JUDGMENTS and ORDERS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2017

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2017

16th session (19 May 2017)

AT-J(2017)0018 Case No. 2016/1101	A	*v.*	NSPA
AT-J(2017)0019 Case No. 2016/1100	N	*v.*	CMRE

17th session (21-22 September 2017)

AT-J(2017)0020 Case No. 2017/1109	S	*v.*	NATO IS
AT-J(2017)0021 Case No. 2017/1106	M	*v.*	NATO IS
AT-J(2017)0022 Case No. 2017/1103	M	*v.*	NCIA
AT-J(2017)0023 Case No. 2017/1104	K	*v.*	AAC Ramstein
AT-J(2017)0024 Case No. 2017/1105	L	*v.*	JFC Brunssum
AT-J(2018)0001 Case No. 2016/1102	G	*v.*	NCIA

18th session (15 December 2017)

AT-J(2018)0002 Case No. 2017/1113	F	*v.*	NAEW&CG GK
AT-J(2018)0003 Case No. 2017/1111	B	*v.*	NCIA

Orders of the NATO Administrative Tribunal

2017

AT(PRE-O)(2017)0001 Case No. 2017/1105	L	*v.*	JFC Brunssum
AT(PRE-O)(2017)0002 Cases Nos 2017/1107-1110	N	*v.*	NSPA
AT(PRE-O)(2017)0003 Cases Nos 2017/1127-1242	A *et al*	*v.*	NATO IS

AT(PRE-O)(2017)0003 Cases Nos 2017/1107-1110	N	*v.*	NSPA
AT(PRE-O)(2017)0004 Case No. 2017/1108	K	*v.*	NSPA
AT(PRE-O)(2017)0005 Cases Nos 2017/1107-1110	N	*v.*	NSPA
AT(PRE-O)(2018)0001 Case No. 2017/1246	D	*v.*	CMRE

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

4 July 2017 AT-J(2017)0018

Judgment

Case No. 2016/1101

SA

Appellant

v.

NATO Support Agency

Respondent

Brussels, 26 June 2017

Original: French

Keywords: invalidity; Invalidity Board; disagreement between the first two medical practitioners; obligation of the Administration; referral of the nomination of the third medical practitioner to the President of the Administrative Tribunal (vi of Article 13 of Annex IV to the CPR).

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 19 May 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 17 November 2016 and registered on 1 December 2016, by Mrs SA, seeking:

- annulment of the decision of 5 August 2016 whereby the General Manager of the NATO Support Agency (NSPA) closed the invalidity proceedings that she had requested on 14 October 2015;
- annulment of the decision of 19 August 2016 whereby the NSPA Human Resources Division Chief took the decision on separation;
- compensation for non-material damage suffered, assessed at €20.000;
- an order for NSPA to pay costs.

2. The comments of the respondent, produced by NSPA on 27 January 2017, were registered on 7 February 2017. The reply of the appellant, dated 9 March 2017, was registered on 16 March 2017. The respondent stated on 18 April 2017 that it was not submitting a rejoinder.

3. The Tribunal's Panel held an oral hearing at NATO Headquarters on 19 May 2017. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

4. Mrs A joined NAMSA, which subsequently became NSPA, in February 2003. She was employed on definite duration contracts from 2003 to 2011 before signing an indefinite duration contract as a senior clerk (grade B-3) on 18 July 2011.

5. The appellant was raising three young children that she had had very close together. To balance the demands of her career and her home life, she requested and was authorized to work part-time starting in 2012. These authorizations were granted again in 2013 and 2014.

6. Owing to reorganizations of the Agency that employed her, the appellant was informed on 5 July 2013 of the possibility that her post would be deleted, and thus her contract terminated, effective 31 December 2014. This intention was confirmed in a letter by the Human Resources Division Chief dated 5 May 2014. The appellant then applied to other posts at NATO, SHAPE and NSPA, where an indefinite duration contract was offered to her on 18 November 2014, effective 1 January 2015.

7. In parallel, a major event in her private life indirectly changed her working conditions. The appellant's husband was appointed to SHAPE and transferred to Mons, Belgium in February 2014. The appellant decided to move to Belgium, 180 km from her place of employment at NSPA in Capellen, Luxembourg. This meant daily long journeys for her to get to work: four hours of driving each day.

8. The appellant was placed on sick leave in July 2014, following which she was continually on sick leave and then extended sick leave from 19 August 2014 to 18 August 2016, the date when NSPA's termination of her contract became final.

9. In the summer of 2014, disciplinary proceedings were initiated against the appellant on the grounds that she had been fraudulently using the office time-clocking system to get paid for hours that she had not worked. The appellant never appeared before the Disciplinary Board for health reasons, and the proceedings did not come to a successful conclusion. In any event, those proceedings have no bearing on the case before the Tribunal.

10. In a letter dated 13 October 2015, NSPA informed the appellant that it intended to terminate her contract if she submitted another medical certificate extending her unfitness to resume working beyond 1 November.

11. On 14 October 2015, while she was on extended sick leave, the appellant requested that the Administration convene the Invalidity Board in accordance with Article 13 of Annex IV to the Civilian Personnel Regulations (CPR) with a view to being recognized as suffering from permanent invalidity. But owing to disagreements between the Administration's designated medical practitioner and the medical practitioners proposed in turn by the appellant, in particular regarding the choice of the third medical practitioner and where to hold the Board's meeting, it was never possible to convene this Board.

12. On 6 November 2015, the General Manager informed the appellant of his decision to terminate her contract, noting that separation would become effective once one of the conditions in Article 45.7.1 was met.

13. On 5 August 2016, the NSPA General Manager informed the appellant that the case associated with her request to convene an Invalidity Board – which could never be formed owing to failures on the part of the staff member's appointed medical practitioner – was being closed. On 12 August 2016, the appellant invited NSPA to rescind its decision. Then on 5 September 2016, the appellant lodged a complaint against the decision of 5 August 2016. NSPA dismissed this complaint on 19 September 2016.

14. On 17 November 2016, the appellant submitted her appeal to the NATO Administrative Tribunal seeking annulment of the decision of 5 August, which was confirmed on 19 September 2016.

15. In the meantime, the NSPA Human Resources Division Chief wrote to the appellant on 19 August 2016 to tell her that her separation had become effective the previous day, at the end of the period of 21 months of extended sick leave foreseen in Article 47 of the

CPR. In her appeal to the Tribunal, the appellant is also seeking annulment of that decision.

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

(i) The appellant's main contentions

16. The appellant puts forward three arguments.

17. Firstly, she argues that the decision to close the invalidity proceedings violated Article 13 of Annex IV to the CPR. In her view, the third medical practitioner should have been appointed by the President of the Administrative Tribunal, at the request of one of the parties. The Administration, observing the difficulty the two medical practitioners chosen by the Administration and by the staff member respectively were having in finding common ground, did not have the authority to unilaterally close the proceedings but rather should have referred the matter to the President of the Tribunal and allow him to designate the third physician forming the Invalidity Board.

18. The appellant puts forward another argument regarding the composition of the Invalidity Board. She disputes the Administration's choice of Dr K, whose impartiality she calls into question because that doctor's wife had been treating her. The appellant notes her suspicion of Dr K's being biased because he would have had access, through his wife, to information that was unfavourable to her.

19. Secondly, the appellant claims that the Administration could not observe the elapsing of the 21-month period of extended sick leave because it had not completed the previous step, *i.e.* the convening of an Invalidity Board. By doing so, the Administration was violating Articles 9 and 45.7 of the CPR.

20. Thirdly, the appellant maintains that the Administration violated the principle of good administration and the duty of care. She criticizes the Administration for not having been attentive to her at a time when she was in a fragile psychological state, and bases this assertion mainly on the medical examinations that the Administration had her undergo during her two years' sick leave and extended sick leave.

21. Based on these illegalities, the appellant is seeking compensation for the non-material damage she suffered, which she assesses at €20.000.

(ii) The respondent's main contentions

22. To begin with, the respondent objects to the admissibility of the submissions in the appeal against the decision of 19 August 2016. In its view, the decision to terminate the contract had already been taken and notified to the staff member on 6 November 2015, and she was told that the separation would become effective when one of the conditions in Article 45.7.3 of the CPR had been met. The appellant is therefore time-barred from challenging that decision.

23. Next NSPA argues that the long duration of the invalidity proceedings was the result of the delaying tactics of the appellant, who had never designated a medical practitioner who agreed to the conditions in which the Invalidity Board should sit, *i.e.* in Luxembourg at NSPA Headquarters. The Administration recalled that its designated medical practitioner had even agreed for the appellant's medical practitioner to participate via video teleconferencing from Brussels. But the circumstance of the appellant's not agreeing that the third medical practitioner should come to Luxembourg kept the Board from being formed. NSPA considers that it showed great concern for the appellant by exploring many possible solutions for setting up the Invalidity Board, which did not work out because of obstruction by the appellant.

24. The Administration goes on to explain that the end of the appellant's employment is dictated by Article 45.7.1, which provides for a maximum period of 21 months' extended sick leave. This 21-month period expired on 18 August 2016, and the Administration therefore had a mandatory duty to remind the appellant of that time limit – which was the latest of those provided for in the CPR – for setting the date of entry into force of the decision on separation, which had already been taken and notified to the appellant on 6 November 2015.

25. Finally, the respondent denies that the appellant suffered any non-material damage; any damage was the result of her behaviour alone.

D. Considerations and conclusions

(i) On the admissibility of the submissions:

26. The decision of 19 August 2016 was taken by the Human Resources Division Chief, not by the Agency's General Manager. It was not covered by the administrative appeal procedures required by the CPR or the case law of the Tribunal. But in any event, the request to annul the decision on termination is time-barred. The letter of 19 August 2016 is merely a reminder of the substance of a decision taken earlier, on 6 November 2015. It is the November 2015 decision that the appellant should have challenged, since it is that decision which was terminating her contract under Article 45.7.1 of the CPR even if the decision would only enter into force later, on the date when one of the conditions in that article was met. The letter of 19 August 2016 serves only to confirm that the period had elapsed and that one of the conditions had been met: expiry of the maximum of 21 months' extended sick leave.

27. The submissions in the appeal directed against the decision of 19 August 2016 are therefore rejected as inadmissible.

28. However, the decision of 5 August 2016 ending the procedure for convening the Invalidity Board is a decision that constitutes grounds for grievance. Its corollary is that the request for an invalidity pension is prevented from ever being heard and therefore granted. It can be regarded as a refusal to grant the invalidity pension and is damaging to the appellant, who is therefore justified in challenging it before the Tribunal, which she did after using the pre-litigation formalities foreseen in the CPR.

(ii) On the legality of the decision

29. Invalidity pensions are governed by Chapter III of Annex IV to the CPR. Under Article 1 thereof:

> Subject to the provisions of Article 2, an invalidity pension shall be payable to a staff member who is under the age limit laid down in the Staff Regulations and who, at any time during the period in which pension rights are accruing to him, is recognized by the Invalidity Board defined below to be suffering from permanent invalidity which totally prevents him from performing his job or any duties proposed to him by the Organization corresponding to his experience and qualifications.

30. Article 2 sets out the composition of the Board:

> The Invalidity Board shall consist of three medical practitioners, the first two being appointed by the Organization and the staff member, respectively, and the third one selected jointly by the first two. Cases shall be submitted to it by the Organization either on its own initiative or at the request of the staff member concerned.

31. It is a fact that the medical practitioner designated by the Organization and the medical practitioners selected in turn by the staff member never managed to agree on the third medical practitioner who would complete the Board. Firstly, the medical practitioner initially named by the staff member took many weeks to propose a colleague. The Organization's and the staff member's medical practitioners spent a long time quarrelling over where the Board should meet, in Luxembourg or in Brussels, with neither agreeing to travel to the city suggested by the other. The appellant then changed medical practitioner, but again no agreement could be reached because the second and third medical practitioners refused to meet at NSPA Headquarters as the Administration's medical practitioner demanded.

32. The CPR contains provisions for resolving such a deadlock. Under Paragraph vi) of Article 13.3 of Annex IV to the CPR:

> The third medical practitioner shall be selected by the other two within 30 calendar days at the most following notification of their names to the parties; failing agreement on this nomination within the prescribed time, the Chairman of the Appeals Board/Administrative Tribunal shall nominate, at the request of either party, this third medical practitioner in accordance with the procedure set out in the above sub-paragraph.

33. It is a fact that neither of the parties referred this deadlock to the President of the Administrative Tribunal or asked him to exercise the authority conferred by Paragraph vi) of Article 13.3 of Annex IV to the CPR.

34. Faced with the impossibility of the third medical practitioner's being selected by mutual agreement between the other two, the Administration had an obligation to refer this matter to the President of the Administrative Tribunal and could not take the decision to close the invalidity proceedings without the Invalidity Board's having met. By deciding to halt the invalidity proceedings requested by the appellant, the Administration closed

off all the channels available to the appellant for being recognized as suffering from invalidity, which it did not have the authority to decide to do.

35. The NSPA General Manager's decision of 5 August 2016 is therefore annulled.

36. It is therefore for the NSPA to resume examining the appellant's request for her permanent invalidity to be recognized and therefore to convene the Invalidity Board. This Board is to be set up in accordance with Article 13 of Annex IV to the CPR. Unless unanimously agreed by the three medical practitioners making up the Board, it shall meet in the premises of the Organization that employed the staff member at the time of her request. Any requests for recusal or withdrawal by one of the medical practitioners cannot constitute grounds for one of them to refuse to form the Board; such requests are discussed by the Board itself once it has been formed.

(iii) On the request for compensation for damage:

37. Although one of the two decisions for which the appellant is seeking annulment is being annulled by the present judgment, she has not established any non-material damage she suffered as a result of it. In particular, the difficulties in forming the Board and the hold-ups in the proceedings are largely the result of the delaying tactics employed by the appellant's designated medical practitioners in response to the Administration's attempts to form the Invalidity Board.

38. The submissions seeking compensation for non-material damage are therefore rejected.

E. Costs

39. 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 [...].

40. Given that there were good grounds for most of the submissions in Mrs A' appeal, it is appropriate to reimburse her for the costs she incurred for her defence. NSPA shall therefore reimburse her for the costs of retaining counsel, up to a limit of €4.000. The appellant did not attend the hearing, so she may not claim any travel or subsistence costs.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 5 August 2016 whereby the NSPA General Manager closed the invalidity proceedings that the appellant had requested on 14 October 2015 is annulled.
- NSPA shall therefore reimburse the appellant for the costs of retaining counsel, up to a limit of €4.000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 26 June 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

14 July 2017 AT-J(2017)0019

Judgment

Case No. 2016/1100

PN

Appellant

v.

Centre For Maritime Research and Experimentation

Respondent

Brussels,11 July 2017

Original: English

Keywords: redundancy; priority status for vacant posts.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 19 May 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the Centre for Maritime Research and Experimentation (CMRE), dated 9 November 2016, and registered on 24 November 2016 as Case No. 2016/1100, by Mr PN seeking, *inter alia*, the annulment of the Director's decision not to consider him as a redundant staff member in relation to a specific vacant post.

2. The respondent's answer, dated 1 February 2017, was registered on 7 February 2017. By letter AT(REG)(2017)0027 dated 7 March 2017, appellant was informed that the Tribunal accepted his request to extend the time limits of the procedure with regard to the submission of the reply. The appellant's reply, dated 23 March 2017, was registered on 27 March 2017. The respondent's rejoinder, dated 26 April 2017, was registered on the following day.

3. The Panel held an oral hearing on 19 May 2017 at NATO Headquarters. 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. Appellant, a former A-3 staff member at the CMRE, joined the Organization in March 1996 and covered different scientific posts under a succession of definite duration contracts.

5. On 7 October 2015, appellant was informed that his contract would not be renewed following its expiration on 4 September 2016.

6. On 19 February 2016, appellant submitted an application for a vacant position, which was circulated to internal staff and, on 16 June, he was informed that he had not been selected for further consideration to that post.

7. On 14 July 2016, appellant introduced a request for administrative review with the acting Head of Personnel and Administration Department, which was rejected on 25 July 2016. Appellant was informed at the same time that the decision had been taken by the Director of the Centre.

8. On 23 August 2016, appellant introduced a complaint with the CMRE Director, which was rejected on 7 September 2016.

9. On 9 November 2016, appellant submitted the present appeal.

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

(i) Appellant's contentions

10. Appellant challenges the decision of the CMRE Director not to consider him as a redundant staff member in relation to a vacant post he applied for.

11. Appellant contends that Articles 57.1 and 57.2 of the NATO Civilian Personnel Regulations (CPR) were violated with respect to his application for a post in the same NATO body and at the same grade as the one he currently held, in particular as the Centre ignored his priority status as a redundant staff member.

12. Appellant believes he meets the requirements for the vacant job and rejects respondent's assessments that he was not fully qualified for it. Appellant underscores, *inter alia*, that during his 20-year career in the Centre he covered different positions all in the domain of underwater warfare, hence disagreeing about the lack of expertise in the required research area. In addition, appellant affirms he was never informed that he was not qualified but simply that his application was not being given further consideration and that he was not invited to an interview to evaluate his suitability for the post.

13. Appellant also contends that the Centre did not comply with its duty of care and good administration as it did not do all it could to reassign him to another position, and also possibly consider his suitability for positions of a lower grade. Moreover, appellant notes that the Centre published another post, matching his qualifications and with a job description very similar to the one he applied for, just after he had left the Centre following a new contract offer by another international organization.

14. Appellant argues that the Centre committed a manifest error of appreciation by terminating his contract instead of appointing him to the vacant posts.

15. Further in the proceedings, appellant also contends the validity of the succession of contracts he was offered for 20 years, stating that he should have been awarded an indefinite duration contract. Appellant takes this into account for the evaluation of his financial prejudice, which, together with the insurance and pension benefits (minus the loss-of-job indemnity he received and the income from his current job), amounts to €365.662,60, plus €40.000 for the non-material damage to all his family. However, during the hearing appellant withdrew the added submissions.

16. Appellant requests the Tribunal:
- to annul the Centre's decision not to further consider his application as a redundant staff member;
- to compensate for the material and non-material damages incurred; and
- to reimburse his legal, travel and subsistence costs.

(ii) Respondent's contentions

17. Respondent states that appellant was fully considered and was given preferential treatment in the review of his application. It points out that the official application deadline for the position was 19 February 2016 and that on 16 June 2016, appellant was already informed about the status of his candidature.

18. Respondent adds that no candidates were finally selected for the position, as the recruiting process had been stopped due to a review of the CMRE's Programme of Work dictated by the requirements of the Centre's customers. Respondent points out that appellant was informed of this review by the Director in his letter dated 9 September 2016; it also adds that the position has not been filled yet and considers the appeal moot.

19. Respondent further remarks that, following the review, a new amended vacancy was advertised, for which appellant did not apply. Respondent explains that the two positions were needed due to a change in managerial decisions on how to allocate the internal resources. Respondent justifies the similarities of the post descriptions by the necessity to maintain for scientific posts a certain level of flexibility with regard to the tasks assigned to scientists.

20. Concerning appellant's suitability for the position he applied for, and for which he considered himself automatically fully qualified, respondents stresses i) that the new post required operational experience and commercially oriented skills which appellant was found not to possess; ii) that different work packages were assigned; and iii) that the posts covered two significantly different areas, one fundamental research and the second applied research.

21. Further, concerning the violation of Article 57.2 of the CPR, respondent rejects the allegation. It notes that the regulations' provision is further implemented in the procedural arrangements of the clearing house, which apply to staff members falling under specific conditions. It adds that while initially non-renewals of contracts were not included, the NATO Council decided at a later stage that turnover of staff for political or technical reasons after at least 10 years of service would be likened to the reasons set out in the regulations and arrangements, hence entitling redundant staff members to benefit from the clearing house. In the light of this, and notwithstanding the fact that appellant was indeed given preferential treatment, respondent questions whether he was actually eligible considering that research posts in scientific establishments were not clearly referred to in the Council's decision. In addition, respondent cites previous Appeals Board case-law stating that a clearing house process does not automatically entail the right to a new job, as the candidate must still be found to be qualified and suitable for the position he applied for.

22. Respondent remarks that appellant was however invited to apply for the position through the normal application process, which he did not do; that he did not pursue an offer for a position in Portugal; and that he did not apply for the revised new position, which was advertised after the review. Respondent therefore doubts appellant's real intention to continue employment with NATO. Respondent also refers to some e-mail exchanges appellant had with the administration regarding the assurances of his benefits

and the loss of job indemnity – which he would have not received had he continued employment with the Organization.

23. Respondent rejects the financial claim arguing that even if appellant's application had not been handled in accordance with the process, this would amount to a "loss of chance", which would not cover all full benefits of the contract that appellant would have received if he had been appointed to the position. It also rejects the non-material damage to him and his family, as this is covered by the benefits he enjoyed at NATO and certainly with his new employer, being an international organization offering similar packages to NATO's.

24. Respondent rejects any claim regarding the validity of the succession of contracts, stressing that they are not part of the present appeal and that they are in any case time-barred as appellant's last contract renewal dates back to 2015.

25. Respondent requests the Tribunal to declare the appeal without merit.

D. Considerations and conclusions

26. After clarifying his request at the hearing, appellant challenges the decision by the CMRE not to retain his candidacy for a vacant post. Appellant suggests that the Organization should have considered his right to the benefits granted to redundant staff.

27. Article 57.2 of the CPR establishes:

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

For this provision to apply, three conditions must be fulfilled: first, a staff member must become redundant; second, such a staff member has priority to apply for vacant posts before any recruitment; and third, the applicant may only apply for posts of the same grade (see AT Judgment in Case No. 2014/1028, paragraph 46).

28. But it is also provided in Article 57.3 of the CPR that:

> In selecting members of the staff to fill vacant posts, account will be taken of their professional qualifications, performance record and experience.

29. Interpreting both paragraphs of the same Article, the Tribunal states that the privilege of redundant staff is clearly conditioned by the fact that the candidate must meet the professional qualifications required by the position. The awarded privilege consists in accepting the candidature – as well as examining it and implementing the ensuing procedure - before applications from candidates who do not meet that characteristic. But it does not follow from the legal framework that a redundant staff member must remain in the Organization whenever a new position is opened. Respondent only had the obligation to give priority consideration to appellant's application, not to accept it. Indeed,

this provision does not give those concerned any preferential treatment in terms of access to vacant posts of their grade but confers only a procedural advantage by requiring respondent to consider their candidature for such posts before other recruitment is put in hand (see NATO Appeals Board Decisions nos. 141, 142, 161 (b)-168, 306, 725 and 882).

30. Despite the discussion on whether scientific staff falls under the scope of Article 57.2 of the CPR, the truth is that it follows from the file that appellant's candidature was taken on board and examined as the candidature of any other redundant staff member would have been. Thus, the privileges provided by Article 57.2 of the CPR were not denied. Appellant considers that CMRE's exclusion of his candidacy contravenes his redundant status. However, no other candidate was considered, and the requirement for giving priority consideration to appellant's candidature was not circumvented.

31. What happened was that appellant did not pass the qualification steps, on the grounds of his unsuitability. According to the substantial submission of the appeal, appellant should have been accepted with disregard for the evaluation of his merits and the requirements of the job description. At this point the Tribunal needs to underline that in his appeal, the evaluation of appellant's qualification is not challenged, and nor is the scarce motivation of the decision. These issues therefore fall outside the scope of the current appeal, and the Tribunal is unable to judge them.

32. Therefore, Article 57.2 of the CPR was rightly implemented since it does not oblige the Organization to relocate the redundant staff at all costs. The rights conferred by the rules are limited to: priority, existence of vacant post and requisite qualifications. Appellant cannot apply for an inexistent suitable position, nor can he expect to avoid the managerial powers of the Organization to design new jobs and advertise further new positions.

33. The claim must be rejected.

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

35. Consequently, the appeal is dismissed as a whole.

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.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed

Done in Brussels, on 11 July 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

7 November 2017 AT-J(2017)0020

Judgment

Case No. 2017/1109

MS

Appellant

v.

NATO International Staff

Respondent

Brussels, 31 October 2017

Original: English

Keywords: education allowance; post-secondary level education; discrimination; discretion.

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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 21 September 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal against the NATO International Secretariat dated 7 April 2017, and registered on 10 April 2017 as Case No. 2017/1109, by Mr MS contesting, *inter alia*, the Organization's refusal to authorize education allowance in respect of the post-secondary education expenses of his son.

2. The respondent's answer, dated 7 June 2017, was registered on 9 June 2017. The appellant's reply, dated 11 July 2017, was registered on 12 July 2017. The respondent's rejoinder, dated 31 July 2017, was registered on 10 August 2017.

3. The Panel held an oral hearing on 21 September 2017 at NATO Headquarters. It heard appellant's statement and 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. The background and material facts of the case may be summarized as follows.

5. Article 30 and Annex III.C of the NATO Civilian Personnel Regulations ("CPR") authorize a system of education allowances for the dependent children of NATO staff members entitled to expatriation allowance. Article 1(b) of CPR Annex III.C provides that such staff members may request reimbursement of education costs:

> in respect of children at post secondary-level of education for studies carried out in the country of which the staff member or the child's other parent is a national or in the duty country. If duly justified by the staff member, for reasons of continuity in following an educational cycle or if educational costs are lower in a third country, an exception to the rule can be granted by the Secretary/Director-General of the Coordinated Organization concerned.

6. NATO's Revised internal guidelines on the education allowance (AP-WP (2011)0008-FINAL) state that "*If a broadly similar degree or qualification is not available in another country where the staff member would be able to claim education allowance, then the claim should be allowed.*"

7. Appellant, an Italian national, has been a member of the NATO International Staff since 2005. Appellant's spouse is also an Italian national. Appellant's current duty station is in Belgium.

8. Appellant's son, who was born in 1997, began his education in English in the United States because his father was then assigned to duty in that country. He then completed his primary and secondary school education in English in British and International schools. NATO reimbursed appellant for the associated expenses in accordance with the relevant CPR provisions.

9. For the academic year 2015-2016, appellant's son began courses in Electronic and Information Engineering at Imperial College London. Appellant represented that admission to this program is highly competitive, and only a few applicants are accepted. By letter dated 1 Sept. 2015, appellant requested that NATO pay education allowance in respect of his son's expenses. Appellant's request indicated that the Information Engineering program at Imperial College afforded "*basic continuity*" and a "*natural and logical continuation*" of his son's studies, and that universities in Belgium and Italy do not offer suitable courses taught in English.

10. By letter dated 10 December 2015, respondent rejected this request, indicating that Article 1(b) of Annex III.C did not apply because appellant's son was "*embarking on a new educational cycle*." Respondent's letter also pointed out that fees were much higher in the United Kingdom than in Belgium or Italy, and that similar courses were available at institutions in those countries.

11. Appellant lodged a request for administrative review on 18 December 2015. Respondent rejected this request on 8 January 2016.

12. Appellant lodged a further request for administrative review on 26 January 2016. Appellant contended in this request that the difference in cost between his son's program in the United Kingdom and the alternative programs cited by the Organization in Belgium and Italy was about €8.000. He offered to pay this amount if respondent would pay education allowance in respect of the balance. Respondent rejected this second request on 18 February 2016.

13. Appellant lodged a complaint against this denial on 15 March 2016 and requested that a Complaints Committee be constituted in accordance with Article 4.2 of CPR Annex IX.

14. The 3 October 2016 report of the Complaints Committee concluded that "*if the CPRs were to be applied*" respondent's initial decision and its rejection of appellant's appeals "*were valid*." However, the report also referred to a "*precedent*" set in another recent case involving another staff member. The report suggested that, as with the other case, appellant's situation could be seen as "*one of a kind*" justifying consideration of awarding education allowance.

15. On 9 February 2017, the Deputy Secretary General, having considered the report of the Complaint's Committee, rejected appellant's complaint.

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

(i) The appellant's contentions

16. Appellant contends that the claim is admissible, as he satisfied the appeals procedure established by Annex IX of the CPR, and the present appeal was filed within 60 days of the 9 February 2017 rejection of his complaint.

17. As to the merits, appellant's reply and his counsel at the hearing clarified that his request for the education allowance "*was not based on the possible continuity in following an educational cycle. It was mainly motivated by the absence of equivalent studies (in their content and in the language of studies) available either in Belgium or Italy*."

18. Appellant first contends that the contested decision was contrary to Article 5.2.5 of CPR Annex IX, as respondent's decision rejecting the report of the Complaints Committee was not taken within 30 days as required by that provision and, moreover, was taken by "*an incompetent authority*," the Deputy Secretary General, and not by the Secretary General.

19. Appellant's second argument is that the contested decision violated Article 30.1 of the CPR and related internal guidelines, in particular through a manifest error of assessment in comparing the son's course of study in England with the alternatives cited by respondent.

20. Appellant advances two supporting lines of argument regarding the lack of equivalent programs of study. He first contends that, as his son's education through his schooling to date has been in English, it is necessary that he continue his studies in English.

21. Next, appellant stresses that his son's course of study is in Electronic and Information Engineering, and not Electronic Engineering. He urges that there are fundamental differences between the emphasis on computer- and software-engineering in the first two years of his son's course of study in the United Kingdom, and a more broadly oriented electrical engineering curriculum in these years at the Belgian university proposed by respondent as an alternative. Appellant acknowledges that beginning in the third year of a four-year degree program, the Belgian university offers some modules of instruction comparable to those available in the UK program, but contends that the Belgian program does not include significant subjects, including computer architecture, networks and distributed systems, and databases.

22. Appellant also appears to contend that Article 2.1(a) of CPR Annex III.C authorizes payment of education allowance here. This provision allows staff members not otherwise authorized to receive education allowance to do so by way of exception "*in the duty country if no school or university corresponding to the child's education cycle is available within 80 km distance from the official's duty station or home*." Appellant does not clarify how this provision is relevant in respect of the facts of this case.

23. Appellant urges that respondent's rules related the education allowance, and in particular for determining whether degree programs are similar, should be administered

flexibly and "*with an open mind*" in light of the concerns of expatriate staff members. Respondent's failure to do so is said to reflect a manifest error of assessment accompanied by a failure to state reasons.

24. Appellant contends that the Complaints Committee and the respondent both erred "*in considering that there would be comparable studies to those followed by the Appellant's son, in Belgium or Italy*." Instead, appellant contends that, given the differences between the English and Belgian programs, no program "*broadly similar*" to his son's in the United Kingdom is available, and that the failure to recognize this reflects a manifest error of assessment. Further, appellant contends that respondent failed to provide reasons for its contested decisions.

25. Appellant's third head of argument is that respondent violated Article 1(b) of CPR Annex III.C, which authorizes education allowance if actual educational costs are lower in a third country. In this regard, appellant renewed his contention that the degree programs identified by respondent in Belgium and Italy are not appropriate comparisons. For appellant, "*the only comparable degree is the one from the MIT (Boston, United States of America)*." This is said to be more expensive than appellant's son's English degree program, so that failure to take this into account led to an incorrect decision contrary to Article 1(b) of Annex III.C. Appellant again further contends that respondent failed to meet its duty to state reasons in this regard.

26. Finally, appellant contends that respondent's actions were discriminatory, as exceptions were granted to other staff members in similar situations. Appellant here cites jurisprudence of the ILO Administrative Tribunal indicating that in applying their written rules, it must do so in accordance with any existing consistent practice.

27. Appellant requests:
- annulment of the 10 December 2015 decision rejecting his request that his son's education allowance be paid and tailored in accordance to the Implementing Directive on the Education Allowance;
- annulment of the 9 February 2017 decision rejecting the Appellant's complaint dated 15 March 2016 against that decision;
- reimbursement of all legal costs incurred and fees of the retained legal counsels.

(ii) The respondent's contentions

28. Respondent "*has no observations with regard to*" admissibility of the appeal.

29. With regard to appellant's claims of procedural defects in making the contested decision, respondent characterizes as regrettable the delay between receipt of the Complaints Committee report and the Deputy Secretary General's decision. Respondent maintains, however, that the delay reflected extensive coordination required by the case, and in any event did not affect the contested decision's validity or outcome. Respondent also observes that the Secretary General designated the Deputy Secretary to decide appellant's complaint.

30. On the merits, respondent contends that the CPR do not authorize payment of education allowance in the circumstances here. Respondent recalls that, under Article

1.1(b) of Annex III.C, the general rule is that education allowance can be paid in respect of post-secondary expenses only in the duty country or in the country of which a staff member, or the child's other parent, is a national. This provision also gives the Head of a NATO body discretionary authority to grant exceptions authorizing education allowance in only two situations: "*for reasons of continuity in following an educational cycle*" or if educational costs in a third country are lower.

31. In respondent's view, appellant does not satisfy the first exception. Citing NATO Appeals Board Decision No. 836 of 14 December 2011, respondent maintains that commencing post-secondary studies of Electronic and Information Engineering at Imperial College London does not involve "*continuity in following an educational cycle*." Instead, it rather marks the initiation of a separate course of post-secondary education.

32. Respondent also denies that the second exception applies, as education costs in the United Kingdom were higher than in Italy or Belgium. Respondent notes that appellant acknowledges this, and indeed offered to pay the difference to cover the higher costs at University College London. Respondent maintains, however, that the CPR do not authorize such an arrangement and that allowing it would effectively deprive the second exception under Article 1(b) of Annex III.C of meaning.

33. Respondent disputes appellant's contention that the English language engineering courses available in Belgium and Italy are not sufficiently similar to appellant's son's course of study at University College London. Respondent urges that the English-language electrical engineering program at KU Leuven, "*leads to a qualification comparable to the degree offered at Imperial College.*" Further, "*demanding a strict similarity*" of programs in different countries "*would lead to an unreasonable result as it would result in the allowance to be always paid.*"

34. Citing jurisprudence of the ILO Administrative Tribunal, respondent contends that under international administrative law, where decisions to award optional benefits are left to an organization's discretion, the relevant decisions are for the organization alone. Respondent also denies the applicability of Article 2.1(a) of Annex III.C, citing decisions of the Appeals Board said to show that this provision applies to certain non-expatriate staff, as well as recalling the history of the provision, which was said to be a special exception made for Luxembourg,

35. With respect to appellant's claim of discrimination, respondent maintains that other cases cited by appellant in which allowance has been granted (including a case cited by the Complaints Committee) involved facts substantially different from those presented here.

36. Respondent requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

37. The appellant pursued the pre-litigation dispute settlement procedure as provided in CPR Annex IX and filed this appeal in a timely manner. Respondent has no observations regarding admissibility. The claim is admissible.

38. The proceedings clarified that certain issues raised in the initial stages of the written procedure were not in dispute. Given the clarification that appellant does not claim based on the need for "*continuity of educational cycles*" the Tribunal need not consider this issue and makes no decision in this regard. Further, there is no dispute regarding the need for appellant's son's instruction to be in English; both parties acknowledge that instruction should be in English.

39. Appellant first alleges that the contested decision was not taken within 30 days of receipt of the Complaints Committee report, contrary to Article 5.2.5 of CPR Annex IX. Further, appellant alleges that the decision was taken by "*an incompetent authority*", the Deputy Secretary General, and not by the Secretary General.

40. While it is incumbent upon administrations to observe the timelines for actions prescribed by the CPR, the failure to do so is not alleged to have caused appellant any injury, and in the circumstances of this case is not grounds for annulment. Further, respondent established that the Deputy Secretary General acted here in the exercise of properly delegated authority, as authorized by the CPR. This first claim is denied.

41. Appellant next claims that the contested decision violated Article 30.1 of the CPR and related internal guidelines though a manifest error of assessment in comparing his son's course of study in England with the alternatives proposed by respondent. This claim appears to rest upon appellant's understanding that the additional exception to the CPR's general rules contained in NATO's Revised internal guidelines on the education allowance (AP-WP(2011)0008-FINAL) has an authoritative legal character akin that of the CPR and is binding on the organization. For its part, respondent contends that these guidelines have not been approved by the NATO Council and are simply policy recommendations that do not have binding legal effect.

42. In response to the Tribunal's questions at the hearing, both parties acknowledged the difficulty of making detailed comparisons between the curricula of different educational institutions and systems. Indeed, in response to the Tribunal's questions, appellant's counsel indicated that appellant did not seek to have the Tribunal to undertake a detailed comparison of this kind.

43. In light of its decision below, the Tribunal need not, and does not, make a decision regarding the character of AP-WP(2011)0008-FINAL as either mandatory or recommendatory, nor does it make any decision regarding the relative similarity of the education programs discussed by the parties.

44. Appellant next contends that respondent violated Article 1(b) of CPR Annex III.C, which authorizes payment of education allowance if actual educational costs are lower in a third country. Appellant contended in this regard that "*the only comparable degree is the one from the MIT (Boston, United States of America),*" a program that is more expensive than the program at University College London.

45. This contention does not correctly interpret the cited CPR provision. Annex III.C authorizes discretionary exceptions allowing education allowance if costs are lower in a third country *than in a country for which allowance is authorized* – here, Belgium or Italy.

The suggested comparison between costs in England and in the United States is not relevant. This element of the claim is rejected.

46. Finally, appellant contends that denial of his claim involved improper discrimination, in that in at least two other comparable instances, education allowance was authorized for post-secondary students in circumstances that did not satisfy either of the exceptions under CPR Annex III.C (continuity of educational cycle or lower costs). At the hearing, respondent indicated that these two other cases were the only instances, aside from appellant's request, where education allowance was requested in circumstances not satisfying CPR Annex III.C. In both of these other cases, allowance was granted.

47. In respondent's view, each of the other cases involved special circumstances, one apparently involving miscommunication and misunderstanding between the staff member and the organization, and the other involving a very talented student admitted to a prestigious program in a foreign institution. In response to the Tribunal's inquiry whether any principle distinguished these cases from appellant's request, respondent stated that no principle need be involved, and that the matter was entirely for the organization's discretion. In this regard, respondent acknowledged that similar cases must be treated similarly, but urged that the other cited situations were not similar.

48. Respondent's denial of appellant's request is consistent with CPR Annex III.C, as the Complaints Committee concluded. However, in the only other analogous situations identified by the parties, respondent, apparently mindful of the interests of the affected staff members, authorized education allowance even though Annex III.C's exceptions did not apply. In one case, approved "*on an exceptional basis*", the rationale seems to have been that a student had very fine qualifications and had been admitted to a "*very singular*" program at a foreign institution. The record suggests that the same may also be true for appellant's son, although no such exception was granted. In another case, respondent appears to have agreed, again "*exceptionally*," to a sharing of expenses with the staff member in an arrangement similar to that appellant unsuccessfully proposed here.

49. As respondent agreed at the hearing, it is a fundamental principle of international administrative law that similarly situated staff members must be treated consistently. This principle applies equally in matters involving an organization's exercise of discretion; the organization is equally bound to treat similarly situated staff members similarly when taking discretionary action. This is particularly important in situations involving very great financial implications for staff members, as is the case here. The respondent's relevant practice apparently involves just three families. They were not dealt with consistently. Instead, in apparently ad hoc decisions, each described as "*exceptional*", respondent authorized education allowance for post secondary education twice, even though the requirements for exceptions under CPR Annex III.C were not met. Respondent did not do so in response to a third case that involves facts that seem at least as compelling - appellant's. The requirement to treat similarly situated staff members consistently has not been met. Instead, appellant received unfavorable and discriminatory treatment in relation to other similarly situated staff members. Accordingly, respondent's decision denying appellant's request must be annulled.

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. As appellant has prevailed in his appeal, he is entitled to reimbursement of justified expenses he incurred, as well as the costs of retaining counsel up to a maximum of €4.000.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision not to grant appellant the education allowance as well as the decision rejecting his complaint are annulled.
- Respondent shall reimburse appellant's justified expenses and the costs of retaining counsel up to a maximum of €4.000.

Done in Brussels, on 31 October 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

21 November 2017 AT-J(2017)0021

Judgment

Case No. 2017/1106

AM

Appellant

v.

NATO International Staff

Respondent

Brussels, 15 November 2017

Original: English

Keywords: harassment: Organization's assistance; consistency with the staff member's initial claim.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 21 September 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO International Staff (IS), dated 17 January 2017, and registered on 10 January 2017 as Case No. 2017/1106, by Mr AM, a staff member claiming that he was the victim, *inter alia*, of harassment, abuse of authority and constructive dismissal.

2. The respondent's answer, dated 20 March 2017, was registered on 28 March 2017. The appellant's reply, dated 27 April 2017, was registered on 4 May 2017. The respondent's rejoinder, dated 6 June 2017, was registered on 9 June 2017. In addition, on 16 February 2017, appellant submitted a further document to the appeal, which was registered as an "Addendum", on 20 February 2017.

3. The Panel held an oral hearing on 21 September 2017 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 Organization in April 2004 as an A2 Manager at the NATO recreational facility, under a definite duration contract. His contract was subsequently renewed in 2007, 2010 and 2013. Appellant was subsequently promoted to the higher consecutives grades. Appellant's last position was that of Director of the NATO recreational facility, at the grade of A5.

6. At the end of May 2015, appellant was placed on sick leave. At the hearing the Tribunal was informed that appellant was in receipt of an invalidity pension.

7. On 12 October 2015 appellant was informed that his contract would not be renewed after its expiry on 20 April 2016. Previously appellant had been made aware that the Organization intended to outsource management of the restaurant at the facilities and to suppress his post. Hence, his position would be deleted after the expiry of his contract.

8. On 18 March 2016, appellant submitted a claim to the Secretary General (SG) requesting "*assistance with regard to harassment and constructive dismissal*". The claim targeted some officials of the Organization.

9. On 27 April 2016 appellant was informed that an independent expert would be hired. The name of the external expert was communicated to appellant on 5 June 2016.

10. On 13 September 2016, the expert produced her report and provided it to the Organization.

11. On 20 September 2016, the Deputy Secretary General (DSG) wrote to appellant informing him that the case was considered closed further to the conclusion in the expert's report, which found no evidence to support appellant's letter.

12. On 21 October 2016, appellant requested an administrative review/complaint to the SG. On 6 December 2016, appellant requested further clarifications, in particular regarding the designation of the official taking the said decision, since this had an impact on the proper procedure to follow (administrative review or complaint).

13. Appellant did not receive an answer to any of his letters and, on 10 January 2017, submitted the present appeal.

14. On 18 January the SG informed appellant of his decision to maintain the DSG's previous decision and, following appellant's request, communicated the expert's report to him.

15. On 16 February 2017, appellant submitted to the Tribunal the decision rendered by the SG on 18 January 2017, further to the previously conducted administrative review. Such documentation has been included as part of the appeal.

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

(i) The appellant's contentions

16. Concerning admissibility, appellant notes that both his letters of 21 October and 6 December 2016 to the SG requesting an administrative procedure/complaint went unanswered. Appellant considered this as an implicit rejection by the Head of the NATO body (HONB) on 11 or 20 November (depending on whether the request is regarded as an administrative review or a complaint), and on 10 January submitted the present appeal. Appellant also notes that, on 18 January 2017, he received the SG's decision confirming the DSG's decision of 20 September 2016. To preserve his rights, he submitted a complaint against that decision and, having already submitted the present appeal, he informed the Tribunal of the ongoing developments. At the same time appellant requested to adapt the object of the appeal, for the good administration of justice, and asked respondent the intended way of proceeding for the ongoing appeal. In the light of this, appellant submits that the appeal is admissible and complies with the pre-litigation procedure.

17. Concerning the merits, appellant affirms that he had worked for many years, to the full satisfaction and with the praise of his hierarchy, as a central figure in the establishment and success of the NATO recreational facility. With the present appeal, he contends that in the last three years of his employment he was the target of a defamation campaign and witch-hunt conducted (and/or condoned) by two high-ranking senior NATO officials.

18. Appellant submits that he was excessively and aggressively scrutinized by the Office of Financial Control and the International Board of Auditors (IBAN), with the resulting findings being improperly used to attack him; that he was unlawfully accused of fraud and mismanagement and used as a scapegoat for the failings of the high-ranking NATO officials; that he was excluded from meetings; that he was bullied; that he was side-lined and his authority and powers undermined, *inter alia*, by not having the chance to present to the nations the business plan he had been working on for the previous year; and that he had not been given a chance to be heard by the nations and had been publicly discredited by their discussing disciplinary procedures against him.

19. Appellant further submits that he was informed while on sick leave, on 12 October 2015, that his contract would not be renewed beyond its expiry on 20 April 2016; his post was consequently suppressed. Appellant contends that his post still exists today in two split functions, and that, much to his surprise, half of his post was advertised on the internet without the Organization's having engaged in any way with him to explain why he would not be entrusted with the position.

20. Appellant rejects any allegation of a decline in his performance and affirms that he contested the "fair" performance rating he received in 2013. Appellant also disagrees with the Administration concerning the reprimand he received in September 2014, claiming it had been a verbal warning with which he had expressed his disagreement.

21. Appellant submits that such a complete lack of communication is a breach of good administration and the duty of care, and that he was the victim of harassment, bullying, abuse of authority and constructive dismissal.

22. Appellant refers to the provisions of Article 12.1.4 of the NATO Civilian Personnel Regulations (CPR), the NATO Code of Conduct and the NATO-wide policy and procedures on the prevention and management of harassment, discrimination and bullying in the workplace.

23. Appellant alleges a violation of the duty of the International Staff (IS) to state reasons, of his rights of defence and of the IS harassment policy. Appellant notes that the decision of 20 September was motivated by a mere reference to the investigation report, without his having been provided with that report. Therefore appellant submits that he was not in a position to understand the decision to dismiss his claims or to assess the legality thereof. He adds that he was not given the possibility of submitting comments on the report, or to be heard before the decision was taken. (The report was subsequently provided to appellant with the SG's decision of 18 January 2017, and has been included in the pleadings of the present appeal.)

24. Appellant claims further manifest negligence and errors of assessment. He argues that the independent expert failed to investigate the facts properly and neglected essential evidence. He holds that the expert's rejection of the list of (thirty) witnesses he proposed was unjustified and that such a refusal constituted gross negligence that affected the outcome of the investigation and the contested decision. He claims that the expert spent very little time on the investigation, merely a few hours with himself, most of which was dedicated to understanding NATO's functioning. Appellant questions the

competence of the independent expert and the fairness and the impartiality of the investigation due to the absence of proper fact-finding.

25 Appellant claims an absence of impartiality and a conflict of interest in managing his request for assistance. Considering that one of the persons he accuses was a senior leader of a division, appellant maintains that the Human Resources (HR) subdivision had been heavily involved in the complaint management process and the flow of information, in breach of the harassment policy requirements.

26. Appellant further submits that the delays in appointing the investigator were excessively long (three months) and that there has been no transparency as to the criteria based on which the expert was chosen and appointed.

27. Appellant affirms that his dignity, reputation and mental health have been seriously affected by such improper behaviour and by the unfair termination of his contract, which resulted in his being in long-term treatment in a psychiatric hospital.

28. Appellant also refers to the request he made, on 30 August 2016, for an amicable settlement. Appellant notes that this request was prepared by him at the initiative of a former Deputy Directory of the Private Office of the SG and notes that he never received any feedback on it.

29. Appellant demands recognition that he suffered from harassment, abuse of authority and constructive dismissal, and demands the annulment of the investigation and the initiation of a new, regular investigation into his allegations.

30. Appellant requests that the Tribunal:
- annul the decisions dismissing his claims;
- compensate him for non-material damage resulting from irregularities in the procedures, evaluated *ex aequo et bono* at €30.000, and for non-material damage resulting from the improper conduct of two accused persons, evaluated *ex aequo et bono* at €50.000; and
- reimburse all the legal costs incurred, travel and subsistence costs and the fees for retaining legal counsels.

(ii) The respondent's contentions

31. Respondent raises a *de jure* ground of inadmissibility of the present appeal, underscoring that appellant made an all-in-one "*request for assistance*" and also introduced parallel proceedings. It underlines that given the close dates and the essentially identical content of the parallel procedures engaged, it agreed to pursue the present appeal, in appellant's interest, to give his grievance its best forum for review and avoid further delays.

32. Respondent observes that appellant waited three years before raising the issue of the alleged inappropriate behaviour, by which time he had been on sick leave for over ten months. It also notes that five months had elapsed since he was informed that his contract would not be renewed. Respondent stresses that appellant's contract situation was never contested by him and, further, any claims in relation to this matter would be

inadmissible. Respondent also notes that appellant had been on a definite duration contract which had not been renewed, a situation that differed from the claimed *"unfair termination*".

33. Respondent advances that appellant claimed to have been harassed but that he never chose to formally report the alleged harassment or follow the established "Procedures in case of harassment". Further, when raising the issue of harassment, appellant did not submit a formal complaint but rather opted for a shortcut, formulating a "*request for assistance with regard to harassment and constructive dismissal*" at the highest level of the Organization. Respondent adds that appellant chose to ignore the existing regulations; instead he mixed up the procedures and applied them in an inconsistent manner, and then blamed the Administration for an undesirable outcome. Respondent underlines that, nevertheless, it decided to proceed in line with the "Procedure in case of harassment" and to nominate an independent external expert.

34. With regard to the fact-finding investigation, respondent notes that appellant failed to provide any evidence of the alleged conspiracy against him. It further stresses that there was no reason to expect automatic communication of the report or to be able to comment on it. Respondent rejects any violation of the harassment policy or of the rights of defence, and recalls that the appointment of an independent expert was aimed at an independent fact-finding and assessment of the allegation made, an exercise disconnected from the Administration's or appellant's opinions.

35. Respondent rejects any accusation of conflict of interest by HR, stressing that the SG's Private Office dealt directly with the matter and that HR was only marginally involved with the necessary and limited administrative assistance.

36. Respondent also denies any violation of the duty to state reasons and stresses that the DSG's letter of 20 September 2016 provided sufficient information about the outcome of the investigation (i.e. no harassment found), the associated decisions (i.e. to close the case) and the reasons for them ("*based on the investigation of the external expert, it was established that there was no evidence that harassment had taken place*"). It continues by recalling that at appellant's request, the report was further shared with him (SG's letter dated 16 February 2016), and consequently the Administration did not violate the duty to inform him.

37. Respondent advances that appellant presented a number of inconsistencies, exaggerations and misrepresentations as alleged harassment on the part of the Administration when in fact, matters pertaining to the proper management of the recreational facilities and the use of the Organization's resources fell instead under the category of performance issues and other professional disagreements.

38. Respondent rejects any allegation of excessive scrutiny or a defamation campaign. It notes that in 2013, the NATO Council approved a revised governance structure for the facility which established that its accounts and financial operations were subject to the NATO Financial Regulations and IS oversight, and that there was a requirement to produce annual financial statements that would be audited by the International Board of Auditors (IBAN). Respondent contends that appellant was in fact unwilling to accept the new governance structure and that this was the start of the witch-

hunt he alleges, which explicitly involved the functions of the senior officials who oversee management of the facility.

39. Respondent notes that praise by senior customers may be based only on an outside view of how the facilities are managed, and does not preclude the existence of internal issues with management and financial irregularities revealed at a later stage. It states that redressing such issues in a concerted effort by the IS and the nations cannot be interpreted as interference, excessive auditing or harassment. It recalls that before the IBAN shed light on the management issues at the facilities, appellant had indeed been praised, as was demonstrated through his chain of promotions (A2 in 2004, A3 in 2005, A4 in 2006, A5 in 2011).

40. Respondent points out that in 2013, appellant's performance declined to a "*fair*" rating, and stresses that in accordance with the harassment policy, "*disagreement on work performance or on another work-related issue is not normally considered to be harassment. Such matters should normally be considered within the framework of staff appraisal/performance management*." It also notes that appellant never contested his 2013 annual review using the appropriate channels and that, in 2014, an "Improving Performance Action Plan" had been initiated, the outcome of which was acknowledged and signed by appellant in 2015. Respondent adds that the reprimand appellant received in September 2014 – the importance of which he denies – is part of a series of warnings about performance issues linked to the management of the facility.

41. Concerning the request for a settlement, respondent explains that it did not intend to settle in this particular instance, particularly as it had not been established that inappropriate behaviour had occurred.

42. Respondent concludes by highlighting further that the expert's report underlines the lack of evidence and the lack of facts to support appellant's allegations, and remarks that the matter was treated at the highest level in the IS with the utmost diligence, attention and care for the rights of all involved. It notes that appellant went on sick leave before requesting assistance and that he therefore suffered no material damage. It also rejects any claim for non-material damages as no irregularities in the procedure were committed and the alleged improper conduct against appellant was not established.

43. Respondent requests that the Tribunal dismiss the appeal as being without merit.

D. Considerations and conclusions

(i) Considerations and conclusions on admissibility

44. Respondent raises three different points of inadmissibility: a) the appellant's failure to comply with the previous administrative review procedure; b) the lack of clear scope of the appeal; and c) the lack of connection between the decision and the conditions of work, as a requisite for Article 61.1 of the NCPR.

45. In order to assess whether appellant followed the pre-litigation formalities as required by Articles 4 and 6.3.1 of Annex IX to the CPR, the Tribunal must recall that the

dispute was initiated by the claim appellant submitted on 18 March 2016 (see paragraph 8 above). The decision of 20 September 2016 was the answer to that claim, and it was taken by the DSG. This is also the decision which is challenged by the current appeal. It follows that appellant submitted a request for administrative review in a timely manner and in due form on 21 October 2016. This submission can be considered a formal complaint provided that the challenged decision was taken directly by the DSG. Hence the appeal shall be deemed admissible.

46. Respondent also indicates that appeal is inadmissible because appellant waited three years before raising the alarm over the alleged inappropriate behaviour. And it adds that appellant challenged the decision only five months after he had been informed that his contract would not be renewed. The Tribunal considers that this allegation concerns the scope of the appeal and shall be analysed in line with the merits of the case.

47. Finally, respondent suggests that the discussion at hand has no connection with the conditions of work because the inappropriate behaviour that appellant reports has not been established. This also constitutes a strand of the merits of the dispute. At this initial stage the Tribunal cannot deny the link of appellant's submission with his conditions of employment as required by Article 61.1 of the CPR.

48. It follows from the foregoing that respondent's claims of inadmissibility must be dismissed and the appeal must be declared admissible.

(ii) Considerations on the merits

49. To begin with, it must be borne in mind that appellant is seeking annulment of the decision of 20 September 2016, in which the Organization concluded that since there was no evidence supporting the allegations made by appellant, there was no need for further action, and it considered the case closed. The appellant's claim had sought assistance from the Organization regarding his allegation of harassment. In particular, appellant's counsels asked the Organization "to investigate", "determine responsibilities and take measures to correct this injustice". The Tribunal must take note that this initial claim was imprecise both in setting out the facts and in what appellant was expecting from the Organization in this regard, and also in closing the arguments. Nevertheless, the requested assistance was offered by the Organization and must be considered to have been fully satisfied by the appointment of an external expert who conducted the investigation that was considered appropriate within the framework of her competences and capacities.

50. Appellant disagrees with the conclusions drawn by the expert, who did not find elements or hints of the denounced harassment. However, by claiming that the subsequent DSG's decision brought an end to the assistance, appellant introduces inconsistent and unclear contentions that were not part of his initial claim. The Tribunal must avoid making any statement of a variety of insinuated points; in particular, the current judgment does not evaluate facts and conducts that could or could not be qualified as harassment. Any declaration about the sufficiency of evidence of harassment would be outside the scope of the appeal – in line with the Administration's previous claim. Appellant did not directly denounce the abusive situation. He did not

ask for specific measures other than that imprecise “assistance”. The contested failure in the Organization’s response cannot be analysed beyond the framework that was established explicitly by appellant’s initial claim. The Tribunal considers that respondent fulfilled appellant’s request by providing the involvement of an external expert and being consequent with her findings.

51. Appellant also mentions that there are grounds for a constructive dismissal. Yet constructive dismissal only can be considered whenever the serious unlawful situation caused or permitted by the employer forces the employee to leave the job. Certainly, a neglectful attitude by the Organization in dealing with a situation of harassment could have sustained this idea. However, appellant did not announce that he was quitting his job, but asked “for assistance” which was in any event offered by the Organization. Furthermore, this claim regarding constructive dismissal was made after the announcement of non-renewal of appellant’s contract, which was the first time that harassment was formally reported.

52. The Tribunal concludes that this appeal must be dismissed as a whole, as no liability can be imposed and, therefore, there are no grounds to award any compensation.

E. Costs

53. 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 […]

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 15 November 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

21 November 2017 AT-J(2017)0022-REV

Judgment

Case No. 2017/1103

JM

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 16 November 2017

Original: English

Keywords: expatriation allowance; continuous residence; factual approach to date of appointment.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 21 September 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA), dated 20 December 2016, and registered on 10 January 2017 as Case No. 2017/1103, by Mr JRM, a staff member challenging the refusal to grant him the expatriation allowance and its associated benefits.

2. The respondent's answer, dated 13 March 2017, was registered on 21 March 2017. The appellant's reply, dated 20 April 2017, was registered on 28 April 2017. The respondent's rejoinder, dated 31 May 2017, was registered on 1 June 2017.

3. The Panel held an oral hearing on 21 September 2017 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. From February 2007 to 31 October 2014, appellant worked on various projects for the NCIA (mainly at its site in The Hague, Netherlands) as a contractor, through a UK-based company and on an international assignment from the company. Appellant resided during these assignments in The Hague.

5. From September 2014 to 31 December 2014, appellant went back to the UK, still under an employment contract with the company.

6. On 7 March 2014, however, appellant applied for a staff position with the NCIA. A tentative offer was made on 13 June 2015, which appellant accepted on 15 June 2014. On 16 June 2014 appellant enquired about the logistics of taking up his duties. On 22 August 2014 the NCIA Human Resources (HR) department informed appellant that, based on his current situation, *i.e.* his residing in The Netherlands and his employer's not being an international organization, he was considered locally recruited and therefore not entitled to the expatriation allowance, the installation allowance or the reimbursement of removal/travel expenses. A final assessment to determine his entitlement to allowances would take place upon his joining the organization.

7. In an e-mail dated 26 August 2014, appellant wrote to HR that he did not consider himself to truly be a resident of the Netherlands. He appreciated, however, that his circumstances were not clear, in that he was registered with the city hall of The Hague as a resident and considered a non-resident in the UK for tax purposes. He informed HR that he intended to leave the Netherlands at the end of October (including deregistering at the town hall) and register at his parents' address in order to fulfil the

criteria for becoming a UK resident for tax purposes (which would take approximately 6-8 weeks, *i.e.* November and December), and to continue working for his company in the UK until he received the firm offer from NCIA. If his appointment started on 1 January 2015, he could then begin to work for NCIA in The Hague with the full range of expatriate entitlements.

8. On 12 September 2014 appellant received the firm offer after successfully completing the security requirements and medical tests. On 17 September 2014 he informed HR that he had returned to the UK. By e-mail dated 1 October 2014, HR informed appellant that the details of his situation had been assessed again with regard to his entitlement to the expatriation allowance. He was advised that, when all circumstances were taken into account, he was not eligible for the expatriation allowance. In addition, his current interruption of stay in The Netherlands was not considered a discontinuity of his residence, even if it was delaying joining the NCIA.

9. The above conclusion was confirmed in an e-mail dated 23 October 2014, in which he was also advised that he had until 31 October 2014 to accept the firm offer. If the NCIA did not receive the signed firm offer by that date, he would be considered as having declined it.

10. Appellant signed the final contract offer with the NCIA on 3 November 2014, and on 5 January 2015 he joined the Agency (at the same The Hague location) as a NATO civilian staff member. At present, he holds an A4 post as a Principal Integration and Test Engineer under a definite duration contract expiring on 30 April 2019.

11. When taking up his duties, appellant raised the question of eligibility for allowances. On 3 February 2015 the Agency concluded that no allowances would be payable. On 5 February 2015 appellant sent an e-mail with some clarifications, seeking a review of the decision. On 14 March 2016, HR responded that appellant was not eligible for installation, removal or travel expenses.

12. Appellant subsequently submitted a first administrative review. On 5 April 2016 the Head of HR rendered a confirmatory decision, after which appellant made a request for further administrative review on 26 April 2016 and a formal complaint to the NCIA Head of the NATO body (HONB) in May 2016. In June 2016, a Complaints Committee (CC) was convened. The CC delivered its recommendations on 3 October 2016, on 23 October 2016 the Agency informed appellant of its decision not to consider him eligible for the expatriation allowance and on 2 November 2016 the HONB issued its final decision.

13. On 20 December 2016 appellant submitted the present appeal.

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

(i) The appellant's contentions

14. Appellant contends that his appeal is admissible. He states that he started enquiring about his eligibility for the expatriation allowance and benefits to the Agency's administration at the beginning of his recruitment process. In particular, he refers to an e-mail from HR informing him, on 22 August 2014, that he was "*considered locally recruited and therefore not entitled to expatriation allowance, installation allowance, removal/travel expenses […] A final assessment to determine entitlement of allowances will take place upon joining the Organization*".

15. Appellant refers to his contract of employment, signed on 5 January 2015, whereby it is stated: "*You may, in addition [to monthly basic salary], be entitled to allowances in accordance with the conditions as stipulated in the NATO Civilian Personnel Regulations*". Appellant notes that the outcome of the "final assessment" (the response from NCIA legal department/HR regarding his eligibility for benefits) was communicated to him several months later, on 14 March 2016, which is the date from which he could finally pursue the administrative review, as he did the following day.

16. Appellant affirms that during all the periods of his various assignments in the Netherlands, he maintained his ties to the UK and he always intended to go back once the assignments were over. Appellant highlights his strong personal and family ties to the UK and contends that he never intended to remain in the Netherlands, or at any point to become a permanent resident of that country.

17. Appellant further stresses that his ties to the UK can also be demonstrated from an administrative point of view, for example considering his UK taxation, and the fact that he was regarded as an expatriate employee by the Netherlands tax authorities, that he maintained his UK social security regime and that he never held a Dutch identity card.

18. Appellant highlights that before taking up his appointment with the NCIA he was factually resident in the UK, having returned the apartment the company was renting for him during all the periods of his employment abroad. He adds that upon taking up his duties with the Agency, he had to move his household goods and appliances by his own means, and the lack of installation and removal expenses caused him hardship.

19. Appellant notes that the Complaints Committee (CC) report was in his favour and that the General Manager (GM) disregarded its conclusions. In particular, appellant refers to the criteria used by the Committee, based on a previous Appeals Board decision, to determine eligibility, and emphasizes further his firm ties to the UK. Appellant also refers to a NATO Advisory Panel Working Group document and retains that he fulfils the guidelines, as i) he is a UK citizen and resident; ii) he was resident in the UK at the time he was appointed and therefore he had not been continuously resident in the Netherlands; and iii) the account of previous service was not a relevant disposition as he was resident in the UK.

20. Appellant advances that, in several exceptions, the Agency supported and granted the expatriation allowance to contractors who were recruited, went back to their own country for six months, and were finally considered eligible.

21. Appellant requests the Tribunal to rule that NCIA considers him an expatriate, as of the date of joining, and thereby confers:
- registration at the Dutch Ministry of Foreign Affairs;
- currency transfer to the UK bank account;
- expatriation allowance;
- home leave;
- household allowance and/or children allowance;
- education allowance;
- installation allowance;
- reimbursement of removal expenses; and
- any other benefits to which he may become eligible.

(ii) The respondent's contentions

22. Respondent disputes the admissibility of the appeal as time-barred. It states that the final decision on appellant's non-eligibility for the expatriation allowance was communicated to him on 23 October 2014 with the final contract offer. It notes that this offer was based on the assessment of non-eligibility for the allowance, and that appellant signed it. Further, respondent affirms that, after appellant joined the Agency, he was informed on 3 February 2015 that he would not be eligible for the installation allowance and the reimbursement of removal costs. Respondent contends that appellant chose to finally pursue administrative review only on 14 March 2016, clearly outside the time limits foreseen by the CPR.

23. Concerning the merits of appellant's claims, respondent refers to Article 28.4.1 of the CPR, as applicable to staff appointed after 1 January 2012. This Article makes provision for payment of the allowance to staff who *"[…] had been continuously resident for less than one year on that State's territory, no account being taken of previous service in their own country's administration or with other international organizations; […]*". Respondent further refers to the NATO Advisory Panel Working Group document and highlights that this document specifically precludes contractors from eligibility for the expatriation allowance.

24. Respondent notes that appellant had been continuously resident in the Netherlands since 2007, working for the NCIA as a contractor, and that such status is not foreseen in the regulations. It observes that Article 28.4.1 makes an exception only for i) staff who work for their own administration or ii) staff of other international organizations. It further notes that the fact that appellant was considered to be on an international assignment by his own company is not relevant, as this would allow the expatriation allowance to be granted indiscriminately to all those who are not nationals of the duty station, provided that they argue that they were considered as expatriates by their companies.

25. Respondent adds that appellant's going back to the UK for a temporary period was only to try and make himself eligible for the allowance and that he had been

informed, when offered the final contract on 23 October 2014, that any interruption of his stay in the Netherlands would not amount to discontinuous residence. It further adds that from all the events that occurred until December 2014, it was clear that appellant never had the intention to establish himself other than temporarily in the UK and, consequently, he must be regarded as not having interrupted his residence in the Netherlands.

26. Respondent further refers to the case law of other international organizations and their consistent approach in defining the concept of "continuous residence", basing it on the existence of objective and factual ties to the duty country.

27. Considering the Complaints Committee report, which was in favour of appellant, respondent remarks that the CC is not a judicial body with powers of adjudication and that the General Manager is not required to follow its views and recommendations. Moreover, in this specific case, the GM did not find that the arguments presented by the CC were sufficiently solid, basing its conclusions on the interpretation of the criteria established by the Appeals Board decision.

28. Respondent points out that in such matters, national taxation rules are separate from rules on eligibility for an expatriation allowance under the rules of an international organization. Therefore appellant's statements regarding this, as well as regarding social security and the release of a Dutch identity card are not relevant.

29. Respondent firmly rejects the allegations about exceptions made in entitling contractors to receive expatriation benefits.

30. Respondent rejects the appellant's request for the installation allowance and the reimbursement of removal and travel expenses, because it considers him to be a long-time local resident of the Netherlands. It also maintains that he is not entitled either to home leave or to currency transfers to his UK bank account. It adds that he is neither married nor does he have dependent children, and therefore is not entitled to the household allowance or the dependent child's allowance. Finally, with regard to the recognition of expatriate status in the Netherlands, it points out that the rules are laid down by the Host Nation, not by the Agency.

31. Respondent requests that the Tribunal declare the appeal inadmissible and unfounded.

D. Considerations and conclusions

(i) Considerations and conclusions on admissibility

32. Respondent considers that the appeal is inadmissible because appellant accepted the decision of 23 October 2014, which meant that he was aware of the denial of his eligibility for the expatriation allowances. The Tribunal observes that before the firm offer of the contract, both appellant and respondent were pursuing an exploratory and future-oriented analysis of the eventual situation of appellant. From the beginning of the negotiation of the appointment, appellant had expressed his concerns regarding the so-called expatriation allowances. At the same time, the Organization had given to

understand that he would not be ineligible. In any case, the dialogue was conducted on the basis that a final assessment to determine his entitlement to allowances would take place "*upon [his] joining the Organization*", as was established by the NCIA's first answer to appellant's first request for information on August 2014. Consequently, the question of the claim for the allowances at issue cannot be properly raised, since it was raised after appellant's effective start of his services in the NCIA. The signing of the contract cannot be considered as a waiver of appellant's claim. On the contrary, appellant could not have addressed his claim prior to becoming a staff member.

33. Respondent also sustains that the appeal should be declared inadmissible because appellant's request for administrative review on 14 March 2016 was time-barred. The Tribunal cannot accept this procedural allegation either. The decision of 3 February 2015, to which respondent refers, was challenged by appellant's e-mail on 5 February 2015. In fact, the Tribunal finds that there was an extended, unjustified and inexcusable delay in the Organization's response on 14 March 2016.

34. Moreover, in a spirit of openness, and given the fact that appellant is not assisted by a lawyer, the Tribunal reiterates its criteria (see AT judgment, Case No. 2015/1066, 27 April 2016) and considers that, in the particular circumstances of the case, the pre-litigation procedure has been respected and, consequently, the appeal must be declared admissible.

(ii) Considerations on the merits

35. Pursuant to Article 28.4.1 of the CPR:

> The expatriation allowance shall be paid to staff in Categories A, L and B, who at the time of their appointment: i) were not nationals of the host State and; ii) had been continuously resident for less than one year on that State's territory, no account being taken of previous service in their own country's administration or with other international organizations; and iii) were recruited internationally from outside the Coordinated Organizations or from outside of the country of assignment; and iv) were recruited from outside the local commuting area of the duty station, which is defined as a radius of 100 kilometres from the duty station.

36. Appellant, who fulfils the condition of not being a national of the country where he was employed, contends that he was not a resident of The Netherlands at the time he was appointed by the NCIA. He claims his stay in The Hague was conditioned by his relation with the UK company, as a contractor for the Agency. Therefore, the Tribunal needs to assess whether appellant could be considered a resident for a minimum of one year on Netherlands territory.

37. The NATO Appeals Board (AB) established in its Decision no. 420, *Woppowa*, 5 September 2001, that the purpose of the expatriation allowance is to partially compensate for the added cost to a staff member of having to live, because of his professional activities, in a given country while maintaining sentimental and, in some cases, material ties to the country of which he is a national. The Tribunal concurs with this interpretation of the rule, in the particular meaning that no matter which nationality appellant possessed, he had already been working and living in The Hague when the recruitment procedure was started. It is beyond doubt that appellant had been

continuously working in The Hague for about seven and a half years. Hence his residence at the duty station could be considered continuous at that time, regardless of the fulfilment of various administrative requisites. For the purpose of the above-mentioned rule, the fact that the agent kept various ties to his country of origin, such as taxation, social security benefits or even administrative residence in the UK, is irrelevant (*cf*. AB Decision no. 89, *Quantrell-Park*, 10 March 1978; no. 776, *De Simone*, 28 October 2010).

38. Appellant also argues that his former employer had granted him the status of expatriate. However, the Tribunal observes that the appellant had a *de facto* permanent status in The Hague when he accepted the job offer, and was living there at that time. This situation had been the same for the previous periods during which he worked as a contractor. As a consequence, the appointment procedure took this circumstance into account. The Organization could reasonably conclude from the fact that the appellant had applied for the position that there was a solid link between him and the Agency's duty station. The appellant's sojourn in the UK during the gap between the termination of his contract with his former employer and the beginning of his new job at the Agency does not undermine the Tribunal's former conclusion. The Tribunal points out that although the signature of the contract with the NCIA took place in November, it was the culmination of the previous recruitment process during which the appellant's residence situation did not undergo any relevant change. Consequently, there is no doubt that appellant had established his continuous residence and center of interests in The Hague.

39. Finally, the Tribunal observes that the Organization set aside the recommendations of the Complaints Committee concluding that appellant should be entitled to the expatriate allowance. The procedure established in Article 5 of Annex IX of the CPR does not necessarily imply that its opinion is binding. The competent authority may deviate from those recommendations provided that its final decision complies with the obligation of sufficient motivation. In this case, appellant was duly informed about the reasons for the Organization's view.

E. Costs

40. 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 […]

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 16 November 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

27 November 2017 AT-J(2017)0023

Judgment

Case No. 2017/1104

MK

Appellant

v.

NATO Headquarters Allied Air Command

Respondent

Brussels, 21 November 2017

Original: English

Keywords: disciplinary action; reducing pension; duty to give reasons; disciplinary board recommendations.

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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 22 September 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal against the NATO Headquarters Allied Air Command dated 6 January 2017, and registered on 12 January 2017 as Case No. 2017/1104, by Mr MK, contesting the reduction of his pension following a disciplinary proceeding.

2. On 24 January 2017, additional documentation provided by appellant was added to the file as an "Addendum" to the appeal. The respondent's answer, dated 9 March 2017, was registered on 22 March 2017. The appellant's reply, dated 21 April 2017, was registered on 2 May 2017. The respondent's rejoinder, dated 1 June 2017, was registered on 8 June 2017.

3. The Panel held an oral hearing on 22 September 2017 at NATO Headquarters. It heard appellant's statement and arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar. The hearing was held in camera in accordance with Rule 26 of the Tribunal's Rule of procedures.

B. Legal and factual background of the case

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

5. Appellant was a civilian staff member of the Allied Air Command (Headquarters Ramstein) between 1 July of 1979 and his retirement on 1 August 2012.

6. Subsequent to his retirement, appellant was convicted by the German Federal Court on 19 November 2013 on two counts of treasonous espionage and a count of attempted treasonous espionage. The charges involved appellant's conduct related to his employment as a NATO staff member. The appeal of his conviction was rejected on 23 October 2014. Appellant was sentenced to seven years, and was incarcerated in the German prison system. Appellant did not disclose these facts in his appeal.

7. On 4 February 2015, respondent's chief personnel management officer transmitted to appellant a document captioned "Initiation of Disciplinary Proceedings". This document cited appellant's conviction by the German court and stated that he had violated his obligations under the NATO Civilian Personnel Regulations (CPR) Articles 12 (duties of secrecy and discretion) and 13 (loyalty to the organization, duties of proper conduct), thereby showing "*a lack of loyalty, discretion and conscience towards the Organization*." It described acts relating to appellant's mishandling of classified information during and after his service as a staff member, stating that "*for further information concerning the details and facts of the aforementioned accusations, I*

expressly make reference to the ruling of the Koblenz High Court which is already at your disposal."

8. The document stated that a Disciplinary Board would be constituted to consider the charges of violating Article 12 and 13 "*recommending the permanent, whole or partial withdrawal of your NATO pension.*"

9. Two aspects of the 4 February 2015 document led to subsequent difficulties. First, the "References" listed at the beginning of the document gave an incorrect date for the Koblenz Court judgment finding appellant guilty; the document listed a judgment of 23 October 2014, which was the date of a later ruling rejecting appellant's appeal. However, the body of the document gives the correct date for the judgment of conviction (19 November 2013). Second, in February 2015 appellant had not asked the German authorities for access to the November 2013 judgment, which they had classified "Secret". Accordingly, respondent had to work out with the German authorities arrangements for his access to the judgment, a process that took several months.

10. There followed several months of correspondence addressing, *inter alia*, appellant's protestations that he did not know the details of the charges against him; making arrangements with German authorities for his access to the classified Koblenz Court judgment; soliciting any comments appellant wished to provide to the Disciplinary Board; and other matters. In the course of this correspondence, appellant charged that various NATO staff members (including, *inter alia*, several who spoke with German investigators during the investigation leading to his conviction) had committed security violations in doing so, should be subject to disciplinary action, and indeed had committed crimes.

11. On 3 September 2015, respondent transmitted to appellant a thirteen paragraph Disciplinary Report, which restated the February 2015 charges that appellant's conduct was inconsistent with his duties under Article 12 and 13 of the CPR. The Report refers to the 13 November 2013 German Court judgment, and briefly summarizes its conclusions regarding appellant's actions and intentions. A footnote states that "*[d]ue to the sensitive nature of this case refer to [the 19 November 2013 judgment] for the specific detail of the facts complained of*." This document again notifies appellant of respondent's intention to form a Disciplinary Board to consider the charges against him. In an 18 September 2015 letter in response, appellant disputed the significance of the German court judgment, deeming it "*the free opinion of the judges and does not have to appreciate facts*." He reiterated his earlier charges regarding staff members involved in investigating his case, deeming these persons "criminals," and accusing respondent of "*lies and crimes*."

12. On 18 December 2015, the German authorities confirmed that appellant had been given access to the judgment on several separate days in November and December 2015. The Disciplinary Board subsequently met on 29 February 2016 and issued its report on 8 March 2016. The Disciplinary Board recommended permanent reduction of appellant's pension by 60%. Although invited to do so, appellant did not submit any written comments to the Disciplinary Board.

13. On 7 November 2016, respondent's Chief of Staff notified appellant in writing that the Disciplinary Review Board unanimously found that he failed to comply with CPR Articles 12 and 13 and recommended permanent reduction of his pension by 60% from the date of approval by the Supreme Allied Commander Europe (SACEUR), "*the only competent authority able to approve the proposed penalty*." The Chief of Staff continued that "*SACEUR approved the recommendation on 31 October 2016, but increased the proposed penalty*" from 60% of pension (as recommended by the Board) to 67%. No reasons were given for SACEUR's decision to deviate from the Disciplinary Board's recommendation. Appellant's pension was subsequently reduced by 67%.

14. By similarly worded letters to the Chief of Staff dated 15 December 2015, appellant requested annulment of the reduction of his pension. By subsequent letters dated 21 December 2016, he contested the reduction of his pension and SACEUR's 31 October 2016 decision in this regard. By letter dated 11 January 2017, the Chief of Staff rejected appellant's complaints and his request for annulment. The Chief of Staff's letter states that he undertook a full review of appellant's case, and concluded that the Disciplinary Board proceedings had been properly conducted. It further states that appellant was "*kept fully informed throughout the proceedings*," and that he "*chose not to make a written submissions in the process*."

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

(i) Appellant's contentions

15. Appellant first contends that the 7 November 2016 letter informing him of his disciplinary sanction did not explain the reasons justifying this action, and further that the "unique basis" for the disciplinary proceedings, the judgment of 19 November 2013 "*has never been communicated to the appellant.*" Therefore, in appellant's submission, "*it must be deemed that the Appellant was not enabled to assess properly the charges which were held again him,*" contrary to CPR Article 60.3 and his right of defense.

16. Second, appellant contends that he was not heard by the Disciplinary Board, contrary to CPR Article 60.4. According to appellant, he "*was not even given the possibility to provide any comments to the Disciplinary Board or to be represented*."

17. Appellant's third head of argument relates to respondent's 7 November 2016 communication informing him of the decision to reduce his pension. Appellant asserts a violation of Article 7.1 of CPR Annex X to the CPR, in that SACEUR's actual decision in his case was never communicated to him. Appellant further contends that the 7 November communication provides no reasons for SACEUR's decision to find a violation of CPR Articles 12 and 13, or of SACEUR's justification for an increase of the penalty, from 60% of pension, to 67%. Accordingly, in appellant's submission, he "*cannot assess whether the disciplinary action taken against him is justified or not.*"

18. Finally, appellant contests the long time - 21 months - between the initiation of disciplinary proceedings on 4 February 2015 and communication of the outcome to him on 7 November 2016. In appellant's view, this violates Article 5.8 of CPR Annex X to the CPR. Appellant finally contends that the allegedly wrongful conduct for which he was

convicted was reported to the criminal authorities during the summer of 2012, while he was still a staff member. The subsequent delay in initiating disciplinary proceedings – until February 2015 – is said to violate the principle of legal certainty.

19. Appellant's reply advances new arguments, *inter alia*, demanding that the Tribunal order respondent to provide him with English and German language texts of the 19 November 2013 judgment. Appellant further alleges defects in the Disciplinary Board's proceedings stemming from the respondent's sometime confusion of the date of the November 2013 judgment of conviction with the date of the denial of his appeal the following year. The reply also alleges inconsistency in respondent's characterization of the reasons for the disciplinary action, essentially asking whether appellant was disciplined for having been convicted, or for having engaged in the conduct for which he was convicted? (In the latter case, according to appellant, respondent was obliged to independently prove that conduct, which in appellant's view, it failed to do.)

20. Appellant contends that respondent's actions caused him moral injury which he evaluates at €20.000.

21. Appellant requests:
- annulment of SACEUR's decision, as communicated in the letter of 7 November 2016, to reduce his pension by 67%;
- compensation for moral harm, evaluated *ex aequo and bono* at €20.000; and
- reimbursement of the costs of retaining counsel, travel and subsistence.

(ii) Respondent's contentions

22. Respondent does not contest admissibility of the appeal.

23. Respondent denies appellant's first claim, to the effect that he was given no explanation of the basis of the disciplinary charges against him. In respondent's submission, appellant "*was fully aware of the reasons behind the disciplinary action*." In this regard, respondent states that it assumed that appellant was familiar with the contents of the judgment in his criminal case, as he had attended his trial. However, respondent notes that it made arrangements with the German authorities to assure that appellant had access to the judgment. In respondent's view, appellant was fully engaged in the process, as evidenced by the large volume of correspondence between appellant and respondent during which he requested and received documents and information for use in responding to the charges "*had he chosen to do so*."

24. As to appellant's second claim, that he was not heard by the Disciplinary Board, respondent contends that he was given several opportunities to present his comments. Respondent points to several letters to appellant inviting him to provide his views to the Disciplinary Board, and extending time limits for him to do so. Appellant did not provide any comments in response.

25. Appellant's third contention was that the 7 November 2016 communication informing him of SACEUR's decision to reduce his pension was defective, *inter alia*, in that he did not receive SACEUR's actual decision and that no reasons were given sufficient to allow him to understand the basis for the penalty imposed. Regarding the

first part of this contention, the record indicates that, not long after this appeal was lodged, appellant was sent a copy of SACEUR's letter approving the penalty. (SACEUR's letter apparently had a classification or handling restriction, and was not made part of the record in this case.) As to appellant's further arguments, respondent recalls that its earlier communications to appellant fully set out the reasons for the penalty, and that it was not necessary to repeat reasons already provided in full.

26. As to SACEUR's decision to impose a harsher penalty than the Disciplinary Board recommended, respondent acknowledges that the 7 November 2016 did not give reasons for this decision. However, "*the Respondent understands that it was due to the severity of the breach in this case. SACEUR wished to reduce the entire amount of NATO's contribution to the pension (which amounts to 67%) leaving the Appellant with the amount that he personally contributed. It is accepted that this was not communicated to the Appellant*."

27. Regarding appellant's contentions regarding the length of time required for the disciplinary proceedings, respondent contends that the delays between February 2015 and December 2015 resulted from the need to meet appellant's requests for comments and information and to assure his access to the German court judgment. The delay between transmission of the Disciplinary Board report to SACEUR in April 2016 and SACEUR's decision on the matter in late October 2016 was explained, *inter alia*, by a change of SACEURs, the seriousness of the case, and concern about the sufficiency of the penalty imposed. Respondent observes that throughout this period, appellant continued to receive his full pension, and so suffered no prejudice on account of any delay.

28. Respondent denies that appellant is entitled to any monetary or other relief, and requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

29. The following provisions of the CPR are relevant to this case:

> Article 59.1: Any failure by staff members or former staff members to comply with their obligations under these Personnel Regulations, whether intentional or through negligence on their part, shall make them liable to disciplinary action.
>
> Article 59.3(f): Disciplinary actions includes: ...
>
> (f) where the staff member has left the Organization, withdrawal in whole or in part, either temporarily or permanently, of benefits under the Coordinated Pension Scheme, Provident Fund, Defined Contribution Pension Scheme or group insurance policy.
>
> Article 59.4: A reduction or suspension of benefits under the Coordinated Pension Scheme, Provident Fund, Defined Contribution Pension Scheme or group insurance policy shall not, save in exceptional circumstances, extend to staff members' own contributions, or to the pension rights or insurance coverage of their dependents, as appropriate.

> Article 60.3: No disciplinary action may be taken until staff members or former staff members have been informed of the allegations against them.
>
> Article 60.4. Before a final decision is taken under ... (f) of Article 59.3, staff members or former staff members shall be entitled to submit oral or written comments.
>
> Article 3.2 of Annex X: The grounds for which disciplinary action is taken must be specified and the staff members concerned informed of the grievances against them.
>
> Article 3.5 of Annex X: Where staff members are the subject if criminal proceedings...A final decision regarding the disciplinary action to the taken against such staff members for the same acts may not be taken until the verdict of the court hearing the case has been confirmed.

30. Admissibility is not contested. Appellant has complied with the pre-litigation process established by the CPR. The claim is admissible.

31. Appellant essentially advanced two lines of argument: that he was not sufficiently informed of the basis for the disciplinary charges against him, and therefore did not know how to respond; and that he was not able to participate in the Disciplinary Board proceedings in his defense. The Tribunal does not find either line of argument to be persuasive or credible.

32. It is appropriate to recall the unusual circumstances of this appeal, which were not properly disclosed to the Tribunal in the appeal. Appellant is a German national who was a NATO civilian staff member in Germany before his retirement. As the documents notifying appellant of the disciplinary charges against him make clear, those charges stem from his conviction by a German court of serious criminal charges related to his service as a NATO civilian staff member. Appellant was present at his trial, was represented by counsel, and heard the charges and evidence against him. The court's judgment, giving the judges' assessment of the charges and evidence against him, was read in his presence. The judgment was later classified as Secret by the German authorities. However, the record demonstrates that respondent arranged with the German authorities for appellant to have access to that judgment while he was in prison, and that he did review the judgment for substantial periods of time over several days in November and December 2015.

33. At the hearing, appellant stated that the document he reviewed while in prison was "*not certified*", "*was just a printout*," was "*a fake*" and was "*a placebo to make me a criminal.*" Appellant offered no evidence in support of this belief, or any reason why the German authorities would take such action. Appellant apparently has not raised these accusations with the German authorities. The Tribunal finds the accusations wholly unconvincing.

34. The Tribunal finds appellant's various claims that he does not know, and was not clearly informed of, the reasons for the disciplinary charges brought against him, and therefore could not exercise his right of defense, to be contrived and unpersuasive. Appellant was sufficiently informed of the charges against him and of the reasons for those charges. Appellant's claims in this regard are dismissed.

35. Appellant also contends that he was not able to participate in his defense, including in the proceedings of the Disciplinary Board. This claim is also unconvincing. The record includes several communications from respondent to appellant (*inter alia*, of 5 March 2015, 25 November 2015, and 8 January 2016) informing him of his right to respond to the charges against him, including by providing comments to the Disciplinary Board. Appellant did not avail himself of these invitations.

36. Indeed, the evidence shows that appellant deliberately cut off communication with the respondent. In a letter of 11 December 2015, appellant expressed aggravation that his demands to initiate disciplinary proceedings against various NATO staff members had not been acted upon, and accused respondent's chief of Human Resource Management of acting improperly in pursuing disciplinary action against him. Appellant's letter concluded that *"I will not accept any further mail on this subject but will return it unopened*." The record shows that appellant subsequently refused to accept the Disciplinary Board's registered letter conveying a final request to comment on his case.

37. Accordingly, the Tribunal rejects appellant's contention that he could not participate in or defend himself in the proceedings of the Disciplinary Board. He took no action in response to multiple clear invitations to present his case to the Disciplinary Board. The appellant has not shown any failure by the Disciplinary Board to comply with the applicable standards and procedures. Appellant's claims in this regard are dismissed.

38. Appellant also raises arguments related to the substantial period required for the disciplinary proceedings in his case, and to aspects of SACEUR's decision. As to the arguments involving the length of the proceedings, the Tribunal notes that several months were required to address appellant's demands for documents and information and to secure his access to the classified November 2013 judgment in his case. The further delay between submission of the Disciplinary Board's report and SACEUR's decision was of a different character. However, this caused appellant no prejudice, as he continued to receive his full pension throughout this period. Appellant's claims in this regard are not reason for annulment, and are dismissed.

39. A final issue, however, is of a different character. As noted, the Disciplinary Board recommended that appellant's pension be reduced by 60%. SACEUR, however, reduced it by 67%. Appellant was given no explanation of the reason(s) for this increased penalty. Respondent's counsel offered speculation as to possible reasons for the increased penalty, but acknowledged that no reasons were given.

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

41. An organization's responsibility to provide reasons is particularly compelling where an organization utilizes a complaints committee or other similar procedure, and the ultimate decision-maker does not accept the committee's recommendations. In this regard, the ILO Administrative Tribunal "*has consistently stressed the requirement that where a final decision refuses, to a staff member's detriment, to follow a favourable*

recommendation of the internal appeal body such decision must be fully and adequately motivated." ILOAT Judgment 2339, Consideration 5. Other ILOAT cases are to like effect. *See* ILOAT Judgments 2092 *("... where a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated.*"); and 2261 (similar).

42. The decision to reduce appellant's pension by an additional 7% was a serious matter, with significant adverse financial implications for appellant. In the circumstances, it was legally necessary for the decision-maker to provide an appropriate statement of the reasons for his decision. This was not done. Respondent's counsel could only speculate as to the reasons for the final decision to impose a harsher penalty. The reasons suggested by counsel, while reasonable in the circumstances, were still only speculation. This is not legally sufficient.

43. Accordingly, the Tribunal must annul the contested decision insofar as it increases the penalty imposed on appellant to reduction of 67% of his pension, and not the 60% recommended by the Disciplinary Board, without providing explanation for the increased penalty.

44. All of appellant's other claims involving aspects of the disciplinary procedure prior to the ultimate decision to increase the penalty to deprivation of 67% of pension, and his claim for moral damages, are dismissed.

E. Costs

45. 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 […]

46. As appellant has partially prevailed in his appeal, he is entitled to reimbursement of justified expenses he incurred, as well as the costs of retaining counsel up to a maximum of €1.000.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision to reduce appellant's pension by 67%, instead of 60% as recommended by the Disciplinary Board, is annulled for failure to give reasons.
- Appellant's other claims are denied.
- Respondent shall reimburse appellant's justified expenses, as well as the costs of retaining counsel up to a maximum of €1.000.

Done in Brussels, on 21 November 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

21 December 2017 AT-J(2017)0024

Judgment

Case No. 2017/1105

PL

Appellant

v.

Headquarters Allied Joint Force Command
Brunssum
Respondent

Brussels, 11 December 2017

Original: French

Keywords: dismissal of a staff member; conditions; validity of the reasons; reasons that cannot warrant dismissal as a disciplinary action.

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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 22 September 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 9 January 2017 and registered on 16 January 2017, by Mr PL, seeking:
- annulment of the decision of 18 October 2016, confirmed on 1 December 2016, whereby the Commander, Allied Joint Force Command Brunssum (JFCBS) terminated his indefinite duration contract effective immediately;
- compensation for material and non-material damage, broken down as follows: 1) compensation equal to the salary he would have received between the date of his contract's termination and the date of his reinstatement; 2) payment of his untaken 46 days' leave; 3) compensation for the income tax he had to pay on the indemnities he received; 4) reimbursement by NATO of the contributions he made to the pension scheme; 5) compensation for damage suffered as a result of the Administration's obstruction of the progress of the disciplinary proceedings;
- the payment of 4% interest on those sums, with effect from 18 October 2016;
- an order for the documents relating to the disciplinary proceedings to be destroyed;
- reinstatement in his legal position and reparation of the injury to his reputation;
- that witnesses who are useful to the understanding of the case be heard; and
- full reimbursement of the costs incurred for his defence.

2. On 10 February 2017, the respondent Administration requested that the Tribunal dismiss the appeal without a hearing. The President of the Tribunal rejected this request in an order dated 22 February 2017.

3. The comments of respondent, dated 21 March 2017, were registered on 24 March 2017. The reply of appellant, dated 18 April 2017, was registered on 3 May 2017. A rejoinder, dated 2 June 2017, was produced by the respondent on 9 June 2017, and was supplemented on 14 July by a new reply registered on 17 July 2017.

4. The Tribunal's Panel held an oral hearing at NATO Headquarters on 22 September 2017. It heard the arguments in the presence of representatives of the Office of the Legal Adviser of the NATO International Staff and Mrs Laura Maglia, Registrar. In line with Article 26 of the Tribunal's Rules of Procedure, the hearing was held in private.

B. Factual background of the case

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

6. On 13 May 2015, the Administration launched an administrative inquiry into the management of fuel intended for ISAF and its participating nations. The Board of Inquiry's report was completed on 5 October 2015, and the Chief of Staff of the Supreme

Headquarters Allied Powers Europe (SHAPE) approved the findings of the inquiry 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. Before this stage of the disciplinary proceedings was completed, the appellant was suspended on 15 January 2016 in accordance with Article 60.2 of the Civilian Personnel Regulations (CPR).

7. After completing the procedures for an administrative review, the appellant submitted a request for annulment of the decision on suspension to the Tribunal. In its judgment in Case No. 2016/1073 dated 30 November 2016, the Tribunal annulled that decision.

8. On 15 January 2016, concurrently with the decision on suspension, the Head of the NATO body (HONB) decided to convene a Disciplinary Board. The report on the disciplinary proceedings was prepared on 21 January 2016, and an additional report was prepared on 13 May 2016.

9. The Disciplinary Board submitted its report to the HONB on 8 September 2016. In its opinion, four of the Administration's reasons for ordering dismissal as a disciplinary action were groundless; its two reasons that were based on established facts were not serious enough to warrant disciplinary action. The Disciplinary Board instead suggested that the appellant be reminded of the rules on contacts with companies that supply NATO and on taking leave, and that he would be subject to disciplinary action if he did not change his behaviour in these two areas.

10. On 18 October 2016, the HONB decided to terminate appellant's contract with immediate effect under Article 59.3 of the CPR. The reason given for HONB's decision is the breakdown of trust in the appellant for the following six reasons:
a) undeclared absence;
b) inappropriate contacts with companies;
c) communication to third parties of the 2015 Administrative Board of Inquiry (ABOI) report;
d) dissemination of false information about NATO officials;
e) illegal dissemination of classified information; and
f) deliberate infringement of the law by having suggested an arrangement under Netherlands law.

11. This is the contested decision. The staff member's salary for the notice period has been withheld.

12. The appellant therefore began the procedure for an administrative review by submitting a complaint on 4 November 2016.

13. On 1 December 2016, the HONB decided to terminate the appellant's contract, confirming his earlier decision of 18 October 2016.

14. On 9 January 2017, 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:

15. The appellant begins by underscoring the admissibility of his appeal, in response to some arguments exchanged in the administrative procedure. In his view, this appeal could be submitted directly to the Tribunal in accordance with Article 62.1 of the CPR. Article 62.2 of the CPR, which allows the staff member and the Administration to agree to submit the matter directly to the Tribunal, no longer applied as the HONB had taken a decision. It was necessary to apply Article 62.1 of the CPR, which allows an appeal to be lodged with the Tribunal against any decision by the HONB. The decision therefore wrongly mentioned Article 62.2 of the CPR and Article 4.3 of Annex IX to the CPR, thus allowing the appellant to submit his case directly to the Tribunal.

16. First, the appellant claims a violation of the disciplinary proceedings. Article 5.2 of Annex X to the CPR states that the disciplinary proceedings must be initiated by a report setting out the facts complained of. According to what the Disciplinary Board wrote, however, the Administration had not produced facts but rather unproven allegations.

17. Secondly, the appellant argues that the proceedings violated the right to a fair trial. On the one hand, he complains that he was not given all the documentation that the Administration was using as grounds for its decision to terminate his contract. He invokes the equality of arms and a violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On the other hand, he criticizes that the accusations are based only on anonymous testimony that he can therefore neither dispute nor challenge. Furthermore, in his view it was illegal for the Agency's legal advisor to be on the Disciplinary Board. Finally, he criticizes the composition of the Disciplinary Board, alleging that one member was biased, as he pointed out to the Administration, which ignored his criticism.

18. Thirdly, he considers that there were insufficient grounds for the contested decision, because the contested decision takes the opposite view from the Disciplinary Board's report but gives no reasons for this difference in judgment.

19. Fourthly, the appellant challenges the decision for being based on reasons that were not discussed in the disciplinary proceedings: the reasons in paragraph 10 d) through 10 f) of the present judgment were not discussed in the disciplinary proceedings, and reasons 10 e) and 10 f) are totally new.

20. Fifthly, the appellant claims that his dismissal as a disciplinary action is based on material inaccuracies.

21. With regard to the first reason, an unjustified absence, he acknowledges having taken three days' annual leave without prior authorization, leave which he had had validated upon his return in accordance with common practice in that NATO body. He argues that at any rate, two days' unjustified absence is not a sufficiently serious reason to terminate a contract.

22. With regard to the second reason, inappropriate contact with companies, the appellant disputes the interpretation of the 2004 directive which, in his opinion, only prohibits contact with third parties during negotiation and assessment periods, not during execution of the contract. In his view, his contacts with third parties were known by his superiors, who never prohibited them; they took place after the contract was signed, and they were therefore not restricted to the contracting officer. He added that he had a hard time remembering the precise details of events that had taken place seven years before, but that in any event the Disciplinary Board considered the facts to be unproven, and that receiving a job offer from a company was no violation of the prohibition on contact with a supplier.

23. The third reason for termination is that the appellant is said to have illegally communicated the 2015 Administrative Board of Inquiry report to third parties. The appellant does not consider his behaviour to have been wrong because the subject was one of the normal topics discussed at work, and one of the legal team's missions was to assess fuel supply conditions, about which the HONB requested assessments from the Legal Office team.

24. The fourth reason for the contested decision is the alleged dissemination of false information about NATO officials. The appellant disputes the allegations by explaining that this supposed false information only has to do with his account of the procedure that he discussed with colleagues. Moreover, this reason was not covered in the Disciplinary Board's report, as is required by Article 5.2 of Annex X to the CPR.

25. The fifth reason for the decision is the alleged illegal dissemination of classified information by the appellant. But he underscores that he did not have access to classified documents, only to a list of document references. Moreover, this reason was not covered in the Disciplinary Board's report, as is required by Article 5.2 of Annex X to the CPR.

26. Regarding the sixth and final reason for the contested decision, *i.e.* that appellant deliberately broke the law applicable to NATO by offering a compromise based on Netherlands law, appellant contends that there is no rule in existence that prohibits to make a proposal for an amicable settlement and that he is free to offer whatever he deems fit to solve the issue.

27. Sixthly, the appellant criticizes the contested decision for having confused the procedure for disciplinary action with the procedure for termination for unsatisfactory performance. In the appellant's view, the Administration showed that it took the decision to dismiss him based on unsatisfactory performance, which requires a different procedure than the disciplinary proceedings that were held.

28. Seventhly, appellant argues that the decision is tainted with the abuse of power. The appellant claims he is the scapegoat for mismanagement by NATO that resulted in a high cost for supplying NATO with fuel for its operations in Afghanistan.

29. The appellant goes on to question the withholding of his salary for the notice period. Article 59.3 of the CPR allows this to be done but only in duly justified circumstances, which the Administration has not presented.

30. In addition to annulment of the decision on termination, the appellant is seeking compensation for material and non-material damage to him arising from that decision.

(ii) The respondent's main contentions:

31. Firstly, respondent challenges the admissibility of the appeal.

32. The Administration claims that the appeal is inadmissible because the appellant changed his mind during the procedure: after rejecting any notion of mediation, he is now accusing the Administration of having obstructed those procedures.

33. It also argues that the appeal is inadmissible because the refusal to submit to mediation and a Complaints Committee rendered the pre-litigation procedure futile.

34. Finally, it asserts that the appeal is inadmissible because the appellant misused the litigation procedure by lodging four successive appeals with the Tribunal.

35. In addition, the respondent argues that some of the appellant's grounds of appeal are inadmissible. In a previous appeal (judgment in Case No. 2016/1099), the appellant had directly challenged the composition of the Disciplinary Board. But he had drawn the conclusions from a previous Administrative Tribunal judgment (Case No. 2016/1072) and understood, in the course of the proceedings, that that appeal was inadmissible inasmuch as it was directed against a preparatory action of the disciplinary decision. He therefore withdrew his appeal, which was confirmed by the President of the Tribunal.

36. The respondent claims that such withdrawal deprives the appellant of any possibility of using the grounds related to submissions that he previously withdrew against the disciplinary action at a later date.

37. Moreover, the respondent Administration argues that the appeal is an abusive use of the appeals procedure, and asks the Tribunal to apply Article 6.8.3 of Annex IX to the CPR to order him to pay a fine in the amount of 50% of his monthly salary.

38. Finally, the Administration denies that the appellant suffered any harm. It asks the Tribunal, should it annul the contested decision, to apply Article 6.9.2 of Annex IX to the CPR and award compensation to the appellant rather than order his reinstatement in the Organization.

D. Considerations and conclusions

(i) On the admissibility of the appeal

39. The Tribunal begins by discussing the respondent's plea of inadmissibility against the appeal.

40. But none of the Administration's arguments is valid.

41. Although the Administration claims that the appeal is inadmissible because the appellant changed his mind during the procedure, this is clearly irrelevant: parties may, during the proceedings, change their line of argument. This alone does not make the appeal inadmissible.

42. The respondent also claims that the appeal is inadmissible because the appellant invalidated the pre-litigation procedure by refusing to agree to mediation and a Complaints Committee. But because the termination decision came from the Head of the NATO body himself, the appellant had the power to go directly before the Tribunal without initiating an administrative review with the decision-maker. There are no grounds for inadmissibility in that.

43. The appeal is also argued to be inadmissible because the appellant misused the litigation procedure by lodging four successive appeals with the Tribunal. But there cannot be a maximum limit on the right to bring appeals against decisions by the Administration. The admissibility of each appeal is examined individually. Even if the appellant was unsuccessful in two of the previous three appeals he lodged – one was found inadmissible and rejected, the other was withdrawn by him – those circumstances in no way affect the appellant's ability to challenge another administrative decision, which is the purpose of the present appeal.

44. Finally, the circumstance of the appellant's having, in a previous appeal, sought annulment of an action preparatory to the termination decision and then having withdrawn that appeal does not prevent him from using arguments, in contesting the disciplinary decision on termination, of irregular intermediate phases of the disciplinary proceedings, including the illegality of acts that he had unsuccessfully submitted for annulment by the Administrative Tribunal. There is no force of res judicata with respect to these preparatory actions, because the appeal seeking their annulment was dismissed as inadmissible and the Tribunal has not ruled on their validity.

(ii) On the legality of the decision

45. To begin with, the Tribunal considers the case sufficiently clear, complete and well-documented not to necessitate hearing witnesses as the appellant has requested.

46. The Tribunal has looked carefully into the grounds of the contested decision, which the appellant disputes as valid grounds for the termination decision he is challenging. Six reasons are given as grounds for the decision: unjustified absences, inappropriate contact with companies, communication to third parties of the 2015 Administrative Board of Inquiry report, the dissemination of false information about NATO officials, the illegal dissemination of classified information, and infringement of the law applicable to NATO by offering a compromise based on Netherlands law.

47. With regard to the appellant's unjustified absences, the disciplinary proceedings and later the litigation procedure reveal that this is limited to a single unjustified absence, for the period from 2 to 8 September 2015. It is a fact that three of the days in that period were days of leave, and that the request had been made but was only approved by his supervisor after the period of absence. The Disciplinary Board's investigation also revealed that it was fairly common for the appellant's hierarchical superiors to grant him

days of leave without recording them in the administrative system. Thus the appellant's omission in declaring those days of leave that he had taken do constitute a disciplinary error.

48. The appellant is criticized for having been in contact with NATO's suppliers during his trip to Dubai on 18–19 October 2009, when he was travelling to his assignment in Afghanistan. The appellant explains this meeting with NATO's supplier as the necessity of understanding the challenges of supplying the fuel and the difficulties encountered by the supplier. He explains that those contacts, which were during a work mission, took place after the contract had been signed, and that his superiors had been informed of them. In the Tribunal's view, such contacts should certainly have been limited to the person responsible for finalizing the contract, but all the Administration's accusations against the appellant with regard to kickbacks he could have arranged or the suppliers might have received are not established. Like the Disciplinary Board, the Tribunal considers such contact to be inappropriate but inconsequential in terms of the appellant's loyalty to NATO in the performance of his duties.

49. Next the appellant is blamed for having disclosed an administrative report about the allegations. However, the testimonial evidence shows that the subject was one of the normal topics discussed at work, because one of the legal team's missions was to assess fuel supply conditions, about which the HONB requested assessments from the Legal Office team. The subject matter of the report was the focus of the work of the appellant's legal service, so it was impossible not to discuss it. The appellant has always denied having disclosed the content of his testimony before the Board of Inquiry, and there is no evidence to the contrary. Therefore the allegations against the appellant are not established.

50. The fourth reason for the disciplinary action is that the appellant is alleged to have disseminated false information about NATO officials. The evidence shows that this supposed false information is just an oral account of the procedure that he discussed with colleagues. The written document that the respondent is criticizing the appellant for is his challenging the composition of the Disciplinary Board. However, this is part of exercising the right to appeal, which cannot be held against the appellant nor serve as the basis for ordering disciplinary action. Moreover, this reason was not covered in the Disciplinary Board's report, as is required by Article 5.2 of Annex X to the CPR.

51. The fifth reason for the contested disciplinary action is the illegal dissemination of classified information. The Administration alleges that the appellant disseminated information that was classified secret, to which he could only have had access in the performance of his duties. This is a particularly serious allegation in a military organization. The appellant recalls that he was a legal adviser for seven years, and that he had access to the list of titles of all the documents in the legal office. It was therefore possible for him to mention the titles and references of a number of documents, as he did at various stages of the procedure, but he did not have access to the documents themselves. In the Tribunal's view, the respondent deduced from the appellant's having mentioned the references of documents that he had fraudulently obtained access to the latter, but it has not produced any evidence to support that. The allegations against the appellant are therefore not established, and could therefore not be used as the basis for disciplinary action.

52. The sixth and final reason for the contested decision is that appellant deliberately broke the law by suggesting an arrangement in accordance with Netherlands law. Such reference to a national law was thought to violate the standards of the NATO Tribunal and the immunities of NATO officials. But this argument does not hold. When parties in a dispute seek an amicable compromise, they have *carte blanche* to find a solution that is acceptable to each of them. They may depart from the legal rules that are applicable to the dispute and agree to a solution that suits both parties outside the framework of the law. To do this, they may decide to draw on rules that are not applicable to the dispute, such as rules from a different legal system or from a national law that does not apply to the dispute. Seeking a compromise means finding the solution that both parties are prepared to accept in order to end the dispute. It is not wrongdoing for a NATO official to seek a compromise with the Administration by suggesting a solution based on national legislation. There again, the sixth reason could not be used as the basis for ordering any kind of disciplinary action against the appellant.

53. There being no need to examine the appellant's other submissions, the Tribunal finds that the grounds given for the decision are mainly inaccurate, and that the only two facts that are established – three days' absence for which authorization was only requested afterward, and inappropriate contact with a supplier that was inconsequential in terms of the official's loyalty – are not serious enough to warrant termination of contract.

54. The decision is therefore annulled.

55. This annulment of a decision on termination should give rise to reinstatement of the official in the Organization. However, the respondent has invoked the provisions of Article 6.9.2 of the CPR, which state that:

> Nevertheless, where the Head of the NATO body [...] affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal shall instead determine the amount of compensation to be paid to the appellant for the injury sustained.

56. Under these conditions, annulment of the decision to terminate the appellant's contract does not entail an obligation to reinstate him.

(iii) On the request for compensation for damage:

57. The appellant is seeking compensation for the damage he suffered as a result of his salary not having been paid as from the date of termination with immediate effect, up to the time he turns 65 years of age, on 25 October 2033. However, the appellant, who was under contract with NATO, had no certainty of his work continuing until the date of his sixty-fifth birthday. Even an indefinite duration contract may be terminated by a subsequent decision by the Administration for reasons of service requirements or the staff member's behaviour.

58. A judge to whom such a matter is referred awards illegally dismissed staff members compensation equal to the salary they would have received between the time of contract termination and the time of reinstatement, minus any professional income

they received over that period. That is not the case when the Administration asks not to reinstate the illegally dismissed staff member: the Tribunal awards the illegally dismissed staff member who is unable to resume working for NATO a lump sum in compensation for the damage suffered.

59. In the circumstances of this case, the Administration shall pay the appellant, in compensation for material damage suffered as a result of the loss of his professional activity, a sum equal to twenty-four months of his total remuneration, including allowances and benefits of all kinds and the retirement pension contributions that the Administration would have paid over that period.

60. In addition to that compensation, the staff member is also entitled to the payment of the indemnity for the notice period foreseen in Article 10.3 of the CPR, of which he was illegally deprived by the contested decision's ordering his termination with immediate effect.

61. Conversely, with regard to the income tax that the appellant had to pay in his State of residence, it is up to the staff member himself to rectify his statements with his tax administration to claim, if applicable, that his income was different from the initially declared income, and that the calculation of his income tax should be modified. It is not up to the NATO Administration nor to the NATO Administrative Tribunal to recalculate the income tax actually owed, nor to determine the tax administration's debts owed to its staff member as a result.

62. With regard to non-material damage, in the Tribunal's view the staff member was ousted in conditions that were particularly degrading to him: termination with immediate effect of a staff member with ten years' experience in a position of responsibility, deprivation of access to his personal effects and documents, accusations of dishonesty, injury to his reputation which diminished his chances of finding another job in a similar field considerably. This damage can be fairly assessed by awarding the appellant compensation in the amount of six months' salary, including allowances and benefits of all kinds. This covers the damage caused by the Administration's obstruction of the progress of the disciplinary proceedings, for which the appellant is seeking compensation.

63. Given that just one year separates the contested decision from the Tribunal's decision, and the very low level of inflation in the country where the appellant resides, there is no need to add the interest sought by the appellant to the sums awarded.

64. The remaining submissions in the appeal are dismissed.

65. The respondent's submissions seeking the appellant's payment of a fine for abusive use of the appeals procedure are also rejected as inadmissible. Not only is it inadmissible for the Administration to present such submissions, since the Tribunal decides on its own whether to order such a fine, but the validity of the appellant's submissions shows that he did not make abusive use of the appeals procedure; rather, he only used it to get his rights restored.

E. Costs

66. Article 6.8.2 of Annex IX provides as follows:

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

67. 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. Allied Joint Force Command Brunssum shall therefore 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.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 18 October 2016 whereby the Commander, Allied Joint Force Command Brunssum ordered the immediate termination of Mr L' employment contract is annulled.
- Under Article 6.9.2 of Annex IX to the CPR, Allied Joint Force Command Brunssum is exempted from reinstating Mr L.
- Allied Joint Force Command Brunssum shall pay Mr L compensation in the amount of twenty-four months of his total remuneration, including allowances and benefits of all kinds and the retirement pension contributions that the Administration would have paid over that period.
- Allied Joint Force Command Brunssum shall pay Mr L the indemnity in lieu of notice foreseen in Article 10.3 of the CPR.
- Allied Joint Force Command Brunssum shall pay Mr L six months' salary, allowances and benefits of all kinds in compensation for non-material damage suffered.
- Under Article 6.8.2 of Annex IX to the CPR, Allied Joint Force Command Brunssum 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 11 December 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

25 January 2018 AT-J(2018)0001

Judgment

Case No. 2016/1102

JG

Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 16 January 2018

Original: French

Keywords: invalidity; date on which it is determined; impossibility of qualifying people who are no longer NATO staff members as permanently incapacitated.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 22 September 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 7 December 2016 and registered on 20 December 2016, by Mrs JG, seeking:

- annulment of the decision of 11 October 2016 rejecting her request for an invalidity pension;
- reimbursement of the costs incurred for her defence;
- production of Articles 12 and 13 of the group insurance contract; and
- payment of salary for the period from 5 to 28 February 2015.

2. The comments of the respondent, dated 20 February 2017, were registered on 22 February 2017. The reply of the appellant, dated 22 March 2017, was registered on 24 March 2017. A rejoinder, dated 25 April 2017, was produced by the respondent on 26 April 2017.

3. The Tribunal's Panel held an oral hearing at NATO Headquarters on 22 September 2017. 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. In line with Article 26 of the Tribunal's Rules of Procedure, the hearing was held in private.

B. Factual background of the case

4. The 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 for NATO on a one-year definite duration contract with 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.

5. The appellant went on sick leave on 5 February 2013, which subsequently became extended sick leave as of 5 May 2013, except for a brief interruption in March-April 2014. After two years of sick leave and then extended sick leave, the Administration terminated her contract on 16 February 2015 in line with Article 45.7.1 of the Civilian Personnel Regulations (CPR). The appellant challenged that decision before the Administrative Tribunal which, in its Judgment no. 2015/1055 dated 20 April 2016, confirmed the legality of the decision on dismissal but changed its date of effect to 1 March 2015. The Tribunal also ruled that the submissions concerning the invalidity pension were inadmissible insofar as they had not been covered by the pre-litigation procedure.

6. This judgment was notified to the appellant on 20 April 2016.

7. On 1 June 2016, the appellant asked the Head of Human Resources to request that the insurance company grant her an invalidity pension. On 12 July 2016, the appellant forwarded by e-mail a certificate from her medical practitioner dated 5 July 2016 stating that he had diagnosed her with permanent invalidity on 23 February 2015, which is after the notification of contract termination but before the date of effect thereof resulting from the above-mentioned Administrative Tribunal judgment. It was only because of a heavy workload that he had been unable to write his report prior to 22 May 2015.

8. The Head of Human Resources had replied that the appellant was no longer a member of the staff since 28 February 2015, that no indication of her permanent invalidity had been given when she had been working, and that the physician's certificate had been written after her employment had ended. Consequently he was unable to forward the request for permanent invalidity.

9. The appellant submitted a petition on 10 August 2016, which the Administration rejected on 31 August 2016. The appellant continued the pre-litigation procedure by entering a complaint on 27 September 2016, which the NCIA General Manager, who is the Head of the NATO body within the meaning of the Civilian Personnel Regulations, rejected on 11 October 2016.

10. This is the decision that the appellant referred to the Tribunal on 7 December 2016.

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

(i) The appellant's contentions

11. First, the appellant argues that she has been incapacitated since 23 February 2015, as confirmed by her physician in a certificate which states that the incapacity dates from 23 February 2015 at the latest. In the appellant's view, it is the date of the examination that must be taken into account, not the date when the certificate was written. Furthermore, it was when the decision on termination was announced, on 16 February 2015, that her state of health worsened.

12. The appellant also argues that the Administration has a responsibility to check whether a staff member risks becoming incapacitated before it terminates that person's contract at the end of his or her extended sick leave. Finally, she asserts that it is not necessary to have the status of a NATO staff member in order to raise issues of invalidity and request a pension.

13. Lastly, in response to the respondent's remark that the invalidity was not permanent in February 2015 because the appellant had continued sending in medical certificates after her dismissal, she notes that she had done so because she was challenging the termination of her contract effective 5 February 2015.

14. In rebuttal, the appellant maintains that the respondent's comments arrived two days after the deadline set by the Tribunal Clerk for filing comments.

(ii) The respondent's main contentions:

15. Firstly, the respondent challenges the admissibility of the appeal.

16. It argues that the full pre-litigation procedure was incomplete because the administrative review provided for in Article 2.2(b) of Annex IX to the CPR had been omitted. Thus the case had been submitted to the Tribunal prematurely.

17. Regarding the legality of the decision, the respondent begins by explaining that the insurance rules agreed on the basis of the pension scheme specify that the request for a pension must be made by a serving NATO staff member, and the appellant was no longer one when she made her request. The respondent strongly disputes whether the appellant's permanent invalidity was established on 23 February 2015, since the first reference to a possible invalidity was made when the appellant mentioned it on 24 April 2015, two months after she had left the Organization. And it was not until eighteen months after the end of her contract that the appellant gave the date of 23 February 2015 as the starting date of her permanent invalidity.

18. In addition, the respondent challenges whether the appellant's invalidity could have been caused by her professional activity in the Organization. The respondent underscores the contradictions in the appellant's reasoning. When the appellant was seeking an annulment of her dismissal in appeal no. 2015/1055, she claimed that she had intended to resume working after 25 February 2015. But in the present case, she is claiming to already have been permanently incapacitated as of that date.

D. Considerations and conclusions

(i) On the admissibility of the appeal

19. The respondent argues that the appellant produced only one administrative review, on 10 August 2016, to which it replied on 31 August 2016. This is inaccurate. As the respondent admits, the appellant sent in another letter on 20 September 2016, to which the Administration replied on 28 September 2016 at 9:31, after which the complaint was sent out that same day at 10:57. Therefore the sequence of the exchanges of letters shows that the appellant did in fact seek two successive administrative reviews before going on to lodge the complaint and then the appeal.

20. The appeal is therefore admissible.

21. Furthermore, the appellant's claim that the Administration responded after the two-month deadline is flawed: the Tribunal Registry sent the appeal to the respondent on 20 December 2016, and on 20 February 2017 there was a response.

(ii) On the legality of the decision

22. For staff in the Defined Contribution Pension Scheme, Article 14 of Annex VI to the CPR provides as follows:

> The Secretary General and Strategic Commanders shall arrange for insurance to provide cover to serving staff who are members of the Scheme for loss of earnings through permanent disability under Article 47 of the Civilian Personnel Regulations.

A contract on that cover was signed by NATO and Allianz Worldwide Care. The rules on granting an invalidity pension are set out in Articles 12 and 13 of this group insurance contract.

23. It follows from the wording of Articles 12 ("Permanent invalidity resulting from an illness other than an occupational illness or from an accident other than an accident on duty") and 13 ("Permanent invalidity resulting from an occupational illness or from an accident on duty") that invalidity pensions are granted only to insured persons who experience a significant reduction in their working and earning capacity in a NATO body. Consequently an invalidity pension cannot be granted to former staff members who have left the Organization definitively: it is only applicable to serving staff whose state of health requires them to stop working, thereby depriving them of part of their professional income. Thus the invalidity pension serves to compensate for this lost income.

24. A staff member who ceases working definitively is paid retirement benefits under Article 12 of Annex VI to the CPR. Regardless of any events – including illness and invalidity – that the former staff member who retires experiences, the retirement benefits remain unchanged. The Administration cannot grant an invalidity pension to a former staff member who has ceased working.

25. It is a fact that no request concerning permanent invalidity was made by the appellant prior to 1 March 2015, the date set by the Tribunal for her separation from NATO. Although the appellant argues that it is the date of the medical examination that must be used to determine her invalidity status, the evidence does not establish that this invalidity existed on 23 February 2015. The medical report by her physician, who cannot establish invalidity on his own under the terms of the group insurance, was drafted only on 22 May 2015. When the appellant requested a permanent invalidity pension, she was no longer a member of the Organization.

26. While her contract was running, the appellant never informed the Administration of the possibility of permanent invalidity; permanent invalidity was mentioned for the first time in an e-mail on 24 April 2015, and then merely as a possibility. The certificate of 22 May 2015, on which the appellant is largely basing her case, does not say that the appellant had been incapacitated since 23 February 2015, and it does not state that the invalidity dated back several weeks or months before the date on the certificate. In the most favourable interpretation for the appellant, the date of onset of the permanent invalidity was 24 April 2015. It was only on 5 July 2016 that the date of 23 February 2015 was mentioned for the first time. These documents, which were written so long after the medical examination, cannot establish the onset of the permanent invalidity.

27. This situation differs from the one in appeal no. 2015/1055; in that case the respondent had asked the group insurance company on 20 November 2014 whether the staff member's state of health could be qualified as a permanent invalidity, to which the company had given a negative answer on 28 November 2014.

28. The Head of the NATO body, observing that the request did not meet certain

conditions of eligibility for the invalidity pension prior to the examination of the staff member's state of health for which the insurance company is responsible, was therefore correct in not forwarding the appellant's request for an invalidity pension to Allianz Worldwide Care.

29. The submissions in the appeal seeking an invalidity pension are therefore rejected.

30. Also dismissed as inadmissible are the appellant's submissions regarding the payment of her salary for the period from 5 February through 1 March 2015, which were not covered by a prior request to the Administration. The Administration is responsible for this payment, however, as shown directly by the operative provisions of Judgment No. 2015/1055 of 20 April 2016.

E. Costs

31. 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 [...].

32. Given that Mrs G's appeal has been dismissed, the provisions of Article 6.8.2 of Article IX prevent her from being reimbursed for any costs.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- Mrs G's appeal is dismissed.

Done in Brussels, on 16 January 2018.

(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

2 March 2018 AT-J(2018)0002

Judgment

Case No. 2017/1113

JF

Appellant

v.

NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 20 February 2018

Original: English

Keywords: res judicata.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2017.

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), dated 17 July 2017 and registered on 19 July 2017 as Case No. 2017/1113, by Mr JF.

2. The respondent's answer, dated 18 September 2017, was registered on 22 September 2017. The appellant's reply, dated 12 October 2017, was registered on 23 October 2017. The respondent's rejoinder, dated 22 November 2017, was registered on 23 November 2017.

3. The Panel held an oral hearing on 15 December 2017 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 Grade B3 AWACS Crew Chief. From 2010 onward he served as a Grade B5 Principal Technician (Instructor).

6. Appellant has been on sick leave since 28 January 2014. On 11 June 2014, appellant was authorized by NAEW&CF GK to travel to the United States in order to undergo medical treatment. 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, accompanied by his wife, from Florida to Aachen, Germany to meet, on 4-5 August, Dr F, the third medical practitioner appointed to 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 these findings.

8. On 13 October 2015 appellant was notified, by letter from the NAEW&CF 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&CF 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&CF GK, on 12 January 2016.

11. On 2 February 2016, appellant submitted a complaint that was rejected by the NAEW&CF 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 at 24.00, following expiration of the period of extended sick leave.

14. Appellant contested the 13 October 2015 decision and the 25 February 2016 decision above through an appeal, registered as Case No. 2017/1076, on which the AT delivered its judgment on 30 January 2016.

15. On 9 May 2017 appellant wrote to respondent requesting access to his medical data, including the full report of the E-3A Medical Adviser of 18 September 2015, which was issued by the IB, and the report provided by the third doctor on the IB. The request was rejected on 31 May 2017 by the Commander, NAEW&CF GK, referring at the same time to Article 1.6 of Annex IX to the CPR and the direct submission of the grievance to the AT.

16. On 17 July 2017 appellant submitted the present appeal.

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

(i) The appellant's submission

15. Appellant refers to Article 1.6 of Annex IX to the CPR and deems the appeal to be admissible.

16. Appellant seeks to obtain access to 1) the full report by Dr B dated 18 September 2015 which was issued following the IB's meeting; and 2) the report provided by Dr F to the IB.

17. Appellant bases his contention on the fundamental right to access his personal data and, in particular, his medical data. Appellant makes reference to such principles as applied in different international organizations, such as in the EU staff regulations or the ILOAT and ECHR case law. Appellant further stresses that the CPR do not contain any specific rule on the right of staff members to access their medical data and adds that, as a principle, such access should be granted.

18. Appellant retains that respondent's reasoning claiming that there was no reason to provide access to appellant's medical data must be reversed and that respondent has to offer a reason for refusing such access.

19. Appellant submits that the right to access his medical documents is covered by the right of access to the personal file and his request is made on the basis of general principles of law.

20. In addition, appellant refers to the principle of sound administration including the right of every person to have access to his/her file, while respecting the legitimate interests of confidentiality and/or professional and business secrecy.

21. Appellant rejects respondent's view that the present appeal should be considered as *res judicata*, stressing that the objects of the two appeals are not the same. In particular, appellant observes that with the judgment in Case No. 2016/1076, the Tribunal did not take any decision on whether it could compel respondent to release the report of Dr F, but rather stated that the Tribunal could not compel Dr F himself to release the report.

22. Appellant also informs the Tribunal that he requested access to his medical data from Dr F directly, and upon his refusal is pursuing the matter before the competent national court.

23. Appellant requests that the Tribunal:
- annul the Commander's decision of 31 May 2017 rejecting his request of 9 May 2017;
- order respondent to provide Dr F's report; and
- reimburse him for the cost of retaining counsel, travel and subsistence.

(ii) The respondent's contentions

24. Respondent does not contest the admissibility of the appeal.

25. Respondent contends that the appeal is however to be considered as *res judicata*.

26. Respondent recalls that the request for access to the medical reports of both Dr B and Dr F were already the subject of Case No. 2016/1076 on which the AT delivered its judgment.

27. In particular, respondent quotes paragraphs 51 and 52 of the AT judgment, stating:

> 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.
>
> In any case, Dr F's opinion was reflected in the IB's findings, given the unanimity of its conclusions.

28. Respondent points out that appellant had access to all the medical information that had been filed over the course of his employment and that he has no justified need for legal action to obtain additional internal documents of the IB, which, *inter alia*, as part of the proceedings shall be kept secret under Instruction 13/3 ix) of Annex IV to the CPR.

29. Respondent further adds that appellant's medical doctor has access to the said documents to which appellant could revert. *In fine*, respondent notes that any observation about the relationship between appellant and Dr F is outside the scope of the present appeal, being this directed against NAEW&CF GK.

30. Respondent requests that the Tribunal dismiss the appeal.

D. Considerations and conclusions

31. The Tribunal has already ruled on appellant's previous appeals, which, in one way or another, are connected: the 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), 2 September 2016 (Case No. 2016/1070, reimbursement of travel and subsistence expenses during invalidity procedure), and 30 January 2017 (Case No. 2016/1076, Invalidity Board's proceedings).

32. Appellant contends that the current request is based on legal grounds other than Case No. 2016/1076. This submission aims to obtain the recognition of the alleged right to have access to medical information or documents that are in the possession of the respondent. Appellant considers that the Tribunal has never ruled on the right of access to medical data.

33. The Tribunal observes, however, that the current appeal reproduces the requests already made by appellant in Case No. 2016/1076. In that previous appeal appellant recalled that access to Dr F's report concerning appellant's medical examination in Aachen had been requested several times and yet he had not been provided with it, either directly or through his medical doctor (*cf.* paragraphs 20 and 27 of the judgment of 30 January 2017 in Case No. 2016/1076).

34. Furthermore, and although during the hearing of previous Case No. 2016/1076 appellant's counsel stated that another of the requests had been withdrawn, this was not the case regarding the abovementioned. That is why the Tribunal explained:

> 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.

35. And, finally, regarding the submission on access to Dr F's report, the Tribunal stated:

> 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.

36. The Tribunal added:

> 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.

As a consequence, this particular claim was also dismissed.

37. The subject of the current appeal has thus exactly and clearly already been addressed in the previous decision of the Tribunal. This implies that the Tribunal is faced with a situation of *res judicata*, since the parties, the subject matter of the appeal and the cause of action match those of the aforementioned earlier case.

37. Article 6.8.4 a) of the Annex IX of the CPR provides that judgments of the Tribunal "*shall be final and not subject to any type of appeal by either party…*" In accordance with this legal provision, also Rule 27.7 of Appendix 1 to Annex IX states: "*Subject to Article 6.8.4 of Annex IX, judgments are final and binding*". As a consequence, NATO AT judgments carry *res judicata* authority and may only be reviewed on exceptional and limited grounds as foreseen in Rules 28 (rectification of error), 29 (revision of judgments) and 30 (clarification of judgments) of the Rules of procedure of the Tribunal.

38. Despite appellant's submissions, the principle of *res judicata* is fully applicable. The changes in the legal reasoning of the appeal cannot undermine this conclusion. The triple identity requirements (same parties, same subject matter and same cause of action) are here in place. The previous judgment of the Tribunal was final, has the force of *res judicata* and cannot be reconsidered by means of a refocused rationale by appellant.

39. The appeal must be dismissed.

E. Costs

40. 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 […]

41. 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 20 February 2018.

(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

2 March 2018 AT-J(2018)0003

Judgment

Case No. 2017/1111

EB

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 23 February 2018

Original: English

Keywords: contract of employment; refusal to renew the contract; manifest errors of assessment; compensation.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2017.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA) dated 22 May 2017, and registered on 1 June 2017 as Case No. 2017/1111, by Mrs EB contesting, *inter alia*, the Organization's refusal to renew her contract.

2. The respondent's answer, dated 31 July 2017, was registered on 9 August 2017. The appellant's reply, dated 7 September 2017, was registered on 12 September 2017. The respondent's rejoinder, dated 12 October 2017, was registered on 23 October 2017.

3. The Tribunal's Panel held an oral hearing on 15 December 2017 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 NATO Consultation, Command and Control Agency (NATO C3 Agency) on 1 March 2005, as a Software Engineer, on a definite duration contract expiring on 29 February 2008.

6. When this contract expired, appellant was offered another definite duration contract for the same position for a period of one year (1 March 2008 to 28 February 2009). This contract was renewed again for another period of one year (1 March 2009 to 28 February of 2010). Following this appellant was offered another definite duration contract for the same position for a period of three years (1 March 2010 to 28 February 2013).

7. Appellant was, in May 2012, offered for the same position of Software Engineer a new definite duration contract of one year for the period 1 March 2013 to 28 February 2014. With the implementation of the Agencies' reform with effect from 1 July 2012, NCIA replaced, *inter alia*, the NATO C3 Agency. In May 2013 respondent offered appellant, for the same position, a new definite duration contract of three years (1 March 2014 to 28 February 2017).

8. By letter dated 21 June 2016, respondent informed appellant that her contract would not be renewed on expiry. In this letter, respondent stressed that *"the reason for non-renewal is the lack of anticipated sustained business in (appellant's) skill areas* (Software Engineer/Developer)".

9. Appellant initiated the pre-litigation procedure against the above-mentioned decision on 21 July 2016 by entering a first request for administrative review. Respondent rejected this request on 12 August 2017, confirming the grounds on which appellant's contract was not renewed.

10. On 1 September 2016, appellant requested a further administrative review. Respondent rejected this request on 22 September 2016, stressing that the earlier conclusion concerning the reason for the non-renewal of appellant's contract was correct and in line with NCIA policy (Directive 2.1).

11. On 14 October 2016, appellant submitted a request for mediation within the meaning of Article 3 of Annex IX to the NATO Civilian Personnel Regulations (CPR). This request was accepted by respondent on 17 October 2016.

12. On 6 December 2016, appellant informed respondent of her decision to withdraw her request for mediation.

13. On 21 December 2016, appellant requested that a Complaints Committee be convened.

14. By a request dated 8 February 2017, appellant requested an extension of her contract for a period of six months owing to personal hardship. This request was rejected by respondent on 13 February 2017. Appellant requested a review of this decision on 21 February 2017. The latter request was also rejected by respondent on 28 February 2017.

15. On 10 March 2017, *i.e.* after appellant had left the Organization, the Complaints Committee issued its report.

16. By letter dated 21 March 2017, respondent informed appellant that it had decided to uphold its previous decision not to renew her contract. In particular, respondent stressed that the Complaints Committee's report confirmed the validity of the grounds justifying this non-renewal, that is to say the "*lack of sustained business*" in appellant's skill areas and the fact that respondent's decision in this regard was a strategic decision in line with the Agency Supervisory Board's strategic guidance. This is the decision being challenged.

17. It was under these conditions that appellant submitted on 22 May 2017 the present appeal to the Tribunal.

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

(i) The appellant's contentions

18. Appellant makes submissions seeking annulment of the challenged decision and compensation for material and non-material damage.

a. On the submissions seeking annulment

19. With the submissions seeking annulment of the challenged decision, appellant invokes five pleas.

20. The first plea concerns the violation of Article 3.2 of Annex IX to the CPR. In particular, appellant observes that the mediation she requested in accordance with this Article was accepted by respondent on 17 October 2016 but was not followed up. In particular, after accepting appellant's request, respondent had a duty to act by appointing a mediator within a reasonable time frame. In December 2016, that is to say one month and a half after the request for mediation, appellant had received no information about the appointment of a mediator, which is not in conformity with Article 3.2 of Annex IX to the CPR. In these circumstances, and given that appellant's contract was ending on 28 February 2017, appellant had no choice but to cancel the request for mediation and to request that a Complaints Committee be convened.

21. According to appellant, it is respondent's responsibility to ensure that Article 3.2 of Annex IX to the CPR is correctly implemented by appointing within a reasonable time frame a mediator who has, after his or her appointment, 15 working days to conduct the mediation. For that reason, it is irrelevant to contend that no mediator is available. As a consequence, and because of the failure to appoint a mediator in due time, appellant lost the opportunity to have the case heard by a third party and, possibly, to obtain the remedy sought. For this reason the challenged decision must be annulled.

22. With the second plea, appellant maintains that with the challenged decision respondent violates Article 5.2.5 of Annex IX to the CPR. This Article provides that after the Complaints Committee issues its report, and before the General Manager makes a final decision, the claimant shall have the right to submit his or her views in writing to the Head of NATO body (HONB) concerned, including with respect to the findings and recommendations of the Complaints Committee. Appellant has not been given the possibility to provide her comments on this report nor was she invited to do so. Consequently, the challenged decision was taken in violation of Article 5.2.5 of Annex IX to the CPR.

23. In any event, appellant stresses that she sent informally some late remarks to the members of the Complaints Committee, which however were never transmitted to the HONB and consequently were never taken into account by respondent before taking the challenged decision. Given the fact that she left the Organization on 28 February 2017 and the Complaints Committee report was issued on 10 March 2017, she did not have the possibility to follow up on the procedure. Consequently, it was incumbent upon respondent, on the basis of the principle of good administration, to ensure that her comments were passed on to the HONB. By failing to do so, respondent vitiated the challenged decision, which must be annulled also on this ground.

24. With the third plea, appellant contends that the challenged decision, taken on the basis of the expected lack of sustained business in appellant's skill areas, must be annulled because it is vitiated by manifest errors of assessment for the following reasons.

25. To start with, the rotation rule invoked by respondent in the written procedure does not concern appellant's situation. This conclusion results from her first contract of employment with respondent. This contract was an initial contract of three years' duration and, consequently, every subsequent renewal should instead have been an indefinite duration contract.

26. Moreover, appellant considers, with reference to the NATO International Peacetime Establishment, that her position is still included in the Personnel Establishment. This means that the position in question was never suppressed.

27. Independently from the job description for her post, appellant developed a much broader range of skills than those of a Software Engineer. Indeed, in addition to her experience with and knowledge of the Joint Defence Planning Analysis and Requirement Tools (JDARTS), appellant gained knowledge in the Defence Planning area and has evolved and developed further skills, in particular managerial skills.

28. In particular, appellant was selected to undertake technical and managerial training. Appellant took part in the Introduction to Management courses in February 2014 and in 2015 obtained a related certificate. Appellant's Reviewing Manager acknowledged in the 2015 Performance Management Report the positive evolution of appellant's skills. Appellant tried to diversify her activities within the JDARTS but she was advised by respondent to focus on JDARTS development and the duties related to it despite her additional specific skills. In fact, the abovementioned report states that appellant also acted as an operational analyst.

29. Concerning, finally, the argument relating to the outsourcing activities falling within the sphere of appellant's skills as one of the grounds for taking the challenged decision, appellant notes that this argument is not relevant because the JDARTS has always been outsourced to contractor companies.

30. In any event and despite this outsourcing, appellant's skills and duties (software testing, user support, JDARTS database management, training and version control) continue to be necessary for respondent's activities, at least until 2020, because of the steady growth of the IT budget.

31. Indeed, the portfolios of the Multinational Project launched in 2016 were transferred to the OA Service Line, thereby increasing the workload of this Service for a long period. In particular, the Multinational Project Alliance Defence Analysis and Planning for Transformation (MN ADAPT) is one of the three projects listed under priority 1 for the 2015-2020 period. The NCIA Demand Plan 2017-2021 also demonstrates that the MN ADAPT project is one of the important projects for this period.

32. Furthermore, the JDARTS continues to be shown in respondent's Customer Services catalogue and respondent considers appellant to be an expert in the OA Service Line (2015 Performance Management Report). As a consequence, respondent's assessment that appellant's skills are no longer needed is not correct.

33. In a fourth plea, appellant argues that the challenged decision violates respondent's duty of care. Indeed, given appellant's skills, competencies and

qualifications there is an obvious need for keeping appellant in the OA Service Line but also, and more generally, in other NCIA services. However, respondent consistently refused to examine whether appellant could continue to work for the OA Service Line or join a different service. This refusal is not in line with the duty of care.

34. In addition, respondent had the obligation, on the basis of the duty of care, to assist its staff member and to examine if other positions could be offered. According to appellant, respondent did not try to find a solution for appellant as a redundant staff member and rejected all of her applications for other positions – without even inviting her for an interview – despite her more than eleven years' service with the Organization.

35. This is all the more relevant because several Software Engineer posts were vacant when the challenged decision was taken. Given appellant's generic skill set and her considerable experience as a Software Engineer, appellant could have easily fulfilled the requirements of the many different vacancies, but respondent decided not to seize this opportunity, in violation of its duty of care.

36. Moreover, when a new post was created in appellant's OA Service Line after her departure from the Organization, with duties clearly similar to those appellant had performed, respondent did not demonstrate a duty of care for appellant with regard to this post. Appellant also could have served the Organization when another staff member of the OA Service Line left the Organization, since appellant obviously had the skills and competencies to perform the duties required by this unoccupied position. In both cases, respondent's attitude demonstrates its failure to act in line with its duty of care.

37. Finally, respondent did not take into account appellant's state of health, of which it was fully aware. This element should have been evaluated by respondent as part of its duty of care, but respondent failed to do so.

38. With the fifth and last plea appellant considers that the challenged decision is tainted by a misuse of power. Appellant contends that this decision was taken with the sole purpose of depriving her of obtaining an indefinite duration contract after she had almost 12 years' seniority with the Organization. Indeed, according to Article 5.4 of the CPR, if a staff member is granted a new contract after ten years' service, it should be for an indefinite duration.

39. However, and despite the provisions of Article 5.4 of the CPR in this regard, respondent applied a consistent contract policy which in practice amounts to preventing any staff member from reaching, or even getting close to, ten years of service, or in any event from obtaining an indefinite duration contract.

40. In particular, concerning appellant's contractual situation, respondent renewed her contract for a total of nine years. The subsequent extension could therefore only be granted for a limited duration since the ten-year threshold had not been reached when the last renewal decision was taken. This kept appellant in service for more than eleven years, on the basis of a succession of definite duration contracts of employment, in violation of the CPR.

41. In this context appellant contends that the challenged decision is tainted by a misuse of powers aimed at not offering an indefinite duration contract under Article 5.4 of the CPR, and not because of the lack of sustained business in appellant's skill areas, a ground that was mentioned in the challenged decision.

42. A set of factual elements confirms this assertion. Firstly, respondent aimed to replace appellant by a person with less seniority but with the same skills and competencies as appellant. This can be seen from the post description of the new position that was created in OA Service Line following appellant's departure from the Organization after the challenged decision was taken.

43. Secondly, appellant's Reviewing Manager and Approving Manager expressly mentioned that appellant's skills were an asset over the long term for the OA Service Line yet the challenged decision was taken on the ground of a lack of a sustained business requirement for her skills.

44. Thirdly, respondent rejected more than twenty applications submitted by appellant from 22 June 2016 onwards without inviting her for an interview.

45. Fourthly, and as it results from the pre-litigation procedure, appellant's post description needed to be modified but appellant was never made aware of this possible change and adjustment of her position in the OA Service Line.

46. Fifthly, and as it results from the Complaints Committee report, given that 17 out of 25 staff members of the OA Service Line already had an indefinite duration contract, according to the guidance of the Agency Supervisory Board, it was not possible to offer an additional indefinite duration contract to appellant.

47. For all these reasons, the challenged decision is tainted with the misuse of power.

48. Given the grounds developed above in the five pleas, appellant considers that the challenged decision must be annulled.

b. On the submissions seeking compensation for material and non-material damage

49. Appellant makes submissions seeking compensation for material and non-material damage caused by the challenged decision; in addition, appellant considers that respondent's behaviour caused separate non-material damage.

50. Concerning, firstly, the material damage caused, appellant contends that the annulment of the challenged decision must entail her reinstatement and appointment to a post in respondent's services with payment of emoluments covering the period from 1 March 2017, the date of the end of her last definite duration contract, to the date of her reinstatement in respondent's services. Regarding respondent's objection concerning the entitlement to allowances because of her marital situation with a staff member of the Agency, appellant points out that this argument is not relevant and in any case inaccurate because divorce proceedings have been initiated.

51. Concerning, secondly, the non-material damage caused by the challenged decision, appellant contends that this damage is the result of the breach of the confidence that appellant had in respondent as her employer for almost 12 years and the feeling of being completely ignored by respondent during the administrative review process. This derives for instance from the manner in which appellant's request for mediation was treated by respondent and also from the fact that NCIA's Acting General Manager did not hear appellant or ask for her comments when the Complaints Committee issued its report.

52. For appellant, the misuse of power created a feeling of frustration and sadness. The rejection of all her applications to remain in the Organization and the non-observance of the duty of care aggravated the non-material damage caused by the challenged decision, which is evaluated at €20.000.

53. Concerning, finally, the non-material damage caused by the behaviour of respondent, regardless of the merits of the challenged decision, appellant indicates several facts which prove the existence of additional non-material damage.

54. In particular, appellant, first, claims that the request for a short contract extension was refused and that this occurred on her last day of work. Second, appellant recalls that the reason for non-renewal of her contract was the lack of sustained business in her area despite her efforts to diversify her activities and skills. In this regard, appellant was not encouraged to diversify but in contrast was asked by her superiors to focus mainly on JDARTS issues. Third, according to appellant, the lack of transparency in the way the mediation process was conducted shows a clear intention by respondent to conduct this process in a way that was detrimental to appellant's interests.

55. Given the fact that respondent assured appellant about the need of OA Service Line for her skills, the challenged decision refusing the renewal of her contract came as a surprise. As indicated in the Complaints Committee's report, this was the result of a miscommunication between the parties involved. The Complaints Committee's report clearly highlights this consideration.

56. Appellant considers that the non-material damage caused by respondent's above-mentioned actions during a long and unclear pre-litigation process is evaluated at €80.000.

57. Appellant requests:

- the annulment of respondent's decision dated 21 March 2017 confirming the decision not to renew appellant's contract;
- if necessary, the annulment of the decision of 12 August 2016 rejecting appellant's first request for administrative review;
- if necessary, the annulment of the decision of 21 June 2016 not to renew appellant's contract;
- compensation for appellant's material damage;
- compensation for appellant's non-material damage evaluated *ex aequo et bono* at €100.000;
- reimbursement of the costs of retaining legal counsel, travel and subsistence.

(ii) The respondent's contentions

a. On the submissions seeking annulment

58. Concerning firstly the violation of Article 3.2 of Annex IX to the CPR, respondent objects that this is not the case in the present litigation. In fact, appellant had submitted a request for mediation pursuant to this Article on 14 October 2017, which was accepted on 15 October 2017. On 17 October 2017, however, appellant was informed that for objective reasons (medical issues, ongoing mediations) there would be a delay in the requested mediation. Appellant maintained her request but decided on 6 December 2017 to cancel it and to request that the Complaints Committee be convened instead.

59. From the submission of appellant's mediation request until its withdrawal, respondent did not violate any rule and acted in line with the established rules and procedures provided for in Agency Directive 05.01 (Policy on Mediation). Respondent notes that neither the CPR nor the NCIA Policy on Mediation stipulates a time limit by which the mediation must be conducted. In any event, mediation is not compulsory for the parties concerned and does not offer a remedy but aims to facilitate fair and balanced discussions between them. For this reason, the first plea must be rejected.

60. With regard, secondly, to appellant's claims of a violation of Article 5.2.5 of Annex IX to the CPR, respondent recalls that the Complaints Committee is not a judicial body with powers of adjudication. According to respondent, the role of this Committee is to provide findings and recommendations to the HONB, but the General Manager is not required under the CPR to follow these recommendations. More specifically, and contrary to appellant's contentions, the CPR do not require the HONB to meet the claimant or to invite her to submit her views.

61. Respondent observes that for the first time in the written procedure appellant contended that she had submitted lengthy submissions to the members of the Complaints Committee as stipulated by the CPR. In this regard, appellant stressed erroneously that these comments were not transmitted to the competent persons. Respondent points out that there is no indication as to how and when these comments were made by appellant and that there was no reference to any communication in order to ensure a follow-up of this transmission. Consequently, respondent did not violate Article 5.2.5 of Annex IX to the CPR.

62. Thirdly, regarding the plea of a manifest error of assessment by respondent in taking the challenged decision, respondent, first, notes that the ground for termination of appellant's contract is in line with the provisions of the CPR.

63. In particular, according to Article 5.2 of the CPR, the duration of a contract may be limited whenever the post has been previously identified as one in which rotation is applicable for political or technical reasons, and this rule concerns all staff members of the Agency. Along the same lines, respondent considers that according to Article 5.5.3 of the CPR and following satisfactory performance by a staff member, the HONB has the discretion to offer in the interest of the service the renewal of a definite duration contract or an indefinite duration contract under the conditions of Article 5.4 of the CPR. In addition, according to Article 5.4.2 of the CPR, the Organization has the discretion to

decide whether to offer a further contract even after a staff member has served for ten or more years.

64. As a consequence, respondent had the right not to renew appellant's contract as it was found that such a renewal would not be in the interest of the Organization due to a lack of sustained business in appellant's skill area as a software developer. This ground was recognized by the Complaints Committee when it agreed with the decision not to renew. There is therefore no manifest error of assessment by respondent in taking the challenged decision.

65. Regarding appellant's third plea, respondent considers, second, that appellant's profile as a software engineer is no longer needed in the OA Service Line and, consequently, the impugned decision is valid.

66. Contrary to appellant's contentions, her post was modified into a new post in order to reflect the need for an operational analyst (and not a software engineer), including a redefinition of the job description as well as a change in description and title from Software Engineer to Scientist. In addition, according to respondent, the new post requires a minimum of two years' experience in applying operational analysis techniques to military problems as well as knowledge and recent expertise in at least one military domain. Appellant did not possess these qualifications. For this reason appellant could also not fill a post vacated by another staff member in the OA Service Line around the time the contested decision was taken, because that post required extensive expertise in the military domain.

67. In this context, respondent holds the view that the fact that appellant developed considerable knowledge of defence planning processes and methods, or participated in management training, does not amount to the technical knowledge expected from an operational analyst.

68. In answer to appellant's contention regarding the effort to diversify her role and activities within the OA Service Line, respondent considers that the areas suggested by appellant for her work were not in the interests of the OA Service Line, which had a full demand book from customers, but not in the area suggested by appellant.

69. About the need for appellant's skills within the OA Service Line, respondent stresses that there is very limited ongoing software development within the Service Line. This is because Allied Command Transformation (ACT) decided to focus on the development of another system to support defence planning, focusing the mandate of the OA Service Line on operational analysis expertise. If software development is required, this can be fulfilled through outsourcing which, according to current estimations, would not entail major expenditure.

70. Concerning, finally, the increase in the OA Service Line's activities in the framework of the MN ADAPT project, respondent argues that there is no evidence of this. Contrary to appellant's contentions, the MN ADAPT project for 2017 continued to run with the OA Service Line as as it had done in the previous years. A large portion of the MN ADAPT effort is provided by operational analysts who in 2016 worked 115 man-days, whereas appellant worked only 11 man-days. The participating nations in this project

went down from three to two with a corresponding reduction in the funding, and for the period 2017–2021 the Demand Plan refers to IT Services in which the OA Service Line is not involved.

71. Respondent concludes that there is no manifest error in its assessment of the lack of sustained business in appellant's skill areas that would vitiate the challenged decision, and that consequently the third plea must be rejected.

72. Regarding the fourth plea, *i.e*. the breach of respondent's duty of care and the contention that there would be other opportunities for appellant's skill set in other Service Lines and that the Agency had refused to look at other opportunities, respondent objects that appellant did not provide any evidence of this other than listing job vacancy titles.

73. Regarding the alleged constant and unjustified rejection of a large number of appellant's applications, respondent observes that appellant had applied to 25 positions since 2014 and, in view of her specific skill set, this seems a disproportionately high amount of applications. In addition, in many cases appellant applied after the expiration of the deadlines. Despite this fact respondent accepted appellant's applications and for some positions appellant was informed that these positions did not match her skill set. Appellant can therefore not argue that the rejection of these applications came as a surprise.

74. In addition, and contrary to appellant's contentions, appellant was invited for three interviews but was found to be unqualified for these three positions. Respondent adds also that appellant again applied after the deadline but respondent accepted her application and in one case respondent accommodated her wishes for written tests, demonstrating that appellant was given special treatment.

75. In respondent's view, NCIA looked very carefully into existing job vacancies in order to see whether a position corresponded to appellant's skill set. Due to the fact that she was being made redundant, appellant received priority consideration for a number of positions, but she was not considered for the positions in question as she lacked the relevant competencies, skills or necessary experience. According to respondent, the fact that a vacancy notice contains the words software or engineer does not render appellant's application automatically eligible for this position.

76. Concerning appellant's contention, with reference to the case law of this Tribunal, that respondent did not take into account her state of health and thereby breached its obligations deriving from the duty of care, respondent objects that the Tribunal's case law does not correspond at all to appellant's situation.

77. Respondent also denies the alleged misuse of power arguments developed by appellant under her last plea concerning respondent's alleged policy to avoid employing long-term staff or granting staff indefinite duration contracts. Respondent considers that appellant has not substantiated her allegations in this regard. She limited her arguments to submitting that the decision not to renew her contract, and more generally the Agency's contract policy, was aimed at preventing her from obtaining an indefinite duration contract, health insurance and pension rights. This was not the case in the present litigation.

78. More specifically, respondent argues that it has awarded 130 indefinite duration contracts since 2015. Appellant's contract was not renewed due to the business needs of the Organization within the legal remit of the CPR. Consequently the fifth plea must be rejected as well as all submissions seeking annulment of the challenged decision.

b. On the submissions seeking compensation

79. Respondent recalls first that appellant received an indemnity for loss of job in the amount of €103.333,68 and continues to receive the allowances provided by the CPR for her children as well the household and other allowances, and that she is also eligible for the health coverage, because her husband is a staff member of the Agency.

80. Concerning, secondly, the alleged non-material damage caused by the challenged decision, respondent points out that despite appellant's expectations about the Agency's needs, appellant had, since the 2015 Performance Management Report, not been promised continued employment in her Service Line.

81. As far as the contention regarding the rejection of her request for a six-month extension of her contract on grounds of exceptional hardship is concerned, respondent objects that such grounds are not foreseen for the extension of contracts. In any event, granting requests of this kind is entirely at the discretion of the General Manager and appellant cannot claim to have a right or expectation in this respect.

82. Finally, regarding the alleged non-material damage caused by the Agency's behaviour, according to respondent appellant did not substantiate her financial demands in this connection.

83. Respondent concludes from the above that appellant's request for compensation for material or non-material damage must also be rejected.

84. Respondent requests that the Tribunal dismiss the appeal as unfounded.

D. Considerations and conclusions

(i) On the submissions seeking annulment

85. Appellant requests annulment, firstly, of the respondent's final decision dated 21 March 2017 confirming the decision not to renew her contract, secondly, and if necessary, of the decision dated 12 August 2016 rejecting appellant's first request for administrative review, and thirdly, and if also necessary, of the initial decision dated 21 June 2016 not to renew appellant's contract.

86. To start with, in the decision dated 21 March 2017, respondent made no changes to the reasons given in its decision dated 12 August 2016 or in the challenged decision dated 21 June 2016. Indeed, in the three decisions, respondent invokes as a ground for non-renewal of appellant's contract the lack of anticipated business in appellant's skill areas. As a consequence, the requests for annulment directed against the decision of

21 March 2017 and of 12 August 2016 are the same as those directed against the decision dated 21 June 2016.

87. In the light of the foregoing, it should be noted that appellant invokes five pleas in support of her submissions seeking annulment of the impugned decision: first, violation of Article 3.2 of Annex IX to the CPR; second, violation of Article 5.2.5 of Annex IX to the CPR; third, manifest errors of assessment; fourth, violation of fundamental principles such as the principles of good administration and of the duty of care; and fifth, misuse of power.

88. The Tribunal, first of all, points out that in relation to decisions concerning the renewal (or not) of staff members' contracts, its review must be limited to the consideration of whether, having regard to the various considerations which have influenced the administration in making its assessment, the administration has remained within reasonable limits of its discretionary powers and has not used its powers in a manifestly incorrect manner.

89. In this context, and in order to establish whether the administration committed a manifest error in assessing the facts in such a manner as to justify the annulment of the contested decision, the evidence adduced by the appellant must be sufficient to render the factual assessments used in the challenged decision implausible. In this regard, an error of assessment is manifest when it is easily discernible and can be easily detected.

90. The Tribunal observes that, in the context of the present litigation, respondent has stated in the challenged decision that the ground for the non-renewal of appellant's contract was *"the lack of anticipated sustained business in (appellant's) skill areas".* With this assessment respondent considers in fact that appellant's qualifications and skills within the OA Service Line were no longer required, entailing the non-renewal of her contract. According to respondent, appellant's profile no longer corresponded to the business plan of the OA Service Line in which appellant worked as a Software Engineer.

91. Firstly, appellant refers in detail to the MN ADAPT project in order to bring evidence before the Tribunal that, contrary to respondent's positions, the activities for which appellant's qualifications and skills would be necessary within the OA Service Line continued to exist and would in the following years increase.

92. Respondent did not contest that the MN ADAPT project would have an impact on the activities of the OA Service Line. It pointed out only that there was no certainty that the OA Service Line activities would increase sufficiently to justify maintaining appellant within the Service Line. In addition, respondent does not contest that appellant's skills and qualifications correspond to the duties required in relation to this programme.

93. Appellant secondly stresses her role within the JDARTS in order to demonstrate that her skills and competencies would continue to be needed within the OA Service Line.

94. Respondent objects that ACT decided to focus on the development of a different system to support Defence Planning, which is different from JDARTS. One cannot necessarily conclude from this that appellant's skills and competencies will not be required for the development of this new system within the OA Service Line.

95. The Tribunal observes that respondent limits its assessment to indicating the prospect of the development of a new service replacing JDARTS, but it avoids any comments about the possibility that, in the development of this new system, appellant could continue to have a role within the OA Service Line. More generally, respondent argues that appellant's skills and qualifications no longer corresponded to the needs of the Agency.

96. In answer to a question from the Tribunal during the hearing, respondent confirmed the abovementioned considerations, however, adding that the non-renewal of appellant's contract was also justified because of the application of the rotation rule and that in any case in her evaluation reports, appellant did not always have a "satisfactory performance".

97. These last contentions must be rejected. Indeed, these grounds invoked by respondent were not raised as grounds for the impugned decision not to renew appellant's contract. On the other hand, they are also an indication that respondent was seeking not to renew appellant's contract for a variety of sometimes contradictory reasons, which is not a sign of good and transparent administration.

98. In this context, the Tribunal considers that respondent has failed to state, to the requisite legal standard, the reasons for having taken the challenged decision.

99. Given the long period of 12 years during which appellant served the Organization on the basis of successive definite duration contracts, respondent had, moreover, the duty to demonstrate full care vis-à-vis appellant when it took a decision that had such a negative impact on appellant's interests without exploring other options for continued employment. Here again, respondent has failed to do so.

100. Appellant has convincingly demonstrated before the Tribunal that the OA Service Line will continue to have activities in her skill area and that she could continue to work on the basis of her qualifications for which she had been offered successive contracts by the Organization since 2005. Indeed, appellant puts sufficient evidence before the Tribunal rendering implausible the assessment of the facts made by respondent in the challenged decision. In a manifestly incorrect manner, respondent has arrived at a decision, which is not supported by facts or by sufficient elements of evidence. Respondent has limited itself to repeating that appellant is not an operational analyst without supporting further its contentions in a sufficient manner during the written and oral proceedings.

101. It results from the above that the assessment of a lack of sustained business in the appellant's skill area appears implausible within the meaning of the considerations developed in paragraph 89 *supra*. As a consequence, the assessment underlying the challenged decision is vitiated by a manifest error of assessment.

102. Respondent's decision of 21 June 2016 not to renew appellant's contract because of the lack of sustained business in appellant's skill area must for this reason alone be annulled. As a consequence, it is not necessary to examine the other submissions in the appeal seeking annulment of this decision.

103. It is now respondent's responsibility to take the necessary measures to reinstate appellant in its service with effect from 1 March 2017, in accordance with the applicable rules of the CPR, for a staff member who served, after a first definite duration contract, for twelve years in the Organization on the basis of successive definite duration contracts.

(ii) On the submissions seeking compensation

104. Appellant seeks compensation for material and non-material damages suffered as a result of the annulled decision not to renew her contract.

105. As regards, firstly, the material damage caused by the annulled decision, appellant is entitled to an indemnity in the amount of the remuneration she would have received had she remained on the staff of the NCIA for the period from 1 March 2017 until the date of her reinstatement in respondent's services. This indemnity includes salary, allowances and benefits provided for in the CPR for staff members in her situation, after deduction of the amount of the loss of job indemnity received by appellant because of the non-renewal of her contract.

106. As regards, secondly, the appellant's claims concerning non-material damage arising from the annulled decision, the Tribunal recalls that the annulment of an unlawful measure, as is the case with the decision of 21 June 2016, may in itself constitute appropriate and sufficient compensation for any non-material damage that this decision may have caused. As a consequence, appellant's claim for non-material damage suffered as a result of the challenged decision – evaluated at €20.000 – must be rejected.

107. Thirdly, there is appellant's separate claim for additional non-material damage suffered independently of the challenged decision.

108. The Tribunal recalls that the annulment of an unlawful measure, as is the case with the decision of 21 June 2016, may not in itself constitute appropriate and sufficient compensation for non-material damage when an appellant shows that he or she has suffered non-material damage which is separate from the unlawfulness justifying the annulment and which may not be entirely remedied by said annulment.

109. In this particular case, and contrary to the assertion of respondent that appellant did not quantify separate non-material damage, appellant invokes the reasons for which her demand is quantified at €80.000 and this because respondent's action caused separate non-material damage to appellant; in particular appellant makes reference *inter alia* to the violation of the principle of good administration and the duty of care during the pre-litigation process which caused this additional non-material damage.

110. According to the case law of the Tribunal, the sense of injustice and the anxiety suffered by a staff member who has to bring a pre-litigation procedure to preserve his or her rights may justify a request for compensation for non-material damage suffered if it is found that the administration has committed irregularities and has not met its obligations in applying the legal rules (see AT judgment in Case No. 2014/1022, paragraph 63).

111. The Tribunal points out that the duty of care and the principle of good administration mean, in particular, that a service taking a decision on a request by one of its staff members must take into account all the factors which may influence that decision, including the interests of the service and also the interests of the staff member concerned.

112. The Tribunal observes that in the present pre-litigation process – as the Complaints Committee pointed out in its report – there was an obvious lack of communication between the parties involved concerning the non-renewal procedure, which was to the detriment of appellant's interests.

113. More generally, as is also mentioned in the Complaints Committee's report, the handling of appellant's file before the challenged decision was taken and the communication of elements and information from appellant's renewal process during the examination by the Complaints Committee created an *"uncomfortable situation for all the parties"*.

114. In the light of these considerations, the Tribunal considers that appellant suffered distinct non-material damage because of respondent's conduct in violation of its obligations in accordance with the duty of care. The alleged failure constitutes a serious breach of the duty of care given – as indicated in paragraph 68 *supra* – the specific situation of a staff member who had served the Organization for more than 12 years.

115. In these conditions, fair compensation is afforded by the Tribunal by ordering the respondent to pay appellant €5.000 in compensation for non-material damage.

E. Costs

116. 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 […]

117. As appellant has prevailed in her appeal, she is entitled to reimbursement of justified expenses incurred by her 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 21 June 2016 not to renew appellant's contract on the grounds of the lack of sustained business in appellant's skill area is annulled.
- Appellant is entitled to an indemnity for the material damage suffered in the amount of the remuneration she would have received had she remained on the staff of the NCIA for the period from 1 March 2017 until the date of her reinstatement in respondent's services, after deduction of the amount of the loss of job indemnity received by appellant because of the non-renewal of her contract.
- Respondent shall pay appellant the sum of €5.000 in compensation for the non-material damages suffered by her.
- Respondent shall reimburse appellant's justified expenses and the costs of retaining counsel up to a maximum of €4.000.

Done in Brussels, on 23 February 2018.

(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)(2017)0001

Order

Case No. 2017/1105

PL

Appellant

v.

Joint Force Command Brunssum

Respondent

Brussels, 22 February 2017

Original: English

Keywords: Rule 10.

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The President of the NATO Administrative Tribunal,

- Having regard to Chapter XIV of the NATO Civilian Personnel Regulations (CPR) and Annex IX thereto, both issued 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 January 2017, and registered on 16 January 2017 under Case No. 2017/1105;

- Considering the submission provided by respondent dated 10 February 2017;

- 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.

- Considering that the objections of inadmissibility raised by respondent should be reserved for the final judgment, and that the proceedings should continue;

- Emphasizing that this Order is without prejudice to the Tribunal's position in law concerning the admissibility or the merits of the present case:

DECIDES

- The request for summary dismissal is denied.
- The proceedings shall continue with the complete answer by respondent to be received not later than 24 March 2017.
- The costs are reserved.

Done in Brussels, on 22 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

AT(PRE-O)(2017)0002

Order

Cases Nos 2017/1107 and 2017/1110

CN

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 8 May 2017

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that Mrs CN submitted an appeal with the NATO Administrative Tribunal (AT) on 16 January 2017 against the NATO Support and Procurement Agency (NSPA), which was registered under Case No. 2017/1107;

- Considering that Mrs CN submitted a second appeal with the AT on 14 April 2017, against the NSPA, which was registered under Case No. 2017/1110;

- 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. 2017/1107 and No. 2017/1110 are joined.
- Both cases shall be heard once the written procedure in Case No. 2017/1110 is completed.

Done in Brussels, on 8 May 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)(2017)0003

Order

Cases Nos

2017/1127, 2017/1128, 2017/1129, 2017/1130, 2017/1131, 2017/1132, 2017/1133, 2017/1134, 2017/1135, 2017/1136, 2017/1137, 2017/1138, 2017/1139, 2017/1140, 2017/1141, 2017/1142, 2017/1143, 2017/1144, 2017/1145, 2017/1146, 2017/1147, 2017/1148, 2017/1149, 2017/1150, 2017/1151, 2017/1152, 2017/1153, 2017/1154, 2017/1155, 2017/1156, 2017/1157, 2017/1158, 2017/1159, 2017/1160, 2017/1161, 2017/1162, 2017/1163, 2017/1164, 2017/1165, 2017/1166, 2017/1167, 2017/1168, 2017/1169, 2017/1170, 2017/1171, 2017/1172, 2017/1173, 2017/1174, 2017/1175, 2017/1176, 2017/1177, 2017/1178, 2017/1179, 2017/1180, 2017/1181, 2017/1182, 2017/1183, 2017/1184, 2017/1185, 2017/1186, 2017/1187, 2017/1188, 2017/1189, 2017/1190, 2017/1191, 2017/1192, 2017/1193, 2017/1194, 2017/1195, 2017/1196, 2017/1197, 2017/1198, 2017/1199, 2017/1200, 2017/1201, 2017/1202, 2017/1203, 2017/1204, 2017/1205, 2017/1206, 2017/1207, 2017/1208, 2017/1209, 2017/1210, 2017/1211, 2017/1212, 2017/1213, 2017/1214, 2017/1215, 2017/1216, 2017/1217, 2017/1218, 2017/1219, 2017/1220, 2017/1221, 2017/1222, 2017/1223, 2017/1224, 2017/1225, 2017/1226, 2017/1227, 2017/1228, 2017/1229, 2017/1230, 2017/1231, 2017/1232, 2017/1233, 2017/1234, 2017/1235, 2017/1236, 2017/1237, 2017/1238, 2017/1239, 2017/1240, 2017/1241, 2017/1242

A, A, B, B, B, BH, BM, B, B, B, B, B, B, B, C, C, C, C, D, D, dW, DC, D, D, D, E, E, F, F, F, F, G, G, G, G, G, G, H, H, H, H, H, H, H, H, H, K, K, K, K, K, L, L, L, L, L, L, L, M, M, M, M, M, M, M, M, O, P, P, P, P, P, P, P, P, P, P, R, R, R, R, R, R, R, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, T, vdB, vdE, vI, vV, V, V, V, V, W, W, W, W, W,

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Appellants

v.

NATO International Staff
Respondent

Brussels, 14 November 2017

Original: English

Keywords: joining cases.

The President of the NATO Administrative Tribunal,

- Considering that the following persons submitted, on 5 September 2017, appeals against the NATO International Staff (IS): A, A, B, B, B, BH, BM, B, B, B, B, B, B, B, C, C, C, C, D, D, dW, DC, D, D, D, E, E, F, F, F, F, G, G, G, G, G, G, H, H, H, H, H, H, H, H, H, K, K, K, K, K, L, L, L, L, L, L, L, M, M, M, M, M, M, M, M, O, P, P, P, P, P, P, P, P, P, P, R, R, R, R, R, R, R, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, S, T, vdB, vdE, vI, vV, V, V, V, V, W, W, W, W, W. The appeals were registered under, respectively, Case No. 2017/1127, 2017/1128, 2017/1129, 2017/1130, 2017/1131, 2017/1132, 2017/1133, 2017/1134, 2017/1135, 2017/1136, 2017/1137, 2017/1138, 2017/1139, 2017/1140, 2017/1141, 2017/1142, 2017/1143, 2017/1144, 2017/1145, 2017/1146, 2017/1147, 2017/1148, 2017/1149, 2017/1150, 2017/1151, 2017/1152, 2017/1153, 2017/1154, 2017/1155, 2017/1156, 2017/1157, 2017/1158, 2017/1159, 2017/1160, 2017/1161, 2017/1162, 2017/1163, 2017/1164, 2017/1165, 2017/1166, 2017/1167, 2017/1168, 2017/1169, 2017/1170, 2017/1171, 2017/1172, 2017/1173, 2017/1174, 2017/1175, 2017/1176, 2017/1177, 2017/1178, 2017/1179, 2017/1180, 2017/1181, 2017/1182, 2017/1183, 2017/1184, 2017/1185, 2017/1186, 2017/1187, 2017/1188, 2017/1189, 2017/1190, 2017/1191, 2017/1192, 2017/1193, 2017/1194, 2017/1195, 2017/1196, 2017/1197, 2017/1198, 2017/1199, 2017/1200, 2017/1201, 2017/1202, 2017/1203, 2017/1204, 2017/1205, 2017/1206, 2017/1207, 2017/1208, 2017/1209, 2017/1210, 2017/1211, 2017/1212, 2017/1213, 2017/1214, 2017/1215, 2017/1216, 2017/1217, 2017/1218, 2017/1219, 2017/1220, 2017/1221, 2017/1222, 2017/1223, 2017/1224, 2017/1225, 2017/1226, 2017/1227, 2017/1228, 2017/1229, 2017/1230, 2017/1231, 2017/1232, 2017/1233, 2017/1234, 2017/1235, 2017/1236, 2017/1237, 2017/1238, 2017/1239, 2017/1240, 2017/1241, 2017/1242;

- 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 Nos 2017/1127, 2017/1128, 2017/1129, 2017/1130, 2017/1131, 2017/1132, 2017/1133, 2017/1134, 2017/1135, 2017/1136, 2017/1137, 2017/1138, 2017/1139, 2017/1140, 2017/1141, 2017/1142, 2017/1143, 2017/1144, 2017/1145, 2017/1146, 2017/1147, 2017/1148, 2017/1149, 2017/1150, 2017/1151, 2017/1152, 2017/1153, 2017/1154, 2017/1155, 2017/1156, 2017/1157, 2017/1158, 2017/1159, 2017/1160, 2017/1161, 2017/1162, 2017/1163, 2017/1164, 2017/1165, 2017/1166, 2017/1167, 2017/1168, 2017/1169, 2017/1170, 2017/1171, 2017/1172, 2017/1173, 2017/1174, 2017/1175, 2017/1176, 2017/1177, 2017/1178, 2017/1179, 2017/1180, 2017/1181, 2017/1182, 2017/1183, 2017/1184, 2017/1185, 2017/1186, 2017/1187, 2017/1188, 2017/1189, 2017/1190, 2017/1191, 2017/1192, 2017/1193, 2017/1194, 2017/1195, 2017/1196, 2017/1197, 2017/1198, 2017/1199, 2017/1200, 2017/1201, 2017/1202, 2017/1203, 2017/1204, 2017/1205, 2017/1206, 2017/1207, 2017/1208, 2017/1209, 2017/1210, 2017/1211, 2017/1212, 2017/1213, 2017/1214, 2017/1215, 2017/1216, 2017/1217, 2017/1218, 2017/1219, 2017/1220, 2017/1221, 2017/1222, 2017/1223, 2017/1224, 2017/1225, 2017/1226, 2017/1227, 2017/1228, 2017/1229, 2017/1230, 2017/1231, 2017/1232, 2017/1233, 2017/1234, 2017/1235, 2017/1236, 2017/1237, 2017/1238, 2017/1239, 2017/1240, 2017/1241, 2017/1242 are joined.

Done in Brussels, on 14 November 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)(2017)0003

Order

Cases Nos 2017/1107 and 2017/1110

CN

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 10 July 2017

Original: English

Keywords: Rule 23; suspension of proceedings.

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The President of the NATO Administrative Tribunal,

- Considering that Mrs CN submitted an appeal with the NATO Administrative Tribunal (AT) on 16 January 2017 against the NATO Support and Procurement Agency (NSPA), which was registered under Case No. 2017/1107;

- Considering that Mrs CN submitted a second appeal with the AT on 14 April 2017, against the NSPA, which was registered under Case No. 2017/1110;

- Recalling AT Order AT(PRE-O)(2017)0002 dated 8 May 2017 joining the two above mentioned Cases;

- Having regard to the joint request dated 29 June 2017 for a suspension of the proceedings on the basis of Rule 23 of the Tribunal's Rules of Procedure (ROP) until 31 December 2017;

- Considering Rule 23 of the ROP, which provides

> 1. The Tribunal, or when the Tribunal is not in session, the President shall rule on any request made by the parties for suspension of the proceedings for the purpose of examining the possibilities of an amicable settlement of the dispute.
>
> 2. The Tribunal or, when the Tribunal is not in session, the President may at any time encourage negotiation aimed at putting an end to the dispute and adopt appropriate measures with a view to facilitating such settlement. With the consent of the parties, the proceedings may be suspended for a time specified by the Tribunal or the President. If an agreement is not reached within this period of time, the proceedings will continue.
>
> 3. No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of the amicable settlement may be relied on for any purpose by the Tribunal or the parties in the contentions proceedings.

DECIDES

- The proceedings are suspended until 31 December 2017.

- If no final settlement of the dispute is reached by that date, the proceedings shall resume with appellant to provide its reply in Case No. 2017/1110 by 15 January 2018 COB.

Done in Brussels, on 10 July 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)(2017)0004

Order

Case No. 2017/1108

GK

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 25 September 2017

Original: English

Keywords: Rule 23; suspension of proceedings.

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The President of the NATO Administrative Tribunal,

- Considering that Mr GK submitted an appeal with the NATO Administrative Tribunal (AT) on 14 February 2017 against the NATO Support and Procurement Agency (NSPA), which was registered under Case No. 2017/1108;

- Having regard to the joint request by both parties during the AT hearing, held on 21 September 2017, for a suspension of proceedings in accordance with Rule 23 of the Tribunal's Rules of Procedure (ROP);

- Considering Rule 23 of the ROP, which provides:

> 1. The Tribunal, or when the Tribunal is not in session, the President shall rule on any request made by the parties for suspension of the proceedings for the purpose of examining the possibilities of an amicable settlement of the dispute.
>
> 2. The Tribunal or, when the Tribunal is not in session, the President may at any time encourage negotiation aimed at putting an end to the dispute and adopt appropriate measures with a view to facilitating such settlement. With the consent of the parties, the proceedings may be suspended for a time specified by the Tribunal or the President. If an agreement is not reached within this period of time, the proceedings will continue.
>
> 3. No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of the amicable settlement may be relied on for any purpose by the Tribunal or the parties in the contentions proceedings.

DECIDES

- The proceedings are suspended until 31 January 2018;
- NSPA will inform the Tribunal about the Agency's mandate to settle the dispute, in accordance with Rule 23 above, not later than 20 October 2017;
- In the case parties inform the Tribunal that they have failed to agree on a final settlement of the dispute, the proceedings shall resume with a further oral hearing of the case by the Tribunal at its earliest session; and
- Parties shall keep the Tribunal informed about progress in the negotiations.

Done in Brussels, on 25 September 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)(2017)0005

Order

Cases Nos 2017/1107 and 2017/1110

CN

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 21 December 2017

Original: English

Keywords: Rule 23; suspension of proceedings; extension.

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The President of the NATO Administrative Tribunal,

- Considering Cases Nos 2017/1107 and 2017/1110 submitted by Mrs CN, joined by Order AT(PRE-O)(2017)0002 dated 8 May 2017;

- Considering the request made jointly by appellant and respondent, dated 29 June 2017 for a suspension of the proceedings on the basis of Rule 23 of the Tribunal's Rules of Procedure (ROP) until 31 December 2017;

- Recalling Order AT(PRE)(2017)0003 dated 10 July 2017 granting such a suspension of proceedings until 31 December 2017;

- Having regard to the letter received on 13 December 2017 by appellant, in coordination with respondent, requesting, on the basis of medical reasons, to extend such a suspension until 15 April 2018:

DECIDES

- The proceedings are suspended until 15 April 2018.

- If no final settlement of the dispute is reached by that date, the proceedings shall resume with appellant to provide its reply in Case No. 2017/1110 by 15 May 2018 COB.

Done in Brussels, on 21 December 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)(2018)0001

Order

Case No. 2017/1246

SD

Appellant

v.

Centre for Maritime Research and Experimentation

Respondent

Brussels, 8 January 2018

Original: English

Keywords: withdrawal.

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AT(PRE-O)(2018)0001

The President of the NATO Administrative Tribunal,

- Considering that Mr SD submitted an appeal with the NATO Administrative Tribunal (AT) on 26 September 2017, and registered under Case No. 2017/1246, against the Centre for Maritime Research and Experimentation (CMRE);

- Considering that the AT Registrar office received a letter, dated 28 December 2017, from Mr D's representative 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 January 2018.

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

Certified by
the Registrar
(signed) Laura Maglia