JUDGMENTS and ORDERS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2018

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2018

19th session (14-16 March 2018)

AT-J(2018)0004 Case No. 2017/1247	A	*v.*	NSPA
AT-J(2018)0005 Case No. 2017/1248	H	*v.*	NAEW&CF GK
AT-J(2018)0006 Case No. 2017/1250	D	*v.*	NAEW&CF GK
AT-J(2018)0007 Case No. 2017/1112	P	*v.*	NCIA
AT-J(2018)0008 Case No. 2017/1125	B	*v.*	NCIA
AT-J(2018)0009 Case No. 2017/1244	M	*v.*	NCIA
AT-J(2018)0010 Case No. 2017/1249	R	*v.*	NCIA
AT-J(2018)0011 Case No. 2018/1255	G	*v.*	NCIA
AT-J(2018)0016 Cases Nos. 2017/1114-1124		*v.*	NATO IS
AT-J(2018)0018 Case No. 2017/1126	L	*v.*	NATO IS
AT-J(2018)0019 Case No. 2017/1243	B	*v.*	NATO IS

20th session (14-15 June 2018)

AT-J(2018)0012 Case No. 2017/1251	M	*v.*	NCIA
AT-J(2018)0013 Case No. 2018/1253	D	*v.*	NCIA
AT-J(2018)0014 Case No. 2017/1252	V	*v.*	NCIA
AT-J(2018)0015 Cases Nos. 2017/1127-1242	A *et al.*	*v*.	NATO IS
AT-J(2018)0017 Case No. 2018/1254	S	*v.*	NCIA
AT-J(2018)0020 Case No. 2018/1259	P	*v.*	NCIA

21st session (20-21 September 2018)

AT-J(2018)0021 Cases Nos. 2018/1262-1263	H, S	*v.*	NAEW&CF GK
AT-J(2018)0022 Case No. 2018/1258	Q	*v.*	NCIA
AT-J(2018)0023 Case No. 2018/1267	M	*v.*	JFC Brunssum
AT-J(2018)0024 Cases Nos. 2017/1107-1110	N	*v*.	NSPA
AT-J(2018)0025 Case No. 2018/1260	S	*v.*	NCIA
AT-J(2018)0026 Case No. 2018/1256-1257	V	*v.*	NCIA

22nd session (14 December 2018)

AT-J(2019)0001 Case No. 2018/1272	L	*v.*	JFC Brunssum
AT-J(2019)0002 Case No. 2018/1265	L	*v.*	NCIA
AT-J(2019)0003 Case No. 2018/1268	F	*v*.	NCIA
AT-J(2019)0005 Case No. 2017/1245	M	*v.*	NCIA

Orders of the NATO Administrative Tribunal

2018

AT(PRE-O)(2018)0002 Case No. 2017/1108	K	*v.*	NSPA
AT(PRE-O)(2018)0003 Case No. 2017/1105	L	*v.*	JFC Brunssum
AT(PRE-O)(2018)0003 Case No. 2018/1261	R	*v.*	NCIA
AT(PRE-O)(2018)0004 Cases Nos. 2018/1256-1257	V	*v.*	NCIA
AT(PRE-O)(2018)0005 Case No. 2018/1265	R	*v.*	NCIA
AT(PRE-O)(2018)0006 Case No. 2018/1266-1271	P	*v.*	CMRE
AT(PRE-O)(2018)0006 Case No. 2018/1264	E	*v.*	NAEW&CF GK
AT(PRE-O)(2018)0007 Case No. 2018/1272	L	*v.*	JFC Brunssum
AT(TRI-O)(2018)0001 Cases Nos. 2017/1127-1242	A *et al.*	*v*.	NATO IS
AT(TRI-O)(2018)0002 Case No. 2017/1104	K	*v.*	AAC Ramstein
AT(TRI-O)(2018)0003 Case No. 2016/1102	G	*v.*	NCIA
AT(TRI-O)(2018)0004 Cases Nos. 2018/1262-1263	H, S	*v.*	NAEW&CF GK

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

7 May 2018 AT-J(2018)0004

Judgment

Case No. 2017/1247

DA

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 27 April 2018

Original: English

Keywords: lack of proper previous administrative review; res judicata.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 15 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Support and Procurement Agency (NSPA), dated 8 September 2017 and registered on 11 October 2017 as Case No. 2017/1247, by Mrs DA.

2. The respondent's answer, dated 11 December 2017, was registered on 18 December 2017. The appellant's reply, dated 16 January 2018, was registered on 19 January 2018. On 13 February 2018, respondent informed that it did not see the need to provide a rejoinder.

3. The Panel held an oral hearing on 15 March 2018 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

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

5. Appellant entered into service with the NSPA in November 1986. From 1 January 2014 she occupied a B5 post as technician under an indefinite duration contract.

6. On 12 May 2014, appellant was notified, in a letter by the General Manager (GM) dated 5 May 2014, that her contract with the NSPA would be terminated on 31 December 2014 owing to the suppression of her post in accordance with the Agency's 2015 Organizational and Personnel Establishment proposal, subject to Agency Supervisory Board (ASB) approval by the end of December 2014.

7. On 26 May 2014, appellant sent a letter to the GM contesting termination of her contract and on 4 June 2014 she submitted a complaint in line with Article 61.3 and Article 4 of Annex IX NATO Civilian Personnel Regulations (CPR). Her complaint was rejected by the GM on 3 July 2014.

8. On 28 August 2014, appellant submitted an appeal with the Tribunal, registered under Case No. 2014/1033. On 30 October 2015 the Tribunal rendered its judgment.

9. On 22 December 2015, appellant submitted to the Tribunal a request for a re-hearing in accordance with Article 6.8.4 of the CPR. On 8 April 2017, the Tribunal rendered its Order AT(TRI-O)(2016)0002, denying the request.

10. On 23 December 2016 appellant wrote a complaint letter to the NSPA GM, in accordance with Article 61 of the CPR. Appellant complained about her "*treatment and wrongful dismissal as a long term NSPA employee*". She requested compensation of € 320.000.

11. On 29 May 2017 appellant wrote again to the GM referring to the 23 December complaint. The GM replied on 12 June 2017 informing appellant that her case against the organization had been closed. Appellant further wrote to the GM on 18 June 2017 claiming that Case 2014/1033 had a different subject.

12. On 8 September appellant introduced the present appeal.

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

(i) The appellant's submission

13. In her submissions, appellant centers on NSPA's non-responsive attitude, disregard of her requests, and disrespect of the NATO regulations. In particular appellant alleges: 1) NSPA's abusive and selective application of the NATO Rules and Regulations by failing to process her complaint properly and by ignoring and selectively applying the procedures; and 2) a dictatorial and humiliating top-down attitude by NSPA, which ignored her correspondence and replied to different subjects than those she raised, in an humiliating way.

14. Appellant's letter of 23 December 2016 to the NSPA GM, states: "*The complaint is based on the wrongful suppression of my post, bullying and mobbing, for a disregard of NATO Rules, Regulations and Procedures and for mis-use of funds and budgets*".

15. Appellant also encloses with her submissions extensive documentation relating to alleged harassment, including written testimonies by several persons. Appellant further stresses the lack of any consideration or of follow-up by the Agency of the attempts she made to denounce the situation, going back over many years, and which had a serious impact on her health.

16. Appellant rejects respondent's view that the present appeal is an attempt to reopen the 2014 case, which the Tribunal already decided and dismissed on procedural grounds. Appellant maintains that, notwithstanding the fact that the 2014 case was not examined on the merits, it was about the wrongful suppression of her post and its reasons, while the present appeal is about NSPA's non-compliance with the CPR, her mobbing/harassment, and her denunciation of the misuse of NATO funds.

17. In her appeal, appellant requests, *inter alia*, that the Tribunal:
- condemn NSPA to respect NATO rules and procedures;
- condemn NSPA to reply to her complaint dated 23 December 2016;
- condemn NSPA to provide reasons for having ignored appellant's complaint and her freedom of information request;
- condemn NSPA to pay an indemnity for moral damages of €25.000; and

- condemn NSPA to pay an indemnity of €6.800 for administrative expenses as well as all other related costs.

18. At the hearing appellant's counsel re-formulated the *petitum* and requested the Tribunal: a) to note NSPA's attitude of not responding to appellant, not submitting her claim on harassment to a Complaints Committee and not providing a mediation proceeding; b) to provide adequate compensation.

(ii) The respondent's contentions

19. Respondent disputes admissibility of the appeal.

20. Respondent refers to the Tribunal's judgment in Case No. 2014/1033 and to Article 6.8.4(a) of the CPR, providing that the judgments of the Tribunal are final and not subject of any type of appeal by either party. Respondent also refers to Order AT(TRI-O)(2016)0002, rejecting appellant's request for a re-hearing, which was denied as not meeting the conditions foreseen by the regulations.

21. Respondent views the present appeal as an attempt to reopen the previous case which was based on the wrongful suppression of post, bullying and mobbing. Respondent stresses that Tribunal already ruled, recalling that Case No. 2014/1033 was declared inadmissible.

22. Further, respondent contends that the appeal is subject to Articles 61 and 62 of the CPR requiring a "*decision affecting [their] conditions of work … to be contested under the set of rules described in Chapter XIV of the CPR*". In her present appeal, the appellant did not challenge any decision taken by the HONB.

23. Respondent rejects any request for damages as not supported by documentation or evidence.

24. Respondent requests the Tribunal to:
- declare the appeal inadmissible; and
- if declared admissible, to declare it unfounded and reject all of appellant's requests.

D. Considerations and conclusions

25. The core of the controversy lies in the appellant's allegation that the organization did not properly address her complaint about harassment. From appellant's point of view the current dispute was formally started with her letter of 23 December 2016. The Tribunal notes that two different questions are thus presented in this case: a) whether the required administrative procedure was complied with in connection with the present appeal; and b) examination of the relationship between the present appeal's submissions and those that were subject of the Tribunal's previous judgment in Case No. 2014/1033.

26. As to the first question, pursuant to Articles 61 and 62 of the CPR, the internal dispute settlement system obliges complainants to follow a number of steps before they may lodge an appeal. In accordance with these rules, Article 6.3.1 of Annex IX to the CPR provides that an appeal submitted to the Tribunal shall only be entertained after the appellant has exhausted all available channels for submitting complaints under this Annex.

27. The Tribunal remarked in its judgment of 17 November 2016 (Case No. 2016/1071) that "*Good administration dictates that every complaint should be answered within a reasonable time frame. Certainly there is no provision in the CPR that specifies the time frame beyond which the Administration's silence in response to a complaint is regarded as an implicit decision to dismiss the complaint*". It held that by analogy with Article 6.3.1 c) of Annex IX, this duration cannot be less than thirty days. It follows that appellant could have considered the lack of response to her claim of 23 December 2016 as an implicit negative decision. However, appellant did not appeal that implicit decision. Moreover, the factual circumstances described show that appellant also failed to utilize the pre-contentious procedure after the organization's explicit response contained in the e-mail dated on 12 June 2017, which recalled that this Tribunal had already definitively ruled on appellant's earlier claims. As a consequence, the administrative review procedure was not properly followed as required by Article 61 of the CPR and Article 2 of its Annex IX.

28. As to the second question identified above, appellant's submission urges that the organization failed in its duty to respond adequately to her allegation of harassment. The Tribunal observes, however, that the current appeal reproduces requests already made by appellant in Case No. 2014/1033. That previous appeal challenged the termination of her contract claiming that it was founded, inter alia, on personal matters and recalled the mobbing/harassment issues (*cf.* paragraph 14 of NATO Tribunal judgment of 8 April 2016). Respondent explicitly rejected those claims on the grounds that they had not been properly addressed in accordance with the CPR provisions (*cf.* paragraph 19 of that judgment).

29. As a consequence, the subject of the current appeal has thus exactly and clearly already been addressed in the previous dispute submitted to the Tribunal. The Tribunal is thus faced with a situation of *res judicata*, since the parties, the subject matter of the appeal and the cause of action match those of the aforementioned earlier case. This conclusion is not altered by the fact that the question of the alleged harassment at the time took the form of a challenge against the end of appellant's contract. The allegation of unfairness in the termination of the contract was founded on the same facts and the same qualification of them by appellant.

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

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

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 27 April 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

15 May 2018 AT-J(2018)0005

Judgment

Case No. 2017/1248

MH

Appellant

v.

HQ NATO Airborne Early Warning and Control Force

Respondent

Brussels, 7 May 2018

Original: English

Keywords: hazard allowance; austere conditions allowance; security assessment.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 14 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the HQ NATO Airborne Early Warning and Control Force (HQ NAEW&CF) dated 26 September 2017, and registered on 10 October 2017 as Case No. 2017/1248, by Mr MH. The appeal contests denial of appellant's request to receive hazard allowance for the period in 2017 when he was deployed to NATO Forward Operating Base (FOB) Konya, located at the 3rd Main Jet Airbase, a Turkish military installation in Konya, Turkey.

2. Respondent's answer, dated 11 December 2017, was registered on 18 December 2017. Appellant's undated reply was received and registered on 29 January 2018. The respondent's rejoinder, dated 20 February 2018, was registered on 21 February 2018.

3. The Panel held an oral hearing on 14 March 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

5. Appellant is an aircraft technician assigned to HQ NAEW&CF at Geilenkirchen, Federal Republic of Germany. He was deployed to FOB Konya from 21 March 2017 to 21 April 2017. Appellant received austere conditions allowance and dislocation allowance while deployed. However, he did not receive hazard allowance because the contingent commander had certified prior to his deployment that conditions at 3rd Main Jet Airbase did not satisfy the requirements for hazard allowance.

6. On 8 June 2017, he sought administrative review of his May 2017 pays lip, which he received that same day, because it did not include hazard allowance for the period of his deployment. This request was denied on 27 June 2017. Appellant's request for further administrative review, dated 16 July 2017, was rejected on 20 July 2017. Appellant then submitted a complaint to the Head of NATO Body on 4 August 2017 under Article 61.2 of the NATO Civilian Personnel Regulations (CPR). His complaint was denied on 17 August 2017.

7. Annex XIV of the CPR regulates participation of NATO international civilian personnel in Council-approved operations and missions. Under Article 8.1 of Annex XIV, the senior NATO Military Commander responsible for a deployed location "*must establish*

and certify whether the level of risk is acceptable to allow staff to be deployed and, once in theatre, whether the level of risk is acceptable to allow staff to remain there."

8. Under Article 11.1 of Annex XIV, "*Heads of NATO bodies shall inform staff of the provisions concerning remuneration and benefits relating to Council-approved Operations and Missions as set out in C-M(2005)0041, C-M(2010)0115 and C-M(2010)0034*."

9. C-M(2005)0041, dated 21 April 2005, addresses participation of NATO civilians in NATO Council-approved operations and missions. Enclosure 2 to Appendix 1 of Annex 1 of that document states, in relevant part:

> 1.3. Compensation for difficult conditions
>
> 1.3.1 All civilians who are assigned on deployment will be entitled to the payment of the following allowances, which maybe cumulated, for hazardous or austere conditions to which the civilian staff member is deployed.
>
> (i) Hazard allowance: Civilian staff members will be entitled to the payment of EUR 40 per day if they are deployed to locations where the level of risk, while acceptable, is significantly higher than at the home duty station, e.g., requiring restricted freedom of movement while off-duty.

10. C-M(2010)0034, dated 26 March 2010, revises the system of deployment allowances for civilian staff based on a report prepared by the Advisory Group of Financial Counsellors. Annex 1 to CM(2010)0034 establishes three different levels of hazard allowance reflecting different levels and types of hazard, defined as follows:

> Level 1: Duty stations where staff are exposed to extreme hardships and very dangerous conditions such as war, active hostilities or insurgencies and where massive danger is due to the likelihood of:
> - Being under fire or air attack;
> - Organized armed action;
> - Widespread terrorist activity; and/or
> - Comparable hardships and hazards.
>
> Level 2. Duty stations where civilian staff are exposed to severe hardships, typical of states with weak state structures and where danger is due to:
> - A high level of organized crime (including piracy);
> - An exceptional amount of violent crime;
> - A dysfunctional security sector; and/or
> - Comparable hardships and hazards.
>
> Level 3. Duty stations where civilian staff are exposed to great hardships, typical for a high level of violence among the civilian population and where danger is due to:
> - Readiness of the civilian population to resort to violence e.g. in post conflict situations;
> - Widespread weapons possession among the civilian population
> - Geographically restricted state authority; and/or

- Comparable hardships and hazards.

11. Annex 1 to C-M(2010)0034 also addresses the conditions for austere conditions allowance. Among circumstances considered as austere conditions are "*restricted personal movement and privacy*."

12. C-M(2010)115, dated 17 December 2010, contains several revisions of deployment policy. Paragraph 19 of Annex 1 to that document recommends that the Council "*approve the revised text of CM(2005)0041 (Annex 1, Appendix 1, enclosure 2) at Appendix 2 to Annex 1 to this report"* (emphasis added). Thus, the new text at Appendix 2 of C-M(2010)115 revises and supersedes the previous Enclosure 2 to Appendix 1 of Annex 1 of CM(2005)0041. The superseded material includes the language quoted above authorizing hazard allowance for staff members deployed to locations with a level of risk significantly higher than at their home duty stations.

13. C-M(2010)115 adopts the new standards for hazard allowance approved in C-M(2010)0034. It thus replaces the "one size fits all" standards in C-M(2005)0041 with a three-tiered system. Under this system, Level 1, which appellant contends best describes his situation while deployed to FOB Konya, involves:

> Duty stations where staff are exposed to extreme hardships and very hazardous conditions such as war, active hostilities or insurgencies and where massive danger is due to the likelihood of: being under fire or air attack; organized armed action; widespread terrorist activity; and/or comparable hardships and hazards.

14. C-M(2010)115 also adopts the standards for grant of austere conditions allowance approved in C-M(2010)0034, in particular, that "*austere conditions*" that may justify grant of the allowance include "*restricted personal movement and privacy*."

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

(i) Appellant's contentions

15. Appellant contends that the claim is admissible, as he satisfied the appeals procedure established by Annex IX of the CPR, and the present appeal was filed within 60 days of the 17 August 2017 rejection of his complaint.

16. Appellant observes that his normal duty station (Geilenkirchen Germany) is at NATO security state ALPHA, but the area on the Konya air base where he worked was at state BRAVO, and his dormitory was in an on-base area at the higher state CHARLIE. In appellant's view, this difference entitles him to receive hazard allowance for the period of his deployment.

17. As, appellant's representative clarified at the hearing, appellant regards the standard for hazard allowance under C-M(2005)0041 as applicable. (As noted above, C-M(2005)0041 authorized the allowance where the level of risk at the deployment

location is significantly higher than at the home duty station.) Appellant's representative contended that C-M(2010)115 did not amend or delete C-M(2005)0041.

18. Appellant also cites a one-page August 2015 Commander's Policy Letter issued by the Acting Commander of the E-3A Component, stating that "[*t]he recent violence on Turkey's southern border is cause for concern for personnel safety. As a result FOB Konya has increased their security status. Violent extremist organizations create an increased risk of terrorism for NATO military force assigned to or operation [sic] from Turkey.*" The Policy Letter continues: *"[w]hile operating from FOB Konya, all E-3A Component personnel are prohibited from leaving the confines of the Konya airbase*". Appellant submits that the Commander's letter further demonstrates the existence of threat requiring hazard allowance.

19. Appellant disputes HQ NAEW&CF's arguments that any threat existed outside of the airbase, and that physical security measures and guards provided security within the base. In appellant's submission, these security measures actually show the existence of threats warranting payment of hazard allowance.

20. Appellant also rejects respondent's argument that he received austere conditions allowance on account of his confinement to base while deployed. In appellant's view, his confinement to base was on account of the threat of terrorism, so that he should receive both hazard allowance and austere conditions allowance.

21. In his reply, appellant suggested an additional argument that was further explained at the hearing. This involved what appellant viewed as an inconsistency or deficiency in the detachment's commander's certification that hazard allowance was not authorized.

22. The certification was made on a prescribed form headed by the words: "*In line with reference B, [Detachment Commander] hereby certifies that level of risk at the deployment location and order transit locations, related to the deployment of NICs is … (Check one box)*".

23. The form then contained containing four boxes, arranged from top to bottom. The first box, which was checked by the detachment commander on 17 March 2017, was followed by the words "***No risk*** - *hazard allowance not applicable*" (bold face in original).

24. The three remaining boxes were captioned respectively "Level 1", "Level 2", and "Level 3", each followed by the wording of the respective threat levels established by C-M(2010)115. None of these boxes was checked. Thus, the detachment commander checked the first box while leaving blank the other three setting out the differing threat levels warranting hazard allowance.

25. There was no dispute that in checking the first box and not the other three, the detachment commander relied upon a security assessment by the commander of respondent's Security Squadron. This security assessment was available to appellant and his representative and to the Tribunal. *Inter alia*, it described and favorably assessed security arrangements at the 3rd Main Jet Airbase. The assessment included a diagram

listing eight different potential threats "*in the Konya region to include the 3rd Main Jet Airbase*." One of these was identified as "N/A" (not applicable) and six as "low". An eighth was listed as "medium".

26. Appellant did not contest the correctness of this security assessment and did not ask the Tribunal to do so. However, in appellant's view, it was questionable and inconsistent for the detachment commander to check a box captioned ""*No risk - hazard allowance not applicable*"" when the underlying security assessment identified six areas of low risk and one area of medium risk. For appellant, the fact that the assessment did so demonstrated the existence of risk entitling him to hazard allowance. Accordingly, the decision denying his request for the allowance should be annulled, and he should be granted it for the period of his deployment.

27. Appellant also referred to a case of Legionnaires Disease at the dormitory where he was quartered that led to a suspension of showering while showers were cleaned. However, appellant confirmed that this was cited to show that austere conditions allowance was justified, not as an additional basis to claim hazard allowance.

28. In his appeal, appellant requests:
- "*Enactment of Hazard Allowance at the corresponding level which the Tribunal should deem to be the most accurate reflection of the level of hazard which exists*" or alternatively
- *"[i]f it is not within the Tribunals competence to select the level; I would seek the payment of Level 1…*" and
-"*Reimbursement of any legal, travel, accommodation and lost work days to attend the Tribunal proceedings for myself and potential representative*."

(ii) Respondent's contentions

29. Respondent does not dispute admissibility.

30. Respondent contests the appeal, contending that correct procedures were followed in assessing whether hazard allowance should be authorized. The disputed decision reflected a well-informed written risk assessment by the appropriate security officer, which was subsequently updated. This risk assessment supported the detachment commander's conclusion that NATO civilians were not subject to any of the three risk levels specified under C-M(2010)115.

31. In respondent's view, conditions inside the protected perimeter of Turkey's 3rd Main Jet Airbase at FOB Konya and appellant's dormitory did not meet any of the three defined levels of risk. According to respondent, "[i*]nside the protected perimeter, there is no exposure to threats such as those at urban centers, public places and non-protected official buildings and locations*."

32. Respondent further contended that confinement to the airbase did not show the presence of risk within the base, and instead reflected concerns about the security situation outside. The incident of Legionnaire's disease was reflected in the payment of austere conditions allowance and did not justify hazard allowance.

33. Respondent maintained that the more recent and detailed definitions of the three risk levels under C-M(2010)115 constituted *lex specialis* and *lex posterior*. They thus take precedence over C-M(2005)0041 and render further consideration of it unnecessary. In respondent's view, the specific requirements of either levels 1, 2, or 3 under C-M(2010)115 are not met.

34. Respondent requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

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

36. Appellant emphasized that the NATO security state at his deployed location was higher than at his home station, contending that the governing standards included the standard under in C-M(2005)004, which authorized the allowance where risk at a staff member's deployed location is significantly higher than at the duty station.

37. The Tribunal does not agree that the prior standard under C-M(2005)0041 is relevant. As explained above, the Council's 2010 decision in C-M(2010)11 expressly amended the prior text of C-M(2005)0041 and substituted the new three-level system for assessing hazards. This is clear from the language in C-M(2010)11 (quoted above) specifying that the new text amends C-M(2005)0041. It is also clear from the structure of the new three-tier system. The old and new criteria for the allowance are simply not consistent. The more detailed and later criteria must govern.

38. Thus, the provision of C-M(2005)0041 cited by appellant no longer applies. The three levels of risk defined by C-M(2010)11 determine eligibility for hazard allowance, not the less detailed uniform standard under C-M(2005)0041.

39. Appellant also contended that his confinement to base while deployed to FOB Konya, the security measures at the base, the Commander's letter referring to security concerns in the host country, and the security assessment identifying six areas of "low" threat and one of "medium" threat demonstrated the existence of hazards satisfying the requirements of hazard level one.

40. This evidence must be weighed against the specific terms of hazard level one:

> Duty stations where staff are exposed to extreme hardships and very hazardous conditions such as war, active hostilities or insurgencies and where massive danger is due to the likelihood of: being under fire or air attack; organized armed action; widespread terrorist activity; and/or comparable hardships and hazards.

41. Thus, hazard level one creates a cumulative series of requirements. There must be "*extreme hardships*" and "*very hazardous conditions*". These must involve "*massive*

danger" due to the "*likelihood*" of circumstances such as being under fire or air attack or "*widespread terrorist activity*."

42. The evidence cited by appellant falls well short of meeting these requirements. In response to the Tribunal's question at the hearing, neither party could identify any security incidents involving NATO personnel inside the base. (Appellant referred to an anti-terrorism security operation by host country authorities in the city of Konya in July 2017 but could offer no details.)

43. Finally, appellant suggests a defect of procedure or appreciation by respondent in that that the contingent commander checked a box labeled "*No risk – hazard allowance not applicable*" on the prescribed form in which he certified that the conditions for hazard allowance were not met. Appellant contended that this was a logical impossibility, as the underlying security assessment identified six areas of "low" threat and one of "medium" threat. Hence, it was impossible to certify that there was "no risk."

44. Appellant's complaint in this regard emphasizes the wording of the form; as noted above, appellant does not dispute the security assessment underlying the commander's decision. The Tribunal agrees that the text accompanying the first box of the certification form would more accurately read "*No QUALIFYING risk – hazard allowance not applicable*." However, viewed fairly and in its entirety, it is clear that the form was intended to document the Commander's views regarding one of four possibilities. The Commander could certify that one of the three levels of threat specified in C-M(2010)11 existed. Or, the Commander could certify that none of them did, so that – as the second part of the caption accompanying the checked box states - "*hazard allowance [is] not applicable*". The Commander checked this box.

45. As the Tribunal has consistently indicated, such a decision is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere if the decision 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. Particularly given the high threshold set for hazard allowance level one and the detailed security assessment underlying the Commander's decision – which appellant's representative stated at the hearing that he did not dispute – the Tribunal has no basis to question the Commander's decision that the requirements of C-M(2010)11 were not met.

46. Finally, appellant invites the Tribunal to indicate the level of hazard allowance that it believes is warranted, if not Level 1. As noted above, the Tribunal has no basis to review the Commander's decision that the requirements of C-M(2010)11 were not met with respect any of the three specified levels of hazard.

47. Appellant's appeal is dismissed.

E. Costs

48. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- Appellant's appeal is dismissed.

Done in Brussels, on 7 May 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

15 May 2018 AT-J(2018)0006

Judgment

Case No. 2017/1250

JD

Appellant

v.

HQ NATO Airborne Early Warning and Control Force

Respondent

Brussels, 7 May 2018

Original: English

Keywords: hazard allowance; austere conditions allowance; security assessment.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John Crook judges, having regard to the written procedure and further to the hearing on 14 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the HQ NATO Airborne Early Warning and Control Force (HQ NAEW&CF) dated 7 November 2017, and registered on 15 November 2017 as Case No. 2017/1250, by Mr JD. The appeal contests denial of appellant's request to receive hazard allowance for the period in 2017 when he was deployed to NATO Forward Operating Base (FOB) Konya, located at the 3rd Main Jet Airbase, a Turkish military installation in Konya, Turkey.

2. Respondent's answer, dated 18 December 2017, was registered on the same day. Appellant's reply, dated 24 January 2018, was registered on 26 January 2018. The respondent's rejoinder, dated 20 February 2018, was registered on 21 February 2018.

3. The Panel held an oral hearing on 14 March 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

5. Appellant is an aircraft technician assigned to HQ NAEW&CF at Geilenkirchen, Federal Republic of Germany. He was deployed to FOB Konya from 24 April 2017 to 24 May 2017. Appellant received austere conditions allowance and dislocation allowance while deployed. However, he did not receive hazard allowance because the contingent commander had certified prior to his deployment that conditions at 3rd Main Jet Airbase did not satisfy the requirements for hazard allowance.

6. On 3 July 2017, appellant sought administrative review of his June 2017 pay slip because it did not include hazard allowance for the period of his deployment. It appears that this request was denied, because appellant then sought a second administrative review on 1 August 2017. This request was denied on 23 August 2017. Appellant then submitted a complaint to the Head of NATO Body on 9 September 2017. This was denied on 15 September 2017

7. Annex XIV of the NATO Civilian Personnel Regulations (CPR) regulates participation of NATO international civilian personnel in Council-approved operations and missions. Under Article 8.1 of Annex XIV, the senior NATO Military Commander responsible for a deployed location "*must establish and certify whether the level of risk*

is acceptable to allow staff to be deployed and, once in theatre, whether the level of risk is acceptable to allow staff to remain there."

8. Under Article 11.1 of Annex XIV, "*Heads of NATO bodies shall inform staff of the provisions concerning remuneration and benefits relating to Council-approved Operations and Missions as set out in C-M(2005)0041, C-M(2010)0115 and C-M(2010)0034*."

9. C-M(2005)0041, dated 21 April 2005, addresses participation of NATO civilians in NATO Council-approved operations and missions. Enclosure 2 to Appendix 1 of Annex 1 of that document states, in relevant part:

> 1.3. Compensation for difficult conditions
> 1.3.1 All civilians who are assigned on deployment will be entitled to the payment of the following allowances, which maybe cumulated, for hazardous or austere conditions to which the civilian staff member is deployed....
>
> (i) Hazard allowance: Civilian staff members will be entitled to the payment of EUR 40 per day if they are deployed to locations where the level of risk, while acceptable, is significantly higher than at the home duty station, e.g., requiring restricted freedom of movement while off-duty.

10. C-M(2010)0034, dated 26 March 2010, revises the system of deployment allowances for civilian staff based on a report prepared by the Advisory Group of Financial Counsellors. Annex 1 to CM(2010)0034 establishes three different levels of hazard allowance reflecting different levels and types of hazard. These are defined as follows:

> Level 1: Duty stations where staff are exposed to extreme hardships and very dangerous conditions such as war, active hostilities or insurgencies and where massive danger is due to the likelihood of:
> - Being under fire or air attack;
> - Organized armed action;
> - Widespread terrorist activity; and/or
> - Comparable hardships and hazards.
>
> Level 2. Duty stations where civilian staff are exposed to severe hardships, typical of states with weak state structures and where danger is due to:
> - A high level of organized crime (including piracy);
> - An exceptional amount of violent crime;
> - A dysfunctional security sector; and/or
> - Comparable hardships and hazards.
>
> Level 3. Duty stations where civilian staff are exposed to great hardships, typical for a high level of violence among the civilian population and where danger is due to:
> - Readiness of the civilian population to resort to violence e.g. in post conflict situations;
> - Widespread weapons possession among the civilian population
> - Geographically restricted state authority; and/or

- Comparable hardships and hazards.

11. Annex 1 to C-M(2010)0034 also addresses the conditions for austere conditions allowance. Among circumstances considered as austere conditions are "restricted personal movement and privacy."

12. C-M(2010)115, dated 17 December 2010, contains several revisions of deployment policy. Paragraph 19 of Annex 1 to that document recommends that the Council "*approve the revised text of CM(2005)0041 (Annex 1, Appendix 1, enclosure 2) at Appendix 2 to Annex 1 to this report"* (emphasis added). Thus, the new text at Appendix 2 of C-M(2010)115 revises and supersedes the previous Enclosure 2 to Appendix 1 of Annex 1 of CM(2005)0041. The superseded material includes the language quoted above authorizing hazard allowance for staff members deployed to locations with a level of risk significantly higher than at their home duty stations.

13. C-M(2010)115 adopts the new standards for hazard allowance approved in C-M(2010)0034. It thus replaces the "one size fits all" standards in C-M(2005)0041 with a three-tiered system. Under this system, Level 1, which appellant contends best describes his situation while deployed to FOB Konya, involves

> Duty stations where staff are exposed to extreme hardships and very hazardous conditions such as war, active hostilities or insurgencies and where massive danger is due to the likelihood of: being under fire or air attack; organized armed action; widespread terrorist activity; and/or comparable hardships and hazards.

14. C-M(2010)115 also adopts the standards for grant of austere conditions allowance approved in C-M(2010)0034, in particular, that "*austere conditions*" that may justify grant of the allowance include "*restricted personal movement and privacy*."

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

(i) Appellant's contentions

15. Appellant contends that he satisfied the appeals procedure established by Annex IX of the CPR. His appeal was filed within 60 days of the 15 September 2017 rejection of his complaint.

16. In his brief appeal, Appellant emphasizes that his normal duty station (Geilenkirchen Germany) is at NATO security state ALPHA, but the area on the Konya air base where he worked was at state BRAVO, and his dormitory was in an on-base area at the higher state CHARLIE. Appellant contends that this difference entitles him to hazard allowance for the period of his deployment.

17. In this regard, appellant's representative clarified at the hearing that appellant views the standard for hazard allowance under C-M(2005)0041 as applicable. (As noted above, C-M(2005)0041 authorized the allowance where the level of risk at the

deployment location is significantly higher than at the home duty station.) Appellant's representative contended that C-M(2010)115 did not amend or delete C-M(2005)0041.

18. As evidence of hazardous conditions in the deployment area, appellant emphasizes a one-page August 2015 Commander's Policy Letter issued by the Acting Commander of the E-3A Component. This document states: "[t*]he recent violence on Turkey's southern border is cause for concern for personnel safety. As a result FOB Konya has increased their security status. Violent extremist organizations create an increased risk of terrorism for NATO military force assigned to or operation [sic] from Turkey*." The Policy Letter continues: "[*w]hile operating from FOB Konya, all E-3A Component personnel are prohibited from leaving the confines of the Konya airbase*." Appellant submits that the Commander's letter further demonstrates the existence of threat requiring hazard allowance.

19. Appellant disputes respondent's contention, advanced in administrative review, citing the base's physical protection measures. In his view, "*I am pleased that Konya airbase has physical protection due to the increased threats, but I am still very concerned for my safety while deployed there*."

20. Appellant also dismisses as irrelevant respondent's position that he was granted austere conditions allowance on account of being confined to base. He observes that austere conditions and hazard allowances are cumulative, so that the grant of austere conditions allowance does not preclude hazard allowance.

21. In his two-page reply, appellant advances a number of additional arguments in a few sentences and without supporting evidence. He suggests that a security certification made prior to his deployment is not valid; that commanders would not authorize hazard allowance even if warranted "*for fear of repercussion from higher command*"; that the security assessment underlying the certification shows a higher risk of terrorism than at his duty station in Germany; that he should have been billeted inside the more heavily guarded FOB, implying that he was billeted in a less secure location where some countries would not billet their personnel; that terrorists have weapons that can reach into the base from locations outside; and that in past deployments he received both austere conditions and hazard allowances.

22. At the hearing, appellant's representative advanced another argument not contained in appellant's written submissions. This involved what was viewed as an inconsistency or deficiency in the detachment commander's certification that hazard allowance was not authorized.

23. The certification was made on a prescribed form headed by the words: "*In line with reference B, [Detachment Commander] hereby certifies that level of risk at the deployment location and order transit locations, related to the deployment of NICs is...(Check one box)*".

24. The form then contained four boxes, arranged from top to bottom. The first box, which was checked by the detachment commander on 17 March 2017, was followed by the words "***No risk*** - *hazard allowance not applicable*" (bold face in original).

25. The three remaining boxes were captioned respectively “Level 1”, “Level 2”, and ”Level 3”, each followed by the wording of the respective threat levels established by C-M(2010)115. None of these boxes was checked. Thus, the detachment commander checked the first box while leaving blank the other three setting out the different threat levels warranting hazard allowance.

26. There was no dispute at the hearing that in checking the first box and not the other three, the detachment commander relied upon a security assessment by the commander of respondent’s Security Squadron. This security assessment was available to appellant and his representative and to the Tribunal. Inter alia, it described and favorably assessed security arrangements at the 3rd Main Jet Airbase. The assessment included a diagram listing eight different potential threats “*in the Konya region to include the 3rd Main Jet Airbase*.” One of these was identified as “N/A” (not applicable) and six as “low”. An eighth was listed as “medium”.

27. Appellant’s representative did not contest the correctness of this security assessment and did not ask the Tribunal to do so. However, he contended that it was questionable and inconsistent for the detachment commander to check a box captioned ““*No risk - hazard allowance not applicable*”” when the underlying security assessment identified six areas of low risk and one area of medium risk. In his view, the fact that the assessment did so demonstrated the existence of risk entitling appellant to hazard allowance. Accordingly, the decision denying appellant’s request for the allowance should be annulled, and he should be granted it for the period of his deployment.

28. In his appeal, appellant seeks:
-- “*the enactment of hazard allowance level 1 and payment retroactively*,” and
-- “*reimbursement of any legal, travel, accommodation, and lost working days to attend proceedings associated with this appeal*.”

(ii) Respondent’s contentions

29. Respondent does not dispute admissibility.

30. Respondent contests the appeal, contending that correct procedures were followed in assessing whether hazard allowance should be authorized. The disputed decision reflected a well-informed written risk assessment by the appropriate security officer. In particular, that assessment found appellant’s on-base accommodation facility “*to be secure and safe to be used as accommodation for personnel*.” This risk assessment supported the detachment commander’s conclusion that NATO civilians were not subject to any of the three risk levels specified under C-M(2010)115 inside the protected perimeter of Turkey’s 3rd Main Jet Airbase.

31. In respondent’s view, entitlement to hazard allowance at any level “*is conditional upon defined levels of risk at duty stations where staff are* exposed *to extreme/severe/great hardships where danger is due to defined situations. Inside the protected perimeter of the TUR 3rd Main Jet Airbase there is no exposure to threats such as those at urban centers, public places and other non-protected buildings and locations*” (emphasis in original).

32. Respondent further contends that confinement to the airbase did not show the presence of risk within the base, and instead reflected concerns about the security situation outside.

33. Respondent maintains that the more recent and detailed definitions of the three risk levels under C-M(2010)115 constituted *lex specialis* and *lex posterior*. They thus take precedence over C-M(2005)0041.

34. With respect to appellant's new arguments in his reply, respondent observes, inter alia, that the 17 March 2017 certification (dated about five weeks before appellant's deployment) was made by the proper officer on the basis of a full and proper security assessment and remained valid; that there was no indication that the certifying officer was "*in fear of repercussion from higher command*" and that, to the contrary, his certification reflected an informed decision involving inputs from various security sources; that appellant was properly billeted in a secure military compound; that some countries did not use this same facility for financial and not security reasons; and that the fact that appellant received hazard allowance on other deployments was not determinative, as "*the actual level of risk, for example during deployments to Afghanistan was different to the deployment in question to FOB Konya*."

35. Respondent requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

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

37. Appellant emphasized that the NATO security state at his deployed location was higher than at his home station, contending that the governing standards included the standard under in C-M(2005)004, which authorized the allowance where risk at a staff member's deployed location is significantly higher than at the duty station.

38. The Tribunal does not agree that the prior standard under C-M(2005)0041 is relevant. As explained above, the Council's 2010 decision in C-M(2010)11 expressly amended the prior text of C-M(2005)0041 and substituted the new three-level system for assessing hazards. This is clear from the language in C-M(2010)11 (quoted above) specifying that the new text amends C-M(2005)0041. It is also clear from the structure of the new three-tier system. The old and new criteria for the allowance are simply not consistent. The more detailed and later criteria must govern.

39. Thus, the provision of C-M(2005)0041 cited by appellant no longer applies. The three levels of risk defined by C-M(2010)11 determine eligibility for hazard allowance, not the less detailed uniform standard under C-M(2005)0041.

40. Appellant also contended that his confinement to base while deployed to FOB Konya, the security measures at the base, the Commander's letter referring to security

concerns in the host country, and the security assessment identifying six areas of "low" threat and one of "medium" threat demonstrated the existence of hazards satisfying the requirements of hazard level one.

41. This evidence must be weighed against the specific terms of hazard level one:

> Duty stations where staff are exposed to extreme hardships and very hazardous conditions such as war, active hostilities or insurgencies and where massive danger is due to the likelihood of: being under fire or air attack; organized armed action; widespread terrorist activity; and/or comparable hardships and hazards.

42. Thus, hazard level one creates a cumulative series of requirements. There must be "*extreme hardships*" and "*very hazardous conditions*". These must involve "*massive danger*" due to the "*likelihood*" of circumstances such as being under fire or air attack or "*widespread terrorist activity*."

43. The evidence cited by appellant falls well short of meeting these requirements. In response to the Tribunal's question at the hearing, neither party could identify any security incidents involving NATO personnel inside the base. (Appellant referred to an anti-terrorism security operation by host country authorities in the city of Konya in July 2017 but could offer no details.)

44. Finally, at the hearing, appellant's representative suggested a defect of procedure or appreciation by respondent in that the contingent commander checked a box labeled "*No risk – hazard allowance not applicable*" on the prescribed form in which he certified that the conditions for hazard allowance were not met. Appellant's representatives contended that this was a logical impossibility, as the underlying security assessment identified six areas of "low" threat and one of "medium" threat. Hence, it was impossible to certify that there was "no risk."

45. The argument in this regard emphasizes the wording of the form; as noted above, appellant does not dispute the security assessment underlying the commander's decision. The Tribunal agrees that the text accompanying the first box of the certification form would more accurately read "*No QUALIFYING risk – hazard allowance not applicable*." However, viewed fairly and in its entirety, it is clear that the form was intended to document the commander's views regarding one of four possibilities. The commander could certify that one of the three levels of threat specified in C-M(2010)11 existed. Or, the commander could certify that none of them did, so that – as the second part of the caption accompanying the checked box states - "*hazard allowance [is] not applicable*". The commander checked this box.

46. As the Tribunal has consistently indicated, such a decision is subject to only limited review by a tribunal (cf. Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere if the decision 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. Particularly given the high threshold set for hazard allowance level one and the detailed security assessment underlying the commander's decision – which

appellant's representative made clear at the hearing that he did not dispute – the Tribunal has no basis to question the commander's decision that the requirements of C-M(2010)11 were not met.

47. Appellant's appeal is dismissed.

E. Costs

48. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- Appellant's appeal is dismissed.

Done in Brussels, on 7 May 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 June 2018 AT-J(2018)0007

Judgment

Case No. 2017/1112

PP

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 June 2018

Original: English

Keywords: NCIA Contract Policy; successive definite duration contracts; resignation before the end of the contract.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Christos A. Vassilopoulos and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure, the appellant's request to forsake an oral hearing and the submissions of the parties in this regard, and having deliberated on the matter at its session held on 15 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA) dated 19 June 2017, and registered on 22 June 2017 as Case No. 2017/1112, by Mr PP contesting, inter alia, the Organization's refusal to renew his contract.

2. The respondent's answer, dated 21 August 2017, was registered on 28 August 2017. The appellant's reply, dated 26 September 2017, was registered on 5 October 2017. The respondent's rejoinder, dated 6 November 2017, was registered on 9 November 2017.

3. By reference to Article 6.7.1 of Annex IX of the NATO Civilian Personnel Regulations (CPR) and Rule 25 of the Rules of Procedure of the Tribunal, in his reply, appellant requested that the Tribunal limit the judicial procedure to the written submissions and forsake the oral hearing. In its rejoinder, respondent did not formally oppose appellant's request.

4. Having examined the positions of the parties, the Tribunal decided not to open the oral procedure and consequently the proceedings were closed on 6 November 2017, the date of the deposit by respondent of its statement of rejoinder.

5. The Tribunal deliberated on the appeal at its session on 15 March 2018.

B. Factual background of the case

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

7. Appellant joined the Allied Joint Force Command Headquarters (JFC) in Brunssum on 1 November 2008, as an Administrative Assistant, on a definite duration – seconded – contract expiring on 31 January 2010. When this contract expired, appellant was offered a definite duration – non-seconded – contract for the same position for a period of five months (1 February 2010 to 30 June 2010).

8. On 29 April 2010, appellant signed a one-year definite duration – non-seconded – contract as a Technician (Web Administration) with the NATO CIS Services Agency (NCSA) taking effect from 1 May 2010 to 30 April 2011. Appellant was, in March 2011, offered, for the same position of Technician (Web Administration), a new definite duration contract for the period from 1 February 2011 to 30 April 2014.

9. With the implementation of the Agencies Reform with effect from 1 July 2012, NCIA replaced, inter alia, the NCSA. In September 2013, respondent offered appellant, for the same position of Technician (Web Administration), a new definite duration contract of three

years (1 May 2014 to 30 April 2017).

10. By decision dated 31 August 2016, appellant was informed by NCIA's General Manager that his contract would not be renewed on expiry and that the reason for the non-renewal was "the Agency's requirement for turnover of staff".

11. Appellant contested this decision and initiated the pre-litigation procedure by entering a first request for administrative review, which was introduced on 26 September 2016 in accordance with Article 2.2 of Annex IX to the CPR. In this request, appellant recalled first that his position was part of the NCSA Peace Establishment (PE) prior to the creation of the NCIA and stressed that the rotation rule invoked for non-renewal of his contract was not mentioned in the job description for his post or in his contract. Respondent rejected this request on 17 October 2016, recalling that the decision on non-renewal of his contract was fully in line with the NCIA Policy and, particularly, with Directive 2.1 on Contract Policy of 1 January 2013 (Directive 2.1) confirming that the reason for the non-renewal was the need for staff rotation.

12. On 28 October 2016, appellant requested a further administrative review of the above-mentioned rejection. According to appellant, Directive 2.1 determines the rotational nature of a number of positions within the NCIA on the basis of objective parameters identifying such positions. For appellant the justification invoked for the non- renewal of his contract did not satisfy this requirement. In addition, appellant stressed that his contractual situation was covered by the NCSA Contract Policy and that the rotation rule invoked by respondent for non-renewal of his contract applied only to staff members recruited after 1 July 2012.

13. On 9 November 2016 appellant met with NCIA's Chief of Staff together with the Head, Human Resources. They discussed the rationale behind the Agency's decision and appellant was allowed to explain his personal situation and outline his arguments in greater detail.

14. The Chief of Staff answered appellant's request for a further administrative review on 18 November 2016. He referred to the talk they had had on 9 November. He stressed that the NCIA Contract Policy had been widely communicated to staff and that it superseded the NCSA policy. He repeated that appellant had been informed that his contract would not be renewed for reasons of turnover and that all NCIA posts may be subject to rotation. He concluded that the earlier conclusion in the decision dated 31 August 2016 concerning the reason for the non-renewal of appellant's contract was correct and in line with the NCIA Contract Policy. He added that since appellant's post was not being relocated to another country or deleted, appellant could not be considered as a redundant staff member under the terms of the CPR.

15. On 22 November 2016 appellant wrote a memorandum to the NCIA General Manager. He explained that the termination of contract put him in a difficult situation, as his son would be completing his secondary education in July 2017 and would commence his university studies thereafter. He referred to the conversation he had had with the Chief of Staff and Head, Human Resources on 9 November 2016, who had recognized that the six months available was a very short time to seek new employment and a suitable university, with accommodation, for his son. He recalled that they had said they would support a request for a contract extension of several months. He requested an extension of his

contract until 1 October 2017 to reduce the hardship the employment termination was likely to generate. This request was granted and, on 2 December 2016, appellant accepted an extension of five months until the end of September 2017.

16. On 15 December 2016, appellant submitted a complaint, requesting the establishment of a Complaints Committee, which was accepted by respondent on 22 December 2016. The Complaints Committee issued its report on 23 March 2017.

17. Appellant decided to leave the Agency with effect from 31 March 2017.

18. By letter dated 21 April 2017, respondent informed appellant that it had decided to uphold its previous decision not to renew his contract. In particular, respondent stressed that the Complaints Committee found that the Agency had followed the correct process with regard to the contract policy in place and that appellant's contract fell under the NCIA Contract Policy.

19. It was under these circumstances that on 19 June 2017 appellant submitted the present appeal to the Tribunal.

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

(i) Appellant's contentions

20. Firstly, appellant contends that the decision of 31 August 2016 (the 'challenged decision') violates the provisions of Article 5.5.3 of the CPR. According to these provisions, following satisfactory performance during a definite duration contract, an indefinite duration contract under the conditions of Article 5.4 of the CPR is to be offered if the staff member has completed at least three years' continuous service under a definite duration contract. This is precisely the situation of appellant, who meets the requirement of satisfactory performance and has held an uninterrupted definite duration contract for more than three years. Article 5.5 of the CPR obligates respondent to examine on a case-by-case basis if the contracts are to be renewed or not on the basis of two criteria: satisfactory performance by the concerned staff member and the interests of the service.

21. Concerning, in particular, the 2015 performance cycle, on the basis of which appellant had his review for renewal of his contract, appellant stresses that this period was in fact a test phase and he did not know that the results in this cycle would be taken into account for the renewal of his contract. Insofar as the performance calibration is concerned, appellant argues that the provided regime is based on a system of "force" or "stack" ranking without meeting the requirement of Article 57.3 of the CPR. More generally, appellant claims that the provided performance process must be transparent. In contrast, appellant was not informed about the manager's discussion of his performance or about the decisive criteria on the basis of which his performance was reviewed; according to appellant there was also no explanation about how the evaluation of a staff member and his performance are articulated in order to find in favour or against the renewal of his contract. For that reason, the challenged decision must be annulled.

22. Appellant secondly claims that respondent must identify in advance the posts for which turnover is desirable for political and technical reasons. This requirement is also

confirmed by the fact that on the website of the NCIA the rotation rule is exclusively linked with the job description of the post to offer. Appellant's post was never identified by respondent as being required for a limited period of time. For that reason, the challenged decision based on the rotation rule for non-renewal of appellant's contract must be annulled.

23. Thirdly, appellant considers that by using the powers conferred by the Preamble of the CPR (point (vii)(a)), respondent adopted Directive 2.1 without however taking care of the general principles of international administrative law.

24. In particular, under the NCSA contractual framework applicable in 2005, civilian staff members with a contract of employment with NCSA were informed that the NCSA Contract Policy was to offer a one-year contract with subsequent contracts of three-year duration for as long as the post remained a valid requirement. Once the ten-year threshold was reached, an indefinite duration contract would be offered to the concerned civilian staff member (the so-called NCSA "1-3-3-3-indef policy"). With the implementation of the Agencies Reform, NCIA replaced, inter alia, the NCSA; in a letter sent to civilian staff members, including appellant, by respondent, dated 1 July 2012, appellant was informed that his contract of employment would continue with the NCIA and that "*all terms and conditions of his employment contract remain unchained*". On the basis of this letter, appellant had legitimate expectations that the previous 1-3-3-3- indef policy would continue to apply for contracts, such as his contract, concluded prior to 1 July 2012, and that a new contract policy could not modify this status quo. By adopting the new contract policy (Directive 2.1) applicable from 1 January 2013, respondent declared all the posts to be rotational, including the positions for contracts concluded before 2012 without any further explanation. This infringes the principle of legitimate expectations.

25. In addition, appellant stressed that Directive 2.1 makes no reference to repealing the respondent's previous assurance that "*all terms and conditions of (the) employment contract remain unchanged*" or any deviation from the previous 1-3-3-3-indef policy. In this regard, respondent failed to inform appellant of the negative consequences of the new contract policy provided by Directive 2.1, which suppressed this rule. Indeed, under the new framework, signing a new definite duration contract would bring a staff member concerned into a less favourable position than he had been in under the previous policy applicable within the NCSA. Respondent did not inform appellant at all about this matter, breaching the obligations deriving in this regard from the principle of the duty of care. More generally, appellant stressed also that by using restrictive channels (NATO Secret and NATO Restricted systems), the new policy was not communicated adequately for information to all staff members, in infringement of the requirement derived from the principle of good administration.

26. Fourthly, appellant contends that in adopting Directive 2.1, respondent implemented incorrectly the discretionary power in the field of the contract policy. Indeed, by declaring all the posts as subject to the rotation rule, Directive 2.1 suppresses in practice any discretionary power conferred by Article 5.5.3 of the CPR to respondent to offer an indefinite duration contract, in violation of the "interests of the service". In these conditions, appellant stresses that Directive 2.1 violates also Article 5.2 of the CPR. In this regard, appellant adds that in contrast to respondent's assertions in the written submissions before the Tribunal, the Complaints Committee stated in its report that the appellant had "*concerns regarding the changes to his contract terms and conditions that he had not properly*

understood due to reassurances given in the letter to all staff issued by the general manager".

27. In a more general context, appellant contends in his reply that it was necessary to launch the administrative review process and to bring the action before the Tribunal in order to have for the first time a clear view of respondent's position before the Tribunal. In this regard, appellant considers that the principle of equality of arms is violated during the administrative review process.

28. Appellant concludes that by adopting Directive 2.1, respondent adopted mandatory rules modifying those laid down by the CPR. Thus, Directive 2.1 is unlawful and consequently the challenged decision based on this Directive must be annulled.

29. Finally appellant considers that he suffered significant moral and material harm because of the application of an inadequate contract policy to his situation. On the basis of the applicable rules, he had the possibility to claim a contract renewal for at least two years, and consequently his claim of compensation in the amount of three to six months' salary is fully justified because the adoption of the challenged decision. The claim of compensation has also a more general scope because he is today out of the Organization and has no access to any relevant information to support his reasonable and fair claim.

30. Appellant requests:

- annulment of the 31 August 2016 decision not to renew his contract;
- declaration of the illegality of Directive 2.1;
- declaration to uphold the NCSA 1-3-3-3-indef policy for former NCSA staff members;
- payment of compensation equal to six months' salary, benefits, emoluments, pension contributions, step increases and health care contributions as well as subsistence costs for non-compliance with the provisions of the CPR on contacting and upholding an unlawful directive on which the challenged decision was based;
- alternatively, payment of compensation equal to three months' salary, benefits, emoluments, pension contributions, step increases and health care contributions as well as subsistence costs for non-renewal of contract for a definite duration of three years in the case that Directive 2.1 is upheld but with application of the NCSA 1-3-3-3-indef policy;
- more alternatively, payment of compensation for non-renewal of contract for the definite duration of two years for failure to justify properly the non-renewal vis-à- vis a two-year extension with the same evaluation and calibration result, i.e. two months' salary, benefits, emoluments, pension contributions, step increases and health care contributions as well as subsistence costs in the case that Directive 2.1 is upheld without application of the 1-3-3-3- indef policy;
- compensation for failure to act upon learning of a privacy infringement: ex aequo et bono set at €5.000;
- compensation for failure to provide appellant with the decision on his complaint in time: ex aequo et bono to be determined by the Tribunal;
- moral damages to be determined by the Tribunal ex aequo et bono for the "uncertainty and psychological anguish during the entire process of Agency transition, organizational disarray, unlawful policy making and continuation and unlawful performance evaluations in 2015"; and
- reimbursement in accordance with the CPR of expenses made by appellant or his

representative.

31. In his reply, appellant requested a copy of all the referenced texts mentioned in the report of the Complaints Committee and formulated different additional claims related to the administrative process and to the proceedings before the Tribunal. Lastly, appellant requested to limit the proceedings to the written submissions and to forsake the oral hearing.

(ii) Respondent's contentions

32. Firstly, respondent objects that even if the NCSA Contract Policy applied to NCSA staff members, indefinite duration contracts would only be considered upon reaching the threshold of 10 years' employment, subject to the interests of the service. This was not the situation of appellant, who worked at NATO for only nine years and two months.

33. In addition, respondent considers that under the NCSA Contract Policy the turnover of staff member's post was not excluded. Indeed, as pointed out by the NCSA Director in relation to the contract policy, the decision on renewal of a contract would always depend on the needs of the Organization as this is provided for in Article 5.5.3 of the CPR. For this reason, the challenged decision based on the rotation rule is valid and in line with the CPR.

34. Secondly, and in contrast to appellant's several claims concerning the lack and errors of communication related to the NCIA Contract Policy, respondent contends that the staff members were sufficiently informed, through the existing internal communication channels, about the new contract and had been invited to question the services about the new Directive 2.1. According to respondent, appellant signed a new contract with the NCIA which referred expressly to NCIA directives, and was fully aware of the impact of the new policy; however, he decided not to object to it or to question it further. Consequently, by adopting the new contract policy on the basis of which the rotation rule was provided, respondent acted in compliance with the duty of care and did not violate any general principle of international administrative law.

35. Insofar as appellant's legitimate expectations to continue to benefit from the NCSA 1-3-3-3-indef policy after the adoption by the NCIA of Directive 2.1 are concerned, respondent objects that no argument could be formulated in this regard. Indeed, by adopting this directive, respondent did not give any staff member a legitimate expectation that the previous contract policy applicable under the NCSA continued to be applicable for staff members concerned by this policy before the establishment of the NCIA. In addition, there is no legitimate expectation for appellant to be offered an indefinite duration contract. Indeed, the Organization enjoys the discretion to decide whether to award a further contract even after a staff member has served for ten or more years. In any event, this is not the situation of appellant, who served the Organization, as indicated, only for nine years and two months.

36. Concerning, thirdly, the alleged deviation of the new NCIA Contract Policy from the former NCSA Contract Policy, respondent contends that Directive 2.1 is entirely in line with Article 5.5.3 of the CPR. This directive – as the previous NCSA policy – is based on offering a succession of definite duration contracts in view of the interests of the service and in line with the CPR. In this respect, and as results from the wording used in Article 5.2 of the CPR which mentions "posts" in the plural form, the rotation rule covers all posts or

categories of posts.

37. Respondent recalls that in its case law, the Administrative Tribunal considered that according to Article 5.2 of the CPR the duration of a contract may be limited if the post has been previously identified as one in which rotation is desirable. In this regard, the Tribunal recognized that the Agency developed a specific contract policy where a general turnover clause is included as an essential requisite for the Agency to keep skills and competencies up to date (Case No. 2013/1003). According to respondent, this means that all staff are subject to the rotation rule owing to competencies and that non- turnover is the exception. Appellant's contract was subject to the rotation rule and consequently the challenged decision refusing the renewal of appellant's contract based on this rule is valid.

38. Respondent disputes, fourthly, appellant's contentions that the performance evaluation process in 2015 was flawed at several steps.

39. Respondent recalls that performance reporting existed in all the agencies and, according to the CPR (Article 5.5), is always used in contract renewal decisions. Consequently, appellant cannot argue that it took him totally by surprise that his rating would indeed be relevant as one of the factors in the decision regarding his contract. In addition, given the fact that the NCIA had to deal with six different performance management systems, a decision to unify the performance process was taken in 2015. In this context, all the concerned staff members, without discrimination, had access to the reports at a very advanced stage of the evaluation process.

40. Regarding appellant's arguments concerning the calibration process, respondent contends that the calibration process was intended to increase fairness and consistency in the managerial process and decisions, which by definition and inherently are subjective. From that perspective, no argument could be drawn concerning the non- renewal of appellant's contract from the fact that appellant's performance was in reality rated "very good" but his performance in 2015 was calibrated as "good". In any event, according to respondent, the challenged decision was taken bearing in mind a number of considerations among which individual performance is only one of the factors.

41. Finally, concerning appellant's claims related to material and moral harm caused by the challenged decision, respondent stressed that appellant's contentions do not contain any substantiation or justification. Further, respondent recalls that appellant received the lump sum payment of € 116.383,43 related to his pension's contributions. Concerning the claim that the final decision issued under the administrative review process was not sent to the correct address, respondent recalls that appellant gave this address to respondent services when he left the Organization.

42. Respondent requests that the Tribunal dismiss the appeal.

D. Considerations and conclusions

(i) On the convenience of a hearing

43. According to Article 6.7.1 of Annex IX to the CPR, "*unless all parties agree otherwise, appeals lodged before the Tribunal will require an audience in the form of an*

oral hearing where all concerned parties may be present and or represented". In this regard, Rule 25, paragraph 1, first sentence, of the Rules of the Procedure of the Tribunal of Annex IX, Appendix I, to the CPR, provides that "(*t)here shall, unless all parties agree otherwise, be a hearing of all parties*".

44. It clearly results from the above-mentioned provisions that an oral hearing is required for appeals lodged before the Tribunal unless parties request differently.

45. In the present case, appellant requested to forsake the oral proceedings and respondent did not formally oppose to this request, highlighting only that the present dispute presents a particular interest in relation to its contract policy.

46. Given the agreement of the parties not to pursue an oral proceeding and considering that the Tribunal has obtained sufficient information from the documents submitted to it during the written proceedings, the Tribunal considers that effectively there was no need to hold an oral hearing.

(ii) On appellant's submissions

47. Firstly, by his submission for annulment, appellant requests the annulment of the challenged decision refusing the renewal of his contract on the basis of the rotation rule provided in Directive 2.1. In this regard, appellant develops various pleas and contentions aiming to establish that on the basis of the NCSA Contract Policy, he had the right to renewal of his contract, independently of the subsequent adoption of Directive 2.1 by respondent. In addition, he criticizes inter alia the adoption of Directive 2.1, on the basis of which the challenged decision was adopted, and requests that the Tribunal declare it illegal and consequently annul the challenged decision.

48. The Tribunal recalls that appellant joined the JFC on 1 November 2008 on a 15-month definite duration – seconded – contract, for a post at grade B-3, expiring on 31 January 2010. At the expiry of this contract, appellant was offered, for the same post, a 5-month definite duration – non-seconded – contract for the period from 1 February 2010 to 30 June 2010. Before the expiry of this contract, appellant signed with NCSA a one- year definite duration – non-seconded – contract for a different post at the same grade of B-3, taking effect from 1 May 2010 to 30 April 2011; before the expiry of this contract, he received an offer of a fourth definite duration contract lasting three years and three months (from 1 February 2011 to 30 April 2014). In September 2013, respondent offered appellant, a new (fifth) definite duration contract of three years (1 May 2014 to 30 April 2017) for a post at grade B-4.

49. Appellant was informed on 31 August 2016 that his contract would not be renewed. On 22 November 2016, he requested, for personal reasons, an extension of his contract, and respondent offered appellant an extension of five months, until the end of September 2017. The request was made in order to mitigate the impact of the upcoming end of his employment with respondent. Appellant accepted this extension on 2 December 2016 without any reservations. The extension was granted and executed by respondent in good faith to accommodate appellant and to smoothen his departure from the Organization. Appellant subsequently and on his own initiative left the Agency with effect from March 2017.

50. The Tribunal observes that appellant served the Organization without interruption on the basis of consecutive definite duration contracts for the period from 1 November 2008 to 31 March 2017 and held positions at grade B-3/4. The contracts did not follow the typical 1-3-3-3 sequence. However and despite his request for an extension of his last contract for five months, which was accepted by respondent, he decided to leave the Organization at 31 March 2017 before the end of the last contract as extended by a common understanding.

51. The Tribunal concludes from the agreement concerning the last five-month extension and appellant's resignation that he is estopped from further pursuing his challenge of the 31 August 2016 decision not to renew his contract.

52. Appellant left the Organization by his own decision before the end of his contract and received the sum of €116.383,43 – sum not contested during the written submissions – corresponding to the pension contributions during the period of his successive contracts. In these conditions, appellant cannot further request the annulment of the challenged decision. On the basis of this consideration, appellant's submissions seeking annulment of the challenged decision must be rejected.

53. Secondly, appellant invites the Tribunal to determine compensation for moral and material damages following the adoption of the challenged decision as well as respondent's actions and omissions during the proceedings.

54. The request for compensation for moral and material damages, being closely related to the submission for annulment which is rejected, must also be rejected. In addition, the Tribunal considers that appellant's claims are not further developed and are contradictory. Appellant requests in fact the Tribunal to grant compensation by invoking different situations and combining respectively the NCSA and the NCIA contract policies, while at the same time challenging the legality of the latter policy.

55. The other claims developed by appellant in his appeal are, directly related to the annulment and compensation submissions. They must also be rejected and, consequently, the appeal must be dismissed in its entirety.

E. Costs

48. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 6 June 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 June 2018 AT-J(2018)0008

Judgment

Case No. 2017/1125

JB

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 June 2018

Original: English

Keywords: NCIA Contract Policy; renewal of contract; initial contract; reassignment contract; definite duration contract.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 15 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA), dated 18 August 2017 and registered on 25 August 2017 as Case No. 2017/1125, by Mr JB.

2. The respondent's answer, dated 24 October 2017, was registered on 31 October 2017. On 28 November, upon appellant's request, the Tribunal President granted a two-week extension to submit the reply. Appellant's reply, dated 14 December 2017, was registered on 18 December 2017. The respondent's rejoinder, dated 24 January 2018, was registered on 5 February 2018.

3. The Panel held an oral hearing on 15 March 2018 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

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

5. Appellant joined the 1st NATO Signal Battalion, at the NATO Communication and Information Systems Services Agency (NCSA), as a B-4 Senior Technician, on 14 January 2008, on a definite duration contract of one year. The contract was renewed for three years until 13 January 2012.

6. On 1 June 2010, appellant was recruited by the Supreme Allied Command Europe (SHAPE), on behalf of the NCSA, as an A-2 Engineer, under a definite duration contract of one year, i.e. until 31 May 2011. A further three-year contract was granted for the period from 1 July 2011 to 30 June 2014. This contract was extended for another three years until 30 June 2017.

7. On 28 November 2016, appellant was informed by the General Manager that his contract would not be renewed upon expiry on 30 June 2017.

8. On 2 January 2017, appellant submitted a first request for administrative review, which was answered by the Director of Infrastructure Services on 24 January 2017, who concluded that the decision not to renew the contract was in line with the NCIA Contract Policy and the need for staff rotation.

9. On 13 February 2017, appellant requested a further administrative review.

10. On 2 March 2017, the Chief of Staff and the Head of Human Resources met with appellant, to discuss together the rationale behind the Agency's decision and to allow appellant to express his concerns in greater detail.

11. The Chief of Staff formally replied to the request for further administrative review on 7 March 2017, making specific reference to the 2 March 2017 meeting. He explained that since that meeting he had reviewed the case once more with appellant's Director and had given full consideration to the additional points raised by appellant on 2 March, in particular concerns regarding continuity and future criticality of skills. However, appellant's contract renewal would not align with future business requirements of the Directorate and the Agency. The Chief of Staff maintained his opinion that the Agency's earlier decision was correct and fully in line with the Agency's requirement to rotate its staff.

12. On 6 April 2017, appellant submitted a complaint, with the request to have his grievance reviewed by a Complaints Committee (CC). The CC rendered its report on 12 June 2017, concluding that appellant had not yet reached the qualifying 10-year period required to be offered an indefinite contract.

13. On 19 June 2017, the NCIA General Manager gave his response. The GM rejected the request for an indefinite duration contract, but granted appellant a further three-year contract, subject to the understanding that this would be his last contract on the post. Appellant was also informed that the legacy systems he supported would become obsolete.

14. On 23 June 2017, appellant signed a contract covering the period from 1 July 2017 to 30 June 2020.

15. On 18 August 2017, appellant submitted the present appeal.

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

(i) The appellant's contentions

16. Appellant maintains that the appeal is admissible as he followed the pre-litigation procedure as provided in the CPR within the prescribed timelines.

17. As to the merits, appellant submits five grounds for annulment:

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR;
b. On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of the appellant's legitimate expectations, and of Articles 4.3 and 4.3.4 b) of NCIA Directive 2.1 on Contract Policy;
c. Violation of the duty to state reasons;
d. Manifest error of assessment; and
e. Misuse of power.

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR

18. Appellant first contends that after being recruited on 14 January 2008 on a one-year contract, the following three-year renewal did not comply with Article 5.1 of the CPR, which foresees a maximum of three years in total for initial contracts.

19. Appellant further contends that, in any case, as he moved from the Signal Battalion to another NATO body, and was recruited by SHAPE, his contract was a reassignment contract, pursuant to Article 5.3 of the CPR which provides that "*Contracts of one year may be offered to staff members reassigned to a different post or another NATO body […]. These contracts may exceptionally be prolonged for up to one further year, notwithstanding Article 5.5.2*". Appellant maintains that the two three-year renewals of 2011 and 2014 were not in line with the provisions of the CPR, as they were not limited to one year. Appellant therefore contends that he should have been offered an indefinite duration contract pursuant to the CPR provisions applicable to his case, as he was recruited before 1 July 2012.

20. Moreover, appellant contends that, considering the nature of his first two contracts, they clearly were initial contracts pursuant to Article 5.1.2 of the CPR. He notes that when he was recruited, he was not seconded, his post had not been previously identified by the HONB as being required for a limited period of time or as rotational, nor was he appointed to a research post.

21. Appellant contends that as from his second renewal, he should have been employed under an indefinite duration contract. The GM was consequently in breach of Articles 5.1.2 and 5.5.2 of the CPR.

22. Appellant considers the argument that he did not lodge a complaint at the time he signed his prior contracts to be irrelevant, since the Agency took a new decision in 2016 when it offered a further contract following a new review of appellant's case, thereby choosing to repeat its mistakes.

Directive 2.1 on Contract Policy

23. Appellant submits that, on a subsidiary basis, he should have been granted a three-year renewable extension, as the three-year definite duration contract was in breach of the NCIA Civilian Contract Policy (Directive 2.1). When he was recruited, he was informed of the NCSA Contract Policy and foresaw a career pattern of 1-3-3-3-year definite duration contracts, followed by an indefinite duration contract. His first two contract renewals were for three years. He expected a further renewal as long as his post remained a valid requirement. These expectations continued when NCSA was transferred to NCIA, since the letter informing him of the transfer stipulated that *"[appellant's] contract of employment, as from 1 July 2012, is with the NCIA … all other terms and conditions of [appellant's] employment remain unchanged*".

24. Appellant adds that the NCSA Contract Policy was not superseded by the NCIA Contract Policy, since it was not mentioned anywhere and not referred to in his contracts. Appellant indicates that the mere fact that he had indicated to the CC that he was "aware" of the policy, or that "*NATO/Allied Command Operations and NCIA regulations, directives*

and instructions in effect at any given time" were generally referenced in his contract, is not sufficient to introduce Directive 2.1 into his contractual framework. Moreover, appellant urges that in view of what he understood to be repeated assurances that the 1-3-3-3 policy would continue to apply, the Agency could not, suddenly and without transitional measures or prior warning, change the rules and apply the new directive and the alleged rotational nature of all NCIA posts.

25. Appellant further claims that the alleged rotational nature of his post was not mentioned either in his job description or in his successive contracts and, in addition, that his post was going to be advertised, proving that it was still needed.

26. Appellant further observes that, should it be considered that the NCIA Contract Policy would apply, – quod non – the three-year duration offer was also not in line with such cases, Article 5.5.2 of the CPR would apply. As a consequence, and following this policy, an indefinite duration contract should have been offered.

c. Violation of the duty to state reasons

27. Appellant contends that the decision that initially informed him of his non-renewal (28 November 2016) did not identify a specific reason. It only mentioned in a general way the elements that were taken into account, such as the need for business continuity and operational requirements within the appellant's work area, his performance and skill set, the Agency's future requirements, and the strategic direction and guidance received from the Agency Supervisory Board "*which now targets a median of six years of employment within the Agency*". However, it was not explained how these elements were considered. Subsequent decisions (24 January 2017, 7 March 2017) remained vague about the "*business decisions of the Agency*" or the "*future business requirements of your Directorate and the Agency*".

28. Appellant refers to the CC report stating that *"[…] there would be a skills gap once Mr B's contract was terminated and that there was no clear plan to address the need for business continuity and the operational requirements […]*", finding this in contradiction with the General Manager (GM)'s decision.

29. Appellant contends that the GM's decision does not identify a precise reason for rejecting a three-year renewable extension, the reasons why his skills would not be needed, nor does it clearly explain to what extent the skills required by the Agency would change.

d. Manifest error of assessment

30. Appellant affirms that his Cell, which operates the voice network across the whole of NATO, had been assigned new large projects on top of other major projects, requiring programme] … would require Mr B's skills for at least a further 3 years" and points out that the non-renewal of his contract would jeopardize correct implementation of major projects as well as the satisfaction of customers.

31. Appellant stresses that his post requires a Cosmic Top Secret security clearance, which might take several months to obtain, that his performance has always been assessed as good or very good, and that he showed eagerness to undergo training to consolidate his skills and be fully competent for the new systems.

32. Appellant claims that the above amounts to a manifest error of assessment.

e. Misuse of power

33. Appellant refers to the guidance given by the Agency Supervisory Board (ASB) to target a median of six-years of employment at the Agency. He stresses that the Agency is under the authority of the North Atlantic Council (NAC), and cannot modify the CPR, which are adopted by the NAC. The Agency further appears to have an informal contract policy, which aims at preventing anyone from reaching the 10-year threshold of employment, which is an inconsistent application and a distortion of its own rules.

34. Appellant requests that the Tribunal:
- annul the 19 June 2017 decision rejecting appellant's complaint, in so far as it rejects appellant's request to be awarded an indefinite duration contract, or at the very least, a three-year renewable contract;
- if necessary, annul the 24 January and 7 March 2017 decisions rejecting, respectively, appellant's first and second request for administrative review, as well as the initial decision dated 28 November 2016 informing appellant that his contract would not be renewed; and
- order reimbursement of all legal costs incurred and fees of retained legal counsel.

(ii) The respondent's contentions

35. With regard to admissibility, respondent submits that appellant is time-barred from appealing against his five previous definite duration contracts, including the application of the former NCSA Contract Policy.

36. With respect to the merits, respondent contends the following.

a. Indefinite duration contract

37. Respondent notes that all of appellant's definite duration contracts contained the paragraph: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and applicable to NATO security regulations, as well as the relevant NATO and [ACO or NCSA or] NCIA Agency regulations, directives and instructions as in effect at any given time*".

38. The very wording of all appellant's contracts clearly shows that these were definite duration contracts, governed by Articles 5.2 and 5.5.3 of the CPR. He never questioned any of these contracts nor complained officially at the time. Therefore, at no time did appellant hold an initial contract.

39. Respondent claims that at the time appellant was hired, all civilian posts of the former NCSA were considered as limited period posts, in accordance with Article 5.2 of the CPR, since the Head of the NCSA had in a memorandum dated 16 January 2006 declared all civilian posts as "*limited period*" posts as specified in Article 5.2 of the CPR.

40. Further, Article 5.5.2 of the CPR does not require the Organization to offer an indefinite duration contract. It clearly provides that the Head of the NATO body may do so. There is no obligation.

41. Respondent continues by noting that the only exception to this can be found in Article 5.4.2 of the CPR, which provides that staff members who have served for 10 or more years consecutively under definite duration contracts and to whom a further contact is offered shall be offered indefinite duration contracts. This provision is also reflected in the NCIA Contract Policy. Respondent points out that appellant has not accumulated 10 years of service at the NCIA so that this provision is not relevant to him.

b. Appellant's legitimate expectation

42. Respondent submits that, contrary to appellant's claim, the NCSA Contract Policy, introduced in 2006 and referred to in his first contracts, did not guarantee continuous employment or the award of indefinite duration contracts before 10 years of service. In fact, it provided for posts of limited duration only.

c. NCIA Contract Policy – applicability

43. Regarding appellant's submission that he had not been made aware of the NCIA Contract Policy that entered into force on 1 January 2013, respondent observes that it provided sufficient information to the Agency staff. The policy was communicated via the NATO Secret system – to which appellant had access – as well as via the NATO Restricted system. Furthermore, an Agency newsletter was sent to all staff on 16 January 2013, on both systems, and links were provided to the actual contract policy. Respondent agreed that a NATO body has a responsibility to provide its employees with reliable information regarding signification aspects of their employment. It adds that, as a corollary, employees also have a responsibility to familiarize themselves with information provided to them and to make further inquiries as required. The Agency cannot be held responsible for shortcomings of staff in familiarizing themselves with the information provided. Moreover, the NCIA Contract Policy clearly indicated that it was applicable to all NCIA staff, thus superseding the NCSA Policy, which was then no longer in force.

d. NCIA Contract Policy – content

44. Respondent maintains that its contract policy does not substantially differ from the former NCSA Contract Policy, and both are in line with the CPR. They are based on offering a succession of definite duration contracts, leaving discretion for the employer to grant further contracts, including indefinite duration contracts.

45. Respondent adds that the preferred manning option for NCIA civilians is based on definite duration contracts. This means that unless specifically mentioned, all NCIA posts may be subject to rotation due to changes in the skills required by the Agency. Notwithstanding this, indefinite duration contracts are allowed, as authorized by the CPR, for a subset of NCIA personnel, based on sound management principles such as continuity for the interest of the service and required skills.

46. Neither the NCSA nor the NCIA Contracts Policies foresee an automatic award of further definite duration contracts or indefinite duration contracts. Appellant was awarded a further definite duration contract, which is in line with the CPR.

e. Duty to state reasons, non-renewable contract, performance

47. Respondent observes that appellant's statements that the 28 November 2016 decision did not satisfy the requirement to state reasons are moot. The GM's decision of 19 June 2017 cancelled and replaced the previous decision, offering appellant a further three-year definite duration contract. Respondent explains that the GM changed his decision as appellant's skill set and experience were needed due to the departure of two colleagues. However, appellant was informed at the same time that the legacy systems that he supported would become obsolete, so there would be no further renewal.

48. Respondent clarifies that the quotation from the CC report describing Mr B's skills as required for "*at least three years*" is incorrect, stressing that the operation and maintenance of future network and underlying voice systems have not yet been decided strategically.

49. Concerning appellant's performance, respondent observes that he is a good performer, but that he did not receive one of the top ratings. The NCIA Contract Policy specifies that those staff members who are consistently high performers may be asked to stay on as long-term employees.

f. Agency Supervisory Board (ASB)

50. Regarding appellant's submissions that the median of six years targeted by the ASB in its strategic direction and guidance would breach the CPR, respondent stresses that neither the CPR nor the NCIA Contract Policy or even the former NCSA Contract Policy foresee an automatic award of a certain number of definite duration contracts, nor do they oblige the Organization to award follow-on contracts. The ASB's guidance, while providing further factors that can be taken into consideration when renewing a staff member's contract, does not in itself modify the CPR, rendering appellant's argument moot.

51. Respondent stresses that appellant himself has already exceeded the median of six years and has therefore, with his latest contract, already benefitted from favorable treatment in comparison with many other staff members.

g. "Informal" contract policy

52. Regarding appellant's contention that the Agency is trying to avoid long-term staff by applying an informal policy aimed at preventing anyone from reaching the ten-year threshold and obtain CPR advantages, respondent submits that this is not supported by facts. It points out that since 2015 the Agency has awarded 146 indefinite-duration contracts, almost exclusively to staff who have reached 10 or more years of service. In comparison with other NATO bodies, this is a rather considerable number of recently awarded indefinite duration contracts. Appellant's contention is also not supported by his own case, as he was offered a further definite duration contract, bringing him over the ten-year mark and making him eligible to receive an indemnity for loss of employment.

53. Respondent requests that the Tribunal declare the appeal:
- inadmissible insofar as the appellant requests an indefinite duration contract on the basis of the application of the former NCSA Contract Policy; and
- unfounded.

D. Considerations and conclusions

54. Although appellant considers that the three-year renewal of the contract he signed on 14 January 2008 did not comply with Article 5.1 of the CPR, the core of his appeal involves his characterization of the situation created since he was recruited by the NCSA. Appellant requests in fact that the Tribunal grant him an indefinite contract by invoking different situations combining respectively the NCSA and the NCIA contract policies, while at the same time challenging the legality of the latter.

55. Appellant contends that the first contract he signed with NCSA on 1 June 2010 should have been considered as a "reassignment contract," meaning that its successive renewals were not in line with Article 5.3 of the CPR. As a consequence, in appellant's view, he should have been offered an indefinite duration contract as from 1 June 2012. Alternatively, appellant claims that, if this contract was not a reassignment contract, it should be considered as an initial contract and not a definite duration one.

56. Article 5.3 of the CPR provides:

> 5.3. Reassignment contracts
> Contracts of one year may be offered to staff members reassigned to a different post or to another NATO body, particularly when they will be performing substantially different duties from those attached to the posts which they previously held. These contracts, known as reassignment contracts, may exceptionally be prolonged for up to one further year, notwithstanding Article 5.5.2.

57. Article 5.1 of the CPR provides:

> 5.1. Initial contracts
> as initial contracts, of between one and 3 years' duration unless Article 5.2 below applies.
> 5.1.2 Notwithstanding Article 5.5.2 below, an initial contract may exceptionally be renewed provided that the total length of service under initial contracts does not exceed 3 years.

58. Article 5.2 of the CPR provides:

> 5.2. Definite duration contracts
> Definite duration contracts not exceeding 5 years shall be offered to staff appointed or reappointed to the Organization if:
> - they are seconded, in which case such a definite duration contract shall not exceed the length of the approved secondment; or
> - they are appointed to posts previously identified by the Head of NATO body as being required for a limited period; or
> - they are appointed to posts previously identified by the Head of NATO body as posts in which turnover is desirable for political or technical reasons; or
> - they are appointed to research posts in scientific establishments.

59. The conditions of Articles 5.3 and 5.1 are not met. The Tribunal firstly observes that appellant accepted a series of contracts without any reservation. He did not challenge them at the time although all the contracts specifically stated that they were definite duration contracts. Nothing in them specifically mentioned or even appeared to imply that they were reassignment or initial contracts. The employment relationship between appellant and the Agency was clearly identified as being one of definite duration contracts in accordance with NCSA and NCIA contract policies. Appellant accepted this without reservation. The Tribunal concludes that the conditions under Article 5.2 were met and that appellant's situation was unambiguously covered by definite duration contracts from the outset (*cf.* Case No. 2013/1002, paragraphs 29 and 30).

60. With respect to appellant's claim for an indefinite contract, a claim that was not part of his requests for administrative review, it is sufficient to recall the Tribunal's confirmation in Case No. 2015/1065 that there is no obligation on the Organization to offer an indefinite duration contract to a staff member who has not yet reached 10 years of employment. The Agency's decision offering a last renewal for three years is within its discretionary powers, in accordance with its policies, and not tainted with any abuse.

61. Appellant contends, on a subsidiary basis, that there were a number of violations of the NCSA and NCIA contract policies. Appellant first refers to a letter of the NCIA General Manager dated 1 July 2012 informing him that, further to the Agencies Reform, the NCIA had been established as from 1 July 2012 and that appellant's contract was henceforth with the NCIA. The letter then contains the sentence: "*All other terms and conditions of your employment contract remain unchanged.*" Appellant concludes from this that the NCSA Contract Policy continues to apply to his situation.

62. The Tribunal is of the view that the quoted sentence refers to the situation at the time the letter was written, not to the future. There is no indication or implication in appellant's contract that these regulations or directives were frozen as on 1 July 2012, when respondent came into existence. It is settled that Administrations may, under certain conditions, amend employment conditions. This is what the NCIA did in 2013, when it adopted its own Contract Policy, which may be seen as a refinement of the NCSA Policy. The new policy was issued to staff, as will be shown below. Both of the contracts offered afterwards, as countersigned by appellant, contain the clause that *"[t]he employment is governed by the provisions of the NCPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (AC)) and NCIA regulations, directives and instructions as in effect at any given time*". The Tribunal cannot but conclude that the NCIA Contract Policy was applicable to both contracts and to the challenged decision.

63. Although appellant admitted before the CC that he had been aware of the new NCIA Contract Policy, he argues in his appeal that the Agency did not take appropriate measures to inform him. The Tribunal has previously held that a NATO body has a responsibility to provide its employees with reliable information regarding significant aspects of their employment. The Tribunal is persuaded that respondent provided sufficient information regarding its contract policy to Agency staff. The Tribunal highlights that the policy was communicated via the NATO Secret system - to which appellant had access – as well as via the NATO Restricted system. Furthermore, an Agency newsletter was sent to all staff on 16 January 2013, on both systems, and links were provided to the actual contract policy. In this connection, the Tribunal rejects appellant's contention that changes in an agency's internal regulations can only be properly communicated to a staff member if they are expressly mentioned in the staff member's contract. Agencies modify their internal regulations and administrative documents with varying frequency and for varying reasons. There is no requirement that every such change must then be incorporated into every staff member's contract in order to be effective. The policy concerned was published and brought to the attention of staff. While respondent's efforts to acquaint its staff members with the new policy may not have attained perfect results, perfection is not required. The record shows that respondent made substantial efforts, appropriate in the circumstances and utilizing various means of communication, to acquaint staff with the new policy.

64. Appellant also contends that the decision of 28 November 2016, which informed him of his non-renewal, did not provide specific reasons. The Tribunal believes that providing reasons for non-renewal is a sound administrative practice that gives due recognition to the interests of staff members in a matter that may be very important to them.

65. In his letter, the GM stated:

> The Civilian Personnel Management Board has reviewed the need for business continuity and operational requirements within your work area, as well as your performance and skill set, plus the future requirements of the Agency. In addition, they have taken into

consideration the strategic direction and guidance received from the Agency Supervisory Board, which now targets a median of six years of employment within the Agency.

66. Even if this explanation has an impersonal and generic quality, the shortcomings in the reasons were remedied by subsequent exchanges between parties, which included a meeting with senior Agency officials. Appellant was thus put in a position to understand clearly the decision-maker's reasoning and to determine whether the contested decision was justified or tainted by an error. The Tribunal may also perform its judicial control (*cf.* NATO AT judgments, Cases Nos. 889, 890 and 897). Indeed, appellant's statement at the hearing indicated that he had understood respondent's reasons. He simply disagreed with them.

67. Appellant contends that there is still a need for his performance and skills in order to ensure business continuity. The Tribunal points out that it is precisely this positive assessment of the appellant's performance that led the Organization to renew the contract for a last definite duration of three years from 1 July 2017. The Agency did not manifestly err in assessing appellant's situation. The decision regarding appellant is in line with the NCIA Contract Policy, and so is not exceptional or contrary to stated policies. Moreover, with respect to appellant's argument of business continuity, the Tribunal observes that this is the Agency's responsibility, even more so as it has a confirmed policy of staff rotation.

68. In his last plea appellant alleges misuse of power. He contends that the internal guidelines of respondent's Agency Supervisory Board (Board) and contract policy, targeting a median of six years of employment, conflict with the CPR. He stresses that the Agency is under the authority of the NATO Council (NAC). The Board cannot, in his opinion, modify the CPR, which are adopted by the NAC. This reflects a misuse of power.

69. As the Tribunal has held supra, neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresee an automatic award of a certain number of definite duration contracts, nor do they oblige the Organization to award contract extensions. The Board, which is the supreme organ of the Agency, may give guidance to management within the limits of the CPR. The guidance given and the adopted policies are not contrary to nor modify the CPR.

64. The Tribunal underlines that the decisions referred to above were taken in the exercise of the Agency's discretionary powers. It is settled jurisprudence, including by this Tribunal, that decisions in the exercise of this discretion are subject to only limited review by a tribunal. Tribunals only interfere when there is an abuse of these powers, for example if a decision 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. Tribunals have also consistently held that they will not substitute their own view for the Organizations' assessment in such cases.

65. For these reasons, the Tribunal concludes that appellant's submission must be rejected and entirely dismissed.

E. Costs

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

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

67. The appeal being dismissed; no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 6 June 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 June 2018 AT-J(2018)0009

Judgment

Case No. 2017/1244

PM

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 June 2018

Original: English

Keywords: NCIA contract policy; renewal of contract; indefinite duration contract; probationary period; discretion.

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This Judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr John R. Crook judges, having regard to the written procedure and further to the hearing on 14 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communication and Information Agency (NCIA or Agency) dated 11 September 2017, and registered on 25 September 2017 as Case No. 2017/1244, by Mr PM contesting, *inter alia*, the Organization's refusal to grant him an indefinite duration contract or, at the very least, a three-year renewable extension of his current contract.

2. Respondent's answer, dated 24 November 2017, was registered on 30 November 2017. Appellant's reply, dated 2 January 2018, was registered on 8 January 2018. Respondent's rejoinder, dated 7 February 2018, was registered on 9 February 2018.

3. The Panel held an oral hearing on 14 March 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

5. Appellant joined the former NATO Communication and Information Systems Services Agency (NCSA) on 1 October 2010 as a grade B-4 technician. He held a one-year definite duration contract, which was clearly designated as such in boldface. His duty station was SHAPE, Belgium. The contract provided that *"[t]he employment is governed by the provisions of the NCPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and SHAPE regulations, directives and instructions as in effect at any given time*". The contract further stipulated that *"[i]f SHAPE wishes to retain the employee's services after the expiration date of the present employment, a new contract will be offered. The employee will be informed not less than 6 months before the expiry date of this contract whether or not SHAPE intends to offer a further appointment*."

6. In March 2011 appellant countersigned a definite duration contract for three years covering the period 1 October 2011 to 30 September 2014. The contract did not contain a clause on possible further appointments. NCIA replaced NCSA effective 1 July 2012.

7. In 2012, a number of NATO entities, including NCSA, were consolidated into NCIA, effective 1 July 2012. By memorandum of that date, NCIA's General Manager notified appellant that his contract was henceforth with NCIA and that "[a]l other terms and conditions of your employment contract remain unchanged."

8. In January 2014 appellant countersigned a definite duration contract for another three years covering the period 1 October 2014 to 30 September 2017. The contract provided that *"[t]he employment is governed by the provisions of the NCPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and NCIA regulations, directives and instructions as in effect at any given time*". The contract did not contain a clause on possible further appointments.

9. On 8 December 2016 appellant countersigned his current two-year definite duration contract with the NCIA effective 1 October 2017 to 30 September 2019.

10. On 16 December 2016 appellant, however, wrote a letter to NCIA submitting that the renewal was in violation of the NCSA contract policy, which according to him was in force at the time of his initial employment and still in force for the current renewal. This policy would guarantee him a first one-year contract with subsequent three-year contracts for as long as his post remained a valid requirement and his performance was satisfactory, which was the case. He requested an administrative review so that the contract would be for three years.

11. The Director of Infrastructure Services replied on 17 January 2017 advising appellant that the NCSA Civilian Contract Policy had been superseded by the NCIA Contract Policy, which had come into effect on 1 January 2013. He added that strategic direction and guidance received from the Agency Supervisory Board now targeted a median of six years of employment within the Agency. He confirmed that Appellant's performance in 2015 had indeed been very good and that, for that reason, the decision had been taken to offer a further contract. He concluded that the two-year extension had been in compliance with the NCIA Contract Policy.

12. On 6 February 2017 appellant wrote to NCIA's General Manager requesting a second administrative review. He submitted that his first contract with NCSA did not fall into any of the categories in Article 5.2 of the NATO Civilian Personnel Regulations (CPR) under which definite duration contracts may be given. He concluded from this that his first contract should be deemed to have been an initial contract under Article 5.1 of the CPR and that, as a consequence, the 2011 extension should have been of an indefinite duration. He was furthermore not in a position to unequivocally understand the reasons behind the decision not to renew his contract for three years, but only for two years, which he considered a violation of the duty to state reasons. Lastly he contended an error of assessment, in view of the continued business needs and his good performance.

13. The Chief of Staff answered on 9 March 2017. He, first of all, referred to the talk they had had on 15 February 2017, together with an HR officer, in order to discuss the rationale behind the Agency's decision and to allow Appellant to express his concerns. They had also discussed the former NCSA Contract Policy. The Chief of Staff underlined that the latter policy was no longer applicable, since the NCIA Contract Policy had superseded it on 1 January 2013. He also noted that appellant had not raised any grievance at the time the previous contracts were issued. He confirmed his opinion that the new contract was correct and in line with the NCIA Contract Policy.

14. On 6 April 2017 appellant lodged a complaint. He repeated his argument that he should have been awarded an indefinite duration contract. In addition, he argued a violation of his legitimate expectations, since he had been informed in 2012 that his contract would henceforth be with NCIA but that the conditions of his employment remained unchanged. He also contended that the new NCIA Contract Policy, of which he had not been made aware, nowhere stipulated that it superseded the NCSA one. He moreover repeated the alleged violation of the principle to state reasons and manifest error of assessment, to which he added abuse of power by the Agency Supervisory Board when it established guidelines, particularly the median of six years policy, which prevented many staff from reaching the threshold of ten years' employment. He requested the convening of a Complaints Committee, which was complied with.

15. The Complaints Committee (Committee) rendered its report on 21 June 2017.

16. It concluded with respect to the claim that the contract extension in 2014 should have been of an indefinite duration that this was a misinterpretation of the CPR, Article 5.4.2 of which clearly states that it is only when staff members have served for ten years or more that a further extension must be of an indefinite duration.

17. Regarding the duration of the contract that was offered, *i.e.* two or three years' duration, the Committee observed that under the CPR, definite duration contracts shall not exceed five years, and that under the NCIA Contract Policy, contracts would normally be of three years' duration but could be less as required to support short-term projects, meet uncertainty with respect to the business outlook, staff performance and other factors. The reference to "other factors" provides the Civilian Personnel Management Board with the latitude to make the decision based on the performance factors referred to in its decision.

18. With respect to the argument that appellant had not been provided with the reasons behind the decision to offer him a two-year contract and not the three-year one that he was expecting, the Committee had been informed that appellant was informed that the two years' extension would allow more time to further evaluate his performance, especially in the light of the requirement to identify the top 25% of performers. The Committee had been informed that appellant, although a good performer, was not considered one of the Agency's top 25% of performers.

19. The Committee also rejected the argument that the Agency's Supervisory Board (Board) was not in a position to modify the provisions of the CPR or even advise the Agency to adopt policies which would be in contradiction with the CPR, such as strategic direction and guidance to target a median of six years' employment. It noted that the Charter of the Agency gives this Board responsibility for providing strategic direction and guidance to the Agency on a number of issues including the Agency's organization. The Committee considered that the Board's guidance that the Agency should target as an overall goal a median of six years' employment was complementary to the CPR and not in contradiction thereof.

20. The Committee recommended that the General Manager confirm the contested decision but also ensure that staff are fully briefed at all levels on the reasons for contract

renewal decisions and consider a number of suggestions for improvement of information and processes.

21. Appellant submitted comments on the Committee's report on 26 June 2017. They were not made part of the case file.

22. On 14 July 2017 the General Manager took his final decision. He recalled that the Committee had recommended that he confirm the decision to offer a two-year contract. It had also found that the NCIA Contract Policy was applicable in appellant's case, that there was no obligation to offer an indefinite duration contract and that the Agency could offer a two-year extension in accordance with the CPR. The Committee had also confirmed that following the renewal appellant had been informed that the recommendation to grant a two-year extension would allow more time to further evaluate his performance and consequently whether he could be considered for a further contract extension beyond 10 years of service. The General Manager concluded by saying that he upheld the decision to offer a two-year contract.

23. On 11 September 2017 appellant lodged the present appeal.

Legal Background

24. The appeal involves several interconnected CPR provisions:
- under CPR Article 5.1.1, staff appointed or reappointed to the Organization prior to 1 April 2012 "*shall be offered contracts, known as initial contracts, of between one and 3 years' duration...*";
- under CPR Article 5.2., the Head of a NATO body (HONB) can offer definite duration contracts not exceeding five years to staff appointed or reappointed if "*they are appointed to posts previously identified by the Head of NATO body as being required for a limited period.*";
- under CPR Article 5.5.3, following satisfactory performance during a definite duration contract, the HONB may offer either "*the renewal of the definite duration contract under the conditions of Article 5.2,*" or an indefinite duration contract;
- under CPR Article 5.4.2, staff members who have served for ten or more years "*under definite duration contracts or under a combination of different types of contracts and to whom a further contract is offered shall be offered indefinite duration contracts*."; and
- under CPR Article 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*."

Applicable Contract Policy

25. When appellant joined NCSA in 2010, NCSA's contract policy was set out in a 2006 memorandum which provided that, to meet needs from rapidly evolving technology and customer requirements, the Agency would adopt a more restrictive policy regarding indefinite duration contracts. Henceforth, *"[t]he NCSA contract policy will be to offer a one-year contract, with subsequent contracts of three-year duration for as long as the*

post remains a valid requirement. As provided in the NATO Civilian Personnel regulations (NCPR), once a civilian employee reaches the ten-year employment threshold, an indefinite duration contract will be offered."

26. On 1 January 2013, *i.e.* well before appellant concluded a second three-year contract with respondent, NCIA promulgated Directive 2.1 on Contract Policy. Under Article 4.3.2 of the Directive:

> Staff, with the exception of scientists and possibly seconded staff, shall be offered a contract of indefinite duration, provided that they have served for ten or more years consecutively with NCI Agency, other NATO bodies or any of the co-ordinated organizations, under definite duration contracts or under a combination of different contracts, *and to whom a further contract is offered* (emphasis added).

27. Under Article 4.1 of the directive *"[t]he agency is committed to ...b) retaining the very best staff members who perform at a superior level*..." Article 4.2 then states in part:

> It is essential for the Agency to maintain an up-to-date set of skills and competencies. Turnover is required and is desirable for a variety of reasons including but not limited to the introduction of up-to-date knowledge and experience from other organizations as well as fresh thinking and approaches that help keep the organization vital and relevant. This is balanced against the need to retain expertise based on sound management principles such as continuity and required capabilities.
>
> The preferred manning option for NCI Agency civilians shall be based on definite duration contracts. This means that unless specifically mentioned, all NCI Agency posts may be subject to rotation due to changes in the skills required by the Agency. This notwithstanding, indefinite contracts are allowed, as authorised by the NATO Civilian Personnel Regulations for a subset of NCI Agency personnel based on sound management principles such as continuity for the interest of the service and required skills.

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

(i) Appellant's contentions

28. Appellant contends that the pre-litigation procedure was duly followed and that the present appeal was lodged within 60 days of the 14 July 2017 rejection. As a consequence, the present appeal shall be deemed admissible.

29. As to the merits, appellant submits five grounds for annulment:

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR,
b. On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of the NCIA Directive 2.1 on Contract Policy,
c. Violation of the duty to state reasons,
d. Manifest error of assessment, and
e. Misuse of power.

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR

30. Appellant first contends that the first contract contained a probationary period and was for that reason an initial contract under CPR Article 5.1. Secondly, the second contract of three years was in his opinion not in compliance with Article 5.1 of the CPR, which foresaw a maximum of three years in total for initial contracts, unless Article 5.2 was applicable.

31. Article 5.2 provides that definite duration contracts, not exceeding five years, may be offered to staff appointed, or reappointed, if (i) they are seconded, (ii) they are appointed to posts previously identified as being required for a limited period, (iii) they are appointed to posts previously identified as being posts in which turnover is desirable for political or technical reasons, or (iv) they are appointed to research posts in scientific establishments. Appellant contends that none of these situations applied to his case.

32. Appellant concludes that the first two contracts were initial contracts, that the second one should not have been of three years but only of two years or of indefinite duration, and that, in any case, any further renewal should have been for an indefinite duration.

33. Appellant considers the argument that he did not lodge a complaint at that time to be irrelevant, since the Agency took a new decision in 2016 when it offered a further contract, following a new examination of appellant's case, thereby choosing to repeat its mistakes.

b. On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of the NCIA Directive 2.1 on Contract Policy

34. Appellant submits that, on a subsidiary basis, he should have been granted a three-year renewable contract, the two-year contract offer being in breach of the NCIA Civilian Contract Policy. When he was recruited, he was informed of the NCSA Contract Policy and foresaw a career pattern of 1-3-3-3 definite duration contracts, followed by an indefinite duration contract. His first two contract renewals were indeed of three years. He further expected a renewal as long as his post remained a valid requirement. These expectations continued when NCSA was transferred to NCIA, since the letter informing him of the transfer stipulated that all other terms and conditions of his employment remained unchanged.

35. Appellant adds that the NCSA Contract Policy was not superseded by the NCIA Contract Policy, since this was not mentioned anywhere and not referred to in his contracts. Moreover, he was not made aware of the introduction of the latter policy, the communication of which was anyway not optimal, as the Complaints Committee had observed. He observes that staff members are under no obligation at all to read newsletters and that newsletters are not supposed to replace formal notifications.

36. Appellant further observes that, should it be considered that the NCIA Contract Policy would apply – *quod non* – then the two-year duration offer was also not in line with that policy, since it provides that although initial and reassignment contracts were no

longer offered to staff, there may be staff holding either of these types of contracts and that, in such a case, Article 5.5.2 of the CPR would apply. As a consequence, and following this policy, an indefinite duration contract should have been offered.

c. *Violation of the duty to state reasons*

37. Appellant contends that the offer of the two-year contract did not identify a specific reason. It was only subsequently mentioned which elements had been take into account, such as the future requirements of the Agency, the strategic direction and guidance received from the Agency Supervisory Board, and the alleged superseding of the NCSA Contract Policy with the NCIA one. Some of the reasons given were contradictory. In its report the Complaints Committee had erroneously observed that appellant was well aware of the specific reasons. In particular the argument that the two-year extension would allow more time to further evaluate appellant's performance was never mentioned before.

d. Manifest error of assessment

38. Appellant contends that the NCIA Contract Policy provides that the definite duration contracts are normally of three years' duration. There was no particular reason not to offer a three-year contract, all the more so as his performance was excellent, later downgraded to very good. Moreover, he was performing, on a day-to-day basis, operations which ensure business continuity. This continuity was now in jeopardy by the contested decision.

e. Misuse of power

39. Appellant refers to the guidance given by the Agency Supervisory Board (Board) to reach a median of six years of employment in the Agency. He recalls that the Agency is under the authority of the North Atlantic Council (NAC). The Board can thus not modify the CPR, which are adopted by the NAC. The Agency further appears to have an informal contract policy which aims at preventing anyone from reaching the ten-year threshold of employment, which is an inconsistent application and distortion of its own rules.

40. Appellant requests:
- annulment of the 14 July 2017 decision rejecting appellant's complaint, insofar as this decision rejects the appellant's request to be awarded an indefinite duration contract, or at the very least, a three-year renewable contract;
- and, if needed, annulment of the decisions dated 17 January 2017 and 9 March 2017 rejecting, respectively, appellant's first request and second request for administrative review; as well as the initial decision dated 8 December 2016 granting a two-year renewal; and
- reimbursement of all legal costs incurred and fees of the retained legal counsels.

(ii) Respondent's contentions

41. With regard to the admissibility of the appeal respondent submits that appellant is time-barred from appealing against his previous three contracts.

42. With respect to the merits, respondent contends the following.

a. Indefinite duration contract

43. All of appellant's definite duration contracts contained the paragraph: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and applicable NATO security regulations, as well as by the relevant NATO and [ACO or NCSA or] NCI Agency regulations, directives and instructions as in effect at any given time*."

44. The very wording of all appellant's contracts clearly shows that these were definite duration contracts, governed by Articles 5.2 and 5.5.3 of the CPR. He never questioned any of these contracts, nor complained officially at the time. At no time did the appellant therefore hold an initial contract.

45. In fact, at the time appellant was hired, all civilian posts of the former NCSA were considered as limited period posts, in accordance with Article 5.2 of the CPR, since the Head of the NCSA had in a memorandum dated 16 January 2006 declared all civilian posts as "limited period" posts as outlined in Article 5.2 of the CPR.

46. Moreover, Article 5.5.2 of the CPR does not require the Organization to offer an indefinite duration contract. It clearly provides that the Head of the NATO body may offer an indefinite contract. There is therefore no obligation.

47. The only exception to this can be found in Article 5.4.2 of the CPR, which provides that staff members who have served for 10 or more years consecutively under definite duration contracts and to whom a further contract is offered shall be offered indefinite duration contracts. This provision is also reflected in the NCIA Contract Policy. Appellant has not accumulated ten years of service. The Agency contends that it thus had no obligation to award an indefinite duration contract also under this head.

b. Appellant's legitimate expectations

48. Respondent submits that, contrary to appellant's claim, the NCSA Contract Policy, introduced in 2006 and to which reference was made in his first contracts, did not guarantee continuous employment or the award of indefinite duration contracts before 10 years of service. In fact, it provided for posts of limited duration only.

c. NCIA contract policy – applicability

49. Regarding appellant's submission that he was not made aware of the NCIA Contract Policy that entered into force on 1 January 2013, respondent observes that it had provided sufficient information to the Agency staff. The policy was communicated via the NATO Secret – to which appellant had access – as well as the NATO Restricted systems. Furthermore, an Agency newsletter was sent to all staff on 16 January 2013, on both systems, and links were provided to the actual contract policy. Respondent agrees that a NATO body has a responsibility to provide its employees with reliable information regarding significant aspects of their employment. It adds that, as a corollary, employees also have a responsibility to familiarize themselves with information provided to them and to make further inquiries as required. The Agency cannot be held responsible for shortcomings of staff in familiarizing themselves with the information provided. Moreover, the NCIA Contract Policy clearly indicated that it was applicable to all NCIA staff, thus superseding the NCSA Policy, which was then no longer in force.

50. Regarding the claim that the terms and conditions of appellant's employment contract would remain unchanged when the NCIA was established on 1 July 2012, respondent observes that regulations or internal directives can be changed unilaterally, provided that they do not change the balance of the contract. Appellant had from the very beginning been made aware that there was a possibility of several definite duration contracts, with a possibility of receiving an indefinite duration contract after 10 years. This did not change with the introduction of the NCIA Contract Policy.

d. NCIA contract policy — content

51. Respondent maintains that its contract policy does not substantially differ from the former NCSA contract policy. Both policies are in line with the CPR. They are based on offering a succession of definite duration contracts, leaving discretion for the employer to grant further contracts, including indefinite duration contracts.

52. Respondent adds that the preferred manning option for NCIA civilians is based on definite duration contracts. This means that unless specifically mentioned, all NCIA posts may be subject to rotation due to changes in the skills required by the Agency. This notwithstanding, indefinite contracts are allowed, as authorized by the CPR, for a subset of NCIA personnel based on sound management principles such as continuity for the interests of the service and required skills.

53. Neither the NCSA Contract Policy nor the NCIA one foresee an automatic award of further definite duration contracts or of indefinite duration contracts. Appellant was awarded a further definite duration contract, which is in line with the CPR.

e. Duty to state reasons

54. Regarding the duty to state reasons, respondent, first of all, with reference to NATO Appeals Board decisions, submits that there is no rule requiring the Administration to explain its decision. Even the decision not to renew a definite duration contract is not subject to the requirement for explanation. The same would apply for the decision to renew a contract, even if the proposed duration was not what the staff member would have liked.

55. Respondent is of the view that appellant was adequately informed by the Service Line Chief, in the presence of the Service Area Owner and the Service Manager.

f. Appellant's performance

56. Respondent observes that appellant is indeed a good performer, but that he did not receive one of the top ratings. The NCIA Contract Policy specifies that those staff members who are consistently high performers may be asked to stay on as long-term employees.

g. Agency Supervisory Board

57. Regarding the submission that the Agency Supervisory Board (Board) in mentioning a median of six years in its Strategic Direction and Guidance would breach the CPR, respondent recalls that neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresees an automatic award of a certain number of definite duration contracts, and none contains an obligation on the part of the Organization to award follow-on contracts. The Board's guidance, while providing further factors that can be taken into consideration when renewing the contract of a staff member, does not in itself modify the CPR, rendering appellant's argument moot.

58. Respondent stresses that appellant himself has already passed the median of six years and has therefore, with his latest contract, already received a rather favourable treatment in comparison with many other staff members.

h. "Informal" contract policy

59. Regarding appellant's contention that the Agency's decision to offer him a two-year instead of a three-year definite duration contract was taken to achieve a goal which is not the one that is required, thereby suggesting that the Agency took this decision to deprive appellant of health insurance and a retirement pension and that the Agency would apply an informal policy aimed at preventing anyone from reaching the ten-year threshold of employment, respondent submits that this is not supported by facts. It points out that the Agency has since 2015 awarded 146 contracts of indefinite duration, almost exclusively to staff who have reached 10 or more years of service, which is, in comparison with other NATO bodies, a rather considerable number of recently awarded indefinite duration contracts.

60. Respondent notes that appellant was born in 1974. As a consequence, he would

still require 12 years of service before becoming eligible for continued medical coverage and 17 years of service before reaching pensionable age. It is thus obvious that the Agency is not depriving appellant of medical insurance or a retirement pension by giving him a two-year definite duration contract.

61. Respondent requests that the Tribunal declare the appeal unfounded.

D. Considerations and conclusions

i) Admissibility

62. Respondent submits that appeals concerning first contracts are time-barred.

63. In addition, the Tribunal notes that appellant initiated the pre-litigation procedure with a single request, namely that the contract that was offered to him be changed from a two-year contract to a three-year contract, without specifying that this would be a renewable one.

64. Appellant has, during the pre-litigation process, expanded his claim and requested an indefinite contract or, on a subsidiary basis, a three-year renewable contract.

65. Appellant has furthermore, during the pre-litigation procedure, added new grounds for appeal, such as misuse of powers.

66. These elements raise major questions of admissibility of the appeal. The Tribunal deems it, at this stage, and in view of the circumstances of the case and of similar cases that are being adjudicated on the same day as the present one, advisable to address the merits of the case first.

ii) Merits

67. As to the merits, appellant submits five grounds for annulment. They are briefly recalled here and will be treated in the same order:

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR,
b. On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of the NCIA Directive 2.1 on Contract Policy,
c. Violation of the duty to state reasons,
d. Manifest error of assessment, and
e. Misuse of power.

Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR

68. Appellant was, prior to the impugned decision, employed under four definite duration contracts. He is currently in his fifth definite duration contract, which he countersigned on 8 December 2016 without any reservation, effective for two years from 1 October 2017 to 30 September 2019. The wording of the contracts that were offered to appellant over the years was clear: they specifically mention that they are definite duration contracts. Nothing in them makes specific reference to or even appears to imply the fact that the first contract or contracts were initial contracts.

69. Appellant submits that the first contract should have been an initial contract under Article 5.1 of the CPR and that, as a consequence, the contract offered in 2011, or at least the one offered in 2014, should have been of an indefinite duration.

70. Article 5.1 of the CPR provides:

> 5.1.1 Staff appointed or reappointed to the Organization shall be offered contracts, known as initial contracts, of between one and 3 years' duration unless Article 5.2 below applies.
> 5.1.2 Notwithstanding Article 5.5.2 below, an initial contract may exceptionally be renewed provided that the total length of service under initial contracts does not exceed 3 years.

71. Article 5.2 (Definite duration contracts) then provides:

> Definite duration contracts not exceeding 5 years shall be offered to staff appointed or reappointed to the Organization if:
> - they are seconded, in which case such a definite duration contract shall not exceed the length of the approved secondment; or
> - they are appointed to posts previously identified by the Head of NATO body as being required for a limited period; or
> - they are appointed to posts previously identified by the Head of NATO body (2) as posts in which turnover is desirable for political or technical reasons; or
> - they are appointed to research posts in scientific establishments.

72. The Tribunal, first of all, observes in this respect that appellant has accepted without any reservation a series of contracts. He did not challenge them at the time. He has, moreover, constantly held, including in the present proceedings, that he was expecting a series of contracts in accordance with NCSA's Contract Policy, which, in his opinion, guaranteed a first contract of one year to be followed by three three-year contracts.

73. In a first argument in support of his submission that his first contract should have been an initial contract, appellant contends that the inclusion of a three months' probationary period clause in his first contract was proof that the contract was an initial contract in accordance with Article 5.1 of the CPR (Initial contracts). The Tribunal cannot agree with this submission. Article 6.1 of the CPR (Probationary period) clearly provides:

> 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.

Thus, there can be a probationary period in either an initial or definite duration contract. Its inclusion does not show that a contract is an initial contract under Article 5.1.

74. Appellant contends that none of CPR Article 5.2's four conditions for definite duration contracts has been met, so Article 5.1 necessarily governs. This argument cannot stand. Respondent correctly points out that the Head of NCSA in January 2006 declared all civilian posts as "limited period" posts as outlined in Article 5.2.

75. As this Tribunal held in Case No. 2013/1002, paragraph 27, it follows from the provisions of Article 5.2 that the duration of a contract may be limited, whenever the post has been previously identified as one in which rotation is desirable either for political or for technical reasons. It is the privilege of the Organization to decide on the activities where staff turnover is advisable according to its own aims and management policies. The only conditions to be met are clearly defined in Article 5.2 of the CPR. There must be (i) a previous identification of the posts, and (ii) a political or technical justification.

76. As the Judgment in Case No. 2013/1002 also recalled, NCSA, and later NCIA, developed its own specific contract policy by means of successive directives where a general turnover clause was always included as an essential requisite for the Agency "to keep skills and competencies up to date", and established different rates of rotation depending on the area (for example, Directive on Personnel Contract Policy dated 12 February 2001; Directive 2-1 on Contract Policy dated 1 July 2005; and Directive 2-1 on Contract Policy dated 1 January 2013). Throughout the evolution of these directives it became clearly established that all civilian staff at the Agency were subject to rotation owing to its core competencies, and that non-turnover of the staff was the exception. There is no contradiction with the provisions of the CPR, since political and technical reasons for rotation may be settled on the basis of general and reasonable criteria, as long as the conditions of Article 5.2, as mentioned above, are met.

On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of NCIA Directive 2.1 on Contract Policy

77. The requirement of legality is indeed an essential element for the enforceability of a contract, or contracts. The Tribunal notes in this particular case that the contracts countersigned by appellant included the clause that NCIA directives were applicable. The employment relationship between appellant and the Agency was also clearly identified as being one of definite duration contracts in accordance with NCSA and NCIA contract policies, and accepted by him without reservation. The Tribunal concludes that the conditions under Article 5.2 were met and that appellant's situation was unambiguously covered by definite duration contracts from the outset. (*cf.* AT judgment in Case No. 2013/1002, paragraphs 29 and 30).

78. Lastly, with respect to the claim for an indefinite contract, it suffices to recall the Tribunal's confirmation in Case No. 2015/1065 that there is no obligation for the Organization to offer an indefinite duration contract to a staff member who has not yet

reached 10 years of employment. The Agency's decision in the matter is within its discretionary powers, is in accordance with its policies and is not tainted with any abuse.

79. Appellant contends, on a subsidiary basis, a number of violations of the NCSA and NCIA contract policies. Appellant in this respect invokes different situations combining respectively the NCSA and the NCIA contract policies, while at the same time challenging the legality of the latter.

80. Appellant, first of all, refers in this respect to a letter by the NCIA General Manager dated 1 July 2012 informing him that, further to the Agencies Reform, the NCIA was established as from 1 July 2012 and that appellant's contract was henceforth with NCIA. The letter then contains the sentence: "All other terms and conditions of your employment contract remain unchanged." Appellant concludes from this that the NCSA Contract Policy was at present still applicable to his situation.

81. The Tribunal is of the view that the sentence quoted by appellant refers to the situation at that time and not to the future. There is no indication or implication in appellant's contract that these regulations or directives were frozen as they stood on 1 July 2012, when respondent came into existence. It is settled that Administrations may, under certain conditions, amend employment conditions. This is what NCIA did in 2013 when it adopted its own Contract Policy, which may be seen as a refinement of the NCSA Policy. The new policy was issued to staff, as will be shown below. Both contracts offered in 2014 and 2016, as countersigned by appellant, contain the clause that *"[t]he employment is governed by the provisions of the NCPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and NCIA regulations, directives and instructions as in effect at any given time"*. The Tribunal cannot but conclude that the NCIA Contract Policy was applicable to both contracts and to the challenged decision.

82. Appellant submits that he was not aware, or made aware, of the new NCIA Contract Policy. As the Tribunal has previously held, a NATO body has a responsibility to provide its employees with reliable information regarding significant aspects of their employment. The Tribunal is persuaded that respondent provided sufficient information regarding its contract policy to Agency staff. The Tribunal recalls that the policy was communicated via the NATO Secret – to which appellant had access – as well as the NATO Restricted systems. Furthermore, an Agency newsletter was sent to all staff on 16 January 2013, on both systems, and links were provided to the actual contract policy. In this connection, the Tribunal rejects appellant's contention that changes in an agency's internal regulations can only be properly communicated to a staff member if they are expressly mentioned in the staff member's contract. Agencies modify their internal regulations and administrative documents with varying frequency and for varying reasons. There is no requirement that every such change must then be incorporated into every staff member's contract in order to be effective. The policy concerned was thus published and brought to the attention of staff. While respondent's efforts to acquaint its staff members with the new policy may not have attained perfect results, perfection is not required. The record shows that respondent made substantial efforts, appropriate in the circumstances and utilizing various means of communication, to acquaint staff with the new policy.

83. The Tribunal also concurs with the Complaints Committee that employees have a responsibility to familiarize themselves with information provided to them and to make further inquiries as required. An Agency cannot be held responsible for shortcomings of staff in familiarizing themselves with the information provided. In this regard, the NCIA Contract Policy clearly indicated that it applied to all NCIA staff, thus necessarily superseding the NCSA Policy, which was then no longer in force. The Tribunal finds appellant's arguments in this respect not persuasive.

84. The next question to be answered is whether the Agency could under the CPR and its Contract Policy offer appellant a two-year-duration contract or whether appellant had legitimate expectations to see a three-year contract offered. The Tribunal recalls that Article 5.2 provides that definite duration contracts shall not exceed five years. Paragraph 4.3 of the NCIA Contract Policy stipulates that definite duration contracts are normally of three-year duration. It is added that "*contracts may be for less than three years as required to support short-term projects, meet uncertainty with respect to the business outlook, staff performance and other factors*". One can thus conclude that the normative texts do not prohibit the granting of contracts of less than three years.

85. It needs to be established, however, whether at least one of the conditions laid down by the Agency in its policy for granting a contract for less than three years has been met. The Complaints Committee notes that the reference to "other factors" gives the Agency and its Civilian Personnel Management Board the latitude to make the decision based on performance factors. The Tribunal agrees.

Violation of the duty to state reasons

86. Appellant contends that he was initially not provided with the rationale behind the Civilian Personnel Management Board (CPMB)'s decision to award him a two-year extension. Respondent contends that international administrative law does not require that reasons be given for a decision not to renew a contract. The Tribunal makes no decision in this regard, although it believes that providing reasons for non-renewal is a sound administrative practice that gives due recognition to the interests of staff members in a matter that may be very important to them.

87. In his letter of 17 January 2017 answering the request for administrative review the Director, Infrastructure Services observed:

> Strategic direction and guidance received from the Agency Supervisory Board now targets a median of six years of employment within the Agency. Your performance in 2015 was indeed very good, which I precisely why the decision was taken to offer you a further contract of employment at this time.

88. In his letter of 9 March 2017 the Chief of Staff, answering the request for a further administrative review, referred to a meeting that he had with appellant in the presence of an HR officer:

> We met on 15 February 2017, together with …from the Human Resources office, to discuss the rationale behind the Agency's decision and to allow you the opportunity to

> express your personal concerns in detail. In the meeting we also spoke about the former NCSA Civilian Contract Policy and your own contracts of employment, particularly those issued during the time of NCSA.

89. It is thus clear that respondent's Chief of Staff had a substantive meeting with appellant at which respondent's reasons and appellant's concerns were thoroughly ventilated. Moreover, further explanations were given during the Complaints Committee proceedings. One of the purposes of the pre-litigation process is to clarify matters, and to resolve them where possible.

90. Lastly, the General Manager in his final decision of 14 July 2017 recalled that the Complaints Committee:

> also confirmed that upon renewal you were informed that the recommendation to grant a two year extension will allow more time to further evaluate your performance and consequently whether you will be considered for a further contract extension beyond ten years of service.

91. Appellant was thus put in a position to understand clearly the decision-maker's reasoning and to determine whether the contested decision was justified or tainted by an error. The Tribunal is also enabled to perform its judicial control. (*cf.* AT judgment in Cases Nos. 889, 890 and 897). Indeed, appellant's statement at the hearing indicated that he understood respondent's reasons. He simply disagreed with them.

Manifest error of assessment

92. Appellant contends that the NCIA Contract Policy provides that the definite duration contracts are normally of three years' duration. There was, in his view, no particular reason not to offer a three-year contract, all the more so as his performance was excellent, later downgraded to very good. Moreover, he was performing, on a day-to-day basis, operations which ensured business continuity. This continuity was now in jeopardy because of the contested decision.

93. Respondent observes that appellant is indeed a good performer, but that he did not receive one of the top ratings. The NCIA Contract Policy specifies that those staff members who are consistently high performers may be asked to stay on as long-term employees. The two-year extension was granted to allow more time to further evaluate appellant's performance, especially in the light of the requirement to identify the top 25% performers.

94. The reasons given by the Administration are not inappropriate. It is the stated, transparent as well as legitimate policy of the Agency to have rotation amongst its civilian staff, with the target of a median of six years' employment in the Organization including the retention of the top 25% performers amongst its staff under indefinite duration contracts. Under this policy some staff will thus have a total of less than six years of service, some will have more than six years of service under definite duration contracts and again others will have indefinite duration contracts. Data provided by the Agency

indeed appear to confirm the implementation of this policy. The Agency holds the view that appellant may be a good or very good performer, but he is not at this stage amongst the top 25% performers, and that the two years will allow more time to further evaluate his performance and to determine whether he will be considered for a further contract extension beyond ten years of service. The Agency did not manifestly err in its assessment of appellant's situation. The decision regarding appellant is thus not exceptional or contrary to stated policies. It is in line with the NCIA Contract Policy. Appellant could not have a legitimate expectation to the contrary. The Tribunal thus fails to see a manifest error in assessment in this approach. Moreover, with respect to appellant's argument of business continuity, the Tribunal observes that this is the responsibility of the Agency, even more so since it has a confirmed policy of staff rotation.

Misuse of power

95. In his last plea appellant alleges misuse of power. He contends that the internal guidelines of respondent's Agency Supervisory Board (Board) and contract policy, targeting a median of six years of employment, conflict with the CPR. He recalls that the Agency is under the authority of the North Atlantic Council (NAC). The Board can, in his opinion, not modify the CPR, which are adopted by the NAC. This reflects a misuse of power.

96. As the Tribunal has held *supra*, neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresee an automatic award of a certain number of definite duration contracts, nor do they contain an obligation for the Organization to award contract extensions. The Board, which is the supreme organ of the Agency, may give guidance to management while staying within the limits of the CPR. As the Tribunal has also held *supra*, the guidance given and the adopted policies are not contrary to nor modify the CPR.

97. The Tribunal underlines that the decisions referred to above were taken in the exercise of the discretionary powers that the Agency's management possesses. It is settled jurisprudence, including by this Tribunal, that decisions in the exercise of this discretion are subject to only limited review by a tribunal. Tribunals only interfere when there is an abuse of these powers, for example if a decision 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. Tribunals have also consistently held that they will not substitute their own view for the Organization's assessment in such cases.

98. Appellant further contends, without supporting evidence, that the Agency appears to have an informal contract policy which aims at preventing anyone from reaching the ten-year threshold of employment, which is an inconsistent application and distortion of its own rules. The Tribunal cannot agree. Data provided by respondent show that meaningful numbers of staff reach this threshold and that others receive indefinite contracts.

99. The Tribunal is of the view that there has been no abuse of discretionary powers.

100. For these reasons, the Tribunal concludes that the appeal is unfounded.

101. The appeal being unfounded, no decision needs to be taken on the admissibility of the appeal or elements thereof.

E. Costs

102. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 6 June 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 June 2018 AT-J(2018)0010

Judgment

Case No. 2017/1249

CR

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 June 2018

Original: English

Keywords: NCIA contract policy; successive definite duration contracts; promotion and new assignment.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Christos A. Vassilopoulos and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 15 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA) dated 6 October 2017, and registered on 10 October 2017 as Case No. 2017/1249, by Mr CR. The appeal seeks to annul NCIA's decision not to offer appellant an indefinite contract or a three-year renewable contract.

2. The respondent's answer, dated 11 December 2017, was registered on 18 December 2017. The appellant's reply, dated 24 January 2018, was registered on 26 January 2018. The respondent's rejoinder, dated 26 February 2018, was registered on the same day.

3. The Panel held an oral hearing on 15 March 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

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

5. Appellant joined the Supreme Headquarters Allied Powers Europe (SHAPE) on 1 September 2010, as Engineer (BME), on a definite duration contract expiring on 31 August 2011. He was graded A-2. When this contract expired, appellant was offered another definite duration contract for the same position for a period of three years (1 September 2011 to 31 August June 2014), renewed for an additional three-year period (1 September 2014 to 31 August 2017).

6. On 7 December 2016, respondent offered appellant, for the same position of Engineer (BME), a new definite duration contract of two years (1 September 2017 to 31 August 2019). Appellant accepted this offer on 12 December 2016, without reservation.

7. During this period, appellant applied for the A-3 position of Service Manager (Infrastructure Services Directorate) within the NCIA.

8. Appellant was on 15 December 2016 informed that he had been selected for this position and was offered a new definite duration contract for the period from 1 January 2017 to 31 August 2019.

9. By email sent on 18 December 2018, appellant accepted this offer and signed the new contract on 20 December 2016. In this email, appellant stressed that *"(he expects)*

that the new contract is not detrimental to (his) staff member status that it is in accordance with (his) current contractual duration and in line with the NATO Civilian Personnel Regulations (CPR)".

10. Appellant signed this new contract on 20 December 2016 without any reservation. On the same day, however, he started the pre-litigation process and requested a first administrative review contesting respondent's previous contract offer, which he had countersigned on 12 December 2016. In this respect, he stressed that this decision did not comply with the NCSA Contractual Policy and, *inter alia*, the 1-3-3-3-indef policy.

11. Respondent replied to this request on 23 January 2017 recalling that the decision on renewal of his contract was fully in line with the NCIA Contract Policy, which had superseded the NCSA Policy. In addition, respondent observed that the considerations of the Civilian Personnel Management Board (CPMB), which met in November 2016, were subsequently taken into account when the General Manager of the Agency approved appellant's appointment in December 2016. It concluded that the contract offer fully complied with the NCIA Contract Policy.

12. On 14 February 2017, appellant requested a further administrative review of the above-mentioned rejection. Appellant stressed that he was offered an initial contract within the meaning of the CPR and that his contractual situation was covered by the NCSA Contract Policy. Consequently, the offer of a three-year contract after his first "initial contract" was not in line with the CPR.

13. NCIA's Chief of Staff met with appellant on 3 March 2017 together with a Human Resources officer to discuss the Agency's decision and to listen to appellant's personal concerns in relation to the NCSA Contract Policy in greater detail.

14. On 7 March 2017 respondent, with reference to the talk of 3 March 2017, answered the request for further administrative review. It stressed that the NCSA Contract Policy was no longer applicable to appellant's current situation. It added that appellant had not raised grievances at the time when earlier contracts were offered. It confirmed that the offer of a contract until August 2019 was correct and in line with the NCIA Contract Policy.

15. On 6 April 2017, appellant lodged a complaint against this decision of 7 March 2017. He requested to be awarded an indefinite duration contract or, at the very least, a three-year renewable extension of his position as Engineer. Appellant also requested that his complaint be submitted to the assessment of the Complaints Committee.

16. By respondent's decision dated 21 April 2017, a Complaints Committee was established in order to investigate appellant's complaint.

17. On 23 July 2017, the Complaints Committee issued its report, recommending that respondent *"(reconsider) the decision of the CPMB and offer (appellant) a three years definite duration contract in his new (position)"*.

18. On 28 July 2017, appellant sent his comments on the Complaints Committee's report, amongst other things underlining that the three-year extension should not start a new contractual period but should maintain appellant's rights acquired under the applicable contract policy.

19. By letter dated 8 August 2017, respondent informed appellant that, on the basis of the conclusions of the Complaints Committee and other considerations, it had decided to cancel the previous decision of a two-year contract and to offer him a three-year definite duration contract in the position of Service Manager (challenged decision).

20. It was under these conditions that appellant submitted on 6 October 2017 the present appeal to the Tribunal because respondent did not grant him an indefinite duration contract or a three-year contract in his previous position as Engineer.

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

(i) Appellant's contentions

21. Appellant contends that his action is admissible. He duly initiated and followed the pre-litigation process challenging the successive intermediary decisions of respondent and the final decision dated 8 August 2017. According to the case law of the Tribunal, *"in the absence of any agreement between the parties on the employment relationship to be established, and in the absence of any explicit commitment on the part of the appellant to give up the pursuit of the case, he cannot be accused of having followed the pre-litigation procedure in an improper manner by lodging the appeal in case no. 2015/1043, after signing his contract"* (see in this regard, AT, joined cases 2014/1027 and 2015/1045).

22. Second, appellant objects that he has attempted only to contest the decision of 12 December 2016 by which respondent awarded the appellant a two-year contract on his position of Engineer and not the decision for his new position as Service Manager. However, respondent's decision dated 8 August 2017 cancelled the earlier decision of two-year extension contact and offered appellant a three-year definite duration contract in the position of Service Manager. According to appellant, the confusion concerning his contractual situation in the decision dated 8 August 2018 affects his interests. The promotion to a higher position, such as the position of Service Manager, could not have any detrimental consequence on the duration of his employment within the Organization in relation to his previous position as Engineer.

23. Thirdly, the granting, as requested by appellant, of a three-year extension contract as Engineer from 1 September 2017 would have led the appellant to have a contract ending on 31 August 2020, not 31 August 2019, then extended to 31 December 2019. The decision of 8 August 2017 reduced the length of the appellant's work by eight months, and consequently the action should be declared admissible, appellant having an interest in taking legal action.

24. In his submissions on annulment, appellant developed six pleas against the challenged decision.

25. Firstly, appellant contends that the progression in the career of a staff member after a promotion should not be detrimental to the duration of his employment situation. Indeed, such as it is the case for a staff member who is holding an indefinite duration contract and keeps this indefinite duration contract when moving and progressing in his career, the same rule must be applicable in case of definite duration contracts. This in in line with the duty of care of the administration and the right of the staff member to pursue a career. The challenged decision did not comply with this rule, and, consequently, it must be annulled.

26. Secondly, appellant considers that the challenged decision violates the provisions of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR. In particular, appellant contends that he was employed since 2010 on the basis of two successive initial contracts within the meaning of Article 5.1.1 of the CPR. Indeed, when appellant was recruited, he was not seconded; his position was not identified by the Head of NATO body as subject to the rotational rule; and appellant was not appointed to a position as researcher. His contract consequently did not fall within the provided options for offering a definite duration contract. This is also confirmed by the case law of the NATO Appeals Board. Indeed, in Case No. 794, the Appeals Board pointed out that the relevant criterion for the qualification of a contract as an "initial" contract within the meaning of the CPR is not dependent on the wording used in the contract, as respondent argued. It is clear that the position offered to appellant was a position for an "initial" employment. Since he had a first initial contract of one year, the second contract could not have been of three years, but of two years, in order to comply with the limit of three years provided for by the CPR for an initial employment.

27. According to Articles 5.5.2 and 5.1.2 of the CPR, the Head of NATO body cannot renew an initial contract, which has already been of three years, for another definite duration and the further renewal must be of an indefinite duration. Consequently, since his second renewal, appellant had to be employed under an indefinite duration contract. Therefore, by rejecting appellant's request to be awarded an indefinite duration contract, the challenged decision breached the provisions of the above-mentioned articles.

28. In this regard, the fact that appellant did not lodge a complaint against the respondent's decisions concerning his two first initial contracts is irrelevant. Indeed, respondent adopted a new decision on 12 December 2016 offering appellant a new renewal of the two-year contract, a decision which was subject to the administrative review process. Consequently, the challenged decision must be annulled and appellant should be granted an indefinite duration contract in his previous position as Engineer.

29. Thirdly, appellant considers that the challenged decision violates the duty to state reasons and must be annulled; indeed, this decision is silent on the reasons why appellant was granted a three-year extension contract and not an indefinite duration contract. Appellant stresses that the various elements to which respondent referred in this decision in order to justify the option for a new three-year contract are not explained; in addition, the documentation on the basis of which the challenged decision was adopted

were never communicated to appellant. Respondent keeps on basing its reasoning on elements which were never communicated to appellant, and this after the recommendations of the Complaints Committee report. With this deliberate omission, respondent did not treat appellant the way it should have. From that perspective, the challenged decision is vitiated and must be annulled.

30. In this regard, appellant requests the Tribunal that respondent communicate the minutes of the CPMB meeting dated 11 October and the selection proposal approved by the General Manager on 5 December 2016.

31. Fourthly, appellant stresses that during the administrative review process, respondent illegally invoked Directive 2.1 in order to justify the decision on an additional renewal of his last contract.

32. On the one hand, appellant contends that, according to Directive 2.1 (point 4.3.2), in light of his performance and notation reports, he should be granted an indefinite duration contract; however, even invoking the contractual policy regime of the NCIA, respondent did not explain the reasons for which it awarded appellant a definite and not an indefinite duration contract. In addition, and according to point 4.3.4 b of Directive 2.1, given the fact that appellant reached the maximum of three years of employment under initial contracts, he did not fall into the categories foreseen by Article 5.2 of the CPR for which the renewal can be envisaged.

33. On the other hand, appellant considers that, in any event, Directive 2.1 is not applicable to his situation and cannot be invoked as a ground for rejecting his request. Appellant was informed by letter dated 1 July 2012 that his contract was with the NCIA and that all the terms and conditions of his employment contract remained unchanged. According to appellant, this means that he had legitimate expectations that the 1-3-3-3-indef policy provided under the previous regime of the NCSA Contract Policy and on the basis of which he was recruited continued to be applicable.

34. In addition, and as pointed out by the Complaints Committee in its report, appellant was never aware of the regime of Directive 2.1, nor was this directive communicated to him. Consequently, respondent could not argue that the NCSA Contract Policy was superseded by the NCIA Contract Policy and Directive 2.1. Furthermore, as required by the case law of the Tribunal, the applicability of Directive 2.1 depends on the existence of a reference to this Directive in the employment contract of the staff member concerned. This is not appellant's contractual situation.

35. Fifthly, appellants contends that the challenged decision offering only a three-year extension was adopted in an error of assessment. Indeed, since he joined the Organization, appellant had a consistently high level of performance, received various awards during his career and his application for a managerial position was accepted because of his professional competencies. On the basis of these considerations, respondent could not justify the refusal to grant him an indefinite duration contract or at least a renewable extension of three years and eight months on his new position. Consequently, the challenged decision must be annulled for manifest error of assessment.

36. Sixthly, appellant considers that the challenged decision amounts to a misuse of powers because this decision offering only an additional renewal was taken in order to achieve a goal which is not the one that is required, since it clearly prevents appellant from reaching ten years of employment and thus obtaining an indefinite duration contract. In particular, respondent took into account the objective of a median six years of employment recommended by the Agency Supervisory Board (ASB), an objective not provided by the CPR, and an informal contract policy rule, which is also not provided by Directive 2.1, aiming at preventing anyone from reaching the ten-year threshold of employment. On the basis of these rules, not provided by the CPR, respondent managed to make an illegal decision on contract renewals at the point of nine years of employment. A further extension could be granted but only for a limited duration of three to five years since the ten-year threshold would not have been reached when the last decision on renewal was adopted.

37. By avoiding answering appellant's complaint and by granting him a three-year extension in his new position, appellant only reached nine years and four months. This is clearly a distortion of the applicable rules to the detriment of staff members amounting to a misuse of power and breaches Article 1.2 of the CPR according to which *"the paramount consideration in the appointment of the staff shall be the necessity of securing the highest standards of diligence, competence and integrity"*. For that reason, the challenged decision must be annulled.

38. In conclusion, appellant requests to be granted an indefinite duration contract or at least a three-year renewable contract in his previous position as Engineer. In addition, he requests to be awarded an indefinite duration contract or at least a renewable extension of three years and eight months in his new position as Service Manager. In this regard, appellant seeks:

- annulment of the challenged decision insofar as this decision rejects appellant's request to be awarded an indefinite duration contract or at the very least a three-year renewal contract in his previous position as Engineer;
- if needed, annulment of the decisions dated 23 January 2017 and 7 March 2017 rejecting appellant's first and second requests for administrative review;
- annulment of the respondent's initial decision dated 12 December 2016 granting appellant only a two-year renewal;
- communication of the CPMB meeting minutes dated 11 October 2016, of the Proposal for Renewal of Staff Contract and of the selection proposal approved by the General Manager on 5 December 2016; and
- reimbursement of all the legal costs incurred and fees of the retained legal counsels.

(ii) Respondent's contentions

39. Respondent objects, firstly, that the appeal is inadmissible. Appellant requested an indefinite duration contract or a three-year definite duration contract in his previous position as Engineer but he subsequently signed a new contract for a new position of Service Manager. As a consequence, the appeal is without any object. Respondent, secondly, contends that the appeal is, in any event, moot. Appellant challenged a contractual situation which does not exist anymore. Indeed, he signed the two-year

definite duration contract for the position of Service Manager and at the same date he started the administrative review process against the decision on a two-year contract in his previous position. Thirdly, respondent considers that, in any event, appellant cannot challenge today a contractual situation established under the NCSA and the NCIA Contract Policy regimes after having signed successive definite duration contracts since 2011, without having objected at all to the illegality of the NCIA Contract Policy regarding the previous NCSA 1-3-3-3-indef policy.

40. Regarding the merits, respondent, firstly, objects that appellant has obtained with the challenged decision a three-year contract from January 2017 to December 2019 in his position of Service Manager, bringing appellant to a longer duration contract than his previous contract in the same position or his contract in the former position of Engineer. Appellant's contractual rights are safeguarded by the adoption of the challenged decision and thus the first plea developed by appellant against the challenged decision must be rejected.

41. Secondly, respondent stresses that appellant never held an "initial contract" within the meaning of Article 5.1 of the CPR. In contrast, and such as it results from the wording used in his two first contracts, they were definite duration contracts governed by Articles 5.2 and 5.3 of the CPR. For that reason, he signed one contract of one year, followed by a three-year definite duration contract, clearly exceeding the threshold of three years required for "initial contracts". Thus appellant cannot request to be granted an indefinite duration contract following his "initial" employment, within the meaning of the CPR.

42. Respondent adds that appellant has in any event no automatic right to an indefinite duration contract with the NCIA Contract Policy regime. Indeed, when appellant was awarded his contract on 1 January 2017, he had served the Organization for six years and four months only. Appellant had not reached ten years of service, and consequently, he had no right to an indefinite duration contract. In addition, even in cases of ten years of service within the Organization, the Head of NATO body concerned has the discretion to offer an indefinite duration contract.

43. Moreover, and in contrast to appellant's contentions, the NCIA Contract Policy does not in any way preclude the Organization from offering in specific and very exceptional situations an indefinite duration contract before the staff member reaches the ten years of service in the Organization, but appellant does not meet the provided conditions.

44. Furthermore, respondent considers that appellant could not argue that the NCSA Contract Policy regime guaranteed continuous employment and the award of an indefinite duration contract before the staff member reaches ten years of continuous service. According to this policy, an indefinite duration contract would only be considered upon reaching the threshold of ten years. Consequently, appellant cannot claim legitimately to have also expected an indefinite duration contract on the basis of the NCSA contractual policy, and the challenged decision is valid and in line with the CPR.

45. Thirdly, respondent considers that the challenged decision did not breach its duty to state reasons. Indeed, respondent explained to appellant that the decision to offer him

a three-year contract was based on the recommendations of the Complaints Committee and further investigations. In addition, respondent took into account appellant's competencies and contribution to the NCIA as Service Manager. These elements prove that the challenged decision complies with the duty to state reasons.

46. Fourthly, and in contrast to appellant's claims concerning the illegal reference to Directive 2.1 in the challenged decision, respondent contends that all staff members were sufficiently informed, through the existing internal communication channels, about the new contractual regime and were invited to ask the Human Resources service about the applicability of Directive 2.1.

47. In particular, appellant had access to the NATO Secret network and he should have read the policy and asked the Human Resources service about the new contractual regime. However, he never contested this new policy when he signed the successive contracts offered by respondent.

48. Concerning the applicable rules of Directive 2.1, respondent recalls that in contrast to appellant's claims, this directive, such as it is the case with the NSCA contractual policy regime, provided the possibility for offering successive definite duration contracts, taking into account the interest of the service and the satisfactory performance of the staff member concerned. From that perspective, appellant cannot claim to have a particular interest for the application in his situation of the NCSA contractual regime and the 1-3-3-3-indef policy insofar he has not reached the requirement of ten years of employment. Respondent had the discretion to offer appellant a new definite duration contract on the basis of the rules provided by Directive 2.1 and the challenged decision is fully in line with it.

49. Fifthly, as regards arguments put forward by appellant in support of his assertion that the challenged decision may amount to a misuse of powers, respondent considers that there is no informal contractual policy aiming at ensuring staff members do not reach ten years of employment or a rule of six years of definite duration employment.

50. In particular, as regards the median term of six years of service (ASB guidance) within the Organization as a criterion in order to prevent a staff member from obtaining a definite or indefinite duration contract, respondent stresses that appellant accomplished the alleged median of six years and received favorable treatment with the last offered contract. In any event, respondent considers that the ASB guidance on a median term of employment of six years must be considered as a whole and, in any event, this objective could not modify or go against the CPR.

51. Concerning the existence of an informal contractual policy preventing staff members from reaching ten years of employment within the Organization, respondent objects that this allegation is not supported by facts. In contrast, since 2015 NCIA has awarded a large number of indefinite duration contracts and this on the basis of the conditions provided by the CPR and Directive 2.1.

52. Therefore, the last plea developed by appellant that the challenged decision amounts to a misuse of powers must be rejected as unfounded.

53. In conclusion, respondent requests that the Tribunal declare the appeal inadmissible and unfounded.

D. Considerations and conclusions

54. By his submissions for annulment, appellant challenged respondent's decision to grant him a renewal for only two years (from 1 September 2017 to 31 August 2019) instead of an indefinite duration contract or a three-year renewal contract for his previous position as Engineer. Appellant's submissions are directed in this regard against all respondent's decisions adopted during the administrative review process as well as against the challenged decision dated 8 August 2017.

55. During the administrative review process as well as during the proceedings before the Tribunal, appellant asserted that the present action is directed against the decision rejecting his request to be awarded an indefinite duration contract or a three-year contract in the position of Engineer. During the hearing, he confirmed that his action is not addressed against the decision to offer him a two-year definite duration contract in the position of Service Manager within the NCIA.

56. The Tribunal observes that appellant accepted on 12 December 2016 respondent's offer of a two-year renewal of his contract in his position as Engineer within the NCIA.

57. Having applied for the position of Service Manager, appellant received three days later, on 15 December 2016, respondent's offer of this new position, and accepted the new offer by email on 18 December 2016. In this email, whereby he accepted the new offer, appellant indicated that he expected that the new contract *"is not detrimental to (his) staff member status that it is in accordance with (his) current contractual duration and rights and in line with the (CPR)"*. On the same date, he started the administrative review process against the respondent's decision to offer him a two-year contract in the former position of Engineer.

58. The Tribunal considers that by accepting the new offer of the position of Service Manager, appellant's previous contract in the position of Engineer has become void of purpose. Indeed, after appellant accepted the respondent's offer of a new position, the contractual link as regards the position of Engineer between respondent and appellant no longer exists.

59. In this context, appellant cannot continue the proceedings requesting the annulment of the challenged decision rejecting his request for an indefinite or a three-year renewal contract in a position that he no longer occupies.

60. Appellant stressed that he had an interest to continue the proceedings because the challenged decision awarded a three-year contract in his new position of Service Manager although he never challenged the respondent's decision offering him this new position. In this regard, the confusion concerning his contractual situation in the

challenged decision dated 8 August 2018 regarding his request affects in any event his interests to continue the proceedings.

61. The Tribunal observes that it is true that appellant did not challenge the respondent's decision offering appellant a two-year contract in the position of Service Manager. However, when accepting this new offer, appellant formulated reservations about his contractual status (duration and rights) without mentioning that these rights concerned his previous contract. In addition, the Tribunal notes that, on the basis of the documents submitted before the Tribunal, appellant did not formulate reservations when he accepted on 12 December 2016 the offer of a two-year contract in the position of Engineer.

62. Given the fact that the contract for the position of Engineer became void of purpose when appellant accepted the offer of the position of Service Manager, respondent took into account the recommendations of the Complaints Committee and offered appellant a new definite duration contract of three years in the position of Service Manager. Nonetheless, this favourable decision for appellant does not give him the interest to continue the proceedings in the context of a contractual situation (*i.e.* his previous contract as Engineer) which does not exist anymore. Consequently, appellant's contentions developed in this regard must be rejected.

63. On the basis of the above considerations, appellant's submissions for annulment must be rejected.

64. The other claims developed by appellant in his action, directly related to the annulment of the respondent's decisions, must also be rejected and consequently the action must be dismissed in its entirety.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 6 June 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 June 2018 AT-J(2018)0011

Judgment

Case No. 2018/1255

TG

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 June 2018

Original: English

Keywords: NCIA Contract Policy; definite duration contract; initial contract; probationary period.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mrs Maria-Lourdes Arastey Sahún, having regard to the written procedure and further to the hearing on 15 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA) dated 9 January 2018, and registered on 10 January 2018 as Case No. 2018/1255, by Mr TG. The appeal seeks to annul NCIA's decision not to offer appellant an indefinite contract following ten years' service under a succession of earlier contracts.

2. Appellant sought an expedited procedure because of claimed financial and medical challenges. The Tribunal was able to hear his claim shortly after conclusion of the written procedure without needing to expedite the proceedings.

3. The respondent's answer, dated 19 February 2018, was registered on the same day. The appellant's reply, dated 26 February 2018, was registered on the same day. The respondent's rejoinder, dated 6 March 2018 was also registered on the same day .

4 The Panel held an oral hearing on 15 March 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

6. Appellant is a former officer retired from a NATO member country's armed services. His final three-year definite duration contract with respondent, which concluded on 31 March 2018, was for a senior financial position.

7. Appellant entered onto duty with NCIA's predecessor agency, the NATO Communication and Information Systems Services Agency (NCSA), on 1 April 2008 under a one-year contract. On its first page, this contract was clearly designated in bold-faced and underscored capitals as a "definite duration contract for a temporary post." Article 8 states: *"[t]he first three months of the appointment will be considered as a probationary period. During this period, either the employee or NCSA can terminate the contract by giving 30 days notice in writing*."

8. Paragraph 3 of the 2008 contract states: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and NATO security regulations as well as by the relevant NATO/ALLIED Command Operations (ACO) SHAPE, and NCSA regulations, directives and instructions as in effect at any given time*." Each of

appellant's subsequent contracts contained similar language providing that it was subject to the employing agencies' "*regulations, directives and instructions as in effect at any given time*".

9. Following this one-year contract, appellant entered into the first of three three-year definite duration contracts on 31 March 2009. This contract, with NCSA, again stated that it was a definite duration contract for a temporary post.

10. On 26 March 2012, appellant signed a second three-year definite duration contract with NCSA. The contract again stated that it was a definite duration contract.

11. In 2012, a number of NATO entities, including NCSA, were consolidated into NCIA, effective 1 July 2012. By memorandum of that date, NCIA's General Manager notified appellant that his contract is henceforth with NCIA and that *"[a]ll other terms and conditions of your employment contract remain unchanged*."

12. On 16 August 2014, appellant signed a third three-year contract, this time with NCIA. The contract, for a term between 1 April 2015 and 31 March 2018, again was a definite duration contract. Article 3 of this contract again provided that "*the employment is governed by ...NCI Agency regulations, directives and instructions as in effect at any given time*."

13. On 12 June 2017, over nine months before the end of his fourth contract, NCIA's General Manager notified appellant by letter that he would not be offered another contract.

Appellant's requests for review

14. On 10 July 2017, appellant lodged a complaint with the General Manager pursuant to NATO Civilian Personnel Regulations (CPR) Article 61.3, seeking reversal of the decision not to renew his contract. (Article 61.3 authorizes submission of a complaint directly to the head of a NATO body "*concerning a decision taken directly by him or her, without a prior administrative review.*")

15. Rather than respond to appellant's direct complaint to the General Manager, NCIA "*consider[ed] it more appropriate to address this as an Administrative Review...*". By letter of 18 August 2017 from NCIA's Director of Service Operations, the deemed request for administrative review was denied.

16. While expressing disagreement with the procedure followed by NCIA, appellant lodged a request for administrative review on 23 August 2017. This was denied by letter from NCIA's Chief of Staff on 5 October 2017.

17. On 12 October 2017, appellant lodged a second compliant, this time under CPR Article 61.2, directed against the decision reflected in the Chief of Staff's 5 October letter. This complaint renewed and elaborated upon the arguments in appellant's previous complaint and requests for administrative review.

18. This complaint was rejected by memorandum dated 13 November 2017 from respondent's General Manager. In this appeal, appellant seeks annulment of this 13 November 2017 decision rejecting his request to be awarded an indefinite duration contract, "*or at the very least, a three-year renewable contract*."

Legal Background

19. The appeal involves several interconnected CPR provisions:
- under CPR Article 5.1.1, staff appointed or reappointed to the Organization prior to 1 April 2012 "*shall be offered contracts, known as initial contracts, of between one and 3 years' duration...*";
- under CPR Article 5.2., the Head of a NATO body (HONB) can offer definite duration contracts not exceeding five years to staff appointed or reappointed if "*they are appointed to posts previously identified by the Head of NATO body as being required for a limited period.*";
- under CPR Article 5.5.3, following satisfactory performance during a definite duration contract, the HONB may offer either "*the renewal of the definite duration contract under the conditions of Article 5.2,*" or an indefinite duration contract;
- under CPR Article 5.4.2, staff members who have served for ten or more years "*under definite duration contracts or under a combination of different types of contracts and to whom a further contract is offered shall be offered indefinite duration contracts*."; and
- under CPR Article 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*."

Applicable Contract Policy

20. When appellant joined NCSA in 2008, NCSA's Contract Policy was set out in a 2006 memorandum which provided that, to meet needs from rapidly evolving technology and customer requirements, the Agency would adopt a more restrictive policy regarding indefinite duration contracts. Henceforth, "[*t]he NCSA contract policy will be to offer a one-year contract, with subsequent contracts of three-year duration for as long as the post remains a valid requirement. As provided in the NATO Civilian Personnel Regulations (NCPR), once a civilian employee reaches the ten-year employment threshold, an indefinite duration contract will be offered*."

21. On 1 January 2013, *i.e.* before appellant concluded his 2014 contract with respondent, NCIA promulgated Directive 2.1 on Contract Policy. Under Article 4.3.2 of the Directive:

> Staff, with the exception of scientists and possibly seconded staff, shall be offered a contract of indefinite duration, provided that they have served for ten or more years consecutively with NCI Agency, other NATO bodies or any of the co-ordinated organizations, under definite duration contracts or under a combination of different contracts, *and to whom a further contract is offered* (emphasis added).

22. Under Article 4.1 of the directive *"[t]he Agency is committed to ...b) retaining the very best staff members who perform at a superior level...*" Article 4.2 then states in part:

> It is essential for the Agency to maintain an up-to-date set of skills and competencies. Turnover is required and is desirable for a variety of reasons including but not limited to the introduction of up-to-date knowledge and experience from other organizations as well as fresh thinking and approaches that help keep the organization vital and relevant. This is balanced against the need to retain expertise based on sound management principles such as continuity and required capabilities.
>
> The preferred manning option for NCI Agency civilians shall be based on definite duration contracts. This means that unless specifically mentioned, all NCI Agency posts may be subject to rotation due to changes in the skills required by the Agency. This notwithstanding, indefinite contracts are allowed, as authorised by the NATO Civilian Personnel Regulations for a subset of NCI Agency personnel based on sound management principles such as continuity for the interest of the service and required skills.

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

(i) Appellant's contentions

23. Appellant contends that respondent did not comply with the CPR's procedures in addressing his complaints and appeals, in particular, by failing to respond properly to his initial complaint. Nevertheless, appellant contends that the claim is admissible, as he satisfied the appeals procedure provided for in CPR Annex IX and the appeal was filed within 60 days of rejection of his complaint.

Claimed violation of CPR Articles 5.1, 5.2, 5.3, and 5.5

24. In the first of his six claims, appellant contends that his previous contract situation did not comply with multiple CPR provisions, and that he should be deemed to be employed under an indefinite duration contract.

25. Appellant maintains that his first contract contained a probationary period and therefore was an initial contract covered by CPR Article 5.1, and that his subsequent three-year contract was a renewal of this initial contract. Accordingly, in appellant's view, the aggregate of four years of initial contracts contravened Article 5.1 of the CPR, which limits initial contracts to three years. In his view, any subsequent renewal should have been for an indefinite duration.

26. Appellant accepts that CPR Article 5.2 authorizes definite duration contracts but denies that it applies to him. As noted above, Article 5.2 authorizes such contracts in four situations for staff appointed, or reappointed, if they are (i) seconded, (ii) appointed to posts previously identified as being required for a limited period, (iii) appointed to posts previously identified as posts where turnover is desirable for political or technical reasons, or (iv) appointed to research posts in scientific establishments.

27. Appellant contends that none of these situations apply, and in particular, that his post had not been designated as one required for a limited period. In any case, in appellant's view, any such designation could only be effective if it had been communicated to him before he signed his contract.

28. Appellant considers the argument that he did not lodge a complaint regarding the alleged irregularity at the time of his earlier contracts to be irrelevant, since the Agency took a new decision in 2016 when it offered a further contract, thereby perpetuating its mistakes.

Frustration of appellant's legitimate expectations; violation of NCIA Contract Policy

29. Second, and subsidiarily, appellant contends that respondent violated its own contract policy, thereby frustrating his legitimate expectations. Appellant maintains that the Contract Policy of NCSA, respondent's predecessor agency, foresaw a career pattern of four definite duration contracts, the first of one year, followed by three three-year contracts. Appellant understood this policy to require that following this ten years of service, he would receive an indefinite duration contract. Appellant had a reasonable expectation that this policy remained in effect and applied to him.

30. Appellant urges that his expectations were reasonable, citing the General Manager's 1 July 2012 letter stating that the terms and conditions of his employment contract remain unchanged. He contends that there was a continuing requirement for his post, citing various agency publications and communications describing NCIA's new responsibilities and need for skill, experience, and continuity, all of which he could provide. These factors reinforced his legitimate expectation of an indefinite contract.

31. Appellant adds that he made important and expensive decisions based on his expectations, notably purchasing a London house with a fixed mortgage. The house has declined in value, and he will face heavy charges to escape his mortgage. Appellant also refers to the United Kingdom's decision to leave the European Union, contending that this leaves him unsure of his ability, as the national of a non-EU country, to remain in the United Kingdom.

Directive 2.1 cannot be applied

32. Third, appellant contends that Directive 2.1, establishing NCIA's new contact policy, cannot be applied to him.

33. Appellant contends that Directive 2.1 did not supersede NCSA's Contract Policy and in any case cannot be applied to him, as he was not properly informed of any change in contract policy. He cites General Manager's 1 July 2012 memorandum providing that the terms and conditions of his employment contract remain unchanged. Appellant also maintains that the new Directive was not communicated to him or his colleagues. It was referred to in a "routine order" disseminated electronically, but that was not sufficient notice. The general statement in his contract that it is subject to respondent's

"regulations, directives and instructions" was not sufficient to subject him to Directive 2.1. This Directive is not referred to in appellant's contract, and he could only have been put on notice of it if it was expressly mentioned in his contract.

34. Finally, appellant contends that, even if Directive 2.1 applies, the failure to offer him an indefinite contract conflicts with it. Appellant's argument in this regard reflects his contention that he exceeded the three years allowed for employment under an initial contract, and so should be deemed to have been employed under an indefinite contract from the time he signed his second three-year contract.

Violation of the Duty to State Reasons

35. In his fourth claim, appellant contends that respondent failed to provide reasons sufficient to allow him to understand the decision not to offer another contract. The explanation he received (referring to "business continuity and operational reasons" and his "performance and skill set") was vague, and he received no explanation of how these factors affected him personally.

36. Appellant notes that that under the terms of Directive 2.1., he should have been able to see the recommendations that were made to the Board that made the decision not to offer him an additional contract. This did not occur.

37. Appellant also urges that respondent knew that his state of health was fragile, due to stress about job security. Respondent should have taken this into account and provided detailed explanation of its decision.

Manifest Error of Assessment

38. Appellant's fifth claim includes material objecting to respondent's decision to offer him a definite duration contract with a term of less than three years. This may reflect a typographical error, as the present appeal concerns respondent's decision not to offer a further contract, not a decision to offer a contract of less than three years.

39. In any case, appellant contends that respondent's decision not to renew his contract reflects a manifest error of assessment. Appellant urges that he had important responsibilities, received positive performance ratings, and devoted years to the agency. Accordingly, he is an asset to respondent, which erred in not recognizing this and offering an indefinite contract. Appellant refers to the meeting he had with respondent's Chief of Staff, in which he explained his qualifications and his personal situation in detail. However, these explanations were disregarded, thus demonstrating a clear error of assessment.

Misuse of power

40. In his sixth claim, appellant contends that respondent's current contract policy was not authorized by the North Atlantic Council and violates the CPR in various respects. He contends, inter alia, that the respondent's declared goal of six-year median tenure of staff members contradicts the CPR, and that respondent has an improper informal policy to remove staff members nearing the ten-year mark in order to deny them benefits to which they are entitled under the CPR.

41. Appellant requests:
- annulment of the 13 November 2017 decision rejecting his request for an indefinite contract, or "at the very least" a three- year contract;
- if required, the annulment of other decisions rejecting his earlier complaints and appeals of like effect;
- "*the benefit of the expedited procedure*"; and
- reimbursement of all legal costs and counsel fees.

(ii) Respondent's contentions

42. Respondent denies that appellant's claims alleging his past contracts' non-compliance with the CPR are admissible. Respondent notes that appellant never raised issues or complained regarding has past contracts, and that his current complaints of past irregularities are time-barred and inadmissible. Respondent adds that numerous disputes with staff members have been resolved through the pre-contentious process of administrative review.

43. Respondent disputes appellant's first claim, that his first contract and subsequent three-year contract were both initial contracts, so that he should have received an indefinite contract following them. Respondent points out that all of appellant's contracts were clearly designated as definite duration contracts and provided that his employment was governed by agency "*regulations, directives and instructions as in effect at any given time*."

44. Regarding appellant's second and third claims alleging that Directive 2.1 cannot be applied to him and frustrates his legitimate expectations, respondent counters that the directive is consistent with the CPR and was properly followed. Appellant's post was properly designated as a "limited period" post for which definite duration contracts are appropriate and consistent with the CPR.

45. In respondent's view, the agency contracting policy when appellant was hired and Directive 2.1 do not differ significantly. Neither required it to offer appellant an indefinite contract after ten years. Both were consistent with CPR Article 5.5.2, which gives an agency discretion whether to offer a further contract. Hence, appellant had no right to an indefinite duration contract.

46. Respondent disputes appellant's claim that he was not made aware of Directive 2.1. The directive was communicated to agency staff on information systems, in the agency news magazine, on the agency intranet, and through a memo to staff from the

General Manager. These communications made clear that the new policy applied to all staff. Appellant unquestioningly signed his 2014 contract which was expressly subject to agency policies. He was responsible for knowing those policies. Respondent cannot be responsible for staff members' failure to acquaint themselves with information they are provided.

47. Respondent disputes the relevance of appellant's arguments involving the United Kingdom's departure from the European Union, as appellant is a national of a state that is not a member of the European Union.

48. Appellant's fourth claim alleged that he was not given sufficient reasons explaining respondent's decision not to renew his contract. Appellant contends that international administrative law does not require that reasons must be given for a decision not to renew a contract, citing Appellate Board jurisprudence to this effect. Respondent adds that appellant in any case received clear and sufficient reasons, citing a meeting between appellant and the Chief of Staff where the reasons for the agency's decision were explained and discussed and a subsequent communication from the General Manager further describing the factors considered by the agency.

49. As to appellant's fifth claim, alleging failure of assessment, respondent counters, inter alia, that appellant's knowledge and performance did not justify an indefinite contract. He did not receive the high performance ratings required to warrant such a contract. Respondent also contests appellant's arguments regarding the need for continuity of his position.

50. Respondent also disputes appellant's sixth claim, that its contract policy was not properly authorized and contradicts the CPR. The CPR authorize definite duration contracts in certain situations. In respondent's view, its policy of utilizing them to allow staff turnover and evolution to meet client needs and changing technology reflect appropriate agency policies that are consistent with the CPR.

51. Respondent also disputes appellant's claim that it maintains an informal policy of refusing indefinite contracts at the ten-year mark in order to deny staff members' benefits under the CPR. Respondent denies the existence of any such policy, noting that it in fact has authorized a substantial number of indefinite duration contracts in recent years.

52. Respondent requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

53. The Tribunal notes that appellant first responded to the General Manager's letter notifying him of the decision not to renew by submitting a complaint directly to the General Manager under CPR Article 61.3, which authorizes such direct complaints without prior administrative review. In disregard of Article 61.3, respondent wrote that it "*considers it more appropriate to address this as an Administrative review*..." and proceeded to address it as such. While expressing disappointment with this procedure, appellant

nevertheless proceeded with the steps of the pre-litigation procedure, resulting in additional delay and expense.

54. NATO bodies are not at liberty to disregard staff members' rights under the CPR, including the right to submit a complaint directly to the Head of a NATO Body in the circumstances covered by CPR Article 61.3. The procedure adopted by respondent in this case does not affect the admissibility of the appeal but is not an acceptable practice.

55. Respondent disputes admissibility of appellant's claims alleging errors in connection with his past contracts, contending that these requests are untimely. In light of the Tribunal's decisions regarding the merits of appellant's claims, it need take no decision in this regard.

Claimed violation of CPR Articles 5.1, 5.2, 5.3, and 5.5

56. Appellant claims that the three-month probationary period clause in his first one-year contract shows that it was an initial contract subject to Article 5.1 of the CPR. The Tribunal cannot agree. Nothing in appellant's first contract indicates that it was an initial contract. To the contrary, the contract states at the top in bold-faced underlined capital letters that it is a "*definite duration contract for a temporary post*."

57. The presence of a probationary clause does not transform this contract into an initial contract. CPR Article 6.1 provides:

> 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.

58. Thus, there can be a probationary period in either an initial or definite duration contract. Its inclusion does not show that a contract is an initial contract under Article 5.1.

59. Appellant contends that none of CPR Article 5.2's four conditions for definite duration contracts has been met, so that Article 5.1 necessarily governs. This argument cannot stand. Respondent correctly points out that the Head of NCSA in January 2006 declared all civilian posts as "limited period" posts as provided in Article 5.2.

60. As this Tribunal held in Case No. 2013/1002, paragraph 27, it follows from Article 5.2 that the duration of a contract may be limited whenever the post has been previously identified as one in which rotation is desirable either for political or for technical reasons. It falls to the Organization to identify the activities where staff turnover is advisable according to its own aims and management policies. The only conditions are clearly defined in Article 5.2 of the CPR. There must be (i) a previous identification of the posts, and (ii) a political or technical justification.

Frustration of appellant's legitimate expectations; violation of NCIA Contract Policy

61. Appellant's second claim is essentially that he remains subject to the NCSA Contract Policy in force when he was recruited in 2008, and that failure to apply it frustrated his legitimate expectations. Appellant contends that he was not made aware of Directive 2.1, which entered into force on 1 January 2013.

62. As to appellant's contention that the terms and conditions of his employment contract remained unchanged when NCIA was established, Article 3 of his final contract, which was signed after Directive 2.1 was promulgated, provides:

> The employment is governed by the provisions of the NATO Civilian Personnel Regulations and NATO security regulations as well as by the relevant ...NCI Agency regulations, directives and instructions as in effect at any given time.

63. There is no indication or implication in appellant's contract that these regulations or directives were frozen as they stood on 1 July 2012, when respondent came into existence. To the contrary, as respondent observes, regulations or internal directives can be changed by an agency, provided the changes do not change the balance of the contract. Appellant makes no such claim here.

64. Appellant's claim that he was not made aware of the adoption of Directive 2.1 also fails The Tribunal is persuaded that respondent provided sufficient information regarding the policy to Agency staff. Inter alia, the policy was communicated via the NATO Secret and NATO Restricted systems. An Agency newsletter was sent to all staff on 16 January 2013, on both systems, and links were provided to the actual contract policy.

65. As the Tribunal has previously held, 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. An agency cannot be held responsible for shortcomings of staff in familiarizing themselves with the information provided. In this regard, the NCIA Contract Policy clearly indicated that it applied to all NCIA staff, thus necessarily superseding the NCSA Policy, which was then no longer in force.

Directive 2.1 cannot be applied

66. The parties' arguments, and the Tribunal's conclusions regarding appellant's third claim largely mirror those indicated above and need not be repeated in detail here. In short, while respondent's efforts to acquaint its staff members with the new policy may not have attained perfect results, perfection is not required. The record shows that respondent made substantial efforts, appropriate in the circumstances and utilizing various means of communication, to acquaint staff with the new policy.

67. In this connection, the Tribunal rejects appellant's contention that changes in an agency's internal regulations can only be properly communicated to a staff member if

they are expressly mentioned in the staff member's contract. Agencies modify their internal regulations and administrative documents with varying frequency and for varying reasons. There is no requirement that every such change must then be incorporated into every staff member's contract in order to be effective.

Failure to State Reasons

68. Appellant contends that the reasons for the decision not to renew his contract were not sufficiently explained.

69. Respondent contends that international administrative law does not require that reasons be given for a decision not to renew a contract. The Tribunal makes no decision in this regard, although it believes that providing reasons for non-renewal is a sound administrative practice that gives due recognition to the interests of staff members in a matter that may be very important to them.

70. In the present case, the HONB's letter notifying appellant of the decision not to offer him a further contract stated:

> The Civilian Personnel Management Board has reviewed the need for business continuity and operational requirements within your work area, as well as your performance and skill set, plus the future requirements of the Agency. In addition, they have taken into account the strategic direction and guidance received from the Agency Supervisory Board.

71. This explanation has an impersonal and generic quality. Nevertheless, any shortcomings in the reasons given were remedied by respondent's subsequent actions. It is undisputed that respondent's Chief of Staff had a substantive meeting with appellant at which respondent's reasons and appellant's concerns were thoroughly ventilated. As described in the Chief of Staff's subsequent 5 October 2017 letter to appellant:

> [W]e met in Brussels on 12 September 2017 together with Head, Human Resources and the Civilian Staff Association to discuss the rationale behind the Agency's decision and to allow you the opportunity to express your concerns in detail. I have now carefully reviewed the various points you brought to our attention, particularly in relation to your concerns regarding performance management, in addition to personal medical issues and eventual potential UK residency status. Having once again given all elements my due consideration, it remains my conclusion that the decision to not renew your contract was correct and is fully in line with the NCI Agency contract policy.

72. A 13 November 2017 Memorandum to appellant from respondent's General Manager offers further insight into the agency's thinking:

> I have now reviewed all available documentation and have considered the various findings and statements on the issues raised by you. I find that the NCI Agency followed the correct process per the NCPRs and the NCI Agency contract policy. In addition, proper consideration was given to the points you mention, notably relating

> to performance management, your personal medical issues and potential UK residency status. I also looked into the operational impact that your non-renewal would have on the Agency and additional consideration was given to future requirements and your performance. Based on this, I regret to inform you that a further extension of your contract of performance cannot be supported.

73. Appellant was thus put in a position to understand clearly the decision-maker's reasoning and to determine whether the contested decision was justified or tainted by an error. The Tribunal is also enabled to perform its judicial control. (*cf.* AT judgment in Cases Nos. 889, 890 and 897). Indeed, appellant's statement at the hearing indicated that he understood respondent's reasons. He simply disagreed with them.

Manifest Error of Assessment

74. Appellant's claim contends that respondent's decision not to renew his contract reflects a manifest error of assessment, citing his important responsibilities, positive performance ratings, and years of service to the agency.

75. The record shows that appellant's performance ratings were below the levels taken into account by respondent in assessing which staff members might be offered indefinite contracts. The tribunal was informed at the hearing that well over half of respondent's staff had higher ratings than appellant's.

76. The respondent's stated policy is to have rotation amongst its civilian staff, with the target of a median of six years' employment in the Organization including the retention of the top 25% performers amongst its staff under indefinite term contracts. Data provided by the Agency appear to confirm implementation of this policy.

77. The Agency did not manifestly err in assessing Appellant's situation. The decision regarding him is not exceptional or contrary to stated policies. It is in line with the NCIA Contract Policy. Appellant could not have a legitimate expectation to the contrary.

78. The agency's decision was taken in the exercise of its management's discretionary powers. It is settled jurisprudence, including in this Tribunal, that decisions in the exercise of this discretion are subject to only limited review by a tribunal. Tribunals only interfere when there is an abuse of these powers, for example if a decision was taken without authority, a rule of form or procedure was breached, it was based on a mistake of fact or law, an essential fact was overlooked, a clearly mistaken conclusion was drawn from the facts or there was an abuse of authority. Tribunals have also consistently held that they will not substitute their own view for the Organizations' assessment in such cases. There was no such abuse of discretionary powers.

Misuse of power

79. In his last plea appellant contends that respondent's internal guidelines and contract policy, targeting a median of six years of employment, conflict with the CPR and have not been approved by the North Atlantic Council, and accordingly reflect a misuse of power.

80. Neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresee an automatic award of a certain number of definite duration contracts, nor do they oblige the Organization to award contract extensions. Respondent's policies operate within the contracting framework established by the CPR, and do not conflict with or modify the CPR. Under CPR Article 5.4.2, a staff member who comes to the end of 10 years of service at the end of a succession of definite duration contracts cannot be offered another such contract and can only be offered a definite duration contract. However, the CPR do not require an agency to offer such a contract.

81. Appellant further contends, without supporting evidence, that the Agency appears to have an informal contract policy, which aims at preventing anyone nearing the ten-year threshold of employment from receiving indefinite contracts and associated employee benefits. The Tribunal cannot agree. Data provided by respondent show that meaningful numbers of respondent's staff are offered indefinite contracts.

82. For these reasons the Tribunal concludes that the appeal is unfounded. The appeal being unfounded, there is no need to rule on the admissibility of the appeal or elements thereof.

E. Costs

83. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 6 June 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 July 2018 AT-J(2018)0012

Judgment

Case No. 2017/1251

SM

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 10 July 2018

Original: English

Keywords: NCIA Contract Policy; admissibility.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mrs Maria-Lourdes Arastey Sahún, having regard to the written procedure and further to the hearing on 15 June 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA or Agency) dated 4 December 2017, and registered on 20 December 2017 as Case No. 2017/1251, by SM. The appeal seeks to annul NCIA's decision not to offer appellant an indefinite duration contract.

2. The respondent's answer, dated 23 February 2018, was registered on 8 March 2018. The appellant's reply, dated 9 April 2018, was registered on 14 April 2018. The respondent's rejoinder, dated 14 May 2018 was registered on 17 May 2018.

3. The Panel held an oral hearing on 15 June 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

5. Appellant joined the NATO Communication and Information Systems Services Agency (NCSA) on 1 October 2011 on a one-year definite duration – seconded - contract. He was graded B-4. On its first page, the contract was clearly designated in bold-faced as a definite duration contract. Article 3 of the contract provided: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and applicable NATO security regulations as well as by the relevant NATO and NCSA CLD regulations, directives and instructions as in effect at any given time*."

6. In 2012, a number of NATO entities, including NCSA, were consolidated into NCIA, effective 1 July 2012.

7. In September 2012 appellant received a two-year definite duration – seconded – contract with NCIA for the period 1 October 2012 – 30 September 2014. On its first page, this contract was clearly designated in bold-faced as a definite duration contract. Article 3 of the contract provided: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and applicable NATO security regulations as well as by the relevant NATO and NCIA CLD regulations, directives and instructions as in effect at any given time*."

8. In April 2014 appellant received a three-year definite duration – non-seconded – contract with NCIA in the same post for the period 1 October 2014 – 30 September 2017.

On its first page, also this contract was clearly designated in bold-faced as a definite duration contract. Article 3 of the contract also provided: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and applicable NATO security regulations as well as by the relevant NATO and NCIA CLD regulations, directives and instructions as in effect at any given time*."

9. By e-mail dated 19 August 2016 appellant requested an administrative review of the NCIA contract policy, allegedly as communicated by the acting EMB Commander at a staff meeting held in Brunssum on 21 July 2016. He referred to the NCSA Civilian Contract Policy of 2006 and requested withdrawal of the NCIA policy.

10. In his reply dated 9 September 2016 the Head of Human Resources (HR) pointed out that the NCSA contract policy was superseded by the NCIA Contract Policy, which had come into effect on 1 January 2013. He added that all staff were informed of this via the NCIA intranet (NR and NS) in early 2013 and that the policy is available to all staff on the intranet records centre and through the Agency HR portal.

11. The Head of HR underlined that proposals for contract renewals are addressed on a case by case basis in the Civilian Personnel Management Board. During the Board consideration is given to both the current and future needs of the organization, the competencies, skill set and performance of the staff member, plus funding availability. Some staff would therefore be offered further contracts, while others would not. He underlined that no individual decisions had been taken on 21 July 2016. The acting EMB Commander had only provided the staff with a verbal description of the contract policy that had been in place and communicated since 2013. He concluded by saying that he was not in a position to withdraw the NCIA contract policy nor to reinstate a contract policy that was in place under one of the NCIA's predecessor organisations.

12. By letter dated 30 September 2016 appellant requested a further administrative review of the NCIA Contract Policy.

13. The Deputy General Manager and Chief of Staff replied on 14 November 2016. He referred to a talk both had together with the Head of HR on 9 November 2016. He repeated that the former NCSA contract policy was superseded in 2013 by the NCIA policy, which was communicated widely at the time and available to all staff, that no individual decision had been taken on 21 July 2016 and that the acting EMB Commander had only provided the staff with a verbal description of the contract policy that has been in place and communicated since 2013. There was therefore no basis upon which to request a further administrative review. He was therefore unable to progress this any further and trusted that this closed the matter.

14. On 23 March 2017 appellant countersigned without reservation a three-year definite duration follow-on contract to cover the period 1 October 2017 – 30 September 2020. Article 9 of the contract provides: *"The NATO Security Regulations and the NATO Civilian Personnel Regulations will apply to this contract and can be accessed on the Agency Intranet. Reference is also made to the NCI Agency Contract Policy as described in the NCI Agency Directive 2.1"*

15. By e-mail dated 21 April 2017 appellant forwarded a letter to HR referring to the contract he signed on 23 March 2017. He mentioned having heard a lot about potential contract problems and was seeking confirmation that his assumption that he was still subject to the NCSA contract policy existing at the time of his initial contract.

16. In his reply dated 25 April 2017 the HR Officer observed that, as appellant knew, the NCSA Civilian Contract Policy was superseded by the NCIA contract policy in 2013. This had been explained to appellant by the Chief of Staff in his letter of 14 November 2016.

17. On 1 May 2017 appellant forwarded a letter dated 26 April 2017 to HR. He stated that he had been informed on 25 April 2017 that his contract would be ruled by the NCIA policy and not the NCSA policy. He added that in that case, since he joined before 2012, the CPR rules for staff before 2012 were valid. He observed that Articles 5.1, 5.2 and 5.3 did not apply in his case and that the only Article that could be applied was Article 5.4 *juncto* 5.5.2 on indefinite duration contracts. He asked when he could sign the corrected indefinite duration contract.

18. Appellant did not receive a reply.

19. On 25 May 2017 appellant wrote to his supervisor that he should have received a reply on 22 May at the latest to his letter dated 26 April and forwarded on 1 May. He requested that his supervisor administratively review his decision so that appellant's new contract would be for an indefinite duration taking effect on 1 October 2017.

20. On 29 June 2017 appellant forwarded by e-mail to the General Manager a letter dated 23 June 2017. He stated that he should have received an answer to his request for administrative review on 14 June 2017 at the latest, and requested a second administrative review.

21. The Chief of Staff replied on 1 August 2017. He referred to another talk that both had together with the Head of HR on 18 July 2017 to discuss the rationale behind the Agency's decision and to enable appellant to explain his views in greater detail. He repeated that the NCSA Civilian Contract Policy was superseded by the NCIA Contract Policy. He had at that occasion also reconfirmed that the NCIA Contract Policy lists a number of important considerations for contract renewals (including performance management which in appellant's case was rated good in 2015 and very good in 2016). He concluded that he remained of the opinion that the Agency's decision to offer a definite duration contract until 30 September 2020 was in full compliance with the Agency's Contract Policy and added that he would be happy to discuss the matter with appellant if the latter would wish so.

22. Appellant lodged a complaint on 29 August 2017, in which he reiterated his arguments. He added that in his opinion the first contract offered by NCIA should have been an indefinite duration contract and, alternatively, that the 2014 contract should have been an initial contract. He requested to be granted an indefinite contract as from 1 October 2017.

23. On 4 October 2017 appellant received by e-mail a copy of the reply from the General Manager, dated 29 September 2017. The General Manager explained that he did not understand appellant's reasoning regarding an initial contract, since appellant was seconded at the time. He further recalled that under the CPR staff members who have served the Organization with performance to the standard as defined by the Head of NATO body for 10 or more years consecutively under definite duration contracts or under a combination of different types of contract and to whom a further contract is offered shall be offered indefinite duration contracts. This provision is also reflected in the NCIA Contract Policy which appellant had accepted as part of the definite duration contracts he had signed. Appellant had now reached six years of employment with the Agency and under both the CPR and the NCIA Contract Policy there was no obligation to grant an indefinite duration contract. This had been explained several times by the Head of HR and the Chief of Staff. He therefore upheld the decision to offer a three-year definite duration contract. The decision on a further definite duration contract would depend on whether appellant manages to achieve high standards of performance.
24. Appellant lodged the present appeal on 4 December 2017.

C. Summary of parties' legal arguments on admissibility

25. Respondent has raised objections to the admissibility of the appeal, which need to be dealt with first.

(i) Respondent's contentions

26. Respondent submits that the appeal is time-barred since appellant raised the request for initial administrative review outside the 30 days foreseen in the CPR. Moreover, appellant never challenged the legality of his first, second and third contracts at the time. Respondent concludes that the appeal is inadmissible.

(ii) Appellant's contentions

27. Appellant contends that the impugned decision is per se an act adversely affecting him, insofar as it rejects his request for conversion of his contract into an indefinite duration contract instead of a three-year definite duration contract. He further submits that the pre-contentious proceeding was duly followed before seizing the Tribunal. He signed his contract on 23 March 2017 and requested clarification on 21 April 2017 of which contract policy he would fall under. Following the reply he received on 25 April 201, he wrote to HR indicating that in his view the CPR applicable to staff recruited before 2012 applied to him and that his contract should be rectified. He concludes that the appeal is admissible.

D. Considerations and conclusions

28. As noted *supra* in paragraph 17 appellant wrote on 1 May 2017 that he was informed that the NCIA Contract Policy and not the NCSA Civilian Contract Policy would apply to him on 25 April 2017, implying that this the first time this had been communicated to him.

29. The Tribunal disagrees. It observes, first of all, that appellant was, like all NCIA staff, duly informed in 2013 of the introduction of the NCIA Contract Policy *(cf.* Case No. 2017/1244, paragraph 82). In any case, he was clearly made aware of the new policy at the Commander's briefing in July 2016. He was, moreover, and following his requests, duly informed in writing on 9 September 2016 and 14 November 2016, as well as during a meeting with the Chief of Staff on 9 November 2016, that the NCSA Civilian Contract Policy was superseded by the NCIA Contract Policy, and that the new policy applied to him. Appellant failed to mention these essential facts regarding his awareness of the new contract policy in his appeal.

30. Appellant thus knew in advance the answer he could expect to his letter of 21 April 2017. This letter can therefore not be qualified a request for clarification nor an initiation of the pre-litigation procedure. The Agency's replies, and subsequent replies, are mere confirmations of earlier information that had been provided to appellant months before.

31. The Tribunal cannot but conclude that appellant's request for administrative review dated 25 May 2017 was submitted after the deadline of 30 days given in Article 2.1 of Annex IX to the CPR. As a consequence, the pre-litigation procedure has not been properly followed.

32. Article 61 CPR and Annex IX to the CPR clearly stipulate that the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for administrative review and complaints provided therein. Non-respect of the pre-litigation process, including non-observance of time limits given therein, thus entails inadmissibility of the appeal.

33. The appeal being inadmissible there is no need to entertain the merits of the appeal.

E. Costs

34. Article 6.8.2 of Annex IX to the CPR provides:

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

35. The appeal being dismissed as inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, 10 July 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 July 2018 AT-J(2018)0013

Judgment

Case No. 2018/1253

JD

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 10 July 2018

Original: English

Keywords: NCIA Contract Policy; renewal of contract; initial contract; definite duration contract; performance.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 15 June 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA), dated 20 December 2017, and registered on 4 January 2018 as Case No. 2018/1253, by Mr JD, a staff member challenging the non renewal of his contract.

2. The respondent's answer, dated 5 March 2018, was registered on 8 March 2018. The appellant's reply, dated 9 April 2018, was registered on 12 April 2018. The respondent's rejoinder, dated 14 May 2018, was registered on 17 May 2018.

3. The Panel held an oral hearing on 15 June 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the cases

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

5. Appellant was first recruited by the NATO Communications and Information Systems Services Agency (NCSA) on 1 November 2010 to fill the post of Cell Head & Engineer (Umbrella Management) as grade A-3, step 1, on a definite duration contract of one year. The contract was renewed for three years from 1 November 2011 until 31 October 2014.

6. In 1 July 2012 NCSA was consolidated into NCIA.

7. A further three-year contract was granted and signed by appellant from 1 November 2014 until 31 October June 2017. It was provided in this contract that "*the employment is governed by … NCIA regulations, directives and instructions in effect at any given time*".

8. On 6 March 2017, appellant was informed by the General Manager that his contract would not be renewed upon its expiry on 31 October 2017. He was also informed that the reason for non-renewal was appellant's performance below the Agency's required standard.

9. On 6 April 2017, appellant lodged a complaint with the General Manager, requesting the assessment of a Complaints Committee (CC)

10. Appellant received the response of the Director of Infrastructure Services on 27 April 2017, informing him that the request would be treated as an administrative review

and concluding that the decision not to renew the contract was in line with the NCIA Contract Policy and with the Agency's requirement to only retain the smallest number of very top performers in the long term.

10. On 26 May 2017, appellant requested a further administrative review and repeated the request for the appointment of a CC.

11. On 14 June 2017, the Chief of Staff and the Head of Human Resources met with appellant, to discuss together the rationale behind the Agency's decision and to allow appellant to express his concerns in greater detail.

12. The Chief of Staff formally replied to the request for further administrative review on 23 June 2017, making specific reference to the 14 June 2017 meeting. He explained that since that meeting he had reviewed the case once more with appellant's Director and had given full consideration to the additional points raised by appellant, in particular concerns regarding Performance Management. He observed that appellant had not taken advantage of the opportunities that were offered for mediation and an informal performance support plan. The Chief of Staff maintained his opinion that the Agency's earlier decision was correct, indicating that appellant's contract renewal would not align with requirements for performance, skill set, need for business continuity, operational requirements and the Agency's future.

13. On 19 July 2017, appellant submitted a complaint, again with the request to have his grievance reviewed by a CC. The CC rendered its report on 23 October 2017, considering appellant's complaint without merit.

14. On 31 October 2017, the NCIA General Manager gave his response rejecting the request for an indefinite duration contract.

15. On 20 December 2017, appellant submitted the present appeal.

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

(i) The appellant's contentions

16. Appellant maintains that the appeal is admissible as he followed the pre-litigation procedure as provided in the CPR within the prescribed timelines.

17. As to the merits, appellant submits five grounds for annulment:
a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR;
b. On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of the appellant's legitimate expectations, and of Articles 4.3 and 4.3.4 b) of NCIA Directive 2.1 on Contract Policy; and on admissibility of Directive 2.1;
c. Violation of the duty to state reasons;
d. Manifest error of assessment; violation of the Performance Management Process; and
e. Misuse of power.

Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR

18. Appellant first contends that after being recruited on 1 November 2010 on a one-year contract, the following three-year renewal did not comply with Article 5.1 of the CPR, which foresees a maximum of three years in total for initial contracts.

19. Appellant further contends that, considering the nature of his first contract, it clearly was an initial contract pursuant to Article 5.1.2 of the CPR. He notes that when he was recruited, he was not seconded, his post had not been previously identified by the Head of the NATO body (HONB) as being required for a limited period of time or as rotational, nor was he appointed to a research post. Appellant adds that his first contract contained a probationary period and therefore it should be considered an initial contract pursuant Article 5.1 of the CPR.

20. Appellant maintains that as from his second renewal, he should have been employed under an indefinite duration contract and the General Manager was consequently in breach of Articles 5.1.2 and 5.5.2 of the CPR.

On a subsidiary basis, violation of the NCSA Civilian Contract Policy, of the appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of the NCIA Directive 2.1 on Contract Policy; and on admissibility of the Directive.

21. Appellant submits that, on a subsidiary basis, he should have been granted a three-year renewable extension, as the three-year definite duration contract was in breach of the NCIA Civilian Contract Policy (Directive 2.1). When he was recruited, he was informed of the NCSA Contract Policy and foresaw a career pattern of 1-3-3-3-year definite duration contracts, followed by an indefinite duration contract. His first two contract renewals were for three years. He expected a further renewal as long as his post remained a valid requirement. These expectations continued when NCSA was transferred to NCIA, since the letter informing him of the transfer stipulated that *"[appellant's] contract of employment, as from 1 July 2012, is with the NCIA … all other terms and conditions of [appellant's] employment remain unchanged*".

22. Appellant adds that the NCSA Contract Policy was not superseded by the NCIA Contract Policy, since it was not mentioned anywhere and not referred to in his contracts. Appellant indicates that the mere fact that he had indicated to the CC that he was "aware" of the policy, or that "*NATO/Allied Command Operations and NCIA regulations, directives and instructions in effect at any given time*" were generally referenced in his contract, is not sufficient to introduce Directive 2.1 into his contractual framework. Moreover, appellant urges that in view of what he understood to be repeated assurances that the 1-3-3-3 policy would continue to apply, the Agency could not, suddenly and without transitional measures or prior warning, change the rules and apply the new directive and the alleged rotational nature of all NCIA posts.

Violation of the duty to state reasons

23. Appellant contends that the decision that initially informed him of his non-renewal (6 March 2017 November 2016) was extremely vague. It only stated that appellant's performance would be "*below the Agency's required standard*". However appellant alleges not being aware of this standard.

24. Appellant also contends that he was given successive and contradictory reasons and maintains that his performance reports generally emphasized his aptitude to fulfill his tasks.

Manifest error of assessment - violation of the Performance Management Process.

25. Appellant affirms that the decision not to renew his contract reveals a lack of transparency, impartiality and objectivity on the side of the Agency.

26. Appellant contends that the Agency took a non-renewal decision on the sole basis of one unique Performance Management report for which motivations are not clear. Appellant refers to the Complaints Committee report in which the different ratings given in successive performance review are addressed. Appellant considers that the 2015 performance review cannot reflect his entire career and capacities.

27. Finally, appellant considers that the contested decision was taken before the Performance Management process was finalized.

Misuse of power

28. Appellant refers to the guidance given by the Agency Supervisory Board (ASB) to target a median of six-years of employment at the Agency. He stresses that the Agency is under the authority of the North Atlantic Council (NAC), and cannot modify the CPR, which are adopted by the NAC. The Agency further appears to have an informal contract policy, which aims at preventing anyone from reaching the 10-year threshold of employment, with an inconsistent application and a distortion of its own rules.

29. Appellant requests:
- annulment of the 31 October 2017 decision rejecting appellant's complaint, in so far as it rejects appellant's request to be awarded an indefinite duration contract, or at the very least, a three-year renewable contract;
- if necessary, annulment of the 27 April and 23 June 2017 decisions rejecting, respectively, appellant's first and second request for administrative review, as well as the initial decision dated 6 March 2017 informing appellant that his contract would not be renewed; and
- reimbursement of all legal costs incurred and fees of retained legal counsel.

(ii) The respondent's contentions

30. Respondent does not dispute admissibility of the appeal.

31. Respondent underlines that appellant did not submit previous complaints about the character and duration of the contracts. Appellant has been employed under a series of definite duration contracts on the basis of Article 5.2 of the CPR.

32. Respondent adds that neither the NCSA nor the NCIA created legitimate expectation that the appellant's contract would be renewed further.

33. Respondent contends that the Agency's contract policy was distributed through all the available communication channels and staff member had the opportunity to ask questions about it. Furthermore, the appellant's contract extension also contained a specific reference to NCIA directives.

34. Respondent also adds that appellant was clearly aware that his performance was below the standards expected from the Agency. The fact that appellant's performance rating may have been better prior to his change of role in 2015 is irrelevant. The Agency had informed appellant in due time in order for him to improve performance.

35. Respondent requests the Tribunal to dismiss the appeal.

D. Considerations and conclusions

36. The Tribunal notes that the initial contested decision not no renew appellant's contract was taken by the General Manager. Appellant submitted a complaint directly under Article 61.3 of the CPR, under which direct complaints without prior administrative review are authorized. Respondent wrote that it considered it more appropriate to address that as an administrative review and addressed it as such.

37. The Tribunal pointed out in Case No. 2017/1112 that NATO bodies are not at liberty to disregard staff members' rights under the CPR, including the right to submit a complaint directly to the Head of the NATO Body in the circumstances covered by CPR Article 61.3. The Tribunal also emphasized that the procedure adopted is not an acceptable practice even though it does not affect to the admissibility of the particular case at hand.

38. Article 5.1 of the CPR provides:

> 5.1. Initial contracts
> 5.1.1 Staff appointed or reappointed to the Organization shall be offered contracts, known as initial contracts, of between one and 3 years' duration unless Article 5.2 below applies.
> 5.1.2 Notwithstanding Article 5.5.2 below, an initial contract may exceptionally be renewed provided that the total length of service under initial contracts does not exceed 3 years.

39. Article 5.2 of the CPR provides:

> 5.2. Definite duration contracts
> Definite duration contracts not exceeding 5 years shall be offered to staff appointed or reappointed to the Organization if :
> - they are seconded, in which case such a definite duration contract shall not exceed the length of the approved secondment; or
> - they are appointed to posts previously identified by the Head of NATO body as being required for a limited period; or
> - they are appointed to posts previously identified by the Head of NATO body as posts in which turnover is desirable for political or technical reasons; or
> - they are appointed to research posts in scientific establishments.

40. The Tribunal has already established that the inclusion of a probationary period clause does not transform a contract into an initial one. There can be a probationary period in either an initial or a definite duration contract (*cf*. Case No. 2017/1244 and Case No. 2018/1255). To this extent, Article 6.1 of the CPR provides:

> 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.

41. Moreover the Tribunal observes that appellant accepted the subsequent contracts without any reservation. He did not challenge them at the time although all of the contracts specifically stated that they were definite duration contracts. Nothing in them specifically stated, or even appeared to imply, that the first contract was an initial one. Appellant's employment relationship with the Agency was clearly identified as being one of definite duration. The Tribunal concludes that the conditions under Article 5.2 were met and that appellant's situation was unambiguously covered by definite duration contracts from the outset (*cf*. Case No. 2013/1002, paragraphs 29 and 30).

42. The Tribunal also recalls that there is no obligation on the Agency to offer an indefinite duration contract to a staff member who has not yet reached 10 years of employment (*cf.* Cases Nos. 2015/1065, 2017/1125 and 2017/1244).

43. The Tribunal considers that is the privilege of the Agency to decide on the activities where staff turnover is advisable according to its own goals and management policies. As was held in Cases Nos. 2013/1002, 2017/1244 and 2018/1255, it follows from Article 5.2 of the CPR that the duration of a contract may be limited whenever the post has been previously identified as one in which rotation is desirable either for political or technical reasons. NCSA, and later NCIA, did develop its own specific contract policy including in its successive directives a general turnover clause. In these directives it became clearly established that all the civilian staff at the Agency were subject to different rates of rotation and that non-turnover was the exception.

44. Appellant contends, on a subsidiary bases, that respondent's conduct involved a number of violations of the NCSA and NCIA contract policies. Appellant in this respect invokes different situations combining respectively the NCSA and the NCIA contract policies, while at the same time challenging the legality of the latter. The Tribunal also addressed this question in the abovementioned Cases Nos. 2017/1125, 2017/1249 and 2018/1255. As in the situation of those cases, a letter of the NCIA General Manager

informed appellant that the NCIA had been established and that his contract was henceforth with the NCIA. The letter contains the sentence: "*All other terms and conditions of your employment contract remain unchanged*". Accordingly, the letter referred to the situation at the time it was written, not to the future. There is no implication that these regulations or directives were frozen as on 1 July 2012, when NCIA came into existence. The Tribunal is of the opinion that Administration may, under certain conditions, amend employment conditions and that this is what NCIA did in 2013 by adopting its own new contract policy. This new policy was applicable to the contract appellant countersigned in 2014.

45. The Tribunal is also persuaded that respondent provided sufficient information regarding the policy to Agency staff. In previous cases, the Tribunal held that a NATO body has a responsibility to provide its employees with reliable information on significant aspects of their employment. But it has been emphasized that the staff members also have a responsibility to familiarize themselves with the information provided to them and make further inquiries as required. There is no requirement that every variation in the internal regulations must then be incorporated into every employee's contract in order to be effective.

46. Appellant also contends that the initial decision informing him of the non-renewal of his contract was extremely vague. In the General Manager's letter of 6 March 2017 it was stated that the reason to the non-renewal of appellant's contract was his "*performance below the Agency's required standard*". The Tribunal has repeatedly expressed that providing reasons for non-renewal of contracts is a sound administrative practice that gives due recognition to the interests of the staff members in such an important matter to them.

47. Even if the explanation given to appellant could be considered concise, the paucity of information was remedied by subsequent exchanges between parties, including a meeting on 8 March 2017, explicitly underlined in the appeal. Appellant's complaint also shows that he could rebut the performance review and, for that reason, could not allege he was not aware of the position of the Agency in this respect. Moreover, a meeting took place on 14 June 2017 in the presence of the Chief of Staff and Head, Human Resources. Appellant was thus aware of the reasoning of the contested decision and it was obvious that he understood it, so there was no impairment of his right of defense.

48. Appellant claims that the contested decision reflects a manifest error of assessment. The Tribunal recalls that it is settled jurisprudence that decisions in the exercise of the discretionary powers are subject to only limited review by the a tribunal. Tribunals only interfere when there is an abuse of these powers, as, for instance, should a decision be taken with lack of authority, a rule of form or procedure be breached, a decision be based on a mistake of fact or law, an essential fact overlooked, etc.

49. The findings of the Complaints Committee showed that the nature of appellant's work was changed significantly in 2015 and that he did not adapt to the transition and new commitments. It appears also from the record that appellant was duly informed of the subsequent performance ratings. In addition an informal performance support plan was provided to appellant in March 2016; however, appellant did not follow it and did not attend some of the meetings that were scheduled to improve his performance. The

Tribunal hence concludes that there was not any abuse of the Agency's discretionary powers.

50. In his last plea appellant contends that the internal guidelines of the Agency and its contract policy, targeting a median of six years of employment, conflict with the CPR, stressing that respondent is under the authority of the NATO Council (NAC) and cannot bypass or modify the CPR.

51. The Tribunal has already held that neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresee an automatic award of a certain number of definite contracts, nor do they oblige the Organization to award contract extensions. The guidance given and the policies adopted by respondent do not modify the CPR.

52. For all these reasons, the Tribunal concludes that appellant's submission must be rejected and entirely dismissed.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 10 July 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

20 August 2018 AT-J(2018)0014

Judgment

Case No. 2017/1252

HV

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 August 2018

Original: English

Keywords: NCIA Contract Policy; renewal of contract; duty to give reasons; Agency discretion; definite duration contract.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 15 June 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA), dated 18 December 2017 and registered on 20 December 2018 as Case No. 2017/1252, by Mr HV. The appellant contests, *inter alia*, respondent's decision to offer him a two-year contract renewal, rather than an indefinite or three-year contract.

2. The respondent's answer, dated 23 February 2018, was registered on 8 March 2018. The appellant's reply, dated 9 April 2018, was registered on 12 April 2018. The respondent's rejoinder, dated 14 May 2018, was registered on 17 May 2018.

3. The Panel held an oral hearing on 15 June 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and by representatives of respondent in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

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

5. Appellant is a senior engineer. His first contract as a NATO staff member, with the NATO Communications & Information Systems Services Agency (NCSA, a predecessor to the respondent), was for one year, commencing 1 November 2010. He then had two three-year contracts, the first with NCSA and the second with NCIA, the latter expiring on 31 October 2017. In late March 2017, respondent offered appellant a fourth contract, for two years through 31 October 2019.

6. Appellant signed this contract on 23 March 2017. However, on 27 April 2017 he requested administrative review of respondent's offer of only a two-year contract. His request was denied on 16 May 2017. His second request was denied on 23 June 2017. He then lodged a complaint on 6 July 2017, requesting an indefinite duration contract, or "*at the very least*" a three- year renewable extension. He asked to have his complaint assessed by a Complaints Committee.

7. In a thorough report, the Complaints Committee agreed that the Agency's decision to award a two-year extension "*was reasonable in the circumstances*" and recommended that the General Manager confirm that decision. The Committee noted appellant's contention that he did not know of the new contract policy adopted by respondent, but believed that it was staff members' responsibility to be aware of Agency directives affecting them. In this regard, the report accepted respondent's need to optimize its work

force to meet future needs, although it felt that the Agency could have done better to explain its needs and the actions being taken to meet them.

8. The Committee's report rejected appellant's claim to a three-year contract, and accepted that two years would permit evaluation of his performance and future business needs. The Committee's report also offered several criticisms of respondent's actions, finding, inter alia, that the publication of respondent's new contract policy "*was not optimal*" and that the Agency "*should have taken more care*" in ensuring individual employees' awareness of the new policy.

9. Appellant's complaint was denied on October 11, 2017, but appellant indicates that this decision was not received by mail until 20 October.

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

(i) The appellant's contentions

10. Appellant contends that the claim is admissible, as he satisfied the appeals procedure established by Annex IX of the CPR, and his appeal was filed within 60 days of learning his complaint was denied. He further contends that his claims regarding his contracts in earlier years are now admissible as these led to an incorrect current decision.

Claimed violation of CPR Articles 5.1, 5.2, 5.3, and 5.5

11. Appellant first urges that Article 5.2 of the NATO Civilian Personnel Regulations (CPR) does not apply to him because his post was not designated for definite duration contracts as required by that Article, or in any case that such designation was not specified in his contracts. He further maintains that his first two contracts, totaling four years, were initial contracts that improperly exceeded the time limit for such contracts under the CPR. He should therefore have been awarded an indefinite duration contract on his second renewal. He contends that it is irrelevant that he did not complain regarding his prior contracts or that they were labeled as definite duration contracts.

Frustration of appellant's legitimate expectations; violation of NCIA contract policy

12. Subsidiarily, appellant contends that respondent violated his legitimate expectation of receiving a three-year extension on the basis of NCSA's contract policy. This led him to expect a career progression of 1-3-3-3 year contracts, followed by an indefinite duration contract. NCSA's incorporation into respondent did not change matters. Respondent's new contract policy in its Directive 2.1 did not supersede NCSA's policy, and cannot be applied to him.

Directive 2.1 not admissible

13. Appellant maintains that he was not notified of respondent's Directive 2.1 establishing the new contract policy and that it cannot be presumed he received or read e-mails providing notice of the new policy. In this regard, he contends that there was no

proof he had read relevant e-mails, and offered arguments seeking to show that he was unlikely to have received them. In his view, Directive 2.1, establishing the new policy could only apply to him if specified in his contract; it was not legally sufficient for his contract to provide that his employment is subject to Agency's regulations. In any case, even if Directive 2.1 applies, the failure to give him an indefinite contract violates it, because the Directive limits initial contracts to three years, and he was employed under such contracts for a longer period.

Violation of duty to state reasons

14. Appellant next maintains that appellant did not give sufficient reasons for its decision to offer him only a two-year contract. The communications he received in response to his requests for administrative review did not provide adequate explanation and ignored the argumentation he provided. Accordingly, he could not assess the action taken in his case. In any case, he was in post for seven years, so it was "hardly conceivable" that the Agency needed two more years to assess his performance. He never got the recommendation regarding his renewal made to the CPMB, which he was entitled to see.

Manifest error of assessment

15. Appellant contends that respondent's decision to offer him only a two-year contract reflects a manifest error of assessment. In appellant's view, he is a strong performer who should have been offered a three-year contract. Moreover, his two-year contract is "in breach of" Directive 2.1, which says that definite duration contracts are "normally" three years.

16. Appellant notes that he got a "very good" rating in 2016 and "good" in 2015. He argues that these show no need to give him just two years to assess his performance; that he got little coaching and guidance regarding his performance; and that some staff members in his area received three year or indefinite contracts.

Misuse of Power

17. As his final claim, appellant asserts misuse of power by respondent. In his view, respondent's management philosophy (*inter alia*, aimed at limiting the percentage of staff serving more than ten years, and targeting for a median of six years of service) is not authorized by the North Atlantic Council, violates the CPR, and is unfavorable to staff members. He further contends that respondent misapplies its own policy, because it misunderstands the meaning of median. Finally, he urges that respondent improperly followed a policy aimed at preventing staff from attaining ten years of service in order to deny them benefits.

18. Appellant requests the Tribunal:
- annulment of respondent's 11 October 2017 decision rejecting his complaint seeking an indefinite duration contract or, at the least, a three-year contract;
- if needed, annulment of earlier decisions rejecting his earlier requests for administrative review; and
- reimbursement of legal costs and counsel fees.

(ii) The respondent's contentions

19. Respondent contends that appellant's claims contesting his past contracts are time barred and inadmissible. In its view, appellant cannot now complain about alleged defects in his first three contracts, which he signed in past years without complaint. It is now too late to seek to challenge decisions related to those contracts.

20. Respondent rejects appellant's claim that his first two contracts were initial contracts, so that he must be considered as having an indefinite contract since his second contract renewal. Respondent notes in this regard that all of appellant's contracts were clearly designated as definite duration contracts and all were expressly subject to the Agency's directives. Respondent further points out that appellant's post, like all posts at the Agency, was designated as a limited period post.

21. In respondent's view, the CPR and past and current Agency policies do not require that a staff member in appellant's position be awarded an indefinite contract after ten years. Under CPR Article 5.4.2, if a staff member who has served ten or more years is offered another contract, it must be an indefinite duration contract, but there is no obligation to offer such a contract. The Agency has discretion in this regard, and there can be no legitimate expectations of an assured indefinite contract.

22. Respondent disputes appellant's claim that it frustrated his legitimate expectations. His contracts were all clearly definite duration contracts, and the contract policy applicable to him when he signed all four of those contracts did not guarantee either continuous employment or the award of an indefinite duration contract after ten years. Indeed, respondent's senior management made clear that the Agency needed to adapt and to have a flexible staffing policy.

23. Respondent maintains that it provided sufficient notice of the new policy, describing the measures it took in this regard. Respondent questions appellant's contention that he was unaware of an important matter that was widely discussed in the Agency.

24. As to appellant's job performance, respondent contends that his performance ratings showed the need to confirm that he was suitable for an indefinite duration contract. In this regard, respondent noted that the Complaints Committee considered four other cases in appellant's area. It recommended contract extensions of three years (instead of two) in those four. It did not do so in the case of appellant.

25. Respondent maintains that it need not give reasons for its decision to offer appellant a two-year extension rather than three years. However, it contends that in any

event, appellant was given sufficient explanations, including at a 23 June 2017 meeting with the Chief of Staff where the contested decision and appellant's concerns were discussed.

26. Respondent urges that its personnel policy is appropriate given rapid technological evolution and the evolving needs of its clients, and is consistent with the CPR. Respondent denied that it has any informal policy to terminate staff members short of ten years, noting that since 2015, the Agency has awarded 146 indefinite duration contracts, almost exclusively to staff with 10 or more years of service.

27. Respondent asks the Tribunal to dismiss the appeal.

D. Considerations and conclusions

28. Respondent urges that appellant's claims alleging errors in connection with his past contracts are inadmissible, contending that these requests are untimely. In light of the Tribunal's decisions regarding the merits of appellant's claims, it need take no decision in this regard.

Claimed violation of CPR Articles 5.1, 5.2, 5.3, and 5.5

29. Appellant contends that the three months' probationary period in his first one-year contract shows that it was an initial contract subject to CPR Article 5.1. The Tribunal does not agree. Nothing in appellant's first contract support this claim. To the contrary, the contract states in bold-faced underlined capital letters that it is a "*definite duration contract for a temporary post*."

30. The presence of a probationary clause does not transform this contract into an initial contract. Under CPR Article 6.1, *"[t]he 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*." Thus, there can be a probationary period in either an initial or definite duration contract.

31. Appellant contends that CPR Article 5.2's four conditions for definite duration contracts have not been met, so that Article 5.1 must apply. The Tribunal does not agree. As respondent points out, the Head of NCSA in January 2006 declared all civilian posts as "limited period" posts as provided in Article 5.2.

Frustration of appellant's legitimate expectations; violation of NCIA contract policy

32. Appellant's second claim rests on the premise that he remains subject to the NCSA contract policy in force when he was recruited. He understands this policy to entitle him to a specific career path culminating after ten years in an indefinite contract, and that failure to apply it frustrates his legitimate expectations. Appellant contends in this regard that that he was not made aware of respondent's new contracting policy contained in Directive 2.1, which entered into force on 1 January 2013.

33. Appellant contends that the terms and conditions of his employment contract remained unchanged when respondent was formed from the merger of NCSA and other agencies effective 1 July 2012. However, Article 3 of the contracts he signed in February 2014 and March 2017, after respondent's new contract policy in Directive 2.1 was promulgated, both provide that the employment is subject to NCIA's directives. The 2014 contract thus provides:

> The employment is governed by the provisions of the NATO Civilian Personnel Regulations ... as well as by the relevant ...NCIA regulations, directives and instructions as in effect at any given time.

34. Article 3 of the 2017 contract adopts slight changes of wording, but the key provision is identical in substance: "*The employment is governed by the provisions of the NATO Civilian Personnel Regulations and NCI Agency regulations, directive and instructions as in effect at any given time*."

35. Nothing in appellant's contracts indicates that that respondent's regulations or directives were frozen as they stood on 1 July 2012. To the contrary, regulations or internal directives can be changed by an agency, provided the changes do not change the balance of the contract. Appellant makes no such claim here.

Directive 2.1 not admissible

36. Appellant's claim that he was not made aware of the adoption of Directive 2.1 also fails. The Tribunal is persuaded that respondent provided sufficient information regarding the policy to Agency staff. *Inter alia*, the policy was communicated via the NATO Secret and NATO Restricted systems. An Agency newsletter was sent to all staff on 16 January 2013, on both systems, and links were provided to the actual contract policy. Briefings were offered to staff.

37. As the Tribunal has held, a NATO body has a responsibility to provide its employees with reliable information regarding significant aspects of their employment. However, as the Complaints Committee report pointed out, employees also have a responsibility to familiarize themselves with information provided to them and to make further inquiries as required. An agency cannot be held responsible for shortcomings of staff in familiarizing themselves with information provided. In this regard, the NCIA Contract Policy clearly indicated that it applied to all NCIA staff, thus necessarily superseding the NCSA Policy, which was then no longer in force.

38. While respondent's efforts to acquaint its staff members with the new policy may not have attained perfect results, perfection is not legally required. The record shows that respondent made substantial efforts, appropriate in the circumstances and utilizing various means of communication, to acquaint staff of the new policy.

39. In this connection, the Tribunal rejects appellant's contention that changes in an Agency's internal regulations can only be properly communicated if they are expressly mentioned in a staff member's contract. Agencies modify their internal regulations and administrative documents with varying frequency and for varying reasons. There is no

requirement that every such change must then be incorporated into every staff member's contract in order to be effective.

Failure to State Reasons

40. The Tribunal is also unconvinced of appellant's contention that the reasons to offer only a two-year hearing were not sufficiently explained.

41. Respondent contends that international administrative law does not require that reasons be given for a decision to offer a two year, rather than a three-year, contract. The Tribunal makes no decision in this regard, although it believes that providing reasons for contracting decisions, especially in matters involving non-renewal (which is not involved here), is a sound administrative practice that recognizes the interests of staff members in matters that may be very important to them.

42. The Tribunal finds that, in any case, the reasons for respondent's decision to offer a two-year contract were sufficiently explained, even if appellant found the explanations insufficient or unpersuasive. Explanations were provided in the Agency's responses to his administrative appeals. Further, according to the Complaints Committee report, appellant told the Committee that he was informed of the decision by the Chief of his Service Line in the presence of three other named individuals. "*He said he was given an explanation of the decision...but his recollection was that it was very basic and did not go into detail. He was very unhappy with the decision...*" The Complaints Committee Report records that appellant subsequently met with the Chief of Staff, although he found the Chief of Staff's explanations "*vague and did not address the issues that he had raised directly*."

43. Thus, respondent did seek to inform appellant of the reasoning underlying its decision to offer him a two-year contract. He did not like the decision or find the explanations he received satisfactory. Appellant's dissatisfaction is perhaps understandable, but it does not render the process by which he was informed insufficient.

44. Appellant was put in a position to understand sufficiently respondent's reasoning and to determine whether the contested decision was justified or tainted by an error. The Tribunal is also enabled to perform its judicial control. (*cf.* AT judgment in Cases Nos. 889, 890 and 897).

Manifest Error of Assessment

45. Appellant contends that respondent's decision to offer only a two-year contract reflects a manifest error of assessment, citing his important responsibilities, hard work, and positive attitude. In his view, respondent should now be able to assess his suitability for an indefinite contract, so it was not necessary to give him a two-year contract to allow further assessment.

46. Here again, the Tribunal finds the Complaints Committee report offers useful insights. That report noted positive aspects of appellant's performance and of the value of his work to the Agency, as evidenced in the written assessments before it. However,

it also noted more ambiguous aspects of that performance and possible areas for improvement, concluding that "*the decision to recommend a two-year extension was reasonable in the circumstances*."

47. The Agency's decision to renew appellant for two years was taken in the exercise of its discretionary powers. It is settled jurisprudence, including in this Tribunal, that such decisions are subject to only limited review by a tribunal. Tribunals only interfere when there is an abuse of these powers, for example if a decision was taken without authority, a rule of form or procedure was breached, it was based on a mistake of fact or law, an essential fact was overlooked, a clearly mistaken conclusion was drawn from the facts or there was an abuse of authority. Tribunals have also consistently held that they will not substitute their own view for the Organizations' assessment in such cases. There was no such abuse of discretionary powers.

48. The Agency did not manifestly err in assessing Appellant's situation. The decision to offer him a two-year contract is not exceptional or contrary to stated policies. It is in line with the NCIA Contract Policy. Appellant could not have a legitimate expectation to the contrary.

Misuse of power

49. Appellant's final plea is that respondent's internal guidelines and contract policy, targeting a median of six years of employment, conflict with the CPR and have not been approved by the North Atlantic Council, and accordingly reflect a misuse of power.

50. Neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresee an automatic award of definite duration contracts, nor do they oblige the Organization to award contract extensions. Respondent's policies operate within the contracting framework established by the CPR, and do not conflict with or modify the CPR.

51. Appellant further urges that the Agency appears to have an informal contract policy, which aims at preventing anyone nearing the ten-year threshold of employment from receiving indefinite contracts and associated employee benefits. The Tribunal cannot agree. Data provided by respondent show that meaningful numbers of respondent's staff are offered indefinite contracts.

52. For these reasons the Tribunal concludes that the appeal is unfounded. The appeal being unfounded, there is no need to rule on the admissibility of the appeal or elements thereof.

E. Costs

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

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

54. As the appeal is unfounded, no award of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 6 August 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 September 2018 AT-J(2018)0015

Judgment

Joined Cases Nos. 2017/1127-1242

A *et al.*

Appellants

v.

NATO International Staff

Respondent

Brussels, 30 August 2018

Original: English

Keywords: financing of medical insurance scheme; Tribunal competence; decision by Head of NATO body; contributions; admissibility.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook, and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearings of 16 March 2018 and 14 June 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of multiple appeals lodged on 5 September 2017 and registered on 6 October 2017, as Cases Nos. 2017/1127-1242 by 116 individual appellants against the NATO International Staff (NATO IS). Appellants all challenge the decision of the NATO Council (NAC) dated 2 February 2016 to amend the footnote to CPR Article 51.2 of the NATO Civilian Personnel Regulations (CPR). The footnote concerns the financing of the group medical insurance scheme and, in particular, the payment of contributions by certain long-serving staff.

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

3. By Order AT(PRE-O)(2017)0003 dated 14 November 2017 the 116 appeals were joined.

4. Respondent's answer, dated 23 October 2017, was registered on 7 November 2017. Appellants' reply, dated 3 January 2018, was registered on the same day. Respondent's rejoinder, dated 29 January 2018, was registered on 30 January 2018.

5. Prior to the 16 March 2018 hearing in these appeals, the President of the Tribunal sent a "*Message from the President of the NATO Administrative Tribunal to the parties*" (President's Message) dated 5 March 2018 to the appellants and to the parties in other appeals involving similar legal issues also being heard in March 2018. The President's Message contained several procedural instructions and requests to the parties. *Inter alia*, it requested them to "*include in their presentation arguments on the Tribunal's competence (see Article 6.2 of Annex IX to the CPR) to hear cases in the absence of a decision by the Head of the NATO body directly affecting appellants*."

6. On 13 March 2018, counsel for appellants submitted an eight-page letter expressing concerns regarding the President's Message. *Inter alia*, this letter objected to the limited time foreseen for appellants to present their arguments at the hearing; to having members of the Tribunal other than the three in the assigned panel play any role in consideration of their appeals; to the Tribunal's raising *proprio motu* questions regarding its competence; and alleging apparent pre-judgment on the question of the Tribunal's competence. The letter concluded by recalling appellants' rights under international administrative law and human rights instruments, and expressing resolution to have those rights "*strictly observed, throughout the present proceedings before the Tribunal and beyond.*"

7. The first hearing in these appeals was convened at NATO Headquarters as scheduled on 16 March 2018 in the presence of a large number of the appellants, their counsel, and Mrs Laura Maglia, Registrar. At the outset of the hearing, appellants' counsel affirmed the concerns and objections expressed in their 13 March letter. Counsel stated that their clients were not being afforded a fair trial and that they would proceed with the hearing only subject to reservation. Counsel for respondent sought clarification and stated that respondent also would proceed under reservation. Following private consultations among the parties and the Tribunal, the hearing was suspended.

8. On 21 March 2018 the Tribunal issued Order AT(TRI-O)(2018)0001. This recalled the circumstances leading to suspension of the 16 March 2018 hearing and invited the parties to address in writing the substance of the question regarding the Tribunal's competence posed in the President's Message of 5 March 2018.

9. As requested, the parties filed additional submissions addressing the Tribunal's competence to hear the cases. Appellants did so on 20 April 2018 and respondent on 19 April 2018.

10. The Tribunal's panel held a resumed hearing on 14 June 2018 at NATO Headquarters. It heard arguments by appellants' counsel and by a representative of the respondent, all in the presence of a substantial number of the appellants and Mrs Laura Maglia, Registrar. At the conclusion of the hearing, the President inquired if counsel for the appellants were content with the proceedings. Counsel expressed no objections.

B. Factual and legal background of the cases

11. These cases all grow out of the decision by the North Atlantic Council on 2 February 2016 to amend the footnote to Article 51.2 of the CPR.

12. Some background is necessary to provide context for appellants' claims. Well before appellants joined NATO, the Organization in 1967 introduced premium free lifelong medical insurance coverage for retirees and their dependents. In order to keep this scheme financially sustainable, various amendments and conditions were subsequently introduced over time.

13. Thus, for example, in 1974 it was decided that to qualify for free lifelong medical coverage for retirees and their dependents, staff recruited after 1 May 1974 who retired at age 60 or above must have been employed for at least five years. Those retiring between the ages of 55 and 60 must have been employed for at least ten years. Active staff had to pay 1/3 of the total premium. Qualified retirees were not required to contribute.

14. Further amendments were made in 1988. The qualifying period of employment for those retiring at age 60 and above was raised from five to ten years, and the premium was indexed and rose from 0.906 % of gross salary to 2.188%.

15. A bridging cover was introduced in 1995. Staff members retiring between the ages of 55 and 60 had to pay a bridging premium until age 65, after which they were entitled to free coverage. This premium was 2.591% of a (theoretical) pension. Retirees aged between 55 and 65 who were recruited before 1 January 1988 were entitled to free coverage if they had been employed for at least five years. The qualifying period was set at ten years (consecutive or otherwise) for staff members recruited between 1 January 1988 and 1 January 1995, and at ten consecutive years for those recruited after 1 January 1995.

16. Medical coverage for retirees was initially underwritten by a private insurance company. When the insurer was no longer prepared to underwrite the scheme for persons over the age of 65, the Organization created in 2001 the Retirees' Medical Claims Fund (RMCF or Fund). Under this new system, staff aged 55 or over who left NATO after a minimum of ten years of uninterrupted service were permanently entitled to reimbursement of medical expenses for themselves and their dependents, but subject to paying a premium. However, certain long-serving staff members were not required to pay after the age of 65, as provided in a footnote added to CPR Article 51.2:

> Provided they were recruited before 1st January 2001, staff members who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.

17. Under the new system introduced in 2001, the premium paid to the RMCF after the age of 65 was set at 4,5% of gross salary for active staff and at 3% for retirees recruited before 1 January 2001 who did not have 25 years of contributions. Staff or

retirees paid one third of the applicable premium, with the remaining two-thirds paid by the Organization.

18. Also as part of the 2001 changes, a Supervisory Committee was set up to oversee management of the RMCF. This Committee is composed of representatives from NATO administrations, active staff, and retired staff.

19. There was a further amendment in 2006. The premium for the bridging cover (for retirees between the ages of 55 and 65) was increased from 2,591% of theoretical pension to 3% of last salary. This premium was again increased in 2013, from 3% to 5%.

20. In 2009 the Secretary General informed the NAC that the Fund held €103 million at the end of 2008. He added that a 2008 actuarial study conducted on the initiative of the Supervisory Committee projected that the RMCF could be depleted between 2030 and 2047, depending on different assumptions regarding the return on assets (3, 5, or 8%). The Secretary General undertook to engage experts to estimate the minimum financial injection necessary to make the Fund sustainable.

21. In 2013, the NATO International Board of Auditors (IBAN) noted that the Fund's assets were estimated to be depleted between 2032 and 2051 based on an actuarial study performed in 2010. Further actuarial studies showed that the RMCF would be depleted somewhere between 2038 and 2043, and that remedial measures were needed to make the RMCF sustainable. The IBAN recommended in particular that the International Staff provide an estimate of the minimum financial injection necessary. The Board also recommended that the IS provide all necessary information and undertake any remedial actions to limit the level of obligations.

22. Several scenarios for strengthening the RMCF were then discussed in the Supervisory Committee and in the Joint Consultative Board, the permanent body set up under CPR Annex XI for consultation among the Administrations, the Confederation of NATO Civilian Staff Committees, and the Confederation of NATO Retired Civilian Staff Associations.

23. In the end, the amendment to the footnote to CPR Article 51.2 mentioned above was proposed to the NAC. Major elements of the amendment were proposed by the representaives of active and retired staff who endored the proposal as a whole. On 2 February 2016 the NAC adopted the amendment, which was issued on 8 February 2016 as Amendment 24 to the CPR. Each staff member received an individual nominative copy of the amendment. While representatives of active and retired staff supported the amended footnote, there was not universal agreement, as the present appeals and others challenging the footnote demonstrate.

24. As amended, the footnote now provides:

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

> service by 3 August 2016. Retired staff who have not contributed to the group insurance scheme for a minimum of 25 years by 3 August 2016 shall be required to pay a premium after the age of 65 to continue coverage under the scheme.

25. The NAC's 2 February 2016 amendment of this footnote is at the heart of these appeals.

26. Appellants are all long-serving staff members of the NATO E-3A Component. According to information provided to the Tribunal, at the time of their appeals 81 appellants had paid into the fund for more than 25 years, and thus would have been entitled to free lifelong medical coverage after their retirement under the previous version of the footnote, while 35 had not yet paid for 25 years.

27. Appellants' counsel indicate that the requirement to actually pay contributions at present affects only two appellants who would not have been required to do so under the prior footnote. These are the appellant in Case No. 2017/1144, who retired after the August 2016 cutoff date and after the administrative review process had begun, and the widow of the appellant in Case No. 2017/1174, who passed away while administrative review was underway.

28. After being notified of the NAC's decision to amend the footnote by an Office Notice dated 8 February 2016, appellants submitted timely requests to the Head of the Personnel and Manpower Division of NAEW&CF, seeking administrative review of the NAC's decision to amend the footnote (which they referred to as "*the initially contested decision*"). They were informed that their requests were forwarded to NATO IS. On 20 May 2016, by letter dated 20 April 2016, the Acting Deputy Assistant Secretary General for Human Resources denied appellants' requests.

29. Not having received a timely response to their initial requests for administrative review, appellants requested further administrative review by NAEW&CF, requests that were again forwarded to NATO IS. After the end of the applicable time limit, appellants were informed by the Acting Deputy Assistant Secretary General for Human Resources that the CPR do not provide for further administrative review in the circumstances of their appeals, and indicating that their next available step would be to submit a formal complaint to the Secretary General.

30. Meanwhile, appellants submitted a request for mediation to the Secretary General. This request was denied by a letter received 1 August 2016 but dated 5 July 2016. Appellants then submitted a formal complaint to the Secretary General, indicating willingness to submit their dispute directly to the Administrative Tribunal pursuant to Article 4.3 of CPR Annex IX. Appellants' formal complaint was eventually denied by letter dated 5 July 2017 from the Assistant Secretary General for Executive Management.

31. Appellants did not request a Complaints Committee, but one was constituted at the request of appellants in other cases. The Committee reviewed a total of 129 similar complaints and held hearings in several duty stations between November 2016 and April 2017. It heard three spokespersons for appellants on 6 March 2017. The Committee issued its report on 4 May 2017.

32. The Committee recognized the significant shortcomings of the RMCF, which was inadequately funded from the outset, and acknowledged concerns expressed by both administration and staff representatives regarding the Fund's continued financial viability. The Committee shared the view of both administration and staff representatives that staff needed to be made aware of the situation so that responsibilities towards future staff members could be met. It also agreed with both administration and staff representatives that action was needed to mitigate the rising costs of medical care and longer life spans. The report also indicated that, whatever the length of their contributions, staff could no longer expect free medical coverage for the rest of their lives.

33. The Committee concluded, however, that notwithstanding the clear financial rationale for changes to medical coverage, the change to the footnote was introduced without due regard to the impact on serving staff. It was of the opinion that the transition period of six months was much too short and did not provide adequate time for staff to take a life-changing decision. The Committee felt that a more gradual phasing in of the change would have been preferable, as was done with previous revisions to the CPR.
34. The Committee recommended that any future such changes to medical coverage be introduced with an appropriate transition period, for example two years. It is also called for better communications between the different NATO Staff Associations as well as between HR departments of the different NATO bodies.

35. With regard to the delays in the administrative review process the Committee recommended that Executive Management ensure that the procedures in place for lodging complaints and requesting administrative review are clearly communicated to other NATO bodies, and that every effort be made to meet deadlines in the processing of such complaints.

36. On 5 July 2017 the Assistant Secretary General for Executive Management replied to appellants' complaint on behalf of the Secretary General. He recalled that the NATO medical group insurance was a solidarity system, heavily relying on the contributions of the active staff, which permit the retiree population to benefit from the group insurance at a low cost. Over the years, a number of changes had been introduced, based on objective considerations, to preserve NATO's group insurance plan, given that free and unconditional lifelong coverage was unsustainable in the long run. The amendment to the footnote was the latest of these changes, which included the indexation of premiums, introduction of the bridging cover, and establishment of the RMCF.

37. He continued that the change to the footnote was introduced to ensure that all entitled retirees and their dependants could enjoy the benefits of a robust medical plan for a reasonable cost until the end of their lives. As a result of the change, all active staff who did not retire before 3 August 2016 would contribute to the medical insurance plan for life. The same would apply to all retired staff who did not have 25 years of service by that date and hence did not obtain the right to free medical coverage. The change had effect only for the future and was therefore not retroactive in nature. He added that for the same reason the change could not be considered discriminatory, because as of the date of implementation, both active and retired staff had to contribute for life. He further

observed that the change did not violate any acquired vested rights and did not affect any contractual rights. It was a change to statutory elements that were governed by the CPR and which may be changed for duly justified reasons. Finally, he concluded that the contribution to be paid after retirement could not be considered to change working conditions in an unacceptable manner. He concluded that for these reasons, and after careful consideration, he was unable to give a favourable answer to the request.

38. Appellants regard this denial of their complaint as "the challenged decision" for purposes of their appeals. It is under these circumstances that appellants lodged the present appeals.

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

(i)(a) Appellants' contentions regarding jurisdiction and admissibility

39. Appellants contend that the Tribunal has jurisdiction and that they complied with all of the CPR's requirements for pre-litigation review in a timely manner. They emphasize delays by the respondent in processing their requests for review and in conducting the complaints procedure. They conclude that the appeal is admissible.

40. In response to the President's Message and the Tribunal's subsequent Order AT(TRI-O)(2018)0001, appellants submitted a supplementary filing addressing the Tribunal's competence. In this filing, appellants first contend that the Tribunal cannot raise an issue regarding its competence to consider these appeals *proprio motu* in absence of a dispute between the parties concerning its competence. Appellants base this conclusion on Article 6.2.2 of CPR Annex IX, which provides that *"[i]n the event of a dispute as to whether a particular matter falls within the competence of the Tribunal...the issue shall be settled by the Tribunal*." Citing jurisprudence of the International Court of Justice regarding the meaning of "dispute", appellants contend that this limits the Tribunal's authority to consider its own competence (*Kompetenz-Kompetenz*).

41. In appellants' view, Article 6.2.2 permits the Tribunal to consider its competence only where it is disputed between the parties. As both parties in these appeals accept that the Tribunal is competent, the Tribunal cannot consider the question or reach a contrary conclusion.

42. Second, appellants urge that there was an individual dispute concerning the legality of the Secretary General's decision rejecting each of their complaints concerning the new footnote. In appellants' submission, rejection of their complaints gave rise to individual disputes affecting each appellant that can be appealed to the Tribunal.

43. Third, appellants submit that the Tribunal is competent to consider their disputes because they concern a CPR provision that seriously violates a principle of international public service law. This contention is based upon the footnote to the last sentence of Article 6.2.1 of Annex IX of the CPR. Article 6.2.1 provides:

> The Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal representative concerning the legality of a decision taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council. In this respect, the Tribunal shall make decisions according to the Civilian Personnel Regulations, other pertinent rules, contracts or other terms of appointment, as well as their interpretation and application to the staff in individual cases.[Footnote]

The footnote at the end of the last sentence then states:

> It is understood that the Tribunal shall have the authority to rule on the Civilian Personnel Regulations in the event that a CPR provision seriously violates a general principle of international public service law.

44. Appellants view this footnote as a separate grant of competence, authorizing the Tribunal to assess claims that a CPR provision "*violates a general principle of international public service law*" even absent some action applying that provision to a staff member in a concrete way. In response to the Tribunal's questions at the June hearing, appellants urged that the change in the footnote to CPR Article 51.2 resulted in a change in entitlements which was indeed serious within the meaning of the footnote to Article 6.2.1 of Annex IX.

45. Finally, appellants contend that, in any event, the new footnote has been directly applied to appellants in Cases Nos. 2017/1144 and 2017/1174. In both appeals, persons who were not required to make contributions under the prior version of the footnote are now being required to do so.

(i)(b) Respondent's contentions regarding jurisdiction and admissibility

46. In its written pleadings and at the 14 June 2018 hearing, respondent did not contest the Tribunal's jurisdiction or the admissibility of the claims.

(ii)(a) Appellants' contentions regarding the merits

47. Appellants contend that the NAC's decision to amend the footnote affects their conditions of work and does not comply with the terms of employment, including general principles of international civil service law, as provided by the CPR. Their requests for administrative review focused upon the NAC's decision to amend the footnote; *"[t]he complaint was directed against the decision taken by the North Atlantic Council on 2 February 2016 ... With the initially contested decision, the North Atlantic Council amended the right to free medical coverage after the age of 65 enshrined in the footnote to Article 51.2.*"

48. Appellants contend that the new footnote is unlawful in multiple respects.

Violation of the Principle of Equal Treatment and Non-Discrimination

49. Appellants first contend that they are subject to unequal treatment and discrimination because they will have to pay contributions to the RMCF while other similarly situated staff members who retired before August 2016 will not. Some unretired appellants who paid for 25 years now must pay, while retirees who paid for 25 years before retiring do not. This is by definition discrimination, for which appellants see no objective justification. All staff engaged before 1 January 2001 are in the same group. All were promised free medical coverage after contributing for 25 years, which some will receive while others will not. There is no proper (actuarial) reason for the distinctions drawn among them.

Violation of the Principle of the Protection of Legal Certainty and Legitimate Expectations

50. Appellants next contend that they had a legitimate expectation of free medical coverage after the age of 65. In their submission, the test under the Administrative Tribunal's case law is whether they had "justified and clear hopes" created by "specific assurances" involving "precise, unconditional and consistent information" from reliable sources. Here, the prior practice of the Organization and the prior footnote constituted such assurances. These gave rise to a legitimate expectation that appellants would be entitled to free medical coverage if they contributed to the insurance scheme for a minimum of 25 years.

Display of Negligence and Violation of the Principle of Good Administration and the Duty of Care

51. Respondent is also said to have failed to meet its duty of care in designing and implementing the new footnote. Appellants contend in this regard that respondent was negligent both in the initial conception and design of the RCMF and in the Fund's subsequent administration, thereby violating its duty of care. Appellants criticized the organization's failure to provide significant start-up funding for the RCMF, arguing that the evidence shows that it was apparent from the Fund's inception that it was grossly underfunded and unsustainable. Appellants' counsel urged at the hearing that promising an employee benefits program but not funding it adequately was not only negligent but could indeed be criminal.

52. Appellants also emphasized the short transition period (six months) provided for staff members with twenty-five years of prior contributions to decide whether to retire or to be required to pay contributions after retirement if they chose not to retire. This short period failed to take into account the interests of affected staff members. There was no reason not to provide a more reasonable transition period, as indeed the Office of Legal Affairs advocated prior to the NAC's decision. Further, the NAC should have "*chosen to amend the length-of-contribution requirement or to raise the contribution,*" *in lieu* of the approach it adopted. The failure to provide a reasonable transitional period and to make different transitional arrangements reflected neglect and poor administration, thus violating the duty of care.

53. Appellants contend that the prior footnote protected them against the shortcomings of the RCMF, as it assured them free medical coverage after retirement.

However, that protection has now been removed, leaving appellants exposed to the consequences of respondent's poor administration and failure to meet its duty of care.

54. Appellants proposed that, should the Tribunal find itself unable to assess their arguments regarding the defects in design and administration of the RCMF, it should appoint an expert "*to investigate proper government by the Organization of the financing of the continued medical coverage and more specifically the RMCF*."

Violation of Acquired rights

55. Appellants contend that they acquired a right to continued medical coverage after 25 years of contributions; the prior footnote established their individual rights in this regard. In their view, the test under international administrative law is whether the benefit was something that induced an individual to take or remain in a position. Here, the promise of free medical at retirement was a principal term taken into consideration by staff members.

56. Appellants accept that under the jurisprudence of the Administrative Tribunal and the Appeals Board the Organization can change regulations of a general character. However, provisions conferring specific rights on individuals cannot be changed. In their view, the prior footnote gave rise to an acquired right guaranteeing to those it covered the right to free medical coverage upon retirement. This specific right was wrongly taken away by the change to the footnote.

Violation of the Principle of Non-Retroactivity

57. In appellants' view, the changed footnote improperly operates retroactively, because it strips them of an acquired right to free continued medical coverage. Other previous changes to the retirement scheme applied only to new staff, but the amendment to the footnote applies to existing staff, and thus violates the principle of non-retroactivity.

The Balance of the Contract is Upset

58. Even if the Tribunal assesses the change in the footnote to be a change of statutory provisions of a general character, appellants urge that the change imposes unanticipated financial burdens on them. The new contributions are substantial and burdensome, and illegally upset the balance of appellants' contracts. While case law holds that statutory provisions of general application can be amended, such changes cannot upset the balance of the contract. Health insurance is "*among the main terms of employment*" and revoking the promise of free health care after retirement imposes burdensome costs that affect retirees' financial security and upset the balance of their contracts.

The Organization Violated the Procedural Rules Governing the Pre-Litigation Process

59. Finally, appellants detail the manner in which respondent's consideration of their appeals regularly failed to comply with the requirements and time lines established by the CPR. By its failure to comply with the CPR's required procedures "*the Organization has unnecessarily protracted these proceedings*" to appellants' detriment.

Relief Sought

60. As clarified and summarized in their submissions at the June 2018 hearing, appellants seek:

- a declaration that the NAC's decision of 2 February 2016 to amend the footnote to Article 51.2 of the CPR is illegal;
- non-application of the decision to amend the footnote to the appellants;
- "A ruling of principle" that should the decision to amend the footnote be applied to the appellants in the future, they would be entitled to full compensation for amounts paid;
- compensation for respondent's procedural violations comprised of moral damages, increased legal costs, and loss of opportunity to seek alternative medical coverage; and
- reimbursement of the costs of retaining legal counsel and travel and subsistence costs, even if the Tribunal finds there are no good grounds for the appeal.

(ii)(b) Respondent's contentions regarding the merits

61. Respondent submitted the same answer and rejoinder in 129 appeals challenging the amended footnote, including the 116 cases at issue in these joined appeals.

62. With respect to appellants' submissions regarding the failure to meet deadlines during the administrative review process, respondent recognizes these as "regrettable" but attributes the delays to the unusual circumstances. The numerous appeals involved multiple individuals from various NATO bodies in different geographical locations. NATO's response required extensive coordination within the International Staff and with other affected NATO bodies. In respondent's view, the proper procedure was followed and the IS acted with due diligence. The delay did not affect the validity or outcome of the decision to deny appellants' administrative appeals, and did not adversely affect appellants or cause them additional damages.

63. Regarding the merits, respondent stresses that the NATO medical group insurance is a solidarity system, heavily reliant upon contributions by active staff (98% of non-organizational contributions into the RMCF in 2014), allowing retirees and their eligible dependents to enjoy a robust medical plan for a reasonable cost. Respondent contends that the system has been changed over time on the basis of objective factors in order to preserve its financial viability and a generous medical plan. The amended footnote is similar to measures previously adopted to these ends. In respondent's view, the Organization demonstrated good governance, continually monitoring the situation and revising the conditions of coverage to ensure the preservation and financial viability of the group medical program.

64. Respondent denies that the Organization failed to foresee increases in healthcare costs. Projected increases in costs and life expectancy were parameters of the actuarial studies undertaken and were fundamental to the ensuing changes. Moreover, even if healthcare costs should rise in an unanticipated manner, the fact that NATO medical group insurance operates as a solidarity system means that they will be shared by all contributors. In this regard, the premium charged to retirees (currently 1.67% of their last salary, with the Organization contributing a further 3.33%) is only a small proportion of the actual medical costs incurred by retirees and their dependents.

65. In respondent's view, the changed footnote is not discriminatory. It applies without exception to all staff who joined the Organization before 1 January 2001 who did not retire before 3 August 2016 and to retirees who had not made 25 years of contributions by that date. All staff who joined after 1 January 2001 and are eligible for continued medical coverage must already pay the premium on a lifelong basis. In addition, should there be any difference of treatment, *quod non*, such differentiation would be objectively justified. Respondent refers in this respect to Decision No. 437 of the NATO Appeal Board, which held that "*differences in the personal situations of the insured under the continued medical scheme do not of themselves constitute indices or factors of discrimination. Indeed the principle of solidarity does not involve the benefits received by each member being in proportion to his or her contribution to the scheme*."

66. Respondent maintains that the change did not violate the principle of non-retroactivity, as the modification only operates prospectively. Staff members and retirees need not contribute for previous years; their previous contributions are not called into question; and their entitlement to lifelong coverage is unchanged. In addition, the NAC did not violate any rule it imposed on itself regarding modification of such provisions.

67. Moreover, the amended footnote does not violate any acquired, vested or contractual rights. Appellants will not be deprived of the benefit of their previous contributions and their eligibility for continued medical coverage has not changed. Potentially requiring appellants to pay a premium from which they previously were exempt does not upset the balance of their contracts or unacceptably change their working conditions.

68. Respondent contends that that the amended footnote changes statutory elements governed by the CPR. In its view, international administrative law distinguishes between such provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. Statutory elements governed by the CPR may be changed by the Organization for duly justified reasons, which have been provided here.

69. For respondent, while certain appellants with the required years of service may have a legitimate expectation of lifelong medical coverage for themselves and their dependents after retirement, this expectation cannot reasonably extend to lifetime free care exempt from paying any premium. The requirement to pay premium is justified by longer life expectancy and higher medical costs.

70. Respondent denies that it failed to provide sufficient notice and information regarding the change contrary to its duty of care and good administration. Respondent notes that a six-month transition period was applied following approval of the change and that an Office Notice was distributed shortly after the approval. The change was extensively discussed prior to its adoption and was the subject of consultations between representatives of the Administrations and of active and retired staff. Respondent is not responsible for any possible deficit of communication between staff associations or between these associations and staff or former staff members.

71. Respondent requests the Tribunal to dismiss the appeal as being without merit.

D. Considerations and conclusions

72. These appeals raise important questions regarding the Tribunal's competence. This Tribunal, following in this respect the jurisprudence of its predecessor the NATO Appeals Board, has constantly recalled that it is a body of limited competence and jurisdiction (*cf.* Cases Nos. 2015/1056-1064) and that it must assure that it acts only within the extent of the powers conferred upon it by the NAC. Accordingly, the Tribunal must address questions going to its jurisdiction and competence before it can consider substantive legal arguments.

73. Given the importance of the issue of the legality of the amended footnote for many active and retired staff, the Tribunal considered it in the interest of good and fair administration of justice not to raise preliminary issues regarding its competence *impromptu* at the 16 March 2018 hearing. Accordingly, the Tribunal alerted the parties beforehand, giving them the opportunity to reflect on the matter and to address it at the hearing should they wish to do so. The Tribunal's President sent a Message to the parties to this effect prior to the hearing. Appellants' reactions to this Message before and during the 16 March 2018 hearing, the Tribunal's suspension of that hearing, and its subsequent invitation to the parties to address questions of competence in writing, are described above.

74. The Tribunal is mindful that respondent has not raised objections to its competence. Respondent confirmed this position in its April 2018 supplemental submission and at the June 2018 oral hearing. The Tribunal emphasizes, however, that this does not diminish its power and obligation to make its own assessment.

75. The Tribunal is competent to review its own competence. It has its own responsibility in such matters and may and, when necessary, must deal with them *sua sponte, i.e.* on its own motion. This is not a matter left to the discretion of the parties; the Tribunal can consider its competence even if the parties do not raise the issue, because the issue of the Tribunal's competence involves a matter of law (*cf.* Council of Europe Administrative Tribunal judgment in Cases Nos. 571-576 and 578/2017, paragraph 66; and United Nations Appeals Tribunal in Judgment No. 2015-UNAT-526).

76. This Tribunal is a body of limited powers. Indeed, Article 6.2.3 of CPR Annex IX stipulates clearly that the Tribunal shall not have any powers beyond those conferred under that Annex.

77. Appellants contend, however, that the footnote to the last sentence of Article 6.2.3. operates as a further independent source of authority to consider their appeals. As noted above, this footnote provides:

> It is understood that the Tribunal shall have the authority to rule on the Civilian Personnel Regulations in the event that a CPR provision seriously violates a general principle of international public service law.

78. The Tribunal does not agree. There can be no doubt that the provisions of Article 6.2.3 and the footnote at the end of its last sentence are intrinsically linked. The footnote applies to the *ensemble* of Article 6.2.3 and must be interpreted and applied in the context of the provision it modifies. In other words, the footnote is not a stand-alone provision. It does not confer additional authority on the Tribunal to consider the legality of NAC action in the abstract and without reference to the CPR's other requirements bearing on its competence.

79. In fact, and as described below, under its own settled jurisprudence and widely-accepted principles of international administrative law, the Tribunal can only rule on the legality of an underlying CPR provision when it has been applied in a concrete manner in a specific decision by the Head of the NATO body (HONB) concerning a specific appellant. The Tribunal cannot deal with potential and hypothetical cases involving situations that may arise in the future. They may well arise, but the details and extent of future decisions and actions are not now known.

80. For these reasons, the Tribunal, like almost all other international administrative tribunals, does not have the competence to hear a challenge against a general rule. Such an appeal is inadmissible.

81. The Tribunal's jurisprudence is consistent in this respect (see, for example, joined Cases Nos. 2016/1090 and 2016/1095, paragraphs 55 and 56). For this reason, in Case No. 2014/1017 the Tribunal rejected the Office of Legal Affairs' contention that an appellant had to seek administrative review within 60 days of learning of changes to the rent allowance. Instead, the Tribunal held:

> 33. …The Tribunal believes that [the CPR's requirement of "a decision affecting a staff member's conditions of work or service"] entails more than just adoption of a policy or change in regulations by a competent NATO organ. The policy or change must be applied in a concrete way by means of a "decision" "adversely affecting" the staff member in some direct and ascertainable way. The possibility that a new policy or rule potentially may affect the staff member in some way at some future time does not provide a sufficiently clear and concrete basis for the Tribunal to assess an appeal.

82. In paragraph 35 of the same judgment, the Tribunal referred to related holdings by its predecessor, the NATO Appeals Board:

> In Decision No. 328, the NATO Appeals Board rejected a similar argument that an appeal was not timely because the appellant should have appealed when he received an Office Notice informing him of new medical insurance rules. Instead, the appellant was allowed to appeal "*against the decision whereby the administrative authority applies them to his particular case*." It is also recalled that in Decision No. 851, in which a staff member sought annulment of a decision by the Secretary-General not to submit to the Council a proposal relating to collective bargaining, the Appeals Board concluded that such a matter concerned all NATO staff and "*can not be considered in terms of an individual dispute*" appealable under the NCPR. This reflects a sound principle that will be followed here.

83. The NATO Appeals Board also held in its Decisions Nos. 784-794, 797-804, and 807-809:

> Although the Appeals Board is not competent to cancel a decision of the North Atlantic Council (see Decision no. 730-731 dated 11 July 2008), it may rule on such a decision's legality, as on that of all regulatory decisions by Heads of NATO bodies or by any other administrative authority, when a Head of a NATO body takes an individual decision implementing the Council's decision... The Appeals Board is competent to hear appeals directed against individual decisions by Heads of NATO bodies to apply the annual adjustment of remunerations and pensions late, even if this may lead the Board to judge whether a decision by the North Atlantic Council complies with the provisions of the NATO Civilian Personnel Regulations…

84. This conclusion is consistent with the practice of other international administrative tribunals (except for some having different statutory provisions concerning their jurisdiction) when faced with challenges to policies of general application not yet directly applied to individuals. The weight of legal authority is that where amendments to staff policies have not yet resulted in individualized decisions implementing such policies, administrative tribunals have found a request for review of such policies to be premature. Tribunals have therefore refrained from judicial review until the policies have been individually applied.

85. NATO is one of the so-called Coordinated Organizations, a group of six organizations headquartered in Europe who cooperate with the aim of harmonizing rules and practices on salaries, allowances, pensions, and other personnel management issues. Although the jurisprudence of other Coordinated Organizations' tribunals does not necessarily have a greater weight in the body of international administrative law than that of other international administrative tribunals, its jurisprudence is instructive here. Thus, in its Cases Nos. 571-576 and 578, the Council of Europe Administrative Tribunal in 2017 confirmed its consistent jurisprudence that it cannot rule on decisions of the Committee of Ministers, but only on implementing administrative decisions by the Secretary-General. In like vein, the Appeals Board of the European Space Agency held in 2016 in joint Cases Nos. 98, 99, and 100 that the mere publication of new subsistence

allowance rates did not affect the claimants' personal interests and that legislation in itself does not automatically affect agents' legal position. This only occurs when the new legislation is applied to them in a concrete manner.

86. Other major international administrative tribunals confirm this approach. The Administrative Tribunal of the International Labour Organization (ILOAT), for example, confirmed and refined its jurisprudence in the matter as follows in paragraph 8 of its Judgment No. 3291. This Judgment explains a powerful reason for this principle, as the contrary rule could prejudice staff by requiring them to respond rapidly to changes in policy or else find themselves time barred:

> The Tribunal notes that allowing a complaint against a general decision which does not directly and immediately affect the complainant but which may have a direct negative effect on her/him in the future, *would cause an unreasonable restriction of the right of defence, as staff members would then have to impugn immediately all general decisions which may have any connection with their future interests, on the basis that a general decision which is not challenged within the established time becomes immune from challenge. On this approach, once a general decision is considered immune, any complaint impugning the subsequent decision implementing it could not challenge the lawfulness of the underlying general decision*. Considering this, the Tribunal is of the opinion that the approach illustrated by the recent case law (Judgments 2822 and 3146) is to be followed. According to that case law, a complainant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him, but she/he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action (emphasis added.)

87. The ILOAT recently reaffirmed in its Judgment No. 4028 the principle that "*a general decision that requires individual implementation cannot be impugned; it is only the individual implementing decisions which may be challenged...*" (*cf.* also ILOAT Judgments Nos. 622, 663, 2953, 3628, 3736, 3740, 3811, and 3883.)

88. In their April 2018 supplemental filing, appellants cite ILOAT Judgment No. 1712 for a contrary proposition, that there may be a cause of action absent any present injury, but that observation does not fully reflect the circumstances underlying the ILOAT's decision. In that case, a typing allowance previously received by appellants had already been suppressed and replaced on their payslips by a "transitional measure" that was less advantageous as it was no longer subject to annual adjustment. This change in the complainants' situation, the Tribunal concluded, "*did cause the complainants injury*." In ILOAT Judgment No. 1330, cited by appellants in a footnote, it appears that a new definition of pensionable remuneration at issue was already being applied to the complainants in the case. This, the ILOAT observed "*obviously affects the way of reckoning the contributions to be docked from their monthly pay*."

89. Appellants' supplemental filing also cited ILOAT Judgments Nos. 2633 and 2583 as showing that Tribunal's willingness to consider changes in pension regimes prior to their application in specific cases because of staff members' interest in certainty

regarding their future pensions. In Judgment No. 2633 the ILOAT did recall its observation in Judgment No. 1712 that there may be a cause of action even absent present injury. However, it also noted that a disputed increased contribution rate was already being applied to the complainants. Similarly, ILOAT in Judgment 2583, stated that staff members may have an interest in knowing the amount of their pensions even if still serving. However, some complainants in that case were already receiving reduced pension payments on account of contested changes to their pension fund. Thus, there was in these cases certainty of the situation in the future and, implementation directly affecting some complainants. This cannot be said of the present cases. There is, first of all, no certainty, whether this particular footnote, or another footnote or, again, a completely different provision will be in force when (most of the) appellants retire. Secondly, at the moment of lodging these appeals no deductions were being made, or changes made to existing deductions, implementing the challenged footnote.

90. The World Bank Administrative Tribunal too has held that it is without jurisdiction to adjudicate the validity of a general rule rather than the application of that rule in a particular case so as adversely to affect the applicant (see, for example, Decisions Nos. 41, 51, 52, 54, 118, 119 and 126).

91. Counsel's letters transmitting these appeals to the Tribunal describe the appeals as "*directed against the decision taken on 5 July 2017 by NATO Secretary Jens Stoltenberg... whereby it was decided not to grant the relief sought in the complaint submitted by the appellant*." Thus, the action upon which the appeals is based is a denial of a request for relief that was made through NATO's system of pre-litigation administrative review.

92. Through the pre-litigation proceedings appellants did indeed receive a final response from, or on behalf of, the Secretary General denying their request for administrative relief. But, as the Tribunal held in paragraph 59 of Cases Nos. 2014/1041 and 2015/1045, the overall justice system is designed to challenge existing decisions. The administrative review process cannot be used to create an appealable decision that did not previously exist. A staff member who disagrees with a policy cannot ask to have it reversed, have the request denied in the administrative review process, and thereby create an appealable decision where there is no concrete action applying the policy to the staff member.

93. Respondent submitted during the hearing that the NAC decision was implemented by being individually notified to appellants. The Tribunal disagrees. Notification of legislation in itself does not automatically affect the legal position of staff members. This only occurs when the new legislation becomes applicable in a concrete manner. As the ILO Administrative Tribunal pointed out in its Judgment No. 3291, the contrary rule could seriously prejudice the rights of staff members, requiring them to contest policy changes when they are made, but before they applied, or risk being barred from doing so at a later time.

94. No such implementing decisions had yet been taken concerning any of the appellants when they lodged their appeals. It is a generally accepted principle that the lawfulness of a decision is assessed as at the date on which that decision was allegedly

taken. Facts that have occurred since that time cannot alter the Tribunal's competence to consider those appeals (*cf.* ILOAT Judgments Nos. 3045 and 3686). In this regard, the Tribunal is mindful of the position of appellants in two appeals – Nos. 2017/1144 and 2017/1174 – where contributions must now be paid in circumstances where a now-retired staff member and the widow of a now-deceased staff member would not have been required to pay under the previous footnote. However, these new circumstances were not made the subject of a timely request for administrative review as the CPR requires. The Administrative Tribunal is competent to address only those claims that have been the subject of administrative review under the CPR, or that it is otherwise authorized to consider, as for example with an agreed referral by a staff member and the HONB under Article 6.3.1 of Annex IX.

95. The Tribunal must conclude that the joined appeals are inadmissible. The Tribunal is fully aware of the need for appellants to obtain legal certainty. Nevertheless, departing from the legal framework outlined above would disregard the structure created by the NAC in the CPR and create a precedent potentially highly prejudicial to staff in other contexts. This conclusion does not prevent appellants from challenging the lawfulness of the underlying general decision when challenging an implementing decision once it is being applied to them.

E. Costs

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

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

97. The appeals being dismissed as inadmissible; no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 30 August 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 September 2018 AT-J(2018)0016

Judgment

Cases Nos. 2017/1114-1124

SD, MDS,
RH, AK,
EK, GM,
EM,
SP, MvS,
DS, BS

Appellants

v.

NATO International Staff
Respondent

Brussels, 30 August 2018

Original: English

Keywords: financing of medical insurance scheme; Tribunal competence; decision by Head of NATO body; contributions; admissibility.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 16 March 2018. Following the hearing the Panel decided that, as the complaints seek the same redress and rest on submissions, which are, for the most part, identical, it is appropriate that they be joined to form the subject of a single judgment.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of eleven appeals against the NATO International Staff (IS). Appellant M lodged the appeal on 27 July 2017. It was registered on 23 August 2017 as Case No. 2017/1119. Appellant P lodged the appeal on 28 July 2017. It was registered on 23 August 2017 as Case No. 2017/1121. Appellants H, K, M, and S lodged their appeals on 31 July 2017. They were registered on 23 August 2017 as respectively Cases Nos. 2017/1116, 2017/1117, 2017/1120, and 2017/1123. Appellants D, D, K, S, and S lodged their appeals on 1 August 2017. They were registered on 23 August 2017 as respectively Cases Nos. 2017/1114, 2017/1115, 2017/1118, 2017/1122, and 2017/1124. They all challenge the decision of the NATO Council (NAC) dated 2 February 2016, which amended a footnote in the NATO Civil Personnel Regulations (CPR) concerning the financing of the group medical insurance scheme and the payment of premiums by retirees in particular.

2. Respondent submitted a single answer, dated 23 October 2017, for these and other appeals involving similar legal issues. It was registered on 7 November 2017. Appellant H sent her reply on 5 December 2017. The other appellants submitted individual replies on 4 December 2017. They were all registered on 20 December 2017. A single respondent's rejoinder for these and similar cases, dated 29 January 2018, was registered on 30 January 2018.

3. Prior to the 16 March 2018 hearing in these appeals, the President of the Tribunal sent a "*Message from the President of the NATO Administrative Tribunal to the parties*" (President's Message) dated 5 March 2018 to the appellants and to the parties in other appeals involving similar legal issues also being heard in March 2018. The President's Message contained several procedural instructions and requests to the parties. *Inter alia*, it requested them to "*include in their presentation arguments on the Tribunal's competence (see Article 6.2 of Annex IX to the CPR) to hear cases in the absence of a decision by the Head of the NATO body directly affecting appellants*."

4. The Panel held an oral hearing on 16 March 2018 at NATO Headquarters. It heard statements and arguments by several of the eleven appellants, who acted as spokespersons for this group, and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar. A number of appellants were absent at the hearing.

B. Factual and legal background of the cases

5. Appellant in Case No. 2017/1114 joined NATO on 16 May 1989. She joined NAPMA on 15 April 1991.

Appellant in Case No. 2017/1115 joined NATO on 7 July 1987. She joined NAPMA on 13 November 1991.

Appellant in Case No. 2017/1116 joined NATO/NAPMA on 1 December 2001.

Appellant in Case No. 2017/1117 joined NATO/NAPMA on 1 July 1992.

Appellant in Case No. 2017/1118 joined NAT/NAPMA on 16 October 1991.

Appellant in Case No. 2017/1119 joined NATO/NAPMA on 1 October 1991.

Appellant in Case No. 2017/1120 joined NATO on 1 November 1987. He joined NAPMA on 1 April 1991.

Appellant in Case No. 2017/1121 joined NATO on 1 November 1986. She joined NAPMA on 1 March 2005.

Appellant in Case No. 2017/1122 joined NATO on 20 August 1984. She joined NAPMA on 16 January 1990.

Appellant in Case No. 2017/1123 joined NATO/NAPMA on 1 March 1991.

Appellant in Case No. 2017/1124 joined NATO/NAPMA on 1 June 1981.

6. These cases all grow out of the decision by the North Atlantic Council on 2 February 2016 to amend the footnote to Article 51.2 of the CPR. Some background is necessary to provide context for appellants' claims.

7. Well before appellants joined NATO, the Organization had in 1967 introduced premium free lifelong medical insurance coverage for retirees and their dependants. In order to keep this scheme financially sustainable, various amendments and conditions were subsequently introduced over time.

8. Thus, for example, in 1974, it was decided that to qualify for free lifelong medical coverage for retirees and their dependents, staff recruited after 1 May 1974 who retired at age 60 or above must have been employed for at least five years. Those retiring between the ages of 55 and 60 must have been employed for at least ten years. Active staff had to pay 1/3 of the total premium. Qualified retirees were not required to contribute.

9. Further amendments were made in 1988. The qualifying period of employment for those retiring at age 60 and above was raised from five to ten years, and the premium was indexed and rose from 0.906 % of gross salary to 2.188%.

10. A bridging cover was introduced in 1995. Staff members retiring between the ages of 55 and 60 had to pay a bridging premium until age 65, after which they were entitled to free coverage. This premium was 2.591% of a (theoretical) pension. Retirees aged between 55 and 65 who were recruited before 1 January 1988 were entitled to free coverage if they had been employed for at least five years. The qualifying period was set at ten years (consecutive or otherwise) for staff members recruited between 1 January 1988 and 1 January 1995, and at ten consecutive years for those recruited after 1 January 1995.

11. Medical coverage for retirees was initially underwritten by a private insurance company. When the insurance company was no longer prepared to underwrite the scheme beyond the age of 65, the Organization created in 2001 the Retirees' Medical Claims Fund (RMCF or Fund). Under this new system staff aged 55 or over who left NATO after a minimum of ten years uninterrupted service were permanently entitled to reimbursement of medical expenses for themselves and their dependants but subject to paying a premium. However, certain long-serving staff members were not required to pay after the age of 65, as provided in a footnote added to CPR Article 51.2:

> Provided they were recruited before 1st January 2001, staff members who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.

12. Under the new system introduced in 2001, the premium paid to the RMCF after the age of 65 was set at 4,5% of gross salary for active staff and at 3% for retirees recruited before 1 January 2001 who did not have 25 years of contributions. Staff or retirees paid one third of the applicable premium, with the remaining two-thirds paid by the Organization.

13. Also as part of the 2001 changes a Supervisory Committee was set up to oversee the management of the RMCF. It is composed of representatives from NATO administrations, active staff and retired staff.

14. There was a further amendment in 2006. The premium for the bridging cover (for retirees between the ages of 55 and 65) was increased from 2,591% of theoretical pension to 3 % of last salary. This premium was again increased in 2013, from 3 % to 5 %.

15. In 2009 the Secretary General informed the NAC that the Fund held €103M at the end of 2008. He added that a 2008 actuarial study conducted on the initiative of the Supervisory Committee projected that the RMCF could be depleted between 2030 and 2047, depending on different assumptions regarding the return on assets (3, 5 or 8%). He undertook to engage experts to provide an estimate of the minimum financial injection necessary to make the Fund sustainable.

16. In 2013, the NATO International Board of Auditors (IBAN) noted that the Fund's assets were estimated to be depleted between 2032 and 2051 based on an actuarial study performed in 2010. Further actuarial studies showed that the RMCF would be depleted somewhere between 2038 and 2043, and that remedial measures were needed to make the RMCF sustainable. The IBAN recommended in particular that the

International Staff provide an estimate of the minimum financial injection necessary. The Board also recommended that the IS provide all necessary information and undertake any remedial actions to limit the level of obligations.

17. Several scenarios for strengthening the RMCF were then discussed in the Supervisory Committee and in the Joint Consultative Board, the permanent body set up under CPR Annex XI for consultation among the Administrations, the Confederation of NATO Civilian Staff Committees, and the Confederation of NATO Retired Civilian Staff Associations.

18. In the end, the amendment to the footnote to CPR Article 51.2 mentioned above was proposed to the NAC. Major elements of the amendment were proposed by the representaives of active and retired staff who endored the proposal as a whole. On 2 February 2016 the NAC adopted the amendment, which was issued on 8 February 2016 as Amendment 24 to the CPR. Each staff member received an individual nominative copy of the amendment. While representatives of active and retired staff supported the amended footnote, there was not universal agreement, as the present appeals and others challenging the footnote demonstrate.

19. As amended, the footnote now provides:

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

20. The NAC's 2 February 2016 amendment of this footnote is at the heart of these appeals.

21. Appellants are all long-serving staff members. At the time the NAC took its decision, five of them had paid into the Fund for more than 25 years, and thus would have been entitled to free lifelong medical coverage after their retirement under the previous version of the footnote.

22. The requirement to actually pay contributions at present affects only one appellant who would not have been required to do so under the prior footnote. This is the appellant in Case No. 2017/1115, who retired after the August 2016 cutoff date, during the present proceedings, *i.e.* after the administrative review process had begun.

23. After being notified of the NAC's decision to amend the footnote by an Office Notice dated 8 February 2016, appellants submitted by separate letters in the first half of March 2017 timely requests for a first Administrative Review, which were forwarded by NAPMA to NATO Headquarters. By letter dated 20 April 2016 the Acting Deputy Assistant Secretary General, Human Resources gave an unfavorable response.

24. By letter dated 19 May 2016, appellant in Case No. 2017/1119 requested the Secretary General's agreement to directly lodge an appeal to the Administrative Tribunal. Similar letters were sent on 20 May 2016 by appellants in Cases Nos. 2017/1117, 1121, and 1122; on 23 May 2016 by appellants in Cases Nos. 2017/1114, 1115, 1116, 1120, and 1123; and on 26 May 2016 by appellants in Cases Nos. 2017/1118 and 1124. On 5 July 2016 the Acting Deputy Assistant Secretary General, Human Resources answered in individual replies that no such agreement could be given and that, as a consequence, the normal procedures as laid down in the CPR would continue to apply. He added that if appellants intended to pursue the matter, the next step available was to submit a formal complaint to the Secretary General. Appellant in Case No. 2017/1114 lodged a formal complaint on 5 July 2016. The others lodged individual complaints on 12 July 2016. They asked for a review by a Complaints Committee.

25. None of the appellants availed themselves of the opportunity to retire before 3 August 2016.

26. The chair of the Complaints Committee contacted a total of 129 claimants by letter dated 16 November 2016 amongst others enquiring whether they would avail themselves of the right to be heard by the Committee. The Complaints Committee subsequently held a number of hearings in several duty stations between November 2016 and April 2017. It heard appellants on 20 February 2017, who made a joint presentation. The Committee issued its report on 4 May 2017.

27. The Committee recognized the significant shortcomings of the RMCF, which was inadequately funded from the outset, and acknowledged concerns expressed by both administration and staff representatives regarding the Fund's continued financial viability. The Committee shared the view of both administration and staff representatives that staff needed to be made aware of the situation so that responsibilities towards future staff members could be met. It also agreed with both administration and staff representatives that action was needed to mitigate the rising costs of medical care and longer life spans. The report also indicated that, whatever the length of their contributions, staff could no longer expect free medical coverage for the rest of their lives.

28. The Committee concluded, however, that notwithstanding the clear financial rationale for changes to be made to medical coverage, the change to the footnote was introduced without due regard to the impact on serving staff. It was of the opinion that the transition period of six months was much too short and did not provide adequate time for staff to take a life-changing decision. The Committee felt that a more gradual phasing in of the change would have been preferable, as was done with previous revisions to the CPR.

29. The Committee recommended that any future such changes to medical coverage be introduced with an appropriate transition period, for example two years. It is also called for better communications between the different NATO Staff Associations as well as between HR departments of the different NATO bodies.

30. With regard to the delays in the administrative review process the Committee

recommended that Exeecutive Management ensure that the procedures in place for lodging complaints and requesting administrative review are clearly communicated to other NATO bodies, and that every effort be made that deadlines in the processing of such complaints are met.

31. Appellants and one other NAPMA claimant, who subsequently did not lodge an appeal, submitted to the Secretary General their joint comments on the Complaints Committee's report on 12 May 2017. They welcomed the general observations made by the Committee that the transition period was too short. They added that the recommendations made, however, did not serve the immediate concerns with regard to their complaints. They regretted that the report did not address the main issue namely that their right of free continued medical coverage was taken away from them retroactively and without any form of compensation. They observed that the constant erosion of the benefits package, which they had initially signed up to, was extremely disheartening and did not represent a stable and foreseeable working environment for long-serving, loyal staff members.

32. On 5 July 2017 the Assistant Secretary General for Executive Management replied on behalf of the Secretary General. He recalled that the NATO medical group insurance was a solidarity system, heavily relying on the contributions of the active staff, which permit the retiree population to benefit from the group insurance at a low cost. Over the years, a number of changes had been introduced, based on objective considerations, to preserve NATO's group insurance plan, given that free and unconditional lifelong coverage was unsustainable in the long run. The amendment to the footnote was the latest of these changes, which included the indexation of premiums, introduction of the bridging cover, and establishment of the RMCF.

33. He continued by saying that the change to the footnote was introduced to ensure that all entitled retirees and their dependants could enjoy the benefits of a robust medical plan for a reasonable cost until the end of their lives. As a result of the change, all active staff who did not retire before 3 August 2016 would contribute to the medical insurance plan for life. The same would apply to all retired staff who did not have 25 years of service by that date and hence did not obtain the right to free medical coverage. The change had effect only for the future and was therefore not retroactive in nature. He added that for the same reason the change could not be considered discriminatory because as of the date of implementation, both active and retired staff had to contribute for life. He further observed that the change did not violate any acquired vested rights and did not affect any contractual rights. It was, in fact, a change to statutory elements that were governed by the CPR and which may be changed for duly justified reasons. Finally, he underlined that the contribution to be paid once retired is not of such a nature that it could be considered to change working conditions in an unacceptable manner. He concluded by saying that for these reasons and after careful consideration he was unable to give a favourable answer to the request.

34. Appellants regard this denial of their complaint as "the challenged decision" for purposes of their appeals. It is under these circumstances that appellants lodged the present appeals.

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

(i)(a) Appellants' contentions regarding jurisdiction and admissibility

35. With respect to the admissibility of their cases appellants observe that the pre-litigation procedure was duly exhausted, but without a favorable outcome, and that the present appeal was lodged within the deadlines given in Annex IX to the CPR. They note unacceptable delays on the side of management in the processing of the requests for review and in the complaints procedure.

36. Appellants draw attention to the 2001 Decision No. 425 of the NATO Appeals Board which held that appeals against decisions of the NATO Council, when it is certain that the new situation will definitely be in force at the time of retirement and when contributions are already being deducted from appellant's emoluments, are admissible.

37. They conclude that the appeal is admissible.

(i)(b) Respondent's contentions regarding jurisdiction and admissibility

38. In its written pleadings and at the 16 March 2018 hearing, respondent did not contest the Tribunal's jurisdiction or the admissibility of the claims.

(ii)(a) Appellants' contentions regarding the merits

39. Appellants' main arguments on the merits, and with minor variations in detail amongst them, are as follows.

40. Appellants submit violation of (implied) contract rights and discriminatory treatment.

41. They contend that the change in the footnote is a disproportionate decision, which is an unacceptable change to an essential element of their working conditions in accordance with their contracts and constitutes a violation of their rights in particular as it relates to their social security.

42. They argue that when they joined NATO they were informed that NATO would take care of their social security. They add that their contracts did not specifically mention that the NAC could change the pension scheme and social security insurance, contrary to other clauses in their contracts, where it was specified that these might be changed by the NAC.

43. Appellants submit that the 2001 footnote was inserted to protect long-serving staff members and that the 2016 change thereto was taken without careful consideration: a minority, being the long-serving active staff members, who have been loyal for decades to the Organization, are the only ones that are being penalized. The guarantee of receiving free medical care upon retirement at age 65, after 25 years of contribution is taken away from them, despite years of service and

contributions and without compensation. In their opinion, such an acquired right cannot be taken away without compensation.

44. They add that, to their astonishment, the decision had been unanimously supported by the NATO Civilian Staff Associations with the argument that it was in "the interest" of all active staff members and retirees. They consider the lack of protection of a specific group of staff members in NATO striking. The NATO Organization, that had always claimed to be a good employer and provide staff with a solid social security package, was supporting these cost- saving measures and closing its eyes for social security aspects and contract obligations towards their long service employees.

45. Appellants contend that changes should be made carefully, respecting the interests of all concerned. To just skip a footnote, which would not solve the overall problem of medical costs coverage for the ever-growing group of elderly people, was not a fair decision, nor did it show good governance, as it did not take into account the welfare of a specific group of employees.

46. They argue that purely and simply doing away with the guarantee of continued medical coverage for a staff member, some of whom had already fulfilled the conditions set previously to benefit from free continued medical coverage, was upsetting the balance of their contracts. Moreover, the decision to deny free coverage, despite contributions made, not only upsets the balance of the contract, but also violates the principles of legal certainty.

47. Appellants submit that staff taking early retirement would continue to benefit from the 25 years rule, while those remaining active staff members could not. They consider this discriminatory treatment. The decision was, moreover, not based on any objective grounds and the immediate cut-off of the 25-year rule had never been justified with arguments of an actuarial nature.

48. They consider that they are now required to finance a solidarity mechanism, which will never operate in their favor, but only in that of retired NATO staff (*i.e*. those retiring before 3 August 2016), their dependants and invalids. These groups will permanently be entitled without paying a premium to receive free medical care. Based on reciprocity, the solidarity principle should also be applied to them. They add that an organization may not treat differently staff in equal circumstances.

49. Appellants request:

- that the old footnote, respecting the right to free medical coverage after age 65 and 25 years of contribution be reinstated for current staff having served the NATO Organization for 25 or more years;
- failing that, that the years of contribution be extended to a total of 30 years in order to qualify for the right to free medical coverage;
- failing that, that financial compensation be awarded for the monthly medical coverage premiums to be paid upon retirement, based on a life expectancy of fifteen years;
- failing that, differentiation in the premium to be paid, depending on the years of contribution and that the contribution ceiling be capped; and

- financial compensation for non-material damage amounting to one month of basic salary for the fact that:
(i) NATO HQ did not adhere to the timelines of the CPR, and
(ii) NATO HQ did not personally inform appellants of the footnote change all of which created personal hardship, confusion and complexity in the present procedure, including loss of hours in preparation, without the help of professional lawyers, or the Confederation.

(ii)(b) Respondent's contentions regarding the merits

50. Respondent submitted a single answer and rejoinder concerning a total of 129 appeals that were lodged challenging the amendment to the footnote. They will be summarized here *mutatis mutandis*.

51. Respondent first of all observes not to have observations with regard to the admissibility of the appeal.

52. With respect to appellants' submissions regarding the failure to meet deadlines during the administrative review process, Respondent submits that, while regrettable, this delay was due to the specific circumstances of the case, which involved a large number of individuals from various NATO bodies in different geographical locations. The handling of the matter therefore required extensive coordination within the IS but also between the IS and the various NATO bodies concerned. In respondent's view, the proper procedure was followed and the IS acted with due diligence. The delay did not affect the validity or outcome of the decision made. It did not in itself adversely affect appellants and it did not cause any additional damages.

53. Regarding the merits, respondent underlines that the NATO medical group insurance is a solidarity system, heavily reliant upon contributions of active staff (98% of non-organizational contributions into the RMCF in 2014), allowing for retirees and their eligible dependants to enjoy the benefits of a robust medical plan for a reasonable cost.

54. Respondent adds that over the years a number of changes were introduced, based on objective considerations and grounds of general interest, to ensure the financial viability of the system and to preserve such a medical plan, given increases in healthcare costs and life expectancy. The amendment to the footnote to article 51.2 of the CPR is similar in nature to measures that were previously adopted to this effect, such as the more restrictive conditions for entitlement to continued medical coverage, the introduction and indexation of premiums, the introduction of the bridging cover in 1995, and the establishment of the RMCF in 2001. In introducing such measures, the Organization demonstrated good governance, continually monitoring the situation and taking steps to revise the conditions of the coverage to ensure the preservation and the financial viability of the NATO medical group insurance in future years. As a result of these interventions, all beneficiaries with the requisite years of service, including entitled retirees and their dependants, remain eligible for lifelong coverage. It can thus not be argued that there were insufficient objective reasons for implementing such changes.

55. Respondent considers the suggestion that the Organization did not foresee

increases in healthcare costs unsubstantiated. Such costs, and the increase in life expectancy, were parameters of the actuarial studies and were fundamental considerations when the changes described above were introduced. The Organization kept a close eye on such trends and implemented measures to contain costs and adapt to them as necessary. It added that, even if healthcare costs were to rise in a manner, which had not been anticipated, the fact that NATO medical group insurance operates as a solidarity system means that they will be shared by all contributors to the scheme. In this regard, the premium, which is charged to retirees (currently 1.67% of their last salary with the Organization contributing a further 3.33%), is only a small proportion of the actual medical costs of the retirees and their dependants.

56. In respondent's view, the changed footnote is not discriminatory. It applies without exception to all staff who joined the Organization before 1 January 2001, who did not retire before 3 August 2016, and who have not made 25 years of contribution to the NATO group insurance by that date. All staff who joined after 1 January 2001 and are eligible for continued medical coverage, must already pay the premium on a lifelong basis. In addition, should there be any difference of treatment, *quod non*, such differentiation would be objectively justified. Respondent refers in this respect to Decision No. 437 of the NATO Appeal Board, which held that "*differences in the personal situations of the insured under the continued medical scheme do not of themselves constitute indices or factors of discrimination. Indeed the principle of solidarity does not involve the benefits received by each member being in proportion to his or her contribution to the scheme*."

57. Respondent maintains that the change did not violate the principle of non-retroactivity, as the modification only operates prospectively. In particular, staff members and retirees need not contribute for previous years, their previous contributions are not called into question and their entitlement to lifelong coverage is unchanged. In addition, the NAC did not violate any rule it imposed on itself regarding modification of such provisions.

58. Respondent submits, moreover, that the amendment to the footnote does not violate any acquired, vested or contractual rights. Appellants will not be deprived of the benefit of their previous contributions and their eligibility for continued medical coverage has not changed. Potentially requiring appellants to pay a premium from which they previously were exempt does not upset the balance of their contracts or unacceptably change their working conditions.

59. Respondent contends that that the amended footnote changes statutory elements governed by the CPR. In its view, international administrative law distinguishes between such provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. Statutory elements governed by the CPR may be changed by the Organization for duly justified reasons, which have been provided here.

60. For respondent, while certain appellants with the required years of service may have a legitimate expectation of lifelong medical coverage for themselves and their dependents after retirement, this expectation cannot reasonably extend to lifetime free

care exempt from paying any premium. The requirement to pay premium is justified by longer life expectancy and higher medical costs.

61. Respondent denies that it failed to provide sufficient notice and information regarding the change contrary to its duty of care and good administration. Respondent notes that a six-month transition period was applied following approval of the change and that an Office Notice was distributed shortly after the approval. The change was extensively discussed prior to its adoption and was the subject of consultations between representatives of the Administrations and of active and retired staff. Respondent is not responsible for any possible deficit of communication between staff associations or between these associations and staff or former staff members.

62. Respondent requests the Tribunal to dismiss the appeal as being without any merit.

D. Considerations and conclusions

63. These appeals raise important questions regarding the Tribunal's competence. This Tribunal, following in this respect the jurisprudence of its predecessor the NATO Appeals Board, has constantly recalled that it is a body of limited competence and jurisdiction (*cf.* Cases Nos. 2015/1056-1064) and that it must assure that it acts only within the extent of the powers conferred upon it by the NAC. Accordingly, the Tribunal must address questions going to its jurisdiction and competence before it can consider substantive legal arguments.

64. Given the importance of the issue of the legality of the amended footnote for many active and retired staff, the Tribunal considered it in the interest of good and fair administration of justice not to raise preliminary issues regarding its competence *impromptu* at the 16 March 2018 hearing. Accordingly, the Tribunal alerted the parties beforehand, giving them the opportunity to reflect on the matter and to address it at the hearing should they wish to do so. In the present case parties did present their additional views on the matter at the oral hearing.

65. The Tribunal is mindful that respondent has not raised preliminary objections to its competence. Respondent confirmed this position at the oral hearing. The Tribunal emphasizes, however, that this does not diminish the Tribunal's powers to make its own assessment.

66. The Tribunal is competent to review its own competence. It has its own responsibility in such matters and may and, when necessary, must deal with them *sua sponte, i.e.* on its own motion. This is not a matter left to the discretion of the parties; the Tribunal can consider its competence even if the parties do not raise the issue, because the issue of the Tribunal's competence involves a matter of law (*cf.* Council of Europe Administrative Tribunal judgment in Cases N° 571-576 and 578/2017, paragraph 66; and United Nations Appeals Tribunal in Judgment No. 2015-UNAT-526).

67. This Tribunal is a body of limited powers. Indeed, Article 6.2.3 of Annex IX to the CPR stipulates clearly that the Tribunal shall not have any powers beyond those conferred under that Annex (*cf.* Cases Nos. 2015/1056-1064).

68. These powers are detailed in Article 6.2.1 in the following terms:

> The Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal successor concerning the legality of a decision taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council. In this respect, the Tribunal shall make decisions according to the Civilian Personnel Regulations, other pertinent rules, contracts or other terms of appointment, as well as their interpretation and application to the staff in individual cases.

69. A footnote to this provision then stipulates:

> It is understood that the Tribunal shall have the authority to rule on the Civilian Personnel Regulations in the event that a CPR provision seriously violates a general principle of international public service law.

70. There can be no doubt that these afore-mentioned provisions are intrinsically linked. The footnote applies to the *ensemble* of Article 6.2.3 and must be interpreted and applied in the context of the provision it modifies. In other words, the footnote is not a stand-alone provision. It does not confer additional authority on the Tribunal to consider the legality of NAC action in the abstract and without reference to the CPR's other requirements bearing on its competence.

71. In fact, and as described below, under its own settled jurisprudence and widely-accepted principles of international administrative law, the Tribunal can only rule on the legality of an underlying CPR provision when it has been applied in a concrete manner in a specific decision by the Head of the NATO body (HONB) concerning a specific appellant. The Tribunal cannot deal with potential and hypothetical cases involving situations that may arise in the future. They may well arise, but the details and extent of future decisions and actions are not now known.

72. For these reasons, the Tribunal, like almost all international administrative tribunals, does not have the competence to hear a challenge against a general rule. Such an appeal is inadmissible.

73. The Tribunal's jurisprudence is consistent in this respect (see, for example, joined Cases Nos. 2016/1090 and 2016/1095, paragraphs 55 and 56). For this reason, in Case No. 2014/1017 the Tribunal rejected the Office of Legal Affairs' contention that an appellant had to seek administrative review within 60 days of learning of changes to the rent allowance. Instead, the Tribunal held:

> 33. ...The Tribunal believes that [the CPR's requirement of "a decision affecting a staff member's conditions of work or service] entails more than just adoption of a policy or change in regulations by a competent NATO organ. The policy or change must be applied

> in a concrete way by means of a "decision" "adversely affecting" the staff member in some direct and ascertainable way. The possibility that a new policy or rule potentially may affect the staff member in some way at some future time does not provide a sufficiently clear and concrete basis for the Tribunal to assess an appeal.

74. In paragraph 35 of the same judgment, the Tribunal referred to relevant precedents of the NATO Appeals Board:

> In Decision No. 328, the NATO Appeals Board rejected a similar argument that an appeal was not timely because the appellant should have appealed when he received an Office Notice informing him of new medical insurance rules. Instead, the appellant was allowed to appeal "*against the decision whereby the administrative authority applies them to his particular case*." It is also recalled that in Decision No. 851, in which a staff member sought annulment of a decision by the Secretary-General not to submit to the Council a proposal relating to collective bargaining, the Appeals Board concluded that such a matter concerned all NATO staff and "*can not be considered in terms of an individual dispute*" appealable under the NCPR. This reflects a sound principle that will be followed here.

75. The NATO Appeals Board also held in its Decisions Nos. 784-794, 797-804, and 807-809:

> Although the Appeals Board is not competent to cancel a decision of the North Atlantic Council (see Decision no. 730-731 dated 11 July 2008), it may rule on such a decision's legality, as on that of all regulatory decisions by Heads of NATO bodies or by any other administrative authority, when a Head of a NATO body takes an individual decision implementing the Council's decision... The Appeals Board is competent to hear appeals directed against individual decisions by Heads of NATO bodies to apply the annual adjustment of remunerations and pensions late, even if this may lead the Board to judge whether a decision by the North Atlantic Council complies with the provisions of the NATO Civilian Personnel Regulations…

76. This conclusion is consistent with the practice of other international administrative tribunals (with the exception of those that have different statutory provisions concerning their jurisdiction), when faced with challenges to policies of general application not yet directly applied to individuals. The weight of legal authority is that where amendments to staff policies have not yet resulted in individualized decisions implementing such policies, administrative tribunals have found a request for review of such policies to be premature. Tribunals have therefore refrained from judicial review until the policies have been individually applied.

77. NATO is one of the so-called Coordinated Organizations, a group of six organizations headquartered in Europe who cooperate with the aim of harmonizing rules and practices on salaries, allowances, pensions, and other personnel management issues. Although the jurisprudence of other Coordinated Organizations' tribunals does not necessarily have a greater weight in the body of international administrative law than that of other international administrative tribunals, its jurisprudence is instructive here. Thus, in its Cases Nos. 571-576 and 578, the Council of Europe Administrative Tribunal in 2017 confirmed its consistent jurisprudence that it cannot rule on decisions of the Committee of Ministers, but only on implementing administrative decisions by the Secretary-General. In like vein, the Appeals Board of the European Space Agency held

in 2016 in joint Cases Nos. 98, 99, and 100 that the mere publication of new subsistence allowance rates did not affect the claimants' personal interests and that legislation in itself does not automatically affect agents' legal position. This only occurs when the new legislation is applied to them in a concrete manner.

78. Other major international administrative tribunals confirm this approach. The Administrative Tribunal of the International Labour Organization (ILOAT), for example, confirmed and refined its jurisprudence in the matter as follows in its Judgment No. 3291:

> 8. The Tribunal notes that allowing a complaint against a general decision which does not directly and immediately affect the complainant but which may have a direct negative effect on her/him in the future, would cause an unreasonable restriction of the right of defence, as staff members would then have to impugn immediately all general decisions which may have any connection with their future interests, on the basis that a general decision which is not challenged within the established time becomes immune from challenge. On this approach, once a general decision is considered immune, any complaint impugning the subsequent decision implementing it could not challenge the lawfulness of the underlying general decision. Considering this, the Tribunal is of the opinion that the approach illustrated by the recent case law (Judgments 2822 and 3146) is to be followed. According to that case law, a complainant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him, but she/he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action.

79. The ILOAT recently reaffirmed in its Judgment No. 4028 the principle that *"a general decision that requires individual implementation cannot be impugned; it is only the individual implementing decisions which may be challenged..*." (*cf.* also ILOAT Judgments Nos. 622, 663, 2953, 3628, 3736, 3740, 3811, and 3883).

80. The World Bank Administrative Tribunal too has held that it is without jurisdiction to adjudicate the validity of a general rule rather than the application of that rule in a particular case so as adversely to affect the applicant (see, for example, Decisions Nos. 41, 51, 52, 54, 118, 119 and 126).

81. The present appeals explicitly challenge the North Atlantic Council Decision PO(2015)0453-REV1, adopted on 2 February 2016, and request that the previous footnote be reinstated. The Tribunal does not have the power to hear such a challenge or to grant such a request and the appeals would also for these reasons be inadmissible.

82. Appellants, however, do refer to Decision No. 425 of the NATO Appeals Board in support of their claim that the appeal is admissible. In this Decision the NATO Appeals Board confirmed the general rule that although, in accordance with the terms of the afore-mentioned Article 4.2.1 of Annex IX, the Board has no direct jurisdiction over decisions of the Council and therefore may not annul such decisions (*cf.* Appeals Board Decision no 169(b)), it may rule on the legality thereof (see, in particular, Appeals Board Decisions Nos. 6 (d), 57, 77, 174 *et seq*), in the event of an appeal against a decision by the HONB, when such a decision merely reproduces or refers to a decision of the Council. It then found that given, on the one hand, that the new scheme would definitely be in force at the time of appellant's retirement and, on the other, that the contributions to fund the new scheme were already being deducted from appellant's emoluments, the objection of

inadmissibility could not be accepted.

83. The Tribunal cannot share the conclusion appellants draw from Decision No. 425 on this point. The situation in the present cases is substantially different from the one dealt with by the NATO Appeals Board. First of all, there is no certainty, and this was also raised during the oral hearing, whether this particular footnote, or another footnote or, again, a completely different provision will be in force when (most of the) appellants retire. Secondly, at the moment of lodging the appeals no deductions were being made, or changes made to existing deductions, implementing the challenged footnote.

84. In order to trigger jurisdiction, the question thus to be answered is whether there was a specific individual administrative decision taken by the HONB, in this case implementing a decision of the NAC, which directly and adversely affects appellants.

85. Through the pre-litigation proceedings appellants did indeed receive a final response from, or on behalf of, the Secretary General denying their request for administrative relief. But, as the Tribunal held in paragraph 59 of Cases Nos. 2014/1041 and 2015/1045, the overall justice system is designed to challenge existing decisions. The administrative review process cannot be used to create an appealable decision that did not previously exist. A staff member who disagrees with a policy cannot ask to have it reversed, have the request denied in the administrative review process, and thereby create an appealable decision where there is no concrete action applying the policy to the staff member.

86. Respondent submitted during the hearing that the NAC decision was implemented by being individually notified to appellants. The Tribunal disagrees. Notification of legislation in itself does not automatically affect the legal position of staff members. This only occurs when the new legislation becomes applicable in a concrete manner. As the ILO Administrative Tribunal pointed out in its Judgment No. 3291, referred to in paragraph 78 *supra*, the contrary rule could seriously prejudice the rights of staff members, requiring them to contest policy changes when they are made, but before they applied, or risk being barred from doing so at a later time.

87. No such implementing decisions had yet been taken concerning any of the appellants when they lodged their appeals. It is a generally accepted principle that the lawfulness of a decision is assessed as at the date on which that decision was allegedly taken. It is not within the Tribunal's competence to consider facts that have occurred subsequently (*cf.* ILOAT Judgment Nos. 3045 and 3686). In this regard, the Tribunal is mindful of the position of one appellant (Case No. 2017/1115), where contributions must now be paid in circumstances where a now-retired staff member would not have been required to pay under the previous footnote. However, these new circumstances were not made the subject of a timely request for administrative review as the CPR requires. The Administrative Tribunal is competent to address only those claims that have been the subject of administrative review under the CPR, or that it is otherwise authorized to consider, as for example with an agreed referral by a staff member and the HONB under Article 6.3.1 of Annex IX.

88. The Tribunal must conclude that the appeals are inadmissible. The Tribunal is fully aware of the need for appellants to obtain legal certainty. Nevertheless, departing from the legal framework outlined above would disregard the structure created by the NAC in the CPR and create a precedent potentially highly prejudicial to staff in other contexts. This conclusion does not prevent appellants from challenging the lawfulness of the underlying general decision when challenging an implementing decision once it is being applied to them.

E. Costs

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

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

90. The appeals being dismissed as inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 30 August 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 September 2018 AT-J(2018)0017

Judgment

Case No. 2018/1254

MS

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 30 August 2018

Original: English

Keywords: NCIA Contract Policy; successive definite duration contracts; renewal of contract; refusal; state reasons; legitimate expectations; manifest error of assessment; misuse of power.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Christos A. Vassilopoulos and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 14 June 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA), dated 21 December 2017 and registered on 9 January 2018 as Case No. 2018/1254, by Mr MS.

2. The respondent's answer, dated 5 March 2018, was registered on 8 March 2018. Appellant's reply, dated 9 April 2018, was registered on 12 April 2018. The respondent's rejoinder, dated 14 May 2018, was registered on 18 May 2018.

3. The Panel held an oral hearing on 14 June 2018 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

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

5. Appellant joined the Joint Warfare Center (JWC) on behalf of the NATO Communication and Information Systems Services Agency (NCSA), in Bydgoszcz, on 1 December 2008, in the post of Event Engineering and Configuration Management, on a definite duration contract expiring on 30 November 2009.

6. On 7 October 2009, appellant was offered by JWC another definite duration contract for the same position for a period of three years (1 December 2009 to 30 November 2012).

7. On 2 October 2012, appellant signed a definite duration contract with the Joint Force Training Center (JFTC), on behalf of the NCIA, for the same position for a period of two years, from 1 December 2012 to 30 November 2014.

8. Appellant was, in June 2014, offered, for the same position, a new definite duration contract for a period of three years, for the period from 1 December 2014 to 30 November 2017.

9. By decision dated 22 March 2017, appellant was informed by the General Manager that his contract would not be renewed upon its expiry on 30 November 2017.

10. On 27 March 2017, appellant submitted a first request for administrative review seeking a renewal of his contract for one additional year period. The Director of Service Operations answered this request on 6 April 2017, and concluded that the decision not to renew appellant's contract was in line with the NCIA Contract Policy as provided by

Directive 2.1 on Contract Policy of 1 January 2013 ("Directive 2.1") and in particular the need for staff rotation.

11. On 13 April 2017, appellant requested a further administrative review of the previous decision.

12. In this context, on 28 April 2017, the Chief of Staff and the Head of Human Resources met with appellant, to discuss together the rationale behind the Agency's decision and to allow appellant to express his concerns in detail. During this meeting appellant made also an allegation, against the CSU Commander, for discrimination and mobbing which was, according to him, the reason for the non-renewal of his contract.

13. By decision dated 31 May 2017, respondent rejected appellant's request for further review on grounds that appellant's contract renewal would not align with the future business decisions of the Agency and the need for staff rotation. As regards appellant's allegation concerning discrimination and mobbing, after having examined the points raised by appellant and the information provided by the competent services, respondent concluded, in the same decision, that there was insufficient evidence to support appellant's claims.

14. On 5 June 2017, appellant lodged a complaint and requested the establishment of a Complaints Committee.

15. On 30 September 2017, the Complaints Committee issued its report; the Committee concluded unanimously that the decision on non-renewal of appellant's contract had to be confirmed and for reasons of the need for staff turnover. In addition, also unanimously, it considered that appellant's complaint of malicious intent and unfair treatment by the CSU Commander was not substantiated and had to be dismissed.

16. On 8 October 2017, appellant submitted his comments on the Complaints Committee's report. In particular, appellant indicated that some conclusions of this report were based "*on presumptions and divagations"* and "*factors provided by (him), which were easy to investigate and check have not been taken into consideration"*.

17. On 30 October 2017, the NCIA General Manager, based on the conclusions of the Complaints Committee's report, confirmed the previous decision of the NCIA not to renew appellant's contract for reasons of the need for staff turnover.

18. It was under these conditions that, on 21 December 2017, appellant submitted the present appeal to the Tribunal.

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

(i) The appellant's contentions

19. Appellant maintains that the appeal is admissible because he followed the pre-litigation procedure as provided in the NATO Civilian Personnel Regulations ("CPR") within the prescribed timelines. In addition, the fact that appellant did not raise a complaint at the time of the 2012 two-year definite duration contract does not impact the admissibility of the present appeal since respondent took a new decision in 2017 regarding the contractual situation of appellant.

20. As to the merits, appellant submits five pleas against respondent's decision not to renew his contract for one year upon its expiry on 30 November 2017.

21. Firstly, appellant contends that respondent's decision refusing to renew his contract for one year violates the NCSA contract policy and appellant's legitimate expectation of at least a one-year renewal of his contract. According to appellant, when he was recruited, he was informed of the NCSA Contract Policy, which made provision for a career pattern of 1-3-3-3-year definite duration contracts. Appellant's first contract renewal was for three years, the second for two years and the third for three years. In this context, respondent let appellant believe that until he reached ten years of service, and as long as his post remained a valid requirement, his contract would be renewed. Appellant expected, consequently, a further renewal for the missing one year. The one year not granted at the time of his second renewal infringes the career pattern model provided by the NCSA contract policy and consequently respondent's decision refusing this renewal must be annulled.

22. These legitimate expectations continued when NCSA was transferred to NCIA, since the letter informing him of the transfer stipulated that *"[appellant's] contract of employment, as from 1 July 2012, is with the NCIA … all other terms and conditions of [appellant's] employment remain unchanged*".

23. Secondly, appellant argues that respondent's decision dated 6 April 2017, mentioned in paragraph 10 of the present judgment, based the non-renewal of his contract on Directive 2.1 and in particular on the need for staff rotation. However, the NCSA Contract Policy was not superseded by the NCIA Contract Policy and Directive 2.1; as a consequence, the career pattern of 1-3-3-3-year definite duration contracts continued to be valid and is applicable to appellant.

24. In addition, according to appellant Directive 2.1 is not applicable to him. Indeed, he was never made aware of Directive 2.1 nor was this Directive communicated to him. The communication of Directive 2.1 was by email, but there is no proof that these emails were read by appellant and other concerned staff. In this regard, appellant stresses that the channels of communication put in place by respondent concerning Directive 2.1 was made with considerable delay and after the entry into force of this directive (1 January 2013). For instance, appellant had access to the Reach system only in October 2013, and the Routine Order 1 was published on April 2013 and the first Routine Order was sent on May 2013. Furthermore, these systems of communication contained links, which did not work.

25. According to appellant, respondent did not take the necessary measures in order to ensure that appellant, and any other staff member, could be correctly and individually informed about the entry into force of the new contract policy regime. Respondent used the existent communication channels without the guarantee that a staff member would have been effectively informed about the entry into force of Directive 2.1.

26. Moreover, appellant stresses that, in contrast to requirements pointed out by the case law of the Tribunal (Case No. 2013/1002, paragraphs 28 and 29), Directive 2.1 was not mentioned or referred to as such in his last contract. Thus it could not be invoked against him in order to justify the non-renewal of his contract, as was the situation in the above-mentioned case law.

27. As a consequence, respondent, on the one hand, assured appellant that all the terms and conditions of his contract with NCSA would remain unchanged and, on the other hand, it never undertook concrete actions to inform appellant that his contract regime was allegedly changed in the light of the new contract policy and Directive 2.1.

28. Thirdly, appellant argues that respondent's decision in the present case breached its duty to state reasons. Indeed, in the decision of 22 March 2017, no specific reason was given for the non-renewal of appellant's contract. It is only in the two subsequent rejection decisions during the administrative review process that respondent indicated the need for staff rotation as a reason for this refusal. In addition, given the fact that appellant's performance reports during the nine years of service emphasized his outstanding aptitude to fulfil his tasks and the fact that his post was not being suppressed, appellant does not understand, in the light of the case law of the Tribunal (cases Nos. 889, 890 and 897), why respondent refused to grant him any renewal.

29. In particular, appellant stresses that the various elements to which respondent made reference in its decision during the administrative process in order to justify the non-renewal are not explained; in addition, the documentation based on which these decisions were taken was never communicated to appellant. Indeed, respondent keeps on basing its reasoning on elements, such as the Civilian Personnel Management Board (CPMB) meeting minutes of February 2017, which were never communicated to appellant. In this regard, respondent's failure is all the more significant because it breaches Article 5(d) of the implementing procedures applicable to the Complaints Committee, which provides that all relevant documentary evidence should be included as an annex to the final report. Consequently, appellant was not fully aware of the considerations taken into account by respondent and the Complaints Committee regarding the non-renewal of his contract. In this regard, appellant also requests that the Tribunal order respondent to communicate the minutes of the CPMB meeting of February 2017.

30. In addition, the explanations that appellant probably could have received from respondent during a meeting organized on 28 April 2017, *i.e.* before the adoption of the decision dated 31 May 2017, could not be considered as an element fulfilling the requirements deriving from the duty to state of reasons.

31. From that perspective, respondent's decision of 30 October 2017 violates the duty to state reasons and must be annulled.

32. Fourthly, appellant claims that respondent's decision refusing the renewal of his contract for one year was adopted in an error of assessment in relation also to a violation of the duty of care.

33. In particular, appellant claims that a "normal" length of three years for a definite duration contract is provided for by Article 4.3 of Directive 2.1. The length of three years was also recalled by the Agency Supervisory Board (ASB) in the NCIA Personnel Establishment Policy which provides under Article 6.4.3 that definite duration contracts should normally be the rule and they should generally be of three years' duration. As a consequence, respondent's decision to refuse to award appellant the additional one year that was not granted at the time of his second renewal was taken in breach of the provisions of Directive 2.1 and based on an error of assessment.

34. In addition, given appellant's performance since his first evaluation in 2012, there were no evident reasons not to offer him an additional one-year definite duration contract. Indeed, appellant's performance has always been outstanding and the relevant staff reports made detailed reference to this.

35. It is only in the 2016 Performance Management Report that appellant's performance was qualified as "good", a qualification strongly contested by appellant in a letter dated 25 March 2016. With detailed documentation, appellant explained that this wrong qualification, in his opinion, was the result of the constant pressure he was under following the arrival of the new CSU Commander. Appellant explained and detailed the forms of harassment that he was subject to, and presented to respondent a list of names of other staff members who were ready to testify in order to confirm his statements.

36. However, despite appellant's request respondent decided, with an unreasonable delay, not to investigate, although Article 17 of Directive 2.1 provides that the conflict resolution mechanism should be handled promptly without any unnecessary delay, preferably within 15 working days. In addition, it is clear from the Complaints Committee's report that respondent did not take into account appellant's considerations and make further investigations, and considered in contrast as relevant the allegations made against him by respondent without further inquiries.

37. According to appellant, the respondent's decision refusing the renewal of appellant's contract for one year shows a manifest error of assessment from an additional perspective. Indeed, and in contrast to the reasons invoked in the decision dated 22 March 2017, it is clear that there is a need for business continuity since appellant's post has not been suppressed. There is a high demand for appellant's services within the current and new projects in the 2017–2019 period in the areas of planning, organization, guidance, coordination and control of events scheduled by customers.

38. Moreover, given appellant's health situation – on sick leave since 10 August 2017, as confirmed in the Complaints Committee's report – respondent committed an error of assessment in violation of its duty of care (Case No. 2016/0017, paragraph 55). Indeed, according to this case law the Head of the NATO body should take into consideration all

the factors which may affect its decision. According to appellant, it also follows from settled case law that this duty is exacerbated when the staff member's state of health is fragile and the Organization adopts a decision such as the decision refusing the renewal of appellant's contract. This element as such vitiated the respondent's decision.

39. Fifthly, appellant considers that respondent's decision refusing a one-year renewal of his contract amounts to a misuse of powers because this decision was taken in order to achieve a goal which is not the one that is required, since it clearly prevents appellant from reaching ten years of employment and thus obtaining an indefinite duration contract. This is confirmed by an email sent to all members of the service line of appellant which states that *"the GM said he is tasked to keep the number of staff going over 10 years to around 25% but we have no management guidance on how this will be implemented"*.

40. In particular, appellant contends that respondent took into account the objective of a median six years of employment recommended by the ASB, an objective not provided by the CPR, which is also not provided by Directive 2.1, aiming at preventing anyone from reaching the ten-year threshold of employment. On the basis of these rules, not provided by the CPR, respondent managed to take an illegal decision on appellant's contract renewal. In addition, it seems that respondent also applied an informal contract policy aiming at preventing anyone from reaching the ten-year threshold of employment. Indeed, there is a "logic" in the contract renewal regime according to which respondent manages to take a decision on contracts at the point of nine years of employment, so that further extensions could be granted, but only for a limited period making sure that the ten-year threshold would not be reached when the last decision on renewal intervenes.

41. As a consequence, respondent's decision refusing the one-year renewal of appellant's contract was taken for the sole purpose of depriving appellant of the possibility of achieving a goal – ten years of employment – which is not the one that is required. For that reason, this decision is void and must be annulled.

42. Appellant is seeking:
- annulment of the decision dated 30 October 2017 rejecting appellant's complaint, insofar as this decision rejects appellant's request to be awarded a one-year definite duration extension;
- if needed, annulment of the respondent's decisions dated 6 April 2017 and 31 May 2017 rejecting, respectively, appellant's first and second requests for administrative review, as well the initial decision dated 22 March 2017 announcing the non-renewal of appellant's contract upon its expiry on 30 November 2017; and
- reimbursement of all legal costs incurred and fees of the retained legal counsels.

(ii) The respondent's contentions

43. With regard to admissibility, respondent submits that appellant is time-barred from appealing against his previous definite duration contract of two years signed in 2012, including his claim that the former NCSA Contract Policy be applied. Appellant signed

all his contracts, which confirms unconditional agreement as to their respective terms, including their qualification and duration, accepting, in any event, that this contract does not follow the alleged 1-3-3-3 pattern.

44. With respect to the merits and the first plea, respondent contends that appellant's contentions concerning his legitimate expectations of obtaining a further one-year extension of his contract based on the NCSA contract policy regime are unfounded. According to Article 5.5.3 of the CPR, the decision offering an extension of the duration of a contract falls under the discretionary power of the Head of the NATO body who adopts his or her decision taking into account the satisfactory performance of the staff member concerned and the interests of the service. This article does not confer any right to automatic contract renewal of the staff member concerned. This is also confirmed in all the appellant's contracts, which reproduce the same paragraph which states that *"if the Organization wishes to retain (appellant's) services … a new contract will be offered"*. Indeed, the wording used in appellant's contracts confirms that appellant has no automatic right to an extension of his contract.

45. Regarding appellant's second plea that Directive 2.1 does not apply to him and that in any event he was not individually informed of the entry into effect of this Directive, respondent stresses that a contract policy is by nature impersonal and variable, and that Directive 2.1 superseding the NCSA contract policy came into force on 1 January 2013.

46. In respect of appellant's contention that he had not been made aware of the NCIA Contract Policy, respondent observes that the new contract policy was advertised through the Agency's existing channels. In particular, the NCIA newsletter of 18 January 2013 informed all staff that the new contract policy had been applicable to all NCIA civilian staff since 1 January 2013. In addition, an article was published on the Agency's intranet, with a link to the new contract policy and extracts from a letter to all staff from the General Manager concerning the new policy regime. Directive 2.1 was also advertised in the NCIA internal magazine, and appellant confirms that the new contract policy was further advertised in the routine order published on 19 April 2013, which was mandatory reading for all staff members. In addition, the new policy was communicated via the NATO Secret system as well as via the NATO Restricted system – to which appellant had access. The above-mentioned information was provided to appellant more than one year before appellant signed his last definite duration contract in December 2014. Moreover, this last contract expressly referred to the NCIA regulations, directives and instructions.

47. Concerning the alleged deviation of the new NCIA contract policy from the CPR, respondent contends that Directive 2.1 is entirely in line with Article 5.5.3 of the CPR. This Directive is similar to the NCSA contract policy regime, and confirms that the Head of the NATO body has discretionary power to offer a succession of definite duration contracts, following the satisfactory performance of the concerned staff member and in the interests of the service. This is also in line with the NCIA Personnel Establishment Policy, which gives strategic direction to the GM to operate on the basis of – *inter alia* – the principle of optimum balance of rotation, retention, continuity and internal mobility.

48. Respondent disputes thirdly appellant's plea concerning the breach of the duty to state reasons with the adoption of the decision refusing the one-year renewal of his

contract. In particular, respondent argues that appellant was given the reasons justifying the refusal of a further one-year renewal of his contract in the decisions taken during the administrative review process as mentioned in the Complaints Committee's report. In this regard, respondent recalls that appellant also met with the Chief of Staff of the Agency during the administrative review process and the reasons, in particular the need for staff rotation, were explained in detail and discussed with him.

49. As regards appellant's fourth plea concerning the error of assessment in respondent's decision refusing the one-year renewal of his contract, respondent recalls that appellant was a good performer, but that he did not receive one of the top ratings. Directive 2.1 specifies in Article 4.2 c) that only those staff members who are consistently high performers may be asked to stay on as long-term employees and this was not the case of appellant. From that perspective, no error of assessment was committed by respondent in taking the decision refusing the renewal for one-year of appellant's contract.

50. Also, the Complaints Committee in its report pointed out that, in contrast to appellant's contentions, before 2016, his performance was also rated very good and good. Concerning the rating of 2015, appellant as acting CSU Commander rated himself as excellent. As regards the harassment, which, according to appellant, is at the origin of his lower rating in 2016, the Complaints Committee notes in its report that there is no evidence to support appellant's claims.

51. Insofar as the error of assessment concerning the need for business continuity is concerned, respondent argues that since the end of 2016, NCIA has been reviewing the structure, processes and staffing of the Agency's Customer Support Units with the aim of optimizing functions in the CSU and achieving efficiencies as mandated by the nations. Consequently, there is no definite interest in business continuity as appellant claimed with the present plea.

52. Regarding appellant's fifth plea that the decision refusing a one-year renewal of his contract amounts to a misuse of powers, respondent considers that it is also unfounded.

53. Concerning the alleged median of six years' employment as a guidance from the ASB, respondent observes that in any event appellant himself has already passed the median of six years and consequently appellant's contention is moot. Moreover, the ASB guidance, while providing further factors that can be taken into consideration when renewing a staff member's contract, does not in itself modify the CPR as appellant claimed.

54. In relation to appellant's contention that the Agency is trying to avoid long-term staff by applying an informal policy aimed at preventing anyone from reaching the ten-year threshold and obtaining CPR advantages, respondent submits that this allegation is not supported by facts. Since 2015 the Agency has awarded 146 indefinite-duration contracts, almost exclusively to staff who had reached 10 or more years of service.

55. Respondent requests that the Tribunal declare the appeal partly inadmissible and fully unfounded.

D. Considerations and conclusions

56. Appellant requests, first of all, the annulment of respondent's decision dated 30 October 2017 rejecting his complaint insofar as this decision rejects appellant's request to be awarded a one-year definite duration contract. Secondly, if needed, appellant requests the annulment of respondent's decisions dated 6 April 2017 and 31 May 2017 rejecting respectively his first and second request for administrative review as well as the decision dated 22 March 2017 announcing the non-renewal of his contract.

57. The Tribunal observes that with the decision of 31 May 2017, respondent made substitution of the reasons given in the decision dated 22 March 2017 for the non-renewal of appellant's contract. Indeed, in the decision dated 31 May 2017, respondent considers that the decision on non-renewal of appellant's contract was motivated by business considerations and the need for staff rotation; in addition, in this decision respondent considered that no evidence substantiates appellant's claims that discrimination and mobbing were the reasons for the non-renewal of his contract.

58. However, with the decision of 30 October 2017, respondent made no substitution of the reasons given in the decision of 31 May 2017. Indeed, in the decision dated 30 October 2017, based on the conclusions of the Complaints Committee's report, respondent recalls the same reasons for the non-renewal of appellant's contract as well as the fact that appellant's claims of discrimination and mobbing were not substantiated by evidence. As a consequence, appellant's submissions for annulment directed against the decision of 30 October 2017 are the same as those directed against the decision dated 31 May 2017 which is in fact the challenged decision in the present appeal.

59. In the light of the foregoing, it should be noted that appellant invokes five pleas against the challenged decision.

On the inadequate statement of reasons in the challenged decision

60. Appellant alleges an inadequate statement of reasons in the challenged decision. In his submissions, appellant considers in sum that the factual and legal grounds on which respondent's reasoning relies do not emerge from the grounds indicated in this decision.

61. The Tribunal recalls that the obligation to state reasons is intended to provide the staff members concerned with sufficient information to determine whether the challenged decision adopted was founded and make it possible for the decision to be the subject of judicial review.

62. In the present case, the challenged decision is sufficiently reasoned. Indeed, it indicates the elements which justify the non-renewal of appellant's contract, stressing in particular the need for staff rotation and the business considerations of the Agency. In addition, in the challenged decision, respondent rejected appellant's claims of discrimination and mobbing which were, according to appellant, the reasons for the non-renewal of his contract. Along the same lines, during the administrative process, respondent brought several elements of information to the knowledge of appellant justifying the non-renewal of his contract by reference to Directive 2.1.

63. In addition, and in order to further clarify the context in which the challenged decision intervened, respondent met with appellant on 28 April 2017, *i.e.* before the adoption of the challenged decision. Appellant did not deny this meeting but stressed that this meeting could not replace respondent's obligation to state reasons in the challenged decision.

64. This allegation must be rejected. Indeed, before the adoption of the challenged decision and in particular during the administrative review process, appellant was sufficiently informed about the reasons justifying non-renewal of his contract. In this regard, the meeting held on 28 April 2017 contributed to bringing to the knowledge of appellant additional information and explanations regarding the reasons for which justified the adoption of the initial decisions as well as the reasons for the adoption of the challenged decision after appellant's second request for administrative review.

65. The Tribunal recalls that the duty to have regard to the interests of a staff member and the principle of good administration require that, when he or she takes a decision concerning the situation of a staff member, the Head of the NATO body concerned must take into consideration all the factors which may affect the final decision. Given the claims of harassment made by appellant during the administrative process, holding a meeting before the adoption of the challenged decision in the present case constitutes an expression of respondent's duty to have regard for the welfare of the staff member concerned.

66. Therefore, the present plea must be rejected as well as appellant's further request formulated under the present plea for having access to specific documentation.

On the violation of the NCSA contract policy

67. Appellant requests the annulment of the challenged decision insofar as this decision is wrongly based on Directive 2.1 and mainly on the staff rotation requirement instead of the NCSA contract policy. In this framework, appellant argues also that Directive 2.1, was never, individually and with the appropriate measures ensuring legal certainty, communicated to him.

68. In particular, by a first set of arguments appellant claims that Directive 2.1, and consequently the rotation rule on the basis of which the challenged decision was adopted, is not applicable to his contractual situation and that he can rely on the previous NCSA contract policy rules. This, he submits, is confirmed by the letter from the NCIA General Manager informing appellant that the NCIA had been established and that his contract was henceforth with the NCIA. This letter indicated that "*(a)ll other terms and conditions of your employment contract remain unchanged".*

69. The Tribunal has already held that this letter refers to the situation at the time the letter was written and not to the future. There is no indication or implication in appellant's last contract that the previous regime was frozen as of 1 July 2012, when NCIA was established. It is settled that Administrations may, under certain conditions, amend employment conditions. This is what the NCIA did in 2013, when it adopted its own Contract Policy (Case No. 2017/1125, paragraph 62; Case No. 2018/1253, paragraph 44).

70. In this regard, it has to be noted that in any event the contract offered and signed without reservation by appellant in June 2014 contains a paragraph 8 stipulating that *"this contract and your appointment (…) is governed by the provisions of the NATO Civilian Personal Regulations and applicable NATO security regulations as well as by the relevant NATO/Allied Command Transformation (ACT), JFTC and NCIA directives in effect during any part of this contract*". The Tribunal cannot but conclude that the NCIA Contract Policy (Directive 2.1) is applicable to the contract appellant countersigned, as indicated, in 2014.

71. As regards the second set of arguments put forward by appellant concerning the failure to communicate Directive 2.1 to appellant, the Tribunal is persuaded that respondent provided sufficient information regarding Directive 2.1 to Agency staff, including appellant.

72. Indeed, in addition to the fact that the NCIA newsletter of 18 January 2013 informed all staff that, since 1 January 2013, the new contract policy was applicable to all NCIA civilian staff, the new regime was communicated via the NATO Secret system as well as via the NATO Restricted system – to which appellant had access. Moreover, Directive 2.1 was further advertised in the routine order, which is mandatory reading for all staff members.

73. Appellant did not contest the existence of the above actions taken by respondent but stressed that respondent did not ensure that with these actions appellant effectively knew of the existence and the entry into force of Directive 2.1.

74. The Tribunal has held that a NATO body has a responsibility to provide its employees with reliable information on significant aspects of their employment (Case No. 2017/1125, paragraph 63). But it has emphasized that the staff members also have a responsibility to familiarize themselves with the information provided to them and to make further inquiries as required (Case No. 2018/1253, paragraph 45).

75. On the basis of the above, the present plea must be rejected.

On the violation of appellant's legitimate expectations to be awarded a renewal of his contract under the NCSA Contract policy

76. Appellant also claims that the challenged decision violates the principle of legitimate expectations for a one-year contract under the regime of the NCSA contract policy and career pattern of 1-3-3-3-year definite duration contracts.

77. In this regard, the Tribunal observes that appellant was offered a first definite duration contract of one year, a second definite duration contract of three years, a third definite duration contract of two years and a fourth definite duration contract of three years. Since he signed his third definite duration contract for a two-year period on 2 October 2012, the career pattern of 1-3-3-3 year definite duration contracts was consequently not followed.

78. However, appellant accepted and signed this third definite duration contract without any reservations and did not challenge the deviation from the career pattern of

1-3-3-3-year definite duration contracts. Consequently, even assuming that appellant could rely in the present case on the NCSA contract policy regime, *quod non*, since the offer of his third contract, it is not apparent that respondent has led him to develop well-founded expectations as regards the offer of a definite duration contract for reaching ten years of employment within the Agency.

79. As a consequence, the present plea and the related other contentions must be rejected.

On the manifest error of assessment

80. Appellant argues that the challenged decision refusing the renewal of his contract for one year was adopted as a result of a manifest error of assessment. In this regard, appellant argues *in limine litis* that on the basis of Directive 2.1 as well as of the NCIA Personnel Establishment Policy, a normal length of three years is provided for a definite duration contract and for that reason the challenged decision, refusing the renewal for the one year missing in appellant's pattern of contracts, must be annulled.

81. To start with, this contention developed by appellant under the present plea is contradictory. Appellant requests to be awarded a one-year contract for the one year "missing in" the two-year contract agreed in October 2012 on the basis of the new contract policy and simultaneously requests not to apply Directive 2.1 to his contractual situation. In addition, with the challenged decision, respondent refused to renew appellant's contract not in relation to the missing year of appellant's third contract signed in October 2012 but because of the rotation rule. As a consequence, this contention must be rejected.

82. According to the case law of the Tribunal, in order to establish whether the administration committed a manifest error in assessing the facts in such a manner as to justify the annulment of the contested decision, the evidence adduced by the appellant must be sufficient to render the factual assessments used in the challenged decision implausible. In this regard, an error of assessment is manifest when it is easily discernible and can be easily detected (see AT judgment in Case No. 2017/1111, paragraph 88).

83. Appellant firstly considers that his performance was outstanding and justified the renewal of his contract and that in any event the reasons for which his performance was assessed lower since 2015 was the harassment that he was subjected to by the new CSU Commander.

84. As the record shows – and this was not contested by appellant during the hearing – the latter did not consistently receive top ratings. Appellant could consequently not base himself on his performance in order to pretend entitlement to the status of long-term employee. From this perspective, in taking the challenged decision not to renew appellant's contract, respondent did not make an error of assessment.

85. As regards, secondly, appellant's allegations concerning discrimination and mobbing, the Tribunal recalls that the Complaints Committee unanimously stated that

the complaint lodged by appellant could not be validated *"as it relates to non-substantiated malicious intent and unfair treatment"*.

86. In this regard and in response to a question of the Tribunal during the hearing, appellant argues that the Complaints Committee did not take into account appellant's considerations and decided with unreasonable delay not to investigate the matter. By this contention, appellant contests the unanimous conclusions of the Complaints Committee report, which on this point confirmed the challenged decision. In this regard, appellant failed to bring before the Tribunal evidence demonstrating that the challenged decision was based on errors in the factual assessment.

86. The same conclusion as above applies to appellant's allegation regarding respondent's manifest error of assessment concerning the business considerations of the Agency. In this regard, appellant only recalls that his position was not suppressed and that the activities of the Agency with the customers will increase in the future.

87. Finally, appellant's allegation related to the error of assessment in violation of respondent's duty of care with regard to appellant's health situation must also be rejected as unfounded and non-supported, in accordance with the submissions and case law of the Tribunal invoked by appellant in paragraph 38 of the present judgment.

88. The present plea must consequently be rejected.

On the misuse of power

89. Appellant contends that the challenged decision amounts to a misuse of power because the decision was taken in order to prevent appellant from reaching ten years of employment. This is allegedly based on an internal guideline of the ASB targeting a median of six years of employment and the existence of an informal policy aimed at preventing staff members from reaching ten years of employment, which is in violation of the CPR.

90. As the Tribunal has held, neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresees an automatic award of a certain number of definite duration contracts, and none obliges the Organization to award contract extensions. The ASB, which is the supreme organ of the Agency, may give guidance to management within the limits of the CPR. The guidance given and the adopted policies are not contrary to nor modify the CPR (Case No. 2017/1125, paragraph 69).

91. According to the case law of the Tribunal, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated.

92. In the present case, the allegations submitted by appellant do not lead to the conclusion that respondent's decision not to renew the contract was a misuse of power. It is not enough for appellant to rely on certain facts and legal considerations in support of his claims; he must also adduce evidence to support their veracity. This is not the case in the present plea.

93. In follows from the foregoing that the present plea must also be rejected and that the action must be dismissed in its entirety.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 30 August 2018.

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

F
Certified by
the Registrar
(signed) Laura Maglia

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

24 September 2018 AT-J(2018)0018

Judgment

Case No. 2017/1126

VCL

Appellant

v.

NATO International Staff

Respondent

Brussels, 5 September 2018

Original: French

Keywords: Complaints Committee; hearing of the staff member or retired staff member (Article 5.2.2 of Annex IX); obligation for the Committee as a whole, not just its Chair, to hear the complainant; substantial formality.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 16 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 28 August 2017 and registered on 4 September 2017, by Mrs VCL, seeking:

- annulment of the decision of 5 July 2017 whereby the NATO Secretary General confirmed his intention, expressed on 23 March 2016 in a letter from the Head of the NATO Pensions Unit, to apply the February 2016 amendments to the footnote to Article 51.2 of the Civilian Personnel Regulations (CPR) to appellant;
- an order for the NATO International Staff to pay her €9.500 in costs incurred for her defence.

2. The respondent's answer, produced by the NATO International Staff on 23 October 2017, was registered on 7 November 2017. The appellant's reply, dated 24 November 2017, was registered on 20 December 2017. A rejoinder was produced on 29 January 2018 and registered on 30 January 2018.

3. On 5 March 2018, the President of the Tribunal sought the parties' comments on the Tribunal's competence, in the light of Article 6.2 of Annex IX to the CPR.

4. In another order, the President of the Tribunal asked respondent on 12 March 2018 to produce appellant's pension slips for August and September 2016 and the exact amounts of the social contributions being deducted at that time from her pension. Respondent produced these on 15 March 2018.

5. The Tribunal's Panel held an oral hearing on 16 March 2018 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

6. Mrs L joined NATO on 1 September 1991. She served continuously under several contracts until 30 September 2010, when she ceased working for NATO and retired at 66 years of age.

7. Under Article 51.2 of the CPR in force at that time, she continued to pay her medical insurance premiums, thinking she would have to do so until such time as she fulfilled the condition of contributing for 25 years, *i.e.* until 31 August 2016.

8. However, on 2 February 2016, the North Atlantic Council amended the CPR and

decided that effective 3 August 2016, all retired NATO staff who had not yet contributed to the group insurance scheme for a minimum of 25 years would henceforth have to continue to pay a premium, even after 25 years' contributions. This is the origin of the dispute.

9. On 23 March 2016, the Head of the NATO Pensions Unit wrote to appellant to inform her of the new rule that was applicable to retired staff and to tell her that this rule would directly affect her personal situation.

10. Mrs L undertook to challenge this decision and so initiated the pre-litigation procedure. On 19 April 2016, she sought an administrative review, which was rejected on 28 April 2016. She then submitted a complaint on 27 May 2016, requesting that a Complaints Committee be convened. The NATO International Staff had been referred a great many complaints about the same matter, *i.e.* the application of the new version of the footnote to Article 51.2, and thus decided to join the complaints and convene a single Complaints Committee for more than one hundred complainants. At the conclusion of a lengthy procedure, the Complaints Committee issued its report, which was submitted to appellant for comment on 4 May 2017 and to which she replied on 12 May 2017.

11. Finally, the NATO Secretary General confirmed the initial decision of 5 July 2017, informing appellant that every retired staff member who had not contributed for a minimum of 25 years by 3 August 2016 had to continue paying a premium for medical insurance, and that he could not support her request. Appellant appealed to the Tribunal on 28 August 2017 to seek annulment of that decision.

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

(i) Appellant's contentions

12. The Tribunal had sought parties' analysis of its competence to adjudicate on the appeal. At the hearing, appellant contends that the Tribunal is competent since the appeal is directed against an individual decision taken regarding her on 23 March 2016 and confirmed on 5 July 2017.

13. To begin with, appellant invokes an illegality that affected the Complaints Committee procedure. Having requested that a Complaints Committee be convened, which the Administration arranged, appellant was not heard by the Committee as a whole but rather just by its Chair. She argues that she was deprived of an essential guarantee: to be heard by the different people making up the Committee. She underscores in particular that the Complaints Committee's report notes that the Committee had heard her, which is inaccurate. For appellant, this is a substantial formality, and the observed violation of the procedure pertaining to her affects the legality of the decision taken at the conclusion of that procedure.

14. Appellant goes on to develop several grounds against abolishing the right of staff who had not yet contributed for 25 years by 3 August 2016 to continued medical coverage

without paying further premiums.

15. In her view, the new version of the footnote to Article 51.2 of the Civilian Personnel Regulations infringes a contractual right guaranteed by § A (iv) of the Preamble to the CPR, which remains static as of the date retirement commences.

16. The general principle of the non-retroactivity of administrative acts and the vested rights of staff such as herself who had contributed for many years (she would have contributed for 25 years as of 31 August 2016) are alleged to have been violated as well.

17. Finally, this footnote violates the principle of equitable treatment of staff by creating different situations for staff based solely on their retirement date or the fact of having contributed for 25 years. It has also been implemented in breach of the principle of legitimate expectations, which entitles appellant to continue being governed by the previous version of the footnote to Article 51.2 of the CPR.

(ii) Respondent's contentions

18. With respect to the alleged procedural irregularity, respondent claims that it is because of appellant's refusal to travel to Brunssum or Geilenkirchen before March 2017 that she had not been able to be heard by the whole Committee as the other appellants – who worked in Brunssum or Geilenkirchen or resided nearby – in this complaints procedure had.

19. Respondent underscores that appellant had nevertheless been heard in Brussels on 27 March 2017 and admits that the hearing was only attended by the Complaints Committee Chair; however, respondent does not view this as a substantial violation of the rules that would invalidate the overall procedure.

20. For respondent, the decision to amend the CPR article was neither irregular nor illegal.

D. Considerations and conclusions

On the Tribunal's competence

21. Article 6.2.1 of Annex IX to the CPR states as follows:

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

22. The President of the Tribunal, in an order on 5 March 2018, asked the parties for their comments on the matter of the Tribunal's competence to adjudicate on the appeal.

23. Unlike other appellants who also brought disputes over the application of the new

footnote to Article 51.2 of the CPR (see the judgments in Cases Nos. 2017/1114-1124 and 2017/1127-1242), appellant is not challenging the provision of the CPR; instead, she initiated the case by requesting annulment of a letter dated 23 March 2016 that was written to her personally to inform her that the new version of the footnote to Article 51.2 would apply to her and would change her personal situation. That decision was confirmed by the NATO Secretary General on 5 July 2017.

24. The appeal is thus indeed directed against an individual decision by a Head of a NATO body. In this specific case, and in view of the context of the case, this letter must be considered as constituting grounds for grievance.

25. The Tribunal is therefore competent to adjudicate on the appeal.

On the admissibility of the submissions

26. Appellant left NATO's service in 2010 before having contributed to NATO's medical insurance scheme for 25 years. Appellant continued paying her premiums for medical coverage.

27. Under the version of Article 51.2 that was in force until 2 February 2016, appellant would have been eligible for continued insurance coverage without paying further premiums as of 26 August 2016, when she would have contributed for 25 years.

28. However, the new Article 51.2 states that:

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

Consequently, to be entitled to coverage, appellant must continue paying premiums and is being directly and immediately affected by the amendment to Article 51.2 and by the decision of 5 July 2017 confirming that the new version of Article 51.2 applied to her.

29. Appellant therefore has grounds to challenge the decision that directly and immediately affects her interests.

On no need to adjudicate

30. Notwithstanding the intention expressed in the letter of 23 March 2016 and the decision of 5 July 2017 which determined that the new version of Article 51.2 applied to appellant, it appears that the premium for medical insurance, which had been deducted from her pension up to and including August 2016, ceased to be deducted as of 1 September 2016, as though the Administration were granting her entitlement to the previous version of the said Article.

31. When questioned by the Tribunal in the hearing, the International Staff said that this was a computer error, because its intention had been to continue making this deduction beyond the 25 years of premiums and therefore to implement the arrangements in the letter of 23 March 2016, as confirmed on 5 July 2017. Furthermore, the International Staff said that it intended to look for ways to restore the deductions that should have been made from appellant's pension from September 2016 onward, including retroactively.

32. Under these circumstances, each of the parties considered that the case has merit. The Tribunal also observes that the decision of 5 July 2017 is continuing to have effects, and that the case has merit.

On the legality of the decision

33. Under Article 5 of Annex IX to the CPR, and Article 5.2.2 in particular, "*The Complaints Committee will ordinarily hear claimants and other witnesses in person*".

34. It is a fact that appellant had requested the convening of a Complaints Committee and asked the Administration to be heard by it, indicating her availability to come to Europe for that purpose. Although the Committee was set up on 15 November 2016, it was only on 10 March 2017 that appellant was for the first time contacted specifically by the Complaints Committee, which suggested the date of 27 March to her. Appellant then made her arrangements to travel to Brussels. It was only upon her arrival at NATO's premises in Brussels that appellant was informed that of the three Committee members, only the Chair was available. Thus only the Chair met with appellant.

35. It is a fact that appellant was not heard by the Committee as a whole, just by its Chair. Respondent gives no circumstances that could justify the absence of the other two Committee members. While it is true, as respondent maintains, that appellant did not call attention to this fact in her 12 July 2017 comments on the Complaints Committee's report (which wrongly notes that she was heard by the Committee), appellant may still plead this ground for the first time to the Tribunal.

36. To be heard by the Committee as a whole is a guarantee for the staff member, because this Committee is comprised of a representative of the staff, a representative of the Head of the NATO body, and a Chair appointed by the Head of the NATO body. The hearing of the staff member is a chance to ask questions, ascertain the facts, and understand the motivations of each of the parties. It is important for each of the three members, who subsequently must make a joint ruling on the grounds of the complaint, to be able to ask appellant questions and not be limited just to the questions asked by the Committee Chair. The collegiality of the Complaints Committee is a guarantee for the staff member which the Administration cannot take away. Omission of this substantial formality is an irregularity that entails annulment of the complaints procedure and therefore of the decision taken at the conclusion of that process. The Administration shall have to reopen the complaints procedure in accordance with the CPR so that appellant may present her arguments orally to the Complaints Committee meeting as a whole.

37. Consequently the decision of 5 July 2017 that followed the irregular pre-litigation procedure must be annulled insofar as it affects Mrs L, and the pre-litigation procedure must thus be reopened by the Administration by reviewing the complaint of 27 May 2016 again and by providing the follow-up that the Administration deems appropriate.

38. This decision is without prejudice to the Tribunal's legal position on the other contentions presented.

E. Costs

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

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

40. Given that there were good grounds for Mrs L's appeal, even if this was for procedural reasons, it is appropriate that she be given the benefit of Article 6.8.2 of Annex IX regarding reimbursement of the costs she incurred for her defence. The International Staff shall therefore reimburse her for the costs of retaining counsel, up to a limit of €4.000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 5 July 2017 whereby the NATO Secretary General confirmed his intention, expressed on 23 March 2016 in a letter from the Head of the NATO Pensions Unit, to apply the February 2016 amendments to the footnote to Article 51.2 of the CPR is annulled insofar as it applies to Mrs L.
- The International Staff shall reimburse Mrs L for the costs of retaining counsel, up to a limit of €4.000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 5 September 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

24 September 2018 AT-J(2018)0019

Judgment

Case No. 2017/1243

EB

Appellant

v.

NATO International Staff

Respondent

Brussels, 5 September 2018

Original: English

Keywords: financing of medical insurance scheme; Tribunal competence; decision by Head of NATO body; contributions; admissibility.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 16 March 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO International Staff (NATO IS) dated 30 August 2017, and registered on 11 September 2017 as Case No. 2017/1243, by Mr EB, a Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK) staff member, challenging the decision of the NATO Council (NAC) dated 2 February 2016, which amended a footnote in the NATO Civilian Personnel Regulations (CPR) concerning the financing of the group medical insurance scheme and the payment of premiums by retirees in particular.

2. Respondent submitted a single answer, dated 23 October 2017, for this and similar cases. It was registered on 7 November 2017. Appellant's reply dated 4 December 2017 was registered on 21 December 2018. A single respondent's rejoinder for this and similar cases, dated 29 January 2018, was registered on 30 January 2018.

3. Prior to the 16 March 2018 hearing in the present appeal, the President of the Tribunal sent a "Message from the President of the NATO Administrative Tribunal to the parties" (President's Message) dated 5 March 2018 to the appellants and to the parties in other appeals involving similar legal issues also being heard in March 2018. The President's Message contained several procedural instructions and requests to the parties. *Inter alia*, it requested them to "*include in their presentation arguments on the Tribunal's competence (see Article 6.2 of Annex IX to the CPR) to hear cases in the absence of a decision by the Head of the NATO Body directly affecting appellants*."

4. The Panel held an oral hearing on 16 March 2018 at NATO Headquarters. It heard arguments by appellant's counsel and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the cases

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

6. Appellant joined NAEW&CF GK in 1989 and has been in service since.

7. Well before appellant joined NATO, the Organization had in 1967 introduced premium free lifelong medical insurance coverage for retirees and their dependants. Over time, and in order to keep this scheme financially sustainable, a number of amendments and conditions were introduced.

8. Thus, for example, in 1974 it was decided that, in order to qualify for free lifelong medical coverage for retirees and their dependants, staff recruited after 1 May 1974 and who retired at age 60 or above had to have been employed for at least five years, while those retiring between the ages of 55 and 60 had to have been employed for at least ten years. Active staff had to pay 1/3 of the total premium. Finally, qualified retirees were not required to contribute.

9. This arrangement was amended in 1988: the qualifying period of employment for those retiring at the age of 60 and above was raised from five to ten years, and the premium was indexed and rose from 0.906 % of gross salary to 2.188%.

10. A further amendment in 1995 introduced a bridging cover. Those retiring between the ages of 55 and 60 had to pay a bridging premium until age 65, after which they were entitled to free coverage. The premium was 2.591% of a (theoretical) pension. Retirees aged between 55 and 65 recruited before 1 January 1988 were entitled to free coverage if they had been employed for at least five years. This qualifying period was set at ten years (consecutive or otherwise) for those recruited between 1 January 1988 and 1 January 1995, and at ten consecutive years for those recruited after 1 January 1995.

11. In its initial years, medical coverage for retirees was underwritten by a private insurance company. When the insurance company was no longer prepared to underwrite the scheme beyond the age of 65, the Organization created in 2001 the Retirees' Medical Claims Fund (RMCF or Fund). Under this new system, staff aged 55 or over who left NATO after a minimum of ten years of uninterrupted service were permanently entitled to reimbursement of medical expenses for themselves and their dependants subject to paying a premium. However, certain long-serving staff members were not required to pay. A footnote was added to Article 51.2 of the CPR which stated:

> Provided they were recruited before 1st January 2001, staff members who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.

12. The total premium after the age of 65 was set at 4,5% of gross salary for active staff and at 3% for retirees recruited before 1 January 2001 who did not have 25 years of contributions, with staff or retirees paying one third of the respective premiums. The premiums were paid into the RMCF.

13. At the same time a Supervisory Committee was set up to oversee management of the RMCF. It is composed of representatives from NATO administrations, from active staff, and from retired staff.

14. In a further amendment in 2006, the premium for the bridging cover (for retirees between the ages of 55 and 65) was increased from 2,591% of theoretical pension to 3% of last salary. This premium was again increased, in 2013, from 3% to 5%.

15. In 2009 the Secretary General informed the NAC that at the end of 2008, the Fund held €103M. He added that an actuarial study conducted on the initiative of the Supervisory Committee in 2008 projected that the RMCF could be depleted between

2030 and 2047, depending on different assumptions regarding the return on assets (3, 5 or 8%). He would engage experts to provide an estimate of the minimum financial injection necessary to make the Fund sustainable.

16. In 2013, the NATO International Board of Auditors (IBAN) noted that the Fund's assets were estimated to be depleted between 2032 and 2051 based on an actuarial study performed in 2010. Further actuarial studies showed that the RMCF would be depleted somewhere between 2038 and 2043, and that measures to remedy this were needed. The IBAN recommended in particular that the IS provides an estimate of the minimum financial injection necessary to make the RMCF sustainable. The IBAN recommended also that the IS provides all necessary information and any remedial actions undertaken to limit the level of obligations, and that measures to remedy this were needed.

17. It is in this contetxt that several scenarios for strengthening the RMCF were discussed in the Supervisory Committee as well as in the Joint Consultative Board (the permanent body set up under Annex XI to the CPR for the consultation between the Administrations, the Confederation of NATO Civilian Staff Committees and the Confederation of NATO Retired Civilian Staff Associations). In the end, the above mentioned amendment to the footnote to Article 51.2 of the CPR was proposed to the NAC. Major elements of the proposal were proposed by the representaives of active and retired staff, who endorsed the proposal as a whole. On 2 February 2016 the NAC adopted the amendment, which was issued on 8 February 2016 as Amendment 24 to the CPR. Each staff member received an individual nominative copy of the amendment. It stipulates:

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

18. On 1 March 2016 appellant requested an administrative review with the claim that the footnote change to Article 51.2 of the CPR is not applied to him neither at present nor in the future. On 9 March 2016 NAEW&CF GK informed that the matter had been forwarded to NATO IS.

19. On 14 April 2016 appellant requested for a further administrative review, with the same claim. On 4 May 2016 the administration informed that NAEW&CG GK was "*not the competent body to answer the requests as it cannot undo or amend decisions that are in the sole competence of the North Atlantic Council. HQ NAEW&CF GK does not have the decisional authority to apply or not to apply the above mentioned revised footnote of Article 51.2 NCPR to retirees, because its not competent for their administration. In accordance with Art. 2.5 Annex IX of the NCPR, your Further Administrative Reivew, like your request for Administrative Review, has therefore been forwarded for further processing to NATO International Staff in NATO HQ, Brussels*".

20. By letter dated 20 April 2016, NATO IS replied to appellant's request for

administrative review, stating, *inter alia*, "*The change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001, who are not retiring before 3 August 2016, and who have not reached 25 years of contribution to the NATO groupd insurance*."

21. On 31 May 2016 appellant formally requested for mediation. On 5 July 2016, the NATO IS replied that there was no agreement for mediation and if "*you still intend to pursue the matter, the next step available in the NCPR is to submit a formal complaint to the Secretary General …*".

22. On 25 August 2016, appellant submitted a formal complaint to the Secretary General (SG) under the provisions of Article 4.1 of Annex IX to the CPR.

23. On 21 November 2016, appellant received information that the Organization set up a Complaints Committee and invited appellant to be heard.

24. A single Complaints Committee was set up to hear appellant's complaint as well as those of a number of appellants from other NATO locations. The Complaints Committee held a number of hearings in several duty stations and heard appellant in Geilenkirchen. The Committee issued its report on 4 May 2017. It was sent to appellant on 8 May 2017.

25. The Committee recognized the significant shortcomings of the RMCF, which had been inadequately funded from the outset, and acknowledged the considerable concern expressed by the administration and staff representatives as to the Fund's continued financial viability. The Committee shared the view expressed by both sides that staff needed to be made aware of the situation in order to ensure that responsibilities towards future staff members could be met. The Committee also agreed with administration and staff representatives that action needed to be taken to mitigate the costs of rising medical care to account for the fact that people were living longer. There was also an acknowledgement that whatever the length of contribution, staff could no longer expect free medical coverage for the rest of their life.

26. The Committee concluded, however, that, notwithstanding the clear financial rationale for changes to the financing of medical coverage, this change had been introduced without due regard to its impact on serving staff. It was of the opinion that the transition period of six months was much too short and did not provide adequate time for staff to take such a life-changing decision. It felt that it would have been preferable to have a more gradual phasing in of the change, as was done with previous revisions to the CPR.

27. The Committee recommended that any future such changes to medical coverage be introduced with an appropriate transition period, for example two years. It is also called for better communications between the different NATO Staff Associations as well as between HR departments of the different NATO bodies.

28. With regard to delays in the Administration's responses to appeals and complaints, the Committee recommended that Executive Management ensure that

existing procedures for lodging complaints and requesting administrative review are clearly communicated to all NATO bodies, and that every effort is made that deadlines in the processing of such complaints are met.

29. On 5 July 2017 the Assistant Secretary General for Executive Management replied on behalf of the Secretary General. He recalled that the NATO medical group insurance was a solidarity system, heavily relying on the contributions of the active staff, which permit the retiree population to benefit from the group insurance at a low cost. Over the years, a number of changes had been introduced, based on objective considerations, to preserve NATO's group insurance plan, given that free and unconditional lifelong coverage is unsustainable in the long run. The amendment to the footnote was the latest of these changes, which included the indexation of premiums, introduction of the bridging cover, and establishment of the RMCF.

30. He continued that the change to the footnote was introduced to ensure that all eligible retirees and their dependants could enjoy the benefits of a robust medical plan for a reasonable cost until the end of their lives. As a result of the change, all active staff who did not retire before 3 August 2016 would contribute to the medical insurance plan for life. The same would apply to all retired staff who did not have 25 years of service by that date and hence did not obtain the right to continued free medical coverage. The change had effect only for the future and was therefore not retroactive in nature. He added that for the same reason the change could not be considered discriminatory because, as of the date of implementation, both active and retired staff had to contribute for life. He further observed that the change did not violate any acquired vested rights and did not affect any contractual rights. It was, in fact, a change to statutory elements governed by the CPR and which may be changed for duly justified reasons. Finally, he underlined that the contribution to be paid once retired is not of a nature to be considered to change working conditions in an unacceptable manner. He concluded by saying that for these reasons and after careful consideration he was unable to give a favourable answer to the request.

31. It is under these circumstances that appellant lodged the present appeal.

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

(i) The appellant's contentions

32. Appellant's arguments on the merits may be briefly summarized as follows.

33. Appellant submits a violation of acquired vested rights, considering himself legally entitled to free continued medical coverage from the age of 65, identical to his rightfully accumulated pension rights of 2% per year. Appellant alleges that in previous changes to the CPR vested rights were explicitly respected.

34. Appellant also submits a discriminatory treatment, sustaining that retroactive and unilateral changes, which deny acquired vested rights constitute discriminatory and inequitable treatment.

35. Appellant argues that there is a lack of objective reasons since both the administration and the CNSC refer to liquidity problems of the RMCF, although the liquidity issues were the organization's responsibility, and prior to that the insurer's liability. Appellant sustains that staff members cannot be made retroactively responsible for the organization's management of the insurer's business risks.

36. Finally, appellant alleges that non-precautionary measures for unexpected increases in healthcare cost and lack of provisions in the organization's financial statements foreseeing the growing liability for the Defined Benefit Pension Scheme. Appellant requests the respect and reinstatement of his right to free medical coverage after the age of 65 and 25 years of contributions.

37. In his rejoinder appellant also submits the lack of transitional measures and the upsetting of the balance of his contract.

38. Appellant requests the Tribunal *"[…] that the old footnote respecting the right to free medical coverage after the age of 65 and 25 years of contribution is reinstated*".
39. Appellant finally reserves the right to seek compensation for all current and future damages trough any possible legal process, "*to include repayment of paid premiums to the Insurer before 2001 and to the RMCF since 2001 and compouned interest on those premiums until today*"

(ii) The respondent's contentions

40. Respondent submitted a single answer and rejoinder concerning a total of 129 appeals challenging the amendment to the footnote, including the present appeal. They will be summarized here *mutatis mutandis*.

41. Respondent first indicates that it does not have observations with regard to the admissibility of the appeal.

42. It notes, however, appellants' claim that the Administration has not met timelines during the administrative review and complaints procedure. Respondent submits that, while regrettable, this delay was due to the specific circumstances of the situation, which involved numerous individuals from various NATO Bodies in different geographical locations. The matter therefore required extensive coordination both within the IS and between the IS and the various NATO Bodies concerned. Noting that the proper procedure was followed and that the IS acted with due diligence in the circumstances to ensure a coordinated response, such delay did not affect the validity nor the outcome of the decision made. It did not in itself adversely affect appellants or cause any additional damages.

43. Regarding the merits, respondent underlines that the NATO medical group insurance is a solidarity system, relying heavily on the contributions of the active staff (98% of the contributions into the RMCF in 2014), which permits retirees and their eligible dependants to enjoy the benefits of a robust medical plan for a reasonable cost.

44. Respondent contended that over the years a number of changes have been introduced, based on objective considerations and grounds of general interest, to ensure the financial viability of the system and to preserve a generous medical plan, given increases in healthcare costs and life expectancy. The amendment to the footnote to article 51.2 of the CPR is similar in nature to measures previously adopted to this effect, such as the more restrictive conditions for entitlement to continued medical coverage, the introduction and indexation of premiums, the introduction of the bridging cover in 1995, and the establishment of the RMCF in 2001. In introducing such measures, the Organization demonstrated good governance, continually monitoring the situation and taking steps to revise the conditions of coverage to ensure the preservation and the financial viability of the NATO medical group insurance program. As a result of these interventions, all beneficiaries with the requisite years of service, including qualifying retirees and their dependants, remain eligible for lifelong coverage. It thus cannot be argued that there were insufficient objective reasons for implementing such changes.

45. Respondent rejects the suggestion that the Organization did not foresee increases in healthcare costs. Projected increases in costs and life expectancy were parameters of the actuarial studies and were fundamental considerations leading to the changes described above. The Organization kept a close eye on such trends and implemented measures to contain costs and make adjustments as necessary. It added that, even if healthcare costs were to rise in an unanticipated manner, the fact that NATO medical group insurance is designed as a solidarity system means that they could be borne on a shared basis by all contributors. The premium charged to retirees (currently 1.67% of their last salary with the Organization contributing a further 3.33%), is only a small proportion of the actual medical costs incurred by the retiree population. Furthermore the insurance also covers retiree's dependants at no additional cost.

46. Respondent contends that the change to the footnote applies without exception to all staff who joined the Organization before 1 January 2001 who did not retire before 3 August 2016 and to retirees who have not made 25 years of contributions to the NATO group insurance by that date. Staff who joined the Organization after 1 January 2001 and who are eligible for continued medical coverage are already required to pay the premium on a lifelong basis. The amendment cannot therefore be considered as discriminatory because, as of the date of implementation, both active staff who did not retire before 3 August 2016 and retired staff not yet eligible for free medical coverage will contribute to the medical insurance plan for life. In addition, should there be any difference of treatment, *quod non*, such differentiation would be objectively justified. Respondent cites here Decision No. 437 of the NATO Appeal Board, which held that "*differences in the personal situations of the insured under the continued medical scheme do not of themselves constitute indices or factors of discrimination. Indeed the principle of solidarity does not involve the benefits received by each member being in proportion to his or her contribution to the scheme*."

47. Respondent further argues that the change did not violate the principle of non-retroactivity, as the modifications only apply for the future. Staff members and retirees are not asked to contribute for previous years, their previous contributions are not called into question, and their entitlement to lifelong coverage is unchanged. In addition, the NAC did not violate any rule it imposed on itself regarding modification of such provisions.

48. Respondent submits that the amendment to the footnote does not violate any acquired or vested rights. Appellants will not be deprived of the benefit of their previous contributions and the required conditions for continued medical coverage have not changed. The change does not affect any contractual rights. In addition, the premium to be paid once retired cannot be considered to upset the balance of appellants' contracts or to unacceptably change working conditions. In any event, although the Organization is obliged to organize a healthcare system for serving and retired staff, this does not create a right to free coverage.

49. Respondent observes that the amendment to the footnote is a change to statutory elements governed by the CPR and that international administrative law distinguishes between such provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. Statutory elements governed by the CPR may be changed by the Organization for duly justified reasons, which have been provided here.

50. Respondent contends that while certain appellants may have a legitimate expectation to remain eligible for lifelong coverage for themselves and their dependents after retirement, if they have the required years of service, this expectation cannot reasonably extend to exemption from paying any premium. The requirement to pay premium is justified by longer life expectancy and higher cost of medical treatment.

51. Respondent disputes the claim that it failed to provide sufficient notice and information regarding the change to the footnote in violation of its duty of care and good administration. Respondent argues that a six-month transition period was applied following the NAC's approval of the change and that an Office Notice was shortly distributed after the approval. The change to the footnote was extensively discussed prior to its adoption and was the subject of consultations between representatives of the Administrations and of active and retired staff, following a proposal made by Confederation of NATO Civilian Staff Committees in 2014. Respondent is not responsible for any possible deficit of communication between staff associations or between these associations and staff or former staff members.

52. Respondent requests the Tribunal to dismiss the appeal as being without merit.

D. Considerations and conclusions

53. This appeal raises important questions regarding the Tribunal's competence. This Tribunal, following in this respect the jurisprudence of its predecessor the NATO Appeals Board, has constantly recalled that it is a body of limited competence and jurisdiction (*cf.* Cases Nos. 2015/1056-1064) and that it must assure that it acts only within the extent of the powers conferred upon it by the NAC. Accordingly, the Tribunal must address questions going to its jurisdiction and competence before it can consider substantive legal arguments.

54. Given the importance of the issue of the legality of the amended footnote for many active and retired staff, the Tribunal considered it in the interest of good and fair administration of justice not to raise preliminary issues regarding its competence

impromptu at the 16 March 2018 hearing. Accordingly, the Tribunal alerted the parties beforehand, giving them the opportunity to reflect on the matter and to address it at the hearing should they wish to do so. The Tribunal's President sent a Message to the parties to this effect prior to the hearing.

55. The Tribunal is mindful that respondent has not raised objections to its competence. Respondent confirmed this position at the oral hearing. The Tribunal emphasizes, however, that this does not diminish its power and obligation to make its own assessment.

56. The Tribunal is competent to review its own competence. It has its own responsibility in such matters and may and, when necessary, must deal with them *sua sponte, i.e.* on its own motion. This is not a matter left to the discretion of the parties; the Tribunal can consider its competence even if the parties do not raise the issue, because the issue of the Tribunal's competence involves a matter of law (*cf.* Council of Europe Administrative Tribunal judgment in Cases Nos. 571-576 and 578/2017, paragraph 66; and United Nations Appeals Tribunal in Judgment No. 2015-UNAT-526).

57. These powers are detailed in Article 6.2.1 of Annex IX:

> The Tribunal shall decide any individual dispute brought by a staff member or a member of the retired NATO staff or his or her legal successor concerning the legality of a decision taken by the Head of a NATO body either on his or her own authority or in application of a decision of the Council. In this respect, the Tribunal shall make decisions according to the Civilian Personnel Regulations, other pertinent rules, contracts or other terms of appointment, as well as their interpretation and application to the staff in individual cases.

58. A footnote to this provision then stipulates:

> It is understood that the Tribunal shall have the authority to rule on the Civilian Personnel Regulations in the event that a CPR provision seriously violates a general principle of international public service law.

59. The footnote is not a stand-alone provision. There can be no doubt that these afore-mentioned provisions are intrinsically linked and that the footnote must be interpreted and applied in the context of the provision of which it is a part. Therefore, the footnote does not confer additional authority on the Tribunal to consider the legality of NAC actions in the abstract, *i.e.* in the absence of some implementing action by a Head of NATO Body (HONB). The Tribunal can only rule on the legality of an underlying CPR provision when it has been applied in a concrete manner in a specific decision taken by the HONB concerning a specific appellant. On the contrary, the Tribunal cannot deal with potential and hypothetical cases involving situations that may arise in the future.

60. The Tribunal's jurisprudence is constant in this respect: *e.g.* in Case No. 2014/1017 it held:

> 33. ...The Tribunal believes that this entails more than just adoption of a policy or change in regulations by a competent NATO organ. The policy or change must be applied in a concrete way by means of a "decision" "adversely affecting" the staff member in some direct and ascertainable way. The possibility that a new policy or rule potentially may affect the staff member in some way at some future time does not provide a sufficiently clear and concrete basis for the Tribunal to assess an appeal.

61. In paragraph 35 of the same judgment, the Tribunal referred to relevant precedents of the NATO Appeals Board:

> In Decision No. 328, the NATO Appeals Board rejected a similar argument that an appeal was not timely because the appellant should have appealed when he received an Office Notice informing him of new medical insurance rules. Instead, the appellant was allowed to appeal "*against the decision whereby the administrative authority applies them to his particular case*." It is also recalled that in Decision No. 851, in which a staff member sought annulment of a decision by the Secretary-General not to submit to the Council a proposal relating to collective bargaining, the Appeals Board concluded that such a matter concerned all NATO staff and "*can not be considered in terms of an individual dispute*" appealable under the NCPR. This reflects a sound principle that will be followed here.

62. The NATO Appeals Board also held in its Decisions Nos. 784-794, 797-804, and 807-809:

> Although the Appeals Board is not competent to cancel a decision of the North Atlantic Council (see Decision no. 730-731 dated 11 July 2008), it may rule on such a decision's legality, as on that of all regulatory decisions by Heads of NATO bodies or by any other administrative authority, when a Head of a NATO body takes an individual decision implementing the Council's decision... The Appeals Board is competent to hear appeals directed against individual decisions by Heads of NATO bodies to apply the annual adjustment of remunerations and pensions late, even if this may lead the Board to judge whether a decision by the North Atlantic Council complies with the provisions of the NATO Civilian Personnel Regulations…

63. This conclusion is consistent with the practice of other international administrative tribunals (with the exception of some that have different statutory provisions concerning their jurisdiction), when faced with challenges to policies of general application not yet directly applied to individuals. The weight of legal authority is that where amendments to staff policies have not yet resulted in individualized decisions implementing such policies, administrative tribunals have found a request for review of such policies as premature. Tribunals have therefore refrained from judicial review until the policies have been individually applied.

64. NATO is one of the so-called Coordinated Organizations, a cooperation between six organizations headquartered in Europe aiming at harmonization of rules and practices on salaries, allowances and pensions, but similarities can also be found in other HR

areas. Although the jurisprudence of tribunals of other Coordinated Organizations do not necessarily have a more important or relevant impact on the body of international service law than that of other international administrative tribunals, reference is first made to Cases N° 571-576 and 578 of the Council of Europe Administrative Tribunal which, in 2017, confirmed its consistent jurisprudence holding that it cannot rule on decisions of the Committee of Ministers, but only on implementing administrative decisions by the Secretary-General. In like vein, the Appeals Board of the European Space Agency held in 2016 in joint Cases 98, 99, and 100 that the mere publication of the new subsistence allowance rates did not affect the claimants' personal interests and that legislation in itself does not automatically affect agents' legal position. This is only the case when the new legislation is applied in a concrete manner.

65. Other major international administrative tribunals confirm the same approach. The Administrative Tribunal of the International Labour Organization (ILOAT), for example, confirmed and refined its jurisprudence in the matter as follows in its Judgment No. 3291:

> 8. The Tribunal notes that allowing a complaint against a general decision which does not directly and immediately affect the complainant but which may have a direct negative effect on her/him in the future, would cause an unreasonable restriction of the right of defence, as staff members would then have to impugn immediately all general decisions which may have any connection with their future interests, on the basis that a general decision which is not challenged within the established time becomes immune from challenge. On this approach, once a general decision is considered immune, any complaint impugning the subsequent decision implementing it could not challenge the lawfulness of the underlying general decision. Considering this, the Tribunal is of the opinion that the approach illustrated by the recent case law (Judgments 2822 and 3146) is to be followed. According to that case law, a complainant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him, but she/he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action.

66. The ILOAT recently reaffirmed in its Judgment No. 4028 the principle that *"a general decision that requires individual implementation cannot be impugned; it is only the individual implementing decisions which may be challenged..."* (*cf.* also ILOAT Judgments Nos. 622, 663, 2953, 3628, 3736, 3740, 3811, and 3883).

67. The World Bank Administrative Tribunal too has held that it is without jurisdiction to adjudicate the validity of a general rule rather than the application of that rule in a particular case so as adversely to affect the applicant (see, for example, Decisions Nos. 41, 51, 52, 54, 118, 119 and 126).

68. The present appeal explicitly challenges the North Atlantic Council Decision PO(2015)0453-REV1, adopted on 2 February 2016, and requests that the previous footnote be reinstated. In order to trigger jurisdiction, the question thus to be answered is whether there was a specific individual administrative decision taken by the HONB, in

this case implementing a decision of the NAC, which directly and adversely affected appellants. Appellant did, in accordance with the pre-litigation proceedings of the present case, indeed receive a final response from, or on behalf of, the Secretary General denying his request for administrative relief. But, as the Tribunal held in paragraph 59 of Cases Nos. 2014/1041 and 2015/1045, the overall justice system is designed to challenge existing decisions. Appellants cannot through the administrative review process create an appealable decision that did not previously exist. The Tribunal does not have the power to hear such a challenge or to grant such a request

69. Respondent submitted during the hearing that the NAC decision was implemented through its publication. The Tribunal disagrees. Notification of legislation in itself does not automatically affect the legal position of staff members. This is only the case when the new legislation becomes applicable in a concrete manner. The contrary rule could seriously prejudice the rights of staff members, requiring them to contest policy changes when they are made, but before they are applied, or risk being barred from doing so at a later time (*cf.* above mentioned ILO Administrative Tribunal judgment No.3291).

70. No such implementing decisions had yet been taken concerning appellant when he lodged his appeal. Any facts that may have intervened since the lodging of the appeal cannot be taken into account. The Tribunal is fully aware of the need for appellant to obtain legal certainty, but departing from the existing legal framework outlined above would create precedents with uncertain consequences both for staff and for the Organization. This conclusion does not prevent appellant from challenging the lawfulness of the underlying general decision when challenging an implementing decision should it be applied to him.

71. The Tribunal, as is the case for almost all international administrative tribunals, does not have the competence to hear a challenge against a general rule. An appeal against a general rule is thus inadmissible. Hence, the Tribunal, as it held in other appeals involving similar issues (in particular, see AT judgments in Cases Nos. 2017/1114-1124 and Cases Nos. 2017/1127-1242) must conclude that the appeal is inadmissible.

E. Costs

72. Article 6.8.2 of Annex IX to the CPR provides:

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

73. The appeal being dismissed as inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 5 September 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

24 September 2018 AT-J(2018)0020

Judgment

Case No. 2018/1259

DL

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 4 September 2018

Original: French

Keywords: NCIA Contract Policy; 1) admissibility; administration's silence with respect to a complaint; implicit decision; concept of a reasonable time frame 2) definite duration contract; renewal; duration of renewal limited to two years; legality in the present case.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 14 June 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal, dated 23 January 2018 and registered on 30 January 2018, by Mr DL, seeking:

- annulment of the implicit decision to dismiss his complaint of 29 August 2017 in which he asked to be given an indefinite duration contract, or, failing this, a three-year contract, as well as the decisions of 12 June 2017 and 11 August 2017 dismissing his administrative reviews, and the decision of 25 April 2017 granting him a renewal of his contract for just two years;
- reimbursement of the costs incurred for his defence.

2. The respondent's answer, dated 3 April 2018, was registered on 9 April 2018. The appellant's reply, dated 7 May 2018, was registered on 8 May 2018. The respondent's rejoinder, dated 6 June 2018, was registered on the same day.

3. The Tribunal's Panel held an oral hearing on 14 June 2018 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

4. The appellant joined the former NATO Communication and Information Systems Services Agency (NCSA) on 1 February 2011 as a grade B5 programmer. He held a one-year definite duration contract. His duty station was SHAPE, Belgium. The contract provided that the employment was governed by the provisions of the NATO Civilian Personnel Regulations (CPR) and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and SHAPE regulations, directives and instructions as in effect at any given time. The contract further stipulated that if SHAPE wished to retain the employee's services after the expiration date of that contract, a new contract would be offered. The employee would be informed not less than six months before the expiry date of the contract whether or not SHAPE intended to offer a further appointment.

5. In September 2011, the appellant countersigned a definite duration contract for three years covering the period 1 February 2012 to 31 January 2015. The contract did not contain a clause on possible further appointments.

6. In 2012, a number of NATO entities, including the NCSA, were consolidated into the NCIA effective 1 July 2012. By memorandum of that date, the NCIA's General Manager notified the appellant that his contract was henceforth with the NCIA and that all other terms and conditions of his employment contract remained unchanged.

7. In June 2014 the appellant countersigned another definite duration contract for three years covering the period 1 February 2015 to 31 January 2018. The contract provided that the employment was governed by the provisions of the NATO CPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and NCIA regulations, directives and instructions as in effect at any given time. The contract did not contain a clause on possible further appointments.

8. On 25 April 2017 the appellant signed his current two-year definite duration contract with the NCIA running from 1 February 2018 to 31 January 2020.

9. However, in a letter dated 21 May 2017, the appellant requested that the NCIA conduct an administrative review with a view to his obtaining a three-year contract. He submitted that his first contract with the NCSA did not fall into any of the categories in Article 5.2 of the NATO Civilian Personnel Regulations (CPR) under which definite duration contracts may be given. He concluded from this that his first contract should be deemed to have been an initial contract within the meaning of Article 5.1 of the CPR and that, as a consequence, the 2011 contract should have been of indefinite duration. Furthermore he said he did not understand the reasons behind the decision to renew his contract for just two years, rather than three years, which he considered a violation of the duty to state reasons. He also submitted that the renewal was in violation of the NCSA Contract Policy, which according to him was in force at the time of his first contract and still in force for the current contract. This policy would guarantee him a first one-year contract with subsequent three-year contracts for as long as his post remained a valid requirement and his performance was satisfactory, both of which conditions were met. In the alternative, the contested decision in his view violated the NCIA Contract Policy. Lastly he contended an error of assessment, in view of the continued business needs and his good performance.

10. The Director of Infrastructure Services replied on 12 June 2017 advising appellant that the NCSA Civilian Contract Policy had been superseded by the NCIA Contract Policy, which had come into effect on 1 January 2013. He added that each decision on renewal required a comparative review that balanced the staff member's performance and abilities against the Agency's future requirements, and that in this case another contract of two years' duration was in line with this balance and the NCIA Contract Policy.

11. On 3 July 2017 the appellant wrote to the NCIA's General Manager requesting a second administrative review. He disputed that the NCSA Contract Policy had been replaced by the NCIA Contract Policy and emphasized the failure to state the reasons for the contested decision.

12. The Chief of Staff answered on 11 August 2017, referring, first of all, to the talk they had had on 18 July 2017, together with the Head, Human Resources. He repeated his argument that the NCSA policy no longer applied and that the two-year duration was sufficient for the appellant to prepare for the next stage of his career. Therefore the contested decision was in line with the NCIA Contract Policy.

13. On 29 August 2017 the appellant filed a complaint, repeating his previous arguments. His position was that he should have been awarded an indefinite duration

contract the first time his contract was renewed in 2012. In addition, he argued a violation of his legitimate expectations, since he had been informed in 2012 that his contract would henceforth be with the NCIA but that the conditions of his employment remained unchanged. He also contended that the new NCIA Contract Policy, of which he had not been made aware, nowhere stipulated that it superseded the NCSA one. He moreover once again alleged a violation of the duty to state reasons and a manifest error of assessment, to which he added abuse of authority by the Agency Supervisory Board (ASB) when it established guidelines, particularly the policy on the median of six years, which prevented many staff from reaching the threshold of ten years' service. He requested that a Complaints Committee be convened; this was never done.

14. Having had no response to his complaint, the appellant asked the NCIA General Manager what he had decided, submitting that an implicit decision had arisen on 28 September 2017 and that, without a response from the General Manager within fifteen days, he would exercise his right to file an appeal with the NATO Administrative Tribunal.

15. On 23 January 2018, the appeal was eventually filed against the implicit decision that the appellant dates at 27 November 2017, the date when the deadline of 15 days that he had set expired.

Legal background of the case

16. The appeal involves several interconnected provisions of the CPR:
- under Article 5.1.1 of the CPR, staff appointed or reappointed to the Organization prior to 1 April 2012 "*shall be offered contracts, known as initial contracts, of between one and 3 years' duration…*";
- under Article 5.2 of the CPR, the Head of a NATO body (HONB) may offer definite duration contracts not exceeding five years to staff appointed or reappointed if "*they are appointed to posts previously identified by the Head of NATO body as being required for a limited period*";
- under Article 5.5.3 of the CPR, following satisfactory performance during a definite duration contract, the HONB may offer either "*the renewal of the definite duration contract under the conditions of Article 5.2,*" or an indefinite duration contract;
- under Article 5.4.2 of the CPR, staff members who have served for ten or more years "*under definite duration contracts or under a combination of different types of contracts and to whom a further contract is offered shall be offered indefinite duration contracts"*; and
- under Article 6.1 of the CPR, "[*t]he 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*."

Applicable contract policy

17. When the appellant joined the NCSA in 2010, this NATO body's contract policy was set out in a 2006 memorandum which provided that, to meet needs from rapidly evolving technology and customer requirements, the Agency would adopt a more restrictive policy on indefinite duration contracts. The document explained that the NCSA Contract Policy would be to offer a one-year contract, with subsequent contracts of three-year duration for as long as the post remained a valid requirement, and, as provided in the CPR, once a civilian employee reached the threshold of ten years' service, an indefinite duration contract would be offered.

18. On 1 January 2013, *i.e.* well before the appellant signed a second three-year contract with the respondent, the NCIA promulgated Directive 2.1 on Contract Policy. Under Article 4.3.2 of the Directive:

> Staff, with the exception of scientists and possibly seconded staff, shall be offered a contract of indefinite duration, provided that they have served for ten or more years consecutively with NCI Agency, other NATO bodies or any of the other Co-ordinated Organizations, under definite duration contracts or under a combination of different types of contracts, *and to whom a further contract is offered* (emphasis added).

19. Under Article 4.1 of the Directive, the Agency is committed to retaining the very best staff members who perform at a superior level. Article 4.2 then states in part:

> It is essential for the Agency to maintain an up-to-date set of skills and competencies. Turnover is required and is desirable for a variety of reasons including but not limited to the introduction of up-to-date knowledge and experience from other organizations as well as fresh thinking and approaches that help keep the organization vital and relevant. This is balanced against the need to retain expertise based on sound management principles such as continuity and required capabilities.
>
> The preferred manning option for NCI Agency civilians shall be based on definite duration contracts. This means that unless specifically mentioned, all NCI Agency posts may be subject to rotation due to changes in the skills required by the Agency. This notwithstanding, indefinite contracts are allowed, as authorised by the NATO Civilian Personnel Regulations for a subset of NCI Agency personnel based on sound management principles such as continuity for the interest of the service and required skills.

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

(i) The appellant's contentions

20. The appellant contends that the present appeal was filed within 60 days of the implicit decision of 27 November 2017 dismissing his complaint, and consequently the present appeal is admissible.

21. As to the merits, the appellant submits five grounds for his request to annul the decision:

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR,
b. In the alternative, violation of the NCSA Civilian Contract Policy, of appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of Directive 2.1 on the NCIA Contract Policy,
c. Violation of the duty to state reasons,
d. Manifest error of assessment, and
e. Abuse of authority.

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR

22. The appellant first contends that the first contract contained a probationary period and was for that reason an initial contract within the meaning of Article 5.1 of the CPR. Secondly, the second three-year contract did not comply with Article 5.1 of the CPR, which provides for a maximum total duration of three years for initial contracts unless Article 5.2 is applicable.

23. Article 5.2 provides that definite duration contracts, not exceeding five years, may be offered to staff appointed, or reappointed, if (i) they are seconded, (ii) they are appointed to posts previously identified as being required for a limited period, (iii) they are appointed to posts previously identified as being posts in which turnover is desirable for political or technical reasons, or (iv) they are appointed to research posts in scientific establishments. The appellant contends that none of these situations applied to his case.

24. The appellant concludes that the first two contracts were initial contracts, that the second one should not have been of three years but only of two years or of indefinite duration, and that, in any case, any further contract should have been of indefinite duration.

25. The appellant considers the argument that he did not file a complaint at that time to be irrelevant, since the Agency took a new decision in 2017 when it offered him a further contract following another review of his case, thereby choosing to repeat its mistakes.

b. In the alternative, violation of the NCSA Civilian Contract Policy, of the appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of the NCIA Directive 2.1 on the NCIA Contract Policy

26. The appellant submits, in the alternative, that he should have been granted a three-year renewable contract, the two-year contract offer being in breach of the NCIA Civilian Contract Policy. When he was recruited, he was informed of the NCSA Contract Policy and expected a career pattern of a one-year contract followed by three three-year definite duration contracts (known as 1-3-3-3), and then an indefinite duration contract. His first two contract renewals were indeed of three years. He further expected a renewal as long as his post remained a valid requirement. He continued to have these expectations when the NCSA was transferred to the NCIA, since the letter informing him

of the transfer stipulated that all other terms and conditions of his employment remained unchanged.

27. The appellant adds that the NCSA Contract Policy was not superseded by the NCIA Contract Policy, since this was not mentioned anywhere and not referred to in his contracts. Moreover, he was not made aware of the introduction of the latter policy, the communication of which was anyway not optimal. He observes that staff members are in no way obliged to read newsletters and that newsletters are no substitute for formal notifications.

28. The appellant further observes that even if the NCIA Contract Policy did apply – which he does not consider to be the case – then the two-year duration offer was not in line with that policy either, since the latter provides that although initial and reassignment contracts are no longer being offered to staff, there may be staff holding either of these types of contracts and, in such a case, Article 5.5.2 of the CPR applies to them. As a consequence, and in accordance with this policy, an indefinite duration contract should have been offered.

c. *Violation of the duty to state reasons*

29. The appellant contends that no specific reason/justification was given for the offer of the two-year contract. The reasons for the decision were only mentioned subsequently; they included the future requirements of the Agency, the strategic direction and guidance received from the ASB, and the alleged superseding of the NCSA Contract Policy by the NCIA Contract Policy. Some of the reasons given were contradictory. He emphasizes that he is not in a position to understand the reasons behind the decision affecting him, particularly since the administration never responded to his complaint.

d. Manifest error of assessment

30. The appellant contends that the NCIA Contract Policy provides that definite duration contracts are normally of three years' duration. There was no particular reason not to offer a three-year contract, especially as his performance had been deemed either "very good" or "good" over the years, in a difficult context, and was later deemed "very good". Moreover, he was performing, on a day-to-day basis, operations which ensure business continuity. That continuity was now being jeopardized by the contested decision.

e. Abuse of authority

31. The appellant refers to the guidance given by the ASB to achieve a median of six years of employment in the Agency. He notes that the Agency is under the authority of the North Atlantic Council (NAC). The ASB can thus not modify the CPR, which are decided by the NAC. The Agency further appears to have an unwritten contract policy aimed at preventing anyone from reaching the threshold of ten years' service, which would be a breach of its own rules and a means of circumventing them.

(ii) The respondent's contentions

a. Admissibility of the appeal

32. The respondent argues that the appeal is time-barred. The complaint was submitted on 29 August 2017; an implicit decision to dismiss it would have arisen thirty days later, on 28 September 2017. Therefore, to be admissible, the appeal to the Tribunal should have been submitted within 60 days of the implicit decision, *i.e.* by 27 November 2017 at the latest.

33. Moreover, the respondent submits that the appellant is time-barred from appealing against his previous three contracts, signed in 2011, 2012 and 2015, as the deadlines for appealing against them had passed.

34. With respect to the merits, the respondent contends the following.

b. Indefinite duration contract

35. All of the appellant's definite duration contracts stipulated that the employment was governed by the provisions of the NATO CPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and NCIA regulations, directives and instructions as in effect at any given time.

36. The very wording of all the appellant's contracts clearly shows that these were definite duration contracts, governed by Articles 5.2 and 5.5.3 of the CPR. He never questioned any of these contracts, nor challenged them officially at the time. At no time did the appellant therefore hold an initial contract.

37. In fact, at the time the appellant was hired, all civilian posts of the former NCSA were considered as limited period posts, in accordance with Article 5.2 of the CPR, since the Head of the NCSA had in a memorandum dated 16 January 2006 declared all civilian posts as "limited period" posts as outlined in Article 5.2 of the CPR.

38. Moreover, Article 5.5.2 of the CPR does not require the Organization to offer an indefinite duration contract. It clearly states that the HONB may offer an indefinite contract. There is therefore no obligation.

39. The respondent notes that the only exception to this can be found in Article 5.4.2 of the CPR, which provides that staff members who have served for 10 or more years consecutively under definite duration contracts and to whom a further contract is offered shall be offered indefinite duration contracts. This provision is also in the NCIA Contract Policy. The appellant has not accrued ten years of service. The Agency concludes that it thus had no obligation to award an indefinite duration contract.

c. The appellant's legitimate expectations

40. The respondent submits that, contrary to the appellant's claim, the NCSA Contract Policy, introduced in 2006 and to which reference was made in the appellant's first contracts, provided no guarantee of continuous employment or of an indefinite duration contract before 10 years of service. In fact, it provided for posts of limited duration only.

d. NCIA Contract Policy – applicability

41. Regarding the appellant's submission that he was not made aware of the NCIA Contract Policy that entered into force on 1 January 2013, the respondent observes that it had provided sufficient information to the Agency staff. The policy was communicated over both the NATO Secret – to which the appellant had access – and the NATO Restricted systems. Furthermore, an Agency newsletter was sent to all staff on 18 January 2013, on both systems, and links were provided to the actual contract policy. The respondent lists the ways in which the new policy was communicated, including on the Agency's intranet, in an in-house magazine and at staff meetings. The appellant acknowledges that this was the case. In the respondent's view, while a NATO body certainly has a responsibility to provide its employees with accurate information on significant aspects of their employment, staff members also have a responsibility to familiarize themselves with the information provided to them and to make further inquiries as required. The Agency considers that it cannot be held responsible for the staff's shortcomings in familiarizing themselves with the information provided. Moreover, the NCIA Contract Policy clearly indicated that it was applicable to all NCIA staff, thus superseding the NCSA Policy, which was by then no longer in force.

42. Regarding the claim that the terms and conditions of the appellant's employment contract remained unchanged when the NCIA was established on 1 July 2012, the respondent observes that internal directives and regulations may be changed unilaterally, provided that they do not upset the balance of the contract. The appellant had from the very beginning been made aware that there was a possibility of several definite duration contracts, with a possibility of receiving an indefinite duration contract after 10 years. This did not change with the introduction of the NCIA Contract Policy.

43. In addition, from 2015 onwards, the appellant's contracts stipulated that they were governed by the NCIA regulations in effect, which the appellant could not therefore have been unaware of and which he has not disputed.

e. NCIA Contract Policy — substance

44. The respondent maintains that its contract policy does not substantially differ from the former NCSA Contract Policy. Both policies are in line with the CPR. They are based on offering a succession of definite duration contracts, leaving discretion for the employer to grant further contracts, including indefinite duration contracts.

45. The respondent adds that the preferred recruitment option for NCIA civilians is based on definite duration contracts. This means that unless specifically mentioned, all NCIA posts may be subject to rotation due to changes in the skills required by the

Agency. This notwithstanding, indefinite contracts are allowed, as authorized by the CPR, for a subset of NCIA personnel based on sound management principles such as continuity in the interests of the service and required skills.

46. Neither the NCSA Contract Policy nor the NCIA Contract Policy foresee an automatic award of further definite duration contracts or of indefinite duration contracts. The appellant was awarded a further definite duration contract, which is in line with the CPR.

f. Duty to state reasons

47. Regarding the duty to state reasons, the respondent, first of all, with reference to NATO Appeals Board decisions, submits that there is no obligation for the Administration to explain its decision. Since even the decision not to renew a definite duration contract is not subject to the requirement for explanation, the same would apply for the decision to renew a contract, even if the proposed duration was not what the staff member would have preferred.

48. The respondent is of the view that the appellant was adequately informed by the Service Line Chief, in the presence of the Service Area Owner and the Service Manager.

g. The appellant's performance

49. The respondent observes that the appellant is indeed a good performer, but that he did not receive one of the top ratings. The NCIA Contract Policy specifies that those staff members who are consistently high performers may be asked to stay on as long-term employees.

h. Agency Supervisory Board (ASB)

50. Regarding the submission that the ASB, in providing for a median of six years' service in its Strategic Direction and Guidance, is in violation of the CPR, the respondent notes that neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresees an automatic award of a predetermined number of definite duration contracts, and none contains an obligation on the part of the Organization to award follow-on contracts. The ASB's guidance, while providing further factors that can be taken into consideration when renewing the contract of a staff member, does not in itself modify the CPR, rendering the appellant's argument groundless.

51. The respondent highlights that the appellant himself has already passed the median of six years' service and has therefore, with his latest contract, already received a rather favourable treatment in comparison with many other staff members.

i. "Unwritten" contract policy

52. Regarding the appellant's contention that the Agency's decision to offer him a two-year instead of a three-year contract was taken with the sole aim of depriving him of health insurance and a retirement pension and that the Agency is applying an unwritten

policy aimed at preventing anyone from reaching the threshold of ten years' service, the respondent submits that this is not supported by facts. It points out that the Agency has since 2015 awarded 130 contracts of indefinite duration: 50 in 2015, 39 in 2016 and 45 in 2017. In comparison with other NATO bodies, the number of recently awarded indefinite duration contracts in the NCIA is rather high.

53. The respondent requests that the Tribunal declare the appeal unfounded.

D. Considerations and conclusions

i) On the admissibility of the appeal

54. The respondent maintains that the request is time-barred: the complaint of 29 August 2017, which went unanswered, would have given rise to an implicit decision to dismiss after 30 days, which the appellant then had 60 days to appeal to the Tribunal. The appeal, which could have been filed until 27 November 2017, was only filed on 23 January 2018, and is therefore time-barred.

55. The appellant takes a different view. He says that, having received no response to his complaint, he contacted the HONB on 13 November, giving him 15 days to respond.

56. Article 5.2 of Annex IX to the CPR makes no provision for the consequences of the HONB remaining silent with respect to a complaint, nor for the failure to convene a Complaints Committee. Only Article 5.2.5 indicates that "*the Head of the NATO body shall take a decision and notify the claimant thereof within 30 days of receipt of the report of the Complaints Committee*". The HONB has 21 days to convene the Complaints Committee, which in turn has 45 days to submit its report to the HONB and send a copy to the complainant. For complainants, the period after they have filed the complaint is an uncertain time, when they do not know what the response to their complaint will be and they are unable to pinpoint exactly when an implicit decision to dismiss their complaint may arise.

57. In the present case, the fact that the appellant contacted the HONB on 13 November 2017, *i.e.* 76 days after filing his complaint, is not a sign of any particular negligence on his part. Once again, the HONB did not respond to him and the appellant therefore contacted the Tribunal less than 60 days after the two-week time frame in which he had asked the administration to inform him of the follow-up to his complaint.

58. Given that Annex IX to the CPR says nothing about the consequences of the HONB remaining silent with respect to a complaint, the HONB demonstrated repeated negligence in the present case and the appellant contacted him again within a reasonable time frame, the request should be considered admissible.

ii) On the merits

59. As to the merits, the appellant submits five grounds for his request to annul the decision. They are briefly recalled here and will be addressed in the same order:

a. Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR,
b. In the alternative, violation of the NCSA Civilian Contract Policy, of appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of NCIA Directive 2.1 on Contract Policy,
c. Violation of the duty to state reasons,
d. Manifest error of assessment, and
e. Abuse of authority.

Violation of Articles 5.1.1, 5.1.2, 5.2, 5.3 and 5.5.2 of the CPR

60. The appellant was, until the contested decision, employed under three definite duration contracts. He is currently in his fourth definite duration contract, which he countersigned on 25 April 2017 without any reservation, effective for two years from 1 February 2018 to 31 January 2020. The wording of the appellant's contracts has always been clear: they explicitly mention that they are definite duration contracts. Nothing in them makes specific reference to or even appears to imply that the first contract or contracts were initial contracts.

61. The appellant submits that the first contract should have been an initial contract under Article 5.1 of the CPR and that, as a consequence, the contract offered in September 2011, or at least the one offered in June 2014, should have been of an indefinite duration.

62. Article 5.1 of the CPR provides:

> 5.1.1 Staff appointed or reappointed to the Organization shall be offered contracts, known as initial contracts, of between one and 3 years' duration unless Article 5.2 below applies.
> 5.1.2 Notwithstanding Article 5.5.2 below, an initial contract may exceptionally be renewed provided that the total length of service under initial contracts does not exceed 3 years.

63. Article 5.2 (Definite duration contracts) provides:

> Definite duration contracts not exceeding 5 years shall be offered to staff appointed or reappointed to the Organization if:
> - they are seconded, in which case such a definite duration contract shall not exceed the length of the approved secondment; or
> - they are appointed to posts previously identified by the Head of NATO body as being required for a limited period; or
> - they are appointed to posts previously identified by the Head of NATO body(2) as posts in which turnover is desirable for political or technical reasons; or
> - they are appointed to research posts in scientific establishments.

64. The Tribunal, first of all, observes in this respect that the appellant accepted without any reservation a series of contracts. He did not challenge them at the time. He has, moreover, constantly held, including in the present proceedings, that he was

expecting a series of contracts in accordance with the NCSA Contract Policy, which, in his opinion, guaranteed a first contract of one year to be followed by three three-year contracts.

65. In a first argument in support of his submission that his first contract should have been an initial contract, appellant contends that the inclusion of a three months' probationary period clause in his first contract was proof that the contract was an initial contract in accordance with Article 5.1 of the CPR (initial contracts). The Tribunal cannot agree with this submission. Article 6.1 of the CPR (probationary period) clearly provides:

> 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.

Thus, there can be a probationary period in either an initial or definite duration contract. Its inclusion does not show that a contract is an initial contract under Article 5.1.

66. The appellant contends that none of the four conditions for definite duration contracts under Article 5.2 of the CPR has been met, so Article 5.1 necessarily applies. There are no grounds for this argument. The respondent correctly points out that the Head of the NCSA in January 2006 declared all civilian posts as "limited period" posts in line with Article 5.2.

67. As this Tribunal held in Case No. 2013/1002, paragraph 27, it follows from the provisions of Article 5.2 that the duration of a contract may be limited, whenever the post has been previously identified as one in which rotation is desirable either for political or for technical reasons. It is the privilege of the Organization to decide on the activities where staff turnover is advisable according to its own aims and management policies. The only conditions to be met are clearly defined in Article 5.2 of the CPR. There must be (i) a previous identification of the posts, and (ii) a political or technical justification.

68. As the Judgment in Case No. 2013/1002 also mentioned, the NCSA, and later the NCIA, developed its own specific contract policy by means of successive directives where a general turnover clause was always included as an essential requisite for the Agency "to keep skills and competencies up to date", and established different rates of rotation depending on the area (for example, Directive on Personnel Contract Policy dated 12 February 2001; Directive 2-1 on Contract Policy dated 1 July 2005; and Directive 2-1 on Contract Policy dated 1 January 2013). Through the evolution of these directives it became clearly established that all civilian staff at the Agency were subject to rotation owing to its core competencies, and that non-turnover of the staff was the exception. There is no contradiction with the provisions of the CPR, since political and technical reasons for rotation may be settled on the basis of general and reasonable criteria, as long as the conditions of Article 5.2, as mentioned above, are met.

In the alternative, violation of the NCSA Civilian Contract Policy, of the appellant's legitimate expectations and of Articles 4.3 and 4.3.4 b) of the NCIA Directive 2.1 on Contract Policy

69. The requirement of legality is an essential element for the enforceability of a contract, or contracts. The Tribunal notes in this particular case that the contracts countersigned by the appellant included a clause stipulating that the NCIA directives were applicable. The employment relationship between the appellant and the Agency was also clearly identified as being one of definite duration contracts in accordance with the NCSA and NCIA contract policies, and accepted by him without reservation. The Tribunal concludes that the conditions under Article 5.2 were met and that the appellant's situation was unambiguously covered by definite duration contracts from the outset (see AT judgment in Case No. 2013/1002, paragraphs 29 and 30).

70. Lastly, with respect to the claim for an indefinite contract, it suffices to recall the Tribunal's confirmation in Case No. 2015/1065 that there is no obligation for the Organization to offer an indefinite duration contract to a staff member who has not yet reached ten years of employment. The Agency's decision in the matter is within its discretionary powers, is in accordance with its policies and is not tainted with any abuse of authority.

71. The appellant asserts, in the alternative, a number of violations of the NCSA and NCIA contract policies. The appellant in this respect mentions different situations concerning the NCSA and NCIA contract policies, while at the same time challenging the legality of the latter.

72. The appellant, first of all, refers in this respect to a letter by the NCIA General Manager dated 1 July 2012 informing him that, further to the Agencies Reform, the NCIA was established as from 1 July 2012 and that appellant's contract was henceforth with the NCIA. The letter then contains the sentence: "All other terms and conditions of your employment contract remain unchanged." The appellant concludes from this that the NCSA Contract Policy is still applicable to his situation.

73. The Tribunal is of the view that the sentence quoted by the appellant refers to the situation at that time and not to the future. There is no indication or implication in the appellant's contract that these regulations or directives were frozen as they stood on 1 July 2012, when the Agency came into existence. It is settled that Administrations may, under certain conditions, amend employment conditions. This is what the NCIA did in 2013 when it adopted its own contract policy, which may be seen as a refinement of the NCSA Policy. The new policy was issued to staff, as will be shown below. Both contracts offered in 2014 and 2017, as countersigned by the appellant, contain a clause stating that the employment is governed by the provisions of the NATO CPR and NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and NCIA regulations, directives and instructions as in effect at any given time. The Tribunal cannot but conclude that the NCIA Contract Policy was applicable to both contracts and to the challenged decision.

74. The appellant submits that he was not aware, or had not been made aware, of the NCIA Contract Policy. As the Tribunal has previously held, a NATO body has a responsibility to provide its employees with reliable information regarding significant aspects of their employment. The Tribunal is persuaded that the respondent provided sufficient information regarding its contract policy to Agency staff. The Tribunal recalls

that the policy was communicated over both the NATO Secret – to which the appellant had access – and the NATO Restricted systems. Furthermore, an Agency newsletter was sent to all staff on 18 January 2013, on both systems, and links were provided to the actual contract policy. In this connection, the Tribunal rejects the appellant's contention that changes in an agency's internal regulations can only be properly communicated to a staff member if they are expressly mentioned in the staff member's contract. Agencies modify their internal regulations and administrative documents with varying frequency and for varying reasons. There is no requirement that every such change must then be incorporated into every staff member's contract in order to be effective. The policy concerned was thus published and brought to the attention of staff. The respondent's efforts to acquaint its staff members with the new policy may not have attained perfect results, but it is not required to do more. The record shows that the respondent made substantial efforts, appropriate in the circumstances and utilizing various means of communication, to acquaint staff with the new policy.

75. The Tribunal is also of the view that employees have a responsibility to familiarize themselves with information provided to them and to make further inquiries as required. An agency cannot be held responsible for shortcomings of staff in familiarizing themselves with the information provided. In this regard, the NCIA Contract Policy clearly indicated that it applied to all NCIA staff, thus necessarily superseding the NCSA Policy, which was then no longer in force. The Tribunal finds the appellant's arguments in this respect not persuasive.

76. The next question to be answered is whether the Agency could under the CPR and its contract policy offer the appellant a two-year-duration contract or whether the appellant had legitimate expectations to see a three-year contract offered. The Tribunal notes that Article 5.2 provides that definite duration contracts shall not exceed five years. Paragraph 4.3 of the NCIA Contract Policy stipulates that definite duration contracts are normally of three-year duration. It is added that contracts may be for less than three years as required to support short-term projects, meet uncertainty with respect to the business outlook, staff performance and other factors. One can thus conclude that the normative texts do not prohibit the granting of contracts of less than three years.

77. It needs to be established, however, whether at least one of the conditions laid down by the Agency in its policy for granting a contract for less than three years was met. In the Tribunal's view, the Agency has the latitude to make the decision based on performance factors.

Violation of the duty to state reasons

78. The appellant contends that he was initially not provided with the rationale behind the decision of the Civilian Personnel Management Board (CPMB) to award him a two-year extension. The respondent contends that international administrative law does not require that reasons be given for a decision not to renew a contract. Without seeking to rule on that, the Tribunal is of the view that providing reasons for non-renewal is a sound administrative practice that gives due recognition to the interests of staff members in a matter that may be very important to them.

79. In his letter of 12 June 2017 answering the request for a first administrative review, the Director, Infrastructure Services observed:

> As you know, the Agency is facing much change in the coming years and therefore upon discussion during the Civilian Personnel Management Board, it was found that in your case a contract renewal of two years would best align with the business decisions of the Agency. The decision provides you with two further years of employment and time to search for a new job, while also allowing the transfer of knowledge and rotation thereafter.

80. In his letter of 11 August 2017 the Chief of Staff, answering the request for a further administrative review, referred to a meeting that he had with the appellant in the presence of the Head of the Human Resources department:

> We met on 18 July 2017, together with Head, Human Resources office, to discuss the rationale behind the Agency's decision and to allow you the opportunity to express your personal concerns in detail.

81. It is thus clear that the respondent's Chief of Staff had a lengthy meeting with the appellant at which the respondent's reasons and the appellant's concerns were thoroughly ventilated.

82. The appellant was thus put in a position to understand clearly the decision-maker's reasoning and to determine whether the contested decision was justified or tainted by an error. The Tribunal is also enabled to perform its judicial control (see AT judgment in Cases Nos. 889, 890 and 897).

Manifest error of assessment

83. The appellant contends that the NCIA Contract Policy provides that definite duration contracts are normally of three years' duration. There was, in his view, no particular reason not to offer a three-year contract, all the more so as his performance was excellent, later downgraded to very good. Moreover, he was performing, on a day-to-day basis, operations which ensured business continuity. That continuity was now being jeopardized by the contested decision.

84. The respondent observes that the appellant is indeed a good performer, but that he did not receive one of the top ratings. The NCIA Contract Policy specifies that those staff members who are consistently high performers may be asked to stay on as long-term employees.

85. The reasons given by the Administration are not inappropriate. It is the stated, transparent and legitimate policy of the Agency to have rotation among its civilian staff with the aim of reaching a target of a median of six years' employment in the Organization and retaining the top performers among its staff under indefinite duration contracts. Under this policy some staff will thus have a total of less than six years' service, some will have more than six years' service under definite duration contracts and again others will have indefinite duration contracts. Data provided by the Agency indeed confirm the implementation of this policy. The Agency holds the view that the appellant does have

good performance reviews, but at this stage he is in the bottom half of staff in terms of performance, the Agency did not manifestly err in its assessment of the appellant's situation. The decision regarding the appellant is thus not exceptional or contrary to stated policies. It is in line with the NCIA Contract Policy. The appellant could not have a legitimate expectation to the contrary. The Tribunal thus fails to see a manifest error of assessment in this. Moreover, with respect to the appellant's argument of business continuity, the Tribunal observes that this is the responsibility of the Agency, even more so since it has a confirmed policy of staff rotation.

Abuse of authority

86. In his last plea the appellant alleges abuse of authority. He contends that the ASB's internal guidance and the NCIA Contract Policy, by targeting a median of six years of employment, conflict with the CPR. He notes that the Agency is under the authority of the North Atlantic Council (NAC) and that, in his opinion the ASB cannot modify the CPR, which are decided by the NAC. The appellant asserts that the six-year rule constitutes an abuse of authority.

87. As the Tribunal has established above, neither the CPR nor the NCIA Contract Policy, nor even the former NCSA Contract Policy, foresee an automatic award of a predetermined number of definite duration contracts, nor do they contain an obligation for the Organization to award further contracts. The ASB, which is the Agency's highest authority, may give guidance to the Agency's management while staying within the limits of the CPR. As the Tribunal has also established above, the guidance given and the adopted policies are not contrary to nor do they modify the CPR.

88. The appellant further contends, without supporting evidence, that the Agency appears to have an unwritten contract policy aimed at preventing anyone from reaching the threshold of ten years' service, which would be a breach of its own rules and a way to circumvent them. The Tribunal cannot agree. Data provided by the respondent show that meaningful numbers of staff achieve this length of service and that others receive indefinite contracts.

89. The Tribunal is of the view that the contested decision is not tainted by abuse of authority.

100. For these reasons, the Tribunal concludes that there are no grounds for the appeal.

E. Costs

91. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 4 September 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 November 2018 AT-J(2018)0021

Judgment

Case No. 2018/1262
JS

and

Case No. 2018/1263
JH

Appellants

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 19 October 2018

Original: English

Keywords: admissibility; abusive proceedings; finality of Tribunal judgments; timing of appeals.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 20 September 2018. During the hearing the Panel indicated that it was its intention, as the appellants' complaints seek the same redress and rest on submission which are, for the most part, identical, to join the cases and issue a single judgment. Appellants agreed with this.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of two appeals, by former staff members Mr JS and Mr JH, against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK). Both appellants were party to earlier appeals against NAEW&CF GK involving similar matters. The Tribunal dismissed those earlier appeals on 17 March 2017 in its judgments in joined Cases Nos. 2016/1080 and 2016/1092 (H *v.* NAEW&CF GK), and joined Cases Nos. 2016/1081 and 2016/1096 (S v. NAEW&CF GK).

2. The current appeals, dated 9 February 2018, were registered on 9 March 2018 as, respectively, Case No. 2018/1262 and Case No. 2018/1263. Appellants submit that the job descriptions connected with contracts that were offered to them in 2015, and that they refused, were subsequently changed during the previous proceedings before the Tribunal. Appellants further allege that the NATO Council (NAC) approved the manpower establishment including these posts, at the B-4 level, on 23 May 2017. Appellants hold the view that the posts should have been graded as B-5/B-6 when they were offered to them in 2015 and that they were right in refusing them. They request that the grading of the posts be changed retroactively to B-5 and that, as a consequence, they are entitled to loss-of-job indemnities.

3. The respondent's answers, dated 27 April 2018, were registered on 2 May 2018. Appellants' replies, dated 21 May 2018, were registered on 9 July 2018. The respondent's rejoinders, dated 3 August 2018, were registered on 24 August 2018. On 8 September 2018 additional documentation provided by appellants was added as an "Addendum" to the submissions.

4. The Panel held an oral hearing on 20 September 2018 at NATO Headquarters. It heard appellants' statements and arguments by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the cases

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

6. Appellants, who served NAEW&CG GK for 30 and 34 years respectively, held indefinite duration contracts as Senior Technicians at B-4 level.

7. Following the NAEW&CF GK reorganization, as approved by the North Atlantic Council (NAC) on 30 September 2015, and which became effective on 1 November 2015, appellants were offered indefinite duration contracts in new posts as Principal Technicians, at a B-4 level. Appellants did not accept the new posts, arguing that the posts should have a higher grade and that they would not be qualified to fill them. Respondent disagreed, maintaining that the posts were properly graded and that appellants were qualified. Following their refusal to accept the new contracts they were offered, appellants received letters of termination of employment dated 16 December 2015 due to the suppression of their former posts as Senior Technicians. Appellants appealed these decisions in a first administrative appeal dated 3 May 2016 and in a second dated 23 June 2016. In their subsequent appeal to this Tribunal, *inter alia*, appellants requested the Tribunal to order correction of the post grading to a higher grade, to determine that termination of their employment was illegal, and to hold that they were entitled to loss-of-job indemnities. The Tribunal dismissed their appeals on 17 March 2018 in its judgments in joined Cases Nos. 2016/1080 and 2016/1092 (H *v.* NAEW&CF GK), and joined Cases Nos. 2016/1081 and 2016/1096 (S v. NAEW&CF GK).

8. On 17 May 2107 appellants, individually but with identical wording, requested a re-hearing based on the discovery of two internal manpower policy documents which were allegedly unknown during the proceedings before the Tribunal. On 19 June 2017 the Tribunal delivered Orders AT(TRI-O)(2017)0001 and AT(TRI-O)(2017)0002. It rejected the requests on grounds that none of the elements put forward by appellants constituted a new fact within the meaning of the provisions of Annex IX to the NATO Civilian Personnel Regulations (CPR). The Tribunal also stated that appellants were seeking to re-open a debate on the conclusions of the Tribunal, contrary to the rule that the Tribunal's judgments are final and not subject to appeal.

9. On 7 July 2017 appellants wrote again to the Tribunal's President, this time requesting a review of the 17 March 2017 judgments pursuant to Article 6.8.4(b) of Annex IX to the CPR. Appellants argued that the language of the job descriptions of the B-4 posts that were advertised on 12 May 2017, *i.e.* after the Tribunal's judgment, did not correspond to the descriptions of the posts that they were offered in 2015. On 19 July 2017 the Tribunal delivered Orders AT(TRI-O)(2017)0003 and AT(TRI-O)0004. The Tribunal rejected the requests, recalling its earlier Orders but adding that the considerations put forward referred to events after the judgment was rendered, and which in any event were not substantially different from the elements the Tribunal already considered in its judgment, and for which it already took a decision.

10. On 10 November 2017 appellants introduced requests for administrative review with NAEW&CF GK against the change in language in the job description of the concerned posts, as allegedly approved by the NAC on 23 May 2017. On 24 November 2017 respondent rejected the requests, maintaining that the requests were time-barred, that appellants had exhausted legal review of their complaints in connection with the Tribunal's 17 March 2017 judgments, and that the Tribunal had denied twice appellants' requests for a re-hearing.

11. On 18 December 2017 appellants introduced a request for further administrative review. This was rejected by the NAEW&CF GK Commander on 17 January 2018 for the same reasons.

12. On 9 February 2018 appellants submitted the present appeals.

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

(ii) Appellants' contentions

13. Appellants consider the appeals admissible. They contend that these are new cases with new elements reflecting new developments, *i.e.* the NAC decision approving what appellants regard as incorrect grades for the posts they were offered in 2015 and the non-disclosure of the upcoming change in the position descriptions of those posts by NAEW&CF GK during the 14 December 2016 hearing.

14. Appellants also consider that their appeals are not time-barred, taking into account the moment in November 2017 when they became aware of the 23 May 2017 NAC decision.

15. Appellants submit that the job descriptions as "Principal Technician" with "Primary Skill Level: Apply" at the grade B-3/B-4, which were offered to them before receiving the termination of employment letter dated 16 December 2015, were in breach of the guidelines as established by NATO document AAP-16(D) (Allied Administrative Publication Manpower Policy), the Skills Framework for the Information Age (SIFA), and the NATO Human Resources (Manpower) Management document. Appellants affirm that the job title "Principal Technician" as defined in the job description dated 2 July 2015 under "Primary Skill Level: Apply" must reflect the grade B-5/B-6, in accordance with referenced documents.

16. In their submissions appellants provide, *inter alia*, a wide array of different job descriptions and grading documents to support their claim of required skills and language in conformity with the above-mentioned documentation and policies.

17. Appellants allege that on 23 February 2016, during the previous proceedings, the job descriptions of the concerned posts were amended, and that NAEW&CF GK did not disclose this information at the December 2016 hearing of their cases.

18. Appellants underline that the Tribunal rendered its judgment on 17 March 2017 and that the NAC approved the amended job descriptions on 23 May 2017.

19. Appellants allege that the new post descriptions as approved by the NAC show that the language of the job descriptions changed from "Primary Skill Level: Apply" to "Primary Skill Level: Assist", with the incorrect grade of B-4. Appellants submit that this constitutes a major element and a major change, demonstrating that their initial claims were correct and that the posts offered to them should have been graded B-5/B-6.

20. Furthermore, appellants submit that respondent, by changing the primary skill level from "apply" to "assist," has implicitly admitted the grave error made in offering them

the contracts with the B-3/B-4 grading.

21. Appellants request the Tribunal to correct the grading of the posts offered to them (from B-4 to B-5) and to hold as a result that, because they were not offered a position at their prior grade (the B-4 grade offered them being incorrect, because a higher B-5 grade was required for the positions offered) termination of their employment was illegal and that they are entitled to receive loss-of-job indemnities.

(ii) Respondent's contentions

22. Respondent submits that the appeals are not admissible for reasons of *res judicata*.

23. Respondent refers to the Tribunal's Judgments in Cases Nos. 2016/1080 and 2016/1092 and Cases Nos. 2016/1081 and 2016/1096 dismissing appellants' contentions regarding the allegedly incorrect grading of the positions they were offered, and upholding the validity of the termination of their employment and the refusal to grant loss-of-job indemnities. Respondent holds that appellants attempt to seek the same legal relief on exactly the same subjects.

24. Respondent also refers to the Tribunal's Orders on 19 June 2017 and 19 July 2017 rejecting appellants' requests for a re-hearing based on the same matters and the same arguments presented in their current appeals.

25. Respondent affirms that appellants' submissions on a revised version of the job description do not change the subject matter of the appeals or open the way for a review of the Tribunal's previous decisions under Rules 28, 29 or 30 of the Tribunal's Rules of Procedure.

26. Moreover, respondent stresses that the revision of the job descriptions occurred more than one year after appellants rejected respondent's offer of these posts and after termination of their employment. They can therefore not derive a subjective right therefrom.

27. Finally, respondent refers to the Tribunal's judgments rejecting appellants' claims to be granted loss-of-job indemnities.

28. Respondent also considers the appeals inadmissible because the relief sought is time-barred. Respondent refers to Article 2.4 of Annex IX to the CPR whereby any request from a retired staff member shall be made within 30 days from the notification of the contested decision.

29. Respondent notes that when appellants submitted their first request for administrative review on 10 November 2017, all and any administrative decisions that they contest had already been taken far more than 30 days earlier. Respondent underlines that its denials of the current appeals on 24 November 2017 and 17 January 2018 rejected appellants' claims on grounds of inadmissibility.

30. Respondent requests the Tribunal to dismiss the appeals.

D. Considerations and conclusions

31. This is appellants' third attempt to appeal the Tribunal's 17 March 2017 judgments. The Tribunal recalls that appellants have twice before sought a review of those judgments. In both instances the Tribunal issued Orders dismissing the requests and stipulating that it does not enter into a discussion on its judgments. Nevertheless, the Tribunal sought to clarify to appellants why their appeals could not be considered. In these Judgments and Orders the Tribunal has answered most, if not all, questions raised by appellants in this, their third try.

32. The Tribunal deems it appropriate, however, before discussing the admissibility and merits of the present appeals, to recall a number of relevant points in the previous Judgments and Orders.

33. Regarding the grading of posts in general, including the posts under discussion, the Tribunal held in the 2017 Judgments in Cases Nos. 2016/1080 and 2016/1092 and Cases Nos. 2016/1081 and 2016/1096:

> 48. Decisions concerning the grading of posts are, in the first instance, within the discretionary powers of the management of an organization, whose recommendations are subject to assessment and possible revision by the NDMAA. These recommendations, as initially proposed or as subsequently revised, are then subject ultimately to consideration and approval by the NAC.
>
> 49. There is consensus among international administrative tribunals, with which this Tribunal has consistently concurred, that a decision in the exercise of an organization's discretion is subject to only limited review by a tribunal (*cf.* Case No. 885, paragraphs 33 – 36). The Tribunal can only interfere with a grading decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.
>
> 50. In view of this, tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases.
>
> 51. The Tribunal observes that during the evaluation of the proposed job descriptions and grading of posts, an apparently serious and coherent process was followed to assess proposals in the context of a changing and downsized environment. In the course of this process, a number of Principal Technician posts, and not only the one offered to appellant, were graded B-4. Others were indeed graded B-5. The fact that some posts were ultimately graded B-4 and others B-5 does not automatically mean that the overall decision was arbitrary. On the contrary, the Tribunal observes that the Organization sought to make considered and nuanced judgments in the exercise of its discretionary powers.
>
> 52. The Tribunal disagrees with appellant's contention that the alleged incorrect grading was in violation of binding Human Resources documents. Appellant in this respect relies on the *2012 NATO Human Resources (Manpower) Management* document. The cover page of this document, however, clearly says that it is a technical report that includes best practices, models and methodologies, data issues,

skill categories and experience levels in human resources management. The context and contents show that the document is a guide to personnel practices, not a set of binding legal rules. It stipulates that *"[t]he levels of responsibility suggested by the Skill Levels do not necessarily relate directly to rank or grade…"* and in the table that follows "*… depicts approximate relationships between Primary NOC Skill Level and Rank/Grade.*". Further, the document suggests the setting up of a more official and permanent working group to complete the work. The Tribunal concludes on the basis of its review of the document that it is not an internal instruction or a binding document. Appellant's plea in this respect fails.

53. The Tribunal concludes that the grading decisions were regularly taken in the exercise of discretionary powers, that there was no abuse of such powers and that there is no indication of arbitrariness. In this regard, it is established international civil service jurisprudence that, when allegations are made, it is the duty of those who make the allegations, in this case the appellant, to provide convincing proof. Appellant has failed to do so.

34. With respect to appellants' claimed inability to perform functions at the higher level appellants claimed should have been offered them, the Tribunal observed in its 2017 judgments:

59. Furthermore, appellant submits that he does not have the required qualifications for the post that was being proposed. Respondent, on the other hand, is confident that appellant has the necessary qualifications and can perform the functions satisfactorily. It, in addition, has offered training whenever necessary. The Tribunal finds that there is no *prima facie* evidence that appellant does not have the required qualifications, which could, moreover, not be established in actual practice following appellant's refusal to countersign the contract and at least try to perform the duties of the post. Appellant has failed to convincingly substantiate his submission.

35. Lastly, as far as the claims for loss-of-job (LOJ) indemnities are concerned the Tribunal held in the same judgments:

55. Appellant considers - and this appears to be the main purpose in pursuing the appeals - that he is entitled to the payment of a LOJ indemnity, for a number of reasons.

56. Annex V to the CPR lays down the regulations on the indemnity for loss of job. These accord the Secretaries-General of the Coordinated Organizations, including the NATO Secretary General, the power to award an indemnity for loss of employment to any staff member who holds a firm contract and whose services are terminated for any one of the following reasons:

(a) suppression of the budget post occupied by the staff member;
(b) changes in the duties of the budget post occupied by the staff member of such a nature that he no longer possesses the required qualifications;
(c) general staff cuts including those due to a reduction in or termination of the activities of an Organization;
...
and who
(a) is not offered a post in the same grade in the same Organization, or
(b) is not appointed to a vacant post in one of the other Coordinated

> Organizations at a comparable remuneration,
> …
>
> 57. In a first submission in this respect appellant contends that the post that was offered to him should have been graded B-5 and that the post offered was not "in the same grade" entitling him to an indemnity for loss of job. This calls for a number of comments.
>
> 58. First of all, the Tribunal has concluded *supra* that the B-4 grading of the post was not irregular. Already for that reason, the claim has become groundless. Secondly, while appellant's reasoning and motivations in this regard are not wholly clear or coherent, if the logic of appellant's claim for a regrading of a post is solely to claim a termination of appointment, with the payment of a LOJ indemnity, that result would be inappropriate and abusive. In this regard, it would defy all logic to consider continued employment with a promotion as loss of employment entitling a staff member to a LOJ indemnity.

36. In Orders AT(TRI-O)(2017)0001 and AT(TRI-O)(2017)0002, which were rendered in response to appellants' first attempt to secure reconsideration of the Tribunal's earlier judgments, the Tribunal observed:

> 11. Annex IX ... stipulates clearly that petitions for a re-hearing may only be made should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment.
>
> 12. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature, which existed prior to the judgment and which were unknown at that time by the Tribunal and by appellant, and which, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. The Tribunal observes, first of all, in this respect that all elements put forward by appellant in his letter were known by him at the time of the Tribunal's judgment. Secondly, appellant has not established that these facts were not known by the Tribunal.
>
> 13. The Tribunal cannot help but observe that none of the elements put forward by appellant in seeking re-hearing constitutes a new fact within the meaning of the above-mentioned provisions of Annex IX. Appellant is, in fact, seeking none other than a re-opening of a debate on the conclusions of the Tribunal, which is at variance with the rule that the Tribunal's judgments are final and not subject to appeal and with the purpose of a re-hearing.

37. In Orders AT(TRI-O)(2017)0003 and AT(TRI-O)(2017)0004, rendered in response to appellants' second attempt, the Tribunal held:

> 8. … The considerations put forward by appellant in his letter of 7 July 2017 refer to events after the Tribunal's judgment was rendered, and which anyway are not substantially different from the elements the Tribunal has already considered in its judgment, and for which it already expressed its views and position.
>
> 9. The Tribunal concludes that the conditions for a re-hearing of appellant's case have not been met and that the request for a re-hearing must be denied.

38. Coming now to the appeals presently before the Tribunal, the Tribunal recalls that it has constantly held that staff members or former staff members cannot challenge general rules or decisions but only implementing decisions directly and adversely affecting them (see, most recently, judgments in Joined Cases Nos. 2017/1127-1242 and Cases Nos. 2017/1114-1124). In the 2017 judgments concerning the present appellants (Cases Nos. 2016/1080 and 2016/1092 and Cases Nos. 2016/1081 and 2016/1096), the Tribunal held:

> 45. The reorganization decision, including the manpower establishment, is a general decision concerning posts that are not, or not yet, attributed to individual staff members. The latter therefore do not have an actionable right concerning the overall grading decision and the Organization is not under an obligation to justify its actions and decisions in this respect.
>
> 46. However, staff members may challenge the legality of an organization's staffing and grading decisions when challenging an individual administrative decision that directly and adversely affects them, such as the offer of a specific post, but can do so only within the framework of the CPR and established international civil service jurisprudence.

39. It is clear from the file and the oral hearing that whatever new facts may have occurred since the Tribunal's initial judgments in March 2017, allegedly involving a NAC decision that appellants have not produced or the publication of revised job descriptions, appellants have not been offered, nor have they unsuccessfully applied for, any of the posts under discussion. In other words, there is no implementing decision related to the alleged new facts that affects them. As a consequence, appellants do not have an actionable right. Their appeals are thus inadmissible.

40. Secondly, the Tribunal has held that not only must the pre-litigation procedures be exhausted before the Tribunal can entertain an appeal, but also that the pre-litigation process must have been timely initiated. Although it is not always clear which decision appellants are exactly challenging, *i.e*. the revised version of the job descriptions dated 23 February 2016, *i.e.* before the Tribunal was seized in the earlier cases, or an alleged NAC decision of 23 May 2017, they initiated the process for seeking an administrative review on 10 November 2017. Either date is long after the thirty days foreseen in Articles 2.1 and 2.4 of Annex IX to the CPR. No convincing arguments were presented that would justify such a lengthy delay. As a consequence, the appeals are time-barred and also for this reason are inadmissible.

41. In this case, it must be held that the present actions are a continuation of the appellant's' attempts to call into question the Tribunal's findings in their previous cases. With the present actions, the appellants raise the same pleas indiscriminately, in so far as they put forward arguments in their support which the Tribunal has already rejected in their previous actions. The appellants' overall conduct after the delivery of the Tribunal's judgments renders the present appeals abusive.

E. Costs

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

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

43. The appeals being dismissed as inadmissible; no reimbursement of costs is due. None were requested.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 19 October 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

19 November 2018 AT-J(2018)0022

Judgment

Case No. 2018/1258

DQ
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 5 November 2018

Original: French

Keywords: admissibility; late submission to the Tribunal due to the Head of NATO body's silence following a complaint.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mrs Maria-Lourdes Arastey Sahún, judges, having regard to the written procedure and further to the hearing on 21 September 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal, registered on 9 January 2018, by Mr DQ (Case No. 2018/1258), seeking:

- cancellation of the decision of 12 June 2017, by the General Manager of the NATO Communications and Information Agency (NCIA), not to renew his contract at its scheduled termination on 30 April 2018; and
- compensation for damage suffered, *i.e.* €15.500, which corresponds to a loss in earnings of €1.500 per year over a period of 10 years, various costs for moving from the Netherlands to Luxembourg, and a possible loss when he sells his house in the Netherlands.

2. The comments of the respondent, dated 3 April 2018, were registered on 11 April 2018. The appellant's reply, dated 9 May 2018, was registered on 22 May 2018. The respondent's rejoinder, dated 21 June 2018, was registered on 5 July 2018.

3. An oral hearing was held on 21 September 2018 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

4. The appellant joined the NATO Communication and Information Systems Services Agency (NCSA) on 1 September 2006 as a B4-grade technician. His three-year contract was renewed on 1 September 2009 but not completed, as he was transferred to another post for three years as from 1 May 2010, then for two years as from 1 May 2013, then again for three years as from 1 May 2015. The appellant was employed on this three-year contract when the dispute that was referred to the Tribunal arose.

5. Each of the definite duration contracts provided that the appellant’s employment was governed by the provisions of the NATO Civilian Personnel Regulations (CPR) and applicable NATO security regulations as well as by the relevant NATO/Allied Command Operations (ACO) and NCSA regulations, directives and instructions as in effect at any given time. As from the 2013 contract, the contracts acknowledged that the NCSA had become the NCIA on 1 July 2012, and “NCIA” replaced “NCSA” throughout the text. The appellant’s duty station was always in Brunssum in the Netherlands. Each of the contracts further stipulated that if the NCIA/CSSC wished to retain the staff member’s services after the expiration date of his employment, a new contract would be offered, and that the staff member would be informed no less than six months before the expiry of the contract whether or not the Organization intended to offer a further appointment.

6. On 12 June 2017, the NCIA General Manager informed the appellant that he did

not intend to renew the appellant's contract when it came to an end on 30 April 2018.

7. The appellant lodged a complaint on 11 July 2017. The administration replied on 19 July 2017, acknowledging receipt of what it called a request for "administrative review". On 1 August 2017, the administration informed the appellant that it had rejected his request for "administrative review".

8. In a letter dated 18 August 2017, the appellant challenged this decision, stressing that he had lodged a complaint and not a request for administrative review. The administration never replied.

9. In an attempt to get his so-called request for administrative review changed into a complaint, the appellant wrote on several occasions to the NCIA Human Resources department. The only reply he got was on 11 October 2017 when the administration said that he could file a second request for an administrative review. Still in the absence of any reply to his complaint, the appellant turned to the Tribunal on 30 October 2017 to ask for advice. The next day, the Registrar of the Tribunal replied that it was not within the Tribunal's remit to give advice to staff members, and that it simply ruled on matters submitted to it, as per Article 6.3.1 of Annex IX of the Civilian Personnel Regulations.

10. In the end, the appellant lodged an appeal with the Tribunal on 9 January 2018, seeking cancellation of the 12 June 2017 decision not to renew his contract at its scheduled termination.

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

(i) Appellant's contentions

11. Firstly, the appellant submits that under Article 4.2 of Annex IX to the CPR, the administration had an obligation to submit his complaint to a Complaints Committee for review, but from the very beginning the NCIA handled his complaint as a request for administrative review, and therefore did not establish a Complaints Committee.

12. Secondly, he claims that under Article 5.4.2 of the CPR, the administration had an obligation to offer an indefinite duration contract to any staff member who had served the Organization for 10 or more years. The appellant joined the Organization in 2006, and so should have been entitled to an indefinite duration contract upon expiry of his contract in April 2018.

13. Thirdly, the appellant submits that the challenged decision violates the NCSA Civilian Contract Policy. He claims that this contract policy, which governed his first employment contracts with the NCSA, remained valid, despite the NCSA becoming the NCIA, insofar as he was informed in 2012 that, despite the change, all the contract terms would remain unchanged.

14. Fourthly, he considers that he performed sufficiently well to be entitled to a contract renewal, and that the NCIA General Manager could not refuse it.

15. Lastly, he considers that though NATO bodies can choose to have different rules to the CPR, they can never curtail staff member rights that result from the CPR.

(ii) Respondent's contentions

16. Respondent argues that the appeal was submitted late. Because the appellant called his initial request to the administration a complaint, the respondent considers that there was an implicit decision to reject the appellant's complaint 30 days after it was submitted on 11 July 2017. Therefore, to be admissible, the appeal before the Tribunal should have been lodged within 60 days of the implicit decision, i.e. by 9 October 2017.

17. The respondent's defence lies mainly in the fact that the appellant failed to follow the procedure preceding litigation laid down in the CPR. It argues that the NCIA General Manager takes decisions after receiving advice from the Civilian Personnel Management Board, which would place an obligation on all staff members to first challenge the decisions of the Head of NATO body by seeking an administrative review then a further administrative review.

18. The defendant also contends that the appeal is inadmissible insofar as it seeks to contest the contracts prior to the 2015 one.

19. In substance, the defendant contests the appellant's interpretation of Article 5.4.2 of the CPR. It claims that the obligation to offer an indefinite duration contract to staff members who have completed more than 10 years of service only applies to staff members who are offered a new contract. The administration has the option not to offer a new contract to staff members on a definite duration contract that is about to expire, even if they have completed more than 10 years of service.

20. The defendant also claims that the appellant may no longer contest his three previous contracts, signed in 2011, 2012 and 2015, as they are now time-barred.

21. Regarding the succession of NCSA, then NCIA, directives, the administration argues that the fact that the NCSA became the NCIA automatically subjected staff member contracts to the rules applicable to the NCIA, since the administration has the ability to unilaterally change the general rules that apply to staff members; also, the NCIA rules were widely made known to staff members when the Agency was transformed.

22. Furthermore, the NCIA directives are very clear and set as a principle the rotation of staff to maintain the Agency's qualifications and skills in the scientific and technical field. The administration may renew contracts, but is not obliged to do so.

23. Next, respondent observes that the appellant was indeed a good performer, but that he did not receive one of the top ratings. The NCIA Contract Policy specifies that those staff members who are consistently high performers may be asked to stay on as long-term employees.

24. Lastly, the administration denies any prejudice to the appellant, because he resigned from his position for another one in another NATO body, where he was awarded an indefinite duration contract.

25. Accordingly, the respondent submits that the appeal must be dismissed as it is inadmissible and unfounded.

D. Considerations and conclusions

(i) On the admissibility of the appeal

26. The respondent argues that the appeal was submitted late: the challenged decision is dated 12 June 2017 and the appellant filed a request for administrative review on 11 July 2017, but the appeal was only lodged on 9 January 2018.

27. It should be stressed that the administration treated the appellant poorly. The initial decision was a decision taken by the Head of NATO body himself. As such, the mechanisms for seeking an administrative review, the aim of which is to allow the Head of NATO body to overturn an illegal decision by one of his/her subordinates, were not applicable. Though the appellant's initial request on 11 July 2017 was unambiguous ("*I would like to initiate a formal complaint based upon article 61.3 NCPR*"), the NCIA's administration treated it as a request for administrative review, misleading him about the means he had at his disposal to challenge the decision. As the Tribunal noted in its decisions in Case No. 2017/1112 and 2018/1253, the NATO bodies may not neglect the rights of staff members under the CPR, including the right to submit a complaint without a prior administrative review, as per Article 61.3.

28. However, the appellant was not vigilant enough. As early as 1 August 2017, he received from the NCIA's Director, Service Operations, an explicit refusal to address his complaint, which was referred to as a "request for administrative review".

29. Two possibilities:

30. Either the appellant considered that this refusal to address his complaint was a decision constituting grounds for grievance. In this case, if he felt it appropriate, he should have challenged the decision before the NATO Tribunal, since the initial decision of 12 June 2017 was from the Head of NATO body. Under Article 6.3.1 of Annex IX to the CPR, he had 60 days from the day of the notification to seize the Tribunal, *i.e.* until 30 September 2017.

31. Or the appellant considered that the Head of NATO body never replied to his 11 July 2017 complaint, as the NCIA deliberately relabelled his complaint, calling it a request for administrative review, and never addressed the complaint. The silence of the General Manager of the NCIA gave rise to an implicit decision to reject the complaint. The CPR does not state after how long an implicit decision to reject a complaint arises, but the Tribunal ruled (see AT judgment in Case No. 2016/1071, paragraph 20) that an implicit decision arises 30 days after a request to the administration. Here, based on the most

favourable method of calculation for the appellant, an implicit decision arose on 11 August 2017, meaning that the appellant had until 11 October 2017 to challenge it before the Tribunal. However, he seized the Tribunal on 9 January 2018 only. The complaint is inadmissible even under Article 6.3.3. of Annex IX to the CRP, which authorizes the Tribunal to extend the period by 30 days "*in very exceptional cases and for duly justified reasons*".

32. Based on an extremely sympathetic interpretation for the appellant according to which the administration's interpretation of his complaint was deliberately erroneous, it could be considered that the appellant reiterated his complaint on 18 August 2017, and never received a reply. But again, despite the poor management of this complaint (lack of response), the calculation of the period in which an appeal was possible shows that it was clearly too late by the time the appellant seized the Tribunal on 9 January 2018.

33. The appeal must therefore be considered as time-barred, and therefore inadmissible. Thus, the Tribunal is not in a position to investigate whether the illegalities alleged by appellant are well founded.

E. Costs

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

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

35. The appeal being dismissed as inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 5 November 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 November 2018 AT-J(2018)0023

Judgment

Case No. 2018/1267

EM

Appellant

v.

Headquarters Allied Joint Force Command Brunssum

Respondent

Brussels, 15 November 2018

Original: English

Keywords: recruitment; legitimate expectations; error of assessment; non-material damages.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 21 September 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against Headquarters Allied Joint Force Command Brunssum (JFCBS) dated 30 April 2018, and registered 3 May 2018 as Case No. 2018/1267, by Mr EM. Appellant seeks, *inter alia*, the annulment of JFCBS's decision informing him that his application for the post of Branch Head Budget & Disbursing at JFCBS had not been successful.

2. Respondent's answer, dated 15 June 2018, was registered on 18 June 2018. Appellant's reply, dated 13 July 2018, was registered on 17 July 2018. Respondent's rejoinder, dated 17 August 2018, was registered on 22 August 2018.

3 The Panel held an oral hearing on 21 September 2018 at NATO Headquarters. It heard appellant's statement and arguments by appellant's representative and respondent's representatives, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

5. Appellant is an A4 staff member, holding an indefinite duration contract with the NATO Support and Procurement Agency (NSPA) since 2012. At the time of the appeal, appellant's position was that of Head of Finance CEPS at CEPMA Versailles.

6. On 28 November 2016, appellant went on sick leave, and on 23 July 2017, while on sick leave, he applied for the position of Branch Head Budget & Disbursing at JFCBS. Appellant's sick leave ended on 4 September 2017, he resumed duties but was absent again as from 6 October 2017 for medical reasons.

7. On 11 October 2017, the NSPA requested an independent medical examination. Appellant was examined on 26 October 2017. On 19 November 2017, the doctor delivered his report, which stated that appellant was fit to resume his duties, on a part-time basis, until end 2017, but in a different position to the one he held when he resumed his duties on 4 September 2017.

8. On 6 October 2017, appellant was invited to a test and an interview in connection with his application to JFCBS. They were conducted on 30 and 31 October 2017 respectively.

9. On 15 November 2017, appellant was informed by JFCBS that he was being "*considered as the candidate with whom this Headquarters would like to continue the selection procedure.*" He was asked to undergo a medical examination, provide a copy

of his security clearance and to "*explicitly inform (…) whether or not (he) would accept the subject post if finally offered to (him) and what would be (his) earliest possible starting date*".

10. On 16 November 2017, appellant confirmed his acceptance, stated that his security clearance was under renewal (it had ended in August 2017) and gave his availability for the medical examination. The medical examination was scheduled on 4 December 2017. On 10 December 2017, appellant wrote to JFCBS to say that all went well at the medical examination, the final green light pending the results of the blood test, and suggested 1 January 2018 as his first working date at Brunssum.

11. On 12 December 2017, JFCBS replied that it was dealing with the security clearance, waiting for the results of the medical examination and checking whether a start on 1 January 2018 was feasible, stressing "*... I'm sure everyone will do what's possible to get all signs on green on time to make it work*". On 13 December 2017, JFCBS wrote "*in view of your transfer, it would be highly appreciated if you could send us an email address of your current CPO/human resources or personnel office in order to contact them as soon as possible*".

12. On 15 December 2017, appellant received an email from the Financial Controller JFCBS who wrote "*First of all my congratulations with your selection...Good news to read that you are able to start earlier in Brunssum....JFCBS/J1 is still waiting for the outcome of the medical and if that is OK, they will send you an offer, if you then accept you can resign with NSPA and NSPA HR can send their transfer sheet to JFCBS/J1...*"

13. On 20 December 2017, appellant received an email from JFCBS informing him that during the preparatory work for his transfer "*unexpected findings came to their attention. These findings seem to represent a non-acceptable breach of the NATO Code of Conduct and may require a review of the earlier decision by JFC Brunssum Nomination Authority to nominate you for subject position*". Appellant was given the opportunity to provide his comments, which he did on 21 December 2017.

12. In parallel, also on 20 December 2017, NSPA wrote to appellant that he had been selected for a position at JFCBS, with a starting date of 1 January 2018, but that since NSPA had not received his resignation letter, appellant was requested "*in accordance with the conclusions of the expertise (…) to take up (his) duties as of 3 January 2018"* and to visit the Agency's medical adviser "*for a return to work discussion*".

13. On 3 January 2018, appellant underwent the medical examination; he was considered fit to work and resumed his duties on 4 January 2018. He was also granted a provisional badge pending the issuing of a security clearance by his national authorities.

14. On 11 January 2018, appellant received a letter from JFCBS informing him that, in the end, his application for the job had not been successful.

15. After appellant requested clarification, he was informed on 12 January 2018 that the decision had been taken within the powers and at the discretion of the JFCBS Commander as the Head of NATO body (HONB).

16. On 7 February 2018, appellant filed a request for administrative review of the withdrawal of the job offer.

17. On 26 February 2018, JFCBS's Chief of Staff rejected the administrative review.

18. On 30 April 2018, appellant submitted the present appeal.

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

(i) Appellant's contentions

19. Appellant considers the appeal admissible since he submitted a request for administrative review of the 11 January 2018 decision on 7 February 2018. The request was rejected on 26 February 2018 (and notified on 27 February 2018) by the Chief of Staff "For the Commander, Allied Joint Force Command Brunssum". He understands that the decision must be regarded as adopted by the HONB. He further submitted the appeal within the 60-day time limit, *i.e.* by Monday 30 April 2018, 29 April 2018 being a Sunday.

20. On the merits, appellant contends a violation of the duty to state reasons and a manifest error of assessment. Appellant notes that the contested decision only stated that the "*application finally had not been successful'* and that the 26 February 2018 letter only indicated that "*After careful review of the case, I confirm the earlier decision that your application was not successful. As a result the regret letter sent you … stands*". Appellant therefore maintains that he was not provided with sufficient information to determine whether the refusal of his request was well founded and to enable him to carry out his review.

21. Further, appellant refers to the email received on 20 December 2017 and maintains that the reasons given for stopping his recruitment amount to a manifest error of assessment. The specific issues referred to were: 1) appellant was on sick leave from 28 November 2016 until 31 December 2017 and this information had not been provided during the recruitment process and 2) appellant did not hold an active security clearance since it had expired in August 2017 and this information had not been provided during the recruitment process either.

22. Appellant maintains that the possibility offered to provide comments on the 20 December 2017 email did not fully respect his right to be heard. Appellant considers that he was not aware of what exactly he was being reproached for, and that he was not given sufficient time (24 hours) to protect his rights and to set out his arguments fully and completely.

23. In addition, appellant stresses that he was not asked to provide the above-mentioned information during the recruitment process and that he was never asked about his health status. He continues by saying that there was no relation between his sick leave and his professional capabilities and that he did not withhold any information from the Selection Board, who also agreed that the interview was not the time nor the place to start discussing in further detail his current relationship with the NSPA. He stresses

that his sick leave was linked to his working conditions with the Agency and that he expected to be considered fit for work, including deployment. Appellant further highlights that only medical staff are allowed to ask information regarding medical issues and states that he did inform the medical adviser about it.

24. Appellant continues by expressing concerns about how – possibly during the transfer procedure – JFCBS obtained the information about his medical status, which is personal data, and contends this to be a violation of his privacy rights and an improper treatment of his personal data.

25. Concerning the security clearance, appellant doubts that not having a valid security clearance would be a problem for JFCBS. Appellant refers to the fact that his clearance was under renewal and in particular to ACO Directive 50-4 under which provisions the appointment could have been postponed until receipt of the renewal.

26. Lastly, appellant maintains that JFCBS violated its contractual obligations. He argues that there was already an agreement between the parties, the post being offered and accepted without reservation, with the start date agreed. Appellant considers that respondent could not just withdraw the job offer.

27. Appellant requests the annulment of the contested decisions, which consequently should lead to his recruitment at JFCBS. In the event of this not being possible, he requests compensation for the material damage suffered, calculated to be €150.000 (notice period plus loss of job indemnity) plus €30.000 representing the costs deriving from this decision, such as the loss of income due to his spouse's resignation in preparation for a timely move to the Netherlands. Appellant also evaluates at €20.000 the non-material damage suffered to his professional reputation and image and the impact on his private and family life.

28. Appellant requests that the Tribunal:
- annul the 26 February 2018 decision to reject his request for administrative review;
- annul the 11 January decision informing appellant that his application for the post had not been successful;
- alternatively, compensate the material damage evaluated *ex aequo et bono* at €180.000;
- compensate the non-material damage evaluated *ex aequo et bono* at €20.000; and
- reimburse the legal, travel and subsistence costs incurred and the fees of the retained legal counsel.

(ii) Respondent's contentions

29. Respondent considers the appeal inadmissible, as filed outside the time limits, arguing that the last day for filing would have been 27 April 2018, not 30 April 2018.

30. Respondent denies the existence of an employment relationship between JFCBS and appellant. Respondent refers to Article 4.6 of the Civilian Personnel Regulations (CPR) whereby *"[t]he appointment of a member of the staff is effected by the signature of a contract specifying the date from which it takes effec*t."

31. Respondent notes that at no stage was a firm offer or contract made, accepted or signed by any of the parties. It affirms that the statement by JFCBS that appellant was considered a candidate with whom JFCBS would like to continue the selection process is merely a statement of intent, which does not create rights and may be withdrawn.

32. Respondent explains that during the selection process it discovered that appellant did not satisfy several of the conditions of engagement laid down in the job description or internal rules and that there were significant discrepancies between documents submitted by appellant and his personal file. Respondent continues by submitting that it became aware of such incompleteness and omissions in the application and the misrepresentation of appellant's work experience only after receiving the transfer sheet from NSPA on 18 December 2017, containing information regarding the extended sick leave as well as the absence of a valid security clearance.

33. Respondent maintains that even if JFCBS could decide on discretionary grounds to terminate the selection process with appellant, the arguments given constituted a valid reason for doing so. Respondent refers to Article 1.2 of the CPR, which states that the paramount consideration in the appointment of staff shall be the necessity of securing the highest standards of diligence, competence, and integrity.

34. Respondent continues by stating that appellant chose to withhold information, to provide half-truths and to leave out relevant information, which led to questioning his integrity and loyalty to the Organization. Respondent considers that appellant did not demonstrate the high standards which may be expected from NATO civilians, especially for A-grades and, in particular, for the function where he would be responsible for the control and management of large amounts of NATO funds.

35. Concerning the claim of violation of privacy rights, respondent states that it is standard practice for personnel files to be sent by one NATO entity to another in the case of a potential transfer. It adds that the so-called "transfer file" does not include medically sensitive data, but does include information regarding the days taken as leave/sick leave. Respondent stresses that it did not inquire about the cause of his absence but appellant chose not to mention it in its entirety.

36. Respondent denies a violation of the right to be heard, stressing that on 20 December 2017 appellant was given the opportunity to provide comments on the prolonged absence from work and the absence of a security clearance. Respondent notes that appellant replied that the information sought was considered medically sensitive and that he assumed he had a waiver for a security clearance; hence it maintains that there was no such violation.

37. Respondent rejects appellant's request for material damages, including the loss of his spouse's income, and emphasizes that appellant did not resign from his job at the NSPA. Respondent also rejects the request for non-material damages as the causality between the loss in reputation and the unsuccessful application was not proven.

38. Respondent requests that the Tribunal:
- declare the appeal inadmissible; and
- uphold the JFCBS decision of 26 February 2018.

D. Considerations and conclusions

(i) Admissibility

39. Article 6.3.1 of Annex IX to the CPR provides:

> Except with respect to decisions for which there are no channels for submitting complaints or where the appellant and the Head of the NATO body concerned have agreed to submit the matter directly to the Tribunal, the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex. In cases where channels for submitting complaints are available and have been pursued, the appeal must be submitted within 60 days of the latest of the following to occur:
>
> (a) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will not be granted; (…)

40. The Tribunal notes that the contested decision of 26 February 2018 was notified to appellant on 27 February 2018 and that the appeal was filed on Monday 30 April 2018. The effective notification of the decision constitutes the essential moment from which the deadline runs. When a complaint has been submitted, this time frame runs from the time of notification of the refusal to allow the complaint (see AT judgment in Case No. 2016/1073). Therefore, the *dies a quo* cannot be set on the same day of the decision, as respondent contends. Neither can the period begin on the same day of the notification, but only on the day following the notification, when the notified staff member enjoys the first complete day permitting him/her to react to the decision. The Tribunal must stress that Saturday not being a working day in the Organization, the time limit for submitting an appeal is therefore to be extended until the next working day. In the present case the appeal was filed on the first working day after the sixtieth day following the notification of the decision. The appeal is admissible.

(ii) Merits

41. Appellant requests first of all the annulment of the decision of 11 January 2018 and the subsequent decision of 26 February 2018, in which respondent rejected his application for the position of Branch Head Budget & Disbursing, on the basis that the Organization did not fulfill its duty to state reasons. The Tribunal has previously mentioned in its jurisprudence that the duty to state reasons is intended to provide the staff members concerned with sufficient information to determine whether the decision adopted was founded and to make it possible for the decision to be the subject of judicial review (see AT judgment in Case No. 2018/1254).

42. It is evident that the decision of 11 January 2018 did not contain any explanation for the announcement that appellant's application had not been successful. However, on the following day appellant was provided with extended information that the decision had been taken "within the powers and discretion" of the HONB and, as the appeal itself states, respondent had already shown the reasons for stopping appellant's recruitment in the email dated 20 December 2017. Those reasons were confirmed at the hearing, in which respondent's claims and observations were fully and exclusively founded on the issues already brought up in the abovementioned email.

43. Thus, it became clear that the Organization decided not to recruit appellant on the basis of his alleged failure to inform it about his long-term sick leave and the expiration of his security clearance. In fact, respondent claims that these issues were sufficient to reconsider whether appellant was fit for the job on offer.

44. First of all, the Tribunal recalls that appellant was already on sick leave when he applied for the job, that this was still the case when respondent interviewed him and, most importantly, that on 15 November 2017, in the same letter in which appellant was informed that he was considered "the candidate" with whom respondent wanted to continue the selection process, he was requested to undergo a medical examination (which was scheduled on 4 December 2017). Appellant was considered fit to work and ended his sick leave on 31 December 2017 and on 4 January 2018 he returned to his position at the NSPA. In addition, on 16 November 2017 appellant informed respondent that his security clearance, which had ended in August 2017, was under renewal – it was finally renewed by Belgium in June 2018. Moreover, appellant kept on working for the NSPA with a temporary waiver without security restrictions.

45. The Tribunal has difficulty understanding how someone can be considered the suitable candidate following the prescribed tests and interview with the Selection Board and suddenly become the opposite on the basis of aspects that had already been acknowledged by the recruiter. The Tribunal does not accept that the two items on which respondent bases appellant's lack of suitability can justify respondent's decision.

46. The specific medical situation was not part of the requirements for access to the position appellant applied for. Respondent could not enquire about the candidate's health status unless the findings of the medical examination required by the selection process showed a reasonable and justified incapacity for the requirements of the post. This is not the case here. Appellant underwent the medical examination and provided adequate information. Moreover, he was fit to work on the date scheduled for him to start in the post. The Organization cannot reproach him for misinformation, disloyalty or concealment and, consequently, the challenged decision is unjustified for this reason.

47. The question of the security clearance is also not grounds for the refusal of appellant's candidacy. Appellant was a staff member of a different agency, not a candidate from outside the Organization. Moreover, appellant revealed in due time that his security clearance was in the process of being renewed.

48. The challenged decision was inconsistent with respondent's acts immediately prior to it. It is neither possible nor necessary to conclude that a contractual link was already established between the parties, but the Tribunal observes that the way in which the selection process developed obliged the Organization to find and prove that exceptional and significant circumstances emerged which justified breaching appellant's legitimate expectations.

49. The evidence offered in the file and at the hearing is sufficient to render the factual assessments of the decision implausible. An error of assessment is manifest in this case and justifies the annulment of the challenged decision.

50. Appellant also seeks, alternatively, compensation for material damage, without offering any evidence or justification for said damages.

51. Considering, finally, the submissions for compensation for the non-material damage that appellant alleges he suffered with the adoption of the challenged decision, the Tribunal considers that the annulment of an act tainted with illegality may in itself constitute adequate and, in principle, sufficient reparation for any non-material damage that this act may have caused (see AT judgment in Case No. 2016/1074). However, in light of the legitimate expectations that the Organization created with the way in which the selection process developed and the way appellant was treated at very short notice, the Tribunal considers it appropriate to award non-material damages. Thus, appellant shall be compensated with €10.000.

E. Costs

52. Article 6.8.2 of Annex IX to the CPR provides:

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

53. The appeal being successful, appellant is entitled to reimbursement of justified expenses incurred.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The decisions of 11 January 2018 and 26 February 2018 are annulled.
- Appellant shall be compensated with €10.000 for non-material damage.
- The rest of the submissions are dismissed.
- Respondent shall reimburse appellant's justified expenses and the costs of retaining counsel up to a maximum of €4.000.

Done in Brussels, on 15 November 2018.

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

Certified by
the Registrar
(signed) Laura Magliaf

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 December 2018 AT-J(2018)0024

Judgment

Joined Cases Nos. 2017/1107 and 2017/1110

CN

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 23 November 2018

Original: French

Keywords: information letter; act not changing the staff member's legal position; preparatory act; principle of good administration; duty of care; Article 45.7 of the CPR; period of 21 consecutive months' extended sick leave; termination owing to extended sick leave; procedure; effective date; compensation for material damage.

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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 A. Vassilopoulos, judges, having regard to the written procedure of the two cases and further to the hearing on 20 September 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal by Mrs CN, a staff member of the NATO Support and Procurement Agency (NSPA), dated 16 January 2017 and registered on 23 January 2017. In this appeal, registered as Case No. 2017/1107, appellant is seeking annulment of respondent's decision of 16 November 2016 terminating her employment contract with immediate effect on account of extended sick leave.

2. Appellant submitted a second appeal on 14 April 2017, which was registered on 20 April 2017. In this appeal, registered as Case No. 2017/1110, appellant is seeking annulment of respondent's decisions of 27 October and 14 November 2016 obliging appellant to resume working as of 3 November 2016 and taking away her right to medical arbitration proceedings.

3. The respondent's answer, in Case No. 2017/1107, was entered on 23 March 2017 and registered on 28 March 2017. The appellant's reply was entered on 27 April 2017 and registered on 4 May 2017. A rejoinder was submitted on 2 June 2017 and registered on 6 June 2017.

4. The respondent's answer, in Case No. 2017/1110, was entered on 19 June 2017 and registered on 21 June 2017. The appellant's reply was entered on 15 May 2018 and registered on 22 May 2018. A rejoinder was entered on 19 June 2018 and registered on 25 June 2018.

5. By order of the Tribunal President on 8 May 2017 in AT(PRE-O(2017)0002, the two aforementioned appeals were joined for the purposes of the written and oral parts of the proceedings and the decision closing the proceedings.

6. By order of the Tribunal President on 10 July 2017, further to the parties' request dated 29 June 2017 and in accordance with Article 23 of the Rules of Procedure, the proceedings in the aforementioned two appeals were suspended until 31 December 2017 in an effort to settle the disputes amicably (AT(PRE-O)(2017)0003).

7. Following a second request by the parties dated 13 December 2017 and in accordance with the same Article, the Tribunal President extended the suspension of the proceedings through to 15 April 2018 (AT(PRE-O)(2017)0005 dated 21 December 2017).

8. In the absence of an agreement between the parties and in accordance with the President's Order of 21 December 2017, the written part of the proceedings was resumed at the stage at which it had been suspended, and concluded for the joined appeals when respondent's rejoinder was entered on 19 June 2018 (Case No. 2017/1110).

9. The Tribunal's Panel held an oral hearing on 20 September 2018 at NATO Headquarters in Brussels. It heard arguments by the parties in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

10. Appellant began working for the Organization on 1 October 2008. In October 2014, respondent offered her a three-year definite duration contract for a B-grade post, for the period from 1 October 2014 to 30 September 2017.

11. Following medical problems that required surgeries, appellant was placed on sick leave covered by a series of medical certificates from 19 November 2014 to 16 November 2016, the date when respondent's decision to terminate her contract on account of extended sick leave was taken.

12. The case file reveals that during the period of sick leave from 19 November 2014 to 16 November 2016, appellant was allowed for a brief period totalling two months (from 2 February 2015 to 2 April 2015) to work on a medical part-time basis, as permitted by the rules and in accordance with respondent's two successive decisions on 29 January 2015 and 2 March 2015.

13. In June 2016, in the framework of the group insurance policy between the Organization and the insurance company Alliance Worldwide Care (AWC), the latter requested that respondent have appellant undergo an independent medical examination to assess her degree of permanent invalidity.

14. In a letter dated 20 June 2016, respondent informed appellant of AWC's request and sent her a list of independent medical practitioners who could assess her degree of permanent invalidity, asking her to choose one from the list.

15. By registered letter dated 24 June 2016, appellant deferred to respondent's request and chose a medical practitioner to perform the examination in question.

16. The case file reveals that this examination took place for the first time on 25 July 2016. However, because appellant's state of health had not stabilized as of the date of the examination, the medical expert could not reach a conclusion about appellant's degree of permanent invalidity. In the report dated 8 August 2016, the expert concluded that "*stabilization can be expected [...] at the end of 2016*" and that *"[appellant's] temporary total incapacity to work is justified through the end of 2016*". In that same report, the expert concluded that "*a follow-up examination [...] could be envisaged in January 2017*".

17. In letter dated 5 September 2016, respondent informed appellant of the medical expert's findings as noted above and recommendation for a further medical examination on 5 October 2016.

18. The case file shows that respondent, in an email on 6 September 2016, forwarded the medical expert's findings and requested confirmation of the appointment for the further medical examination, scheduled for 5 October 2016.

19. In an email dated 30 September 2016, appellant confirmed that she would be at the appointment on 5 October 2016 with the medical practitioner chosen for the examination to determine her degree of permanent invalidity.

20. In a letter dated 5 October 2016, respondent sent appellant her administrative file which had been submitted to AWC as part of implementing the above-mentioned permanent invalidity procedure. This file included a note by the NSPA Medical Advisor also dated 5 October 2016, in whose opinion appellant's potential invalidity did not arise from an accident occurring on duty, from an occupational illness, from a public-spirited act or from risking her life to save another human being.

21. On 6 October 2016, the medical expert wrote his report on the examination he had performed the day before, with the finding that appellant had a degree of incapacity for work of 20%.

22. In a letter dated 13 October 2016, respondent told appellant that it had received the findings of the medical examination of 5 October 2016 from AWC. According to respondent, the examination revealed that appellant's state of health corresponded to a percentage of invalidity below the 33.33% threshold for claiming a pension for permanent invalidity. The same letter asked appellant to sign the statement about her degree of invalidity as assessed in the medical examination.

23. The case file shows that respondent, in an email on 14 October 2016, forwarded the medical expert's findings from the examination on 5 October 2016.

24. In an email dated 25 October 2016, respondent's medical practitioner invited appellant to a meeting with the Agency's medical officer to discuss the findings of the medical report of 5 October 2016.

25. In an email the same day, appellant informed respondent that she intended to meet with the Agency's medical officer after she had received the report that the medical expert had sent to AWC.

26. In a letter dated 27 October 2016, respondent informed appellant that, based on the 5 October 2016 medical examination and information provided following the AWC medical examination on 26 October 2016, her degree of permanent invalidity was 20%. The same letter stated that the expert had confirmed to respondent that appellant was fit to resume working part-time at 50% as of 1 November 2016. Also in that same letter, respondent invited appellant to undergo a medical examination on 2 November with a view to resuming work on 3 November 2016. The decision in that letter forms one of the two contested acts in Case No. 2017/1110 (decision of 27 October 2016).

27. By registered letter on 28 October 2016, appellant informed respondent of the existence of a medical certificate attesting to her incapacity for work for a period that

covered the date of 3 November 2016, and sought explanations as to whether respondent, in its letter of 27 October 2016 (see above paragraph), was in essence challenging the validity of her medical certificate.

28. In an email dated 2 November 2016, appellant cited the above-mentioned medical certificate to inform respondent that she would not be attending the medical examination scheduled that day.

29. In an email dated that same day, respondent, noting appellant's refusal to attend the planned medical examination, began by recalling the context in which she had been asked to come to the Agency, and then proposed a meeting to discuss the situation she was now in as a result of the findings of the medical examination of 5 October 2016 as well as the options available to both parties at this stage for her to resume working.
30. Appellant sent respondent an email on 3 November 2016 to explain that she was unfit to work for medical reasons, and the same day emailed respondent another medical certificate attesting to her incapacity for work over the period from 3 to 11 November 2016.

31. In an email to appellant dated 3 November 2016, respondent acknowledged appellant's position that she would not contact the relevant services nor complete the preliminary formalities for resuming work, on grounds that she had another medical certificate attesting to her incapacity for work. In these circumstances, respondent underscored the existence of differing medical opinions: the one from the medical examination of 5 October suggesting that appellant resume working, and the one from the subsequent examination attesting to appellant's temporary incapacity for work until 11 November 2016. Therefore, to overcome the impasse created by having two differing medical opinions, respondent invoked the possibility of initiating medical arbitration proceedings in line with Article 7 of the group insurance contract between the Organization and AWC, to support or refute the findings of the 5 October 2016 examination.

32. In the same email of 3 November 2016, respondent informed appellant that in any event, her entitlement to sick leave would end on 18 November 2016, the expiry date of the maximum period of 21 consecutive months of extended sick leave following the first three months of sick leave, in accordance with Article 45.7 of the NATO Civilian Personnel Regulations (CPR). Also in that email, respondent asked appellant, firstly, to complete the formalities required by the medical examination procedure of 5 October 2016 and sign the statement for AWC and, secondly, to agree to or turn down the possibility of medical arbitration in accordance with the above-mentioned Article 7 owing to the differing medical opinions on her fitness to resume working.

33. In an email on 4 November 2016, appellant wrote that she was unfit to resume working because of her health problems, as shown by the medical certificates she had submitted in to respondent's services in a timely manner. Furthermore she said she had sent the requested documents to the Organization's medical service (statement of her degree of invalidity below 33.33%) and had asked to see the group insurance contract between NATO and AWC. As for the supposed recommendations of the medical expert

on the basis of which appellant had been asked to resume working, she said that she could not find those documents and requested information about this.

34. In an email dated 4 November 2016, respondent acknowledged that appellant had signed the statement of invalidity from the medical examination of 5 October 2016; it recalled that her absence since 3 November 2016 was unjustified and that appellant risked having to pay back the undue salary she had received for the period from that date forward. In the same email, respondent reminded her that should there be any disagreement over appellant's resumption of work stemming from her new medical certificate, it would be appropriate to pursue the proposed arbitration.

35. In an email dated 7 November 2016, appellant informed respondent that she had no other choice but to pursue the suggested arbitration, and she asked respondent for information and clarifications about the substance of Article 7 of the group insurance contract between NATO and AWC.

36. In an email dated 8 November 2016, respondent asked appellant to come to a meeting that same day.

37. In an email dated 10 November 2016, respondent reminded appellant that she had not taken any steps to clarify her true intentions and, despite having been asked to do so, had not contacted the relevant services. In that email, respondent recalled that appellant's maximum period of extended sick leave would end on 18 November 2018 and that, if she did not return to work by (Monday) 14 November 2018 at the latest, the Organization would be obliged to terminate her employment contract in accordance with Article 45.7 of the CPR.

38. In an email dated 11 November 2016, appellant sent respondent another medical certificate attesting to her incapacity for work, covering the period from 11 November to 11 December 2016.

39. In a letter dated 14 November 2016, respondent reminded appellant of its initial intention to start medical arbitration proceedings, since it was of the view that appellant would be returning to work before 18 November 2016, the end date of the 21-month period in which staff were entitled to paid extended sick leave. These are the circumstances in which respondent had given appellant a final deadline of 14 November 2018 for coming in to reach an agreement on the conditions for her resuming working. However, in respondent's view, the additional medical certificate submitted on 11 November 2016 for a further month of incapacity for work served as proof that appellant was unfit to resume working before 18 November 2016, the date when the maximum period foreseen by Article 45.7 of the CPR ran out. In that same letter, respondent withdrew its offer of arbitration and recommended that the Agency’s Director terminate appellant's contract in accordance with Article 45.7.3 of the CPR. The decision in that letter forms the second of the two contested acts in Case No. 2017/1110 (decision of 14 November 2016).

40. In a decision on 16 November 2016, in accordance with Article 45.7.3 of the CPR and given the fact that appellant had submitted another medical certificate for incapacity

for work that ran through 11 December 2016, respondent terminated appellant's contract on grounds of extended sick leave, effective the day the decision was taken. This is the decision being challenged in Case No. 2017/1107 (decision of 16 November 2016).

41. On 26 November 2016, appellant requested a first administrative review against the decisions in the letters sent to her by respondent dated 27 October and 14 November 2016 respectively.

42. Responding to that request for administrative review, in a decision dated 19 December 2016 respondent began by recalling that what were supposedly challenged decisions had only aimed to give appellant information as part of the invalidity proceedings, to ask her to come to work and, for that purpose, to undergo the medical examination required by the rules. Next, in that same decision, respondent sent an excerpt from the group insurance policy pertaining to the permanent invalidity procedure. Finally, given that there was no point in pursuing medical arbitration because appellant had not returned to work despite respondent's requests that she do so, respondent agreed that the medical certificates submitted by appellant did justify her absence from 1 November to 18 November 2018, a period for which she would be paid. In this decision, respondent asked appellant to make separate contact with the relevant service regarding the decision on termination of her employment contract.

43. On 15 January 2017, appellant submitted appeal 2017/1107 against the decision of 16 November 2016 to terminate her employment contract.

44. On 19 January 2017, appellant entered a complaint against the above-mentioned decision of 19 December 2016 seeking annulment thereof and also of the decisions of 27 October and 14 November 2016. In this complaint, appellant asked respondent to provide her with a complete copy of the rights and procedures for beneficiaries of the pensions and social insurance provided under the group insurance contract between NATO and AWC. Finally, she asked to avail herself of medical arbitration proceedings by establishing a tripartite board on which a medical practitioner of her choice would sit.

45. In a decision on 15 February 2017, respondent rejected appellant's complaint against the above-mentioned decision of 19 December 2016.

46. On 27 April 2017, appellant submitted appeal no. 2017/1110 against the above-mentioned decisions of 27 October and 14 November 2016 obliging her to resume working as of 3 November 2016 and withdrawing her right to medical arbitration proceedings.

47. In a letter dated 15 June 2017, respondent informed appellant of its intention to submit a new request to AWC for arbitration proceedings in connection with her permanent invalidity. That same letter explained that this offer did not concern the question of the validity of the medical certificates covering the period from 1 to 18 November, a question that at any rate had been resolved in appellant's favour.

48. In a letter dated the same day, and as noted in its letter to appellant (see previous paragraph), respondent submitted a request in connection with appellant's permanent invalidity to AWC.

49. It is in this context that, following a joint request by the parties, the Tribunal President issued an order suspending the proceedings in the aforementioned appeals until 31 December 2017 with a view to arriving at an amicable settlement of the cases (see paragraph 6 of the present judgment).

50. The case file shows that appellant signed a compromise to get further arbitration with AWC on 10 October 2017 with a view to a resolution of the two sides' dispute over the medical matters in appellant's permanent invalidity procedure since the 5 October 2016 medical examination. The parties chose a new arbitration doctor by common agreement.

51. After a second request by the parties to suspend the proceedings, the Tribunal President extended the suspension of the proceedings through 15 April 2018 (see paragraph 7 of the present judgment). That order stated that in the absence of an agreement by that date, the written part of the proceedings would resume at the stage at which it had been suspended.

52. In a letter dated 22 February 2018, the chosen arbitration doctor recused himself, citing provisions of the "*Code de déontologie de l'expert*" (expert's code of ethics), and in particular Article 8 thereof on professional independence and freedom of prescription.

53. In a letter dated 3 April 2018, AWC informed appellant that following the recusal of the chosen arbitration doctor, the arbitration initially undertaken had ended. AWC went on to suggest that under those circumstances, appellant should begin new arbitration proceedings and choose a new arbitration doctor.

54. In an exchange of emails between respondent and appellant on 11 April 2018, the parties noted that they disagreed with starting new arbitration proceedings in connection with appellant's permanent invalidity.

55. In accordance with the Tribunal President's order mentioned at paragraphs 7 and 51 of the present judgment, the written part of the proceedings resumed at the stage at which it had been suspended, and appellant was asked to submit a reply in Case No. 2017/1110.

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

Case No. 2017/1107

(i) Appellant's main contentions

56. In this appeal, appellant begins by presenting submissions seeking annulment of the decision of 16 November 2016 whereby respondent terminated her contract on grounds of extended sick leave, in which connection she develops two contentions.

57. In the first, appellant argues that the decision of 16 November 2016 violates Article 45.7 of the CPR in several ways.

58. Firstly, appellant considers that the condition regarding the period of 21 consecutive months' extended sick leave required by the article in question was not met at the time the decision of 16 November 2016 was taken. In appellant's view, based on the documents submitted for the present appeal, it would appear that the start date of the period of extended sick leave should have been 18 March 2015, not 19 November 2014. Furthermore, there are indications in the tally of appellant's leave that the 21-month period was interrupted or that appellant took other categories of leave over that period, *i.e.* from February to April 2015 (working part-time on health grounds) and for a 20-day period between July and August 2015.

59. In particular, appellant is of the view that the two-month period of part-time work on health grounds from February to April 2015 cannot be included in the tally of the 21-month period required by Article 45.7 of the CPR, because the staff member was effectively working during that period. For this reason, periods of part-time work on health grounds must not be considered as being part of the period of appellant's extended sick leave.

60. In any case, appellant considers that despite respondent's assertions regarding her two months' leave, based on the tally included the case file, the leave in question was for only one and a half months, and not two months as respondent is claiming. Under these conditions, and in accordance with that tally, the period of extended sick leave that was interrupted on 2 February 2015 by appellant's having been allowed to work part-time on health grounds should have resumed on 18 March 2015.

61. In addition, and contrary to respondent's assertion, appellant considers that taking account (or failing to take account) of the two-month period of part-time work on health grounds is fundamental to the Organization's power to terminate appellant's contract on grounds of extended sick leave. Indeed, under Article 45.7 of the CPR, respondent can terminate the terminate the contract of a staff member on grounds of extended sick leave only after the period of 21 months has actually expired, and not at any time before that period, as respondent is contending in the present proceedings.

62. Consequently all periods that were effectively worked, which in appellant's case corresponds to the period from 1 February to 18 March 2015, must be deducted from the period of 21 consecutive months required by Article 45.7 of the CPR. In appellant's view, this article gives the Organization the right to terminate a staff member's contract on grounds of extended sick leave, but in no way places an obligation on it to terminate a staff member's contract before that period runs out, or even after it.

63. In the light of the foregoing, appellant concludes that the decision of 16 November 2016 terminating her contract on grounds of extended sick leave was taken in violation of Article 45.7 of the CPR.

64. In her second contention, appellant claims that the decision of 16 November 2016 violates the principle of good administration and demonstrates an abuse of the powers conferred on the Organization by the CPR under Article 45.7 of the CPR, in the case of a staff member's being on extended sick leave.

65. Supposing that the 21-month period had been calculated correctly, the decision of 16 November 2016 informed appellant that her extended sick leave was ending on 18 November 2016 but noted that appellant's contract was being terminated as of that same day, *i.e.* 16 November 2016, not 18 November 2016, so before the actual 21-month period had expired.

66. More broadly, appellant argues that respondent took a series of decisions prior to the decision of 16 November 2016 which have left her in a state of worry and uncertainty and which show that her case was not handled in accordance with the principle of good administration. In particular, respondent used the findings of the medical examination of 5 October 2016 as the basis for asking respondent to resume working at a time when she had not been presented with the findings of that examination. At the conclusion of that examination, the medical practitioner had in no way recommended that appellant resume working.

67. Moreover, and to resolve the discrepancy in the differing medical opinions on appellant's fitness to resume work, respondent proposed arbitration. However, appellant says that respondent's services withdrew that proposal a few days later and recommended that the Agency terminate appellant's contract.

68. Thus the decision of 16 November 2016 was taken in a context of poor handling of appellant's case, in flagrant violation of the principle of good administration, by not allowing appellant access to information she needed about her medical file in order for her to be in a position to assert her rights. In particular, appellant considers that because she was not in possession of the examination report of 5 October 2016 owing to respondent's extreme lack of care, she was unable to comprehend the reasons respondent was using as a basis for asking her to resume working.

69. Furthermore, by depriving her of the initially proposed arbitration, respondent did not give appellant the chance to present her case and cite the reasons that objectively prevented her from resuming work.

70. More generally, appellant argues that respondent handled her case with zero care, displaying an unacceptable attitude toward a staff member who had been in its service for eight years.

71. For all these reasons, appellant concludes that the decision of 16 November 2016, which was taken in flagrant violation of the principle of good administration and the duty of care and abusively, is illegal and must consequently be annulled.

72. It is under these conditions that appellant, secondly, presents submissions seeking compensation for the material and non-material damage she has suffered as a result of the termination of her employment contract under Article 45.7 of the CPR.

73. With regard, firstly, to the material damage suffered as a result of the decision of 16 November 2016 to terminate appellant's contract, appellant considers that the material damage suffered as a result of the illegal termination of her contract is equivalent to the total of the salaries and the allowances she should have received through the end of her contract in September 2017. Furthermore, because medical arbitration was not pursued, she lost out on a chance of her contract being renewed after its three-year end date.

74. What is more, given that she was in an age group that, research shows, takes 25.6 months to find a new job, and that the Organization does not have an unemployment insurance scheme, respondent should compensate appellant by offering her a compensation payment that would cover her basic needs for the time it takes her to find a new job.

75. Under these circumstances, appellant quantifies her material damage as equal to €112,804.09, which corresponds to 25.6 months' pay. This period includes the period remaining to be paid on her contract, *i.e.* from 16 November 2016 to 30 September 2017, as a result of the illegal termination of the said contract.

76. With regard, secondly, to the non-material damage suffered as a result of the decision of 16 November 2016, appellant considers that this decision was taken based on a series of aggravating circumstances that show beyond a doubt a serious violation of the principle of good administration and the duty of care. Thus appellant has suffered non-material damage as a result of the state of worry, uncertainty, anxiety and stress brought on, which will last until she finds a new job.

77. Furthermore, she was left with no livelihood from one day to the next, even though she still has dependent children, and she is still unfit to work owing to an occupational illness that began while she was working for respondent, which makes it difficult to find and get a new job.

78. In the light of the particular circumstances of the case, given the precariousness of her situation as a result of the decision of 16 November 2016 and the punitive nature of her contract termination, appellant is seeking compensation for the non-material damage suffered assessed *ex aequo et bono* at €25.000, an amount corresponding to five times her gross salary.

79. Under these conditions, appellant requests that the Tribunal:
- declare the present appeal admissible;
- declare that there are good grounds and justification for the present appeal;
- annul respondent's decision of 16 November 2016 to terminate appellant's contract on grounds of extended sick leave;
- order respondent to pay €112.804,09 in compensation for the material damage suffered by appellant, an amount corresponding to payment of appellant's salary for a reasonable amount of time, *i.e.* 25.6 months (as determined by the OECD

for a woman of her age in Europe), to allow her to find a job, including the salary she would have received through the end of her contract had it not been wrongly terminated;
- order respondent to pay €25.000 in compensation for non-material damage suffered by appellant, for the state of worry and uncertainty brought on by the wrongful early termination of her contract, which violated the principle of good administration and the principle of moderation amid several aggravating circumstances;
- order respondent to pay interest at the prescribed legal rate on the compensation for the material and non-material damage; and
- order respondent to pay the costs of the proceedings and the costs incurred by appellant for her defence.

(ii) Respondent's main contentions

80. Respondent objects, firstly, that the decision of 16 November 2016 did not violate Article 45.7 of the CPR.

81. To begin with, respondent argues that this article empowers the Head of the NATO body to terminate a staff member's contract before the end of the maximum period of 21 consecutive months' extended sick leave. According to Article 45.7.3, separation will not become effective until one of the conditions as stipulated in Article 45.7.1 is fulfilled, in this case the end of the period of 21 consecutive months' extended sick leave.

82. In the present case, appellant was first on sick leave for three consecutive months starting on 19 November 2014, consequently her extended sick leave began on 19 February 2015 and ended on 18 November 2016.

83. Next, with regard to the interruption of this period owing to appellant's resuming work for a very brief 20-day period in July and August 2015, Article 45.7.1 states that the sick leave of staff members who have a relapse within 2 months of having resumed their duties will not be considered as interrupted.

84. The same goes for the roughly two-month period of part-time work on health grounds between February and April 2015. Indeed, as can be seen from the temporary incapacity procedure, since the periods during which a staff member is employed on a part-time basis are regarded as periods of incapacity, they do not interrupt the course of the first twelve months of incapacity of the staff member concerned. Consequently, even when she was working part-time on health grounds during the first year of her sick leave, appellant was still considered to be on sick leave.

85. Finally, assuming that the start date of the period of 21 consecutive months' extended sick leave was 18 March 2015, respondent did have the right to terminate appellant's contract under Article 45.7 of the CPR without the 21-month period having expired at the time the decision on contract termination was taken. That decision would only take effect as of the actual expiry date. Thus, assuming that the period of 21 consecutive months' extended sick leave started on 18 March 2015, this would have

pushed back the start date of the decision on termination but it would not have rendered it illegal, as appellant claims.

86. Respondent retorts, secondly, that the decision of 16 November 2016 in no way violates the principle of good administration or demonstrates an abuse of the powers conferred on the Organization by the CPR under Article 45.7 of the CPR, nor is it punitive, as appellant asserts.

87. In particular, to start with, respondent is of the view that it applied the provisions of Article 45.7 of the CPR to the requisite legal standard. These provisions authorize it to terminate a staff member's contract prior to the actual expiry of the period of 21 consecutive months' extended sick leave, although the actual separation should only become effective once this 21-month period has expired.

88. Next, respondent claims that the handling of appellant's case by its services in no way shows a hostile attitude toward her. On the contrary, respondent invited her several times to a meeting to find a solution to her situation, and it did everything it could to avoid letting the 21-month period expire on 18 November 2016. But even though respondent had warned appellant of the necessity of resuming working no later than 14 November 2016 to avoid the provisions of Article 45.7 of the CPR being applied, appellant produced another incapacity-for-work certificate running through 11 December 2016, thereby leaving respondent with no choice but to apply Article 45.7 of the CPR and terminate her contract.

89. Finally, respondent argues that its offer of medical arbitration – to resolve the discrepancies between the differing medical opinions on whether appellant should resume work – aimed to allow appellant to resume working by 18 November 2018 at the latest. But with the certificate submitted on 11 November 2016 certifying appellant's unfitness to work through 11 December 2016, there was no doubt that as of 18 November 2016, the period of 21 months' extended sick leave would be over. Consequently the medical arbitration had become pointless as of that date, and there was no reason to pursue arbitration.

90. Under those circumstances, by withdrawing its offer of medical arbitration, respondent was merely confirming appellant's intention not to come back to work by 18 November 2016. As of that date, given that the 21-month period of extended sick leave had expired, termination of appellant's contract in line with Article 45.7 of the CPR was, at any rate, official.

91. Moreover, the case file shows that the arbitration was aimed at resolving the discrepancies between the medical opinions. Respondent states that this offer did not also aim to resolve the parties' diverging views on the expert's findings in appellant's permanent invalidity procedure, as she is wrongly claiming. In that connection, respondent recalls that appellant did sign the required statement from the medical examination on 5 October 2016 regarding her degree of invalidity, which was below the 33.33% threshold.

92. With regard, lastly, to appellant's submissions seeking compensation for the material and non-material damage suffered as a result of the decision of 16 November 2016, respondent considers them to be devoid of any legal grounds.

93. With regard to the material damage allegedly suffered, respondent considers that the decision of 16 November 2016 was taken in accordance with the conditions foreseen by Article 45.7 of the CPR; consequently no damage could have arisen as a result of that decision, nor was there a lost chance for appellant to expect her contract to be renewed. The same goes for any compensation appellant is making a claim for owing to her being unemployed as a result of the decision of 16 November 2016.

94. As for the non-material damage allegedly suffered, in respondent's view the decision of 16 November 2016 was taken without any missteps that could justify compensation for damages of any kind; furthermore the amount of compensation put forward by appellant in her written pleadings is totally unjustified.

95. Under these conditions, respondent submits that the present appeal should be dismissed in its entirety as groundless.

Case No. 2017/1110

(i) Appellant's main contentions

96. In this appeal, appellant is presenting submissions seeking annulment of respondent's decision of 27 October 2016 requiring appellant to resume working following the medical examination of 5 October 2016 and annulment of the decision of 14 November 2016 whereby respondent withdrew its offer of medical arbitration. In this connection she develops five arguments.

97. In the first argument, appellant alleges that the above-mentioned contested decisions, taken together, are based on provisions that are not binding on her and that, in any event, were not brought to her attention in due course.

98. On the one hand, in appellant's opinion, the provisions in the group insurance contract between NATO and AWC do not affect her, since she is a third party to the previously mentioned co-contractors. Indeed, the principle of privity of contract means that the contract can only have obligations for the parties that signed it. That is not the case of appellant. Thus unless it can be proven that appellant gave her explicit agreement to the application of the provisions of the group insurance contract between NATO and AWC and that she was aware of that, these provisions cannot be binding on her.

99. Moreover, apart from the somewhat insufficient reference to the "NATO pension and insurance system", appellant's employment contract contains no information or explanation about the applicable rules under the said "system".

100. On the other hand, it was only in the pre-litigation procedure that respondent sent appellant for the first time an excerpt from the medical arbitration arrangements that applied to the present case.

101. Thus respondent cannot use acts that are not binding on appellant, the substance of which was not brought to her attention at the time when she was recruited, as grounds for the contested decisions with a view to making its case. Thus appellant illegally ensured that recruited staff such as appellant had no control over how their rights were being applied, rights that moreover were administered in the framework of a relationship between NATO and AWC in which no staff member could intervene to preserve his or her rights.

102. In a second argument, appellant stresses that respondent's withdrawal of the offer of medical arbitration on 3–4 November 2016 is illegal, and therefore the decision of 14 November 2016 formalizing that withdrawal must be annulled.

103. In particular, appellant argues that Article 2.2 of Annex 2 to the Absence and Reintegration Policy allows respondent to have a medical dispute resolved by an arbitrator. Respondent offered that arbitration, and appellant formally accepted it while requesting further information about it.

104. Consequently, the unilateral withdrawal of this offer of arbitration by the decision of 14 November 2016 violates the principle of withdrawal of a unilateral administrative act giving rise to subjective rights, because such a withdrawal is only possible within a reasonable time frame and where the act giving rise to those rights is tainted with irregularity.

105. That is clearly not the case of the decision of 14 November 2016, whereby respondent withdrew the offer of arbitration without any valid justification.

106. In a third argument, appellant argues that the decision of 27 October 2016 in which respondent requested her to undergo a medical examination on 2 November 2016 with a view to her resuming working the next day violates Article 6.6.3 of the Absence and Reintegration Policy and the principle of good administration.

107. Appellant contends that it follows from that article that the human resources service must ensure that staff members are fully informed of the rules applicable and of the Absence and Reintegration Policy and absence procedures, and must also provide assistance and guidance to the heads of service, making sure that the principles and procedures are applied fairly and consistently.

108. However, in its decision of 27 October 2016, respondent precisely violated the aforementioned arrangements. In it, respondent asked appellant to undergo a medical examination on 2 November to resume working on 3 November, with no explanation. On 28 October 2016, appellant responded by asking respondent whether it was challenging the validity of the medical certificate covering her until 11 November 2016. It was in response to this, in an e-mail on 2 November 2016, that respondent informed appellant for the first time of the existence of a decision taken by AWC on the basis of the findings

of the examination report of 5 October 2016, which stated that appellant was fit to return to work as of 3 November 2016.

109. It is therefore clear according to appellant that the decision of 27 October 2016 was in material breach of Article 6.6.3 of the Absence and Reintegration Policy, and of the principle of good administration.

110. Appellant also stresses that she always cooperated with respondent and that she always replied straight away to respondent's requests by providing the medical certificates required to justify her absences. She always acted promptly. The same could not always be said about respondent, which on several occasions had presented her with a done deal without providing any suitable explanations. This is the context in which the decision of 27 October 2016 was taken, in obvious breach of the principle of good administration; thus the decision must be annulled.

111. In a fourth argument, appellant contests respondent's assertions that the "offered" arbitration proceedings concerned only the validity of her medical certificate and not her degree of permanent invalidity.

112. Appellant contends that Annex 1 of the Absence and Reintegration Policy lacks clarity on this point, but that it appears from Article 7 of the group insurance contract that the arbitration proceedings provided for are not restricted to medical issues. Furthermore, with medical issues, the arbitration is not restricted to the sole question of whether the staff member concerned is fit for work.

113. Consequently, by limiting medical arbitration proceedings to the sole question of whether medical certificates are valid, Annex 1 of the Absence and Reintegration Policy illegally restricts the scope of Article 7 of the group insurance contract between NATO and AWC; thus the decision of 14 November 2016, insofar as it was based on this premise, is illegal and must therefore be annulled.

114. Furthermore, in appellant's view, respondent ought to ensure that its staff members are able to contest a medical examination; in this respect, the setting up of a tripartite commission is the only way to guarantee that staff members' rights are upheld. The administrative practice that led to the contested decisions being taken does not meet that objective in any way, thus the decision is vitiated on this count and must be annulled.

115. In a fifth and final argument, appellant contends that the contested decisions are based on the second examination of 5 October 2016, which was supposedly recommended by the appointed medical expert, when in fact it was suggested and requested by insurer AWC, as the documents in the case file show, the aim being to not take into account the findings of the first examination, which suggested a follow-up examination in late December 2016 or early January 2017.

116. It is clear that, to assess whether there has been a change in appellant's physical condition, the expert would not suggest another examination such a short time after the first examination on 25 July 2016. Following the first examination, he had initially

recommended an examination within six months, but for some unknown reason, then recommended that the examination be performed earlier, on 5 October 2016.

117. According to appellant, there is evidence that the insurer put pressure on the appointed expert to quickly conduct the second examination so as to conclude that appellant's physical condition had improved and that she could resume working. Thus, the contested decisions are blatantly tainted by illegality, and suggest that they were actually taken for other reasons.

118. Under these conditions, appellant requests in her application that the Tribunal:
- declare the present appeal admissible;
- declare that there are good grounds and justification for the present appeal;
- annul the decisions of 27 October 2016 and 14 November 2016 obliging her to resume working part-time at 50% as of 3 November 2016 and taking away her right to medical arbitration;
- declare that the provisions of the NATO group insurance contract are not binding on the appellant and may not be applied to her;
- declare that the annex of the Absence and Reintegration Policy violates Article 7 of the group insurance policy between NATO and AWC, and is therefore inapplicable; and
- order respondent to pay the costs of the proceedings and the costs incurred by appellant for her defence.

119. In her reply, appellant requests that the Tribunal also:
- in the light of the failed attempt at amicable medical arbitration, order a legal medical examination and appoint an independent orthopaedics expert to establish appellant's degree of invalidity and, if applicable, her right to an invalidity pension.

(ii) Respondent's main contentions

120. Respondent replies firstly that by signing her contract, appellant accepted the application of NATO's pension and insurance system; consequently, the rules of the system (in this case the group insurance contract between NATO and AWC) are binding on her and therefore applicable. In this respect, respondent considers that the fact that the contract was not submitted to appellant does not invalidate in any way appellant's obligations resulting from the contract. Indeed, any group insurance is based on a stipulation for the benefit of third parties. Therefore appellant, like any other staff member, is a creditor of the service to be provided by AWC as a result of the contract between NATO and AWC.

121. Furthermore, respondent points out that it was precisely under this regime that appellant was paid during the first 12 months of her sick leave. This means that since signing her contract, appellant knew that respondent offered group insurance to all its staff members and agreed to be covered by this insurance, with all its terms and conditions.

122. In this context, the decisions being contested in this appeal are not tainted by any form of illegality and thus the first argument put forward by appellant must be rejected.

123. Secondly, respondent contests that the medical arbitration offered/proposed in its e-mails of 3 and 4 November 2016 and accepted by appellant precisely aimed at settling the dispute over the validity of the medical certificate submitted by appellant on 3 November 2016 stating that she was unfit to work until 11 November 2016. Arbitration was proposed so that appellant's absence on the basis of that certificate could be justified in order for her to continue to receive her emoluments from 3 November 2016 onward.

124. It is clear from the pre-litigation procedure that respondent considers that it settled the dispute in favour of appellant by accepting as valid the aforementioned certificate and the certificate provided on 11 November 2016 extending her incapacity for work through 18 November 2016. According to respondent, with these certificates appellant was able to receive her emoluments until that date; thus, appellant's argument that there was supposedly a violation of the rules applicable to the withdrawal of the offer of arbitration is irrelevant.

125. Thirdly, respondent rejects any suggestion that the decision of 27 October 2016 was in breach of Article 6.6.3 of the Absence and Reintegration Policy and of the principle of good administration. As the documents in the case file show, when the respondent's services received the findings of the medical examination of 5 October 2016, they informed appellant of them and told her what steps to take in view of those findings.

126. Thus the argument put forward by appellant against the decision of 27 October 2016 is groundless.

127. Fourthly, respondent replies that the arbitration offered to appellant on 3 and 4 November 2016 was based specifically on the arrangements in Article 7 of the group insurance contract between NATO and AWC. The arbitration specifically aimed at resolving the differences between the findings of the medical examination whereby appellant was asked to resume working and the certificate submitted by appellant on 3 November 2016 stating that she was temporarily unfit to work until 11 November 2016 and could not resume her duties.

128. Thus the alleged inconsistency between the article in question and Annex 1 of the Absence and Reintegration Policy is unfounded.

129. Lastly, respondent contends that appellant's last argument claiming, in substance, that the procedure was circumvented is based on unfounded premises, vague suppositions and insinuations, and unproven facts that in no way vitiate the contested decisions in the present appeal.

130. In these circumstances, respondent invites the Tribunal to declare the present appeal seeking annulment of the contested decisions as unfounded, and to reject all other requests developed by appellant to support her conclusions as unfounded.

D. Considerations and conclusions

(i) On the submissions of appeal 2017/1110

131. In this appeal, appellant is seeking annulment of respondent's decision of 27 October 2016 obliging her to resume working as of 3 November 2016, and annulment of the decision of 14 November 2016 whereby respondent withdrew its offer of medical arbitration.

132. First of all, regarding the submissions seeking annulment of the decision of 27 October 2016, it should be recalled that appeals may be brought against decisions producing binding legal effects with a direct and immediate impact on the interests of the staff member concerned. Such is the case of measures bringing about a distinct change in a staff member's legal position.

133. Firstly, the Tribunal observes that with the decision contained in the letter of 27 October 2016, respondent informed appellant that AWC had sent the Agency the findings of the medical examination of 5 October 2016 plus further related information; secondly, in the same decision, respondent noted the established degree of invalidity and indicated that this degree is below the threshold for claiming an invalidity pension; lastly, in this decision, given the findings of the examination and the expert's recommendation, respondent invites appellant to a medical examination with the Agency's medical officer on 2 November 2016 with a view to her resuming working on 3 November 2016.

134. Thus, the decision of 27 October 2016 only informs appellant of the findings of the medical examination and of the fact that, based on this, appellant is not entitled to an invalidity pension. In the absence of any other information about appellant's incapacity for work and based on the expert's recommendation, respondent also invites her in the same decision to resume working on 3 November 2016.

135. Given that this decision was a simple letter of information, it should not be considered as a decision producing binding legal effects with a direct and immediate impact on the interests of appellant. It does not bring about a change to her legal situation and does not constitute grounds for grievance.

136. Essentially, appellant's grievance with regard to the decision of 27 October focuses on the fact that she was asked to resume working on 3 November 2016 despite being unfit to do so for health reasons. In her replies and in the documents in the case file, appellant stresses that this part of the decision, *i.e*. the request for her to resume working, brings about a change in her legal situation, and therefore constitutes grounds for grievance.

137. As the letters between appellant and respondent between 13 and 25 October 2016 show (see paragraphs 22 to 25 of the present judgment), appellant was informed of the findings of the medical examination and was invited to discuss them with the Agency's medical officer with a view to her resuming working as of 3 November 2016.

138. It is a fact that, based on the expert's findings (examination of 5 October 2016), appellant was not found to be unfit to resume working. It was for the sake of good administration and to address the consequences of a long absence on health grounds that respondent – upon advice from the expert – invited appellant to resume working on 3 November 2016. The fact that appellant was supposed to return to work – and that she was aware that her absence as from 3 November 2016 was not justified – is confirmed by the fact she sent in further medical certificates specifically justifying her absence.

139. Thus the decision of 27 October 2016 did not bring about a change to appellant's legal situation as it results from the findings of the medical examination of 5 October 2016 and in particular the fact that appellant was supposed to resume working on 3 November 2016. Moreover, these findings were in no way contested by appellant.
140. Therefore appellant's request seeking annulment of the decision of 27 October 2016 as part of the present appeal should be rejected.

141. Secondly, with regard to the request for annulment of the decision of 14 December 2016, appellant argues in substance that by illegally withdrawing its initial offer of medical arbitration, respondent incorrectly concluded that the provision of Article 45.7 of the CPR applied and therefore that appellant's contract should be terminated. In this respect, appellant maintains that in the present case the offer was withdrawn in violation of the rules applicable to the withdrawal of an administrative act.

142. The Tribunal considers that though some preparatory decisions may constitute grounds for grievance for the staff member concerned insofar as they might influence the content of a subsequent contestable act, such decisions may not be the subject of a standalone appeal and must be contested at the same time as the appeal against that subsequent act, stating, if required, that the preparatory decision was illegal.

143. The Tribunal notes that in the present case, in the decision of 14 November 2016, respondent began by reminding appellant that she had not attended the medical examination on 2 November 2016 with a view to resuming working on 3 November 2016. In the decision, respondent observes that appellant had sent it a first medical certificate covering 3 to 11 November 2016, and then a second certificate covering 11 November to 11 December 2016. Next, as that same decision states, the submission of new certificates of incapacity for work clearly shows that appellant could not resume working before 18 November 2016. Under these conditions, there was no point in pursuing medical arbitration to determine whether appellant could in fact resume working prior to that date. Finally, in that same decision, respondent pointed out that the period of 21 consecutive months' extended sick leave was ending on 18 November 2016, and if that period expired before appellant resumed working, the provisions of Article 45.7 of the CPR would enter into force.

144. This is the context whereby, in that same decision, the relevant service proposed termination of appellant's contract to the Agency.

145. It follows that the decision of 14 November 2016 not only served to provide information on several matters but also constituted a preparatory act with a view to taking

a definitive act, *i.e.* the decision to terminate appellant's contract. That decision refers specifically to the recommendation made to the Agency's General Manager to terminate appellant's contract.

146. Consequently a preparatory act, such as the decision of 14 November 2016, paving the way for the final decision to terminate appellant's contract, which embodies the supposedly illegal withdrawal of the proposed arbitration, does not constitute an act adversely affecting her that could be the subject of a stand-alone appeal, as appellant is attempting to argue with her request for annulment in Case No. 2017/1110.

147. It is therefore appropriate also to reject the request for annulment of the decision of 14 November 2016.

148. Under these conditions, it is also appropriate to reject, lastly, the requests associated with the requests for annulment developed by appellant in Case No. 2017/1110; consequently, this appeal as a whole must be dismissed.

(ii) On the submissions of appeal 2017/1107

149. In Case No. 2017/1107, appellant is seeking, firstly, annulment of the decision of 16 November 2016 whereby respondent terminated her contract in accordance with Article 45.7 of the CPR, and she develops the following contentions.

On the illegality of the decision of 16 November 2016 terminating appellant's contract owing to the illegality of the decision of 14 November 2016 recommending that termination

150. In this argument, appellant maintains that the decision of 14 November 2016 whereby respondent recommended to the Head of the NATO body that her contract be terminated by taking back the offer of arbitration aimed at settling their dispute was illegal; therefore, by being based on that recommendation, the decision of 16 November 2016 terminating appellant's contract is also tainted with illegality and must consequently be annulled.

151. In the Tribunal's view, as a preparatory act, the decision of 14 November 2016 is indeed likely to constitute grounds for grievance to appellant insofar as it can effectively influence the content of the decision terminating her contract. Yet, as noted in paragraph 142 of the present judgment, while the decision of 14 November 2016 may not be the subject of a standalone appeal, it may be challenged in an appeal against the decision of 16 November 2016, as is being done in the present case.

152. This grievance was not developed in Case No. 2017/1107, however, but rather in Case No. 2017/1110. Nonetheless, because the two cases have been joined, the Tribunal considers the grievance put forward by appellant to be admissible, and consequently will discuss whether there were good grounds for it.

153. In that respect, the Tribunal finds that the grievance put forward by appellant is based on an erroneous premise.

154. As respondent's offer of arbitration on 3 and 4 November 2016 clearly shows, this arbitration was solely for the purpose of settling the dispute on whether appellant's absence from work was justified or not in the light of the medical examination of 5 October 2016, given the new certificate of incapacity for work appellant sent respondent for the period of 3–11 November 2016.

155. Consequently, as opposed to what appellant is claiming in some elements of the present case, this offer of arbitration did not have a broader purpose, *i.e*. to settle the conflicts over the conditions whereby appellant's contract was terminated on grounds of extended sick leave or to resolve the parties' diverging views on respondent's implementation of the permanent invalidity procedure in the present case.

156. It is important to recall that following the examination on 5 October 2016, the observed degree of appellant's invalidity was too low for her to be able to claim a permanent invalidity. These are the circumstances in which appellant was asked to resume working on 3 November 2016. The additional certificate of incapacity for work sent in by appellant justified her absence from work as of that same date. Thus the offer of arbitration aimed to resolve that contradiction.

157. In that connection, the Tribunal finds that in her certificates for the periods of 3–11 November 2016 and 11 November–11 December 2016, appellant was in reality asking respondent to continue to receive paid extended sick leave benefits. Through the arbitration, appellant was seeking to have that situation confirmed. In such a case, there is no doubt that the period of 21 months' paid extended sick leave would have been reached on 18 November 2016, and that termination of appellant's contract in accordance with Article 45.7.3 of the CPR would have been effective.

158. Consequently, even if it were true that withdrawal of the offer of arbitration was illegal as appellant alleges, this did not run the risk of influencing the content of the decision of 16 November 2016 to appellant's disadvantage. In contrast, respondent's position of asking her to resume working aimed to interrupt the period of 21 consecutive months' extended sick leave to avoid termination of appellant's contract on grounds of extended sick leave after that period ran out.

159. Furthermore, as the decision of 19 December 2016 shows, respondent agreed in the pre-litigation procedure to take the medical certificates sent in by appellant into consideration. In this decision (see paragraph 42 of the present judgment) respondent actually settled the dispute between itself and appellant in her favour by deeming that the justification of her absence starting on 3 November 2016 based on medical certificates was valid. Thus, and based on those certificates, the period of 21 months' extended sick leave ran out on 18 November 2016.

160. In the light of the foregoing, it must be observed that, given appellant's request to be kept on sick leave starting on 3 November 2016 – and consequently even beyond 18 November 2016 – in accordance with the medical certificates attesting to that, the alleged illegality of the withdrawal of the offer of arbitration in no way risked influencing respondent's decision on terminating appellant's contract on grounds of extended sick leave.

161. Appellant's argument concerning the illegality of the decision of 14 November 2016 owing to the illegal withdrawal of the offer of arbitration must be rejected, since that decision in no way tainted the decision of 16 November 2016 terminating appellant's contract with illegality.

On the violation of the principle of good administration and duty of care

162. Appellant reproaches respondent for having violated the principle of good administration and the duty of care toward its staff in taking the decision of 16 November 2016.

163. With regard to the violation of the principle of good administration, the factual framework of the present judgment shows that respondent contacted appellant regularly to get her to resume working before the period of 21 consecutive months of extended sick leave expired.

164. Indeed, on 13 October 2016, respondent informed appellant of the findings of the medical examination on 5 October 2016, which it sent to her on 14 October 2016. On 25 October 2016, respondent also invited her to meet with the Agency's medical officer to discuss the findings of that medical report. In an email that same day, appellant did not turn down the invitation but explained that she needed further information. In the decision of 27 October 2016, respondent invited her to resume working on 3 November 2016 in the light of the fact that the specialist had considered her fit to resume working as of 1 November 2016. In an email dated 28 October 2016, appellant sent respondent a medical certificate attesting to her incapacity for work as of 3 November 2016.

165. Furthermore, and in the same context as after the present appeals were lodged, respondent and AWC together looked into the possibility of reviewing appellant's situation with a view to further invalidity proceedings, which had failed when the chosen arbitration doctor recused himself. In this situation, new arbitration proceedings were even offered, but appellant turned down this offer.

166. Under such circumstances, a violation of the principle of good administration cannot be successfully argued.

167. As for the duty of care, this reflects the balance of rights and reciprocal obligations between the Organization and its staff, as foreseen by the CPR. This balance means that when a Head of a NATO body takes a decision about a staff member's situation, it must take into consideration all the factors that may influence that decision, including the interests of the service but also the interests of the staff member concerned.

168. As the factual elements at paragraph 164 above show, respondent took the necessary steps in managing appellant's case; respondent was aware of the sensitivity of the case and wanted to pre-empt a decision that would be adverse to appellant so that she could assert her rights. It was therefore in a spirit of care for appellant that the invalidity proceedings were initiated with the medical examination of 5 October 2016, so that the findings could determine appellant's eligibility for permanent invalidity benefits.

Under these conditions, the period of 21 consecutive months' extended sick leave, which could give rise to termination of appellant's employment contract, could be interrupted.

169. Consequently, and contrary to appellant's allegations, respondent did not violate its duty of care toward appellant in taking the decision of 16 November 2016.

170. Thus appellant's argument that the principle of good administration and the duty of care was violated must be rejected.

On the violation of Article 45.7 of the CPR

171. Appellant argues that the decision of 16 November 2016 terminating her contract on grounds of extended sick leave violates Article 45.7 of the CPR.

172. Article 45.7 of the CPR, entitled "Extended sick leave", provides as follows:

> 45.7.1 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."
>
> 45.7.2 Extended sick leave shall not count towards calculation of the date on which the member of the staff may become entitled to a salary increment. It excludes all leave entitlement.
>
> 45.7.3 Extended sick leave may be regarded by the Head of the NATO body as grounds for termination of contract on the conditions laid down therein. However, separation will not become effective until one of the conditions as stipulated in Article 45.7.1 is fulfilled.
>
> [...]

173. Firstly, it follows from Article 45.7.1 of the CPR that in order to be eligible for paid extended sick leave for a maximum period of 21 consecutive months, a staff member must be absent for more than 3 consecutive months owing to sickness or accident duly recognized under Article 45.7.2 of the CPR.

174. This condition has been fulfilled in the present case. It is a fact that appellant was absent from work owing to sickness from 19 November 2014 to 18 February 2015.

175. Consequently, in accordance with Article 45.7.1 of the CPR, the period entitling appellant to paid extended sick leave for 21 consecutive months began on 19 February 2015.

176. Appellant challenges this date on the grounds that according to respondent's tally of her leave, the period of two months' medical part-time work from 2 February to 2 April 2015 should not be counted since appellant had actually been working. At any rate, in appellant's view this period was in reality shorter, from 2 February 2015 to 18 March 2015. Thus it is only as of that date that her entitlement to paid extended sick leave for 21 consecutive months should have begun.

177. As respondent has asserted and appellant has not denied in substance, under Article 11.I of the group insurance contract, entitled "Temporary incapacity": "*When an insured person is authorized, on account of sickness ... to carry out his duties on a part-time basis ... Since the periods during which an insured person is employed on a part-time basis are regarded as periods of incapacity, they do not interrupt the course of the first twelve months of incapacity*".

178. In this case, the two months' medical part-time work from 2 February to 2 April 2015 was granted by a decision by respondent (see paragraph 12 of the present judgment), and it was consequently authorized within the meaning of the aforementioned article.

179. This period of two months' medical part-time work, from February to April 2015, occurred during appellant's first twelve months of incapacity for work, since her incapacity began on 19 November 2014. Thus in accordance with the provisions of the aforementioned article, given that the period of two months' medical part-time work occurred during the first year of appellant's incapacity for work, it does not interrupt the course of the incapacity.

180. Under these conditions, it is also pointless to examine appellant's argument regarding the effective start date of the period of 21 consecutive months' extended sick leave, *i.e.* 18 March 2015, because of that medical part-time work, since at any rate, as mentioned, the period of medical part-time work does not interrupt the course of appellant's first twelve months of incapacity, as is the case here.

181. At the hearing, appellant disputed the application of NATO's group insurance scheme by invoking rules derived from national legislation and European law, but without establishing to the requisite legal standard any incompatibility of the said insurance scheme or explaining the reason why the rules of the said insurance scheme ought not to be applied to the present case. She merely recalled that she had not been informed about the group insurance scheme when she signed her contract, which prevented her from asserting her rights.

182. Such general, unsubstantiated allegations, assuming they were admissible, are not sufficient to establish the existence of an error in the application of the arrangements of Article 45.7.3 of the CPR with respect to termination of appellant's contract owing to extended sick leave. Thus these allegations must be dismissed.

183. Appellant considers moreover that the 21-month period, even were it to have started on 19 February 2015, was interrupted by a period of 20 days' leave granted by respondent to appellant from 23 July 2015 to 9 August 2015.

184. In this connection, the Tribunal recalls that the last sentence of Article 45.7.1 of the CPR states: "*the sick leave of staff members who have a relapse within 2 months of having resumed their duties will not be considered as interrupted*". Even assuming that the 21-month period was interrupted on 23 July 2015, it follows that appellant remained – and this was not challenged before the Tribunal – on incapacity for work as of 9 August 2015 and was thus entitled to paid extended sick leave.

185. It follows from the foregoing that appellant's allegations regarding the start date and duration of the period of 21 months' paid extended sick leave, which in her view tainted the decision of 16 November 2016 with illegality, should be dismissed.

186. Next, it follows from Article 45.7.1 of the CPR that staff who are absent for more than 3 consecutive months owing to sickness are 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.

187. Contrary to appellant's allegations, in the present case respondent applied the aforementioned provisions to the requisite legal standard. Indeed, prior to the expiry of the period of 21 months' paid extended sick leave, respondent invited appellant to undergo a medical examination to determine whether she was suffering from permanent invalidity. According to the findings of the medical examination of 5 October 2015, which are not challenged by appellant, she is not suffering from permanent invalidity; thus her paid extended sick leave would have expired on 18 November 2016, the end date of the period of 21 consecutive months foreseen by Article 45.7.1 of the CPR. Insofar as she was fit to resume working, appellant was asked by respondent to come in on 2 November 2016 for a prior medical examination with the Agency's medical officer and on 3 November 2016 to resume working.

188. Finally, Article 45.7.3 of the CPR provides that extended sick leave may be regarded by the Head of the NATO body as grounds for termination of contract on the conditions laid down therein. However, the same provision states that separation will not become effective until one of the conditions as stipulated in Article 45.7.1 is fulfilled.

189. In that connection, it should be recalled that according to the case law of the Tribunal, the Head of the NATO body may not base the decision to terminate a staff member's contract with immediate effect on Article 45.7.3 of the CPR alone. Implementation of this article involves assessing the circumstances of each case and requires that the staff member regarding whom the administration is preparing to take such a decision be able to discuss that decision and then receive notification of it before it takes effect (Administrative Tribunal Case No. 2015/1055, paragraph 32 and case law cited).

190. The circumstances that the Head of the NATO body must examine in order to determine whether he may terminate the contract as soon as the 21-month period of extended sick leave expires include whether a return to work is possible in the near future (Administrative Tribunal Case No. 2015/1055, paragraph 33).

191. In this case, the decision of 16 November 2016 expressly states that the 21 consecutive months of paid extended sick leave would end on 18 November 2016. In that same decision, and taking into account the medical certificates submitted by appellant to justify her incapacity for work through 11 December 2016, respondent terminated appellant's contract effective 16 November 2016, on the basis of Article 45.7.3 of the CPR.

192. The Tribunal observes that appellant never claimed to be about to return to work; on the contrary, even though she had been fully informed of the consequences of not returning to work by 18 November 2016, she submitted medical certificates to respondent that put her on sick leave for a period that went beyond the expiry date of the 21-month period, *i.e.* 18 November 2016.

193. It follows that as of the date the decision of 16 November 2016 was taken, there was no certainty over the possibility of appellant returning to work, even in the not too distant future; this is moreover confirmed by the overall attitude of appellant, who constantly turned down respondent's invitations to meet and to clarify this matter, from the time of medical examination of 5 October 2016 through to the decision of 14 November 2016 whereby the relevant service recommended that the Head of the NATO body terminate appellant's contract owing to extended sick leave. Taken together, these factors show that respondent could consequently terminate appellant's contract under Article 45.7.3 of the CPR.

194. Thus respondent was right in drawing on Article 45.7.3 to terminate appellant's contract.

195. The decision of 16 November 2016 expressly states that in line with Article 45.7.1 of the CPR, the paid extended sick leave would end on 18 November 2016, but termination of appellant's contract was effective immediately, *i.e.* on 16 November 2016, the date when the decision challenged in appeal 2017/1107 was taken.

196. However, as the Tribunal's case law shows (Case No. 2015/1055, paragraph 32), the implementation of Article 45.7.3 of the CPR requires that the staff member regarding whom the Administration is preparing to take a decision on contract termination be able to discuss that decision and then receive notification of the decision before it takes effect.

197. That is not the case with the decision of 16 November 2016 terminating appellant's contract with immediate effect, two days before the period of 21 consecutive months' extended sick leave ended.

198. Under such circumstances, it is appropriate to annul the decision of 16 November 2016 insofar as it terminates appellant's contract as of 16 November 2016, in accordance with the Tribunal's case law on this cited above at paragraph 196, and to set the start

date of it as the first day of the month following notification of the decision, *i.e.* 1 December 2016.

199. In the framework of her appeal no. 2017/1107, appellant develops, secondly, submissions seeking compensation for material damage caused by the illegal termination of her employment contract.

200. In the light of the Tribunal's submissions at paragraph 198 of the present judgment, respondent must compensate appellant by paying her the emoluments and allowances for the period from 16 November to 1 December 2016.

201. In the light of appellant's submissions, interest must be paid this on compensation starting from the date of the present judgment, calculated based on the applicable interest rate and, consistent with the Tribunal's case law, the latest European Central Bank rate plus 2%.

202. Consequently the balance of appellant's submissions seeking compensation for the material damage allegedly suffered must be rejected.

203. The submissions on compensation for supposed non-material damage must also be rejected. In the Tribunal's view, given the circumstances of the case, the annulment of an act tainted with illegality – even partly, as is the case here with the decision of 16 November 2016, in itself constitutes sufficient and appropriate compensation for any non-material damage caused to appellant. The submissions on compensation for supposed non-material damage quantified by appellant must consequently also be rejected.

E. Costs

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

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

205. Given that there were good grounds for only a small part of the submissions in appellant's appeal, it is appropriate to reimburse her for a fraction of the amounts she has requested as reimbursement of the costs she incurred for her defence. Respondent shall therefore pay her €2.000 for this.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The decision of 16 November 2016 is annulled insofar as it was effective prior to 1 December 2016;
- Respondent shall pay the amount corresponding to the emoluments and allowances it should have paid appellant for the period from 16 November to 1 December 2016, plus interest at the latest European Central Bank rate + 2%, starting from the time the present judgment was rendered;
- The remaining submissions in Case No. 2017/1107 are dismissed;
- Case No. 2017/1110 is dismissed.
- Respondent shall pay appellant €2.000 under Article 6.8.2 of Annex IX to the CPR.

Done in Brussels on 23 November 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 December 2018 AT-J(2018)0025

Judgment

Case No. 2018/1260

HS

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 26 November 2018

Original: English

Keywords: complaints; implicit denial of complaint; time for appeal.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 20 September 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal by Mr HS, formerly a technician employed by the NATO Communication and Information Agency (NCI Agency or NCIA). By his appeal, appellant contests a decision by respondent's General Manager not to renew his contract.

2. The appeal, which on its face was not dated, was lodged on 24 January 2018 and was registered on 9 February 2018, as Case No. 2018/1260. Respondent's answer, dated 10 April 2018, was registered on 13 April 2018. Appellants' reply dated 9 May 2018, was registered on 22 May 2018. Respondent's rejoinder, dated 21 June 2018, was registered on 5 July 2018.

3. The Panel held an oral hearing on 20 September 2018 at NATO Headquarters. It heard appellant's statement and arguments by his counsel in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

4. Appellant was employed by respondent and its predecessor Agency on a succession of four definite term contracts. He first served on a one-year definite duration seconded contract with the former NATO Communications and Information Systems Services Agency (NCSA) commencing 1 January 2011. He signed a three-year definite duration seconded contract with NCSA on the same post from 1 January 2012 to 31 December 2014. He then signed his first definite during non-seconded contract with respondent for one year, through 31 December 2015. His last contract with respondent was a definite duration contract for two years, to 31 December 2017. His duty station has always been in Brunssum, the Netherlands.

5. Each of appellant's contracts provided that his employment was governed by the provisions of the NATO Civilian Personnel Regulations (CPR) and applicable NATO security regulations, as well as by the relevant NATO and Agency regulations, directives and instructions in effect at any time. Beginning with the 2015 contract, the contracts gave effect to NCSA's transformation to NCIA on July 1, 2012, replacing NCSA as the employing Agency. Each contract provided that if the employing Agency wished to retain appellant at the end of his contract, a new contract would be proposed and he would be notified at least six months before the end of the contract.

6. In accordance with its internal procedures, respondent's Civilian Personnel Management Board reviewed appellant's case and concluded that his contract should not be renewed. By letter dated 18 April 2017, respondent's General Manager informed appellant that his contract would not be renewed after 31 December 2017. However, at

appellant's request, respondent subsequently extended his contract until 31 March 2018 on an exceptional basis.

7. Under Article 61.3 of the CPR, a staff member "*may submit a complaint in writing to the Head of the NATO body concerning a decision taken by him or her, without a prior Administrative review.*"

8. Following the General Manager's 18 April 2017 letter, appellant's legal counsel submitted to the General Manager a document captioned "Complaint Article 61.2 NCPR on Decision of Non-Renewal of Contract on Expiry." There are two versions of this document in the record. One, submitted as an annex to the appeal and dated 16 May 2017, is unsigned and not on law firm letterhead. The second, submitted by respondent, is dated 17 May 2017, signed, and is on the letterhead of appellant's counsel's law firm.

9. The 17 May 2018 complaint briefly sets out appellant's arguments challenging the decision not to offer him a further contract. Appellant did not request a Complaints Committee. Respondent's Director of Service Operations responded to the complaint by letter dated 7 June 2018. The 7 June 2018 letter stated that respondent would treat appellant's 17 May complaint as a request for administrative review, set out the agency's reasons for not extending appellant's contract, and rejected appellant's request for relief.

10. More than two months later, appellant's legal counsel on 10 August 2017 wrote to the Director of Service Operations, the NCIA official who signed the 7 June letter. Appellant's counsel disputed respondent's handling of appellant's complaint and the Director of Service Operations' authority to respond to the complaint. Counsel's letter states that the Director's answer "*implicates that there is no answer at all, because you are not entitled to give an answer to the complaint*." Respondent did not reply to this letter.

11. Meanwhile, as noted above, appellant requested and was granted a three month extension of his contract. However, nothing in the file indicates any further action with respect to appellant's 17 May 2017 complaint until this appeal seeking annulment of the decision not to offer him a new contract was lodged on 24 January 2018. Appellant's reply contains a vague allusion to further requests by appellant for a response to his complaint, but these are not explained and there are no substantiating documents in the record.

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

(i) Appellant's contentions

12. Appellant contends that his claim is admissible, as he submitted a complaint pursuant to CPR Article 61.3, so no administrative review was required before an appeal to the Administrative Tribunal. He never received a response to his complaint as such. Instead, respondent chose to treat the complaint as a request for administrative review, which was denied. Thus, in appellant's view, there has been no answer to his complaint, and the 60-day time requirement for lodging an appeal never began to run.

13. As to the merits of his claim, appellant contends that he remains subject to the contracting policy of NCSA (respondent's predecessor Agency) in force at the time of his initial contract in 2011. He maintains that under the NCSA contract policy he is entitled to receive an indefinite duration contract following a ten-year career path of an initial one-year contract followed by three three-year contracts, provided his post remained a valid requirement and he performed satisfactorily. In appellant's view, the previous contract policy conferred on him a right that the Agency cannot change by altering its contract policy. For purposes of the prior policy, appellant contends that his performance has been satisfactory, pointing to recent staff report ratings of "good" and "very good," but acknowledging another rating of "mediocre" which appellant related to post-operative medical challenges and a new supervisor. Given his overall levels of satisfactory performance, appellant contends that the decision not to offer a further contract was not properly substantiated.

14. Appellant contends, subsidiarily, that under the NCSA contract policy in force at the time of his entry onto duty, his most recent contract should be deemed an indefinite duration contract. Appellant contends that his position was never designated under CPR Article 5.2 as one "in which turnover is desirable for political or technical reasons" for which definite duration contracts not exceeding 5 years may be offered. In appellant's view, respondent's new contract policy adopted effective 1 January 2013 cannot be applied to him, as it involves a significant change in contracting policy that could only be applied to him if reflected in his contract. Appellant cites various Agency statements at the time of transition from NCSA to NCIA as evidencing that transition to the new Agency would not affect the previously applicable contract policy.

15. Appellant further contends that the lack of a response to his complaint to the Head of NATO Body (HONB) violates CPR Article 4.1, and that the HONB's failure to convene a Complaints Committee violates CPR Article 4.2. Appellant's citations to CPR Articles 4.1 and 4.2 are inapposite; those provisions address other matters. The intended references are probably to Articles 4.1 and 4.2 of Annex IX to the CPR. In this regard Article 4.2 of Annex IX provides that a staff member lodging a complaint to the HONB may request a Complaints Committee; a Complaints Committee is not required absent such a request.

16. At the hearing, appellant introduced a new argument to support his claim that non-renewal of his contract was in error. He told the Tribunal that respondent had advertised his previous position, and that he had applied for and been accepted for the position. However, his current situation was uncertain as he had not passed a required physical examination. Respondent's representative at the hearing was not aware of this alleged development.

17. Appellant requests that the decision not to renew his contract be annulled and that he be offered a new definite duration contract or an indefinite duration contract.

(ii) Respondent's contentions

18. Respondent submits that this appeal is not admissible, urging that appellant did not comply with the CPR's administrative review procedure before lodging the appeal. In any case, respondent contends that even accepting appellant's position - that he

submitted a complaint, and not a request for administrative review - the appeal was lodged long after the applicable 60-day deadline for an appeal under Article 6.3.1 of Annex IX to the CPR. Under appellant's view that the Agency did not respond to his complaint, he was obliged to conclude after a certain time that there was an implicit decision rejecting the complaint. Respondent assesses, based on the Administrative Tribunal's jurisprudence, that such an implicit rejection cannot be less than 30 days after the unanswered complaint. Respondent therefore calculated that the appeal should have been submitted by 16 August 2017, more than five months before it was in fact submitted on 24 January 2018.

19. Respondent also disputes the admissibility of appellant's claim insofar as it impugns his previous definite duration contracts with NCIA, which appellant signed on 21 November 2014 and 22 May 2015. Respondent notes that appellant signed those contracts without complaint, and contends that any complaints regarding them come long after the time limit for appeal.

20. On the merits, respondent denies that appellant had either a right to, or a legitimate expectation of, a further contract renewal. Appellant points out that under CPR Article 5.5.3, administrations retain discretion whether to grant indefinite duration contracts, and that the wording of appellant's contracts makes clear that they do not convey a right of contract renewal. Respondent also denies that its predecessor Agency's contract policy (under which appellant claims either a right of renewal or an indefinite contract) remains in effect. Appellant notes that, in any event, the predecessor Agency's policy addresses the situation of staff members with ten years of service. Appellant does not meet this requirement, having completed only three years of non-seconded service.

21. Respondent maintains that appellant's employment situation is governed by respondent's current contract policy, as made clear by his several definite duration contracts. The aim of this policy is to allow staffing flexibility to meet changing technology and customer needs through the use of definite duration contracts. Under this policy, he has neither a right nor an expectation of contract renewal.

22. Respondent also disputes appellant's claim that his job performance entitled him to a contract extension, noting that appellant's performance ratings fell below the level of outstanding knowledge and performance required to be considered for employment with an indefinite duration contract.

23. Finally, in its rejoinder, respondent adds that appellant's contracts provided that he may be required to undertake deployments both within and outside NATO boundaries. Thus, his two recent contracts with respondent provided that *"[f]or NATO International Civilian Staff, acceptance of any employment contract linked to this post constitutes agreement to deploy in excess of 30 days if required*." Respondent pointed out, however, that appellant was continuously declared "temporarily not deployable" for medical reasons.

24. Respondent requests that the appeal be found inadmissible, or, if it is found admissible, be denied on the merits.

D. Considerations and conclusions

25. The Administrative Tribunal will first address the manner the respondent dealt with appellant's complaint. As the Tribunal has noted in other recent non-renewal cases involving respondent, *e.g.* Cases No. 2017/1112, No. 2018/1253 and No. 2018/1258, it is not a proper or acceptable practice for a NATO Agency to refuse to consider a staff member's complaint to the Head of NATO Body (HONB) under Article 61.3 of the CPR, and instead unilaterally to deem it a request for administrative review.

26. Article 61.3 affirms a staff member's right to submit a complaint to the HONB concerning a decision taken by the HONB without prior administrative review. Appellant here clearly availed himself of that right. His counsel's 17 May 2017 communication was unambiguous; it could not reasonably be read as anything other than a complaint pursuant to Article 61.3. Respondent, however, did not treat it as such, instead unilaterally deeming counsel's communication as a request for administrative review, not a complaint.

27. At the hearing, respondent's representatives confirmed that they were mindful of the Administrative Tribunal's recent jurisprudence critical of respondent's prior practice in this regard. They indicated that respondent would for the future treat complaints as required by the CPR, and would not unilaterally decide to treat them as requests for administrative review.

28. The Tribunal also notes that respondent did not reply to appellant's counsel's letter of 10 August 2017. Particularly given the contents of this letter, as a matter of good administration, there should have been a response from the administration.

29. As noted above, there are two versions of appellant's complaint in the record, one dated 16 May 2017 and the second dated the following day. There are no apparent differences in the texts of the two documents. Appellant's reply acknowledges that the 16 May document is a draft, and refers to apparent difficulties regarding delivery of the 17 May signed version. As respondent raises no objections to admissibility in this regard, the Tribunal need take no decision regarding the delivery issue and will regard the signed document dated 17 May 2017 as constituting appellant's complaint.

30. Respondent contends that the appeal is inadmissible because of excessive delay in submitting it.

31. As noted above, appellant's complaint was lodged on 17 May 2017. Respondent's written response to that complaint, treating it as a request for administrative review and denying that request, was dated 7 June 2017. Thereafter, appellant took no action until 10 August 2017, when his legal counsel wrote that the 7 June 2017 letter was not a response to appellant's complaint so that he had in fact received no response. The materials provided to the Tribunal show no subsequent action by appellant or his counsel until this appeal was filed on 24 January 2018.

32. Following respondent's letter of 7 June 2017 denying what respondent deemed to be a request for administrative review, appellant had several options. He could decide to accept the course of action respondent sought to impose and pursue his concerns as

a request for administrative review. He chose not to do so. He thus did not have the procedural possibility of making a timely appeal to this Tribunal following an administrative review process that resulted in an outcome he found unsatisfactory.

33. Or, appellant could have considered that respondent's letter of 7 June 2017 constituted in fact a denial of the relief sought in his complaint. In that case, under Article 6.3.1 of CPR Annex IX, an appeal of that denial to this Tribunal would have to be submitted within 60 days of 7 June 2017, that is, by the first week of August 2017.

34. Or, appellant could have adopted the position that he in fact took, regarding respondent's letter of 7 June 2017 as being without legal consequence with respect to his complaint. Appellant could then wait to see if there might be some further response to his complaint. In that situation, however, the Tribunal's jurisprudence teaches that a party cannot wait indefinitely for an Agency to respond to an appeal or complaint. The silence of the NCIA Director General gave rise to an implied refusal decision to which appellant had to respond in a timely way. As the Tribunal observed in Case No. 2016/1071:

> Good administration dictates that every complaint should be answered within a reasonable time frame. Certainly there is no provision in the CPR that specifies the time frame beyond which the Administration's silence in response to a complaint is regarded as an implicit decision to dismiss the complaint. But by analogy with Article 6.3.1 c) of Annex IX, this duration cannot be less than thirty days.

35. Here, as in Case No. 2016/1071, the Tribunal views thirty days as a reasonable period after which appellant should have regarded his complaint as having been denied, so that it was incumbent upon him to act by way of a timely appeal to the Tribunal in order to preserve his rights.

36. By this analysis, appellant should have filed this appeal by a date in early September 2017.

37. As yet another alternative, the Tribunal might conceivably view appellant's counsel's letter of 10 August 2017 as putting respondent on notice that appellant anticipated some further response. So far as the record before the Tribunal indicates, this letter evoked no further response. In the case, appellant should have regarded there to be an implicit denial around 10 September 2017. From this starting date, the 60-day period for lodging an appeal would have expired in the first half of November. Even under this possibility the appeal was filed more than two months later.

38. Under any of these possibilities, the appeal was lodged well after the time required for an appeal to this Tribunal under the CPR. Accordingly, the Tribunal must conclude that the appeal is inadmissible. As a result, the Tribunal will not examine the merits of appellant's claims.

E. Costs

39. Article 6.8.2 of Annex IX to the CPR provides:

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

40. The appeal being dismissed as inadmissible; no reimbursement of costs is due. None were, in fact, requested.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 26 November 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

18 December 2018 AT-J(2018)0026

Judgment

Joined Cases Nos. 2018/1256 and 2018/1257

TV

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 6 December 2018

Original: English

Keywords: NCIA Contract Policy; definite duration contract; redundant status.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 20 September 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of a first appeal against the NATO Communications and Information Agency (hereinafter "NCIA" or "Agency"), dated 12 January 2018 and registered on 18 January 2018 as Case No. 2018/1256, by Mr TV. With this action appellant seeks the annulment of the NCIA decision dismissing his request to be granted redundant status.

2. Respondent's answer, in Case No. 2018/1256, dated 29 March 2018, was registered on 9 April 2018. Appellant's reply, dated 16 May 2018, was registered on 22 May 2018. Respondent's rejoinder, dated 21 June 2018, was registered on 5 July 2018.

3. In a second appeal against NCIA dated 14 January 2018 and registered on 18 January 2018 as Case No. 2018/1257, appellant challenged the NCIA decision concerning the non-renewal of his contract insofar as that decision was taken without a Civilian Personnel Management Board (CPMB) having been held, as provided for in the Agency Contract Policy.

4. Respondent's answer, in Case No. 2018/1257, dated 29 March 2018, was registered on 9 April 2018. Appellant's reply, dated 18 May 2018, was registered on 22 May 2018. Respondent's rejoinder, dated 21 June 2018, was registered on 5 July 2018.

5. By order of the AT President (AT(PRE-O)(2018)0004 dated 23 May 2018), Cases Nos. 2018/1256 and 2018/1257 were joined for purposes of the written and oral parts of the procedure and the decision closing the proceedings.

6. On 24 August 2018, the parties were invited by the Registrar of the Tribunal, Mrs Laura Maglia, to attend the oral hearing of the joined cases at the NATO Headquarters on 20 September 2018.

7. By email sent to Registrar on 18 September 2018, appellant asked the Tribunal to be allowed to attend the hearing via Skype, invoking the impossibility of physically being in NATO Headquarters because he had moved to Italy on 8 September 2018 to take up an appointment at another NATO site.

8. On 19 September, the Tribunal answered the appellant that, firstly, his request had been made at very late notice (only two days before the hearing), and secondly, the Tribunal cannot hold its hearings via Skype. The Tribunal indicated to appellant that only a video-teleconference from another NATO location would be possible since only that could offer the necessary protection of NATO documentation. The Tribunal also remarked that this might take time to set up. Further, the Tribunal informed appellant that under such circumstances, if it was not possible for appellant to be present at NATO Headquarters for the hearing scheduled on 20 September 2018, the joined cases would

be heard *in absentia* in accordance with Rule 26, paragraph 3, of the Rules of Procedure of the Tribunal.

9. By email sent on 19 September 2018, appellant apologized to the Tribunal and to respondent for the late notification of his request, and expressed hopes that all parties could appreciate that it had been made for the very valid reasons invoked in his email of 18 September.

10. The Panel held an oral hearing on 20 September 2018 at NATO Headquarters *in absentia* of appellant and heard arguments by representatives of the respondent, in the presence of the Registrar of the Tribunal, Mrs Laura Maglia.

B. Factual background of the cases

11. Appellant joined the NCIA on 1 April 2014 under a three-year definite duration contract as a Senior Programme Coordination Officer, grade A3, with a duty station of Brussels, Belgium.

12. By letter dated 9 December 2015, respondent informed appellant that by a decision of the General Manager of the Agency, his duty station was being changed from Brussels to The Hague. This letter indicated also that the post title, post number, grade, step and other terms and conditions of appellant's contract would remain unchanged. Appellant accepted this modification of his contract. By letter also dated 9 December 2015, respondent informed appellant that the modification of his contract would take effect from 1 July 2016.

13. By email sent to his superior on 2 June 2016, appellant recalled his request for an extension of his contract from the end of March 2017 to the end of July 2017, invoking the business needs of the Agency and his family situation. By email on the same date, his superior informed him that his request had been submitted for review to the CPMB, and that he would be informed of the Agency's decision.

14. At a meeting on 6 June 2016, the CPMB decided to offer the appellant a short four-month contract at the end of his first three-year contract.

15. On the basis of the above, on 22 June 2016, respondent offered appellant an additional contract for a duration of four months from 1 April 2017 to 31 July 2017. On 4 July 2016, appellant signed this new contract covering the period from 1 April 2017 to 31 July 2017.

16. On 17 January 2017, appellant asked respondent for information about when the CPMB would hold a meeting to discuss the question of his new contract with the Agency. By email dated 2 March 2017, respondent reminded appellant that the CPMB had decided on 6 June 2016 to grant him an extension of four months and that there would be no other discussion of his contract in a future meeting of the CPMB.

17. On 8 March 2017, appellant submitted a first request for administrative review of the decision of 2 March 2017. Respondent answered that request on 27 March 2017,

recalling that in the email of 2 March 2017 no decision had been taken in relation to his request. The email only contained explanations concerning the final extension of four months that appellant had obtained in June 2016.

18. By email sent on 24 May 2017, appellant requested a further administrative review of the respondent's decision of 27 March 2017. On 14 June 2017, respondent rejected appellant's request for a further review of the decision not to hold an additional CPMB meeting to discuss the renewal of appellant's contract.

19. On 27 June 2017, respondent lodged a complaint against the respondent's decision, which was not in line with the Agency's Contract Policy.

20. Prior to that, on 30 March 2017, appellant had requested confirmation of his provisional redundant status in his post as a Senior Programme Coordination Officer and consequently of his eligibility for inclusion in the NATO Clearing House. By email on 31 March 2017, respondent reminded appellant that his contract was the last one in his current position and that "*it is anticipated that [he] would remain in this position until the termination date laid down in [his] contract*. *There is therefore no reason to consider that [he] would be a redundant staff member*".

21. On 13 April 2017, appellant submitted a first request for administrative review of the decision contained in the email indicated in paragraph 20 *supra* not to consider his status as "redundancy" or "provisional redundancy". Respondent answered this request on 15 May 2017, recalling that appellant's contract had not been terminated before the date laid down in his contract and consequently he was not eligible for inclusion in the NATO Clearing House. In addition, he had signed his contact which specified that he would remain in that position until the end date of the contract, *i.e.* 31 July 2017.

22. On 4 June 2017, appellant requested a further administrative review of the decision rejecting his request to be confirmed as a redundant staff member and to be included in the NATO Clearing House. On 6 July 2017, respondent rejected appellant's request.

23. On 12 July 2017, appellant lodged a complaint against respondent's decision to continue refusing to grant him the redundant status and requested the establishment of a Complaints Committee.

24. On 24 July 2017, respondent rejected appellant's complaints concerning respectively his redundant status and, in accordance with the Agency Contract Policy, the necessary consultations of the CPMB before taking a decision on extension (or non-extension) of his contract.

25. At appellant's request, on 16 August 2017 a Complaints Committee was established for the purpose of examining appellant's grievance.

26. On 17 October 2017, the Complaints Committee issued its report, and concluded that appellant could not have been considered redundant and did not meet the eligibility criteria for inclusion in the Clearing House. On 31 October 2017 and 8 November 2017, appellant submitted his comments on the Complaints Committee's report.

27. On 14 November 2017, the NCIA General Manager, based on the conclusions of the Complaints Committee's report, confirmed the previous decision by the NCIA not to consider him as redundant staff and not to resubmit his case to the CPMB.

28. It was under these conditions that, on 12 January 2018, appellant submitted the present appeals before the Tribunal.

29. On 4 April and 7 May 2018, respondent transmitted to appellant several documents that the latter had requested during the written procedure. By letter dated 9 July 2018, appellant requested that the Tribunal additionally disclose a classified document in which reference is made to respondent's rejoinder concerning the NATO Clearing House rules. On 18 July 2018, the Tribunal informed appellant that no release of the full document requested was necessary and denied appellant's request for disclosure of this document.

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

(i) Appellant's contentions

30. Appellant maintains that the two appeals are admissible.

31. As regards the merits of the joined cases, appellant, firstly, developed contentions concerning the annulment of respondent's decision of 30 March 2017 not to confer on him "redundant" or "provisional redundant" status (appeal 2018/1256).

32. In this regard, appellant argues that his post was not deleted and, in any event, respondent did not communicate in due course to appellant that his post would be deleted. In particular, appellant stressed that respondent had remained silent on the deletion of his post when it proposed to appellant to move from Brussels to The Hague. In this connection, appellant requested a copy of respondent's decision, which indicated which posts had been selected for deletion and the documentation in which the appellant's post was identified as one for deletion. Moreover, appellant believes that his situation is extremely similar to that of one of his colleagues who decided not to change duty station. The colleague concerned, after declining the offer, took the loss-of-job indemnity and retired but his post was not deleted.

33. In addition, given the ongoing process for reducing staff in the Agency, appellant considered that, if his post was deleted, he had a "redundancy" or at least "provisional redundancy" status. In this regard for instance, in the 2016 Performance Report, appellant's first and second Line Managers agreed that the appellant's post was being deleted and "hence being made redundant". In that respect, appellant requested the communication of his 2016 Performance Report.

34. Furthermore, respondent never contested the fact that, when appellant applied for other positions, appellant answered "yes" to the question of whether he held redundant or provisional redundant status. In this regard, appellant asked respondent to confirm the record of such redundancy status given in appellant's application forms.

35. Appellant considers also that respondent did not clarify the meaning of "redundant" or "provisional redundant" staff. In particular, respondent did not deliver to appellant any documentation concerning such definitions. According to appellant, pursuant to the case law of the Tribunal, the incomplete information delivered by the NATO body's services could be considered as a fault for which appellant was justified to seek compensation. Thus, on the basis of his own research concerning the meaning of "redundancy" and following deductive reasoning, appellant concluded that his post was being deleted and he was being made redundant. In any event, appellant requested the communication of any documentation in the Agency's possession and in general NATO's definitions of the terms "redundant" or "provisional redundant" staff.

36. Secondly, appellant argues that the decision on non-renewal of his contract is vitiated because this decision was not in compliance with the Agency Contract Policy and Directive 2.1, because a CPMB, which has to decide whether to renew his contract (appeal 2018/1257), was not held beforehand. It is in this context that appellant argues that respondent "did not adhere" to the Agency Contract Policy.

37. In particular, according to appellant, respondent did not act prudently and in a timely manner. Indeed, as derived by the Terms of Reference of the CPMB (*"a fair, consistent and coordinated manner"* to act in case of a renewal of any duration contract), the CPMB has to be consulted first on the basis of a proposal. This was not the case in his situation; the Human Resources Service did not provide the CPMB with any proposal concerning his contract. Moreover, respondent did not provide any information that led appellant to believe that the convening of a CPMB for his new contract was planned. In this regard, appellant requested from respondent the communication of the following documents: a copy of the Agency Contract Policy, the Terms of Reference providing for the convening of a CPMB in force at the time appellant was working for the Agency, and the "proposal for renewal of a staff member".

38. In addition, appellant considers that the need to hold two separate CPMB meetings for his situation was also recognized by the Chief of Staff of respondent's services when the service concerned examined his request for an administrative review; in this regard, appellant requests that this person attend the Tribunal hearing or sign a statement confirming the above (appeal 2018/1257).

39. Thirdly, appellant claims that during the pre-litigation phase, respondent did not comply with the timelines provided for by the NATO Civilian Personnel Regulations ("CPR"). This concerns *inter alia* the establishment of the Complaints Committee and the issuance of the Complaints Committee's report (appeal 2018/1256). On a more general basis, appellant claims that respondent continuously failed to adhere to the requirements, processes and timelines provided for by the CPR, considering wrongly that its adherence thereto was at its own discretion, thus causing unnecessary stress to appellant (appeal 2018/1257).

40. Fourthly, appellant claims that respondent has not been transparent and has not made relevant information available to appellant in order that the latter could have preserved his rights (appeals 2018/1256 and 2018/1257). In this regard, he requested access to the documentation on the basis of which it was decided to move the duty station for his post (appeal 2018/1257).

41. Finally, in accordance with Article 5.3 of Annex IX to the CPR, appellant requests that respondent provide a signed, written statement to the effect that appellant would not be subject to adverse action of any kind because of pursuing a complaint through administrative channels (appeals 2018/1256 and 2018/1257).

42. Appellant is seeking:
- annulment of respondent's decision dated 30 March 2017 concerning a failure to apply to appellant the redundancy/provisional redundancy status and consequently the application of Article 57 of the CPR (appeal 2018/1256);
- anonymity under Rule 11 of Annex IX – Appendix 1/6 of the CPR (appeals 2018/1256 and 2018/1257);
- provision by respondent of a letter of reference if appellant so requested, and production of a "good reference" letter to appellant in a format that is on a "to whom it may concern" basis (appeals 2018/1256 and 2018/1257);
- reinstatement of appellant in his post, on a three-year definite duration contract, with his post not being deleted, in line with significant manpower shortages noted by the Nations and the Head of the NATO body (appeals 2018/1256 and 2018/1257);
- alternatively, transfer of appellant to another vacant post in the same location, at the same grade and level of responsibility for which he possesses the required qualifications and experience (appeal 2018/1257);
- compensation for material damage equal to the sum of all salaries and all emoluments between the time of the termination of appellant's contract and the date of the Administrative Tribunal's judgment (appeals 2018/1256 and 2018/1257); and
- compensation for non-material damage in the amount of EUR 50,000 (appeals 2018/1256 and 2018/1257);reimbursement of the costs of legal fees, travel and subsistence costs (appeals 2018/1256 and 2018/1257).

(ii) Respondent's contentions

43. With regard to admissibility, respondent submits that appellant in both cases is time-barred from appealing against his definite duration contract of three years signed in 2014 and its extension in 2016. Appellant raised, firstly, a question concerning his alleged redundancy status in an email sent to respondent's services on 30 March 2017. After the first negative decision on 31 March 2017, he started pre-litigation proceedings on 13 April 2017, far beyond the timelines foreseen by the CPR (appeal 2018/1256). Concerning, secondly, the alleged lack of consultation of the CPMB affecting the decision on renewal of his contract, respondent recalls that appellant requested information from respondent's services about the consultation of the CPMB in January 2017, six months after the short extension of his contract (appeal 2018/1257). Insofar as the other submissions presented in his appeal (post not being deleted, reinstatement, references, written statement by the Agency etc.) are concerned, respondent observes that these submissions were not subject to an administrative review and they are consequently inadmissible (appeals 2018/1256 and 2018/1257).

44. As regards the merits and, firstly, appellant's contentions related to his alleged redundant status, respondent objects that appellant did not hold an indefinite duration contract nor a definite duration contract with ten or more years of continuous service and

that his definite duration contract was not terminated before the end date laid down in his contract. Consequently, appellant did not fulfil any of the cumulative conditions provided by the CPR and the NATO Clearing House procedure in order to be considered a redundant staff member. In this regard, during the pre-litigation proceedings, appellant was fully aware that he was not a redundant staff member and consequently respondent had no obligation to give him priority consideration under Article 57.2 of the CPR. As a consequence, the challenged decision not to confer on him redundant status was valid (appeal 2018/1256).

45. Concerning, secondly, the contentions that respondent did not follow the process provided by the Agency Contract Policy, respondent recalls that a CPMB was effectively held on 6 June 2016, at which it was decided to offer appellant a final short contract extension of four months. This contract clearly indicated that it would be the last contract of appellant in his position (appeal 2018/1257).

46. Concerning, thirdly, the contentions that respondent had not complied with the timelines provided for by the CPR, respondent retorts that during the pre-litigation process it had maintained a constant dialogue with appellant, spent a considerable amount of time and effort in responding to his claims, and repeatedly explained to him the reasoning behind the challenged decisions. In any event, according to respondent, appellant's rights during the pre-litigation proceedings were not curtailed and he proceeded through the various steps of the pre-litigation process (appeals 2018/1256 and 2018/1257). In addition, appellant was at no time redundant and the Agency's services never withheld information from him (appeal 2018/1256).

47. Finally, as regards the appellant's other submissions related to an adverse action by respondent, to his request for references or moreover for reinstatement in his old post, or to his claim for moral damages, respondent contends that these submissions have no legal basis and, in any event, were not discussed during the pre-litigation process. Thus they must be declared inadmissible (appeals 2018/1256 and 2018/1257).

48. In conclusion, respondent invites the Tribunal to declare appeals 2018/1256 and 2018/1257 inadmissible and unfounded.

D. Considerations

49. By his two appeals, appellant is in fact challenging respondent's decision of 14 November 2017, whereby respondent, firstly, denied appellant's "redundant" status and, secondly, did not bring appellant's contract for renewal before the CPMB as provided for in the Agency Contract Policy. According to appellant, this last decision regarding the renewal of his contract is vitiated and must be annulled. In addition to the submissions for annulment, appellant develops a number of additional separate claims in both of the appeals and requests anonymity in accordance with Rule 11 of the Tribunal's Rules of Procedure.

(i) Anonymity request

50. Appellant requests anonymity, asking that his name should not appear in the Tribunal judgments.

51. The Tribunal recalls that in accordance with its case law, it ensures that each of its judgments, compendia and collections of judgments indicate that, in the event of reproduction of any judgment, even if only partial, the name of the appellant must not appear (see AT judgment in Case No. 2013/1007, paragraph 54).

52. In any event, appellant has not demonstrated good grounds which could justify granting anonymity in the present appeals. It follows from the foregoing that appellant's request for anonymity must be rejected.

(ii) Appeal 2018/1256

53. Respondent expresses several reservations concerning the admissibility of this appeal, considering that the appeal is, in any event, time barred.

54. The Tribunal observes that appellant followed the successive steps of the pre-litigation proceedings, as provided by the CPR, against respondent's decision denying him "redundant" status.

55. Indeed, on 30 March 2017, appellant requested confirmation of the redundant status of his post. By the email of 31 March 2017, respondent answered that his contract was the last in his current position and, consequently, that he could not be considered as a redundant staff member. This respondent's decision was the subject of the first request for administrative review, which was rejected by respondent's decision dated 15 May 2017. This decision was also the subject of a further request for administrative review, which was also rejected by respondent's decision dated 6 July 2017. On 12 July 2017, appellant lodged a complaint against that decision and requested the establishment of a Complaint Committee, which issued its report on 17 October 2017. On the basis of the considerations in the Complaints Committee report, on 14 November 2017, respondent confirmed its previous decision, recalling that appellant's contract had not been terminated before the anticipated end date and that appellant could not have been considered as a redundant staff member.

56. Under these circumstances, the appeal brought before the Tribunal on 12 January 2018 against respondent's decision refusing appellant's redundant status was lodged within the timelines provided for by the CPR and met the requirements of the previous administrative review; consequently, appeal 2018/1256 must be considered as admissible.

57. As regards the merits of the appeal, the Tribunal observes that appellant signed his first contract for three years in 2014 without formulating any reservation concerning a possible renewal of this contract. The status of his contract was not modified when the duty station was changed from Brussels to The Hague; appellant signed a new contract which provides that the post title, post number, grade, step and other terms and conditions of his contract would remain unchanged. Before the end of his contract,

appellant did not request renewal of that contract either. Appellant was in fact aware of the duration of his contract, and never contested that his contract was only for a three-year, non-renewable period.

58. It is in this context that appellant requested, for personal reasons, that a short extension of his contract be granted. Respondent then did offer a new contract for an additional four months, which was accepted without any reservation by appellant. This contract extension indicated, at item 10, the following: *"as per our common understanding, this will be your last contract on your current position; should you not be successfully selected and appointed to another position within the NCIA before the end of this contract then the contract will automatically expire on 31 July 2017"*.

59. There is no doubt from the foregoing that the contract signed in 2014 and the extension of this contract signed in 2016 were offered exclusively for the determined period without any possibility of renewal after the end of it, i.e. 31 July 2017. In this regard the Tribunal considers that the short extension of the contract was offered by respondent with regard for the welfare of appellant and on the basis of his specific request.

60. During the pre-litigation process, and as confirmed by the Complaints Committee's report (item 29), appellant was informed that he did not meet the conditions for being considered as a redundant staff member under Article 57.2 of the CPR. Indeed, this status is applicable to a staff member who holds an indefinite duration contract, a series of definite duration contracts covering ten or more years' continuous service, or a definite duration contract terminated before the date laid down by the contract. This is not the case with appellant.

61. As a consequence, the claims of annulment developed by appellant in the present appeal must be rejected, as must be the other conclusions closely connected with those claims which, in any event, were for the first time presented before the Tribunal and not in the pre-litigation proceedings.

(iii) Appeal 2018/1257

62. The claims developed in this second appeal are directly linked to the decision whereby appellant was offered his definite duration contract and the decision on extension of that contract for another four months which was taken in June 2016 and accepted by appellant on 4 July 2016.

63. By appellant's request on 17 January 2017 for information on whether the CPMB was consulted in connection with the renewal of his contract, appellant tried to challenge the respondent's previous decisions offering him a definite duration contract and/or a short-term contract. In this regard, respondent expressed serious reservations about the admissibility of the present appeal, which was brought before the Tribunal six months after the signature of the last extension of his contract. According to respondent, with his action appellant was in fact trying to reopen the debate concerning a possible renewal of his contract and in this regard invoked an alleged lack of consultation of the CPMB.

64. The Tribunal observes that appellant had developed his arguments in an inconsistent manner, repeating the same claims and continuously expressing reservations and doubts about the actions and intentions of respondent to find the right solution to his request on the basis of good faith. However, given the fact that appellant is not being assisted by a lawyer, in a spirit of goodwill toward appellant, the Tribunal considers that under the specific circumstances of the case the present appeal is admissible. Indeed, appellant followed the successive steps of the pre-litigation proceedings, challenging the respondent's final decision of 14 November 2017 insofar as in this decision it is stated that respondent is properly adhering to the process provided by the Agency Contract Policy.

65. As regards the merits of this case, and insofar as appellant is challenging the lack of consultation of the CPMB concerning the four-month extension of his contract, the Tribunal observes that the issue was effectively brought before the CPMB which – after having examined the proposal of respondent's services – agreed, in the meeting held on 6 June 2016, to grant appellant a four-month extension of his contract. On 4 July 2016, appellant also signed this extension without formulating any observation.

66. With his claims, appellant challenges in fact the lack of consultation of the CPMB for examining in general the renewal of his first three years' contract. Given the nature of appellant's contract, this assumption is in any event wrong on the basis of the considerations stated in paragraphs 59 to 61 of the present judgment.

67. As a consequence, the submissions on annulment developed in appeal 2018/1257 must be rejected, as must the other requests – closely connected with these submissions – which in any event were for the first time presented before the Tribunal and not in the pre-litigation proceedings. In these circumstances, it is also appropriate to reject appellant's request for the hearing of a witness.

68. It follows from all the foregoing considerations that the appeals must be rejected in their entirety.

E. Costs

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

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

70. The appeals being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 6 December 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

4 March 2019 AT-J(2019)0001

Judgment

Case No. 2018/1272

PL

Appellant

v.

Headquarters Allied Joint Force Command Brunssum

Respondent

Brussels, 14 February 2019

Original: French

Keywords: dismissal of an appeal that is devoid of merit; perfectly clear interpretation of the provisions on which the Administration based its decision.

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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 Laurent Touvet, judges, having regard to the written procedure in the hearing on 14 December 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal registered on 15 July 2018 by Mr PL, seeking:

- annulment of the decision dated 20 December 2017, confirmed on 16 May 2018 by the dismissal of his complaint, whereby the General Manager of Allied Joint Force Command Brunssum (hereinafter “HQ Brunssum”) omitted retirement pension contributions from the calculation of the compensation for non-material damage ordered by the NATO Administrative Tribunal in Judgement No. 2017/1105 dated 11 December 2017;
- compensation for non-material damage arising from the delay in sorting out this situation; and
- an order for HQ Brunssum to reimburse the costs of retaining counsel for the case.

2. The respondent’s answer, dated 10 September 2018, was registered on 17 September 2018.

3. In this answer, respondent requests that the Tribunal apply Rule 10 of the Rules of Procedure of the Administrative Tribunal whereby the latter may summarily dismiss an appeal that is devoid of merit. In an order dated 9 October 2018 (AT(PRE-O)(2018)0007), the Tribunal President decided, on the basis of Rule 10, to take no further action until the Tribunal's next session.

4. The Tribunal took note of the written procedure at its session on 14 December 2018 at NATO Headquarters.

B. Factual background of the case

5. The appellant was a legal adviser at Headquarters Allied Joint Force Command Brunssum. He is alleged to have mismanaged fuel supply contracts for ISAF. On 18 October 2016, the Commander, Headquarters Allied Joint Force Command Brunssum decided to terminate appellant's contract effective immediately on the basis of Article 59.3 of the Civilian Personnel Regulations (hereinafter “CPR”). The reason for his decision was the breakdown of trust in the appellant for six different reasons.

6. Appellant challenged the legality of that decision before the Tribunal, which decided on 11 December 2017 to annul the decision of 18 October 2016 whereby HQ Brunssum had ordered the immediate termination of appellant’s contract. HQ Brunssum invoked Annex IX to the CPR, whereby if the Head of the NATO body affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal instead determines the amount of compensation to be paid to the appellant for the injury sustained. HQ Brunssum was therefore exempted from reinstating appellant.

7. The Tribunal consequently ruled that appellant should be awarded the following financial compensation:

- in compensation for material damage resulting from the loss of his professional activity, a sum equal to twenty-four months of his total remuneration, including allowances and benefits of all kinds and the retirement pension contributions that the Administration would have paid over that period;
- the indemnity in lieu of notice foreseen in Article 10.3 of the CPR; and
- in compensation for non-material damage suffered, six months' salary, allowances and benefits of all kinds.

8. For the application of Judgment No. 2017/1105, the Chief of Staff of HQ Brunssum informed appellant on 20 December 2017 that he would be paid €395.293,20 and gave him the breakdown of how that sum had been calculated.

9. Appellant disputes how the compensation for non-material damage was calculated. He undertook two concurrent approaches.

10. On 2 March 2018, he requested a clarification of the judgment by the Tribunal, in line with Rule 30 of the Tribunal's Rules of Procedure (Appendix 1 to Annex IX to the CPR). On 27 March 2018, the Tribunal President issued an order dismissing that request on grounds that the Judgment of 22 December 2017 was clear.

11. In parallel appellant introduced another procedure. On 1 March 2018, he submitted a request for administrative review to the Head of NATO body to ask the latter to reconsider the decision taken on his behalf on 20 December 2017. He challenged the method used to calculate his compensation. That administrative review was dismissed on 27 March 2018, and so appellant lodged a complaint on 25 April 2018. That complaint was dismissed on 16 May 2018, and appellant appealed to the Tribunal on 15 July 2018. This is a separate case from the one judged on 27 March 2018: it is directed against a new decision, the one taken by the Administration to apply Judgment No. 2017/1105. The Tribunal Registrar, to whom appellant referred the matter, replied clearly to that effect and referred him to the ordinary legal procedures for challenging a decision by a Head of NATO body.

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

(i) The appellant's contentions

12. Appellant claims that the difference in wordings between the compensation for lost income and the definition of the compensation for non-material damage is irrelevant. In his view, the fact that retirement pension contributions are not mentioned in the calculation of the compensation for non-material damage does not mean that they are not included in it. He cites the 150th Report of the Coordinating Committee on Remuneration, according to which ambiguities in the pension scheme must always be interpreted in a way that is favourable to the staff. Pension contributions are among the "benefits of all kinds" mentioned in the operative part of the Judgment of 11 December 2017.

(ii) The respondent's contentions

13. Respondent argues that the differences in the wording of the third and fifth sub-paragraphs of the operative part of the judgment are indeed relevant. The third sub-paragraph, which reproduces the wording of paragraph 59 of the Judgment, expressly mentions “retirement pension contributions” after “benefits of all kinds”. Conversely, the fifth sub-paragraph, which draws on the wording of paragraph 62 of the paragraph, does not. Thus these pension contributions have not been included in the compensation for non-material damage paid to appellant.

D. Considerations and conclusions

14. With regard to compensation for the damage to appellant suffered as a result of the immediate termination of his contract, the Tribunal, in Judgment no. 2017/1105 dated 11 December 2017, noted two different types of damage:

- material damage, for which it awarded appellant “a sum equal to twenty-four months of his total remuneration, including allowances and benefits of all kinds and the retirement pension contributions that the Administration would have paid over that period”; and
- non-material damage, for which it ordered “compensation in the amount of six months' salary, including allowances and benefits of all kinds”.

15. For each type of damage, the wording of paragraphs nos. 59 and 62 of the Judgment is reproduced.

16. It is evident from comparing these two wordings that they are clearly different. Material damage is calculated based on total remuneration, including allowances, benefits and pension contributions, whereas non-material damage is established based on salary, allowances and benefits; “pension contributions” are not mentioned. It is thus clear that such contributions are not to be included in the basis for calculation of compensation for non-material damage. Any reasonable person can easily tell them apart just from reading them.

17. The appeal is devoid of merit and may therefore be dismissed in accordance with Article 10 of the Tribunal’s Rules of Procedure.

18. Appellant’s other submissions seeking compensation for non-material damage caused by the delay in replying to him are dismissed as a result.

E. Costs

19. Article 6.8.2 of Annex IX to the CPR provides:

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

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

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 14 February 2019.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 March 2019 AT-J(2019)0002

Judgment

Case No. 2018/1265

RL

Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 19 February 2019

Original: French

Keywords: fitness of a staff member to return to his job after sick leave or extended sick leave; power of the Administration to have the staff member undergo a medical examination; end of contract; illegal retroactivity.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 14 December 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal, registered on 16 March 2018, by Mr RL, seeking:

- annulment of the decision of 17 January 2018 whereby the General Manager of the NATO Communications and Information Agency (NCIA) informed him that his contract had expired on 16 July 2017;
- should he not be reinstated, €1.559.584,50 in compensation for material damage;
- compensation for material damage of various kinds;
- compensation for non-material damage, assessed at €21.000; and
- reimbursement of his legal costs and travel and subsistence expenses.

2. The respondent's answer, dated 4 June 2018, was registered on 15 June 2018. The appellant's reply, dated 16 July 2018, was registered on 19 July 2018. The respondent's rejoinder, dated 20 August 2018, was registered on 22 August 2018.

3. The Tribunal's Panel held an oral hearing on 14 December 2018 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

4. Appellant joined the NATO Consultation, Command & Control Agency (NC3A) in 2004. When his contract was not renewed in 2011, he was given a reassignment contract with the NATO Communication and Information Systems Services Agency (NCSA), which became the NCIA on 1 July 2012. His first contract was for one year, after which he was employed on a three-year contract (2012–2015) and then an indefinite duration contract starting on 1 January 2015.

5. On 14 July 2015, he was presented with a draft performance review that noted his difficulties in dealing with change and stress. He immediately requested that the review be amended and that he be granted four days' leave to prepare his remarks, which was turned down. Appellant said he felt like he was living in a hostile environment without the support of his management.

6. On 16 July 2015 appellant went on sick leave, which was extended several times. That sick leave became extended sick leave on 16 October 2015, in accordance with Article 45.7 of the Civilian Personnel Regulations (CPR).

7. From November 2015 onward, every attempt at contact between the Administration and appellant failed.

8. In spring 2017, as the end of the 21-month period of extended sick leave drew

near, an Invalidity Board was convened to assess whether appellant was fit to resume working. The Board met on 18 April 2017. In its opinion, the staff member was not suffering from a permanent invalidity that prevented him from returning to work.

9. On 12 May 2017, SHAPE informed the staff member that it was following the Invalidity Board's advice and setting the date for him to resume working as 1 June 2017. However, appellant was hospitalized and his sick leave was extended to 30 June 2017.

10. On 24 June 2017, appellant was informed by NCIA that it considered his absence to be unauthorized as from 1 June, a statement that was later reversed after appellant had spoken with the SHAPE Medical Adviser.

11. In the two weeks leading up to 16 July 2017, the date when the 21 months' extended sick leave would end, contradictory statements were made by the doctors. The SHAPE Medical Adviser certified on 7 July 2017 that appellant could not resume working before 26 July 2017, yet appellant's own doctor certified also on 7 July 2017 that he had been fit to resume working since 1 July 2017.

12. Appellant then tried to demonstrate his fitness for work by going to his workplace on 10 July 2017, but he was unable to do so the next day, when he was barred from accessing his office and his computer.

13. On 20 July 2017, appellant asked NCIA for explanations about his administrative situation but was not given an answer.

14. In a medical report dated 26 July 2017, the SHAPE Medical Adviser stated that the staff member was temporarily but not fully incapacitated. He suggested that the staff member could not resume working full-time and that his work required adaptations. Appellant was "temporarily unfit".

15. In summer and autumn 2017, appellant sent respondent many requests (10 August, 18 August, 31 August, 22 September, 25 September, 2 November and 12 December 2017) aimed at clarifying his administrative situation, since he was not fit to resume working in the same conditions in which he had previously worked, but he was not permanently incapacitated for work either.

16. Appellant claims that respondent never replied to his requests. NCIA gives another explanation of the situation: appellant had always refused to talk with his employer and said that all contact had to be solely directed through his partner, Mrs V. In respondent's view appellant was uncooperative, since it had sent him 90 emails to try (unsuccessfully) to move forward on mediation. Appellant's offers to resume working part-time, starting with a half-day per week and gradually increasing over the course of a year, were never put in practice because appellant remained on extended sick leave.

17. On 17 January 2018, respondent's Head of Human Resources informed appellant of the NCIA General Manager's decision to terminate his contract as from 16 July 2017, exactly two years after the start of his sick leave, in accordance with Article 45 of the CPR.

18. On 22 January 2018, appellant informed respondent of his intention to challenge

the decision of 17 January 2018 and asked to be allowed to submit his appeal directly to the Tribunal. On 2 February 2018, the NCIA General Manager agreed, in accordance with Article 4.3 of Annex IX to the CPR.

19. On 6 March 2018, appellant lodged a petition with the NCIA General Manager. Finally, on 16 March 2018, he submitted an appeal to the Tribunal.

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

(i) Appellant's contentions

20. Appellant begins by explaining that respondent applied Article 45.7 of the CPR illegally because the conditions therein on contract termination were not met. In appellant's view, he was no longer on sick leave on 16 July 2017 because he had been declared fit to resume working as from the previous 1 July, as shown by the two medical certificates which the Administration did not challenge. In addition, he recalled the opinion of the Invalidity Board, which found on 18 April 2017 that he was not permanently incapacitated for work, which deprived him of his entitlement to an invalidity pension. Thus the consequence of this ought to be his return to work. Furthermore, the SHAPE Medical Adviser had declared appellant "temporarily" unfit for work, which also indicated that his return to work was likely in a near future; that doctor did not rule out the possibility of his returning to work part-time with some adaptations to ease his reinstatement in the work team after two years' absence. But respondent did nothing to ease his return under such conditions.

21. Appellant's performance was excellent, despite respondent's assertions to the contrary. When his performance was merely rated satisfactory, appellant challenged this inaccurate review.

22. The failure of the mediation process is down to respondent alone; respondent's written submissions clearly show bias throughout the entire period of his sick leave and extended sick leave.

23. Appellant next submits that this refusal to reinstate him with adaptations to his conditions and schedule constitutes a violation of his fundamental right to work and of his employer's duty of care toward him.

24. The absence of any reply from the Administration to his requests that he only be made to undergo a medical examination if it was independent and impartial leads appellant to claim that the challenged decision lacks sufficient grounds. He also raises the fact that some of the medical certificates that respondent used to decide that his contract should be terminated were not brought to his attention.

25. Appellant also emphasizes the Administration's disregard for the duty of care, in the light of respondent's behaviour in the months leading up to the challenged decision. He supports this by citing the fact that, without any notice, his salary for June 2017 was not paid to him even though he had submitted a medical certificate; it was only paid once he had protested against this omission. Likewise, his salary for July 2017 was only paid

on 18 August 2017. Furthermore, his medical cover was cancelled as of 16 July 2017; although respondent did later re-establish the cover, albeit without any explanation or excuse, this served no purpose because the health insurance scheme does not allow for retroactive decisions, leaving him without medical cover between 16 July 2017 and 17 January 2018. He goes on to complain that he was not reimbursed for his journeys to meet with the SHAPE Medical Adviser, and that the refusal to allow him access to his office meant he was no longer entitled to tax-exempt fuel or other duty-free goods and prevented him from getting into his email where he had information about his medical cover. Finally, he was not paid his salary for January 2018. All these behaviours by respondent put him in a difficult situation.

26. As a consequence of his request for annulment of the decision of 17 January 2018, appellant is seeking to be reinstated as a member of NATO's staff. Failing that, he is seeking compensation for the loss of his job in the form of payment of the salary he would have received until the day when he turns 65 years of age, *i.e.* 16 January 2034. He is also seeking compensation for material damage corresponding to the time spent by his partner to educate their handicapped child, who could no longer attend the school whose fees had been covered by NATO. He is moreover seeking reimbursement of the cost of the appointments with the SHAPE Medical Adviser and the cost of the journeys to go there, *i.e.* a total of €1.554, plus the cost of the round-trip journey to his workplace on 11 July 2017 when he was refused access, *i.e.* €35,50. In addition, the sick leave prevented him from taking his annual leave, which he is asking to have paid (€6.000). The absence of medical cover cost him €2.575, for which he is claiming reimbursement. Finally, not having access to tax-free fuel is thought to have cost him €1.430 over the period from 10 July to 31 December 2017.

27. All this material damage comes to a total of €1.559.584,50. The non-material damage arising from respondent's actions for which appellant is seeking compensation comes to €21.000.

(ii) Respondent's contentions

a) Admissibility of the appeal

28. Respondent does not challenge the admissibility of the main submissions in the appeal. Respondent does, however, challenge the admissibility of some claims for compensation that were not submitted in advance to the Administration: compensation for his partner, untaken annual leave, certain medical expenses and tax-free fuel.

b) Reasoning regarding the merits of the appeal

29. Respondent emphasizes that the staff member's performance had shown he had difficulty adapting his skills to the jobs he was given. In 2008 in particular, his performance was rated "satisfactory" in his performance reviews but appellant refused to acknowledge the draft performance review. When taking up his new duties in January 2015, appellant demonstrated difficulty adapting, with a tendency to put his personal priorities before those assigned to the work team. This was noted in a performance review which said that despite appellant's real technical skills, he had difficulty dealing with change and stress.

30. Respondent vehemently disputes that it could be blamed for the difficulty in making contact with appellant. In particular, appellant always refused to take part in discussions with his employer, delegating that role to his partner instead, without saying why. Respondent presented its great many attempts to reach him and to try to adapt the workstation for appellant's return to his team. Appellant wanted to return on his own terms, and ceased all contact after having been told that he could only resume working if he underwent an examination with the SHAPE Medical Adviser.

31. After the Invalidity Board's finding of 18 April 2017 that appellant was not fully incapacitated for work, respondent followed that advice and asked appellant to resume working as of 1 June 2017, which he did not do, since he was again on sick leave.

32. After having been reminded that the expiry of the two-year period of extended sick leave would allow respondent to terminate his contract, appellant, who up to then had sought to extend his sick leave, drastically changed course by taking the initiative to return to work, in particular on 3 and 4 July 2017, while he was still on sick leave. On 7 July 2017, appellant met with his family doctor and his psychologist, who declared him fit to resume working retroactively from 1 July 2017, whereas he had just spent two months hospitalized. The SHAPE Medical Adviser declared him unfit to resume working on 7, 13 and 26 July 2017. His sick leave was therefore not over on 16 July 2017, which gave the Administration the power to terminate his contract as of that date, since the 21 months' extended sick leave mentioned in Article 45.7 of the CPR had been reached.

33. Respondent was faced with differing medical opinions, which it explains it tried to resolve by seeking a new opinion on appellant's fitness to resume working from an independent doctor. Article 3(d) gives the Administration the power to have any staff member undergo a medical examination at any time. But appellant refused to undergo this new medical examination, citing the lack of independence of the doctors approached by respondent. Respondent recalls, however, that these doctors are chosen every two years by a committee that includes representatives of the NATO Civilian Personnel Association.

34. With regard to the request for restitution of the work computer, which allows access to a network of classified information, respondent recalls that it had taken until November 2016, sixteen months after the start of appellant's sick leave, for appellant's partner to bring in his computer, even though every staff member is required to give back a work computer once they no longer need it. Throughout this period appellant logged in nearly every day, and added his name to circulation lists without informing his management. Thus he had had all the time he needed to transfer his personal documents onto a personal computer.

35. Finally, appellant's personal effects, which for two years he never claimed, were logged and put away in October 2017 to be given back to him.

36. With regard to the claims for compensation, respondent refutes appellant's line of reasoning by observing it was not at all certain that appellant's appointment with the Organization would have lasted until he was 65 years of age.

D. Considerations

37. Article 45.7 of the CPR states:

> 45.7.1. 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.
>
> …
>
> 45.7.3. Extended sick leave may be regarded by the Head of the NATO body as grounds for termination of contract on the conditions laid down therein. However, separation will not become effective until one of the conditions as stipulated in Article 45.7.1 is fulfilled.

38. Appellant went on sick leave on 16 July 2015, which was continuous for three months and extended by a 21-month period of extended sick leave. A few weeks before the end of this two-year period, on 18 April 2017, an Invalidity Board was convened to determine whether appellant was permanently incapacitated for work. The Board found that this was not the case, which deprived him of his entitlement to an invalidity pension.

39. It is not disputed that appellant was born in 1969 and will only reach 65 years of age in 2034. Consequently, the question of the end of his sick leave depends only on whether or not he was declared fit for work.

40. Appellant had been on sick leave and then on extended sick leave since 16 July 2015, and only came back to work on 3 and 4 July 2017. But this physical presence does not necessarily mean that he was fit. Respondent could ask the staff member to resume working only once he had a certificate attesting to his fitness for work: under Article 3(d) of the CPR, "*staff members ... hold posts on the establishment of a NATO body only on condition that ... they fulfil the physical standards demanded by the exercise of their functions*". If the Administration has doubts about a staff member's fitness, it is authorized by Article 45.2 of the CPR, which states that "*the Organization may require a staff member to undergo a medical control before recognizing any certificate as valid*", to make a staff member's return conditional on verification of that person's medical fitness by the doctor of its choice.

41. That is what respondent did when it had appellant undergo a medical examination of his fitness with the SHAPE Medical Adviser on 7 July 2017. The latter declared him temporarily unfit, and confirmed that assessment on 13 and 26 July 2017. Consequently respondent had the ability to terminate his contract as of the end of the 21-month period given in Article 45.7.1 of the CPR, which expired on 17 July 2017.

42. Therefore, in accordance with Article 45.7.3 of the CPR, the Administration had the power to terminate appellant's contract, which it did six months later, on 17 January 2018.

43. Appellant's other contentions are without merits. Holding a job is not an unconditional right; it is subject to the conditions laid down in the CPR.

44. The Administration did not disregard its duty of care, since it tried repeatedly to contact appellant. The latter resorted to tricks and excuses to defer a medical examination by a doctor designated by the Administration on grounds that he feared such doctors would be biased. The Administration even offered to have the doctor for the examination chosen from a list drawn up with the support of the Staff Association. Appellant persisted in refusing. Respondent could therefore do nothing more to try to determine appellant's fitness for work, and did not disregard its duty of care in this. Although appellant complains of errors and omissions in the payment of his salary over the course of 2017, it is a fact that those omissions were rectified in the weeks that followed. There again, respondent cannot be blamed for disregarding its duty of care.

45. Conversely, the decision taken on 17 January 2018 took effect on 16 July 2017, six months earlier. While the Administration may terminate the staff member's contract once the 21-month period mentioned in Article 45.7.1 of the CPR has expired, it may only do so from that point forward. In taking the decision with retroactive effect, it tainted its decision with illegality. The decision of 17 January 2018 is annulled insofar as it took effect on an earlier date.

46. Appellant is seeking compensation for the illegality of the decision that was taken. Given that this illegality concerns only the period from 17 July 2017 to 17 January 2018, this period alone may give rise to compensation. Now, over the period between the effective date of the decision (16 July 2017) and the date it was taken (17 January 2018), appellant continued to receive his salary up to and including the month of December. The retroactive nature of the challenged decision might have induced the Administration to ask him to repay the amounts he received between the effective date of the decision and the date when it was taken. Yet the Administration did not ask him to repay those amounts, and appellant kept the salary he had received all year in 2017. On the other hand, he was never paid for the first 17 days of January 2018. In the Tribunal’s view, appellant's claims for compensation are therefore valid with respect only to that 17-day period. It orders respondent to pay appellant an amount corresponding to that remuneration, including the medical cover he would have received had the challenged decision not contained a retroactive aspect.

47. There are not good grounds for other claims for compensation, however; they have merits only with regard to the retroactivity of the decision that was annulled for its retroactive nature. But given that appellant remained in his post throughout 2017 and received his salary for that, such retroactivity was inconsequential in terms of material or non-material damage. In particular, it had no impact on entitlement to the education allowance, which derives only from employment by the Organization, or on coverage of the cost of examinations by the SHAPE Medical Adviser and of the journey to go there, which are borne by the staff member. And while appellant has put in a claim for payment of the annual leave that his sick leave prevented him from taking, Article 45.7.2 precludes staff on sick leave from being entitled to any leave. Appellant's remaining claims for compensation were never made in a prior request to the Administration and are therefore inadmissible.

48. Finally, appellant has not proven the non-material damage claimed to have arisen from that retroactivity given that he continued to be paid until 31 December 2017, he was not asked to repay the remuneration he had received, and the non-payment of his salary for 17 days in January 2018 was being redressed in the present judgment.

E. Costs

49. Article 6.8.2 of Annex IX provides as follows:

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

50. In the circumstances of this case, given that there were not good grounds for most of the appeal, the NCI Agency shall reimburse appellant for the costs of retaining counsel, up to a limit of € 2.000.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The NCIA shall pay appellant the remuneration for the period from 1 to 17 January 2018, including the corresponding medical cover.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 19 February 2019.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

15 March 2019 AT-J(2019)0003

Judgment

Case No. 2018/1268

NF

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 12 March 2019

Original: English

Keywords: expatriation allowance; continuous residence; previous contractor at the same duty station; reiterates case law.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 14 December 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") was seized of an appeal against the NATO Communications and Information Agency (NCIA) dated 6 June 2018, and registered on 15 June 2018 as Case No. 2018/1268, by Mr NF. Appellant seeks, *inter alia*, the annulment of the decision by the General Manager (GM) not to grant him entitlement to expatriation allowance.

2. Respondent's answer, dated 14 August 2018, was registered on 23 August 2018. Appellant's reply, dated 19 September 2018, was registered on 24 September 2018. Respondent's rejoinder, dated 24 October 2018, was registered on 30 October 2018.

3 The Panel held an oral hearing on 14 December 2018 at NATO Headquarters. It heard statements and arguments by appellant and respondent's representatives, in the presence of Mrs Laura Maglia, Registrar.

B. Factual and legal background of the case

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

5. Appellant joined the NCIA, at the Mons (Belgium) location, on 1 August 2017, as an A-2 Incident Resolution Engineer, under a definite duration contract expiring on 31 July 2020.

6. From 9 September 2015 to 19 July 2017, appellant worked as a contractor providing services, as a subcontractor of AIRBUS Defence and Space AS, as an engineer in support of the NCIA Operations Centre in Mons.

7. At the job interview for the post with the NCIA, appellant was informed that he would not be considered eligible for the expatriation allowance in accordance with Article 28.4.1 of the NATO Civilian Personnel Regulations (CPR).

8. Appellant accepted the firm job offer on 19 June 2017, signed his employment contract on 1 August 2017 and on 5 September 2017 approached the Administration regarding his eligibility for the expatriation allowance. On 22 November 2017 the Agency reiterated its position.

9. On 9 December 2017 appellant requested an administrative review. Human Resources (HR) sought an extension of deadlines before responding on 22 January 2018 with the confirmation of the original decision.

10. On 2 February 2018, appellant requested a further administrative review, which was rejected by the NCIA Chief of Staff on 7 March 2018, after a videoconference with appellant and the Deputy Head, Human Resources.

11. On 6 July 2018 appellant submitted the present appeal.

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

(i) Appellant's contentions

12. Appellant considers the appeal admissible. Owing to serious family health issues, appellant requested that the Tribunal apply Article 6.3.3 of Annex IX to the CPR and exceptionally grant him 30 additional days to submit the appeal.

13. Appellant refers to the videoconference he had with the Agency's Chief of Staff (representing the Head of NATO body) and the Deputy Head of Human Resources. He maintains that the discussion led him to understand that he could further pursue his right to appeal with this Tribunal, hence the direct submission of the present appeal. Appellant also retains that denying him access to the Tribunal would be a breach of Article 7 of the Universal Declaration of Human Rights, EU regulations and national laws.

14. Appellant contests the Agency's position that he does not meet the requirements of Article 28.4.1 of the CPR to be eligible for the expatriation allowance. He stresses that he never established residence in Belgium and that he never had an office in Mons. He adds that he never intended to establish and that he always rented either a private room or a hotel room as his contract could have been cancelled at any point in time with 30 days' notice. Appellant continues by considering, *inter alia*, that his family as well as his centre of interest has always been in the United Kingdom; that his taxes and national insurance contributions are paid to the UK government; and that he has never been a NATO official but always independent, with his legal place of work established in the United Kingdom.

15. Appellant acknowledges that during the recruitment process he was informed about his status with respect to eligibility to the expatriation allowance but also stresses that he waited to take up his duties before pursing further his claims, *quod non*.

16. Appellant firmly rejects that he is to be considered as resident in Mons because he had been providing a service there and contends that respondent's position is in violation of his right to freedom of movement and residence as enshrined in Article 45 of Chapter V of the Charter of Fundamental Rights of the European Union.

17. Appellant considers that the specific number of hours of his consultancy contract would not make it a real contract of employment and that the number of days served in a year (roughly 175) would not make him continuously resident on the territory of the host nation for a period of 12 months prior to taking up his appointment.

18. Appellant refers to the definition of place of residence, and its details of proof, in the pension rules as contained in Instruction 33/1 of Article 33 of Annex IV to the CPR.

In the light of this article, he maintains that he has fulfilled the criteria to be considered resident in the United Kingdom.

19. Appellant refers to NATO documents such as MC 216/4 and the standard manpower (SMAP) procedures, which specifically relate to contractors and outline the adherence to European and national employment laws, and contends that compliance therewith by the NCIA would have avoided the present litigation. Appellant also mentions other institutions, in particular the European Space Agency (ESA) and its different, better business models for contractors.

20. Appellant requests that the Tribunal:
- consider his appeal admissible and well founded; and
- order that he be granted the expatriation allowance with retroactive effect as from 1 August 2017, as well as the installation allowance.

(ii) Respondent's contentions

21. Respondent contests the admissibility of the appeal under both Article 4.1 and Article 6.3.1 of Annex IX to the CPR. Respondent stresses that appellant did not complete the pre-litigation procedure, in particular by not having lodged a complaint, and that the appeal was submitted three months after the Agency's response to his further administrative review which therefore puts it clearly outside the time limits foreseen by the Regulations.

22. Respondent rejects that the videoconference appellant had with senior Agency management ever constituted an agreement between him and the General Manager to appeal directly to the Tribunal. Respondent dismisses appellant's reasoning that the CPR process infringes Article 7 of the Universal Declaration of Human Rights, EU regulations and national laws.

23. Respondent refers to Article 28.4.1 of the CPR as applicable to staff appointed after January 2012.

24. Respondent affirms that appellant does not fulfil the above criteria insofar as he had been continuously resident for almost two years in Belgium, he did not previously work for his own country's administration or another international organization, and he was recruited locally from Mons, where he had performed work for the Agency as a contractor since September 2015.

25. Respondent adds that appellant worked during regular office hours (and more) for an average of days that is only slightly below the annual average for NATO civilian staff members.

26. Respondent also recalls that appellant, before taking up his duties, had been informed on several occasions that he was not eligible for the expatriation allowance and that the fact that he kept various ties with his country of origin such as taxation, social security benefits, registration as a cross-border worker and even administrative residence were irrelevant.

27. Respondent refers to previous Appeals Board and Administrative Tribunal case law and in particular the recent AT judgment in Case No. 2017/1103. Respondent stresses that appellant's residence was continuous as of 2015 and that the conditions of "continuous residence" depend on the existence of objective, factual links with the duty country, which is the simple residence, regardless of family links, home address or taxation.

28. Respondent highlights that the Coordinated Organizations also have similar provisions and that in particular ESA, as quoted by appellant, denies expatriate benefits to new staff members who previously worked for them as contractors if their physical place of work, prior to being appointed, was the duty country.

29. Respondent refers also to appellant's mention of Instruction 33/1 of Article 33 of Annex IV to the CPR (Rules of the Coordinated Pension Scheme), highlighting that the notion of residence in that context is of a different nature.

30. Respondent considers any reference to the Charter of Fundamental Rights of the European Union (EU) or any other EU or national regulations as misconceptions by appellant of the concepts of freedom of movement and freedom of residence, those being principles applicable to other situations. Similarly, respondent explains that appellant's references to NATO documents such as MC 216/4 and the SMAP procedures are to be understood in their context and practices, which are unrelated to staff members' entitlement to allowances under the CPR, as in the present case.

31. Respondent also rejects any claim relating to the installation allowance, emphasizing that it was never requested before or in the first or further administrative review.

32. Respondent therefore affirms that the appeal has no legal grounds, that appellant has been continuously resident in Belgium since 2015 and that he was recruited locally.

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

D. Considerations and conclusions

(i) Admissibility

34. As the Tribunal has recalled in previous judgments, the internal dispute settlement system obliges complainants to follow a number of steps before they may lodge an appeal. Specifically, Article 6.3.1 of Annex IX to the CPR provides that appeals must be submitted within 60 days of notification of the challenged decision. Even assuming that appellant understood the content of the videoconference meeting before the decision of 8 March as an agreement for him to lodge a direct appeal, he should have lodged the appeal before 8 May 2018. The appeal was, however, lodged on 6 June 2018.

35. Appellant is requesting to be granted, exceptionally, 30 additional days to submit the appeal in view of family problems seriously affecting his wife and other relatives. Article 6.3.3 of Annex IX to the CPR provides:

> Notwithstanding the time limits prescribed in Articles 6.3.1 and 6.3.2, and in very exceptional cases and for duly justified reasons, the Tribunal may admit appeals lodged up to a further 30 days after the time allowed.

36. According to the above-mentioned rule, there is a margin of discretion for the Tribunal in deciding whether or not to grant the extension. Given that the only requirement is the exceptionality of the reasons for such an extension, serious family problems may be considered as exceptional and, therefore, may be taken as falling within the scope of the discretionary power so conferred. This additional time frame covers the date of submission of the current appeal.

37. As a consequence, the appeal is admissible.

(ii) Merits

38. Article 28.4.1 of the CPR states:

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

39. Appellant, who fulfils the condition of not being a national of the country where he is employed, contends that he was not resident in Belgium at the time he was appointed by the Agency. He claims his stay in Mons was contingent upon his personal attachment with the United Kingdom, as a contractor for the Agency. Therefore, the Tribunal needs to assess whether appellant could be considered resident for a minimum of one year on Belgian territory.

40. In its Judgment in Case No. 2017/1103 the Tribunal recalled the opinion of the NATO Appeals Board in the latter's Decision No. 420 of 5 September 2001. According to it, the purpose of the expatriation allowance is to partially compensate for the added costs for a staff member of having to live, because of his professional activities, in a given country while maintaining sentimental and, in some cases, material ties to the country of which he is a national. The Tribunal underscored that no matter what the nationality of the staff member, the vital element to assess eligibility for the expatriation allowance remains whether that person was working and living in the country of the duty station when the recruitment procedure started.

41. It is beyond doubt that appellant has been continuously working in Mons since 9 September 2015. Hence, the residence at the duty station must be considered continuous at that time, regardless of the fulfilment of different administrative requisites.
42. Appellant stresses his status as resident in the United Kingdom and the fact that his previous situation as a contractor was of uncertain duration. However, for the purpose of the above-mentioned rule, it is irrelevant that he kept various links with his country of origin, such as taxation, social security benefits, maintenance of a home and its basic supplies, and even administrative residence in the United Kingdom (*cf.* NATO Appeals Board decisions no. 89 of 10 March 1978, and no. 776 of 28 October 2010, also quoted in Case No. 2017/1103).

43. The said reasoning does not preclude or interfere in any way with any of the fundamental rights that appellant enjoys as a citizen of the European Union, in particular in relation to the freedom of movement between EU Member States. The CPR do not contain any constraints whatsoever in this respect.

44. Appellant also requests the installation allowance, which is governed by Article 26.1.1 of the CPR and states:

> Eligible staff members whose actual and habitual residence at the time of their appointment by NATO for an appointment of at least one year, or of their transfer for at least one year to a different duty station, is more than 100 km away from their assigned duty station and who can prove and confirm by submitting the appropriate documentation that they have in fact moved their residence in order to take up duty, are eligible for the installation allowance.

45. No claim for the installation allowance was ever submitted to the Organization and, as a consequence, there is no previous decision which could be challenged at this stage. Nevertheless, for the Tribunal, having arrived at the conclusion *supra* that appellant was continuously resident in the duty station at the time he was recruited, a simple reading of the rule leads to the conclusion that it cannot be applicable to appellant's situation. Therefore, appellant does not fulfil any of the conditions set out in it.

E. Costs

46. Article 6.8.2 of Annex IX to the CPR provides:

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

47. As appellant's claims have been dismissed, he is not entitled to reimbursement of costs. None were, in fact, requested.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 12 March 2019.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 April 2019 AT-J(2019)0005

Judgment

Case No. 2017/1245

IM

Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 8 April 2019

Original: French

Keywords: NCIA Contract Policy; admissibility.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs Maria-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 14 December 2018.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 15 September 2017 and registered on 26 September 2017, by Mrs IM, seeking:

- annulment of the decision of 22 March 2017, whereby the General Manager of the NATO Communications and Information Agency (NCIA) decided not to renew her contract which was to expire on 31 January 2018; and
- reimbursement of the costs incurred in the present case, including the cost of retaining counsel.

2. The respondent's answer, dated 27 November 2017, was registered on 30 November 2017. The appellant's reply, dated 28 December 2017, was registered on 9 January 2018. The respondent's rejoinder, dated 8 February 2018, was registered on 9 February 2018. New comments were produced by the appellant on 14 March 2018 and 25 October 2018, and by the respondent on 16 November 2018.

3. The Tribunal's Panel held an oral hearing on 14 December 2018 at NATO Headquarters. It heard the appellant's statement and arguments by the appellant's representative and by the respondent's representatives, in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

4. The appellant joined the NATO Communication and Information Systems Services Agency (NCSA) on 1 February 2011. She was employed under three successive definite duration contracts, the first for one year (1 February 2011 to 31 January 2012), the second for three years (1 February 2012 to 31 January 2015) and the third for an additional three years (1 February 2015 to 31 January 2018). On 1 July 2012, her employer became the NATO Communications and Information Agency (NCIA) following the NCSA's transformation.

5. By e-mail dated 15 March 2017, confirmed by letter dated 22 March and received 23 March, the appellant was informed that her contract would not be renewed upon its expiry.

6. The appellant then initiated the pre-litigation procedure. On 30 March 2017, she made a first request for administrative review, which was rejected on 18 April 2017. On 27 April 2017, she made a second request for administrative review, which was rejected on 16 May 2017. The appellant therefore brought a complaint on 30 May 2017, which was rejected by the decision of 24 July 2017.

7. Appellant lodged an appeal with the Tribunal on 24 November 2017 to seek annulment of the decision of 22 March 2017.

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

(i) The appellant's contentions

8. The appellant begins by explaining that the decision not to renew her contract for another period of three years violates both Article 5 of the Civilian Personnel Regulations (CPR) and the NCSA's "1-3-3-3" contract policy. She argues that the Administration was required to renew her contract for another period of three years.

9. To request the application of the NCSA Directive, the appellant puts forward several arguments. She begins by stating that she was never clearly informed that her contract was no longer governed by the NCSA's Contract Policy but by the NCIA's instead. The appellant also observes that this is not mentioned in her contract either. In any event, even the NCIA Contract Policy states that the Administration must conduct a balanced assessment of its turnover, internal mobility and business continuity requirements, which, in her view, was not done in the decision of 22 March 2017.

10. Secondly, the decision was not sufficiently substantiated insofar as the Administration simply used generic wording without explaining how the criteria stated should be analysed and without referring to her personal situation.

11. Thirdly, the Administration failed to respond to the arguments presented during the pre-litigation phase, in particular the fact that her professional performance had been rated as "good", which should have led to her contract being renewed. The Administration has not explained why the staff member's performance was not good enough for her to continue to be employed by the NCIA. Furthermore, the appellant contests her 2016 rating.

12. Fourthly, the appellant argues that the NCIA still needs qualified staff to work in finance, which should have led it to renew her contract. In particular, the appellant is the only financial expert on her team, which would be severely affected if her contract was not renewed.

13. Lastly, the appellant claims the Administration abused its authority by applying strategic directives whereby the NCIA targeted an average of six years' employment at the Agency. By doing so, the NCIA illegally modified the Civilian Personnel Regulations by adding a stricter rule for staff members, with the objective of preventing as many people as possible from reaching ten years' service and thereby becoming entitled to an indefinite duration contract.

(ii) The respondent's contentions

14. The respondent rejects all of the appellant's contentions.

15. First of all, it recalls that the NCSA Contract Policy does not apply to this dispute, since the NCSA became the NCIA on 1 July 2012. The staff members were informed of this transformation and of its legal consequences. The Administration has the power to unilaterally change some general rules that do not upset the overall balance of the contract.

16. In any event, the appellant's employment on the date of the contested decision was based on a contract signed in 2015, so after the transformation. It was stated in that contract that the provisions of the Civilian Personnel Regulations and the NCIA's own directives applied.

17. In any case, under the NCSA Contract Policy, established on 13 March 2006 and applicable until 2012, there was no guarantee of contract renewal. Contract renewals were always dependent on a determination of the Administration's requirement for them, as per the rule in Article 5.5.3 of the CPR; the Contract Policy did not guarantee that staff members' contracts would automatically be renewed. Article 5.5.3 simply states that contracts may be renewed, in the interests of the service.

18. The conditions for the renewal of the appellant's contract are governed by Article 5 of the CPR. In particular, under Article 5.2, contract renewals may be limited if the agency has adopted a specific contract policy with a general turnover clause, under which renewals are exceptional. This is the case with the NCIA Contract Policy, which contains a general turnover clause on the need to retain a high level of expertise and follow the most recent developments in research and technology. Only the very top performers may be offered a contract renewal.

19. This rule was applied to the appellant, whose performance put her in the bottom half of comparable staff members.

20. The reasons for non-renewal, which the Administration is not obliged to state, were given to the appellant in the decision of 22 March 2017 itself and repeated in the General Manager's 24 July 2017 decision. They were detailed as follows: assessment of the need for operational continuity, the Agency's business requirements and outlook, as well as the skills and performance of the appellant.

21. All in all, the Administration correctly applied the CPR and the NCIA Contract Policy directive.

D. Considerations

On the admissibility of the appeal

22. Though the respondent has not raised the issue of admissibility, the question was put to the parties during the oral hearing. They were allowed to put forward their arguments on this.

23. The Tribunal may raise the issue of the admissibility of an appeal *ex officio* and for this reason reject an appeal submitted outside the prescribed time frame, even if the respondent did not raise the issue itself.

24. Under Article 6.3.1 of Annex IX of the Civilian Personnel Regulations, appeals must be submitted within 60 days of the notification of the decision.

25. The contested decision, dated 22 March and notified on 23 March 2017, was signed by the General Manager of the NCIA, who is the Head of NATO body within the meaning of the Civilian Personnel Regulations. Therefore, the mandatory administrative review mechanisms provided for in Article 2 of Annex IX, and the complaint submission mechanisms provided for in Article 4 of Annex IX, are not applicable. To contest the decision, the appellant had only two options: either to lodge an appeal directly with the Tribunal or to request an administrative review by the official who took the decision, then, if that request was rejected by the Head of NATO body, to lodge an appeal with the Tribunal.

26. However, the appellant pursued several avenues with the Administration. Her first initiative was to contact the General Manager of the NCIA (Head of NATO body within the meaning of the Civilian Personnel Regulations) to ask him to reconsider the decision not to renew her contract, on 30 March 2017. This was therefore a request for administrative review by the official who took the decision. But it was not the Head of NATO body himself who replied to the appellant. In the most favourable interpretation for the appellant, the authority's 30-day silence constituted an implied decision to reject her request. Neither the parties nor the Tribunal can say for certain when exactly the General Manager was petitioned, but it can be said that it was no later than 18 April 2017, which is the date his subordinates responded to the request. An implicit decision to reject the request therefore arose on 18 April at the latest. The appellant had 60 days from that date to dispute the refusal, *i.e.* by 18 June at the latest. However, she only lodged her appeal on 15 September 2017, nearly three months after the expiration of that time frame.

27. The appeal is therefore time-barred and must be dismissed.

E. Costs

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

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

29. In this particular case, the fact that the appeal is dismissed precludes the payment of any sum under this head.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

– The appeal is dismissed.

Done in Brussels, on 8 April 2019.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0002

Order

Case No. 2017/1108

GK

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 26 February 2018

Original: English

Keywords: withdrawal.

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The President of the NATO Administrative Tribunal,

- Considering the appeal submitted by GK with the NATO Administrative Tribunal (AT) on 14 February 2017 and registered under Case No. 2017/1108;

- Considering the AT Order AT(REG)(2017)0004 dated 25 September 2017 suspending, under Rule 23 of the Tribunal's Rules of procedure, the proceedings until 31 January 2018;

- Considering letter AT(REG)(2018)0025 dated 31 January 2018 further extending such suspension until 23 February 2018;

- Taking note of the motion for withdrawal received by appellant on 22 February 2018;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President:

> […] may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional.

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

DECIDES

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 26 February 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0003

Order

Case No. 2017/1105

PL

Appellant

v.

Headquarters Allied Joint Force Command Brunssum

Respondent

Brussels, 27 March 2018

Original: English

Keywords: request for clarification of judgment (Rule 30 ROP).

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The President of the NATO Administrative Tribunal,

- Considering that Mr PL submitted an appeal with the NATO Administrative Tribunal (AT) on 9 January 2017, and registered under Case No. 2017/1105, against the Joint Force Command Brunssum;

- Considering that the Tribunal rendered its judgment in Case No. 2017/1105 on 11 December 2017;

- Noting documentation received from Mr L, on 2 March 2018, entitled "*Request for Clarification of Judgment – preliminary request for clarification of judgment 2017/1105 (Pro forma)*";

- Having regard to Rule 30 of the AT Rules of procedures (ROP) stating:

  1. After a judgment has been rendered, a party may, within three months of the notification of the judgment, request from the Tribunal a clarification of the operative provisions of the judgment.

  2. The request for clarification shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent.

  3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the request for clarification. If the request is admitted, the Tribunal shall issue its clarification, which shall thereupon become part of the original document.

- Observing that Mr L' preliminary (pro forma) request for clarification of judgment does not meet the above mentioned criteria of Rule 30 ROP;

DECIDES

- Mr L' request is denied.

Done in Brussels, on 27 March 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0003

Order

Case No. 2018/1261

AR

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 23 May 2018

Original: English

Keywords: Rule 23.

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

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The President of the NATO Administrative Tribunal,

- Considering that Mr AR submitted an appeal with the NATO Administrative Tribunal (AT) on 8 February 2018 against the NATO Communications and Information Agency (NCIA), which was registered under Case No. 2018/1261;

- Having regard to the letter received, on 22 May 2018, by NCIA requesting a suspension of the procedure on the basis of Rule 23 of the Tribunal's Rules of procedure (ROP), and of appellant's e-mail sent to the AT Registrar, on 23 May 2018, confirming his agreement to such suspension;

- Considering Rule 23 of the ROP whereby:

  1. The Tribunal, or when the Tribunal is not in session, the President shall rule on any request made by the parties for suspension of the proceedings for the purpose of examining the possibilities of an amicable settlement of the dispute.

  2. The Tribunal or, when the Tribunal is not in session, the President may at any time encourage negotiation aimed at putting an end to the dispute and adopt appropriate measures with a view to facilitating such settlement. With the consent of the parties, the proceedings may be suspended for a time specified by the Tribunal or the President. If an agreement is not reached within this period of time, the proceedings will continue.

  3. No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of the amicable settlement may be relied on for any purpose by the Tribunal or the parties in the contentions proceedings.

DECIDES

- The proceedings are suspended until 20 June 2018.

- If no final settlement of the dispute is reached by that date, the proceedings shall resume with respondent to provide its reply in Case No. 2018/1261 by 27 June 2018 COB.

Done in Brussels, on 23 May 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0004

Order

Cases Nos 2018/1256 and 2018/1257

TV

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 23 May 2017

Original: English

Keywords: joining cases.

Boulevard Léopold III - B-1110 Bruxelles - Belgique
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The President of the NATO Administrative Tribunal,

- Considering that Mr TV submitted an appeal with the NATO Administrative Tribunal (AT) on 13 January 2018 against the NATO Communications and Information Agency (NCIA), which was registered under Case No. 2018/1256;

- Considering that Mr TV submitted a second appeal with the AT on 16 January 2018, against the NCIA, which was registered under Case No. 2018/1257;

- Having regard to Rule 13.3 of the Tribunal's Rules of Procedure, which provides:

  The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

- Without prejudice to the Tribunal's position in law on any of the arguments put forward by the parties;

- In the interest of the economy of the judicial process and in accordance with the powers given in Rules 13.3;

DECIDES

- Cases No. 2018/1256 and No. 2018/1257 are joined.

Done in Brussels, on 23 May 2017.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0005

Order

Case No. 2018/1261

AR

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 19 July 2018

Original: English

Keywords: withdrawal.

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Tel: +32 2 707 38 31 – E-mail: mailbox.tribunal@hq.nato.int

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The President of the NATO Administrative Tribunal,

- Considering that Mr AR submitted an appeal with the NATO Administrative Tribunal (AT) on 8 February 2018, and registered under Case No. 2018/1261, against the NATO Communications and Information Agency (NCIA);

- Noting Order AT(PRE-O)0003 dated 23 May 2018, suspending the proceedings in accordance with Rule 23 of the AT Rules of procedures (ROP), and its further extensions until 11 July 2018;

- Considering that the AT Registrar office received communication on 11 July 2018 that the parties reached a settlement, and, by letter dated 13 July 2018, that Mr R decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President

> […] may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional.

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

DECIDES

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 19 July 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0006

Order

Case No. 2018/1264

JE

Appellant

v.

HQ NATO Airborne Early Warning and Control Force

Respondent

Brussels, 27 September 2018

Original: English

Keywords: withdrawal.

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

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The President of the NATO Administrative Tribunal,

- Considering that Mr JE submitted an appeal with the NATO Administrative Tribunal (AT) on 2 March 2018, and registered under Case No. 2018/1264, against the HQ NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK);

- Considering that the AT Registrar office received an email dated 25 May 2018, confirmed by letter, dated 12 September 2018, from appellant informing that he decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of procedures whereby the President

> […] may accept the withdrawal without convening the Tribunal or a Panel for this purpose, provided the withdrawal is unconditional.

- Observing that the withdrawal is indeed unconditional and that nothing stands against it being accepted;

DECIDES

- The request for withdrawal is granted and the appeal is dismissed.

Done in Brussels, on 27 September 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0006

Order

Cases Nos 2018/1266 and 2018/1271

LP

Appellant

v.

Centre for Maritime Research and Experimentation

Respondent

Brussels, 29 August 2018

Original: English

Keywords: joining cases.

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

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The President of the NATO Administrative Tribunal,

- Considering that Mr LP submitted an appeal with the NATO Administrative Tribunal (AT) on 16 April 2018 against the Centre for Maritime Research and Experimentation (CMRE), which was registered under Case No. 2018/1266;

- Considering that Mr LP submitted a second appeal with the AT on 13 July 2018, against the CMRE, which was registered under Case No. 2018/1271;

- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Cases No. 2018/1266 and No. 2018/1271 are joined.

- Both cases shall be heard once the written procedure in Case No. 2018/1271 is completed.

Done in Brussels, on 29 August 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2018)0007

Order

Case No. 2018/1272

PL

Appellant

v.

Headquarters Allies Joint Force Command Brunssum

Respondent

Brussels, 9 October 2018

Original: English

Keywords: Rule 10.

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The President of the NATO Administrative Tribunal,

- Having regard to Chapter XIV of the NATO Civilian Personnel Regulations (CPR) and Annex IX thereto, both issued on 12 May 2013 as Amendment 12 to the CPR;

- Considering the appeal lodged by Mr PL against Joint Force Command Brunssum (JFCBS) dated 15 July 2018, and registered on 20 July 2018 under Case No. 2018/1272;

- Considering the submission provided by respondent dated 10 September 2018;

- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear disputes concerning the legality of a decision taken by the Head of a NATO body;

- Having regard to Rule 10 of the Rules of procedure of the Administrative Tribunal, which provides:

    1. Where the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, he may instruct the Registrar to take no further action on it until the next session of the Tribunal. Such ruling shall suspend all procedural time limits.
    2. After notifying the appellant and considering any additional written views of the appellant, the Tribunal at the next session may either summarily dismiss the appeal as being clearly inadmissible, outside its jurisdiction, or devoid of merit, stating the grounds therefor, or it may decide to proceed with the case in the normal way.

- Recalling the Administrative Tribunal's judgment issued on 11 December 2017, in Case No. 2017/1105 and in particular its paragraphs 39 *ff;*

DECIDES

- The Registrar is instructed to take no further action on the case until the next session of the Tribunal.
- All procedural time limits are suspended.
- Appellant may submit additional written views in accordance with Rule 10, paragraph 2.
- The Tribunal will at its next session either summarily dismiss the appeal or decide to proceed with the case in the normal way.

Done in Brussels, on 9 October 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2018)0001

Order

Joined Cases Nos. 2017/1127-1242

A *et al.*

Appellants

v.

NATO International Staff

Respondent

Brussels, 21 March 2018

Original: English

Keywords: suspension of proceedings.

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The present Order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mr Christos A. Vassilopoulos, judges.

A. Factual background and procedure

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") scheduled the oral hearing in Joined Cases Nos. 2017/1127-1242 on 16 March 2018 before a Panel composed as stated above.

2. On 5 March 2018, the President of the Tribunal sent to the parties' representatives in these joined cases, and in other cases involving similar claims also being heard on 16 March 2018[1], a "Message from the President of the NATO Administrative Tribunal to the parties." The President's message described the procedures the Tribunal intended to follow in these cases.

3. The President's 5 March message stated, *inter alia*:

> The cases will, as usual, be heard by different Tribunal Panels composed of three judges. The Panels will, however, exceptionally all sit together, *i.e.*, all five judges, throughout these hearings for the purpose of obtaining the maximum harmonized positions possible.

The message further stated:

> Lastly, and importantly, I invite the parties to include in their presentations arguments on the Tribunal's competence (see Article 6.2 of Annex IX to the CPR) to hear cases in the absence of a decision by the Head of the NATO Body directly affecting appellants, a matter that has not, or not fully, been debated in the written procedure.

4. On 13 March 2018, counsel for appellants in Joined Cases Nos. 2017/1127-1242 submitted an eight-page letter objecting to elements in the President's 5 March message. *Inter alia*, this letter expressed the view that:

> - the time envisioned was much too short for a proper presentation of appellants' claims; that in counsel's judgment, two hours were required; and that without the requested time, "*the Appellants' right to a fair trial would be seriously breached*";
>
> - the intention to have all members of the Tribunal attend the hearing to hear appellants' claims was contrary to the governing rules, improper, and for various reasons would entail "*several serious breaches of their [clients'] right to a fair trial*";
>
> - the Tribunal had no authority to raise questions regarding its competence, as the parties' written submissions showed no dispute between the parties in this regard. In appellants' view, under Article 6.2.2. of the CPR, the Tribunal cannot consider its competence in the absence of such a dispute between the parties. Further, appellants were not prepared to

[1] Cases Nos. 2017/1114-1124, Case No.2017/1126, and Case No. 2017/1243.

address the Tribunal's question regarding competence orally at the hearing, and "*at the very least*," if the matter were to be considered, further written proceedings were necessary "*in accordance with our clients' right to a fair trial including the right to adversarial process*";

- the manner in which the President's question regarding competence was framed revealed prejudicial prejudgment on his part.

5. The hearing convened as scheduled on 16 March 2018 before the designated Panel. In their opening presentations, appellants' counsel reiterated the concerns summarized above. Counsel informed the Administrative Tribunal that they had prepared a shortened oral presentation of their case in accordance with the President's message, but that they would not address the competence issue at the current hearing. Counsel expressly maintained their objections and stated that appellants would proceed under reservation.

6. Counsel for respondent objected to the appellants' reservation, sought clarification of its meaning, and recorded the respondent's own reservation.

7. The President stated that the Administrative Tribunal could find additional time for appellants' presentation of their claims; that recurring issues were being heard and decided by different Panels, but that the Administrative Tribunal sought to avoid inconsistent outcomes insofar as possible in the respective judgments; and that the purpose of citing the competency issue in the 5 March message had been to allow prior reflection by the parties, rather than raising the issue at the hearing without prior notice.

8. Counsel for appellants responded that their reservation related to the unfairness of the proceedings; that the Administrative Tribunal had no duty to seek consistency, and that if this were a concern, all similar cases should have been joined into a single proceeding, as appellant had proposed; and that the competency issue could only be addressed following additional written proceedings.

9. The President then suspended the hearing to allow for consultations among the three Panel members and the parties' counsel. Counsel for appellants reiterated their previously stated concerns, emphasizing their view that the anticipated procedure deprived appellants of their right to a fair trial and maintaining their position in this regard; that appellants could not address the issue of competence orally; and that written procedures would be necessary if the question of competence were to be addressed. Counsel for Respondent expressed concern about what was seen to be an ambiguous and unbalanced procedural situation, where appellants might accept favorable rulings by the Administrative Tribunal but would contest unfavorable rulings in national courts.

10. The hearing was then resumed. The President announced that, following the consultations, the hearing was suspended.

B. Decision

FOR THESE REASONS

The Tribunal decides that:

- A resumed hearing in Joined Cases Nos. 2017/1127-1242 will be scheduled as soon as practicable.

- The Parties are invited to address to the Tribunal, in writing, within 30 days of the notification of this Order, the substance of the question regarding the Administrative Tribunal's competence indicated in the President's message of 5 March 2018.

Done in Brussels, on 21 March 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2018)0002

Order

Case No. 2017/1104

MK
Appellant

v.

Headquarters Allied Air Command Ramstein
Respondent

Brussels, 26 March 2018

Original: English

Keywords: request for revision.

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This Order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the appellant's request for revision dated 14 December 2018, and having considered the request at its March 2018 session.

A. Factual Background

1. The above Panel of the NATO Administrative Tribunal (hereinafter the "Tribunal") rendered a Judgment in the appeal in this case on 21 November 2017. In that Judgment, the Tribunal decided that:

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

2. Appellant subsequently submitted an eleven-page document dated 14 December 2017 and captioned "*Subject: Request for Revision of Appeal 1104*." In this document, appellant requested "*a revision of the appeal 1104 with a rehearing in accordance with Rule 29, Annex IX, Appendix 1, NCPR / Article 6.8.4 (b) Annex IX, NCPR, due to the fact that a determining fact and evidence had been ignored at the hearing and had not been known by the Tribunal and the appellant at the time of the Tribunal's judgment*".

3. The first two pages of appellant's request set forth various criticisms of the Tribunal's Judgment in his case. These are followed by approximately two pages captioned "Justification for the Revision of the Judgment." Appellant here argues, *inter alia*, that "*the contentions of the Tribunal are unfounded and speculative*," that the Tribunal was delinquent in not questioning the appellant regarding accusations the Tribunal found unconvincing, and that the Tribunal committed other errors of procedure, omission, and assessment.

4. The balance of appellant's request sets out multiple objections and concerns related to the conduct of German judges and prosecutors in his German criminal proceedings, and alleged security breaches and other misconduct by NATO officials.

5. The request concludes: "*Based on my above listed presentations of violations during the investigations, the judicial proceedings, the NATO disciplinary proceedings and the determining facts ignored by the Tribunal, I request revision of case 1104 and an oral re-hearing with the availability of the German judgement*".

B. Legal Background

6. Article 6.8.4 of Annex IX of the NATO Civilian Personnel Regulations (CPR) provides:

6.8.4 (a) The judgments of the Tribunal shall be final and not subject to any type of appeal by either party, except that the Tribunal may be requested by either party within 30 days from the date of the judgment to rectify a clerical or arithmetical mistake in a judgment delivered.

(b) Either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. Petitions for a re-hearing must be made within 30 days from the date on which the above- mentioned fact becomes known, or, in any case, within 5 years from the date of the judgment. With the consent of the parties, the Tribunal may decide in a given case that no oral hearing is required and a decision can be taken on the basis of the written record before it.

7. Rule 27(7) of the Tribunal's Rules of Procedure (ROP) provides:

Subject to Article 6.8.4 of Annex IX, judgments are final and binding.

8. Rule 29 of the Tribunal's ROP provides:

In accordance with Article 6.8.4 of Annex IX, either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. Petitions for a re-hearing must be made within 30 days from the date on which the above-mentioned fact becomes known, or, in any case within 5 years from the date of the judgment.

C. Considerations and Conclusions

9. The above-quoted 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, 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 was rendered.

10. Appellant has failed to show that these requirements have been met. It is not apparent from his request what, precisely, is the fact that, if known, would have led to a different outcome in his case (which, it should be noted, resulted in a Judgment in his favor). Whichever of the matters cited appellant regards as a "determining fact," he has failed to show how it would have led to a different outcome in his case. Moreover, it is not clear which, if any, of the many factual allegations made in his request involve matters that were not known to him at the time of the earlier proceedings. Many, if not all, of the claims and factual assertions in his current request involve matters that were in the record of the earlier proceeding.

D. Decision

FOR THESE REASONS

The Tribunal decides that:

- Appellant's request for revision of the Judgment in Case No. 2017/1104 and a rehearing is denied.

Done in Brussels, on 26 March 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2018)0003

Order

Case No. 2016/1102

JG

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 24 August 2018

Original: English

Keywords: request for clarification (Rule 30).

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This Order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr Laurent Touvet and Mrs Arastey Sahún, judges, having regard to the appellant's request dated 30 April 2018 for clarification of judgment in Case No. 2016/1102, and having considered the request at its June 2018 session.

A. Factual Background

1. The above Panel of the NATO Administrative Tribunal (hereinafter the "Tribunal") rendered a judgment in this case on 16 January 2018, dismissing the appeal.

2. Appellant subsequently submitted a document dated 30 April 2018 requesting the Tribunal "*to clarify their Judgment (Case No. 2016/1102, date: 16 January 2018), specifically in regard of the contentions of the Appellant and Respondent as well as some of the points in the legality portion of the conclusion*", in accordance with Rule 30 of the Tribunal's Rules of procedure (ROP).

3. In her document, appellant set forth, *inter alia*, a series of arguments relating to the sick leave, the status as staff member, the medical certificates, the date of the disability and the admissibility of the back pay request. Appellant added that "*We have legitimate uncertainly as to how the conclusions were reached based on the inconsistencies we have addressed*."

4. By letter dated 30 April 2018, the AT Registrar, in accordance with the provisions of Rule 30.3 of the AT ROP, which provides: "*The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the request for clarification […]*", requested respondent to provide its views on the request by 25 May 2018.

5. By letter dated 17 May 2018, responded stated, *inter alia*, that *"[…] a request shall only be admissible if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent*" and "[…] *the submissions are not requests for clarification, but Appellant attempts to re-open case 2016/1102 and even case 2015/1055 […]. We refer to Article 6.8.4 (a) Annex IX NCPR which states that the judgments shall be final and not subject to any type of appeal by either party*".

B. Legal Background

6. Article 6.8.4 of Annex IX of the NATO Civilian Personnel Regulations (CPR) provides:

> 6.8.4 (a) The judgments of the Tribunal shall be final and not subject to any type of appeal by either party, except that the Tribunal may be requested by either party within 30 days from the date of the judgment to rectify a clerical or arithmetical mistake in a judgment delivered.

(b) Either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. Petitions for a re-hearing must be made within 30 days from the date on which the above- mentioned fact becomes known, or, in any case, within 5 years from the date of the judgment. With the consent of the parties, the Tribunal may decide in a given case that no oral hearing is required and a decision can be taken on the basis of the written record before it.

7. Rule 30 of the Tribunal's ROP provides:

1. After a judgment has been rendered, a party may, within three months of the notification of the judgment, request from the Tribunal a clarification of the operative provisions of the judgment.

2. The request for clarification shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent.

3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the request for clarification. If the request is admitted, the Tribunal shall issue its clarification, which shall thereupon become part of the original document.

8. Rule 27(7) of the Tribunal's Rules of Procedure (ROP) provides:

Subject to Article 6.8.4 of Annex IX, judgments are final and binding.

C. Considerations and Conclusions

9. Annex IX to the CPR provides that judgments of the Tribunal are final and are not subject to any type of appeal by either party. It follows from this that neither party may enter into a discussion with the Tribunal concerning the latter's reasoning and conclusions. The only exception is that the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment rendered, which is not the case here.

10. Annex IX further provides that either party may petition the Tribunal for a re-hearing. Annex IX then stipulates clearly that petitions for a re-hearing may only be made should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment.

11. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature, which existed prior to the judgment and which were unknown at that time by the Tribunal and by appellant, and which, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. The Tribunal observes, first of all, in this respect that all elements put forward by appellant in her letter

dated 30 April 2018, were known by her at the time of the Tribunal's judgment. Secondly, appellant has not established that these elements were not known by the Tribunal. In fact, they were.

12. The Tribunal observes that none of the elements put forward by appellant would either justify a request for a re-hearing in accordance with Article 6.8.4 of Annex IX, or a request for clarification. Appellant has failed to identify "*in which respect the operative provisions of the judgment appear obscure, incomplete or inconsistent*", as required in Rule 30.2. She rather submits contentions, which were in the record of the proceedings or have been debated at the hearing. The Tribunal is of the view that appellant is, in fact, seeking none other than a re-opening of a debate on the conclusions of the Tribunal, which is at variance with the rule that the Tribunal's judgments are final and not subject to appeal and with the purpose of a re-hearing. The Tribunal therefore concludes that the conditions for Rule 30 have not been met and that the request for clarification must be denied.

D. Decision

FOR THESE REASONS

The Tribunal decides that:

- Appellant's request for clarification is denied.

Done in Brussels, on 24 August 2018.

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

Certified by
the Registrar
(signed) Laura Maglia

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

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2018)0004

Order

Joined Cases Nos 2018/1262 and 2018/1263

JS, JH

Appellants

v.

NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 3 December 2018

Original: English

Keywords: request for a re-hearing.

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The present Order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Mr Chris de Cooker, President, Mr John R. Crook and Mr Christos A. Vassilopoulos, judges.

A. Factual background and procedure

1. On 19 October 2018, the NATO Administrative Tribunal (hereinafter "Tribunal") rendered a single judgment in Cases Nos 2018/1262 and 2018/1263, dismissing the appeals of Mr JS and Mr JH submitted against the NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW&CF GK).

2. On 25 October 2018 appellants wrote to the Tribunal requesting a re-hearing in accordance with Article 6.8.4(b) of Annex IX to the NATO Civilian Personnel Regulations (CPR).

3. In this letter appellants assert that they have been subjected to adverse action by respondent following their request for Administrative Review of 26 November 2015, which they contend resulted in their receiving termination of employment letters dated 16 December 2015. Appellants state that respondent violated Article 5.3.1 of Annex IX to the CPR, which reads as follows:

> No individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels, presenting any testimony to the Complaints Committee, or assisting another staff member.

4. Appellants also enclosed a document entitled "Minutes of Transformation Task Force (TTF) Working Group Meeting - 03 DEC 2015". They submitted that it contained a determining fact that was not known by the Tribunal at the time of the 19 October 2018 judgment, and on this basis they request a re-hearing of their cases. These minutes stipulate that "*[c]urrently MSEC has an issue with 3 CIV not willing to sign their new contract, they have requested a review of grade*". The minutes also contain the statement that "*if they do not sign they have resigned*". Appellants submit that the third person referred to in the minutes was allowed to reconsider his request for review and to sign the contract he was offered.

5. Appellants consider this difference in treatment to be an adverse action, as respondent never invited them to reconsider their request for administrative review. Appellants add that they never refused the offered contract/job description but only submitted a request for Administrative Review.

6. With the re-hearing request, appellants seek:
- acknowledgment by respondent that the termination of employment was based on an adverse action; and
- financial compensation in the amount of two years' salary for the premature termination of employment.

B. Considerations

9. Annex IX to the CPR provides that judgments of the Tribunal are final and are not subject to any type of appeal by either party. It follows from this that neither party may enter into a discussion with the Tribunal concerning its reasoning. The only exception is that under Article 6.8.4(a) of Annex IX, the Tribunal may be asked by either party to rectify a clerical or arithmetical mistake in a judgment. That is not the case here.

10. Annex IX further provides that either party may petition the Tribunal for a re-hearing in very limited circumstances.

11. Annex IX stipulates clearly that petitions for a re-hearing may only be made should a determining fact not have been known by the Tribunal and by the party requesting re-hearing at the time of the Tribunal's judgment.

12. In other words, the re-hearing procedure presupposes the discovery of elements of a factual nature that existed prior to the judgment and that were unknown at that time by the Tribunal and by the party seeking a re-hearing. These facts must be of a nature that, had the Tribunal been able to take them into consideration, could have led it to a different conclusion. Article 6.8.4 (b) further provides that petitions for a re-hearing must be made within 30 days from the date on which the fact becomes known. Appellants have not indicated when they became aware of the supposed new fact, nor have they provided supporting evidence in this respect. More to the point, the minutes appellants presented are of a meeting at which appellants were not present, and merely reflect a factual situation that was known to appellants and to the Tribunal.

13. Although appellants' request for a re-hearing refer to the recent judgment in Cases Nos. 2018/1262 and 2018/1263 (*cf.* paragraph 1 *supra*), their current request is, in fact, appellants' fourth attempt to appeal the Tribunal's 17 March 2017 judgments in joined Cases Nos. 2016/1080 and 2016/1092 (H *v.* NAEW&CF GK), and joined Cases Nos. 2016/1081 and 2016/1096 (S *v.* NAEW&CF GK).

14. Appellants have twice before sought a review of those judgments. In both instances the Tribunal issued Orders dismissing the requests and stipulating that it does not enter into a discussion on its judgments. Notwithstanding the Tribunal's clear direction, appellants submitted further appeals, leading to the judgment dated 10 October 2018 dismissing those appeals. The Tribunal will do so again this time. The Tribunal deems it, however, necessary to reiterate what it already expressed in its judgment of 19 October 2018, and in particular paragraph 41 thereof:

> …it must be held that the present actions are a continuation of the appellant's' attempts to call into question the Tribunal's findings in their previous cases. With the present actions, the appellants raise the same pleas indiscriminately, in so far as they put forward arguments in their support which the Tribunal has already rejected in their previous actions. The appellants' overall conduct after the delivery of the Tribunal's judgments renders the present appeals abusive.

15. Appellants' submissions of 25 October 2018 are nothing more than a further attempt to reopen their cases, which the Tribunal already examined extensively. They constitute an abusive use of the appeals procedure.

16. The conditions for a re-hearing have not been met and the request for a re-hearing must be denied.

C. Decision

FOR THESE REAONS

The Tribunal decides that:

- The request for a re-hearing is denied.

Done in Brussels, on 3 December 2018.

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

Certified by
the Registrar
(signed) Laura Maglia