



JUDGMENTS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2013

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

**Judgments of the NATO Administrative Tribunal
2013**

2013

1st session (9-13 September 2013)

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

4 November 2013

AT-J(2013)0001

Judgment

Case No. 885

JF,

Appellant

v.

NATO Support Agency,

Respondent

Brussels, 21 October 2013

Original: English

Keywords: probationary period; non-confirmation in appointment.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 11 September 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 7 December 2012 and registered on 17 December 2012, by Mr JF, against the NATO Support Agency (NSPA). The appellant is a former staff member of the NSPA.

2. The Comments of the respondent, dated 11 April 2013, were registered on 23 April 2013. The Reply of the appellant, dated 13 May 2013, was registered on 16 May 2013.

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

4. The Tribunal's Panel held an oral hearing on 11 September 2013 at NATO Headquarters. It heard arguments by Maître LL, of Lallemand & Legros, Brussels, representing the appellant, Mr SL, NSPA Assistant Legal Advisor, and Mr FP, NSPA Chief of Human Resources Division, representing the respondent, in the presence of Mr EG, Deputy NATO IS Legal Adviser, Mr BS, NATO IS Assistant Legal Adviser, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. Appellant, seconded from the UK Ministry of Defence (MOD), joined the NSPA (formerly NAMSA, NATO Maintenance and Supply Agency) on 10 October 2011 under a definite duration contract as a Senior Procurement Officer, in grade A3, step 1.

7. The contract included the standard clause of six months probationary period, *i.e.* ending on 9 April 2012. It also included a mandatory deployment clause. In the “Contract Confirmation report” (signed by the appellant on 14 March 2012) management requested an extension of the probationary period for the purpose of allowing appellant to demonstrate a successful deployment tour. On 19 March 2012

appellant was notified that the probationary period was extended for a further period of six months, *i.e.* until 9 October 2012.

8. Appellant initially worked in the Competition Cell of Logistical Support in Capellen, Luxembourg. He was then with effect from 1 June 2012 deployed to Afghanistan for a period scheduled to end on 31 August 2012.

9. On 10 June 2012, appellant introduced by a direct e-mail to the Head of the NSPA Human Resources Division a formal complaint of bullying and harassment by Mr H. The incident, involving a late night encounter between the two men after an exchange of words, was investigated by the Programme Manager. The report concluded that there was no case of harassment, but identified a lack of respect between the persons concerned and mentioned an immediate removal from the theatre of operations back to Capellen if the requirement of respectful behavior under any circumstances and to all personnel was not upheld. Appellant signed the report on 15 June 2012 and appended his disagreement.

10. On 19 July 2012, appellant filed a complaint against Ms N. alleging that she had sent inappropriate and rude e-mails to him. Appellant has stated that there was no follow-up by management about this complaint.

11. On 24 July 2012 appellant was advised that his deployment would end prematurely on 2 August 2012.

12. On 2 August 2012 appellant was repatriated. He was on annual leave on 6 and 7 August 2012, on compensation and annual leave from 16 August until 14 September 2012, on annual leave from 3 until 5 October 2012 and on unpaid leave on 8 October 2012.

13. On 20 September 2012, appellant had a five-hour meeting with the Chief of Procurement Division, during which he was given a staff report. The overall assessment was good to very good. The report, however, also noted unsatisfactory relationships with others and mediocre adaptability and power of expression. The Programme Manager observed that appellant had proven to be most effective in the Competition Cell in Capellen within a small focus team. He added that appellant's interpersonal qualities, however, did limit the latter's capacity to work with others, particularly in a fast moving, high-pressure environment where flexibility is essential. This had come to a head whilst deployed to Afghanistan, such that appellant was repatriated early undermining his credibility with colleagues in the programme. The Chief of Division concluded that appellant was not fit for deployment. Appellant signed the report the same day explaining that he did not accept the content of some observations and in particular that he was not deployable.

14. On 2 October 2012 appellant replied with a 29-pages memorandum, including 49 annexes, stating his dissent.

15. On 9 October 2012, upon return from unpaid leave, appellant met his Division Chief and the reporting officer, in the presence also of a Staff Association

representative to discuss his dissent. On the same day he received the decision informing him that his contract would be terminated at the end of the probationary period, *i.e.* on 9 October 2012 at 23:59 hours. He was by letter dated 10 October 2012 informed that the 30 day notice period would be substituted by an allowance.

16. Following approaches by NSPA to MOD, appellant returned to work for MOD on 10 November 2012.

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

(i) *The appellant's contentions*

17. In his appeal, appellant contests the decision to terminate his contract at the end of the probationary period. Appellant alleges the violation of his rights of defense under Annex VIII.A to the NCPR in that the General Manager's (GM) decision terminating the contract was adopted on the same day as the meeting appellant had to discuss his staff report and that the GM's decision did not refer to his comments, but only to the line manager's recommendation.

18. Appellant also alleges a manifest error of appraisal when his Division Head concluded that appellant was considered not fit for deployment. Appellant recalls that his competence and technical skills were rated "good" or "very good" and that the shortcoming areas that were identified (*i.e.* "adaptability", "power of expression" and "relationship with others") were in contrast with the good relationships he had with his colleagues. Appellant further states that the main reason for not considering him fit for deployment were the two official complaints he had filed against his colleagues. Appellant contends that the NSPA instead of complying with the NCPR obligations to provide assistance to him in this matter, ignored the issues and reverted to the appellant for being the cause of tensions within the team.

19. Appellant recalls that his initial probationary period was assessed positively and contends that deployment was not a mandatory requirement according to his job description. Appellant underlines that the job description in this respect did contain the wording "if required", whilst his contract earmarked deployment as "mandatory".

20. Appellant also alleges that as the decision to terminate the contract was taken as a retaliation for having identified significant contractual issues and failures within Afghanistan rendering such a decision illegal as being against appellant's legitimate actions.

21. Appellant claims violation of the principles of proportionality, solicitude and good administration when NSPA considered that deployment was mandatory when it was not a requirement for his post, when it decided for an early repatriation whilst he was performing his duties, and when it terminated the contract knowing that he could not return to the UK MOD before 2014. Appellant further claims violation of the rationale of

Article 6.4 NCPR and Clause 8 of his contract, when NSPA substituted the notice period with an allowance.

22. Appellant requests the annulment of NSPA's decision to terminate his contract. Appellant does not request reinstatement but rather a financial compensation consisting of two years' salary, being the remainder of his contract, from which is to be deducted the income from MOD. Appellant calculates this to amount to € 152.647, to which are to be added two annual pay spine rises. In addition, appellant requests moral damages in the amount of € 10.000 and the reimbursement of costs of retaining counsel and travel and subsistence costs.

(ii) *The respondent's contentions*

23. In its comments, respondent claims that the appeal is inadmissible since it was allegedly submitted on 12 December 2012, *i.e.* more than 60 days from the date of the notification of the decision of 9 October 2012.

24. Respondent contends that appellant's personality did not prove to be fitting with the environment. Interpersonal skills are a key factor in the accomplishment of the in-theatre mission and appellant's inflexibility and personality led to his early repatriation.

25. Respondent dismisses the allegation of breach of Article 6.4 NCPR and Clause 8 of the contract and confirms that appellant's post was assigned to be a "mandatory deployment".

26. Respondent also rejects the allegation of violation of the performance assessment procedure with respect to appellant's rights. Upon his return from Afghanistan, appellant was on leave from early August until 17 September 2012. On 20 September 2012 he received his staff report from the administration and, according to the procedure, had a meeting to discuss it. Further, he also submitted his extensive written comments within the prescribed 10 days period. NSPA stresses that appellant's comments were carefully examined, but notes that due to additional leave taken by appellant, the only day available for a discussion was 9 October 2012, the last day of the probationary period.

27. NSPA underlines international organizations' discretionary authority in dealing with probationary appointments.

28. Respondent dismisses the of allegations of retaliation, of violations of principles of proportionality, solicitude and good management as non-founded and legally flawed.

29. Lastly, respondent dismisses appellant's claims for material damages as he did not suffer any loss of earnings. Respondent strongly objects to the request regarding moral damages, which are not substantiated.

D. Considerations and conclusions

(i) Considerations on admissibility

30. Respondent submits that the appeal is inadmissible since it was not lodged within the required 60 days from the date of the contested decision dated 9 October 2012 and handed to the appellant the same day. Respondent alleges that the appeal was lodged on 12 December 2012 and consequently time-barred. The file shows, however, that the appeal was dated 7 December 2012 and that the Appeals Board's Secretary received the fax submitting the appeal the same day. The appeal was registered on 12 December 2012 and forwarded to defendant on 17 December 2012. The appeal was lodged within the time limits and the claim of inadmissibility fails.

31. Appellant submits that the comments of defendant must be dismissed from the proceedings, since the latter had until 18 February 2013 to submit its comments, which were only sent on 11 April 2013. Respondent has explained and documented that the letter dated 17 December 2012 was only received in Capellen on 22 February 2013. The Tribunal is, first of all, perplexed to see such an unexplained delay in mail between NATO and NSPA. Nobody's good faith is put in doubt, however. Secondly, it must be observed that respondent, should its comments be dismissed from the proceedings, could have presented them during the oral hearing (*cf* NATO Appeals Board, Case No. 680). Thirdly, the detailed file as presented by appellant would have been sufficient for the Tribunal to arrive at the conclusions below. For these reasons, the request that the defendant's comments be dismissed from the proceedings is not granted.

32. The appeal is admissible.

(ii) Considerations on the merits

33. Decisions concerning appointments, and a *fortiori* decisions concerning the confirmation in the appointment at the end of the probationary period, are within the discretionary power of the Head of the Organization. There is consensus among international administrative tribunals that a decision in the exercise of discretion is subject to only limited review by a tribunal.

34. The Administrative Tribunal of the International Labour Organization (ILOAT), for example, recently held that it would interfere with a non-extension of contract decision "*only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.*" (ILOAT Case No. 3214). And in Case No. 3217 it ruled: "*(a)s noted in a recent decision (Judgment 3163, under 8), the Tribunal has set its face against assessing the exercise of a discretionary power, such as the power not to renew a fixed-term contract, unless it is demonstrated that the competent body acted on some wrong principle, breached procedural rules, overlooked some material fact or reached a clearly wrong conclusion.*"

35. The World Bank Administrative Tribunal (WBAT) held in one of its first cases (Case No 6, *Suntharalingam*) that *“(t)he determination whether a staff member’s performance is unsatisfactory is a matter within the Respondent’s discretion and responsibility. The Administration’s appraisal in that respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.”*

36. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations’ assessments in such cases. The ILOAT recently recalled that *“(i)t is clear from the case law that the Tribunal will not interfere with the discretionary assessment of the decision-maker unless there is a reviewable error”* (ILOAT Case No. 3228). The WBAT ruled in Case No. 85 (*de Raet*): *“(t)he second point which the Tribunal has made repeatedly before is that in matters involving the exercise of discretion by the Bank, the Tribunal is not charged with the task of re-examining the substance of the Bank’s decision with a view to substituting the Tribunal’s decision for the Bank’s. The duty of the Tribunal is to assess the Bank’s decision – as to both its content and the manner in which it has been made – to determine whether it constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.”*

37. The NATO Administrative Tribunal concurs with these approaches.

38. The Tribunal will now first analyze whether the impugned decision was taken without authority or in breach of a rule of form or procedure.

39. Article 6 (“Probationary period”) of the NCPR provides:

- 6.1 The first 6 months of an initial or definite duration contract covered by Articles 5.1.1 and 5.2 are a probationary period, unless the contract is for a period of one year or less, in which case the first 3 months are the probationary period.
- 6.2 Reassignment to a different post may entail a probationary period of 3 months to ensure that members of the staff have the ability to carry out their new duties.
- 6.3 The probationary period shall not run during any period of sick leave in excess of 5 consecutive working days.
- 6.4 At or before the end of the probationary period, the member of the staff will be notified in writing:
 - (a) that the contract is confirmed; or
 - (b) that it is terminated in accordance with the provisions therein (see Article 10.1); or
 - (c) in exceptional cases, that one further probationary period not exceeding 6 months is necessary.

40. Article 10 of the NCPR lays down the details concerning notice periods and indemnities. Its first paragraph covers the situation where a staff member is not confirmed in his appointment at the end or during the probationary period. It provides:

10.1 During the probationary period, an appointment may be terminated by either of the contracting parties:

- (i) on 30 calendar days' notice under initial contracts and definite duration contracts;
- (ii) on 90 calendar days' notice under reassignment contracts.

41. In its Decision No. 842 the NATO Appeals Board observed, with reference to its Decision No. 209, that a decision to terminate a contract during the probationary period can be taken at any time and does not have to be preceded by the performance review discussed in Article 55 of the NCPR. It added that the administration must, however, respect the rights of the defence. This exercise, which consists of enabling the staff member to familiarize himself with his personal file and present his arguments, can take place in a relatively short time frame.

42. This is exactly what has happened in the present case. Appellant knew since the end of July, when he was informed about the premature end of his deployment, that there was a problem and that the confirmation of his appointment had become an issue. He was given the time to reflect on the situation. He was shown a Staff Report on 20 September 2012. He gave extensive written comments on it on 3 October 2012 and he had a discussion with his Division Head on 9 October 2012. Upon this he was given formal notice of the decision to terminate the appointment.

43. It may be true that the last, but not the only, talk took place on the last day of the probationary period. This is not at variance with the NCPR or appellant's contract. Appellant's contract provides in paragraph 8 that he would at or before the end of the probationary period be informed in writing that the contract is confirmed or that is terminated with 30 days' notice (emphasis added). Article 6.4 of the NCPR has the same wording. It must in addition be underlined that appellant had taken leave most of the time since his return from deployment, rendering dialogue extremely difficult, for which he carries the responsibility.

44. The Tribunal concludes that the procedure that was followed was regular. It respected the NCPR as well as appellant's rights of defence.

45. The Tribunal will now analyze whether the decision was based on an error of fact or law, overlooked some essential fact, was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence.

46. As mentioned *supra*, international administrative tribunals have consistently held that they will not substitute their own view for the organizations' assessments. They will not interfere with or review the merits of a non-confirmation decision unless there has been an abuse of discretion. The Tribunal will therefore examine whether there was any such abuse of discretion in the decision that applicant was not suitable for employment in NSPA and whether he was treated fairly (*cf* WBAT case No. 470).

47. International administrative tribunals have emphasized the importance of such discretion in cases involving probationary employees. As the ILOAT put it, for example, in its judgment No. 2599 :

(t)he purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the organisation. The competent authority will determine on the evidence before it whether or not to confirm the appointment and must be allowed the utmost measure of discretion in deciding whether someone it has recruited shows, not just the professional qualifications, but also the personal attributes for the particular post in which he is to be working. Only where the Tribunal finds the most serious or glaring flaw in the exercise of the Director-General's discretion will it interfere (see Judgment 1246, under 3). The Tribunal reaffirmed that view in Judgments 2427 and 2558, amongst others.

48. The WBAT held in Case No. 7 (*Buranavanichkit*):

Probation has as its purpose the determination whether the employee concerned satisfies the conditions required for confirmation. These conditions may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with superiors and other staff members. The merits of the Bank's decision in this regard will not be reviewed by this Tribunal except for the purposes of satisfying itself that there has been no abuse of discretion.

49. A new employment relationship is a delicate matter, both for the employer and for the employee. Both need a period of probation in order to evaluate their work relationship and to agree whether continued employment is appropriate (*cf* WBAT Case No. 10 (*Salle*) quoting the World Bank's staff rules). The probationary period allows the Organization to decide whether the staff member indeed has the professional qualifications and capabilities, but also whether the person fits in his job in the Organization and in a team. This is *a fortiori* the case for deployment where staff work and live together in a harsh environment.

50. The case file shows extensively why management arrived at the conclusion that appellant should not be confirmed in his appointment. The 20 September 2012 staff report clearly explains why it was proposed not to confirm appellant in his appointment. His line management observed therein:

Although J has worked hard since he came to NSPA and he tackles all jobs with passion, this has often clouded his decisions and he has demonstrated that he can be rather obstinate and unwilling to be flexible when working with others. J has also not shown that he is willing to listen to other colleagues' points of view. This has made it difficult in working in an environment that will only function if a team player type of attitude is applied. This was shown to be the case shortly after he arrived at NSPA and continued throughout his deployment. Unfortunately, it is his difficulty in working with others that has caused the most contention among his colleagues and superiors

Mr F's personality and attitude do not contribute to an effective, cohesive team work environment.

51. Line management further concluded that appellant was not fit for deployment. Following receipt of his staff report, appellant was given the opportunity to give extensive written comments and to have a lengthy meeting with his Division Head.

52. It is clear from the record that the decision not to confirm appellant in his appointment was based on an overall assessment of appellant's performance and character. The decision is not a retaliation for the complaints he had lodged, as appellant submits and for which he does not bring convincing evidence.

53. It therefore appears that NSPA had exercised its discretion reasonably in deciding that appellant had not demonstrated his suitability for continued employment with NSPA. The Tribunal further concludes that the decision not to confirm appellant in his appointment was not based on a manifest error of appraisal, does not constitute an abuse of power, and was not disproportionate.

54. The Tribunal concludes that the appeal seeking annulment of NSPA's decision dated 9 October 2012 to terminate appellant's appointment at the end of his probationary period is to be dismissed.

55. Appellant further claims violation of the rationale of Article 6.4 NCPR and Clause 8 of his contract, when NSPA substituted the notice period with an allowance.

56. Clause 8 of the contract provides that appellant would at or before the end of the probationary period be informed in writing that the contract is confirmed or that is terminated with 30 days' notice. Clause 10 of the contract provides that the NATO staff rules apply to the contract. A simple reading of the relevant texts shows that Clause 8 is in accordance with the rationale and the letter of Articles 6.4 and 10.1 of the NCPR as quoted *supra*. Appellant has not established the contrary.

57. Secondly, Article 10.5 provides that the Head of the NATO body may substitute for all or part of the contractual period of notice an allowance equal to the emoluments during that period. It generally is good administration to apply this provision whenever possible, in particular for a short notice period as was involved here.

58. Thirdly, appellant being excused from duty during the notice period and having received the corresponding emoluments in a lump sum was certainly not adversely affected by this decision. He has not proven the contrary.

59. The Tribunal concludes that there is no violation of the rationale and letter of Article 6.4 NCPR and Clause 8 of appellant's contract, when NSPA substituted the notice period with an allowance.

60. Appellant submits that the deployment was not mandatory. Appellant's contract, countersigned by him, clearly states that his post was earmarked for mandatory deployment or duty travel. This claim is dismissed. It is also irrelevant since the decision not to confirm appellant in his appointment was not solely based on the assessment of his capabilities to adequately function in deployment.

61. The dismissal of the appeal seeking annulment of the 9 October 2012 decision consequently gives rise to dismissal of the other submissions seeking payment of material damages, payment of moral damages and reimbursement of costs. The Tribunal wishes, however, to observe that appellant was, also through the good offices of NSPA, quickly reintegrated in his national administration.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.
- The security deposited by Mr F shall be reimbursed.

Done in Brussels, on 21 October 2013.

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

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



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

4 November 2013

AT-J(2013)0002

Judgment

Case No. 896

MD,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 24 October 2013

Original: English

Keywords : reorganization, vacancies during reorganization, reassignment



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 9 September 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 18 February 2013 and registered on 20 February 2013 by Mr MD, against the NATO International Staff (IS). The appellant is currently a staff member of the NATO IS.

2. The Comments of the respondent, dated 22 April 2013, were registered on 23 April 2013. The Reply of the appellant, dated 23 May 2013, was registered on 28 May 2013.

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

4. The Tribunal’s Panel held an oral hearing on 9 September 2013 at NATO Headquarters. It heard arguments by Maître LL and Maître AT, of Lallemand & Legros, Brussels, representing the appellant, and Mr EG, Deputy NATO IS Legal Adviser and Mr BS, NATO IS Assistant Legal Adviser, representing the respondent, in the presence of Mr CS, President NATO IS Staff Association, Mr PL, NATO IS Staff Association as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

6. Appellant joined the NATO IS in 1997 covering different positions. He received an indefinite term contract at grade A5, step 5, as of 1 July 2009, as Head of the NATO Partnership Section (earlier named the Outreach Countries Section) in the Public Diplomacy Division (“PDD”).

7. In 2011 the Public Diplomacy Division was reviewing its structure in order to improve, modernize and correct its deficiencies. A further review of the Division’s structure was undertaken in 2012.

8. Appellant, seeking clarifications, had on 24 August 2012 a talk with his Division Head, the Assistant Secretary General for Public Diplomacy, during which the latter described his plans for an upcoming reorganization. She explained the intention to, amongst other things, merge the two sections "NATO Country Section" and "NATO Partnership Section" into a single "Engagement Section" with effect from 1 October 2012, to be headed by Mrs N.

9. Appellant summed up the talk the same day in an e-mail to his Division Head. He thanked her for the proposals she had made of other possible duties that he could continue to perform within the Division. It was also his recollection that she would support him in a transfer to another Division. He concluded by saying that he preferred to be part of the solution than a part of the problem and that he would consider attentively what will be proposed concretely at the end. In her reply the Division Head observed to be sure that by working together the right solution could be found.

10. On 12 September 2012 the Assistant Secretary General for Public Diplomacy submitted a package of proposals to reform and reorganize PDD to the Director of the Private Office. One of the proposals was indeed to merge the NATO Partnership Section with another Section into a single Engagement Section. The proposal concerned a new structure only. It did not contain human resources considerations, such as who should be the Head of the new Section concerned or what would become of the holders of the existing posts.

11. The file does not indicate when the decision to authorize the reorganization and corresponding appointments was made, but it shows that the reorganization was announced on 27 September 2012 and took effect on 1 October 2012. Appellant was informed thereof by telephone on 27 September 2012. The organizational chart distributed on 27 September 2012 showed Mrs N. as Head of the Engagement Section and did not show appellant in any position. In the weeks that followed, appellant was given no assignments or responsibilities; this was confirmed at the hearing.

12. On 21 November 2012, appellant filed a complaint with the NATO Secretary General against the decision, not notified to the appellant, to appoint Mrs N., and consequently not him, to the position of Head of the Engagement Section, PDD. He requested the annulment of the appointment of Mrs N. and an open procedure in order to identify the candidate who would be best qualified to exercise the functions of the post in question. Alternatively he requested to be transferred, possibly with his budgetary post, to equivalent and permanent functions within NATO IS. He also requested 5.000 Euro as compensation for moral damages.

13. The Secretary General having failed to reply within 30 days to the complaint appellant lodged on 20 December 2012 the present appeal against the implicit decision to reject the appellant's complaint.

14. A number of possible reassignments for appellant were considered. He was as of 20 February 2013 transferred to the Financial Controller's Office, as Special Adviser for a period of four months until 30 June 2013.

15. On 18 June 2013 appellant was offered a new indefinite duration contract starting 1 July 2013, within the Office of the Financial Controller, as an auditor at grade A5, step 8. Appellant signed this contract on 5 September 2013. The Tribunal was informed thereof by both parties during the hearing and it received a copy of the contract.

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

(i) *The appellant's contentions*

16. Appellant submits that the implicit decision to reject his complaint and the decision to nominate Mrs N. as Head of the newly created "Engagement Section" are taken in violation of his rights of defense and of the obligation of motivation resting with the Organization to justify such decisions.

17. Appellant observes that, since August 2012, he was left in the dark about the outcome of the restructuring. He was not informed or officially notified (notwithstanding contacts with both the Private Office and the PDD Assistant Secretary General) of the impact that the reorganization would have on his functions. He was, since October 2012, left *de facto* without functions and responsibilities. He considers these violations of the principles of good administration and of transparency.

18. Appellant further states that he was not made aware of the objective criteria that were applied leading to the selection of Mrs N. and not himself. Appellant submits in this respect a violation of Articles 57.1 and 57.3 NCPR, as well as the internal applicable directives concerning the recruitment and selection process. The vacant position was not published and the selection process was conducted without consultation with the interested parties, including appellant, or consideration of their professional qualifications and performance record. Appellant recalls that he was in the performance review graded as excellent and that when he applied for the post of Head of the "NATO Countries Section", which was also merged into the new "Engagement Section", he was considered as the second best qualified candidate.

19. Furthermore, appellant alleges violation of Article 4.1 NCPR in so far as, following the merger, the functions proper to his post were transferred to the newly formed position, leaving him with substantial and permanent modifications to his original post description. Appellant did not sign a new contract and therefore the modifications are impacting on the principle of equivalence of grade and functions.

20. Appellant requests:

- the annulment of the implicit decision to reject appellant's complaints;
- the annulment of the decision to appoint Mrs N. to the post of Head of the Engagement Section and not appellant;
- alternatively, the appointment of appellant to equivalent functions;
- compensation for moral damages amounting to € 20.000; and
- reimbursement of all costs.

(ii) *The respondent's contentions*

21. Respondent submits that the appeal is inadmissible to the extent that it is directed against the position of the Head of the new Engagement Section. Respondent observes that appellant was aware of the nomination as of 24 August 2012 and that the appeal is to be considered time-barred.

22. Respondent explains that the restructuring process of the PDD was necessary to streamline the establishment and to gain efficiencies. It submits that, as established by the jurisprudence of other international organizations' administrative tribunals, restructuring and reclassification of posts is within the discretion of the Organization. Furthermore, the assessment that Mrs N. was found as the most suitable candidate for the post was based on extensive consultation with staff and in consideration of objective criteria, which included a careful assessment of appellant's profile.

23. Respondent contests the alleged incertitude as several efforts and contacts, as early as August 2012, were made to find a suitable post at an A5 level with different Divisions.

24. Respondent submits that the creation of the Engagement Section and the selection of its Head took place in the framework of an internal restructuring. Such a restructuring is within the competence and discretion of the Organization. Articles 57.1 and 57.3 are not applicable to this process, including any provisions thereof that establish individual rights for a staff member. In the course of such an internal reorganization made no formal recruitment process is required. As a consequence, respondent contends, none of the rules and procedures applicable to the recruitment for a specific position were applicable.

25. Respondent adds that there is no violation of Article 4.1 NCPR as appellant was still holding a post of a specific grade and with a designed location of where his functions are to be exercised. From the beginning of the reorganization the Organization tried to identify a proper position, which was found as from 20 February 2013 in the Financial Controller's Office.

26. Considering that the Organization did not violate any rule or regulation and that it had made every effort to find a proper position for appellant respondent submits that it cannot be held liable for any indemnities to be paid. It added that, in any event, the claim for € 20.000 is inadmissible as it is not consistent with the amount requested in the complaint.

27. Respondent requests:

- a declaration that the appeal is inadmissible; and
- to the extent that it is admissible, the rejection of the appeal as unfounded.

D. Considerations and conclusions

(i) Considerations on admissibility

28. Respondent submits that the appeal is time-barred and thus inadmissible contending that, during his talk with his Division Head on 24 August 2012, appellant was informed of the reorganization, of the merger of two sections, including the one he headed, into one section, and the appointment of a third Section Head to this new position. He was also then informed that the reorganization was expected to enter into force on 1 October 2012.

29. It is not in dispute that appellant had a talk with his Assistant Secretary General on that day, but this was about a month before any formal decisions or actions were taken. Any discussion at that time could only be hypothetical even if it involved possible changes that in fact materialized. Such an informal talk about proposals not yet submitted or approved cannot be considered a notification of an administrative decision against which an appeal may stand. The claim of inadmissibility on these grounds fails.

30. The appeal is admissible.

(ii) Considerations on the merits

31. During the hearing the parties informed the Tribunal that prior to the hearing a permanent and satisfactory solution had been found for appellant in the Financial Controller's Office. Counsel for the appellant also indicated that, in light of this development, the appellant did not maintain the request that the appointment of Mrs N. be annulled, but wished to maintain the appellants' remaining claims. The appeal has therefore to a large extent become moot. The Tribunal will, however, address the legality of the impact of the process on appellant, his claim for compensation for damages and the claim for reimbursement of costs.

32. Decisions concerning reorganizations and appointments are within the discretionary power of the Head of the Organization. There is consensus among international administrative tribunals that a decision in the exercise of this discretion is subject to only limited review by a tribunal. These tribunals have consistently held that they will not substitute their own view for the organizations' assessments, save in certain limited circumstances not present here. This Tribunal concurs in this (*cf* AT judgment in Case No. 885, paragraphs 33-36).

33. In appellant's written submissions and at the hearing, it was made clear that the appellant did not contest the reorganization. However, the Tribunal observes that the reorganization of PPD affected appellant directly and adversely in a number of ways.

34. First, appellant had since 2009 a contract as Head of the NATO Partnership Section. The post was with the 2012 reorganization emptied of its contents when these were merged into another Section, to which he was not appointed. The functions proper to his post were transferred to the newly created Section, leaving him with no responsibilities or functions, let alone responsibilities or functions corresponding to his original post description. Respondent submits that appellant had a post and a salary. This argument does not hold. Appellant was *de facto* without functions, without a job, without productive employment. No alternative was offered to him at the moment of the reorganization and the post he held was not formally suppressed. This constitutes a breach of the employment contract appellant had with his employer and a violation of Article 4.1 of the NCPR. This breach was eventually remedied when by mutual agreement a new position was found. Appellant must, however, be compensated for the initial and protracted breach of contract and the limbo he was left in.

35. The breach of his contract had serious consequences for the appellant. Appellant was *de facto* without a job as from 1 October 2012. He was *de facto* redundant. This had an impact on his image both within and outside the Organization.

36. Secondly, appellant was not advised of the administration's intentions concerning his future. There may be good reasons not to immediately render a staff member redundant and have a notice period running when other avenues are being pursued. A careful assessment must indeed be made, in each case, of the advantage for the staff member of not being put on notice and the disadvantage of not having a formal priority status in the filling of vacant posts. The decision not to render a valued employee formally redundant can be good administration, as the end result in this case has shown.

37. On the other hand, one may at least expect that a staff member be advised of the administration's intentions. Not doing so is not good administration. The good intentions of both parties to find an acceptable solution is not in dispute, but the non-transparent attitude of the administration and the sudden implementation of the reorganization has contributed to unnecessary and avoidable incertitude and anguish for the appellant, following from the breach of his contract.

38. Thirdly and as respondent has confirmed in its written comments, the Engagement Section that was created with the reorganization was a new Section and a new Head of that Section was to be identified. The Tribunal concludes that this is a new post and that a vacancy for this post should therefore have been published. This would, however, not entail an automatic appointment of appellant to the vacant post. He might have been a good candidate, but many considerations do play a role in the selection process for senior posts. As mentioned *supra* these

matters are in the domain of the discretionary powers of the Head of the Organization. No assumptions can and may be made in this respect and a claim for moral damages in this respect has no basis.

39. Respondent submits that the creation of the Engagement Section and the selection of its Head took place in the framework of an internal restructuring and that Articles 57.1 and 57.3 of the NCPR dealing with vacancies are not applicable to this process, including any provisions thereof, which establish individual rights for a staff member. The administration thus argued in effect that a new position created in the course of a reorganization does not constitute a “vacancy” requiring notice and competition. This submission finds no basis in the NCPR or in any laws or by-laws of the Organization and respondent has not provided any convincing elements in support of it. Reorganizations are disruptive. They entail reformulations of duties, reporting lines, functions, posts, positions, etc. Reorganizations entail uncertainties for the staff members concerned who are then *a fortiori* to be protected by the clauses in their contracts and the NCPR, as well as by such general principles as the duties of care and of good administration. The NCPR may not be specific enough about reorganizations and the creation and suppression of positions during that process, or about posts and positions in general. It is clear to the Tribunal, however, that Articles 4, 57.1, 57.2 and 57.3 are applicable during a reorganization.

40. Fourthly, appellant was not formally notified of the effects of the reorganization on his situation or of the fact that he was no longer on the organizational chart. Such decisions affect a staff member directly and he must be formally advised thereof in writing. The requirement to personally and formally advise staff members of the effects of a reorganization on their situations cannot be satisfied by the simple publication of an organizational chart or an informal meeting with supervisors.

41. Appellant has requested the Tribunal to alternatively appoint him to equivalent functions. As explained above, this portion of the claim has, first of all, become moot. The Tribunal wishes, however, to observe that under Article 4.2 of (“old”) Annex IX to the NCPR it shall decide on individual disputes. It has in this respect jurisdiction to resolve all questions regarding the interpretation and application of the NCPR, contracts or other terms of appointment. It may annul such decisions as are contrary to the contracts or other terms of appointment of the staff member concerned or to the relevant provisions of the NCPR. It follows from this that the Tribunal does not have the competence to appoint a staff member to equivalent functions, or to direct the Organization to do so.

42. Appellant had in the initial complaint requested € 5.000 for moral damages. The amount was in the appeal increased to € 20.000 without any reasons or justification being given. Respondent, considering that the Organization did not commit any error or fault, requests to dismiss any claim for monetary damages. It in any event submits that the amount of € 20.000 is inadmissible as it is not consistent with the amount requested in the complaint.

43. At the hearing respondent submitted that the claim for moral damages is inadmissible since the Organization had not expressed itself on it. The Tribunal, first of all, observes that its competence to award damages is based on Article 4.2.2 of ("old") Annex IX to the NCPR, which provides

It may also order the Organization to repair the damage resulting from any irregularity committed by the Head of a NATO body.

It follows from this that the decision to award damages is independent from a decision the Tribunal may take annulling an administrative decision or not. It also follows from this that the Tribunal's competence is also not dependent on whether the Organization has taken a decision concerning a request for damages or expressed itself otherwise in the matter. Respondent having chosen not to reply to the complaint, which is its right, is estopped from invoking this point now.

44. The Tribunal, having considered all aspects of the appeal, including the breach of contract and the irregularities identified in the preceding paragraphs, is of the opinion that a compensation in the amount of € 5.000 (five thousand Euro) is an appropriate compensation for the injury caused to the appellant.

E. Costs

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

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

Appellant who works at NATO Headquarters is not entitled to reimbursement of travel and subsistence costs. The appeal being successful appellant is entitled to the reimbursement of the costs of retaining counsel, up to a maximum of € 4.000 (four thousand Euro).

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- Mr D is entitled to € 5.000 for damages.
- NATO shall reimburse Mr D the costs of retaining counsel up to a maximum of € 4.000.
- The remaining submissions in the appeal are dismissed.
- The security deposited by Mr D shall be reimbursed.

Done in Brussels, on 24 October 2013.

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

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



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

5 November 2013

AT-J(2013)0003

Judgment

Case No. 887

RS et al.,

Appellants

v.

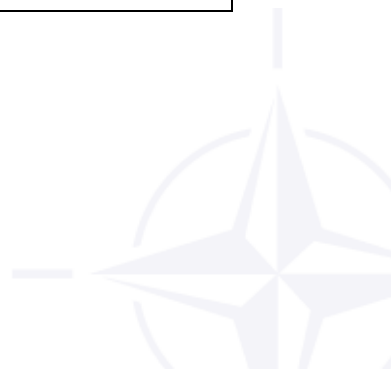
NATO Medium Extended Air Defense System Management Agency,

Respondent

Brussels, 5 November 2013

Original: English

Keywords: tax reimbursement; informing staff; national taxes; staff member responsibility.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 11 September 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 17 December 2012 and registered on 3 January 2013, by Mr DG, Ms GH, Mrs JM, Ms RP, Ms TP, Ms BS, and Ms RS, against the NATO Medium Extended Air Defense System Management Agency (NAMEADSMA). The appellants are all U.S. citizens and current or former members of NAMEADSMA's direct hire staff.

2. The Comments of the respondent, dated 28 February 2013, were registered on 5 March 2013. The Reply of the appellants, dated 16 April 2013, was registered on 22 April 2013.

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

4. The Tribunal's Panel held an oral hearing on 11 September 2013 at NATO Headquarters. It heard arguments by Maître AB of Lallemand & Legros, Brussels, representing the appellants, Mr VL, NAMEADSMA Deputy General Manager and Mr NK, NAMEADSMA Legal Adviser, representing the respondent, in the presence of Mr EG, Deputy NATO Legal Adviser, Mr BS, NATO IS Assistant Legal Adviser, as well as Mrs Laura Maglia, Registrar *a.i.* During the hearing, the Tribunal conducted a conference call with Mr RH, Tax Liaison Office, International Atomic Energy Agency, who currently administers tax reimbursement for NATO. Mr H answered questions regarding tax reimbursement and tax reimbursement agreements.

5. In response to the Tribunal's request during the hearing, the NATO International Staff on 13 September 2012 provided documentation regarding tax reimbursements provided to NAMEADSMA staff. This documentation was distributed to the parties. The appellants requested leave to submit comments on the documentation on 24 September 2013, including those comments with their request for leave. The respondent was invited to reply to the appellants' comments, and did so on 11 October 2013. The Tribunal took account of both parties' comments.

6. In July 2013, Ms S requested to withdraw from the appeal. Her unconditional withdrawal was approved by order of the Tribunal President on 19 July 2013.

B. Factual background of the case

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

(i) *The NATO-United States Tax Reimbursement Agreement*

8. NAMEADSMA, located in Huntsville, Alabama, USA, was created in 1996 to oversee the multi-national Medium Extended Air Defense System, a joint project intended to replace the MIM-104 Patriot missile system. The appellants entered into service with NAMEADSMA at different times. Ms S joined in September 2007. Mr G and Ms TP joined in January 2009. Ms H, Ms M, Ms RP, and Ms BS (who has withdrawn) all joined in January 2011.

9. The appellants allege various failures in relation to the administration and calculation of reimbursements to pay their U.S. federal and Alabama state taxes pursuant to the 18 July 1990 Tax Reimbursement Agreement (TRA) between NATO and the United States of America.

10. Some background may assist in understanding the Appeal. Article 19 of the 1951 “Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff” (the Ottawa Agreement) provides that NATO officials

shall be exempt from taxation on the salaries and emoluments paid to them by the Organization in their capacity as such officials.

However, Article 19 also provides that a Member state may conclude an arrangement with the NATO Council whereby that state will employ and assign its nationals to NATO, pay their salaries and emoluments, and tax those salaries and emoluments. The United States of America and the Council concluded such an arrangement in September 1951.

11. In 1983, the United States and NATO concluded the “Supplemental Arrangement concerning the employment by NATO bodies of United States nationals” (the Brussels Arrangement), authorizing NATO bodies to hire and directly compensate U.S. nationals. However, the United States has a long-standing policy of not allowing income its nationals receive from international organizations immunity from taxation. This could place NATO employees who are U.S. nationals at a financial disadvantage, because NATO’s compensation structure presumes that salaries and emoluments are not taxed. Accordingly, Article 3 of the Brussels Arrangement provided that U.S. national employees directly hired by NATO must pay U.S. income taxes due on their NATO salaries and emoluments; that NATO would reimburse them for these tax payments; and that the United States would then reimburse NATO under the provisions of a (future) tax reimbursement agreement.

12. The Tribunal was informed that the 1990 TRA is one of several generally similar tax reimbursement agreements concluded between the United States and NATO and

other international organizations. Article 1 specifies the taxes for which reimbursement can be made

NATO shall reimburse NATO officials who are liable for and pay the United States self-employment tax and United States Federal, state and local income taxes on their NATO institutional income.

13. Article 11 of the TRA authorizes reimbursement of roughly one-half of U.S. federal “self-employment tax” (SET). SET reflects the fact that U.S. Social Security and Medicare taxes typically are paid one-half by an employee and one-half by the employer. A self-employed person (or a person employed by an entity not required to pay such U.S. taxes, such as international organizations like NATO) must pay both halves -- the employee’s share, plus the additional amount usually paid by an employer. Under the TRA, the additional “employer’s share” is reimbursable; the employee’s share is not. SET can be substantial; the current rate is 15.3% of the first (US) \$113,700 of self-employment income. (The burden of SET is reduced somewhat because the employer-equivalent half of the tax is deducted from taxable income.)

14. Administering the TRA and determining amounts of reimbursements due to individual employees are complex and require detailed information about employees’ tax situations. During the relevant period, these functions were centralized in the Office of NATO’s Financial Controller in Brussels.

(ii) NAMEADSMA’s actions related to tax reimbursement

15. Ms S’s and Ms TP’s employment contracts both refer to the TRA. Paragraph 12 of Ms S’ September 2007 contract states:

[r]eimbursement for income taxes paid by you on your earnings as a NATO staff member is subject to the Tax reimbursement agreement between the North Atlantic Treaty Organization and the United States of America.

Ms TP’s February 2009 contract is similar. The other appellants’ contracts do not mention the TRA.

16. In late January 2009, and in January of subsequent years, a senior NATO human resources official in Brussels sent to the Chief of NAMEADSMA’s Administration Office and to comparable officials in other NATO bodies a detailed memorandum explaining NATO’s policies and procedures for tax reimbursement and enclosing a copy of the TRA and other information. Recipient NATO bodies were requested to supply these materials to U.S. direct hire staff. They were also requested to ensure “that all future direct hire employees are provided with a copy when joining NATO.” The memorandum’s first paragraph states clearly that U.S. citizens’ “earnings as staff members of NATO are not exempt from United States taxes” under the Ottawa Agreement.

However, according to the TRA:

the Organization will reimburse staff for United States taxes paid on their NATO institutional income.

17. NAMEADSMA's Administration Office Leader e-mailed these materials to Ms S, Mr G, and other employees not involved in this appeal, on 13 February 2009, in an e-mail captioned "Tax Reimbursement Agreement" with the short text "FYI". These materials apparently were not given to other U.S. citizens who later joined NAMEADSMA, nor were similar materials sent from Brussels to NAMEADSMA on 27 January 2010 given to employees. NAMEADSMA circulated NATO Headquarters' 27 January 2011 tax reimbursement memo addressing 2010 U.S. taxes only in August 2011, *i.e.* months after those taxes were due.

18. Notwithstanding the references to the TRA in two employees' contracts, and the clear instructions sent to NAMEADSMA in January 2009 and later years, NAMEADSMA provided certificates to the appellants in February 2008, 2009, 2010, and 2011 stating their NATO institutional income for the prior year, that he/she "*is covered under the terms of Article 19*" of the Ottawa Agreement, and that:

[t]he terms of Article 19 of the Agreement referenced above, which was signed by the United States and all NATO countries, guarantees the person concerned complete exemption from taxation on emoluments during the period of employment.

19. Similarly, an August 2010 e-mail from NAMEADSMA's Personnel and Admin Office Leader to Ms M and Ms RP (who were then being recruited to join NAMEADSMA) refers to "[t]he (tax-free) emoluments paid to members of the staff." The record includes other documents written by various appellants indicating that they believed, based on information received from NAMEADSMA, that they did not need to pay U.S. state and federal taxes.

20. The appellants contend that until August 2011, relying on such information and advice from NAMEADSMA, they believed that they were not required to pay U.S. federal or Alabama state taxes on their NATO emoluments, and they did not do so. The relevant years varied, as the appellants entered into service at different times. During 2011, two appellants received notices of deficiency from Alabama, which caused the appellants to make inquiries and to acquaint themselves with the TRA and with NATO's procedures for claiming reimbursement. They then appear to have acted assiduously, making properly documented requests to the NATO Financial Controller's Office for checks to pay overdue taxes and filing amended tax returns.

21. The responsible official in the NATO Financial Controller's office consulted with and assisted the appellants. In the months that followed, NAMEADSMA was authorized to issue checks, many for large amounts, payable to U.S. and state tax authorities to pay appellants' past tax obligations and estimated future taxes. The record includes photocopies of many such checks issued in January 2012 and April 2012. However, some appellants were required to pay penalties and interest because of late payment of taxes. In addition, several appellants disputed the amounts paid on

their behalf as calculated by the Office of the Financial Controller, particularly with respect to SET.

(iii) *The appeal*

22. On 17 September 2012, appellants' counsel requested NAMEADSMA's General Manager to pay full compensation for various amounts claimed by each of the appellants, totaling approximately (US) \$88,000. NAMEADSMA's deputy general manager replied on 15 October 2012 that "a response will be submitted to you in due course." On 31 October 2013, appellants' counsel asked for a decision within 15 days. On 5 November 2013, NAMEADSMA's Deputy General Manager asked whether the appellants had actually requested reimbursements. Appellants' counsel provided that information on 3 December 2012. By letter dated 6 December 2012 NAMEADSMA's Deputy General Manager thanked Appellants' counsel for the additional and helpful information. He underlined the complexity of the matter and stated that he had turned to the NATO HQ Legal Adviser for additional advice and assistance. He suggested that the previous correspondence not be considered as a formal complaint, which in turn would alleviate the deadline of 16 December 2012. He was confident that a decision could be provided not later than 13 February 2013. Appellants lodged the present appeal on 17 December 2012.

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

(i) *The appellants' contentions*

23. The appellants allege violations of what they regard as governing principles of international administrative law, contending that NAMEADSMA's failure to provide them accurate information regarding tax reimbursement matters violated:

- their legitimate expectations; and
- the duty of good administration and due care.

24. As indicated above, the appellants' situations vary, and their monetary claims vary as well. Each appellant claims compensation for one or more of the following forms of damage said to result from the alleged violations of international administrative law:

- penalties and interest resulting from late filing of state and federal taxes based on incorrect advice provided by NAMEADSMA;
- amounts paid to tax and legal advisors in the course of regularizing appellants' tax situations after August 2011;
- amounts in addition to income tax reimbursements previously calculated by the Office of the Controller and paid;
- amounts in addition to self-employment tax reimbursements previously calculated by the Office of the Controller and paid. In this regard, several appellants seek full reimbursement of SET;
- amounts to pay quarterly estimated state and federal taxes for 2012; and
- costs and attorneys' fees;

- each appellant also seeks (US) \$4,000 as moral damages.

(ii) *The respondent's contentions*

25. The respondent contends that the claim was inadmissible because NAMEADSMA has no responsibility for, or control over, tax reimbursement matters, which fall under the authority of the NATO Financial Controller. The respondent also contends that its employees could have no legitimate expectation not to pay taxes, and that its responsibilities for good administration did not extend to informing employees regarding their obligations under U.S. and state tax laws, these being matters for which each individual is responsible.

D. Considerations and conclusions

(i) *Considerations on admissibility*

26. Appellants complain of NAMEADSMA's failure to provide a satisfactory response within 60 days to their demand for tax reimbursements. NAMEADSMA responds that it is not the proper respondent, as it has no control over tax reimbursements, so that the claim should be ruled inadmissible. As a practical matter, there is force in this argument. NAMEADSMA does not control TRA payments. It serves as a conduit, issuing checks payable to U.S. taxing authorities to satisfy the appellants' tax obligations, but only as authorized and directed by NATO's Financial Controller. Nevertheless, the appellants acted as Article 2.1 of Annex IX as in force at that time required: they submitted their complaint to the Head of NATO body to which they belong. The Tribunal observes that Annex IX in the version that entered into force on 1 July 2013 provides differently in Articles 2.1 and 4.1. These provide that if a Head of NATO body does not have authority to rescind or modify a contested decision, requests for administrative review and any appeal must be lodged with the body having such authority.

27. Respondent submits that the appeal is inadmissible because no formal complaint had been lodged and no final decision was taken. Indeed, NAMEADSMA's letter of 6 December 2012 suggested that the previous correspondence not be considered as a formal complaint and that a decision could be expected before 13 February 2013. Appellants lodged the appeal anyway, contending that this was necessary to protect their rights, lest their claim be rendered inadmissible by running of the 60-day time period for lodging an appeal following a NATO body's failure to respond, under Articles 4.3.1 and 4.3.2 of Annex IX to the NCPR. In their view, the Annex IX time limits embody mandatory principles of public law that cannot be suspended by agreement of the parties. The representative of the Office of the Legal Adviser disputed this view.

28. The Tribunal has reservations about the desirability of proceeding in such a manner, in particular in a case like this involving multiple appellants, complex issues requiring individual analysis, liaison with NATO HQ, and the evident willingness of the responsible NATO officials to work with employees to seek proper solutions. Lodging an appeal in such circumstances renders the situation unnecessarily adversarial and

risks freezing positions and making amicable and mutually beneficial resolutions less likely. For purposes of future cases, the Tribunal draws attention to Rule 23 of its Rules of Procedure, authorizing suspension of proceedings on the parties' request to allow examination of possibilities for amicable settlement. Article 3.3 of Annex IX (new) is written in the same vein. In this context, the Tribunal is of the opinion that parties may by mutual agreement suspend time limits.

29. The Tribunal declares the appeal admissible.

(ii) Considerations on the merits

30. The Tribunal notes that three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the NATO body. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.

31. The NATO Appeals Board (Board) recently addressed somewhat similar issues (Appeals Nos. 853, 854, 856, and 859 (2012)). The appellants there alleged that NATO failed to provide sufficient information regarding operation of the Defined Pension Scheme when they entered on duty. The Board determined that the Organization had indeed given them incomplete information, and had therefore "*committed a fault for which the appellants were justified in seeking compensation.*" However, it also concluded that the appellants were "*negligent and imprudent*" in failing to ascertain the details of the Pension Scheme, lessening the Organization's responsibility. NATO was directed to pay each appellant one Euro as compensation.

32. The NCPR establish a balance of reciprocal rights and obligations. A consequence of this, and of the principle of good administration, is reflected in the Appeals Board's decision in A. The Tribunal recognizes, as did the Board in A, that a NATO body has a responsibility to provide its employees with reliable information regarding significant aspects of their employment. However, employees also have a responsibility to familiarize themselves with information provided to them and to make further inquiries as required. This is particularly so for matters such as national taxation, that (unlike the pension scheme in A) NATO does not control and that differ for employees of different nationalities.

33. In assessing the parties' actions, the Tribunal finds shortcomings on both sides. NAMEADSMA's personnel seem not to have clearly understood or explained the TRA or the operation of NATO's tax reimbursement program, and apparently gave some of the appellants incorrect advice. Further, NAMEADSMA provided the appellants with the incorrect tax certificates described above. At the hearing, NAMEADSMA's counsel contended that the appellants requested the certificates and were responsible for their contents. The Tribunal disagrees. It was NAMEADSMA's responsibility to provide its U.S. staff with correct information about the TRA. It was not necessarily NAMEADSMA's responsibility to provide its employees with advice or documentation

regarding their tax situations. However, when it elected to do so, it had a responsibility to ensure that the information provided was accurate. It was not.

34. On the other hand, at least some of the appellants did not make appropriate and prudent inquiries regarding their situations. Two of them had contracts referring to the TRA; they apparently did not ask for a copy. Two appellants (including one whose contract referred to the TRA) received an e-mail with detailed information about tax reimbursement and the TRA in February 2009. They apparently did not read or act on it.

35. Each appellant is a U.S. citizen with prior experience in the U.S. work force outside of NAMEADSMA. Each was therefore familiar with U.S. citizens' normal obligation to pay U.S. income and Social Security taxes. The Tribunal also notes that information regarding U.S. tax laws and procedures is readily available, including on the Internet.

36. Even after they learned of and received the TRA in August 2011, some of the appellants elected not to pay SET, although their obligation to do so is indicated in the TRA's text. Indeed, some appellants demanded that the NATO Financial Controller document that U.S. law required them to pay SET. These employees did not undertake the modest research required to clarify their situations. The instructions for Form 1040, the basic U.S. tax form, include extensive guidance regarding SET; the instructions can easily be located on the Internet. They explain who must pay SET, and state on page 2 that

[y]ou must pay [self-employment] tax on income you earned as a U.S. citizen employed by an ...international organization... for services performed in the United States.

37. Thus, this appeal reveals shortcomings on the part of both NAMEADSMA and at least some of the appellants. Given this, the Tribunal decides that NAMEADSMA should compensate those employees who had to pay penalties and interest on account of their late filing in reliance on the certificates or other incorrect advice provided by NAMEADSMA. Other claims for compensation are addressed in the following paragraphs.

38. First, as confirmed by appellants' counsel at the hearing, the bulk of the damages claims involves requests for full reimbursement of SET, in addition to the partial reimbursements authorized by Article 11 of the TRA. At the hearing, appellants' counsel contended that SET should be fully reimbursed because the tax was complex, unfamiliar, and NAMEADSMA did not disclose that they had to pay it. The Tribunal disagrees.

39. As discussed above, Article 11 clearly provides that only the portion of SET reflecting the employer's share (roughly half) is reimbursed. The portion not reimbursed mirrors the employee's share of U.S. Social Security and Medicare taxes, taxes paid by U.S. taxpayers in almost all employment situations. These would have been paid by the appellants had they worked for other U.S. employers. Moreover, information regarding SET, and the obligation of U.S. taxpayers working for

international organizations in the United States to pay it, is readily available on the Internet. Accordingly, the several claims for full reimbursement of SET are denied.

40. Second, several appellants seek reimbursement of expenses for legal, accounting, and tax preparation advice incurred during or after August 2011 as they worked to regularize their tax situations. The Tribunal views these as personal expenses, not as the responsibility of the Organization. Tax situations differ in each case depending on very personal and private circumstances. It is a personal choice to seek expert advice. These claims are denied.

41. Third, two appellants claim compensation for advance payments of quarterly estimated tax requested but not yet received when they sought compensation from NAMEADSMA in September 2012. At the hearing, appellants' counsel did not know whether these had been paid. The Tribunal accordingly asked the NATO Financial Controller to provide available information regarding recent tax reimbursement payments to the appellants. This was promptly provided to the Tribunal and the parties, for which the Tribunal records its appreciation. It reveals that one appellant received (US) \$8,349 in advances to pay estimated federal and state tax for the initial quarters of 2012. The second received such advances totaling at least (US) \$8,039. Given these substantial payments, and absent any contrary evidence, the Tribunal regards these claims as having been satisfied.

42. Fourth, some appellants disputed the NATO Financial Controller's Office's computation of the amounts of tax reimbursement due. As noted above, calculating reimbursements due each employee involves a detailed assessment of the employee's personal financial information. It also requires application of complex rules reflecting that NATO's tax reimbursements are themselves treated as taxable income by the United States. Net reimbursements must be "bulked up" to take account of this. The Tribunal has neither the information nor the expertise to assess the accuracy of such calculations, although individual appellants can address particular issues with appropriate personnel responsible for NATO tax reimbursement issues.

43. Based on the foregoing, the Tribunal decides the following regarding the six individual appellants' claims:

- Mr G: NAMEADSMA should compensate Mr G (US) \$2,944.25, the amount of penalties and interest paid on account of late filing of his taxes for 2009, 2010, and 2011. His other claims are denied.
- Ms H alleges that her claims for reimbursement were honored, but the amounts were too low because she did not know she had to pay SET. Her claim is denied.
- Ms M apparently did not pay SET. Her claim is denied.
- Ms RP apparently did not pay SET but seeks reimbursements for SET and for amounts reflecting disagreements with NATO Financial Controller's calculations. Her claim is denied.
- Ms TP: NAMEADSMA should compensate Ms TP (US) \$1,410.80, the amount of penalties and interest paid on account of late filing of her 2009 taxes. Her other claims are denied.

- Ms S: NAMEADSMA should compensate Ms S (US) \$364, the estimated amount of penalties and interest paid on account of late filing of her 2011 taxes. The Tribunal notes that the information provided to the Tribunal and the parties by the NATO Financial Controller after the hearing indicates that Ms S has returned to NAMEADSMA uncashed tax reimbursement checks totaling (US) \$50,775.00. This amount substantially exceeds her claim in this appeal. The Tribunal has not been informed of the reasons for her action.
- The appellants' request for (US) \$4,000 each for moral damages is denied.

E. Costs

44. Article 4.8.3 of the version of Annex IX of the CPR applicable to the appeal provides as follows:

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

The appeal being only partly successful, the appellants shall be reimbursed for the cost of retaining counsel up to a limit of € 2.000 (two thousand Euro).

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- NAMEADSMA shall compensate Mr G (US) \$2,944.25, Ms TP (US) \$1,410.80, and Ms S (US) \$364.
- The appellants' other claims are denied.
- Appellants shall be reimbursed for the cost of retaining counsel, up to a limit of € 2.000.
- The appellants' security deposits shall be reimbursed.

Done in Brussels, on 5 November 2013.

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

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



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

8 November 2013

AT-J(2013)0004

Judgment

Case No. 892

IF,

Appellant

v.

NATO International Staff,

Respondent

Brussels, 8 November 2013

Original: English

Keywords: Complaints Committee; status of staff member on unpaid leave.



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

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 8 February 2013 and registered on 14 February 2013, by Mrs IF, against the NATO International Staff.
2. The Comments of the respondent, dated 15 April 2013, were registered on 22 April 2013. The Reply of the appellant, dated 8 May 2013, was registered on 13 May 2013.
3. The appeal was lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, inter alia, establishing the NATO Administrative Tribunal. Pursuant to the Transitional Provisions contained in Article 6.10 of ("new") Annex IX of the NCPR, appeals pending before the NATO Appeals Board on 30 June 2013 are transferred to the Tribunal. They shall be decided by the Tribunal in accordance with the provisions of Annex IX in effect prior to when the new regulations entered into force, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973.
4. The Tribunal's Panel held an oral hearing on 12 September 2013 at NATO Headquarters. It heard arguments by Maître LL and Maître AT, of Lallemand & Legros, Brussels representing the appellant, Mr EG, Deputy NATO IS Legal Adviser and Mr BSt, NATO IS Assistant Legal Adviser, representing the respondent, in the presence of Mr CS, President NATO IS Staff Association, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

5. The material facts of the case may be summarized as follows.
6. Appellant joined the NATO International Staff on 17 August 1998 with a definite duration contract occupying an A4 post. In 2002 she was offered an indefinite contract, which she accepted in 2003. In October 2004 Mrs F was appointed to the post of A5 Director of the NATO Information Office in Moscow.
7. In view of the strained relationship between NATO and Russia appellant had to return back urgently to Brussels.
8. Appellant then applied for the post of Head of the NATO Liaison Office in New York, which is also at A5 level, but was not retained. In a letter dated 28 August 2009 the Director of the Private Office explained that the (former) Secretary General was of the opinion that, since NATO does not have a diplomatic service, staff should after an

assignment abroad return to Headquarters before another assignment. Secondly, he observed that the position in New York was rather a liaison position, which did not have the representational character as the one in Moscow or the policy incentives for someone at appellant's career level. He added that no A6 positions were available at the moment. However, appellant was informed that, should she wish to apply for an A6 post in future, the Organization would look favorably on such application, within the respect of the standard recruitment procedures at NATO.

9. Appellant was, as of 1 October 2009, offered an indefinite duration contract as Head of the Central Asia and Caucasus in the Political Affairs and Security Policy Division, at a grade of A5, step 710. On 23 February 2011 appellant applied of a one-year unpaid leave of absence to take up an assignment with the Centre for Transatlantic Security Studies (CTSS) at the National Defense University in Washington DC. The unpaid leave was extended until 31 May 2013.

10. In November 2011 appellant applied for the A6 post of Director, Defence Policy and Capabilities, Defence Policy and Planning Division (A52(2011)). Appellant participated to an on-line selective test on 26 January 2012 and on 15 February was informed by the Recruitment Service that she was not successful. However, no other qualified candidate was found. The Organization started a new recruitment procedure (A 16(2012)). Appellant applied for the new vacancy in May 2012 and was informed on 9 July 2012 by the Recruitment Service that her application had not been successful.

11. On 22 August 2012 the appellant's counsels filed a complaint against the decision communicated on 9 July 2012 requesting the decision to be annulled, a renewed shortlist to be issued and her case to be submitted to a Complaints Committee.

12. The Assistant Secretary General for Executive Management (ASG EM) replied on 20 September 2012 as follows: *"...it was entirely legitimate not to pursue the application of candidates from the first recruitment process for further participation in the recruitment process for the re-advertised post"; "...a thorough review took place of the recruitment process and decisions taken, including the initial recruitment process, and it has to be found that procedures were properly followed an that the competent authorities reaches their decisions correctly. Furthermore, I would like to inform that the recruitment process for this post has been completed and that the decision to offer the post was taken well before the receipt of your letter. As a result, the request made in your letter cannot be accommodated. In such circumstances there would be no purpose in establishing a complaints committee"*.

13. On 10 October 2012 appellant's counsels sent another letter to the Secretary General mentioning that neither they nor their client had received an acknowledgment of receipt of the complaint or were informed of any steps initiating forming the Complaints Committee.

14. On 10 December 2012 the Human Resources department forwarded by e-mail the letter dated 20 September 2012 to counsels.

15. On 12 December 2012 the appellant reiterated the request to submit her complaint to a Complaints Committee and highlighted the lack of motivation in the 20 September letter.

16. By letter dated 7 January 2013 ASG EM apologized for the apparently incomplete address on the 20 September 2012 letter. He stated to stand by the content of that letter, which, in his opinion, replied in full to the concerns expressed in the letter of 22 August 2012. He also remained of the view that under the NCPR the circumstances of appellant's case do not call for the establishment of the Complaints Committee.

17. By letter dated 8 February, appellant lodged the appeal against the decision to reject her complaint.

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

(i) The appellant's contentions

18. Appellant submits that the rejection of her complaint and the failure by the Organization to set up a Complaints Committee are in violation of Article 3.2 of "old" Annex IX NCPR. Moreover, appellant recalls that the jurisprudence of the Appeals Board follows the same approach stating that when a staff member intends to challenge a decision taken about him by an authority subordinated to the Head of the NATO body (HONB), he must, within a reasonable period, submit a complaint to the HONB, who must comply with it, except when the case had been voided of substance. Appellant notes that the fact that the recruitment procedure was completed before the submission of appellant's complaint does not in itself void the complaint.

19. Appellant claims misuse of authority when she was not shortlisted for the second application on grounds that she competed before for the same post. Appellant determines this to be an arbitrary decision by the Director of the Private Office (DPO), neither based on legal or objective justifications nor on merit and qualifications criteria as such as those advertised in the vacancy notice. Appellant further links this arbitrary decision to the previous one taken by the DPO when her name was crossed off the list of short-listed candidates between the written and oral tests. Appellant considers the recruitment procedure not transparent and the decision flawed with partiality, arbitrary and to be discriminatory for the appellant.

20. Appellant further states that, considering her strong background in defence planning, her current work in the U.S. in the field of defence and defence posture review and her overall performance rated outstanding, the February and July decisions are breached by an error of assessment of appellant's competencies. Appellant alleges also that, upon her return from leave of absence, she will be considered as redundant, therefore, in light of Articles 57.1 and 57.2 NCPR, her application should have been considered as a priority; also, bearing in mind the duty of care of the administration and its previous commitments, the application should have been considered "favorably".

21. Appellant requests the annulment of the decision of 9 July 2012 rejecting her application to the A6 position, the annulment of the 20 September 2012 decision rejecting her complaint (and consequently the 7 January decision) and the annulment of the decision granting the A6 position to another applicant. Appellant considers that notwithstanding the leave of absence, she is to be considered a staff member as intended under the definition of the preamble of the NCPR and therefore entitled to lodge a complaint under Article 61 of the NCPR.

22. Appellant further requests to be compensated for the moral prejudice caused by the illegality of the above mentioned decisions (€ 10.000). Moreover, appellant requests to be granted the A6 post of Director, Defence Policy and Capabilities upon her return from leave of absence (or any other suitable A6 post in line with the appellant's qualifications and interests) and compensation of € 80.000 for the prejudice suffered for the loss in terms of income and pension rights for the year already elapsed in which she could have been in the position. However, should the annulment of the decision to appoint another applicant to the A6 post give rise to substantial difficulties and other suitable A6 post could not be found upon her return from leave, the appellant requests to be granted € 60.000 of compensation (subject to further reassessment depending on the capacity of the Organization to find the appropriate A6 position). Appellant states that while her first year of leave of absence was voluntary, the second one was a consequence of the illegal rejection of her application to the A6 vacancy.

23. Appellant requests:

- the annulment of the decision dated 9 July 2012 rejecting the appellant's application to the grade A6 post of Director, Defence Policy and Capabilities, Defence Policy Planning Division;
- the annulment of the decision dated 20 September 2012 rejecting the appellant's complaint dated 22 August 2012;
- if needed, the annulment of the decision dated 7 January 2013 confirming the above mentioned decision;
- the annulment of the decision to appoint another agent than the appellant to the A6 post of Director, Defence Policy and Capabilities, Defence Policy Planning Division;
- the granting of appropriate remedies; and
- the reimbursement of the costs of retaining counsel, travel and subsistence.

(ii) The respondent's contentions

24. Respondent submits that the appeal can be considered admissible only in so far as it is directed against the 9 July 2012 decision not to shortlist the appellant for the re-advertised post and the 20 September 2012 decision not to grant the request for a Complaints Committee. Respondent affirms that the decision to annul the appointment of another agent to the A6 post of Director, Defence Policy and Capabilities, does not constitute an individual decision taken by the Secretary General vis-à-vis the appellant and therefore cannot be subject of an appeal. Regarding the remedies requested, as well as the monetary compensation, respondent considers these not admissible as they have never been submitted to the HONB for a decision.

25. Respondent submits that appellant being on a two years unpaid leave of absence, not holding or being assigned to a post within NATO, is to be considered in excess of the approved establishment and not to hold a status under the NCPR. Therefore, respondent submits that appellant is not in a position to introduce a formal complaint under the NCPR. Respondent underlines that the Organization has no functional authority on an individual on leave of absence. In addition, respondent notes that the elapse of time of six weeks after the notification of the 9 July 2012 decision, in this case is beyond the “reasonable time” foreseen by the NCPR as the formal recruitment process was already finalized.

26. On the allegation that appellant was discriminated in the second round of recruitment, respondent observes that during the first round no suitable candidates were found. Therefore the fact that appellant submitted an identical application should not lead to any surprise if the application was not retained for the second round. Respondent further notes that appellant did not lodge a complaint about any flaws in procedure during the first recruitment round and therefore, to the extent that the appeal is directed against this first round, it must be considered inadmissible.

27. On the allegation of improper use of authority, arbitrariness and lack of transparency in the recruitment process, respondent submits that staff are recruited on the basis of merit, but also taking into account the necessity to secure the highest standards of diligence, competence and integrity, as well as to provide an equitable geographical representation. Respondent adds that A6 posts are of a high political nature. For this reason the Secretary General, through the Private Office, takes a direct interest in the recruitment and appointment of such staff. Respondent further explains that the procedure explicitly provides for a role of the Private Office during the recruitment process and that, as a consequence, there were no flaws in such a recruitment process where the proper authorities took the appropriate decisions.

28. Regarding the submission that appellant should have benefited of the provision of Article 57.2 NCPR, respondent states that appellant cannot be qualified as redundant, as a staff member becomes redundant only when his/her post is suppressed. On the alleged entitlement to an A6 post, respondent observes that there is no such commitment from the Organization and that there is no obligation to provide such a post. Respondent emphasizes that appellant is entitled to an A5 post. The letter by the DPO, in which expectations for an A6 position were mentioned, was clear in determining that an eventual application by the appellant for such posts, would be treated according to the standard recruitment procedures at NATO.

29. Respondent rejects the allegation that the second year of leave of absence was caused by the absence of offering an A6 post, as this is not substantiated by facts. Respondent also rejects all indemnities requested as not admissible and without merit.

30. Respondent requests:

- that the appeal is declared inadmissible; and
- that if declared admissible, this would only be to the extent that it is directed against the letter of 20 September, and that the appeal is rejected as not founded.

D. Considerations and conclusions

(i) Considerations on admissibility

31. Appellant seeks the annulment of the decision of 20 September 2012, reiterated in the 7 January 2013 decision, dismissing her complaint against the announcement of 9 July 2012 whereby she was informed that her application had been rejected.

32. However, in her appeal appellant adds a new request, *i.e.* seeking the annulment of the appointment of another agent. This request was not part of the initial complaint of 22 August 2012 and was therefore not part of the impugned decision. The request was also not otherwise submitted to the HONB for decision. This request is therefore a new ground of appeal and must be dismissed.

33. Respondent submits that wherever the appeal challenges the procedure and non-selection of appellant in the first round of the selection process of the post concerned, it is time-barred and inadmissible. The Tribunal agrees with this.

34. As a consequence, the appeal is admissible in so far as it is directed against the 9 July 2012 decision not to shortlist the appellant for the re-advertised post and the 20 September 2012 decision not to grant the request for the establishment of a Complaints Committee, and in so far as it requests damages and reimbursement of costs.

(ii) Considerations on the merits

a) Action for annulment

35. Appellant seeks with her complaint an annulment of the decision to reject her application. She requests that a new selection procedure is made. She also requests the annulment of the decision not to establish a Complaints Committee. When reviewing the merits of the case, the Tribunal will first consider the request for annulment of the decision of 20 September 2012 not to establish a Complaints Committee, since this is a procedural matter.

36. Respondent alleges that under the provisions of Annex IX to the NCPR only staff members can introduce an appeal. It argues that appellant being on leave of absence on unpaid leave from the Organization does not hold a status under the NCPR and is not in a position to introduce an appeal.

37. The Tribunal observes that there is no provision in the NCPR or in the 27 April 2011 letter in support of this submission from the respondent. Unpaid leave is granted pursuant Article 46.1 NCPR. The wording of this article makes clear that those on unpaid leave for private reasons have the status of a staff member, *i.e.* Article 46.1.14 NCPR refers to "Members of the staff on unpaid leave...". Members of the staff on unpaid leave do have a contract with the Organization even though the main

contractual obligations between parties (functions and salary) are suspended. Many other mutual duties and rights are maintained, as for instance the Organization's powers to check the compatibility of appellant's assignment outside NATO, the eventual appellant's right to a loss-of-job indemnity, contributions to the pension's scheme, etc. The relationship is neither ineffective nor unenforceable.

38. Also the letter of 7 April 2011 granting unpaid leave provides in paragraph 2 that the proposed assignment is not incompatible with appellant's status as an international civilian staff member. Paragraph (b) mentions that if no job is found for her on her return her contract may be terminated and that she may be entitled to a loss of job indemnity in accordance with the NCPR. Paragraph (g) reminds appellant of the obligation for staff members under Article 12.2(b) NCPR to seek prior authorization for any outside activity from the HONB who must determine whether such activity is compatible with the proper discharge of duties or with the status as member of the international civilian personnel. Lastly, appellant was also allowed to remain covered under the medical plan and to (partly) contribute to the pension scheme.

39. The Tribunal concludes that a member of the staff who has been granted leave of absence cannot be considered to be outside of the Organization to the extent that (s)he is not permitted to lodge a complaint or to challenge an individual decision taken by the HONB. For these reasons the respondent's argument that appellant has no standing fails.

40. Article 2.2 of ("old") Annex IX to the NCPR provides:

Members of the staff making a complaint shall be entitled to request that, before a decision is taken, the complaint be submitted to a Complaints Committee.

41. This provision is unequivocal. It constitutes a right of the staff member and the HONB does not have a margin of discretion in the matter. The NATO Appeals Board has consistently held that, if such a request is made, the HONB must comply with it (*cf* NATO Appeals Board decisions Nos. 367, 400, 772, 773, 840, 845, 849). This is not the case, however, when the request is manifestly abusive or the dispute has been voided of substance (*cf* NATO Appeals Board decisions No. 698, 700, 701, 740), which is not the case here.

42. By refusing the establishment of the Complaints Committee the administration proceeded in an incorrect manner, not giving substantial reasons for this improper way of treatment. There is nothing in the file that could lead to presume that the Complaints Committee would not satisfy appellant's right of audience. The period of six weeks for lodging the complaint after the decision of 9 July 2012 cannot be considered unreasonable and it cannot justify a decision not to establish such a Committee. Also the argument that the recruitment process was completed is not a convincing justification for not establishing the Committee. It is to be added that it took the administration a month to answer appellant's complaint.

43. The Tribunal concludes that the decision of 20 September 2012, reiterated on 7 January 2013, not to establish a Complaints Committee must be set aside.

44. It follows from this conclusion that the Administration is obliged to reconsider appellant's complaint in a procedurally correct manner, in particular by convening a Complaints Committee in accordance with Article 3 of ("old") Annex IX to the NCPR so that appellant may present the grounds for challenging the decision not to short-list her for the post in question (*cf* NATO Appeals Board Decision No. 772 with reference to Decision No. 400). Appellant submits that that decision was arbitrary and discriminatory and was taken with manifest error of assessment, and tries to explain how the first recruitment process should have been taken into account. All these issues must, however, first be considered in the Complaints Committee proceedings and cannot be adjudicated at this stage.

45. The Tribunal cannot anticipate the conclusions of the Complaints Committee, the subsequent decision of the HONB, or any resolution that parties may find for the dispute. As a consequence, the Tribunal will not at the present time consider the appeal challenging the decision communicated on 9 July 2012 not to short-list applicant in the second round for the post in question.

b) Action for compensation

46. No material damages may be assessed until appellant's complaint has been reconsidered following the present judgment, and the outcome of that is known.

47. The Tribunal will, however, consider the request for moral damages caused by the mismanagement of the previous complaint.

48. Respondent submits that the claims for damages are inadmissible because there is no individual decision of the HONB concerned against which an appeal may be lodged.

49. The Tribunal reaffirms in this respect (*cf* AT-J(2013)0002, paragraph 43) that its competence to award damages is based on Article 4.2.2 of ("old") Annex IX to the NCPR, which provides: "It may also order the Organization to repair the damage resulting from any irregularity committed by the Head of a NATO body". It follows from this that the decision to award damages is independent from a decision the Tribunal may take annulling an administrative decision or not. Claims for compensation are admissible as incidental to the action for annulment. It also follows from this that the Tribunal's competence is also not dependent on whether the Organization has taken a decision concerning a request for damages or expressed itself otherwise in the matter. Respondent's argument fails.

50. The Tribunal concludes that the illegality of the procedure followed by the administration when it did not grant the request to establish a Complaints Committee, to which must be added its awkward and protracted way of communicating with appellant and her counsels, did cause appellant non-material damages. The Tribunal considers the amount of € 2.000 (two thousand Euro) an appropriate compensation for the injury caused to appellant in this respect.

E. Costs

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

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

The appeal being successful appellant is entitled to the reimbursement of the costs of retaining counsel, up to a maximum of € 4.000 (four thousand Euro).

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decision of 20 September of 2012 rejecting the appointment of a Complaints Committee is annulled.
- The remaining submissions in the appeal are dismissed.
- Mrs F is entitled to € 2.000 damages.
- NATO shall reimburse Mrs F the costs of retaining counsel up to a maximum of € 4.000.
- The security deposited by Mrs F shall be reimbursed.

Done in Brussels, on 8 November 2013.

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

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



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

11 November 2013

AT-J(2013)0005

Judgment

Cases Nos. 889 and 890

PL (Case No. 889) and AL (Case No. 890),

Appellants

v.

NATO International Staff,

Respondent

Brussels, 8 November 2013

Original: French

Keywords: admissibility; time frames; late submission of annexes; obligation to provide justification; restructuring of services; principle of non-discrimination; action for damages.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Cook and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 12 September 2013.

A. Proceedings

1. The Appeals Board of the North Atlantic Treaty Organization (hereinafter referred to as "NATO") was seized of an appeal (Case No. 889), presented on 4 January 2013, by Mr PL, a member of the NATO International Staff, seeking in particular annulment of a decision by the International Staff to transfer him, and his post, from the Secretary General's Close Protection Unit (hereinafter "CPU") to the Headquarters Security Force (hereinafter "HQSF") as of 1 January 2012.

2. The same day, the NATO Appeals Board was seized of an appeal (Case No. 890), presented by Mr AL, also a member of the NATO International Staff, seeking annulment of the decision by the International Staff also to transfer him, and his post, from the CPU to the HQSF as of 1 January 2012.

3. The Comments of the respondent in both cases, presented on 15 March 2013, seek the dismissal of the appellants' submissions. The two appellants presented their reply to the respondent's comments on 22 April 2013.

4. The appeals were lodged prior to the coming into force, on 1 July 2013, of amendment 12 to the NATO Civil Personnel Regulations (NCPR), amending Annex IX thereto and, *inter alia*, establishing the NATO Administrative Tribunal (Tribunal).

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

6. The Tribunal's Panel held an oral hearing on 12 September 2013 at NATO Headquarters. It heard arguments by Maître LL and Maître AT of Lallemand & Legros, Brussels, representing the appellants, and Mr EG, Deputy NATO IS Legal Adviser, and Mr BS, Assistant Legal Adviser, NATO IS, representing the respondent, in the presence of Mr CS, President of the NATO IS Staff Association, Mr PL, NATO IS Staff Association, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

7. PL and AL (hereinafter referred to collectively as "appellants"), grade C3 guards in the NATO Office of Security, were members of the Close Protection Unit and, in particular, the Residence Unit for several years. At the time the Unit was made up of twelve people, including the two appellants.

8. On 16 December 2011, having been called by the Head of the CPU to a brief meeting, Mr AL was informed that he would no longer be a member of the CPU at the Secretary General's Residence. At that meeting, the Head of the CPU explained that this decision had been reached as part of the restructuring of that Unit, and also notified him of the decision to transfer him with his post to the HQSF.

9. The same day, and following the same procedure, Mr PL was also informed that he would no longer be part of the CPU at the Residence, that this decision had been reached as part of restructuring the CPU, and that he would be transferred with his post to the HQSF.

10. In separate letters from the acting Deputy Assistant Secretary General for Human Resources dated 13 January 2012, each of the two appellants was advised individually of the decision on their transfer to the HQSF effective 1 January 2012. In each letter, each appellant was invited to sign his new contract and was informed of the decision to award him the special CPU allowance through 31 January 2012. The latter decision was justified by the lateness of the decision officially informing each appellant of his transfer effective 1 January.

11. In separate letters, dated 3 February and 1 March 2012, to the Deputy Assistant Secretary General for Human Resources, Mr AL and Mr PL respectively sought explanations of the objective criteria behind the decision taken to transfer them. In those same letters, appellants respectively made clear that they were taking steps in line with the formalities of the procedure in Article 61.2 of the CPR.

12. In nearly identical letters sent separately to Mr AL and Mr PL, dated 17 February and 5 March 2012, the Deputy Assistant Secretary General for Human Resources replied that their transfer to the Headquarters Security Force "had been done in the framework of restructuring the Residence team assigned to the close protection of the Secretary General" by downsizing it from twelve to ten CPU members. These same letters explained that the choice to keep team members had to be made "based on a review of the individual performance of each of the team members."

13. In separate letters dated 9 and 16 March 2012 respectively, Mr AL and Mr PL filed a complaint in line with Article 61.3 of the CPR against the decision in the above-mentioned letters of 13 January 2012. In their respective complaints, appellants argue, on the one hand, that since their performance was satisfactory, as the annual review of their individual performances attested, it was surprising for them to be among those chosen for a transfer and, on the other hand, their transfer/reassignment would in any case have financial repercussions because they would lose the special CPU allowance and suffer a significant decrease in the amount of overtime performed and paid. Under

these conditions, each appellant has respectively requested annulment of the decision to transfer him as well as compensation for the financial damage they claim to have suffered as a result of this decision.

14. On 3 July 2012, the Complaints Committee (hereinafter "the Committee") submitted its reports on appellants' complaints. It concluded that the restructuring of the CPU was a management task authorized by the CPR, and that appellants' transfer, through individual decisions, had complied with the arrangements governing such restructuring efforts. It was the view of the Committee that neither the CPR nor the management policies and practices in place could be invoked to claim financial compensation for appellants or invalidate their transfer. Under these conditions, the Committee recommended against taking other steps in this matter.

15. Nevertheless, in these recommendations the Committee also invited all the Heads of Division and Independent Office to demonstrate as much transparency as possible and to do their utmost to communicate with the staff whenever such restructuring measures were foreseen, in line with good management practice.

16. In two separate letters dated the same day, *i.e.* 6 November 2012, the NATO Deputy Secretary General dismissed appellants' respective complaints, noting in each case that it was unfortunate that "the case had not been handled with greater transparency".

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

(i) The appellants' contentions

17. In their respective appeals, appellants request, firstly, annulment of the Deputy Secretary General's decision of 6 November 2012 dismissing their respective complaints and, insofar as necessary, annulment of the decisions of the acting Deputy Assistant Secretary General for Human Resources of 13 January 2012 transferring their posts from the CPU to the HQSF. For this purpose they invoke three arguments: first, the absence of reasons for the contested acts; second, violation of the provisions of articles 4.1.1, 4.1.2 and 57.4 of the CPR in view of the principle of good governance, the duty of care and the principle of respect for the rights of the defence; and third, violation of the principle of non-discrimination.

18. Appellants allege, secondly, that the contested decisions have caused them financial damage owing to the loss of the CPU allowance on the one hand and the loss of compensation for paid mandatory overtime on the other. In addition, appellants allege that the contested decisions have a direct impact on their personal and professional lifestyle, which has furthermore caused them distinct non-material damage.

19. Lastly, appellants request that the Tribunal order the Complaints Committee to turn over to them any reports that concern them.

20. In the replies filed in both cases appellants seek the same relief as in their appeals, except for the request for communication of the Complaints Committee's reports, which were handed over to them by respondent.

21. In Case No. 889, appellant requests:

- annulment of the NATO Deputy Secretary General's decision of 6 November 2012 dismissing appellant's complaint of 16 March 2012;
- annulment, insofar as necessary, of the decision by the acting Deputy Assistant Secretary General for Human Resources of 13 January 2012 transferring appellant with his post from the Secretary General's Close Protection Unit to the HQSF as of 1 January 2012;
- compensation for the damage suffered by appellant;
- communication of the Complaints Committee's report; and
- an order for respondent to pay the costs.

22. In Case No. 890, appellant requests:

- annulment of the NATO Deputy Secretary General's decision of 6 November 2012 dismissing appellant's complaint of 9 March 2012;
- annulment, insofar as necessary, of the decision by the acting Deputy Assistant Secretary General for Human Resources of 13 January 2012 transferring appellant with his post from the Secretary General's Close Protection Unit to the HQSF as of 1 January 2012;
- compensation for the damage suffered;
- communication of the Complaints Committee's report; and
- an order for respondent to pay the costs.

(ii) *The respondent's contentions:*

22. Firstly, respondent pleads the inadmissibility of both appeals on the grounds that these appeals against the acts challenged respectively by appellants were filed too late.

23. Secondly, respondent considers both appeals to be groundless.

24. In this connection, respondent begins by referring to the Appeals Board's case law to argue that the obligation to substantiate decisions which is the responsibility of the maker of the contested decisions has been fully met in the present case.

25. Next respondent affirms that the disputed decisions fell within the Secretary General's sphere of competence and his considerable latitude to restructure the CPU.

26. Finally, respondent submits that appellants have put forward no concrete arguments or relevant facts proving that the disputed decisions were taken based on considerations that were discriminatory toward them.

27. Regarding the material damage relating to the loss of the close protection allowance on the one hand and paid mandatory overtime on the other, respondent

notes that in any case appellants may not claim allowances and other benefits linked to CPU duties after being transferred to the HQSF.

28. Under these circumstances, respondent concludes, after having forwarded the Complaints Committee's reports in the annexes of its defence, that the two appeals must be dismissed either as inadmissible or as groundless.

D. Considerations and conclusions

(i) Considerations on admissibility

Arguments of the parties

29. In the defences on both cases, respondent argues that both appeals are inadmissible on the grounds that these appeals directed against the acts challenged respectively by appellants were filed too late. In both cases, respondent advances the same arguments, namely that both appeals were filed after the sixty-day time period foreseen by the CPR after each appellant acknowledged receipt of the act he claims to be causing damage. The two appeals are considered to have been lodged on 9 January 2013, whereas the deadline for admissible filing of the two appeals was on the 6th of that month.

30. Appellants retort that the appeals were filed within the sixty-day time frame foreseen by Article 4.3.2 of Annex IX to the CPR. Appellants argue in particular that because the challenged acts were adopted and notified to appellants on 6 November 2012, their respective appeals, filed on 4 January 2013, fall within the regulatory sixty-day time frame foreseen by the CPR, *i.e.* before the deadline of 6 January 2013.

31. Nevertheless, both appellants expressly acknowledge in their accounts that the documentation attached to their appeals was entered belatedly, *i.e.* on 9 January 2013, but they argue that this is not sufficient grounds to render their appeals inadmissible. The documentation attached to the appeals is thought to have been filed late in order to avoid obstructing the facsimile machine, in keeping with the instructions given by the Appeals Board's secretariat. The two appellants are of the view that if such a circumstance were to be considered as infringing the CPR and thus made the appeals inadmissible, it would be appropriate for the Tribunal to consider the late filing of these annexes as a very exceptional case (excusable error, *force majeure*) in the sense of Article 4.3.2 of Annex IX to the CPR.

Ruling of the Tribunal

32. Article 4.3.2 of Annex IX to the CPR provides that:

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

33. The time frame for an appeal foreseen in Article 4.3.2 of Annex IX to the CPR is established with a view to ensuring the security of legal situations and avoiding any discrimination or arbitrary treatment in the administration of justice.

34. The application of the CPR with respect to the time frames foreseen by Article 4.3.2 may only be waived in very exceptional circumstances. Such circumstances consist of an objective element, *i.e.* unusual circumstances outside the appellant's control, and a subjective element, *i.e.* the obligation for the appellant to guard against the consequences of an unusual event by taking the appropriate steps. In these conditions, anyone who is planning to lodge an appeal with the Tribunal must take extra care to respect the time frame for doing so.

35. In the cases before the Tribunal, respondent generally argues the inadmissibility of the two cases on grounds of lateness but does not provide further explanations. It is clear however, in particular from the documents put before the Tribunal, that the claim of inadmissibility is based on the belated submission of the annexes to the two appeals. As appellants state in their written pleadings, the documentation attached to their appeals was submitted after the expiry of the sixty-day deadline in Article 4.3.2 of Annex IX to the CPR.

36. It has been established that the appeals in Cases nos. 889 and 890 were filed on 4 January 2013, before the sixty-day deadline foreseen by Article 4.3.2 of Annex IX to the CPR. Taken on its own, the fact of the annexes to these appeals having been submitted after the deadline in the CPR cannot render the appeals in question inadmissible, since the appeals themselves were filed within the time frame given in the CPR. Under these circumstances, there is no reason to rule on whether, in the present case, there were unusual circumstances outside appellants' control that justified the late filing of the two appellants' appeals.

37. As for the annexes attached to each appeal that are submitted after the time frame given in the CPR in the framework of this dispute, the Tribunal considers that, for both cases, given that the attached documentation was submitted within a reasonable amount of time after the expiry of the sixty-day deadline, these documents are placed in the files of each respective case.

38. It follows from the foregoing that respondent's claims of inadmissibility in both cases owing to lateness of the appeals must be dismissed, and the two appeals must be declared admissible.

(ii) Considerations on the merits

39. In their respective appeals, appellants make the same requests regarding annulment and compensation and, for that purpose, cite the same contentions and arguments.

(a) *On the requests for annulment*

40. To start with, in their respective appeals, the two appellants request, firstly, annulment of the Deputy Secretary General's decision of 6 November 2012 dismissing their respective complaints and secondly, insofar as necessary, annulment of the decisions of the acting Deputy Assistant Secretary General for Human Resources of 13 January 2012 transferring their posts from the CPU to the HQSF.

41. In the present case, the above-mentioned decisions by the acting Deputy Assistant Secretary General for Human Resources were challenged in the two complaint procedures, under Article 61 of the CPR. These procedures resulted in the formal rejection of the two appellants' complaints in two separate decisions on 6 November 2012. In those decisions, respondent made no substitution for the reasons given in the above-mentioned decisions by the acting Deputy Assistant Secretary General for Human Resources of 13 January 2012.

42. Therefore, because appellants' requests for annulment are formally directed against the dismissal of their complaint, the cases brought before the Tribunal in fact concern the acts challenged in the complaints, *i.e.* the decisions of 13 January 2012 transferring appellants from the CPU to the HQSF.

43. Consequently, in line with what has been said under point 41 above, the submissions for annulment directed against the decisions by the acting Deputy Assistant Secretary General for Human Resources of 13 January 2012 are the same as those directed against the two respective decisions by the Deputy Secretary General of 6 November 2012 sent to appellants separately.

44. In the light of the foregoing it should be noted that appellants invoke three arguments in support of their requests for annulment: first, the absence of reasons for the contested acts; second, violation of the provisions of articles 4.1.1, 4.1.2 and 57.4 of the CPR in view of the principle of good governance, the duty of care and the principle of respect for the rights of the defence; and third, violation of the principle of non-discrimination.

On the first contention, the absence of reasons for the challenged acts

Arguments of the parties

45. In this request the two appellants argue, in substance, that they are unable to assess whether the decisions taken to transfer them from the CPU to the HQSF were valid because those decisions were not sufficiently substantiated, given that they were never told the objective criteria or the reasons for the transfer.

46. With regard to this, the two appellants refer to the case law developed by other international courts, emphasizing the fact that a civil servant being transferred has the right to be informed of the reasons for his/her reassignment, which ensures the transparency of the decision-making process that, in any case, is in question in the two cases brought before the Tribunal. In this context, the two appellants consider that the

Tribunal may not be able to exercise its control and that, in any event, the fact that respondent merely refers, in the decisions to transfer appellants from the CPU to the HQSF, to the Complaints Committee's findings without citing the relevant passages thereof is not in line with the Appeals Board's case law with respect to the obligation for substantiation.

47. Respondent argues, referring to the Appeals Board's case law, that the obligation to substantiate decisions which is the responsibility of the maker of the contested decisions has been fully met in the present case. In accordance with that case law, although the two appellants were not informed in writing of the reasons for their transfer, they were told clearly, precisely and fully of those reasons, first in a meeting with the Head of the CPU, then in letters sent to appellants on 17 February and 5 March 2012 by the Deputy Assistant Secretary General for Human Resources.

Ruling of the Tribunal

48. The aim of the obligation for substantiation is, on the one hand, to provide the interested party with enough information to allow him/her to determine whether the contested decision is justified or otherwise is tainted by an error that makes its legality questionable, and, on the other, to enable the Tribunal to perform judicial oversight thereof.

49. Thus the obligation for substantiation implies that the person who is the subject of a decision that constitutes grounds for grievance must be put in a position to clearly and unequivocally understand the decision-maker's reasoning; the scope of this obligation must be viewed in terms of the practical circumstances of each case.

50. Therefore the reasons for the decision must, in principle, be notified to the interested party at the same time as the decision constituting grounds for grievance, and will be sufficient if they present the facts and the legal considerations essential to the balance of the decision, so that the decision-maker is not obliged to provide further explanations for the reasons that led him/her to take that decision. However, a decision is sufficiently substantiated if it is taken in a context understood by the staff member concerned that may enable him to comprehend the significance of the action taken with respect to him.

51. In the present case it has been established, on the one hand, that in a meeting with their Head at the time of the events, the two appellants were informed of the respondent's decision to restructure the CPU and downsize it. At that meeting, appellants were also informed by respondent that, in line with the restructuring that cut their posts in the CPU, they would nonetheless be transferred to the HQSF. In this way, the contested decisions explicitly state that they were taken as part of a restructuring of the CPU which involved a transfer of the two appellants from the CPU to the HQSF.

52. It follows from the foregoing that respondent explained the legal considerations essential to the balance of the contested decisions to appellants. This being the case,

these decisions were taken in a context understood by the two appellants that enabled them to comprehend the significance of the action taken with respect to them.

53. Furthermore, if the reasons given were in fact insufficient, as appellants incorrectly maintain, in that they did not include any concrete element justifying the respondent's choice of transferring them, it would be permissible for the administration to make up for the initial insufficiency in the substantiation of its decision by providing additional details at a moment when, before lodging an appeal, the person concerned already has information that constitutes an initial substantiation.

54. Now, that is the situation in this case. For, before appellants' appeals were lodged, respondent had separately explained to them that the choice of keeping certain team members in the CPU or not had been made "based on a review of the individual performance" of each Unit member. This additional explanation complements the initial substantiation of the contested decisions, *i.e.* that these decisions were taken as part of a restructuring of the CPU.

55. As for the two appellants' arguments regarding the question of whether the reasons given were valid, it must be noted that this question relates to the merits of the cases and so must be addressed separately from the contention regarding the obligation for substantiation. The same goes for the arguments that endeavour to show that the contested decisions were taken following a process that lacked transparency.

56. It results from the foregoing that respondent did meet the requirements arising from the obligation for substantiation of the contested decisions and, consequently, the first contention must be dismissed.

On the second contention, the violation of Articles 4.1.1, 4.1.2 and 57.4 of the CPR

Arguments of the parties

57. In this contention, appellants maintain that respondent failed to respect the implementing arrangements of the provisions of the CPR regarding the conditions for transfer of a NATO staff member to another post, in particular by violating its obligation to consult that staff member in advance, prior to taking the disputed decisions.

58. Appellants argue that instead of taking account of their views before deciding to transfer them, as is expressly required by Article 57.4 of the CPR, respondent merely told appellants in separate letters that they had been personally informed of the decisions being taken. It therefore seemed clear that the contested decisions had been taken without any prior consultation of appellants, in violation of the above-mentioned provisions of the CPR. Moreover, in appellants' opinion, once the contested decisions had referred to the individual performance review for each of them, respondent was bound by its obligations arising from the implementing arrangements of Article 57.4 of the CPR and, therefore, it should have sought their views beforehand.

59. Such an obligation was all the more incumbent on respondent, in appellants' view, in the light of the principle of good governance and the duty of care. Before

taking the disputed decisions, in order to weigh the staff members' interests, respondent should have sought appellants' views in advance. In the absence of this prior consultation, appellants' rights of defence were furthermore not respected.

60. Respondent affirms that the disputed decisions fell within the Secretary General's sphere of competence and his considerable latitude to restructure the CPU. Under these circumstances, appellants' transfer from the CPU to the HQSF did not fall within the framework of Article 57.4 of the CPR and, therefore, respondent neither overlooked this provision nor violated the principle of good governance and the duty of care or the principle of respect for the rights of the defence.

Ruling of the Tribunal

61. Article 4.1.1 of the CPR states:

When it is in the interests of the service, the Head of NATO body, having consulted with the staff member concerned, may transfer the staff member to another post in the same geographical location.

62. Article 57.4 of the CPR provides:

Within a system of performance management, the Head of NATO body, having taken account of the views of the staff member, may transfer a staff member to another vacant post in the same location in the same grade and level of responsibility for which the staff member possesses the required qualifications and experience.

63. It must immediately be noted that appellants' contention regarding the violation of the above-mentioned articles is based on an erroneous premise. The decision on appellants' transfer from the CPU to the HQSF was taken as part of a restructuring of the CPU following a downsizing, not as part of the normal transfer of a staff member from one post to another "in the interests of the service" within the meaning of the said provisions. Thus, as regards the decisions affecting them, the two appellants do not fall under the scope of Articles 4.1.1 and 57.4 of the CPR.

64. In that connection, it is important to note that, in the framework of post deletions, *i.e.* in the present case, the staff members concerned were "redundant" within the meaning of Article 57.2 of the CPR, which states:

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.

In that context, the Administration was not required to consult the interested parties in advance, as the two appellants claim, and this lack of consultation is not to be seen as a violation of the principle of good governance and the duty of care.

65. On the other hand, it must be noted that respondent's decisions to transfer the staff in question from the CPU to HQSF clearly show that, precisely in line with the requirements arising from the principle of good governance and the duty of care – and

therefore as opposed to what appellants claim – respondent did weigh these staff members' interests and offered to transfer them.

66. But the fact that respondent, when determining which persons to transfer, applied by analogy criteria drawn from "a system of performance management" as mentioned in Article 57.4 of the CPR, does not impose on it any obligation to consult the staff members concerned prior to taking that decision. That being the case, the documents filed with the Tribunal show that appellants had been informed of this option by respondent, and they had had the choice of agreeing to this proposal or, if they wished, asserting their rights under Article 57.2 of the CPR if there was another vacant post.

67. In this connection, appellants maintain that respondent violated the principle of good governance and the duty of care, since posts were vacant in the CPU and the Administration, without consulting them, did not offer to put them in those posts. It should be noted that, as appellants themselves acknowledge in their written pleadings, these posts became vacant after their transfer and, in any case, they were temporary posts. Thus assuming that the Administration had had the obligation to consult them and offer them the posts in question, in application of the principle of good governance, respondent offered them a non-temporary post, without prejudice for appellants' right to request to be transferred to the posts in question.

68. Finally, as for the alleged violation of appellants' rights of defence during this procedure, it must be noted that prior to taking the disputed decisions, respondent had told appellants about the appraisals that justified taking these decisions, and appellants had had the opportunity to challenge the validity of the decisions taken both during the complaints procedure and before the Tribunal. Under these circumstances, no violation of the rights of the defence may be claimed.

69. It follows from the aforementioned considerations that the two appellants' second contention must be dismissed.

On the third contention, the violation of the principle of non-discrimination

Arguments of the parties

70. In this contention, appellants maintain, firstly, that the decisions to transfer them from the CPU to the HQSF were taken without any transparency and in violation of the principle of non-discrimination. The comparison of CPU members' individual performances should have been done using objective criteria to ensure that the members of this Unit received equal treatment. Apart from a general statement that the choice to transfer appellants had been made in the context of a comparison of CPU members' individual performances, the contested decisions do not make reference to any practical information. Moreover, in appellants' view, the Complaints Committee does not give any information in its reports to establish that appellants, in the comparison of their individual performances, could be objectively designated as the persons to transfer.

71. Secondly, appellants maintain that since they had always passed their aptitude tests and their performance reviews were good – since they had met all the objectives assigned to them – they could not, in any case, be numbered among those to be transferred. Thus the contested decisions were thought to be tainted by an error of judgment.

72. Thirdly, appellants consider their transfer from the CPU to the HQSF to have been totally arbitrary, as a new piece of information from the defence file attests, to wit that the Secretary General was thought to have lost faith in appellants, and the latter were thought no longer to be able to perform their duties as required. In appellants' view, their brief meeting with their Head of Service had been limited to the announcement of their transfer following the decision to restructure the CPU. Respondent's above-mentioned allegation, made for the first time in the written procedure, confirms, in appellants' view, that the contested decisions had been taken based on clearly discriminatory premises.

73. Finally, regarding the considerations put forward by the Complaints Committee in its reports, concerning appellants' individual performance reviews, in response to a question by the Tribunal, appellants dispute them on the one hand and, on the other, state that they learned of the background to the restructuring decision and of the other allegations belatedly, since these reports were provided by respondent in its defence pleadings.

74. Respondent begins by submitting that appellants have put forward no concrete arguments or relevant facts proving that the disputed decisions were taken based on considerations that were discriminatory toward them.

75. Next respondent emphasizes the fact that the two appellants had been informed at the meeting with their Head of Unit that the decisions to transfer them were also justified by the fact that they were no longer able to perform their duties to the level required. Consequently, respondent concluded that appellants had all the relevant information justifying the decisions taken on transferring them from the CPU to the HQSF and, therefore, no allegation of discrimination could be made.

76. Finally respondent, in response to appellants' allegations, maintains that the Complaints Committee's reports clearly showed that the discussions on restructuring the service were sufficiently advanced, and appellants were identified as people who were not keen about the new management procedures advocated by their superior, and that, in any case, other CPU members had better individual reviews.

Ruling of the Tribunal

77. The principle of equal treatment and non-discrimination requires that comparable situations not be treated differently and different situations not be treated identically, unless such treatment is objectively justified.

78. In their third contention, appellants argue in substance, firstly, that the contested decisions are tainted by illegality since they do not refer to any objective element showing that appellants' transfer was, in reality, based on a comparative examination of CPU members' individual performances. Consequently, since their situation was comparable to that of the other CPU members, they received discriminatory treatment in being chosen to be transferred from the CPU to the HQSF.

79. However, appellants provide no factual or other element to establish the existence of any discrimination in comparison to the other CPU members.

80. The absence of an element making it possible, at the very least, to presume the existence of discrimination is not remedied by appellants' statement that respondent did not take into account the fact that their individual performance reviews were good since, even if it were proven, this fact is not sufficient, on its own, to establish discrimination against them in comparison to the other CPU members.

81. Secondly, appellants maintain that, in any event, the contested decisions should indicate, in the framework of their individual performance reviews, the concrete elements that led respondent to choose who to transfer.

82. But determination of those elements should be considered to fall under the discretionary authority of the respondent, in the present case the NATO Secretary General, to establish which of the relevant criteria should be used to select staff members for assignment to the CPU.

83. It must be noted, as the Complaints Committee's reports make clear, that it has been clearly shown that the choice to transfer appellants was based on well-defined criteria set by respondent, and there was no violation of the rules in the CPR. These reports clearly mention the criteria that led respondent to transfer appellants to the HQSF, in particular the fact that appellants' performances were not the best of the CPU members, and that they lacked motivation as regards the planned reorganization of the Unit. In view of the respondent's broad discretion as regards the restructuring of the CPU, these criteria were sufficient to choose the persons to be transferred.

84. In the third place, as regards appellants' allegation that their individual performance reviews should respect certain rules guaranteeing the preservation of the rights of the staff members concerned, it must be noted that respondent has the authority to make the changes it believes to be in the interest of the CPU's good functioning, provided that the vested rights of the members of that Unit are upheld. That has been done in this case since, taking account precisely of the fact that appellants have held their posts in NATO for more than ten and fourteen years respectively, the respondent has transferred them to the HQSF.

85. Finally, as regards the argument that the disputed decisions were not taken by a transparent procedure, this cause for complaint alone is not sufficient to invalidate them. Although it is true that the procedure followed by respondent might appear not to be transparent, it must be observed that the particular functioning of the CPU, that is subject to high security considerations, requires some rules of operation to remain

confidential. Contrary to what is asserted by the appellants, the respondent has weighed the interests of the service and only communicated to the appellants that information which would allow the smooth operation of the CPU to be upheld.

86. It follows that the disputed decisions are not based on arbitrary criteria in connection with the respondent choosing to transfer them from the CPU to the HQSF, and hence do not infringe the principle of equality of treatment and non-discrimination.

87. It results from the foregoing that the third contention should also be rejected; as the appellants' other contentions have been dismissed it is necessary to dismiss the submissions for annulment of decisions in Cases nos. 889 and 890 as a whole.

(b) On the submissions for compensation

88. Under this head, appellants allege that the contested decisions have caused them financial damage owing to the loss of the CPU allowance on the one hand and the loss of compensation for paid mandatory overtime on the other. In addition, appellants allege that the contested decisions have a direct impact on their personal and professional lifestyle, which has furthermore caused them distinct non-material damage.

89. Respondent replies that, in any case, appellants may not claim allowances and other benefits linked to CPU duties after being transferred to the HQSF.

90. The Tribunal judges that submissions for compensation for material or moral damage must be dismissed when they are closely linked with submissions for annulment which have themselves been dismissed as groundless.

91. In this case, as review of the contentions advanced in support of the annulments sought has revealed no illegality committed by the respondent, and thus no misdeed by the latter that would involve responsibility, the submissions for compensation for the alleged harm suffered by the appellants in Cases Nos. 889 and 890, by reason of the irregularities claimed, must also be dismissed as unfounded.

(c) On the request for communication of the Complaints Committee's reports

92. As the respondent produced the Complaints Committee's report in its answer in each of the cases considered, the appellants' submissions seeking its communication are no longer relevant.

93. On the basis of all the above considerations, the appeals in Cases nos. 889 and 890 must be dismissed, and there is no further need to rule on appellants' request for communication of the Complaints Committee's reports.

E. Costs

94. Article 4.8.3 of Annex IX to the NCPR provides that:

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

95. Hence the two appellants, whose submissions for annulment and compensation have all been dismissed, cannot be awarded any sum under this head.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- It is not necessary to rule on the submissions seeking communication of the Complaints Committee reports.
- Mr PL's appeal is dismissed.
- Mr AL's appeal is dismissed.
- The security deposited by each appellant shall be reimbursed.

Done in Brussels, on 8 November 2013.

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

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



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

19 November 2013

AT-J(2013)0006

Judgment

Case No. 883

**C.P.,
Appellant**

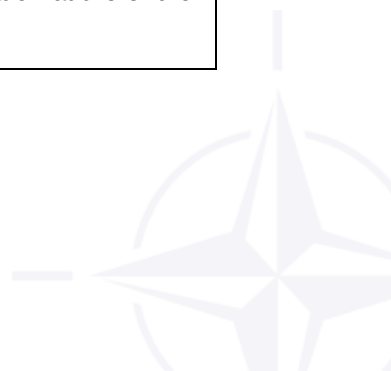
v.

**NATO Support Agency (NSPA),
Respondent**

Brussels, 14 November 2013

Original: French

Keywords: force of res adjudicata under a previous Appeals Board decision; force valid only if the Administration intends to take an identical decision on the same legal grounds; termination at the end of 21 months of extended sick leave.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 10 September 2013.

A. Proceedings

1. The Administrative Tribunal of the North Atlantic Treaty Organization (hereinafter "NATO") has been seized of an appeal, dated 29 October 2012 and registered on 31 October 2012, by Mrs C.P., against the NATO Support Agency (NSPA, formerly NAMSA). The appellant is currently a former staff member of the NSPA.

2. The Comments of the respondent, dated 10 January 2013, were registered on 18 January 2013. The Reply of the appellant, dated 22 February 2013, was registered on 28 February 2013.

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

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

5. The Tribunal's Panel held an oral hearing on 10 September 2013 at NATO Headquarters. It heard arguments by Maître JB of Buyle Legal, Brussels, representing the appellant, Mr SL, Assistant Legal Adviser, NSPA, and Mr FP, Head of Human Resources Division, NSPA, representing the respondent, in the presence of Mr EG, Deputy NATO IS Legal Adviser, Mr BS, Assistant Legal Adviser, NATO IS, and Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

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

7. Mrs CP, who had worked at the NATO Maintenance and Supply Agency (NAMSA) as a logistics expert since 1984, was put on sick leave on 3 May 2010 and then on extended sick leave from 3 August 2010. After having Mrs P undergo a medical examination, on 6 May 2011 the insurance company, Vanbreda International, informed NAMSA that she "should be in a fit state to take up her professional duties on 16 May 2011". On 11 May 2011 the Head of the NAMSA Human Resources Division asked Mrs P to resume working on 16 May 2011. In view of the short notice given, Mrs

P asked to take her remaining annual leave and not start working again until 14 June 2011, and NAMSA agreed to this.

8. Having received the Head of NAMSA Human Resources Division's request that she return to work in the next few days, in a letter dated 9 June 2011 Mrs P lodged a complaint and requested the convening of a Complaints Committee, and also requested implementation of the appeals procedure laid down by the agreement between Vanbreda International and NATO. NAMSA did not grant either of her two requests, and continued the procedure in course, decreasing Mrs P's emoluments as of 10 June 2011, and then terminating her contract as of 30 June 2011, by a decision taken on 28 June 2011 and notified to her on 5 July.

9. The NATO Appeals Board, to which Mrs P had referred her appeal of the legality of this decision terminating her contract, ruled in decisions nos. 840-845-849 of 1 June 2012 that "when the Administration receives a request to convene a Complaints Committee, it is required to comply, unless the request is manifestly abusive, which was not the case here. It is also required, when considering terminating the contract of a staff member on long-term sick leave who has been deemed fit to resume working by medical experts but who claims not to be, to inform her that she may set in motion the arbitration procedure in Article 7 of the agreement between Vanbreda International and NATO, or to implement it itself if the staff member has so requested. In the present case, the Administration did not inform the staff member of the options for having the opinion of Vanbreda International reviewed, nor did it implement the arbitration procedure despite the staff member's request for it to do so".

10. From this the Appeals Board concluded: "It follows from the foregoing that the decision of 28 June 2011 was taken following an irregular procedure and must be cancelled. This cancellation entails the obligation for the Administration, should it still intend to terminate Mrs P's contract, to implement the arbitration procedure set out in Article 7 of the agreement between Vanbreda and NATO, in order to determine whether the contract can in fact be terminated despite the medical reasons invoked by Mrs P., and then, if the appellant continues with her request, to convene a Complaints Committee (Appeals Board decisions no. 400 of 13 July 2000 and nos. 772 and 773 of 10 December 2010)". The Board decided to cancel the decision terminating Mrs P's contract and ordered her reinstatement in her position.

11. In addition, with regard to the damage for which Mrs P was seeking compensation, the Appeals Board decided that "cancellation of the decision terminating a staff member's contract entails reinstatement in her post and, in the absence of service performed, the payment of compensation equal to the difference between the emoluments she would have received over the same period in her position and the income of a professional nature that she may have earned during the illegal dismissal".

It referred Mrs P back to her employer to determine the exact amount of that compensation, and awarded her € 5.000 in compensation for non-material damage.

12. In response to this Appeals Board decision of 1 June 2002, the NSPA General Manager sent various letters to Mrs P indicating the conditions under which he was

prepared to apply the Appeals Board decision. In particular he informed her on 6 August 2012 that the decision of 28 June 2011 was considered null and void; on 17 August 2012 he informed her of the detailed account of the sums due; and on 23 August 2012 he informed her of the implementation of the arbitration procedure in Annex 7 of the agreement between Allianz Worldwide Care (the health insurance company that replaced Vanbreda) and NATO. Late in August the NSPA General Manager received a new medical certificate stating that Mrs P was unfit for work as she had a 100% disability through 31 August 2012 and a 50% disability "for approximately one month" thereafter. However, Mrs P did not come to work on 3 September 2012, the first working day when she was fit to work 50%. Consequently the NSPA General Manager decided on 3 September 2012 to terminate Mrs P.'s contract effective immediately, on the basis of Article 45.7.3 of the NCPR. Mrs P has requested annulment of this decision from the Appeals Board; the NATO Administrative Tribunal, which took over from it on 1 July 2013, is competent to rule on her request.

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

(i) *The appellant's contentions*

13. Appellant submits:

- that the Administration did not comply with the terms of the Appeals Board decision of 1 June 2012 which obliged it to implement the arbitration procedure in Article 7 of the agreement between the insurance provider and NATO;
- that since September 2012 she was only on sick leave half-time;
- that the employer could not terminate the contract without notice since there was no misconduct by Mrs P;
- that the successive decisions on termination were evidence of a relentless attitude that caused appellant non-material damage; and
- that the salaries paid by the employer did not respect the *res adjudicata* of the Appeals Board of 1 June 2012.

14. Appellant requests:

- annulment of the decision of 3 September 2012 whereby the NSPA General Manager terminated her contract as from 3 May 2012;
- reinstatement at the NSPA;
- payment of her salary from 2 May 2012 to 3 September 2012 or until the date of her reinstatement, estimated at € 30.000;
- compensation for material and non-material damage, estimated to total € 350.000, plus interest at the legal rate as from 3 September 2012; and
- reimbursement of the travel and subsistence expenses associated with her defence, and the cost of retaining counsel.

(ii) The respondent's contentions

15. Respondent submits:
- that the Administration fully applied the Appeals Board decision with respect to the payment of salaries; and
 - that the Administration could terminate Mrs P's contract based on grounds other than those in the first termination that the Appeals Board annulled, and could note that the 21-month time frame for extended sick leave had expired, *ipso facto* terminating the contract.
16. Respondent challenges the admissibility of appellant's request for a decision on the payment of emoluments as from 2 May 2012.
17. Respondent requests that the appeal be declared inadmissible and groundless, and seeks dismissal of all requests that might have been declared admissible.

D. Considerations and conclusions

(i) Considerations on admissibility

18. Respondent argues that the request for a decision ordering the payment of emoluments as from 2 May 2012 is inadmissible because, on the one hand, the appeal is not directed against a decision by respondent and, on the other, the Appeals Board had already ruled on the question of the payment of emoluments.

19. Given that the question of the payment of emoluments as from 2 May 2012 relates to the merits of the case, which will be considered below, the appeal is admissible.

(ii) Considerations on the merits

(a) *On the legality of the decision of 3 September 2012 terminating appellant's contract*

20. Under Article 45.7.3 of the NCPR:

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

21. The NSPA General Manager could not use the situation of extended sick leave as grounds to terminate a staff member's contract effective immediately. Implementation of Article 45.7.3 involves assessment of the circumstances of each case and requires that the staff member against whom the administration is preparing to take such a decision be able to discuss that decision and then receive notification of the decision taken. Thus appellant has grounds to request annulment of that decision

insofar as it takes effect on 3 September 2012; its date of effect must be the first day of the month following the date of notification, *i.e.* 1 October 2012.

22. But under Article 45.7.1 of the NCPR:

Members of the staff who are absent for more than 3 consecutive months owing to sickness or accident duly recognized under Article 45.2 above shall be entitled to paid extended sick leave for a maximum period of 21 consecutive months, or until they are recognized either as fit to resume their duties or as being permanently incapacitated under the terms of the group insurance policy or by the invalidity board set up under the Coordinated Pension Scheme, as appropriate, or until the end of the calendar month in which they reach the age of 65, whichever is the sooner. Emoluments (including, if applicable, contributions to the Provident Fund or the Defined Contribution Pension Scheme) during the first 9 months of absence shall be paid by the Organization, the remaining months being covered under the Group Insurance scheme and paid at the rate of 80%. The sick leave of staff members who have a relapse within 2 months of having resumed their duties will not be considered as interrupted.

23. Appellant found herself on sick leave continuously from 3 May to 3 August 2010, and then on extended sick leave from 3 August 2010 until the date of the hearing in September 2013 on the present appeal, as the medical certificates she sent regularly to NSPA, covering this entire period, attest. Under the application of the last sentence of the above-mentioned Article 45.7.1, this situation was not interrupted by the annual leave granted to appellant from 16 May to 14 June 2011 to allow her to make her arrangements for a return to Luxembourg after she was declared fit to resume working. The Administration could therefore rightfully, as of 3 May 2012, which marked the end of the 21-month period foreseen in Article 45.7.1, terminate appellant's contract on those grounds. Thus the Administration did not disregard the force of *res adjudicata* in decisions nos. 840-845-849 of 1 June 2012, since the grounds for termination differ from those used by the Administration when it took the decision of 28 June 2011, and could terminate appellant's contract at any time after 3 May 2012. As has been stated above, this date could not, in the circumstances of the case, be earlier than 1 October 2012.

24. Finally, appellant argues that the provisions of Article 7 of her contract stipulate a 90-day notice period. But confirmation of termination at the end of a 21-month period of extended sick leave is a correct application of Article 45.7.1 of the NCPR, which describes the procedure for contract terminations when the staff member is incapacitated for service, as mentioned in Article 9.1 of the same Regulations. The stipulations of Article 7 of the contract may not adversely affect the implementation of Article 45.7.1, all the more so as the contract also stipulates that the NCPR are applicable to it (see NATO Appeals Board decisions nos. 839-863-864 of 7 February 2013).

25. It follows from the foregoing that the Tribunal must confirm that appellant's employment relationship is terminated on the basis of Article 45.7.1 of the NCPR as from 1 October 2012.

(b) *On appellant's submissions, in particular regarding compensation for damage suffered*

26. Firstly, appellant requests the loss-of-job indemnity foreseen in Article 10.7 of the NCPR and Annex V thereto; under Article 10.7

A staff member whose indefinite duration contract is terminated and who fulfils the conditions laid down by the Council shall be entitled to the payment of an indemnity as set out in Annex V.

But contract termination owing to extended sick leave is not one of the reasons listed in Annex V, Article 1, paragraph 2. Appellant's request for the award of this indemnity must therefore be dismissed.

27. Secondly, cancellation of the decision terminating a staff member's contract entails reinstatement in her post for the period in question and, in the absence of service performed, the payment of compensation equal to the difference between the emoluments she would have received over the same period in her position and the income of a professional nature that she may have earned during the illegal dismissal. In the present case, although the contested decision terminated appellant's contract as from 3 September 2012, the NSPA only paid her the amounts foreseen in the Appeals Board Decision of 1 June 2012 for the period through 2 May 2012. Appellant is therefore referred to the NSPA to determine the exact amount of this compensation to which she is entitled for the period from 3 May to 1 October 2012, plus interest at the Central European Central Bank rate.

28. Thirdly, the NSPA's attitude in summer 2012 – in particular its hesitations, its unexplained changes of position, and the brutality of its contacts with appellant – caused her non-material damage which the Tribunal evaluates at € 10.000, which the NSPA is ordered to pay her in compensation.

29. The balance of the requests for compensation that appellant quantifies as totalling € 350.000, is not supported by any justification.

E. Costs

30. Article 4.8.3 of Annex IX to the NCPR, in the version that applies to this dispute, provides as follows:

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

31. In this case, Mrs P's presence at the hearing was essential. It is therefore appropriate to reimburse her for any travel and subsistence costs incurred for her in order to appear before the Board, within the expense limits laid down for staff of her grade, plus the costs of retaining counsel up to a maximum, with respect to the latter, of € 4.000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 3 September 2012, whereby the NSPA General Manager decided to terminate Mrs P's contract, is annulled insofar as it was effective 3 September and not 1 October 2012.
- The NSPA shall pay Mrs P, in reparation for the material damage suffered, compensation equal to the difference between the emoluments she would have received from 2 May to 1 October 2012 in her position and any income of a professional nature that she earned during her illegal dismissal, plus interest at the Central European Bank rate.
- The NSPA shall pay Mrs P the sum of € 10.000 in compensation for the non-material damage suffered by her.
- The NSPA shall reimburse Mrs P for the justified travel and subsistence costs she incurred to appear before the Appeals Board, within the travel limits prescribed for staff members of her grade, and for the costs of retaining counsel, up to a maximum of € 4.000.
- The remaining submissions in the appeals are dismissed.
- The security deposited by Mrs P shall be reimbursed.

Done in Brussels, on 14 November 2013.

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

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



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

18 November 2013

AT-J(2013)0007

Judgment

Case No. 891

JA,

Appellant

v.

NATO Joint Warfare Centre,

Respondent

Brussels, 14 November 2013

Original: English

Keywords: dismissal for disciplinary reasons; disclosure of internal information.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 10 September 2013.

A. Proceedings

1. The NATO Appeals Board was seized of an appeal, dated 23 January 2013 and registered on 6 February 2013 by Ms JA, against the NATO Joint Warfare Centre (JWC).

2. The Comments of the respondent, dated 24 April 2013, were registered on 25 April 2013. The Reply of the appellant, dated 10 May 2013, was registered on 30 July 2013.

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

4. The Tribunal's Panel held an oral hearing on 10 September 2013 at NATO Headquarters. It heard arguments by Ms A, representing herself, Captain(N) AW, JWC Legal Adviser, Mr DC, JWC Civilian HR Manager, Mr SB, Legal Adviser ACT Element Europe and Ms AT, ACT Element Europe Contractor, representing the respondent, in the presence of Mr EG, Deputy NATO IS Legal Adviser and Mr BS, NATO IS Assistant Legal Adviser, as well as Mrs Laura Maglia, Registrar *a.i.*

5. During the hearing parties were provided with copies of the proceedings pending before the Norwegian court as introduced by the appellant.

B. Factual background of the case

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

7. Appellant joined the NATO Joint Warfare Centre on 1 November 2005 with an initial contract at the B5 grade with responsibility for personnel management. On 1 November 2006 the contract was converted into an indefinite-duration contract. Since 1 June 2010 the post has been defined as the Head of Manpower Office. In March 2011 Ms A lodged a complaint with the JWC Commander on grounds that her post was inadequately graded, claiming that it should have been graded A3 when it was created in 2003. The complaint was dismissed and in June 2011 appellant lodged an appeal

with the NATO Appeals Board. The Appeals Board dismissed appellant's claims with decision No.843 dated 9 March 2012.

8. On 30 March 2012 appellant informed the Commander JWC by email that she would send an email to national and international newspapers as well as to political and military departments in Norway. Minutes later she indeed sent emails around expressing her disagreement with the decision of the Appeals Board and accusing NATO of discrimination, of violation of national laws, and of the failure to follow its own processes and procedures. She attached NATO RESTRICTED information, extracted from the NATO SECRET computer system. She posted a CNN iReport on 2 April 2012 entitled "A political decision to un power the Joint warfare Centre, NATO, Norway, - by applying post grade discrepancy and consequently discriminate towards a NATO International Civilian employee?". She subsequently published similar messages on Facebook on 5 April 2012.

9. On 3 April 2012, appellant was informed that her actions appeared to be a prima facie failure to comply with certain obligations under the NCPR and that she was suspended from her duties in accordance with Article 60.2 NCPR pending an administrative investigation into the matter. She was also requested to remove and retract all information, emails and documents posted on public websites or sent to members of the public for the purpose of seeking publicity and all material that may contravene NATO security protocols.

10. Appellant gave written replies to questions asked during the investigation. Following the investigation report, dated 10 May 2012 and which was also provided to the appellant, a disciplinary proceeding started on 1 June 2012. A Disciplinary Board was established on 18 June 2012. It heard appellant on 3 July 2012 and submitted its report and recommendations to the JWC Commander on 4 September 2012. The Board concluded that there was clear evidence that a number of actions, which were not denied by appellant, had taken place of such scope and gravity that they gave due and valid reasons for the Head of the NATO Body to call for appellant's dismissal.

11. By letter dated 7 September 2012 the JWC Commander informed appellant of the outcome of the disciplinary proceedings and of his decision to dismiss her, with immediate effect in accordance with Article 9.1(v) NCPR.

12. With the same letter, appellant was also informed that due to her sick leave, separation from the Organization would not be effective until one of the conditions stipulated in Article 45.7.2 was fulfilled. Appellant was, in fact, on sick leave on 12 March 2012 and long term sick leave since 12 May 2012.

13. On 7 November 2012 appellant sent to the JWC Commander a petition in which she contested the reasons of the decision. On 26 November 2012 the JWC Commander rejected the petition and confirmed the dismissal.

14. The present appeal is lodged against the 26 November 2012 decision by the JWC Commander.

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

(i) *The appellant's contentions*

15. In her appeal, appellant states that the decision of dismissal is a retaliation of what she considers whistleblowing when she distributed information on her personal case in appeal No. 843. Appellant affirms that such act was not aimed at damaging the Organization but to highlight the dysfunctional system of NATO's organizational change. Appellant further considers the dismissal to be a too harsh a consequence for her mistake in misinterpreting the right to disclose her appeal No. 843 and states that she didn't commit any substantial breach of duties nor acted in breach of her employment contract. Appellant apologizes for her misinterpretation and recalls her loyalty, integrity and professionalism with the Organization. Appellant adds that she removed the information from the social media.

16. Appellant claims to be a victim of discrimination (gender, nationality and religious belief) with respect to the grading of her post as a B5 which should have been in line with grading of the same positions in other NATO agencies. Appellant alleges a failure on the part of JWC to comply with its responsibilities to rectify the discrepancy and the discrimination. Appellant also contests a lack of communication with JWC and a lack of feedback when she proposed to resign.

17. Appellant notes that the NCPR do not cover issues as gender discrimination, whistleblowing or restrictions on the use of social media. Appellant considers that NATO civilians are lacking human rights protection as enshrined in international and domestic law, and informs that the discrimination and retaliation suffered by JWC motivated her to fight for those rights in the public courts. Appellant informed about her pending case before the Norwegian District Court of Stavanger.

18. Appellant requests:

- the reversal of her dismissal as unlawful and maintenance in her indefinite contract;
- the removal of the disciplinary action from her personnel file;
- the reimbursement of the financial losses equivalent to the difference between a B5 and A3 salary from the time of her employment in 2005 to 2013;
- the difference in emoluments between the 80% of full pay received by the insurance company and the 100% which she should have received according to her contract;
- 100.000 NOK as compensation for the stress, strain, discrimination and dismissal resulting in her extended sick leave; and
- the reimbursement of legal and travel costs.

(ii) *The respondent's contentions*

19. In its comments, respondent notes that appellant's separation from the Organization had not yet come into effect as appellant was still on extended sick leave. Respondent affirms that the dismissal followed appellant's actions of sending e-mails to

various organs of the Norwegian and international press, Norwegian government departments, as well as posting information on the CNN internet website and her Facebook page during the period of 30 March to 2 April 2012. The posting contained unsubstantiated accusations against NATO of, *inter alia*, discrimination, misuse of military power, negligence and failure to adhere to the Organizations' internal rules and regulations. The posting also contained the release of NATO RESTRICTED and NATO UNCLASSIFIED information regarding the NATO Establishment Review Tool. Therefore, failure of appellant to comply with the obligations under the NCPR led to her suspension on 3 April 2012 and to an administrative investigation into the matter. On 1 June 2012, and as a result of the investigation, disciplinary proceedings were initiated against appellant, in accordance with the relevant NCPR dispositions.

20. Respondent notes that the decision of 7 September 2012 to dismiss appellant took into account the administrative investigation, the line management's assessment, the Disciplinary Board's report as well as appellant's comments at the hearing of this Board. Respondent further notes that appellant's medical reports did not indicate that her health was a contributory factor in her actions. The dismissal was therefore taken on the basis of the infringement of Article 13 NCPR which provides:

On accepting appointment with NATO, each member of the staff shall sign the following declaration: "I solemnly undertake to exercise in all loyalty, discretion and conscience the functions entrusted to me as a member of the staff of NATO and to discharge these functions with the interests of the Organization only in view. [...] Members of the staff shall conduct themselves at all times in a manner compatible with their status as representatives of the Organization. They shall avoid any action or activity which may reflect adversely on their position or on the good repute of the Organization.

as well as of Article 12.2.5(b) NCPR:

They shall not, except as authorized in the normal course of official duties or with the prior approval of the Head of the NATO body: (b) make or release for publication through the press, radio, television or other agencies of public information statements on matters in any way related to the aims and activities of the Organization; ...

and Article 18.2 NCPR:

New members of the staff shall sign a declaration stating that they: (a) assume responsibility for preserving the secrecy of the classified information with which their duties may bring them into contract; (b) undertake to comply to the Security Regulations; ...

21. Respondent questions the total removal of the contested information from the social media and considers that the lack of dialogue with the appellant regarding the submission of information to the media and internet was to clearly exert pressure on the Organization. It further stresses that the Organization has different internal channels for dealing with complaints concerning work and working conditions and that national as well as international law are not binding NATO as such. Moreover, there is no form of censorship with respect to the right of freedom of expression, provided that the

disclosure of information does not affect NATO's and Member State's legitimate interests.

22. Respondent further considers that the alleged discrimination is a speculation and is not proven with any factual background. Moreover it relates to the grading of the post on which the NATO Appeals Board already had pronounced itself. Respondent rejects the financial claims as unfounded.

23. Respondent requests to dismiss the appeal.

D. Considerations and conclusions

(i) Considerations on admissibility

24. The appeal is admissible.

(ii) Considerations on the merits

25. Disciplinary decisions are within the discretionary power of the Head of the Organization. There is consensus among international administrative tribunals that a decision in the exercise of this discretion is subject to only limited review by a tribunal (*cf* AT judgment in Case No. 885, paragraphs 33-36).

26. Disciplinary measures constitute a very special exercise of discretionary powers and the review by tribunals of this quasi-judicial power must be of a particular nature. The organization's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily.

27. The Tribunal will now analyze the impugned decision of dismissal with the limited standard of review in mind and accordingly to the NCPR. It is to be underlined that the impugned decision concerns the facts occurred after the Appeals Board's decision in Case No. 843. As a consequence, the Tribunal will not review matters that were before the Appeals Board in that case.

28. When reviewing the impugned decision, it is, first of all, observed that the underlying facts of the misconduct are not in dispute. Appellant has admitted them. She claims the freedom of speech and submits that she was whistleblowing, which will be dealt with below.

29. The Tribunal also observes that the procedure as foreseen in the NCPR was correctly followed and that the decision was taken on the basis of facts that were clearly identified and communicated. Petitioner was given the opportunity to comment on the charges made. The Disciplinary Board was correctly constituted and it heard appellant. The Head of the NATO Body took his decision after having received the Board's report and followed the latter's recommendations. No irregularity both in terms of procedure and of substance is identified. This is, moreover, not in dispute.

30. The next question is whether the facts as established legally amount to misconduct. Article 59.1 NCPR provides:

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.

31. In order to review the disciplinary action decided by the Administration, the Tribunal will in this case analyze both the existence of misconduct that warrants a disciplinary penalty, and the proportionality of the punishment to the misconduct (*cf* NATO Appeals Board Cases Nos. 243 and 380).

32. Regarding duties and obligations of staff members, Article 12.2.5 (b) NCPR provides that staff members shall not except as authorized in the normal course of official duties or with the prior approval of the HONB:

make or release for publications through the press, radio, television or other agencies of public information statements on matters in any way related to the aims and activities of the Organization.

33. Each member of the staff must, in accordance with the above mentioned incompatibility, on accepting his/her appointment with NATO sign a declaration of loyalty (Article 13 NCPR) as well as a declaration stating that he/she assumes responsibility for preserving the secrecy of the classified information with which his/her duties may bring him/her into contact (Article 18.2 (a) NCPR) and undertakes to comply with the Security Regulations (Article 18.2 (b) NCPR).

34. On 30 March 2012 appellant distributed her personal case of Appeal 843. The information was sent to the Norwegian and international media, and some Norwegian government departments. On 2 April 2012 the information was posted on the CNN internet website. On 3 April 2012 Appellant had been requested to remove and retract all information. On 5 April 2012 Ms A posted the information on her Facebook page. The posting included screen shots of the NATO Establishment Review Tool classified as NATO RESTRICTED or NATO UNCLASSIFIED. Appellant added a variety of comments alleging discrimination committed by JWC, misuse of military power, NATO's failure to adhere its member states' laws, NATO's failure to follow their own processes and procedures, NATO's negligence, and JWC's wrong-doing towards its employees. The information was open and publicly available on the Appellant's Facebook page.

35. The disclosure of information related to NATO activities cannot be considered in any case as an exercise of its employees' freedom of expression. The information on a personal case or dispute, such as that resolved in Case No. 843, could be of the personal concern of the involved employee to the strict limits of those facts that have no implications on the Organization's interests. The freedom of expression is, however, not unlimited. National and international law systematically provide that the exercise of this freedom may be subject to restrictions, for example in the interest of security, for the protection of the reputation or rights of others, or for preventing the disclosure of

information received in confidence (*cf* Article 10.2 of the European Convention on Human Rights).

36. The Tribunal agrees that appellant had the right to explain her former claim. But her action was beyond a mere explanation of a personal situation since the posting on the Facebook page included comments, data and images affecting seriously her duties of loyalty and discretion, damaging the Organization reputation and expanding broadly doubts and suspicions on its activities.

37. Appellant submits that the disclosing of information was justified by the intention to protect other employees from discrimination. However the allegation of discrimination was a question that was considered, and dismissed, in Case No. 843. Appellant has not convincingly established a connection between her particular case and any general policy that should be revised and exposed publicly and needed to be remedied.

38. Appellant claims that she was “whistleblowing”. It is, first of all, to be noted that, although no common legal definition exists in this respect, a number of common elements can be identified. Whistleblowing generally refers to the reporting of illegal, irregular, dangerous or unethical practices. It must be reported through appropriate channels to those authorities that have the power to act on it. The issue must have a public interest dimension, *i.e.* the whistleblower should not pursue a personal grievance. The Tribunal concludes that this is not the case here. Appellant was pursuing a personal issue, including through social media. She was discrediting her employer and publishing confidential information.

39. Regarding the severity of the sanction imposed on appellant, the Tribunal can revise the decision provided it is manifestly wrong (*cf* NATO Appeals Board’s case No. 479). It is recalled that it is standard international administrative jurisprudence that the disciplinary authority has discretion to determine the severity of the disciplinary measure (*cf* ILOAT 207, 1984, 2773, 2944), provided that the measure adopted is not manifestly out of proportion to the offence. It can in the present case not be alleged that the disciplinary measure chosen was manifestly out of proportion to the degree of seriousness of the acts listed above. The Tribunal can therefore not say that the measure of dismissal was disproportionate or unwarranted. It will therefore not substitute its judgment for that of the Head of the NATO Body.

40. The Tribunal concludes that the appeal seeking annulment of the dismissal decision is to be dismissed.

41. Appellant’s claims concerning financial losses are related to Case No. 843. They are not the subject of the present judgment. These claims are dismissed.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.
- The security deposited by Ms A shall be reimbursed.

Done in Brussels, on 14 November 2013.

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

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



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

19 November 2013

AT-J(2013)0008

Judgment

Case No. 897

VT,

Appellant

v.

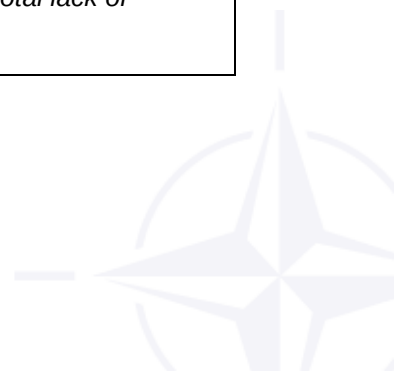
NATO International Staff,

Respondent

Brussels, 14 November 2013

Original: French

Keywords: successive temporary contracts; admissibility, complaint, reasonable time; total lack of substantiation.



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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahùn and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 13 September 2013.

A. Proceedings

1. The NATO Administrative Tribunal has been seized of an appeal, dated 27 February 2013, by Mrs VT, a NATO International Staff member, seeking in particular the annulment of the International Staff's decisions dismissing her request for reclassification of her temporary contract as an initial contract.

2. The Comments of the respondent in the present case, dated 26 April 2013, seek the dismissal of the appellants' submissions. The appellant presented her Reply to the Comments on 28 May 2013.

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

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

5. The Tribunal's Panel held an oral hearing on 13 September 2013 at NATO Headquarters. It heard arguments by the appellant and her counsel, Maître AT, on the one hand and, on the other, by Mr EG, Deputy NATO IS Legal Adviser, Mr BS, Assistant Legal Adviser, NATO IS, and Mrs SP, Senior Officer, Political Affairs and Security Policy Division, representing the respondent, in the presence of Mr PL, NATO IS Staff Association, as well as Mrs Laura Maglia, Registrar *a.i.*

B. Factual background of the case

6. Mrs VT was initially recruited as an intern in the Executive Management Division, Business Transformation Unit, Building Integrity Programme for a period from 21 September 2009 to 20 March 2010.

7. On 20 February 2012, appellant signed a temporary staff contract for the period from 20 February 2012 to 19 May 2012 to work in the Political Affairs and Security Policy Division. In May 2012, she signed a second temporary staff contract to continue working in the same division for a period from 20 May 2012 to 19 May 2013.

8. As the case file shows, at the time of signing the latter two contracts, appellant simultaneously signed a statement acknowledging, *inter alia*, that at the end of these two contracts, respondent was not obliged to offer her another contract.

9. In a letter sent to the Deputy Assistant Secretary General for Human Resources on 12 September 2012, appellant sought to have her employment relationship reclassified as an initial contract on the basis of the two successive temporary staff contracts totalling 15 months. In appellant's view, based in particular on the two above-mentioned contracts, her contractual relationship with NATO had clearly been permanent in nature since 20 February 2012 and, consequently, she was entitled to invoke the provisions of Article 5.5.1 of the NATO Civilian Personnel Regulations. Yet as of the date the present appeal was lodged, appellant had not been offered a new contract or an extension of her last contract.

10. Appellant's request was dismissed by a decision by the Deputy Secretary General on 8 October 2012, formulated as follows:

Your counsel, in her letter of 12 September 2012, has requested conversion of your temporary staff contract. I have looked into this matter but must inform you that I cannot accede to your request.

11. This decision was the subject of a complaint on 4 December 2012, entered by appellant under Article 61.3 of the CPR. In that complaint, appellant first reiterated the arguments in her above-mentioned letter of 12 September, namely that her contractual relationship with respondent since 20 February 2012 was permanent in nature. Next she argued that this conclusion stemmed in particular from Article 77 of the CPR and Article 6.2 of the International Staff contract policy, which respondent had clearly violated. Finally, in appellant's view the loss of a chance to be awarded an indefinite duration contract had caused her, and was continuing to cause her, material and non-material damage.

12. This complaint was implicitly dismissed by defendant on 3 January 2013, then was explicitly dismissed by a decision by the Deputy Assistant Secretary General for Human Resources formally rejecting appellant's complaint. This decision was drafted as follows:

The Secretary General asked me to reply to your counsel's letter dated 4 December 2012. In the absence of any new information in this letter of 4 December 2012, I confirm the decision noted in our letter of 8 October 2012 that was sent to you in reply to your request dated 12 September 2012.

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

(i) *The appellant's contentions*

13. Appellant submits, firstly, that having lodged her complaint against the disputed acts within a reasonable time, in line with the provisions of the CPR and the case law of the Appeals Board on this matter with respect to successive temporary contracts, her appeal is admissible.

14. Appellant argues, secondly, that respondent's decisions dismissing her request for reclassification of her contractual situation are illegal and must be annulled. In this connection she invokes two arguments: firstly, the absence of reasons for the disputed acts, and secondly, violation of the provisions of Article B(v)e of the Preamble and Articles 5.1.1, 5.1.2, 77.1, 77.2, 78.1 and 78.2 of the CPR, in combination with the violation of Article 2.2 of the Guidelines, Articles 6.1 and 6.2 of the Implementing Arrangements, and the duty of care. She likewise maintains that in principle her situation is not covered by the provisions of CPR Article 5.2 and that, if that article should be applicable, respondent is in breach of it since, in accordance with the case law of the Appeals Board, appellant should have been informed in advance that her post was subject to turnover. Yet this was not done.

15. Appellant alleges, thirdly, that the contested decisions have caused her material harm through the loss of any serious chance of being offered a contract of indefinite duration after the refusal to convert her successive temporary contracts into an initial contract. Furthermore, she asserts that she has suffered distinct moral harm, since she has been put into a situation of uncertainty, particularly since March 2010 when she signed her internship contract with respondent. On top of that, she adds that respondent's neglect of the duty of care in the handling of her request, and generally in dealing with her personal situation, has damaged her confidence and aggravated the non-material harm she is suffering.

16. This being so, appellant seeks:

- annulment of the implicit decision to dismiss appellant's complaint of 4 December 2012, which became apparent on 3 January 2013;
- annulment of the decision of 12 February 2013 to dismiss appellant's complaint of 4 December 2012;
- insofar as necessary, annulment of the decision of 8 October 2012 dismissing appellant's request of 12 September 2012;
- the conversion of appellant's contracts into an initial contract, starting on 20 February 2012 and lasting three years;
- the awarding of damages in the amount of € 20.000;
- compensation for the moral harm suffered, estimated *ex æquo et bono* at € 10.000; and
- an order for respondent to pay the costs.

(ii) The respondent's contentions:

17. Respondent pleads, firstly, that appellant's appeal is inadmissible, since the associated complaint was submitted outside the reasonable time laid down by Article 61.3 of the CPR. Thus the procedure followed by appellant was in reality intended to circumvent the applicable provisions in order to bring a case before the Appeals Board, since appellant had already signed these contracts with respondent which had henceforth become definitive.

18. Secondly, respondent considers the appeal to be groundless. On this head respondent begins by referring to the Appeals Board's case law to argue that the obligation to substantiate decisions by the maker of the contested decisions has been fully met in the present case. Respondent further maintains that, in any case, from her first appointment appellant was informed that her functions would be temporary, so that the aforementioned provisions of the CPR, the Guidelines and the Implementing Arrangements cannot have been breached. Finally, supposing that the appeal were admissible, appellant could not invoke CPR Article 5.1 to gain the benefit of an initial contract, since her situation would fall under CPR Article 5.2. Therefore, in view of the length of her contracts, appellant could instead gain the benefit of a contract of definite duration in case of reclassification of her contractual situation.

19. Thirdly, as to the material and moral damage alleged by appellant, respondent holds that, in the absence of any illegality committed, appellant's submissions for relief must be dismissed.

20. Under these conditions, respondent submits that in the present case the appeal must be dismissed either as inadmissible or as groundless.

D. Considerations and conclusions**(i) Considerations on admissibility***Arguments of the parties*

21. In its answer, respondent pleads the inadmissibility of appellant's appeal on the grounds that the latter's complaint against the allegedly illegal acts was not submitted within a reasonable period. Appellant did not dispute the consequences of her contractual situation in good time, and submitted her complaint late, in reality circumventing the provisions of the CPR, in particular Articles 24.6 and 61.3 and Article 4.3.2 of Annex IX. For this reason, as respondent also argued at the hearing, the appeal should be dismissed as inadmissible, in accordance with the Appeals Board's case law in Decision no. 837 (Formignani), which was fully applicable to the present case.

22. Appellant replies that the objection of inadmissibility should itself be dismissed.

23. On the one hand, she argues that respondent takes no account of the fact that appellant submitted a complaint against the decision of 8 October 2012 in good time and that, in this decision, respondent made no reference to the alleged grounds of inadmissibility when rejecting appellant's request.

24. On the other hand, in appellant's view, in the context of successive temporary staff contracts, the illegality of the disputed act lies in the abusive succession of these contracts, which fact in reality allows the person concerned to submit a complaint within the reasonable period intended by the CPR, as in this case. In this regard appellant refers to the precedents of the Appeals Board, which has ruled that such appeals are admissible, even when the signature of a large number of successive contracts goes back several years before the abusive nature of these contracts is contested, in accordance with the CPR (Cases no. 779, no. 811, no. 812 and no. 822).

25. In response to a question from the Tribunal, appellant believes that the ruling of the Appeals Board in Case no. 837, cited by respondent in point 21 above, was not applicable in the present case. In that case there had not been a succession of temporary contracts, whether of short or long duration, which in contrast characterized the present case. Hence the notion of a reasonable time must be assessed in the light of the Appeals Board's rulings in Cases nos. 779, 811, 812 and 822 mentioned in the previous point, which have similarities with the present dispute.

26. This being so, appellant submits that the complaints procedure was begun within a reasonable time, in accordance with the precedents laid down by the Appeals Board, and that the objection of inadmissibility is hence entirely groundless.

Ruling of the Tribunal

27. Article 61.1 of the CPR states:

Members of the staff shall, in the first instance, refer any complaint affecting their work or their conditions of work or of service to the head of their division or office, through their immediate supervisor". Article 61.3 of the same Regulations further states: "after recourse to the procedures in paragraphs 1 and 2 of this article, members of the staff shall be entitled to submit in writing and within a reasonable time their complaints to the Head of the NATO body concerned in accordance with the provisions of Articles 2 and 3 of Annex IX to these regulations.

28. In the terms of Article 2 of Annex IX to the CPR:

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

29. Article 4.3.1 of Annex IX states as follows:

The Appeals Board shall only entertain appeals arising out of a decision of the Head of the NATO body concerned which constitutes grounds for grievance." Article 4.3.2 of the same annex says that "Appeals shall be lodged with the Secretariat of the Appeals Board within 60 days from the date of notification of the decision appealed against.

30. It follows from the above-mentioned provisions taken together that, when a staff member intends to challenge a decision taken about him by an authority subordinate to the Head of the NATO body to which he belongs, he must first of all, and within a reasonable time, submit a complaint to the Head of the relevant body.

31. To avoid belatedly throwing past situations into question, and to ensure that the decisions of Heads of NATO bodies have some legal certainty, the notion of the reasonable period must also be applied to requests made directly to the Head of the NATO body to which the staff member or former staff member belongs or belonged. Hence the notion of "reasonable time", in the sense of CPR Article 61.3, must be assessed in the light of Article 4.3.2 of Annex IX which sets the deadline for appealing against the decisions of the Head of a NATO body at 60 days, while allowing the admission "in very exceptional cases and for duly justified reasons" of appeals lodged after that time, and of CPR Article 24.6, according to which "claims for allowance submitted more than 3 months after the event to which the claim relates will not be granted retroactively unless exceptional circumstances can be proved" (see in particular Case no. 822 mentioned above).

32. In this case, appellant's first contract ended on 19 May 2012 and was renewed for a further year, *i.e.* for the period from 20 May 2012 to 19 May 2013. It is on the basis of the conclusion of this second temporary staff contract for an additional year that appellant maintains, in reality, that the functions she performs for respondent are permanent, and hence requests reclassification of her contractual situation.

33. In this regard it is important to note that appellant requested reclassification of her contractual situation on 12 September 2012, and submitted a complaint, against the decision of 8 October 2012 rejecting that request (cited in point 10 above), on 4 December 2012. Thus the request for reclassification of appellant's contractual situation was made to respondent before the end of her second contract as a temporary staff member.

34. Under these conditions, respondent objects that the appeal is inadmissible because, since appellant's second contract was concluded on 20 May 2012, the submission of her complaint on 4 December 2012 seems unreasonable in the light of the requirements of the CPR and the Appeals Board's case law.

35. It is important to bear in mind that appellant requested reclassification of her contractual situation on 12 September 2012, *i.e.* three months and three weeks after the signature of her contract and long before it came to its end. Taking account of these circumstances and of the insecure situation resulting from her employment under a second temporary staff contract, appellant therefore submitted her complaint against the rejection of her request on 4 December 2012.

36. It follows that, contrary to what respondent alleges, the time which passed before appellant made her complaint was reasonable, and consequently no countervailing argument can be derived from the Appeals Board's ruling in Case No. 837.

37. It follows from the foregoing that respondent's claim of inadmissibility must be dismissed, and the appeal must be declared admissible.

(ii) Considerations on the merits

(a) On the submissions seeking annulment

38. To begin with, it must be borne in mind that appellant is seeking, firstly, annulment of the implicit decision to dismiss appellant's complaint, which became manifest on 3 January 2013, then annulment of respondent's decision of 12 February 2013 which explicitly dismissed that same complaint, and finally, insofar as necessary, annulment of the decision of 8 October 2012 dismissing appellant's request of 12 September 2012 seeking reclassification of her contractual situation.

39. In this regard, it must be pointed out that an appeal, formally directed against the dismissal of a complaint, has the effect of laying the act against which the complaint was made before the Tribunal, if the dismissal of the complaint is, as such, lacking in independent substance. For a dismissal decision, whether implicit or explicit, if it is pure and simple, only confirms the act or omission that the complainant is objecting to, and taken by itself does not constitute an act that can be contested.

40. In this case the explicit decision of 12 February 2013 to dismiss appellant's complaint, which was taken before the lodging of the present appeal, substitutes for the implicit rejection on 3 January 2013.

41. Therefore, because appellant's submissions for annulment are formally directed against the dismissal of her complaint, they lead the Tribunal to consider the act complained of, *i.e.* respondent's decision of 8 October 2012 rejecting appellant's request of 12 September 2012 seeking reclassification of her contractual situation.

42. As the decision explicitly dismissing appellant's complaint did not make any changes to the reasons given in the decision of 12 September 2012, it must thus be said that the submissions seeking annulment directed against the decision of 8 October 2012 are one and the same as those directed against the decision by the Deputy Assistant Secretary General for Human Resources of 12 February 2013.

43. This being so, in support of her submissions seeking annulment appellant invokes two arguments: firstly, the lack of any substantiation of the disputed acts, and secondly, violation of the provisions of Article B(v)e of the Preamble of the CPR and Articles 5.1.1, 5.1.2, 77.1, 77.2, 78.1 and 78.2, put together with the violation of Article 2.2 of the Guidelines, Articles 6.1 and 6.2 of the Implementing Arrangements, and the duty of care.

On the first contention, the total absence of reasons for the challenged acts

Arguments of the parties

44. By this contention, appellant maintains that the decision rejecting her request for reclassification of her contractual situation and the formal dismissal of her complaint lack any substantiation. Further, referring to the case law of the Appeals Board and other international jurisdictions, she maintains that a total absence of reasons given cannot be remedied in the course of legal proceedings, as it is only if there is insufficient substantiation, and not if there is no substantiation of any kind as in this case, that the administration may legitimately provide additional information during the proceedings, and thus meet its obligation to provide reasons.

45. Respondent replies, in substance, that the decision rejecting appellant's request for reclassification of her contractual situation was made in a context known to the person concerned. For, on the one hand, appellant was informed that she was going to perform temporary functions as a replacement for a staff member on sick leave and, on the other, at the time of signature of her temporary staff contracts, in 2012, appellant signed an agreement recognizing that respondent was under no obligation, at the end of each temporary contract, to offer her a new contract.

46. In reply to a question from the Tribunal on the extent of the reasons given for the impugned decisions, while recognizing that these decisions did not contain sufficient information to this end, respondent continues to consider that, in any event, taking into account the context of appellant's recruitment, the latter held all necessary information to comprehend the substance of and reasons for the decisions rejecting her request for reclassification of her contractual situation. On this head appellant replies that, in any event, after her first contract respondent offered her a new contract.

Ruling of the Tribunal

47. The Tribunal has already deemed that the purpose of the obligation for substantiation is, on the one hand, to provide the interested party with enough information to allow him/her to determine whether the contested decision is justified or otherwise is tainted by an error that makes its legality questionable, and, on the other, to enable the Tribunal to perform judicial oversight thereof (see judgment of 8 November 2013, Cases nos. 889 and 890, point 48).

48. Thus the obligation for substantiation implies that the person who is the subject of a decision that constitutes grounds for grievance must be put in a position to clearly and unequivocally understand the decision-maker's reasoning; the extent of this obligation must be viewed in terms of the practical circumstances of each case (see judgment mentioned above, point 49).

49. The reasons for the decision must, in principle, be notified to the interested party at the same time as the decision constituting grounds for grievance, and will be sufficient if they present the facts and the legal considerations material to the decision

as a whole, so that the decision-maker is not obliged to provide further clarification of the reasons for the decision in question. However, a decision is sufficiently substantiated if it is taken in a context understood by the staff member concerned that may enable him/her to comprehend the significance of the action taken with respect to him/her (see judgment mentioned above, point 50).

50. In the instant case, it must be acknowledged that the decision rejecting the request for reclassification of appellant's contractual situation, that was taken on 8 October 2012, does not include any concrete information in view of the requirements laid down above by the Tribunal. For, in this decision (see point 10 above), respondent merely gives a laconic response, providing no explanation, and simply informs appellant that her request has been looked into and cannot be accepted.

51. The same is true of the decision of 12 February 2013 dismissing appellant's complaint which, in rather vague terms, tells appellant that her complaint of 4 December 2012 contains no new information additional to that in her request for conversion of 12 September 2012, and confirms the decision of 8 October 2012 that had been challenged.

52. It follows that the impugned decision of 8 October 2012 rejecting the demand for the reclassification of appellant's contractual situation is lacking in any substantiation.

53. Under these conditions, contrary to what respondent maintained in substance during the proceedings, failing any substantiation of the impugned act, respondent cannot remedy the supposed initial insufficiency of the reasons given for the decision by providing additional clarification subsequently, since the person concerned did not have information constituting the least substantiation of this act.

54. It results from the foregoing that respondent did not meet the requirements arising from the obligation for substantiation of a decision constituting grounds for grievance and, consequently, the first contention must be accepted.

55. Therefore, it is right to annul the impugned decision of 8 October 2012 by the Deputy Assistant Secretary General for Human Resources rejecting the request for the reclassification of appellant's contractual situation, without ruling on appellant's other contentions in support of her request for annulment.

(b) On the submissions for compensation and the request for the reclassification of appellant's contract

56. Considering, in the first place, the submissions for compensation for the material damage that appellant alleges she has suffered, the Tribunal points out that annulment of the act challenged for a deficiency of substantiation, as in the present case, cannot give grounds for compensation, as deficient substantiation, which is a grievance of form, is not the same thing as a defect of internal legality.

57. At this stage the Tribunal is not in a position to investigate whether the illegalities alleged by appellant are well-founded, any more than it is able to verify that there has been illegal behaviour. Thus a request for annulment on the basis of the illegalities

alleged as part of appellant's contentions can only be considered, if need be, in the light of the grounds for the decision which will take the place of the impugned decision, after the latter has been annulled by the Tribunal.

58. Considering, in the second place, the submissions for compensation for the moral damage that appellant alleges she has suffered, the Tribunal considers that the annulment of an act tainted with illegality may in itself constitute adequate and, in principle, sufficient reparation for any moral harm that this act may have caused. This conclusion is all the more applicable insofar as the annulment ordered is grounded on a deficiency of substantiation of the impugned act.

59. As this is manifestly the case here, it is appropriate to dismiss the requests for compensation as a whole, as well as the other heads of relief sought by appellant in her appeal seeking reclassification of her contractual situation.

E. Costs

60. Article 4.8.3 of Annex IX to the CPR provides that:

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

61. Under the circumstances of this case, it is appropriate for appellant to be reimbursed the costs of retaining counsel, up to a total of € 4.000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 8 October 2012 by the Deputy Assistant Secretary General for Human Resources, rejecting the request for the reclassification of appellant's contract, is annulled.
- The remaining submissions in the appeal are dismissed.
- Respondent shall refund appellant the costs of retaining counsel, up to a maximum of € 4.000.
- The security deposited by appellant shall be reimbursed.

Done in Brussels, on 14 November 2013.

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

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