2019

ANNUAL REPORT OF THE

NATO ADMINISTRATIVE TRIBUNAL

2019 Annual Report of the NATO Administrative Tribunal

Introduction

This is the seventh Annual Report of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO). It covers the period 1 January 2019 – 31 December 2019 and is issued, on the initiative of the Administrative Tribunal, pursuant to Rule 4(h) of its Rules of Procedure.

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

On 1 March 2019, the NAC adopted a number of amendments to Chapter XIV of the NATO Civilian Personnel Regulations and Annex IX thereto, which deal with administrative review, mediation, complaints and appeals. They were issued on 3 June 2019 together with the Tribunal's amended Rules of Procedure.

The changes seek in particular to increase the effectiveness of the complaints and appeals framework in a number of ways, such as: the simplification of the pre-litigation process, in particular for retirees, and the extension of the timelines for dealing with administrative review, complaints and appeals.

Some of the changes concern the Tribunal's functioning. The Tribunal will henceforth have a vice-President and it can, if deemed useful by the President, take decisions by a full Panel consisting of the President and the four other members.

The amended Rules of Procedure also reflect the fact that appeals may be lodged electronically on the Tribunal's portal. The Rules also fine-tuned the provisions regarding third parties and interventions. As a corollary, the Tribunal will publish a list of

pending appeals on its website.

The Rules now also provide that the members of the Panel and the parties may participate using secured videoconferencing.

Under the old Rule 10, the Tribunal could decide to summarily dismiss a case only at a session. Now it can do so at any time once the procedure for it is completed.

Lastly, the amendments introduce the Tribunal's judicial closure between 15 December and 15 January and between 1 and 31 August, respectively.

Composition

On 28 June 2019, the Tribunal elected by secret ballot Mr Laurent Touvet as its Vice-President.

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

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

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

Organizational and administrative matters

In May 2018, the Tribunal moved to the new NATO HQ premises, where it was allocated functional and suitable space for the judges and the Registrar, as well as for its documentation. In August 2019, the Tribunal was moved again within the new HQ.

Functional and suitable space was, however, maintained.

The Tribunal benefited from the services of an intern from March to August 2019.

Proceedings of the Tribunal in 2019

The Tribunal held four sessions of oral hearings (14 March, 20 June, 30 September, and 6 December 2019) and rendered 16 judgments, four of which were included in the 2018 Annual Report [1] It rendered two judgments in February 2020 following its December 2019 session; they are covered in this Report.

Two cases were withdrawn during the written procedure.[2]

The Tribunal's President issued eleven orders in 2019. In two orders unconditional withdrawals of the above-mentioned cases were accepted. Two other orders joined cases from the same appellants.[3]

On 6 December 2018, the Tribunal rendered its judgment in joined Cases Nos. 2018/1256 and 1257 (*cf.* 2018 Annual Report, page 15). On different dates appellant submitted requests under Rule 28 (rectification of error), Rule 29 (revision of judgment) and Rule 30 (clarification of judgment). In three separate orders, the President denied these requests. These orders will be discussed in the next chapter of this Report.

In three orders[4] the President suspended proceedings in individual cases; the Tribunal subsequently summarily dismissed two of them. The third case (Case No. 2019/1292) was still pending at the time of writing this report.

In the final order, concerning Case No. 2018/1275, the President, having regard to the excessively voluminous documentation in the file and the need of an expeditious conduct of the judicial proceedings, ordered the parties to provide a schedule listing by annexes and page numbers, the material in the annexes they regarded as most

[1] It rendered 26 judgments in both 2014 and 2015, 29 in 2016, 10 in 2017 and 27 in 2018.
[2] Case No. 2018/1273 and Case No. 2018/1274.
[3] Case No. 2019/1284, Case No. 2019/1285 and Case No. 2019/1291.
[4] Case No. 2018/1276, Case No. 2019/1288 and Case No. 2019/1292.

important to understanding of the case.

The Tribunal itself issued one order, rejecting a request for revision.[5]

The NATO Communications and Information Agency (NCIA) was respondent in six cases, and the NATO International Staff (NATO IS) and the NATO Support and Procurement Agency (NSPA) appeared in three cases each. The Joint Force Command Brunssum (JFC BS) and the Centre for Maritime Research and Experimentation (CMRE) appeared in one case each.

The Tribunal continued to resolve cases as expeditiously as possible. The judgments were rendered in a time-span of between four and eleven months – the duration of the written procedure alone is around four months, also depending on whether an appeal is lodged during the judicial closure. Two cases took four months: one involved an expedited hearing, and the other was summarily dismissed. In four cases the judgments were rendered within seven months, in two within eight months, and another two within nine months. Four cases where appellants requested a postponement of the oral hearing took between ten and eleven months.

In 2019, sixteen new appeals were introduced and another two were registered at the beginning of 2020 after the judicial closure.

Cases are assigned to Panels of three judges with due consideration to the principle of rotation and to equitable distribution of workload. In each case, the President designates another member of the Panel or himself to serve as judge-rapporteur, *inter alia*, to prepare a draft judgment for consideration and approval by the Panel. Taking together the years 2013-2019, the President and members have been assigned to between 27 and 30 cases each.

In 2019 the Tribunal published for the first time statistics of its judgments covering the period 2013-2018.

[5] Case No. 2017/1245.

On 20 June 2019, the Tribunal's President addressed the Joint Consultative Board to present the work of the first 5 years of the Tribunal.

The Tribunal's case law in 2019[6]

The Tribunal rendered the following judgments, as well as three orders involving significant issues under the Rules. This summary includes the judgments that were rendered in 2020 following the December 2019 session.

As referred to in the previous chapter, on 6 December 2018 the Tribunal rendered its judgment in joined Cases Nos. 2018/1256 and 1257 (*cf.* 2018 Annual Report, page 15). Following this, appellant in those cases submitted separate requests on different dates invoking Rule 28 (rectification of error), Rule 29 (revision of judgment) and Rule 30 (clarification of judgment). The President denied these requests in three separate orders.

The first order held that appellant, instead of raising clerical or arithmetical errors in the judgment, as is required under Rule 28, was in fact contesting the considerations and statements of the Tribunal. Appellant was seeking a reopening of the conclusions of the Tribunal's judgment, contrary to the rule that the Tribunal's judgments are final and not subject to appeal.

The second order addressed a request for revision of the judgment. Rule 29 provides for the possibility of a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting the re-hearing at the time of the Tribunal's judgment. Appellant asserted that respondent had exhibited clear "adverse action" against him following his complaint and sought revision of the judgment on this basis. The President pointed out that the texts governing revision of Tribunal judgments make clear that revision is available only in narrowly defined circumstances. First, the party seeking revision must demonstrate the existence of a previously unknown "determining fact", that is a fact that would have led to a different outcome in the case had it been known. Further, the fact must be something that was not previously known to either the Tribunal or the party requesting revision. Thus, revision is an exceptional remedy,

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

available only in the unusual situation in which a newly discovered fact might have led to a different outcome had it been known to the requesting party and the Tribunal when a judgment is rendered. The President observed that appellant failed to show that these requirements were met. The President noted that all elements put forward by appellant were known by him at the time of the Tribunal's judgment. The President considered that by his request appellant was in fact seeking a re-opening of the conclusions of the Tribunal's judgment

The third order concerned a request for clarification under Rule 30. The President noted that appellant had not demonstrated to the requisite legal standard that the *operative provisions of the judgment appear obscure, incomplete or inconsistent* within the meaning of Article 6.8.4 (a) of Annex IX to the CPR and Rule 30, so that the provisions cited by appellant should be clarified. The President noted that appellant was in fact again contesting the considerations and statements in the Tribunal's judgment, and that such successive actions were demonstrative of an abusive attitude inconsistent with the good administration of justice.

In its judgments during the reporting year, the Tribunal had again to deal with the non-renewal of definite-duration contracts. It rendered three judgments in this respect.

Case No. 2019/1278 is similar to several appeals adjudicated by the Tribunal in 2018 concerning the non-renewal of contracts under the NCIA's contract policy. The Tribunal made reference to these earlier findings in this case. In addition, appellant contested earlier disciplinary proceedings initiated against him, disputed alleged performance issues involving his soft skills and individual conduct, and claimed failure by respondent to satisfy the duty of care in understanding his medical situation. The Tribunal observed that the disciplinary procedure was not contested at the time and that there was therefore no basis to consider it in this appeal. The Tribunal further failed to see a manifest error of assessment concerning appellant's performance or a breach of the duty of care by respondent. Following its case-law, the AT recalled that a contract renewal is not automatic and that it is within the discretionary powers of the Head of the NATO body (HONB). It dismissed the appeal.

In **Case No. 2019/1280** appellant, the holder of a three-year contract with the NCIA, disputed respondent's withdrawal of its offer of a one-year extension prior to its acceptance in accordance with the offer's terms. Appellant claimed manifest error of assessment, breach of contractual obligations and legitimate expectations, failure to give reasons, violation of the right to be heard and of the duty of care. While appellant's supervisor recommended that her contract not be renewed, the NCIA General Manager decided instead to offer a one-year extension. Appellant, however, delayed responding, first going on a long leave and then engaging in substantial e-mail communications with the General Manager and others regarding the conditions for continuation of her work. The General Manager ultimately withdrew the offered extension. Appellant maintained that she had in fact signed the contract before the offer was withdrawn, but it was not returned as required for the new contract to enter into force. The Tribunal did not find appellant's claims persuasive. It observed that respondent had made reasonable efforts to accommodate appellant's personal situation, Including by rejecting the recommendation not to extend her contract and instead offering a one-year renewal. Respondent was free to withdraw its offer prior to its acceptance and appellant had the responsibility to make her intentions clear in due time. The appeal was therefore dismissed.

Case No. 2019/1283 also deals with a non-renewal of contract. Appellant brought forward several elements said to show the real reasons behind the non-renewal (involving, *inter alia*, incidents during deployment and frictions and disagreements with his hierarchy), which appellant alleged caused respondent to ignore his outstanding performance, senior academic qualifications and continued need for the post. The Tribunal referred to Article 5.5.3 of the CPR, which provides that the HONB "may" offer the renewal of a definite duration contract if it is in the "interest of the service," observing that the Organization has a wide discretion to decide whether to renew or not. The Tribunal held that the Agency's decision was within its discretionary powers and that the decision was taken in accordance with its policies and not tainted with any abuse of authority. On the issue of convening a Complaint Committee, the Tribunal recalled that whenever the contested decision is taken by the HONB himself, appellant can lodge an appeal directly with the Tribunal, in accordance with Article 61.3 and Appendix 3 to Annex IX to the CPR.

Three other cases dealt with disciplinary proceedings.

Two cases were submitted by the same appellant, Case No. 2018/1270 against his suspension during a disciplinary procedure, and Case No. 2018/1275 against the termination of his employment by NCIA. In **Case No. 2018/1270** the Tribunal referred to its case-law addressing the difference between Article 60.2 and 60.3 of Annex X to the CPR, whereby "the decision to suspend a staff member is not a disciplinary action, it's a conservative precautionary measure to enable any disciplinary proceedings that may follow to progress properly". The Tribunal found no abuse of respondent's authority under Article 60.2 when suspending appellant and dismissed the appeal. In **Case No. 2018/1275** appellant contested his termination for having created a hostile and offensive working environment and pursuant to individual complaints alleging abusive conduct. The Tribunal found that there were no shortcomings in the process leading to appellant's termination, that the Disciplinary Board had carried a thorough and well documented investigation of the alleged serious misconduct, that appellant had adequate notice and was properly interviewed together with various witnesses and, lastly, that the Board's conclusions were supported by extensive evidence. The Tribunal therefore dismissed the appeal.

In **Case No. 2019/1286**, appellant, a former NSPA staff member, challenged his disciplinary dismissal. Following appellant's submission of a forged medical certificate to justify a day of absence, respondent initiated disciplinary proceedings. Appellant was subsequently dismissed for serious misconduct in breach of the CPR rules and obligations, in particular Articles 13 and 59. The Tribunal found that the proceedings were conducted in accordance with the CPR's requirements and that the facts confirmed that appellant had indeed forged a medical certificate. The appeal was dismissed.

Two cases were submitted by the same appellant, albeit against two different NATO bodies.

Case No. 2019/1279 concerned appellant's sick leave. The dispute arose in the context of appellant's request for medical arbitration and his subsequent return to work. NSPA contended that certain days claimed as sick leave should be considered as unjustified

absence and requested repayment of salary for those days. The Tribunal considered that the NSPA''s dispositions on arbitration proceedings contained a contradiction and had to be interpreted in a way favorable to appellant. The Tribunal calculated the correct number of days to be deducted from appellant's salary and awarded half of the compensation for legal cost of the defense, appellant being only partly successful in his appeal.

Case No. 2019/1282 is the follow-up of Case No. 2018/1267, this time against JFC Brunssum (BS), which the Tribunal decided in November 2018. The prior case concerned the recruitment of appellant to a post in JFC BS for which he had applied and was accepted, but to which he ultimately was not appointed. In that case, the Tribunal annulled the Commander's decision and ordered compensation for non-material damages. In response to the Tribunal's November 2018 judgment, respondent considered that the annulment of the earlier decision not to appoint Appellant set the process back to the recruitment phase. It then repeated the recruitment process and Appellant was again not selected, based on the same grounds as in the prior case. In the new case before it the Tribunal noted that it could not but observe a lack of good will by respondent to implement its earlier final and binding decision. It called on both parties to avoid a repetition of the judicial controversy and to mutually agree a solution. The appeal was successful and appellant was compensated with an additional 20,000 Euros for non-material damage as well as legal costs.

Two cases were submitted by the same appellant against CMRE; they were joined.

In **Case No. 2018/1266** appellant requested the upgrade of his former post, a decision that he alleged was adopted but never implemented. The Tribunal observed that appellant failed to demonstrate that at any time any competent authority or body had made a conclusive decision to upgrade the post and that, moreover, appellant had not reacted against the failure to implement the alleged decision to upgrade. The Tribunal rejected the appeal as inadmissible and unfounded.

Appellant in **Case No. 2018/1271** requested compensation for damages suffered as a result of allegedly persecutory and retaliatory acts by the former CMRE Director. The Tribunal highlighted that appellant referred to events and situations that took place at

the latest in 2017, the last one being the decision to terminate his contract. Appellant had not disputed any of the decisions taken by the former CMRE Director at the time, not even the notification of termination his employment. The request for compensation therefore had to be considered as out of time. The Tribunal observed as to several other allegations put forward that appellant did not provide convincing proof. No evidence could be found in the file concerning the alleged harassment, nor did an investigation conducted by an external investigator support appellant's allegations. The appeal was dismissed.

Three further appeals dealt with different issues.

In **Case No. 2018/1277** appellant contested, *inter alia*, the termination of her contract. Following internal reorganizations at the NCIA location in SHAPE, appellant, holder of an indefinite duration contract, asked for her job description to be updated. The administration did so, while also upgrading her post. Appellant was appointed *ad interim* to the new post, and when a call for applications was made, she applied for it. Shortly after, she was notified that she had not been selected as she did not have the qualifications required for the post, that her contract would be terminated, and that she would receive a loss-of-job indemnity. Meanwhile, her previous job had been deleted, leaving appellant in a precarious situation. The Tribunal held that that appellant could not be dismissed for not having been selected for the new position. The fact that a staff member is unable to perform duties at a higher grade is no reason to terminate his or her contract. Respondent had not followed the procedure in Directive AD 02.02 which foresees that if the incumbent of an upgraded post is not fulfilling the requirements of the post, he or she should be given the opportunity to undergo the development training required to improve his or her performance. The decision to terminate appellant's contract was therefore illegal and was annulled.

Case No. 2018/1269 was brought by a NATO retiree contesting the decision by the NATO IS to deduct from his monthly pension an amount equal to the alimony appellant was ordered to pay to his wife pursuant to a national court judgment which he was disregarding. Referring to Article 3 of the Ottawa Agreement, the Tribunal held that the Agreement imposes on the Organization a legal and not just a moral obligation to facilitate the proper administration of justice. The decision to deduct the amounts due

was a reasonable exercise of the Organization's discretion in carrying out this obligation under the Agreement. The decision was taken after appellant was given ample opportunity to resolve the matter without respondent's involvement; it was only after his continued refusal to comply with the national court judgment that the Organization acted to deduct the amounts. The appeal was dismissed.

Case No. 2019/1281 concerned the cancellation of a supplemental medical insurance cover appellant and other NATO retired staff in the same country had elected to receive and paid for. This benefit, for which he continued to pay premiums after retiring, was terminated years after his active service ended as the result of a decision of the local Staff Committee. Retirees, who constituted the majority of persons covered by the supplementary cover, could not participate in that decision. The Staff Committee's decision was subsequently implemented by the International Staff. The Tribunal considered that the Organization in making that implementing decision was obliged to take into account a broader range of factors and not just treat the request to terminate the coverage as a ministerial act it was required to carry out. The Tribunal held that the Organization had a duty of care to consider the overall impact of the decision, including on the substantial population of retired staff members covered by the supplemental medical insurance. The Tribunal therefore annulled the contested decision.

Lastly, two cases were summarily dismissed under Rule 10 of the Tribunal's Rules of Procedure.

In **Case No. 2018/1276** appellant, an NCIA staff member who served as Chairman of an Interview Panel for a post in the Agency challenged the management decision to appoint to the post a person other than the one recommended by the Interview Panel. The Tribunal recalled its jurisdiction and competence under the CPR and in particular Article 61.1 which limits access to the pre-litigation and litigation procedures to staff members who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment. The Tribunal noted that the decision appellant challenged did not meet these requirements and declared the appeal inadmissible. Further, concerning appellant's request to stand before the Tribunal in a whistleblowing capacity, the Tribunal referred to its earlier case-law holding that whistleblowing must be reported through appropriate channels to the authorities

with the power to act on it. The Tribunal observed that it is not such an appropriate channel.

In **Case No. 2019/1288** appellant, a NATO retiree, submitted an appeal following his exchanges with the IS administration regarding changing his tax adjustment to that of a different country. Appellant had, however, not submitted a complaint within the prescribed time limits under Article 4.1 of Annex IX to the CPR. He contended that he needed to wait for the outcome of the 2017 tax assessment before reacting to the administration's unfavorable response. The Tribunal concluded that the time limits cannot be unilaterally suspended, and that the appeal was inadmissible by reason of failure to comply with the CPR requirements.