
# JUDGMENTS and ORDERS

# OF THE NATO ADMINISTRATIVE TRIBUNAL

## 2016

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

**Judgments of the NATO Administrative Tribunal**

**2016**

**12th session (17-18 March 2016)**

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 May 2016 AT-J(2016)0008

# Judgment

## Case No. 2015/1067

**GV**
**Appellant**

***v.***

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

Brussels, 18 April 2016

Original: English

*Keywords: subsistence allowance; travel on official duty; vicinity; NATO canteen available.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 having deliberated on the matter following the hearing on 18 March 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (HQ NAEW&CF GK), dated 28 October 2015, and registered on 11 November 2015 as Case No. 2015/1067, by Mr GV, a staff member of the HQ NAEW&CF GK.

2. The respondent's answer, dated 8 January 2016, was registered on 14 January 2016. The appellant's reply, dated 11 February 2016, was registered on 12 February 2016. The respondent's rejoinder, dated 29 February 2016, was registered on the same day.

3. The Panel held an oral hearing on 18 March 2016 at NATO Headquarters. It heard arguments by appellant, assisted by another staff member, and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar *a.i.*

## B. Factual background of the case

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

5. On 11, 12, 13 and 15 June 2015 appellant travelled under a NATO travel order to the German Air Force base of Nörvenich in order to perform maintenance and repair works on an airplane stationed there.

6. Upon return from his travel he filed a travel claim.

7. On 30 July 2015 appellant was informed that there would be no reimbursement for his official duty travel because ACO Directive 060-050 - Travel on International Duty (Directive) was applicable.

8. On 27 August 2015 appellant submitted a letter in which he stated that the above-mentioned decision had been rendered in clear violation of Article 41 of the NATO Civilian Personnel Regulations (CPR). He added: "*Therefore I have decided to exercise my rights in accordance with NCPR and am initiating the Administrative Review, Complaints, Appeals process, this in order to seek correct compensation for the official duty travel*".

9. On 4 September 2015 a Memorandum was issued by the Organization noting that, in accordance with ACO Directive 060-050, no subsistence allowance shall be paid for those NATO TDY ("NATO Travel on International Duty") destinations located within 80 km of the duty station where a NATO canteen is available. It was also pointed out that

the distance between Geilenkirchen and Nörvenich is less than 60 km and that Mr V began and ended his TDY every day at his duty station. Finally, the organization recalled that on 23 January 2015 an email had been sent to all personnel clearly stating the specific regulation regarding the 80 km distance from duty location. Furthermore, these instructions were also on the portal of the Force Headquarters Finance (FHF) Travel Office.

10. On 30 September 2015 the HQ NAEW&CF GK Commander, reminded appellant that he had been provided with a duty vehicle. He also submitted that, based on the authorization established in line with Article 41.4.6 of the CPR, the Supreme Allied Commander Europe (SACEUR) had adopted the policy to pay no subsistence allowance for those NATO destinations within 80 km of the duty station where a NATO canteen is available. That policy applied to Nörvenich. Furthermore, it was noted that the destination was a German Air Force base with catering facilities serving meals at very competitive prices.

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

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

11. Appellant considers that the decision not to grant him the subsistence allowance was rendered in violation of Article 41 of the CPR. Appellant also submits that there could be inequality among the staff in the implementation of the above-mentioned Article 41. He adds that there is no legal definition of "NATO canteen", nor of a "NATO installation". Finally, appellant also considers that the concept of "vicinity" is not strictly defined in Article 41 of the CPR.

12. Appellant requests that the Tribunal:
- compensate him by ordering payment to him of the subsistence allowance for official duty travel, and reimburse him for any legal and travel costs incurred by him.

13. In his reply appellant also requests that the Tribunal:
- provide clarification of "NATO installation" at Article 41.4.6;
- provide the kilometric distance pertaining to the word "vicinity" in the same rule; and
- suspend/rescind section 4 of ACO Directive 060-050 until the above clarifications have been made.

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

14. The facts are not disputed by respondent.

15. Respondent argues that appellant did not exhaust the pre-litigation procedure since he lodged the appeal following the decision of 30 September instead of filing a

complaint. In his reply, appellant considers that this falls under Article 2.1 of Annex IX to the CPR and a direct appeal is permitted.

16. On a subsidiary basis, the Organization considers that the rejection of the claimed allowance was in accordance with Article 41.4.6 of the CPR (particularly, the second sentence). The respondent recalls that SACEUR made use of it by issuing the ACO Directive 060-050 Travel on International Duty dated 4 December 2014, which reads: "*No subsistence allowance shall be paid for those NATO TDY destinations located within 80 km of the duty* …". Moreover, the Organization considers that it is not relevant that there is no NATO canteen in Nörvenich, since there is one at the appellant's duty station, which is less than 80 km away.

17. Respondent requests that the Tribunal:
- dismiss the appeal on grounds of inadmissibility; and
- on subsidiary basis, dismiss it on the merits.

## D. Considerations and conclusions

18. As the Tribunal has recalled in previous judgments, the internal dispute settlement system obliges complainants to follow a number of steps before they may lodge an appeal.

19. In particular, Article 61.1 of the CPR states:

> Staff members [...] who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment [...] and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations.

The above-mentioned Article 2 of Annex IX to the CPR states in its first paragraph that the process for seeking an administrative review shall be initiated within 30 days of notification of the decision to the affected agent.

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.

Finally, pursuant to Article 6.3.1 of Annex IX to the CPR, an appeal submitted to the Tribunal shall only be entertained after the appellant has exhausted all available channels for submitting complaints under this Annex.

20. 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.

21. The Tribunal considers that the pre-litigation procedure has been properly exhausted in this case. Appellant sought administrative review of the decision denying him the subsistence allowance by his letter of 27 August, addressed to the Organization. In fact, the Organization considered its answer of 4 September as the "reply to request for administrative review". Furthermore, this document refers to "the information/decision that the Travel Office provided to Mr. V…". Subsequently, appellant sent his request to the Commander, who replied on 30 September that he considered this step to be the "further administrative review to the administrative review of 4 September". Therefore, the legal steps for the prior review were properly observed.

22. With regard to the submissions that appellant added in his reply (paragraph 11 above), the Tribunal notes that they refer to matters that were not in the previous claims and, consequently, must be excluded from the judicial debate. Moreover, pursuant to Article 6.2 of Annex IX to the CPR, the added requests fall outside the Tribunal's jurisdiction insofar as they do not concern the individual and particular dispute and go beyond the interpretation and application of the rules to an individual case.

23. With respect to the merits of the case, Article 41.4.6 of the CPR reads as follows:

> Notwithstanding the rules above, where staff members travel on official duty to another NATO installation possessing canteen or restaurant facilities and where this duty does not require them to be absent from their residence for a significantly longer period than would be the case if they were working in their own headquarters, the amount of subsistence allowance payable shall normally be reduced to 20% of the full approved rate of the daily allowance. In addition, the Head of the NATO body may introduce other special rules for duty travel performed in the vicinity of the staff member's normal place of work or habitual place of residence.

24. The CPR include a footnote specifying that the authority conferred on the Head of NATO body is reserved to SACEUR in respect of members of the staff employed by NATO bodies within Allied Command Operations.

25. On the basis of aforementioned legal authorization, ACO Directive 060-050 was promulgated on 4 December 2014 by the competent authority. The Directive is in accordance with Article 41 of the CPR, which it serves as a secondary rule, providing further measures for the implementation of this Article.

26. Regarding travel on official duty in the vicinity of the normal place of work, paragraph 3-4 g.(4) of the Directive provides as follows:

> No subsistence allowance shall be paid for those NATO TDY destinations located within 80 km from the duty station where a NATO canteen is available in accordance with Article 41.4.6 of the NCPRs at Reference A.

27. In the Tribunal's view, a literal interpretation of the provision implies that the exception to reimbursement occurs for those situations in which the following conditions are present: a) the destination is located within 80 km of the duty station; b) there is a NATO canteen in the destination. This is also the conclusion of a systematic and comprehensive interpretation, since Article 41.4.6 of the CPR establishes a reduction of the rate whenever the destination is "another NATO installation possessing canteen…". Although the Directive could have been adjusted for the situation of travel to destinations other than NATO installations, neither Article 41.4.6 – for the reduction – nor the Directive – for the exception in the case of a short distance – envisages the possibility of destinations without a NATO canteen, let alone non-NATO installations. Consequently, provided that all the other legal requirements concur, all duty travel to destinations with no NATO canteen available shall be subject to reimbursement of the corresponding allowance regardless of the distance from the duty station.

28. The Organization's decision denying the claim for reimbursement must be annulled.

## E. Costs

29. 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.

30. The appeal being successful, appellant is entitled to reimbursement of justified expenses incurred by him.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision denying the reimbursement of the subsistence allowances due for the travel on 11, 12, 13 and 15 June 2015 to the German Air Force base of Nörvenich is annulled.
- HQ NAEW&CF GK is ordered to reimburse justified expenses incurred by the appellant.
- The other submissions are dismissed.

Done in Brussels, on 18 April 2016.

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

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

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 May 2016 AT-J(2016)0009

**Judgment**

**Case No. 2015/1055**

**JG**

**Appellant**

***v.***

**NATO Communications and Information Agency**

**Respondent**

Brussels, 20 April 2016

Original: French

*Keywords: termination; notification in writing (Article 9.2 of the CPR); possibility of sending the written decision by email; termination for extended sick leave (Article 45.7.3 of the CPR); procedure, notice period and effective date.*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 17 March 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 18 August 2015 and registered on 27 August 2015, by Mrs JG, seeking:
- annulment of the decision of 16 February 2015 whereby the General Manager of the NATO Communications and Information Agency (NCIA) terminated her contract;
- entitlement to a pension for permanent invalidity;
- alternatively, compensation for material and non-material damage suffered as a result of the absence of a pension for permanent invalidity; and
- reimbursement of the costs incurred for her defence.

2. The appellant is a former A2-grade telecommunications engineer with the NCIA.

3. The comments of the respondent, dated 23 October 2015, were registered on 31 October 2015. The reply of the appellant, dated 1 December 2015, was registered on 18 December 2015. A rejoinder, dated 25 January 2016, was produced by the respondent on 28 January 2016.

4. Additionally, in an email on 19 February, appellant requested a closed hearing before the Tribunal for her case. The President of the Tribunal consulted the respondent and then granted this request on 26 February 2016.

5. The Tribunal's Panel held an oral hearing at NATO Headquarters on 17 March 2016. It heard arguments by the parties, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar *a.i.*

## B. Factual background of the case

6. Appellant joined NATO on 1 September 2005 as a B4-grade technician with the NCSA in Ramstein, where she was employed until 30 September 2010. She continued working with NATO under a one-year definite duration contract at the NATO Communication and Information Systems School (NCISS) in Latina, Italy as from 1 October 2010. This contract was converted into an indefinite duration contract on 1 October 2011. She was employed there as an A2-grade telecommunications engineer.

7. The appellant went on sick leave on 5 February 2013, which subsequently became extended sick leave as of 5 May 2013. She returned to work part-time on 18 March 2014, but her recovery lasted just one month; on 19 April 2014 she was again placed on extended sick leave.

8. After two years of sick leave and then extended sick leave, the Administration wished to terminate her contract under Article 45.7.1 of the Civilian Personnel Regulations (CPR). On 16 February 2015, the General Manager's decision to terminate her contract as from 5 February 2015 was taken; that decision was notified to her by email on 17 February.

9. That is when the pre-litigation phase of the case began. On 11 March 2015, appellant sought an administrative review of the General Manager's decision. The Administration responded to this on 31 March, underscoring that as the initial decision had been taken by the Head of NATO body, appellant had to refer the matter directly to the Tribunal. For the rest, the Administration dismissed the administrative review. Appellant responded to this on 8 April, claiming to have the choice of procedure: either a detailed administrative review procedure and a complaint followed by an appeal, or a direct appeal. The Administration answered her on 27 April, refusing to send her the administrative file.

10. On 6 May 2015, appellant sought a second administrative review with no new arguments. The Administration responded to this by refusing, as it had done in the past. On 10 June 2015, appellant submitted a complaint on the basis of Article 4.1 of Annex IX to the CPR. The General Manager dismissed it on 24 June.

11. On 18 August 2015, appellant submitted an appeal before the NATO Administrative Tribunal.

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

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

12. Appellant brought up several arguments in support of her request for annulment of the decision.

13. Firstly, she argues that the decision was not taken in writing as required by Article 9.2 of the CPR. The circumstance of the decision having been sent by email might not meet the condition of notification in writing. Appellant submits that she should have received an original copy of the contested decision by mail. This rule is rooted in particular in the Vienna Convention on International Treaties and applicable national law.

14. Secondly, appellant criticizes the Administration for terminating her contract without checking whether there was a chance she would be fit to resume working at some stage. Extended sick leave was not thought to be legal grounds for termination under Article 9.1 of the CPR. According to appellant, the Administration should have undertaken an adversarial procedure with her prior to taking the decision on termination.

15. Thirdly, appellant argues that the Administration could only take its decision by giving the 180-day notice period mentioned in Articles 10.3 and 10.4 of the CPR and

Article 9 of her employment contract.

16. Fourthly, appellant criticizes the procedure applied to her, arguing that the decision derived from a biased procedure in which the Administration neglected its duty of care by failing to consider her state of health.

17. Fifthly, the disputed decision was thought to be illegally retroactive, since it had been taken on 16 February but with effect from the previous 5 February.

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

18. Without disputing the admissibility of the appeal, respondent dismisses all the arguments therein and requests that it be declared groundless.

19. The Administration recalls that the contested decision was written and signed, that it was sent to appellant in an email containing the scanned version of the signed decision, and that appellant had received it. In its view, Article 9.2 of the CPR does not require an original document to be sent, and it refutes any invocation of national laws, since only the NATO CPR is applicable to the employment relationship between NATO and its staff members. Moreover, it indicated, the letter was also mailed to the staff member at the last known address that the Administration had for her.

20. With regard to the supposed obligation for the Administration to check whether the staff member on extended sick leave was about to be fit to resume working, respondent denies that there is any possibility of enquiring about the nature of the illness on which the extended sick leave was based, since this is prohibited by medical confidentiality. Article 45.7.1 of the CPR provides for an automatic outcome when the 21-month period of extended sick leave elapses; after that period, the Administration is required to terminate the contract of the staff member on extended sick leave.

21. Respondent also submits that the 180-day notice period in Articles 10.3 and 10.4 of the CPR and in Article 9 of her contract are inapplicable to the situation of a staff member on extended sick leave for whom the 21-month period of such leave has elapsed. Article 45.7 of the CPR clearly provides that termination is the automatic outcome of the 24-month period of sick leave and then extended sick leave elapsing.

22. With respect to fulfilment of the duty of care, respondent argues that the staff member had never, during her two years' sick leave, asked for a reassignment and was requesting this for the first time in the litigation stage. Respondent submits that it had taken a very understanding attitude toward appellant when family-related difficulties arose. The Administration refutes that the staff member had truly intended to resume working and mentions, in support of that, the medical certificates she continued sending to the Administration for periods after the notification of the contested decision to terminate her contract. Moreover, the allegations of harassment by a colleague during her previous assignment in Ramstein were unfounded.

23. As for appellant's request for an invalidity pension, respondent argues that this request had never been discussed in the pre-litigation phase, and appellant had never mentioned a possible permanent invalidity prior to the end of her contract.

## D. Considerations and conclusions

### *(i) On the written character of the contested decision*

24. Under Article 9.2 of the CPR: *"The termination of a contract shall be notified in writing to the staff member concerned."* Appellant claims that sending and receiving the contested decision by email violate this provision. Appellant is confusing two concepts.

25. First is the form in which the decision was taken. The requirement for a written decision is in opposition to a purely verbal decision (see Appeals Board Decision no. 402, dated 12 December 2000). The decision must be written in order to give material form to the existence of the decision, specify the content of it, and authenticate it with a date and a signature. In the present case, the decision was indeed written. The material form of this decision is an email from the Human Resources Branch Chief stating that the General Manager had taken the decision to terminate appellant's contract. This email specifies its scope, legal foundation and grounds.

26. Second is the form in which the decision was notified. The conditions of notification of a decision only affect the legality of the decision insofar as they pinpoint the starting point of the appeal and allow any retroactivity to be determined. Notification by email does not break any rules, especially not Article 9.2 of the CPR: a decision may be notified by handover in person, by mail, by fax or by email. The concept of email is not in opposition to the concept of a written document; it is only a means of transmission of a written document. In this case, on 17 February 2015 appellant received a scanned copy (in pdf) of the letter of 16 February containing the contested decision.

27. Thus notification by email of a written document does not violate the provisions of Article 9.2 of the CPR, which merely demand that the decision be taken in writing but do not require the original document to be sent to the staff member whose contract was terminated.

### *(ii) Prior procedure, notice period, effective date of the termination decision*

28. Next, appellant argues that the Administration should have undertaken an adversarial procedure with her prior to terminating her employment.

29. Under Article 45.7.1 of the CPR:

> 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 or by the invalidity board set up under the Coordinated Pension Scheme, as appropriate, or until the end of the calendar month in which they reach the age of 65, whichever is the sooner. [...] The sick leave of staff members who have a relapse within 2 months of having resumed their duties will not be considered as interrupted.

And under Article 45.7.3 of the CPR:

> Extended sick leave may be regarded by the Head of the NATO body as grounds for termination of contract on the conditions laid down therein. However, separation will not become effective until one of the conditions as stipulated in Article 45.7.1 is fulfilled.

30. These provisions necessarily complement those in Article 9.1, which state the reasons for termination of the contract of a NATO civilian staff member. The 21 months' extended sick leave is legal grounds for termination of a staff member's contract even though such grounds, given in Article 45.7.3, are not covered in Article 9.1.

31. In this case, appellant was placed on sick leave starting on 5 February 2013, and subsequently on extended sick leave starting on 5 May 2013. Although appellant returned to work from 18 March to 19 April 2014, this was for a shorter period than the two months noted in the last sentence of Article 45.7.1 of the CPR, so her extended sick leave is not considered as interrupted. The 21 months' extended sick leave therefore ended on 5 February 2015, the date when appellant's contract was terminated.

32. Appellant claims that the Administration should have undertaken an adversarial procedure with her prior to terminating her employment. The Tribunal has ruled (see AT Judgment in Case No. 883, paragraph 21, dated 14 November 2013) that the Administration may not use the situation of sick leave as the sole grounds to terminate a staff member's contract effective immediately under Article 45.7.3. In its view, the implementation of that article involves assessing the circumstances of each case and requires that the staff member against whom the Administration is preparing to take such a decision be able to discuss that decision and then receive notification of the decision before it takes effect.

33. The circumstances that the Administration must examine in order to determine if it can terminate a contract when the 21-month extended sick leave period expires is the question of whether a resumption of work in the near future is possible. Thus appellant claims that she was about to resume working when her contract was terminated. Yet this claimed intention is not borne out by the documents in the file, since appellant never explained her absences but rather continued to send in medical certificates for sick leave just before and after the expiration date of the 21-month period on 5 February 2015: certificate dated 26 January 2015 extending the sick leave through 13 February, certificate dated 11 February extending it again through 25 February, and even another certificate sent on 23 February, when she had already received her termination letter, extending the sick leave through 23 March 2015. It is evident that, on 5 February 2015, appellant's return to work was not imminent. Specifically, when she was placed in a situation of challenging her termination upon receiving notification of it on 17 February, appellant responded by sending in a medical certificate extending her extended sick leave once more. This circumstance shows that the Administration could therefore terminate her contract. As in the previous judgment dated 14 November 2013, the effective date must be set as the first day of the month following notification of the decision, *i.e.* 1 March 2015. The claim about the illegal retroactivity of the decision is therefore valid, to that extent.

34. Appellant argues that the Administration could only take its decision by giving the 180-day notice period mentioned in Articles 10.3 and 10.4 of the CPR and Article 9 of her employment contract. The above-mentioned Tribunal judgment of 14 November 2013 found that the rules on notice periods – both those in the CPR and the reminder in the contract of the staff member who is subject to the provisions of the CPR – are inapplicable to the termination of a staff member who reaches the end of a 21-month extended sick leave period (see NATO Appeals Board Decisions nos. 839-863-864 dated 7 February 2013 and AT judgment in Case No. 883, paragraph 24, dated 14 November 2013). The procedure for termination for extended sick leave follows specific rules that do not leave any room for the notice period given to a staff member in an ordinary situation; in a way, the 21-month period in Article 45.7.1 of the CPR is in itself a notice period known by the staff member.

***(iii) Neglect of the duty of care***

35. Appellant criticizes the procedure applied to her, suggesting that respondent neglected its duty of care. To begin with, sources of national law must be set aside since the only law applicable here is the law derived from the CPR and the texts used in application thereof. During appellant's two-year period of sick leave followed by extended sick leave, the Administration tried to spare appellant from coming in to work by offering her authorized absences for family reasons.

36. Appellant submits that the Administration had tried to trick her by making no contact with her in order to surprise her with the termination decision. But as has been presented above, the Administration considered quite rightly that, as of 5 February 2015, appellant's return to work was not imminent.

37. If the Tribunal were to acknowledge appellant's line of reasoning regarding her frailty due to her illness, any termination procedure for staff members on extended sick leave would be futile. Yet Article 45.7.3 of the CPR makes this grounds for termination after a 21-month period, without drawing any distinctions as to the seriousness of the illness or the specific situation of the staff member.

38. Finally, the events cited by appellant in connection with her claims of psychological harassment at her previous assignment in Ramstein that started up again when a former colleague from Ramstein took an assignment in Latina are unfounded. They have no effect on the 21-month period after which the Administration must terminate the staff member's contract.

39. Finally, the submissions concerning recognition of her permanent invalidity are inadmissible because they are not directed against a decision by the Administration and were not covered by a pre-litigation procedure.

## E. Costs

40. Article 6.8.2 of Annex IX to the CPR states as follows:

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

41. Given that there were good grounds for only a small part of the submissions in Mrs G's appeal, it is appropriate that she be reimbursed a portion of the amounts that she has claimed for the costs of retaining counsel. The NCIA is therefore ordered to pay €1000 in this connection.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 5 February 2015 is annulled insofar as it took effect before 1 March 2015.
- The NCIA shall pay Mrs G €1.000 in line with Article 6.8.2 of Annex IX to the Civilian Personnel Regulations.
- The remaining submissions in her appeal are dismissed.

Done in Brussels, on 20 April 2016.

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

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

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIVE

10 May 2016 AT-J(2016)0010

**Judgment**

**Joined Cases Nos. 2016/1056-1064**

**B *et al.***

**Appellants**

***v.***

**Supreme Headquarters Allied Powers Europe**

**Respondent**

Brussels, 21 April 2016

Original: English

*Keywords: jurisdiction; staff member; classified documents; NATO HQ Sarajevo.*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook, and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 17 March 2015.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of multiple related appeals by Mr JMB, Mr IDS, Mr JF, Mr KBL, Mr RJM, Mr JOS, Mr DS, Mr ES and Mr LT, dated 28 August 2015 and registered on 9 September 2015, as Cases Nos. 2016/1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, and 1064. Appellants are International Civilian Consultants (ICCs) at NATO Headquarters Sarajevo (NHQSa) seeking recognition of their claim that they are NATO staff members.

2. The appeals included urgent requests for production of numerous restricted or classified NATO documents, many said to be available to appellants but not to their counsels, including appellants' employment contracts and job descriptions. Many of these documents were said to be marked NATO Unclassified (NU). By an Order of 23 September 2015, the Administrative Tribunal requested respondent's views on appellants' counsels' ability to have access to NU documents for purposes of their representation.

3. On 15 October 2015, respondent submitted a response that, *inter alia*, included appellants' contracts and job descriptions; rejected appellants' other requests for access to documents; disputed the appellants' standing and the Tribunal's jurisdiction; and contended that NATO's requirements precluded access to NU materials by appellants' counsels.

4. On 30 October 2015, the Tribunal issued an Order (1) joining the appellants' cases; (2) limiting proceedings at this stage to the question of jurisdiction; (3) authorizing appellants to make a further statement on jurisdiction and to supply documentation regarding measures taken in response to the NATO Civilian Personnel Regulations (CPR)'s pre-litigation requirements by 12 November 2015; and (4) setting the schedule for the further written submissions.

5. Pursuant to this Order, appellants on 12 November 2015 submitted a short statement on jurisdiction and documentation relating to their requests for pre-litigation review. This submission renewed appellants' request for their counsels to be allowed access to a small group of identified documents, stating that the lack of such access interfered with appellants' right to a fair hearing.

6. The respondent's answer, dated 18 December 2015, was registered on 22 December 2015. The appellant's reply, dated 22 January 2016, was registered on the same day. The respondent's rejoinder, dated 26 February 2016, was also registered on the same day.

7. On 4 March 2016, appellants wrote to the Tribunal objecting to respondent's reference in their written materials to provisions of NATO classified Operational Plans (OPLANs) for the Balkans, and seeking access to those documents and authorization to file a further written submission. On 7 March 2016, the Tribunal ordered respondent to advise on declassification of the relevant excerpts and to provide them to the Tribunal by 10 March 2016.

8. On 10 March 2015, respondent wrote to the Tribunal objecting to appellants' request and complaining of prejudice, but separately submitting the particular classified documents at issue to the Tribunal's Registrar *a.i.* utilizing classified channels. However, as these documents were not available to appellants, the Tribunal did not inspect them and informed the parties at the oral hearing that the documents were not part of the case file.

9. The Tribunal's Panel held an oral hearing on 17 March 2016 at NATO Headquarters. It heard arguments by counsels for the appellants and representatives of the respondent, all in the presence of Mrs Laura Maglia, Registrar *a.i.*.

## B. Factual background of the case

10. The material facts relevant to the Tribunal's jurisdiction may be summarized as follows.

11. All of the appellants hold indefinite duration contracts as ICCs at NHQSa. The appellants have been employed at NHQSa for varying lengths of time in varying capacities, but these differences are not relevant to the present proceedings.

12. Appellants' employment contracts, which are documents bearing NATO symbols and the designation NATO UNCLASSIFIED, identify the parties as the appellants and "NATO HQ Sarajevo (Sarajevo Bosnia and Herzegovina)." Each contract provides that "the employment is governed by the provisions of the Balkans Civilian Staff Regulations for Crisis Response Operations (Balkans CSR for CRO HQs CSR) and relevant applicable administrative procedures as in effect at any given time." These Civilian Staff Regulations were referred to in the proceedings as the "Balkan Regulations."

13. The contracts further state that "*the employee will be affiliated to the Balkans Supplementary Health Insurance and to the Balkans Accident Death and Disability Insurance schemes on a mandatory basis*." The contracts do not refer to the CPR.

14. NHQSa has a complicated legal status. Its existence and presence in the Balkans ultimately derive from the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, the "Dayton Accords," as authorized and implemented by successive United Nations (UN) Security Council Resolutions adopted under Chapter VII of the UN Charter. These Security Council resolutions authorize NHQSa's continued presence in Bosnia and Herzegovina, where it performs various functions as directed by the Security Council, including support for the UN's International Criminal Tribunal for the Former Yugoslavia and for certain European Union activities.

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

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

15. Appellants maintain that the ICC category was not lawfully created and contains unauthorized deviations and derogations from the CPR. In response to the Tribunal's question at the hearing, counsel stated that the illegality stems from Preamble Part E (xi) of the CPR, which requires that *"[a]ny NATO body wishing to diverge from these Regulations shall seek Council approval to do so*." Appellants indicate that they know of no Council decision approving any divergences from the CPR by or with respect to NHQSa. They object to references in respondent's written materials to classified OPLANs that are alleged to show such approval but cannot be examined by appellants' counsels.

16. Appellants acknowledge, both in their written materials and at the hearing, that they are not listed among the persons subject to the CPR pursuant to the literal requirements of Part A(i) of the Preamble to the CPR (*i.e.*, international civilian personnel, consultants, and temporary (civilian) personnel). However, they maintain that as their current status is unlawful because it is contrary to the CPR, they are entitled to be regarded as NATO International Civilians (NICs), and to exercise the right of recourse to the Administrative Tribunal as they would were they lawfully engaged as NICs. Thus they should have access to the Tribunal in order to obtain a hearing of their claim that their status lacks proper legal foundation.

17. Appellants urge that Supreme Headquarters Allied Powers Europe (SHAPE) is the proper respondent to their claims, because it has legal personality, while NHQSa does not, and funding for NHQSa, including for the appellants' positions, comes via SHAPE.

18. Appellants contend that, in the absence of recourse to the Tribunal, they have no adequate forum to hear their complaints, as the dispute resolution procedures available to them under the Balkan Regulations are located within the chain of command and are neither disinterested nor able to grant the relief sought. Appellants further maintain that they had insufficient information regarding the possibility of convening administrative boards of inquiry independent of the command to address their complaints.

19. Appellants request that the Tribunal:
- find portions of respondent's reply inadmissible;
- require the production of certain documents listed in an Annex;
- hold that it has jurisdiction to hear the joined cases, or, should it find that it lacks jurisdiction, to state that its judgment creates a legal vacuum and that the Tribunal considers it highly desirable that the competent NATO authorities seek a solution affording the appellants access to a court or to arbitration; and
- rule on any other points, including costs, as submitted in the nine respective appeals.

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

20 Respondent lodges extensive arguments against the Tribunal's jurisdiction to entertain the appeal; its principal arguments are summarized here. Respondent initially contends that the Tribunal does not have jurisdiction to entertain the claims because, as ICCs employed by NHQSa, they do not fall into the categories of persons authorized by the CPR to appeal to the Administrative Tribunal.

21. Respondent points out that under Article 6.2.1 of Annex IX to the CPR, the Tribunal has jurisdiction only with respect to disputes brought by a "staff member" contesting a decision by a "NATO body." Both are defined terms, but appellants' claims do not satisfy either definition. First, under Article 1.1 of Annex IX to the CPR, staff members are those personnel listed in paragraph B(v)(c)-(f) of the CPR's Preamble, that is, international civilian staff, consultants, temporary staff, and seconded staff. Appellants acknowledge that, as ICCs, they not formally fall within any of these categories.

22. Second, respondent contends that NHQSa is not a NATO body for purposes of the CPR. It is not included in the list of NATO bodies at Appendix 2 of Annex IX to the CPR. It does not satisfy the definition of NATO bodies contained in Part B (v)(a) of the CPR Preamble, as it was established pursuant to the Dayton Accords and their implementing Security Council Resolutions, not by a decision of the NATO Council, and is not fully financed through international budgets, as it is partially financed by both NATO and the European Union.

23. Next, respondent argues that it is not the proper respondent, contending that it has no contractual or other legal relationship with appellants, pointing out that their employment contracts were with NHQSa, and that SHAPE has no legal relationship with them.

24. Respondent also denies that appellants have satisfied the CPR's pre-litigation procedures, arguing that there has been no appealable decision. The appellants were previously represented by other counsel who sent a communication to the Secretary General's private secretary raising their concerns about their status. This document was forwarded to SHAPE, with the names of the NHQSa staff members associated with the request removed to respect prior counsel's wish to protect his clients' identities. Respondent contends that such an anonymous request did not satisfy the CPR's requirements, and that, in any case, its response merely contained information and was not a decision having legal effects that would entitle appellants to seek administrative review under the CPR.

25. Respondent additionally urges that appellants had adequate remedies available to them in the form of dispute settlement procedures under the Balkan Regulations, and that they were obliged to utilize those remedies pursuant to the terms of their employment contracts.

26. Respondent further contends that appellants' request – to consider the appellants' claim to status as NATO International Civilians – involves policy considerations that lie outside the competence of the Tribunal.

27. In support of its view that the Tribunal lacks jurisdiction, respondent invokes the NATO Appeals Board's decision in Case No. 732, where the Board concluded that it did not have jurisdiction over a claim brought by an ICC. Appellants deny the relevance of Case No. 732, arguing that the appellant in that case did not challenge the legality of his ICC Status.

28. Respondent requests that the Tribunal:
- dismiss the joined cases on all points and find that the joined cases are clearly outside its jurisdiction.

## D. Considerations and conclusions

29. Pursuant to the Tribunal's Order of 30 October 2015, the sole issue now before the Tribunal is its jurisdiction to consider the appellants' claims.

30. In considering this issue, the Tribunal has been mindful that it is a body of limited jurisdiction. Article 6.2.3 of Annex IX to the CPR directs that *"[t]he Tribunal shall not have any powers beyond those conferred under this Annex.*" Under Article 6.2.1 of Annex IX, "[*t]he Tribunal shall decide any individual dispute brought by a staff member ... concerning the legality of a decision taken by the Head of a NATO body* ..." Under Article 1.1 of Annex IX, "*[t]he term 'staff member' refers to the personnel included in the categories listed in paragraph B(v)(c), (d), (e) and (f) of the Preamble to the CPRs*." As noted above, these provisions of the Preamble identify international civilian staff, consultants, temporary staff, and seconded staff as staff members.

31. Appellants freely acknowledged throughout these proceedings that they are not staff members within the literal scope of these CPR provisions. The essence of their claim is that they ought to be staff members, because their current status as ICCs has not been created in accordance with the CPR's requirements. Accordingly, they should be entitled to have recourse to the Tribunal on the same basis as staff members, because that is what they would be had their status been properly created.

32. Notwithstanding appellants' request that the Tribunal now hold that it has jurisdiction, the essence of their position seems to be that the Tribunal should assume that they are right on the merits of their claims, and that further merits proceedings will confirm that they are indeed entitled to recognition as NATO international civilian staff members authorized to appeal to the Tribunal. This argument, while ingenious, is too much to ask of the Tribunal. As noted, this is a Tribunal of clearly defined and limited jurisdiction. The appellants are not NATO staff members as that status is clearly defined under the CPR. They therefore do not satisfy the CPR's clear and mandatory requirements for bringing an appeal to the Administrative Tribunal.

33. Like the Appeals Board in Case No. 732, the Tribunal finds that it does not have jurisdiction to entertain claims by the appellants – as ICCs and not NATO staff members – against the respondent. Given this determination, the Tribunal need not rule on the additional objections to jurisdiction and admissibility raised by the respondent.

34. Appellants invite the Tribunal, should it find that it lacks jurisdiction, to state that its judgment creates a legal vacuum, and in effect to urge the competent NATO authorities to seek a solution affording the appellants access to a court or to arbitration. The Tribunal is not prepared to do so. The adequacy of the remedies available under the Balkan Regulations, or the possibility of creating an administrative board of inquiry to consider appellants' grievances, are matters going more to the merits of appellants' claims than to the Tribunal's jurisdiction. Moreover, these matters were not addressed in the written and oral proceedings in sufficient detail to support the conclusions called for by appellants. Indeed, the Tribunal was informed at the hearing that appellants, while protesting their lack of information regarding the possibility of an administrative board of inquiry to consider their grievances, had not requested or considered the regulations applicable to such boards.

35. Much was said during the proceedings regarding the appellants' claimed inability to present their claims because of their own and their counsels' inability to access certain controlled or classified NATO documents. In this regard, appellant's counsels argued at the hearing that they had no responsibility to apply to their national authorities for security clearances to facilitate access to such materials, contending, *inter alia*, that the suggestion that they do so contravened Article 14 of the International Covenant on Civil and Political Rights. Whatever the merits of that view, the Tribunal notes that, in response to appellants' requests, respondent obtained and provided to appellants their contracts and job descriptions as well as excerpts from a number of other requested documents. It also appears to the Tribunal that many of the requested documents go largely, if not exclusively, to the merits of appellants' claims. In this regard, there was considerable argument regarding access to certain classified OPLANS said by respondent to show in some manner the NATO Council's approval of appellants' contested status. The Tribunal notes that if these particular documents (which the Tribunal has not read and which are not part of the case file) are as described by respondent, they go to the merits of appellants' claims, not to the issue of jurisdiction.

## E. Costs

36. 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…

37. The Tribunal recalls that it arrives at the same conclusion as the Appeals Board in Decision No. 732 (*cf* paragraph 33 *supra*) and that therefore no good grounds existed for the present appeals. The appeal being dismissed, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed for lack of jurisdiction.

Done in Brussels, on 21 April 2016.

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

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

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 May 2016 AT-J(2016)0011

# Judgment

## Case No. 2015/1066

**MDP**
**Appellant**

***v.***

**NATO Joint Force Training Centre**
**Respondent**

Brussels, 27 April 2016

Original: English

*Keywords: Article 26 CPR prior to amendment 21; installation allowance; exception; special hardship in individual cases; good administration; equal treatment and non-discrimination; privacy.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 18 March 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Joint Force Training Centre – Bydgoszcz/Poland (NATO JFTC), dated 4 October 2015 and registered on 9 October 2015 under Case No. 2015/1066, by Mr MDP, a staff officer with the NATO JFTC.

2. The appellant seeks annulment of the respondent's decision denying the installation allowance but authorizing an exception for special hardship provided for in Article 26.3 of the NATO Civilian Personnel Regulations (CPR) in the version applicable to the current dispute, prior to amendment 21 to the CPR which took effect on 1st July 2015.

3. The answer of the respondent to this appeal, dated 9 December 2015, was registered on 18 December 2015. The reply of the appellant, dated 21 January 2016, was registered on 25 January 2016. The rejoinder of the respondent, dated 25 February 2016, was registered on the same day.

4. The Tribunal's Panel held an oral hearing on 18 March 2016 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence 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. Appellant signed on 26 November 2013 a three-year definite duration contract with JFTC as a staff officer. The contract took effect on 1st May 2014.

7. As a military staff member with the JFTC, appellant was informed by respondent's email sent on 18 March 2014 about the regime applicable to his situation regarding the installation and expatriation allowances. In this email, it was mentioned that the appellant's previous accommodation in the duty station in Poland was considered as a temporary domicile in the vicinity of the NATO body, and consequently appellant had to move out of the temporary domicile to a new place of residence within a certain period of time, otherwise the requested allowances would not be granted.

8. After several exchanges with appellant, who expressed his disagreement with this specific constraint, respondent confirmed its decision by email sent on 8 May 2014.

9. In response to the above-mentioned respondent's decisions, appellant initially submitted a mediation request dated 13 May 2014 in accordance with Article 3 of

Annex IX to the CPR. However, having been informed by respondent about the necessity of completing the pre-litigation process provided for by the CPR, on 4 June 2014 appellant formulated a first request for an administrative review of the above-mentioned decision by respondent dated 8 May 2014. In this request, appellant challenged *inter alia* the requirement invoked by respondent that he find a new place of residence in Poland in order to be granted the full installation and expatriation allowance as provided for in the CPR.

10. By decision dated 2 July 2014, respondent rejected the first request by appellant for an administrative review, confirming its decision and stressing that according to the implementing instructions for the regime applicable to this situation, "*if the staff member makes no change of residence and converts his temporary domicile into the established residence, he will not be eligible for installation allowance*".

11. By internal correspondence dated 7 July 2014, appellant requested a copy of "*any treaties, laws and regulations*" and, in particular a copy of the "*implementing instructions*" to which respondent referred in its decision of 2 July 2014 in relation to the applicable regime for granting the installation allowance.

12. By respondent's email sent on 9 July 2014, appellant was informed about the possibility of requesting to be granted an exception under the installation allowance regime provided for in Article 26.3 of the CPR and therefore of submitting a detailed hardship case. In this email, it stressed that the peculiar situation of appellant in relation to the one-year contractual commitment with his landlord as a private individual made it possible to envisage such a possibility.

13. By internal correspondence dated 11 July 2014, respondent communicated to appellant the requested document AP-WP(2002)9 dated 17 July 2002 and entitled "Advisory Panel on Administration, Installation Allowance, Note by the Secretary".

14. By internal correspondence dated 10 August 2014, appellant requested to be granted the exception in the installation allowance regime provided for in Article 26.3 of the CPR. In this request, appellant considered that in the event that respondent authorized this exception, he could be granted the full installation allowance.

15. After having exchanged several emails with appellant on this issue, by a decision dated 31 October 2014, respondent granted appellant the exception to the application of Article 26.1 of the CPR as a result of his special hardship.

16. On 3 and 4 December 2014, appellant submitted respectively a request for modification of the terms of the installation allowance and a complaint relating to the eligibility criteria for the requested installation allowance. For appellant, the authorized exception was flawed because respondent determined under Article 26.2 of the CPR the specific rates and conditions of this allowance, without granting the full allowance to appellant, however.

17. By a new decision dated 18 December 2014, respondent confirmed that appellant was not eligible for the requested installation allowance because he had not changed his residence. However, given the appellant's specific hardship, respondent

decided to modify the previous above-mentioned decision dated 31 October 2014, extending the relief to be granted under the regime of Article 26.3 of the CPR and applying the maximum installation allowance entitlement as set out in Article 26.2 of the CPR.

18. By various letters dated on 12 and 29 January 2015, appellant requested further clarifications regarding this last decision by respondent, also invoking the possibility of reaching a final compromise in the dispute.

19. In this regard, by a first letter dated 20 January 2015, confirmed by a second letter dated 10 February 2015, respondent reiterated its previous position that appellant was not eligible for the installation allowance but was authorized to be reimbursed for the expenses that placed him in a situation of special hardship. In the same letter, respondent invited appellant to state whether he accepts the terms of the modified decision.

20. By letter dated 4 March 2015, appellant emphasized his option of continuing the procedure before the Complaints Committee and reserved his final position. Appellant transmitted by letter to respondent dated 7 April 2015 further considerations regarding the installation allowance regime in the framework of his complaint.

21. In its recommendations and conclusions dated 3 July 2015, the Complaints Committee – examining the decision determining the eligibility criteria for appellant's requested installation allowance and the decision modifying the rate and conditions applied to the authorized exception – stated that the decisions of respondent based, *inter alia*, on the document with reference AP-WP(2002)9 dated 17 June 2002 (see *infra* para 13) were unlawful and that appellant should be paid the full installation allowance under the regime provided for by Article 26 of the CPR.

22. Respondent, by decision dated 7 August 2015, decided not to follow the recommendation of the Complaints Committee, confirmed its previous decision not to grant the requested installation allowance under Article 26.1 of the CPR and authorized the hardship exception provided for under Article 26.3 of the CPR. This decision mentions that in addition to the reimbursement decided by respondent in its decision dated 31 October 2014, a number of additional reimbursements of his expenses relating to installation costs would be made.

23. It is under these circumstances that appellant brought the present action before the Tribunal.

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

### *(i) Appellant's contentions*

24. Firstly, appellant argues that the decision refusing to grant the installation allowance under Article 26.1 of the CPR is unlawful because this decision does not

comply with the requirement provided for by this provision. Appellant considers that he fulfils the required conditions, as confirmed by the Complaints Committee report.

25. Insofar the challenged decision refusing to grant the installation allowance under Article 26.1 of the CPR is exclusively based on a non-public document with reference AP-WP(2002)9, a working paper which provides, in fact, that the former military staff must change their residence in order to be granted the installation allowance, appellant claims that this decision violates the principles of fairness and transparency.

26. In particular, appellant considers that, even if this internal documentation could be considered valid, respondent did not comply with the requirements deriving from the principle of good administration. Indeed, appellant was not informed by respondent in an accurate and timely manner under the terms of his employment about the specific applicable conditions for the granting of the installation allowance, despite several meetings with respondent before his contract took effect. In a meeting with a human resources staff officer in January 2014, the latter at no time told the appellant that he would need to find a different place to live, otherwise he would not be qualified to receive the requested allowance. It was only on 18 March 2014 that respondent clarified its position on this issue. Furthermore, the document on the basis of which the decision refusing to grant the installation allowance to appellant is based was never transmitted to him when he signed his contact.

27. In addition, with a set of arguments which could be understood as a plea of illegality challenging the document with reference AP-WP(2002)9, appellant considers that the adoption of this document is unlawful and consequently the decision based exclusively on this internal documentation is also unlawful. As a working paper, this old document dated 2002 could not be considered, in any event, as a source containing rules superior to the requirement provided for by Article 26.1 of the CPR. As this document provides a supplementary condition for granting the installation allowance not provided for by the CPR, it is entirely unlawful and directly violates Article 26.1 of the CPR. In the view of appellant, this analysis is fully confirmed by the recommendations and conclusions of the Complaints Committee's report.

28. Secondly, appellant stresses that the respondent's decisions modifying the conditions and rates of payment of the installation allowance on the basis of the exception provided by Article 26.3 of the CPR is also unlawful. Article 26.3 of the CPR allows the administration to authorize the exception of the installation allowance as a whole, not to modify the rates and conditions of payment of this allowance in case of a special individual hardship. This derives from the spirit and the logic of the provisions of Articles 26.1 to 26.3 of the CPR.

29. In any event, the modification of the rate and conditions of payment for the reimbursement violates the purpose of the installation allowance, which aims to lessen the financial impact associated with establishing a residence. This is not the case precisely when the rates and conditions of payment are determined by respondent in the framework of an exception authorized under Article 26.3 of the CPR. Indeed, the existing reimbursement regime implies that the staff member concerned had sufficient liquidity to pay the expenses for establishing his residence, with the effective

reimbursement pending for a long time. The same conclusion also concerns the reimbursement of the Value Added Tax (VAT).

30. Thirdly, appellant considers that the respondent's decision to modify the rate and conditions of payment of the installation allowance is discriminatory with respect to other staff members who received the installation allowance without having the obligation to provide documentation of the accounting of the expenses to be reimbursed. In this regard, appellant contends that the obligation to submit, for reimbursement purposes, personal information such as his shopping preferences and habits violates his privacy.

31. Finally, appellant requests that the respondent have access to several documents in relation to the emolument policy applicable to the staff members.

32. In these conditions, appellant seeks:
- annulment of the decision refusing to appellant the installation allowance under Article 26.1 of the CPR;
- annulment of the decision modifying the rate and conditions of payment of the installation allowance under the authorized exception for individual hardship provided for by Article 26.3 of the CPR;
- payment of the installation allowance in accordance with Article 26.2 of the CPR;
- reimbursement of the cost of the delivery service to transfer the hard copy of the present appeal to the Tribunal; and
- reimbursement for a legal counsel's consultation fee.

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

33. Firstly, respondent objects that appellant did not, as a military staff member assigned to JFTC, fulfil the conditions of entitlement to the said allowance provided for by Article 26.1 of the CPR. Appellant has been temporarily present in the local area of JFTC, fulfilling the condition concerning an established residence more than 100 km from the place of his residence, but he did not change his actual physical residence in the local vicinity of JFTC upon accepting the appointment in order to be eligible for the installation allowance. This interpretation clearly results from Article 26.1 of the CPR and is confirmed by the document AP-WP(2002)9. In this regard, respondent is of the view that, by performing certain other physical or legal actions, appellant could not fulfil the above-mentioned second condition provided for by the CPR.

34. In any event, respondent stresses that the document AP-WP(2002)9 is fully compliant with Article 26.1 of the CPR. In particular, respondent recalls that pursuant to the Preamble of the CPR, for matters not covered by the administrative regulations, the Heads of NATO bodies will consult the Advisory Panel on Administration before taking their decision. This has been precisely the case with the consultation of the document AP-WP(2002)9, since respondent based its decision refusing to grant the requested installation allowance on this document. In this regard, respondent argues that the administration has, in any case, and as it results from NATO Appeals Board decisions, the obligation to consult any available guidance on interpretation issued by the Advisory Panel before adopting a final decision.

35. Concerning the plea relating to the lack of information about the application of the document AP-WP(2002)9 in relation to the terms of appellant's employment, respondent considers that appellant was informed in a timely manner about the applicable rules relating to the installation allowance and the condition of moving out of his temporary residence in order to be granted the said allowance. In this regard, appellant requested further information about this issue, but before receiving the answer to his requests, he decided himself to renew his existing lease and consequently rendered himself ineligible for this allowance. From that perspective, respondent considers that it observed the requirements deriving from the principle of good administration and that there has not been discrimination against appellant.

36. Secondly, respondent deems that the exception authorized under Article 26.3 of the CPR was adopted in full compliance with the requirement provided for by this provision. Indeed, using the discretionary power conferred by the CPR in this matter and after having declared the appellant ineligible for the requested allowance, respondent granted an exception on the basis of the appellant's specific and individual hardship and determined the method of financial compensation by setting transparent, fair conditions tailored to this hardship.

37. Concerning in particular the full application of the regime provided for in Article 26.2 of the CPR in case of an exception authorized under Article 26.3 of the CPR, respondent argues that appellant could not request the full application of Article 26.2 of the CPR because this provision concerns only staff members eligible to be granted this allowance.

38. Thirdly, in view of the authorized exception granted to appellant on the basis of his individual hardship under Article 26.3 of the CPR, no violation of the principle of non-discrimination argued by appellant could be established.

39. Finally, in relation to appellant's claimed violation of his right to privacy, respondent considers that the access of other staff members to appellant's data is limited to those who have a need to know in order to carry out their duties. From that perspective, no violation of his privacy could be asserted.

40. In these conditions, respondent seeks that the Tribunal:
- dismiss the appeal as unfounded and without merit; dismiss the appeal as to the relief and compensation sought; and
- dismiss the claimed costs as undocumented and unjustified.

## D. Considerations

41. To start with, the Tribunal observes that, after a particularly long pre-litigation procedure, given the mutual arrangement for temporary suspension of this procedure at different stages, appellant requested the review (i) of various respondent's decisions denying eligibility for the installation allowance under Article 26.1 of the CPR and (ii) of the decisions modifying the rates and conditions for payment adopted after an exception authorized under Article 26.3 of the CPR.

42. In a spirit of openness and given the fact that appellant is not assisted by a lawyer, the Tribunal considers that, under the particular circumstances of the case, the pre-litigation procedure has been respected and, consequently, the appeal must be declared admissible.

*On the subject matter of the claims for annulment*

43. In his action, appellant did not formally identify the specifically challenged acts, except in his reply, where he mentioned that his request was aimed at the review of the respondent's decision dated 8 May 2014.

44. Firstly, the Tribunal observes that appellant challenged the respondent's successive decisions refusing to grant him the installation allowance as provided for in Article 26.1 of the CPR on the grounds that these decisions were motivated by rules in an internal, not public, document with reference AP-WP(2002)9.

45. After a long exchange of emails between the parties on this issue, respondent recalled in an email sent on 9 July 2014 that appellant was ineligible for the installation allowance under Article 26.1 of the CPR. However, respondent stressed that appellant could request the exception provided for by Article 26.3 of the CPR on the basis of his special and individual hardship and, in this respect, he was invited to formally formulate such an application.

46. Appellant decided to express such application in a letter dated 10 August 2014, which was accepted by respondent in successive decisions dated 31 October 2014, 18 December 2014, and 7 August 2015 which successively increased the reimbursement under the authorized exception.

47. With the last decision dated 7 August 2015 (challenged decision), respondent decided to confirm its previous decision about the ineligibility of appellant for the requested installation allowance under Article 26.1 of the CPR and to authorize the granting to appellant of the hardship exception provided for under Article 26.3 of the CPR.

48. Secondly, the Tribunal observes that appellant contested the conditions whereby the challenged decision authorized this exception pursuant to Article 26.3 of the CPR; nevertheless he simultaneously continued to question the legality of the respondent's decision refusing to entitle him to the installation allowance under Article 26.1 of the CPR. In addition, appellant continued the procedure before the Complaints Committee requesting the review of these decisions. In response to a question by the Tribunal during the hearing, appellant continues to claim that he challenged both decisions before the Tribunal.

49. The Tribunal states that in his application dated 10 August 2014, appellant requests the authorization of the exception provided for in Article 26.3 of the CPR, demanding to be granted the full installation allowance because of his specific hardship under the exceptional regime provided for in this provision. By consequently modifying his initial application to request the authorization for the exception provided for by this article, appellant recognized in fact that he did not fulfil the conditions of eligibility for

the ordinary regime of Article 26.1 of the CPR. Having also been reimbursed for several expenses under the exceptional regime authorized by respondent under Article 26.3 of the CPR, appellant could not, in good faith, continue simultaneously to claim before the Tribunal that the respondent's decision refusing the installation allowance under Article 26.1 of the CPR was illegal.

50. In these circumstances, the Tribunal considers that the present action is directed against the challenged decision insofar as this decision authorizes the hardship exception provided for in Article 26.3 of the CPR.

*On the legality of the decision authorizing the exception under Article 26.3 of the CPR*

51. Article 26.1 of the CPR, entitled "Eligibility", provided in paragraph 1, such as is applicable in the present litigation, prior to amendment 21, that: "*An installation allowance shall be granted to members of the staff whose established residence was more that 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*". Article 26.2 of the CPR provides for the rate and conditions of payment of the installation allowance for staff members eligible to receive this allowance under Article 26.1 of the CPR.

52. Pursuant to Article 26.3 of the CPR, entitled "Exceptions", "*in cases where the application of these provisions would cause special hardship in individual cases, Heads of NATO bodies may authorize an exception*".

53. Although appellant sets out in his action criticisms and comments concerning the decision which he seeks to have annulled, without necessarily referring formally and clearly to specific grounds for annulment, the Tribunal considers itself to be in a position to rule on the action and to assess the legality of the challenged decision. In this regard, the examination of appellant's arguments and contentions in a spirit of openness allows the Tribunal to identify three different pleas invoked against the challenged decision.

54. By his first plea, appellant argues that the challenged decision violates the provisions of Article 26.3 of the CPR because the authorized exception in this provision implies the full granting of the installation allowance under the conditions of Article 26.2 of the CPR. Therefore, having modified the rate and conditions provided for in Article 26.2 of the CPR and having limited the full payment of the installation allowance with this practice, the challenged decision violated Article 26.3 of the CPR

55. This plea must be rejected. As it clearly results from Article 26.3 of the CPR, the authorized exception under this provision is exclusively accorded in case of "special hardship". In this regard, as it results from the same provision, the concerned administration has broad discretion to authorize the requested exception "in individual cases".

56. In contrast to the appellant's contention, the exception under this article is authorized on the basis of the special hardship incurred by the staff member, hardship

which the administration has the discretion to identify, and not on the basis of an accounting of the installation allowance in accordance with the rates and conditions provided for in Article 26.2 of the CPR. From that perspective, the eligibility or ineligibility for the installation allowance is irrelevant where the administration authorizes an exception under Article 26.3 of the CPR on the basis of the special hardship incurred by the staff member.

57. In this regard, in compliance with the requirements of good administration, respondent authorized in the challenged decision the exception under Article 26.3 of the CPR and validated the reimbursement of several expenses made by appellant.

58. In addition, and as results from the consecutive respondent's decisions dated 31 October 2014, 18 December 2014 and 7 August 2015 (challenged decision), respondent examined the individual case of appellant and his successive requests for reimbursement, expanding the scope of the authorized exception in order to restore the special hardship incurred by appellant. From that perspective respondent fully complied with its duty of care toward its staff. This duty implies, in particular, that when the administration takes a decision concerning the situation of a staff member, the competent service should take into consideration all the factors which may affect its decision, and when doing so it should take into account not only the interests of the service but also those of the staff member concerned. This is precisely the case in the present dispute.

59. In this regard, appellant argues that in the challenged decision, a large number of his expenses did not fall under the regime of the authorized exception for his special hardship, although the full payment of the installation allowance could cover these expenses. This contention must also be rejected.

60. The Tribunal observes that appellant did not claim that respondent, in its broad discretion to qualify the eligibility of the expenses to be reimbursed under the challenged decision, did not comply in particular with the obligation to examine carefully and impartially all the matters relevant to his special hardship. Instead, he mainly argued that under the regime of Article 26.3 of the CPR, he has to receive the full installation allowance, the payment of which could cover his expenses related to his established residence, including expenses which are not eligible under the regime of Article 26.3 of the CPR.

61. Appellant also argues that the reimbursement of the expenses incurred under the regime of Article 26.3 of the CPR implies that the concerned staff member has in his possession liquidities to cover his expenses while awaiting effective reimbursement after a long period of time. According to appellant, this practice causes the staff member specific hardship, although the aim of the installation allowance is to allow this member to establish his residence in his place of employment precisely in order to cover the necessary related expenses.

62. This contention must also be rejected. The aim of the exception provided for by Article 26.3 of the CPR is to authorize the administration to assist a staff member in view of his specific hardship in relation to establishing his residence by reimbursing

some of the expenses incurred – as was the case in the present dispute – and not to cover all the expenses in relation to this.

63. By a second plea, appellant argues that the challenged decision violates the principle of non-discrimination because other staff members benefit from the installation allowance regime without being required to provide documentation attesting to and accounting for the expenses to be reimbursed.

64. It should be recalled that the principle of equal treatment and the principle of non-discrimination oblige the administration not to treat the same situations differently.

65. Apart from general considerations, appellant has not provided any proof of the discrimination of which he considers himself to have been a victim in relation to the authorization of the exception granted under Article 26.3 of the CPR. Further, appellant did not invoke any specific contentions demonstrating the existence of any discrimination against him. He simply invokes the different legal situations put in place under Articles 26.1 and 26.3 of the CPR in order to make a plea of discrimination. In these conditions, the present plea must, in any event, be rejected.

66. By a third plea, appellant argues that the challenged decision – which allows the accounting of the eligible expenses and thus the communication to third persons of his personal data and personal information – has violated his right to privacy.

67. This plea must also be rejected. The Tribunal recalls that the decision adopted under the authorization provided for in Article 26.3 of the CPR implies that the administration has to process the personal data of a given staff member in order to evaluate the eligibility of the requested reimbursement. Moreover, these reimbursements are made, as provided for by this provision, on the basis of the special hardship in “individual cases”.

68. From that perspective, the Tribunal observes that the processing of appellant’s data and related personal information on the basis of the challenged decision has been adequately handled by respondent, in full compliance with the requirement provided for by the CPR.

69. Furthermore, appellant did not invoke a specific violation of his privacy by the respondent’s services during the performance of their duties on the basis of the challenged decision but instead he focuses exclusively, and as a matter of principle, on the fact that the certain staff members of the administration had access to his personal data on the basis of the challenged decision.

70. It results that the last plea invoked by appellant in his contentions for cancellation must be also rejected as unfounded.

71. It follows from all the foregoing that the submissions for cancellation must be dismissed as groundless; consequently, the appeal must be dismissed in its entirety with no need to rule on the request for access to the respondent’s documentation formulated by appellant in the present appeal.

## E. Costs

72. 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…

73. The appeal being dismissed as there are no good grounds for it, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal of Mr DP is dismissed.

Done in Brussels, on 27 April 2016.

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

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

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 May 2016 AT-J(2016)0012

# Judgment

## Case No. 2015/1065

**SW**

**Appellant**

***v.***

**NATO Communications and Information Agency**

**Respondent**

Brussels, 27 April 2016

Original: French

*Keywords: renewal of definite duration contract; ability to renew it for a duration different from that of the initial contract.*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 17 March 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 11 September 2015 and registered on 25 September 2015, by Mrs SW, seeking:

- cancellation of the definite duration contract offered to appellant on 2 June 2015 insofar as it covers just one year's employment;
- cancellation of the decision of 14 July 2015 whereby the NATO Communications and Information Agency (NCIA) General Manager dismissed her complaint;
- compensation for material and non-material damage, assessed at €10.000; and
- reimbursement of the costs incurred for her defence.

2. The Comments of the respondent, dated 24 November 2015, were registered on 4 December 2015. The Reply of the appellant, dated 11 January 2016, was registered on 14 January 2016. A rejoinder, dated 15 February 2016, was produced by the respondent on 19 February 2016.

3. The Tribunal's Panel held an oral hearing at NATO Headquarters on 17 March 2016. It heard arguments by the parties, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar *a.i*.

## B. Factual background of the case

4. Appellant joined the NCSA in 2006, but her contract was not renewed when it expired in 2009. She lodged an appeal with the NATO Appeals Board which, in Decision no. 766 dated 9 July 2010, ruled against the contract termination on 9 July 2010. In line with the Appeals Board's decision, which found that as of the date of its own decision the contract would in any event have expired, appellant was not reinstated in her post but rather was awarded compensation.

5. On 12 December 2011, appellant was recruited at NACMA, an agency that was incorporated into the NCIA in 2012, as a finance senior assistant on a three-year definite duration contract (Article 5.1.1). The job description indicated that the three-year contract "may be renewed ... for a further period of three years". On 3 April 2014, her contract was renewed for one year, from 12 December 2014 to 11 December 2015, owing to concerns about her professional skills and her interpersonal behaviour. Her administration ordered her on 5 November 2014 (one month before her first contract expired) to undergo coaching to improve her professional behaviour toward her colleagues.

6. On 28 May 2015, the Director of Human Resources took the decision to offer appellant a second contract renewal of just one year's duration, from 12 December 2015 to 11 December 2016. This is the decision challenged by appellant in the present case. On 1 July 2015 she entered a complaint, under Article 4.1 of Annex IX to the Civilian Personnel Regulations (CPR), against the decision on renewal of the contract insofar as it was only one year in duration. The NCIA General Manager dismissed this complaint on 14 July 2015.

7. On 11 September 2015, appellant lodged an appeal with the NATO Administrative Tribunal.

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

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

8. Firstly, appellant argues that the contested decision violates Article 5.5.2 of the CPR and Article 4.3.4 of the Agency's Directive 2.1 on Contract Policy. She notes that because her contract was signed in 2011, i.e. prior to 1 April 2012, it is the provisions in the previous version of Articles 5.1 through 5.3 that are applicable. She submits that her contract was an initial contract governed by Article 5.1.1 of the CPR. For subsequent contracts, Article 5.5.2 states that following satisfactory performance, the Head of the NATO body may offer an indefinite duration contract. From this appellant infers that if the Administration wished to maintain the employment relationship with her, it had no other choice but to offer her an indefinite duration contract.

9. Secondly, appellant argues that the contested decision violates the Administration's undertakings in vacancy notice NAC 96-221. The vacancy notice from 2011 indicated that the three-year contract "may be renewed by mutual consent for a further period of three years". For appellant, this created an entitlement for the incumbent of the post, and the Administration could not offer her employment of less than three years' duration.

10. Thirdly, appellant criticizes the performance assessment process as having been improperly conducted, in violation of Articles 55.3 and 55.4 of the CPR. Appellant cites two judgments by the Administrative Tribunal of the International Labour Organization (ILOAT judgment no. 2414 dated 2 February 2005; no. 3252 dated 6 November 2013) which found that an organization "cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance". In her view, the performance assessment process did not follow the rules in Article 55 of the CPR: no objective had been set for her; her assessment report for 2013 was only given to her on 3 September 2015; supposedly assessments had been done but not in the forms foreseen by the CPR; third parties had been questioned and had performed the assessment. Moreover, this assessment was performed with no regard for the principle of adversariality of the process.

11. Fourthly, appellant claims that the decision violated the principle of adversariality:

the draft decision should have been presented to the staff member so that she could provide her comments on it, and this was not done.

12. Fifthly, appellant invokes an obvious error of judgment in not having offered her a longer contract. Appellant claims that her excellent performance should have resulted in her being offered a contract of longer duration.

13. Finally, the decision was thought to be illegal because no explanation had been given for it.

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

14. Respondent interprets Article 5.5.3 of the CPR as giving it substantial flexibility in the follow-up to the employment relationship after the first period: either termination, or a definite duration contract of no imposed duration. In its view, it had total freedom to offer her a new definite duration contract when the first contract expired. Both CPR Article 5.5.3 and the Agency's Directive on Contract Policy, applicable from 1 January 2013, give it this power.

15. With regard to completing the staff member's performance assessment before deciding on her ongoing employment, respondent argues that the assessment process for 2014 was ongoing, since under the rules it was scheduled to be completed by 31 May of the following year. Although the assessment process was not finished as of the date of the contested decision, this delay resulted solely from the staff member's refusal to meet with her manager and sign her assessment report.

16. The Administration counters appellant's claim that she had never been informed of her poor professional performance by noting the many warnings given to her about her interpersonal problems with her colleagues, the fact that the first three-year contract had only been renewed for one year, and the fact that she had been given coaching sessions by an external consultant, a process she had voluntarily undertaken.

17. Respondent notes that a decision to offer a one-year contract was not one of the decisions that required explanation.

18. The Administration also notes that it had put a great deal of effort into trying to facilitate appellant's working relationship and help her make improvements, but she did not take the opportunities extended to her.

19. With regard to the alleged damage suffered, the Administration denies that any existed.

## D. Considerations and conclusions

20. What is at the heart of this case is how the first contract signed with appellant in December 2011 should be qualified. Appellant is basing her entire argument on the circumstance of its being an initial contract to which Articles 5.1 and 5.5.2 of the CPR

apply. From this she draws the conclusion that the only two options available to the Administration at the end of the initial contract were termination of the contractual relationship or an indefinite duration contract. If the Administration were to choose to continue the contractual relationship, it could only do so through an indefinite duration contract.

21. The very wording of the first contract clearly shows that it was not an initial contract but rather a definite duration contract governed by Articles 5.2 and 5.5.3 of the CPR. For the renewal of definite duration contracts, three possibilities are available to the Administration under Article 5.5.3: terminate the contractual relationship, offer a new definite duration contract not exceeding five years, or offer an indefinite duration contract. The Administration opted for the second solution, renewal of the contract by a new definite duration contract of a duration different from that of the first. Nothing in the Civilian Personnel Regulations stands in the way of choosing a duration different from that of the first definite duration contract, so long as it does not exceed five years, as stated in Article 5.2. This is what the Administration did in the contested decision, by offering appellant a new one-year definite duration contract. The first argument is therefore invalid: neither Article 5.5.2 of the CPR, which is not applicable to this case, nor Article 4.3.4 of the Agency's Directive, which gives no entitlement to an indefinite duration contract, was violated.

22. Secondly, the Tribunal has considered the entitlements that could be created for the staff member by the wording of the vacancy notice for her post. Certainly the Appeals Board has ruled that the vacancy notice is an implicit part of the contract (Decisions no. 713 dated 12 July 2007, no. 817 dated 27 May 2011 and no. 835 dated 11 November 2011), yet this is only true for the parts of the vacancy notice pertaining to the job description, which therefore form part of the employment contract. Simple words – moreover drafted in conditional language – that recall rules in the CPR cannot be allowed to extend staff members' rights beyond what is in the CPR, or to set such rights in stone in spite of subsequent changes to the CPR. In the present case, vacancy notice NAC 96-221 merely notes a possibility of contract renewal for three years: it cannot be regarded as having created an entitlement for the staff member to be given a contract of that duration at a later date.

23. Thirdly, appellant invokes the improper conduct of her performance assessment process. Appeals Board case law requires decisions on renewal of contracts to be taken only after the performance assessment procedures foreseen in Article 55 of the CPR have been completed (Decisions no. 769 dated 17 September 2010 and no. 841 dated 6 July 2012). Performance assessment is a guarantee for staff members that the decision to extend their contract (or not) is in the interests of the service and based on objective, verifiable data, not on arbitrary intentions. According to the case law, which is nonetheless realistic, the Administration may base its decision on the last two annual assessments without awaiting the third, which could not have been completed before the date on which the Administration had to take its decision, six months before contract expiry (Decision no. 888 dated 27 June 2013).

24. In the present case, appellant does not dispute that performance assessments for 2012 and 2013 were done for her. Regarding the assessment for 2014, a directive was

issued that made the reference period run until 31 March 2015 and requested that assessment reports be submitted by 31 May 2015. It was therefore possible for this process not to have been completed by 28 May 2015, the date when appellant was offered the contract renewal. What is more, appellant kept this assessment process from being completed by refusing to meet with her manager and refusing any further contact while she was on sick leave. All of these circumstances prevented the review process for 2014 from being completed before a decision was taken on the terms of renewal of appellant's contract.

25. There was no rule requiring the Administration to undertake an adversarial procedure before offering appellant a draft contract renewing her employment with the Organization. Nor was there any rule requiring the Administration to explain its decision: even the decision not to renew a definite duration contract is not subject to the requirement for explanation (Appeals Board Decisions no. 173(a) dated 5 December 1984; no. 812 dated 8 April 2011; no. 884 dated 18 April 2013; no. 888 dated 27 June 2013). The same goes in particular for the decision to renew a contract, even if the proposed duration is not what the staff member would have liked.

26. Finally, appellant invokes an obvious error of judgment by the Administration in the choice of the duration of the new contract it was offering.

27. Appellant claims that her good professional performance should have led the Administration to give her a contract of longer duration. It is true that her performance assessments for 2012 and 2013 acknowledged her very good performance, but the evidence submitted to the Tribunal shows a sharp decline in her performance thereafter. In April 2014, her first contract was only renewed for one year, and she did not challenge that. In an effort to find a solution for persistent interpersonal problems in several services, appellant was obliged to take individual training sessions. Ten sessions were scheduled, but she only attended three and missed the others. Unlike the performance assessments for 2012 and 2013, which were full of praise, the one for 2014 is more cautious, noting persistent interpersonal problems and a decline in overall performance. Consequently, given the broad discretionary authority the Administration enjoys, it made no obvious error of judgment in limiting the duration of the contract renewal decided on in May 2015.

28. None of the arguments having been found to be valid, the appeal must be dismissed as groundless. Since the decision was legal, it could not have caused appellant to suffer damage; therefore her claims for compensation must also be dismissed.

## E. Costs

29. Article 6.8.2 of Annex IX provides as follows:

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

30. Given that Mrs W's appeal has been dismissed and no serious concerns were involved, Article 6.8.2 of Annex IX to the CPR prevents her from being awarded the amounts she is seeking for reimbursement of the costs incurred for her defence.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- Mrs W's appeal is dismissed.

Done in Brussels, on 27 April 2016.

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

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

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 September 2016 AT-J(2016)0013

**Judgment**

**Case No. 2016/1072**

**PL**

**Appellant**

***v.***

**Headquarters Allied Joint Force Command Brunssum**

**Respondent**

Brussels, 26 August 2016

Original: French

*Keywords: disciplinary proceedings; admissibility; inadmissibility of appeals against preparatory acts, such as refusal to consider a report by the appellant.*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 19 July 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 3 March 2016 and registered on 11 March 2016, by Mr PL, seeking:

- annulment of the decision by the Commander, Allied Joint Force Command Brunssum (JFCBS) dated 10 February 2016 to reject his reply in the disciplinary proceedings;
- annulment of the decision of 24 February 2016 rejecting his complaint;
- an order requiring the Commander, JFCBS to halt the disciplinary proceedings, subsidiarily to produce the Board of Inquiry's report and prove its allegations, and in any case, in application of Rule 24 of the Rules of procedure, to forgo taking any steps while legal proceedings are ongoing;
- compensation for non-material damage, assessed at €30,000;
- compensation for material damage suffered as a result of the termination of his contract; and
- reimbursement of the travel and subsistence expenses incurred for his defence, and the cost of retaining counsel.

2. The comments of the respondent, dated 4 and 10 May 2016, were registered on 17 and 23 May 2016 respectively. The appellant produced additional written submissions on 15 July 2016, in which he requested application of Rule 11 of the Tribunal's Rules of procedure on anonymity of the judgment.

3. In an Order dated 29 March 2016, the President of the Tribunal, noting the introduction of a second appeal by the same appellant, decided to join the two appeals. But examination of the appeals then revealed that appeal No. 2016/1072 would be likely to be dismissed as clearly inadmissible, in application of Rule 10 of the Tribunal's Rules of procedure.

4. In an Order dated 17 May 2016, the President of the Tribunal cancelled his previous Order of 29 March 2016 and decided to apply Rule 10 of the Administrative Tribunal's Rules of procedure to appeal No. 2016/1072, to instruct the Registrar to take no further action on it until the next session of the Tribunal, and to suspend all time limits relating to the proceedings.

5. In accordance with the provisions of Rule 10.2 of its Rules of procedure, the Tribunal met on 19 July 2016 at NATO Headquarters.

## B. Factual background of the case

6. The appellant is a legal adviser at Headquarters Allied Joint Force Command Brunssum. He is accused of making mistakes in managing fuel supply contracts for ISAF. On 15 January 2016 the appellant was suspended in application of Article 60.2 of the NATO Civilian Personnel Regulations (CPR). On 19 January he filed a complaint against this suspension, and requested access to his work files and diaries. Having received the disciplinary procedure report, the appellant initiated a series of discussions with the administration to challenge a number of steps in the disciplinary proceedings. On 19 February he filed a new complaint and made a further request for documents.

7. On 3 March 2016, the appellant lodged an appeal with the NATO Administrative Tribunal.

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

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

8. The appellant complains that he has not had access to his file or to the documents necessary for his defence, such as his diary. He criticizes the composition of the Disciplinary Board, which did not comply with the provisions of Annex X of the CPR. He accuses the Disciplinary Board of having someone whom he suspects of being biased against him as a member. He also disputes the accusations made against him which, in his view, the report does not prove.

9. In his additional written submissions, he invokes a violation of Article 6 of the European Convention on Human Rights.

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

10. The respondent's main contention is that the appeal is inadmissible, and it asks the Tribunal to apply Rule 10 of the Rules of procedure for a summary dismissal. It is inadmissible because the contested decisions are merely preparatory acts to a possible decision ordering disciplinary action. Furthermore, the appellant did not comply with the pre-litigation administrative procedures.

11. On the substance, the respondent maintains that the appellant was given access to all the documents that it was possible for him to have, but that he cannot be given witness statements. The respondent also indicates that the composition of the Disciplinary Board had to be changed to prevent a conflict of interests.

## D. Considerations and conclusions

12. Disciplinary action is covered by Articles 59 and 60 of the CPR. Article 60.1 refers to Annex X of the CPR, which provides a precise definition of the disciplinary proceedings at Article 5 thereof. The disciplinary proceedings include numerous steps which make it possible to establish the facts and give them an appropriate legal characterization, and then to decide on the extent of the disciplinary action(s) to be ordered, if any. The whole proceedings obviously respect the right of defence, by allowing the staff member against whom the proceedings have been initiated to access their file and present their position. To enable the proceedings, which can last several weeks or months, to function properly, they must not be interrupted by points of procedure; therefore any complaints about the progress of the proceedings may only been entered once the latter have been completed. It is only against any disciplinary action ordered that the staff member may invoke any irregularities occurring during the proceedings in order to contest the legality thereof.

13. In appeal No. 2016/1072, the supposed decisions (rejection of his reply in the disciplinary proceedings) which the appellant is seeking to have annulled and the orders that he is asking the Tribunal to issue to the respondent (to halt the disciplinary proceedings, subsidiarily to produce the Board of Inquiry's report and prove its allegations, and in any case, in application of Rule 24 of the Rules of procedure, to forgo taking any steps while legal proceedings are ongoing) are just intermediary steps in the disciplinary proceedings. The decisions and documents that the appellant is seeking to have annulled (letters of 10 and 24 February 2016) are merely preparatory acts which form part of the disciplinary proceedings and cannot be directly contested before the Tribunal (see NATO Appeals Board Decision no. 709 of 6 November 2006); they may only be invoked to support a request for annulment of any disciplinary action ordered at the end of the proceedings.

14. Given that the appellant's other submissions derive from submissions which the Tribunal deems inadmissible, they must therefore be rejected.

15. As regards the appellant's request for an anonymous judgment in application of Rule 11 of the Rules of procedure, the Tribunal finds that the reasons given by the appellant concerning his privacy are insufficient to grant this request. Therefore, there is no need to apply Rule 11.4 of the Rules of procedure.

## E. Costs

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

17. Given that Mr L' appeal has been dismissed and no serious concerns were involved, Article 6.8.2 of Annex IX to the CPR prevents him from being awarded the amounts that he requests as reimbursement of the expenses incurred for his defence.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, on 26 August 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 September 2016 AT-J(2016)0014

# Judgment

## Case No. 2016/1075

**WW**

**Appellant**

***v.***

**Headquarters Supreme Allied Command Transformation**

**Respondent**

Brussels, 30 August 2016

Original: English

*Keywords: summary dismissal; exhaustion of pre-litigation procedures.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 at its session of 19 July 2016 further to Tribunal Order AT(PRE-O)(2016)0003.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against Headquarters Supreme Allied Command Transformation (SACT) by Mrs WW dated 31 March 2016 and registered on 12 April 2016 under Case No. 2016/1075, with the request that the changed footnote of Article 51.2 of the NATO Civilian Personnel Regulations (CPR) is not applied in her case, neither now nor in the future.

2. Considering that the provisions of the CPR foresee that appellant must have exhausted all available channels for submitting complaints before submitting an appeal with the Tribunal, the President of the Tribunal issued Order AT(PRE-O)(2016)0003 on 27 April 2016 in accordance with Rule 10, paragraph 1, of the Tribunal's Rules of procedure.

3. In accordance with Rule 10.2 of the Tribunal's Rules of procedure the Tribunal deliberated on the matter at its next session, *i.e.* on 19 July 2016.

## B. Factual background of the case

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

5. Appellant is a NATO staff member since 4 February 1991. She is currently holding a position in the Human Resources department at HQ SACT.

6. By Office Notice (2016)0008 dated 8 February 2016 amendment 24 to the CPR was issued, in which the footnote to Article 51.2 was modified to read:

> Provided they were recruited before 1st January 2001, staff members who on 3 August 2016 have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay premium after the age of 65, under the condition they retire from service by 3 August 2016. Retired staff who have not contributed to the group insurance scheme for a minimum of 25 years by 3 August 2016 shall be required to pay a premium after the age of 65 to continue coverage under the scheme.

Its previous version read:

> Provided they were recruited before 1st January 2001, staff members 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.

7. By letter dated 31 March 2016 appellant, an advance copy of which was sent by e-mail to the Tribunal's mailbox on 1 April 2016, lodged the present appeal (erroneously called "complaint" in her letter), requesting that the previous footnote continue to be applied to her or, failing that, that she receive financial compensation for all financial losses or liabilities, now or in the future.

8. On 5 April 2016 the Registrar *a.i.* advised appellant that the Tribunal can only entertain appeals if they have followed the pre-litigation procedure and that appellant's letter did not give an indication that this had been done. She added that if the pre-litigation procedure has been followed, this should be included in the plea.

9. On 7 April 2016 appellant wrote to the Registrar *a.i.* informing her that a retroactive administrative review was being pursued.

10. On 27 April 2016, the President of the Tribunal, considering the provisions of the CPR which foresee that appellant must have exhausted all available channels for submitting complaints before submitting an appeal with the present Tribunal, issued Order AT(PRE-O)(2016)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.

## C. Summary of appellant's contentions on admissibility

11. Appellant submits that the appeal was lodged within the prescribed 60-day time limit from the date the contested decision was issued on 8 February 2016.

## D. Considerations

12. As the Tribunal has consistently recalled in its Judgments in, for example, Cases No. 2013/1008, 2014/1013, 2014/1014, 2014/1015, 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 CPR 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.

13. 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.

14. In the present case, appellant contends that the pre-litigation procedure would be followed with retroactive effect, *i.e.* after having lodged the appeal.

15. The Tribunal cannot accept this. Annex IX to the CPR is clear in that the pre-litigation procedures must be exhausted before the Tribunal can entertain an appeal.

16. Proceedings as done show a regrettable lack of awareness of, or respect for, a comprehensive dispute settlement process that has now been in force for over three years.

17. 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 CPR. It must be summarily dismissed.

## E. Costs

18. 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 […]

19. 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 August 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 September 2016 AT-J(2016)0015

# Judgment

## Case No. 2016/1070

**JF**

**Appellant**

***v.***

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

**Respondent**

Brussels, 2 September 2016

Original: English

*Keywords: reimbursement of travel and subsistence expenses; invalidity procedure.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and having deliberated on the matter following the hearing on 19 July 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), dated 12 February 2016 and registered on 22 February 2016 as Case No. 2016/1070, by Mr JF.

2. The respondent's answer, dated 20 April 2016, was registered on 4 May 2016. The appellant's reply, dated 3 June 2016, was registered on the same day. The respondent's rejoinder, dated 1 July 2016, was registered on 5 July 2016.

3. The Panel held an oral hearing on 19 July 2016 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the case

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

5. Appellant started working at the NATO Air Base in Geilenkirchen (NAB GK) in November 1997 as a B3 AWACS Crew Chief. From 2010 he served as a B5 Principal Technician (Instructor).

6. Appellant has been on sick leave since 28 January 2014. On 11 June 2014 he was authorized by NAEW&CF GK to travel to the United States in order to undergo medical treatment, which has been continuous ever since. However, appellant's counsel was warned that he could be required to attend periodical follow-up assessments in Germany and that travel costs would be "*at the expense of your client*".

7. On 18 November 2014, appellant informed the Organization that he was in the process of selling his house near his duty station due to his medical conditions. He requested payment for his removal expenses, which was authorized by the Administration on 9 December 2014. Nevertheless, it was pointed out that appellant's departure date from the Organization had not been established.

8. On 22 April 2015, in accordance with the NATO Civilian Personnel Regulations (CPR), appellant initiated the invalidity procedure. The Component's Medical Advisor and the doctor appointed by appellant agreed in naming a third doctor to the invalidity board. Consequently, on 8 July 2015 appellant received an email setting an appointment with the third doctor, to be held in Aachen (Germany) on 5 August 2015. On the same day appellant requested a Skype address for the third doctor. The organization

answered on 10 July informing that he had no Skype address, but providing the doctor's e-mail address and the rest of the doctor's contact information.

9. On 12 July 2015 appellant's wife sent a letter to the doctor pointing out that appellant was not fluent in German and that therefore the evaluation should be conducted in English. She also wondered whether the meeting could take place in Tampa (Florida). The doctor replied on 14 July that a meeting in Florida was not an option and that native speaker's support would be available. He also noted the possibility of a second meeting on 7 August, so he advised them to be prepared for a stay in Aachen if needed.

10. Appellant and his wife travelled from Florida to Aachen on 1st, stayed until 8th August, and met the doctor on 4th and 5th August 2015.

11. Back in the United States, on 12 August 2015, appellant submitted a claim with NAEW&CF GK for reimbursement of his and his wife's travel and subsistence expenses for the trip to Germany (185,10 € for hotel charges; plus 1742,30 USD –twice- for flight tickets).

12. On 17 August 2015 the Head of the Civilian Human Resources Branch rejected the claim. On 18 September 2015, appellant requested administrative review of that decision, which was further rejected by the NAEW&CF GK Division Head, on 30 September 2015. On 16 October 2015, appellant requested a further administrative review, which was also rejected by decision of the Commander on 9 November 2015. On 2 December 2015, appellant submitted a complaint, which was rejected by decision of 15 December 2015.

13. As a result of a disciplinary measure, appellant's contract was terminated on 7 January 2015. This termination became effective on 27 January 2016, 2400hrs, following the expiration of the period of extended sick leave.

14. On 12 February 2016 appellant submitted the present appeal.

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

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

15. Appellant claims the violation of Article 13 of Annex IV of the CPR, in particular of its Instruction 13/3x in so far as it states that the costs of the meeting of the Invalidity Board shall be met by the Organization.

16. Appellant disagrees with the interpretation the Organization gives to spirit of this Instruction, contending that it lays down a general rule. In particular the second paragraph, in his view, does not lay down an exhaustive list of expenses that fit with the definition of the costs to be covered. It is instead merely a restriction with regard to coverage of the fees and travel expenses of the medical practitioner representing the staff member. He further adds that the costs of the meeting of the Invalidity Board cannot reasonably be limited to the fees and travel expenses related to the medical practitioner representing the staff member but must necessarily include the fees and travel expenses

of the medical practitioner presenting the Organization and of the third medical practitioner.

17. Appellant considers that purpose of the Instruction is to allow staff members to have their case examined by an independent medical committee at the Organization's cost, and that, if such committee feels an additional assessment to be necessary in preparation of their meeting and in order to reach a decision, it only makes sense that all related costs, including any necessary cost to attend the assessments, are covered by the Organization as well. He further submits that the CPR do not refer to the reimbursement of the travel expenses incurred by the staff member because such medical examinations in an invalidity procedure are optional steps and not mandatory. Appellant also notes that the regulations do not make a distinction between an invalidity procedure initiated by the staff member or the Organization.

18. Appellant further submits that since the fees of the third doctor were paid, together with the costs of English translation, it was obvious that they were considered as part of the meeting of the Invalidity Board and therefore there was no reason why the travel and subsistence expenses of appellant and his wife to attend the examination should not also have been met. Appellant also recalls that the meeting took place upon request of the Organization's medical adviser, without consulting the other doctors on the Board and that the Organization itself determined such meeting as "crucial".

19. Further, appellant adds that, by analogy with Instruction 16/2 of Annex IV of the CPR on periodical medical examinations, requiring that such examinations shall be taken at the place of residence of the person concerned, or that travel expenses of the person concerned are to be reimbursed by the Organization if exceeding 50km from home, a similar rule should also apply, and that nothing to the contrary is stated in the regulations. In his view it was therefore perfectly legitimate to expect to be reimbursed as with any travel on duty.

20. In addition, appellant refers to the letter he received on 11 June 2014 authorizing him to travel to the U.S. for treatment and in particular to what stated by the Organization *"… will therefore require your client to attend periodical follow-up assessments in Geilenkirchen […] Travel cost is at the expense of your client*". He submits that the invalidity procedure is a separate process from the "*periodical follow-up assessments*" which might be decided by the Organizations' medical adviser in case of regular sick leave. He also notes that this letter was sent before appellant gave notice of his change of residence and his household removal back to the United States.

21. Appellant also considers that the Organization was fully aware that he would have to travel from the United States to attend the appointment in Aachen, having authorized his travel to the United States for treatment in June 2014, and on 20 November 2014, having agreed to his request for payment of removal expenses.

22. Appellant informs that he tried to avoid travelling by offering other options such as organizing the meeting by other means (*i.e.* Skype communications), having the third doctor travel to the United States instead, or having the support of a U.S. based doctor, but that no alternative was found to having him, at the very short notice of less than a month, travel to Germany. Appellant also claims that the short notice was unnecessary,

and that there was no urgent reason for him to be in Aachen on 4-5 August when the Board finally met only on 18 September 2015.

23. Appellant alleges violation of the principles of proportionality, reasonableness and the duty of care insofar as the travel expenses were unnecessarily incurred at the Organizations' request and in the lack of respect of his medical conditions and ongoing medical treatment.

24. Appellant claims the reimbursement of the return flight for himself ($1742.30), the return flight of his wife, who served as his medical companion ($1742.30), accommodation from 2 to 8 August 2015 (€185.10), a rental car (€195.69), fuel (€46.69) and parking (€2.90 + $128.00).

25. Appellant also submits that the circumstances of the situation and the seriousness of the illegality, together with the denial of the cost reimbursement in the context of the invalidity procedure, put him through a lot of stress and anxiety and caused feelings of injustice and frustration which have caused non-material damages. These damages have been quantified firstly at €10.000 and, subsequently, at €50.000.

26. Appellant requests that the Tribunal should:
- annul the decision of 17 August 2015 rejecting appellant's claim for reimbursement;
- annul the decision of 15 December 2015 rejecting appellant's complaint;
- compensate for the material prejudice;
- compensate for non-material damage evaluated at *ex aequo et bono* at €50.000 (€10.000 in the first appellant's submission); and
- reimburse his legal costs.

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

27. Respondent stresses that the appellant's decision to travel to the Unites States for medical treatment was his personal choice. It was authorized but not mandated by the Organization. Respondent also notes that the this Tribunal, in its judgment in Case No. 2014/1021 recognized that there was no urgent need for appellant to travel to the United States for medical treatment.

28. Respondent refers to the letter sent to appellant on 11 June 2014, laying out clearly the conditions for the authorization to travel to the United States during his sick leave: "*Your client may now travel to the USA, which is hereby authorized. However, our Medical Advisor has announced that he needs to continue monitoring his situation closely and will therefore require your client to attend periodical follow-up assessments in Geilenkirchen […] Travel cost is at the expense of your client. Our Medical Advisor has confirmed that there is a choice of suitable specialist therapy in the English language available in the region here and there is no need to travel to the US for qualified treatment*."

29. Respondent therefore affirms that appellant knew he might need to return to Europe for medical assessment, and that his departure was taken at his own risk. Further, appellant adds that the medical examination in Aachen was the consequence of

an invalidity procedure that appellant initiated, so that, considering the need of proving his claim, he was fully aware of the necessity of having to return to Germany.

30. Respondent refers to the form certifying appellant's personal information which himself provided to the Organization on 16 January 2015. The personal information indicates that his permanent address, as of 1 January 2015, was in Germany, close to the airbase. Respondent notes that the appointment in Aachen was about 35km south of his address.

31. Respondent adds that the authorization for removal expenses related only to partial removal of his household goods in advance of his final departure, as clearly stated in the letter dated 9 December 2014. Respondent stresses that such authorization was not an authorization for appellant to permanently move to the United States and give up his residence in the vicinity of his duty station.

32. Respondent rejects appellant's analogy with Instruction 16/2 of Annex IV of the CPR, observing that this instruction relates to periodical examinations after the Invalidity Board has recognized a staff member's invalidity.

33. Further, respondent rejects appellant's interpretation of the meaning and scope of Instruction 13/3x of Annex IV of the CPR, contending that the Instruction cannot be construed to reimburse appellant's travel costs. Respondent explains that appellant had his place of residence in Germany and the text of the Instruction mentions only reimbursement of the travel expenses of the medical practitioner representing the staff member.

34. In addition, referring to the alternative options proposed by appellant, respondent observes that conducting a psychological assessment via Skype could not be considered appropriate, and that it would have been an unreasonable expectation to have the third doctor fly to the United States or to request that his role as third medical practitioner to be legally delegated to other doctors at a NATO facility.

35. Respondent views appellant's claims, composed of his, his spouse's expenses and all related costs, to be widely exaggerated and in contradiction with the certification of his residence being close to the duty station.

36. Respondent denies as unproven any violations of the principle of legitimate expectations, proportionality and duty of care. Respondent also contends that appellant is not entitled to a reimbursement of personal costs originating from his own decisions and personal interest.

37. Respondent also rejects the claim for moral damages as lacking any substantiation, given the absence of any abusive position of the Organization. It also strongly contest the admissibility of the increase of the claim from €10.000 of the first submission to €50.000 of the second submission.

38. Respondent requests that the Tribunal dismiss the appeal.

## D. Considerations and conclusions

### *(i) Considerations on admissibility*

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

### *(ii) Considerations on the merits*

40. Travel expenses of the members of the staff are regulated in Chapter VIII of the CPR. These rules provide for expenses of candidates (Article 37), expenses for travel between established residence - at the time of taking up duty with NATO - and place of duty (Article 38), removal expenses for those eligible for the payment of installation allowance (Article 39) and travel and subsistence expenses when travelling on duty (Articles 40 and 41). The three first situations are clearly not the case in the present dispute. Moreover, the Tribunal also considers that the regulatory regime for duty travel is not applicable.

41. Appellant was authorized to travel to the United States pursuant his decision to be treated in his country. However, appellant was warned of the possibility of further assessments and that the necessary travels back from the United States would be at his own expense. It should be noted that appellant's move to his native country did not meet any of the requirements of a travel on duty: a) it was decided by the agent; b) it had no relation with his functions or with interests, orders or instructions of the Organization; and, c) the travel was at his own expense. On this last point, the Tribunal wants to emphasize that the partial granting of the removal allowance was linked to the fact that appellant's contract was due to end.

42. As the Tribunal stated in Case No. 2014/1021, concerning the same agent, the possibility of a staff member leaving his/her duty's location is subject to the provisions of Article 12.1.2 of the CPR. Therefore, the general rule is that staff members are obliged to stay at their location and, consequently, permission shall be obtained to waive this obligation.

43. Since the current appeal is closely related with the above mentioned Case No. 2014/1021, it seems advisable to replicate some of the Tribunal's reasoning, as follows: "*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. 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*" (*cf.* paragraphs 43 and 44).

44. Appellant invokes some rules of Annex IV of the CPR to substantiate his request for reimbursement of expenses insisting that the Organization should support all the costs of the invalidity procedure, whatever their source. However, Article 16 of Annex IV of the CPR provides rules on medical examination, but only in case of a person who is "drawing an invalidity pension". The Tribunal considers it evident that this rule does not apply to appellant, who does not receive such a pension. Appellant does not fall in the scope of the rule and, consequently, the Instructions linked to Article 16 are not of interest in the present case.

45. The Tribunal also holds the view that Instruction 13/3 x) of Annex IV of the CPR is not applicable. This rule provides for the costs of the meeting of the Invalidity Board. Although in the French version of this paragraph 13/3 x) the wording used is in the first sentence is: "*Les frais de travaux de la Commission d'invalidité sont supportés par l'Organisation*", the Tribunal cannot accept the interpretation provided by appellant during the hearing. He maintained that the French word "*travaux*" includes all activities related to the Invalidity Board, even the travel of the staff member. While is true that the English version ("The cost of the meeting…") differs from the French one in this particular portion of the text, the English version is more consistent. The heading of this section of Instruction 13/3 [Paragraphs vii) to xi)] is literally equivalent in both versions ("Meeting of the Invalidity Board/ Réunion de la Commission d'invalidité"). Therefore, the whole section only regulates the aforementioned meeting. Paragraph x) does not establish two different types of costs, but two different rules: a) the cost of the meeting is allocated to the Organization; b) the Organization bears the fees and travel expenses of the medical practitioner representing the staff member. More precisely, the later costs include the fees and travel expenses whenever the practitioner lives in a country other than of the Invalidity Board location, but not those of the agent whose medical situation is assessed. Further, a careful reading of the Instructions for article 13 of Annex IV allows the Tribunal to conclude that these regulations presume that the invalidity procedure takes place around the agent's duty station and/or official residence. There is no provision foreseeing a change in these locations. For this reason, no expenses for travel of the agent are authorized.

46. The abovementioned reason should be enough to dismiss the appeal. Nevertheless, the Tribunal wishes to record some additional views regarding some of appellant's submissions.

47. Appellant included in his claim the costs of his wife's travel. In light of the above, there is no legal basis to the reimbursement of appellant' expenses. Appellant's decision to be accompanied by his wife was entirely his own, was not supported by independent evidence, and was not notified to or discussed with the agency. This request is *a fortiori* unfounded and lacks any justification.

48. The appeal being dismissed no compensation for material damages can be acknowledged. Nor can the Tribunal recognize the claim for moral damages, given the lack of justification.

## E. Costs

49. 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 […]

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

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- -The appeal is dismissed.

Done in Brussels, on 2 September 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 September 2016 AT-J(2016)0016

# Judgment

## Case No. 2015/1068

**MW**

**Appellant**

***v.***

**NATO International Staff**

**Respondent**

Brussels, 2 September 2016

Original: English

*Keywords: admissibility; exhaustion of pre-litigation procedures; Invalidity Board.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 their deliberations following the hearing on 19 July 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO International Staff (IS) dated 28 November 2015, and registered on 11 December 2015 as Case No. 2015/1068, by Mrs MW.

2. The respondent's answer, dated 9 February 2016, was registered on 11 February 2016. The appellant's reply, dated 14 March 2016, was registered on 15 March 2016. The respondent's rejoinder, dated 13 April 2016, was registered on 15 April 2016.

3. The Panel held an oral hearing on 19 July 2016 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the case

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

5. Appellant joined the IS on 18 January 2010, as an A3 Officer in the NATO Office of Resources, with a definite duration contract expiring on 17 January 2013. Appellant previously worked for the former NATO Consultation, Command and Control Agency starting on 19 August 2002, on a series of definite duration contracts of three years each, and until that Agency was discontinued.

6. In early June 2012 appellant was put on sick leave due to complications related to her pregnancy. On 24 June 2012 she went on maternity leave.

7. On 10 July 2012 she was informed by e-mail that her contract would not be renewed. At the end of her maternity leave, on 28 November 2012, she was put on sick leave and, on 28 February 2013, on extended sick leave. She sent in medical certificates regularly.

8. On 21 November 2014 the Acting Director Human Resources (HR) wrote to appellant informing her about actions to be taken in connection with the end of the extended sick leave on 27 November 2014. In the letter reference was also made to the procedures initiated on 7 November 2014 concerning the setting up of an Invalidity Board and the further steps to be undertaken to continue that process. The Acting Director HR stipulated in this respect that, if the Invalidity Board arrived at the conclusion that she was suffering from permanent invalidity, an invalidity pension would be payable with retroactive effect as from 1 December 2014. On the other hand, if she was not recognized as permanently invalid, she would receive a loss-of-job indemnity.

9. The Invalidity Board met on 28 January 2015 and declared appellant permanently invalid. Appellant was informed thereof by telephone by HR and advised that the paperwork would follow.

10. On 26 May 2015 appellant was informed, however, that the Invalidity Board had not indicated that appellant was permanently invalid before the date of the Board's meeting. Respondent concluded that she was therefore permanently invalid only as from 28 January 2015. Since her contract had ended on 24 November 2014, she would, as a consequence, not be entitled to an invalidity pension. She would, on the other hand, be entitled to a loss-of-job indemnity.

11. On 15 June 2015 appellant introduced a request for Administrative Review, to which the Organization replied on 8 July 2015, and on 29 July 2015 a request for a Further Administrative Review.

12. On 29 September 2015, the NATO Deputy Secretary General, on behalf of the Secretary General, wrote to appellant confirming the Organization's position with respect to her grievances.

13. On 30 November 2015 appellant submitted the present appeal.

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

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

14. Appellant submits that the appeal is admissible. She notes that two administrative reviews were submitted: a first one on 15 June 2015, to which the Organization replied on 8 July 2015, and a second one on 29 July 2015, to which the Organization replied on 29 September 2015. The present appeal was filed against the decision contained in the letter dated 29 September 2015.

15. Appellant contends that the 29 September 2015 letter, signed by the Deputy Secretary General "on behalf of the Secretary General", constitutes a decision of the Head of the NATO body (HONB) and, as such, Article 1.6 of Annex IX of the NATO Civilian Personnel Regulations (CPR) applies, allowing appellant to lodge an appeal directly with the Tribunal without going through the complaints procedure.

16. Appellant further states that her medical condition would have prevented her from arguing a case before a Complaints Committee. This would have subjected her to unbearable stress. Moreover, under the rules she may not be represented before this Committee. As a consequence her rights to a fair trial would not have been assured.

17. Regarding the merits, appellant submits that the letter she received on 21 November 2014 informed her that "… *if the outcome of the Invalidity Board is that you are recognized as suffering from permanent invalidity, an invalidity pension would become payable which would apply with backdated effect from 1 December 2014…*". In respondent's reply to appellant's administrative review (letter dated 8 July 2015) appellant was informed, however, that "[i]*n your case, the Board met on 28 January 2015,*

*and determined that you were suffering from a permanent invalidity as of that date. The Invalidity Board did not indicate that the invalidity became lasting prior to the date of the meeting. Accordingly, as your contract ended on 27 November 2014 and it was decided that there was no prior to or on that that date [sic], you are not entitled to an invalidity pension under the Coordinated Pension Scheme. […]*".

18. Appellant observes that on 21 November 2014, the Organization knew that the Board would not and could not convene before 27 November and, therefore, she lost her pension rights because the Board did not convene before that date.

19. Appellant further adds that, due to the nature of her illness, it would not make sense, nor would it be possible, for her to have been invalid until 27 November 2014, have recovered between 28 November 2014 and 28 January 2015 and be considered permanent invalid only as of the date of the Board's meeting.

20. Appellant claims that there is an error/internal contradiction in the document "Conclusions de la Commission d'invalidité" in so far it is not clear whether it indicates 28 January 2015 as the date of consolidation or simply the date of the meeting. Therefore, in accordance with Article 13/4 iii) of Annex IV-III of the CPR, which states:

> In the event of an obvious factual error, the Secretary/Director-General shall refer the case to the Invalidity Board …

Appellant submits that the Secretary General should have referred the case back to the Invalidity Board.

21. Appellant notes that the concept of "consolidation" is also particularly misleading in light of her specific psychiatric illness and that her state of health had been unchanged for quite a while.

22. Appellant further submits the violation of the principle of good administration and discrimination. Appellant affirms that respondent attempted to manipulate the process by appointing doctors to represent her on the Invalidity Board, which caused an extensive waste of time that delayed the process.

23. Appellant refers also to the Organization's abusive attitude towards communication between the administrative services and herself, in particular with regard to sick leave certificates. Appellant recalls in particular an episode in the summer of 2013 and an alleged gap in justified absence between 29 and 31 July 2013, a period during which she was undergoing surgery.

24. Appellant further contends a violation of Article 13/4 iv) of Annex IV-III to the CPR, which states:

> Within 30 calendar days of receipt of the findings of the Invalidity Board, the Secretary/Director-General shall notify his decision in writing, together with the findings of the Invalidity Board, to the staff member or former staff member.

and notes that the decision of the Secretary General was communicated by letter dated 26 May 2015, after her legal representative's interventions. Moreover, the findings of the

Board were only communicated by letter dated 29 September 2015 (7 months after the Board's meeting) and after the two requests for administrative review.

25. Appellant seeks:
- annulment of the Secretary General's decision that she is not entitled to an invalidity pension and, consequently, the award of such pension;
- a reconvening of the Invalidity Board to correct the errors of the "Conclusions de la Commission d'Invalidité"; and
- reimbursement of all legal, travel and subsistence costs, and lawyer's fees.

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

26. Respondent disputes the admissibility of the appeal, arguing that appellant did not file a complaint against the decision dated 29 September 2015. It submits that the decisions of the HONB communicated through another authority cannot be considered as decisions "taken directly" and therefore the normal procedure foreseen by the CPR applies. Respondent refers to established case law of this Tribunal which stresses the importance of compliance with the pre-litigation phase.

27. Respondent notes that although the appeal is directed against the letter dated 29 September 2015, appellant's concerns relate to the decision of the Invalidity Board as reflected in its report. It adds that therefore it is not for the Organization, nor for the Tribunal, to substitute itself for the Board, particularly on medical matters.

28. Regarding the merits, respondent rejects the alleged violation of Article 13/4 iii) of Annex IV-III to the CPR contesting an error/contradiction in the report of the Board. It further states that in the absence of an indication to the contrary of such alleged error/contradiction, there is no factual or legal basis to support its rectification.

29. Respondent also rejects the claim of a violation of the principle of good administration as well as the claim of discrimination, submitting that the allegations brought forward by appellant under this head are contrary to the facts and/or not substantiated.

30. Respondent contends that appellant herself had delayed the nomination of the doctors representing her on the Board and that the Organization had attempted to speed up the process, which was also in her interest.

31. Respondent further adds that other episodes mentioned in the pleadings, such as a gap in the medical certificates provided between 29 and 31 July 2015 and the way the administration handled that matter, should be considered as demonstrating a positive attitude towards appellant's administrative deficiencies.

32. Concerning the alleged violation of Article 13/4 iv) of Annex IV-III to the CPR and the time elapsed between the decision of the Secretary General following the findings of the Board and its communication to appellant, respondent observes that this was not to appellant's detriment. It affirms that such decision merely confirmed the existing situation, namely that appellant was not entitled to any invalidity pension or any other

social security benefits since the end of the period of extended sick leave (27 November 2014), since the Board failed to recognize invalidity prior to that date.

33. Respondent asks the Administrative Tribunal:
- to declare the appeal inadmissible; and
- should the appeal be declared admissible, to dismiss it as being without merit.

## D. Considerations and conclusions

34. The Tribunal must first address the admissibility of the appeal.

35. The Tribunal shall, in accordance with Article 6.3.1 of Annex IX to the CPR, 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 circumvent the entirety of these pre-litigation procedures.

36. As the Tribunal has consistently recalled in its Judgments, the NATO Council, following a detailed review, adopted a new internal dispute resolution system in January 2013, which entered into force on 1 July 2013 and is laid down in Chapter XIV of the CPR 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 responsibility on NATO managers, and ultimately on the Heads of NATO bodies, for addressing and wherever possible resolving issues instead of leaving them to be resolved by the Tribunal through adversarial legal proceedings.

37. Respondent submits that the appeal is inadmissible since appellant has not exhausted the full pre-litigation procedure as required by the CPR and in particular has not filed a complaint against the decision dated 29 September 2015.

38. Appellant has submitted that the complaints procedure was either not required or not proper in the present case and has submitted a number of arguments in this respect, which the Tribunal will now analyse.

39. Appellant, first of all, submits that the grievance is the result of a decision contained in a letter dated 29 September 2015, signed by the Deputy Secretary General “on behalf of the Secretary General”. Given that the Secretary General is the Head of the Organization and thus Head of the NATO Body, Article 1.6 of Annex IX to the CPR specifically authorizes the lodging of an appeal without going through the complaints procedure.

40. Respondent submits on this point that decisions of the HONB communicated through another authority cannot be considered as decisions “taken directly” by the HONB and that therefore the normal procedure foreseen by the CPR should apply.

41. The Tribunal agrees with respondent's contention. It has indeed confirmed this consistently in its case-law starting with Case No. 2013/1008, where it held in paragraph 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 CPR). 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.

42. Appellant further refers to the Complaints Committee procedure laid down in Article 5.2 of Annex IX to the CPR and observes that she is in no position to speak for herself and that the very fact that she could be forced to speak would subject her to unbearable stress. This would be extremely detrimental to her medical condition and to her fragile mental equilibrium.

43. The Tribunal observes in this respect that the complaints procedure is a procedure whereby the HONB must take a final decision before a case may be submitted to the Tribunal. This procedure includes the possibility for the staff member to call for a Complaints Committee, which the HONB must accept. The rules do not require the staff member to make such a request, however, and the latter is free to do so or not. Appellants may indeed have good reasons not to ask for a Complaints Committee, and in such situations the HONB takes a decision on the written record before him or her.

44. Appellant then refers to Article 5.2.3 of Annex IX to the CPR, which provides:

> The claimant may be assisted by another staff member or someone external to the NATO body, including a member of the retired NATO staff or professional counsel, in preparing the complaint and any other submissions and in presenting his/her case at the oral hearing(s). Such other person may not, however, speak for the claimant and must, as a condition of his/her continued presence at the hearing, comply with any directive issued by the Complaints Committee concerning the conduct of the hearing.

45. Appellant submits in this respect that since neither she – for medical reasons – nor anyone else on her behalf could speak before the Complaints Committee, her rights to a fair trial, as guaranteed by Article 6 of the European Convention on Human Rights, would not be assured.

46. The Tribunal disagrees with this submission. The Tribunal repeats, first of all, that the rules do not require a staff member to call for a Complaints Committee.

47. Secondly, and more importantly, the Complaints Committee is a peer review process in which colleagues give advice to the HONB before the latter takes a final decision that may be challenged before the Tribunal. This process is an internal review process that cannot be equated with a trial.

48. It is true that respondent could have indicated in its letter of 29 September 2015 what the next steps would have been in case appellant was not satisfied with the reply, as it has occasionally done in other situations and as is increasingly the practice in national and international administrations. It is ultimately the responsibility of an appellant, however, to decide on the steps he or she takes and on the reasons for them. It appears from the file that appellant took her decisions in this respect in cognizance of the rules, albeit with an erroneous interpretation thereof, for which appellant indeed carries the responsibility.

49. The appellant not having exhausted the necessary pre-litigation procedures, the Tribunal cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.2 of the CPR and Article 6.3.1 of Annex IX thereto. The appeal must be dismissed.

## E. Costs

50. Article 6.8.2 of Annex IX to the CPR provides as follows:

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

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

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 2 September 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

7 October 2016 AT-J(2016)0017

# Judgment

## Case No. 2016/1069

**AR**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 26 September 2016

Original: English

*Keywords: Article 8 CPR; resignation; rescission of a resignation; principle of parallelism of forms; conditions; mutual agreement; requirement to state reasons; duty of care.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 19 July 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Support and Procurement Agency (NSPA), dated 5 February 2016 and registered on 12 February 2016 under Case No. 2016/1069, by Mr AR, staff member with the NSPA.

2. The appellant seeks annulment of respondent's decision taken on 24 July 2015 not to rescind appellant's resignation submitted on 16 June 2015.

3. The answer of the respondent to this appeal, dated 11 April 2016, was registered on 14 April 2016. The reply of the appellant, dated 17 May 2016, was registered on 25 May 2016. The rejoinder of the respondent, dated 20 June 2016, was registered on 21 June 2016.

4. The Tribunal's Panel held an oral hearing on 19 July 2016 at NATO Headquarters. The Tribunal heard arguments by both parties in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the case

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

6. Appellant is a staff member with the NSPA. His last contract with the NSPA covered the period from 17 March 2015 to 31 December 2017.

7. By email sent on 16 June 2015, appellant sent respondent, in an attachment, his letter of resignation dated 17 June 2015. In this letter, appellant indicated his intention to leave on 5 July 2015 after taking his leave.

8. By email sent to appellant on 17 June 2015, respondent acknowledged receipt of the above-mentioned letter of resignation.

9. Placed on sick leave on 24 June 2015, appellant submitted his medical certificates to respondent and invited it to proceed with the required medical assessment.

10. The first medical control having been carried out, on 2 July 2015, in accordance with Article 45.2 of the NATO Civilian Personnel Regulations (CPR), in a letter dated 14 July 2015 respondent informed appellant that, on the basis of that control, his temporary disability for work was medically justified.

11. By letter dated 20 July 2015 attached to an email sent to respondent on the same date, appellant asked the respondent to disregard his letter of resignation dated 17 June 2015 and rescind his resignation. In the same letter, appellant informed respondent that he would return to work when he was cleared medically to do so, and also underlined that his resignation dated 17 June 2015 had been submitted because of the stress caused by his appointment to serve in his deployment but also, and mainly, because he was under duress.

12. By email sent on 24 July 2015, respondent replied that appellant's resignation was irrevocable unless otherwise mutually agreed. This email also noted that respondent did not agree to appellant's request to rescind the resignation dated 17 June 2015.

13. On 21 August 2015, appellant lodged a first administrative review on the basis of Article 2.2 a) of Annex IX to the CPR against the decision taken by respondent in its email sent on 24 July 2015.

14. In his first administrative review, appellant underlined that his letter of resignation dated 17 June 2015 had been drafted under duress and that he did not remember why or when he had drafted it. Placed on sick leave because of severe depression when he returned from his deployment, appellant recalled that he had not had a single reason to submit his resignation. Having been under contract with respondent for over eight years, having been deployed for a long period and having received excellent feedback from his hierarchy during this period, appellant found it unexpected that respondent had immediately accepted his resignation without any comment. Appellant finally pointed out that respondent had never sent him any explanation about the reasons why his request to rescind his resignation had been rejected.

15. The first administrative review was rejected by respondent's decision dated 7 September 2015 (decision of 7 September 2015). In this decision, respondent stressed that after having carefully studied all material in the file concerning appellant's resignation, it had concluded that the resignation letter had not been written under duress. On the contrary, it inferred from this letter that appellant knew exactly what he was doing and observed that he had used a clear, constructed and articulate reasoning. According to this decision, the resignation had become irrevocable since the time of its acceptance by the decision contained in the email of 17 June 2015, which had not been challenged separately by appellant. In this context, appellant was time-barred from challenging this decision when he asked on 20 July 2015 to rescind his resignation. For respondent, appellant was aware of the fact that his resignation had become irrevocable since its acceptance on 17 June 2015.

16. While he was on sick leave, appellant once again submitted medical certificates to respondent and invited it to proceed with the required medical assessment. The second medical control was carried out in accordance with Article 45.2 of the CPR, on 18 September 2015.

17. On 22 September 2015, appellant lodged a further administrative review on the basis of Article 2.2 b) of Annex IX to the CPR against respondent's decision of 7 September 2015.

18. In his further administrative review, appellant stressed, inter alia, that he did not remember having received the acknowledgment of receipt of his letter of resignation dated 17 June 2015 and, in any case, no time limit is foreseen in Article 8.2 of the CPR for reaching a mutual agreement between the parties in order to consider the resignation irrevocable. In this regard, the only existing decision was respondent's refusal to rescind appellant's resignation. Appellant also insisted that his resignation had been drafted under duress, as is directly reflected in the reports of the consulted doctors. From this point of view, and in contrast with the statement in the decision of 7 September 2015 about appellant's ability to write and structure a letter of resignation, appellant argues that that ability is completely irrelevant to proving that his resignation was sent to respondent under duress.

19. By decision dated 12 October 2015 (decision of 12 October 2015), respondent rejected appellant's second administrative review. In this decision, respondent observed that when appellant submitted his resignation, he had not been under a sick leave regime. Responding to the argument that appellant had had no reason to submit his resignation, respondent pointed out that appellant had had several issues with the senior leadership of his programme, as reflected in an email sent to his superiors on 20 June 2015. In this decision, respondent also recalled that prior to appellant's submitting his resignation (on 16 June 2015), he had also had an incident of inappropriate behaviour with one of his colleagues, which had been reported to the senior leadership of the programme.

20. In an email sent to appellant on 27 October 2015, appellant was requested to attend a psychiatric evaluation on 30 October 2015.

21. In the evaluation report dated 4 November 2015, the doctor noted that appellant was in a depressive state and his disability for work was fully justified from a medical standpoint. In this report, the doctor stressed that there was no link between appellant's depressive state and his stay in Afghanistan during his deployment.

22. By letter dated 10 November 2015, appellant lodged a complaint on the basis of Article 61.2 of the CPR and Article 4 of Annex IX to the CPR against the above-mentioned decision of 12 October 2015.

23. By decision dated 9 December 2015, respondent rejected appellant's complaint.

24. Under these circumstances, appellant brought the present action before the Tribunal against this decision of 9 December 2015 and against respondent's decision of 24 July 2015 not to rescind his resignation submitted on 16/17 June 2015.

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

### *(i) Appellant's contentions*

25. Appellant presents three pleas – which are developed together – against the decision dated 24 July 2015 rejecting his request to rescind his resignation. The first plea concerns the violation of Article 8 of the CPR; in the second plea, appellant argues that, with the above-mentioned decision, respondent failed in its obligation to state reasons; the last plea concerns the violation of the duty of care. The contentions developed by appellant may be examined separately as follows.

26. Concerning, firstly, the violation of Article 8 of the CPR; even if there is no mention in this provision of the possibility of rescinding a resignation, appellant argues that he has the right to request that his resignation be rescinded because, given that he was under duress, he did not exercise his free consent when submitting this resignation. Appellant considers that this interpretation also results from the provisions of a similar regime applicable in the European institutions and bodies such as the European Investment Bank. In this regard, the European case law confirms that any pressure or threat, as is the situation in the present case, aimed at persuading an employee to resign, makes it possible to infer that the employee's consent is defective (joined cases T-7/98 and T-208/98).

27. Appellant recalls that he had been under stress and in a depressive state, as confirmed by the medical certificates submitted just a few days after his request for resignation; consequently, respondent could not argue that appellant's resignation was valid under the requirements provided for in Article 8.2 of the CPR.

28. Secondly, concerning the failure of respondent to state reasons for its decisions, appellant stresses that respondent did not validly explain the motives for rejecting his request to rescind his resignation. Given that his request was valid because of his medical state, respondent was required to develop a relevant argumentation in order to justify the rejection of his request. However, in respondent's view, it was able and competent to deliver medical assessments in concluding that appellant's resignation was valid without any reservations about the mental illness from which appellant was indisputably suffering; consequently his request to rescind his resignation by reason of invalid consent was unfounded.

29. In response to respondent's argument that appellant had developed a very structured reasoning in setting out his resignation, appellant considers that this contention is absolutely irrelevant in view of the indisputable medical report and evaluation. Indeed, appellant recalls that, in all these reports, no reservation is expressed about the extremely fragile psychological state of appellant, an element which was disregarded by respondent when it took the challenged decision.

30. From the same perspective, it is also irrelevant to invoke an incident with one of his colleagues which happened when appellant was deployed in Afghanistan or an

exchange of emails with his superiors in order to argue that appellant's resignation was valid. Indeed, even this contention could not affect the indisputable fact that it is on the basis of the medical reports that appellant was in a depressive state when he submitted his resignation.

31. Finally, appellant argues that respondent failed to comply with its duty of care because respondent never examined the rescission of his resignation on the basis of all the relevant elements of the file and, notably, the medical reports on the basis of which it was undisputed that appellant's disability for work was medically justified. This became more obvious when respondent immediately accepted appellant's resignation without question even though appellant had been under contract with respondent for eight years, with about 50% of his time under deployment, and had received excellent feedback from his hierarchy and the Agency's customers.

32. In these conditions, appellant seeks:
- annulment of respondent's decision taken on 24 July 2015 not to rescind his resignation submitted on 16 June 2015;
- annulment of respondent's decision dated 9 December 2015, rejecting appellant's complaint; and
- reimbursement of the legal costs incurred, travel and subsistence costs and fees of the retained legal counsel.

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

33. Respondent objects, firstly, that appellant was fully aware of the consequences of his resignation. This is evidenced not only by appellant's emails sent to respondent when appellant decided to resign – suggesting the steps to follow and the way to calculate his rights in order for his resignation to become effective – but also from other emails suggesting that appellant had serious issues with his hierarchy. In addition, as regards the investigations concerning an incident with one of his colleagues between 12 and 16 June 2015, *i.e.* just before his resignation, respondent stressed that appellant was fully conscious of the consequences of his decision to resign, which was also linked to this incident.

34. Moreover, respondent recalls that during the pre-litigation procedure, it had made it clear that appellant has had several issues with superiors and colleagues, a fact which he did not contest. Concerning, in particular, the incident with one of appellant's colleagues during his deployment, respondent recalls that it had informed appellant of its intention to issue a reprimand letter for this incident. In respondent's view, all these elements constitute the main reasons for which appellant decided to resign.

35. Respondent considers, secondly, that there was no violation of Article 8.2 of the CPR when it rejected appellant's request to rescind his resignation. Respondent points out that given the incidents between appellant, on the one hand, and his colleagues and hierarchy, on the other, the rejection of this request was fully justified, since appellant's consent to resigning was indisputable and made at his free will. In this regard, no argument can be drawn from the case law of the European Union's courts.

Furthermore, respondent stressed that, in any event, such case law is not binding on NATO's judicial system. Therefore appellant's request to rescind his resignation on the grounds that his consent was not valid is unfounded.

36. Finally, respondent considers that, having examined all the relevant elements of the file, the medical certificates as well as the reasons for the rejection of appellant's request to rescind his resignation, it had fully complied with the requirements deriving from its duty of care and its obligation to state reasons.

37. In these conditions, respondent asks the Tribunal to dismiss the appeal as unfounded and without merit.

## D. Considerations

38. To start with, the Tribunal observes that appellant is seeking the annulment of both respondent's decision dated 24 July 2015 and respondent's decision dated 9 December 2015 rejecting appellant's complaint.

39. Given the fact that in the last decision of 9 December 2015, respondent provided a detailed analysis of why appellant's request to rescind his resignation was being rejected, substituting the reasons given initially in the decision of 24 July 2015, the Tribunal considers that the decision dated 9 December 2015 replaced the first one and, consequently, the present action must be considered as directed against the decision of 9 December 2015 (referred to herein as the "challenged decision").

40. Article 8.1 of the CPR, entitled "Resignation", provides in its first paragraph that

> Members of the staff wishing to resign in accordance with the terms of their contracts must notify the Personnel Service of their decision in writing through their immediate superior.

The second paragraph of the same Article states:

> On behalf of the Head of the NATO body, the Personnel Service shall acknowledge receipt of the resignation. This resignation is then irrevocable unless otherwise mutually agreed.

41. As it results from these provisions, the condition which must be fulfilled in order to consider the resignation irrevocable is that a mutual agreement has been reached by the concerned parties.

42. The Tribunal observes that Articles 8.1 and 8.2 of the CPR contain no indications about the applicable regime for the case of seeking to have a resignation rescinded. In this regard, however, and under the principle of parallelism of forms and procedures as pertains to resignations, a mutual agreement must also be reached in the case where a person requests rescission of his or her resignation. Consequently, the present plea developed by appellant against the challenged decision must be examined on the basis of this consideration.

43. Appellant considers, with his first plea, that the challenged decision violates Article 8 of the CPR on the grounds that when he resigned, he did not exercise his free consent because he was under stress and in a depressive state, as has been confirmed by various medical certificates. In this regard, consequently, and as was contended during the hearing, respondent should accept that appellant had rescinded his resignation.

44. The Tribunal observes that appellant had sent respondent various medical certificates attesting to his depressive state after he returned from his deployment. Indeed, after sending respondent his resignation on 16 June 2015, appellant was placed under a first sick leave on 24 June 2015.

45. Appellant also requested to rescind his resignation on 20 July 2015, *i.e.* more than four weeks after his resignation.

46. Moreover, and even if, as has been established by the medical certificates provided after his resignation, appellant was temporarily not able to work, this element could not lead exclusively to the conclusion that appellant did not express his free consent when he resigned on 16 June 2016.

47. Recalling the case law of the European Union judicature (joined cases T-7/98 and T-208/98), appellant also stresses that under this case law, when it is apparent that a staff member's resignation has been vitiated by a defect in consent, the concerned administration is bound to immediately accept the withdrawal of the resignation. This is precisely the case in the present dispute.

48. Even if that case law could be invoked in the present case, this contention must also be rejected. The medical certificates submitted by appellant after his return from his deployment did not, as such, give rise to the consideration that when appellant resigned on 16 June 2016, his consent was vitiated. Consequently, the first plea must be rejected.

49. Consequently, and on the basis of the fact that there is no other element in the file of the present case establishing that appellant's consent was vitiated when he submitted his resignation on 16 June 2015, appellant's contention must be rejected.

50. Appellant argues with his second plea that in the challenged decision respondent failed to comply with its obligation to state reasons because of appellant's specific medical situation.

51. The Tribunal stresses that under Article 8 of the CPR, the Head of the NATO body concerned enjoys broad discretion on agreeing to a staff member's resignation. Under the principle of parallelism of forms and procedures, the same conclusion is applicable in cases where a staff member decides to rescind his or her resignation.

52. In line with this consideration, the Tribunal must confine itself in its review to ascertaining whether the decisions adopted under Article 8 of the CPR were free from

manifest errors. In this regard, appellant did not develop any contentions against the challenged decision. Appellant limited his contentions to the fact that respondent did not further examine appellant's situation before adopting the challenged decision.

53. In order to rescind a resignation, the parties concerned must come to a mutual agreement; from that perspective, respondent did not make an obvious error of judgment nor did it violate Article 8 of the CPR in rejecting appellant's request to rescind his resignation.

54. With his last plea, appellant considers that, with the adoption of the challenged decision, respondent violated its obligation of duty of care because in practice respondent ignored appellant's medical situation, which deserved deep analysis in the light of the amount of time appellant had worked for respondent. This plea is developed by appellant together with the second plea of contentions.

55. The Tribunal recalls that the duty of care implies that, when the NATO body takes a decision concerning the situation of a staff member, even as it exercises broad discretion, it should take into consideration all the factors which may affect its decision; when doing so, it must take into account not only of the interests of the service but also those of the staff member concerned.

56. Specifically with regard to the broad discretion of the NATO body to assess the interests of the service under Article 8 of the CPR, review by the Tribunal must be limited to the question of whether the concerned body remained within reasonable limits and did not use its discretion in an incorrect way.

57. Appellant argues in particular that respondent's reacting immediately to appellant's resignation – dated 16 June 2015, accepted on 17 June 2015 – attested to respondent's manifest failure in the duty of care.

58. Even if in these circumstances respondent could be considered to have observed the duty of regard for the staff member's interests, by the present action appellant is only seeking annulment of respondent's decision rejecting appellant's request for rescission of his resignation.

59. Concerning appellant's request for rescinding his resignation dated 20 July 2015, respondent rejected it in a decision taken on 24 July 2015. Given the background of the case, the Tribunal finds that respondent used its discretion under Article 8 of the CPR in a correct way and in compliance with the requirements deriving from its duty of care. Therefore, the third plea must also be rejected; consequently the submissions for annulment must be dismissed.

60. It follows from all the foregoing considerations that the appeal must be rejected in its entirety.

## E. Costs

61. 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 […].

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

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 26 September 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

8 December 2016 AT-J(2016)0018

# Judgment

## Case No. 2016/1074

**GK**

**Appellant**

***v.***

**NATO Joint Force Training Centre**

**Respondent**

Brussels, 28 October 2016

Original: English

*Keywords: Article 5.5.3 CPR; ACT Directive; subsequent contracts; satisfactory performance; exceptions; discretion; limitations; error of law.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 26 September 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Joint Force Training Centre (JFTC), dated 23 March 2016 and registered on 7 April 2016 under Case No. 2016/1074, by Mr GK, staff member with the JFTC.

2. The appellant seeks annulment of respondent's decision to offer him a new two-year definite duration contract instead of an indefinite duration contract.

3. The answer of the respondent to this appeal, dated 6 June 2016, was registered on 13 June 2016. The reply of the appellant, dated 13 July 2016, was registered on 21 July 2016. The rejoinder of the respondent, dated 22 August 2016, was registered on 29 August 2016.

4. The Tribunal's Panel held an oral hearing on 26 September 2016 at NATO Headquarters. The Tribunal heard arguments by both parties, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar.

## B. Factual background of the case

5. Appellant signed a three-year definite duration contract with respondent running from 3 June 2013 until 2 June 2016.

6. In the appellant's staff report, dated 16 November 2015, respondent recommended that a new contract be offered to appellant. In this report, appellant's overall assessment was qualified as "satisfactory". Nevertheless, given appellant's overall performance, it was recommended not to offer him an indefinite duration contract but instead a two-year contract.

7. Commenting on this report, appellant expressed his disagreement with the above-mentioned assessments and provided a statement, dated 30 November 2015, explaining the reasons for his disagreement.

8. By decision dated 2 December 2015, respondent offered him a two-year definite duration contract of employment with effect from 3 June 2016.

9. Appellant accepted this offer on 3 December 2015 but indicated his intention to challenge respondent's decision to offer him a definite duration contact instead of an indefinite duration contract.

10. On 4 January 2016, appellant lodged a complaint against the decision dated 2 December 2015, requesting that this decision be rescinded or modified because with this decision he was offered only a definite duration contract. Appellant also requested that his complaint be submitted to a Complaints Committee.

11. On the basis of his new contract, an improvement monitoring process was initiated and the initial meeting between the concerned parties was held on 1 February 2016. The first progress assessment of the appellant was scheduled on 1 March 2016 and the second on 1 April 2016.

12. By decision dated 2 February 2016, respondent rejected appellant's complaint, recalling that the decision of 2 December 2015 had been adopted in full compliance with the requirements of the NATO Civilian Personnel Regulations (CPR) and the updated version of the ACT NATO Civilian Personnel Contract Policy Directive No. 50-6 (ACT Directive) dated 8 December 2015. By the same decision dated 2 February 2016 (challenged decision), respondent also rejected appellant's request to submit his complaint to the Complaints Committee because the decision of 2 December 2015 had been taken directly by the Head of the NATO body (HONB). Therefore, and in accordance with Article 61.3 and Appendix 3 of Annex IX to the CPR, this decision was not subject to administrative review and the Complaints Committee procedure was not applicable.

13. The first progress assessment report of appellant dated 1 March 2016 mentions that appellant was more engaged in his work, was demonstrating positively his ability to take initiative and was in a positive way emotionally dedicated to supporting the Branch in fulfilling its tasks. However, it also notes that he should continue working on a more requirement-driven approach when proposing the use of resources.

14. In this context, on 23 March 2016 appellant brought the present action before the Tribunal against the decisions dated 2 December 2015 and 2 February 2016, whereby respondent offered appellant a two-year definite duration contract of employment with effect from 3 June 2016 instead of an indefinite duration contract.

15. The second progress assessment report on appellant dated 1 April 2016 indicates that appellant showed a high level of engagement in his work and was actively involved in solving problems and making related proposals.

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

### *(i) Appellant's contentions*

16. By a single plea, appellant considers that the challenged decision violates Article 5.5.3 of the CPR and the relevant rules of the ACT Directive and develops in this regard a certain number of contentions.

17. Firstly, according to appellant, from the combined application of the concerned rules it follows that following satisfactory performance by a staff member of a three-year definite duration contract, a contract of indefinite duration *"will normally be offered"*. In this regard, the challenged decision neither provides any evidence why appellant's case diverges from the suggested *"*normality*"* to which the relevant texts refer, nor any objective reason for the determination of the duration of the last offered contact. From this perspective, as the challenged decision was based on manifest errors of appreciation, it also violates the principles of good administration and of non-discrimination. Appellant submits that he is the only staff member who, upon satisfactory performance, was not offered an indefinite duration contract.

18. Secondly, the grounds in the appellant's staff report on the basis of which it was recommended that he be offered only a two-year contract circumvent in fact the rationale of the rule in Article 5.5.3 of the CPR. Indeed, the recommendation to offer appellant only a two-year contract was in fact a rehabilitative measure aimed at allowing appellant to improve his duty performance. Such a situation is not covered by the scope of the above-mentioned provisions. Moreover, the grounds claimed by respondent in order to justify the offer of only a two-year contract place the focus on appellant's behavioural problems rather than on the positive performance of his duties.

19. Thirdly, the fact that the challenged decision was exclusively based on a manifest error concerning the appellant's staff report has a disproportional effect on his personal situation, thereby violating the principle of proportionality. Indeed, although respondent invokes minor shortcomings in appellant's performance – which in any case is qualified without any doubt as satisfactory – the challenged decision incontestably has a significant impact on appellant's professional career. Appellant argues that his situation is not covered by the exceptions provided by the ACT Directive (the case of the administration deciding not to offer an indefinite duration contract). In addition, and in contrast to the respondent's position in this regard, appellant argues that the list of exceptions provided for is exhaustive in order to ensure legal security, and his situation does not fall under these exceptions.

20. Appellant considers that the challenged decision has had a significant, devastating impact on his professional and personal life, causing non-material damage. In addition, his current situation and the unpleasant working conditions have had a serious impact on his health, causing increased anxiety and extra stress.

21. In these conditions, appellant seeks:
- annulment of the challenged decision;
- reimbursement of the costs for the transfer of the hard copy of the appeal before the Tribunal and the other costs incurred (travel, accommodation and per diem) for him to attend the hearings; and
- compensation evaluated *ex aequo et bono* at €5.000 for the non-material damage resulting from the strenuous situation caused by the challenged decision.

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

22. Respondent objects that the challenged decision fully complies with the requirements provided for by Article 5.5.3 of the CPR and the ACT Directive.

23. Firstly, respondent submits that even if the performance of a staff member was qualified as *"satisfactory"*, the renewal of a contract is not automatic, nor does it constitute a right for this staff member. In contrast, according to the same provisions, the respondent has a high level of discretion, taking into account all the relevant facts, in adopting its decision and offering (or not) a definite or indefinite duration contract. In this context, it is irrelevant to argue that appellant has suffered discrimination vis-à-vis his colleagues because he was the only staff member to whom respondent did not offer an indefinite duration contract.

24. Secondly, respondent rejects the set of appellant's contentions that no explanation was provided about the reasons why his offer was limited to a two-year definite duration contract. In this regard, respondent replies, in particular, that despite appellant's general satisfactory performance, it is on the basis of identified shortcomings that appellant was given an offer for a two-year contract. This cannot be called into question by appellant's contention that the decision was arbitrary and without any stated reasons. In contrast, during his evaluation – scheduled six months before the end of his initial contract – appellant was fully aware of the reasons that led respondent to offer only a new definite duration contract. In the same context, an infringement of the principle of proportionality may not be argued in order to consider that the challenged decision is flawed by an error of judgment. Appellant's staff report contained a clear recommendation for an offer of a two-year contract, which is not arbitrary and is justified by the identified shortcomings of appellant.

25. Thirdly, contrary to appellants' contentions, respondent submits that the challenged decision did not violate the ACT Directive but instead provided an additional exception with the possibility of offering him a definite duration contract. Respondent argues that the list of exceptions allowing a definite duration contract to be offered is not exhaustive. This derives also from the same Directive which provides that the administration has the option of offering a further definite or indefinite duration contract. In any case, the ACT Directive could not limit respondent's discretion to offer a definite or indefinite contract under Article 5.5.3 of the CPR by taking mainly into account the interests of the service.

26. Concerning, finally, the submission seeking compensation for non-material damage, respondent argues that it must be rejected because in the absence of any faults or error, the claim is unfounded.

27. In these conditions, respondent requests that the Tribunal dismiss the appeal as unfounded and without merit. As for the compensation sought, respondent asks the Tribunal to reject the appeal as unfounded and without merit and to find the damages undocumented and unjustified.

## D. Considerations

28. According to Article 5.5.3 of the CPR:

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

29. In this regard, point 10 of the ACT Directive indicates:

> Following satisfactory performance during the period of their 3 year definite duration contract, a contract of indefinite duration will normally be offered in accordance with Article 5.5.3 [of the CPR]. The following exceptions apply to this policy:
> a. An individual recruited to a post where turnover is considered to be desirable for political or technical reasons, will normally be offered a further 3 year definite duration contract which, depending on the policy at the time, may be extended for further periods.
> b. An individual recruited to a post which is required for a limited period may be offered a further definite duration contract of up to 3 years duration which, depending on the length of the requirement, may be extended for further periods.
> c. The appointments of Financial Controllers at HQ SACT and JWC will be renewed in accordance with […].

30. It results from the wording of point 10 of the ACT Directive that in case of *"satisfactory performance during the period of … 3 year definite duration contract"* of a staff member, the HONB concerned will offer a contract of indefinite duration except in the case that the contract of such staff member falls within the scope of one of the three exceptions mentioned above.

31. Respondent considers that, despite the rules above mentioned in the ACT Directive, it has in any case full discretion, on the basis of the assessment and recommendation of the staff member's staff report, to offer a definite or indefinite duration contract to that staff member, on the basis of powers conferred by Article 5.5.3 of the CPR. This contention must be rejected.

32. In an area where the HONB has broad discretion conferred by the CPR, in this case Article 5.5.3 of the CPR, an internal Directive may be adopted with the intention of guaranteeing that the staff members and other civil servants concerned will receive the same treatment. The Tribunal considers that this is precisely the case of the ACT Directive. This Directive must, as such, be regarded as a rule of conduct, indicating the practice to be followed, which the HONB imposes on itself and from which it may not depart, since otherwise the principle of equal treatment would be infringed.

33. In the present case, first appellant completed three years of continuous service under a definite duration contract; second, his performance on the staff report is qualified as "satisfactory"/"satisfaisante". Under these conditions, and given the fact that the contract offered does not fall under the limited exceptions regime provided for by point 10 of the ACT Directive, respondent committed an error of law in taking the

challenged decision to offer appellant only a two-year definite duration contract instead of an indefinite duration contract.

34. In this regard, respondent argues that even if the ACT Directive could be regarded as a rule of conduct indicating the practice to be followed, which the respondent imposes on itself, it may however depart from this practice, specifying the reasons for doing so. This is particularly the situation in the present case because, despite the qualification of appellant's performance as "satisfactory"/"satisfaisante" by respondent, the offer of a two-year definite duration contract was fully justified, taking into account appellant's overall assessment and performance.

35. With this contention respondent argues in fact that the exceptions list mentioned in point 10 of the ACT Directive is not exhaustive. This contention must also be rejected. Indeed, given the wording of point 10 of the ACT Directive, in case of satisfactory performance of a staff member after a contract of three years' duration, the HONB concerned has to offer an indefinite duration contract to the same staff member; it can only depart from this and offer a definite duration contract when the contract of employment falls under the exceptions regime mentioned in point 10 of the ACT Directive. This is not the case in the present litigation. The Tribunal observes that nowhere does the text of the ACT Directive indicate that the list of exceptions is non-exhaustive. The Tribunal cannot but conclude from the plain language of the ACT Directive that the list of exceptions provided in point 10 of the ACT Directive must be considered as being exhaustive.

36. Consequently, the challenged decision must be annulled insofar as with this decision respondent offered appellant a two-year definite duration contract instead of an indefinite duration contract, without there being any need to examine the other pleas and contentions put forward by appellant.

37. Considering, finally, the submissions for compensation for the moral damage that appellant alleges he suffered with the adoption of the challenged decision, the Tribunal considers that the annulment of an act tainted with illegality may in itself constitute adequate and, in principle, sufficient reparation for any moral harm that this act may have caused.

38. As this is the case here, it is consequently appropriate to dismiss appellant's request for compensation.

## E. Costs

39. 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 […]

40. Under the circumstances of the case, respondent must refund appellant the costs incurred for the transfer of the hard copy of the appeal before the Tribunal and the travel and subsistence costs incurred for attending the oral hearing, on the basis of relevant documents and evidence in support.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The respondent's decision of 2 December 2015 offering only a two-year definite contract to appellant instead of an indefinite duration contract is annulled.
- Respondent is ordered to refund appellant the costs incurred for the transfer of the hard copy of the appeal before the Tribunal and the travel and subsistence costs incurred for attending the oral hearing, on the basis of relevant documents and evidence in support.

Done in Brussels, on 28 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

8 December 2016 AT-J(2017)0019

# Judgment

## Case No. 2016/1071

**JC**

**Appellant**

**v.**

**NATO Communications and Information Agency**

**Respondent**

Brussels, 17 November 2016

Original: French

*Keywords: contract renewal of a staff member with ten years' service; contract necessarily of indefinite duration – exception – research post; concept of research post (CPR Article 5.4.3)*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 26 September 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 4 March 2016 and registered on 10 March 2016, by Mr JC, seeking:

- annulment of the decision of 20 November 2015 whereby the General Manager of the NATO Communications and Information Agency (NCIA) offered him a definite duration contract at the end of his previous contract;
- annulment of the implicit decision whereby the NCIA General Manager dismissed his complaint;
- annulment of the contract inasmuch as it is of definite duration;
- compensation for material and non-material damage, assessed at €10,000; and
- reimbursement of the costs incurred for his defence.

2. The Comments of the respondent, dated 9 May 2016, were registered on 17 May 2016. The reply of the appellant, dated 16 June 2016, was registered on 20 June 2016. A rejoinder, dated 19 July 2016, was produced by the respondent on 21 July 2016.

3. The Tribunal's Panel held an oral hearing at NATO Headquarters on 26 September 2016. It heard arguments by the parties, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar.

## B. Factual background of the case

4. Appellant joined NATO on 6 December 2004. He started as a staff member at grade B4, and later B5. At the time of the dispute he was a "principal scientific assistant" based in The Hague, the Netherlands.

5. On 18 March 2015, the NCIA General Manager, who is the Head of NATO body within the meaning of the NATO Civilian Personnel Regulations (CPR), told him that his contract, which would expire on 31 December 2015, would not be renewed. Appellant challenged this decision by seeking two successive administrative reviews, both of which were dismissed. Next he pursued mediation, and then entered a complaint on 5 August 2015.

6. On 20 November 2015, the Head of NATO body accepted the complaint and set aside his decision not to renew the contract. At the same time he took another decision to offer appellant a new contract, which was a two-year definite duration contract. He also indicated that the duty station would change to Mons, Belgium on 1 March 2016. This decision is reflected in the proposal made to appellant on 3 December 2015 to sign his new two-year contract, which provides for a transfer to Mons on 1 June 2016.

Appellant wanted to add his reservation regarding the duration of the contract to it, but the Administration refused. In the end the contract was signed by both parties on 17 December 2015.

7. Although he had signed the contract, appellant entered a complaint on 19 December 2015 against the decision of 20 November 2015. The Head of NATO body did not respond to this. On 25 February 2016, appellant was told that his transfer to Mons had been deferred again and would become effective 1 September 2016.

8. On 4 March 2016, appellant lodged an appeal with the NATO Administrative Tribunal.

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

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

9. First, appellant defends the admissibility of his appeal, arguing that it is admissible to challenge the contract that he signed, which is merely the confirmation of the NCIA General Manager's decision only to offer him a two-year definite duration contract. He observes that there is no set date in the CPR for determining the date of the implicit decision arising from the Head of NATO body's silence in response to a complaint.

10. Secondly, appellant argues that the contested decision violates Article 5.4.2 of the CPR and Article 4.3.2 of NCIA Directive 2.1 on Contract Policy. He contends that the wording of Article 5.4.2 obliges the Administration to offer an indefinite duration contract to staff members who have already served for more than ten years at NATO and whose contract is expiring. In his view, the only exception, noted at Article 5.4.3, is scientists, and he denies being one, recalling that he is just a "scientific assistant". He stresses that the NCIA personnel establishment policy uses very similar terms, since Article 6.4.4 thereof reserves the exception to the principle of the indefinite duration contract for staff in a "scientific post". In his reply, appellant said that while the NCIA may be regarded as a NATO scientific establishment, it does not employ exclusively scientific personnel, and he denies being scientific personnel.

11. Appellant recalls in his reply that the CPR must take precedence over the Agency's directives, which may not diverge from the rules in the CPR, in which an exception is only made for "research posts"; appellant denies filling such a post because he is performing support tasks for the scientific and research staff.

12. Appellant puts forward other arguments such as the situation of several other NCIA staff members in the same professional situation and with the same amount of seniority as he, who were offered indefinite duration contracts at the end of their previous contracts. Finally, he submits that the Administration failed in its duty of care by not responding explicitly to his complaint.

13. Consequently he is seeking not only annulment of the decision to limit the duration of renewal of his contract but also compensation for the damage suffered by him, which

he estimates at €10.000.

14. The matter of the duty station in Mons is no longer disputed.

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

16. Firstly, respondent challenges the admissibility of the appeal. According to respondent's calculation of the time frames, appellant should have registered his appeal before 19 January 2016, i.e. well in advance of 4 March 2016, when it was actually registered by the Tribunal Registrar. Respondent does not see, in the initiatives taken by appellant between 20 November and the end of February, any event that would interrupt the running of the time frames for lodging an appeal.

16. Respondent goes on to claim that the General Manager was not required to convene a second Complaints Committee because the submitted dispute was identical to the one for which a Complaints Committee had already been convened in September 2015.

17. Responding to appellant's contentions, respondent argues that appellant is a member of the scientific staff and was therefore covered by the exception in Article 6.4.4 of the NCIA Personnel Establishment Policy, which authorizes not offering an indefinite duration contract to staff members filling scientific posts. For respondent, neither the CPR, nor the NCIA directive on contract policy, nor any other text obliges him to offer an indefinite duration contract.

18. With regard to compensation for the alleged damage, respondent argues that because appellant has not sufficiently substantiated his request, it must be dismissed (which is what the European Civil Service Tribunal does). Respondent dismisses all the contentions in the appeal and requests that it be declared groundless.

## D. Considerations and conclusions

***(i) Considerations on admissibility:***

19. Article 6.3.2 of Annex IX to the CPR provides that the time frame for lodging appeals against decisions by the Heads of NATO bodies is 60 days from the date of notification of the decision to the appellant. When a complaint has been submitted, this time frame runs, under Article 6.3.1, from the time of notification of the refusal to allow the complaint.

20. The disputed decision is dated 20 November 2015. Appellant submitted a complaint against that decision on 19 December, exercising his right under CPR Article 61.3, even though the initial decision had been taken by the Head of NATO body. Good administration dictates that every complaint should be answered within a reasonable time frame. Certainly there is no provision in the CPR that specifies the time frame beyond which the Administration's silence in response to a complaint is regarded as an implicit

decision to dismiss the complaint. But by analogy with Article 6.3.1 c) of Annex IX, this duration cannot be less than thirty days. Consequently, even assuming this reasonable time frame was set at thirty days, an implicit decision would have arisen on 19 January at the earliest, at which point appellant had 60 days (*i.e.* until 20 March) to challenge it before the Administrative Tribunal in accordance with CPR Article 6.3.1. He lodged his appeal on 4 March 2016, before the expiration of that time frame. His appeal is therefore admissible.

***(ii) On the legality of the contested decision:***

21. To consider the legality of the contested decision, the applicable texts must first be determined. The debate has centred on the wording of the CPR, that of the NATO personnel establishment policy and that of the NCIA directive on contract policy, which are not identical.

22. The Civilian Personnel Regulations are clearly applicable to the staff member. Although the NATO Agencies may establish special rules, they may only do so after seeking the Council's approval in accordance with Article E (xi) of the Preamble to the CPR. Admittedly, the Appeals Board's case law has allowed that the Agencies may adopt different rules than those in the CPR, yet the Appeals Board has only acknowledged the legality of doing so in situations where those rules are more favourable to staff members. A NATO Agency may not, however, create special rules that might restrict the rights that staff members derive from the CPR (NATO Appeals Board decisions no. 376 dated 8 May 1998, no. 386 dated 11 March 1999, no. 394 dated 25 February 2000, no. 733 dated 14 March 2008, no. 754 dated 10 July 2009, nos. 772 and 773 dated 10 December 2010, no. 775 dated 4 February 2011), in particular for the rules on contract renewal (no. 745 dated 31 October 2008).

23. In the present appeal, it is a question of which staff members are deprived of a right provided for by the CPR, the right to receive an indefinite duration contract. The CPR makes a few exceptions, which must be interpreted strictly. The exceptions to the rule on granting an indefinite duration contract may not be defined more broadly by local rules than the rules in the CPR.

According to CPR Article 5.4.3:

> Notwithstanding Article 5.4.2 above, a staff member who is filling a research post in a scientific establishment shall not be offered an indefinite duration contract (... ).

The local rules cited by respondent, which note the impossibility of granting an indefinite duration contract to "scientists" (NCIA contract policy) or for "scientific posts" (NCIA personnel establishment policy), provide exceptions that are broader than in the CPR. Because they deprive more staff members of the possibility of receiving an indefinite duration contract than the CPR, and are therefore unfavourable to those staff members, these provisions must be set aside; the only rules to apply are those in the CPR.

24. The Tribunal observes that the duties performed by appellant are not those of a "research post" within the meaning of CPR Article 5.4.3. Appellant is an IT technician who assists scientific researchers by giving them engineering support, but he himself is not in charge of developing or executing a research programme.

25. Consequently, as appellant was not covered by the exception in the CPR, he could not be offered any contract other than an indefinite duration contract when his previous contract expired. The Administration was not required to renew his contract, but if it decided to do so, it was obliged to offer him an indefinite duration contract.

***(iii) On the request for compensation for damage:***

26. Appellant is seeking compensation for the damage suffered as a result of signing a two-year definite duration contract instead of the indefinite duration contract that he had requested. The Tribunal observes, first of all, as respondent rightly stresses, that appellant has not substantiated the nature or the form of the damage, whether material or non-material, that he claims to have suffered, particularly as there was no discontinuity in his employment relationship with NATO. In addition, the Tribunal recalls that the annulment of an action tainted with illegality can in itself constitute the appropriate compensation for any alleged non-material damage (see the AT judgment in case no. 897). Consequently the Tribunal is of the view that appellant cannot be paid any financial compensation whatsoever for it.

## E. Costs

27. Article 6.8.2 of Annex IX provides as follows:

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

28. Given that there were good grounds for most of the submissions in Mr C's appeal, it is appropriate to reimburse him for the costs he incurred for his defence. The NCIA shall therefore reimburse Mr C for the travel and subsistence costs incurred by him to appear at the hearing, as well as the costs of retaining counsel, up to a limit of €4.000.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The NCIA General Manager's decision of 20 November 2015 to set a definite duration of two years for the contract offered to Mr C is annulled, as is the implicit decision dismissing appellant's complaint against that decision.
- Under Article 6.8.2 of Annex IX to the CPR, the NCIA shall reimburse Mr C for the travel and subsistence costs incurred by him to appear at the hearing, as well as the costs of retaining counsel, up to a limit of €4.000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 17 November 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

8 December 2016 AT-J(2016)0020

# Judgment

## Case No. 2016/1073

**PL**

**Appellant**

***v.***

**Headquarters Allied Joint Force Command**
**Brunssum**
**Respondent**

Brussels, 30 November 2016

Original: French

*Keywords: Suspension of a staff member – conditions.*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John R.Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 26 September 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 15 March 2016 and registered on 21 March 2016, by Mr PL, seeking:
- annulment of the decision of 15 January 2016 whereby the Commander, Allied Joint Force Command Brunssum (JFCBS) suspended him immediately from his duties and deprived him of access to his workstation;
- annulment of the decision of 27 January 2016 rejecting his complaint;
- an order for the Commander, JFCBS to halt the disciplinary proceedings against him immediately;
- an order for the Administration to produce the ABOI 2015 report and all associated documents;
- compensation for material and non-material damage, assessed at €30.000; and
- full reimbursement of the costs incurred for his defence.

2. The comments of the respondent, dated 26 May 2016, were registered on 27 May 2016. The reply of the appellant, dated 26 June 2016, was registered on 1 July 2016. The rejoinder of the respondent, dated 27 July 2016, was registered on 22 August 2016.

3. The Tribunal's Panel held an oral hearing at NATO Headquarters on 26 September 2016. It heard arguments by the parties, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar.

## B. Factual background of the case

4. The appellant is a legal adviser at Headquarters Allied Joint Force Command Brunssum. He is alleged to have mismanaged fuel supply contracts for ISAF.

5. On 13 May 2015, the Administration launched an administrative enquiry into the management of fuel intended for ISAF and its participating nations. The Board of Enquiry's report was completed on 5 October 2015, and the Chief of Staff of the Supreme Headquarters Allied Powers Europe (SHAPE) approved the results of the enquiry on 18 December 2015. Its recommendations included initiating disciplinary proceedings against a number of people, including appellant, who are alleged to have caused undue costs or placed NATO at financial risk. These disciplinary proceedings began with the preparation of a disciplinary report. Prior to drafting this report, the Head of the NATO body informed appellant, in a letter dated 15 January and notified on 18 January, that it had been decided, firstly, to convene a Disciplinary Board, and secondly, to suspend him with immediate effect, with no loss of remuneration, under Article 60.2 of the Civilian Personnel Regulations (CPR), until the Disciplinary Board issued its opinion.

6. On 19 January 2016 appellant lodged a complaint against this suspension, which was based on the recommendations of an enquiry report that was not in his possession, and asked to be given access to his work files and diaries. On 21 January, the administrative enquiry report was sent to appellant by the Deputy Chief of Staff, who underscored the possible violations of NATO rules with which appellant was charged and gave him two weeks to present his oral or written comments. The Head of the NATO body dismissed the complaint on 27 January 2016.

7. On 15 March 2016, the appellant lodged an appeal with the NATO Administrative Tribunal.

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

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

8. Appellant claims, firstly, that the suspension decision was taken prematurely, before the disciplinary report had been issued, at a time when he had not yet been charged with any established facts.

9. He also argues that the proceedings were illegal because he had not been offered an opportunity to present comments, in violation of Article 60.2 of the CPR. In particular he underscores that the Board of Inquiry's report from 2015 had not been forwarded to him: he could not usefully challenge the order for suspension from office unless he knew what the charges against him were. Moreover, owing to the contested decision he no longer had access to his work papers or his diaries for the previous weeks and months, so he was unable to present relevant arguments to defend himself in the disciplinary proceedings or provide the right reasoning for challenging the order for suspension from office.

10. Next appellant challenges each of the cumulative conditions in Article 60 of the CPR required to issue an order for suspension. In particular, he argues that no charges of serious misconduct can be laid against him, nor does the letter of 15 January 2016 mention any. Because the facts are unproven, the order for suspension from office is based on mere allegations that do not fulfil the second condition, i.e. to be based on facts that the Head of the NATO body considers well-founded. Finally, he argues that the Organization did not suffer any damage since only a few members of NATO's leadership were made aware of the facts.

11. He argues, lastly, that the order for suspension from office was illegal insofar as no intelligible grounds for it were given. This argument refers to the failure to send the Board of Inquiry's report from 2015.

12. He also cites a violation of the principle of equal treatment because other colleagues alleged to have violated NATO's rules were not suspended on those grounds alone.

13. Finally, he claims to have suffered particular harm when his access to his workplace was closed off to him and many colleagues observed him being barred from the premises, which was in violation of Article 12.1.4 of the CPR, whereby the Administration is required to treat members of the staff with courtesy. Consequently he is seeking not only annulment of his suspension but also compensation for the damage suffered by him, which he estimates at €30.000.

***(ii) Respondent's main contentions***

14. Firstly, respondent challenges the admissibility of the appeal. It claims that Appeal no. 2016/1073 is nothing but a needless repetition of the previous appeal lodged under no. 2016/1072, with the sole aim of including comments that appellant had omitted from his previous written pleadings.

15. Respondent argues that it had the power to order the suspension while the disciplinary proceedings were under way, without waiting for the disciplinary report to be drafted. For respondent, the ongoing disciplinary proceedings did not prevent the Administration from ordering the suspension at any time.

16. Next respondent submits that each of the conditions in Article 60 of the CPR required for issuing an order for suspension had been met.

17. The Administration notes, firstly, that appellant could not refute the seriousness of the allegations made against him, which were revealed by the enquiry report.

18. As for the grounds for the contested decision, they follow from referral to the Board of Enquiry's report, which establishes the facts. Moreover, appellant could not have been unaware of the past events and the charges against him. In any event, appellant received the disciplinary report three days after the suspension letter, at which time he was able to familiarize himself with the details of the charges against him.

19. The details of the disciplinary report show that the charges are sufficiently substantiated and documented to be considered by the Head of the NATO body as well-founded and grounds for suspension.

20. As regards the harm to the Organization, it is a fact: NATO needs an independent, unbiased legal counsel, yet appellant placed himself in a situation of conflict of interest. The necessity of protecting the witnesses who disclosed the facts justified barring appellant from his service, especially as his continuance in office would have allowed him to destroy evidence. Therefore the proper progress of the disciplinary proceedings justified appellant's suspension.

21. Finally, there are no grounds for the argument that the principle of equal treatment was violated; the circumstance of other staff members having been treated differently has no impact on the decisions compelled by his personal situation.

## D. Considerations and conclusions

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

22. Article 6.3.2 of Annex IX to the CPR provides that the time frame for lodging appeals against decisions by the Heads of NATO bodies is 60 days from the date of notification of the decision to the appellant. When a complaint has been submitted, this time frame runs, under Article 6.3.1 of the CPR, from the time of notification of the refusal to allow the complaint.

23. The appeal poses no difficulty in this regard, since it is clear that the contested decision was taken on 15 January 2016 and notified on 18 January 2016, that the complaint of 19 January was dismissed on 27 January, and that the appeal was lodged with the Administrative Tribunal on 15 March 2016, *i.e.* less than sixty days after notification of the contested decision.

24. Respondent also objects to the contested decision being qualified as a decision causing grievance.

25. The decision to suspend a staff member is covered by Article 60.2 of the CPR:

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

26. The decision to suspend a staff member is not a disciplinary action; it does not have to be preceded by the guarantees inherent to the disciplinary proceedings. It is a conservative precautionary measure to enable any disciplinary proceedings that may follow to progress properly. This measure, which is separate from the disciplinary proceedings and the disciplinary action that may ultimately be ordered after those proceedings, produces its own effects which are the exclusion of the staff member from his service – which in itself causes grievance – and may be combined with depriving the staff member of his emoluments in whole or in part, which also causes grievance to him.

27. Thus a decision to suspend a staff member, on the basis of Article 60.2 of the CPR, is a decision that causes grievance against which an appeal can be lodged before the NATO Administrative Tribunal (see NATO Administrative Tribunal decisions in cases nos. 2014/1034 and 2015/1042).

28. The appeal is therefore admissible.

***(ii) On the legality of the decision***

29. But suspension from office, which is conservative, is aimed at preserving the functioning of the administration or the evidence that may be the basis for later disciplinary proceedings, and cannot be based on a mere suspicion devoid of any prima facie plausible information. It must fulfil the procedural and substantive conditions laid down in the Civilian Personnel Regulations.

30. Article 60.2 of the CPR (see paragraph 25 above) sets out three cumulative conditions:

- a charge of serious misconduct is made;
- the charge is well-founded;
- the staff member's continuance in office during investigation of the charge might prejudice the Organization.

31. After an administrative enquiry had gathered information that some staff members may have caused undue costs or placed NATO at financial risk, the Head of the NATO body decided in December 2015 to launch a disciplinary enquiry to establish whether the allegations mentioned in the report were well-founded, and to determine the liabilities of the staff members concerned.

32. Given that the Administration had launched an enquiry to determine whether there were grounds for the charges against appellant, it could not suspend him before that enquiry had been concluded unless the enquiry turned up information that was sufficiently serious and certain as to justify an urgent decision to bar him from the service.

33. As Article 60.2 of the CPR provides, a staff member may not be suspended until a charge of serious misconduct has been made against him. This charge of serious misconduct must be substantiated in a document drafted by the Administration and brought to the attention of the staff member concerned before or at the same time as the decision on suspension, and must indicate what charges against him justify the order to bar him from the service.

34. In this case, as of 15 January 2016, while the enquiry was under way, the Administration was not in possession of any document that could constitute a charge of serious misconduct against appellant. This charge of serious misconduct only became available a few days later, with the results of the administrative enquiry performed by the Administration itself. The suspension was therefore ordered following an irregular procedure, since the first of the conditions in Article 60.2 of the CPR had not been fulfilled. There is therefore no need to examine whether the other conditions stipulated in that article had been met.

35. Thus the Tribunal decides that the decision to suspend appellant from office was taken without one necessary step in the procedure laid down in the CPR being completed. The decision is therefore annulled. This annulment is based not on the substance of the charges against appellant but rather on the premature date when the decision was taken, and in no way prejudges the decision that the Tribunal might take if it were to be seized of an appeal against a disciplinary action taken at the end of the ongoing proceedings.

### *(iii) On the request for compensation for damage*

36. Appellant is seeking compensation for the damage suffered as a result of his suspension. But as respondent rightly stresses, appellant has not substantiated the nature or the form of the damage, whether material or non-material, that he claims to have suffered, particularly as as the contested decision expressly mentions that it involved no loss of remuneration. Consequently the Tribunal is of the view that since the existence of the damage has not been demonstrated, he cannot be paid any financial compensation for it. Annulment of the order for suspension from office is, on its own, appropriate compensation for the alleged damage.

## E. Costs

37. Article 6.8.2 of Annex IX provides as follows:

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

38. Given that there were good grounds for most of the submissions in Mr L appeal, it is appropriate to reimburse him for the costs he incurred for his defence. JFCBS shall therefore reimburse Mr L for the travel and subsistence costs incurred by him to appear at the hearing, as well as the costs of retaining counsel, up to a limit of €4.000.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 15 January 2016 whereby the Commander, JFCBS suspended Mr L immediately from his duties and deprived him of access to his workstation is annulled, as is the decision of 27 January 2016 dismissing appellant's complaint against that decision.
- Under Article 6.8.2 of Annex IX to the CPR, JFCBS shall reimburse Mr L for the costs of retaining counsel, up to a limit of €4.000, as well as the travel and subsistence costs incurred by him to appear at the hearing.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 30 November 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

24 January 2017 AT-J(2017)0001

# Judgment

## Case No. 2016/1097

**CH**

**Appellant**

***v.***

**NATO International Staff**

**Respondent**

Brussels, 11 January 2017

Original: English

*Keywords: review of invalidity pension decision.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 both parties and to their agreement signed on respectively 9 and 22 November 2016 that the appeal be examined on the basis of the written submissions without recourse to an oral hearing, and having deliberated on the matter at its session of 16 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO International Staff (IS) by Mr CH dated 26 June 2016 and registered on 6 July 2016 under Case No. 2016/1097, with the request to annul the 22 February 2006 decision to grant him an invalidity pension and to either reinstate him or grant him an invalidity allowance, with retroactive effect.

2. The respondent's answer, dated 1 September 2016, was registered on 13 September 2016. The appellant's reply, dated 5 October 2016, was registered on 10 October 2016.

3. By letter dated 17 October 2016 appellant reiterated some of his arguments, but also informed the Registrar that he would, for health reasons, probably not be able to attend the oral hearing that was scheduled for 16 December 2016. In an agreement signed on respectively 9 and 22 November 2016 the parties agreed that the appeal could be examined on the basis of the written submissions without recourse to an oral hearing, in accordance with Article 6.7.1 of Annex IX to the NATO Civilian Personnel Regulations (CPR), which provides that *"[u]nless all parties agree otherwise, appeals lodged before the Tribunal will require an audience in the form of an oral hearing where all concerned parties may be present…*"

4. The respondent's rejoinder, dated 8 November 2016, was registered on 11 November 2016.

5. The Tribunal deliberated on the appeal at its session on 16 December 2016.

## B. Factual background of the case

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

7. Appellant entered the service of NATO on 1 May 1985 in the Allied Joint Force Command Headquarters (JFC) in Brunssum, the Netherlands. On 7 November 2005 JFC's Head of the Civilian Personnel Branch informed appellant that due to the latter's extended sick leave and following the Medical Consultant's recommendation an Invalidity Board would be convened. By letter dated 22 February 2006, appellant was informed by JFC's Head of the Civilian Personnel Branch that, further to the unanimous conclusions of the Invalidity Board, his employment would terminate on 28 February 2006 and that

he would be granted an invalidity pension as from 1 March 2006. This is the contested decision.

8. By letter dated 15 May 2015, *i.e.* nine years later, appellant petitioned the NATO Secretary General, in order to clarify his formal status, to reconsider the termination of his contract and the granting of an invalidity pension per 1 March 2006 and to grant him a retirement pension as from 1 October 2014 with simultaneous award of a loss-of-job indemnity.

9. By e-mail dated 21 August 2015, the Head of the NATO Pension Unit replied that appellant's status was very clear. Appellant had been receiving an invalidity pension since 2006 and would continue to receive this pension until the age of 65, when the invalidity pension would be automatically converted into a retirement pension. He added that appellant had received accurate and complete information when he was found to be suffering from invalidity, and ever since then, and that he could have contacted the NATO Pensions Unit at any time, and indeed had done so for questions relating to other topics. On the other hand, he had never brought up the question of his status or complained about a lack of information. He concluded by saying that appellant had the possibility of making a formal request to his former employing NATO body, JFC Brunssum, to convene a new Invalidity Board to reassess the invalidity.

10. By letter dated 24 August 2015 appellant reiterated his petition to the NATO Secretary General.

11. By letter dated 17 September 2015, the Head of NATO Staff Services informed appellant that, having giving the matter his full attention, he concluded that there did not appear to be elements which would lead to a different conclusion than that already explained by the Head of the Pensions Unit in his email of 21 August 2015, namely that appellant's status as a pensioner receiving an invalidity pension from NATO was clear and well defined in Article 14 of the CPR. He repeated that appellant had the possibility of making a formal request to his former employing NATO body, JFC Brunssum, to convene a new Invalidity Board to reassess the invalidity. He was, however, not convinced that, at that stage, it would make sense to do so.

12. By letter dated 25 September 2015, appellant reiterated his requests and formulated a detailed proposal of a letter that he was expecting to receive instead of the letter of 17 September 2015.

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

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

13. Appellant submits that he understands that his appeal might be late, but argues that he was not in a position to adequately lodge his appeal any earlier due to national circumstances and procedures. He alleges that national authorities and courts do not consider the NATO invalidity pension as a pension as such and that invalidity pensions are treated differently by several international organizations. He refers in particular to a decision by a Dutch court of 3 February 2015, which reveals that the European Patent Office (EPO) had changed its rules regarding invalidity pensions as per 1 January 2008 and that from that date onwards (and even for existing invalidity cases) an invalidity pension had been changed into a non-taxable invalidity allowance. He concludes that he is being treated differently from others in a comparable position.

14. Appellant considers that for obvious factual and legal circumstances his former Head of NATO body (HONB) was not or could not be in a position to formally decide on the legal issue of his unlawful or irregular dismissal, since the decision to grant an invalidity pension was, in his view, taken by the wrong authority.

15. Appellant says that he had no access to the CPR until early June 2016 when pensioners were provided with a hard copy of Annex IX to the CPR and were advised that he complete version of the CPR was available on the NATO website. He submits in his reply that the new CPR were only made applicable to him as from that date.

16. Appellant asks the Tribunal:

(i) to reinstate him with retroactive effect to 1 March 2006 in his capacity as NATO international civilian staff member grade A2 step 6; or, alternatively

(ii) to change, with retroactive effect to 1 March 2006, his status as recipient of an invalidity pension into that of an employee assigned to non-active status in receipt of an invalidity allowance equal to his current invalidity pension including allowances and tax compensation; or, alternatively

(iii) to pay him, as a non-taxable allowance, as from 1 March 2006 the amount of the difference between the real taxes he would have had to pay to his national authorities based on the NATO invalidity pension, including taxable allowances and tax compensation, and the tax compensation actually received from NATO, until appellant reaches the age limit laid down in the CPR (*i.e.* up to his entitlement to a NATO retirement pension as per 1 October 2016). This solution would bring him into the same situation as an invalid EPO staff member without changing the current status of appellant until the age limit laid down in the CPR. He has calculated this to amount to a non-taxable allowance of € 150.396,00 or, alternatively, and instead of a non-taxable allowance, to amount to a taxable amount of € 313.325,00.

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

17. Respondent, first of all, underlines that appellant never entered into a contractual relationship with the IS. He was employed by JFC Brunssum. JFC Brunssum is also the NATO body that decided to grant appellant an invalidity pension as from 1 March 2006, a decision that appellant is contesting. As a former JFC Brunssum staff member, appellant should have directed any concerns to or through the NATO body that last employed him (*i.e.* JFC Brunssum) in accordance with Articles 2.1 and 2.4 of Annex IX to the CPR. The IS has no authority to rescind or modify the contested decision. Appellant directed the present appeal to the wrong NATO body.

18. Respondent explains that within NATO both retirement and invalidity pensions are administered by the IS. Appellant has been in contact with the IS Pensions Unit concerning administrative matters related to his invalidity pension on several occasions in the past. Respondent submits that it is in this context that appellant's communications to the IS of 15 May 2015, 24 August 2015 and 25 September 2015 are to be understood. The respective responses from the IS by e-mail dated 21 August 2015 and by letter dated 17 September 2015 are to be understood in the same context.

19. Respondent further submits that, as required under Article 6.3.1 of Annex IX to the CPR, appellant did in no way respect the internal dispute settlement procedure as laid down in the CPR. Appellant did not make a request for administrative review, nor did he submit a complaint.

20. Lastly, respondent alleges that appellant did not respect any of the timelines prescribed by the CPR. It submits that appellant's argument that he was not aware aware of the latest version of the CPR fails because the CPR were already electronically available on the NATO website in 2015 and, the appellant acknowledges having received a copy of Annex IX to the CPR in May 2016.

21. As far as the merits are concerned respondent holds the view that the IS is not competent to comment on the contested decision, which emanates from within another NATO body, namely JFC Brunssum, and is therefore to be contested before that NATO body in the way described in the CPR. It is not for the IS to reconsider decisions taken by other NATO bodies far less decisions on issues that do not fall within the competence of the IS and which the Head of the IS is unable to rescind or modify. Appellant was informed that in order to revisit any decisions taken at the level of JFC Brunssum, the HONB had to be approached.

22. Respondent underlines that any references to rules, procedures and practices at the EPO are not relevant for the present proceedings, EPO being a different international organization with rules and regulations of its own. EPO is also not one of the so-called Co-ordinated Organizations and therefore its rules on pensions and invalidity also differ entirely from those of NATO.

23. Regarding the tax regime applicable to appellant, respondent submits that appellant should also in this case contact JFC Brunssum.

24. Respondent asks the Tribunal to declare the present appeal inadmissible. If declared admissible, it invites the Tribunal to dismiss the appeal as being without any merit.

## D. Considerations

25. It is at the outset appropriate to recall the powers that are given to the Tribunal in Annex IX to the CPR. Article 6.2.1 of Annex IX to the CPR defines the competence of the Tribunal as follows:

> The Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal successor concerning the legality of a decision taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council. In this respect, 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.

26. As far as the award of remedies is concerned Article 6.9.1 stipulates:

> If the Tribunal concludes that the appeal is well founded in whole or in part, the Tribunal may grant, in whole or in part, the remedies sought by the appellant, including annulment of 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 NATO regulations governing personnel, and specific performance of an obligation such as a pay increase, promotion, transfer or reinstatement of employment, and the payment of monetary relief. It may also order the NATO body to pay compensation for the injury resulting from any irregularity committed by the Head of the NATO body.

27. It follows from these provisions that the Tribunal's powers are limited. This is confirmed in Article 6.2.3 of Annex IX to the CPR in the following terms:

> The Tribunal shall not have any powers beyond those conferred under this Annex…

28. Appellant has submitted three requests to the Tribunal. In the first one he contests the 22 February 2006 decision, in which his employment was terminated and an invalidity pension was granted. He requests that the decision be annulled and that he be reinstated as a staff member. The appeal does not, however, provide any valid grounds on the basis of which this decision should be annulled more than ten years after the event. The contested decision was at the time validly taken by the employing NATO body under the powers given in C (vi) of the Preamble to the CPR. Any appeal concerning that decision should have been lodged at that time and within the time limits given in the CPR.

29. Appellant states that a new situation had arisen justifying a reversal of the February 2006 decision, *i.e.* a Dutch court referred, in a February 2015 judgment, to changes introduced in the pension scheme in the European Patent Office (EPO) in 2008. Suffice it to say here that the EPO, like many international organizations, has its own independent social-security and pension system, which may well be different from that

of NATO. NATO is part of the so-called Coordinated Organizations, which have a common pension scheme, details of which can be found in Annex IV to the CPR. Article 51 thereof provides that these rules must be applied in a uniform manner and a special Administrative Committee on Pensions of the Coordinated Organizations was set up to ensure this. Decisions no. 304(a) and (b) of the NATO Appeals Board, to which appellant refers, must be seen in that coordinated context. There is no law or rule in force entitling appellant to the benefits, or to an alignment with the benefits, of a pension system of another international organization, and a change in the pension scheme of another international organization cannot be grounds for annulling a decision validly taken under NATO's pension scheme.

30. In his second and third requests appellant asks the Tribunal to change, with retroactive effect, his status as recipient of an invalidity pension into that of an employee assigned to non-active status in receipt of an invalidity allowance equal to his current invalidity pension including allowances and tax compensation. Alternatively, he asks to be paid, as a non-taxable allowance, with retroactive effect, the amount of the difference between the real taxes he would have had to pay to his national authorities based on the NATO Invalidity pension, including taxable allowances and tax compensation, and the tax compensation actually received from NATO.

31. With these requests appellant seeks to go beyond the rules in force at present. The pension rules are laid down in Annex IV to the CPR. They have been validly applied in appellant's case. He did not challenge that decision at the time and the current appeal against the February 2006 decision is therefore time-barred. The relevant rules that are applicable to appellant in this case have also not changed since 2006, and they are clear. Appellant's requests are thus contrary to the provisions in force. It is not for the Tribunal to change the rules or to apply and interpret them beyond their ordinary meaning. Appellant's requests have thus no basis in the law currently in force.

32. Appellant states that he had no access to the CPR until June 2016 and that the rules are only applicable to him as from that date. The Tribunal disagrees. First of all, rules are applicable when they are issued. The CPR have been available on the internet since 2015. Moreover, and as respondent correctly observes, appellant has not followed the provisions of Annex IX to the CPR since May 2016 either.

33. More importantly, however, is the fact that relevant information can always be obtained from the administration. Appellant has not established that he has requested access to the CPR or that the administration has denied him access thereto (*cf.* NATO AT Judgment in Case No. 2015/1052, paragraphs 37-43).

34. The Tribunal concludes that appellant's pleas fail and that the appeal must be dismissed in its entirety.

35. However, the Tribunal considers it appropriate to recall that management has a special responsibility in the dispute resolution process. Management has, for example, the responsibility to assist staff and former staff and to explain to them the correct procedure to follow, or the correct person or instance to address (*cf.*, for example, NATO

AT Judgment in Case No. 2013/1008, paragraph 40). The principle of good administration and the duty of care entail that wrongly addressed requests must be forwarded to the appropriate NATO body. Article 2.5 of Annex IX to the CPR is to be applied by analogy. The Tribunal notes that the IS has indeed explained in its correspondence with appellant that he should contact JFC Brunssum. The Tribunal is, however, satisfied that this would not have changed the outcome of the appeal.

## E. Costs

36. 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 [...]

37. The appeal being dismissed, no reimbursement of costs is due. In addition, no reimbursement of costs was requested.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 11 January 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

8 February 2017 AT-J(2017)0002

# Judgment

## Case No. 2016/1077

**FP**

**Appellant**

***v.***

**NATO Communications and Information Agency**

**Respondent**

Brussels, 24 January 2017

Original: English

*Keywords: security clearance; renewal process; payment of a fee; admissibility; discrimination.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 16 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA), dated 27 April 2016 and registered on 9 May 2016 as Case No. 2016/1077. In this appeal, Mr FP seeks the annulment of the respondent's decision dated 1 March 2016 on the payment by the appellant of a fee for initiating the process for renewing his security clearance and the refusal to reimburse this fee to him.

2. The respondent's answer, dated 7 July 2016, was registered on 18 July 2016. The appellant's reply, dated 4 August 2016, was registered on 23 August 2016. By letter dated 22 September 2016 and registered on 27 September 2016, the respondent informed the Tribunal of its decision not to submit a rejoinder in the present case.

3. The Panel held an oral hearing on 16 December 2016 at NATO Headquarters in Brussels. It heard arguments by the appellant and by representatives of the respondent, in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

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

5. In service with NATO since 1998, the appellant has held an indefinite duration contact with the respondent since 1 August 2013, in the post of System Manager at Grade A-3.

6. On 14 August 2015, the appellant received an email from the respondent about the security clearance renewal process. In this email, it was stated that, given his level of security clearance and according to the *arrêté royal du 4 septembre 2013* (hereafter "*arrêté royal"*), the appellant had to pay a contribution (fee) of € 200 to the National Security Authority in Belgium. In this email, it was also stated that several requests had been made by the Supreme Headquarters Allied Powers Europe (SHAPE) to the competent authority to obtain an exemption from payment of this contribution for the Belgian staff members of the Allied Command Operations (ACO). However, this request was not accepted.

7. In an email sent to the respondent on 18 August 2015, the appellant argued that he did not have to pay this contribution because the *arrêté royal* mentioned above did

not specify who had to bear the cost of this fee. Consequently, it was up to the respondent to pay this contribution related to the renewal of his security clearance. In the same email, the appellant stated that he would pay the contribution in order not to delay the renewal of his clearance security, but he insisted on receiving explanations about the legal basis upon which the payment of this contribution had to be borne by the staff member concerned, that is to say the appellant.

8. In the absence of any answer to his email dated 18 August 2015, the appellant started pre-contentious procedures and introduced, on 7 September 2015, his first request for Administrative Review against the decision contained in the above-mentioned email dated 14 August 2015. Furthermore, the appellant stressed that during his service with the respondent, he had never been in contact with the Belgian National Security Authority about the payment of these fees. In addition, the appellant mentioned that this issue was not specified in his contract.

9. In the absence of any answer to this request, the appellant considered that his first review had implicitly been rejected and introduced a further request for Administrative Review, on 30 September 2015.

10. By email sent to the appellant on 7 October 2015, the respondent attached its written reply dated 11 September 2015 to the appellant's first request for Administrative Review in which it observed that the appellant had in fact requested an administrative review of a decision of the Belgian authorities and, consequently, that this request for review could not be examined by the respondent because it had no authority to rescind or modify this decision; in the same email the respondent also attached a letter dated 5 October 2015 which stated the reasons contained in the letter dated 11 September mentioned above.

11. By email sent to the respondent on 27 October 2015, and by attached letter dated the same day, the appellant requested mediation, arguing that the decision for payment of € 200 for the renewal of his security clearance was not a decision by the national authorities but by the respondent. In the same letter, the appellant stressed, in addition to the discriminatory effect of this decision, that, in the French version of the *arrêté royal,* there was no indication that the fees relating to the renewal process of the security clearance had to be paid by the staff member concerned.

12. On 5 November 2015, the appellant lodged a complaint in which he reiterated his previous arguments, also requesting that his complaint be submitted to a Complaints Committee. The latter was established following the respondent's decision dated 18 November 2015.

13. By letter dated 17 December 2015, the respondent informed the appellant that it accepted the Complaints Committee's request to extend the timeline initially provided for delivering the report, in order to obtain further information.

14. By email dated 9 February 2016, the Complaints Committee delivered its report to the parties. The Complaints Committee recommended that the respondent continue "*to follow the current practice within NATO"* and to *"not reimburse any fees for security clearances"*.

15. By decision dated 1 March 2016 and sent by email on 3 March 2016, the respondent decided to confirm its previous decision requesting the payment by the appellant of the fees related to the renewal process of his security clearance and, consequently, to reject the appellant's demands.

16. These are the circumstances under which, on 27 April 2016, the appellant brought the present appeal before the Tribunal.

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

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

17. Firstly, the appellant argues that with his appeal, he did not challenge the national law but the respondent's decision of 1 March 2016 insofar as this decision, which implements this law, illegally concludes that he is responsible for paying the fees related to the renewal process of his security clearance. According to the appellant, this conclusion also results from the Complaints Committee's report which stated that the appellant had never been provided by the respondent with any reference about the obligation to pay this fee or not. On the contrary, it is up to the respondent to pay this fee because, on this issue, the Belgian authorities exclusively contacted the respondent for the payment of these fees and not the staff members concerned. According to the appellant, since he joined NATO, the renewal process was entirely managed by the respondent, which in any case paid the relevant fees.

18. Secondly, the appellant contends that the renewal process for the security clearance is not the same in all NCIA locations, creating discrimination between staff members who paid these fees. Having submitted emails in this regard as evidence, the appellant claims that in one specific location, the NCIA effectively decided to pay for the renewal of a security clearance of an individual. By applying different rules to staff members on this matter without any concrete policy plan, the NCIA discriminated against its staff members and in particular the appellant, thereby violating its duty of care.

19. Thirdly, the appellant states that his contract does not specify at all the issue at stake. Instead, this contract stipulates that the terms and conditions of this "*will remain unchanged, unless further"* notification by the respondent. In this regard, the appellant underlines that, since he joined NATO in 1998, he never paid the fee for the renewal of the security clearance; in addition he had never been notified of any modification or change of his contract in this respect. Consequently, the appellant concludes that the respondent has to bear the fees by analogy with the specific costs relating to his training which are paid by the respondent, as provided for by the same contract.

20. The appellant requests that the Tribunal:
- annul the respondent's decision dated 1 March 2016 requiring him to pay € 200 for initiating the process for his security clearance;
- reimburse to the appellant the € 200 paid by him for initiating the renewal process of his security clearance;
- compensate the appellant for the time spent to bring an appeal before the Tribunal which the appellant evaluates at € 5.446;
- compensate the appellant for the moral harm caused by the challenged decision, evaluated *ex aequo and bono* at € 1; and
- reimburse the appellant for the legal, travel and subsistence costs occurred.

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

21. The respondent rejects, firstly, the admissibility of the appeal because, as it is stated by the Complaints Committee, the fees regarding the renewal process for the security clearance of an individual are the responsibility of the nations and not of NATO/ the NCIA. Therefore, as the decision concerning the payment of the fees was not taken by the respondent but by the national authority, no administrative review against this decision could be made under the regime of the NATO Civilian Personnel Regulations (CPR) and consequently the appeal must be dismissed as inadmissible.

22. Furthermore, and in contrast to what the appellant contends, the respondent considers that staff members are contacted by the competent National Security Authority by email and are requested by this Authority to directly pay the fees to the same Authority. This confirms that the decision for the payment of the fees relating to the renewal of clearance security is not a decision by the respondent. In any event, the respondent argues that the national (Belgian) law applicable does not state that the amounts determined by this law must be paid by the entity who employs the staff member concerned, only that these amounts are due. As it results from the Complaints Committee report, the above-mentioned national law also requires the payment of different fees for security clearance for individuals and for legal entities.

23. Secondly, in the absence for the moment of any rule regulating the issue above, the respondent observes that its practice not to pay or not to reimburse the fees for the renewal of the security clearance of his staff members is not illegal. This is also confirmed by the Complaints Committee, which recommends that the respondent continue its practice not to reimburse the fees for security clearance. According to the respondent, only in the event of an official decision by the competent authorities to provide a framework on this subject must this practice be duly adapted. In addition, the respondent considers that given the ongoing discussion on this matter, it is inappropriate at this stage to adopt a unilateral decision on the reimbursement of the fees paid by the staff members concerned and it must follow, as recommended by this report, its established practice.

24. Thirdly, the respondent argues that there is no obligation upon it to pay the fees for the renewal of the security clearance of a staff member as a result of a practice followed in a specific NCIA location to reimburse the fees paid by a staff member. Moreover, the respondent underlined that from the evidence provided by the appellant

(emails), there is no indication that a practice is established in this matter in a specific NATO body within the NCIA. Consequently, the plea of unequal treatment developed by the appellant in this regard is not acceptable.

25. Fourthly, concerning the obligation for the respondent to pay the fees for the renewal of the security clearance of a staff member on the basis of his contract, the respondent states that this is unacceptable because security clearance is mandatory for all NATO civilian staff. Consequently, no argument could be invoked for the payment of these fees by analogy between these fees on the one hand and the fees paid for training on the other hand. In this regard, the respondent argues that these latter fees are specific to a certain position on the basis of each contract. In connection with this, the respondent observes that, for instance, it has no obligation to pay the fees for the renewal of staff members' passports or driver's licenses.

26. Finally, regarding the claims for compensation, the respondent argues that the appellant has no right to be compensated for the time spent for preparing a full appeal before the Tribunal. In addition, no material damages could be requested in connection with the adoption of the decision refusing to pay or to reimburse the fee relating to the renewal of the appellant's security clearance.

27. The respondent requests that the Tribunal dismiss the appeal.

## D. Considerations and conclusions

28. To start, the appellant formally seeks the annulment of the respondent's decision dated 1 March 2016 by which the respondent rejected the appellant's complaint against the respondent's decision dated 14 August 2015 requesting that the appellant pay € 200 for initiating the renewal of his security clearance. The Tribunal observes that in the decision dated 1 March 2016 the respondent made no substitution for the reasons given in the decision dated 14 August 2015; therefore the case brought before the Tribunal in fact concerns the challenged act in the complaint, that is to say the decision of 14 August 2015 (challenged decision).

### *(i) Admissibility*

29. The respondent contests the admissibility of the appeal because the appellant requested the review of the challenged decision which is in fact an act adopted by the national competent authorities and not by the respondent.

30. The Tribunal observes that by the first head of claim referred to in paragraph 20 of the present judgment, the appellant requests the annulment of the challenged decision requesting the appellant to pay € 200 in order to initiate the process for the renewal of his security clearance and, by the second head of claim, the reimbursement by the respondent of the amount of € 200 paid by the appellant.

31. As it results from the appeal and the appellant's reply, as well as from the declarations of the appellant during the hearing, the appeal is in fact against the

respondent's decision of 14 August 2015, by which it refused to pay the fees for initiating the process for the renewal of the appellant's security clearance and to reimburse these fees if the staff member concerned made this payment. In this context, and contrary to what the respondent contends, the appellant does not challenge any national act. Consequently, the present appeal must be declared admissible.

***(ii) Merits***

32. By his first plea, the appellant argues in fact that the respondent has an obligation to pay the fees concerning the renewal of security clearance and, in any event, to reimburse these fees if the concerned staff member paid them, and that, in this regard, the challenged decision must be annulled.

33. The Tribunal observes that the appellant did not invoke any violation of a rule of the CPR or any other fundamental rule which is binding for the NATO bodies and according to which the respondent has to pay these fees. Generally speaking, the appellant considers that such an obligation derives from legal texts and, as a matter of principle, is inherent to his employment contract. This argument must be rejected.

34. At this stage, it is undisputed that there is no legal obligation deriving from the CPR or from any other legal text for the respondent to pay this fee for its staff members. This is furthermore stated without any doubt by the Complaints Committee in its report dated 9 February 2016. This is also confirmed by the fact that there are ongoing discussions in order to provide a legal framework concerning the payment of these fees.

35. As regards the appellant's contention that the *arrêté royal* does not specify who has to pay the fee, the Tribunal, first of all, observes that it has no jurisdiction to give an interpretation of national law.

36. The Tribunal observes that, in fact, by requesting that the appellant pays the fees for initiating the process concerning his security clearance, the respondent did not infringe the CPR or any other legal text. Instead, the respondent informed the appellant about his obligation, under national law, to pay the fees directly to the national competent authority. In these circumstances, the present plea must be rejected on its merits.

37. Secondly, concerning the plea of discrimination, invoked by the appellant on the grounds of divergent practices existing in different locations of the NCIA, the Tribunal points out that, in the absence of any obligation for the respondent to pay or reimburse the concerned fees, the grounds of discrimination cannot be established.

38. In this regard, the Tribunal states that, even assuming that in some specific NCIA locations the payment of this fee is not made by the staff member concerned, this cannot be considered as a general practice which is applicable uniformly in all NCIA agencies, creating a binding obligation in the NCIA locations. On the contrary, the well-established practice, as mentioned in the Complaints Committee's report, is that – at this stage and given the ongoing negotiation for adopting a legal framework in this matter – no payment or reimbursement is to be made by the respondent.

39. In addition, in the absence of any obligation under the CPR for the respondent to pay this fee for its staff members, the payment or the reimbursement of this fee precisely depends on the application, in each case, of the relevant national legislation. Therefore and even if any divergence could be observed in this respect, by the adoption of the challenged decision refusing the reimbursement of the fee to the appellant, the respondent did not discriminate against him and, consequently, the plea of unequal treatment must be rejected.

40. The appellant argues, with his third plea, that the obligation for the respondent to pay or reimburse the fees paid by the appellant concerning the renewal of his security clearance results clearly from his contract and, as such, is a matter of the conditions of his employment. This is, in his view, also reinforced by the fact that the *arrêté royal* does not mention who precisely must pay the fees concerned.

41. This contention is based on the mistaken premise about the obligations for the respondent to pay the fees relating to the clearance security for its staff members. Indeed, given that in this matter there is no obligation deriving from the CPR or any other legal text for the respondent to reimburse or pay these fees, this could not be subject to a contract between the respondent and the appellant governed precisely by the same CPR.

42. The last plea invoked by the appellant must consequently be rejected and, accordingly, the claims for annulment must be dismissed in their entirety.

43. The dismissal of the appeal seeking annulment of the challenged decision leads to dismissal of the other submissions and those seeking payment of material and moral damages.

## E. Costs

44. 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 […]

45. As the appellant's claims have been dismissed, his claims under this head are also dismissed.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 24 January 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

8 February 2017 AT-J(2017)0003

# Judgment

## Case No. 2016/1076

**JF**

**Appellant**

***v.***

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

**Respondent**

Brussels, 30 January 2016

Original: English

*Keywords: Invalidity Board proceeding; reasoning of the Invalidity Board findings; review of obvious factual errors.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 16 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), dated 25 April 2016 and registered on 4 May 2016 as Case No. 2016/1076, by Mr JF.

2. The respondent's answer, dated 1 July 2016, was registered on 15 July 2016. The appellant's reply, dated 16 August 2016, was registered on 28 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 27 September 2016. On 10 October 2016 appellant requested access to a medical report of 4-5 August 2015 as being instrumental to the case. On 14 November 2016 the Tribunal informed appellant's counsel that the matter raised would be discussed in the framework of the contentious procedure during the hearing.

3. The Panel held an oral hearing on 16 December 2016 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs. Laura Maglia, Registrar.

## B. Factual background of the case

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

5. Appellant started working at the NATO Air Base in Geilenkirchen (NAB GK) in November 1997 as a B3 AWACS Crew Chief. From 2010 he served as a B5 Principal Technician (Instructor).

6. Appellant has been on sick leave since 28 January 2014. On 22 April 2015 appellant initiated the invalidity procedure in accordance with Annex IV to the NATO Civilian Personnel Regulations (CPR). On 1 August 2015, appellant travelled from Florida to Aachen to meet, on 4-5 August, Dr F, the third medical practitioner appointed on the Invalidity Board (IB).

7. On 18 September 2015, the three doctors of the IB met via Skype. The board found unanimously that appellant "*is not suffering from a permanent invalidity which totally prevents him from performing the duties attached to his employment in the Organization ... or any alternative duties proposed to him by the Organization that correspond to his experience and qualifications while taking into consideration any medical limitations*." All three members of the board signed a document recording this conclusion.

8. On 13 October 2015, appellant was notified, through a letter of the NAEW&CG GK Civilian Resource Manager, of SACEUR's decision not to grant him an invalidity pension, in accordance with the IB's conclusion.

9. On 12 November 2015, appellant requested an administrative review of the decision refusing to grant him an invalidity pension, which was rejected by the NAEW&CG GK Division Head, Personnel and Manpower Division, on 3 December 2015.

10. On 21 December 2015, appellant requested a further administrative review, which was rejected by the Commander, NAEW&CG E-3A Component, on 12 January 2016.

11. On 2 February 2016, appellant submitted a complaint that was rejected by the NAEW&CG GK Force Commander on 25 February 2016.

13. As a result of a disciplinary measure, appellant's contract was terminated on 7 January 2015. This termination became effective on 27 January 2016, 2400hrs, following expiration of the period of extended sick leave.

14. On 25 April 2016 appellant submitted the present appeal.

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

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

15. Appellant maintains that his appeal is admissible as he strictly complied with the relevant CPR provisions. Appellant rejects respondent's contention in the pre-contentious procedure that a decision of SACEUR, communicated by another authority, cannot be reviewed by the Head of the NATO body (HONB) concerned. He notes that he had no other choice than to request an administrative review of the 13 October 2015 decision adopted by SACEUR and communicated by the NAEW&CG GK Civilian Resource Manager, in accordance with the CPR articles.

16. The first claim of the appeal contends that respondent violated Instruction 13/4 of Annex IV to the CPR; the duty to state reasons; the principle of good administration and of the rights of the defense; and failed to provide an effective remedy.

17. Noting that Instruction 13/3 xi of Annex IV to the CPR states that the findings of the IB shall be final except in the case of obvious factual errors, appellant maintains that the reasons for the IB findings are essential in order to review the substantial and formal legality of the contested decision.

18. Appellant recalls that he asked to be informed of the reasons for the IB findings, which were mentioned as an annex to said findings, and contends that reasons are required in accordance with the duty to state reasons and the consistent case-law of the Tribunal's predecessor, the NATO Appeals Board.

19. While a document – prepared by the Agency's medical adviser - intended to set out the "Reasons for the Board's findings" was provided to appellant, appellant rejects

respondent's explanations of the character of that document during the pre-contentions procedure. Further, as neither NAEW&CG GK Civilian Resource Manager nor SACEUR had access to the purported statement of reasons, he submits that SACEUR was not in a position to understand the IB's findings and check for obvious factual errors, as required by Instruction 13/4 iii) of Annex IV to the CPR.

20. Appellant further reminds that he has several times requested access to Dr F's report concerning his medical visit in Aachen, but has not been provided with it, either directly or through his medical doctor. Appellant quotes in this respect ILOAT case-law giving the right to a staff member to be provided access to his medical reports.

21. Appellant therefore considers that the IB findings and the decisions based on these finding are not properly motivated. Moreover, he notes that the HONB did not review the contested decision in the internal appeal process, claiming a lack of competence and expertise to scrutinize medical findings. As such, appellant determines that, considering that the IB findings are only final if free from "obvious factual errors", a failure to review findings for such errors (in coordination with SACEUR as necessary) deprives him of the benefit of an effective remedy.

22. Secondly, appellant cites the irregular definition of invalidity and, more specifically, of the notion of permanence, that he contends was applied by the IB. He contends that the IB's findings, and the invalidity decision based on those findings, are therefore tainted by legal and factual errors, and as such should be annulled.

23. Concerning the asserted legal error, appellant maintains that the IB focused on whether his illness was permanent, rather than on whether his working capacity was permanently affected in light of the specific requirements of his job description. Appellant submits, in accordance with a statement provided by appellant's doctor on the IB, Dr W, during the pre-contentious phase that the criterion of permanence was erroneously defined by the Board. Appellant argues that the IB could not legally refuse an invalidity pension because of a possibility that his medical condition may remit at some point during the course of his working life. Referring to Article 16 of Annex IV to the CPR, Appellant considers that if it can be determined that he is incapable of performing his duties and is expected to remain so in the near future and for an undetermined period of time in the future, he is entitled to an invalidity pension.

24. Concerning factual error, appellant maintains that by considering him potentially able to return to work in the future, the finding of the Board are tainted by obvious factual error. Moreover, he further states that the origin of his invalidity, which he regards as occupational, should also have been examined.

25. Appellant claims that the Instruction in 13/3 vii) of Annex IV to the CPR was violated in that the deadline of 60 calendar days for the IB to meet following the appointment of the third medical practitioner was not met. He notes that the Board had to meet by 29 August at the latest, but it only met on 18 September 2015. He points out that he had to travel, at very short notice and under additional stress and several constraints, from Florida to Aachen to meet with Dr F. on 5 August 2015 specifically because of the August deadline. Appellant maintains that it was respondent's

responsibility to ensure that the deadline was met, and that it should be held liable for the illegal delay contrary to the CPR, and for wrongful conduct in failing to remind the board members of their obligations.

26. In addition, appellant considers that the multiple illegalities he suffered (absence of proper reasons for the findings, absence of proper examination of invalidity based on a correct definition of permanence, delay in finalizing the procedure, refusal to grant access to Dr F's report, absence of effective remedy), coupled with the frustration, stress and anxiety to which he is particularly exposed, caused him a non-material prejudice evaluated *ex aequo et bono* at €10.000. Appellant further stresses that he is sick due to his employment with NATO and that the legal fights he's undertaking are not made "*à la légère*" and without reasons. He notes that he has no job, his monetary resources are dwindling, and that his health insurance coverage will stop on 27 January 2017.

27. Appellant requests that the Tribunal:
- annul SACEUR's decision of 13 October 2016 refusing to grant him an invalidity pension;
- annul the decisions of 12 January 2016 and 25 February 2016 rejecting, respectively his request for further administrative review and his complaint;
- grant an invalidity pension or annul the IB proceedings and convene a new IB in order to make a new assessment of his invalidity;
- grant access to Dr F's report following the examination of 4-5 August 2015;
- compensate the material prejudice consisting in his lack of income since the end of his employment (in the form of an invalidity pension);
- compensate the non-material prejudice evaluated *ex aequo et bono* at €10.000; and
- reimburse costs of retaining counsel, travel and subsistence.

However, during the hearing, appellant's counsel expressly stated that the third of the abovementioned requests was withdrawn.

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

28. Respondent does not contest admissibility of the appeal.

29. Respondent notes that appellant wishes to challenge the findings of the IB, made in accordance with Article 13 of Annex IV to the CPR, that he does not suffer from a permanent invalidity which totally prevents him from performing his duties. However, it contends that there is no indication of a factual error of the IB's findings in accordance with Instruction 13/3 xi) of Annex IV to the CPR, or of any procedural flaw that could possibly bring their validity into question.

30. Respondent points out that on 29 June 2015, the NAEW&CF GK's Medical Adviser, Dr B, and appellant's appointed doctor, Dr W, agreed on Dr F, a recognized specialist in psychosomatic medicine and psychotherapy in Aachen, as the third medical practitioner on the Board. As Dr F wished to undertake a thorough examination *in situ*, he met appellant on 4-5 August 2015 in Aachen, and drafted a detailed 20 page assessment report in German (subsequently translated into English). Respondent notes that this report was available to the other Board members, was discussed during the

proceedings, and was considered as thorough and coherent. The diagnosis made in the report was neither questioned nor challenged.

31. Respondent further observes that the members of the IB held their first Skype video-conference on 26 August 2015, exceeding the time limits of Instruction 13/3 vii) of Annex IV to the CPR by approximately three weeks, but maintains that this does not represent any substantial ground for impairing or voiding the IB's decision. Respondent affirms that the reason for exceeding the prescribed period was the impossibility to reach appellant's medical doctor, the need for coordination between the three members in different time zones, the summer holiday period, the elaborate examinations by Dr F, and the need to translate his detailed report. Respondent argues that there is no evidence that the delay in the initial convocation led to a wrongful decision of the Board.

32. Respondent recalls that on 18 September 2015, the IB held another Skype videoconference with all three members, during which they agreed on their findings. Respondent further adds that, in accordance with Instruction 13/3 viii) of Annex IV to the CPR, all three members had access to the complete administrative and medical file, including the reports by appellant's appointed doctor and Dr F. Respondent stresses that during the 18 September 2015 video-conference, the IB agreed unanimously that appellant's medical condition is not permanent.

33. Respondent contends that the decision-making process met all CPR requirements and there was no need to elaborate about the possible cause of appellant's condition or alternative duties.

34. Respondent rejects the allegations regarding "obvious factual errors" as not proved or sustained in any way. Respondent also rejects that the claim of violation of procedure concerning the enclosure to the IB findings "Reasons for the Board's findings". It explains that during the meeting on 18 September 2015, the Board members did not draft "reasons." However, as Respondent's human resources division had no access to the medical files, Dr B was asked to summarize the outcome of the meeting on the basis of her notes.

35. Respondent considers appellant's claim that the IB did not properly address his permanently affected working capacity as speculative, stressing that the IB members were responsible to assess appellant's working condition in regard to his ability to perform his work duties on his NATO post. Respondent notes that Article 16 to the CPR does not apply to him, as he was never declared invalid.

36. Respondent rejects appellant's contentions regarding the medically correct definition of "permanence" as presented by Dr W, viewing them as subjective and related to his national experience. Respondent also rejects appellant's conclusion that Dr W's testimony proves the illegality of the IB's findings.

37. Respondent further stresses that there was no need for Dr W to receive the enclosure "Reasons for the Board's findings" as he participated in all internal communications of the Board.

38. Respondent further rejects appellant's allegation that the Organization's failure to release Dr F's report leads him to believe that its content would support his claims. Respondent adds that neither the HONB or SACEUR are in possession of Dr F's report (or any other medical report), and that it is not in the position to order doctors to release confidential medical documents or to grant appellant access to doctor's reports.

39. Moreover, respondent reminds that, in accordance with Instruction 13/3 ix) of Annex IV to the CPR, the findings of the IB are secret. Accordingly, it is with no surprise that appellant's efforts to reach out Dr F individually have not been successful.

40. Respondent also affirms that neither the HONB nor SACEUR have the authority, the expertise or the competence to scrutinize or to question the IB's decisions. In Respondent's view, appellant's contention that SACEUR should have had access to Dr F's report in order to render the decision and to "*understand the findings and check for obvious factual errors*" is widely exaggerated. It further stresses that the decision was based on the unanimously approved findings of the IB, which SACEUR considered as legal and reasoned.

41. Respondent adds that if the Tribunal deems it necessary, an Order can be issued to the members of the IB to release medical files or to invite them to testify at the hearing on their medical conclusions and the deliberations during the IB proceedings.

42. Respondent rejects any claim for material and moral damages and recalls that appellant's dismissal was the outcome of a disciplinary procedure, which was confirmed by the Tribunal in Case No. 2015/1048. Respondent also rejects the non-material prejudice as not substantiated.

43. Respondent requests that the Tribunal dismiss the appeal.

## D. Considerations and conclusions

44. The Tribunal has already ruled on appellant's previous appeals that, in one way or another, are connected: judgments of 20 January 2015 (Case No. 2014/1021, travel authorization for medical treatment away from duty station), 15 January 2016 (Case No. 2015/1049, time limits in pre-litigation review), 1 March 2016 (Case No. 2015/1048, disciplinary procedure), and 2 September 2016 (Case No. 2016/1070, reimbursement of travel and subsistence expenses during invalidity procedure).

45. After the withdrawal of appellant's main request to be granted an invalidity pension and the subsidiary request to annul the IB proceedings and to convene a new IB to make a new assessment of his invalidity, the core claim of the appeal seeks annulment of the decisions of 13 October 2015 (first), 12 January 2016 (rejecting administrative review), and 25 February 2016 (rejecting previous complaint). Appellant also makes two other principal requests: 1) access to Dr F's report, and 2) compensation of material and non-material prejudice.

46. As a formal exception, appellant claims the violation of the deadline of 60 calendar days as provided in Instruction 13/3 vii) of Annex IV to the CPR, that reads as follows:

> The Invalidity Board shall meet at the latest within 60 calendar days following the appointment of the third medical practitioner.

Even though that deadline was not met in this case, the Tribunal cannot draw a conclusion that this requires annulment of the whole proceeding. Appellant did not show, or indeed, claim, that this delay affected the IB's decision. As the appellant was not granted the pension he requested, a small failure in observing the time limits, for which, moreover, convincing explanations were provided, had no impact on his rights, or on the content of the IB's findings.

47. The legal framework for determining eligibility for an invalidity pension is established by the Pension Scheme Rules in Annex IV to the CPR, in particular in article 13 - and its Instructions – setting out the conditions of entitlement. The key prerequisite for invalidity pension is recognition by the IB that a staff member is "*suffering from permanent invalidity which totally prevents him (the staff member) from performing his job or any duties proposed to him by the Organization corresponding to his experience and qualifications*". If the IB finds that the staff member suffers from permanent invalidity under these circumstances, the Secretary/Director General of the Organization – or SACEUR - shall decide to grant to the staff member an invalidity pension "in accordance with the findings of the Invalidity Board" (Instruction 13/4 (i), Annex IV to the CPR). There is an exception to this rule whenever the findings of the IB involve "an obvious factual error". In such a case, those findings cannot be considered final, and the competent authority shall again refer the case to the IB, pursuant to article 13/4 iii), in relation with 13/3 xi) Annex IV to the CPR.

48. In the present case, the decision not to recognize appellant's right to an invalidity pension was preceded by the IB's unanimous findings that, at his subsequent request, were communicated to appellant on 29 October 2015. There is no reason to doubt the organization's decision was in accordance with the abovementioned rule, since the requisite was met and no statement finding "obvious factual errors" was issued.

49. However, the Organization's decision can be subject to judicial review inasmuch the concerned staff member raises a question regarding its legality, a question within the competence of this Tribunal as provided in Article 6.2.1 of Annex IX to the CPR. In this regard, appellant considers that the challenged decision should have been accompanied by proper reasons in order to satisfy his right to an eventual further administrative and/or judicial review.

50. The Tribunal considers that the administrative decision not to grant the requested invalidity pension is well sustained on the basis of the IB's findings, since neither the HONB nor SACEUR have the legal competence to award the pension against those findings. The invalidity pension must necessarily be based on the IB's medical assessment of the staff member. In the current case, the IB unanimously considered that appellant was not suffering from permanent invalidity.

51. However, the Tribunal wishes to be clear that the possibility given to the Organization to refer a case back to an IB "in the event of an obvious factual error" reveals a certain degree of obligation in the explanation given by the IB for its findings. We concur with the opinion of the Appeals Board in its Decision No. 434, that: "*While doctor-patient privilege prevents medical information from being disclosed to persons not involved in the invalidity examination process, in no way does it exempt the Board from its obligation to provide the reasons for its findings. That obligation is reinforced by the fact that, unless there have been obvious factual errors, the administrative authority is bound by the said findings*". This is what has occurred in the present dispute. Although the IB expressed its findings tersely, albeit in a manner that satisfied the formal requirements of Annex IV, its reasoning was completed by Dr B's statements of 1 December 2015 and Dr W's letter of 12 December 2015. By this means, any risk of deprivation of appellant's right of defense must be considered as overcome.

52. Neither the Organization nor this Tribunal has power to compel the third doctor to deliver his written findings to appellant. In this respect, whilst it could be quite obvious that there is no secrecy for the concerned agent himself about his own medical situation, the Tribunal cannot shape the concrete items or documents in which Dr F. or any other medical practitioner could have collected the appellant's medical data. In any case, Dr. F's opinion was reflected in the IB's findings, given the unanimity of its conclusions.

53. Appellant also contends that there was legal error in the definition of permanent invalidity applied by the IB. Article 13.1 of Annex IV to the CPR solely refers to invalidity that, besides its permanency, prevents the agent "from performing his job or any duties proposed to him by the organization corresponding to his experience and qualifications". It follows from this definition that there is the possibility that the concerned staff member could be affected by temporary diseases, injuries or health requirements, and consequently not be entitled to receive an invalidity pension.

54. The determination of the impermanence or permanence, just as of the degree of affectation, belongs to the medical domain. In the current case, the three medical practitioners who were members of the IB decided unanimously in finding appellant's condition not to be permanent. The Tribunal cannot base its ruling on later assertions from one of the members of the IB who had concurred in that finding. The Tribunal did not participate in the deliberations of the IB, and cannot override the findings it stated in accordance with the rules on the basis of a substantial medical record and following deliberations of its members.

55. The Tribunal must add that any dispute on the relationship between patients and the medical practitioners, and the resulting duties and rights, are outside of its jurisdiction.

56. It follows from the above reasoning that no "obvious factual error" was apparent in the proceedings or conclusions of the IB. Appellant maintains his opposition to the decision without giving arguments to show any such error. In fact, appellant's strong opposition to the final result of the proceeding was due to his self-diagnosis, which is contradicted by the medical practitioners' opinions as stated in their unanimous findings. Consequently, the challenged decisions must be confirmed.

57. The dismissal of the claims already addressed leads to the subsequent rejection of those related with the compensation of prejudices.

## E. Costs

58. 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 […]

59. 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 30 January 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

13 February 2017 AT-J(2017)0004

# Judgment

## Case No. 2016/1098

**AT**

**Appellant**

**v.**

**NATO Communications and Information Agency**

**Respondent**

Brussels, 8 February 2017

Original: French

*Keywords: transfer of a staff member; conditions.*

Boulevard Léopold III - B-1110 Brussels - Belgium
Tel.: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 22 July 2016 and registered on the same day, by Mr AT, seeking:

- annulment of the decision of 13 June 2016 whereby the General Manager of the NATO Communications and Information Agency (NCIA) rejected appellant's request to cancel the geographic transfer of his post from The Hague to Mons as of 1 August 2016;
- removal from his contract of the clause on geographic transfer and appropriate deferment of the date of that transfer; and
- compensation for the non-material damage suffered, assessed at €10,000.

2. Initial comments regarding the Tribunal President's request on 25 July 2016 for the Head of NATO body to consider taking measures in line with Article 6.3.5 of Annex IX to the Civilian Personnel Regulations (CPR) were produced by NCIA on 26 July 2016, and by appellant on 29 July 2016. The comments of respondent, dated 19 August 2016, were registered on 22 August 2016. The reply of appellant, dated 21 September 2016, was registered on 27 September 2016. A rejoinder, dated 27 October 2016, was produced by respondent on 29 October 2016.

3. The Tribunal's Panel held an oral hearing at NATO Headquarters on 16 December 2016. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the case

3. Mr T joined the NC3A on 1 November 2000. The NC3A became the NCIA on 1 July 2012. Up to the time of the present case, his duty station had always been The Hague, the Netherlands. He was employed on a series of definite duration contracts, of which the most recent expired on 30 June 2016.

4. On 5 November 2015, the NCIA informed appellant that he would be offered another definite duration contract. But the draft contract sent to him was not an identical renewal; a new sentence had been added to Article 2, indicating that the duty station might in future (at an unspecified date) be changed to Mons, Belgium.

5. Appellant was displeased with this prospect. On 27 November 2015, he sent an informal complaint to the Human Resources service, to which he did not receive a reply. Starting on 4 December 2015, appellant pursued a first administrative review, the form of appeal provided for in Article 2 of Annex IX to the CPR, which consisted of requesting to have the disputed clause on a later transfer to another duty station removed from his

contract. At the same time, appellant signed the proposed contract but added a reservation regarding the planned duty station.

6. His manager replied to him on 4 January 2016, refusing to change the disputed clause. Appellant then pursued the administrative procedure by submitting a request for a second administrative review to the Head of NATO body on 22 January 2016. This administrative review was rejected on 11 February by the Deputy General Manager/Chief of Staff, who refused to modify the contract.

7. In the meantime, on 28 January 2016, NCIA informed appellant that his post would be transferred from The Hague to Mons on 1 August 2016.

8. Appellant pursued the administrative procedure by moving into its third phase. On 1 March 2016 he submitted a complaint, which led to the convening of a Complaints Committee, which issued its report on 25 April 2016. The report found in favour of the staff member, deeming in particular that the date of 1 August 2016 was too soon.

9. The Administration continued with its initial plans, however, and held a meeting between appellant and the Head of NATO body on 17 May 2016. On 13 June 2016, the contested decision to transfer appellant from The Hague to Mons as of 1 August 2016 was taken. On 30 June, the Administration had the staff member sign a new contract containing a clause noting the new assignment in Mons as of 1 August. He signed it – "under pressure" in his view – in order to avoid losing his job, since the previous contract was due to expire at the end of that same day.

10. Appellant lodged his appeal with the Administrative Tribunal on 22 July 2016.

11. In parallel, in September 2016 there were several exchanges of correspondence between the parties, and appellant's transfer took place on 17 October 2016.

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

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

12. To start with, appellant claims that there are insufficient reasons for the disputed decision.

13. Next he criticizes the Administration for having failed in its duty of good administration by not abiding by the Complaints Committee's conclusions.

14. The third contention is a disregard for the duty of care, even if it is not expressed in those terms: appellant refers to the "brutality" with which the Administration acted as well as the "psychological pressure" and the attempted intimidation to which, in his view, he was subjected. A violation of Article 5.3 of Annex IX to the CPR, which provides that no staff member shall be subject to retaliation because of pursuing a complaint, may be added to this same contention.

15. With regard to the basic conditions, appellant argues that the Administration violated the NCIA's Civilian Staff Movement Policy (CSMP).

16. Finally, appellant claims that respondent violated the CPR by including a transfer clause in the proposed contract renewal, whereas the contract renewal should have been done identically.

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

17. Respondent claims its right to offer transfers to its staff members, even in the absence of any text authorizing it to do so. Article 4.1 of the CPR specifically authorizes it to do so, and Article 1(2) of Annex V mentions the possibility of having several duty stations. Furthermore, the Administration recalls that contract renewal is subject to the interests of the service, which in this case demanded that appellant be reassigned to Mons, Belgium.

18. With regard to the ambit of the Complaints Committee's report, the Administration stresses that the recommendations it contains are purely consultative and in no way mandatory. The Head of NATO body considered the report to be based on an erroneous line of reasoning, so it opted to disregard it, as it had the right to do.

19. Next respondent strongly objects to appellant's allegations that his requests were not examined seriously. On the contrary, it was appellant who refused to consider any different solution but would not explain why he was refusing a transfer of any kind. Appellant had been informed that he was eligible for the loss-of-job indemnity if he were to refuse to be transferred, something he does not mention in his appeal.

20. Finally, the submissions seeking compensation for damage have not been substantiated and must be rejected. In any event, appellant had a very long time to organize his removal, and the decision to retain ownership of his apartment in The Hague is a personal choice for which he alone must bear the financial consequences.

21. Regarding the request to suspend the contested decision, respondent stresses that the decision is reversible and there is therefore no urgent need to prevent it from being applied.

## D. Considerations and conclusions

### *(i) On the interpretation of the submissions:*

22. The requests appellant sent his Administration have evolved over the course of the dispute, to adapt to that same Administration's evolving positions on the question of the effective date of the transfer. Therefore the Tribunal must first assess the scope of the submissions in the appeal.

23. The entire first part of the procedure focuses on the addition of a clause to the draft contract providing for a transfer to Mons at an unspecified future date. It is the possibility

of a transfer that appellant was challenging at that time. And, on 28 January 2016, the NCIA told him that the transfer would take place on 1 August 2016. The correspondence that follows sometimes confuses the two issues. For example, the complaint of 1 March 2016 is still directed against the clause on a transfer of unspecified future date, whereas the decision being challenged before the Tribunal – the decision of 13 June – mentions only the date of 1 August 2016. In the discussion that followed over several months, the issue of the refusal to remove the clause on a transfer on an unspecified date was gradually eclipsed by the issue of the transfer on 1 August 2016. Following the staff member's request for clarification on 17 June, both issues were combined in the contract that the Administration asked appellant to sign on 27 June, which includes a transfer clause with the date of 1 August 2016.

24. Given the overlap in the Administration's two positions and the ongoing procedure between appellant and respondent, the Tribunal is of the view that the appeal of 22 July 2016 referred both issues to it simultaneously. The contested decision comprises both parts of the dispute. It is a request for annulment of 1) the refusal to remove the clause on a transfer at an unspecified future date, a contract that appellant signed with reservations on 4 December 2015, and 2) the decision to transfer the staff member as of 1 August 2016, which is also the refusal to reconsider an identical previous decision expressed on 28 January.

***(ii) On the admissibility of the appeal***

25. The appeal, interpreted in this way, does not raise a question of admissibility.

***(iii) On the legality of the decision:***

26. Firstly, the Tribunal examines the legality of the decision to transfer appellant as of 1 August 2016. Appellant was informed of this transfer to Mons on 28 January 2016: as of this date he was aware that he would have to move to Mons on 1 August. The CPR does not set out any rules on the notice period for transferring staff within a single NATO body. For NCIA staff, the Civilian Staff Movement Policy, paragraph 6, states that a staff member must be notified of any transfer at least six months before its effective date. In this case the notification was given on 28 January and the transfer was to become effective on 1 August, so six months' notice had been provided.

27. Although appellant complains of a disregard for the duty of care and even being pressured, there is nothing in the case file that establishes this. The Administration did what it could, however, to try to understand the reasons for the staff member's refusal and to consider his difficulties, as the postponement of the effective transfer to 25 October 2016 (instead of 1 August as initially decided) shows in particular. Furthermore, appellant had been informed on 4 January that if he refused to agree to this transfer, he would be entitled, in accordance with Article 1 (para. 1(2)(f)) of Annex V to the CPR, to the loss-of-job indemnity when his contract that was still running expired. Appellant therefore has no grounds to claim that he was pressured into agreeing to a transfer. By signing his new contract on 30 June 2016, he agreed to it having been fully informed of the consequences of his choice, and having been told about the other alternative, which offered a valuable indemnity.

28. The other contentions in the appeal are not further substantiated. The opinion of the Complaints Committee is consultative in nature. The Head of NATO body is required to take it into account, not to follow the guidance it contains. In the latter situation, it must provide reasons for its decision, which it did by stating the missions awaiting appellant in Mons.

29. Finally, there is no provision that prevents the Administration from offering a staff member, when renewing his or her contract, certain conditions that vary from those that applied to the previous contract. Should it do so, it merely has to anticipate the eventuality of the staff member not agreeing to those conditions modifying the contract by giving him the option of refusing the contract renewal and receiving the loss-of-job indemnity, which was proposed to appellant.

30. Thus the submissions in the appeal directed against the annulment of the transfer on 1 August 2016 are rejected.

31. It remains for the Tribunal to examine the submissions in the appeal directed against the clause inserted into the initial contract on a transfer on an unspecified date. Given that this clause was replaced, over the course of the proceedings, by the setting of a specific date for this transfer, the first submissions are no longer relevant. The Tribunal is therefore obliged to conclude that there is no reason to rule on these submissions.

***(iv) On the request for compensation for damage***

32. All the submissions having been either rejected or declared groundless, there is no reason to rule on appellant's requests for compensation, particularly as appellant cannot establish any fault committed by the Administration against him. What is more, the damage he alleges is mainly the result of his own refusal to examine the consequences of being transferred and to consider that all he had to do was express his refusal to be transferred, without even providing any reasons, in order for the Administration to set aside its decision.

## E. Costs

33. In the circumstances of this case, there is no reasons to deliberate on the costs, for which appellant has not sought reimbursement.

## F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- There is no need to rule on the submissions in the appeal against the decision of 5 November 2015 insofar as it provided for the possibility of effecting the transfer of appellant from The Hague to Mons at a later date.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 8 February 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0005

**Judgment**

**Case No. 2016/1078**

**JH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; grading of post; competence; discretion; judicial review.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 20 April 2016, and registered on 12 May 2016 as Case No. 2016/1078, by Mr JH contesting, *inter alia*, the grading of a new post that was offered to him following a NAEW&CF GK reorganization.

2. The respondent's answer, dated 1st July 2016, was registered on 18 July 2016. The appellant's reply, dated 15 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. Appellant joined the E-3A-Component at Geilenkirchen – today NAEW&CF GK – on 1 November 1995 as Senior Technician, Radar Specialist at grade B-4.

7. Following the NAEW&CF GK reorganization, as approved by the NAC on 30 September 2015 and which became effective on 1st November 2015, appellant's post having been suppressed, he was offered an indefinite duration contract in a new post as Principal Technician – Engineering Environment Specialist, Laboratories Branch, at grade B-4.

8. Appellant accepted this offer and signed a new contract, but contested the grade assigned to the new post, considering that the job description assigned did not reflect the

correct grade B-5/6 but the incorrect grade B-4. He accordingly started administrative review procedures seeking review of the grading of his post.

9. Appellant introduced the first administrative review on 18 November 2015. By letter dated 26 November 2015, the appellant's Branch Chief supported the appellant's arguments, stressing that in comparison to other posts, appellant's post clearly had responsibilities corresponding to a B-5 position. The Branch Chief said in this letter that appellant's post (and also other technician posts) should be graded B-5, but it was downgraded during the review process *"with no clear accountability or justification"*. This first administrative review was rejected by respondent on 15 December 2015. Appellant's request for further administrative review, introduced on 16 December 2015, was rejected by respondent on 8 January 2016; and a "Request for Mediation/Formal Complaint", introduced on 5 February 2016, was rejected by respondent on 25 February 2016.

10. It is under these circumstances that, on 20 April 2016, appellant brought the present appeal before the Tribunal against the decision of 25 February 2016.

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

### *(i) Appellant's contentions*

11. Appellant firstly argues that the correct grade for the position he was offered should be B-5, and not B-4 as assigned. Appellant grounds this contention, *inter alia*, on the NATO Occupational Code (NOC) and the corresponding skill levels. He notes that the job description of the Principal Technician post contains skills (such as "Skill Level 3" Apply) that fall into the NOC category identified for a B-5/B-6 grading. He adds that the new position includes a high level of responsibilities assigned for grade B-5, a contention confirmed by the 26 November 2016 letter from his Branch Chief referred to above. In this letter, the Branch Chief indicated that the posts of several staff members (including appellant) involve "*the responsibilities defined as B-5 positions*" and were initially submitted for approval with the grade B-5. Therefore, given the position's job description in relation to the applicable rules for grading positions, respondent illegally offered appellant a new contract of grade B-4.

12. In addition, appellant argues on the basis of Article 4.2 of the NATO Civilian Personnel Regulations (CPR) that he could be appointed at a higher step, here B-5, reflecting his qualifications and skills.

13. Appellant contends, secondly, that the NAC decision of 30 September 2015, by which the reorganization was approved by NATO member countries, is based on incorrect and irregular information provided by NAEW&CF GK that infringed upon and disregarded binding management directives. If the NAC decision approving the grading assigned to his post *in se* cannot be challenged, respondent should have been directed to the proper authority competent to review it – the Peacetime Establishment Authority (PEA) or the NATO Defense Manpower Audit Authority (NDMAA). Their decisions are subject to an appeal before the Tribunal, particularly in this case, where the decision of NAC is based on an incorrect decision for grading a position.

14. In this regard, appellant recalls that, according to the jurisprudence of the NATO Appeals Board, even if the Board was not competent to annul a NAC decision, it could rule on the legality of such a decision when a Head of a NATO Body took an individual decision implementing the NAC decision. For appellant, this is precisely the case in the present litigation, because the NAC decision was adopted on the basis of incorrect information supplied by the respondent. In this regard, the contract of employment between respondent and appellant established a contractual relationship that must comply with the requirements of the CPR and the other relevant legal texts. Here, however, here the offered contract illegally assigned the appellant a grade of B-4 instead of grade B-5.

15. Finally, appellant argues that the incorrect and illegal grading of B-4 causes him material prejudice. If the correct grade of B-5 were applicable, appellant would be entitled to remuneration at the higher rate corresponding to that grade. Instead his remuneration today reflects the lower grade of B-4.

16. Appellant requests the Tribunal to grant:
- correction of the grading of Principal Technician – Engineering Environment Specialist post from grade B-4 to B-5/B-6, retroactively, as of 1 November 2015; and
- reimbursement of legal, travel and subsistence costs.

### *(ii) Respondent's contentions*

17. Respondent notes, firstly, that following the NAC approved reorganization, appellant was offered a new appointment to a post at the same B-4 grade he held previously. He accepted this offer by signing a new contract. Under these circumstances, a staff member has no actionable right for changing a post in the Organization, its job description or its grading. Respondent explains that NATO's manpower requirements are decided by the nations through the NAC. A position therefore does not originate from the contractual rights and obligations established between a NATO body and the staff member. It is, rather, independent of the incumbent. As such, appellant has no subjective right to the post, nor is he entitled to legally dispose of it. In this regard, appellant cannot invoke the protection of his legitimate expectation or the violation of his contractual rights that emerge from his employment relationship.

18. Secondly, concerning appellant's contentions regarding the NAC decision, respondent stresses that it is not the decision of a NATO body, and is not an executive act subject to Tribunal review. In this regard, respondent denies that it submitted false and improper information to the higher authorities leading to an illegal downgrading of the post. Respondent rather notes that appellant's observations indicate a misunderstanding about NATO procedures on the creation of posts and their proper grading. Respondent observes in this regard that it had no competence to intervene in the review process of the posts by the NDMAA, which classified all of them.

19. Thirdly, respondent considers that article 4.2 of the CPR has no application in the present litigation because this provision relates only to a step increase under certain conditions not present here.

20. Respondent finally considers that appellant has not suffered material prejudice because his remuneration remains the same after the NAEW&CF GK reorganization as it was before. Because appellant holds the same grade as he held before this reorganization, he cannot invoke any violation of the principle of legitimate expectation or of his contractual rights.

21. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

22. As mentioned supra, the present appeal originates in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment in the same grade and location as before.

23. According to article 6.2.1 of Annex IX to the CPR:

> [t]he Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal successor concerning the legality of a decision taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council.

Articles 6.2.2 and 6.2.3 indicate respectively that:

> [i]n the event of a dispute as to whether a particular matter falls within the competence of the Tribunal as defined in section 6.2, the issue shall be settled by the Tribunal.

and that

> [t]he Tribunal shall not have any powers beyond those conferred under this Annex.

24. In his first request for relief, the appellant asks the Tribunal to correct the grading of his Principal Technician – Engineering Environment Specialist post from grade B-4 to B-5/B-6, retroactive to 1 November 2015. By this request, appellant actually requests the Tribunal to issue directions to the respondent.

25. It derives, however, from the above-mentioned provisions of Articles 6.2.1 to 6.2.3 of Annex IX to the CPR that the Tribunal is not entitled to issue directions requiring respondent to do or to refrain from doing something. It is instead for the respondent to draw the appropriate conclusions from the operative part of the Tribunal's judgment regarding the legality or illegality of a contested decision and from the grounds on which it is based.

26. Therefore, appellant's request that the Tribunal correct the grading of Principal Technician – Engineering Environment Specialist post from grade B-4 to B-5/B-6, retroactively as of 1 November 2015, does not fall within the competence of the Tribunal.

27. However, with his appeal to the Tribunal, appellant introduces a set of arguments that in fact amount to a call for annulment of respondent's decision to offer him an

indefinite duration contract of grade B-4 instead of grade B-5/B-6. In this regard, he also submits claims for compensation of damages resulting from this decision.

28. Accordingly, the Tribunal will now analyze the appeal directed against respondent's decision to offer him an indefinite duration contract of grade B-4 instead of grade B-5/B-6.

29. By his first plea, appellant develops two sets of contentions. He first argues that respondent transmitted erroneous information to the competent authorities concerning the grading of his and other posts, in breach of binding internal rules including, inter alia, the NOC. Appellant refers to his Branch Chief's letter as showing that the offered post includes a high level of responsibilities, indicating, according to the internal rules, grade B-5 and not B-4. Consequently, according to appellant, the challenged decision based on this erroneous assessment should be annulled.

30. The Tribunal understands from statements during the oral hearing that Headquarters NAEW&CF GK management did submit proposals to the competent NATO authorities for a Peacetime Establishment, together with job descriptions and proposed grades for the recommended posts. These were proposals only. They were subject to evaluation and possible revision by the PEA or the NDMAA and to subsequent decisions by the NAC.

31. In this context, the Tribunal considers that the authorities involved in the evaluation of the proposed job descriptions and grading of the posts enjoy a wide discretion.

32. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a discretionary decision is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a grading decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

33. In view of this, tribunals have also consistently held that they will not substitute their own view for the organization's assessments in such cases.

34. The Tribunal observes that during the evaluation of the proposed job descriptions and the grading of posts an apparently serious and coherent process was followed in assessing proposals in the context of a changing and downsized environment. Pursuant to this process, a number of Principal Technician posts, and not only the one offered to appellant, were finally graded B-4. Others were indeed graded B-5.

35. The evidence shows that a substantial number of management's grading proposals were revised downward by the competent authorities, and that management in turn sought reconsideration of some of those changes. One of the posts downgraded by the NDMAA was the post occupied by appellant. The NDMAA's Civilian Classification Board downgraded this post from grade B-5 (as initially proposed by respondent) to grade B-4

36. The fact that, during this process, some posts were ultimately downgraded from B-5 to B-4 while others were not does not imply that the respondent's decision concerning appellant's contract offer was flawed. On the contrary, the Tribunal observes that the Organization sought to make well-balanced and nuanced judgments in the exercise of its discretionary powers in the process of grading the posts concerned.

37. Establishing that the respondent made an error in its assessment of the facts that would justify annulment of the challenged decision requires convincing proof. It is appellant's duty to provide such proof. Appellant has failed to do so.

38. The Tribunal also disagrees with appellant's contention that the alleged incorrect grading violated binding Human Resources documents. Appellant in this respect relies on the *2012 NATO Human Resources (Manpower) Management* document. The cover page of this document, however, clearly says that it is a technical report that includes best practices, models and methodologies, data issues, skill categories and experience levels in human resources management. The context and contents show that the document is a guide to personnel practices, not a set of binding legal rules. It stipulates that *"[t]he levels of responsibility suggested by the Skill Levels do not necessarily relate directly to rank or grade…"* and in the table that follows "*… depicts approximate relationships between Primary NOC Skill Level and Rank/Grade.*". Further, the document suggests the setting up of a more official and permanent working group to complete the work.

39. The Tribunal concludes that the document concerned is not a binding internal instruction or document and that appellant's contention in this respect fails.

40. By his second set of arguments, appellant maintains that respondent was aware of the errors committed in the classification process but did not correct them, despite giving appellant the impression it would do so. Appellant contends that respondent is therefore in breach of its duty to have regard to the welfare of a staff member, in neglect of obligations deriving from the CPR and the other applicable texts.

41. This contention must be also rejected. The respondent's duty to have regard to the welfare of its staff members reflects the balance of reciprocal rights and obligations established by the CPR in the relationship between the NATO bodies and its staff members. That duty implies that when the administration takes a decision concerning the situation of a staff member, it must take into consideration all the factors which may affect its decision, and when doing so it should take into account not only the interests of the service but also those of the agent concerned. However, the protection of the rights and interests of a staff member is subject to compliance with the rules in force.

42. In this regard, in addition to the fact that the involved authorities enjoy a wide discretion in evaluating proposed job descriptions and grading posts, the Tribunal observes that the appellant's interests were taken into account by the fact that he was offered an indefinite duration contact following suppression of his previous position.

43. The applicant's first plea must therefore be rejected as lacking any foundation in law.

44. By his second plea, appellant argues that the challenged decision violates Article 4.2 of the CPR.

45. Pursuant to this provision *"Members of the staff shall normally be appointed at the lowest step of their grade. However, the Head of NATO body may recognize exceptional qualifications and skills and appoint at a higher step if the candidate in question can demonstrate possession of high level training and proficiency or specific experience which is directly relevant to the duties attached to the post in question. (…)".*

46. This plea must be rejected on the merits. This provision does not concern the grading of a staff member like appellant in case of a reorganization of the service.

47. Accordingly, the second plea must be rejected as unfounded, and the claim for annulment of the challenged decision must be dismissed in its entirety. Since the claim for annulment has been rejected, it is necessary to reject also the claim for damages, which seeks compensation for the material damage that allegedly resulted from this decision.

48. It follows that the present appeal must be dismissed in its entirety.

## E. Costs

49. 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 […]

50. 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 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0006

# Judgment

## Case No. 2016/1079

**UD**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; grading of a post; competence; discretion; judicial review.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 20 April 2016, and registered on 12 May 2016 as Case No. 2016/1079, by Mr UD contesting, *inter alia*, the grading of a new post that was offered to him following a NAEW&CF GK reorganization.

2. The respondent's answer, dated 1 July 2016, was registered on 18 July 2016. The appellant's reply, dated 9 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. Appellant joined the E-3A-Component at Geilenkirchen – today NAEW&CF GK – on 1 September 1995 as Senior Technician at grade B-4.

7. Following the NAEW&CF GK reorganization, as approved by the NAC on 30 September 2015 and which became effective on 1 November 2015, appellant's post having been suppressed, he was offered an indefinite duration contract in a new post as Principal Technician (UNIX Services Op and Mgnt) at grade B-4.

8. Appellant accepted the offered post and signed a new contract, but contested the grade assigned to the post, considering that the job description did not reflect the correct

grade B-5/6 but the incorrect Grade B-4. He accordingly started administrative review procedures seeking review of the grading of his post.

9. Appellant introduced the first administrative review on 27 November 2015. By letter dated 27 November 2015, the head of the Systems and Server Section supported the appellant's arguments, stressing that the appellant's new post offered by respondent was, before the reorganization, a B-5 post but was downgraded to B-4 without any reduction in duties and responsibilities. In the same letter, appellant's section head requested the respondent to review the grade mapping for the post. This first administrative review was rejected by respondent on 18 December 2015. Appellant's request for further administrative review, introduced on 22 December 2015, was rejected by respondent on 29 January 2016; and a "Request for Mediation/Formal Complaint", introduced on 10 February 2016, was rejected by respondent on 25 February 2016.

10. It is under these circumstances that, on 20 April 2016, appellant brought the present appeal before the Tribunal against the decision of 25 February 2016.

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

### *(i) Appellant's contentions*

11. Appellant firstly argues that the correct grade for the position he was offered should be B-5, and not B-4 as assigned. Appellant grounds this contention, *inter alia*, on the NATO Occupational Code (NOC) and the corresponding skill levels. He notes that the job description of the Principal Technician post contains skills (such as "Skill Level 3" Apply) that fall into the NOC category identified for a B-5/B-6 grading. He adds that the new position includes a high level of responsibilities assigned for grade B-5, a contention confirmed by the 27 November 2016 letter from his section head referred to above which contends that the appellant's post involves B-5 responsibilities. Therefore, given the position's job description in relation to the applicable rules for grading positions, respondent illegally offered appellant a new contract of grade B-4.

12. Appellant contends, secondly, that the NAC decision of 30 September 2015, by which the reorganization was approved by NATO member countries, is based on incorrect and irregular information provided by NAEW&CF GK that infringed upon and disregarded binding management directives. If the NAC decision approving the grading assigned to his post *in se* cannot be challenged, respondent should have been directed to the proper authority competent to review it – the Peacetime Establishment Authority (PEA) – or the NATO Defense Manpower Audit Authority (NDMAA). Their decisions are subject to an appeal before the Tribunal, particularly in this case, where the decision of NAC is based on an incorrect decision for grading a position.

13. In this regard, appellant recalls that, according to the jurisprudence of the NATO Appeals Board, even if the Board was not competent to annul a NAC decision, it could rule on the legality of such a decision when a Head of a NATO Body took an individual decision implementing the NAC decision. For appellant, this is precisely the case in the present litigation, because the NAC decision was adopted on the basis of incorrect

information supplied by the respondent. In this regard, the contract of employment between respondent and appellant established a contractual relationship that must comply with the requirements of the CPR and the other relevant legal texts. Here, however, here the offered contract illegally assigned the appellant a grade of B-4 instead of grade B-5.

14. Appellant argues that before the reorganization an identical post was graded B-5, but that during the reorganization the grade of the post was changed to B-4 without a relevant change in the corresponding job description. This latter post was offered to appellant. Appellant observes, however, that in the "Final report on the initial state peacetime establishment" (ISPE) of the NAEW&CF GK dated 12 December 2014, the post offered to appellant was not mentioned at all. In addition, according to appellant, annex C of this report ("List of Posts with grades as determined by the Civilian Classification Board") lists all the posts but does not indicate that appellant's position as changed via the Civilian Classification Board (CCB). In this regard, appellant requests that the Tribunal order respondent to communicate the report to the parties, including its Annex.

15. According to appellant, there is no doubt that the offered post was graded B-4 instead of B-5 illegally and by mistake. In this regard, his supervisor informed the competent persons about the wrong grade for the post, and appellant believed that they recognized the error and indicated that a correction would be forwarded via chain of command to the NDMAA. Appellant considers that this statement can be confirmed by two witnesses. Despite the recognition of the error concerning the grade of his position, respondent did not forward the necessary information to the NDMAA before the new Permanent Establishment was approved by the NAC.

16. Finally, appellant argues that the incorrect and illegal grading of B-4 causes him material prejudice. If the correct grade of B-5 were applicable, appellant would be entitled to remuneration at the higher rate corresponding to that grade. Instead his remuneration today reflects the lower grade of B-4.

17. Appellant requests the Tribunal to grant:
- correction of the grading of Principal Technician post from grade B-4 to B-5/B-6, retroactively, as of 1 November 2015; and
- reimbursement of legal, travel and subsistence costs.

### *(ii) Respondent's contentions*

18. Respondent notes, firstly, that following the NAC approved reorganization, appellant was offered a new appointment to a post of the same B-4 grade he held previously. He accepted this offer by signing a new contract. Under these circumstances, a staff member has no actionable right for changing a post in the Organization, its job description or its grading. Respondent explains that NATO's manpower requirements are decided by the nations through the NAC. A position therefore does not originate from the contractual rights and obligations established between a NATO body and the staff member. It is, rather, independent of the incumbent. As such, appellant has no subjective right to the post, nor is he entitled to legally dispose

of it. In this regard, appellant cannot invoke the protection of his legitimate expectation or the violation of his contractual rights derived from his employment relationship. It adds that no rights of appellant can be derived from a comparison between the grading of a post in the current Peacetime Establishment and of one in 2010.

19. Secondly, concerning appellant's contentions regarding the NAC decision, respondent stresses that it is not the decision of a NATO body, and is not an executive act subject to Tribunal review. In this regard, respondent denies that it submitted false and improper information to the higher authorities leading to an illegal downgrading of the post. Respondent rather notes that appellant's observations indicate a misunderstanding about NATO procedures on the creation of posts and their proper grading. Respondent observes in this regard that it had no competence to intervene in the review process of the posts by the NDMAA, which classified all of them.

20. Respondent finally considers that appellant has not suffered material prejudice, because his remuneration remains the same after the NAEW&CF GK reorganization as it was before. Because appellant holds the same grade as he held before this reorganization, he cannot invoke any violation of the principle of legitimate expectation or of his contractual rights.

21. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

22. As mentioned supra, the present appeal originates in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment, in the same grade and location as before.

23. According to article 6.2.1 of Annex IX to the CPR:

> [t]he Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal successor concerning the legality of a decision taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council.

Articles 6.2.2 and 6.2.3 indicate respectively that:

> [i]n the event of a dispute as to whether a particular matter falls within the competence of the Tribunal as defined in section 6.2, the issue shall be settled by the Tribunal

and that:

> [t]he Tribunal shall not have any powers beyond those conferred under this Annex.

24. In his first request for relief, the appellant asks the Tribunal to correct the grading of his Principal Technician post from grade B-4 to B-5/B-6, retroactive to 1 November 2015. By this request, appellant actually requests the Tribunal to issue directions to the respondent.

25. It derives, however, from the above-mentioned provisions of Articles 6.2.1 to 6.2.3 of Annex IX to the CPR that the Tribunal is not entitled to issue directions requiring respondent to do or to refrain from doing something. It is instead for the respondent to draw the appropriate conclusions from the operative part of the Tribunal's judgment regarding the legality or illegality of a contested decision and from the grounds on which it is based.

26. Therefore, appellant's request that the Tribunal correct the grading of Principal Technician – Engineering Environment Specialist post from grade B-4 to B-5/B-6, retroactively as of 1 November 2015, does not fall within the competence of the Tribunal.

27. However, with his appeal to the Tribunal, appellant introduces a set of arguments that in fact amount to a call for annulment of respondent's decision to offer him an indefinite duration contract of grade B-4 instead of grade B-5/B-6. In this regard, he also submits claims for compensation of damages resulting from this decision.

28. Accordingly, the Tribunal will now analyze the appeal directed against respondent's decision to offer him an indefinite duration contract of grade B-4 instead of grade B-5/B-6.

29. By his appeal, appellant develops two sets of contentions. He first argues that respondent transmitted erroneous information to the competent authorities concerning the grading of his and other posts, in breach of binding internal rules including, inter alia, the NOC. Appellant refers to his section head's letter as showing that the offered post includes a high level of responsibilities, indicating, according to the internal rules, grade B-5 and not B-4. Consequently, according to appellant, the challenged decision based on this erroneous assessment should be annulled.

30. The Tribunal understands from statements during the oral hearing that Headquarters NAEW&CF GK management did submit proposals to the competent NATO authorities for a Peacetime Establishment, together with job descriptions and proposed grades for the recommended posts.

31. Decisions concerning the grading of posts are, in the first instance, within the discretionary powers of the management of an organization, whose recommendations are subject to assessment and possible revision by the NDMAA. These recommendations, as initially proposed or as subsequently revised, are then subject ultimately to consideration and approval by the NAC.

32. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a discretionary decision is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a grading decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

33. In view of this, tribunals have also consistently held that they will not substitute their own view for the organization's assessments in such cases.

34. The Tribunal observes that during the evaluation of the proposed job descriptions and the grading of posts an apparently serious and coherent process was followed in assessing proposals in the context of a changing and downsized environment. Pursuant to this process, a number of Principal Technician posts, and not only the one offered to appellant, were finally graded B-4. Others were indeed graded B-5.

35. The evidence shows that a substantial number of management's grading proposals were revised downward by the competent authorities, and that the management in turn sought reconsideration of some of those changes.

36. The fact that, during this process, some posts were ultimately downgraded from B-5 to B-4 while others were not does not imply that the respondent's decision concerning appellant's contract offer was flawed. On the contrary, the Tribunal observes that the Organization sought to make well-balanced and nuanced judgments in the exercise of its discretionary powers in the process of grading the posts concerned.

37. Establishing that the respondent made an error in its assessment of the facts that would justify annulment of the challenged decision requires convincing proof. It is appellant's duty to provide such proof. Appellant has failed to do so.

38. The Tribunal also disagrees with appellant's contention that the alleged incorrect grading violated binding Human Resources documents. Appellant in this respect relies on the *2012 NATO Human Resources (Manpower) Management* document. The cover page of this document, however, clearly says that it is a technical report that includes best practices, models and methodologies, data issues, skill categories and experience levels in human resources management. The context and contents show that the document is a guide to personnel practices, not a set of binding legal rules. It stipulates that *"[t]he levels of responsibility suggested by the Skill Levels do not necessarily relate directly to rank or grade…"* and in the table that follows "*… depicts approximate relationships between Primary NOC Skill Level and Rank/Grade.*". Further, the document suggests the setting up of a more official and permanent working group to complete the work.

39. The Tribunal concludes that the document concerned is not a binding internal instruction or document and that appellant's contention in this respect fails.

40. By his second set of arguments, appellant maintains that respondent was aware of the errors committed in the classification process, and that respondent therefore is in breach of its duty to have regard to the welfare of a staff member, in neglect of obligations deriving from the CPR and the other applicable texts.

41. This contention must be also rejected. The respondent's duty to have regard to the welfare of its staff members reflects the balance of reciprocal rights and obligations established by the CPR in the relationship between the NATO bodies and its staff members. That duty implies that when the administration takes a decision concerning

the situation of a staff member, it must take into consideration all the factors which may affect its decision, and when doing so it should take into account not only the interests of the service but also those of the agent concerned. However, the protection of the rights and interests of a staff member is subject to compliance with the rules in force.

42. In this regard, in addition to the fact that the involved authorities enjoy a wide discretion in evaluating proposed job descriptions and grading posts, the Tribunal observes that the appellant's interests were taken into account by the fact that he was offered an indefinite duration contact following suppression of his previous position.

43. In the same context, appellant argues that respondent made several errors in grading of his and other posts, and then assured those affected that the correct information would be communicated to the competent authorities in order to correct the assigned grade. However, despite this assurance, the errors were not corrected. In this regard, appellant argues that this could be confirmed by two witnesses.

44. This contention must also be rejected. The decisional process for grading the concerned posts involved an iterative process of assessment by respondent and other NATO authorities as they sought to meet the requirements posed by a reduced Peacetime Establishment. As mentioned in paragraph 31 of the present judgment, in the final assessment concerning the grading of the concerned posts, the competent authority has significant discretion to decide for each post the corresponding grade. In these conditions, the Tribunal concludes also that there is no need to hear the witnesses.

45. Appellant also requests the respondent to produce the documentation relating to the process of the grading of the posts during the reorganization.

46. While Rule 9(2)(h) of the Tribunal's Rules of Procedure provides that an appeal may include a request for the production of documents, it is for the Tribunal to rule on such a request. At the hearing in the present case, the Tribunal requested the respondent to provide documentation of the list of posts with grades as determined by the CCB in 2014. Respondent provided these documents to the Tribunal and the appellant on 15 December 2015.

47. Accordingly, the appellant's pleas must be rejected as unfounded, and the claim for annulment of the challenged decision must be dismissed in its entirety.

48. Since the claim for annulment has been rejected, it is necessary to reject also the claim for damages, which seeks compensation for the material damage that allegedly resulted from this decision.

49. It follows that the present appeal must be dismissed in its entirety.

## E. Costs

50. Article 6.8.2 of Annex IX to the CPR provides as follows:

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

51. The dismissal of 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 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0007

# Judgment

## Cases Nos 2016/1080 and 2016/1092

**JH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; grading of post offered; termination of appointment following non-acceptance of new post; loss of job indemnity.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceeding

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 3 May 2016, and registered on 23 May 2016 as Case No. 2016/1080, by Mr JH contesting, *inter alia*, the grading of a new post that was offered to him but not accepted following a NAEW&CF GK reorganization.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. On 23 June 2016 appellant introduced a second appeal, registered on 7 July 2016 as Case No. 2016/1092, contesting, *inter alia*, the termination of his employment without the payment of an indemnity for loss of job.

4. The respondent's answer, dated 5 September 2016, was registered on 6 September 2016. The appellant's reply, dated 5 October 2016, was registered on 6 October 2016. The respondent's rejoinder, dated 7 November 2016, was registered on the same day.

5. By Order AT(PRE-O)(2016)0005 dated 10 October 2016, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2016/1092 was completed.

6. At the request of the Tribunal further documentation was circulated at the oral hearing. Appellant was given the opportunity to comment thereon in writing and respondent to react thereto, which was done on 3 and 11 January 2017 respectively.

7. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

8. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of

NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

10. Appellant, who served at NAEW&CF GK for over 34 years, held, under an indefinite duration contract, the post of Senior Technician (Simulator) at the Logistic Wing Command Group at B-4, step 11 level. Following the NAEW&CF GK reorganization as approved by the North Atlantic Council (NAC) on 30 September 2015 and which became effective on 1 November 2015, appellant was offered an indefinite duration contract in a new post as Principal Technician – Engineering Environment Specialist, at a B-4, step 11 level.

11. Appellant did not accept the new post, arguing that it should have a higher grade, and started pre-contentious procedures. The first administrative review introduced on 26 November 2015 was rejected by respondent on 16 December 2016; the further administrative review introduced on 5 January 2016 was rejected by respondent on 25 January 2016; and the "Request for Mediation/Formal Complaint" introduced on 23 February 2016 was rejected by respondent on 10 March 2016. On 5 May 2016 appellant introduced the first appeal (Case No. 2016/1080).

12. On 16 December 2015 appellant received from respondent a letter of termination of employment, due to the suppression of his former post as Senior Technician (Simulator) and following his refusal to agree to the new contract offered to him. The letter added that he was entitled to a notice period of 180 days; that, as a consequence, his employment would end on 12 June 2016 at 24:00hrs; and that he would not be entitled to an indemnity for loss of job, since a post had been offered to him at the same level he held previously.

13. Appellant contested this termination of employment and started the pre-contentious procedures. The first administrative review introduced on 4 January 2016 was rejected by respondent on 1 February 2016; the further administrative review introduced on 19 February 2016 was rejected by respondent on 21 March 2016; and the "Request for Mediation/Formal Complaint" introduced on 6 April 2016 was rejected by respondent on 27 April 2016. On 23 June 2016 appellant introduced the second appeal (Case No. 2016/1092).

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

### *(i) Appellant's contentions in Case No. 2016/1080*

14. In the first appeal, appellant disputes the grading of the new post offered him following the reorganization. In his view, this post should have the grade of B-5/6, and not of B-4 as assigned.

15. Appellant bases his contentions, *inter alia*, on the NATO Occupational Code (NOC) and the associated skill level. He notes that the job description of the Principal Technician post contains language (such as "Skill Level 3 (Apply)"), which falls into the NOC category, identified for a B-5/6 grading. He also adds that the new post includes supervisory responsibilities, not previously part of the Senior Technician position, and that, in comparison, other Principal Technician posts in different departments have been assigned the correct B-5 grading.

16. Appellant contends that the decision of the NAC of 30 September 2015, by which the reorganization and a new Peacetime Establishment were approved, is based on incorrect and irregular information provided by NAEW&CF GK, which conflicts with and disregards binding management directives. Moreover, appellant stresses that if the NAC decision *in se* cannot be challenged, he should have been directed to the authority that is competent to review it.

17. In addition, appellant claims the violation of Part 4 of Annex V – 1 to the NATO Civilian Personnel Regulations (CPR) concerning the granting of the LOJ indemnity. Appellant maintains that, contrary to these CPR dispositions, he has not been offered a post of the same grade in the same Organization in that, in addition to the alleged illegal post grading, the Mission System Engineering Centre, to which the new post will be transferred, is recognized to be an independent organization under the Headquarters NAEW Control Force. Appellant asserts a further violation of the CPR in that the new job description also contains a mandatory deployment clause, which he urges would significantly alter his employment status.

18. Appellant requests the Tribunal:
- to grant correction of the grading of Principal Technician – Engineering Environment Specialist post from B-4 to B-5/6, retroactively, as of 1 November 2015;
- to rule that the new contract offer and attached job description violate the regulations on the LOJ indemnity laid down in Annex V to the CPR as well as the NATO Human Resources guidelines; and
- to grant reimbursement of legal, travel and subsistence costs.

### *(ii) Respondent's contentions in Case No. 2016/1080*

19. Respondent notes that, following the NAC approved reorganization, appellant was offered a new appointment for a post of the same grade, *i.e.* B-4 level, as the one he was holding. Respondent affirms that, even if the new proposed post has a different job description, the change of duties and responsibilities is not of such a nature that appellant

no longer possesses the required qualifications. Respondent also notes that appellant agreed to long term or frequent short term deployments by signing his employment contract linked to an earlier job description.

20. Respondent further notes that as appellant declined to sign a new contract on the grounds that his placement and the job description do not comply with the CPR and other NATO regulations, he expressed unwillingness to continue his employment with the Organization.

21. Respondent denies that false and improper information leading to an illegal downgrading of the post were submitted to the higher authorities. Instead, appellant's observations indicate a misunderstanding of NATO procedures on the creation of posts and their proper grading.

22. Respondent contends that, because he has left the Organization, appellant no longer has a legitimate interest in pursuing legal procedures for an upgrade of the post of Principal Technician, or a determination about his placement and job description.

23. Respondent stresses that staff members do not have a personal right to opt for LOJ indemnity at their convenience. Moreover, respondent observes that appellant was not eligible for such indemnity as he was offered a post in the same grade in the same Organization. Respondent remarks that the re-organized Headquarters NAEW&CF GK remains part of NATO, which must be be considered in its entirety.

24. Respondent adds that staff members do not have an actionable right to change the job description or grading of a post in the Organization. It explains that NATO's manpower requirements are decided by the nations through the NAC. A post does therefore not originate from the contractual rights and obligations established between a NATO body and the staff member but, rather, is distinct from the incumbent. As such, appellant has no legal right to the post nor is he legally entitled to dispose of it. Moreover, respondent adds that decisions of the NAC are not administrative acts that can be subject to judicial review.

25. Respondent requests the Tribunal to dismiss the appeal.

### *(iii) Appellant's contentions in Case No. 2016/1092*

26. In the second appeal appellant contests the termination of employment due to the suppression of his post as Senior Technician, without being granted the LOJ indemnity.

27. Appellant stresses that his pre-contentious procedure, *inter alia* his letter of 26 November 2015 (first administrative review of Case No. 2016/1080), provided detailed information as to why he was not able to sign the new contract offer and accept the corresponding job description. This information was not recognized by respondent. The termination of his employment then created a new situation, obliging appellant to start a new proceeding. The new contract did not provide the proper legal basis for a further working relationship with the Organization. In particular, appellant disputed the grading of the new post, the contract's mandatory deployment clause, and the additional duties

and responsibilities requiring a different set of skills compared to his former job as Senior Technician. Appellant remarks that NAEW&CF GK did not recognize any of the information that he submitted when it terminated his employment on 16 December 2015.

28. Appellant contests respondent's statement that his failure to sign the offered contract meant that he did not wish to continue to work for the Organization. Notwithstanding his present status as a NATO retiree, appellant maintains that he wanted to be reinstated in his contract of employment, but on the basis of a proper job proposal following correction of the illegal errors (violations of CPR and NATO directives/regulations) which he cited in the appeals procedure.

29. In the light of the above, appellant contends that the termination of his employment results from an irregular offer of employment and, as such, violates Part 4 of Annex V – 1 to the CPR in so far as no LOJ indemnity is granted with the termination letter of 16 December 2015.

30. Moreover, appellant insists that his employment was wrongfully and disrespectfully terminated after 34 years of loyal and exceptional service to the Organization, maintaining that this requires compensation for moral damages.

31. In addition, appellant argues, with reference to Article 5.3.1 of Annex IX to the CPR, that the decision to terminate his employment pending pre-litigation constitutes an adverse action.

32. Appellant requests the Tribunal:
- to determine that the termination of employment is in violation of the CPR and the NATO directives/regulations;
- to determine that appellant is entitled to a termination of employment with the payment of a LOJ indemnity;
- to order appropriate compensation for immaterial and moral damages; and
- to order reimbursement of legal, travel and subsistence costs.

### *(iv) Respondent's contentions in Case No. 2016/1092*

33. Respondent observes that the notice of termination was given to appellant solely because he declined to sign and return the new contract of employment offered to him, following the suppression of his old post as a result of the NAC approved reorganization of Headquarters NAEW&CF GK.

34. Respondent contends that appellant's actions and claims throughout both procedures are both contradictory and duplicative, and are only masking appellant's intention to leave the Organization under conditions allowing him to receive the LOJ indemnity.

35. Respondent stresses that appellant was granted an extension of the deadline to return his new contract countersigned, thereby granting his request for time to consult with his attorney. Further, he was duly informed of what the consequences of a refusal

to sign would be, *i.e.* termination of the contract without the entitlement to payment of loss of job indemnity but with a notice period of 180 days in accordance with the CPR dispositions.

36. Respondent adds that, in view of the lack of appellant's reaction, it could not but conclude that there was no wish to accept the offer to continue to work with the Organization, rendering its offer to him null and void. This gave ground for termination of the existing contract, as it was linked to a post that was suppressed with the re-organization.

37. Respondent also submits that no rule in the CPR gives a request for an administrative review a suspensive effect, allowing the staff member to withhold acceptance of an offer of appointment and contract. Moreover, respondent stresses that it can only offer appointments to posts approved by the NAC and that it is not within its authority, nor of any higher military Headquarters, to create or upgrade them.

38. Respondent notes that appellant separated from the Organization on 12 June 2016 and that he is, as of 1 July 2016, receiving his retirement pension without any deduction.

39. Respondent reinforces that appellant is not eligible for the indemnity for loss of job as the CPR's conditions are not met: a new post with the same grade and in the same Organization in Geilenkirchen was offered, and the changes in duties under the contract were not of such a nature that appellant no longer met the required qualifications. Respondent also indicates that for minor changes in the new job appellant was offered training.

40. Respondent contends that moral damages are neither substantiated nor quantified, and are in any case groundless since they are the consequence of appellant's actions.

41. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

42. As mentioned *supra*, the present appeals originate in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In this exercise appellant was offered a continuation of his employment.

43. The two appeals were initiated at different times, reflecting the different legal situations both before and after the appellant's employment was terminated. Accordingly, they contain different pleas and legal arguments. While they are sometimes repetitive and complementary, they are also sometimes contradictory. This raises questions concerning the admissibility of some pleas and arguments, in particular in the second appeal that were not introduced in the first appeal or in the pre-litigation procedures. The Tribunal deems it appropriate to adjudicate both appeals at the same time, in order to harmonize insofar as possible the resolution of inconsistent pleas and

requests for relief. It will at this stage accordingly give priority to the arguments on the merits of both appeals.

44. Appellant, first of all, seeks a regrading of the post that was offered to him, submitting that the B-4 grading as proposed violated binding Human Resources guidelines, and that other similar posts offered to others were graded B-5.

45. The reorganization decision, including the manpower establishment, is a general decision concerning posts that are not, or not yet, attributed to individual staff members. The latter therefore do not have an actionable right concerning the overall grading decision and the Organization is not under an obligation to justify its actions and decisions in this respect.

46. However, staff members may challenge the legality of an organization's staffing and grading decisions when challenging an individual administrative decision that directly and adversely affects them, such as the offer of a specific post, but can do so only within the framework of the CPR and established international civil service jurisprudence.

47. The Tribunal understands from statements made during the oral hearing that the Headquarters NAEW&CF GK management did submit proposals to the competent NATO authorities for a Peacetime Establishment, together with job descriptions and grading. These proposals were proposals only. They were subject to evaluations by the NATO Defence Manpower Audit Authority (NDMAA) and to subsequent decisions by the NAC.

48. Decisions concerning the grading of posts are, in the first instance, within the discretionary powers of the management of an organization, whose recommendations are subject to assessment and possible revision by the NDMAA. These recommendations, as initially proposed or as subsequently revised, are then subject ultimately to consideration and approval by the NAC.

49. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a decision in the exercise of an organization's discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a grading decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

50. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases.

51. The Tribunal observes that during the evaluation of the proposed job descriptions and grading of posts, an apparently serious and coherent process was followed to assess proposals in the context of a changing and downsized environment. In the course of this process, a number of Principal Technician posts, and not only the one offered to appellant, were graded B-4. Others were indeed graded B-5. The fact that some posts were ultimately graded B-4 and others B-5 does not automatically mean that the overall decision was arbitrary. On the contrary, the Tribunal observes that the Organization

sought to make considered and nuanced judgments in the exercise of its discretionary powers.

52. The Tribunal disagrees with appellant's contention that the alleged incorrect grading was in violation of binding Human Resources documents. Appellant in this respect relies on the *2012 NATO Human Resources (Manpower) Management* document. The cover page of this document, however, clearly says that it is a technical report that includes best practices, models and methodologies, data issues, skill categories and experience levels in human resources management. The context and contents show that the document is a guide to personnel practices, not a set of binding legal rules. At the bottom of page 13, it is thus stipulated that *"[t]he levels of responsibility suggested by the Skill Levels do not necessarily relate directly to rank or grade…*" and in the table that follows *"… depicts approximate relationships between Primary NOC Skill Level and Rank/Grade.*" Page 15 of the report suggests the setting up of a more official and permanent working group to complete the work. The Tribunal concludes on the basis of its review of the document that it is not an internal instruction or a binding document. Appellant's plea in this respect fails.

53. The Tribunal concludes that the grading decisions were regularly taken in the exercise of discretionary powers, that there was no abuse of such powers and that there is no indication of arbitrariness. In this regard, it is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so.

54. The Tribunal further finds that the decision to terminate appellant's appointment was regular. The NAC abolished appellant's previous post, and he was properly informed of this by the Component. He was also properly advised of the consequences of not countersigning the new job offer, *i.e.* that his employment would be terminated with a notice period but without an indemnity for loss of job. The Component went to great length to guarantee continued employment, which appellant declined. He carries the responsibility for this and must accept the consequences.

55. Appellant considers - and this appears to be the main purpose in pursuing the appeals - that he is entitled to the payment of an indemnity for loss of job, for a number of reasons.

54. Annex V to the CPR lays down the regulations on the indemnity for loss of job. These accord the Secretaries-General of the Coordinated Organizations, including the NATO Secretary General, the power to award an indemnity for loss of employment to any staff member who holds a firm contract 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;
> ...

> 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,
> …

56. In a first submission in this respect appellant contends that the post that was offered to him should have been graded B-5 and that the post offered was not "in the same grade" entitling him to an indemnity for loss of job. This calls for a number of comments.

57. First of all, the Tribunal has concluded *supra* that the B-4 grading of the post was not irregular. Already for that reason, the claim has become groundless. Secondly, while appellant's reasoning and motivations in this regard are not wholly clear or coherent, if the logic of appellant's claim for a regrading of a post is solely to claim a termination of appointment, with the payment of a LOJ indemnity, that result would be inappropriate and abusive. In this regard, it would defy all logic to consider continued employment with a promotion as loss of employment entitling a staff member to loss of job indemnity.

58. Furthermore, appellant submits that he does not have the required qualifications for the post that was being proposed. Respondent, on the other hand, is confident that appellant has the necessary qualifications and can perform the functions satisfactorily. It, in addition, has offered training whenever necessary. The Tribunal finds that there is no *prima facie* evidence that appellant does not have the required qualifications, which could, moreover, not be established in actual practice following appellant's refusal to countersign the contract and at least try to perform the duties of the post. Appellant has failed to convincingly substantiate his submission.

59. In a further argument appellant submits that the post offered was not in the same Organization and that he would also for that reason be entitled to the loss of job indemnity. The Tribunal disagrees. It may be true that a reorganization was under way and that some units have been replaced with others, but this was, and is, taking place within one of the six Coordinated Organizations, the North Atlantic Treaty Organization. The words "same Organization" in Annex V to the CPR therefore refer to NATO as a whole. This argument fails.

60. Lastly, appellant contends that the new contract contains a mandatory deployment clause, which differs significantly from his previous one, entitling him to a LOJ indemnity. The old job description provides: "*Participating, as directed, in exercises and NATO operations and missions including taking part in frequent short term and/or long-term deployments… and/or duty travel (TDY) both within and outside NATO's boundaries…participating in deployment and/or TDY, if required, upon short notice and/or prior knowledge of the location and/or the conditions in which NATO will be operating…*" The new contract provides: "…*The primary duty location will be Geilenkirchen, Germany. However, the staff member will, at the discretion of the employer, temporarily perform his/her duties and/or participate in exercises and NATO operations and missions, to include taking part in frequent, short-term and/or long-term deployments/TDY, at other locations both inside and outside NATO countries' boundaries…*"

61. The Tribunal cannot but conclude that the new clause does not differ significantly from the old one, and that this submission also must be dismissed.

62. In the second appeal appellant also requests to be compensated for immaterial and moral damages. The Tribunal initially observes that these alleged damages are not substantiated or quantified. Secondly, the Tribunal points out that, where the alleged damage on which an appellant relies arises from the taking of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, the rejection of the claim for damages, as those claims are closely linked. The claim for annulment being dismissed, the claim for financial compensation must therefore also be dismissed.

63. Concerning finally the appellant's claim that the termination of his contract was an adverse action the Tribunal considers that this claim must also be rejected.

64. The Tribunal observes that the specific reference to Article 5.3.1 of Annex IX to the CPR refers to the Complaints Committee and provides that *"[n]o individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member."* There is no doubt that the scope of this provision does not concern the termination of appellant's employment situation which, as indicated in the present judgment, was in any event in compliance with the CPR.

## E. Costs

65. 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 […]

66. The appeals being dismissed, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0008

**Judgment**

**Cases Nos 2016/1081 and 2016/1096**

**JS**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; grading of post offered; termination of appointment following non-acceptance of new post; loss of job indemnity.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 3 May 2016, and registered on 23 May 2016 as Case No. 2016/1081, by Mr JS contesting, *inter alia*, the grading of a new post that was offered to him but not accepted following a NAEW&CF GK reorganization.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. On 23 June 2016 appellant introduced a second appeal, registered on 5 July 2016 as Case No. 2016/1096, contesting, *inter alia*, the termination of his employment without the payment of an indemnity for loss of job (LOJ).

4. The respondent's answer, dated 5 September 2016, was registered on 6 September 2016. The appellant's reply, dated 5 October 2016, was registered on 6 October 2016. The respondent's rejoinder, dated 7 November 2016, was registered on the same day.

5. By Order AT(PRE-O)(2016)0006 dated 10 October 2016, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2016/1096 was completed.

6. At the request of the Tribunal further documentation was circulated at the oral hearing. Appellant was given the opportunity to comment thereon in writing and respondent to react thereto, which was done on 3 and 11 January 2017 respectively.

7. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

8. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of

NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

10. Appellant, who served in NAEW&CF GK for over 30 years, held, under an indefinite duration contract, the post of Senior Technician (Simulator) at the Logistic Wing Command Group at B-4 level. Following the NAEW&CF GK reorganization as approved by the North Atlantic Council (NAC) on 30 September 2015 and which became effective on 1 November 2015, appellant was offered an indefinite duration contract in a new post as Principal Technician – Engineering Environment Specialist, at B-4 level.

11. Appellant did not accept the new post arguing that it should have a higher grading and started pre-contentious procedures. The first administrative review, introduced on 26 November 2015, was rejected by respondent on 16 December 2015; the further administrative review, introduced on 5 January 2016, was rejected by respondent on 25 January 2016; and the request for mediation/complaint, introduced on 23 February 2016, was rejected by respondent on 10 March 2016. On 5 May 2016 appellant introduced the first appeal (Case No. 2016/1081).

12. On 16 December 2015 appellant received from respondent a letter of termination of employment, due to the suppression of his post as Senior Technician (Simulator) and following his refusal to agree to the new contract offered to him. The letter added that he was entitled to a notice period of 180 days; that, as a consequence, his employment would end on 12 June 2016 at 24:00hrs; and that he would not be entitled to a LOJ indemnity, since a post had been offered to him at the same level he held previously.

13. Appellant contested this termination of employment and started the pre-contentious procedures. The first administrative review, introduced on 4 January 2016, was rejected by respondent on 1 February 2016; the further administrative review, introduced on 19 February 2016, was rejected by respondent on 21 March 2016; and the request for mediation/complaint, introduced on 6 April 2016, was rejected by respondent on 27 April 2016. On 23 June 2016 appellant introduced the second appeal (Case No. 2016/1096).

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

### *(i) The appellant's contentions in Case No. 2016/1081*

14. In the first appeal, appellant contests the proper grading of the new post offered to him following the reorganization. In his view the post should be graded B-5/6 and not B-4 as assigned.

15. Appellant bases his contentions, *inter alia*, on the NATO Occupational Code (NOC) and the associated skill level. He notes that the job description of the Principal Technician post contains language (such as "Skill Level 3 (Apply)"), which falls into the

NOC category, identified for a B-5/6 grading. He also adds that the new post includes supervisory responsibilities, not previously part of the Senior Technician position, and that, in comparison, other Principal Technician posts in different departments have been assigned the correct B-5 grading.

16. Appellant contends that the decision of the NAC of 30 September 2015, by which the reorganization was approved by nations, is based on incorrect and irregular information provided by NAEW&CF GK, which conflicts with and disregards binding management directives. Moreover, appellant stresses that if the NAC decision *in se* cannot be challenged, he should have been directed to the proper authority that is competent to review it.

17. In addition, appellant claims the violation of Annex V to the NATO Civilian Personnel Regulations (CPR) concerning the granting of the LOJ indemnity. Appellant maintains that, contrary to these CPR dispositions, he has not been offered a post of the same grade in the same Organization in that, in addition to the alleged illegal post grading, the Mission System Engineering Centre, to which the new post will be transferred, is recognized to be an independent organization under the Headquarters NAEW Control Force. Appellant asserts a further violation of the CPR in that the new job description also contains a mandatory deployment clause, which he urges would significantly alter his employment status.

18. Appellant requests the Tribunal:
- to grant correction of the grading of Principal Technician – Engineering Environment Specialist post from B-4 to B-5/6, retroactively, as of 1 November 2015;
- to rule that the new contract offer and attached job description violate the Regulations on the LOJ indemnity laid down in Annex V to the CPR as well as the NATO Human Resources manpower management guidelines; and
- to grant reimbursement of legal, travel and subsistence costs.

### *(ii) The respondent's contentions in Case No. 2016/1081*

19. Respondent notes that, following the NAC approved reorganization, appellant was offered a new appointment for a post of the same grade, *i.e.* B-4 level, as the one he was holding. Respondent affirms that, even if the new proposed post has a different job description, the change of duties and responsibilities is not of such a nature that appellant no longer possesses the required qualifications. Respondent also notes that appellant agreed to long term or frequent short term deployments by signing his employment contract linked to an earlier job description.

20. Respondent further notes that as appellant declined to sign a new contract on the grounds that his placement and the job description do not comply with the CPR and other NATO regulations, he expressed unwillingness to continue his employment with the Organization.

21. Respondent denies that false and improper information leading to an illegal downgrading of the post were submitted to the higher authorities. Instead, appellant's

observations indicate a misunderstanding of NATO procedures on the creation of posts and their proper grading.

22. Respondent contends that, because he has left the Organization, appellant no longer has a legitimate interest in pursuing legal procedures for an upgrade of the post of Principal Technician, or a determination about his placement and job description.

23. Respondent stresses that staff members do not have a personal right to opt for LOJ indemnity at their convenience. Moreover, respondent observes that appellant was not eligible for such indemnity as he was offered a post in the same grade in the same Organization. Respondent remarks that the re-organized Headquarters NAEW&CF GK remains part of NATO, which must be considered in its entirety.

24. Respondent adds that staff members do not have an actionable right to change the job description or grading of a post in the Organization. It explains that NATO's manpower requirements are decided by the nations through the NAC. A post therefore does not originate from the contractual rights and obligations established between a NATO body and the staff member, but, rather, is distinct from the incumbent. As such, appellant has no legal right to the post nor is he legally entitled to dispose of it. Moreover, respondent adds that decisions of the NAC are not administrative acts that can be subject to judicial review.

25. Respondent requests the Tribunal to dismiss the appeal.

### *(iii) Appellant's contentions in Case No. 2016/1096*

26. In the second appeal appellant contests the termination of employment, due to the suppression of his post as Senior Technician, without being granted the LOJ indemnity.

27. Appellant stresses that his pre-contentious procedure, *inter alia* his letter of 26 November 2015 (first administrative review of Case No. 2016/1081), provided detailed information as to why he was not able to sign the new contract offer and accept the corresponding job description. This information was not recognized by respondent. The termination of his employment then created a new situation, obliging appellant to start a new proceeding. The new contract did not provide the proper legal basis for a further working relationship with the Organization. In particular, appellant disputed the grading of the new post, the contract's mandatory deployment clause, and the additional duties and responsibilities requiring a different set of skills compared to his former job as Senior Technician. Appellant remarks that NAEW&CF GK did not recognize any of the information that he submitted, when it terminated his employment on 16 December 2015.

28. Appellant contests respondent's statement that his failure to sign the offered contract meant that he did not wish to continue to work for the Organization. Notwithstanding his present status as a NATO retiree, appellant maintains that he wanted to be reinstated in his contract of employment, but on the basis of a proper job proposal following correction of the illegal errors (violations of CPR and NATO directives/regulations) which he cited in the appeals procedure.

29. In the light of the above, appellant contends that the termination of his employment results from an irregular offer of employment and, as such, violates Part 4 of Annex V – 1 to the CPR in so far as no LOJ indemnity is granted with the termination letter of 16 December 2015. Lastly, he contends that the proposed post was not in the same Organization but in a new Organization and that also for that reason he was entitled to a LOJ indemnity.

30. Appellant concludes that his employment was wrongfully and disrespectfully terminated after 30 years of loyal and exceptional service to the Organization, maintaining that this requires compensation for moral damages.

31. In addition, appellant argues, with reference to Article 5.3.1 of Annex IX to the CPR, that the decision to terminate his employment pending pre-litigation constitutes an adverse action.

32. Appellant requests the Tribunal:
- to determine that the termination of employment is in violation of Annex V to the CPR and of NATO Human Resources manpower management guidelines;
- to determine that appellant is entitled to a termination of employment with the payment of the LOJ indemnity;
- to order appropriate compensation for immaterial and moral damages; and
- to order reimbursement of legal, travel and subsistence costs.

***(iv) Respondent's contentions in Case No. 2016/1096***

33. Respondent observes that the notice of termination was given to appellant solely because he declined to sign and return the new contract of employment offered to him, following the suppression of his old post as a result of the NAC approved reorganization of Headquarters NAEW&CF GK.

34. Respondent contends that appellant's actions and claims throughout both procedures are both contradictory and duplicative and are only masking appellant's intention to leave the Organization while avoiding to hand in the termination himself and trying to create leverage for obtaining the LOJ indemnity.

35. Respondent stresses that appellant was granted an extension of the deadline to return his new contract countersigned thereby granting his request for time to consult with his attorney. Further, he was duly informed of what the consequences of a refusal to sign would be, *i.e.* termination of the contract without the entitlement to payment of the LOJ indemnity but with a notice period of 180 days in accordance with the CPR dispositions.

36. Respondent adds that, in view of the lack of appellant's reaction, it could not but conclude that there was no wish to accept the offer to continue to work with the Organization rendering its offer null and void. This gave ground for the termination of the existing contract, as it was linked to a post that was suppressed with the re-organization.

37. Respondent also submits that no rule in the CPR gives a request for an administrative review a suspensive effect, allowing the staff member to withhold acceptance of an offer of appointment and contract. Moreover, respondent stresses that it can only offer appointments to posts approved by the NAC and that it is not within its authority, nor of any higher military Headquarters, to create or upgrade them.

38. Respondent notes that appellant separated from the Organization on 12 June 2016 and that he is, as of 1 July 2016, receiving his retirement pension without any deduction.

39. Respondent reinforces that appellant is not eligible to the LOJ indemnity as the CPR conditions are not met: a new post with the same grade and in the same Organization in Geilenkirchen was offered and the changes in duties under the contract were not of such a nature that appellant no longer met the required qualifications. Respondent also indicates that for minor changes in the new job appellant was offered training.

40. Respondent contends that moral damages are neither substantiated nor quantified, and are in any case, groundless since they are the consequence of appellant's actions.

41. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

42. As mentioned *supra*, the present appeals originate in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In this exercise appellant was offered a continuation of his employment.

43. The two appeals were initiated at different times, reflecting the different legal situations both before and after appellant's employment was terminated. Accordingly, they contain different pleas and legal arguments. While they are sometimes repetitive and complementary, they are also sometimes contradictory. This raises questions concerning the admissibility of some pleas and arguments, in particular in the second appeal, that were not introduced in the first appeal or in the pre-litigation procedures. The Tribunal deems it appropriate to adjudicate both appeals at the same time, in order to harmonize insofar as possible the resolution of inconsistent pleas and requests for relief. It will at this stage accordingly give priority to the arguments on the merits of both appeals.

44. Appellant, first of all, seeks a regrading of the post that was offered to him, submitting that the B-4 grading as proposed violated binding Human Resources guidelines, and that other similar posts offered to others were graded B-5.

45. The reorganization decision, including the manpower establishment, is a general decision concerning posts that are not, or not yet, attributed to individual staff members. The latter therefore do not have an actionable right concerning the overall grading

decision and the Organization is not under an obligation to justify its actions and decisions in this respect.

46. However, staff members may challenge the legality of an organization's staffing and grading decisions when challenging an individual administrative decision that directly and adversely affects them, such as the offer of a specific post, but can do so only within the framework of the CPR and established international civil service jurisprudence.

47. The Tribunal understands from statements made during the oral hearing that the Headquarters NAEW&CF GK management did submit proposals to the competent NATO authorities for a Peacetime Establishment, together with job descriptions and grading. These proposals were proposals only. They were subject to evaluations by the NATO Defence Manpower Audit Authority (NDMAA) and to subsequent decisions by the NAC.

48. Decisions concerning the grading of posts are, in the first instance, within the discretionary powers of the management of an organization, whose recommendations are subject to assessment and possible revision by the NDMAA. These recommendations, as initially proposed or as subsequently revised, are then subject ultimately to consideration and approval by the NAC.

49. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a decision in the exercise of an organization's discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a grading decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

50. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases.

51. The Tribunal observes that during the evaluation of the proposed job descriptions and grading of posts, an apparently serious and coherent process was followed to assess proposals in the context of a changing and downsized environment. In the course of this process, a number of Principal Technician posts, and not only the one offered to appellant, were graded B-4. Others were indeed graded B-5. The fact that some posts were ultimately graded B-4 and others B-5 does not automatically mean that the overall decision was arbitrary. On the contrary, the Tribunal observes that the Organization sought to make considered and nuanced judgments in the exercise of its discretionary powers.

52. The Tribunal disagrees with appellant's contention that the alleged incorrect grading was in violation of binding Human Resources documents. Appellant in this respect relies on the *2012 NATO Human Resources (Manpower) Management* document. The cover page of this document, however, clearly says that it is a technical report that includes best practices, models and methodologies, data issues, skill categories and experience levels in human resources management. The context and contents show that the document is a guide to personnel practices, not a set of binding legal rules. It stipulates

that *"[t]he levels of responsibility suggested by the Skill Levels do not necessarily relate directly to rank or grade…"* and in the table that follows "*… depicts approximate relationships between Primary NOC Skill Level and Rank/Grade.*". Further, the document suggests the setting up of a more official and permanent working group to complete the work. The Tribunal concludes on the basis of its review of the document that it is not an internal instruction or a binding document. Appellant's plea in this respect fails.

53. The Tribunal concludes that the grading decisions were regularly taken in the exercise of discretionary powers, that there was no abuse of such powers and that there is no indication of arbitrariness. In this regard, it is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so.

54. The Tribunal further finds that the decision to terminate appellant's appointment was regular. The NAC abolished appellant's previous post, and he was properly informed of this by the Component. He was also properly advised of the consequences of not countersigning the new job offer, i.e. that his employment would be terminated with a notice period but without a LOJ indemnity. The Component went to great length to guarantee continued employment, which appellant declined. He carries the responsibility for this and must accept the consequences.

55. Appellant considers - and this appears to be the main purpose in pursuing the appeals - that he is entitled to the payment of a LOJ indemnity, for a number of reasons.

56. Annex V to the CPR lays down the regulations on the indemnity for loss of job. These accord the Secretaries-General of the Coordinated Organizations, including the NATO Secretary General, the power to award an indemnity for loss of employment to any staff member who holds a firm contract and whose services are terminated for any one of the following reasons:

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> and who
> (a) is not offered a post in the same grade in the same Organization, or
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57. In a first submission in this respect appellant contends that the post that was offered to him should have been graded B-5 and that the post offered was not "in the same grade" entitling him to an indemnity for loss of job. This calls for a number of comments.

58. First of all, the Tribunal has concluded *supra* that the B-4 grading of the post was not irregular. Already for that reason, the claim has become groundless. Secondly, while appellant's reasoning and motivations in this regard are not wholly clear or coherent, if the logic of appellant's claim for a regrading of a post is solely to claim a termination of appointment, with the payment of a LOJ indemnity, that result would be inappropriate and abusive. In this regard, it would defy all logic to consider continued employment with a promotion as loss of employment entitling a staff member to a LOJ indemnity.

59. Furthermore, appellant submits that he does not have the required qualifications for the post that was being proposed. Respondent, on the other hand, is confident that appellant has the necessary qualifications and can perform the functions satisfactorily. It, in addition, has offered training whenever necessary. The Tribunal finds that there is no *prima facie* evidence that appellant does not have the required qualifications, which could, moreover, not be established in actual practice following appellant's refusal to countersign the contract and at least try to perform the duties of the post. Appellant has failed to convincingly substantiate his submission.

60. In a further argument appellant submits that the post offered was not in the same organization and that he would also for that reason be entitled to the LOJ indemnity. The Tribunal disagrees. It may be true that a reorganization was under way and that some units have been replaced with others, but this was, and is, taking place within one of the six Coordinated Organizations, the North Atlantic Treaty Organization. The words "same Organization" in Annex V to the CPR therefore refer to NATO as a whole. This argument fails.

61. Lastly, appellant contends that the new contract contains a mandatory deployment clause, which differs significantly from his previous one, entitling him to a LOJ indemnity. The old job description provides: "*Participating, as directed, in exercises and NATO operations and missions including taking part in frequent short term and/or long-term deployments… and/or duty travel (TDY) both within and outside NATO's boundaries…participating in deployment and/or TDY, if required, upon short notice and/or prior knowledge of the location and/or the conditions in which NATO will be operating*…" The new contract provides: "…*The primary duty location will be Geilenkirchen, Germany. However, the staff member will, at the discretion of the employer, temporarily perform his/her duties and/or participate in exercises and NATO operations and missions, to include taking part in frequent, short-term and/or long-term deployments/TDY, at other locations both inside and outside NATO countries' boundaries…*"

62. The Tribunal cannot but conclude that the new clause does not differ significantly from the old one, and that this submission also must be dismissed.

63. In the second appeal appellant also requests to be compensated for immaterial and moral damages. The Tribunal initially observes that these alleged damages are not substantiated or quantified. Secondly, the Tribunal points out that, where the alleged damage on which an appellant relies arises from the taking of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, the rejection of the claim for damages, as those claims are closely linked. The

claim for annulment being dismissed, the claim for financial compensation must therefore also be dismissed.

64. Concerning finally the appellant's claim that the termination of his contract was an adverse action, the Tribunal considers that this claim must also be rejected.

65. As the Tribunal held in similar cases, where this claim was introduced with specific reference to Article 5.3.1 of Annex IX to the CPR (*cf.* AT judgment in Cases Nos 2016/1080 and 2016/1092) the latter provision refers to the Complaints Committee and provides that *"[n]o individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member."* There is no doubt that the scope of this provision does not concern the termination of appellant's employment situation which, as indicated in the present judgment, was in any event in compliance with the CPR.

## E. Costs

66. 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 […]

67. The appeals being dismissed, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0009

# Judgment

## Case No. 2016/1082

**HJ**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reorganization; post suppression; abuse of discretion; standard of review.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (Tribunal) was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 3 May 2016, and registered on 23 May 2016 as Case No. 2016/1082, by Mr HJ, contesting the termination of employment due to suppression of his post.

2. The respondent's answer, dated 16 July 2016, was registered on 21 July 2016. The appellant's reply, dated 16 August 2016, was registered on 28 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the case

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. Appellant started working for respondent on 1 September 1997, and after 16 February 1998 was employed as a NATO International Civilian (NIC) as Staff Assistant (Graphics) with NATO grade B.2.

7. Following the NAEW&CF GK reorganization approved by the NAC on 30 September 2015, appellant's post was suppressed.

8. On 1 October 2015 appellant was notified by a letter from the Head, Civilian Human Resources Branch, that his employment with the Organization would end, with payment of Loss of Job (LOJ) indemnity, on 31 March 2016. As provided in this letter, appellant's employment was terminated, with payment of LOJ indemnity.

9. Appellant introduced a first administrative review on 29 October 2015, which was rejected by respondent on 18 November 2015. He introduced a further administrative review on 4 December 2015, which was rejected by respondent on 18 December 2015. Respondent rejected a "Request for Mediation/Formal Complaint" dated 15 January 2016 on 10 March 2016.

10. On 3 May 2016 appellant introduced the present appeal.

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

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

11. Appellant contends that his termination of employment has no legal basis, and must be annulled.

12. Appellant first contends that the 1 October 2015 termination of employment letter does not fulfill the formal requirements of Articles 9 and 10.3 of the NATO Civilian Personnel Regulations (CPR), in that it was not signed by the Commander of the Component as the "Head of the NATO body" (HONB).

13. Appellant further submits that the NAC decision of 30 September 2015, approving the respondent's new post establishment, did not have direct legal effect and did not automatically suppress his post. In his view, an "*official pronouncement when the implementation of the new Organization will start*" was legally required. No such pronouncement was made. Absent such an execution order giving effect to the NAC decision, appellant sees no legal basis to start further concrete personnel measures. Hence, his post "cannot have been suppressed."

14. Appellant further maintains that the NAC decision to suppress his post was based on incorrect and improper information provided by the respondent, namely a request to delete his NIC post and to reinstate an identical one as a Local Wage Rate (LWR) post. Appellant maintains that this recommendation by respondent to the NAC was incorrect and legally improper, contending that this recommendation should be subject to a judicial review.

15. Appellant observes that the new post establishment contains a LWR position substantially identical to the previous Staff Assistant Graphics position he previously occupied as a NIC. He submits that this shows the conversion of a NIC post to LWR, and not a deletion of posts without replacement. Appellant regards this as improper because establishing a LWR position in Visual Media Services, Base Support Wing could "*jeopardise the security or the military operational readiness and capability of the NATO E-3A Component.*" Appellant further contends that this action violates binding rules of manpower policy laid down in MC 216/3 (AAP-16 (D)), "Manpower policies and Procedures Guidance for members of classification Boards."

16. Appellant requests the Tribunal to:
- determine that the termination of his employment is invalid, so that appellant continues his employment under his previous working conditions;
- if continued employment as a NIC is not possible, to grant, in addition to the loss of job indemnity, compensation for his material and immaterial damages "*as for example differences and losses in the pay of the salary, pension contributions to the NATO pension scheme, loss of the tax free privileges as a NIC etc*;" and
- grant reimbursement of legal, travel and subsistence costs.

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

17. Respondent views termination of appellant's employment as a measure by the HONB that was required to implement the NAC decision of 30 September 2015. Appellant's termination was duly executed in accordance with Articles 9.1(iii) and 9.2 of the CPR, following the approval of respondent's new post establishments as determined by the NAC. Respondent observes that the NAC is the supreme policy making body of NATO, and contends that no execution orders or other administrative acts were required to validate its decisions or authorize their execution.

18. Respondent maintains that the termination complied with all formal requirements under the CPR, including the 180-day notice period under Article 10.3, and entitlement for the Loss of Job Indemnity under Article 107 and sections 1.6 of Annex V. Respondent further urges that properly designated officials exercised the HONB's powers relative to civilian personnel.

19. As to appellant's contentions regarding matters prior to the NAC decision, respondent urges that NAC decisions are not executive acts subject to judicial review. For respondent, once the NAC approved the new establishment, the decision became binding, and any elements of the pre-legislative phase are not subject to the judicial procedures under the CPR.

20. Respondent rejects, as without legal basis, appellant's request for compensation of material and non-material damage over and above the authorized LOJ indemnity.

21. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

22. Appellant contests as lacking legal foundation the termination of his employment following the reorganization of respondent decided by the NAC on 30 September 2015.

23. Appellant first contends that the 1 October 2015 termination of employment letter he received does not fulfill the formal requirements of Articles 9 and 10.3 of the CPR, as it was not signed by the Commander of the Component as the HONB. However, respondent contends, and appellant does not dispute, that the Head of the Civilian Human Resources Branch signed 1 October 2015 letter in the exercise of delegated authority. Such delegation is clearly authorized by the CPR. In accordance with

Paragraph C.(vii)(b) of the Preamble of the CPR, the Heads of NATO bodies are authorized "*to designate the official or officials authorized to exercise the powers and authorities relative to civilian personnel vested in them...*". Accordingly, this objection fails.

24. Appellant next contends that the NAC decision of 30 September 2015, approving respondent's new post establishment, did not have direct legal effect and did not automatically suppress his post. Appellant offers no analysis or legal authority in the CPR or in principles of international administrative law in support of this contention. This objection also must be rejected.

25. Finally, appellant maintains that the NAC decision approving the respondent's new staffing establishment rested on legally unsound grounds. Appellant appears to contend that respondent's staffing recommendations involved errors of judgment, as they "*could jeopardise the security or the military operational readiness and capability of the NATO E-3A Component*." Appellant further contends that these recommendations violated binding NATO personnel directives regarding the allocation of functions to LWR staff, contrary to MC 2164 (AAP-16(D)), of which appellant provided only very limited excerpts.

26. Respondent contends that the NAC's decision establishing its staffing was conclusive, and that the decisions and recommendations leading to that decision are not subject to the Tribunal's review. Appellant contends, however, that it does not seek invalidation of a NAC decision, but rather disputes its application in his case, citing in this regard the Appeals Board decision in Case No. 784 of 4 October 2010.

27. Article 6.2.3 of Annex IX to the CPR makes clear that:

> [t]he Tribunal shall not have any powers beyond those conferred under [Annex XIII]. Nothing in this Annex shall 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.

The respondent's actions and recommendations cited by appellant involve matters that clearly fall within the scope of respondent's discretionary authority. The Tribunal's constant jurisprudence affirms that it can only interfere with a discretionary decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority. (*cf.* Case No. 885, paragraphs 33 – 36.)

28. Appellant has not shown that any of these conditions has been met. Appellant in essence contends that respondent's decision that security and operational readiness considerations do not require NIC staffing of the Staff Assistant (Graphics) position was incorrect. However, appellant offers virtually no evidence or argument in support of this contention. On its face, the decision he questions - that the functions previously performed by the Staff Assistant (Graphics) need not be performed by a NATO International Civilian - does not suggest any mistake of fact or assessment, or abuse of authority.

29. Appellant also contends that a NATO personnel document he cited (MC 216/4 (AAP-16(D)) showed the conversion of the Staff Assistant (Graphics) function NIC to LWR status was illegal. However, appellant did not show that this document (of which only brief and irrelevant excerpts were provided to the Tribunal) reflect mandatory legal rules. To the contrary, the limited portions made available show that this document is a broadly worded policy framework offering flexible guidance for the exercise of discretion in classifying positions.

30. It is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so. Accordingly, appellant's plea in this respect fails.

31. Appellant also seeks compensation for immaterial and moral damages. These alleged damages are not quantified. In any case, where an appellant's alleged damages stem from the taking of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, rejection of the claim for damages. The claim for annulment being dismissed, the claim for damages must also be dismissed.

## E. Costs

32. Article 6.8.2 of Annex IX to the CPR provides as follows:

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

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

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0010

**Judgment**

**Case No. 2016/1083**

**EC**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reorganization; unsuccessful application for vacant post.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 3 May 2016, and registered on 23 May 2016 as Case No. 2016/1083, by Mr EC challenging that he was not considered for an A-2 post to which he applied.

2. The respondent's answer, dated 18 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. In 2005 appellant started working for NAEW&CF GK and, since 1 October 2010, occupies the post of Senior Software Programmer at grade B-5.

7. On 22 June 2015 appellant applied, *inter alia*, for an A-2 position as Software Engineer.

8. Following the NAEW&CF GK reorganization, appellant, as of 1 November 2015, was assigned to another post as Principal Technician Software Engineering at grade B-5.

9. Appellant contested that he was not considered for the A-2 position for which he applied and introduced a first administrative review on 26 November 2015, which was rejected by respondent on 16 December 2015. He introduced a further administrative review on 5 January 2016, which was rejected by respondent on 28 January 2016. A "Request for Mediation/Formal Complaint" dated 23 February 2016 was rejected by respondent on 10 March 2016.

10. On 6 May 2016 appellant introduced the present appeal.

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

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

11. Appellant submits that he was not considered for the A-2 post he applied for. He contends that his qualifications meet all the requirements for that position, and that he is entitled to be promoted and to be appointed to that post.

12. Appellant emphasizes his background and capabilities, and also notes that in 2010, when he applied for a similar A-2 position, the administration informed him that he was second. Hence, appellant expresses surprise that during the current re-organization, several internal candidates who were not even considered in 2010 were now reassigned to A-2 positions. He also notes that external candidates have been offered similar positions as well, whereas he had over 24 years of relevant experience in the same field.

13. In order to demonstrate that his non-selection was irregular, appellant further notes that the post he applied for is still vacant and demands that he be provided with a written substantiated statement of all the criteria he did not meet.

14. Appellant rejects as unfounded respondent's statements about his unsuitability for increased responsibilities, his poor performance, the overstatement of his role in given projects, and his difficulty in working in teams. Appellant highlights in this respect several more than satisfactory staff reports.

15. Appellant concludes that he is entitled to be promoted to the post at a higher grade and that respondent has to compensate him financially for the irregular rejection of his application.

16. Appellant requests the Tribunal:
- to determine that his new contract contravenes his application for an A-2 post;
- to determine that he should be selected for the A-2 position of Software Engineer retroactively as of 1 November 2015;
- failing the above, to order the production by respondent of a detailed and substantiated written statement of all the criteria he did not meet in relation to his application;

- to be compensated for the financial losses caused by the irregular rejection of his application for the post; and
- to be reimbursed the legal, travel and subsistence costs.

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

17. Respondent stresses that following the reorganization, appellant was assigned to another post with the grade of B-5, the same grade previously held, and that therefore he did not sustain any material disadvantage under his contract of employment.

18. Respondent states that appellant has no absolute right to a promotion, but to the contrary, NATO bodies have a wide margin of discretion when selecting staff members, as long as such selection is not tainted with substantial factual errors or procedural flaws.

19. Respondent affirms that appellant was considered for the A-2 application but was assessed as not being capable and suitable for the increased responsibilities of that particular position and similar ones.

20. Respondent notes that appellant's performance and attitude deteriorated as of 2013 when he moved, on his own initiative, to another section.

21. Respondent reports that appellant had been counselled on numerous occasions and submits different written statements as evidence relating to his workplace difficulties and poor performance.

22. Respondent reinforces that it is appellant's performance, attitude and behavioral deficiencies since 2013 that led to his being considered unsuitable for the position. Respondent also remarks that the discrepancy between appellant's view of himself and his actual performance is the biggest obstacle to him moving on to higher graded posts.

23. Respondent rejects any entitlement to material compensation.

24. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

25. The present appeal occurs during a major reorganization and down-sizing exercise, during which appellant was offered continued employment by the Component. This offer must be seen in the context of that reorganization and cannot be considered a reaction to appellant's application for a more senior post. The reassignment does therefore not contravene appellant's application for another post.

26. Regarding this application, appellant contends that he meets the requirements for a vacant post at a higher level and that he is, for that reason, entitled to be appointed to fill this vacancy. He complains that he was not considered for the post. He requests the Tribunal to determine that he should be selected for the position.

27. Apart from the question whether the Tribunal has the power at all to determine that appellant should be selected for the post, the Tribunal deems it, first of all, opportune to observe that there is no automatic entitlement for a staff member to be appointed to a post he has applied for, and *a fortiori* not to a post at a higher level. When a vacant post is advertised, it is to be expected that a number of qualified applicants will compete for it. It is then for the employer to determine who is not only the best qualified but also the most suitable person for the post.

28. Decisions concerning appointments are within the discretionary powers of the management of an organization. There is consensus among international administrative tribunals, and this Tribunal has consistently concurred with this view, that a decision in the exercise of this discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a non-selection decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

29. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases.

30. Respondent has during the present proceedings very candidly and in great detail outlined the reasons why it arrived at the conclusion that appellant was not suitable for the post in question. These amply answer appellant's plea that a detailed and substantiated written statement be provided of all the criteria he did not meet in relation to his application.

31. The Tribunal concludes from this, first of all, that appellant's application was indeed taken into consideration and that appellant's claim to the contrary must be dismissed.

32. Secondly, the Tribunal is of the view that the elements that were provided sufficiently justify why respondent arrived at its conclusions. Some disagreements continue to exist concerning some of the explanations provided, but taken as a whole, the record clearly confirms that there are issues regarding appellant's performance.

33. The Tribunal concludes that the non-selection decision was regularly taken in the exercise of management's discretionary powers. The request that the Tribunal annuls the non-selection decision and determines that appellant be appointed to the post is therefore denied.

34. With respect to the submission seeking compensation for financial losses, the Tribunal, first of all, observes that these are not substantiated or quantified and appear to be a request for compensation for non-realized gains. Secondly, the Tribunal points out that where the alleged damage on which an appellant relies arises from the taking of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, the rejection of the claim for damages, as those claims are closely

linked. The claim for annulment being dismissed, the claim for financial compensation must therefore also be dismissed.

## E. Costs

35. 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 […]

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

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0011

# Judgment

## Case No. 2016/1084

**MH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reorganization; post suppression; invalidity.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 6 May 2016, and registered on 23 May 2016 as Case No. 2016/1084, by Mr MH contesting the termination of employment due to the suppression of his post.

2. The respondent's answer, dated 18 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. Appellant started working for NAEW&CF GK as a Special Vehicle Operator on 8 July 1997 under a Local Wage Rate (LWR) Civilian contract. On 1 October 2003, he became a NATO International Civilian (NIC) at the C-3 step 1 level.

7. Following the NAEW&CF GK reorganization, as approved by the North Atlantic Council (NAC) on 30 September 2015, appellant's post was suppressed.

8. On 1 October 2015 appellant was informed by the Head, Civilian Human Resources Branch that his employment with the Organization would end, with the payment of Loss of Job (LOJ) indemnity, on 31 March 2016. It was added that, if appellant was on sick leave, Article 10.4 on extension of the period of notice as well as

Article 45.7.1 of the NATO Civilian Personnel Regulations (CPR) would apply. Appellant had, in fact, been on sick leave since 3 August 2015.

9. Appellant introduced a first administrative review on 28 October 2015, which was rejected by respondent on 18 November 2015. He introduced a further administrative review on 4 December 2015, which was rejected by respondent on 18 December 2015. A "Request for Mediation/Formal Complaint" dated 15 January 2016 was rejected by respondent on 10 March 2016.

10. On 6 May 2016 appellant introduced the present appeal.

11. Appellant left the Organization with effect from 1 September 2016, after an Invalidity Board recognized him as suffering from a permanent invalidity totally preventing him from performing his duties.

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

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

12. Appellant contends that his termination of employment does not have a legal basis.

13. Appellant submits that the 1 October 2015 termination of employment letter does not fulfil the formal obligations of Articles 9 and 10.3 of the CPR, as it, *inter alia*, was not signed by the Commander of the Component as the "Head of the NATO body" (HONB).

14. With respect to the NAC decision of 30 September 2015 approving the new post establishment for the Component, appellant observes that this decision did not automatically suppress his post. He adds that without an execution order giving effect to the NAC decision, there was no legal basis to start further concrete personnel measures.

15. Appellant further holds that the NAC decision to suppress his post was based on incorrect and improper information provided by the Component (namely a request to delete his NIC post and to reinstate an identical one as LWR) and considers the latter should be subject to a judicial review.

16. Appellant notes that the new post establishment contains an identical number of special vehicle drivers as the previous post establishment that was suppressed, however, with a difference of the status of the incumbents. He stresses that the job descriptions of the new and old posts are 99% identical and that therefore identical work with identical duties and responsibilities will continue to be done, even after the end of his employment in March 2016. He concludes that the posts were conversed from NIC to LWR instead of being deleted without replacement.

17. Appellant adds that in 2003 he, together with other members of the Vehicle Operations Section, were assigned the status of a NIC because of their significant duties and responsibility. He further highlights that at the time of this conversion, it was officially

recognized and assessed that the military operational readiness and capability of the Component would otherwise have been jeopardized.

18. Appellant submits that the reclassification measure is in violation of the rules and procedures of manpower policy and in particular of AAP-16(D)S4 Number 7, whereby LWR posts should not be created to perform administrative or technical functions normally performed by international military or civilian personnel for the purpose of evading the International Manpower Ceiling.

19. Appellant contends that, after many years of loyal service, the termination of his employment on the basis of an irregular treatment caused him harm, giving rise to compensation for non-material damage.

20. Appellant requests the Tribunal:
- to determine invalid the termination of his employment and to continue his employment under his previous working conditions;
- to grant him, in the case continued employment as a NIC would not be possible, in addition to the LOJ indemnity, a compensation for his material and immaterial damages, including the difference in benefits he would have had with the NIC status; and
- to grant reimbursement of legal, travel and subsistence costs.

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

21. Respondent notes that appellant's termination of employment was duly executed in accordance with Article 9.1(iii) and 9.2 of the CPR, following the approval of the new post establishments determined by the NAC decision of 30 September 2015.

22. Respondent observes that the termination complied with all formal requirements foreseen by the CPR, including the 180-day notice period, the entitlement for the loss of job indemnity, and the exercise of powers relative to civilian personnel by properly designated officials.

23. Respondent notes that appellant's termination is a measure by the HONB required to implement the NAC decision. It further adds that the NAC is the supreme policy making body of NATO, and no execution orders or other administrative acts are required to validate its decisions or authorize their execution.

24. Respondent stresses that once the NAC approved the new establishment, the decision became binding and any elements of the pre-legislative phase are not subject to the judicial procedures under the CPR; further, NAC decisions are not executive acts subject to judicial review.

25. In addition, respondent explains that the NAC re-organization decision is the implementation of the Lisbon Summit Declaration of November 2010, by which Heads of States decided on a 35% manpower saving in the NATO Command Structure. It observes that appellant's post as a NIC post was suppressed because, *inter alia*, it is not

required for long-term deployments, in consideration also with the changed CPR 2010 regime on long-term deployments.

26. Respondent rejects, as without legal basis, any request for compensation of material and non-material damage over and above the authorized loss of job indemnity.

27. Respondent notes that appellant was on sick leave since 3 August 2015 and the 180 days period of notice was extended during the sick leave. Furthermore, it informs that appellant left the Organization as of 1 September 2016, after he was recognized by an Invalidity Board as suffering from a permanent invalidity totally preventing him from performing his duties.

28. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

29. The present appeal is directed against the termination of appellant's employment following the reorganization decided by the NAC on 30 September 2015.

30. It is true that appellant was initially, *i.e.* by letter dated 1 October 2015, notified of the termination of his employment, and that his notice period was extended following his sick leave. His employment with the Organization, however, never came to an end on this ground. In fact, appellant left the Organization as of 1 September 2016, after he was recognized by an Invalidity Board as suffering from a permanent invalidity totally preventing him from performing his duties. He has received the corresponding indemnities and is receiving an invalidity pension. Appellant has during the oral hearing confirmed his acceptance of that decision.

31. As a consequence, the impugned decision has ceased to have effect following the decision to grant appellant an invalidity pension. A new situation has arisen during the present proceedings and the Tribunal need no longer to adjudicate on the parties' respective contentions.

32. The Tribunal observes, however, that this arrangement has intervened very late in the proceedings. The Tribunal deems it appropriate under the circumstances of the case, and without prejudice to its position in law regarding any of the submissions made by the parties, to award up to € 4.000 in costs.

## E. Decision

FOR THESE REASONS

The Tribunal decides that:

- There is no longer a need to adjudicate in the present appeal.
- NAEW&CF GK shall refund appellant the costs of retaining counsel, up to a maximum of € 4.000.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0012

**Judgment**

**Case No. 2016/1085**

**HH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reorganization; post suppression; abuse of discretion; NAC decision.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 14 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 6 May 2016, and registered on 24 May 2016 as Case No. 2016/1085, by Mr HH contesting the anticipated termination of his employment due to suppression of his post.

2. The respondent's answer, dated 18 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 14 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the case

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. Appellant started working for respondent in 1985, and from February 1985 until September 2003, was employed in a Local Wage Rate (LWR) civilian position. After October 1 2003, he was employed as a NATO International Civilian (NIC) as a Special Vehicle Operator with grade C-3.

7. Following the NAEW&CF GK reorganization approved by the NAC on 30 September 2015, appellant's post was suppressed.

8. On 1 October 2015, appellant was notified by a letter from the Head, Civilian Human Resources Branch, that his employment with the Organization would end, with payment of Loss of Job (LOJ) indemnity, on 31 March 2016. At the hearing, the Tribunal

was informed that an Invalidity Board in August 2016 concluded that appellant was not suffering from permanent invalidity which totally prevented him from performing his job. However, the Tribunal was also informed that appellant was on extended sick leave, so that the termination of his employment had not, as of the time of the hearing, yet become effective.

9. Appellant introduced a first administrative review on 28 October 2015, which was rejected by respondent on 18 November 2015. He introduced a further administrative review on 4 December 2015, which was rejected by respondent on 18 December 2015. Appellant made a "Request for Mediation/Formal Complaint" dated 11 January 2016 which was rejected by respondent on 10 March 2016.

10. On 6 May 2016, appellant introduced the present appeal.

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

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

11. Appellant contends that his termination of employment has no legal basis, and must be annulled.

12. Appellant first contends that the 1 October 2015 termination of employment letter does not fulfill the formal requirements of Articles 9 and 10.3 of the NATO Civilian Personnel Regulations (CPR), in that it was not signed by the Commander of the Component as the "Head of the NATO body" (HONB).

13. Appellant further submits that the NAC decision of 30 September 2015, approving the respondent's new post establishment, did not have direct legal effect and did not automatically suppress his post. In his view, an "*official pronouncement when the implementation of the new Organization will start*" was legally required. No such pronouncement was made. Absent such an execution order giving effect to the NAC decision, appellant sees no legal basis to start further concrete personnel measures. Hence, his post "*cannot have been suppressed*."

14. Appellant further maintains that the NAC decision to suppress his post was based on incorrect and improper information provided by the respondent, namely a request to delete his NIC post and to reinstate an identical one as a LWR post. Appellant maintains that this recommendation by Respondent to the NAC was incorrect and legally improper, contending that this recommendation should be subject to a judicial review.

15. Appellant contends that the conversion of the NIC post he previously occupied to a LWR post was improper, *inter alia*, because establishing LWR personnel in the Motor Pool Branch "*could jeopardise the security or the military operational readiness and capability of the NATO E-3A Component*." Appellant further contends that this action violates binding rules of manpower policy laid down in MC 216/3 (AAP-16 (D)), "Manpower policies and Procedures Guidance for members of classification Boards," relating to the establishment of LWR positions.

16. Appellant further points out that in the course of the reorganization, he applied for, but was not selected for, a vacant fire brigade position.

17. Appellant requests the Tribunal to:
- determine that the termination of his employment is invalid, so that appellant continues his employment under his previous working conditions;
- if continued employment as a NIC is not possible, grant, in addition to the LOJ indemnity, a contract of employment as a LWR, including compensation for his material and immaterial damages "*as for example differences and Losses in the pay of the salary, pension contributions to the NATO pension scheme, plus access to the NATO health insurance (Allianz), Loss of the tax free privileges as a NIC etc*" retroactive to the end of his employment as a NIC; and
- grant reimbursement of legal, travel and subsistence costs.

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

18. Respondent views termination of appellant's employment as a measure by the HONB that was required to implement the NAC decision of 30 September 2015. Appellant's termination was duly executed in accordance with Articles 9.1(iii) and 9.2 of the CPR, following the approval of respondent's new post establishment as determined by the NAC. Respondent observes that the NAC is the supreme policy making body of NATO, and contends that no execution orders or other administrative acts were required to validate its decisions or authorize their execution.

19. Respondent maintains that the termination was carried out by a proper person exercising delegated authority and complied with all formal requirements under the CPR, including the 180-day notice period under Article 10.3, and entitlement for the LOJ indemnity under Article 10.7 and sections 1.6 of Annex V. Respondent explains, however, that as appellant remains on sick leave, the termination of his employment has not yet come into effect. Respondent further urges that properly designated officials exercised the HONB's powers relative to civilian personnel.

20. As to appellant's contentions regarding matters prior to the NAC decision, respondent urges that NAC decisions are not executive acts subject to judicial review. For respondent, once the NAC approved the new establishment, the decision became binding, and any elements of the pre-legislative phase are not subject to the judicial procedures under the CPR.

21. Respondent rejects, as without legal basis, appellant's request for compensation of material and non-material damage over and above the authorized loss of job indemnity.

22. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

23. Appellant contests as lacking legal foundation the termination of his employment following the reorganization of respondent decided by the NAC on 30 September 2015.

24. Appellant first contends that the 1 October 2015 termination of employment letter he received does not fulfill the formal requirements of CPR Articles 9 and 10.3, as it was not signed by the HONB. However, respondent contends, and appellant does not dispute, that the Head of the Civilian Human Resources Branch signed 1 October 2015 letter in the exercise of delegated authority. Such delegation is clearly authorized by the CPR. In accordance with Paragraph C.(vii)(b) of the Preamble of the CPR, the Heads of NATO bodies are authorized "*to designate the official or officials authorized to exercise the powers and authorities relative to civilian personnel vested in them*..." Accordingly, this objection fails.

25. Appellant next contends that the NAC decision of 30 September 2015, approving respondent's new post establishments, did not have direct legal effect and did not automatically suppress his post. Appellant offers no analysis or legal authority, either in the CPR or in general principles of international administrative law, in support of his contention that such an execution order is required to give legal effect to a decision by the NAC. This objection also must be rejected.

26. Finally, appellant maintains that the NAC decision approving the respondent's new staffing establishment rested on legally unsound grounds. Appellant appears to contend that respondent's staffing recommendations involved errors of judgment, as they "*could jeopardise the security or the military operational readiness and capability of the NATO E-3A Component.*" Appellant further contends that these recommendations violated binding NATO personnel directives regarding the allocation of functions to LWR staff, contrary to MC 2164 (AAP-16(D)).

27. Respondent contends that the NAC's decision establishing its staffing was conclusive, and that the decisions and recommendations leading to that decision are not subject to the Tribunal's review. Appellant contends, however, that it does not seek invalidation of a NAC decision, but rather disputes its application in his case, citing in this regard the Appeals Board decision in Case No. 784 of 4 October 2010.

28. Article 6.2.3. of Annex IX to the CPR makes clear that:

> [t]he Tribunal shall not have any powers beyond those conferred under [Annex XIII]. Nothing in this Annex shall 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.

The respondent's actions and recommendations cited by appellant involve matters that clearly fall within the scope of respondent's discretionary authority. The Tribunal's constant jurisprudence affirms that it can only interfere with a discretionary decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken

conclusion was drawn from the facts or if there was an abuse of authority. (*cf.* Case No. 885, paragraphs 33 – 36).

29. Appellant has not shown that any of these conditions have been met. Appellant in essence contends that respondent's decision that security and operational readiness considerations do not require NIC staffing of the Special Vehicle Operator position was incorrect. However, appellant offers virtually no evidence or argument in support of this contention. On its face, the decision he questions - that the functions performed by the Special Vehicle Operator need not be performed by a NATO International Civilian - does not suggest any mistake of fact or assessment, or abuse of authority.

30. Appellant also contends that a NATO personnel document he cited (MC 216/4 (AAP-16(D)) showed the conversion of the Special Vehicle Operator function from NIC to LWR status was illegal. The cited document was not made part of the record in this appeal, and appellant did not show that it reflects mandatory legal rules. The brief and irrelevant excerpts provided to the Tribunal in a similar appeal by another staff member show that this document is a broadly worded policy framework offering flexible guidance for the exercise of discretion in classifying positions

31. It is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so. Accordingly, appellant's plea in this respect fails.

32. Appellant also seeks compensation for immaterial and moral damages. These alleged damages are not quantified. In any case, where an appellant's alleged damages stem from the taking of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, rejection of the claim for damages. The claim for annulment being dismissed, the claim for damages must also be dismissed.

## E. Costs

33. 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 […]

34. 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 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0013

# Judgment

## Cases Nos 2016/1086 and 2016/1093

**PS**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; abuse of discretion; termination of appointment following non-acceptance of new post; loss of job indemnity; medical restrictions; deployment clause assessment of job qualifications.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2016.

## A. Proceedings

1. In this judgment, the NATO Administrative Tribunal (hereinafter the "Tribunal") decides two joined appeals. In the first, the Tribunal was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 6 May 2016, and registered on 24 May 2016 as Case No. 2016/1086, by Mr PS contesting, *inter alia*, the respondent's offer to him of an indefinite duration contract in connection with a NAEW&CF GK reorganization.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. On 23 June 2016, appellant introduced a second appeal, registered on 5 July 2016 as Case No. 2016/1093, contesting, *inter alia*, the termination of his employment without loss of job indemnity.

4. The respondent's answer, dated 5 September 2016, was registered on 6 September 2016. The appellant's reply, dated 5 October 2016, was registered on 6 October 2016. The respondent's rejoinder, dated 7 November 2016, was registered on 11 November 2016.

5. By Order AT(PRE-O)(2016)0007 dated 10 October 2016, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2016/1093 is completed.

6. The Panel held an oral hearing on 15 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

7. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

9. Appellant is a long serving (34 years) former staff member of the Component. He is now retired. His last contract was as a B-4 Senior Technician (Computer) in respondent's Logistics Wing, Aircraft Electronics Systems Branch. As planning for the reduction of respondent's staffing progressed prior to the 30 September 2015 NAC decision, appellant received the impression that he would not be placed in a post in the new establishment. The record indicates that this result would not have been unsatisfactory to him. However, as events transpired, by letter dated 29 October 2015, appellant was offered a new contract of employment as B-4 Senior Technician (Computer) in the Aircraft Electronic Systems Branch.

10. Appellant did not sign the contract he was offered, believing that the placement letter he received and the associated contract and job description were incorrect and improper in several respects. He initiated his first request for Administrative Review of these matters on 27 November 2015. Respondent denied this request on 16 December 2015. Appellant lodged a second request on 5 January 2016, which was denied by respondent on 25 January 2016. Appellant then made a "Request for Mediation/Formal Complaint" on 25 January 2016, which was denied on 10 March 2016.

11. On 16 December 2015, appellant received from respondent a letter of termination of employment, due his failure to sign and return the contract he was offered and the suppression of his post, with termination effective as of 12 June 2016, 24:00hrs. The letter further stated "*because you were offered a post at the same grade, you do not qualify for payment of the Indemnity for Loss of job in accordance with Annex V of the NCPR.*"

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

### *(i) Appellant's contentions in Case No. 2016/1086*

12. Citing Part 4 of Annex V to the CPR (governing loss of job (LOJ) indemnity), appellant contends that his termination without LOJ indemnity was unlawful, as he was offered a position for which he did not possess the required qualifications. According to appellant, the job description of the post he was offered added "*an enormous scale of duties and responsibilities*" for which he did not have the required qualifications. In this regard, appellant contends that since 2009, he had been engaged in process review and force management activities, and no longer has the qualifications for his prior post or for the duties specified in the description of the post he was offered.

13. Appellant further contends that the contract he was offered, which required him to be available for deployments away from his duty station "*at the discretion of the employer*" conflicted with a documented and permanent medical restriction that he was "*deployable only after prior approval from BMB/BMO*." Appellant cites a 12 June 2014 memo from the Force Commander to the effect that a NATO International Civilian who declines employment because a new contract would alter his/her employment status due

to inclusion of a mandatory deployment clause will be terminated with LOJ indemnity. In his reply, appellant cites in addition an alleged conflict with NATO Human Resources Manpower Management Guidelines relating to deployment restrictions, contending that these barred that contract he was offered.

14. Appellant additionally cites respondent for "bad employership", initially alleging in the appeal that the classification of the expanded duties and responsibilities reflected in the position description "*appears not to be determined by the NATO Defence Manpower Audit Authority (NDMAA) Civilian Classification Board*." However, appellant apparently abandons this argument in his reply, instead contending that respondent provided "*incorrect proper information and handling...to the former PEA/NDMAA which could not be a legal basis for the approval that was given by the North Atlantic Council*."

15. As the final plea in his first appeal, appellant alleges that he has been subjected to discriminatory treatment, in that another long-serving staff member in the former computer and ESM shops had been made redundant with LOJ indemnity, while appellant had been offered a post. In respondent's view, this reflected improper discrimination, as the other individual was not the oldest and otherwise appeared more qualified to be retained than appellant. Appellant represents that he and others indicated on a questionnaire that they would like to make way for "fresh blood," and that he was given the impression that his "*chances for early departure were practically guaranteed*." Appellant thus in effect contends that he was discriminated against because he was not made redundant.

16. Appellant requests the Tribunal to:
- decide that the placement letter, contract and job description he was offered offend against CPR and NATO Human Resources manpower management guidelines;
- award "Appropriate Compensation" for moral damages; and
- order reimbursement for travel, subsistence and counsel fees.

### *(ii) Respondent's contentions in Case No. 2016/1086*

17. Respondent contends that following suppression of his post, appellant was offered a new appointment in his previous grade (B-4), but appellant declined to sign the new contract. Respondent therefore terminated his previous contract, which was linked to the suppressed post, effective 12 June 2016.

18. While the job description of the new post offered to appellant differed from that of his previous position, respondent maintains that the new duties could be accomplished with appellant's qualifications, and that refresher, conversion, and re-certification training could be provided to the extent necessary.

19. As to appellant's medical restrictions, respondent insists that it would continue to recognize the restrictions, as it had prior to the re-organization, noting that the organization had discretion to release a staff member from deployment duties when necessary for medical reasons. Respondent observes in this regard that appellant had agreed in his previous contract to an identical deployment clause. Respondent expressly

affirms that appellant "*will not be required to undertake duties he cannot perform because of his restrictions*."

20. Respondent rejects appellant's allegations of discrimination. In respondent's submission, its decision not to terminate appellant in the course of the reorganization was a proper exercise of management discretion in reshaping its work force to implement the re-organization and staff reductions required by the decision of the Heads of State at the Lisbon Summit. Respondent urges in this regard that staff members have neither a personal right to be terminated by the employer, nor a right to be granted loss of job indemnity at their convenience.

21. In respondent's view, as appellant has left the organization, he no longer had a legitimate basis to contest the legality of the contract and job description he was offered. Respondent denies appellant's claim for moral damages, and requests that the tribunal dismiss his appeal.

### *(iii) Appellant's contentions in Case No. 2016/1093*

22. Appellant's second appeal largely repeats contentions made in the first appeal. These will not be repeated here in detail.

23. The second appeal thus emphasizes appellant's view that the contract he was offered "*offends against the NCPR and personnel (manpower) guidelines ... with regard to the medical restrictions of the appellant*..." The appeal again stresses appellant's belief that he lacked the qualifications to perform the new duties and responsibilities listed in the position description accompanying the contract he was offered. The appeal also reaffirms appellant's claim that he was the victim of discrimination, in that he should have been made redundant with LOJ indemnity. Instead, he was offered a position, while another staff member he regarded as more suitable for retention was made redundant with LOJ indemnity.

24. The second appeal reiterated the claim of "bad employership" based on the contention that respondent determined the B-4 grade of the offered position without reference to the NDMAA. As noted above, appellant apparently withdrew, or in any case significantly modified this claim in his first appeal, contending instead that the respondent provided incorrect or incomplete information in its recommendations prior to the NAC decision.

25. In addition, appellant argues, with reference to Article 5.3.1 of Annex IX to the CPR, that the decision to terminate his employment pending pre-litigation constitutes an adverse action.

26. Appellant sought a decision:
- that the 16 December 2015 termination of his employment offends against the CPR and other personnel manpower management guidelines "*and with regard to the permanent medical restrictions of the appellant*.";
- that he is entitled to termination of employment with LOJ indemnity';
- awarding "*appropriate compensation for immaterial/moral damages*"; and

- ordering reimbursement of appellant's travel and subsistence costs and the costs of counsel.

### *(iv) Respondent's contentions in Case No. 2016/1093*

27. Respondent's answer to the second appeal in part repeats some arguments made in the first appeal, and, to that extent, will not be repeated here.

28. Respondent urges that the sole reason for terminating appellant was that he did not sign and return the new contract of employment offered to him following suppression of his prior post stemming from the reorganization required to implement the NAC's decision. Respondent notes that appellant, like other staff members, was given additional time to consult with counsel in deciding whether to sign. He and other staff members were expressly informed that failure to sign contracts offered to them by a specified date would result in termination without loss of job indemnity. Thus, in respondent's view, appellant's situation results from his personal decisions, not from any alleged illegality of the contract offered to him (which respondent denied).

29. In respondent's contention, appellant's two appeals were contradictory, the first seeking annulment of his termination, while the second sought loss of job indemnity for that termination. However, in respondent's estimation, both appeals ultimately sought the same end – termination with LOJ indemnity. Respondent maintains that appellant was not entitled to such an indemnity, as he was offered a position, in the same grade, in the same organization, in the same location, as before the reorganization. Hence, the requirements of section 1.(3)(a) of CPR Annex V, defining eligibility for LOJ indemnity, were not met.

30. In respondent's contention, staff members do not have a personal right to opt for a LOJ indemnity, and the organization has discretion to determine how best to meet its staffing requirements. In this regard, respondent contends that it was not obliged to terminate appellant's employment due to his medical limitations.

31. Respondent's disputes appellant's claim for immaterial damages, and asked that the appeal be dismissed.

## D. Considerations and conclusions

32. As mentioned supra, the present appeals originate in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment, in the same grade and location as before.

33. The two appeals were initiated at different times, reflecting the different legal situations both before and after the appellant's employment was terminated. Accordingly, to some extent they contain different pleas and legal arguments. While they are sometimes repetitive and complementary, they are also sometimes contradictory. This raises questions concerning the admissibility of some pleas and arguments, such

as a claim introduced in appellant's reply in the first appeal that was not contained in the appeal itself.

34. The Tribunal notes in this regard a possible lack of consistency among appellant's formal requests for relief (seeking both a finding that the contract he was offered violated the CPR and other relevant standards, and a finding that he was entitled to termination with loss of job indemnity) and appellant's assertion in his reply in the second appeal that he "*does want to be reinstated in his contract of employment*," although on terms different from those he was offered.

35. The Tribunal also notes certain unusual aspects of these appeals. In both, unlike the perhaps more familiar pattern where staff members seek to annul decisions denying them positions for which they believe themselves qualified, appellant asks to annul a decision offering him a position on the basis that he was *not* qualified. Further, again contrary to a more frequent pattern, appellant alleges that he was subjected to improper discrimination by being offered a position, instead of being made redundant.

36. The Tribunal deems it appropriate to adjudicate both appeals at the same time, in order to harmonize insofar as possible the resolution of inconsistent pleas and requests for relief. It will accordingly give priority to the arguments on the merits of both appeals.

37. First, appellant contended that he was unlawfully terminated without LOJ indemnity because the contract he was offered was accompanied by a position description including duties and functions he was not qualified to perform. The respondent countered that the duties indicated could be accomplished with appellant's qualifications, and that refresher, conversion, and re-certification training could be provided to the extent necessary. The Tribunal finds that there is no *prima facie* evidence that appellant does not have the required qualifications, which could, moreover, not be established in actual practice following appellant's refusal to countersign the contract and at least try to perform the duties of the post. Appellant has failed to convincingly substantiate this first submission, and it is denied.

38. Second, appellant contended that the contract offered to him was unlawful because it included a mandatory deployment clause providing that respondent in its discretion could require him to participate in short- or long-term deployments. This was said to be contrary to the CPR and to NATO personnel policy documents that appellant's counsel contended at the hearing were legally binding. In appellant's view, this clause was inconsistent with a documented permanent medical restriction deeming him "*deployable only after prior approval from BMB/BMO*." Respondent countered that it would continue to recognize this restriction, as it had prior to the re-organization, and affirmed that appellant would not be required to perform duties inconsistent with his medical condition.

39. The disputed clause is identical to the comparable clause in appellant's 2010 contract. It thus would not change his status from that he agreed to under his previous contract (although the requirement allowing his deployment *"only after prior approval from BMB/BMO*" was first certified in November 2010, after he signed the previous contract in August 2010). Both contracts state in relevant part:

> The primary duty location will be Geilenkirchen, Germany. However, the staff member will, at the discretion of the employer, temporarily perform his/her duties and/or participate in exercises and NATO operations and missions, to include taking part in frequent, short-term and/or long-term deployments/TDY, at other locations...

40. As respondent observed, any deployment under this contact provision is "*at the discretion of the employer*." In this regard, respondent affirmed to the Tribunal in its Rejoinder that appellant "*will not be required to undertake duties he cannot perform because of his restrictions*." Appellant did not question or dispute this assurance, which was contained in written submissions signed and sealed by respondent's Legal Advisor. Accordingly, had appellant accepted the contract he was offered, the respondent was apparently willing to commit to assuring that his medical restriction would be observed. In this regard, the Tribunal recalls that the restriction was not that appellant was "non-deployable", but that he was "*deployable only after prior approval from BMB/BMO*."

41. Appellant contended that the deployment clause in the contract he was offered violated certain NATO Human Resources management documents that counsel asserted at the hearing constituted binding legal rules of the same mandatory legal character as the CPR. The Tribunal's review of the excerpts of those documents provided as exhibits to his appeals shows, however, that they are designed as guides to management practices, and not binding legal rules. In any case, appellant did not provide any clear explanation of how the contract he was offered violated the cited provisions. Appellant's submissions relating to these medical restrictions must be dismissed.

42. Third, appellant initially contended in his first appeal that his expanded duties and responsibilities "*appear[.] not to be determined by the NATO Defence Manpower Audit Authority (NDMAA) Civilian Classification Board*." However, he later substituted the contention that respondent provided *"incorrect proper information and handling...to the former PEA/NDMAA which could not be a legal basis for the approval that was given by the North Atlantic Council.*"

43. Decisions concerning the provisions to be included in contracts and the elements in position descriptions are within the discretionary powers of the management of an international organization.

44. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a decision in the exercise of an organization's discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a decision of the kind disputed by appellant here if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

45. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases.

46. The Tribunal observes that during the course of the reorganization, an apparently serious and coherent process was followed to meet the requirements of a changing and downsized environment. The decisions taken in the course of this process were regularly taken in the exercise of discretionary powers. Appellant provided no evidence of any abuse of such powers. In this regard, it is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so. Accordingly, this submission must also be denied.

47. Finally, appellant contended that he was subjected to wrongful discrimination, in that he should have been made redundant with LOJ indemnity, but was instead offered a position while another staff member he regarded as better suited for retention was made redundant with LOJ indemnity. As with allegations of abuse of discretion, allegations that an organization has engaged in discriminatory conduct require that the author of the allegations provide convincing proof. Appellant's belief that he should have been terminated with LOJ indemnity instead of another individual who was terminated does not constitute convincing proof. Appellant's fourth submission also must be rejected.

48. In both appeals, appellant requests compensation for immaterial and moral damages. The alleged damages are not substantiated or quantified. Moreover, appellant has failed to establish that any decisions by the respondent are illegal and must be annulled. Where a claimant's alleged damages stem from a claim that an allegedly illegal decision must be annulled, rejection of that claim for annulment entails, as a matter of principle, rejection of the claim for damages. Appellant's claims being dismissed, the claim for financial compensation must also be dismissed.

49. Concerning finally the appellant's claim that the termination of his contract was an adverse action, the Tribunal considers that this claim must also be rejected.

50. As the Tribunal held in similar cases, where this claim was introduced with specific reference to Article 5.3.1 of Annex IX to the CPR (*cf.* AT judgment in Cases Nos 2016/1080 and 2016/1092) the latter provision refers to the Complaints Committee and provides that *"[n]o individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member."* There is no doubt that the scope of this provision does not concern the termination of appellant's employment situation which, as indicated in the present judgment, was in any event in compliance with the CPR.

## E. Costs

51. 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 […]

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

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0014

# Judgment

## Cases Nos 2016/1087 and 2016/1091

**WJ**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; abuse of discretion; termination of appointment following non-acceptance of new post; loss of job indemnity; medical restrictions; deployment clause; assessment of job qualifications.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2016.

## A. Proceedings

1. In this judgment, the NATO Administrative Tribunal (hereinafter the "Tribunal") decides two joined appeals. In the first, the Tribunal was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 4 May 2016, and registered on 24 May 2016 as Case No. 2016/1087, by Mr WJ. This appeal contests, *inter alia*, the terms of respondent's offer of an indefinite duration contract to the appellant in connection with a NAEW&CF GK reorganization.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. On 23 June 2016, appellant introduced a second appeal, registered on 5 July 2016 as Case No. 2016/1091, contesting, *inter alia*, the termination of his employment without loss of job indemnity.

4. The respondent's answer, dated 5 September 2016, was registered on 6 September 2016. The appellant's reply, dated 5 October 2016, was registered on 6 October 2016. The respondent's rejoinder, dated 7 November 2016, was registered on the same day.

5. By Order AT (PRE-O)(2016)0008 dated 10 October 2016, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2016/1091 is completed.

6. The Panel held an oral hearing on 15 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

7. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial

reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

9. Appellant is a long serving (20 years) former staff member of the Component. His last contract was as a B-4 Senior Technician (Computer) in respondent's Logistics Wing Command Group, Computer/ESM Section. By letter dated 29 October 2015, appellant was offered a new employment contract for Post No. OEW LEE 0390 as B-4 Senior Technician (Computer) in the Logistics Wing Command Group, Computer/ESM Section.

10. Appellant did not sign the contract he was offered, believing that the placement letter he received and the associated contract and job description were incorrect and improper, *inter alia*, for failure to take account of his medical condition.

11 Appellant initiated his first request for administrative review of the contract offered to him on 27 November 2015. Respondent denied this request on 16 December 2015. Appellant lodged a second request on 5 January 2016, which was denied by respondent on 25 January 2016. Appellant then made a "Request for Mediation/Formal Complaint" on 25 January 2016, which was denied on 11 March 2016.

12. On 16 December 2015 appellant received from respondent a letter terminating his employment without loss of job indemnity, due his failure to sign and return the contract he was offered and the suppression of his post. While the 180 day notice period for termination ended on 12 June 2016, respondent's letter stated that, as appellant was currently on sick leave, *"the provisions of Article 10.4 and 45.7.1 of the NATO Civilian Personnel Regulations apply*."

13. Appellant initiated his first request for administrative review of his termination on 4 January 2016. This request for administrative review cited appellant's medical restrictions, contending that on account of them, "he cannot fulfill the necessary qualifications for deployment" and providing information regarding the medical conditions involved. Respondent denied this request on 1 February 2016. Appellant lodged a second request on 19 February 2016, which was denied by respondent on 11 March 2016. Appellant then made a "Request for Mediation/Formal Complaint" on 16 April 2016, which was denied on 27 April 2016."

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

### *(i) Appellant's Contentions in Case No. 2016/1087*

14. Appellant's initial request for administrative review of 27 November 2015 stressed his lack of qualifications for the new post he was offered, but did not refer to his medical limitations. However, these were briefly mentioned in his 5 January 2016 second request and are emphasized in his appeal to the Tribunal in Case No. 2016/1087. Citing Part 4 of Annex V of the NATO Civilian Personnel Regulations (CPR) governing loss of job

(LOJ) indemnity, appellant contends that his termination without LOJ indemnity was unlawful, as the contract he was offered, which required him to be available for deployments away from his duty station "at the discretion of the employer," conflicted with his permanent medical restrictions. In this regard, an April 2016 medical certificate issued by the military physician commanding respondent's Medical Squadron states that appellant is able to work full time, but significantly restricts the locations in which he can work and provides that he is deployable "*only after prior approval from SWM/SWMFO*." While the Medical Squadron's certificate in the record is dated in April 2016, both parties appeared to assume that appellant was subject to similar medical restrictions when the new contract was offered to him in October 2015. The record also included additional evidence, which need not be summarized here, regarding appellant's medical conditions.

15. Appellant cites a 12 June 2014 communication from the Force Commander stating that "*If a NIC declines employment in an ESPE post that would significantly alter his/her employment status due specifically to the inclusion of a mandatory deployment clause, the employment of that NIC shall be terminated with payment of ILOJ*." Appellant also contends that the NATO Human Resources Manpower Management Guidelines relating to deployment restrictions bar the contract he was offered. Hence, in appellant's submission, the respondent "*was not allowed to offer the appellant a new contract [that] included the duties of being part of temporary deployments*."

16. Appellant contends that respondent "offended against the care and responsibility of the employer for the health of its employees," inter alia, by incorrectly informing higher authorities within NATO that appellant was able to perform the functions indicated in his contract and job description, when he could not do because of his medical restrictions.

17. Appellant further contends in general terms that he did not possess the required qualifications for the position he was offered. According to appellant, the job description of the post he was offered added "an enormous scale of duties and responsibilities" for which he did not have the required qualifications.

18. Appellant's reply includes a brief reference to the "*irregular grading of the offered post*", but this was not further explained.

19. Appellant requests the Tribunal to:
- decide that the placement letter, contract and job description he was offered offend against CPR and NATO human resources manpower management guidelines; and
- order reimbursement for travel, subsistence and counsel fees.

### *(ii) Respondent's Contentions in Case No. 2016/1087*

20. Respondent contends that following suppression of his post, appellant was offered a new appointment in his previous grade (B-4), but he declined to sign the offered contract. Respondent therefore terminated his previous contract, which was linked to the suppressed post, effective 31 July 2016. In respondent's view, appellant is not entitled to LOJ indemnity under CPR Annex V because he was offered a position in the

same grade as his previous position.

21. While the job description of the new post offered to appellant differs from that of his previous position, respondent maintains that the new duties could be accomplished with appellant's qualifications, and that refresher, conversion, and re-certification training could be provided to the extent necessary.

22. As to appellant's medical restrictions, respondent insists that they were "*considered during the cross-walk*" to the offered post, and that it "*would continue to recognize*" the restrictions, as it had prior to the re-organization. Respondent notes that it has discretion to release a staff member from deployment duties when necessary for medical reasons, and that appellant agreed to long-term or frequent short-term deployments in his previous contract signed in 2010. Respondent further observes that medical restrictions on deployment are not automatically grounds for termination or medical invalidity.

23. In respondent's view, as appellant has left the organization, he no longer has a legitimate basis to contest the legality of the contract and job description he was offered. Respondent requests that the tribunal dismiss his appeal.

24. In response to the few words in appellant's reply intimating, without further explanation, that the post offered to appellant was improperly graded, respondent denies that it was improperly down-graded.

### *(iii) Appellant's Contentions in Case No. 2016/1091*

25. Appellant's subsequent appeal to the Tribunal repeats some contentions made in his first appeal in Case No. 2016/1087, and indeed refers the Tribunal to that appeal for details of his arguments. To the extent of such repetition, appellant's arguments will not be repeated here in detail.

26. The appeal in this second case renews appellant's contention that he lacks the qualifications to perform the new duties and responsibilities listed in the job description accompanying the contract he was offered. The appeal also stresses appellant's contention that the contract was improper because it included a mandatory deployment clause that conflicted with his permanent medical restrictions. In appellant's submission, this clause entailed a significant alteration in his employment status requiring that he be terminated with loss of job indemnity. Further, appellant contends that the offered contract violated relevant NATO Human Resources manpower management guidelines dealing with mandatory deployment requirements.

27. In his second appeal, appellant sought a decision:

- that the 16 December 2015 termination of his employment offends against the NCPR and other personnel manpower management guidelines "*and with regard to the permanent medical restrictions of the appellant*."
- that he is entitled to termination of employment with LOJ indemnity'
- awarding "*appropriate compensation for immaterial/moral damages*"; and
- ordering reimbursement of appellant's travel and subsistence costs and the costs of counsel.

### *(iv) Respondent's Contentions in Case No. 2016/1091*

28. Respondent's responses to the second appeal also repeat some arguments made in the first appeal. These will not be repeated here.

29. Respondent urges that the sole reason for terminating appellant was that he did not sign and return the new employment contract offered to him following suppression of his prior post in the reorganization implementing the NAC's decision. Respondent notes that appellant, like other staff members, was given additional time to consult with counsel in deciding whether to sign. He and other staff members were expressly informed that failure to sign the contracts offered to them by a specified date would result in termination without LOJ indemnity. Thus, in respondent's view, appellant's situation results from his personal decisions, not from any alleged illegality of the contract offered to him (which respondent denies).

30. In respondent's view, appellant's two appeals are contradictory, the first seeking annulment of his termination, while the second seeks loss of job indemnity for that termination. However, in respondent's view, both appeals ultimately seek the same end – termination with LOJ indemnity. Respondent maintains that appellant is not entitled to such an indemnity, as he was offered a position, in the same grade, in the same Organization, in the same location, as before the reorganization. Hence, the requirements of section 1.(3)(a) of CPR Annex V, defining eligibility for LOJ indemnity, were not met.

31. Respondent contends that the reasons given by appellant for not signing the contract – the alleged "irregularity" of the contract, his asserted lack of the required qualifications, his medical restrictions, and the deployment clause – are intended "*only to distract from the fact that he had created the situation himself*." Respondent insists in this regard that staff members do not have a personal right to opt for a LOJ indemnity.

32. In respondent's view, the duties of the new post offered to appellant were such that appellant had the required qualifications; in any case, "[*f]or minor changes, the Respondent ... offered training*." Respondent further urges that "*his medical restrictions would be recognized.*"

33. Respondent's disputes appellant's claim for immaterial damages, and asks that the appeal be dismissed.

## D. Considerations and Conclusions

34. As mentioned earlier, the present appeals originate in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment, in the same grade and location as before.

35. The two appeals were initiated at different times, reflecting the different legal situations both before and after the appellant's employment was terminated.

Accordingly, to some extent they contain different pleas and legal arguments. While they are sometimes repetitive and complementary, they are also sometimes inconsistent. This raises questions concerning the admissibility of some pleas and arguments.

36. The Tribunal deems it appropriate to adjudicate both appeals at the same time, in order to harmonize insofar as possible the resolution of inconsistent pleas and requests for relief. It will accordingly give priority to the arguments on the merits of both appeals.

37. First, appellant contends that he was unlawfully terminated without LOJ indemnity because the position description for the contract he was offered included duties and functions for which he did not have the required qualifications. The respondent counters that the indicated duties could be accomplished with appellant's qualifications, and that refresher, conversion, and re-certification training could be provided to the extent necessary. The Tribunal finds that there is no *prima facie* evidence that appellant lacks the required qualifications, which, moreover, could not be determined in actual practice following appellant's refusal to countersign the contract and at least try to perform the duties of the post. Appellant fails to convincingly substantiate his first submission in this regard, and it is denied.

38. Second, appellant contends that the contract he was offered was unlawful because it included a mandatory deployment clause providing that respondent in its discretion could require him to participate in short- or long-term deployments. In appellant's view, this involved a change in his terms of employment that was inconsistent with the permanent medical restrictions significantly limiting the areas in which he could work and deeming him "*deployable only after prior approval from SWM/SWMFO*." This is said to be contrary to the Force Commander's 12 June 2014 communication referred to above and to the CPR and NATO personnel policy documents that appellant's counsel contended at the hearing were legally binding.

39. The deployment clause in appellant's 12 July 2010 contract states in relevant part that "*the staff member will, at the discretion of the employer, temporarily perform his/her duties and/or participate in exercises and NATO operations and missions, to include taking part in frequent, short-term and/or long-term deployments/TDY at other locations both inside and outside NATO countries' boundaries*." The corresponding clause in the contract offered to him in October 2015 is identical. The new contract therefore does not "*significantly alter his... employment status*," and appellant's submission in this regard must be dismissed.

40. Regarding appellant's medical restrictions, as respondent observes, any deployment under this contract provision is "*at the discretion of the employer*." Respondent affirms (although in terms less categorical than those used in another similar case) that appellant's medical restrictions would be "recognized", as they were prior to the reorganization. The Tribunal notes that appellant's deployment restriction was not absolute; instead, any deployment required the prior approval of the competent authorities. Indeed, in response to a question from the Tribunal, appellant stated that he had in fact traveled to a four-day meeting away from Geilenkirchen, indicating both that he could travel in appropriate cases and that the Component was prepared to authorize such official travel.

41. Appellant maintains that the contract's deployment clause violates certain NATO Human Resources management documents that counsel contended at the hearing constituted binding legal rules of the same mandatory legal character as the CPR. The Tribunal's review of the excerpts of those documents provided to it shows, however, that they are designed as guides to management practices and cannot be regarded as binding legal rules. Moreover, the specific provisions appellant cites do not appear relevant to his situation, inter alia, because they address situations where a staff member is non-deployable. As just noted appellant was in fact deployed for training away from his duty station with prior medical clearance. Appellant's submissions in this regard must be dismissed.

42. The Tribunal has found that there is insufficient evidence to show that appellant lacked the required technical qualifications for the position he was offered. However, another aspect of appellant's qualifications is more problematic. The description of the position that he was offered included significant tasks and requirements that could only be performed in areas where he could not work because of medical limitations that were known to respondent.

43. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a decision in the exercise of an organization's discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a decision of the kind disputed by appellant here if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

44. The Tribunal finds that this is such a case. As appellant submitted in the written procedure and explained in detail at the hearing, he could, because of the medical limitations, not perform a major part of the work required for the position he was offered. At the hearing, the Tribunal heard a statement by the appellant in which he indicated that, because of the medical limitations on the areas in which he could work, he could not perform 95% of the work required for the position he was offered. He explained that he could not in good conscience sign a contract requiring him to perform work he was medically unable to perform. Respondent did not comment on this statement. While appellant's 95% estimate may be exaggerated, his statement underscores the inconsistencies between the elements of the job description he was offered and his medical restrictions.

45. At the hearing, a representative of respondent told the Tribunal that when the contract was offered, respondent knew of appellant's medical restrictions, but not of the medical conditions underlying them. Respondent indicated that appellant's medical restrictions were "*considered during the cross-walk*" to the offered post. Nevertheless, important elements of the job description given appellant in October 2015 are clearly inconsistent with those restrictions. Further, in the course of appellant's subsequent requests for administrative review and in the proceedings on the current appeals, he provided additional detailed information regarding the nature and extent of his medical conditions. In the Tribunal's view, this should have caused respondent to consider

whether it had taken appropriate account of essential facts, or had drawn appropriate conclusions from the facts known to it, in dealing with appellant. It did not do so.

46. Respondent has a duty to have regard to the welfare of its staff members reflecting the balance of reciprocal rights and obligations established by the CPR in the relationship between a NATO body and its staff members. This duty implies that when the administration took decisions concerning the situation of a staff member, it was obliged to take into consideration all the factors that may affect its decision. Further, when doing so it must take into account not only the interests of the service but also those of the staff member concerned. This duty to have regard for the welfare of a staff member is particularly compelling where decisions involve a staff member whose physical or mental health is known to be involved. This is precisely the situation in the present appeal, but respondent failed to act appropriately.

47. As a consequence, the decision of 29 October 2015 to offer to appellant Post Number OEW LEE 0390 (Senior Technician (Computer) under the offered conditions and subsequent related decisions, including the termination of his employment on 16 December 2015, must be annulled.

48. In both appeals, appellant seeks compensation for immaterial and moral damages. These alleged damages are not substantiated or quantified. In any event, annulment of the challenged decisions mentioned above constitutes, in the circumstances, adequate compensation for any non-material harm suffered. Appellant's claims in this regard are denied.

## E. Costs

49. 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 […]

50. Appellant having partially prevailed in his appeal, is entitled to reimbursement of justified expenses incurred by him and the costs of retaining counsel up to a maximum of € 4.000.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision of 29 October 2015 to offer to appellant Post Number OEW LEE 0390 Senior Technician (Computer) under the offered conditions and subsequent related decisions, including the termination of his employment on 16 December 2015, are annulled.
- Respondent shall reimburse appellant justified expenses incurred by him and the costs of retaining counsel up to a maximum of € 4.000.
- Appellant's other claims are dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0015

**Judgment**

**Case No. 2016/1088**

**PL**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; loss of job indemnity; deployment clause; medical restrictions; discretion; judicial review.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 6 May 2016, and registered on 24 May 2016 as Case No. 2016/1088, by Mr PL seeking, *inter alia*, the termination of his contract with indemnity for loss of job and, subsidiary, the upgrading of his post from B-4 to B-5.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 16 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. The Panel held an oral hearing on 15 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsels and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

4. In the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

6. Appellant joined NATO 34 years ago. The last contract he signed before the 2015 NAEW&CF GK reorganization was in 2010. It was an indefinite contract with the E-3A-Component, at Geilenkirchen – today NAEW&CF GK – as Senior Technician (Avionics) at grade B-4, in the Flight Avionics Maintenance Branch Section. This contract had effect as of 1 August 2010.

7. Before the reorganization, appellant informed respondent of his interest in an early departure from the NAEW&CF GK after his long service. In the first phase of the NAEW&C Force Civilian Reorganization System (CRS), and after having received a provisional non-placement letter, appellant considered that his request had been

accepted in principle by respondent. Consequently, he did not apply for any upcoming vacancies.

8. Following the NAEW&CF GK reorganization, as approved by the NAC on 30 September 2015 and which became effective on 1 November 2015, appellant's post having been suppressed, he was offered an indefinite duration contract in a new post as Senior Technician (Avionics), at grade B-4.

9. Appellant accepted this offer and signed a new contract on 30 November 2015, but underlined that in his view the job description was incorrect and had substantial changes with new duties added, and that he would provide further details. He accordingly started administrative review procedures, seeking mainly to benefit from the loss of job indemnity consequent to the suppression of his post. During the pre-litigation process appellant also requested that the job description assigned to his post be amended to take into consideration his medical status and work restrictions as confirmed by medical certificates.

10. Appellant's first administrative review, introduced on 26 November 2015, was rejected by respondent on 17 December 2015; appellant's request for further administrative review, introduced on 5 January 2016, was rejected by respondent on 25 January 2016; and a "Request for Mediation/Formal Complaint", introduced on 23 February 2016, was rejected by respondent on 10 March 2016. In this decision (challenged decision) respondent indicated that the administration had been in contact with the medical advisor about appellant's *"medical status and restrictions"* but considered that appellant's medical restrictions had no implications for his eligibility for loss of job (LOJ) indemnity.

11. It is under these circumstances that, on 6 May 2016, appellant brought the present appeal before the Tribunal against the decision of 10 March 2016.

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

### *(i) Appellant's contentions*

12. Appellant, firstly, argues that the decision offering him a new contract cannot be considered as valid because it does not comply with the provisions of section 1 of Annex V to the NATO Civilian Personnel Regulations (CPR) concerning LOJ indemnity. According to these provisions, respondent may award an indemnity for loss of employment to a staff member whose services are terminated because of suppression of the budget post occupied by the staff member, or changes in the duties of that budget post of such nature that the staff member no longer possesses the required qualifications, and who is not offered a post in the same grade in the same organization.

13. According to appellant, this is precisely the case in the present litigation. He contends that there is no doubt that his post was suppressed and the new duties specified in the job description are far more extensive than those of his previous post and exceeded his qualifications. He further contends that the skill level responsibilities,

knowledge and qualifications for the new post are such that it should be graded B-5 instead of B-4. Based on these elements, appellant maintains that following the re-organization, he must be accorded the status of a staff member whose post is terminated and is entitled to indemnity for loss of job retroactively, and not a new contract graded B-4.

14. Appellant contends, secondly, that according to point 8 b.(3) of the CRS, if a NATO international Civilian (NIC) declines employment in an End State Peacetime Establishment (ESPE) post that would significantly alter his/her employment status due to the inclusion of a mandatory deployment clause, that NIC'S employment shall be terminated with payment of LOJ indemnity. In the present litigation, the new employment status under the new offered post included a mandatory deployment clause that could not be accepted. Consequently, and in contrast to his challenge of the decision to offer him a new contract, appellant contends that his employment should be terminated with payment of LOJ indemnity.

15. Thirdly, appellant considers that the decision offering him a new contract is incompatible with article 4.3 of Annex XIV to the CPR. Pursuant this provision, if a staff member is unable to agree to the terms outlined in a changed post description, and cannot be reassigned or otherwise re-employed, the contract will be terminated with the payment of indemnities and allowances/supplements as provided in the CPR. It results from this provision that appellant must be granted LOJ indemnity.

16. Subsidiarily, appellant contends that the NAC decision of 30 September 2015, by which the reorganization was approved by NATO member countries, is based on incorrect and irregular information provided by NAEW&CF GK that infringed upon and disregarded binding management directives. If the NAC decision approving the grading assigned to his post *in se* cannot be challenged, respondent should have been directed to the proper authority competent to review it – the Peacetime Establishment Authority (PEA) or the NATO Defense Manpower Audit Authority (NDMAA). The decisions of these authorities are subject to an appeal before the Tribunal, particularly in this case, where the decision of NAC is based on an incorrect decision for grading a position.

17. Appellant recalls that, according to the jurisprudence of the NATO Appeals Board, even if the Board was not competent to annul a NAC decision, it could rule on the legality of such a decision when a Head of a NATO Body took an individual decision implementing the NAC decision. For appellant, this is precisely the case in the present litigation, because the NAC decision was adopted on the basis of incorrect information supplied by the respondent. In this regard, the contract of employment between respondent and appellant established a contractual relationship that must comply with the requirements of the CPR and the other relevant legal texts. Here, however, and given the duties and responsibilities mentioned in the job description of the offered post, the contract illegally assigned the appellant a grade of B-4 instead of grade B-5.

18. In this regard, appellant argues that the duties relating to the new post are incompatible with his permanent medical restrictions. Accordingly, appellant does not fulfill the necessary requirements for employment as laid down in the contract he was offered. In response to a question from the Tribunal, appellant argues in addition that

respondent infringed the basic rules of good administration by offering him a contract with a job description that was incompatible with his medical health status.

19. Appellant requests the Tribunal to grant:
- indemnity for loss of job retroactively from 1 November 2015 following termination of his contract;
- subsidiarily, correction from B-4 to B-5, retroactively, as of 1 November 2015 and amendment of the job description for the offered post in order to take into account his health condition; and
- reimbursement of legal, travel and subsistence costs.

### *(ii) Respondent's contentions*

20. Respondent retorts, firstly that, following the NAC approved reorganization, appellant was offered a new appointment to a post of the same grade B-4, and signed a new contract. Under these circumstances, appellant was not eligible for LOJ indemnity. Consequently, the provisions of section 1 of Annex V to the CPR are not applicable.

21. Furthermore, the grade for this post is B-4, as it was approved as part of the new Peacetime Establishment. In this regard, a staff member has no actionable right for changing a post in the Organization, its job description or grading. Respondent explains that NATO's manpower requirements are decided by the NATO member countries through the NAC. Therefore, a position does not originate from the contractual rights and obligations established between a NATO body and the staff member. As such, appellant has no subjective right to the post, nor is he entitled to legally dispose of it. In this regard, according to respondent, appellant cannot invoke medical restrictions in order secure a LOJ indemnity, because these restrictions cannot become part of the job description.

22. Secondly, concerning appellant's contentions regarding the NAC decision, respondent stresses that it is not the decision of a NATO body, and is not an executive act subject to Tribunal review. In addition, respondent observes that it had no competence to intervene in the review process of the posts by the NDMAA, which determined their classifications.

23. Regarding the difference between the job descriptions of the post and the appellant's former post, respondent argues that appellant meets the essential qualifications of the new job description. Further, respondent provides in any event conversion and re-certification training if necessary.

24. Finally, as to the applicability of the provisions of sections 3 and 4 of Annex XIV to the CPR regarding LOJ indemnity where a contract introduces a mandatory deployment requirement, respondent argues that appellant agreed earlier to long-term or frequent short-term deployment in accordance with these sections of Annex XIV. In this context, respondent recalls also having accepted the appellant's medical restrictions and agreed to exempt appellant from specific tasks (tank entries). This situation cannot ground any right for the grant of loss of job indemnity.

25. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

26. As mentioned earlier, the present appeal originates in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment, in the same grade and location as before.

### *On the subject-matter of the appellant's claims*

27. The Tribunal recalls that, during the written procedure, appellant developed two main requests for relief. By his first request, appellant asked to be granted LOJ indemnity retroactively from 1 November 2015 following the termination of his contract. By his second request, appellant asked the Tribunal to upgrade his post from grade B-4 to B-5 retroactively from 1 November 2015, and to amend the job description for the offered post to take into account his health condition.

28. Following a question of the Tribunal at the hearing, appellant decided to modify the content of his claims. He maintained his request for LOJ indemnity, and asked the Tribunal only to amend his job description to reflect his medical restrictions. Appellant thus effectively amended his request for relief, to request that the Tribunal annul respondent's decision to offer him an indefinite duration contract with a job description that did not take account his medical condition.

### *On the loss-of-job indemnity*

29. Appellant claims that the challenged decision infringes in three different ways on the provisions concerning the granting of LOJ indemnity.

30. Firstly, appellant argues that, according to point 1 to Annex V to the CPR, entitled "*Regulations on the indemnity for loss of job",* respondent *"shall have the power to award an Indemnity for loss of employment to any staff member" (…) "whose services are terminated for" (…) "(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;" (…) "and (3) who (a) is not offered a post in the same grade in the same Organization".*

31. In this regard, appellant considers the he meets all the requirements of these provisions defining eligibility for the LOJ indemnity.

32. This contention must be rejected. It is undisputed that appellant was offered and accepted a new post in the same B-4 grade he held before the reorganization. Consequently, appellant cannot argue that he was not offered a post in the same grade after the reorganization or that respondent contravened the requirement of point 1 to Annex V to the CPR. Appellant's argument that given the job description of this post, it

should be upgraded to B-5, is irrelevant for purposes of determining eligibility for the LOJ indemnity, under Annex V to the CPR.

33. Appellant also submits that the post offered was not in the same organization, contrary to point 1 to Annex V to the CPR, and that he should for that reason be entitled to the LOJ indemnity. The Tribunal disagrees. It may be true that a reorganization was under way, and that some units were replaced with others, but this was, and is, taking place within one of the six Coordinated Organizations, the North Atlantic Treaty Organization. The words "same Organization" in Annex V to the CPR refer to NATO as a whole.

34. Secondly, appellant contends that, according to point 8 b.(3) of the CRS, his employment should be terminated with payment of LOJ indemnity because of the inclusion of a mandatory deployment clause in his contract.

35. This contention must also be rejected. Even if appellant could invoke this rule in order to claim LOJ indemnity, this rule concerns a redundant staff member and not appellant, who instead accepted and signed a new contract after the suppression of his previous post.

36. Thirdly, appellant considers that the decision offering him a new contract is incompatible with Article 4.3 of Annex XIV to the CPR according to which, if a staff member is unable to agree to the terms outlined within a changed post description, and cannot be reassigned or otherwise re-employed, the contract will be terminated with the payment of applicable indemnities and allowances/supplements.

37. The situation regulated under Article 4.3 of Annex XIV to the CPR does not concern appellant. The deployment clause in the new job description being identical to the one in the job description of appellant's previous post, and which was accepted by him, the Tribunal considers that this clause does therefore not alter in any event the employment relationship on this point.

38. Consequently, this last contention must be rejected as unfounded, and the claim for granting the loss of employment/job indemnity under the CPR must be dismissed in its entirety.

***On the claim of annulment***

39. As modified at the hearing, appellant's claim seeks the annulment of respondent's decision offering him an indefinite duration contract with an inadequate job description in relation to his health condition. In this context, appellant considers that respondent infringes on its duty to have regard to the welfare of its staff members in keeping with the balance of reciprocal rights and obligations established by the CPR in the relationship between a NATO body and its staff members.

40. The Tribunal recalls that this duty implies that when the administration takes decisions concerning the situation of a staff member, it is obliged to take into consideration all the factors that may affect its decision. Further, when doing so, it must

take into account not only the interests of the service but also those of the staff member concerned. This duty to have regard for the welfare of a staff member is particularly compelling where decisions involve a staff member whose physical or mental health is known to be involved.

41. It is undisputed on the basis of medical certificates as well as of discussions during the pre-litigation procedure that because of his permanent medical restrictions, appellant can perform the duties specified for his current post except for one task that was not included in his previous job description.

42. In fact, the job description of the new post offered by respondent after the reorganization process clearly specifies “tank entry is required” and includes among the incumbent’s duties *“the maintenance inside a/c integral tanks for avionics related systems in accordance with applicable Technical Orders Instructions”.*

43. On this specific point, respondent recognized before the Tribunal that the new job description differs from the previous job description by referring specifically to avionics maintenance inside of aircraft tanks. Respondent also accepted during the written procedure that, given the appellant’s medical status, his duties cannot be fully performed as specified in the job description.

44. The Tribunal takes note of respondent’s commitment that appellant will not have to work in the tanks and expects respondent to abide by it. The Tribunal considers that respondent has thus *de facto* modified the challenged decision in order to comply with the appellant’s medical permanent restrictions. In fact, and in answer to a question by the Tribunal, respondent confirmed and appellant agreed that, since the latter signed the new contract, he had never been requested to perform duties incompatible with his health status.

45. Consequently, the challenged decision ceasing to have effect on this point, the Tribunal concludes that the appellant’s claim of annulment has become devoid of purpose and that, consequently, there is no further need to adjudicate on it.

46. It follows from all the foregoing that the appeal must be dismissed.

## E. Costs

47. 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 […]

48. 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 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0016

# Judgment

## Cases Nos 2016/1089 and 2016/1094

**MB**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; termination of appointment following non-acceptance of new post; loss of job indemnity; medical restrictions; deployment clause.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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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 R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2016.

## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 4 May 2016, and registered on 24 May 2016 as Case No. 2016/1089, by Mr MB contesting, *inter alia*, the respondent's offer for an indefinite duration contract, dated 29 October 2015, following a NAEW&CF GK reorganization.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 17 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. On 23 June 2016, appellant introduced a second appeal, registered on 5 July 2016 as Case No. 2016/1094, contesting, *inter alia*, the termination of his employment without loss of job indemnity.

4. The respondent's answer, dated 5 September 2016, was registered on 6 September 2016. The appellant's reply, dated 5 October 2016, was registered on 6 October 2016. The respondent's rejoinder, dated 7 November 2016, was registered on the same day.

5. By Order AT(PRE-O)(2016)0009 dated 10 October 2016, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2016/1094 is completed.

6. The Panel held an oral hearing on 15 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

7. At the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

9. Appellant, who served in NAEW&CF GK for over 29 years, held, under an indefinite duration contract, since 1 August 2010 the post of Senior Technician (Communications) at the Logistics Wing, Section communications, Computer & ESM Maintenance Branch at grade B-4. This contract contained a deployment clause (paragraph 8). However, since 4 February 2011, respondent's Medical Branch has certified that appellant is permanently not deployable.

10. Following the NAEW&CF GK reorganization, as approved by the North Atlantic Council (NAC) on 30 September 2015 and which became effective on 1 November 2015, appellant was offered by the final placement letter dated 29 October 2015 an indefinite duration contract in a new post as Senior Technician (Communications), at the Logistics Wing, Section Maintenance Production Squadron, also at grade B-4. This offer contained the same deployment clause (paragraph 8) as in his previous contract.

11. Appellant did not accept the new post, on the ground that the contract he was offered violated the NATO Civilian Personnel Regulations (CPR) and other personnel guidelines, and he started pre-contentious proceedings.

12. The first request for administrative review was introduced on 26 November 2015. In this request, appellant stressed that the final placement letter with contract and job description offended against the CPR and other legal texts with regard to his permanent medical restrictions. Respondent rejected this request on 16 December 2016, recognizing however the appellant's medical restrictions. According to respondent, appellant's refusal to sign the new contract resulted in termination of his employment without benefit of loss of job (LOJ) indemnity because appellant was offered a post in the same grade in the same organization.

13. Appellant's request for further administrative review, introduced on 4 January 2016, was rejected by respondent on 25 January 2016; in this decision, respondent indicated that *"failure to meet medical criteria for deployment is not per se grounds for termination."* A "Request for Mediation/Formal Complaint", introduced on 23 February 2016, was rejected by respondent's decision dated 10 March 2016. In this context, on 4 May 2016 appellant introduced against this decision a first appeal (Case No. 2016/1089).

14. On 16 December 2015, appellant received from respondent a letter terminating his employment without LOJ indemnity, due his failure to sign and return the contract he was offered and the suppression of his post as Senior Technician (Communications) at the Logistics Wing Command Group, and effective as of 12 June 2016, 24:00hrs.

15. Appellant contested the termination of his employment and started a second series of pre-contentious proceedings.

16. Appellant initiated a request for administrative review of the termination of his employment on 4 January 2016. In this request, appellant reiterated his arguments developed in the previous pre-litigation procedure that culminated in Case No. 2016/1089. This request for administrative review was rejected by respondent on 1

February 2016. In the further request for administrative review introduced on 19 February 2016, appellant developed, *inter alia*, a set of arguments concerning his medical restrictions. This request was rejected by respondent on 8 March 2016. A "Request for Mediation/Formal Complaint", introduced on 6 April 2016, was rejected by respondent's decision on 27 April 2016. In this decision, respondent stressed that the termination of appellant's employment was not linked to his medical restrictions. On 23 June 2016, appellant brought a second appeal against this decision (Case No. 2016/1094).

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

### *(i) Appellant's contentions in Case No. 2016/1089*

17. In this case, appellant firstly argues that the offered contract offends against the CPR and, in particular, requirements deriving from his permanent medical restrictions, which were first certified by the Component's Medical Branch on 4 February 2011 and permanently excluded any deployment. In this regard, the job description for the post he was offered in the placement letter of 29 October 2015 included duties that appellant could not execute because of his medical restrictions. As the respondent knew of these medical restrictions based upon medical certificates of its own doctors, the offered contract offended against the employer's duty of care and responsibility for the health of its employees.

18. Appellant secondly asserts that, according to the NATO Human Resources manpower management guidelines, in case of permanent medical restrictions, respondent must offer to the concerned staff member a post for which there is no mandatory deployment requirement. This was not the case with the 29 October 2015 final placement letter and the attached job description. Because of the medical certificate of 4 February 2011 certifying that appellant was non-deployable, respondent could not grant him a new post in the new Permanent Establishment, as the NATO Human Resources manpower management guidelines require that respondent can only fill the post with someone fit for deployment. It was in this context that appellant refused to sign the new offer, because it offended against the CPR and the management guidelines.

19. Appellant contends also that respondent "*offended against the care and responsibility of the employer for the health of its employees*," *inter alia*, by incorrectly informing higher authorities within NATO that appellant was able to perform the functions indicated in his contract and job description, when he could not do because of his medical restrictions.

20. Appellant further contends, in general terms, that he did not possess the required qualifications for the position he was offered. According to appellant, the job description of the post he was offered added "*an enormous scale of duties and responsibilities*" for which he did not have the required qualifications.

21. Finally, concerning respondent's contentions that appellant's previous contract signed in 2010 contained a mandatory deployment clause to which appellant did not

object, appellant recalls that, when he signed his contract in 2010, there were no medical restrictions. However, these were certified on 4 February 2011, after the contract was signed in 2010. These restrictions continue to exist today.

22. Appellant requests the Tribunal to:
- annul as illegal the final placement letter dated 29 October 2015 which offers the appellant the contract for the new position with its included job description; and
- reimburse the legal, travel and subsistence costs.

### *(ii) Respondent's contentions in Case No. 2016/1089*

23. Respondent retorts, firstly that appellant persistently refused to sign the new offered contract and, for that reason, it terminated on 16 December 2015 his prior contract, which was linked to his suppressed post. The termination of this contract taking effect on 12 June 2016, appellant left the organization and consequently, according to respondent, has no legitimate interest to pursue these proceedings for determining that the offered contract and job description did not comply with the CPR. In respondent's view, appellant is not entitled to a LOJ indemnity under Annex V to the CPR because he was offered a position in the same grade as his previous one.

24. Respondent secondly observes that, despite the difference between the job descriptions of the post offered and the appellant's former post, appellant meets the essential qualifications of the job description for the new post. In any event, respondent provides conversion and re-certification training, if necessary.

25. In addition, respondent informed appellant that it would continue to recognize his certified medical restrictions, just as prior to the reorganization, that it has discretion to release a staff member from deployment duties when necessary for medical reasons, and that appellant had agreed to long-term or frequent short-term deployments in his previous contract signed in 2010. Respondent also observes that appellant had already agreed, by signing his contract in 2010, to long-term or frequent-term deployment in accordance with section XIV to the CPR.

26. Respondent requests the Tribunal to dismiss the appeal in Case No. 2016/1089.

### *(iii) Appellant's contentions in Case No. 2016/1094*

27. In the second appeal, appellant challenges the decision dated 16 December 2015 terminating his employment without LOJ indemnity due to the suppression of his post.

28. Appellant, firstly, recalls that he was not able to sign the offered contract and the corresponding job description, which he considered to be irregular and not a proper legal basis for a further working relationship with the Organization. In particular, appellant reiterated his arguments about the mandatory deployment clause and the additional duties and responsibilities requiring a different set of skills. Appellant remarks that NAEW&CF GK did not recognize any of the information he submitted in the course of administrative review and terminated his employment without taking into account his undisputed medical restrictions barring any deployment, as reflected in the 4 February

2011 medical certificate of respondent's Medical Branch. In these conditions, since the new offered contract modified significantly his employment status, appellant could not accept it.

29. Appellant, secondly, asserts entitlement to LOJ indemnity in accordance with the provisions of Annex V to the CPR, because of the termination of his contract. These provisions authorize respondent to award an indemnity for loss of employment to a staff member (i) whose services are terminated because of (a) the suppression of the budget post occupied by the staff member, (b) the 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, and (ii) who is not offered a post in the same grade in the same organization. According to appellant, these conditions are fulfilled in the present case.

30. Appellant, thirdly, contests respondent's statement that he did not wish to continue to work for the Organization as he did not sign the new contract offer. Appellant maintains that he wanted to be reinstated in employment, but on the basis of a proper job proposal correcting the illegal errors (violations of CPR and NATO directives/regulations), which he alleged.

31. In addition, appellant argues that the decision to terminate his employment pending the pre-litigation proceedings constitutes an adverse action.

32. Appellant concludes that his employment was wrongfully and disrespectfully terminated after 29 years of loyal service to the Organization without LOJ indemnity, and that this gives grounds to compensation for moral damages evaluated to be at least € 18.000. In addition to payment of LOJ indemnity, appellant stresses that the non-respect by respondent of his medical restrictions entitles him to additional moral damages for the unjust termination of his employment.

33. In these circumstances, appellant requests the Tribunal to:
- annul the decision terminating his employment dated 16 December 2015;
- award him the LOJ indemnity consequent to this termination;
- compensate him for immaterial and moral damages for a minimum of €18.000; and
- order reimbursement of legal, travel and subsistence costs.

### *(iv) Respondent's contentions in Case No. 2016/1094*

34. Respondent observes, firstly, that the contract was terminated for the sole reason that appellant declined to sign and return the new contract of employment that he was offered following the suppression of his previous post as a result of the NAC- approved reorganization of Headquarters NAEW&CF GK.

35. Respondent submits, secondly, that appellant's actions and claims throughout both proceedings are contradictory and duplicated, and only mask appellant's intention to leave the Organization without handing in the termination himself and trying to create leverage to obtain LOJ indemnity.

36. Respondent stresses, thirdly, that appellant is not eligible for LOJ indemnity, as the CPR's conditions are not met. He was offered a new post with the same grade and in the same Organization in Geilenkirchen, and the changes in his duties were not such that he no longer had the required qualifications. Respondent also observes that, for minor changes in the new job, training was available. In addition, respondent considers that it has the power to decide which staff members were necessary in a given role, taking account of their medical restrictions and the impact on the overall deployability. In this regard, respondent was under no obligation to terminate appellant's employment due to his medical limitations in regard to deployment.

37. Respondent contends that moral damages are neither substantiated nor quantified and, in any case, groundless since the alleged damages result from appellant's contradictory actions. Since appellant is not eligible for loss of job indemnity, there are no grounds for any damages.

38. Respondent requests the Tribunal to dismiss the appeal.

## D. Considerations and conclusions

39. As mentioned, the present appeals originate in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment, in the same grade and location as before, but he decided to decline this offer.

40. The two appeals were initiated at different times, reflecting the different legal situations both before and after the appellant's employment was terminated. Accordingly, to some extent they contain different pleas and legal arguments. While they are sometimes repetitive and complementary, they are also sometimes inconsistent. This raises questions concerning the admissibility of some pleas and arguments.

41. The Tribunal deems it appropriate to adjudicate both appeals at the same time, in order to harmonize as far as possible the resolution of inconsistent pleas and requests for relief. It will accordingly give priority to the arguments on the merits of both appeals.

***On the claim for annulment of the respondent's decision of 16 December 2015 terminating appellant's employment***

42. Firstly, appellant contends that his contract was unlawfully terminated without loss of job indemnity because the position description for the contract he was offered included duties and functions for which he did not have the required qualifications. Respondent counters that the indicated duties could be accomplished with appellant's qualifications, and that refresher, conversion, and re-certification training could be provided to the necessary extent.

43. The Tribunal finds that there is no *prima facie* evidence that appellant lacks the required qualifications, which, moreover, could not be determined in actual practice following appellant's refusal to countersign the contract and at least try to perform the duties of the post. Appellant fails to convincingly substantiate his first submission in this regard.

44. Second, appellant contends that the contract offered by respondent with the placement letter in October 2015 was unlawful because it included a mandatory deployment clause providing that respondent, in its discretion, could require him to participate in short or long-term deployments. In appellant's view, this involved a change in his terms of employment that was inconsistent with permanent medical restrictions expressly barring such deployment.

45. Appellant's previous contract provided in paragraph 8 that *"the staff member will, at the discretion of the employer, temporarily perform his/her duties and/or participate in exercises and NATO operations and missions, to include taking part in frequent, short-term and/or long-term deployments/TDY at other locations both inside and outside NATO countries' boundaries."*

46. Notwithstanding this provision, and since February 2011, that is to say prior to the reorganization, respondent accepted the medical certificates excluding any deployment.
47. Appellant argues in fact that the impossibility of deployment should have been reflected in the new contract. However, the clause providing a possible deployment was not changed accordingly.

48. The Tribunal considers that this fact does not flaw respondent's decision. Indeed, despite the existence of the same clause in the new offer, respondent expressly and without reservation accepted during the proceedings appellant's permanent inability to be deployed and to participate in deployment training.

49. The new contract therefore does not alter appellant's employment status, and appellant's submission in this regard must be dismissed. In addition, given respondent's assurances, appellant cannot argue that the contract offer violated the prior applicable framework under which the medical restrictions were fully respected.

50. Appellant maintains that the contract's deployment clause violates certain NATO Human Resources management documents that, according to his counsel at the hearing, constituted binding legal rules having the same mandatory legal character as the CPR.

The Tribunal's review of the excerpts of the documents provided to it shows, however, that they are designed as guidelines to management practices and cannot be regarded as binding legal rules. Appellant's submissions in this regard must be dismissed.

51. On the basis of the foregoing, the Tribunal finds that the decision to terminate appellant's appointment was regular. The NAC abolished the old post and appellant was properly informed of this by the Component. He was also properly advised of the consequences of not countersigning the new job offer, *i.e.* that his employment would be terminated with a notice period but without a LOJ indemnity. The Component went to great length to guarantee continued employment, which appellant declined. He carries the responsibility for this and must accept the consequences.

52. Consequently, the claims for annulment in both appeals initiated by appellant against respondent's decision terminating his employment must be dismissed.

***On loss of job indemnity***

53. Appellant considers that he is entitled to receive LOJ indemnity. In this regard, he argues mainly that, according to point 1 of Annex V to the CPR, entitled "*Regulations on the indemnity for loss of job",* respondent *"shall have the power to award an indemnity for loss of employment to any staff member" (…) "whose services are terminated for" (…) "(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;" (…) "and (3) who (a) is not offered a post in the same grade in the same Organization (…)".* Appellant considers that he meets all of these requirements. In addition, appellant claims that he is entitled to a loss of job indemnity also on the basis of other rules.

54. Appellant's submissions regarding the LOJ indemnity are based exclusively on the premise that the termination of his employment was unlawful because respondent's new contract offer did not take into account appellant's medical restrictions precluding deployment. As indicated in paragraph 51 above, the termination of appellant's employment was regular and, consequently, appellant's submissions regarding the LOJ indemnity based on an illegal termination of his contract must be dismissed.

55. In any event, the Tribunal recalls that appellant was offered a new post in the same grade B-4 as he held before the reorganization.

56. In a further argument, appellant submits also that the post offered was not in the same organization and that he would for that reason also be entitled to the loss of job indemnity. The Tribunal disagrees. It may be true that a reorganization was under way, and that some units have been replaced with others, but this was, and is, taking place within one of the six Coordinated Organizations, the North Atlantic Treaty Organization. The words "same Organization" in Annex V to the CPR therefore refer to NATO as a whole.

57. In the second appeal, appellant also requests compensation for immaterial and moral damages. The Tribunal points out that, where the alleged damage on which an

appellant relies arises from the adoption of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, the rejection of the claim for damages, as those claims are closely linked. The claim for annulment being dismissed, the claim for financial compensation must therefore also be dismissed.

58. Concerning finally appellant's claim that the termination of his contract was an adverse action, the Tribunal considers that this claim must also be rejected.

59. As the Tribunal has held in similar cases, where this claim was introduced with specific reference to Article 5.3.1 of Annex IX to the CPR (*cf.* AT judgment in Cases Nos 2016/1080 and 2016/1092), the latter provision refers to the Complaints Committee and provides that *"[n]o individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member."* There is no doubt that the scope of this provision does not concern the termination of appellant's employment situation which, as indicated in paragraph 51 of the present judgment, was in any event in compliance with the CPR.

60. It follows from all the foregoing that the appeals must be dismissed.

## E. Costs

61. 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 […]

62. The appeals being dismissed, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

30 March 2017 AT-J(2017)0017

**Judgment**

**Cases Nos 2016/1090 and 2016/1095**

**AH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 17 March 2017

Original: English

*Keywords: reassignment following reorganization; termination of appointment following non-acceptance of new post; grading of post; competence; discretion; judicial review.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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## A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK or the "Component"), dated 6 May 2016, and registered on 24 May 2016 as Case No. 2016/1090, by Mr AH contesting, *inter alia*, the respondent's offer of an indefinite duration contract, dated 29 October 2015, following a NAEW&CF GK reorganization.

2. The respondent's answer, dated 19 July 2016, was registered on 21 July 2016. The appellant's reply, dated 18 August 2016, was registered on 26 August 2016. The respondent's rejoinder, dated 16 September 2016, was registered on 3 October 2016.

3. On 23 June 2016, appellant introduced a second appeal, registered on 5 July 2016 as Case No. 2016/1095, contesting, *inter alia*, the termination of his employment without loss of job (LOJ) indemnity.

4. The respondent's answer, dated 5 September 2016, was registered on 6 September 2016. The appellant's reply, dated 5 October 2016, was registered on 6 October 2016. The respondent's rejoinder, dated 7 November 2016, was registered on the same day.

5. By Order AT(PRE-O)(2016)0009 dated 10 October 2016, the Tribunal's President decided to join the two cases and to hold the oral hearing once the written procedure in Case No. 2016/1095 is completed.

6. The Panel held an oral hearing on 15 December 2016 at NAEW&CF Headquarters in Geilenkirchen. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

## B. Factual background of the cases

7. At the Lisbon Summit Declaration of November 2010, NATO Heads of State decided on a 35% manpower saving in NATO's Command Structure. This decision was subsequently confirmed at the 2012 NATO Summit in Chicago. The present appeal must be seen in the context of a number of appeals that were addressed to the Tribunal following from a decision by the North Atlantic Council (NAC) on 30 September 2015, implementing these Summit decisions. The NAC decision approved reorganization of NATO's two international military headquarters, including respondent, with substantial reductions of their staffing ceilings. This decision required significant staffing reductions and realignments by respondent.

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

9. Appellant, who served in NAEW&CF GK for over 35 years, held, under an indefinite duration contract, the post of Senior Technician (Radar) at the Logistics Wing, Section Radar Maintenance Branch, at grade B-4.

10. Following the NAEW&CF GK reorganization, as approved by the North Atlantic Council (NAC) on 30 September 2015 and which became effective on 1 November 2015, appellant was offered an indefinite duration contract in a new post as Senior Technician (Radar), at the Logistics Wing Radar Section, also at grade B-4.

11. Appellant did not accept the new post, arguing that the contract offer offended against the NATO Civilian Personnel Regulations (CPR) and other personnel guidelines. He disputed in particular the B-4 grade assigned to the post, because the indicated skill level, responsibilities, knowledge and qualifications in his view concerned a post at grade B-5. Appellant accordingly started pre-contentious procedures.

12. The first administrative review, introduced on 26 November 2015, was rejected by respondent on 16 December 2015; the further administrative review, introduced on 5 January 2016, was rejected by respondent on 25 January 2016; and the request for mediation/complaint, introduced on 23 February 2016, was rejected by respondent on 10 March 2016. In this context, on 6 May 2016 appellant introduced the first appeal (Case No. 2016/1090).

13. On 16 December 2015, appellant received from respondent a letter terminating his employment without loss of job indemnity, effective as of 12 June 2016, due his failure to sign and return the contract he was offered and the suppression of his previous post. It added that, as appellant was on sick leave, CPR Article 10.4 (on extension of the notice period) and Article 45.7.1 (on extended sick leave) would apply. Appellant was still on sick leave at the time of the hearing.

14. Appellant contested the termination of his employment and started a second series of pre-contentious procedures.

15. The first administrative review, introduced on 4 January 2016, was rejected by respondent on 1 February 2016; the further administrative review, introduced on 19 February 2016, was rejected by respondent on 8 March 2016; and the request for mediation/complaint, introduced on 6 April 2016, was rejected by respondent on 27 April 2016. On 23 June 2016 appellant introduced the second appeal (Case No. 2016/1095).

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

### *(i) Appellant's contentions in Case No. 2016/1090*

16. In this case, appellant, firstly, argues that the offered contract offends against the CPR in that the job description contains additional duties and responsibilities such that, in his view, the new post should have been graded B-5. As the proper grade for the new contract should have been B-5, it was not at the same grade as his previous post. Appellant accordingly decided not to accept the offer, citing a violation of the CPR, in particular, section 1 of Annex V to the CPR.

17. Appellant, secondly, contends that his decision to refuse the new contract is justified because the offer significantly altered his employment status due to the inclusion of an allegedly enlarged mandatory deployment clause.

18. Appellant invokes, thirdly, that the decision of the NAC of 30 September 2015 was based on incorrect and irregular information provided by NAEW&CF GK concerning in particular the grade level, which disregarded binding management directives. If the NAC decision cannot *in se* be challenged, he submits that he should have been directed to the proper authority competent to review it. The decision of this authority is subject to an appeal before the Tribunal, particularly when the decision of the NAC is incorrect.

19. In his reply appellant adds, referring to his second appeal (Case No. 2016/1095), that, because of its disregard of binding rules governing employment, respondent was not allowed to terminate his employment without a LOJ indemnity.

20. Finally, appellant argues that the irregular and illegal treatment of his situation during the re-organization of the E-3A Component after more than 35 years of loyal and exceptional service caused moral damage that must be compensated in an appropriate manner for a minimum of €3.000.

21. Appellant requests the Tribunal to:
- determine that the Placement letter, with contract and job description, dated 29 October 2015, offends against the CPR and NATO Human Resources manpower management guidelines;
- grant the appellant an appropriate compensation for moral damages; and
- reimburse the legal, travel and subsistence costs.

### *(ii) Respondent's contentions in Case No. 2016/1090*

22. Respondent retorts, firstly that appellant persistently refused to sign the new contract and that, for that reason, his employment, which was linked to the suppressed post, was terminated on 16 December 2015. Appellant being on sick leave, the notice period will end in accordance with Articles 10.3 and 10.4 of the CPR.

23. Respondent maintains, secondly, that following the NAC approved reorganization, appellant was offered a new appointment to a post of the same grade B-4. Under these

circumstances, appellant was not eligible for loss of job indemnity and, consequently, the provisions of section 1 of Annex V to the CPR are not applicable.

24. Furthermore, the B-4 grade for this post is as stated in the job description of the new Peacetime Establishment. In this regard, a staff member has no actionable right to change a post in the Organization, its job description or grading. Respondent explains that NATO's manpower requirements are decided by the NATO member countries through the NAC. Therefore, a position does not originate from the contractual rights and obligations established between a NATO body and the staff member. It is, rather, independent from the incumbent. As such, appellant has no subjective right to the post, nor is he entitled to legally dispose of it.

25. Concerning, thirdly, appellant's contentions regarding the NAC decision, respondent stresses that decisions of the NAC are not executive acts and are not subject to the Tribunal's review.

26. In addition, respondent observes also that appellant agreed to long-term or frequent short-term deployment in accordance with Annex XVI to the CPR by signing his previous contract in 2010. Consequently, appellant cannot claim the LOJ indemnity provided for by this Annex in cases where an existing job description is revised to add a deployment requirement.

27. Finally, respondent argues that the moral damages claimed by appellant are neither substantial nor quantified.

28. In these conditions, respondent requests the Tribunal to dismiss the appeal in Case No. 2016/1090.

### *(iii) Appellant's contentions in Case No. 2016/1095*

29. In the second appeal, appellant challenges the decision dated 16 December 2016 terminating his employment without LOJ indemnity due to the suppression of his post.

30. Appellant, firstly, recalls that he was not able to sign the offered contract and the corresponding job description, as he considered them to be irregular and not a proper legal basis for a further working relationship with the Organization. In particular, appellant reiterated his arguments about the mandatory deployment clause, and his contention that the additional duties and responsibilities requiring a different set of skills dictated a higher grade. According to the job description of the offered post, the post should be graded B-5 instead of B-4. Hence, he was not offered a position at the grade he previously held. Despite the errors committed in this regard, respondent did not correct them, ignoring the requirements of the CPR and the applicable texts. Appellant adds that NAEW&CF GK did not take into account any of the information that he submitted and terminated his employment on 16 December 2015.

31. Appellant, secondly, asserts entitlement to LOJ indemnity in accordance with CPR Annex V, in connection with termination of his contract. These provisions authorize respondent to award this indemnity to a staff member (i) whose services are terminated

because of (a) the suppression of the budget post occupied by the staff member, or (b) changes in the duties of that budget post of such a nature that he no longer possesses the required qualifications, and (ii) who is not offered a post in the same grade in the same organization. According to appellant, these conditions are fulfilled in his case.

32. Appellant also contends that, according to point 8 b. (3) of the NAEW&C Force Civilian Reorganization System (CRS), his employment should be terminated with payment of loss of job indemnity because of the inclusion of a mandatory deployment clause in his contract.

33. Under the same conditions, appellant considers that his employment should be terminated with payment of loss of job indemnity on the basis of article 4.3 of Annex XIV to the CPR, providing that if a staff member is unable to agree to the terms of a changed post description, and cannot be reassigned or otherwise re-employed, the contract will be terminated with the payment of indemnities and allowances/supplements, as provided in the applicable regulations.

34. Appellant, thirdly, contests respondent's statement that his failure to sign the new contract indicated that he did not wish to continue to work for the Organization. Appellant maintains that he does want to be reinstated in employment, but on the basis of a proper job proposal that corrects the illegal errors that he finds in the offer he received.

35. In addition, appellant argues that the termination of his contract, under the conditions mentioned above, while the pre-litigation proceedings in Case No. 2016/1090 were pending, constitutes an adverse action prohibited by article 5.3.1 of Annex IX to the CPR. According to this provision no individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member. The respondent's decision to terminate appellant's employment during the pre-litigation proceedings is an adverse action within the meaning of this provision. This becomes more obvious because his contract was terminated after 35 years of service.

36. Appellant concludes that his employment was wrongfully and disrespectfully terminated after 35 years of loyal service to the Organization without LOJ indemnity and that this justifies moral damages evaluated at, at least, €3.000.

37. In addition, appellant argues, with reference to Article 5.3.1 of Annex IX to the CPR, that the decision to terminate his employment pending pre-litigation constitutes an adverse action.

38. In these circumstances, appellant requests the Tribunal to:
- annul the decision of termination of his employment dated 16 December 2015;
- find him entitled to loss of job indemnity following this termination;
- compensate him for immaterial and moral damages for a minimum of €3.000; and
- order reimbursement of legal, travel and subsistence costs.

### *(iv) Respondent's contentions in Case No. 2016/1095*

39. Respondent observes, firstly, that the contract was terminated for the sole reason that appellant declined to sign and return the new contract that was offered to him following suppression of his previous post as a result of the NAC approved reorganization of Headquarters NAEW&CF GK.

40. Respondent submits, secondly, that appellant's actions and claims throughout both proceedings are contradictory and duplicated, and only mask appellant's intention to leave the Organization without resigning while trying to create leverage to obtain loss of job indemnity.

41. Respondent stresses, thirdly, that appellant was given an extension of the deadline to return the new countersigned contract (until 30 November 2016, originally due 16 November 2016), thereby granting his request to consult with his attorney. Appellant was duly informed of the consequences of a refusal to sign, *i.e.* termination of contract without LOJ indemnity but with a notice period of 180 days in accordance with the CPR's provisions. Respondent submits also that, absent a response from appellant, it could not but conclude that there was no wish to accept the offer to continue to work with the Organization, rendering the offer null and void. This gave ground for the termination of the existing contract, linked to a post that was suppressed with the re-organization.

42. Respondent stresses, thirdly, that appellant is not eligible for LOJ indemnity, as the CPR's conditions are not met. He was offered a new post with the same grade and in the same Organization in Geilenkirchen, and the changes in his duties were not such that he no longer had the required qualifications. Respondent also observes that, for minor changes in the new job, training was available.

43. Respondent contends that moral damages are neither substantiated nor quantified and, in any case, groundless, since they are the consequence of appellant's contradictory actions. Since appellant is not eligible for the loss of job indemnity, there are no grounds for any damages.

44. In these conditions, respondent requests the Tribunal to dismiss the appeal in Case No. 2016/1095.

## D. Considerations and conclusions

45. As mentioned, the present appeals originate in the major restructuring exercise in the Headquarters NAEW&CF GK required to implement the NAC's decision. In the course of this restructuring, appellant was offered a contract to continue his employment, in the same grade and location as before, but he decided to decline this offer.

46. The two appeals were initiated at different times, reflecting the different legal situations both before and after the appellant's employment was terminated. Accordingly, to some extent they contain different pleas and legal arguments. While they

are sometimes repetitive and complementary, they are also sometimes inconsistent. This raises questions concerning the admissibility of some pleas and arguments.

47. The Tribunal deems it appropriate to adjudicate both appeals at the same time, in order to harmonize as far as possible the resolution of inconsistent pleas and requests for relief. It will accordingly give priority to the arguments on the merits of both appeals.

***On the claim for annulment of the respondent's decision of 16 December 2015 terminating appellant's employment***

48. Firstly, appellant contends that the contract he was offered was unlawful because it included a mandatory deployment clause providing that respondent in its discretion could require him to participate in short- or long-term deployments. This, according to appellant, involved a change in his terms of employment compared to his previous contract.

49. This contention must be rejected. Appellant invokes in general terms an inconsistency with his previous contractual situation, without however specifying how the new deployment clause altered his contractual status. His previous contract before the reorganization had the same deployment clause, which appellant did not contest. Consequently, appellant's submission must be rejected.

50. Appellant also argues that the proposed contract offer violates certain NATO Human Resources management documents, which appellant's counsel invoked also at the hearing, constituted binding legal rules of the same mandatory legal character as the CPR. The Tribunal observes that, through this contention, appellant develops only vague and unsubstantiated reference not capable to identify the specific arguments put forward by him in support of his plea. Consequently, this contention must also be rejected.

51. Appellant secondly argues that respondent transmitted erroneous information to the competent authorities concerning the grading of his new post. Appellant was, in his view, therefore allowed to refuse to sign this contract and consequently the respondent's decision terminating appellant's employment is unlawful.

52. Appellant maintains that, according to the job description of the new contract, the post must be graded B-5 and not B-4. He refers in general terms to the transmission of erroneous information by respondent in the process of grading of this post without however indicating or specifying any flawed element in this respect.

53. Furthermore and in contrast to other disputes concerning the process of determining the grades of the newly created posts during the reorganization, appellant did not contend that respondent downgraded the new post from a higher grade initially proposed. He only considered that, given its job description, the post should be graded B-5 and not B-4.

54. Through this submission, appellant contests the grading of his and other new posts, and in particular the discretion respondent has in this respect.

55. The Tribunal recalls that decisions made in the course of a reorganization, including determining the manpower establishment, are general decisions concerning

posts that are not, or not yet, attributed to individual staff members. Such staff members therefore do not have an actionable right concerning decisions to allocate particular grades to particular posts, and the Organization is not under an obligation to justify its actions and decisions in this respect.

56. However, staff members may challenge the legality of an organization's staffing and grading decisions when challenging an individual administrative decision that directly and adversely affects them, such as the offer of a specific post, but can do so only within the framework of the CPR and established international civil service jurisprudence.

57. Decisions concerning the grading of posts are, in the first instance, within the discretionary powers of the management of a NATO body, whose recommendations are subject to assessment and possible revision by the NATO Defense Manpower Audit Authority (NDMAA). These recommendations, as initially proposed or as subsequently revised, are then subject ultimately to consideration and approval by the NAC.

58. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a decision in the exercise of an organization's discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a grading decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

59. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases.

60. Appellant did not bring forward any concrete argument or evidence to show that respondent, when evaluating proposed job descriptions and grading of posts, did not make considered and nuanced judgments in the exercise of its discretionary powers.

61. The Tribunal observes that during the evaluation of the proposed job descriptions and grading of posts, an apparently serious and coherent process was followed to assess proposals in the context of a changing and downsized environment. It finds that the grading decisions were regularly taken by respondent in the exercise of its discretionary powers, that there was no abuse of such powers and that there is no indication of arbitrariness. In this regard, it is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so.

62. Accordingly, the Tribunal finds that the decision to terminate appellant's appointment was regular. The NAC abolished appellant's old post. He was properly informed of this by the Component. He was also properly advised of the consequences of not countersigning the new job offer, *i.e.* that his employment would be terminated with a notice period but without a loss of job indemnity. The Component went to substantial lengths to guarantee continued employment, which appellant declined. He carries the responsibility for this and must accept the consequences.

63. Consequently, appellant's request in both appeals to annul respondent's decision terminating his employment must be dismissed.

***On loss of job indemnity***

64. Appellant considers that he is entitled to receive a loss of job indemnity. In this regard, he argues that, according to point 1 of Annex V to the CPR, entitled "*Regulations on the indemnity for loss of job",* respondent *"shall have the power to award an indemnity for loss of Employment to any staff member" (…) "whose services are terminated for" (…) "(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;" (…) "and (3) who (a) is not offered a post in the same grade in the same Organization (…)".* Appellant considers that he meets all of these requirements. In addition, appellant claims that he is entitled to a loss of job indemnity also on the basis of other rules.

65. Appellant's submissions regarding loss of job indemnity are based on the premise that the termination of his employment was unlawful due to the assigned wrong grade to the post offer. As indicated in paragraph 61 above, the termination of appellant's employment was regular. Consequently, appellant's submissions regarding the loss of job indemnity based on an illegal termination of his contract because the alleged error must be dismissed.

66. In any event, the Tribunal recalls that appellant was offered a new post in the same grade B-4 as he held before the reorganization.

67. Appellant argues further that the post offered was not in the same organization, and also entitling him to LOJ indemnity. The Tribunal disagrees. It is true that a reorganization was under way, and that some units were replaced with others, but this was, and is, taking place within one of the six Coordinated Organizations, the North Atlantic Treaty Organization. The words "same Organization" in Annex V to the CPR refer to NATO as a whole.

68. Appellant also requests compensation for immaterial and moral damages. The Tribunal points out that, where the alleged damage on which an appellant relies arises from the adoption of a decision whose annulment is sought, the rejection of the claim for annulment entails, as a matter of principle, the rejection of the claim for damages, as those claims are closely linked. The claim for annulment being dismissed, the claim for financial compensation must therefore also be dismissed.

69. Concerning finally the appellant's claim that the termination of his contract was an adverse action, the Tribunal considers that this claim must also be rejected.

70. As the Tribunal held in similar cases, where this claim was introduced with specific reference to Article 5.3.1 of Annex IX to the CPR (*cf.* AT judgment in Cases Nos 2016/1080 and 2016/1092) the latter provision refers to the Complaints Committee and provides that *"[n]o individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member."* There is no doubt that the

scope of this provision does not concern the termination of appellant's employment situation which, as indicated in the present judgment, was in any event in compliance with the CPR.

71. It follows from all the foregoing that the appeals must be dismissed.

## E. Costs

72. 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 […]

73. The appeals being dismissed, no reimbursement of costs is due.

## F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 17 March 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2016)0001

# Order

## Cases Nos 2015/1056 - 1064

**B *et al.***

**Appellants**

***v.***

**Supreme Headquarters Allied Powers Europe**

**Respondent**

Brussels, 7 March 2016

Original: English

*Keywords: Rule 16.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal (Tribunal),

- Considering Cases Nos 2015/1056-1064 B *et al.* scheduled to be heard at NATO Headquarters on 17 March 2016;

- Having regard to the parties' submissions provided in accordance to Order AT(PRE-O)(2016)0005 dated 30 October 2015;

- Considering the letter dated 4 March 2016 received by appellant's representatives;

- Having regard to Rule 16.1 of the Rules of procedure of the Tribunal stating, *inter alia*:

  > 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 the President shall fix […]

**DECIDES**

- To request respondent to advice on the declassification the relevant extracts of the OPLANs referred to in paragraph 21 and footnotes 22 and 23 of the answer (Piece B, pp.196-197) and in paragraph 20 of the rejoinder (Piece D, p.477) and to provide this documentation to the Tribunal by COB 10 March 2016.

Done in Brussels, on 7 March 2016.

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

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

NORTH ATLANTIC TREATY ORGANIZATION
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AT(PRE-O)(2016)0003

# Order

## Case No. 2016/1075

**WW**
**Appellant**

***v.***

**Supreme Allied Command Transformation**
**Respondent**

Brussels, 27 April 2016

Original: English

*Keywords: Rule 10.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Having regard to Chapter XIV of the NATO Civilian Personnel Regulations (CPR) and Annex IX thereto, both issued on 12 May 2013 as Amendment 12 to the CPR;

- Considering the appeal lodged by Mrs WW against the Supreme Allied Command Transformation (ACT) dated 31 March 2016 and registered on 12 April 2016 under Case No. 2016/1075;

- Considering the provisions of the CPR which foresee that appellant must have exhausted all available channels for submitting complaints before submitting an appeal with the present Tribunal;

- Having regard to Rule 10 of the Rules of procedure of the Administrative Tribunal, which provides:

    1. Where the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, he may instruct the Registrar to take no further action on it until the next session of the Tribunal. Such ruling shall suspend all procedural time limits.
    2. After notifying the appellant and considering any additional written views of the appellant, the Tribunal at the next session may either summarily dismiss the appeal as being clearly inadmissible, outside its jurisdiction, or devoid of merit, stating the grounds therefor, or it may decide to proceed with the case in the normal way.

**DECIDES**

- The Registrar is instructed to take no further action on the case until the next session of the Tribunal.
- All procedural time limits are suspended.
- 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.

Done in Brussels, on 27 April 2016.

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

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

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

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AT(PRE-O)(2016)0004

# Order

## Case No. 2016/1072

**PL**

**Appellant**

***v.***

**Joint Force Command Brunssum**

**Respondent**

Brussels, 17 May 2016

Original: English

*Keywords: Rule 10.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Having regard to Chapter XIV of the NATO Civilian Personnel Regulations (CPR) and Annex IX thereto, both issued on 12 May 2013 as Amendment 12 to the CPR;

- Considering the appeal lodged by Mr PL against Joint Force Command Brunssum (JFC BS) dated 3 March 2016 and registered on 11 March 2016 under Case No. 2016/1072;

- Considering the second appeal lodged by Mr PL against JFC BS dated 15 March 2015 and registered on 21 March 2016 under Case No. 2016/1073;

- Considering the submission provided by respondent dated 4 May 2016;

- Recalling Order AT(PRE-O)(2016)0001 dated 29 March 2016 whereby Cases No. 2016/1072 and 2016/1073 were joined;

- Having regard to Rule 10 of the Rules of procedure of the Administrative Tribunal, which provides:

    1. Where the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, he may instruct the Registrar to take no further action on it until the next session of the Tribunal. Such ruling shall suspend all procedural time limits.
    2. After notifying the appellant and considering any additional written views of the appellant, the Tribunal at the next session may either summarily dismiss the appeal as being clearly inadmissible, outside its jurisdiction, or devoid of merit, stating the grounds therefor, or it may decide to proceed with the case in the normal way.

**DECIDES**

With respect to Case No. 2016/1072:

- 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.

With respect to Case No. 2016/1073:

- The request for summary dismissal is denied.
- The proceedings shall resume with the complete answer by respondent to be received not later than 26 May 2016.
- The costs are reserved.

With respect to Order AT(PRE-O)(2016)0001:

- The Order is repealed.

Done in Brussels, on 17 May 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

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AT(PRE-O)(2016)0005

**Order**

**Cases No. 2016/1080 and 2016/1092**

**JH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 10 October 2016

Original: English

*Keywords: joining cases.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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AT(PRE-O)(2016)0005

The President of the NATO Administrative Tribunal,

- Considering that Mr JH submitted an appeal with the NATO Administrative Tribunal (AT) on 3 May 2016 against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), which was registered under Case No. 2016/1080;

- Considering that Mr JH submitted a second appeal with the AT on 23 June 2016 against NAEW&CF GK, which was registered under Case No. 2016/1092;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Cases No. 2016/1080 and No. 2016/1092 are joined.

- Both cases shall be heard once the written procedure in Case No. 2016/1092 is completed.

Done in Brussels, on 10 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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AT(PRE-O)(2016)0006

**Order**

**Cases No. 2016/1081 and 2016/1096**

**JS**

**Appellant**

***v.***

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

**Respondent**

Brussels, 10 October 2016

Original: English

*Keywords: joining cases.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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AT(PRE-O)(2016)0006

The President of the NATO Administrative Tribunal,

- Considering that Mr JS submitted an appeal with the NATO Administrative Tribunal (AT) on 3 May 2016 against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), which was registered under Case No. 2016/1081;

- Considering that Mr JS submitted a second appeal with the AT on 23 June 2016 against NAEW&CF GK, which was registered under Case No. 2016/1096;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Cases No. 2016/1081 and No. 2016/1096 are joined.

- Both cases shall be heard once the written procedure in Case No. 2016/1096 is completed.

Done in Brussels, on 10 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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AT(PRE-O)(2016)0007

**Order**

**Cases No. 2016/1086 and 2016/1093**

**PS**

**Appellant**

***v.***

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

**Respondent**

Brussels, 10 October 2016

Original: English

*Keywords: joining cases.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Considering that Mr PS submitted an appeal with the NATO Administrative Tribunal (AT) on 6 May 2016 against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), which was registered under Case No. 2016/1086;

- Considering that Mr PS submitted a second appeal with the AT on 23 June 2016 against NAEW&CF GK, which was registered under Case No. 2016/1093;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Cases No. 2016/1086 and No. 2016/1093 are joined.

- Both cases shall be heard once the written procedure in Case No. 2016/1093 is completed.

Done in Brussels, on 10 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
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AT(PRE-O)(2016)0008

# Order

## Cases No. 2016/1087 and 2016/1091

**WJ**

**Appellant**

***v.***

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

**Respondent**

Brussels, 10 October 2016

Original: English

*Keywords: joining cases.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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AT(PRE-O)(2016)0008

The President of the NATO Administrative Tribunal,

- Considering that Mr WJ submitted an appeal with the NATO Administrative Tribunal (AT) on 4 May 2016 against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), which was registered under Case No. 2016/1087;

- Considering that Mr WJ submitted a second appeal with the AT on 23 June 2016 against NAEW&CF GK, which was registered under Case No. 2016/1091;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Cases No. 2016/1087 and No. 2016/1091 are joined.

- Both cases shall be heard once the written procedure in Case No. 2016/1091 is completed.

Done in Brussels, on 10 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
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ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2016)0009

# Order

## Cases No. 2016/1089 and 2016/1094

**MB**

**Appellant**

***v.***

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

**Respondent**

Brussels, 10 October 2016

Original: English

*Keywords: joining cases.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Considering that Mr MB submitted an appeal with the NATO Administrative Tribunal (AT) on 4 May 2016 against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), which was registered under Case No. 2016/1089;

- Considering that Mr MB submitted a second appeal with the AT on 23 June 2016 against NAEW&CF GK, which was registered under Case No. 2016/1094;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Cases No. 2016/1089 and No. 2016/1094 are joined.

- Both cases shall be heard once the written procedure in Case No. 2016/1094 is completed.

Done in Brussels, on 10 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2016)0010

# Order

## Cases No. 2016/1090 and 2016/1095

**TH**

**Appellant**

***v.***

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

**Respondent**

Brussels, 10 October 2016

Original: English

*Keywords: joining cases.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Considering that Mr TH submitted an appeal with the NATO Administrative Tribunal (AT) on 4 May 2016 against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), which was registered under Case No. 2016/1090;

- Considering that Mr TH submitted a second appeal with the AT on 23 June 2016 against NAEW&CF GK, which was registered under Case No. 2016/1095;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

**DECIDES**

- Cases No. 2016/1090 and No. 2016/1095 are joined.

- Both cases shall be heard once the written procedure in Case No. 2016/1095 is completed.

Done in Brussels, on 10 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

NORTH ATLANTIC TREATY ORGANIZATION
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ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2016)0011

# Order

## Case No. 2016/1099

**PL**

**Appellant**

***v.***

**Joint Force Command Brunssum**

**Respondent**

Brussels, 13 October 2016

Original: English

*Keywords: Rule 10.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Having regard to Chapter XIV of the NATO Civilian Personnel Regulations (CPR) and Annex IX thereto, both issued on 12 May 2013 as Amendment 12 to the CPR;

- Considering the appeal lodged by Mr PL against Joint Force Command Brunssum (JFC BS) dated 9 October 2016 and registered on 11 October 2016 under Case No. 2016/1099;

- Recalling the Administrative Tribunal's Judgment issued on 26 August 2016, in Case No. 2016/1072 and in particular its paragraphs 12 *ff;*

- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear disputes concerning the legality of a decision taken by the Head of a NATO body;

- Having regard to Rule 10 of the Rules of procedure of the Administrative Tribunal, which provides:

    1. Where the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, he may instruct the Registrar to take no further action on it until the next session of the Tribunal. Such ruling shall suspend all procedural time limits.
    2. After notifying the appellant and considering any additional written views of the appellant, the Tribunal at the next session may either summarily dismiss the appeal as being clearly inadmissible, outside its jurisdiction, or devoid of merit, stating the grounds therefor, or it may decide to proceed with the case in the normal way.

**DECIDES**

- The Registrar is instructed to take no further action on the case until the next session of the Tribunal.
- All procedural time limits are suspended.
- 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.

Done in Brussels, on 13 October 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2016)0012

# Order

## Case No. 2016/1099

**PL**

**Appellant**

***v.***

**Joint Force Command Brunssum**

**Respondent**

Brussels, 8 December 2016

Original: English

*Keywords: withdrawal.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Considering that Mr PL submitted an appeal with the NATO Administrative Tribunal (AT) on 9 October 2016, and registered under Case No. 2016/1099, against the Joint Force Command Brunssum;

- Recalling that the President, by Order AT(PRE-O)(2016)0016 dated 13 October 2016, suspended the proceedings under Rule 10 of the of the AT Rules of procedures;

- Considering that the AT Registrar office received a letter, dated 7 December 2016, from Mr L informing that he decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President "*may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional*";

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

**DECIDES**

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 8 December 2016.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2016)0001

# Order

## Combined Cases Nos 2014/1027 and 2015/1043

**DW**

**Appellant**

***v.***

**NATO International Staff**

**Respondent**

Brussels, 29 January 2016

Original: French

*Keywords: Article 6.8.4a) of Annex IX to the CPR and Article 28 of the Rules of procedure of the Tribunal; request for rectification of clerical and arithmetical mistakes; clerical mistakes; Article 30 of the Rules of procedure; request for clarification of judgment; inadmissibility.*

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This order 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.

## A. Procedure and factual background

1. On 9 November 2015, the NATO Administrative Tribunal (hereinafter "the Tribunal") rendered a judgment in combined Cases Nos 2014/1027 and 2015/1043, in which it firstly rejected the first appeal as inadmissible and secondly partially accepted the requests for annulment made by the appellant in the second appeal (hereinafter "the judgment of 9 November 2015").

2. In a letter dated 24 November 2015, pursuant to the provisions of Article 6.8.4a) of Annex IX to the NATO Civilian Personnel Regulations (CPR) and Article 28 of the Rules of procedure of the Tribunal, the appellant submitted a request for rectification of the clerical or arithmetical mistakes supposedly contained in the judgment. Secondarily, in the same letter, the appellant also asked for the judgment of 9 November 2015 to be clarified, pursuant to Article 30 of the Rules of Procedure of the Tribunal.

3. Regarding this request, in a letter dated 30 November 2015 the Tribunal invited the respondent to provide its comments, referring in particular to the request for clarification of the aforementioned judgment.

4. In a letter dated 2 December 2015, the appellant pointed out that his request was primarily for the clerical and arithmetical mistakes made by the Tribunal to be rectified, and that the request for clarification of the judgment was only secondary.

5. In a submission dated 8 December 2015, the respondent provided its comments on the appellant's requests.

## B. Ruling

6. First of all, as regards the request for rectification of the clerical and arithmetical mistakes which were supposedly made, the Tribunal points out that, pursuant to Article 6.8.4 a) of Annex IX to the CPR, "*the judgments of the Tribunal shall be final and not subject to any type of appeal by either party, except that the Tribunal may be requested by either party within 30 days from the date of the judgment to rectify a clerical or arithmetical mistake in a judgment delivered*".

7. In this respect, pursuant to Article 28 of the Rules of procedure of the Tribunal, "*clerical and arithmetical errors in the judgment may be corrected by the Tribunal on its own initiative or at the request of a party*".

8. Under these provisions, the Tribunal noted on its own initiative, and in agreement with the appellant's request, that the judgment communicated to the parties contained

clerical mistakes and, therefore, that these should be corrected as per Article 6.8.4a) of Annex IX to the CPR, as follows:

- in paragraph 6, "20 September" should read "21 September";
- in paragraph 25, second indent, and paragraph 27, first indent, "second hiérarchique" should read "second recours hiérarchique" [in the French version];
- in paragraph 29, "sur sa demande" should read "sur la demande du requérant" [in the French version];
- in paragraph 38, "17 May 2010" should read "17 March 2010";
- in paragraph 49, "déterminée" should read "indéterminée" [in the French version];
- in paragraph 54, "avril 1010" should read "avril 2010" [in the French version]; and
- in paragraph 119, "article 5.2" should read "article 5.4.2" [in the French version].

9. In his request, the appellant also claims that there was another clerical or arithmetical mistake made in the judgment of 9 November 2015, insofar as paragraph 115 refers to the version of the CPR which came into force on 1 April 2012, when in fact the appellant was recruited on 1 April 2010, as acknowledged by the Tribunal; therefore, the former version of Article 5 of the CPR should apply.

10. With this request, also described as a request for rectification of a clerical or arithmetical mistake, the appellant, in substance and under the pretext of rectifying a clerical or arithmetical mistake, invites the Tribunal to reconsider its interpretation as to whether the version of Article 5 of the CPR which entered into force on 1 April 2012 should apply here.

11. However, with this content, the appellant's request does not constitute a request for rectification of a clerical or arithmetical mistake as per Article 6.8.4a) of Annex IX to the CPR and Article 28 of the Rules of procedure; therefore, it should be dismissed. What the appellant is actually claiming in substance is that the Tribunal made an error of law in the judgment of 9 November 2015, by applying the wrong version of Article 5 of the CPR.

12. In this respect, it is important to stress that the judgments of the Tribunal are final and not subject to any type of appeal by either party.

13. Secondly, regarding the appellant's secondary request for clarification of the judgment, the Tribunal points out that, pursuant to Article 30.1 of the Rules of procedure, "*after a judgment has been rendered, a party may, within three months of the notification of the judgment, request from the Tribunal a clarification of the operative provisions of the judgment*". Paragraph 2 of the same article provides that "*the request for clarification shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent*".

14. In his request, the appellant criticizes the Tribunal for not ruling on one of the aspects of his request, i.e. the conversion of his contract as part of the awarding of a category A post. In this context, the appellant also considers that the Tribunal should clarify why it applied the 1 April 2012 version of Article 5 of the CPR in this case, when the appellant had actually been employed since 1 April 2010 on the basis of several temporary staff contracts.

15. The Tribunal notes that in his request, the appellant does not state (as required as per Article 30.2 of the Rules of Procedure) with sufficient particularity which aspects of the operative provisions of the judgment of 9 November 2015 appear obscure, incomplete or inconsistent and require clarification. The appellant argues in substance that the Tribunal rendered the judgment of 9 November 2015 *infra petita*, claiming once again that the judge made a mistake.

16. Furthermore, the Tribunal points out that the request for the conversion of the appellant's contract was only partially accepted in the judgment of 9 November 2015, and that it was up to the service concerned to take all necessary and appropriate action to implement the judgment.

17. The appellant's request for the judgment of 9 November 2015 to be clarified should therefore be dismissed.

FOR THESE REASONS,

the Tribunal decides that:

- The original of this order shall be annexed to the original of the rectified judgment. A note of the rectification order shall be made in the margin of the original of the rectified judgment.
- The request for clarification of the judgment of 9 November 2015 in combined Cases Nos 2014/1027 and 2015/1043 is dismissed as inadmissible.

Done in Brussels, on 29 January 2016.

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

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

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2016)0002

# Order

## Case No. 2014/1033

**DA**

**Appellant**

***v.***

**NATO Support and Procurement Agency**

**Respondent**

Brussels, 8 April 2016

*Keywords: request for re-hearing.*

Boulevard Léopold III - B-1110 Bruxelles - Belgique
Tel: +32 2 707 38 31 - Bureau/Office: FD 205 – E-mail: mailbox.tribunal@hq.nato.int

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The present Order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos Vassilopoulos, judges.

## A. Factual background

1. On 30 October 2015 the NATO Administrative Tribunal (hereinafter "Tribunal") rendered its judgment in Case No. 2014/1033, dismissing the appeal that Mrs DA submitted against the NATO Support and Procurement Agency (NSPA) on grounds of inadmissibility. The Tribunal recalls that such inadmissibility stems from the parties' responsibility not only to submit an appeal within the prescribed time-limits, but also to check that the appeal has been properly lodged.

2. On 22 December 2015 appellant submitted a request for a re-hearing with reference to the above-mentioned judgment in accordance with Article 6.8.4 of Annex IX to the NATO Civilian Personnel Regulations (CPR). Appellant requests, *inter alia*, to consider the appeal admissible and the Tribunal to dispose on the merits of the case.

3. On 8 February 2016 respondent submitted its comments to the request for a re-hearing. Respondent maintains, *inter alia*, the inadmissibility of the request for revision under the dispositions of Article 6.8.4 of the CPR.

4. On 15 March 2016, the Tribunal Registry has also received a further submission by appellant labeled "*memoire en réplique*". Such further submission has been presented by appellant upon its own motion and as such cannot be admitted.

## B. Considerations

5. Annex IX to the CPR provides that judgments of the Tribunal are final and are not subject to any type of appeal by either party. It follows from this that neither party may enter into a discussion with the Tribunal concerning the latter's reasoning and conclusions. The only exception is that the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment rendered, which is not the case here.

6. Annex IX further provides that either party may petition the Tribunal for a re-hearing. Since Appellant makes a specific reference to Article 6.8.4 of Annex IX, the Tribunal is prepared to consider appellant's letter under this head.

7. Annex IX then stipulates clearly that petitions for a re-hearing may only be made should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment.

8. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature, which existed prior to the judgment and which were unknown at that

time by the Tribunal and by appellant, and which, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. The Tribunal observes, first of all, in this respect that all elements put forward by appellant in her request for revision were known by her at the time of the Tribunal's judgment. Secondly, appellant has not established that these facts were not known by the Tribunal.

9. The Tribunal observes that none of the elements put forward by appellant with a view to a re-hearing constitutes a new fact within the meaning of the above-mentioned provisions of Annex IX and that appellant is, in fact, seeking none other than a re-opening of a debate on the conclusions of the Tribunal, which is at variance with the rule that the Tribunal's judgments are final and not subject to appeal and with the purpose of a re-hearing. The Tribunal therefore concludes that the conditions for a re-hearing of appellant's case have not been met and that the request for a re-hearing must be denied.

## C. Costs

10. As the Tribunal already indicated in its Judgment in Case No. 2014/1033, the Tribunal may only order reimbursement of costs in cases where it is admitted that there were good grounds for the appeal. This not being the case, the submissions under this head must also be dismissed.

## D. Decision

FOR THESE REASONS

The Tribunal decides that:

- The request for a re-hearing is denied.

Done in Brussels, on 8 April 2016.

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

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