his contract or to obtain compensation.

47. The appellant offered brief and unsupported arguments regarding the first two limitations, first contending that the NAC's decision was not in the interests of the service because it "had been adopted in order to make savings," and that under case law "an organization cannot only make savings to the detriment of its staff." However, a fair reading of the DPRC's report approved by the NAC shows that much more was involved in the effort to modernize allowances than simply financial savings. In any case, the jurisprudence of the Appeals Board and other tribunals has frequently upheld measures to reduce staff costs as a means to meet financial exigencies (*cf* Appeals Board Decision No. 174). This argument cannot be accepted.

48. Appellant then urged that the NAC decision violated the rule against retroactivity, in that it compromised staff members' entitlement to legal certainty. However, the appellant did not explain the suggested connection between non-retroactivity and legal certainty, or show how changes in the NCPR that are prospective in operation violate the principle of non-retroactivity. This argument also cannot be accepted.

49. The appellant next advanced arguments regarding the transitional regime of rent indemnities for staff members previously receiving rent allowance. The appellant did not indicate how these follow from the limitations on the organization's power to modify elements of the employment relationship he cited, and it is not clear that they do. Appellant first contended that the transitional regime "should have been decided by the Council and not by the HONB, the Secretary General." No analysis or legal authority was offered to support this contention, nor did appellant show how he was adversely affected by the allegedly improper procedure. In any case, appellant's claim disregards the NAC's approval of the portion of the DPRC's Report (see paragraph 14 above) sanctioning establishment of transitional measures.

50. The appellant's second line of argument was to the effect that he "does not understand how the transitional regime is implemented and what it means practically." The Tribunal will address this argument below in connection with appellant's contentions regarding legal certainty.

51. The appellant's core argument was that "*the modification of the conditions for granting and calculating the rent allowance clearly upsets the balance of the Appellant's contract...and violates his vested rights and his contract of employment...*" The appellant also urged that modification of the rent allowance modifies the essential conditions of future staff members' contracts. The Tribunal cannot consider arguments regarding unknown future staff members whose contracts do not yet exist, who are not party to this appeal, and who have no relationship with the appellant.

52. The principal support for appellant's contention that the balance of his contract has been upset was that his total remuneration is currently approximately 2% less than it might have been, had the rent allowance not been modified, growing to an eventual future reduction below what might have been, in amounts variously estimated at 4.4% (in the appeal) and 5% (at the hearing).

53. Thus, the appellant's central contention was not that his nominal remuneration has been reduced, but that he will receive less in the future than he might have had there been no change in the system of allowances. This seems close to a suggestion that the appellant had a right – indeed, according to the appellant, a vested right - to receive future allowances in amounts at least as advantageous to him as those he would have received before the allowances regime was changed. In the Tribunal's view, he does not have such a right. Indeed, this position seems to deny the NAC's ability to make prospective changes in current staff member's allowances, contrary to the understanding of international administrative law articulated by all participants in this appeal and described above.

54. As the case law establishes, and as the appellant recognizes, allowances and other conditions of employment of general applicability set out in the NCPR can be changed by the Organization, subject to the safeguards identified by the appellant and listed above. The appellant has a contractual right to the salary that accompanies his position, but that contract entitles him to receive various allowances only insofar as they are authorized by the regulations for persons in his particular situation at any given time.

55. The notion of "upsetting the balance of the contract" involves a much more significant realignment of the employment relationship than has occurred here. The heart of appellant's claim is that his total pay packet will be less in the future than it might have been had there been no change in the housing allowance. However, his nominal salary has not been reduced. In modifying the rent allowance, the Organization adopted transitional measures intended to assure that the notional value of affected staff members' salary did not decline on account of the change. The Tribunal believes that this has been accomplished.

56. At the hearing, the appellant's counsel disputed that the transitional measures accomplished their intended objective, emphasizing that there was a small reduction in the appellant's net compensation between his December 2013 and January 2014 payslips. However, comparison of the two payslips shows that there was actually a small increase in this sum of his basic salary and rent indemnity in January 2014 over the previous month. The record also shows that on January 1, 2014, there was a -0.3% annual salary adjustment for NATO employees in Luxembourg, reducing the appellant's basic salary and certain other emoluments contributing to his net salary. To the extent that there was a small (approximately €8) reduction in the appellant's final payment for January 2014, the reduction reflects the negative salary adjustment, increases in his insurance and pension contributions, and other minor adjustments unrelated to rent indemnity. The evidence thus shows that the transitional measures accomplished their goal of protecting the notional value of appellant's salary from reduction on account of the change in allowances.

57. Accordingly, the Tribunal rejects the appellant's claims that modification of the rent allowance was illegal because it was not in the interests of the Organization, was retroactive, or impermissibly upset the balance of the contract. International administrative law permits an organization to amend regulations of general applicability regarding allowances subject to certain limits, particularly that the changes not upset the

balance of the appellant's contract. The transitional measures adopted by the organization and applied in appellant's case satisfied these requirements.

Legal Certainty

58. The appellant contended that substitution of rent indemnities for rent allowances, and the method for calculating those indemnities, were complex and confusing, and that he did not understand the changes, contrary to the Organization's obligation to assure legal certainty. At the hearing, the appellant's counsel emphasized an exhibit submitted by the respondent that presented elements listed on the appellant's December 2013 and January 2014 payslips side-by-side in a small table. Counsel indicated that "this was the first time" the appellant had seen this information, and that he understood the new system only after seeing the respondent's exhibit. In counsel's contention, this demonstrated the complexity of the new system and showed that the organization had failed to provide a certain and comprehensible legal regime.

59. This argument is not persuasive. The respondent's December 2013 and January 2014 pay slips, both of which were included in his initial appeal, are clear and transparent. No great curiosity or effort is required to place them side-by-side to see the changes between the two months. The Tribunal does not accept appellant's contention that the new system was too complex and obscure to provide legal certainty.

Good Administration and the Duty of Care

60. Appellant next contended that the respondent failed to provide sufficient notice and information regarding the changes in the system of allowances, in violation of its duty of care and good administration. The evidence is to the contrary. As indicated above (paragraph 16) the record shows that the respondent made substantial efforts to inform staff members of the changes to the allowances regime. These included a detailed briefing to the general assembly of the Staff Association subsequently posted on the organization's internal website; an e-mail sent to staff members with a link to this briefing; and an individual letter sent to staff members. The appellant's component of NSPA ("LO") was on distribution to receive the e-mail linked to the briefing.

61. The appeal represents that appellant was not aware of any of these communications, and instead received only two internal e-mails on 18 June 2013 referring to changes in the rent allowance. Be that as it may, the appeal's suggestion that appellant was unaware of these measures is not sufficient to rebut the evidence showing that the respondent took substantial and timely measures to inform its staff of the changes. The claim that the respondent failed to provide sufficient information regarding the changed regime is rejected.

Violation of the Social Dialogue

62. Finally, the appeal contended that the changes in the rental allowance were illegal, first, because they violated the duty of collective bargaining, and second, because the organization failed in its duty to engage in consultations with staff representatives. Appellant's counsel confirmed at the hearing that the appellant is not

an elected staff representative, so this claim involves rights asserted as a staff member, not as a staff representative.

63. The appellant contends that the change in his payslip was illegal because the underlying decision by the NAC violated a duty to engage in collective bargaining. In this regard, appellant's counsel urged at the hearing that public employees have a "universally accepted right" to collective bargaining. In support of this view, the appeal cited a policy statement by the International Labor Organization (ILO) affirming the value of collective bargaining and ILO conventions 98 and 154, dealing with collective bargaining. At the hearing, the appellant's counsel also emphasized ILO Convention 151, concerning organization and bargaining by public service employees.

64. NATO is not party to any of these conventions and they are not binding upon the Organization. Indeed, not all of NATO's members are party to the cited conventions; only 12 of the 28 NATO member countries are party to ILO Convention 154, the Collective Bargaining Convention.

65. Moreover, while ILO Convention 98 is widely accepted by States, it does not mention international organizations and expressly excludes public employees. The other two are far from universal acceptance; ILO Convention 151 has 52 parties and Convention 154 has 45. (The ILO has 185 member States.) Thus, these instruments do not show a uniform practice of States, informed by a sense of legal obligation, sufficient to indicate a rule of customary international law relevant to international organizations like NATO. The relatively narrow acceptance by States of ILO Convention 151, which directly addresses public sector employment, is noteworthy in this regard. Accordingly, the appellant's contentions regarding a failure of a legal duty to engage in collective bargaining cannot be accepted.

66. Almost all international organizations have established mechanisms for addressing management-staff relations; in NATO's case, these are reflected in Chapter XVIII of the NCPR. The appellant contended subsidiarily that there was a failure of consultation with staff representatives in connection with the changes to the allowances regime, apparently in violation of these provisions of the NCPR.

67. However, the record shows that these provisions were followed here. The appeal noted that "the staff representatives were only consulted within the process of reviewing the regime of allowances." At the hearing, claimant's counsel acknowledged that there was consultation between representatives of the organization and of the staff, but asserted that these consultations "were not conducted in good faith."

68. The basis for counsel's assertion of bad faith appeared to be that the proposals ultimately submitted to the NAC by the Secretary General did not reflect the position strongly urged by the Staff Association representatives, that is, that there should be no changes in current staff members' allowances. Without more, the Tribunal cannot find that this establishes a violation of NCPR Chapter XVIII. A duty to consult does not entail an obligation on the part of an administration to accept the positions advocated by staff representatives.

69. The appellant's claims alleging violation of the social dialogue are therefore dismissed.

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

E. Costs

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

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

72. The 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 27 October 2014.

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

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



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

22 December 2014

AT-J(2014)0026

Judgment

Case No. 2014/1023

**JM,
Appellant**

v.

**NATO Communications and Information Agency,
Respondent**

Brussels, 19 December 2014

Original: English

Keywords: annual leave entitlement; redundancy; Complaints Committee.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 9 December 2014.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) has been seized of an appeal registered on 1 July 2014, by Mr JM, against the NATO Communications and Information (NCI) Agency, which was registered on 18 July 2014 as Case No. 2014/1023. The appellant seeks annulment of the respondent's decision denying him redundancy status and the corresponding loss-of-job indemnity under Annex V to the NATO Civilian Personnel Regulations (NCPR).

2. The answer of the respondent, dated 15 September 2014, was registered on 25 September 2014. The reply of the appellant, dated 27 October 2014, was registered on 31 October 2014. The rejoinder of the respondent, dated 20 November 2014, was registered on 21 November 2014.

3. The Tribunal's Panel held an oral hearing on 9 December 2014 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence of representatives of the Office of the NATO International Staff (IS) Legal Adviser and Mrs Laura Maglia, Registrar *a.i.*

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

B. Factual background of the case

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

6. Appellant joined NATO in 1986 as Assistant Telecommunication Engineer at grade A2. He is since 1 May 2010 Engineer (SATCOM operations & maintenance) at the NATO CIS Services Agency (NCSA) with Mons, Belgium, as duty station. Following the NATO agency reform that entered into force on 1 July 2012, appellant's post was transferred to the new NCI Agency.

7. Under the annual remuneration adjustment effective at 1 January 2003, NATO staff were granted two extra days of official leave in order to reflect the reduction in the statutory working hours in France, one of the reference countries considered by the Coordinating Committee on Remuneration, a body in which NATO and several other international organizations seek to harmonize staff remuneration. This measure was not uniformly implemented in NATO. NATO IS, and more recently the NCI Agency, granted the official leave days during the Christmas holidays. NCSA authorized staff members to take those two days at their convenience throughout the year.

8. Following the NATO agency reform in 2012 and the establishment of the NCI Agency, the NCI Agency General Manager decided that all NCI Agency staff would fall under the same regime of official holidays and that the agency would follow the practice of the NATO IS, *i.e.* grant the two additional leave days during the Christmas/New Year period. In Routine Order No. 30 dated 22 November 2013, NCI Agency staff were, amongst other things, informed that the General Manager had approved the official holidays for Mons, Belgium in Agency Notice (AN)13-006J(NS).

9. In a memo dated 10 February 2014 addressed to the General Manager, appellant raised a number of grievances, one of them being that, in his view, granting the two days of additional official leave during the Christmas period when SHAPE Mons and Glons were closed for energy reasons amounted to taking away an agreed pay rise. He requested reinstatement of these days as annual leave available throughout the year.

10. In a memo dated 12 March 2014 addressed to the General Manager, appellant observed that the reduction of two days annual leave directly impacted his annual leave entitlement, thus affecting his conditions of work and service. He therefore requested to be classed as a redundant staff member and be afforded the rights of redundancy as per Annex V to the NCPR, in view of the fact that his NCSA post had been suppressed and that the new NCI Agency post did not offer an equivalent remuneration package.

11. By memo NCI/HR/2014/3671 dated 6 May 2014, the Chief of Staff replied to appellant's memo of 10 February 2014 and explained the Agency's policy with respect to the official holidays: that all NCI Agency staff should observe the same number of holidays, irrespective of their location. He added that the list of official holidays published by NATO HQ is used as the baseline to determine the number of NCI Agency holidays and that the total number of official holidays is a combination of actual official holidays and the two extra days granted as a result of the 1 January 2003 remuneration adjustment. The total number of official holidays granted may vary from year to year, mostly depending on the number of days granted during the Christmas/New Year periods. He pointed out that the General Manager had decided to follow the example of NATO IS, namely to authorize, for the year 2014, fifteen days of official holidays including the two extra days. All staff were notified of this, and the two extra days were clearly identifiable on the Official Holidays list.

12. By memo dated 16 May 2014 addressed to the General Manager, appellant acknowledged receipt of the 6 May 2014 memo of the Chief of Staff. Observing that this was not a reply to his 12 March 2014 memo, he requested a reply by 6 June 2014.

13. By memo NCIA/HR/2014/5764 dated 26 May 2014, the General Manager informed appellant that he could not agree to appellant's statements about redundancy. He noted that the conditions of appellant's contract of employment had not changed, since the number of annual leave days had not changed. He added that official holidays granted by the Agency are not to be considered as annual leave. He, however, recognized appellant's concerns, which were also expressed by other staff, and had decided to convene a Complaints Committee so that he could be advised further on the issue. He asked appellant to forward to the Head of Human Resources, with copy to him, any information relating to official holidays that appellant would believe to be important for the Complaints Committee to consider.

14. On 1 July 2014 appellant lodged the present appeal, submitting that his request to be classed as a redundant staff member had been denied by the General Manager.

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

(i) Appellant's contentions

15. Appellant requests the annulment of the decision of 26 May 2014 allegedly denying him the rights of redundancy. He refers to paragraph 6.3.1(a) of Annex IX to the NCPR, submitting that he was notified by the Head of the NATO Body (HONB) that his request to be classified as redundant would not be granted.

16. Appellant brings forward the following legal grounds on which the appeal is based:

- with reference to paragraph 9(1) of Annex V to the NCPR: he has been employed as a NATO International Civilian for 28 years on an indefinite contract;
- with reference to paragraph 1(2)(a) of Annex V to the NCPR: his post in NSCA was suppressed under the NATO Agency reorganization at 30 June 2012;
- with reference to paragraph 1(2)(c) of Annex V to the NCPR: the NSCA Organization was terminated; and
- with reference to paragraph 1(3)(b) of Annex V to the NCPR: the new NCI Agency post does not offer comparable remuneration to that he received under the NSCA.

17. In his reply appellant reiterates that his appeal is based on a reduction in leave days, resulting in a reduction of his remuneration.

18. Appellant further submits that he decided to implement the only action that would ensure a fair hearing in a timely manner, by going directly to the Administrative Tribunal, as his grievance was directly due to two decisions taken by the General Manager. He refers to Article 1.6 of Annex IX to the NCPR, which provides that, where the grievance is the result of a decision taken directly by the Head of a NATO body, the aggrieved party may lodge an appeal directly with the Administrative Tribunal.

19. In response to one of respondent's submissions, appellant denies that he has refused to cooperate in the setting up of a Complaints Committee, but that he had not requested the setting up of such a Committee. He adds that he had to respond within the timeframe for appealing the contested decision.

(ii) Respondent's contentions

20. Respondent submits that the appeal is inadmissible on the grounds of non-exhaustion of pre-litigation procedures.

21. Respondent further contends that the NCI General Manager did not take a decision in his letter dated 26 May 2014. Instead, that letter informed the appellant of the decision to create a Complaints Committee to assist the General Manager in making an informed decision on appellant's status.

22. Respondent also submits that the initial appeal did not comply with the requirements under Rule 9 of the Tribunal's Rules of procedure, as appellant did not initially provide legal arguments in support of his appeal, including them only in his reply.

23. Regarding the merits of the case, respondent observes that NCI Agency staff in Mons have always been fully informed about the Agency's policy on official holidays through Routine Orders containing links to Agency Notices.

24. Respondent reiterates that the NCI Agency follows the number of official holidays granted by the NATO Secretary General and, secondly, that the number of such holidays is the same throughout the Agency, but that their dates may vary to take into account local circumstances.

25. Respondent emphasizes that the two extra days are to be considered as official holidays and not as extra days of annual leave. While there was a different practice in the past on when these days could be taken, that did not transform them into annual leave. It emphasizes that the HONB has no authority to determine the number of days of annual leave, since this is governed by the NCPR, but that he does have the authority to determine the number and timing of official holidays.

26. Respondent contends that appellant does not have acquired rights to the number of official holidays or to the dates on which they are granted. They also do not constitute an essential condition of appellant's employment contract. A modification in the number or the dates of official holidays therefore does not constitute a unilateral act altering or terminating appellant's contract. Respondent refers in this respect to a distinction between contractual and statutory terms of appointment, the latter of which may be amended by the organization. As a consequence, appellant cannot claim redundancy.

27. Respondent requests the Tribunal to declare:

- that the appeal be is inadmissible;
- that the appeal is unfounded.

D. Considerations and conclusions

(i) Considerations on admissibility

28. Respondent submits that the appeal is inadmissible on the grounds of non-exhaustion of pre-litigation procedures.

29. The Tribunal has repeatedly recalled that the NATO Council, following a detailed review, adopted in January 2013 a new internal dispute resolution system, which entered into force on 1 July 2013 and which is laid down in Chapter XIV of the NCPR and Annex IX thereto. The establishment of the Tribunal is only one aspect of this new system. The new system puts major emphasis on pre-litigation procedures. It provides for a thorough - where necessary two-step - administrative review, greater use of mediation, and an improved complaints procedure. The reform also places greater responsibilities on NATO managers, and ultimately the Heads of the NATO bodies, to address, and wherever possible, to resolve, issues instead of leaving them for resolution

by the Tribunal through a contested legal proceeding.

30. The Tribunal attaches great importance to dispute resolution through the pre-litigation process and it, at each occasion, verifies whether the *ensemble* of the pre-litigation process has been respected. Article 6.3.1 of Annex IX, in fact, is unambiguous in this respect. It stipulates:

...the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex.

31. Appellant submits that the impugned decision was taken directly by the HONB and that, as a consequence, he may seize the Tribunal directly. This pre-supposes that the HONB has indeed taken a decision. The 26 May 2014 letter can be read in different ways in this important respect. It, on the one hand, does say that the Managing Director cannot agree with Appellant's statements about redundancy and briefly explains the reasons for this conclusion. This suggests that the appellant's claim was rejected. On the other hand, the letter mentions that the HONB was going to seek the advice of a Complaints Committee, also in view of similar grievances expressed by other staff. This may suggest that the HONB did not regard appellant's complaint as finally resolved. Thus, the letter is ambiguous, for which the respondent bears responsibility. Taking account of the circumstances, the Tribunal concludes that the letter constitutes a decision by the HONB denying appellant's claim to redundancy status that appellant is entitled to challenge.

32. This conclusion is reinforced by the fact that, while the HONB unambiguously announced that he would convene a Complaints Committee in order to review the issue of the extra leave days in view of a number of grievances, including appellant's, this process was never put in motion. A Complaints Committee panel was never set up or began proceedings. The initiative for the Committee was with the HONB, as is his right under Article 4.2 of Annex IX to the NCPR. But it was then also the HONB's responsibility to assure that this panel functioned and was able to give its advice to the HONB regarding appellant's complaint and the concerns of other staff who expressed grievances. The responsibility for the functioning or non-functioning of this panel cannot be put on appellant or made dependent on appellant providing information. It is for the panel to decide which information it requires and who should provide this. Respondent carries the responsibility for the fact that the Committee was not properly set up and brought into operation. Respondent is then estopped from invoking the argument that appellant has not exhausted all available channels for submitting complaints under Annex IX to the NCPR.

33. The appeal is admissible.

(ii) Considerations on the merits

34. When the NATO Secretary General in December 2002 submitted to Council the 143rd Report by the Chairman of the Co-ordinating Committee on Remuneration on the annual adjustment of remuneration at 1 January 2003, he proposed to increase the number of the International Staff's official holidays at Christmas in 2003 and subsequent years by two days. He added that he would recommend that other NATO bodies

consider taking similar action in respect of their own staff. The NATO Council endorsed this. The impugned decision to grant these official leave days during the Christmas/New year period is therefore in conformity with the original Council decision. It is also clear from the 2002 decision that the two extra days are official holidays and not extra annual leave days. The fact that some Agencies have in the past allowed these days to be used throughout the calendar year, or continue to do so, does not alter their status as official holidays and not annual leave.

35. It is added in this respect that the NATO Appeals Board, in its Decisions No. 705, 706 and 737, has upheld the legality of the 2002 decision to grant extra official leave days *in lieu* of a pay rise. This aspect of the matter is, however, not in dispute in the present case.

36. As confirmed during the hearing, the fact that the SHAPE premises in Mons, Belgium, are closed between Christmas and the New Year does not mean that the NCI Agency's separate facility on that site must be closed during the same period. The appellant appeared to contend that NCI Agency's offices would be closed as a matter of course during the inter-holiday period. Accordingly, in his view, the agency's decision to require the two additional official days to be used during this period amounted to taking them away, since the NCI Agency would in any event not be open for business. The Tribunal does not share this view. The Agency's decision not to open for business during some or all of the holiday period did not create an entitlement to additional holidays during this period. Thus, the Agency's decision to allocate the two official holidays to this period – which was in keeping with the Secretary General's original recommendation (see paragraph 34 *supra*) – did not cause the appellant to "lose" holidays to which he was entitled.

37. Moreover, the total number of official holidays differs slightly per year on account of variations in the calendar. It is under these circumstances difficult to verify whether appellant has indeed "lost" one or two official leave days, as he contends. He has not brought forward convincing evidence in this respect. There is no identified loss.

38. But even when assuming that one or two days of official leave were somehow "lost", the Tribunal is of the view that this would not entail a redundancy status.

39. Appellant refers extensively to Annex V to the NCPR on the Regulations on the indemnity for loss of job, the relevant parts of which reads as follows:

1. The Secretaries-General of the Coordinated Organizations shall have power to award an indemnity for loss of employment to any staff member of the Coordinated Organizations:
 - (1) who holds a firm contract;
 - (2) and whose services are terminated for any one of the following reasons;
 - (a) suppression of the budget post occupied by the staff member;
 - (b) changes in the duties of the budget post occupied by the staff member of such a nature that he no longer possesses the required qualifications;
 - (c) general staff cuts including those due to a reduction in or termination of the activities of an Organization;
 - (d) the withdrawal from the Organization of the Member country of which the staff member is a national;
 - (e) the transfer of the headquarters of the Organization or of any of its units to

- another country and the consequent transfer of the whole staff concerned;
 - (f) the refusal by the staff member, where his contract does not cover the point, to be permanently transferred to a country other than that in which he is serving;
 - (g) withdrawal of security clearance on grounds which do not warrant the dismissal of the staff member as a result of disciplinary action;
 - (h) specific staff policy as agreed by the Council or as provided for in the staff regulations of the Organization concerned (excluding cases where the services of a staff member are terminated on grounds of health, discipline or on reaching the age limit), after not less than 10 consecutive years of service in one or more of the Coordinated Organizations;
- (3) and who
- (a) is not offered a post in the same grade in the same Organization, or
 - (b) is not appointed to a vacant post in one of the other Coordinated Organizations at a comparable remuneration, or
 - (c) if employed in the public service, has failed to obtain immediate reintegration in his national civil or military administration.

40. Appellant, amongst other things, contends that, with the Agency reform in 2012, his job was suppressed and that he was reassigned to a new job. He submits that with the impugned decision concerning the leave days his new job no longer had “equivalent” remuneration, to use his own words. However, appellant reads into Annex V requirements that it does not contain. The Tribunal observes that the reassignment to his new post dates back to 2012, when he was reassigned to a post in the same grade in the same Organization, thus satisfying the requirement of Article 3(a) of Annex V to the NCPR. Appellant accepted this reassignment and any appeal against the reassignment decision is time-barred. Further, the notion of comparable (or equivalent) remuneration on which appellant appears to rely only applies in cases where a staff member is reassigned to another Co-ordinated Organization (*cf* Article 3(b) of Annex V to the NCPR), which is not the case here. The conditions for entitlement to a loss-of-job indemnity under Annex V to the NCPR are therefore not met.

41. Staff are not only bound by the NCPR as in force when they join the organization. They are also bound by any subsequent amendments or changes in policy. Or as the Tribunal observed in Case No. 2014/1017:

Article 6.2.3 of Annex IX to the NCPR provides that the Annex does not limit or modify the authority of the Organization or the head of NATO body, including the lawful exercise of their discretionary authority to establish and amend the terms and conditions of employment of staff.

Under Article 6.2.1 of Annex IX, the Tribunal is to decide individual disputes by staff members

concerning the legality of a decision taken by the Head of a NATO body ... in application of a decision of the Council.

In this regard, Note (1) to Article 6.2.1 affirms that:

it is understood that the Tribunal shall have the authority to rule on the Civilian Personnel Regulations in the event that a CPR provision seriously violates a general principle of international public service law.

42. Appellant's core argument then is that the change in the way of granting official holidays constitutes such a change in his employment conditions that he must be considered a redundant staff member. The Tribunal disagrees.

43. The Tribunal has already held *supra* that the 2012 reassignment decision is final and cannot be challenged retroactively on grounds of subsequent amendments to rules or policies.

44. What may be challenged, on the other hand, is whether the decision amending the scheduling of official holidays upsets the balance of appellant's contract. The impugned decision falls within the discretionary power of the HONB. This Tribunal has consistently held that a decision in the exercise of discretion is subject to only limited review by the Tribunal and that it will not substitute its own view for the Agency's assessment in the matter. The review by the Tribunal is limited to assess the HONB's decision – as to both its content and the manner in which it has been made – to determine whether it constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure, or whether the decision violates a general principle of international civil service law. The Tribunal is, first of all, of the opinion that the decision was regular.

45. As to the content, the Tribunal is to review whether the decision violates a general principle of international service law and, in particular in this case whether the decision upsets the balance of appellant's employment conditions. The Tribunal, first of all, recalls that the alleged loss is not properly identified. Secondly, even assuming that the two days were lost, which would amount to less than one per cent of "remuneration", the impact cannot be considered as upsetting the balance of appellant's contract and employment conditions to such an extent that he should be entitled to any relief. As a consequence, the appeal is unfounded and must be dismissed.

E. Costs

46. Article 6.8.2 of Annex IX to the NCPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is unfounded and is dismissed.

Done in Brussels, on 19 December 2014.

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

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



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

28 January 2015

AT-J(2015)0027

Judgment

Case No. 2014/1021

**JF,
Appellant**

v.

**NATO Airborne Early Warning and Control Force,
Respondent**

Brussels, 20 January 2015

Original: English

Keywords: *Travel authorization for medical treatment away from duty station.*



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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria Lourdes Arastey-Sahún and Mr John Crook, judges, having regard to the written submissions and having deliberated on the matter following the hearing on 9 December 2014 further to Tribunal Order AT(PRE-O)(2014)0009.

A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal, dated and received on 11 June 2014, by Mr JF against the NATO Airborne Early Warning and Control Force (E-3A Component) concerning the decision of the E-3A Component Commander not to allow him to travel to the United States to receive medical treatment while on sick leave. The appeal was registered under number 2014/1021 and forwarded to respondent on 12 June 2014.
2. In his appeal appellant requested an expedited hearing in accordance with Article 6.6.4 of Annex IX to the NATO Civilian Personnel Regulations (NCPR).
3. On 13 June 2014, appellant added further documentation, which was forwarded to the respondent on 18 June 2014.
4. The respondent submitted its views on the request for an expedited hearing to the Registry of the Tribunal, which were received on 7 July 2014.
5. On 16 July 2014, in accordance with Article 6.6.4 of Annex IX NCPR, the President of the Tribunal issued Order AT(PRE-O)(2014)0009 providing that the expedited hearing was denied and that the proceedings shall be continued.
6. The answer of respondent dated 4 August was registered on 14 August 2014.
7. The reply of appellant, dated 15 September 2014, was registered on 25 September 2014.
8. The rejoinder of respondent dated 23 October 2014, was registered on 6 November 2014.
9. The above-mentioned appeal was lodged after the coming into force, on 1 July 2013, of amendment 12 to the NATO Civilian Personnel Regulations (NCPR), amending Chapter XIV NCPR and Annex IX thereto and, *inter alia*, establishing the Tribunal. The present appeal is therefore governed by the above-mentioned provisions.
10. The Tribunal's Panel had an oral hearing on 9 December 2014 at NATO Headquarters. It heard both parties, in the presence of representatives of the NATO Office of the Legal Adviser and Mrs Maglia Laura, Registrar *a.i.*

B. Factual background of the case

11. Appellant started working at the NATO Air Base in Geilenkirchen in November 1997 as a B3 AWACS Crew Chief. During his career he was further promoted to become B5 Principal Technician (Instructor). Due to his health situation he now covers temporarily the B4 position of Jet Engine Technician.

12. Since 2012, appellant deployed to Afghanistan three times: during July/August 2012, after which five weeks of sick leave were prescribed; 12-16 September 2013, after which sick leave was prescribed 2-24 November; and 5 December 2013 - 16 January 2014.

13. On 20 January 2014, a disciplinary procedure was started against appellant based on allegations that he was engaged in US Army Reserve activities during 4-24 November 2013, when he had reported to be unable to work at the E-3A Component due to sickness.

14. Appellant has been on sick leave since 28 January 2014.

15. On 6 March 2014, appellant informed the organization of his plans to travel to the United States. On 12 March 2014, appellant flew to the United States seeking diagnosis of his medical condition. He in particular consulted with a medical professional in Boise, Idaho, prior to returning to Germany on 18 April 2014. He informed the E-3A Component of the results of the assessment and of his intention to initiate treatment with no end date, in the United States beginning in the third week of May. He informed the E-3A Component at the same time of his plan to stay in the United States for a 90-day period.

16. The E-3A Component acknowledged the information and, beginning of May, initiated medical assessments of the appellant's medical condition through the Medical Advisor and the Occupational Health Officer. On 13 May 2014 the Administration denied appellant's travel request to fly to the United States on 20 May 2014.

17. Appellant asked for the decision to be reconsidered on 15 and 16 May. Both requests were refused.

18. On 22 May 2014 appellant wrote to the Commander asking to be authorized to travel to the US for treatment while on sick leave.

19. On 2 June 2014, the Commander informed appellant's counsel that he was obliged to insist on a complete medical assessment by his specialists and to offer help with a detailed treatment plan. That process was not yet completed. As a consequence, he could not authorize appellant to travel to the United States at that point.

20. By letter dated 11 June 2014 the Chief of the Civilian Human Resources Branch informed appellant's counsel that the Medical Advisor and the Occupational Health Officer had completed their assessment and had concluded that there was no

occupationally related indication, and that appellant was authorized to travel to the United States for treatment while on sick leave. He added that the Medical Advisor intended to monitor the situation closely and will require periodical follow-up assessments in Geilenkirchen, the first one in early August 2014.

21. Also on 11 June 2014 appellant submitted the present appeal to the Administrative Tribunal.

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

(i) *The appellant's contentions*

22. Appellant considers the appeal admissible as the contested decision was taken directly by the Head of the NATO Body, in accordance with Article 61.3 and Article 1.6 of Annex IX NCPR

23. Appellant requests:

- the annulment of the Commander's decision of 2 June 2014;
- if necessary, the annulment of the Administration's decision of 13 May 2014 to deny travel;
- the recognition of the defendant's liability;
- the authorization to travel for treatment; and
- the award of material damages €971,49 (\$1,324.56, the cost of a non-refundable air ticket), non-material damages evaluated at €20.000, and the reimbursement of costs.

24. Appellant maintains the appeal notwithstanding that the authorization to travel was in the meantime granted as, besides the compensation for the material damage, he asserts the Component's liability for an irregular and abusive persistent refusal to grant such authorization. This prevented appellant from receiving the necessary medical treatment, causing him prejudice and harming his health.

25. Appellant maintains that the Commander's decision denying the right to travel had no legal basis and violated his legitimate expectations to be able to seek urgent medical treatment in the United States. Appellant considers the decision of 2 June 2014 as a violation of the duty of care and an abuse of power.

26. Appellant affirms that the Component did not act with the required urgency and solicitude. Even if his illness had been diagnosed only when appellant sought treatment in the United States, the Component was well aware of his health situation as he has been previously on sick leave after deployment.

27. Appellant notes that his first request for travel was made on 25 April 2014 and that final authorization was given on 11 June 2014.

28. Appellant further considers that the Component's justifications for the required medical examination have been unclear and inconsistent, varying from the recognition of an occupational health nature, to a "routine request" for staff on sick leave, to the authorization for treatment in the United States.

29. Appellant stresses that the recognition of his illness is not contested.

(ii) *The respondent's contentions*

30. Respondent considers that the appeal is inadmissible as it did not follow the pre-contentious procedure. Respondent notes that appellant, instead of initiating an internal review through his supervisors, engaged through his outside counsel directly with the Component's administration and the Commander.

31. Respondent refers to the 22 May letter from appellant to the Commander and contends that it did not constitute a complaint in the sense of Article 61.2 NCPR and therefore the 2 June 2014 letter cannot be considered as a decision rejecting a complaint.

32. Respondent also considers the appeal must be dismissed on the merits as the primary relief sought by appellant, namely the authorization to travel, was already resolved at the time of lodging the appeal.

33. Concerning the claim for compensation for the material prejudice (the cost of the unused ticket), respondent contests such a claim, as appellant failed to timely request a travel authorization (necessary when staff is on sick leave – a procedure known to appellant who requested it at another occasion during sick leave), bought the ticket prematurely (1 May 2014) and was slow in attending the required meeting with the E3A Component Medical Advisor.

34. Respondent adds that, in any case, reimburseable costs such as fees and taxes should be recoverable from the full price of the ticket, and should be deducted from the claim.

35. Respondent stresses that procedures in order to determine a deployment-related illness were necessary in order to assess and closely monitor the appellant's situation.

36. Respondent further adds that there was no medical necessity to undertake treatment in the United States, and that appropriate treatment in English language is possible also in the Geilenkirchen area. Respondent also notes that use of modern technologies, not requiring travel, could be available for the treatment.

37. Respondent also contests the amount of the non-material prejudice (€20.000) as arbitrary.

38. Respondent alleges that appellant was seen in the office at the E3A Component on 28 June 2014 and that, at that time, he had not yet traveled to the United States. This fact is disputed by appellant who encloses, as evidence of this departure to the

United States, the Delta Airlines check-in flight request for departure to the United States on 27 June 2014.

39. In his rejoinder, respondent encloses a draft settlement agreement and a proposal to offer an ex gratia payment of €500.

D. Considerations and conclusions

(i) Considerations on admissibility

40. As the Tribunal recalled in other previous judgments (*i.e.* Case No. 2013/1018 and Cases Nos. 2014/1013 and 2014/1016, *inter alia*), the NATO Council adopted a new internal dispute settlement system in January 2013, which took effect on 1 July 2013. Under the new system, complainants must follow a number of steps before they may lodge an appeal. Article 61.1 of the CPR states:

Staff members [...] who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment [...] and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations.

Article 6.3.1 of Annex IX to the CPR states that an appeal submitted to the Tribunal shall only be entertained after the appellant has exhausted all available channels for submitting complaints under this Annex.

Article 2.1 of Annex IX to the CPR states:

Staff members or retired NATO staff who consider that a decision affecting their conditions of work or of service does not comply with their terms and conditions of employment and decide to contest the decision may, within 30 days after the decision was notified to them, initiate the process for seeking an administrative review [...].

Article 4.1 of Annex IX to the CPR states:

Claimants wishing to contest the decision after pursuing an administrative review as prescribed in Article 2 of this Annex [...] may make a formal complaint in accordance with the provisions of Article 61 of the Civilian Personnel Regulations. Such complaints shall be submitted to the Head of the NATO body in which the administrative review was conducted.

It follows from the foregoing that the above-mentioned provisions subordinate the admissibility of an appeal to the condition of having properly gone through the prior administrative procedure set out in these articles.

41. Respondent considers that the appeal is inadmissible since the decision of the Commander did not result from the required procedure. On the other hand, appellant maintains that the contested decision was taken by the Head of the NATO body (HONB), and so may be appealed to the Tribunal. The Tribunal points out that the current dispute was initiated with the Administration's decision of 13 May refusing to

grant appellant's permission to travel. Pursuant to Article 61.1 of the NCPR (and Article 2 of Annex IX), this first refusal shall be considered the "affecting decision" that provoked appellant's disagreement and his first request for reconsideration. Thus, appellant contested that decision by seeking review by the competent authority (in accordance with Article 61.2 of the NCPR) and complied with the administrative procedure, following the appropriate procedure leading to the complaint being addressed to the Commander.

42. The pre-litigation channels have been exhausted. Therefore the appeal is admissible in so far as it is directed against the HONB's decision of 2 June 2014 confirming the previous decision not to authorize the appellant to travel to the United States.

(ii) Considerations and conclusions on the merits

43. Appellant considers that there was no legal basis to deny his travel to the United States. However, the possibility of a staff member leaving his/her duty's location is subject to the provisions of Article 12.1.2 of the NCPR that states:

The Head of the NATO body may for reasons of service at any moment call upon members of the staff, whose whole time shall thus be at the disposal of the Organization.

Therefore the general rule is that the staff members are obliged to stay at their location and, consequently, permission shall be obtained to waive this duty. This approach of the foregoing provision prevents the Tribunal from considering appellant's travel to the United States as an absolute right, whose denial could be justified only by exceptional circumstances. It was to the appellant to show the legal basis for his claim, since the travel appears as an exception to his duty of stay at his post in the designated location.

44. Certainly, appellant's allegation of health reasons might have constituted such exceptional circumstances. Thus, the Tribunal must analyze to what extent the medical treatment sought by appellant in his country should have been taken into consideration by the Organization in assessing his situation. But there is no compelling evidence of the extreme urgency for the treatment appellant chosen in the United States. As the reasons given by the appellant were precisely his suffering from a possible occupational disease, the Tribunal cannot perceive any violation of the appellant's rights to receive medical treatment on account of the respondent's requirement that he be assessed by the organization's medical advisers. Health and safety conditions of the members of the staff shall be ensured by the Organization (Article 16 of the NCPR). In accordance with its obligations, medical controls can be ordered (Article 45 of the NCPR). The Tribunal finds that the Organization fulfilled its duty of care towards the appellant by making reasonable arrangements for an adequate assessment by its own medical services, the Medical Advisor and the Occupational Health Officer.

45. The Tribunal also notes that the Organization activated a prompt response to appellant's claims. The situation evolved as follows: A) On 25 April appellant informed his superiors that he needed treatment in the United States to begin the third week of May and was planning on staying there for a 90-day period. B) On 13 May appellant's travel request was denied so that he would be available for medical assessments. C) Appellant asked for the decision to be reconsidered on 15 and 16 May. Both requests

were also refused. D) On 22 May appellant wrote to the E-3A Commander. E) On 2 June the Commander's decision was issued, stating that the organization's medical specialists should undertake a complete medical assessment. Therefore, appellant's travel was not authorized. F) Finally, on 11 June appellant was authorized to travel to the United States, indicating that he should be back at Geilenkirchen in early August. The Tribunal notes that less than two months elapsed between the time when the appellant submitted his first request and the approval of the travel permission. Although a staff member is entitled to expect a decision to be taken within a reasonable time, the Tribunal also notes that in the meanwhile the appellant's situation was subjected to medical examinations and that a medical report needed to be rendered. In view of such circumstances the period was not excessively long and the final favorable decision was taken in a reasonable length of time.

46. The Tribunal concludes that the requests seeking annulment of decisions of 13 May and 2 June 2014 are to be dismissed.

47. The dismissal of the annulment consequently gives rise to dismissal of the other submissions as no liability can be imposed and, therefore, there are no grounds to award the payment of damages and the reimbursement of costs. The Tribunal wishes, however, to observe that the respondent tried to settle the matter and offered an *ex-gratia* payment of €500, which was not accepted by appellant.

E. Costs

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

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

The dismissal of appellant's claims gives rise to dismiss also appellant's claims under this head.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 20 January 2015.

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

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



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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

28 January 2015

AT-J(2015)0028

Judgment

Case No. 2014/1022

**VT,
Appellant**

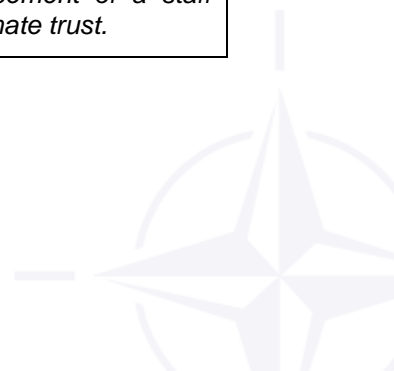
v.

**NATO International Staff
Respondent**

Brussels, 23 January 2015

Original: French

Keywords: temporary contract; application for conversion; temporary duties; replacement of a staff member; long absence; non-material damage; good administration; duty of care; legitimate trust.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 8 December 2014.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter referred to as the "Tribunal") was seized of an appeal, dated 27 June 2014, by Mrs VT, a former NATO staff member.
2. The Comments of the respondent in the present case were presented on 29 August 2014, to which the appellant submitted her reply on 1 October 2014. The respondent presented a rejoinder in response to the latter on 4 November 2014.
3. The Tribunal's Panel held an oral hearing on 8 December 2014 at NATO Headquarters in Brussels. It heard arguments by the parties in the presence of Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

4. The material facts of the case may be summarized as follows.
5. On 20 February 2012, the appellant signed a temporary contract of a definite duration of three months with the respondent; in May 2012, she signed a second temporary contract for the period from 20 May 2012 to 19 May 2013.
6. At the time of signing the above-mentioned contracts, the appellant signed statements acknowledging that at the end of those two contracts, the respondent was not obliged to offer her another contract.
7. On 12 September 2012, the appellant applied for conversion of her contractual relationship with the respondent owing to the permanent nature of her employment since joining on 20 February 2012, on the basis of two successive contracts covering a period of 15 months.
8. The appellant's application was dismissed in a decision by the respondent on 8 October 2012, a decision that was the subject of a complaint that, in turn, was dismissed explicitly on 12 February 2013.
9. This decision was brought before the Tribunal (Case No. 897) which, in its judgment of 14 November 2013, cancelled the above-mentioned decision of 8 October 2012 for violation of the obligation for substantiation.
10. On the basis of the above-mentioned judgment, the respondent took a new decision on 15 January 2014 (hereinafter referred to as the "contested decision") dismissing the appellant's application for conversion of her contract on the grounds that

she had been recruited under a temporary contract to replace a member of staff under articles 77.1 and 78 of the Civilian Personnel Regulations (hereinafter the "CPR").

11. In the contested decision, the respondent emphasized firstly that there was no doubt the appellant had been performing temporary duties to replace someone who was on extended sick leave, during the period for which she was engaged. This had been explicitly stated to the appellant and to other candidates in the interviews to fill the post in question. Secondly, the appellant was well aware, as can be seen from the statements pertaining to the above-mentioned contracts, that her duties had been temporary, regardless of their duration; in this context, the appellant may not invoke Article 5 of the CPR with a view to having her contract converted.

12. Before disputing the decision of 15 January 2014, the appellant questioned the respondent on 7 February 2014 seeking clarification of the administrative procedure for countering this decision.

13. Having received no reply, the appellant challenged the contested decision by setting two distinct procedures in motion: she challenged the contested decision in the first procedure by invoking her status as a former staff member and, in the second, her status as a serving staff member. In both procedures the appellant formulated the same grievances and the same submissions.

14. More specifically, on 14 February 2014 the appellant initiated an administrative review under Article 61.1 of the CPR and Articles 2.1 and 2.2(a) of Annex IX to the CPR as a serving staff member. That same day she initiated another administrative review under Article 61.1 of the CPR and Articles 2.1 and 2.4 of Annex IX to the CPR as a former staff member.

15. Having received no reply to these two administrative reviews, on 31 March 2014 the appellant initiated a second administrative review under Articles 2.1 and 2.2(b) of Annex IX to the CPR as well as a complaint under Article 4.1 of Annex IX thereto. After the respondent did not reply to these, the appellant lodged a complaint on 5 May 2014 against the dismissal of her second administrative review under Article 61.2 of the CPR.

16. The two above-mentioned complaints, dated 31 March and 5 May 2014, formulated by the appellant as a former staff member and a serving staff member respectively, having been implicitly dismissed by the respondent, the appellant has lodged the present appeal.

C. Summary of parties' principal contentions and arguments

(i) Considerations on admissibility

17. The respondent objects, in its defence, that the appeal is inadmissible inasmuch as it is directed against the implicit decision to reject the appellant's complaint dated 5 May 2014. According to the respondent, as of the date the decision was taken to turn down the appellant's application for conversion of her contract, *i.e.* 15 January 2014, she

was in any event a former NATO staff member; consequently she could only invoke the provisions of Articles 2.1 and 2.4 of Annex IX to the CPR. Given that there was no doubt about this, it was consequently obvious that the appellant was not entitled to initiate a procedure against the disputed decision as a serving staff member.

18. The appellant confirms in her written pleadings that she intended to withdraw her appeal insofar as it was directed against the implicit rejection of the complaint of 5 May 2014 which she had lodged as a serving staff member.

(ii) Considerations on the merits

19. In her appeal, the appellant makes submissions seeking cancellation and compensation.

On the submissions seeking cancellation

20. In her submissions seeking cancellation of the contested decision, the appellant makes a single argument: violation of Article 77.1 of the CPR. In particular, the appellant argues that, contrary to what is stated in the contested decision, at the time of her recruitment, the respondent had in no way been seeking to replace a particular staff member for any reason at all. Consequently, because the respondent committed an error of judgment regarding the implementing arrangements of Article 77.1 of the CPR, the contested decision dismissing the application for conversion of her contract on those grounds in line with Article 5 of the CPR should be cancelled.

21. Firstly, as the e-mails between the relevant services prior to the appellant signing her contract on 20 February 2012 show, it was planned that the appellant would be engaged for a long period provided the funding was available. Consequently, in recruiting the appellant, the respondent was not – from the time the first contract was signed with the appellant – seeking to replace a particular staff member for health reasons. With regard to the request to hear witnesses testify about this in the hearing, regardless of the relevance of hearing witnesses about this matter, the appellant objects that such a request must be made in a separate act rather than as part of the defences submitted respectively by the parties in the written proceedings. In the absence of such a request, however, the Tribunal cannot hear witnesses in the oral proceedings.

22. Furthermore, the appellant argues that maintenance of the Building Integrity programme required, in any event, keeping her post in place regardless of any procedure for replacement of a particular staff member and for meeting the requirements of the said programme. This was thought to be confirmed by the fact that, when the appellant's contract ended, she was replaced by a permanent staff member transferred into the Building Integrity programme specifically owing to her departure. According to the appellant, the transferred staff member was performing the same duties that had been assigned to her. In that respect, she asked the Tribunal to hear testimony from the transferred person. These elements, taken together, were thought to prove that the appellant, since the time she was recruited, was not replacing any staff member, as the respondent alleged.

23. Secondly, the appellant argues that in the actual performance of her duties she could not *de facto* be replacing anyone who was supposedly on sick leave. First, according to her contract, she was performing administrative support duties for the Building Integrity programme, whereas the duties performed by the person she was supposed to be replacing were management duties involving decision-making. Next, the appellant argues that she was recruited under a temporary contract at grade A1, whereas the post of the staff member to be replaced was at grade A4. Finally, even in the job vacancy notice of the person being replaced which came out in September 2012, the experience required to fulfil the duties of that person was targeted, specific experience in foreign affairs, security and defence.

24. As for the argument that the temporary staff member who is replacing a staff member cannot, in the interests of the service, be obliged to perform exactly the same duties and have the same grade and professional experience, the appellant argues that such an interpretation of Article 77.1 of the CPR would render this article meaningless. Any absence of a staff member from any NATO service would give the respondent the power to recruit any temporary staff member to fulfil any duties. That is not the objective of the above-mentioned article, however. Moreover, the case law of the NATO Appeals Board and the Administrative Tribunal, invoked in this connection by the respondent, has never confirmed such an interpretation of the provisions of the above-mentioned article (see Appeals Board decision No. 878 and AT judgment in Case No. 906).

25. Lastly, the appellant claims that no argument may be made about the permanent nature of her duties based on the signed statements attached to her two contracts. The parties concerned may not use such practices to depart from the rules in the CPR on conversion of a temporary staff member's contract.

26. The appellant therefore submits that she was not recruited for temporary replacement of a staff member on sick leave. Therefore Article 77.1 of the CPR is inapplicable. Consequently, under Article 5 of the CPR and the provisions of Articles 6.1 and 6.2 of the implementing arrangements on the use of temporary staff, the respondent should have taken the necessary steps in September 2012 to create and budget for a civilian post. Consequently the respondent committed an error of judgment in the contested decision by rejecting the appellant's application for conversion of her contract based on Articles 77 and 78 of the CPR.

27. The respondent replies that it made no error regarding the implementing arrangements of Articles 77.1 and 78 of the CPR, stating that the appellant was recruited for a period during which a staff member was absent from service and there was an urgent need to find a replacement for this staff member for a period exceeding the 180 days foreseen in the CPR. Therefore the provisions of Article 5 of the CPR cannot be applicable, for various reasons.

28. Firstly, the respondent rejects any allegations that it had intended, from the time the appellant was engaged, to offer her a temporary contract for a long period, beyond any context of replacement of a staff member within the meaning of Article 77.1 of the CPR. According to the respondent, in the meetings at which the appellant was offered her first temporary contract, it was clearly stated that she would be performing temporary

duties owing to the absence of a staff member on sick leave. In this connection the respondent suggests that the Tribunal hear witnesses in the oral proceedings. Moreover, the conclusion of a lengthy employment contract with a staff member in no way prejudices the respondent's choice whether to offer that staff member an indefinite duration contract.

29. Secondly, the respondent argues that the second temporary contract was offered to the appellant owing to the necessity of continuing to replace a staff member on sick leave who, at the end of that sick leave, was placed on permanent invalidity. Thus in those exceptional circumstances it was necessary to recruit a temporary staff member for more than 180 days, which is fully justified in the light of Articles 77 and 78 of the CPR and is the reason why the respondent offered the appellant the second temporary contract.

30. Thirdly, the respondent considers the appellant to have been aware of her contractual situation and, in particular, that she was being engaged only for temporary duties in the completely exceptional context of a staff member being absent for more than 180 days. Furthermore the appellant acknowledged she would be performing temporary duties, as is shown in her statements attached to her contracts.

31. Fourthly, the respondent refutes the appellant's allegations that she had not been replacing the staff member on sick leave because of the difference in duties performed, experience and grade between the appellant and the replaced staff member. The respondent considers that, in replacing a staff member, it was not necessary for the temporary staff member to perform exactly the same duties or to have the same experience and grade.

32. Fifthly and finally, the respondent takes exception to the suggestion that the appellant, at the end of her contract, was herself replaced by a staff member transferred from another service, which would suggest that, in any event, the appellant was performing autonomous duties. The transfer of the persons concerned to the Building Integrity programme was justified by the necessity of reorganizing the service owing to other staff members' resuming their duties over the same period. The respondent invited the Tribunal to hear testimony in connection with this.

On the submissions seeking compensation

33. The appellant claims to have suffered non-material damage as a result of the respondent's conduct throughout the pre-litigation procedure. This damage was initially assessed at €5.000 and then at €15.000.

34. Firstly, throughout the proceedings which followed the contested decision, it is claimed that the respondent did not meet its obligations arising from the principle of good administration; it did not take any formal position on any of the appellant's requests, which were all rejected implicitly. Furthermore, during the proceedings in question, despite the appellant's initiatives and requests for clarification (see paragraph 12 above), the respondent did not help the appellant in any way or cooperate with her. This is a manifest violation of its duty of care. The appellant states that the respondent

never provided her with any information to relieve her of uncertainty or save her various costs involved in initiating different proceedings.

35. Secondly, although the respondent offered the appellant a six-month contract, that offer was withdrawn because the present proceedings were initiated. The respondent thus gave the appellant legitimate hopes of a new contract, but decided to retract for discriminatory reasons associated with the proceedings under way. According to the appellant, the person responsible for offering her this contract certainly intended to do so, but was prevented on account of the lodging of this appeal.

36. The respondent replies that the above-mentioned submissions on compensation must be dismissed in their entirety.

37. Firstly, the respondent claims that the appellant was fully informed of the reasons for the decision not to convert her temporary contract into an indefinite duration contract, both in the context of this case and also during the previous case (Case No. 897). In these circumstances, the respondent considers that it has ensured that the appellant had all the information she needed to assert her rights. The respondent therefore claims that its conduct has not caused the appellant any non-material damage.

38. Secondly, the respondent asserts that when the appellant began two pre-litigation procedures – one as a former staff member and the other as a serving staff member – there was no doubt that she was a former staff member at the end of her second contract. From this point of view, the respondent's lack of reply to the appellant's request for clarification, dated 7 February 2014, in no way constitutes a violation of the principle of good administration or its duty of care. As there was no violation, a request for compensation for non-material damage cannot succeed.

39. As regards the informal discussions and e-mail exchanges which took place after the Tribunal's first ruling in Case No. 896, the respondent claims that no official offer was made in respect of a new six-month contract with the appellant. The fact that members of the respondent's staff took certain steps cannot be regarded as the expression of an intention to hire the appellant. Therefore, no violation of the above-mentioned principle can be put forward to justify a request for compensation for non-material damage. The appellant's submissions seeking compensation must therefore be dismissed.

D. The parties' submissions

40. The appellant asks the Tribunal:

- to cancel the implicit decisions to reject her complaints of 31 March and 5 May 2014;
- to order the respondent to pay a sum assessed *ex aequo et bono* at €15.000 as compensation for the non-material damage she has suffered;
- to order the respondent to reimburse all the legal costs incurred, travel costs and lawyer's fees, with no ceiling.

41. The respondent asks the Tribunal to dismiss the appeal as inadmissible inasmuch as it is directed against the complaint of 5 May 2014 and, for the rest, as unfounded.

E. Ruling

(i) *On the subject of the appeal*

42. Despite the intentions expressed during the written proceedings regarding a partial withdrawal of the submissions on cancellation, the appellant formally maintained in her appeal two distinct submissions directed against the implicit decisions to reject her complaints, dated 31 March and 8 May 2014 respectively.

43. However, in response to a question from the Tribunal during the hearing, the appellant formally withdrew one of the submissions on cancellation inasmuch as it was directed against the implicit rejection decision of 8 May 2014.

44. The Tribunal noted this withdrawal and the submissions on cancellation are therefore directed solely against the implicit decision to reject the appellant's complaint of 31 March 2014.

(ii) *Considerations on the merits*

On the submissions seeking cancellation

45. Article 77.1 of the CPR states as follows:

Temporary personnel may be engaged by the Head of the NATO body when necessary to replace members of the staff who are absent or to undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned.

Articles 78.1 and 2 of the CPR state as follows:

The duration of employment of temporary personnel... shall not normally exceed a period of 90 consecutive days. However, if required by circumstances, such contracts may be extended by one further period not exceeding 90 days.
Where, in exceptional cases, the services of temporary personnel are required for a period exceeding 180 days, the Head of the NATO body shall seek prior budgetary approval to the extension.

46. These provisions taken together show that, when taking on temporary staff, the NATO service concerned intends to replace absent staff or allocate tasks which are of a temporary nature and cannot be carried out by the existing personnel. This hiring of staff on a temporary basis may exceed the 180-day period only in exceptional cases and provided budgetary approval has been requested and given.

47. The case law also shows that the replacement of a staff member on extended sick leave is one of the grounds for the recruitment of a temporary staff member under Article 77.1 of the CPR (see AT judgment in Case No. 878).

48. In this case, the appellant claims that the first of the conditions set out in paragraph 46 above, *i.e.* recruitment to replace a staff member on sick leave, was not met.

49. First of all, the appellant states that the respondent clearly intended to recruit her for a long period and not in the context of replacing an absent staff member. The contested decision to reject the appellant's request for contract conversion on these grounds would therefore be illegal.

50. This argument must immediately be dismissed. It must be borne in mind that, as shown by the file presented to the Tribunal, the staff member in question was indeed absent during the period for which the appellant was recruited as a temporary staff member. Furthermore, the appellant does not present any argument in her written pleadings, or at the hearing, concerning the actual absence from work of the staff member concerned. She merely asserts that, in reality, she never replaced the staff member in question.

51. In addition, it has been established that, for the appellant's first contract, the respondent clearly stated its decision to recruit her on a temporary basis. The respondent repeated this decision to give a temporary contract when it offered the appellant a second temporary contract of one year's duration. The conclusion of these two temporary contracts does not give the appellant grounds to believe that the respondent intended to offer her a different type of contract subsequently.

52. However, the appellant claims, secondly, that she was not really recruited to replace an absent staff member under her two temporary contracts; she asserts that she did not have the same tasks, responsibilities or grade as the staff member in question. She therefore claims that it cannot be successfully argued that she replaced the staff member in question.

53. Furthermore, the appellant contests the interpretation of the relevant provisions of the CPR whereby the NATO service concerned has broad powers to determine the duties and tasks assigned to the temporary staff member. She claims that such an interpretation could circumvent the objectives of Articles 77.1 and 78.2 of the CPR and nullify the basis/grounds for any application/request for the conversion of a temporary contract.

54. In this context, the Tribunal takes the view that, as regards the performance of the temporary duties of NATO staff, and with a view to good management of the service, the administration concerned has broad discretion to decide the conditions that shall apply to the recruitment of temporary staff in accordance with the CPR.

55. Moreover, the individual circumstances of the service concerned and the urgency of accomplishing its tasks may justify the fact that the temporary staff member does not necessarily have the same profile as the person being replaced. It is therefore up to the service concerned, within its powers of discretion, to decide which duties and responsibilities the temporary staff member should perform in the framework of replacement. This conclusion is drawn directly from the principle of Article 77.1 of the

CPR, which refers to the possibility of replacing an absent staff member or recruiting a temporary staff member to undertake tasks which are also temporary and which the existing staff cannot deal with.

56. More generally, it must be noted that, in justifying the recruitment of the appellant on the grounds of Article 77.1 of the CPR, owing to a staff member's absence from work for health reasons, the respondent has not exceeded its powers of discretion, as ensured by the Tribunal. The same applies to the exceptional circumstances invoked by the respondent to justify the second contract of one year's duration; the exceptional circumstances within the meaning of Article 78.2 of the CPR include the final departure of a staff member who has already been absent on extended sick leave.

57. In the light of the foregoing, the Tribunal considers that the respondent used its powers of discretion correctly in the present case, in the framework of the tasks allocated to the respondent to replace the absent staff member and, more generally, in the framework of the application of Articles 77.1 and 78.2 of the CPR.

58. It follows from the foregoing that the first of the conditions invoked for the combined application of the provisions of Articles 77.1 and 78.2 of the CPR has been met, and the respondent's decision has not violated the regulations.

59. Therefore, the sole argument put forward by the appellant must be dismissed, and as a result her submissions on cancellation should be dismissed; there is no need to rule on the parties' requests that witnesses be heard.

On the submissions seeking compensation

60. The appellant had initially assessed her non-material damage at €5,000, arguing that, during the pre-litigation procedure, the respondent did not meet its obligations arising from the principle of good administration and duty of care. According to the appellant, the failure to meet these obligations become blatant when the respondent gave her legitimate expectations of an imminent engagement but then discriminated against her by withdrawing its offer owing to the lodging of this appeal. The foregoing considerations led the appellant to assess the non-material damage she claims to have suffered at €15.000.

61. The Tribunal points out that, in accordance with its case law, submissions on compensation must be dismissed when they are closely linked with submissions on cancellation which have themselves been dismissed as groundless (see its judgment in Case No. 903, paragraph 98, and Case No. 2013/1001, paragraph 96).

62. If the alleged damage has not arisen from the contested decision itself, as is the case here, the person concerned must prove that there has been an irregularity or a violation of a legal rule, real damage and a causal link between the alleged conduct and the damage in order to justify the submissions seeking compensation. All these conditions must be met; if one of them is not met, this is enough to dismiss the submissions in question.

63. The Tribunal considers that the sense of injustice and the unpleasantness suffered by a staff member who has to bring a pre-litigation procedure to preserve his or her rights may justify a request for compensation for non-material damage suffered if it is found that the administration has committed irregularities and has not met its obligations in applying the legal rules.

64. In this case, the appellant argues that, during the pre-litigation procedure, the respondent did not give her appropriate information on the procedure to be followed, despite her requests; she also claims that, in general, the respondent never replied to her requests and that this was a violation of the principle of good administration and the duty of care.

65. The Tribunal points out that the duty of care and the principle of good administration mean, in particular, that a service taking a decision on a request by one of its staff must take into account all the factors which may influence that decision, including the interests of the service and also the interests of the staff member concerned.

66. As regards the allegation that failure to reply to the appellant's question concerning the system for contesting the decision was a violation, it is regrettable that the respondent did not give any information following the appellant's requests for clarification.

67. However, such a lack of response, in particular in this case, does not constitute a violation of the principle of good administration and the duty of care; in these requests, the appellant was in fact trying to obtain information on the steps she should take in order to ensure that her appeal was admissible and well-founded. These questions may be part of the information that a service could potentially provide to its staff members, but it is up to the staff member concerned, with his or her legal counsel if appropriate, to consider the relevance and validity of the steps that may be taken to preserve his or her rights and to refer the case to the Tribunal.

68. It should also be noted that the appellant criticizes, in general, the lack of any response to her requests for clarification, but she does not allege that the respondent's conduct involved hiding documents or information that she should have known about, in blatant violation of its obligations in accordance with the principle of good administration and the duty of care.

69. As regards the respondent's lack of an explicit response to the administrative reviews or the complaints, this, likewise, does not constitute a violation of the principle of good administration or the duty of care. By making provision for implicit rejection decisions, the CPR permit any staff member to preserve his or her rights and, if appropriate, to refer the case to the Tribunal if no response to a request is received within the deadline. This is precisely what the appellant has done.

70. As regards the alleged legitimate expectations of the appellant concerning her possible recruitment, the Tribunal points out that the right to protection of legitimate expectations applies to any individual in whom the administration has instilled justified

and clear hopes by giving specific assurances in the form of precise, unconditional and consistent information from authoritative and reliable sources.

71. That is clearly not the situation here; the only exchange of e-mails with the respondent's staff in the context of this case does not meet any of the above-mentioned conditions to support an allegation of violation of the principle of legitimate expectations.

72. As a result, study of the arguments put forward by the appellant to support her submissions on compensation has revealed no irregularity or illegal action by the respondent and thus no misconduct for which the respondent could be held liable.

73. Consequently, the submissions on compensation for non-material damage allegedly suffered by the appellant must be dismissed as groundless; there is no need to rule on the parties' requests that witnesses be heard.

74. It follows from all the foregoing considerations that this appeal must be dismissed as a whole.

F. Costs

75. Article 6.8.2 of Annex IX to the CPR provides as follows:

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

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

G. Decision

For these reasons,

the Tribunal decides that:

- Ms VT's appeal is dismissed.

Done in Brussels, on 23 January 2015.

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

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