2017

ANNUAL REPORT OF THE

NATO ADMINISTRATIVE TRIBUNAL

2017 Annual Report of the NATO Administrative Tribunal

Introduction

This is the fifth Annual Report of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO). It covers the period 1 January 2017 – 31 December 2017 and is issued, on the initiative of the Administrative Tribunal, pursuant to Rule 4(h) of its Rules of Procedure.

On 23 January 2013, the NATO Council created the NATO Administrative Tribunal (Tribunal). The corresponding Regulations entered into force on 1 July 2013. The Tribunal's first Annual Report, covering the first six months of its existence (1 July 2013 – 31 December 2013), describes in detail the competence and proceedings of the Tribunal.

Composition

The Tribunal's composition has remained unchanged during the reporting period and is as follows:

Mr Chris de Cooker (Netherlands), President;
Mrs Maria-Lourdes Arastey Sahún (Spain), Member;
Mr John R. Crook (United States), Member;
Mr Laurent Touvet (France), Member; and
Mr Christos A. Vassilopoulos (Greece), Member.

The Tribunal was throughout the year assisted in an outstanding manner by the Registrar, Mrs Laura Maglia.

Organizational and administrative matters

The Tribunal is pleased to report that the e-submission tool for appeal proceedings has indeed become fully operational in 2017, which is a major improvement in the judicial process for all stakeholders. This password-protected portal is accessible via approved personal registrations for each case, which ensures an enhanced data protection of the exchanges between the parties. Submission via the portal also guarantees that procedural matters, including time limits, are certified. The portal is accessible for its users 24/7 and provides all parties with a practical overview of the state-of-play in each case, at any stage of the proceedings.

Proceedings of the Tribunal in 2017

The Tribunal dealt with thirteen cases. It held three sessions of oral hearings (on 19 May, 21-22 September, and 15 December 2017) and rendered ten judgments. In one case[1] the Tribunal will issue its judgment in 2018 in conjunction with a number of other similar cases.

The two remaining cases were joined[2] and subsequently suspended at the request of the parties in order to examine the possibilities of an amicable settlement of the dispute.

One case was withdrawn during the written procedure.[3]

In another case, the Tribunal suspended the proceedings when it found during the oral hearing in September that parties were willing to explore a possible settlement. The Tribunal was subsequently informed in 2018 that parties had reached a settlement. It accepted the withdrawal of the case.[4]

[1] Case No. 2017/1112.
[2] Cases Nos. 2017/1107 and 2017/1110.
[3] Case No. 2017/1246.
[4] Case No. 2017/1108.

The Tribunal's President issued seven Orders. In one a request by respondent to apply Rule 10 of the Tribunal's Rules of Procedure on summary dismissal was denied. In two Orders cases were joined. In a further two Orders Rule 23 of the Rules of Procedure was applied, under which the President may grant suspension of proceedings requested by both parties for the purpose of examining the possibilities of an amicable settlement of the dispute. In one Order an extension of such a suspension of proceedings was granted and the last Order accepted an unconditional withdrawal of a case.

As mentioned in the previous Annual Report, the Tribunal issued in 2017 nineteen judgments following its December 2016 session; these were included in the 2016 Report. Similarly, the Tribunal issued in 2018 three judgments following its September and December 2017 sessions. They are included in the present report.

The NATO Communications and Information Agency (NCIA) was respondent in four cases, the NATO Support and Procurement Agency (NSPA) in three, and the NATO International Staff (NATO IS) in two. The Centre For Maritime Research and Experimentation (CMRE), the Joint Force Command Brunssum (JFC BS), the NATO Headquarters Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK), and the NATO Headquarters Allied Air Command (AAC Ramstein) were respondent in one case each.

The Tribunal continued to resolve cases as expeditiously as possible: five judgments were rendered in approximately seven months of lodging of the appeal and five between ten and twelve months. It is recalled that the duration of the written procedure alone is around four months.

In 2017, 149 new appeals were registered. Of these, 129 (some collective appeals and others brought by individuals) challenged an amendment to the footnote to Article 51.2 of the NATO Civilian Personnel Regulations (CPR) concerning the continued payment by certain retirees of contributions to the group medical insurance scheme. These cases will be adjudicated in 2018. Several of the remaining twenty cases concern a similar issue involving

application of a new contract policy in one Agency. Nevertheless, it is fair to conclude that the trend toward reduction of the number of new cases observed in previous years appears to have slowed somewhat.

Cases are assigned to Panels of three judges with due consideration to the principle of rotation as well as equitable distribution of workload. In each case, the President designates another member of the Panel or himself to serve as judge-rapporteur, *inter alia*, to prepare a draft judgment for consideration and approval by the Panel. Taking together the years 2013 - 2017 the President and members have been assigned to between 18 and 25 cases each.

The Tribunal's jurisprudence in 2017[5]

The Tribunal rendered the following judgments.

A first group of three separate cases centered on invalidity matters. In Case No. 2016/1101 appellant challenged, *inter alia*, the Administration's decision to terminate an attempt to convene an Invalidity Board. The parties disagreed on the appointment of two medical practitioners on the Board and, after several months, faced a further deadlock when no agreement could be reached on the selection of the third medical practitioner required to complete the Board. The Tribunal held that, in accordance with paragraph (vi) of Article 13.3 of Annex IV to the CPR, in case of a deadlock, the Administration had an obligation to refer the matter to the President of the Tribunal. An Administration may not decide to close invalidity proceedings without the Invalidity Board having convened. The Tribunal therefore annulled the Agency's decision. The President of the Tribunal was subsequently asked to appoint a medical practitioner.

Case No. 2016/1102 is a second appeal by another appellant. In its April 2016 judgment in Case No. 2015/1055, the Tribunal upheld the legality of the

[5] The following summaries of Tribunal judgments are for information purposes only and have no legal standing. The full texts of the judgments can be found on the Tribunal's website.

decision to terminate appellant's appointment, but fixed the date of the termination at 1 March 2015 instead of 5 February 2015. In June 2016 appellant requested respondent to forward her application for invalidity benefits to the insurance company, which was denied with the argument that the group insurance contract on invalidity applies to active staff members only. Appellant's treating physician had, in fact, issued a statement dated 22 May 2015 that he considered her permanent invalid as from 23 February 2015. The Tribunal observed that appellant had not made any request for invalidity benefits during her employment and that invalidity cannot be established by a single medical practitioner. The Tribunal declared the appeal unfounded.

In the third invalidity case, Case No. 2017/1113, an appellant lodged his sixth appeal.[6] He contended that his new request, seeking recognition of a claimed right of access to medical information or documents in the possession of the respondent, was based on legal grounds other than those involved in appellant's prior Case No. 2016/1076. He considered that the Tribunal had never ruled on this particular point. The Tribunal disagreed. It held that its previous judgment exactly and clearly addressed the subject of the current appeal. The Tribunal recalled that in accordance with the applicable rules its judgments are final and not subject to any type of appeal. As a consequence, the Tribunal's judgments carry *res judicata* authority. They may only be reviewed on exceptional and limited grounds and cannot be reconsidered by means of a refocused rationale by appellant.

Two cases concerned decisions taken in disciplinary proceedings. In the first, Case No. 2017/1104, a German Federal Court sentenced appellant, early in his retirement, to a prison term for illegal activities committed in connection with his employment with the NATO Headquarters Allied Air Command. Following this verdict, the Head of the NATO Body (HONB) initiated disciplinary proceedings.

[6] Previous cases are Case No. 2014/1021 (concerning travel authorization for medical treatment away from duty station), Case No. 2015/1049 (regarding time limits in pre-litigation procedures), Case No. 2015/1048 (re disciplinary procedure), Case No. 2016/1070 (on reimbursement of travel and subsistence expenses during the invalidity procedure), and Case No. 2016/1076 (on the Invalidity Board's proceedings).

The Joint Disciplinary Board proposed as a disciplinary sanction a pension reduction by 60%. The HONB changed this to 67%, but no reasons were given for the increased penalty. The Tribunal recalled that international administrative law requires an international organization to provide sufficient reasons for actions adverse to a staff member in order to allow the latter to understand the rationale or justification for the adverse action and, as appropriate, to contest it. This is particularly compelling where an organization utilizes a joint committee or similar procedure. Where a final decision does not follow a recommendation of such an internal body, the decision must be fully and adequately motivated. This was not done in the present case, so the Tribunal annulled the HONB's decision insofar as it increased the penalty imposed. All other claims were denied.

One appellant submitted his fourth appeal[7] in Case No. 2017/1105. This appeal concerned appellant's dismissal following a disciplinary proceeding. The HONB's decision gave six grounds for the dismissal. The Tribunal analyzed these and found that four grounds were not convincingly established. Two grounds were found to be established, but were not serious enough to warrant the termination of employment. The Tribunal annulled the decision to dismiss. The logical consequence of this would have been appellant's reinstatement. The HONB had however invoked the provisions of Article 6.9.2 of the CPR, which provide that, where the HONB 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. In the light of this the Tribunal determined appropriate compensation.

Two cases concerned allowances. In the first, Case No. 2017/1103, appellant, who is a non-national of the country where he was employed, alleged eligibility for expatriation allowance. He contended that he met the criteria established

[7] Earlier cases are Case No. 2016/1072 (regarding intermediary steps in the disciplinary proceedings), Case No. 2016/1073 (concerning suspension during disciplinary proceedings), and Case No. 2016/1099 (re the composition of the disciplinary board, subsequently withdrawn).

by the CPR for the allowance, in that, when starting his working relationship with the Agency, he had to be considered as a non-resident of that country, as he was previously employed there as a contractor by a foreign company. He also emphasized his continuous and very strong ties with his home country. The Tribunal considered that appellant's residence in the duty station must be considered as continuous, as he lived at the duty station for about seven and a half years, and this irrespective of the fact that he chose his home country for the purpose of taxation, social security benefits, administrative residence, etc. The Tribunal concluded that appellant, at the moment of his appointment, had a *de facto* permanent status in the duty country, and dismissed the appeal.

Case No. 2017/1109 dealt with exceptional entitlement to an education allowance for post-secondary education in a country other than the ones for which the allowance is usually authorized by the regulations (i.e. duty country or home country). Appellant contended that in at least two comparable cases involving colleagues education allowance was authorized in circumstances that did not satisfy either of the exceptions under Annex III.C to the CPR (continuity of educational cycle or lower costs) and for which the Organization, under its discretion, exceptionally had granted the allowance. Recalling the fundamental principle of international administrative law that similarly situated staff members must be treated similarly in the exercise of the Agency's discretion, the Tribunal concluded that appellant had received unfavorable and discriminatory treatment. It annulled the Organization's decision not to grant the allowance.

Three cases were related to staff members' contractual situations. The appellant in Case No. 2016/1100 had a succession of definite duration contracts on different scientific posts. Upon notification that his last contract would not be renewed, appellant applied for a vacant position for which he was not retained. He appealed that decision, contending that the Organization had infringed upon his right to be granted redundancy status under Article 57.2 of the CPR. The Tribunal observed that the privilege of redundant staff is conditional on the candidate meeting the professional qualifications required for the position applied for. The Tribunal further stressed that the CPR confer, to

those concerned, only a procedural advantage by requiring the Organization to consider the application; they do not oblige it to reassign redundant staff. The appeal was dismissed.

In Case No. 2017/1106 appellant was placed on sick leave in May 2015. In October 2015 he was informed that his contract would not be renewed after its expiry in April 2016, since his functions would be outsourced. In March 2016 appellant submitted a claim to the Secretary General requesting "assistance with regard to harassment and constructive dismissal". The claim targeted a number of senior officials of the Organization. An independent expert concluded that there was no evidence in support of appellant's claims. The Tribunal found that no liability could be imposed on the Organization, which had fulfilled appellant's main, albeit vaguely formulated, request when it appointed an independent expert. The appeal was dismissed. At the hearing, moreover, the Tribunal was informed that appellant was receiving an invalidity pension.

The appellant in the last case, Case No. 2017/1111, also had a succession of definite duration contracts since 2005. In 2016 she was, however, informed that her contract would not be renewed on expiry. The reason given for the non-renewal was the lack of anticipated sustained business in appellant's skill areas as software engineer/developer. The Tribunal found that appellant presented sufficient evidence to render implausible the respondent's assessment of the facts concerning anticipated sustained business. The Tribunal also rejected additional arguments by respondent that the non-renewal was also justified by application of the rotation rule and by the results of performance reviews. It considered these arguments to indicate that respondent sought to avoid renewing appellant's contract for a variety of sometimes contradictory reasons, which is not a sign of good and transparent administration. The Tribunal considered that respondent had failed to state, to the requisite legal standard, the reasons for having taken the challenged decision. The decision was annulled.