



JUDGMENTS and ORDERS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2019

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2019

23rd session (14 March 2019)

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2019

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

12 April 2019

AT-J(2019)0004

Judgment

Joined Cases Nos. 2018/1266 and 2018/1271

LP

Appellant

v.

**Centre for Maritime Research and Experimentation
Respondent**

Brussels, 3 April 2019

Original: English

Keywords: promotion; time limits; harassment; duty to provide proof.

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This judgment is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs María-Lourdes Arastey-Sahún and Mr John R. Crook, judges, having regard to the written procedure of the two cases and further to the hearing on 14 March 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal by Mr LP, a staff member of the Centre for Maritime Research and Experimentation (CMRE), dated 16 April 2018 and registered 20 April 2018 as Case No. 2018/1266. In this appeal, appellant seeks annulment of respondent's decision of 21 February 2018 rejecting his request to upgrade the post of Head of the Personnel and Administration Department (PAD) from grade A4 to A5, with retroactive effect from January 2014.
2. Appellant submitted a second appeal on 13 July 2018, registered on 19 July 2018 as Case No. 2018/1271. In this appeal, appellant seeks annulment of respondent's decision of 15 May 2018 rejecting his allegations of harassment and abuse of authority from the former CMRE Director, requesting financial compensation and his promotion to grade A5 step 7 with economic benefits from 1 January 2014.
3. The respondent's answer in Case No. 2018/1266, dated 19 June 2018, was registered on 27 June 2018. The appellant's reply, dated 25 July 2018, was registered on 7 August 2018. A rejoinder was submitted on 6 September 2018 and registered on 24 September 2018.
4. The respondent's answer in Case No. 2018/1271, dated 19 June 2017, was registered on 21 June 2017. The appellant's reply, dated 17 October 2018, was registered on 23 October 2018. A rejoinder dated 22 November 2018 was registered on 23 November 2018.
5. By order of the Tribunal President, AT(PRE-O(2017)0002, dated 29 August 2018, the two appeals were joined.
6. On 22 February 2019, appellant informed the Tribunal that for health reasons he was not able to attend the hearing. He provided a three-page written statement which the Tribunal accepted as an additional pleading under Rule 16 of its Rules of procedure (ROP). Appellant also submitted a video message, which the Tribunal declined to accept as not in conformity with the adversarial character of the Tribunal's proceedings.
7. *In absentia* of appellant, and in accordance with Rule 26.2 of the ROP, the Tribunal's Panel held an oral hearing on 14 December 2019 at NATO Headquarters in Brussels. It heard arguments by respondent in the presence of Mrs Laura Maglia, Registrar.

B. Factual background of the case

8. Appellant, a former Air Force officer, began working for the CMRE in 1999 covering different functions. Appellant held the position of Head PAD, from 1 November 2005 to 31 December 2015. From 1 January 2016 to 31 December 2017 he performed the duties of Host Nation Relations adviser. Appellant retired as of February 2019.

9. In September 2017 appellant informed the Director CMRE that his task as Host Nation Relations adviser was completed. On 28 September 2017 he was informed that this role would come to an end with effect from 31 December 2017. Appellant was offered the position of Head General Services Real Estate Maintenance, which he declined. Therefore, in accordance with Article 9 of the CPR, appellant's contract was due to terminate on the above-mentioned date of 31 December 2017.

10. On 1 November 2017, a new Director assumed charge of CMRE. On 6 December 2017 she withdrew the post suppression decision and appellant continued to work in his previous role as from 1 January 2018.

11. On 9 November 2017 appellant submitted a claim for psychological, moral and existential damages resulting from harassment and abuse of authority allegedly perpetrated by the former CMRE Director.

12. On 11 December 2017 appellant submitted a claim to the Director regarding the upgrading of his post from A4 to A5. Additional exchanges took place between the parties, namely on 19 December 2017 (Directors' reply), 9 January 2018 (appellant's further views) and on 19 January 2018 (Director's final position with respect to the upgrading).

13. Also on 11 December 2017 appellant submitted a second claim for damages resulting from his alleged harassment. Additional exchanges took place, namely on 19 December (Director's request for documentation), 9 January 2018 (appellant's reply) and 19 January 2018 (Director's notification that an investigation by an external expert would take place). On 6 February 2018 the external investigator was appointed and a report was delivered on 13 April 2018.

14. On 16 February 2018 appellant submitted a formal complaint with a request that the complaint to be considered by a Complaints Committee. On 21 February 2018 the Director rejected the complaint and indicated that appellant should direct his grievance directly to the Administrative Tribunal.

15. On 16 April 2018, appellant submitted his first appeal (Case No. 2018/1266).

16. By letter dated 15 May 2018, the Director informed appellant of the findings of the investigation and, based on its conclusions, rejected his claims for reclassification of his post and his request for financial compensation.

17. On 24 May 2018 appellant asked to be provided with the annexes to the report of the investigator. On 31 May 2018 the Director denied this request in view of the confidentiality of the documentation.

18. On 13 July 2018 appellant submitted his second appeal (Case No. 2018/1271).

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

Case No. 2018/1266

(i) Appellant's main contentions

19. Appellant's first appeal focuses on the upgrade of the Head PAD post. He maintains that the upgrade from A4 to A5 was part of the Peace Establishment (PE) submission during the cycle to approve the 2014 CMRE Financial Plan.

20. Appellant details exchanges since 2013 with CMRE stakeholders relating to the validation and finalization of the post upgrade. He provides documentation that in his views shows that the upgrade was included in the required budget and finance plans of the Centre, and that it was agreed at the time by the Director, the Deputy Director, and cleared with the Chief Scientist.

21. Appellant describes his understanding of the CMRE Personnel Establishment process and contends that since 2013, the year when CMRE became customer-funded (hence no longer subject to the NATO international manpower ceiling and procedures), upgrades and downgrades of civilian posts are decided by the Director and do not require any specific approval by higher authorities, in this case the Science and Technology Board (STB). In appellant's understanding this was done to facilitate shaping the composition of the centre and its staff according to the demand of its customers.

22. In support of this procedural point, appellant stresses that since 2013 none of the Centre's upgrades of civilian posts have been submitted for the approval by the STB, adding that in some cases upgrades were approved outside of the approval cycle of the financial plans.

23. Appellant considers his appeal admissible. He stresses that he did not challenge the lack of implementation of the upgrade and other actions taken by the former CMRE Director earlier as, according to him, they were part of the former Director's deliberate intent to create a hostile and offensive work environment for him. The adoption by the current Director of measures such as cancelling his dismissal, reinstating him in his position, and declaring that the proposed upgrading of his position remained under consideration, show, in his opinion, the validity to his claims. Moreover, appellant stresses that his claims are within the required time limits, as they are directed against the 21 February 2018 Director's decision.

24. Appellant requests the Tribunal to annul the Director's decision of 21 February rejecting his request to upgrade his post and to order:

- the upgrade to be implemented with effect from 1 January 2014;
- that he be promoted into the A-5 position with effect from 1 January 2014, with the consequent attribution of the corresponding steps; and
- that he be granted all the economic benefits resulting from the promotion as of

the date of its effect.

(ii) Respondent's main contentions

25. Respondent considers the appeal inadmissible for two main reasons: 1) lack of a decision to be appealed against; and 2) non-compliance with the time limits to challenge decisions.

26. Respondent stresses that appellant has been requested several times to provide a copy of the decision to upgrade his post, without this ever happening. According to respondent this is unsurprising, as there never was such a decision.

27. Respondent refers to the 21 February 2018 letter of the CMRE Director, in particular to the explanations given to appellant: *"As I indicated to you in my letters dated 19 December 2017 and 19 January 2018, I have found no evidence that the upgrade of your post has been approved in line with the STO Charter. Nevertheless, in both my letters, I indicated that I would still consider the upgrade of your post in the context of the implementation of the PWC (Price Waterhouse Coopers) audit recommendations and that it would then be addressed in accordance with the requirements of the STO Charter. I must therefore disagree with the subject of your complaint stating that the purpose of my letter was not to implement the upgrade of your post as it is clearly contradicting the express wording of my two letters. My intention is to propose a new organizational structure to the Science and Technology Board in March 2018"*.

28. Respondent also considers the present appeal moot, as the NATO Civilian Personnel Regulations (CPR) foresee time limits for the submission of complaints against decisions affecting a staff member. In the present case, appellant's post was allegedly upgraded with effect from 1 January 2014, but appellant did not take any action against the lack of implementation until December 2017. In respondent's views waiting more than three years after the alleged "decision" makes the case clearly inadmissible.

29. Moreover, respondent maintains that the documentation provided by appellant is not evidence of the upgrade. It asserts that the upgrade was never forwarded to the STB, and that the only document mentioning appellant's name in relation to a possible upgrade was merely a budgeting exercise in case the upgrade decision would actually be taken.

30. Respondent does not dispute that appellant's upgrade was considered, but denies that an actual decision was ever taken and approved by the STB. It adds that both the CMRE Financial Controller and the International Military Staff (IMS) Financial Controller (ultimately the entity with responsibility for the Centre) confirmed this. Their statements were included in the report by the investigator.

31. Respondent strongly disagrees with appellant's understanding of the CMRE establishment process. It refers to Article 6.2(a) of Annex 5 to the STO Charter which provides: *"CMRE personnel establishment will be prepared by the Director, for endorsement by the STB, and for approval by the appropriate committees"*. It explains that the personnel establishment submission concerns the number of international civilians needed, the distribution of their grades and ranks, and the total costs for the

organization. The upgrading of a position inevitably leads to a change in this balance and therefore must be approved through the regular PE establishment process, which includes STB endorsement.

32. Respondent requests the Tribunal to declare the appeal inadmissible or, in case it declares the appeal admissible, to declare it without merit.

Case No. 2018/1271

(i) Appellant's main contentions

33. Appellant's second appeal concerns his claim to be victim of harassment and abuse of authority by CMRE's previous Director.

34. Appellant considers his claim for harassment admissible. He maintains that, *quod non*, the current Director should have rejected his claim, instead of asking for additional information, documentation and, when received, to initiate an investigation.

35. Appellant alleges that the former Director deliberately sought to create a hostile and offensive work environment for him. He summarises the former Director's actions in this regard as follows:

- refusing to upgrade the Head PAD position set by his predecessor and reflected into the 2014 CMRE Financial Plan approved by the STB;
- removing appellant from a selection panel set up for recruitment of a position within PAD;
- cancelling the above-mentioned recruitment, knowing that this decision would have negative repercussions on PAD's performance;
- making structural changes to PAD that weakened the department without achieving results of efficiency and effectiveness;
- treating matters pertaining to PAD directly with appellant's subordinates without involving him or keeping him informed;
- removing appellant as Head of PAD, knowing that this would have negative repercussions on his reputation within the CMRE;
- assigning appellant temporary tasks and placing him in a temporary post;
- excluding appellant from the CMRE Board of Directors although he was one of the most senior and knowledgeable managers of the Centre;
- not reinstating appellant in the Head PAD position at the end of his temporary assignment, instead offering him a less important position under the supervision of a staff member of a grade lower than his; and
- dismissing appellant as a result of his refusal to accept this demotion.

36. Appellant affirms that his claim for harassment is based on this accumulation of events over time which added together constitute persecutory behaviour. Appellant holds that the fact that the current Director cancelled, insofar as possible, her predecessor's acts against him (withdrawal of the letter of dismissal, reintegration as Head PAD, participation to the CMRE Senior Management Group) confirm this.

37. Appellant questions the conclusions of the external investigator. He contends that the fact that the investigator's decision to inform witnesses that their interview would not be anonymous and that summaries of their interviews would be shared with the Director (and not appellant) raises doubts about the correctness of the procedure, as it could have influenced the independence of the witnesses and their statements about the facts. Appellant also expresses dissatisfaction with having requested, but having been denied, the annexes to the investigation report.

38. Appellant maintains that the investigator's report confirms the facts outlined in his claim, but also expands, at length, his disagreement with some comments made by the persons interviewed. Appellant also presents documentation, which he labels as an investigation carried out on his behalf, which he contends counterbalances statements and conclusions of the external expert's investigation.

39. The second appeal again addresses the issue of the post upgrade and repeats contentions that were also part of his first appeal. Appellant maintains that, despite technical considerations linked to the upgrade, the real reason for the refusal by the former Director was his prejudice against appellant.

40. In addition, appellant represents that he learned from the investigator's report facts of which he was previously unaware: that the former CMRE Director's negative opinions of him were influenced and prejudiced by facts that were never raised with him, namely a lack of trust between him and the CMRE Chief Scientist, and unfair treatment of two members of the Human Resources team.

41. Appellant states that these charges of misconduct against him were never raised by the former CMRE Director, nor were they addressed in accordance with the NATO regulations, so that he was not given a chance to defend himself.

42. Accordingly, appellant concludes that the former CMRE Director violated Articles 12.1 and 16.1 of the CPR, that he committed an abuse of authority, and that his acts were persecutory and retaliatory.

43. Finally, appellant disagrees with the current Director's contentions that, following her cancellation of his dismissal, his behaviour has been less than cooperative and that he engaged in retaliation tactics or revenge against the CMRE and the Director herself.

44. Appellant requests the Tribunal:

- to annul the CMRE Director's decision of 15 May 2018 dismissing his claim;
- to order CMRE to pay him € 120,000 as compensation for the damage suffered;
- to order CMRE to promote him with effect from 1 January 2014 to grade A-5, with the corresponding economic benefits.

(ii) Respondent's main contentions

45. Respondent disputes admissibility of the appeal, pointing out that appellant never brought any complaint or claims for harassment against the former Director CMRE before he left office at the end of 2017 and, moreover, that appellant never disputed past decisions which he is now complaining about.

46. In particular respondent sees as time-barred all decisions pertaining to facts occurring years earlier, such as: the alleged decision not to implement the post upgrade as of 1 January 2014 (2014); the decision to remove appellant from a recruitment panel (2013); the former Director's decision to make structural/organizational changes (2015); the allegations of being by-passed (2014-2015); the decision assigning him to another position (2016); the decision concerning the composition of the CMRE Board (2016); and the decision to terminate appellant's contract (2017), which in any case is without object as the current Director withdrew that decision.

47. Respondent also highlights that the fact that an investigation was carried out does not mean that the time limits to challenge decisions were re-opened. Moreover, the independent investigation showed that appellant's claims were without merit.

48. Respondent asserts that, as appellant was informed, it *"[...] will initiate an investigation to be undertaken by an external expert to assess whether or not harassment took place in line with the NATO Civilian Personnel regulations and the policy on the prevention and management of harassment, discrimination and bullying in the workplace."* This cannot be interpreted as a validation of appellant's claims.

49. Further, respondent points out that the current CMRE Director requested appellant to resume his functions as Head PAD as she considered that his continued support and extensive experience would benefit the Organization. This fact however, does not confirm the validity of appellant's claim. Rather, it must be seen as an effort by the new Director to address a difficult personnel issue in the light of the challenges of the Centre at the time, notably the lack of key personnel.

50. Respondent maintains that, regrettably, appellant's behaviour since the withdrawal of the dismissal has not been up to the required standards. Rather, he has engaged in retaliation or revenge tactics against the Centre's staff and the current Director.

51. About the different allegations made, respondent contends that appellant did not provide any evidence of harassment or wrongdoing by CMRE and its staff or its former Director. Instead, the report of the outside investigator called these claims into question.

52. By letter dated 15 May 2018, the CMRE Director informed appellant of the outcome of the investigation: *"[h]er conclusions were that while expectations may not have been clearly communicated, it is her opinion that the findings do not support your allegations of moral harassment and/or abuse of authority. The evidence does not establish that Mr [...] actions and decisions were "persecutory" or "retaliatory" or that [appellant] had been the victim of an intimidating, hostile or offensive work environment in breach of NATO's applicable policy"*. Respondent therefore rejected appellant's claims of violation of the CPR provisions and denied the financial compensation.

53. As to appellant's claim that he was not provided with the report's annexes, respondent affirms that they were not given in view of their confidentiality. Respondent highlights that summaries of such statements were part of the main report which appellant did receive.

54. Respondent requests the Tribunal to declare the appeal inadmissible or, in case it declares the appeal admissible, to declare it without merit.

D. Considerations and conclusions

55. The two appeals, while initiated at different times and containing formally different pleas, are repetitive and complementary. They are also sometimes inconsistent. The Tribunal deemed it appropriate to join both appeals and adjudicate them at the same time, in order to harmonize their resolution as far as possible.

(i) On the submissions of appeal no. 2018/1266

56. Firstly, as mentioned, appellant's request to upgrade his former post as Head PAD rests on his assertion that the upgrade was duly adopted but never implemented. Appellant argues that the decision to upgrade was allegedly taken with effect from 1 January 2014.

57. The Tribunal has consistently stated that it 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 (Cases No 2016/1078 and Cases Nos 2016/1090 and 2016/1095, *inter alia*).

58. Nevertheless, the record does not show any convincing evidence of such a formal and official decision to upgrade the post at issue. Nor can it be concluded that the upgrade did not need specific approval by authorities outside of CMRE. Appellant failed to demonstrate that at any time any competent authority or body inside or outside of the organization made a conclusive decision to upgrade the post. The absence of such proof is particularly remarkable, considering that respondent repeatedly asked for the slightest evidence of any previous decision, but appellant did not bring forward any concrete evidence to show that such a decision existed. Instead, appellant described what he believed should have been the procedures for the upgrade of posts, taking for granted that his was already and definitely approved.

59. Appellant did not react against the failure to implement the upgrade that he contends should have been entered into force on 1 January 2014. Appellant's claim was only raised on 11 December 2017. The Tribunal can understand that appellant's interest increased when he was accepted to resume his functions as Head PAD after the notification to terminate his employment was withdrawn. However, appellant occupied that post until 1 January 2016, when he was moved to the post of Host Nation Relations adviser. Thus, appellant acquiesced in the same grade A4 during the two years following the allegedly decided upgrade.

60. In any case, the organization has not simply rejected appellant's claim on the basis of a question of time limits. Instead, the current challenged decision was taken after careful effort to find any substantial support for appellant's assertion about the upgrade.

61. Consequently, this first appeal is rejected as inadmissible and unfounded.

(ii) On the submissions of appeal no. 2018/1271

62. The second appeal seeks compensation for damages suffered by appellant as a result of the allegedly persecutory and retaliatory acts of the former CMRE Director. It again claims the promotion as from 1 January 2014, which is already addressed in the first appeal.

63. The Tribunal must highlight that appellant refers to events and situations that took place at the latest in 2017, the last being the decision to terminate his contract. Appellant did not dispute any of the decisions taken by the former CMRE Director at the time, not even the notification of the termination of his employment. Given these facts, appellant's request for compensation must be considered as out of time (*cf.* Case No 2015/1054).

64. Once again, the Tribunal notes that the organization acted in accordance with the principle of good administration and fulfilled its duty to have regard to the interests of a staff member. It did not reject appellant's claim *prima facie* on the grounds of time limits. Instead, it initiated an investigation led by an external expert. This must be considered as a substantial effort to address appellant's concerns.

65. Appellant seems not to press the contention that a Complaints Committee should have been constituted to consider his claim. Nevertheless, respondent gave convincing arguments during the hearing why it had not convened a Complaints Committee, since appellant was involved in determining the composition of the Committee as part of his functions and duties.

66. In any case, the Tribunal's consistent jurisprudence follows international civil service jurisprudence that affirms that it is the duty of those who make allegations, here the appellant, to provide convincing proof. Appellant has failed to do so. Neither the pieces of evidence brought by the parties, nor the findings of the external investigator support the allegations of harassment.

67. Furthermore, while appellant seeks compensation for immaterial and moral damages suffered, the alleged damages are not disaggregated or substantiated in any way.

68. It follows from the foregoing that the second appeal must also be rejected.

E. Costs

69. 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 [...].

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 3 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

12 April 2019

AT-J(2019)0006

Judgment

Case No. 2018/1270

JM
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 8 April 2019

Original: English

Keywords: suspension; misconduct; disciplinary action; Disciplinary Board.



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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 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) was seized of an appeal dated 11 July 2018 by Mr JM against the NATO Communications and Information Agency (NCIA). It was registered on 19 July 2018 as Case No. 2018/1270. Appellant challenges the decision to suspend him from duty with pay during a disciplinary procedure against him.

2. The respondent’s answer, dated 17 September 2018, was registered on the same day. Appellant’s reply, dated 18 October 2018, was registered on 22 October 2018. The respondent’s rejoinder, dated 21 November 2018, was registered on 23 November 2018.

3. The Panel held an oral hearing on 14 March 2019 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. In line with Article 26 of the Tribunal’s Rules of Procedure, the hearing was held in camera.

B. Factual background of the cases

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

5. Appellant was a Service Line Chief who supervised a 27-person team composed of NATO civilians, military personnel, and contractors. His appeal initially sought annulment of a 3 May 2018 decision by respondent’s General Manager suspending him from his functions with pay, blocking his access to internal e-mail, and locking his files.

6. While this appeal was underway, following the report of a Disciplinary Committee, the General Manager terminated appellant’s employment on 26 October 2018. That termination is the subject of a separate appeal, Case No. 2018/1275, in which a hearing is anticipated later in 2019. The present appeal concerns only appellant’s request for relief related to his suspension.

7. The events leading to this appeal began in the late summer of 2016, when a staff member alleges that appellant, who was then his supervisor, began to harass him in various ways. In subsequent months, the staff member unsuccessfully sought assistance regarding his concerns from senior supervisors, the staff association, and SHAPE human resources personnel.

8. On 8 June 2017, the staff member lodged a detailed and documented formal complaint, alleging multiple acts of harassment and abusive conduct by appellant. Respondent’s General Manager on 1 August 2017 appointed a staff member to

investigate this complaint. On 25 August SHAPE informed appellant of the investigation and provided him a copy of the 8 June complaint. In November 2017, appellant was interviewed by the investigator.

9. On 8 March 2018, the investigator submitted her report, which upheld seven of the nine charges in the 8 June 2017 complaint. The investigator found that *“the complainant has been the subject of moral harassment and intimidation or abuse of authority.”* She further concluded that *“[d]uring my investigation ...it became evident that this was not an isolated incident...”* and that *“[a] number of junior staff have reported how their Performance Management Reports were used to undermine them...”* The Investigator recommended consideration of disciplinary action.

10. On 24 April 2018, respondent initiated disciplinary proceedings against appellant. The memorandum notifying him of these proceedings referred to the 8 June 2017 staff member’s complaint (which SHAPE had earlier provided to him) and to the subsequent investigation, of which he was also aware. The memorandum cited respondent’s zero tolerance policy on harassment.

11. On 26 April 2018 appellant received a further written complaint from an agency contractor, a young woman supervised by appellant. Her complaint set out detailed allegations of bullying, intimidation, and sexual harassment by appellant. The complaint referred to a *“private intimate relationship”* with appellant, described subsequent abusive and manipulative conduct in his dealings with her, and alleged that appellant then caused her contract to be terminated prematurely. The Disciplinary Board subsequently found that criticisms of the complainant’s conduct that appellant caused to be sent to her employer constituted defamation and abuse of authority.

12. On 3 May 2018, the General Manager suspended appellant from his functions with pay, also suspending his network and physical access privileges and locking his accounts. The General Manager’s letter cited the *“unhealthy atmosphere”* in appellant’s office and referred in general terms to the 26 April complaint, as the complainant had not yet agreed her complaint could be given to appellant.

13. On 4 May 2018, respondent received a written complaint with supporting documents from a second female contractor, a person with long experience working with the agency. Her complaint contended that her contract supporting appellant’s unit was terminated on account of his allegedly false and defamatory statements. The complaint describes firings, premature departures from the unit, and retaliatory conduct by appellant.

14. On 22 May 2018, appellant was notified by the Head of Human Resources that the scope of the disciplinary proceedings was expanded to include the 4 May complaint. The notification included the 8 March 2018 investigator’s report and the 4 May complaint.

15. Also on 22 May, appellant’s law firm transmitted a letter from appellant to the chair of respondent’s Supervisory Board. This letter contended, inter alia, that the 8 June 2017 staff member’s complaint against appellant was out of time and should have been dismissed. Appellant further alleged that his suspension was made *“in order for me not*

to interfere in their plans to change the natural course of SMC to, in my opinion, a disaster.”

16. The author of the 26 April complaint subsequently agreed to allow her complaint to be disclosed to appellant, and it was provided to him on 16 July 2018. The scope of the disciplinary proceedings was expanded to include her complaint as well.

17. Sometime prior to 5 Sept. 2018, appellant lodged a complaint alleging harassment by the staff member who lodged the 8 June 2017 complaint against him. Appellant's complaint cited an allegedly false statement by the staff member in a meeting of the Staff Association.

18. On 26 October 2018, following a unanimous and heavily documented adverse decision by the Disciplinary Board, the General Manager sent a letter dismissing appellant. As noted above, this dismissal is the subject of a separate appeal.

19. Appellant lodged this appeal on 27 June 2018.

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

(i) Appellants' main contentions

20. Appellant contends that, as the suspension involved a decision by the HONB, he can appeal directly to the Tribunal and his claim is therefore admissible.

21. Concerning the merits, appellant contends that his suspension violates Articles 60.2 and 60.3 of the NATO Civilian Personnel Regulations (CPR). CPR Article 60.2 authorizes immediate suspension of a staff member if three conditions are met: there is *“a charge of serious misconduct,”* the NATO body considers that the charge is prima facie well-founded, and it considers further that *“the continuance in office during investigation of the charge might prejudice the Organization.”* Under CPR Article 60.3 *“[n]o disciplinary action may be taken until staff members or former staff members have been informed of the allegations against them.”*

22. Appellant contends, as his counsel confirmed at the hearing, that Articles 60.2 and 60.3 are inextricably interconnected. In appellant's view, suspension is a disciplinary measure that cannot be imposed before the requirements of Article 60.3 are met.

23. In appellant's view, none of Article 60.2's three requirements have been met. First, no charge of serious misconduct was established at the time of his suspension, because the letter giving notice of his suspension contained only references to allegations of harassment. These did establish the existence of serious misconduct or inform him of the charges as required to take disciplinary action pursuant to Article 60.3.

24. The second requirement – that the charge be prima facie well-founded – was not met for substantially the same reason: there were only the allegations of the initial complaint. In appellant's view, the fact that additional charges were referred to the

Disciplinary Board after his suspension shows that the suspension was unjustified when it was done.

25. The third requirement – of possible prejudice to the organization – was not met because appellant was on sick leave when he was suspended, so it was not necessary to deny him access to his office or lock his files. Appellant contends in this regard that the suspension was implemented “brutally” by a staff member of respondent delivering the notification at his home while he was on sick leave

26. Appellant contends that that his reputation was irreparably damaged because information related to charges and proceedings against him was not properly protected. He further contends, without further explanation or evidence, that he was actually suspended in order to muzzle him at a time when the General Manager was to present a major proposal, which appellant opposed, to the NCIA Supervisory Board. However, at the hearing, appellant’s counsel stated that this last claim was not being maintained in this appeal and would be addressed in appellant’s separate appeal addressing his termination.

27. Appellant initially sought annulment of his suspension and the related measures announced in the General Manager’s letter of 3 May 2018 as well as termination of the disciplinary proceedings against him. However, at the hearing appellant’s counsel stated that, in light of appellant’s termination, he no longer sought annulment of the suspension or termination of the disciplinary proceedings.

28. Thus, at the present stage of his appeal, appellant seeks:

- compensation for non-material damage, *“which is to be evaluated ex aequo and bono at €30.000,00 for the 63 (3/5/2018) days of unsubstantiated suspension”*; and
- reimbursement of travel, subsistence and actual costs of counsel.

(ii) Respondent’s main contentions

29. Respondent contends that the appeal is inadmissible, observing that appellant initiated the administrative review process but then abandoned it and instead appealed the General Manager’s decision directly to the Tribunal. In respondent’s view, the failure to follow through with the review process renders the claim inadmissible. Respondent further urges that appellant’s request to annul the suspension and terminate the disciplinary proceedings have become moot following his termination.

30. Concerning the merits, respondent maintains that CPR Articles 60.2 and 60.3 address different situations, and that action under Article 60.2 does not require a showing sufficient to warrant disciplinary action under Article 60.3. Respondent contends that Article 60.2’s requirements for a suspension were met. The agency received a complaint from a staff member making detailed charges of serious misconduct, as required by the first sentence of Article 60.2. A subsequent substantial investigation prior to the suspension both upheld these charges and identified other misconduct by appellant. Thus, the charges were prima facie well founded. This was further demonstrated, when the Disciplinary Board later confirmed the validity of the initial misconduct charges, as well as others received subsequently.

31. Respondent maintains that appellant's continuance in office could have been prejudicial to the Organization, citing the risk that he could otherwise harass or intimidate staff members and interfere with the work of the Disciplinary Board. In this regard, respondent noted, *inter alia*, appellant's requests soon after disciplinary proceedings began to abruptly terminate the contracts of several contractors, including two who later submitted detailed complaints regarding his behavior. Respondent also cited its wish to improve the atmosphere in appellant's Service Line, which it believed had been badly impaired by appellant's behavior.

32. Respondent disputes appellant's claim that the Organization faced no risk of prejudice because he had started sick leave on 3 May 2018, noting that when appellant initially went on sick leave on 26 April, he only informed the Agency of unspecified eye problems. Respondent adds that sick leave can end at any time, and that, even while on sick leave, a supervisor normally can communicate freely with his staff.

33. Respondent observes that appellant provided no evidence to support his claim that his reputation had been impaired, and rejects his demand for moral damages.

D. Considerations and conclusions

(i) Considerations on admissibility

34. The decision to suspend appellant was made by the General Manager. Accordingly, he has the right under Article 1.6 of CPR Annex IX to appeal directly to the Tribunal. While appellant initially pursued and abandoned administrative review under other provisions of Annex IX, this did not erase his right to appeal directly under Article 1.6. Further, as clarified at the hearing, following appellant's termination, he does not maintain the requests to annul his suspension and terminate the disciplinary proceedings, although he does maintain his claims for moral damages and for expenses and attorney's fees. These claims are admissible to this extent.

(ii) Considerations on merits

35. Appellant's argument weaves together CPR Articles 60.2 and 60.3. As confirmed by counsel at the hearing, appellant regards suspension under Article 60.2 as a disciplinary measure. Hence a staff member cannot be suspended unless the staff member has been apprised of the charges against him and those charges have been established to the extent required to impose a disciplinary measure under Article 60.3.

36. In appellant's view, Articles 60.2 and 60.3 were not satisfied here because the General Manager "*has not given sound reasons or rational connection and proportionality between the facts and the measure adopted.*" Appellant cites in this regard the Administrative Tribunal's joined Cases Nos. 2014/1034 and 2015/1042, arguing that suspension is only possible if "*the staff member can irrefutably and clearly identify the reasons for the decision.*" In appellant's view, the July 2017 complaint and the General Manager's letter announcing his suspension fall short in this regard.

37. The Tribunal has substantial doubts about appellant's contention that he could not sufficiently understand the reasons for his suspension. In any case, his argument is built on the premise that suspension under CPR Article 60.2 is a disciplinary measure within the scope of CPR Article 60.3. It is not. The plain text of Article 60.2 shows that it is a preliminary protective measure, available before an agency takes disciplinary action. A staff member may be suspended if a NATO body considers that charges against the staff member are "*prima facie* well-founded" (italics added). Thus, they need not at this stage be established to the degree potentially required to justify later disciplinary action. The last sentence of Article 60.2 reinforces this point: suspension operates "*pending the results of the enquiry*."

38. Article 3 of CPR Annex X further illustrates this difference between suspension and disciplinary measures. Under Article 3.4 of CPR Annex X "*[s]taff members may not be penalized more than once for the same offense. However, disciplinary action may be preceded by immediate suspension as provided for in Article 60.2 of the Personnel Regulations*." Article 3.5 of Annex X is similar, again distinguishing between suspension and disciplinary measures.

39. The Administrative Tribunal has rejected the linkage between Article 60.2 and 60.3 urged by appellant. As it held in paragraph 25 of the judgment in Case No. 2016/1073:

The decision to suspend a staff member is not a disciplinary action; it does not have to be preceded by the guarantees inherent to the disciplinary proceedings. It is a conservative precautionary measure to enable any disciplinary proceedings that may follow to progress properly.

40. Appellant seeks support in Cases Nos. 2014/1034 and 2015/1042, but these also clearly recognize the distinction between suspension and disciplinary measures. These cases involve a peculiar sequence of events: a staff member was placed on administrative leave, then terminated, then restored to duty, but then left in a suspended status for a protracted period, all without any sort of proceeding where the agency explained its reasons and appellant could respond.

41. Against this unusual background, the Tribunal again made clear the difference between suspension and disciplinary measures:

49. Regarding the right of defence of the staff member concerned, it can be considered fulfilled if the Organization provides an opportunity to make the staff member aware of the misconduct in which he/she has been involved. A distinction must be made between two very different situations. One is the adoption of the precautionary measure of suspension, and the other is the disciplinary proceeding opened because of the conduct alleged against the staff member. Although in both cases the right of defence of the staff member must be guaranteed, it is obvious that the suspension has essential peculiarities that are not consistent with the requirement of prior hearings. It is sufficient that the staff member can irrefutably and clearly identify the reasons for the decision.

50. The possibility afforded by Article 60.2 of the CPR to suspend a staff member is not intended as a final disciplinary measure against that person but to enable respondent to adopt a precautionary measure ensuring the good functioning of the ongoing inquiry.

42. CPR Article 60 gives an agency significant discretion in administering disciplinary measures, provided basic due process requirements are met. The Tribunal finds no abuse of that discretion in respondent's decision to suspend appellant. Respondent has shown that it met the first two requirements of CPR Article 60.2. Charges of serious misconduct were lodged against appellant. They were "*prima facie well founded*", as confirmed by the investigator's March 2018 report. Appellant was well aware of the July 2017 complaint, which he received in November 2017, and of the subsequent investigation, for which he was interviewed. He was formally notified that disciplinary proceedings were underway and received copies of additional complaints as they became available.

43. With respect to Article 60.2's third requirement, respondent has substantiated its concern that allowing appellant's continued access to his office and to communications with his staff might be prejudicial to the Organization. The available evidence gave reason for concern that appellant had created an unhealthy office environment, had engaged in abusive conduct, had intimidated and retaliated against staff, and that there was a risk that such conduct could impede the ongoing disciplinary proceedings. While appellant contends that suspension was inappropriate because he was on sick leave when he was suspended, the record shows that at that time, appellant had only told respondent that he would be absent for a few days because of an eye condition. Moreover, as respondent observed, sick leave can end.

44. Given the record in the case, the Tribunal finds no abuse of respondent's authority under CPR Article 60.2 in suspending appellant and initiating disciplinary proceedings.

45. Appellant alleged that his reputation was injured on account of respondent's conduct. He provides no evidence in support of this claim, which must be rejected.

46. Appellant also complains that the measures taken against him deprived him of access to his "personal case file and agenda" as required to respond to the disciplinary proceedings against him. The Tribunal anticipates that this issue will be raised and addressed in Case No 2018/1275.

47. For these reasons, the appeal must be rejected in its entirety.

E. Costs

48. 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 [...]

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 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

12 April 2019

AT-J(2019)0007

Judgment

Case No. 2018/1269

JC
Appellant

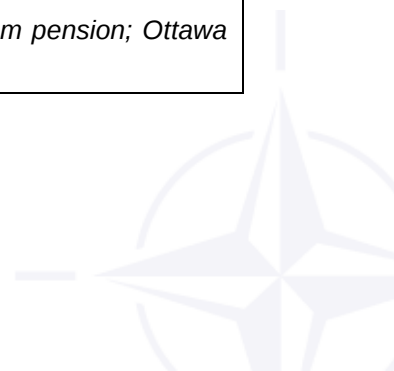
v.

NATO International Staff
Respondent

Brussels, 10 April 2019

Original: English

Keywords: non-compliance with national court order in private matter; deduction from pension; Ottawa Agreement; privileges and immunities; alimony.



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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 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) was seized of an appeal dated 27 June 2018 by former staff member Mr JC against the NATO International Staff (IS). It was registered on 5 July 2018 as Case No. 2018/1269. The appeal seeks annulment of the decision to deduct from his monthly pension, in co-operation with the French national authorities, an amount equal to the alimony that appellant was to pay to his wife following a French Court Order but failed to do so.

2. The respondent’s answer, dated 3 September 2018, was registered on 19 September 2018. Appellant’s reply, dated 16 October 2018, was registered on 17 October 2018. The respondent’s rejoinder, dated 16 November 2018, was registered on the same day.

3. The Panel held an oral hearing on 14 March 2019 at NATO Headquarters. It heard appellant’s statements 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 cases

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

5. Appellant is a retired staff member of the NATO Maintenance and Supply Agency (NAMSA), which since has become the NATO Support and Procurement Agency (NSPA). He resides in Luxembourg.

6. By letter dated 9 June 2017, the *Bureau du recouvrement des créances alimentaires* (*Bureau* or *Bureau du recouvrement*), an organ of the French Ministry of Europe and Foreign Affairs, requested NSPA Human Resources’ assistance in executing a ruling of the *Tribunal de Grande Instance* in Grasse, France, dated 23 August 2016, ordering appellant to pay monthly alimony to his wife in the amount of €1,600 in connection with divorce proceedings. Appellant had failed to comply with this judgment. The *Bureau* was on 15 June 2017 advised by NSPA to address itself directly to NATO’s Pensions Unit, which is in charge of the administration of all NATO pensions and is part of the IS. The *Bureau* did so by letter dated 22 June 2017.

7. On 27 June 2017 the Head of the Pension Unit wrote to appellant, informing him that he had received the *Bureau’s* letter and stating that, since this was a private matter, the Organization should not be involved. He further observed that NATO’s privileges and immunities are not granted for the personal benefit of staff members or former staff members. He urged appellant to take the necessary actions to settle the dispute privately

and asked to be informed by 27 July 2017 at the latest about the way forward. Failing this, he reserved the right for the Pensions Unit to take any action that may be appropriate and necessary.

8. On 3 July 2017 the Pensions Unit sent an e-mail to appellant advising him that he had not informed the Unit of his divorce and that he had therefore received unauthorized household allowance. The corresponding sums needed to be recovered.

9. The following day, *i.e.* on 4 July 2017, appellant replied by e-mail saying that he well knew his obligations to inform the administration of any changes in his personal situation, but that he was not divorced. He advised that divorce proceedings were ongoing and that he had appealed the court decision awarding alimony to his wife.

10. By e-mail dated 5 July 2017, the Pensions Unit thanked appellant for his reply, but emphasized that the French authorities had invoked Article XXII of the 1951 Ottawa Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (Ottawa Agreement), which provides that the Organization's immunities may not impede the course of justice. It added that appealing a court decision in France does not suspend the execution of a court ruling. As it was necessary for the Pensions Unit to implement the deductions from his pension, it intended to do so in six installments, but it was open to any suggestion appellant might have.

11. By letter dated 7 July 2017, appellant answered the 27 June 2017 letter. He requested a copy of the letter of the *Bureau* and expressed surprise that neither his wife's legal representative nor the *Bureau* had chosen to address him but rather had written to the Organization. He agreed that the affair was private and that the Organization should not be involved, adding that he did not expect nor request any immunity or privilege for his personal benefit as a former staff member. Regarding the intended deductions from his pension he inquired regarding the Organization's legal basis to pay any part of salary/pension to any account other than that of the normal recipient. He gave assurances that he intended to resolve the case through his appeal against the award of a *pension alimentaire* and the amount ordered. He had in the meantime withheld payment, since any payment made would be unrecoverable.

12. By letter dated 9 August 2017, appellant expressed disappointment not to have received a reply to his 7 July 2017 letter. He recalled that he had asked three questions: 1) could he have a copy of the letter from the *Bureau*; 2) was it normal to consider acceding to such a request without him first having been approached by the requesting office?; and 3) what would be the Organization's legal basis to pay any part of his pension to another party?

13. By letter dated 7 September 2017, the Deputy Assistant Secretary General for Human Resources recalled that the Head of the Pensions Unit had urged appellant to take urgent action to settle a dispute following an enforceable judgment. He informed appellant that the Pensions Unit would start making the corresponding deductions, with a monthly amount of € 2,900.00 as of 1 September until 3 April 2019 and a final deduction

of € 1,922.00 in May 2019. He concluded by saying that appellant might wish to contact the *Bureau* directly.

14. By letter dated 13 September 2017, appellant first questioned the amount to be deducted, which in his opinion exceeded significantly the amount of € 18,522 that the *Bureau* had mentioned. Second, he recalled his intention to resolve the matter through legal proceedings and not to involve the Organization, adding that he had, on the advice of his lawyer, withdrawn his appeal and replaced it with a *procédure d'incident*, which should have the same effect. He also recalled that he had withheld payment of the *pension alimentaire* since any payments made would be unrecoverable, adding that even if he wished to pay he had no idea to which bank account it should be paid since he had not been informed of this by the court, his wife, her lawyer or the *Bureau*. Concerning the suggestion to contact the *Bureau* (with which he had no contact) he would first require a copy of their letter. He insisted that he had not received an answer to his questions regarding the legality of considering a request from a creditor who had not first approached him and the legal basis for paying part of his pension to another party. He finished by requesting that action to deduct any part of his pension be suspended until he had received satisfactory replies to his questions. Should the Organization persist, it was his intention to appeal against this administrative decision to the NATO Administrative Tribunal. He asked to be informed about the steps required for a retired staff member to lodge an appeal, since the current CPR text appeared to address only active staff members.

15. On the same day, *i.e.* 13 September 2017, appellant wrote to the *Bureau du recouvrement*. NATO IS was not in copy, but a copy was submitted with the request for administrative review (*cf. infra*, paragraph 17). Appellant's 13 September letter stated that he had been informed that the *Bureau* had requested the deduction of € 18,522 from his pension, and requested a copy of the letter and copies of all other correspondence in their possession in relation to this claim. He also asked for an explanation of why the *Bureau* had addressed its request for recovery directly to his former employer rather than to him. He was of the opinion that, in view of the fact that he had previously not received correspondence from any source on this subject, its action appeared to him to have been both premature and procedurally incorrect.

16. On 22 September 2017, appellant wrote an e-mail to the Head of the Pensions Unit. He noted that € 2,900 had been deducted from his September pension and asked to be informed about the identity of the recipient. He recalled his earlier questions and requests for the exact amount to be deducted and for a suspension, and asked for replies on these matters. Finally, he asked for the name and position of the "*official responsible for human resources management at NATO Headquarters*" to whom he should address a request for administrative review of the 7 September 2017 decision. He repeated the latter request in a further e-mail dated 28 September 2017.

17. On 1 October 2017, appellant sent a request for administrative review to the NATO IS Assistant Secretary General for Executive Management. The request recalled the history of the matter, emphasizing that appellant had not received answers to his questions and considered NATO's decision to withhold payment of part of his pension to be premature, since his reasonable requests for information had not been satisfied.

Appellant further submitted that there was no legal basis for NATO to pay any part of his pension to anyone but himself and recalled that he was seeking to resolve the debt to his estranged wife through the French legal system. He acknowledged the court ruling by which he was condemned to pay a *pension alimentaire*. He admitted having withheld the payments, and indicated he was totally prepared to accept the legal consequences in France of this decision. He requested that the 7 September 2017 decision be reversed and any deductions from his pension reimbursed.

18. On 24 October 2017, appellant wrote an e-mail to the Head of the Pensions Unit. He noted that € 804.40 had been deducted from his October pension and asked to be informed about the identity of the recipient. He observed that the deduction was inconsistent with the letter of 7 September 2017, which he contested and regarding which he had sought administrative review.

19. By letter dated 27 October 2017, the Assistant Secretary General for Executive Management answered the request for administrative review and upheld the contested decision. He explained that the decision to deduct from the monthly pension was based on the enforceable judgment by the *Tribunal de grande instance* in Grasse which was communicated to NATO by the *Bureau du recouvrement* of the French Ministry of Europe and Foreign Affairs on 9 June 2017. He recalled that the Organization had made it clear that it should not be involved as the dispute was of a private nature. He drew attention to Article 3 of the Ottawa Agreement which states that "*the Organization and Member States shall cooperate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the immunities and privileges set out in the present Agreement*". However, the amount of the deduction was revised and was limited to the total amount of € 18,552 as indicated by the French authorities. A first amount of € 2,900 having already been deducted in September 2017, € 804.40 would be deducted from the October 2017 pension, to be followed by eight monthly deductions of € 1852.20. The Assistant Secretary General urged appellant to take all appropriate steps to comply with any legal obligations that fall upon him, concluding that if appellant wished to pursue the matter, the next step would be to submit a formal complaint to the Secretary General.

20. On 24 November 2017, appellant lodged a complaint. He observed that the judgment of the *Tribunal de grande instance* in Grasse was not attached to the 7 September 2017 letter (*cf.* paragraph 13 *supra*) and that there was no proof of the alleged correspondence between the *Bureau du recouvrement* and the Organization. He further recalled his question regarding the legal basis for the deductions (to which he had not received a reply) and his request to suspend the deductions, contending in this regard that the divorce proceedings in France were still pending and that he questioned the veracity of his wife's statements regarding her income. He found it surprising that the Pensions Unit decided to suspend any action regarding the household allowance until the end of the divorce proceedings and at the same did not deem it necessary to suspend the deductions from his pension with respect to the alimony. Appellant submitted that the Organization's conduct violated the duty to state reasons, the duty of care and the principle of good administration, and requested annulment of the decision and, in any event, submission of the complaint to a Complaints Committee.

21. A Complaints Committee (Committee) was convened. It heard a number of witnesses, including officials from the *Bureau* as well as appellant, who was authorized to submit further input. On 13 March 2018, the Chairman of the Committee forwarded to appellant copy of the Committee's report inviting him to submit, within five working days, his comments to the Secretary General.

22. In its report, the Committee noted that the Organization had dealt with similar cases involving non-payment of taxes by NATO pensioners and with cases of non-payment of alimony by serving staff. There was a procedure for such cases, involving a letter to the individual concerned giving a deadline to rectify the situation, after which time the Organization would deduct the monies owed. However, this was the first case involving a judgment against a pensioner for non-payment of alimony. The Pensions Unit had followed the procedure used in the cases mentioned above and had also contacted the Office of Legal Affairs for advice. The Committee further noted that the Pensions Unit is a small office dealing with some 3000 pensioners, which found itself providing more and more support to both active and retired staff. The Committee observed that communications with these staff could be improved. The Committee noted that the letter from the *Bureau du recouvrement* was never provided to the complainant by the Organization as it considered that this was not legally required and that the complainant already possessed all the pertinent information. The Organization agreed however that there was no reason why they could not have provided the letter after consultation with the originator (the *Bureau du recouvrement*).

23. The Committee observed that the complainant was bound to pay alimony by the *Tribunal de Grande Instance* in Grasse on 23 August 2016 and that the decision was "*exécutoire par provision*" – that is, immediately enforceable. The complainant had appealed this decision, but later withdrew the appeal on the advice of his lawyer, and replaced it with a *procédure d'incident*. The Committee further noted that under French law the complainant was legally bound to pay the requested sum even while his appeal was being heard, and would then need to claim the monies back later should he win his appeal.

24. The Committee noted that the *Bureau du recouvrement* is a Consulate office which helps French nationals facing problems recovering alimony owed by persons residing abroad. The *Bureau* communicates via diplomatic routes with the competent central authorities of the European Union member states, and in this case had initially contacted the *Parquet Général du Grand-Duché de Luxembourg* (appellant's nation of residence). According to normal procedures, the *Parquet* should then have contacted the complainant directly and followed the process to recover monies owed (*i.e.* by seizing the sums from his bank account, or properties owned). The Committee noted that the *Parquet Général* had declined to take any action because the complainant was a retired member of NSPA, erroneously believing that his pension was paid by NSPA and that the *Parquet* had no authority to approach NSPA. Moreover, on previous occasions when the Luxembourg authorities dealing with such cases (Justice for Peace) had contacted NSPA, NSPA had responded that it was protected by Article XXII of the Ottawa Agreement and that no seizure from its accounts could be executed.

25. The Committee observed that the *Parquet's* interpretation of the Ottawa Agreement was incorrect: while it is true that the Organization and its Agencies have immunity, individuals, unless they are engaged in activities for the Organization - for example, missions or operations - are not covered by such immunity. While the accounts owned by the Organization and Agencies were indeed covered by immunity, this was not the case for the private accounts of staff members or retirees. Thus, once the complainant's pension was paid to his private account, it was not covered by any immunity accorded to the Organization, and would be subject to any seizure deemed necessary by the appropriate authorities. The Committee noted that subsequent to the *Parquet* declining to take any action, the *Bureau du recouvrement* had contacted NSPA themselves, and had eventually been re-directed to the NATO Pensions Unit. Moreover, the Bureau had since realized that the *Parquet Général* in Luxembourg had perhaps been too hasty in their assumptions concerning the complainant's immunity. The *Bureau* had therefore recently contacted the *Parquet* again with regard to a further debt that had since built up, following the complainant's continued refusal to make any payments. They had also contacted the complainant to inform him that criminal proceedings had been initiated against him.

26. The Committee arrived at the following conclusions and recommendations:

- The *Bureau du Recouvrement des créances alimentaires* had followed the correct procedures in first contacting the *Parquet Général du Grand-Duché de Luxembourg*.
- The *Parquet* had failed to contact NSPA or the complainant, in the erroneous assumption that they would receive the same negative response as on previous occasions, namely that NSPA was unable to take any action as staff's and retirees' emoluments were covered by diplomatic immunity.
- This would seem to suggest that the NSPA had misinterpreted the Ottawa Agreement, believing that individual staff members' emoluments could not be seized. The administration at NATO HQ had not been as transparent as they could have been in not replying in due time to complainant's requests for information and in not providing a copy of the letter from the *Bureau du recouvrement* to the complainant as he had requested. The Committee noted that the complainant was perfectly aware of the court's decision regarding the alimony to be paid to his wife, but that NATO's refusal to provide a copy of the documentation had not helped the situation.
- The Organization needed always to balance its duty to assist national authorities with its duty of care to serving or former staff members. As such, any move to deduct money from a salary or pension should only be taken as a last resort, when all other avenues to recoup monies owed had been explored and due process followed by the competent national authorities. However, once due process had been followed, the Organization had a clear moral obligation to act, albeit on a voluntary basis in line with its specific legal status, in order to ensure national court decisions were honored.
- Given the French court ruling against the complainant, the Committee considered that the Organization had acted properly in deducting the sum of money from complainant's pension, given that he had done nothing to distance the Organization from what was a private matter, and that the Organization had been contacted by the *Bureau du recouvrement*.

- At the same time, the Committee considered that the NATO Pensions Unit and the NATO Administration should have provided the complainant with a copy of the letter from the *Bureau* as per his original request. The Committee also considered it regrettable that the Pensions Unit had originally miscalculated the amount to be deducted from complainant's pension, although the Unit had acknowledged its mistake.
- The Committee noted that this had been the first case involving an alimony claim against a NATO pensioner: as such, there was no standard response or procedure for the NATO Administration to follow. The Committee therefore recommended that Executive Management put in place clear procedures for any future situation involving similar requests for assistance by competent national authorities.
- The Committee also recommended that guidance be provided to all Agencies on application of the Ottawa Agreement. The Committee also recommended that Executive Management share any new procedure as outlined above with other NATO bodies, for their increased understanding and for future use.
- In conclusion, although the case may have deserved a more structured and transparent approach, the Committee did not feel that there had been any wrongful intention or conduct on the part of the Organization. While recalling the importance that the Organization attaches to immunity, the Committee considered that the Organization had a moral obligation to respect an enforceable court decision, and, on the basis of a legal and legitimate request, to facilitate the administration of justice and provide assistance, albeit on a voluntary basis, given NATO's specific legal status. The complainant, for his part, was fully aware of the French court judgment, knew that it was enforceable, and knew exactly the sums due and the identity of the beneficial recipient, namely his wife. Consequently, the Committee considered and recommended that none of complainant's requests in his complaint and in his email of 10 February 2018, be met.

27. Appellant submitted his comments on the Committee's report on 21 March 2018. He observed that the report did not mention that he was not seeking immunities. He pointed out that the Committee was referring to correspondence, *i.e.* from the *Bureau* that he didn't have, despite his repeated requests. He objected to the Committee's interviews with French authorities. He noted that the size of the Pensions Unit is no justification for their errors, such as the failure to respond to legitimate queries, errors in calculation, and falsely accusing a former staff member of dissimulating the truth. He emphasized that he still had not received the request of the *Bureau*, which had never contacted him or answered his letter, and that he disagreed with the Organization's position that it was not legally required to give him the letter, urging that providing the letter would have facilitated the administration of justice under Article 3 of the Ottawa Agreement.

28. He further noted that he had given the Committee documentation regarding his *procédure d'incident*, but that it was not mentioned. He trusted that this document was treated in complete confidentiality by the Committee. In his view, the Organization's moral obligation to respect an enforceable court decision would be voluntary, and that in this case, given the ongoing proceedings before the national courts and the Organization's duty of care, implementation should be suspended. He repeated that NATO had no legal basis to withdraw the sums from his pension, that he didn't know how

to keep the Organization distanced from the matter as it was contacted by an outside body, and that he had never received answers to his questions. He requested annulment of the contested decision.

29. The Secretary General took his final decision on 16 May 2018. Taking into account all aspects of this case, including that the decision was linked to an enforceable judgment by the *Tribunal de grande instance* in Grasse of 23 August 2016 which was communicated to NATO by the Bureau, he informed appellant that he was unable to give a favorable response to appellant's complaint. Following the recommendation of the Complaints Committee, he attached copy of the French authorities' letter of 9 June 2017.

30. Appellant lodged this appeal on 27 June 2018.

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

(i) Appellants' contentions

31. Appellant first contends that respondent violated the duty to state reasons, arguing that he had on numerous occasions asked for clarification and documentation, in particular the correspondence between the *Bureau* and respondent. He had also requested the legal basis for the deduction from his pension payments and suspension of seizures from his pension pending finalization of divorce proceedings in France.

32. Appellant observes that the Complaints Committee report did not include any of the documents that he requested, and that none of the annexes mentioned in the report were provided to him. He considers this a violation of Article 5(d) of the Implementing Procedures applicable to Complaints Committees, which provides that "*All relevant documentary evidence should be included as an annex to the final report.*" He was thus not fully aware of the considerations of the Complaints Committee and was not fully able to express his views.

33. Appellant refers to the Tribunal's jurisprudence, in particular in Cases Nos. 889, 890 and 897, where it held that: "*[t]he aim of the obligation for substantiation is, on the one hand, to provide the interested party with enough information to allow him/her to determine whether the contested decision is justified or otherwise is tainted by an error that makes its legality questionable, and on the other, to enable the Tribunal to perform judicial oversight thereof. Thus the obligation for substantiation implies that the person who is the subject of a decision that constitutes grounds for grievances must be put in a position to clearly and unequivocally understand the decision-maker's reasoning; the scope of this obligation must be viewed in terms of the practical circumstances of each case.*" Appellant submits that he was not put in a position to clearly and unequivocally understand the first letter of the Organization of 27 June 2017, the initial contested decision of 7 September 2017, or the decision rejecting his request for administrative review.

34. Second, appellant claims violation of the duty of care and of the principle of good administration, as he was wrongly accused of lying to the Pensions Unit by failing to

register his divorce. He submits that he complied with the request to settle his dispute with his estranged wife, and repeatedly informed the Organization that their divorce proceedings were still pending and that he had no intention to benefit from any privileges or immunities of the Organization. He had done his best to obtain a copy of the alleged correspondence between the *Bureau* and the Organization.

35. He alleges that the Organization, on the other hand, did not provide the documentation requested and had not answered his queries about the legal basis for the deductions from his pension. While appellant was repeatedly reminded that the issue at stake was of a private nature to be solved without involving the Organization, he was unable to do so since he had not been granted access to certain documents. He also criticizes the Complaints Committee for interviewing French civil servants. All these are said to show that respondent was in breach of the duty of good administration and of the duty of care.

36. Third, appellant claims violation of Article 7 of Annex IV of the CPR, which provides that “[a] staff member who has completed 10 or more years’ service, within the meaning of Article 4, in one or more of the Organizations listed in Article 1, shall be entitled to a retirement pension.” He argues that, having worked for the Organization for 38 years, he is entitled to such a retirement pension, and that seizure of his pension to pay allegedly unpaid alimony violates this provision, adding that the CPR nowhere specifically authorizes such deductions. While respondent repeated several times that this was a private issue that should be resolved by the appellant and without involving the Organization, it then involved itself by making the deductions. He finds it surprising that the Pensions Unit decided to suspend any action regarding the household allowance until the end of the divorce proceedings, whereas the Organization did not deem it necessary to suspend deductions from his pension payments for the alimony.

37. In a fourth argument, appellant contends that respondent misinterpreted Articles 3 and 5 of the Ottawa Agreement, citing Article 3, which provides that “[t]he Organization and Member States shall co-operate at all times to facilitate the proper administration of justice and prevent the occurrence of any abuse in connection with the immunities and privileges set out in the present Agreement”. In appellant’s opinion the words “*facilitation of the proper administration of justice*” do not mean that respondent must agree to make deductions from his monthly pension payments. Justice could have been facilitated by providing him with the requested documentation. In his view Article 3 of the Ottawa Agreement requires administration of justice, not execution. He also refers to the report of the Complaints Committee, which underlined that there was only a “moral” obligation for respondent to provide assistance, “*albeit on a voluntary basis, given NATO’s specific legal status.*” He repeats that he several times explained that the divorce proceedings were ongoing and that there were serious suspicions regarding the veracity of his wife’s statements regarding her income and therefore on the amount of alimony awarded. The Organization should, in view of its duty of care, have paid more attention to these objections. Instead of observing a moral obligation to respond to the *Bureau*’s request, the Organization should have waited until the end of the French divorce proceedings.

38. Appellant also contends violation of Article 5 of the Ottawa Agreement, which states that “[t]he Organization, its property and assets, wheresoever located and by

whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity." He argues that since his pension comes from the Organization's property and assets, it should not have been possible to seize it to pay for the alleged alimony. Lastly, he submits that, in any case, it could only have been done with the approval of the Chairman of the NATO Council Deputies, who never authorized such a waiver of immunity, as far as the appellant is aware.

39. Appellant requests:

- annulment of the decision dated 16 May 2018 rejecting appellant's complaint dated 24 November 2017;
- if needed, annulment of the decision dated 27 October 2017 rejecting appellant's first request for administrative review dated 1 October 2017; as well as of the initial decision dated 7 September 2017, announcing the deduction from appellant's monthly pension of the amount of the alimony that he allegedly owes to his wife;
- payment of € 4,000 as a financial compensation of his moral prejudice; and
- reimbursement of all the legal costs incurred and fees of the retained legal counsels.

(ii) Respondent's contentions

40. Respondent has no observations with regard to the admissibility of the appeal. It is, however, of the view that the appeal should be declared without merit.

41. Respondent recalls that Article 3 of the Ottawa Agreement stipulates that "[t]he Organization and Member States shall co-operate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the immunities and privileges set out in the Agreement."

42. Respondent submits further that the Preamble of the CPR recalls, in line with Article XXII of the Ottawa Agreement, that the privileges and immunities to which NATO staff members are entitled do not exempt them from the duty to fulfill their obligations as private individuals or from the duty to respect the laws and police regulations. This also applies to former staff. The immunity of jurisdiction/execution under the Ottawa Agreement cannot be abused by a current or former staff member to escape decisions of a court taken in his/her regard. It is not acceptable to try to hide behind such immunity in order to evade legitimate payments an individual is legally bound to make. Immunities are provided for the interest of the Organization, not to create an individual benefit.

43. Respondent explains the procedure when the Organization is notified that a staff member is not honoring his/her private legal obligations emanating from a contract or a Court decision. The individual concerned is requested to act as speedily as possible to resolve the situation. It is also explained that failure to do so may oblige the Organization to take any action it may consider appropriate, including remitting salaries and emoluments, including pensions, to the third-parties concerned. In addition, since non-compliance could impact on the Organization's reputation, it may be considered as a

potential violation of the individual's obligations under Chapter IV of the CPR and could thus also entail disciplinary action.

44. Respondent maintains that in addressing the French request to withhold from the pension payment, it demonstrated appropriate diligence and care, acted in a responsible way, and did not commit any error or fault. It repeatedly explained the legal basis for its actions, but appellant repeatedly made clear that he had no intention to abide by the Court ruling, thereby contradicting his insistence that he had no intention to involve the Organization in a private dispute. Respondent had therefore adequately stated the reasons for its actions.

45. Respondent refers to Decision No. 768 of the NATO Appeals Board, which stated that *"[s]taff members or former staff members of NATO or any of its bodies cannot claim any immunity that would allow them to evade the payments of debts contracted by them in the course of their private activities and in no way connected with the Organization"*. The Appeals Board continued that *"[t]he NATO Secretary General was therefore legally justified in taking the impugned decision to aid the execution of a judicial decision by a court of a member state intended to ensure that a former member of the Organization would pay his debts."* Respondent adds that no immunity was waived.

46. Regarding the letter of the French Ministry of Foreign Affairs, and recalling that this letter was ultimately communicated, respondent underscores that appellant was made aware of its contents. In addition, and as the Complaints Committee noted, appellant was perfectly aware of the Court order, and knew that it was enforceable, the amount of monthly alimony due, and the beneficiary's identity.

47. Concerning the household allowance, respondent observes that once the situation was clarified - *i.e.* that appellant was still married - the allowance was not further questioned and was restored. This did not adversely affect appellant and did not cause any damage in addition to that alleged.

48. Finally, concerning the Complaints Committee's findings on the way IS organized its work, respondent recalls that in accordance with the CPR, the Complaints Committee acts independently and impartially, proceeding as it deems necessary to carry out its responsibilities to advise the Head of the NATO Body. Furthermore, as regards the documentation used by the Complaints Committee, it observes that the French Ministry of Foreign Affairs' letter was eventually communicated to appellant, and that it is not clear to which other annexes the Appellant refers. Finally, with regard to the criminal proceedings mentioned in the Complaints Committee's findings, the IS advises that it had been informed by the French Ministry of Foreign Affairs that appellant's wife filed a complaint with the police of Cannes on 21 February 2018.

49. Respondent requests the Tribunal to dismiss the appeal as being without any merit.

D. Considerations and conclusions***(i) Considerations on admissibility***

50. Respondent has no observations with regard to the admissibility of the present Appeal.

51. The Tribunal observes, however, that appellant raises issues that were resolved either before or during the pre-litigation process. Thus, the misunderstanding between the parties regarding his entitlement to household allowance was immediately corrected when the matter was clarified before pre-litigation was initiated. Submitting arguments regarding this matter in the present proceedings is therefore not appropriate. Another example is appellant's access to the letter of the French authorities. Access was granted in the context of the pre-litigation complaints process. This was perhaps late in the overall process, but appellant had the letter in his possession before submitting the appeal. This Tribunal has made it clear that it is one of the purposes of pre-litigation to resolve matters. This was done in this respect.

52. These issues were thus resolved and the Tribunal considers it inappropriate to come back on them in the present proceedings. This being said, the Tribunal considers the appeal to be generally admissible.

(ii) Considerations on merits

53. At the oral hearing, and only when asked by the Tribunal, appellant informed the Tribunal that the French national courts in December 2018 ruled his appeal inadmissible, so that the judgment ordering payment of alimony was no longer subject to appeal. Appellant added that he was not yet formally notified of this ruling, and confirmed that he still does not intend to pay. These elements have duly been taken into account by the Tribunal in its deliberations.

54. Appellant first contends violation of the duty to state reasons.

55. The record shows that appellant was fully aware at all relevant times of the French court judgment requiring him to pay a specific amount of alimony, and that this judgment was enforceable pending appeal. He also made abundantly clear throughout these proceedings that he did not intend to comply with the court's order. The Tribunal agrees that the Complaints Committee erred when it did not attach the relevant documentation to its report. This omission was, however, corrected by respondent when it attached the letter of the *Bureau* to the final decision. The Tribunal concludes that appellant was fully aware of the facts and reasons underlying the impugned decision.

56. It would have been better for the letter to have been provided at an earlier time, but appellant has failed to demonstrate how he has been adversely affected by not having it in hand earlier. He knew the essence of its contents and, as noted, consistently affirmed his intention not to comply with the judgment of the French Court, an attitude that did not change after he received the letter of the *Bureau*. The Tribunal further finds that respondent has repeatedly and adequately explained its obligation under the Ottawa

Agreement to facilitate the proper administration of justice. The argument that respondent violated its duty to state reasons therefore fails.

57. Appellant, secondly, contends violation of the duty of care and of the principle of good administration. The Tribunal observes that appellant claims to have complied with respondent's request to settle the dispute between him and his estranged wife. However, there is no evidence in the record supporting this claim, which is inconsistent with his repeated insistence that he would not comply with the court's judgment. Not complying with the French court's judgment, appealing that judgment, and continuing the divorce proceedings are not steps towards a settlement. Moreover, and as mentioned *supra*, obtaining the *Bureau's* letter did not alter appellant's attitude. His argument that he was unable to settle the matter without involving the Organization since he had not been granted access to certain documents, of which he knew the contents, not only fails, it is frivolous.

58. Appellant further contends there was a violation of Article 7 of Annex IV of the CPR, which entitles him to a retirement pension, submitting that any deduction from his pension is illegal. The Tribunal holds that the entitlement to a retirement pension is not and has not been in question, but appellant's right to a pension under Article 7 does not insulate him from his individual legal obligations. Duly justified deductions from a pension (or a salary) may occur. The impugned deductions from appellant's pension could have been avoided by his compliance with the 2016 judgment of the *Tribunal de Grande Instance* in Grasse.

59. In a fourth, and last, argument appellant contends that respondent misinterprets Articles 3 and 5 of the Ottawa Agreement.

60. Article 3 of the Ottawa Agreement obliges the Organization to co-operate with the Member-States in order to facilitate the proper administration of justice. The nature of the necessary cooperation may vary depending on the circumstances, and there may be several ways for the Organization to fulfill this treaty obligation. Nevertheless, appellant's suggestion that handing him the letter of the *Bureau du recouvrement* would have satisfied this requirement does not hold. The Tribunal fails to see, in light of appellant's repeated refusal to pay the alimony, how giving him the letter could have facilitated the proper administration of justice. It would not, and did not.

61. The 2016 judgment of the *Tribunal de Grande Instance* in Grasse clearly stipulates that non-compliance with its ruling to pay alimony can lead to criminal charges. Appellant's counsel, when asked by the Tribunal at the oral hearing whether she in the exercise of her duty of care had advised appellant thereof, replied in the affirmative. Granting appellant's repeated requests that respondent not cooperate with the *Bureau* and not deduct the amounts due from his pension, would not facilitate the proper administration of justice either. It would rather entail the frustration of justice and render the Organization an accomplice.

62. Article 5 of the Ottawa Agreement provides that "[t]he Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the

Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity. It is however, understood that no waiver of immunity shall extend to any measure of execution or detention of property."

63. Appellant asserts that he is not seeking immunities, and - as a retiree - he does not have any. However, although he denies it, appellant is in substance seeking to hide behind the status of the Organization in order to evade the payment of legal obligations he incurred in the course of his private life and that are in no way connected with the Organization (*cf.* NATO Appeals Board, Decision No. 768). It may indeed be difficult and time-consuming to seize assets of the Organization, if at all possible, but that is not the issue here. The question before us does not concern immunities of the Organization or their waiver. The question is instead the correct application of Article 3 of the Ottawa Agreement.

64. The Tribunal holds the view that the Ottawa Agreement imposes on the Organization a legal, and not just a moral, obligation to facilitate the proper administration of justice. The decision to deduct the amounts due was a reasonable exercise of the Organization's discretion in carrying out this obligation under the Ottawa Agreement. It was taken after appellant had ample opportunity to resolve the matter without involvement of the respondent. It is only after appellant's continued refusal to comply with the French Court judgment, which continues until this day, notwithstanding the advice of his French and Belgian counsels, that the Organization acted to deduct the amounts concerned. The Tribunal concludes that the co-operation with the French authorities in the matter before it was consistent with the Ottawa Agreement and with the Organization's duties thereunder. It concurs in this respect with the NATO Appeals Board, which held in Decision No. 768 that "[t]he NATO Secretary General was therefore legally justified in taking the impugned decision to aid the execution of a judicial decision by a court of a member state intended to ensure that a former member of the Organization would pay his debts."

65. As a consequence, the appeal must be rejected in its entirety.

E. Costs

48. 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 [...]

49. 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 10 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

3 July 2019

AT-J(2019)0008

Judgment

Case No. 2018/1276

JM
Appellant

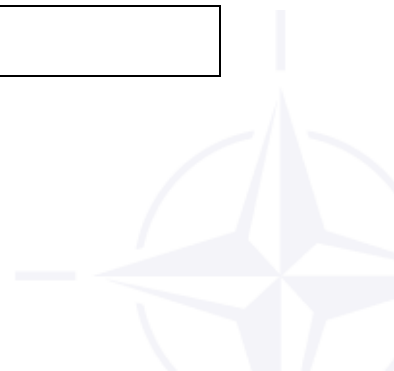
v.

NATO Communications and Information Agency
Respondent

Brussels, 21 June 2019

Original: English

Keywords: summary dismissal; decision affecting a staff member; Interview Board.



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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 John R. Crook, judges, having regard to the written submissions and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2019)0003.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 4 December 2018, and registered on 20 December 2018, as Case No. 2018/1276, by Mr JM against the General Manager of the NATO Communications and Information Agency (NCIA). The appeal concerns the appointment of another candidate to a vacant NCIA post than the candidate proposed by the Interview Panel, of which appellant was the Chairman.

2. The respondent’s answer, dated 18 February 2019, was registered on 7 March 2019.

3. On 18 March 2019, the President of the Tribunal issued Order AT(PRE-O)(2019)0003 in accordance with Rule 10, paragraph 1 of the Tribunal’s Rules of Procedure. This Order suspended the procedural time limits and authorized the appellant to submit additional written views. Appellant submitted his additional views on 19 April 2019.

B. Factual background of the case

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

5. Appellant was appointed Chairman of the Interview Panel for an A2 post at the NCIA NATO Communication and Information Systems School (NCISS) in Latina, Italy.

6. The vacancy attracted eighty-nine candidates, of whom five were invited for an interview for possible selection. Three of them withdrew and the remaining two were interviewed on 19 January 2018.

7. On 19 February 2018, appellant signed and returned to the Human Resources department (HR) the panel interview report, identifying Mr W as the most suitable candidate and Mr F as the alternate.

8. On 9 May 2018, appellant enquired with the administration about the hiring status of the post. On 14 May 2018, HR replied that Mr W had withdrawn his candidature and that the post would be offered to Mr F.

9. On 17 May 2018, appellant spoke with Mr W and learned that the post was never offered to him. On 20 May 2018, the General Manager approved the candidature of Mr F to the post and offered him the job, which was accepted.

10. On 1 June 2018 the Agency explained to appellant that Mr W had resigned from the Agency in order to take up a position elsewhere within NATO. It also reminded appellant that he had signed a non-disclosure agreement and that he should not have contacted any candidate. It further explained that an interview panel merely recommends candidates and that appellant should not be further involved in the recruitment process.

11. Following further email exchanges with the administration, appellant, considering the explanations that were given insufficient, submitted on 27 June 2018 a “First Administrative Review Request” in which he requested that Mr. W be offered the job, that Respondent change its recruitment practices to assure that a person recommended by an Interview Panel is offered the position, and that Panel members “be kept updated of the status of their recruitment actions...”

12. On 7 August 2018, appellant not having received an answer to his letter, submitted a “Second Administrative Review Request.” The NCIA Chief of Staff replied on 22 August 2018, explaining, *inter alia*, that the Administrative Review process was available to staff wishing to challenge decisions that affect their conditions of work or who feel that a decision taken does not comply with the terms and conditions of their employment.

13. On 19 September 2018, appellant submitted a “Formal Complaint” with the NCIA General Manager in which he also requested establishment of a Complaints Committee. The NCIA General Manager (GM) replied on 10 October 2018. In his letter, the General Manager reiterated what had been explained by the Chief of Staff adding that, as appellant was not personally affected by a decision, it was not appropriate to set up a Complaints Committee. The GM also added “*I do agree, though that prior to reverting to the second candidate, the Human Resources office should have contacted you, as hiring manager, to inform you of the impending proposal and to discuss the way ahead. I have therefore asked [...], Acting Head Human Resources, to discuss this with you over the phone and to re-assure that any potential future cases will be dealt with differently.*”

14. On 4 December 2018, appellant lodged the present appeal.

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

(i) The appellant's main contentions:

15. Appellant maintains that the pre-litigation procedure has been exhausted and deems his appeal admissible.

16. Appellant was appointed, first, Hiring Official, and, then, Chairman of the Interview Panel. His appeal centers on the fact that the Panel judged one candidate best for the post, but that the job was never offered to him.

17. Appellant considers that he has standing before this Tribunal in order to “*play[...] a whistleblowing role if needed.*” He also maintains that an allegedly flawed recruitment process did affect his conditions of employment, as well as of the rest of the Agency.

Appellant believes his role as Chairman of the Interview Panel carries with it whistleblowing responsibilities, in particular because the non-disclosure agreement (NDA) signed by all panel members meant that any irregularity could not be identified by external stakeholders, namely the candidates, rendering them unable to complain.

18. Appellant considers that the job should have been offered to the first candidate, regardless of whether the candidate intended to accept it or not. He states that the goal of holding an interview panel is to secure the highest standards of competence, diligence and integrity based on merit. He maintains that a staff member participating in several selection boards as a candidate, and who is deemed the most qualified and suitable by more than one board, must be given the chance to accept either post, instead of having someone in the administration make that decision.

19. He acknowledges that the authority to appoint a NATO civilian is indeed vested in the Head of NATO body, but that the selection panel is an organ that identifies the best qualified candidate. In his view, the role of HR is purely administrative, and it should refrain from altering the Panel's proposal without due justification. Moreover, he maintains that when an organization chooses to hold a competition it must abide by its written rules and by the general principles set forth there.

20. Appellant contends that there was an error of assessment in offering the position to Mr. F. In his view, the decision to offer the job to a candidate cannot be based on his personal or administrative situation, but only on grounds of qualification and suitability as assessed by the Interview Panel in order to meet the criteria established in Article 1.2 of the CPR. In this regard, appellant views the requirements of Article 3 of the NATO Civilian Personnel Regulations (CPR) as the only exceptions to this principle.

21. Finally, appellant rejects respondent's accusations of a possible conflict of interest, which were advanced without any evidence.

22. Appellant requests the Tribunal to:

- declare unlawful the appointment of a staff member other than the one proposed in the first place by the Interview Panel;
- annul the decision not to convene a Complaints Committee;
- declare that the HR Recruitment Division's job proposal to the alternate candidate was unlawful and a "*departure of administrative best practices*"; and
- in his additional submissions, award an indemnity for moral damages.

23. Appellant also requested not to hold an oral hearing, as "*there are no material facts in dispute*".

(ii) The respondent's main contentions:

24. Respondent denies the admissibility of the appeal. It contends that the possibilities to challenge a decision through the pre-litigation phase are not unlimited, and that a decision may be challenged only if it affects a staff member's personal working conditions, giving rise to a personal and direct cause of action. Respondent refers in this

respect to the extensive case-law of the Administrative Tribunal of International Labour Organization (ILOAT).

25. Respondent continues that the offer of the post in question is a decision that affects Mr W and Mr F only, but that neither of them challenged it. Respondent also refers to the fact that Mr W resigned from the Agency on 1 June 2018 to take up another position elsewhere in the Organization, leading to selection of the alternate candidate.

26. Moreover, respondent refers to what it views as a “habit” of appellant to challenge decisions that do not affect him personally.

27. Respondent stresses that the challenged decision did not violate the CPR or any other regulation. It recalls that in accordance with the CPR’s dispositions (Article 2) and the NCIA appointment procedure (Articles 4.4, 10.4.2, 10.4.5 and 10.4.7 of AD 02.02), the authority to appoint a candidate rests with the General Manager and that the Interview Panel provides a recommendation only.

28. Respondent disagrees with appellant’s view that the requirements for appointment set out in Article 3 CPR are the only grounds for an agency not to implement a panel’s recommendations. Respondent notes that those conditions are minimum requirements, which are verified before even starting the selection process.

29. Respondent adds that in its view, any irregularities in the selection process are linked to appellant. Respondent maintains, *inter alia*, that it could be safely assumed that appellant and Mr W knew each other long before the selection process for the post, in light of their working environment. Respondent therefore suggests the possibility of a conflict of interest.

30. Respondent concludes that the appeal serves no purpose. It stresses that the appointment of Mr F was not irregular and did not violate any NATO rule or regulation. It refers further to the GM’s letter, acknowledging that appellant should have been informed sooner. It contends that the letter provides a sufficient indication of the agency’s intentions in similar cases in the future.

31. Respondent requests the Tribunal to find the appeal inadmissible and unfounded. It also leaves it to the appreciation of the Tribunal the possibility of applying Article 6.8.3 of the CPR.

D. Considerations and conclusions

32. The Tribunal recalls that it has limited jurisdiction. In accordance with Article 6.2.3 of Annex IX to the CPR, it does not have powers beyond those conferred under Annex IX. Article 61 of the CPR and Annex IX to the CPR clearly mandate that the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for administrative review and complaint they create. These provisions must be read in conjunction with Article 61.1, which limits access to the pre-litigation and litigation

procedures to staff members who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment.

33. Appellant challenges a decision by management to appoint another person than the one recommended by the Interview Panel of which he was the chairman. This decision did not affect appellant's working conditions and did not violate any of his terms and conditions of employment. The appeal is therefore not admissible.

34. Appellant further considers to have standing before this Tribunal "*playing a whistleblowing role if needed*". This Tribunal observed in Case No. 891 that, although no common legal definition exists in this respect, a number of common elements may be identified. Whistleblowing generally refers to the reporting of illegal, irregular, dangerous or unethical practices. The Tribunal held that it must be reported through appropriate channels to those authorities that have the power to act on it. A litigation process before the Tribunal is not such an appropriate channel. As explained above, the Tribunal can only deal with individual administrative decisions that directly and adversely affect a staff member in violation of his terms of appointment.

35. For these reasons the Tribunal concludes that the appeal must be summarily dismissed as clearly inadmissible.

E. Costs

36. 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 [...].

37. 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 summarily dismissed.

Done in Brussels, on 21 June 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

25 July 2019

AT-J(2019)0009

Judgment

Case No. 2019/1280

RB
Appellant

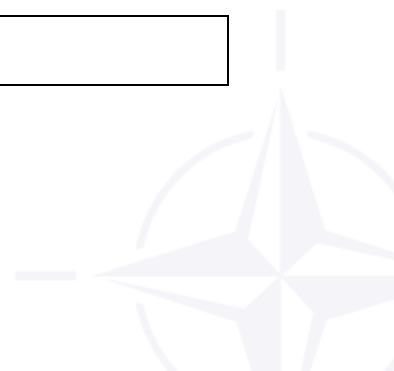
v.

NATO Communications and Information Agency
Respondent

Brussels, 15 July 2019

Original: English

Keywords: contract offer, withdrawal; reasons; duty of care; 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 Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 20 June 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) was seized of an appeal dated 4 April 2019 by Mrs RB against the NATO Communications and Information Agency (NCIA). It was registered on 4 April 2019 as Case No. 2019/1280. Appellant challenges NCIA’s General Manager’s decision to withdraw NCIA’s offer of a renewal employment contract.

2. The respondent’s answer, dated 10 May 2019, was registered on the same day. The appellant’s reply, dated 24 May 2019, was registered on the same day. The respondent’s rejoinder, dated 7 June 2019, was registered on the same day.

3. The Panel held an oral hearing on 20 June 2019 at NATO Headquarters. It heard the appellant’s statement and arguments by the appellant and her representatives 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. The appellant joined NCIA in 2016 with a three-year contract as a Branch Head (Staff Services and Support). In this position, she was in charge of, *inter alia*, “the preparation of employment contracts and contract renewal offers.” Her contract expired at the end of May 2019. She lives in the Hague and supports her parents there. She sought, and the Tribunal approved, expedited consideration because of her adverse financial situation resulting from expiration of her contract.

6. Although the issue is not directly presented in this appeal, it is apparent that the appellant had a difficult relationship with the Deputy Head of Human Resources (HR) causing her in September 2018 to raise her concerns regarding him in a long e-mail to the Head of HR. This e-mail was also forwarded to the General Manager on 28 November 2018.

7. In November 2018, the respondent initiated its regular process to determine whether to renew the appellant’s contract. The appeal states that the Head of HR supported renewal of her contract for three years, citing as evidence a draft of a memorandum to the Civilian Personnel Management Board (CPMB) with his signature that commented favorably on her performance and recommended renewal for three years. The respondent contends that the appellant should not have had access to this draft. The issue of her access to the document is not material to resolution of the appeal and the Tribunal need not resolve it.

8. In the final version of the renewal recommendation memorandum considered by the CPMB, the Deputy Head of HR recommended non-renewal. This memorandum, which the parties agreed was written by the Head of HR, was far less supportive of the appellant's performance than the earlier draft annexed to her appeal. While noting some strengths, it also described aspects of her performance in guarded terms and identified several areas requiring improvement. The appellant's reply disputes many of the less-than favorable comments in the CPMB Memorandum, but the Tribunal need not decide the disputed issues, as the present appeal does not contest the decision to offer a one-year contract.

9. The Head of HR's handwritten notes on the CPMB memorandum show that he disagreed with his Deputy's non-renewal recommendation. The document instead reflects a decision, signed by the General Manager, to offer the appellant a one-year contract.

10. On 29 November 2018, the appellant was told of the offer of a one year contract and given the agency's standard form of contract to agree and sign. Article 11 stated that the contract "*will come into force when a copy, signed and agreed by you, has been returned to Human Resources.*" The document did not contain a deadline for signature. A 30 November 2018 e-mail to the respondent from the Deputy Head of HR remarks that "*[s]ince you explained that you still wanted time to consider our offer, I attach a soft copy of the contract..*"

11. The appellant told the Tribunal that she was surprised and upset by the offer of only a one year contract, as she had not been apprised of shortcomings in her performance. In an e-mail to the Deputy Head of HR on 3 December 2018, she expressed appreciation for a talk with him but continued that she was "*at this point taking all elements into consideration.*" She went on leave from 11 December 2018 until 14 January 2019 without signing the contract. She did not sign it upon her return.

12. The respondent represents that the person on the appellant's staff responsible for employment contracts "*asked the Appellant several times to return the signed contract*" and a 5 April 2019 e-mail to her from the Head of HR refers to "*several reminders for you to sign the contract..*" At the hearing, however, the appellant said that the staff member administering employment contracts was her subordinate and insisted that he did not raise the matter with her. The reply states in this regard that, prior to an e-mail from the Deputy Head of HR on 18 February, "*[n]ever before had she received formal emails or letters requesting to sign the contract within a certain time.*" However, the record also includes an e-mail dated 14 February 2019 transcribing electronic communications between the appellant and the staff member responsible for contract administration. In this exchange, the appellant asked "*how much time do staff normally get to sign contracts.*" She was told that "*we asked normally one month.*" The record also includes a 1 March 2019 e-mail from the appellant to [the Head of HR] stating that the staff member "*has asked about the contract,*" but the timing of his request is not clear.

13. On 18 February 2019, the Deputy Head of HR sent appellant a short e-mail regarding her failure to sign and return the contract. After noting that more than two months had passed since the agency offered the new contract, he concluded "*[T]his is*

to request you to provide us with a reply/signed copy ASAP, anyway NLT CoB Friday 22 February 2019.” Two minutes later, the appellant replied by e-mail that *“I have received your email and will surely provide my response by Friday COB 22f [sic] Feb 2019.”*

14. The appeal states that the appellant spoke with the Head of HR to seek “clarification” while both were in Brussels on 22 February 2019. According to the appeal, the appellant signed the contract *“and was planning on personally hand it to [the Head of HR] during their Face to Face meeting 29 February 2019. She was waiting for this meeting in order to have the one year extension clarified and to agree on a plan of action...”* (The appellant clarified at the hearing that this meeting was actually intended for 1 March, as there was no 29 February in 2019.)

15. The appellant affirmed at the hearing that she signed the contract on 22 February after discussions with the Head of HR in Brussels. The appeal included a copy of the contract with her signature and manually dated 22 February 2019. Below the signature line, the copy included a partially blurred hand-written sentence added and signed by the appellant. At the hearing she clarified that this read: *“Note: It has been agreed with [the Head of HR] that we will mutually agree to actions to ensure proper delivery and support/clarity from him r/e the 1 yr contract renewal.”* The appellant told the Tribunal that the Head of HR agreed to this addition to the contract during their discussions in Brussels.

16. The appellant also told the Tribunal that she and the Head of HR agreed that the signed contract did not need to be returned to HR on 22 February, and that it could be physically delivered to him at a meeting between them scheduled on 1 March 2019. The reply states that the appellant returned the signed contract on the evening of 25 February 2019, but there is no confirming evidence of this, and it is inconsistent with the appellant’s statement at the hearing.

17. The respondent’s representatives at the hearing said that they were not aware of the arrangements and agreements said to have been concluded by the Head of HR. Their understanding was that he had not agreed to extend the February 22 deadline to return the signed contract. In response to the Tribunal’s question, they said that the Head of HR was currently hospitalized.

18. In any case, the appellant did not return a signed contract to HR by 22 February. Instead, on 25 February, she sent a long e-mail to the Deputy Head of HR, also addressed to the Head of HR. The e-mail, captioned *“Contract renewal,”* begins *“[f]irstly, I appreciate that you require a response and indeed I have had to take time to reflect on the 1 year renewal offered to me.”* Apparently referring to the appellant’s recent discussions with the Head of HR in Brussels, it continues: *“I shared with [the Head of HR] last week that I have a few matters where I feel there is need for clarity from your selves in order to move forward and would appreciate if we can have this in writing so we are both aligned.”*

19. The e-mail sets out the appellant’s understanding of the events leading to the offer of a one year contract, expresses her wish for *“a comprehensive understanding as to who is my line manager,”* and recalls her need for resources to accomplish various

assigned tasks. It then lists six bullet points on which the appellant seeks explanations and agreements, concluding *"I would appreciate if you could respond to this in writing in order for us to have a firm commitment and clear understanding from both sides."*

20. The next day, 26 February 2019, the appellant sent another long e-mail, this time to the General Manager. In it, the appellant states that *"with little guidance to correct" "minor questions...possibly related to the agency's hierarchical approach...I can be a greater asset over the next years and particularly if due support is given to me and my branch."*

21. This e-mail sets out the appellant's lack of understanding of the offer of a one year contract and complains about the lack of clarity and feedback in her relations with both the Head and Deputy Head of HR. Following eight detailed bullet points addressing her concerns and plans for her work, the appellant posits that *"in absence of any real feedback, or a performance discussion and necessary support or tools required to improve performance gaps"* her one-year extension *"was related to a possible personal dislike"* by the Deputy Head of Human Resources.

22. Early in the morning of 28 February 2019, the General Manager sent appellant a short e-mail withdrawing the offer of a contract extension. This stated in relevant part: *"Given the fact that you have not signed the contract offer I provided to you many months ago after a difficult decision on my part, and the need to bring real reform to the HR function, I am withdrawing my offer of a one year extension as of today... I made a decision, which you have not accepted. I'm sorry this hasn't worked out."*

23. The appellant replied by e-mail on the evening of 28 February:

I have signed the contract extension with the intention to personally hand it to... [the Head of HR] during our F2F tomorrow, Friday 29 February. Reason being to have the one year extension clarified and agree on a plan of action to allow me to meet the organizations expectations in the new contract period. Never have I not accepted the extension, and acknowledged also by [Head of HR] on 22 February an explanation is due in order to allow me to move forward successfully in my role.

24. Claimant's counsel on 11 March 2019 wrote the General Manager asking if his 28 February e-mail was a final decision, so that the appellant's existing contract would end on 31 May 2019. There was no reply. Claimant's counsel wrote again on 25 March 2019 informing the General Manager that the appellant would file this appeal. There again was no reply.

25. Appellant lodged this direct appeal of the General Manager's decision on 4 April 2019.

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

(i) Appellants' contentions

26. The appellant contends that she seeks annulment of a decision by the General Manager, the head of the NATO Body, and so can appeal directly to the Tribunal under Article 1.6 of Annex IX of the NATO Civilian Personnel Regulations (CPR). She further contends and her claim is timely and admissible.

27. The appellant advances four merits claims.

Violation of the Duty to State Reasons

28. First, the appellant contends that the General Manager did not provide sufficient reasons for his decision to withdraw the renewal offer. As to his statement that the appellant had not signed the contract, she contends she had done so. Moreover, in her view, non-signature was not a sufficient reason. As she understands matters, the normal practice is to provide a time limit for a staff member to sign, and that *"the Agency sometimes has to wait four or five months... and previous cases act as precedent."* In any event, *"at no point had she objected to the decision accept [sic] to ask for a clarification."*

29. Further, the appellant maintains in her reply that *"it is not mandatory to send the contract to Human Resources,"* suggesting that delivery of the document to [the Head of Human Resources] was appropriate.

30. In the appellant's view, the General Manager's further reference to *"bring real reform to the HR function"* was *"generic"* and did not explain how her non-renewal would contribute to this goal, or *"what kind of specific reform is needed..."* Accordingly, the appellant *"is not in a position to understand unequivocally"* the GM's reasoning. The appellant refers further in this regard to the respondent's failure to answer her counsel's letters.

Manifest Error of Assessment

31. Second, the appellant contends that *"it cannot be argued that the Appellant did not sign the one-year contract ... offered to her,"* pointing to her 26 February 2019 e-mail to the General Manager, in which *"it was never said that the Appellant was planning on refusing the one-year renewal offered to her... [S]he never said that she refused the offer."*

32. The appellant affirmed at the hearing, as stated in her appeal, that she *"actually signed the contract and was planning on personally hand [sic] it to [the Head of HR] during a meeting due to take place on 29 February 2019, which she did..."* Thus, according to the appellant, *"[i]t is therefore clear that, by stating that the Appellant did not sign the contract offer...the Defendant committed a manifest error of assessment."*

33. The appellant adds that, if the General Manager's decision was motivated by doubts about her past performance, those doubts were provoked by the Deputy Head of Human Resources, who made harsh, unfavorable, and untrue comments regarding her, and was the subject of her September 2018 informal complaint to the Head of Human Resources. In this regard, the appellant maintained that she was entitled to see the CPMB Minutes, and asked that they be given to her.

Breach of the Defendant's Contractual Obligations – Breach of the Appellant's Legitimate Expectations

34. The appellant contends that the signing of an employment contract gives rise to contractual obligations binding on an agency, and further that, under the case law of European institutions, even signing is sometimes not required to create such a relationship. In the appellant's view, *"there was already an agreement between the parties:"* she was offered a post, had accepted and signed on 22 February, and the *"mutual agreement between the parties was well reached."* The respondent could not simply *"withdraw"* the new contract extension without violating its contractual obligations.

35. The appellant adds in a sentence that the respondent *"deceived the Appellant's legitimate expectations that she would be offered a one-year renewal."*

36. At the hearing, appellant and her counsel developed further arguments relating to this head of claim. The appellant told the Tribunal that she signed the contract with the handwritten addendum on 22 February, after orally agreeing on the addendum with the Head of HR while in Brussels. In response to the Tribunal's question at the hearing, the appellant's legal counsel indicated that the oral exchanges between the appellant and the Head of HR on 22 February legally altered the terms of the contract document, both to add the terms of the handwritten note as a contract term, and to alter or waive the requirement that the signed contract be physically returned to HR in order for it to enter into force.

Violation of the Right To Be Heard – Violation of the Duty of Care

37. Third, the appellant contends that the respondent violated her right to be heard prior to a decision adverse to her interests, and that the respondent also violated its duty of care. She maintains that she was never informed of any time limit for signing the contract, and that *"in good faith she was questioning the reasoning for the 1 year in order to avoid"* future difficulties. However, she was notified of the withdrawal without prior communication and *"was therefore not able to express herself on this decision."*

38. Regarding the duty of care, the appellant urges that non-renewal of her contract places her in very difficult economic circumstances, as she has a mortgage, is caring for her parents, and the decision leaves her too little time to secure another position. The duty of care dictated that her personal situation should have been taken into account in deciding whether to withdraw the offer of a contract extension. The appellant pointed to the respondent's failure to reply to her counsel's letters as confirming its failure to observe the duty of care.

39. The appellant seeks:

- annulment of the 28 February 2019 decision and “*the reintegration of the Appellant for a duration of three years or at least one year*”;
- remuneration for the period after 31 May 2019, plus interest at the European Central Bank rate plus 2 points;
- alternatively, material damages equivalent to three years or at least one year of employment;
- compensation for moral prejudice evaluated to be 20,000 Euros;
- respondent to provide the 23 November 2018 CPMB meeting notes/minutes;
- the benefit of the expedited procedure; and
- reimbursement of legal costs and counsels’ fees.

(ii) Respondent’s contentions

40. The respondent contends that the appeal is inadmissible on two grounds. First, the respondent contends that the decision being appealed is not correctly identified, citing as an example one of the appellant’s e-mails describing the General Manager’s 28 February decision as informing her “*that her contract will eventually not be renewed.*” In the respondent’s view, there was no such decision; the General Manager’s February 28 decision was to withdraw a contract offer.

41. Second, the respondent urges that gravamen of the appeal is to contest the November decision to offer the appellant a one-year contract, but that the deadline for contesting that decision has passed, so any appeal is out of time.

Merits

42. As to the merits, the respondent stresses that an offer to extend a contract is a unilateral act that does not result in formation of a contract until it is accepted in accordance with its terms. Such an offer can be retracted, as happened here following the appellant’s protracted delay and failure to react.

Failure to State Reasons

43. In the respondent’s view, the General Manager’s 28 February e-mail sufficiently explains his reasons, particularly in the context of plans to reorganize the HR Branch known to the appellant. First, the appellant simply had not signed and returned the offered contract after a lengthy delay. As to his second point, the respondent contends that the NCI Agency must rely on dedicated and motivated staff. While the appellant could have helped the respondent in this respect and knew that her help would have been needed, she chose instead to linger, leaving uncertainty as to her commitment. This became unacceptable for the respondent.

Manifest Error of Assessment

44. The respondent denies that the General Manager’s decision reflected a manifest error of assessment, arguing that the appellant did not sign and return the contract to HR as its terms required. While the appellant blames her difficulties on the Deputy Head of

HR, she was in fact offered a contract renewal by a board of other senior agency personnel. In the respondent's view, the appellant wrongly characterizes revocation of the offer as a decision not to renew. To the contrary, she was offered a contract but did not accept it in a timely way. Her injury was self-inflicted.

45. The respondent observes that some of the appellant's arguments regarding error of assessment address the strength of her performance. For the respondent, these are not relevant, as the General Manager's decision was not predicted upon the appellant's past performance. Nevertheless, the respondent submitted extensive arguments and evidence said to refute appellant's criticisms of her job performance.

Breach Of Contractual Obligations - Legitimate Expectations

46. The respondent insists that no contract renewal was concluded, and disputes the appellant's argument that legal obligations could arise even absent a contract. The respondent questioned the appellant's claim to have signed her contract on 22 February 2018, but observed that, in any event, no signed contract was returned to HR before the applicable deadline.

47. The respondent denies that the appellant had a legitimate expectation that its offer of a new contract would remain open indefinitely. It points to the appellant's long delay in responding, her failure to observe the February 22 deadline to respond, and the agency's own need to recruit a person to fill her position if she did not accept the contract offered to her.

Right to be Heard - Duty of Care

48. The respondent maintains that neither the CPR or general principles of international administrative law require that the appellant be given an opportunity to comment prior to a decision adverse to her interests. In any case, the appellant clearly had multiple opportunities to address her concerns. She had multiple meetings with her line manager, the Head of HR, and the General Manager. She also sent e-mails to all of them.

49. The respondent also denies that it violated the duty of care, emphasizing that it offered the appellant a new contract. She did not respond for almost three months, and ultimately disregarded a clear deadline to sign and return the contract. In the respondent's view, the appellant also had obligations running to the organization. If she was not going to take the offered position, she should have let the respondent know, so that her successor could be recruited.

50. The respondent contends that any prejudice to the appellant was self-inflicted, and that she is not entitled to any relief.

D. Considerations and conclusions

(i) Considerations on admissibility

51. The decision to withdraw the contract offer was made by the General Manager. Accordingly, she has the right under Article 1.6 of CPR Annex IX to appeal directly to the Tribunal.

52. It is correct, as the respondent indicates, that the appeal sometimes uses imprecise language in describing the contested decision. Nevertheless, the appeal's request for relief indicates the purpose of the appeal: "[t]he Appellant respectfully requests the annulment of the 28 February 2019 decision..." Thus, the appeal is directed against the General Manager's decision to withdraw the contract offer. The Tribunal notes, however, that the appellant's requests for relief include requests for "the reintegration of the Appellant for a duration of three years" or alternatively for material damages equivalent to three years' compensation. The appeal does not explain the rationale for these requests, which might be understood as an implicit appeal of the November 2018 decision to offer only a one year contract. Any such appeal would be manifestly out of time and would therefore be inadmissible.

53. Both parties advance substantial arguments and evidence regarding the appellant's past job performance. As the appellant points out, this is irrelevant to the present appeal. The General Manager did not cite her past job performance as a reason for his decision to withdraw the contract offer. The parties' extensive arguments and evidence might be germane to the November 2018 renewal decision in her case, but the appellant did not contest that decision, and the time for doing so has passed. Accordingly, the Tribunal need not consider issues and evidence related to the appellant's past job performance.

(ii) Considerations on merits

Failure to Give Reasons

54. The appellant first contends that the General Manager did not provide sufficient reasons for his decision. The Tribunal does not agree. The General Manager's decision, is brief, to the point of being blunt. However, it makes his reasons clear, particularly in the context. The General Manager first points out that the appellant had not accepted a contract offered to her "many months before." Even assuming that the appellant signed the contract on 22 February (a disputed issue discussed below), the appellant had not returned the contract, as expressly required to bring it into force. While the appellant may feel that this is not a proper or sufficient reason, the point is clear.

55. Second, the General Manager referred to the need "to bring real reform to the HR Function." The respondent points to the planned reorganization of the HR branch, and to its need to rely on dedicated and motivated staff, as context for this comment. Given the appellant's long delay in responding to the contract offer, and of her long and unhappy e-mail to the General Manager of 26 February, this adequately explains his reasons.

56. As the appellant observes, her legal representatives twice wrote to respondent following the contested decision, first to seek confirmation that General Manager's decision was a final decision, and then to inform him of the appellant's intention to file a direct appeal to the Tribunal. Neither letter was answered. This reflects a failure of good administration by the respondent. However, this shortcoming does not render the General Manager's explanations legally insufficient.

Manifest Error of Assessment

57. The appellant next contends that withdrawal of the contract offer reflected a manifest error of assessment, as the appellant never rejected the offer, which contained no clear deadline for response. Further, to the extent the decision was related to her past performance, any adverse assessment was manifestly in error because of the quality of her performance did not justify such action. As noted above, the General Manager's decision did not rest on an assessment of the appellant's past performance. Accordingly, the Tribunal need not consider the parties' evidence and arguments in this regard.

58. The Tribunal does not find a manifest error of assessment. Given the circumstances, it would not have been apparent to the respondent that the appellant had accepted, or would accept, the offered contract. No signed and agreed contract was returned to HR by the appellant prior to 28 February. Instead, the appellant wrote long e-mails to her hierarchy, including the General Manager, expressing dissatisfaction and seeking written assurances and understandings on matters of concern. These e-mails did not say that the appellant intended to accept the offer. Instead, they can be read as attempts to negotiate additional contract terms responsive to the appellant's concerns prior to concluding the contract.

Breach Of Contractual Obligations / Legitimate Expectations

59. Article 11 of the Contract is clear. The contract would come into force when a copy "*signed and agreed*" by the appellant – not just signed – "*has been returned to Human Resources*". However, the appellant contends that in the circumstances, she had a contractual relationship with the respondent, or that she had a reasonable expectation of a future contract.

60. The parties dispute whether the appellant signed the contract on 22 February 2019. The appellant told the Tribunal that she did so, following discussions with the head of Human Resources on 22 February. She further told the Tribunal that she agreed with the Head of HR to add the provision handwritten on the face of the signed document, and to defer giving it to him until a meeting they planned for 29 February (actually 1 March).

61. However, in the respondent's view, the appellant's e-mails after 22 February show that she had not yet "*signed and agreed*" the contract. The Tribunal sees force in this analysis. The appellant's long e-mail of 25 February to the Head and Deputy Head of Human Resources – seeking their written agreement confirming several matters - begins with the words: "*I appreciate that you require a response and indeed I have had to take*

time to reflect on the 1 year renewal offered to me.” While not conclusive, this language strongly suggests that the appellant’s process of reflection was continuing, leading to her request for various written commitments prior to concluding the contract.

62. The appellant’s long e-mail of 26 February again suggested that she had not yet reconciled herself to the respondent’s offer, and wished to give vent to an array of concerns and complaints at the highest level of the organization.

63. If matters were indeed agreed on 22 February, is not apparent to the Tribunal why delivery of the signed contract – the act clearly required by the contract’s terms to bring it into force – should have been delayed in this manner. The appellant could have e-mailed the signed contract to her staff member responsible for managing staff contracts on 22 February, or she could have handed it to him on the next business day in The Hague. This did not happen. The appellant instead continued to negotiate, writing long e-mails to her hierarchy, expressing her concerns and requirements, but also perpetuating an ambiguous situation that the General Manager ultimately found unacceptable.

64. At the hearing, the respondent’s representatives said they had no knowledge of the claimed agreements between the appellant and the Head of Human Resources adding conditions to the contract and deferring the date for its delivery to HR. The documents of record do not shed light on these agreements. The Tribunal was told that the Head of Human Resources was currently hospitalized.

65. In any case, the Tribunal need not decide whether the contract was signed on 22 February. The other action required by the express terms of Article 11 to bring the contract into existence – its delivery to HR – did not occur before the General Manager withdrew his offer. Under general principles of law, formation of a contract requires clear acceptance of an offer in accordance with the offeror’s terms. The terms of the offer here were not met. There was no contract.

66. Given the circumstances here, the respondent was free to withdraw its offer prior to its acceptance in accordance with the offer’s terms.

Right to be Heard - Duty of Care

67. Finally, the appellant contended that the respondent did not give her the opportunity to be heard before withdrawing the contract offer. The respondent denied any such obligation under the CPR or the principles of international administrative law, adding that, in any event, the appellant had multiple avenues to express concerns regarding her situation, and had made substantial use of them.

68. The appellant’s counsel at the hearing acknowledged that the “*right to be heard*” prior to decisions affecting staff was not yet widely recognized in international administrative law. However, she encouraged the Tribunal to apply it, both as a wise principle and to further develop the law in this regard. Without expressing a view on the wisdom or desirability of the principle advocated by counsel, the Tribunal recalls that

under Article 6.2 of CPR Annex IX, its competence is limited. The Tribunal's mandate does not allow it to accept counsel's invitation to adopt this principle.

69. Finally, the appellant contended that the respondent failed in its duty of care, emphasizing her situation as a mortgage holder and her role as the financial support for her parents in The Hague.

70. The Tribunal does not find this claim persuasive. The respondent made reasonable efforts to accommodate the appellant's situation. The CPMB and the General Manager rejected a recommendation not to extend her contract, instead offering her a one-year renewal. The respondent then stood by through December, January and much of February 2019, waiting for a response. She was eventually given a reasonable 22 February 2019 deadline to agree, sign and return her contract. Despite immediately replying that she would do so, she did not. Instead, she sent long e-mails to her hierarchy, setting out concerns and seeking written commitments of corrective action.

71. While perhaps not bound by a legal "*duty of care*," the appellant had some responsibility to make her intentions clear to the respondent in due time, so that it could, if needed, initiate recruitment of a new staff member to fill her post. She did not do so.

72. The respondent did not violate the duty of care.

73. For these reasons, the appeal must be rejected in its entirety.

E. Costs

74. 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 [...]

75. 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 15 July 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

25 July 2019

AT-J(2019)0010

Judgment

Case No. 2019/1278

**FA
Appellant**

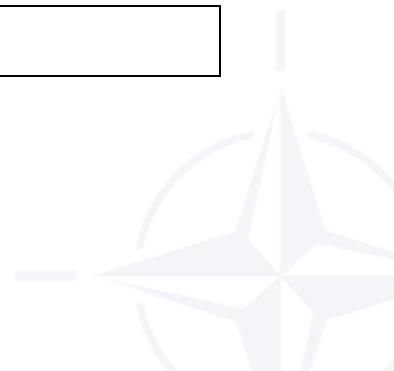
v.

**NATO Communications and Information Agency
Respondent**

Brussels, 16 July 2019

Original: English

Keywords: non-renewal of contract.



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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John R. Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 20 June 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 21 December 2018, and registered on 3 January 2019 as Case No. 2019/1278, by Mr FA against the General Manager of the NATO Communications and Information Agency (NCIA). Appellant is a former A2 Manpower Analysis staff officer. The appeal concerns the non-renewal of appellant’s contract.

2. The respondent’s answer, dated 4 March 2019, was registered on 8 March 2019. Appellant’s reply, dated 3 April 2019, was registered on 4 April 2019. The respondent’s rejoinder, dated 6 May 2019, was registered on 7 May 2019.

3. The Panel held an oral hearing on 20 June 2019 at NATO Headquarters. It heard appellant’s statements 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, after being a temporary consultant from 2009 to 2012 with the former NATO CIS Services Agency (NCSA), was on 1 November 2012 recruited by the NATO Communication and Information Agency (NCIA) at the Supreme Headquarters Allied Powers Europe (SHAPE) duty location, with a one-year contract. A two years’ contract followed in 2013 and in 2015 he was offered a three years’ contract, *i.e.* until 31 October 2018.

6. On 9 October 2017, the NCIA initiated disciplinary proceedings against appellant. The proceedings related to an altercation he had with his immediate supervisor incident on 3 October 2017, when appellant, who was on sick leave at the time following a traffic accident in August, returned to the office for personal administrative issues. Following the disciplinary proceedings, appellant was issued a written censure.

7. On 24 January 2018 appellant accepted a lateral transfer to a post in Management Support.

8. By letter dated 27 April 2018, appellant was informed by the NCIA General Manager (GM) that his contract would not to be renewed. The GM’s letter stated, *inter alia*: “[...] *The Civilian Personnel Management Board (CPMB) reviewed a number of criteria to make the determination whether or not a further contract will be offered. Based on this review, the PMB determined that the renewal of your contract would not be*

supported. The criteria we applied included the need for business continuity and operational requirements within your work area, the future requirements of the Agency as well as your performance and skill set. In order for their contract to be renewed, staff members are also expected to behave at all times in an appropriate manner in accordance with the NCI Agency Code of Conduct. The CPMB also looked into your behaviour and awareness of proper conduct within a multinational working environment”.

9. On 24 May 2018 appellant lodged a complaint. A Complaints Committee (CC) was convened and rendered its report on 3 October 2018. In its findings the CC stated: *“It is the unanimous finding of the Committee that the complaint lodged by [the appellant] is without merit. It is the unanimous finding of the Committee that the decision for non-renewal be confirmed as in the overall interest of the service”.*

10. On 8 October 2018 appellant provided his comments on the report. By letter dated 2 November 2018, the GM confirmed the decision not to renew the contract in the interest of the service. The GM however agreed to appellant’s request for an extension based on his personal situation, and extended the contract until 21 December 2018.

11. On 21 December 2018 appellant lodged the present appeal.

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

(i) The appellant's main contentions

12. Appellant notes that he properly followed the pre-litigation procedure within the prescribed time limits, and contends that the appeal is admissible.

13. Regarding the merits, appellant contends: 1) violation of the duty to state reasons; 2) manifest error of assessment; 3) violation of the right to be heard; and 4) violation of the duty of care.

14. On the violation of the duty to state reasons, appellant maintains that the GM’s letter dated 27 April 2018 did not identify a specific reason for non-renewal. In appellant’s view, the elements quoted such as *“the need for business continuity and operational requirements within Appellant’s work area, the future requirements of the Agency and his performance and skill set”* amount to a *“clause de style”* that do not satisfy the duty to state reasons.

15. Appellant contends that he does not know what the *“future requirements”* and the *“operational requirements within his work area”* are, and how these requirements have been assessed in order to conclude that his contract should not be renewed. In addition, appellant advances that it is hard to conceive that the Administration would take the time and make the effort to implement a lateral transfer of a staff member if his skills were not needed at the new place of employment.

16. Appellant considers that he was not given concrete and comprehensive reasons for the contested decision, nor were necessary changes in his skills identified by the Agency. Hence, quoting this Tribunal's case law, he was not "*put in a position to clearly and unequivocally understand*" the contested decision.

17. Moreover, appellant deems that the reason of business continuity is irrelevant, since the post he filled had been advertised and the selection process completed. Appellant observes in this regard that several positions requiring his skills, experience, and competence have been published.

18. Appellant underlines that the violation of the duty to state reasons is shown by the content of the CC's report. He refers to Article 5(d) of Appendix 3 to Annex IX to the CPR (Implementing Procedures applicable to Complaints Committees) which reads as follows: "*All relevant documentary evidence should be included as an annex to the final report*". Appellant contends that none of the annexes mentioned in the report were provided to him, therefore vitiating the CC's decision. Appellant considers that without being aware of all the references he could not be fully aware of the considerations taken into account by the CC and thus to fully express his views on the report.

19. Appellant presents extensive arguments intended to demonstrate the alleged manifest error of assessment. He considers two main elements: the first related to the quality of his performance; and the second concerning the incident that led to the written censure.

20. Appellant emphasises that his performance assessments have always been very positive, that he was rated "excellent" in 2014, "very good" in 2015, and again "excellent" in 2016 (the 2017 assessment not being completed). He also points out that the CC report also recognises that he is an outstanding performer.

21. Appellant disagrees strongly with the CC report's references to his reported "*incapacity to deal with peers in a multi-cultural environment*," with its description of his behaviour as "*arrogant*", "*bullying*", "*disrespectful*", "*[of] effusive Mediterranean lineage*", or that he "*attempted to factionalise the teams into those that supported his views and those that did not*." Appellant considers all these statements to be unsubstantiated. On the contrary, he provides written testimonies of his exemplary behaviour, and highlights that he is a very social individual who is very active in community life and has taken part in various sport clubs (swimming, cycling, choir, ...) at SHAPE for many years.

22. With respect to the incident that led to his censure, appellant put forward his recollection of events, insisting that he did not breach his duties and the NCIA Code of Conduct. *Quod non*, he emphasises that Article 5.3 of the NCIA Code of Conduct foresees that "*NCIA personnel members who believe that they are being treated inappropriately should first of all inform the alleged offender and attempt to solve the issue directly with the alleged offender at the earliest time possible, when appropriate [...]*". He notes that only six days passed from the incident to the letter informing him of the disciplinary proceedings, and that in between no attempt was made to comply with Article 5.3 above, the Agency clearly failing to abide to it.

23. Appellant stresses that he accepted the outcome of the disciplinary procedure as he, as a former military member, respects the chain of command and higher authority. Moreover, knowing that he was going through the contract renewal process, he did not wish to exacerbate the situation. He considers it particularly unfair that the first and only incident in his career has impacted on the non-renewal, given that he had already been sanctioned for the incident.

24. For these reasons, appellant advances that none of the criteria that were taken into account in the contested decision were supported by any justification (expertise, business continuity, future requirements of the Agency), so that it is patent that the only genuine motivation behind the non-renewal decision is the disciplinary action.

25. Appellant then contends that taking the disciplinary action into consideration for the non-renewal decision is a breach of the *ne bis in idem* principle of law, quoting case law of the International Labour Organization Administrative Tribunal ("ILOAT") regarding the double jeopardy rule in this respect.

26. Appellant considers further that he should have been heard before the decision not to renew his contract was taken. He contends that if he had been informed that the disciplinary measure would impact his renewal, he would have raised observations on the fairness of the procedure leading to the disciplinary sanction.

27. Finally, concerning the duty of care, appellant holds that the Agency did not pay sufficient attention to his medical situation, to the physical and emotional impact of his serious accident and the resulting care and surgeries, and to the stress the non-renewal decision caused him and his family, involving important financial consequences, as appellant has custody of his sister-in-law's children. Appellant also advances that he was excluded from some recruitment campaigns and was denied access to the SHAPE restricted area after many years of committed services.

28. Appellant requests the Tribunal to:

- annul the 2 November 2018 decision rejecting his complaint, in so far as this decision confirms the non-renewal of appellant's contract;
- annul the initial decision dated 27 April 2018, announcing the non-renewal;
- order reimbursement for the "*enormous*" moral and image damages that he and his family incurred; and
- order reimbursement of all the legal costs and fees.

(ii) The respondent's main contentions

29. Respondent does not dispute the admissibility of the appeal.

30. Concerning the claimed violation of the duty to state reasons, respondent maintains firstly that there is no rule requiring the Administration to explain its non-renewal decision. It refers in this respect to the NCIA Contract Policy, which stipulates: "*staff members will be informed of the NCI Agency to renew or not their contract between 9 to 6 months prior to contract expiration*". Secondly, respondent highlights that appellant accrued only 6 years of employment with the Agency, so he is not in a *de facto* situation

comparable to the holder of an indefinite duration contract, the termination of which would indeed require substantiation by the Organization. Thirdly, it considers that the GM's letter dated 27 April 2018 (see *supra*) did provide quite comprehensive reasons.

31. Respondent fails to understand how appellant could claim to be unaware that his past behaviour did not meet the required Agency's standards, since he was subject of a disciplinary action and was issued a sanction.

32. Respondent considers that the reference in the 27 April 2018 letter to appellant's "*behaviour and awareness of proper conduct in a multinational working environment*" did provide sufficient explanation, as it clearly referred to the disciplinary action.

33. Respondent also refers to the CC report, which states: "*[t]he letter ... informing [the appellant] of non-renewal indicated that the Agency has a set of criteria for contract renewal. One of these is business continuity and the need for the particular skill set. Another is the performance of the individual. The third criterion cited is individual behaviour in accordance with the NCI Agency Code of Conduct [...]*"

34. Respondent focuses on the fact that the Agency's criteria includes assessments of 1) qualifications (*i.e.* skills, expertise and ability to do the job) and 2) suitability (*i.e.* behaviour).

35. While respondent underlines that appellant's expertise was not at issue, his soft skills did not justify continued employment with the Agency. It further adds that appellant's 2016 performance management report already mentioned that he had to work on his soft skills: "*[a]n area of improvement is about his relationship with colleagues. Francesco needs to act with more tact and diplomacy, encouraging communication with the view to facilitate the dialogue and resolve issues.*"

36. Respondent considers any discussion linked to the disciplinary action definitely closed, underlining that appellant did not challenge the decision within the governing time limits.

37. Concerning the reference to Article 5(d) of Appendix 3 to Annex IX to the CPR, respondent notes that the CC report did not contain any annex, and that the CPR leaves it to the discretion of the CC to include or not annexes to its report. It stresses nevertheless that the report contained sufficiently detailed quotes of relevant statements and documentary evidence for appellant to be sufficiently informed of the CC's reasoning.

38. Respondent contests appellant's claims of violation of Article 5.3 of the NCI Agency Code of Conduct, expressing surprise at how an HR professional like appellant could dispute a zero tolerance for violations of the Agency's Code of Conduct in particular in light of Article 12.1.1 of the CPR requiring members of the staff to "*treat their colleagues and others ... with respect and courtesy at all times*"

39. Respondent does not consider that taking appellant's behaviour into account as part of a non-renewal contract decision would be contrary to the *non bis in idem* principle. Respondent recalls that there is no right to a contract renewal, and that a decision not to

renew cannot be considered a sanction, observing that it is not listed as such in Article 59 of the CPR.

40. Concerning the claimed violation of the right to be heard, respondent maintains that there is no right for staff members to be heard prior to a decision not to renew a contract. Respondent points out that appellant did at the time submit comments during the disciplinary action and was therefore able to present his position in that respect.

41. Respondent disagrees with the alleged lack of care, noting that appellant received an additional limited contract extension to suit his personal needs. It denies that it prevented appellant from applying to other positions in the Agency. It notes that the one position appellant applied for was the same position he held before, and that the Agency did not need to consider this application further as he was not being renewed in that post. Referring to appellant's access to the SHAPE restricted area, respondent explains that he is currently working for a private company under contract with SHAPE, and that his access to the NCIA facilities (located in the restricted area) is treated as any other external visitor's.

42. Lastly, respondent rejects any claim for damages as not being explained or substantiated.

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

D. Considerations and conclusions

44. The Tribunal observes that the present appeal is similar to a great number of appeals that have been before it regarding the NCIA contract policy. The Tribunal therefore refers to the consistent jurisprudence that has developed concerning challenges to that policy and its implementation in individual cases.

45. The Tribunal notes further that both parties advance substantial arguments and evidence regarding matters that are irrelevant to the present appeal. The parties' extensive arguments regarding a disciplinary procedure that took place months earlier might have been germane to the non-renewal decision, but appellant did not contest that decision at the time, and the time for doing so has passed. Accordingly, the Tribunal need not consider issues and evidence related to the disciplinary procedure.

46. This Tribunal has consistently held that decisions concerning renewal or non-renewal of contracts are within the discretionary power of the Head of the Organization. There is consensus among international administrative tribunals that a decision in the exercise of discretion is subject to only limited review by a tribunal. A tribunal would interfere with a non-extension of contract decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority. Tribunals have also consistently held that they will not substitute their own view for the organizations' assessments in such cases (*cf.* Judgment in Case No. 885).

47. Regarding the alleged violation of the principle to state reasons, the Tribunal, first of all, repeats that it is good administration to state reasons. The reasons were clearly given to appellant in the GM's letter of 27 April 2018. They were also extensively spelled out in the CC's report. The criteria that the NCIA applies are a combination of business continuity, the need for particular skill sets, the individual's performance, and the individual's behaviour in relation to the NCI Agency Code of Conduct. It is clear from the evidence that the last criterion, i.e. the one of individual conduct, has played a determining role in the discretionary assessment that was made. The Tribunal is of the view that in the present case the reasons were clearly and sufficiently given.

48. Appellant further alleges manifest error of assessment in two respects: first, concerning the quality of his performance; and second, regarding the incident that led to the written censure.

49. The Tribunal has taken note of the evaluations of appellant's performance. It concludes that appellant's background, technical skills and commitment are not in dispute. It observes, however, that there was an issue concerning appellant's soft skills and individual conduct. This is well documented and the Tribunal fails to see a manifest error of assessment here.

50. Regarding the incident that led to the written censure, the Tribunal cannot but repeat that it will not consider issues and evidence related to this disciplinary procedure (*cf.* paragraph 45 *supra*).

51. Appellant considers that he should have been heard before the decision not to renew his contract was taken. He, however, fails to indicate the legal basis for this.

52. Lastly, appellant claims violation of the duty of care. He holds that the Agency did not pay sufficient attention to his medical situation and to the impact the serious accident and the consequent care and surgeries had on him both physically and emotionally. This is, however, not supported by any evidence. The Tribunal understands that the non-renewal decision may have caused additional stress, but that in itself does not render the decision illegal or entail an entitlement to financial compensation. The Tribunal has regularly held that contract renewal is not automatic.

53. Appellant also asserts that he had been excluded from some recruitment campaigns and had been denied access to the SHAPE restricted area after many years of committed services. Respondent correctly observes that the one position appellant applied for was the same position he held before, and that the Agency did not need to consider this application further, as he was not being renewed in that post. Referring to access to the SHAPE restricted area, respondent explains that appellant is currently working for a private company under contract with SHAPE, and that appellant's access to the NCIA facilities (located in the restricted area) is the same as any other external visitor's. Respondent also notes that appellant received a limited contract extension to suit his personal needs. In view of this the Tribunal concludes that the plea of violation of the duty of care also fails.

54. Appellant refers to the implementing procedures applicable to Complaints Committees in Appendix 3 of Annex IX to the CPR. Article 5, paragraph (d), provides: *“All relevant documentary evidence should be included as an annex to the final report.”* Appellant observes that none of the annexes mentioned in the report were provided to him, therefore vitiating the decision taken. Appellant further considers that he was not aware of all the references, and thus was not fully aware of the considerations taken into account by the CC, leaving him unable to respond fully to its report. Respondent counters that the CC report did not contain any annexes, and that it is within the discretion of the CC whether or not to include annexes to its report. In any case, the report contained detailed quotes of relevant statements and documentary evidence sufficient to inform the appellant of the CC’s analysis.

55. The Tribunal finds the wording of Article 5(d) clear enough: relevant documents *“should”* be annexed. However, the use of the verb *“should,”* instead of *“must,”* *“shall,”* or other imperative verbs suggests a certain limited degree of flexibility. The Tribunal does not preclude the possibility of exceptional circumstances that might lead a CC not to annex a particular document, although it should then explain its action. But the crux of Article 5(d) is clear: as a general rule all documents are to be annexed, even if they have been quoted in the report itself. The discretionary power that respondent alleges the CC has is not supported by the wording of this paragraph.

56. On the other hand, appellant appears to be well aware of the contents of most if not all documents, since some were in his possession and others were extensively quoted in the report. He has not, and certainly not sufficiently, made clear which document would substantially alter his knowledge or understanding of the matter, or where he has been adversely affected. The burden of proof for this lies with appellant. It is emphasized in this respect that the subject matter of the present appeal is an administrative decision not to renew a contract, and not a disciplinary procedure, where different standards apply. The Tribunal repeats that final reports of CCs should as a general rule include all documentary evidence in annex, but it cannot share appellant’s view that he was not fully aware of the CCs considerations, which were clear in its report. In the context of this case, any shortcomings in the CC’s written report can have no effect on the validity of the contested decision.

57. The Tribunal finds that the non-renewal process was regular. It is also convinced that appellant understands the reasons behind this decision. He just disagrees with it. The Tribunal concludes that the appeal must be dismissed in its entirety.

E. Costs

58. 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 [...].

59. 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 16 July 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

25 July 2019

AT-J(2019)0011

Judgment

Case No. 2019/1279

EM

Appellant

v.

**NATO Support and Procurement Agency
Respondent**

Brussels, 23 July 2019

Original: French

Keywords: unjustified absence; reimbursement by the staff member to the Organization; calculation of the number of days of absence.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 20 June 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 22 December 2018 and registered on 3 January 2019, by Mr EM, seeking:

- cancellation of the decision of 26 October 2018 whereby the General Manager of the NATO Support Agency (NSPA) rejected appellant's complaint against the decision of 15 June 2018 establishing that his period of unjustified absence ran from 15 March to 13 May 2018 inclusive; and
- reimbursement of the legal expenses incurred.

2. The respondent's answer, dated 1 March 2019, was registered on 8 March 2019. The appellant's reply, dated 5 April 2019, was registered on 9 April 2019. The respondent's rejoinder, dated 9 May 2019, was registered on 10 May 2019.

3. The Tribunal's Panel held an oral hearing on 20 June 2019 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 became an NSPA staff member in 2012. He was employed on an indefinite-duration contract as the Head of Finance, CEPS. From November 2016 onwards, appellant took several periods of sick leave for burnout, resuming his duties intermittently.

5. On 16 March 2018, appellant produced a new medical certificate covering a period of sick leave until 30 April 2018. As early as 20 March, the administration ordered a medical control appointment, which took place on 5 April 2018.

6. The events unfolded quickly. On 10 April 2018, the administration ordered the staff member to resume work full-time "immediately", while allowing possible arbitration proceedings in the event of disagreement. Following that there were several e-mail exchanges in which both the administration and appellant reiterated their positions; during these exchanges the administration clearly told the staff member that his absences would be considered unjustified from 15 March onwards.

7. Appellant eventually accepted the principle of arbitration and asked for the list of approved doctors. The administration initially gave appellant the name of only one doctor, which he refused. Soon after, the administration and appellant agreed on another doctor, who examined appellant on 27 April 2018.

8. On 9 May 2018, the NSPA informed appellant that the doctor had concluded that he was fit to resume work, and explained how to go about returning to work on Monday 14 May at 10 a.m. Appellant did indeed return to work on 14 May 2018.

9. Soon afterwards a discussion arose between appellant and the administration about the number of unjustified days of absence and therefore the amount of money to be paid back by the staff member to the NATO body. That is the only object of this dispute.

10. On 29 May, the Head of the Administration and Support Branch informed appellant that his absence was considered to have been unjustified from 15 March to 13 May inclusive and amounted to the equivalent of €25,620.63. The administration suggested staggering the money to be paid back into six monthly instalments of €4,270.10.

11. On 5 June, appellant disagreed with the number of days and the method of calculation of the amounts to be reimbursed. He considered that the period of unjustified absence ran only from 6 to 30 April 2018, with the exception of 27 April, when he attended a medical control appointment requested by the administration, *i.e.* 15 working days in total. He proposed taking annual leave to cover the whole period in question.

12. On 15 June, the same NSPA official stated their position to appellant, establishing the period of unjustified absence as 15 March to 13 May and splitting the amount due between days of leave on the one hand (corresponding to appellant's remaining leave for 2018) and a deduction from appellant's salary on the other (€14,077.32, in six monthly instalments of €3,480.22). This is the contested decision.

13. Appellant then initiated the process to challenge the decision before the administration. On 12 July, he submitted a request for administrative review of the decision, reiterating his position of 5 June.

14. On 2 August, his request was partially granted insofar as the start of the period of reimbursement was pushed back from 15 March to 6 April because of difficulties in interpreting Operating Instruction (OI) 4400-04. The rest of the request for review was rejected. The administration noted that a first deduction had been made on appellant's July 2018 salary, and that only €4,493.93 remained to be paid, in five instalments of €899.38.

15. On 21 August, appellant submitted a second request for administrative review. He added new requests: that Human Resources be ordered to send him a copy of the findings of the arbitration report and to send him a written apology, that disciplinary action be taken against the Human Resources staff, that he be reimbursed for the amounts already deducted and be awarded compensation for the non-material damage caused, as well as various requests pertaining to the medical procedures undergone in the preceding weeks.

16. This request was not only rejected on 31 August by the acting General Manager of the NSPA, the administration also returned to its initial interpretation of 15 June, and now considered that the appellant had been on unjustified absence from 15 March onwards.

17. On 1 October 2018, appellant submitted a complaint to the General Manager, who rejected it on 26 October.

18. Appellant lodged his appeal with the Administrative Tribunal on 22 December 2018.

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

(i) The appellant's contentions

19. Appellant firstly contends that his appeal is admissible, contrary to what respondent claimed during the period of administrative review. He points out that his request for administrative review was addressed to the person specified in Article 2.2 of Annex IX of the Civilian Personnel Regulations (CPR), *i.e.* the immediate supervisor of the official who took the contested decision, even if the request for administrative review had gone through the supervisor of the requester.

20. On the merits, appellant raises the issue of the violation of Article 2.4 of Annex I and Article 5.11 of OI 4400-04 on the arbitration procedure. Appellant refers to the wording of Article 2.4 of Annex I to OI 4400-04 on the arbitration procedure: "*If the arbitration doctor's opinion confirms the conclusion of the medical assessment, the absence shall be recorded and dealt with as unjustified from the date of the medical assessment*". Appellant therefore considers that the period of unjustified absence should have started on 6 April, the day after the medical control appointment.

21. Appellant claims that the administration misapplied Article 5.11 of the Operating Instruction insofar as it initially did not give the staff member any choice in the arbitration doctor, and only sent him one name. The staff member had to ask to get a list containing several names.

22. Appellant also claims that respondent violated the principle of good administration, transparency and duty of care, insofar as the administration changed its interpretation of the applicable rules, and used hurtful language with regard to the appellant.

(ii) The respondent's contentions

Admissibility of the appeal

23. Firstly, respondent disputes the admissibility of the first and second request for administrative review, meaning that the complaint and therefore the appeal are inadmissible. In respondent's view, requests for administrative review, to be addressed to the supervisor of the official who took the decision, should be made through the immediate supervisor of the requester, which was not the case here.

24. Respondent also disputes the admissibility of the appeal on the basis of the date it was entered. Respondent argues that the exact amount to be reimbursed by appellant was sent to him on 29 May, so the request for administrative review sent on 12 July, was late, insofar as it was submitted after the 30-day deadline set out in Article 2.1 of Annex

IX to the CPR.

Reasoning regarding the merits of the appeal

25. The administration based its calculation of the number of days of unjustified absence on the general rule set out in Article 6.2.4. of Operating Instruction 4400-04, and on Article 2.4 of Annex I, which covers the medical arbitration procedure. Respondent argues that any other interpretation would encourage staff members to systematically seek medical arbitration with the sole objective of reducing the length of their unjustified absence.

26. Regarding a small number of specific days which appellant believes should not be included, respondent refuses to consider as days of justified absence the days appellant went to see the arbitration doctor: he was not working, and therefore cannot expect to be paid for them. Regarding official holidays, respondent considers them to be days of unjustified leave since the staff member did not work any of the days of the corresponding week; official holidays are merely a continuation of the days worked in the same week.

27. In response to appellant's argument that the procedure was vitiated insofar as only one arbitration doctor was initially appointed, respondent argues that appellant may no longer make that claim before the Tribunal. Appellant took part in the rest of the medical proceedings, proving that he accepted them and therefore considered that they were not out of order.

28. Lastly, respondent underlines the great care and diligence it exercised when reviewing appellant's successive requests. Therefore it did not violate the principles of good administration, transparency and duty of care.

D. Considerations and conclusions

On the admissibility of the appeal

29. On 29 May 2018, the Head of the NSPA's Administration and Support Branch informed appellant that his absence was considered to have been unjustified from 15 March to 13 May inclusive and amounted to the equivalent of €25,620.63. The administration suggested staggering the money to be paid back into six monthly instalments of €4,270.10. Given the wording of this letter and the fact that the administration did not know then if appellant intended to reimburse the amount due by using days of leave or by deductions from his salary, this letter of 29 May may be considered as a preparatory act to the decision of 15 June.

30. Thus the first request made on 12 July for administrative review of the decision of 15 June 2018 was not late.

31. Regarding the channels through which the request for administrative review was made, it appears from the written record that appellant did in fact follow the procedure set out in Article 2 of Annex IX to the CPR, by sending his request to his immediate

supervisor for him to send to the supervisor of the official who took the contested decision. The administration is simply criticizing appellant for refusing to have a conversation with his immediate supervisor, whom he urged to send his request for administrative review without delay, even though his immediate supervisor considered his request to be incomplete.

32. But such circumstances do not make the request for administrative review flawed.

On the merits of the appeal

33. What constitutes a day of unjustified leave for NSPA staff members is established in Annex I to OI 4400-04 on arbitration proceedings.

34. Two articles are interpreted differently by appellant and respondent.

35. Article 6.2.4 of the OI provides that:

[...] If the control doctor considers the absence to be unjustified, HR will inform the staff member accordingly who will then be required to return to work immediately. As a consequence, any unjustified sick leave days will be deducted from annual leave. If the annual leave entitlement has already been taken in full there will be a corresponding reduction of emoluments.

Article 2.4 of Annex I to the same OI provides:

If the arbitration doctor's opinion confirms the conclusion of the medical assessment, the absence shall be recorded and dealt with as unjustified from the date of the medical assessment.

36. Respondent considers Article 6.2.4 to be the main provision that applies in all cases, including in the event of medical arbitration, and is of the view that the period of unjustified absence starts on the date established by the control doctor, *i.e.* 15 March in this case.

37. Conversely, appellant considers that medical arbitration is only covered by Article 2 of the Annex, which replaces Article 6.2.4. Appellant therefore considers that the period of unjustified absence should have started on 6 April, the day after the medical control appointment, which was the determining date.

38. In its reply to the first request for administrative review, the administration acknowledged having difficulties reconciling the wording of the two articles. It decided to choose the interpretation that was most favourable to appellant, *i.e.* the date of the medical examination. Respondent admits that it would have ultimately accepted this option if the staff member had not submitted a second request for administrative review. But since the staff member made further requests, respondent reverted to its initial interpretation, which was stricter. The final decision, which was taken after the complaint was submitted, overturned the favourable interpretation. It was decided that the absence had become unjustified as from 15 March, as was stated in the initial decision.

39. The Tribunal considers that OI 4400-04 contains a contradiction, and that it must be interpreted in a way that is favourable to appellant. In the event that medical arbitration is requested, Article 2 of the Annex shall supersede the general rule. Respondent's fear that this interpretation might be taken advantage of because it could systematically give rise to requests for arbitration aimed solely at reducing the period of unjustified absence seems unfounded. In any event, in this case, the parties communicated frequently with each other and were quickly able to find a date for the medical appointment, which the staff member respected. It cannot be said that appellant took advantage of the process. Therefore the absence became unjustified as from 6 April.

40. There are other days that are disputed, between 6 April and the day appellant resumed working, on 14 May.

41. The first one is 27 April, when the staff member attended the appointment with the arbitration doctor. The administration considers this to be a day of unjustified absence, whereas appellant considers that he was on mission. The Tribunal shares appellant's view on this point. The appointment was requested by respondent, and the doctor was based in Luxembourg, over 400 km away from appellant's home in Versailles; he was obliged to attend the appointment, and the round trip took him a full day. 27 April must be deducted from the number of days of unjustified absence.

42. The second specific period that is disputed is the long weekend of 10–13 May. Appellant returned to work on Monday 14 May. The administration would like that four-day weekend to be considered as a period of unjustified absence, arguing that the staff member did not work at all that week. That year, Thursday 10 May was an official holiday and a non-business day, and the administration had decided that all its staff members would be on leave on Friday 11. It is clear that when appellant was ordered on 9 May to resume working the next day, he could not return earlier than 14 May. Besides, Monday 14 May was the date for which respondent had set a starting time for appellant to resume working and to attend a medical examination to confirm he was fit for work.

43. Thus the Tribunal considers that the notion of working week invoked by respondent is unfounded; absences must be considered on a day-to-day basis. It considers that, when told on Wednesday 9 May to return to work, appellant did so on the very first business day that followed, as instructed by the administration. The fact that there were four non-business days between the day appellant was told to return to work and the day he actually returned is no fault of his. These four days must not be considered as days of unjustified absence. The period of unjustified absence ended on 9 May inclusive.

44. The period of unjustified absence must therefore be considered to be 6 April to 9 May inclusive, not counting 27 April. The contested decision must be rectified to take this into account. It will be up to respondent to calculate the amount to be deducted from appellant's salary, depending on the number of days of leave used to cover all or part of this period, which contains 22 working days.

45. Appellant's other submissions must be dismissed.

46. The fact that the administration, by not letting appellant choose the arbitration doctor, misapplied Article 5.11 of the Operating Instruction does not affect the legality of the contested decision insofar as appellant was able to choose to see another doctor a few days after requesting to do so.

47. Lastly, respondent rightly highlights that it did not violate the principle of good administration, transparency and duty of care. The fact that an administration changes its position during an administrative review process in no way means that it has violated that principle. The whole point of the administrative review procedure is to allow the administration to change its decision based on discussions with the staff member. In the present case, respondent was responsive and agreed to look into all appellant's requests, even though it considered them inadmissible. It cannot be accused of not showing care and concern in handling appellant's requests.

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. In the circumstances of this case, the appeal being granted only in part, an order for the NSPA to pay Mr M €2,000 in compensation for the costs incurred for his defence will serve as a fair implementation of these provisions.

F. Decision

FOR THESE REASONS,

the Tribunal decides that:

- The contested decision be rectified insofar as it included 15 March to 5 April, 27 April and 10 to 13 May 2018 in the period of unjustified absence. The NSPA shall be responsible for calculating the amount to be deducted from appellant's salary, depending on the number of days of leave used to cover all or part of this period, which contains 22 working days.
- The NSPA shall pay Mr M the sum of €2,000 in compensation for the costs incurred for his defence.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 23 July 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 September 2019

AT-J(2019)0012

Judgment

Case No. 2018/1277

JF

Appellant

v.

**NATO Communications and Information Agency
Respondent**

Brussels, 19 August 2019

Original: French

Keywords: indefinite duration contract; termination; illegal justification; staff member unable to perform duties of a higher grade.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mr John Crook and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 20 June 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 10 December 2018 and registered on 18 December 2018, by Ms JF (Case No. 2018/1277) seeking:

- annulment of the decision of 12 October 2018 whereby the General Manager of the NATO Communications and Information Agency (NCIA) rejected the appellant's complaint against his decision of 18 July 2018 to terminate her contract;
- compensation for material damage of various kinds: payment of the salaries she should have received as a B5 staff member since 1 March 2018, and payment in respect of the period of notice that was illegally shortened;
- compensation for non-material damage, assessed at €20,000;
- reimbursement of her travel and subsistence expenses and the cost of retaining counsel.

2. The respondent's answer, dated 18 February 2019, was registered on 7 March 2019. The appellant's reply, dated 9 April 2019, was registered on 10 April 2019. The respondent's rejoinder, dated 10 May 2019, was registered on the same day.

3. The Tribunal's Panel held an oral hearing on 20 June 2019 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, who was born in 1962, joined NATO in 1989 and has held an indefinite-duration contract ever since. She initially worked at SHAPE then in February 2010 joined the NCSA, which became the NCIA in 2012. She was a grade B4 staff member.

5. In 2017, following internal reorganizations which generated internal tensions, appellant asked for her job description to be updated, which the administration agreed to do, upgrading her position from B4 to B5. Appellant was appointed ad interim to the position on 12 March 2018, and when a call for applications was made, she applied for it.

6. But the situation soon deteriorated. On 25 July appellant was notified of the NCIA General Manager's decision of 18 July 2018 which stated that:

- she did not have the qualifications required for the B5 position, and consequently she had not been selected;
- her contract would be terminated on 1 January 2019; and
- she would receive the indemnity for loss of job.

7. Appellant challenged the decision. On 23 August 2018 she submitted a complaint to the General Manager, asking that a Complaints Committee be convened. That complaint was rejected on 12 October 2018.

8. On 18 December 2018, appellant submitted her appeal to the NATO Administrative Tribunal seeking annulment of the decisions of 18 July and 12 October 2018.

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

(i) *The appellant's contentions*

9. To seek annulment of the decision rejecting her for the position she had applied for, appellant contends first of all that respondent violated Article 57.3 of the Civilian Personnel Regulations (CPR), which provides that "*in selecting members of the staff to fill vacant posts, account will be taken of their professional qualifications, performance record and experience*" and Article 4.5 of Directive AD.02.02 on recruiting, selecting and appointing NATO Civilian Staff. She is of the view that, in accordance with these provisions, she should have been considered first for the post. If the incumbent of an upgraded post is not fulfilling the requirements of the post, they should be given the opportunity to undertake the development training required to improve their performance. If at the end of the development period the incumbent still does not fulfil the requirements, a second development period of between three and 12 months must be offered. If at the end of the second development period the incumbent still does not fulfil the requirements, they will be transferred to a position of their previous grade. Only if no such post is available may the administration terminate the contract.

10. Appellant highlights that the administration did not explain why it had opened the post for competition when appellant was meeting the requirements and had proven her ability to perform the duties of the post, to which she had been appointed ad interim. She considers that she was discriminated against by not being appointed directly, with no competition. Furthermore, even though there were only two applicants for the post and the other candidate withdrew in the end, meaning that appellant was the only candidate for the position, she was not appointed in spite of her professional qualities. She argues that the administration committed an error of law and an error of fact by not appointing her directly to the post.

11. Appellant also recalls a previous dispute; in 2017 she requested an upgrade of her post, to which administration never replied. Appellant considers that the contested decision is actually retaliation by the administration for the request she made a few months earlier, which amounts to an abuse of authority.

12. Lastly, appellant claims that not recruiting her constitutes a manifest error of judgment. Based on her professional performance, as shown in her previous performance reviews, respondent should have offered her the post. In particular, the administration cannot base its decision on her lack of experience since she already held the position ad interim.

13. Regarding the decision to terminate her contract, appellant disagrees with the procedure that led up to it. She points out that she was not given the chance to provide her point of view before the decision was taken.

14. Appellant claims a violation of Article 9 of the CPR insofar as the reason for the termination given by respondent was not one of the possible reasons listed in that article. The administration could not legally terminate appellant's contract on the grounds that she was unable to perform duties above those of her grade: this is not a reason listed in Article 9.

15. Appellant also claims that the administration failed in its duty of care. More specifically, she says that the administration was not sensitive to her situation.

16. On a subsidiary basis, appellant argues that respondent violated Article 10.3 of the CPR on notice periods: the decision to terminate her contract was taken less than six months before the announced termination date.

(ii) The respondent's contentions

a) Admissibility of the appeal

17. Respondent does not challenge the admissibility of the appeal.

b) Reasoning regarding the merits of the appeal

18. Regarding the supposed violation of Directive AD.02.02 on recruiting, selecting and appointing NATO Civilian Staff, respondent does not have the same interpretation as appellant. It submits that the administration's obligation to consider a staff member's application does not entitle the staff member to automatically be recruited.

19. Respondent details the procedure it followed by publishing the call for applications, and gives the names of the 43 staff members who were invited to apply for one of the upgraded B5 positions. This limited competition fulfilled the requirements laid down in the directive.

20. Respondent observes that when a post is upgraded the incumbent must demonstrate different skills to the ones required at the lower grade. A staff member's holding the post ad interim does not mean that they are qualified to stay in it.

21. Regarding appellant's claim that respondent abused its authority, showed a lack of good governance and failed in its duty of care, respondent notes the circumstances of the previous dispute in 2017. It claims that the supposed complaint was not made against any decision, and that consequently there was no time frame in which it had to reply.

22. The appellant's August 2017 request contained several requests for the administration. The administration agreed to the requests that complied with the CPR. In particular, the respondent denies the appellant's accusations of retaliation; it was appellant who thought she could influence the wording of the description of the post she

was about to apply for. And when the branch head intervened, it was not to reject her but to have her invited to an interview.

23. Regarding the manifest error of judgment, respondent refutes each of appellant's allegations, which it considers unsubstantiated. In particular, the Interview Panel was able to consult her 2016 performance review; the 2017 review was still ongoing on the day of the interview so they were not able to access that. The fact that the mastery of the internal communication tools was mentioned in both the required skills and the desirable skills was not detrimental to appellant, who knew the post and should have expected to be asked about those tools. In summary, respondent denies that there was a manifest error of judgment and recalls the Panel report, which stated that appellant failed to demonstrate that she had the skills required for a B5 post, and that she should take development training to gain qualification for this position.

24. Regarding the fact that appellant was not heard before the decision was taken, respondent underscores first of all that appellant had never asked to be heard and that, in any event, the administration is not obliged to hear a staff member before terminating their contract.

25. Next, respondent rejects the claim that it violated Article 9 of the CPR. It argues that the deletion of the post that appellant held previously is one of the causes for termination listed in Article 9, paragraph (iii). The administration also points out that it offered training to appellant, as noted in the contested decision itself, but appellant refused both the training and the proposal to move her to another position.

26. Lastly, respondent rejects appellant's claim that the notice period was too short. The 180-day period in Article 10.3 of the CPR is only given as a guideline, whereas appellant's contract actually mentions a 90-day notice period. Thus the five-month notice period she was given meets the requirements of her contract.

27. In any event, appellant was on sick leave from 25 October 2018 onward and the termination of her contract never became effective. Respondent also rejects appellant's claims for compensation and requests that the appeal be dismissed.

D. Considerations and conclusions

On the admissibility of the appeal

28. The admissibility of the appeal is not in question.

Regarding the merits of the appeal against the decision not to select the candidate for the "Principal assistant (IT coordination)" post

29. Article 57.3 of the CPR provides that:

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

Article 11.1 of NCIA Directive AD 02.02 provides for selection following post upgrades. The incumbent of an upgraded post should be considered first for the post, except when there are several staff members at the same NCIA location. In such cases a limited competition must be held.

30. The NCIA followed this procedure by sending a call for applications to potential candidates at the NCIA in Mons (Belgium). Appellant may not claim that she had a right to be appointed before anyone else, without even looking at her skills and professional performance. The wording “*account will be taken*” in Article 57.3 of the CPR does not create any right to automatic selection but rather means that the professional qualifications, performance record and experience of the staff member in question will be considered. And Article 11.1 of Directive AD 02.02 places an obligation on the administration to hold a competition, which it did.

31. Respondent considered that appellant’s professional experience in the post she held ad interim showed that she did not have the skills required. The fact that a staff member holds a position ad interim does not necessarily mean that they are qualified to stay in it. The NCIA General Manager did not make a manifest error of judgement by following the advice of the Interview Panel, which considered that appellant had failed to demonstrate that she had the professional skills required for the B5 post as listed in the job description, that she had had difficulties explaining the main tasks of the post she held ad interim, and that she would have to take training to be able to stay in the position.

32. There is nothing in the written record that suggests that respondent abused its authority by seeking to retaliate against appellant for a request she had made in August 2017, which the administration had actually partly granted.

Regarding the merits of the appeal against the decision to terminate appellant’s contract

33. Article 9.1 of the CPR provides that:

The Head of NATO body has the right to terminate contracts for due and valid reasons, e.g.:

- (i) if the staff member does not perform to the standard determined by the Head of NATO body, as assessed under the system established by the Head of NATO body in accordance with Article 55.1 or 55.5;
- (ii) if the staff member is incapacitated for service;
- (iii) if the post which the staff member holds is suppressed;
- (iv) if the country of which the staff member is a national ceases to be a member of the Organization or withdraws or does not renew the security clearance;
- (v) as a result of disciplinary action [...]

34. Appellant’s contract was terminated on 18 July 2018. The decision was confirmed on 12 October 2018 after she had submitted a complaint. In the decision it was stated that appellant did not have the skills required for the position she was in and that her contract was being terminated. Respondent invoked two causes for termination set out in Article 9.1: appellant did not have the skills required for the position, and it was impossible to reinstate her in her previous job, which had been deleted.

35. The Tribunal does not agree with this. It was the administration that took the initiative to upgrade appellant's B4 post to B5 and to appoint her to it provisionally whilst waiting for the results of the call for applications for this new position. At the same time, the post held by appellant until 12 March 2018 had been deleted. Appellant was thus in a precarious situation: there was no certainty that she would be able to stay in her new job because she first had to pass the competition, but she apparently had no way of getting her former job back, since it had been deleted.

36. The Tribunal is of the view that appellant could not be dismissed for not having been selected for the new position. The fact that a staff member is unable to perform duties at a higher grade is no reason to terminate their contract. As provided for in Directive AD 02.02 on recruiting, selecting and appointing NATO Civilian Staff, in particular Article 11.7, if the incumbent of an upgraded post is not fulfilling the requirements of the post, they should be given the opportunity to undertake the development training required to improve their performance. If at the end of the development period the incumbent still does not fulfil the requirements, a second development period of between three and 12 months must be offered. If at the end of the second development period the incumbent's performance is still unsatisfactory, they are to be transferred to a position of their previous grade. Only if no such post is available may the administration terminate the contract.

37. Respondent did not follow this procedure and so did not offer appellant the guarantees she was entitled to. The offer of development training was only made in the same decision as the one that terminated her contract, but should have preceded it to allow her to improve her performance before any decision was taken to terminate her contract.

38. The decision of 18 July 2018 is therefore illegal insofar as it terminated appellant's contract. There is therefore no need to examine the other arguments for annulment put forward by appellant.

On the claims for compensation

39. Appellant claims that she suffered material and non-material damage, for which she is seeking compensation.

40. The material damage consists of the emoluments to which she considered herself entitled had she been recruited to the B5 post. The dismissal of appellant's submissions regarding the decision not to select her entails dismissal of the corresponding claims for compensation. As for the material damage arising from her termination, it depends on whether the termination had become effective or not. On the day of the hearing before the Tribunal, appellant was on long-term sick leave that had not yet exceeded 21 months; therefore termination of her contract had not yet become effective. Accordingly no compensation may be awarded on those grounds.

41. The non-material damage must be assessed in the light of the effects of the termination decision, the circumstances in which the decision was taken and appellant's length of service in the Organization. In view of 1) the impact on appellant's health, 2) the wrongful termination of a staff member whose only shortcoming was that she was unable to perform the duties required for a higher position than the one she had and 3)

her 29 years' service, an order for the NCIA to pay appellant the sum of €1,000 will serve as fair compensation for the non-material damage suffered by her.

E. Costs

42. 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 [...].

43. In the circumstances of this case, the appeal being granted in part and dismissed in part, the appellant shall be reimbursed for the costs of retaining counsel, up to a limit of €2,000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The contested decision is annulled insofar as it terminates Ms F's contract.
- The NCIA shall pay Ms F €1,000 in compensation for the non-material damage suffered, and an amount corresponding to the costs she incurred for her defence, up to a limit of €2,000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels on 19 August 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 November 2019

AT-J(2019)0013

Judgment

Case No. 2019/1288

AW
Appellant

v.

NATO International Staff
Respondent

Brussels, 28 October 2019

Original: English

Keywords: summary dismissal; time-barred.

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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 Arastey Sahún and Mr John R. Crook, judges, having regard to the written submissions and having deliberated on the matter further to Tribunal Order AT(PRE-O)(2019)0008.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 5 July 2019, and registered on 10 July 2019, as Case No. 2019/1288, by Mr AW, against the NATO International Staff (IS). The appeal concerns respondent’s refusal to grant appellant’s request for mediation in the matter of his pension tax adjustment, since it was not made in a timely manner.
2. The respondent’s answer, dated 22 August 2019, was registered on 30 August 2019.
3. On 4 September 2019, the President of the Tribunal issued Order AT(PRE-O)(2019)0008 in accordance with Rule 10, paragraph 1 of the Tribunal’s Rules of Procedure. This Order suspended the procedural time limits and authorized the appellant to submit additional written views. Appellant submitted his additional views on 19 September 2019. The Tribunal deliberated on the matter at its session on 30 September 2019.

B. Factual background of the case

4. Appellant is a former NSPA staff member in receipt of a NATO pension since 2011. As a married staff member, appellant receives the household allowance. On 25 November 2016, appellant moved his domicile from the Netherlands to Luxembourg, while his wife continued to be resident in the Netherlands.
5. On 6 December 2016, appellant wrote a letter to the NATO Pension Unit (NPU) concerning the tax situation of his pension in the Netherlands. Further exchanges followed with the administration and, on 23 October 2017, appellant wrote to the NPU asking for revision of his tax adjustment, requesting that it to be considered, following Luxembourg’s tax legislation criteria, as “class 1”, since his wife was not registered in Luxembourg.
6. After some reminders by appellant and brief exchanges with the administration acknowledging delays due to the workload and the move to the new HQ, the administration replied to appellant on 3 May 2018, informing him that:

The tax adjustment mechanism is an instrument proper to the Co-ordinated Organizations, of which NATO is part. Further the legal framework which rules the activities of the NATO Pension Unit is the NATO Civilian Personnel Regulations (CPRs). The tax adjustment mechanism (Article 42) is an integral part of the NATO CPRs, and therefore binding for the NPU. Accordingly, the NPU has to, and can only, apply the NATO rules, as opposed to taking into consideration a large variety of 29 individual member nations directives.

7. On 28 May 2018 and 20 June 2018, appellant e-mailed to the administration requesting the name, title and e-mail address of the person to whom he could submit a complaint. On 2 July 2018, the NPU informed appellant that the request had been passed to the competent office, which would react upon return from leave.

8. On 27 July 2018, the Head of Staff services wrote to appellant, informing him that his 28 May 2018 e-mail was taken as a request for administrative review. The letter further stated:

I have examined all the elements regarding your situation in Luxembourg, and the request for the Organization to reconsider the level of tax adjustment paid to you. I would like to inform you that, in accordance with Article 28 of Annex IV of the Civilian Personnel Regulations (CPRs), entitlement to family allowances when pension benefits are being paid is subject to the conditions relating to the attribution of such allowances according to the modalities and conditions provided for under the CPRs. I have noted that you are married and are paid household allowance. Further, as foreseen in Article 42 of Annex IV to the CPRs, the level of the tax adjustment is determined by the family situation and the level of the NATO Pension. The instructions under the same Article 42 also state that the family allowances provided for in Article 28 shall be assimilated to pensions in determining the tax adjustment in so far as similar allowances are taxable under the national legislation. No account shall be taken of individual factors related to the personal circumstances or private means of a particular pensioner and I note that you have not informed us of any change in your civil status. Based on the above, the tax adjustment is calculated in full respect of the applicable rules within the CPRs and I regret therefore that I am not in a position to give you a favourable answer.

The Head of Staff Services further informed that appellant could submit a complaint in accordance with Chapter XIV and Annex IX of the regulations.

9. Several months later, on 14 January 2019 appellant wrote to the Director Executive Management Division requesting mediation *“to help to put NATO rules and national tax legislation in the right perspective.”*

10. On 13 March 2019 the Deputy Assistant Secretary General for Human Resources (DASG HR) replied to appellant’s request, referring to the 27 July 2018 letter by the Head of Staff Services and informing him that *“according to Article 4.1 of Annex IX of the CPRs, in order to be considered, a complaint must be submitted to the Head of the NATO body within 30 days following the outcome of the administrative review. Before submitting a complaint, Article 3.1 states that a request for mediation may be addressed to the Head of NATO body in which the administrative review was conducted.”* He further noted that appellant’s request for mediation was submitted almost six months after the notification of the outcome of the administrative review, therefore not in a timely manner.

11. On 4 April 2019 appellant replied to the DASG HR by a letter he characterized as an “official complaint”. Appellant expressed his disagreement with NATO’s position and with the 30 day binding time limit applied to his situation.

12. On 10 May 2019 the DASG HR replied to appellant’s letter. He referred to the 27 July 2018 and 13 March 2019 letters, to the time limits established by Article 4.1 of the CPR, and concluded that the Organization was not in a position to consider his complaint *“which was submitted some eight months after the notification of the outcome*

of the administrative review.”

13. On 5 July 2019 appellant submitted the present appeal.

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

(i) The appellant's contentions

14. Appellant maintains the appeal is admissible.

15. Appellant submits that his request of 28 May 2018, by which he was simply asking for the details (name, title, address and e-mail) of the person to whom to lodge his complaint, was not properly considered as a request for an administrative review. He emphasizes that, on the contrary, - upon advice of the NPU - he submitted a request for revision on 23 October 2017, to which the Organization reacted six months later, on 3 May 2018.

16. Appellant continues by stressing that on 27 July 2018, nine months after his 23 October 2017 request for revision and without any notice, the administration issued a second decision, responding to a so-called “request for administrative review” with different arguments. He explains that this 27 July 2018 decision by Head of Staff Services came too late in the process of preparing his 2017 taxes and was without real value for his situation, as the 2017 tax application was already finalized.

17. Appellant continues by contending that he needed to wait until the Luxembourg authorities decided on his 2017 tax application as, in the absence of an unfavorable outcome by the national authorities on his tax assessment, there was no sense to lodge a formal request for mediation or a complaint.

18. Appellant notes that the Luxembourg tax authorities decided about his situation in December 2018, placing him in “class 1” as his wife had not (yet) joined him in Luxembourg. According to a simulation made by appellant the difference in additional income tax to be paid between class 1 and class 2 is around 6,000 Euros.

19. Appellant contends that the NPU needs to consider Luxembourg tax law, according to which he belongs to “class 1”, regardless of his family situation – married or not married.

20. Appellant considers that putting him in “class 1” does not violate any CPR rule and does not contradict the legislators' aim in establishing the tax adjustment mechanism. He adds that making this change would permit the Nation concerned to receive the amount of tax it is entitled to. Appellant further stresses that his entitlement to the household allowance should not influence a tax calculation based on national tax law, when this national tax law doesn't make an explicit reference to this situation.

21. Concerning the appeal, appellant maintains that there is no link between the merits of the dispute and the present case before the Tribunal. Appellant notes that the appeal seeks referral of the case back to the Organization for mediation, while respondent in its defense brought other elements into play.

22. Appellant advances that the 30 day time limit could not be considered applicable in his case, as he had to wait for the decision of the Luxembourg tax authorities. He further contends that the administration itself did not respect the time limits during the administrative appeals procedure, that he was left unclear on how the procedures worked, and on when and where he could submit an appeal. He was left to himself to find out how to protect his rights.

23. Appellant requests the Tribunal to annul the DASG HR's decision of 10 May 2019 and to refer his request for mediation or his complaint back to the Organization in order to obtain a decision on the merits of the dispute.

(ii) The respondent's contentions

24. Respondent urges that the appeal is clearly inadmissible. It considers that appellant abuses the dispute resolution system, voluntarily choosing not to follow the proper procedure prescribed in the CPR prior to lodging this appeal with the Tribunal.

25. Respondent refers to the CPR's rules governing administrative review, mediation, complaints and appeals. Respondent points in particular to Article 4.1 of Annex IX to the CPR, which provides that to be considered, a complaint must be submitted to the Head of the NATO body within 30 days following the outcome of the administrative review or mediation, as well as to Article 3.1 of Annex IX, which stipulates that before submitting a complaint to the Head of the NATO Body concerned, staff members may request mediation.

26. Respondent underlines that appellant's request should have been introduced within the timeframe to submit a complaint, *i.e.* within the 30-day period following the outcome of the administrative review. Respondent notes that the 27 July 2018 letter was clear in indicating appellant the way forward if he wished to pursue the matter further. It emphasizes that appellant deliberately did not follow this advice, instead requesting mediation 6 months after the outcome of the administrative review and then lodging a complaint 8 months after this outcome.

27. Respondent considers that appellant's purpose is to reopen the decision communicated to him on 27 July 2018. *Quod non*, respondent raises that should appellant's argument be accepted and the 13 March 2019 letter be considered as the start of the appeals procedure, appellant should have requested administrative review of the decision not to accept his request for mediation, rather than submitting a complaint in violation of the rules regarding the applicable procedure.

28. Respondent does not consider appellant's request for mediation a valid ground for grievance, noting that, in accordance with Article 3.1 of Annex IX to the CPR, the Organization "*may*" agree to a request for mediation.

29. Respondent contends that the Tribunal is not competent to hear the case, as the matter at issue relates to the tax regime applicable to appellant in accordance with Luxembourg's fiscal laws, which is a matter to be raised with the national authorities concerned.

30. In subordinate order, respondent addresses the merits of the case, stressing that the tax adjustment paid to appellant is determined by his family situation and the level of his NATO pension, in accordance with the relevant CPR provisions and in particular with Articles 28 and 42 of its Annex IV. Respondent observes that this adjustment reflects the fact that appellant is married and receives the household allowance, which he chose not to renounce.

31. Respondent requests the Tribunal to summarily dismiss the appeal, or if declared admissible, to find it without merit.

D. Considerations and conclusions

32. The facts of the case are clear. On 23 October 2017, appellant wrote to the NPU asking for a revision of his tax adjustment, requesting that it be considered, following the Luxembourg tax legislation criteria, as “class 1”, since his wife was not registered in Luxembourg.

33. It took the Administration regrettably until 3 May 2018 to provide what appears to be a simple and straightforward answer.

34. On 28 May 2018 and 20 June 2018, appellant e-mailed to the administration requesting the name, title and e-mail address of the person to whom he could submit a complaint.

35. On 27 July 2018, the Head of Staff services wrote to appellant, informing him that his 28 May 2018 e-mail was taken as a request for administrative review. This was correct: under the CPR, administrative review is a step to be followed before lodging a complaint. The Head of Staff Services then provided a detailed decision on the matter. He concluded that if appellant was not in agreement with this decision, he could lodge a complaint in accordance with Chapter XIV and Annex IX of the CPR.

36. Appellant did not lodge such a complaint within the time limits under Article 4.1 of Annex IX to the CPR, which requires that a complaint must be submitted within 30 days. He reacted only on 14 January 2019.

37. The CPR make clear that limits are to be respected. While they can be suspended by mutual agreement between the parties, this obviously is not the case here. Non-respect of time limits including during the pre-litigation phase entails inadmissibility of an appeal.

38. Appellant argues that the Administration was late in answering his initial requests, in other words up to Administration’s reply of 3 May 2018. This may well be true, but no time limits are given in the CPR for answering mail sent prior to the pre-litigation process. As the Tribunal also observed in Case No. 2016/0019, good administration dictates that every request or complaint should be answered within a reasonable time frame. In the case before us, however, no adverse effect can be deduced from the delay, in particular as Appellant himself claims that he needed more time to await the outcome of the decision-making by the Luxembourg tax authorities.

39. Appellant argues that he needed to wait for the outcome of the 2017 tax assessment before reacting to the Administration's unfavourable response. But that is a matter between him and the Luxembourg tax authorities. He cannot, with this argument, unilaterally suspend time limits that apply for dispute resolution between himself and NATO.

40. Appellant not having previously or timely introduced the necessary pre-litigation procedures, the Tribunal, as it has constantly held (*cf.*, for example, Judgments in Cases Nos. 2014/1015, 2014/1018, and 2016/1075), and in accordance with Rule 10, paragraph 2, of its Rules of Procedure, cannot but conclude that the appeal is clearly inadmissible by reason of failure to comply with the requirements of Article 61.1 of the CPR. It must be summarily dismissed.

E. Costs

41. 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 [...].

42. 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 28 October 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

14 November 2019

AT-J(2019)0014

Judgment

Case No. 2019/1281

**SA
Appellant**

v.

**NATO International Staff
Respondent**

Brussels, 12 November 2019

Original: English

Keywords: supplemental medical coverage; duty of care; role of Staff Associations, meaning of "request".

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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 María-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 30 September 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 8 April 2019, and registered on 10 April 2019, as Case No. 2019/1281, by Mr SA, against the NATO International Staff (IS). The appeal concerns the termination of “Supplement C,” a supplementary medical insurance cover previously available to active and retired staff members in Turkey.
2. The respondent’s answer, dated 13 June 2019, was registered on 17 June 2019. Appellant’s reply, dated 4 July 2019, was registered on 8 July 2019, and respondent’s rejoinder, dated 6 August 2019, was registered on 16 August 2019.
3. The Panel held an oral hearing on 30 September 2019 at NATO Headquarters. It heard appellant’s statements 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. Appellant is a former civilian staff member who retired in 2011. During his long NATO career, he served in senior budget and disbursing functions in various NATO Headquarters in Turkey. While appellant currently represents NATO retired civilian personnel in Turkey in various capacities, it was confirmed in the course of the proceedings that he brings this appeal in his individual capacity.
5. Appellant contests the Deputy Secretary General’s 11 Feb 2019 decision denying his complaint concerning suppression of “Supplement C,” a complement to NATO’s basic group medical coverage that previously was available to active and retired staff in Turkey. Supplement C provided coverage of out-patient treatment in addition to coverage provided under NATO’s system-wide medical coverage. The parties described Supplement C’s coverage in somewhat different terms, but the differences are not material for purposes of the appeal.
6. Under Article 50.3 of the NATO Civilian Personnel Regulations (“CPR”), such supplementary coverage is “*payable in full by the insured members of the staff.*” However, in practice, retirees in Turkey who elected to continue Supplement C coverage also paid premiums and were covered.
7. Appellant represents that retired members of the staff in Turkey were “*the overwhelming majority of the beneficiaries of Supplement C.*” Respondent agrees, informing the Tribunal at the hearing that at the time it was terminated, Supplement C covered the households of 148 retired and 47 active staff.

8. On or around 23 May 2017, the Civilian Staff Association at Land Command Headquarters (“LC HQ”) in Turkey held a referendum in which a majority of the active staff who voted elected to request withdrawal from Supplement C. The reasons for the Staff Association’s decision have not been explained.

9. E-mails and correspondence in the record shows that that the LC HQ Staff Association’s request to terminate Supplement C was communicated to respondent by Staff Association representatives, utilizing staff association channels. LC HQ was not involved in this process.

10. Respondent had to take action to terminate Supplement C, as this required modification of NATO’s agreements with its health insurer. The evidence indicates that respondent’s Insurances Services was notified of the requested change by the Confederation of NATO Civilian Staff Committees sometime in September 2018. Insurances Services then notified NATO’s insurer of the change on 22 September 2018.

11. Appellant contends that retired staff were not notified of the Staff Association’s request to terminate Supplement C, and that he and others learned of the termination only when they received their January 2018 payslips showing no further deductions for the Supplement. In an 18 July 2018 letter, the Deputy Assistant Secretary General for Human Resources stated that *“there have been number of contacts in 2017 between Staff and retiree representatives in Izmir.”* Appellant, who was active in retired staff affairs at the time, denies that this occurred. When asked at the hearing, respondent could provide no further information regarding the alleged contacts.

12. On 6 February 2018, appellant and 34 similarly situated retirees requested administrative review of the decision to terminate their Supplement C coverage. On 3 April 2018, the Deputy Assistant Secretary General for Human Resources replied that respondent could not change the decision to terminate Supplement C and could not “accept” the request, citing Article 2.4 of CPR Annex IX. This provision requires that retirees’ complaints that *“concern a work or career-related matter that arose during their employment”* shall be referred to the NATO body where the retiree was last employed. Respondent’s 3 April letter therefore stated that the appeal *“should have been addressed to Land Command HQ in Izmir.”*

13. By letter dated 5 June 2018, LC HQ’s Chief of Staff informed respondent that in LC HQ’s view, the cancellation of Supplement C *“is not a work or career-related matter”*, so that responsibility for administrative review of appellant’s appeal lay with respondent.

14. By letter dated 18 July 2018, the Deputy Assistant Secretary General for Human Resources reiterated respondent’s view that the claim should have been handled by LC HQ. This letter affirmed respondent’s view that *“[d]ecisions to engage in, modify or terminate such insurances fall under the competence of the Staff Associations concerned.”* It continues that *“after seeking the views”* of members of the Staff Association in Izmir, *“I am not in a position to re-establish Supplement C as the IS does not have the authority to take such a decision.”* The letter concludes that should appellant disagree, he could submit a complaint under Chapter XIV and Annex IX of the CPRs.

15. By letter dated 27 August 2018, appellant requested consent to refer his appeal directly to the Administrative Tribunal. This request was denied on 3 October 2018. On 2 October 2018, appellant filed a formal complaint with the Secretary General. On 11 February 2019, the Deputy Secretary General rejected the complaint, reiterating respondent's position that decisions to terminate supplementary insurances "*fall under the competence of the local staff associations*" and that the International Staff does not have authority to re-establish Supplement C. This is the decision now being appealed.

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

(i) The appellant's main contentions

16. Appellant urges that the appeal is admissible, contending that he followed the procedure for an appeal by a retired staff member specified in Article 2.4 of Annex IX of the CPR. He thus directed his request for administrative review "*to the official responsible for human resources management at NATO Headquarters.*" Appellant disputes respondent's contention that the appeal concerns a "*work or career-related matter*" arising during his employment that had to be directed to the NATO body in which he was last employed. In appellant's view, termination of his supplemental coverage several years into his retirement did not concern a work or career-related manner, or arise during his employment. Instead, the plain meaning of Article 2.4 shows that his appeal was properly directed to respondent.

17. Appellant adds that it was respondent that both ultimately acted on his appeal and implemented termination of Supplement C coverage.

18. As to the merits, appellant disputes respondent's interpretation of Article 47.1(e) of the CPR, to the effect that it was required to implement the request of the local staff association in Turkey, that only the staff association can request restoration of Supplement C, and that respondent lacked authority to do so.

19. In appellant's view, respondent's interpretation of Article 47(1)(e) reflects an error of law. Appellant submits that respondent had more than a "*custodian*" role, and had an obligation to consider the position of the affected retirees in deciding whether to accept the request to terminate Supplement C. In appellant's view, it is unfair to deny retired staff a voice in this matter, as many paid premiums for Supplement C coverage after retirement, wanted it to continue, and should have had some opportunity to be consulted prior to its termination.

20. Appellant urges in this regard that Article 47.1(e) provides that local staff association may "*request*" supplement coverage, but the decision whether or not to act on that request lies with the respondent. Appellant contends that the plain meaning of Article 47.1(e) establishes that a local staff association can only make a "*request.*" The decision whether to honor that request is a decision to be made by respondent. Here, respondent uncritically accepted the request and acted to terminate coverage without considering the impact of this decision on appellant and other retired staff.

21. Appellant also rejects respondent's argument of "*congruent forms*," that is, that Article 47.1(e) also empowers a staff association to request termination of coverage. In appellant's view, Article 47.1(e) deals with requests to initiate additional coverage, not with requests to terminate it. The request to terminate involved different factors, notably its impact on retired staff, that had to be taken into account

22. Appellant adds that the staff association that respondent regarded as the relevant actor is associated with LF HQ, a NATO body different from the no-longer existent body for which appellant worked. LF HQ is therefore not the body "*concerned*" for purposes of Article 2.4 of CPR Annex IX.

Failure to State Reasons

23. Appellant contends that respondent has failed to provide reasons to explain the decision to terminate Supplement C. Appellant observes in this regard that, while respondent has not explained the reasons for the decision, it does not deny the duty to provide explanation of the reasons for the decision. Instead, respondent claims the responsibility was on LF HQ in Izmir.

Lack of prior Information

24. Appellant further maintains that he had no prior notice of the termination of Supplement C, and was confronted with a *fait accompli*. The Pensions Unit sent a letter on 8 February 2018 saying that Supplement C premiums would no longer be deducted, but this was after the action was already taken. Appellant adds that the lengthy procedure required to get respondent to address his request for Administrative Review shows a failure to meet the duty of care.

Retroactive Application of Administrative Decision

25. Appellant contends that his status was set at retirement and cannot be changed on a matter that he views as "*fundamental*."

Infringement of Acquired Rights

26. In appellant's view, in agreeing to continue Supplement C at the time of retirement and paying the necessary premiums, he entered into a contract for continued coverage that respondent cannot unilaterally change. The benefit involved is fundamental, and its improper elimination upset the balance of his contract. Further, the change was made without proper consultation or any actuarial studies to establish its justification. Appellant recalled in this regard Appeals Board jurisprudence highlighting the need for an appropriate analytical basis to justify changes in medical coverage. There was no such analysis here.

27. Appellant seeks annulment of the contested decision, reimbursement of additional medical expenses incurred as the consequence of the suppression of Supplement C, and legal expenses of €7,000. The appeal stated that these additional expenses would be quantified before the hearing. This was not done, but appellant

stated at the hearing that his additional medical expenses were in the range of € 200-€300, a modest amount that respondent did not question.

(ii) The respondent's main contentions

28. Respondent maintains that the appeal is inadmissible, first urging that appellant lacks standing to appeal insofar as he might claim as a CNRCSA Regional Delegate. However, appellant confirmed in his Reply and at the hearing that he appealed solely in his individual capacity.

29. Citing Article 2.4 of Annex IX of the CPR addressing appeals by retired staff members, respondent contends that the appeal involves “a work or career-related matter that arose during” appellant’s employment, and so should have been referred to the official responsible for human resources management “in the NATO body in which the retired NATO staff member was last employed.” Thus, in respondent’s view, the appeal should be “taken care of” by LC HQ, the remaining NATO Headquarters in Turkey and therefore the NATO body to which appellant should have directed his complaint.

30. Respondent observes in this regard that the NATO body that last employed appellant no longer exists, and that the LF HQ Staff Association that requested termination represents all active NATO staff in Turkey. Hence, LF HQ had the duty to notify retired staff and give reasons, because the decision was made there. Respondent had no responsibilities in this regard.

31. Respondent further maintains that, insofar as appellant claims as a retiree, decisions to engage in or modify supplementary coverages fall under the competence of the LF HQ Staff Association, so that he should have directed his concerns to them.

32. In respondent’s view, in terminating Supplement C coverage, it acted pursuant to the request of the LF HQ Staff Association and does not have the authority to re-establish Supplement C. The proper authority to “rescind or modify the contested decision” is the LC HQ Staff Association, and it alone has the power to “engage, modify or terminate supplementary coverage.” The appeal is therefore inadmissible, as it is directed to the wrong body. Respondent insists in this regard that the fact that it considered the appeal does not mean that it considers itself competent to reinstate Supplement C.

33. With respect to the merits of the appeal, respondent stresses what it sees as its limited role and authority with respect to termination of Supplement C. In respondent’s view, the decision to terminate the additional coverage lay with the Staff Association in Izmir; respondent took no decision and simply implemented the association’s request to terminate. In this regard, respondent invokes a doctrine of “congruent forms,” arguing that, as CPR Article 47.1(e) gives the LC HQ Staff Association the power to request supplemental coverage, it must as well have the power to request its termination.

34. Respondent further contends that there had in fact been “a number of contacts between staff and retirees” in Izmir, and that it had notified retirees of the change after the fact “only because pensions ... [are] administered by the IS”, “not out of a sense of

obligation.” Insofar as there might be any obligation to give notice or reasons, that duty lay with LF HQ, not with respondent.

35. Respondent adds that, in any case, there was no deprivation of contractual, acquired or vested rights. Citing relevant legal authorities, respondent contends that an international organization can make changes to insurance and other staff and retiree benefits, and that those at issue here did not impermissibly upset the balance of the contract.

36. Respondent insists that it is not evading its obligations, but that its limited “*custodian’s role*” requires that it not infringe on the authority of staff associations under CPR Article 47.1(e). Respondent observes in this regard that the issue of harmonizing supplemental medical coverages and of associating retired staff associations with this process has been under discussion in the Joint Consultative Board.

37. Respondent requests the Tribunal to summarily dismiss the appeal, or if the appeal is found admissible, to find it without merit.

D. Considerations and conclusions

(i) Considerations on admissibility

38. The Tribunal does not accept respondent’s contention that the appeal is inadmissible because it was directed to the wrong NATO body. The appeal centers on appellant’s treatment during his retirement. A benefit that he valued, and for which he continued to pay premiums after retiring, was terminated years after his active service ended. This cannot reasonably be seen to involve “*a work or career-related matter that arose during*” appellant’s employment, such that Article 2.4 of CPR Annex IX would require him to appeal to LF HQ. Appellant correctly directed the appeal to the respondent, which was obliged to address it on its merits.

39. The appeal is admissible.

(ii) Considerations on merits

40. This appeal involves appellant’s loss of a supplemental medical insurance cover that he, and at least some other NATO retired staff in Turkey, valued and paid for. This followed a vote by a much smaller number of active staff in Izmir, a vote of which the retirees apparently had no notice, and in which they could not participate. Appellant and others have yet to receive any explanation of the reasons for the change.

41. Respondent’s arguments build from interpretations of Article 47.1(e) of the CPR that the Tribunal does not find convincing. Article 47.1(e) says that staff associations can “request” supplemental medical coverage. In its submissions, respondent appears to treat this as creating an obligation for it to do what the staff association asks. This is not what Article 47.1(e) says. A staff association “*requests*.” A request is not obligatory. It lies within respondent’s discretion to assess such a request and either to accept or reject it.

42. In its written materials, respondent's legal analysis takes a further, and in the Tribunal's view, also unwarranted step: that if a staff association can "*request*" additional insurance cover, it can also "*request*" it be terminated, and respondent is again bound to do as the association asks. The implication of this interpretation is that Article 47.1(e) required respondent to mechanically implement a request by a comparatively small number of active service staff, notwithstanding its adverse impact on a substantially larger group of retirees, without the retirees being informed, given an opportunity to comment or participate, or given reasons for the adverse action.

43. At the hearing respondent's interpretation of its role under Article 47.1(e) softened slightly. Counsel acknowledged that the responsible IS officials would review a request to terminate supplemental coverage to assure that termination would not adversely affect NATO's broader insurance program. If it would, respondent could exercise discretion not to implement it.

44. The Tribunal believes that, even accepting for the limited purpose of analysis respondent's "*congruent forms*" argument, the Staff Association's request to terminate was still a request. It required respondent to make a decision. The Tribunal believes that in making that decision, respondent was obliged to take into account a broader range of factors than were considered here, where the evidence indicates that respondent's request to its insurer was treated as a purely ministerial or administrative act.

45. While the ultimate decision on the Staff Association's request lay within the respondent's discretion, it had a duty of care to consider the impact of that decision on the substantial population of retired staff members covered by Supplement C. Respondent knew or could have easily ascertained the number affected; indeed, at the hearing, when the Tribunal requested this information, it was quickly obtained. However, there is no indication in the record, or any representation by respondent, that the interests of these retired staff members were considered in any way. There is no evidence indicating that respondent took reasonable measures – indeed, any measures – to seek their views, or that there was any consideration of possible means to limit the adverse impact of the change on retired staff.

46. Further, under accepted principles of international administrative law, principles that respondent did not contest, respondent was obliged to provide sufficient explanation to those affected of the reasons for terminating their Supplement C coverage. This did not occur at the time of termination, or at any time since.

47. The contested decision rejecting appellant's complaint to the Secretary General is therefore annulled.

E. Costs

48. 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 [...].

49. The appeal being allowed, appellant is entitled to be reimbursed by respondent for the €200 of additional medical expenses he incurred due to termination of Supplement C; reasonable travel and subsistence expenses incurred in connection with his participation in the hearing; and the costs of retaining counsel up to a limit of €4,000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is admissible;
- The contested decision is annulled; and
- Respondent shall compensate appellant for €200 of additional medical expenses he incurred due to termination of Supplement C; for his reasonable travel and subsistence expenses incurred in connection with participation in the hearing; and for the costs of retaining counsel up to a limit of €4,000.

Done in Brussels, on 12 November 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 December 2019

AT-J(2019)0015

Judgment

Case No. 2018/1275

JM

Appellant

v.

**NATO Communication and Information
Respondent**

Brussels, 29 November 2019

Original: English

Keywords: termination; Disciplinary Board; evidence; witnesses.

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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 María-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 30 September 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 4 December 2018, and registered on 17 December 2018, as Case No. 2018/1275, by Mr JM, against the NATO Communications and Information Agency (NCIA or Agency). The appeal contests appellant’s termination of employment for disciplinary reasons.
2. The respondent’s answer, dated 15 February 2019, was registered on 3 March 2019. Appellant’s reply, dated 29 March 2019, was registered on 2 April 2019, and respondent’s rejoinder, dated 2 May 2019, was registered on 7 May 2019.
3. The Panel held an oral hearing on 30 September 2019 at NATO Headquarters. It heard appellant’s statements and arguments by appellant’s representative and by representatives of the respondent, in the presence of Mrs Laura Maglia, Registrar. In line with Article 26 of the Tribunal’s Rules of Procedure, the hearing was held *in camera*.

B. Legal and factual background of the case

4. Termination is a disciplinary sanction authorized by Article 59.3(e) of the NATO Civilian Personnel Regulations (CPR).
5. Article 5 of Annex X to the CPR (Annex X) sets out the procedures to be followed in disciplinary proceedings. Article 5.2 of Annex X requires preparation of a report setting out the facts of alleged misconduct and proposing a penalty. Pursuant to Article 5.3 of Annex X, the staff member is given this report and has 15 working days in which to comment on it. Under Article 5.5 of Annex X, the official responsible for personnel management may convene a Disciplinary Board where termination is recommended. The composition and procedures of Disciplinary Boards are described in Article 6 of Annex X. A Disciplinary Board was constituted in connection with the conduct at issue in this appeal.
6. Appellant was a NATO civilian with a definite duration contract as Service Management Integrated Team Chief. He previously supervised a 27-person team composed of NATO civilians, military personnel, and contractors. In a previous appeal (Judgment in Case No. 2018/1270) he unsuccessfully contested his suspension on account of issues related to his conduct. In his current appeal, appellant contests respondent’s General Manager’s decision of 26 October 2018 terminating his employment. As the termination decision was taken by the Head of NATO Body (HONB), appellant brings this appeal directly to the Administrative Tribunal pursuant to Article 1.6 of Annex IX to the CPR. Respondent does not contest admissibility.

7. Relevant allegations related to appellant's conduct are described in the Tribunal's earlier Judgment in Case No. 2018/1270. In brief, appellant was the subject of several allegations of harassment and other improper and abusive conduct. A staff member's complaint against him in June 2017 led to an investigation that began in August 2017. The investigator's March 2018 report upheld seven of nine charges made in the staff member's complaint, referred to additional incidents of misconduct by appellant, and recommended consideration of disciplinary action.

8. On 24 April 2018, respondent initiated disciplinary proceedings against appellant. The memorandum notifying him of these proceedings referred to the June 2017 staff member's complaint and the subsequent investigation; appellant was previously notified of both. The memorandum also cited respondent's zero tolerance policy on harassment.

9. On 26 April 2018 respondent received a further written complaint from an Agency contractor, a young woman supervised by appellant. Her complaint detailed allegations of bullying, intimidation, and sexual harassment by appellant. It referred to a "*private intimate relationship*" with appellant, described subsequent abusive and manipulative conduct, and alleged that he caused her contract to be terminated prematurely. The author of the 26 April complaint subsequently agreed to disclosure of her complaint to appellant, and it was provided to him on 16 July 2018. The scope of the disciplinary proceedings was expanded to include her complaint.

10. On 3 May 2018, the General Manager suspended appellant from his functions with pay, also suspending his network and physical access privileges and locking his accounts.

11. On 4 May 2018, respondent received a written complaint with supporting documents from a second female contractor, a person with long experience working with the Agency. She contended that her contract supporting appellant's unit was terminated on account of allegedly false and defamatory statements by appellant, and cited firings, premature departures from the unit, and retaliatory conduct by appellant. Appellant was subsequently notified that the scope of the disciplinary proceedings was expanded to include this complaint.

12. On 13 June 2018, a Disciplinary Board was established. Over the following weeks, the Board conducted a thorough investigation. It interviewed appellant twice, as well as over forty witnesses, including twenty-two who worked in appellant's service line. It also reviewed extensive documentation. The Board prepared a substantial report that, with its accompanying documentary annexes in the record in the appeal, totalled 220 pages. The report was transmitted to the General Manager on 14 September 2018.

13. The report summarized appellant's statements regarding claimed inadequacies of his staff and other challenges he faced, as well as his claimed successes and accomplishments. However, it also found that the evidence substantiated charges by three named staff members involving, variously, harassment, abuse of authority, defamation, bullying, intimidation, and sexual harassment. The Board also found that "*during the interviews, it became apparent that [the appellant] exercised improper*

behaviour to additional staff members” as specified in annexes to the report.

14. The report was provided to appellant, who submitted comments disputing the Board’s procedures and conclusion. Appellant requested that the report be considered “invalid” as “*my requests have not been considered and my fundamental rights not respected.*”

15. The Board recommended that appellant be dismissed from the Agency in accordance with CPR Article 59.3(e). By letter of 26 October 2018, the General Manager notified appellant of his decision to dismiss appellant as recommended by the Disciplinary Board. The General Manager’s letter reviewed the procedural steps leading to the Board’s findings confirming various complaints of misconduct. The letter further stated, *inter alia*:

The Disciplinary Board found sufficient proof and concluded that you created a hostile and offensive work environment in the SMC Service Line.

I understand you deny the allegations, however the Disciplinary Board has interviewed a large number of witnesses who confirm the hostile and offensive work environment that you created as well as the individual complaints against you.

Your actions have breached a fundamental rule that NATO International Civilians should comply with ... [citing and quoting CPR Art. 12.1.4, which, *inter alia*, requires that staff members “shall not harass, bully or otherwise abuse another staff members.”]

16. Appellant was separated on 1 December 2018. He was on sick leave receiving full pay and benefits prior to that date.

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

(i) The appellant's main contentions

17. The appeal renews several contentions relating to appellant’s May 2018 suspension that were considered and rejected by the Administrative Tribunal in its Judgment in Case No. 2018/1270. Appellant thus insists that suspension is a disciplinary measure requiring a full investigation and report before any action can be taken. As his suspension was merely based on “*unsubstantiated allegations*”, both his suspension and subsequent termination were invalid. Appellant adds that he should have been given the staff member’s sexual harassment complaint prior to his suspension, but only got it later, so that he should not have been suspended for that reason as well.

18. Appellant advances several specific legal challenges to his termination, although these are sometimes presented briefly or in conclusory terms. Citing Appeals Board jurisprudence, he contends that he should have been given all of the documents justifying respondent’s action, and that failure to provide him with all documents considered by the Disciplinary Board is “*a gross violation of the principle of equality of arms,*” which he views as “*a procedural requirements for any fair trial.*” Appellant adds

that, because he did not receive the entire file, he was unable to understand the HONB's reasons for terminating him.

19. Appellant next contends that the Disciplinary Board's report is tainted because it was partially based on comments by anonymous witnesses who cannot be interviewed "*to hold them accountable for their statements.*" Appellant maintains in this regard that he was not given the witness statements considered by the Board.

20. Third, appellant attacks the composition of the Disciplinary Board, maintaining, *inter alia*, that the Board's chair, respondent's Financial Controller "*...is a direct report to the HONB and, therefore not independent.*"

21. Appellant also advances an array of arguments intended to show that the Disciplinary Board's process was deficient and denied him the "*guarantees for a fair trial.*" Appellant alleges, *inter alia*, that he could not access necessary documents because he was denied access to his e-mails and files; that he could not call witnesses; and that he only got two days' notice of his interviews with the Board, giving him too little time to prepare or to be accompanied. Appellant urges further that his comments were ignored by the Board, emphasizing his allegation that the proceedings involved a "*mobbing*" against him by three improperly motivated subordinates whose actions have never been investigated. Moreover, in appellant's view, the Board should not have considered the testimony of other named individuals who did not file formal complaints against him. Further, the Board selectively quoted a critical comment in a performance appraisal, but did not quote other positive comments. Appellant also maintains that the Board received no evidence, and that the complaints against him by specific individuals are "*not evidenced.*"

22. Accordingly, appellant contends that the Board "*abused of power*" and its report "*is completely based on assumptions and prejudices.*"

23. Appellant contends that disciplinary proceedings have not been initiated against other line managers who have been the subject of complaints, and that therefore "*the principle of equality has not been applied.*"

24. Appellant adds that he was highly qualified but was given few resources, weak personnel, lacked support from his managers or respondent's human resources staff, and faced "*unbelievably high*" resistance. Despite these obstacles, he accomplished "*great results,*" but at a great personal cost to his health. He suggests, without clarification or supporting evidence, that he was actually suspended to prevent him from expressing his opposition to organizational changes supported by the General Manager.

25. By way of relief, appellant requests the Tribunal, *inter alia*, to:

- annul his termination;
- order physical destruction of any and all documents related to these disciplinary proceedings, including in appellant's personal file;
- order respondent's HONB to provide a certificate of appreciation for loyal service;
- order compensation for multiple forms of material damage, including:
 - an indemnity equal to the individual's and employer's contribution to the Defined Contribution Pension Scheme from the date of termination to the date of the Tribunal's judgment;
 - the complete cost of legal assistance;
 - compensation for the full notice period for contract termination under Article 10.3 CPR;
 - compensation for all days of untaken leave, including home leave;
 - compensation for the full amount of salary appellant would have received between 26 October 2018 and the end of his contract at the end of August 2020;
- order compensation of non-material damage for:
 - physical and emotional damage equal to 24 months salaries, including allowances, health insurance and Defined Contribution Pension Scheme contributions;
 - one full month of salary as per NCPR corresponding to end of contract and re-instatement;
 - 24 months' salaries, including allowances, health insurance and Defined Contribution Pension Scheme contributions, for the damage to appellant's reputation;
- order additional material damage in the amount of income tax on the compensation awarded;
- order interest at 4% from 26 October 2018;
- order performance reports to be prepared for 2017 and 2018 where clearly [appellant] has exceeded expectations and his line manager, anticipated a VERY GOOD;
- order the administration to provide all the requested documents and (witness) statements;
- impose the necessary disciplinary actions against the members of the NCIA Disciplinary Board for abuse of power and for not having acted free of prejudice; and
- order respondent to communicate the above to appellant's national authorities, requesting them to disregard the report of the Disciplinary Board.

26. Appellant's request to be reinstated was withdrawn during the proceedings.

(ii) The respondent's main contentions

27. Respondent urges that appellant's arguments regarding the supposed invalidity of his suspension, including the claim that his suspension was a disciplinary measure that could not be taken without a detailed prior investigation, were considered and rejected in the Tribunal's judgment in appellant's prior appeal challenging his suspension.

28. Respondent's response to the appeal devotes substantial attention to the facts, frequently referring to the Disciplinary Board's findings. Respondent contends that, as set out in the General Manager's dismissal letter, appellant was terminated for creating a hostile and offensive work environment and pursuant to valid individual complaints of abusive conduct. In respondent's view, the Disciplinary Board made a full investigation. It properly applied the definitions of harassment, sexual harassment, bullying, intimidation and abuse of authority under the Agency Code of Conduct. Accordingly, in respondent's view, appellant's termination was lawful and in accordance with the CPR.

29. Respondent's written materials address in some detail the complaints of misbehaviour lodged against appellant, pointing out that as of August 2018, there were 14 separate staff complaints in appellant's service line, from a total staff of 27, and that a large number of witnesses interviewed by the Board stated that they had witnessed or experienced inappropriate behaviour.

30. With respect to appellant's specific claims of defects in the procedure leading to his discharge, respondent maintains, *inter alia*:

- the proceedings were not based on "*unsubstantiated allegations*" but proceeded from the Agency's prior investigation of the first complaint against appellant. The Disciplinary Board then conducted a thorough additional investigation and made its recommendation, all as required by the relevant directive.
- the Board was properly constituted of unbiased persons; the chair, the Financial Controller, was in a subject area and location removed from appellant's activities in order to assure her objectivity. Appellant's Director was not named to the Board because his name was mentioned in some of the complaints.
- the witnesses were not anonymous: the Board had clear authority under the relevant directive to hear witnesses, and its report names all 48 that were heard.
- concerning access to documents, respondent observes that the General Manager's termination letter of 26 October 2018 said documents on the appellant's laptop could be made available to him, but he never asked. The same was true for access to his personnel file: he never asked.
- as to appellant's claims to have been a victim of harassment, the Disciplinary Board found "*not one shred of evidence*" that he was harassed, but rather that he created a hostile work environment. Respondent also disputes appellant's description of his functions and his claims of an inadequate and incompetent staff.

31. Respondent disputes appellant's compensation claim, initially noting that he seeks to be reinstated to a position where he was allegedly harassed, that he appears to make duplicative salary claims, and that he seeks multiple forms of relief not available under the CPR.

32. Respondent accordingly asks that the Tribunal declare the appeal unfounded.

D. Considerations and conclusions

33. As mentioned in paragraph 17 *supra*, the appeal renews several contentions relating to appellant's May 2018 suspension that were considered and rejected by the Administrative Tribunal in its Judgment in Case No. 2018/1270.

34. As Article 6.8.4 of Annex IX to the CPR confirms, "*judgments of the Tribunal shall be final and not subject to any kind of appeal by either party.*" It is not possible or appropriate for appellant to seek to relitigate here claims that the Tribunal considered and rejected in his prior appeal.

35. While appellant lodges numerous accusations and complaints regarding his treatment by respondent, the Tribunal observes that many of them conflict with the evidence or are otherwise unfounded. Appellant contends that the Disciplinary Board heard anonymous witnesses, but the witnesses interviewed by the Board are clearly named in its report, and the reports of their interviews are annexed to its report, which was provided to appellant and on which he commented. Appellant insists that the Board ignored his statements, but the text of the report makes clear that they were considered. Appellant claims that he could not call witnesses, but the evidence shows that the persons he asked to have interviewed by the Board were interviewed.

36. Appellant claims he was denied access to relevant documents, but respondent insists that they were preserved and were available to him had he asked, as indicated in the General Manager's letter notifying him of his dismissal. Appellant claimed in general terms at the hearing that he asked for access to his documents. Counsel for respondent – herself the custodian of the documents – expressly denied this. Appellant contends that the reasons for his termination were not explained, but the General Manager's dismissal letter is clear; perusal of the Board's more than 200 page report – which was provided to him as required by the CPR – clearly shows the underlying reasons. Appellant insists that there was no evidence in the Board's extensive report supporting its conclusions. However, when asked about this claim by the Tribunal at the hearing, appellant explained that the reports of witness interviews and other documents were not sworn or authenticated in by some authority in some official way, and that they therefore were not evidence. The CPR do not require that a Disciplinary Board limit itself to evidence that is somehow officially authenticated or otherwise meets the technical evidence rules of some national legal systems.

37. The Disciplinary Board was properly constituted. The fact that the disinterested Financial Controller from Brussels, and not an official from Mons, was named to preside on a Board reviewing the conduct of a senior staff member is not reason for condemnation. And, while it is true, as appellant contends, that she is a subordinate of the HONB, so is every other staff member of respondent.

38. The Tribunal sees in the record no material shortcomings in the process leading to appellant's termination. A properly constituted Disciplinary Board carried out a thorough and well-documented investigation of multiple allegations of his serious

misconduct. The Board produced a substantial and detailed report that was part of the record in this appeal. Appellant had adequate notice and was interviewed twice. The Board interviewed the witnesses appellant asked to have interviewed. The Board's conclusions are clearly supported by the extensive evidence included in the annexes to its report.

39. At the end of its inquiries, the Disciplinary Board believed the testimony of multiple witnesses regarding appellant's misconduct. It did not accept his competing claims that he was being "*mobbed*" by disgruntled and incompetent staff members or was otherwise blameless. Appellant received the Board's report and its extensive supporting documents and submitted critical comments disputing the report. At the end of the process, the HONB followed the Board's well-documented and reasonable recommendation.

40. For these reasons, the appeal must be rejected in its entirety.

E. Costs

41. 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 [...].

42. The appeal having been rejected, no order of costs is due.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 29 November 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
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5 December 2019

AT-J(2019)0016

Judgment

Case No. 2019/1282

EM
Appellant

v.

Headquarters Allied Joint Force Command Brunssum
Respondent

Brussels, 29 November 2019

Original: English

Keywords: execution of judgments; possibility afforded by Article 6.9.2, Annex IX CPR.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Mrs María-Lourdes Arastey Sahún and Mr John R. Crook, judges, having regard to the written procedure and further to the hearing on 30 September 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 24 April 2019, and registered on 29 April 2019, as Case No. 2019/1282, by Mr EM, against the Headquarters Allied Joint Force Command Brunssum (JFCBS). The appeal concerns the implementation of the Tribunal’s judgment in Case No. 2018/1267 M v. JFCBS.

2. The respondent’s answer, dated 29 May 2019, was registered on 5 June 2019. Appellant’s reply, dated 3 July 2019, was registered on 5 July 2019. The respondent’s rejoinder, dated 1 August 2019, was registered on 16 August 2019.

3. The Panel held an oral hearing on 30 September 2019 at NATO Headquarters. It heard appellant’s statements and arguments by appellant’s representative and respondent’s representatives, 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. On 15 November 2018, the Tribunal rendered its judgment in Case No. 2018/1267 M v. JFCBS. The case concerned the recruitment of appellant to the post of Branch Head Budget & Disbursing at JFCBS to which he had applied but ultimately not been appointed.

6. The final provision of the judgment reads as follows:

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.

7. On 20 November 2018, appellant’s counsel sent a letter to the JFCBS Commander requesting that the necessary steps be taken to implement the judgment. In particular, appellant requested that he be offered the post of Branch Head Budget & Disbursing at JFCBS, and that he be paid the compensation and costs granted in that judgment.

8. There is no evidence in the file of the reaction from the respondent, if any.

9. On 8 January 2019, appellant's counsel sent a further letter to the JFCBS Commander stating, *inter alia*:

[...] we would like to remind you that it has been judged by the NATO administrative tribunal that the Command has to implement decisions within a reasonable time. This reasonable time is considered to be respected whenever the implementation takes place within a six weeks period. Since the judgment of Mr M's case was rendered on 15 November 2018, this reasonable time has now elapsed and we once again request its implementation. As such, Mr M should be offered the post of Branch Head Budget and Disbursing at JFC BS with no further delay. Additionally, the 14.000 Euros for moral compensation and reimbursement of expenses have to be paid to Mr M's bank account [...]. The judgment is binding and there is no justification whatsoever for not paying the moral damages and legal fees. There is absolutely no room for manoeuvre in the payment of this amount. Regarding the post of Branch Head Budget and Disbursing, we remind you the content of article 6.9.2 of Annex IX to the NCPR: "Nevertheless, where the Head of NATO body concerned, or as regards those bodies to which the Paris Protocol applies, the Supreme Commander concerned, affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal shall instead determine the amount of compensation to be paid to the appellant for the injury sustained". Therefore should it be impossible to offer the post to Mr M, it should be notified in writing to the Tribunal, in order for it to grant him compensation. We draw your attention to the fact that, alternatively, there also are vacant posts in JFC Brunssum or within ACO, which could be considered. Given the duty incumbent on the Command to implement the judgments within a reasonable time, we therefore request you to comply with the 15 November 2018 decision without further delay, and in any case, before 20 January 2019.

10. Following the above-mentioned letter, the compensation for non-material damage was paid by respondent.

11. On 18 January 2019, the JFCBS Commander replied to appellant by letter stating, *inter alia*:

[...] The Tribunal noted that the JFCBS Selection Board considered you as a suitable candidate following the prescribed test and interview, which subsequently became the opposite on the basis of aspect that had already been acknowledged by the recruiter. This perspective has been an essential part of the judgment of the Tribunal to consider the decision of discontinuation being flawed. I requested clarification from the Selection Board, including the recruiter whether it knew of the extended absence from your post at NSPA [...] and to which degree, this information was considered relevant to the selection process. [...] I note that the Tribunal erred on the fact that the Board, or the recruiter, were aware of your extended absence before the first report of the Selection Board [...]. I requested that the Selection Board explicitly clarified whether the extended absence from your position at NSPA was relevant for their decision to recommend to the COS to discontinue the selection process. [...] The cause of your long term absence was not relevant to this determination. This aspect set the recommendation of the Board in a different perspective. The Board could not uphold its original recommendation that you be selected as a suitable candidate. Therefore, JFC BV reaffirms that offering you this post is not appropriate. The selection process concluded and the vacancy was filled.

The Commander further confirmed in the letter that the costs of retaining counsel were going to be executed upon documented justification.

12. On 24 January 2019, appellant wrote back to the Commander to pursue his request for implementation of the 15 November 2018 judgment and to request information about the status of two positions within the Allied Command Organization (ACO) to which he had applied, the first at Allied Air Command HQ in Ramstein and the second at JFC Brunssum. Appellant also provided the corresponding invoices for reimbursement of the legal costs.

13. By letter dated 8 February 2019, appellant was informed by the Deputy Commander JFCBS of the decision by the Chief of Staff (COS) that his application dated 23 July 2017 to the post Branch Head Budget & Disbursing at JFCBS had not been successful. The letter stated, *inter alia*:

On 7 December 2018 an amended Civilian Personnel Selection Board convened in Brunssum to assess your application [...]. The Board considered the information available in November 2017 when it nominated you for the position together with the information available now. It unilaterally agreed that you prevented the Board from making a fully informed recommendation to the COS JFC Brunssum by not informing the Board of a prolonged period of absence from your position as Head of Finance in CEPS Versailles. The Board considers that, regardless of the reasons for this absence, which are not of importance, you should have mentioned it. The fact that you deliberately withheld potentially relevant issues, such as a lengthy absence from work, cause that Board to question your decision making, integrity and transparency. Your omission of disclosing pertinent information, and the manner in which the Board finally discovered it, shaped the Board's final recommendation to prefer the candidacy of another applicant.

14. By another letter of 8 February 2019, appellant was informed that his application to the position of Financial Controller/Assistant Chief of Staff had been unsuccessful.

15. On 11 February 2019, the Civilian Human Resources Offices, HQ AIRCOM, Ramstein informed appellant that he had not been selected for the applied position (180734) within HQ AIRCOM.

16. On 15 February 2019, appellant submitted a complaint against the 18 January 2019 decision by the JFCBS Commander, to be considered also as a request for administrative review against the 8 February decision by the COS.

17. On 1 March 2019, the Commander rejected appellant's complaint and request for administrative review and invited appellant to submit the matter directly to the Tribunal in accordance with Article 6.3.1 of Annex IX to the CPR.

18. On 24 April 2019, appellant submitted the present appeal.

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

(i) The appellant's contentions

19. Appellant contends that respondent is in breach of Article 6.8.4 of Annex IX to the CPR, which unequivocally states that "*The judgments of the Tribunal shall be final and not subject to any type of appeal by either party*" and Rule 27.7 of the Tribunal's Rules of procedure stating: "*Subject to Article 6.8.4 of Annex IX, judgments are final and*

binding".

20. Appellant believes that in its decisions of 18 January and 1 March 2019, respondent is trying to challenge the judgment of the Tribunal presenting the correct factual circumstances and motivation for the decision not to select appellant to the post he applied for. Appellant contends that going back to the Selection Board once again to ask for more clarifications on the reasons which led to the rejection of appellant for the position is a manifest breach of the principle of *res judicata*.

21. Appellant argues that JFCBS must implement the provisions of the judgment and offer him the position of Branch Head Budget & Disbursing. Should this not be possible, he believes that alternatives should be considered, or failing this, that the avenue to request that the Tribunal order the application of Article 6.9.2 of Annex IX to the CPR should be pursued. Appellant remarks on the coinciding timings of him being notified of his unsuccessful applications to the ACO positions and the 8 February letter by the COS.

22. Appellant maintains that in accordance with the ACO Directive 050-004, once the 15 November 2018 judgment had been rendered, both parties were back to the situation where the medical report and the security clearance were the final steps in the process. Appellant claims that he should have been put in the position he was in at the particular date of the annulment of the 11 January 2018 decision, that the judgment did not order a "*renewed process*", and that a new Selection Board should in no case have been convened.

23. Appellant further notes that another candidate had already been selected to the post when the new Selection Board was convened, meaning that the outcome of the "*renewed process*" was a foregone conclusion.

24. Appellant also claims a breach of the principle of reasonable delay, duty of care and good faith. Appellant stresses that two reminders were necessary to receive the reimbursement of the legal costs and the compensation for the non-material damage caused and that, six months since the date of the judgment, the aspects related to the post of Branch Head Budget & Disbursing were still not implemented. He claims that he was left in total ignorance about his situation, all the more so after the unsuccessful outcome of the alternative positions he had applied to.

25. Further, appellant claims that the decision to reject appellant's application because he "*deliberately withheld potentially relevant issues, such as a lengthy absence from work*" is tainted by a manifest error of appreciation and devoid of merit. Appellant recalls that the same argument was brought forward by respondent in Case No. 2018/1267 and that position had not been supported by the Tribunal, which annulled the decision.

26. Appellant also highlights that should respondent consider that appellant was unsuitable because of his leave, which was sick leave, it would be liable for discrimination because of health considerations.

27. In addition, appellant argues that the forwarding by JFCBS of the 8 February letter to NSPA, his current employer, was highly prejudicial to his reputation and his future

career and constituted a breach of the ACO Directive 050-004 as well as a violation of privacy.

28. In the appeal, compensation for non-material damage assessed *ex aequo et bono* at €20,000 was requested. During the hearing, appellant requested compensation for damage assessed at €30,000, consisting of his wife's need to quit her job, him being put back in a position he did not want to hold, violation of confidential information and damage to his future career chances. Appellant also asked the Tribunal to order the defendant to pay punitive damages assessed at €150,000.

29. During the hearing, appellant requested the Tribunal to:

- annul the JFCBS Commander decision of 1 March 2018 rejecting his complaint and the request for administrative review;
- annul the decisions of 18 January and 8 February 2018 refusing to offer him the position of Branch Head Budget & Disbursing at JFCBS;
- compensate for the damage caused, as above mentioned; and
- reimburse the legal costs incurred, travel and subsistence costs and counsel fees.

(ii) The respondent's contentions

30. Respondent considers that with the Tribunal's annulment of the two decisions of 11 January and 26 February 2018, the last decision relating to the recruitment process remaining in effect was the letter by which appellant was informed by the Head of the Civilian Personnel Board (CPSB) of the intention to continue the selection process. It further explains that to finalise the resulting incomplete process, it followed the applicable regulations, in particular the JFCBS directive in force, that is, ACO Directive 050-013, which details the overall framework under Chapter 1 of the CPR. Respondent's request to the Tribunal to disregard appellant's considerations made under Directive 050-04 was not in effect at the time of the recruitment process in question.

31. Respondent explains that according to regulations, the recruitment process was set back to the moment where the Commander would need to take a decision on the appointment of the candidate. Following these provisions, in order to assess appellant's qualifications and suitability with the requirements of the job, the Commander reconvened the CPSB which delivered its decision on 8 February 2019, and duly motivated and communicated it to appellant.

32. Respondent highlights that when the first decision was taken, the CPSB was not aware of appellant's lengthy absence from his work. The considerations given by the new CPBS reconvened in December 2018 explicitly addressed the failure to inform the selection board on the prolonged absence and the relevance of such information as well as the consequences of not disclosing relevant information during the interview. Respondent refers to the 18 January letter whereby the recommendations of the Board were clearly described to appellant.

33. Respondent submits that the judgment logically and directly implied the requirement for the Commander to deliver a new decision to appellant. It considers that the Commander's decision of 18 January 2019 implements the 15 November 2018 judgment, as by that decision appellant was compensated with the €10,000 for the non-

material damage incurred as well as the €4,000 for the legal costs incurred, and informed of the new decision not to offer him the post of Branch Head Budget & Disbursing.

34. Respondent recalls that the HONBs have considerable discretionary authority over the recruitment of candidates within their own organizations and that the Tribunal acted within the set limitations to its powers to abstain from a decision on the suitability and qualifications of appellant.

35. Respondent does not consider the two-month period to implement the AT judgment to be an unreasonable delay in breach of the duty of care. Respondent also rejects any allegation of potential discrimination on medical grounds and highlights that JFCBS has a legitimate interest in ascertaining that current and future staff members are transparent and truthful, and demonstrate the highest level of integrity.

36. Further, respondent stresses that the Tribunal did not order JFCBS to provide appellant with the post, nor did it consider that any other post within ACO should have been offered to him. Respondent notes that appellant incorrectly assumes that the JFCBS Commander would have the authority to provide appellant with a post within one of the ACO entities, disregarding the fact that each NATO military body or Agency is an independent organizational unit and is considered under the CPR an independent employer.

37. Respondent rejects any accusation of wrongful interventions in appellant's applications within ACO and enforces that such behaviour cast additional doubts on appellant's compliance with the NATO Code of Conduct standards of behaviour and professionalism.

38. Respondent further rejects the allegations that the information provided to NSPA by JFCBS constitutes a violation of his privacy, as such an exchange of documentation is purely administrative and necessary to allow a smooth transfer between NATO entities.

39. Respondent disagrees with any request for financial compensation. It sees no grounds for the non-material damage, for undue delay in taking its decision or the incorrect implementation of the AT judgment.

40. Respondent requests the Tribunal to:

- dismiss the appeal in its entirety;
- uphold the decisions of the Commander dated 18 January, 8 February and 1 March 2019; and
- deny any financial compensation for non-material damage and for legal costs to appellant.

D. Considerations and conclusions

41. The Tribunal must recall that the decision of 11 January 2018, in which respondent rejected appellant's application for the post of Branch Head Budget & Disbursing, was annulled by the judgment of 15 November 2018. The judgment stated that:

[i]t 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. (Paragraph 43)

It further stated that:

The Tribunal does not accept that the two items on which respondent bases appellant's lack of suitability can justify respondent's decision. (Paragraph 45)

Thus, the Tribunal concluded that:

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. (Paragraph 48)

Consequently, the Tribunal assessed that:

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. (Paragraph 49)

42. It is clear that the annulment of such a decision should have caused a new decision on the matter. In any event, the reasons given by the Tribunal to annul the decision of 11 January 2018 necessarily implied that any further decision from the organization should have been built on the exact circumstances already reached at that point of the recruitment process.

43. In disregard of those base lines, respondent reconvened the CPSB, setting the recruitment process back to a previous step in which non infringement had been observed by the Tribunal in the previous judgment. What is worse, by doing so, the organization introduced in the CPSB decision-making the two items expressly rejected in the judgment as grounds to sustain appellant's lack of suitability. By requesting that the CPSB be reconvened, respondent did not demonstrate the respect due to the Tribunal's judgment, in which it was clearly established that this selection body had already carried out its functions and taken the correspondent decision; it was the HONB who subsequently added the two different elements on the grounds of which the annulled decision of 11 January 2018 was adopted.

44. During the hearing, respondent admitted that the reasons behind the decision of 8 February 2019 were the same as those behind the annulled decision, although it considered that they were now better articulated. The Tribunal wants to stress that the principle of *res judicata* serves to ensure that parties are not requesting over and over again a judicial response that has already been issued. It is true that in the present case the request of the appeal is not strictly the same as the one previously judged, but the slight differences clearly derive from respondent's conduct which jeopardizes the effectiveness of the first judgment of this Tribunal in the precedent dispute between parties.

45. The grounds and motivation of the decision of 18 January 2019 are exclusively the two reasons that the Tribunal had already adjudicated upon. The judgment in Case 2018/1267 explicitly stated that both were unlawful, not by a mere lack of explanation, but for its essence:

a) 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. (Paragraph 46)

b) 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. (Paragraph 47)

46. The file shows a lack of goodwill by respondent with regard to its obligation to implement the decision of the Tribunal. The organization may freely consider that the judgment does not satisfy its legitimate expectations. However, judgments of this Tribunal are subject to the principle of legal certainty, meaning that they are final and binding (Rule 27.7 of Appendix 1 to Annex IX CPR) unless the remedy of the re-hearing provided by Article 6.8.3 b) of Annex IX CPR is requested. It follows from this that parties cannot but follow up the on Tribunal decision and that the organization must put forward adequate measures to solve the administrative proceedings.

47. Due to all the above-mentioned reasons, the challenged decision shall be annulled. The Tribunal requires that respondent avoid a repetition of the judicial controversy and calls upon both parties to reach a solution by themselves by means of a mutual agreement.

48. It is apparent from respondent's pleadings that the organization is not open to recruiting appellant. Even so, at this point of the dispute, no steps have been taken to activate the possibility offered by Article 6.9.2 of Annex IX CPR and, consistently, the Tribunal is not in a position to make any statement in this respect.

49. Pursuant to the last sentence of Article 6.9.1 of Annex IX, appellant must be compensated for the non-material damages resulting from the unlawful decision, to the amount of €20,000, considering the way in which respondent managed the issues at stake.

E. Costs

50. 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 [...].

51. The appeal being successful, appellant is entitled to reimbursement of justified expenses incurred.

F. Decision

The Tribunal decides that:

- The decisions of 18 January and 1 March 2019 are annulled.
- Appellant shall be compensated with €20,000 for non-material damage.
- Respondent shall reimburse appellant's justified expenses and the costs of retaining counsel up to a maximum of €4,000.

Done in Brussels, on 29 November 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

10 February 2020

AT-J(2020)0001

Judgment

Case No. 2019/1286

BT
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 31 January 2020

Original: English

Keywords: Disciplinary proceedings; Article 59.3 of the CPR; Articles 5.1 to 5.3 and 6.1 of Annex X to the CPR; forged medical certificate; Articles 13.1 and 13.2 of the CPR; serious misconduct; dismissal.



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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 María-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 6 December 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) was seized of an appeal against the NATO Support and Procurement Agency (hereinafter “NSPA” or “Agency”), dated 3 July 2019 and registered on 19 July 2019 as Case No. 2019/1286, by Mr BT. With this action appellant seeks the annulment of the NSPA decision dated 21 March 2019 dismissing appellant for serious breach of his basic obligations under the NATO Civilian Personnel Regulations (“CPR”) and the Code of Conduct with immediate effect in accordance with Article 59.3(e) of the CPR.

2. The respondent’s answer, dated 6 September 2019, was registered on the same day. The appellant’s reply, dated 4 October 2019, was registered on 7 October 2019. The respondent’s rejoinder, dated 31 October 2019, was registered on 4 November 2019.

3. The Panel held an oral hearing on 6 December 2019 at NATO Headquarters. It heard arguments by appellant’s representative and respondent’s representatives, in the presence of the Registrar of the Tribunal, Mrs Laura Maglia.

B. Factual background of the cases

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

5. Appellant joined the NSPA on 4 January 2018 as a Buyer, grade B5, on a three-year definite duration contract ending on 3 January 2021. On 28 November 2018, appellant was absent from work for medical reasons for part of the day.

6. On 5 December 2018, appellant sent respondent by email a medical certificate to justify his absence from work and requested that his clocking-in and -out data for the day of 28 November 2018 be corrected. This medical certificate was attached as a PDF file entitled “TT – Sick Note – Nov 28 2018”. The doctor (doctor A) who allegedly signed the medical certificate attested that appellant was unable to work on the date of 28 November 2018. This certificate, which contained typos and several inconsistencies, indicated the following: “Je soussigne(e) Dr [...] certifie avoir examine ce jour Monsieur TB est incapable de travailler le 11/28/2018. Motif : Maladie Sortie autorisee”. The certificate in question did not bear the doctor’s stamp but did contain a signature, with no mention of the name. The same certificate indicated the social security number of appellant, the telephone and address of the medical doctor concerned, and the date of the certificate as follows: “Luxembourg Ville, le 11/28/2018”.

7. Given the fact that this medical certificate contained errors, typos and discrepancies, on 6 December 2018, the Chief of the Recruitment and Medical Branch of NSPA contacted by fax the doctor whose contact details were indicated on the certificate in question. She requested that the doctor confirm the authenticity of various certificates provided by the same doctor to the NSPA concerning appellant and in particular the last certificate, dated 28 November 2018, attached to the email of 5 December 2018. On the same day, 6 December 2018, the doctor concerned indicated that the certificate dated “11/28/2018” was not his certificate. The doctor noted on the contested document that “Ceci n’est PAS mon certificat!” and then returned it to respondent.

8. On 7 December 2018, the Chief of the Human Resources (HR) Division consulted with appellant’s branch manager, who requested the initiation of disciplinary proceedings against appellant in accordance with the procedure provided for in Annex X to the CPR (“Annex X”).

9. On 7 December 2018, the General Manager of the Agency sent appellant a letter informing him of the facts based on which it seemed that appellant had submitted an “apocryphal” medical certificate to respondent’s services in order to justify his absence on 28 November 2018. In the same letter, the General Manager expressed the view that, *prima facie*, these facts were substantiated and established. In this regard, appellant was also informed of respondent’s decision to suspend him with immediate effect and without emoluments, pending investigation of the charges in accordance with Article 60.2 of the CPR. Appellant acknowledged receipt of this letter on 10 December 2018.

10. By letter dated 11 December 2018, sent by email to appellant the same day, the Chief of the HR Division initiated disciplinary proceedings against appellant for the facts mentioned in paragraphs 6 et 7 *supra*. To this letter a report was attached, dated the same day, setting out the allegations of misconduct and the circumstances in which they occurred, and proposing one of the disciplinary actions provided for in Article 59.3 of the CPR. By the same letter, and in line with Article 5.3 of Annex X, appellant was invited to submit any written or verbal comments within 15 days.

11. By email sent on 13 December 2018, appellant denied the accusations in the report of 11 December 2018 and contested the alleged existence of any intentional misconduct or fraudulent behaviour. Appellant indicated that he had also expressed this point of view to his branch manager and asked to be allowed to present evidence to the Disciplinary Board in order to refute the claims against him.

12. By email dated 13 December 2018, the Chief of the Human Resources Division explained to appellant the ongoing proceedings and the different stages in which he could present comments. In the same email, respondent recalled that appellant would have the opportunity during the proceedings to reply to the allegations and to present exculpatory evidence, which would be taken into account by her in her recommendation. Whether a Disciplinary Board would be set up depended on the conclusions of this recommendation. She therefore “strongly” encouraged appellant to respond to the allegations of misconduct and to provide any evidence that appellant believed would help him.

13. By email sent on 13 December 2018, appellant answered that he would draft a response and would send it within the requested time limits, stressing that he did not understand the proceedings.

14. By letter dated 20 December 2018, appellant presented his comments. In this letter, appellant repeated that, on 28 November 2018, he had medical problems and had consulted a doctor in Longwy (doctor B). He then attached a medical certificate from this doctor, dated 28 November 2018, which indicated that “Je soussigné, docteur en médecine, certifie que l’état de sante’ de M. TB l’oblige à garder le domicile ce jour. A longwy, le Mercredi 28 Novembre 2018”. This certificate was signed and stamped by this doctor. Appellant also attached the invoice for this consultation, also dated 28 November 2018, as well as a medical prescription.

15. In the same letter, appellant explained that in his email of 5 December 2018, he had sent the wrong document from doctor A to respondent’s services and not the correct certificate from doctor B mentioned in paragraph 14 *supra*. Appellant stressed that he had erroneously forwarded a medical certificate from doctor A which effectively had been modified and which was saved on his desktop. Appellant also acknowledged that the certificate transmitted on 5 December 2018 was a modified document from doctor A because for professional and personal reasons he sometimes modified PDF files using editing software; this was precisely the case of the certificate from doctor A transmitted erroneously on 5 December 2018. Appellant claims that this document was in no way intended for use as an actual medical certificate for his absence on 28 November 2018.

16. He further argued that he had no obligation under the applicable rules to provide a certificate for this short absence and that he was in possession of a perfectly valid medical certificate from doctor B dated 28 November 2018. Appellant also invited respondent to contact doctor B in order to confirm the consultation of 28 November 2018. As concerns his honest intention, appellant stressed that although he had had a medical certificate for the full day of 28 November 2018, he had nevertheless come to work in the afternoon. Lastly, appellant stressed that he had not violated any of his obligations, that since joining the NSPA he had followed the rules for all his previous absences, and that this had to be taken into account. According to appellant, qualifying his actions as serious misconduct entailing dismissal, as respondent did, should at a minimum be considered disproportionate.

17. On 17 January 2019 the Chief of the HR Division sent the file of investigations and recommendations to the Chair of the Disciplinary Board, stressing that, given the gravity of the facts, the explanations provided by appellant did not constitute sufficient grounds to recommend a more lenient disciplinary action. She concluded that appellant had committed misconduct by submitting a falsified certificate without providing sufficient justification for this action. In addition, appellant had not identified mitigating circumstances to be taken into account. In this context, separation from service (through dismissal) of the appellant could be seen as a proportional disciplinary action. In the light of Article 59.3(e) of the CPR, she recommended the dismissal of appellant.

18. By respondent's email dated 24 January 2019, appellant was invited to attend the Disciplinary Board meeting scheduled on 29 January 2019. Appellant effectively participated in this meeting and answered the questions of the Board.

19. On 18 February 2019, the Disciplinary Board issued its report. The Board concluded that there was no valid excuse or rationale for the fraudulent actions of appellant, which had been done deliberately. According to the Board, this constituted unacceptable behaviour which undermined the credibility of and trust in the staff member. The Board consequently recommended, in line with the proposal of the HR service, the strongest punishment under the CPR, *i.e.* dismissal of appellant.

20. By letter dated 26 February 2019, the General Manager informed appellant that he had received the recommendation of the Disciplinary Board and that, after careful consideration of the file, he had concluded that appellant had forged a medical certificate. He informed appellant of his intention to dismiss him. He added that according to Article 60.4 of the CPR, appellant had the right to submit oral or written comments by 8 March 2019. Appellant met with the General Manager on 7 March 2019. At that meeting, appellant once more provided the same explanations as to why he had sent in the contested certificate.

21. By letter to appellant dated 21 March 2019, after recalling the background of the case, the General Manager concluded that appellant again had not provided any reasonable explanation for forging the medical certificate. In this letter, the General Manager recalled that appellant had, for a third time, had the opportunity to defend his position. Thus the General Manager concluded that the alleged facts were substantiated and established, and that appellant's behaviour constituted a very serious breach of the basic obligations under the CPR and the Code of Conduct for staff members. According to the General Manager, the position of appellant in the Procurement Division, where the integrity of the staff members must be beyond reproach, constituted an aggravating circumstance. In addition, given that appellant had not cited any mitigating circumstances, the General Manager informed him that he was being dismissed with immediate effect in accordance with Article 59.3(e) of the CPR.

22. On 18 April 2019, appellant requested an administrative review of this decision. He stated that respondent had "received every proof leading to the conclusion that the certificate was not a fake".

23. By decision dated 6 May 2019, respondent rejected appellant's request, stressing that the decision on appellant's dismissal dated 21 March 2019 had been taken by the General Manager, who is a Head of NATO body, and consequently his decision could be challenged through a complaint without seeking prior administrative review. Therefore the letter of 18 April 2019 was to be considered as a complaint within the meaning of Article 4 of Annex IX to the CPR ("Annex IX"). In this decision, the General Manager indicated that the examination of the submitted evidence and the case file had led to the conclusion that appellant had provided a forged medical certificate. This was the fact based on which the disciplinary action was decided, not the existence (or lack thereof) of a valid medical certificate or the fact that appellant did not have the obligation to submit a medical certificate for his absence on 28 November 2018.

24. It is under these conditions that, on 3 July 2019, appellant submitted the present appeal to the Tribunal.

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

(i) Appellant's contentions

25. Appellant requests the annulment of respondent's decision of 21 March 2019 (challenged decision) as confirmed by decision of 6 May 2019 because this decision was taken in violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), in relation to several provisions of the CPR, on the basis of the following grounds.

26. Firstly, the disciplinary proceedings were initiated and conducted by persons who did not have the required competences and were characterized by bias against appellant. Indeed, during the disciplinary proceedings, appellant's case was handled by the same persons alternately in the different steps of the proceedings. This effectively contradicts the CPR, which guarantees that different persons with different functions examine a file in the different steps in order to ensure impartial treatment of the file.

27. Secondly, the report drafted by respondent's services was incomplete and violates Article 5.2 of Annex X. Indeed, several facts were omitted, including the fact that appellant wanted to defend himself immediately but had been ordered to wait, the circumstance that appellant had had no obligation to transmit this certificate but had done so anyway, and the fact that, despite being ill, appellant had come to work for a half-day on 28 November 2018. In addition, given the fact that the transmitted certificate contained errors and typos, the HR Division could have asked him to provide explanations rather than immediately initiating the disciplinary proceedings.

28. Thirdly, appellant contends that the General Manager's decision to treat his request for administrative review as a complaint without appellant's approval deprived him of his right to initiate mediation (Articles 3 and 4.1 of Annex IX to the CPR), to seek an administrative review of the contested decision (Articles 2 and 4.1 of Annex IX to the CPR), or to initiate a procedure before the Complaints Committee (Article 4.2 of Annex IX to the CPR). In addition, he had never had problems with his employment and had always acted in good faith. Appellant deserved the presumption of innocence and was entitled to the right to be heard before the initiation of the disciplinary proceedings.

29. Fourthly, appellant argues that during the proceedings, he had not been provided with essential information by the Agency which it had used to take the challenged decision and that he had been deprived of access to the file. Appellant requests that the Agency provide him with the complete report of the Disciplinary Board.

30. In addition, appellant requests annulment of the challenged decision because it had been based on an error of assessment of Article 59 of the CPR. In this regard, appellant puts forward the following grounds.

31. Firstly, appellant claims that he did not need to give the HR service a medical certificate for one day (or half-day) of absence. Indeed, according to Article 45.2 of the CPR, such a certificate is only required for two consecutive days of absence; this is not the case in the present proceedings; therefore, he considers that he acted in good faith and had no incentive to present a falsified document.

32. Secondly, appellant contends that the alleged falsification of the document is the result of a test that he regularly carries out as part of his activities as a graphic designer and that it was therefore in error that this forged document was sent out. He also refers to the fact that the certificate in question contained typos and errors that were easily detectable; thus, if he had really intended to submit such a certificate, given his expertise, he would have taken precautions to avoid errors and discrepancies. In contrast to respondent's arguments, it is appropriate to say that appellant only "modified" the medical certificate in question, not that he "forged or falsified" it.

33. Thirdly, appellant claims that, in any event, he had a valid certificate from doctor B, which, in error, was not sent to respondent on the correct date (5 December 2018). Appellant submitted this certificate from doctor B on 20 December 2018, when the problem appeared with the wrong certificate sent on 5 December 2018. As stated at the hearing of 6 December 2019, during the period from 5 December to 20 December 2018, appellant had not understood that there was a problem with the medical certificate sent on 5 December 2018. Indeed, appellant believed that on that date he had sent the correct, valid certificate from doctor B. Appellant had also submitted a statement from doctor B confirming that appellant had consulted him on the disputed day and had invited respondent to contact this doctor for confirming the truthfulness of this evidence.

34. Fourthly, appellant argues that respondent did not prove or specify with which obligations of the CPR or of the Code of Conduct appellant did not comply exactly. Appellant acted with loyalty, discretion and conscience and did not violate his obligations of integrity and accountability. Appellant was fully transparent and took prompt action to resolve and correct his error from the moment he understood the problem. Thus, the error committed by appellant in transmitting a modified document cannot be qualified as serious misconduct, and the challenged decision must therefore be annulled.

35. Finally, given the illegality of the challenged decision, appellant is claiming compensation for material damages. In this regard, he requests the payment of his remuneration as from 10 December 2018 until the date of "re-instatement", or compensation for the loss of remuneration as from 10 December 2018 until 3 January 2021 in an amount that includes basic salary, the expatriation allowance, benefits in kind, retirement pension contributions and the dependent child allowance. Appellant claims entitlement to the VAT exemption for the purchase of a vehicle, which he had not obtained because of the initiation of the disciplinary proceedings. Appellant also requests compensation for non-material damages suffered as a result of the challenged decision, evaluated *ex aequo et bono* at six months' salary. It is obvious, according to appellant, that the challenged decision affected his reputation and could put him in difficulty when it comes to finding a similar job.

36. Appellant requests:

- annulment of respondent's decision dated 21 March 2019, confirmed by respondent's letter of 6 May 2019;
- "re-instatement" in his position in the Agency in accordance with Article 6.9.1 of Annex IV to the CPR;
- compensation for material and non-material damages, broken down as follows:
 - payment of his remuneration as from the date of his suspension, 10 December 2018 until the date of "re-instatement";
 - alternatively, in case the Tribunal does not agree to "re-instate" him in the Agency, compensation for the loss of remuneration as from 10 December 2018 until 3 January 2021;
 - reimbursement of the VAT paid on the purchase of a vehicle, in the amount of EUR 4,415.64;
- compensation for non-material damages suffered as a result of the decision to terminate the contract with immediate effect, evaluated *ex aequo et bono* at six months' remuneration;
- anonymity under Rule 11 of the Tribunal's Rules of Procedure, Appendix 1 of Annex IX to the CPR; and
- reimbursement of the costs incurred for his defence (*i.e.* travel costs and legal costs) equal to a provisional amount of EUR 5,170.

(ii) Respondent's contentions

37. Concerning the appellant's plea that the challenged decision infringed the rules governing the disciplinary proceedings, respondent submits, firstly, that these proceedings were initiated and conducted by the competent persons in accordance with the CPR. As regards the assumption that the disciplinary proceedings were vitiated since the same persons were involved during the different steps of the proceedings, respondent answered that this is wrong and there is no concrete factual evidence of irregularity in the proceedings and in particular in the Disciplinary Board composition.

38. As regards, secondly, appellant's contentions that the report submitted to the Disciplinary Board was incomplete and not accompanied by appellant's comments, respondent argues that there are obviously not good grounds for this argument. Indeed, appellant acknowledged receipt of the report on 10 December 2018 and presented his comments on this report on 20 December 2018.

39. Thirdly, respondent rejects appellant's contentions that the requalification by the General Manager of appellant's request for administrative review as a complaint deprived him of his rights deriving from the CPR. Concerning further appellant's argument that he did not have access to sufficient information and elements based on which the challenged decision was taken, respondent considers that appellant had all the relevant information and respondent's assumptions based on which the disciplinary proceedings were initiated and the challenged decision taken.

40. As regards the plea alleging errors of assessment concerning Article 59 of the CPR, respondent submits that it was clearly established that appellant had falsified a medical certificate and, moreover, that appellant acknowledged that he had done so.

41. In particular, with reference to appellant's contention that he inadvertently submitted the wrong medical certificate, respondent stresses, firstly, that this assertion is not reliable. In fact, the modified certificate in question bears the same date for which appellant wanted to justify his absence. Concerning the contention relating to the existence of a valid medical certificate which was in error not transmitted on 5 December 2018, respondent argues that even if this certificate was genuine, it cannot justify why appellant forged a medical certificate. Respondent also rejects appellant's contention that he was not obliged to submit such a certificate. Indeed, as it was stated by his superior, appellant had, during the first year of his employment and over several periods, had problems with absences.

42. As regards the existence of misconduct justifying the decision on dismissal, respondent considers that there is no doubt that appellant forged an official document and submitted it in support of a request for sick leave. This is a blatant breach of the rules and obligations under Articles 13 and 59.1 of the CPR and, consequently, dismissal is a proportional disciplinary action.

43. In conclusion, respondent invites the Tribunal to declare that there are not good grounds for the appeal. Should the Tribunal uphold appellant's appeal and order payment of any compensation for lost emoluments, this must be subject to the general principle of mitigation and to the fact that any income earned by appellant in the interim should be deducted from any compensation ordered. Respondent also requests that the Tribunal reject appellant's claim for reimbursement of the VAT on the purchase of appellant's vehicle.

D. Considerations

(i) Request for anonymity

44. Appellant requests anonymity, asking that his name should not appear in the Tribunal's judgment. Appellant has not demonstrated good grounds that could justify granting anonymity in the present appeal. It follows that appellant's request for anonymity must be rejected.

45. The Tribunal recalls, however, that in accordance with its case law, it ensures that each of its judgments, compendia and collections of judgments indicates 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. 2013/1107, paragraph 54).

(ii) On the merits

46. Appellant develops two pleas seeking annulment of the challenged decision. In the first plea appellant submits that the challenged decision was taken in violation of the

rules governing disciplinary proceedings in relation to Article 6 of the ECHR. With the second plea, appellant contends that in taking the challenged decision, respondent committed several errors of assessment regarding Article 59 of the CPR.

a. On the disciplinary proceedings

47. Firstly, according to Article 5.1 of Annex X:

Disciplinary proceedings shall be initiated:

(a) by the immediate superior of the staff member ...;

(b) by the official responsible for personnel management, who shall first consult the staff member's superior as defined in the previous subparagraph;

48. In the present case, the disciplinary proceedings were not initiated at the initiative of appellant's "immediate superior" but by the Chief of the HR Division who is to be considered as "the official responsible for personnel management" as provided for by the CPR. Therefore, contrary to appellant's allegation, the Chief of the HR Division is competent for initiating the proceedings.

49. The Tribunal further observes that the official responsible for personnel management consulted the appellant's branch manager who, in the present situation, must be considered as the superior of appellant within the meaning of Article 5.1(b) of Annex X. The purpose of this provision is precisely to enable the superior of the staff member concerned to be consulted when the official responsible for personnel management initiates the procedure in order to obtain relevant information concerning an alleged action by this staff member.

50. As the case file reveals, since July 2018, the person whom appellant wrongly considers as his "immediate superior" within the meaning of Article 5.1(b) of Annex X had noted that appellant had problems with attendance and his days of leave, and that he had been closely tracking the appellant's attendance in the service in coordination with his branch manager. This is clear from the statement of this person dated 29 August 2019, and supported by several factual elements submitted to the Tribunal. Appellant did not contest the factual elements in question. He only stated that these elements had no bearing on the heart of the case and were irrelevant for further conclusions. The Tribunal concludes that appellant was not arguing that his alleged immediate superior had a different point of view from his branch manager concerning the initiation of disciplinary proceedings. Consequently, appellant's contentions in relation to Article 5.1 of Annex X must be rejected.

51. Secondly, Article 6.1 of Annex X provides:

The Disciplinary Board shall be composed of three members: the official responsible for personnel management or such other official as the Head of the NATO body may appoint (Chair), the Head of Division or independent service to whom the staff member is responsible ..., and a staff member nominated by the Staff Committee holding in so far as possible a grade not lower than the staff member who is the subject of disciplinary procedures

52. In light of this provision, and as regards the participation of the HR Executive Officer in the Disciplinary Board, the Tribunal states that this participation is in line with Article 6.1 of Annex X. In addition, it must be underlined that the HR Executive Officer was not the person who initiated the disciplinary proceedings in the present case. Concerning the participation of appellant's branch manager in the Disciplinary Board, the Tribunal considers that it is also in line with Article 6.1 of Annex X. Indeed, appellant's branch manager is to be considered in the present case as the Head of service to whom the staff member is responsible.

53. The Tribunal notes, however, that appellant's branch manager was consulted by the official responsible for personnel management on 7 December 2018 when the latter was considering recommending the initiation of disciplinary proceedings. Contrary to appellant's contention, such consultation does not vitiate the composition of the Disciplinary Board for reasons of impartiality. It is common practice for the branch manager of the staff member concerned to participate in the Disciplinary Board precisely in order to provide, as the person best placed to do so, the relevant information concerning the staff member in question. Consultation of the hierarchical superior does not necessarily mean that he/she agrees with the process undertaken or the recommendation made by the initiator.

54. Thirdly, Article 5.2 of Annex X provides:

The authority initiating disciplinary proceedings shall prepare a report setting out the facts complained of and the circumstances in which they occurred and proposing one of the penalties provided for in the Personnel Regulations. Two signed copies of this report shall be prepared, the first forwarded through the usual channels to the official responsible for personnel management and the second sent to the staff member. The staff member shall sign the report, indicating the date on which it was received, and return it or hand it over to the authority which has initiated the proceedings.

55. The Tribunal observes that on 7 December 2018, appellant was informed of the facts based on which it appeared that there had been serious misconduct entailing the application of disciplinary actions and that investigations were ongoing. In this letter, the circumstances for which this misconduct seemed *prima facie* to be established were also mentioned. Appellant acknowledged receipt of this letter on 10 December 2018. By letter, dated and sent by email on 11 December 2018, the disciplinary proceedings were initiated and to this letter was attached the disciplinary report, also dated 11 December 2018, in which the relevant facts were described in detail. With this report, the official responsible for personnel management recommended initiating the disciplinary proceedings and proposed, given the seriousness of the alleged misconduct, dismissal as the appropriate punishment. The above mentioned letters contain the necessary information justifying the recommendation of initiating the disciplinary proceedings.

56. The Tribunal considers that the information and elements referred to by appellant in this plea, which allegedly were missing from the file, are in fact the justifications which he subsequently produced (written comments) in the disciplinary proceedings. Respondent could therefore not include those justifications, as appellant claims, in the letters in question. It is also undisputed that appellant submitted these written comments

to the authority initiating the proceedings. These comments were forwarded to the official responsible for personnel management in order to be included in the file to be submitted to the authority responsible for taking disciplinary action and to the Disciplinary Board.

57. Accordingly, and contrary to appellant's submissions, no violation of Article 5.2 of Annex X under Article 6 of the ECHR can be established.

58. Fourthly, the Tribunal holds that appellant did not specify which information in question was not communicated to him. In any event, after analysis of the file, the Tribunal finds that respondent took its decisions on facts and information that also appear in the record of the proceedings.

59. The Tribunal recalls that by letter dated 26 February 2019, the General Manager of the Agency informed appellant that he had received the recommendations of the Disciplinary Board in support of dismissal and invited him, in accordance with the CPR, to submit his comments. Appellant presented theses on 7 March 2019. The Tribunal notes that appellant was thus given a third opportunity to submit his comments in the context of the disciplinary proceedings before the disciplinary action was handed down.

60. Concerning the fact that the Disciplinary Board's report was not communicated to appellant, this does not constitute a violation of the CPR or of his right to be heard and to have access to the information contained in the file. Such communication is not foreseen in the CPR. The Tribunal notes that, with the third observations of the staff member, the procedure reached its final stage before the final decision was taken. This decision is based on elements discussed by the parties and on which the agent in question had the opportunity to present his observations. Indeed, appellant was heard three times in the context of the disciplinary proceedings and he was able to exercise his rights of defence. He can therefore not claim that his rights were violated.

61. In addition, appellant submits that he did not have access to all the relevant documents in the proceedings. The Tribunal notes that following appellant's request in the present proceedings, respondent communicated the report in question. Appellant thus had the opportunity to comment on them in his rejoinder and at the hearing. The Tribunal concludes that no violation of appellant's rights of defence occurred in this respect.

62. Fifthly, as regards the infringement of appellant's rights of defence in view of the requalification of his request for administrative review as a complaint, the Tribunal finds that the request for administrative review in question had been sent by appellant to the General Manager of the Agency, who is a Head of NATO body under the CPR. The CPR provide that staff may submit a complaint in writing to the Head of the NATO body concerning a decision taken directly by him or her, without a prior administrative review. The General Manager was thus not only entitled to consider the administrative review request as a complaint, but it was a token of good administration not to deny the request entirely but rather to move forward immediately. With this requalification, respondent did not violate any rule of the CPR and did not deprive appellant of any right of defence.

63. The argument that appellant could not bring the case before a Complaints Committee must also be rejected. It is clear from Article 1 of Appendix 3 to Annex IX to the CPR that the complaint procedure is not applicable to administrative decisions taken directly by the Head of the NATO body.

64. As regards the argument that the respondent's requalification prevented appellant from requesting mediation within the meaning of Article 3 of Annex IX to the CPR, it should be pointed out that a combined reading of Article 61 of the CPR and Article 3 of Annex IX to the CPR indicates that such a request may be made at any time but requires the agreement of both parties. As a consequence, no violation of the CPR or an infringement of appellant's right of defence can be claimed.

65. Finally, the Tribunal notes that there is no obligation incumbent on respondent under the CPR to inform appellant that there was an issue with his medical certificate before the initiation of disciplinary proceedings. Assuming that the respondent's service could have informed him about the issue, this in no way would prevent respondent from continuing its investigations into the seriousness of the misconduct committed, or prevent appellant from providing explanations in due course.

66. The Tribunal also recalls that on several occasions appellant had the opportunity to exercise his rights of defence and to set out the elements which, in his view, were at the root of the matter. The fact that respondent does not agree with appellant's explanations does not constitute a denial or obstruction of appellant's rights of defence. The Tribunal concludes that no convincing argument concerning a violation of appellant's rights of defence has been put forward.

67. It follows from the foregoing that appellant's plea and submissions regarding a violation of the rules governing the disciplinary proceedings under Article 6 of the ECHR must be rejected as a whole.

b. On the errors of assessment regarding appellant's dismissal

68. According to Articles 13.1 and 13.2 of the CPR:

On accepting appointment with NATO, each member of the staff shall sign the following declaration: "I solemnly undertake to exercise in all loyalty, discretion and conscience the functions entrusted to me as a member of the staff of NATO and to discharge these functions with the interests of the Organization only in view. I undertake not to seek or accept instructions in regard to the performance of my duties from any government or from any authority other than the Organization/Headquarters."

Members of the staff shall conduct themselves at all times in a manner compatible with their status as representatives of the Organization. They shall avoid any action or activity which may reflect adversely on their position or on the good reputation of the Organization.

69. Articles 59.1 to 59.3 of the CPR provide:

Any failure by staff members or former staff members to comply with their obligations under the Civilian Personnel Regulations, whether intentional or through negligence on their part, shall make them liable to disciplinary action.

Disciplinary actions taken shall, together with the reasons, be recorded in staff members' files and, except in the case of action taken under Article 59.3(a) below, shall be notified by writing to them.

Disciplinary actions includes:

(...)

(e) dismissal (...)

70. And Article 3.2 of Annex X stipulates:

The grounds on which disciplinary action is taken must be specified and the staff members concerned informed of the grievance against them.

71. The Tribunal recalls that, in accordance with these provisions, staff members who are subject to disciplinary proceedings must be properly and clearly informed of the allegations against them by being given access to the file based on which respondent intends to initiate disciplinary action. In particular, the information required aims to establish whether the allegations are true and, consequently, proven. In this context, it is for the Tribunal to determine whether the action thus taken was warranted by the nature of the alleged misconduct (see Case No. 2014/1031, paragraph 73).

72. Firstly, the Tribunal holds that appellant was properly and clearly informed of respondent's allegations against him.

73. Indeed, by respondent's letter dated 7 December 2018, appellant was clearly informed of the facts that could potentially be considered as misconduct that would require disciplinary action to be taken. In this letter, respondent explained the alleged facts in detail. In particular, reference is made to a PDF file which contains a medical certificate dated 28 November 2018 attached to an e-mail sent by appellant on 5 December 2018 to the competent service of respondent in order to justify his absence on 28 November 2018 on medical grounds. Respondent stressed in this letter that the PDF file in question contained several errors and discrepancies. For that reason, respondent informed appellant that it was asking the doctor concerned (doctor A) to certify the authenticity of this certificate. This doctor communicated to respondent that the medical certificate in question dated 28 November 2018 was not his certificate. In the same letter, respondent expressed the view that these facts appeared to be substantiated and established and, given the seriousness of the alleged facts, it was decided to suspend appellant with immediate effect pending investigation of the charges in accordance with Article 60.2 of the CPR.

74. In addition, by letter dated 11 December 2018 and sent to appellant by email on the same date, respondent initiated the disciplinary proceedings at the initiative of the official responsible for personnel management. To this email was also attached the disciplinary report based on which the recommendation was made to initiate disciplinary

proceedings and, given the seriousness of the alleged facts (falsified medical certificate), to order dismissal as a disciplinary action. Respondent also recalled in the challenged decision the facts based on which the disciplinary proceedings had been initiated.

75. Secondly, the Tribunal considers that the facts are established and substantiated in accordance with the requirement in the abovementioned provisions of the CPR. It is undisputed that appellant was absent from his work on 28 November 2018. It is also undisputed that appellant sent an email to respondent on 5 December 2018 and attached to this email a PDF file containing a medical certificate for justifying his absence on 28 November 2018. It is undisputed that this certificate is not authentic.

76. The Tribunal observes that the title of the PDF medical certificate in question attached to this email is "TT – Sick Note – Nov 28 2018". It is consequently undeniable that the document in question, attached by appellant to his email, aimed to justify appellant's absence for medical reasons on 28 November 2018. As regards the content of this certificate, the Tribunal points out that appellant was in possession of a certificate from the same doctor A justifying his absence on 5 November 2018. Concerning the PDF file sent, the Tribunal observes that it was from the same doctor. However, the date of this certificate is now 28 November 2018 and the doctor who seemed to have signed this document certifies that on that day – that is to say 28 November 2018 – appellant consulted him and was unable to work. It is indisputable once more that the modifications made by appellant to this document served to justify his absence on 28 November 2018.

77. The Tribunal concludes that the alleged facts are established and that appellant forged a medical certificate.

78. Thirdly, the Tribunal notes that, during the disciplinary proceedings, appellant had the opportunity to present his observations on the decisions made by respondent and to put forward justifications aimed at establishing that the alleged facts were not accurate.

79. The Tribunal points out that appellant did not mistakenly send any valid certificate, but a forged medical certificate. In these conditions, sending a forged medical certificate while being in possession of a valid certificate as alleged by appellant is not a plausible justification. In any case, assuming that appellant was in possession of a valid certificate and that he mistakenly sent the amended certificate, the Tribunal finds that appellant acted with gross negligence, which does not preclude the initiation of disciplinary proceedings in any event.

80. The Tribunal also observes that the modifications made to the medical certificate by appellant precisely centered on the date of 28 November 2018. In response to a question from the Tribunal about the fact that the modified document did not bear the doctor's stamp but only a sort of signature of the doctor – which is not the same as the one on the valid certificate from the same doctor on 5 November 2018 – appellant replied that this modification was the result of the transformation of the document by the software. This assertion is not convincing. Notwithstanding appellant's qualifications and competences, it is established that appellant submitted, even erroneously as he claims, a forged document.

81. Furthermore, appellant argues that he did not need to submit the contested certificate because, according to Article 45.2 of the CPR, he had no obligation to do so, since he was absent for less than two consecutive days. This explanation has no merit either. This argument in no way justifies the alteration and submission of a medical certificate. In any event, and as indicated by respondent in its written submissions and repeated at the hearing without being contested by appellant, the latter was not far from having exhausted his annual quota of days of uncertified sick leave.

82. The Tribunal considers that in general appellant attempts to show that he acted in good faith; however, he did not provide any plausible justification for forging the document in question. The alleged facts, even assuming that they were the result of negligence, are uncontested and justify the initiation of the disciplinary proceedings and subsequent disciplinary action.

83. It follows from the foregoing that respondent has established, to the requisite legal standard and without any error of assessment, that appellant falsified a medical certificate and that appellant's justifications cannot establish any mitigating circumstances.

84. Article 13.2 of the CPR states that a staff member shall conduct himself at all times in a manner compatible with his status as representative of the Organization and that he shall avoid any action or activity which may reflect adversely on his position or on the good repute of the Organization. Contrary to appellant's contention, falsifying a medical certificate to justify a day's absence from work constitutes a case of serious misconduct with respect to the obligations under Article 13.2 of the CPR for which the decision by the Agency to dismiss appellant is to be considered as appropriate and in line with the provisions of Articles 59.1 and 59.3 of the CPR.

85. It follows that the second plea put forward by appellant seeking annulment of the challenged decision for several errors of assessment must be rejected, as must all the submissions on annulment developed by appellant in the present appeal.

86. As regards the submissions on compensation put forward by appellant, the Tribunal recalls that if such submissions are closely linked with submissions on annulment, dismissal of the latter also entails dismissal of the submissions on compensation. In the present case, appellant's submissions concerning his alleged material and non-material damage are closely linked with the submissions on annulment, which have been dismissed. As a consequence, all the other submissions put forward by appellant in the present appeal must also be dismissed.

87. It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

E. Costs

88. 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 [...]

89. 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 31 January 2020.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

10 February 2020

AT-J(2020)0002

Judgment

Case No. 2019/1283

MC
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 4 February 2020

Original: English

Keywords: non-renewal of definite duration contract; discretionary power; no Complaints Committee procedure.

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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 María-Lourdes Arastey Sahún and Mr Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 6 December 2019.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 13 May 2019 and registered on the same day, as Case No. 2019/1283, by Mr MC, against the NATO Support and Procurement Agency (NSPA). The appeal concerns the non-renewal of appellant’s definite duration contract after its expiry date on 31 July 2019. Appellant requests that the Tribunal grant him an expedited hearing.

2. The respondent’s answer, dated 11 July 2019, was registered 16 July 2019. Appellant’s reply, dated 2 September 2019, was registered on 11 September 2019. It repeated the request for an expedited hearing. The respondent’s rejoinder, dated 7 October 2019, was registered on 9 October 2019.

3. The Panel held an oral hearing on 6 December 2019 at NATO Headquarters. It heard appellant’s statements 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 worked with NSPA as a consultant from 7 January 2013 to 30 May 2015 under three successive contracts. On 1 June 2015 appellant started to work as a NATO International Civilian under a definite duration contract in the post of Chief of Team (LCC HQ), grade B6. In 2016, he was offered a new definite duration contract, at a higher grade (A3), for three years from 1 August 2016 to 31 July 2019.

6. On 16 January 2019, appellant received from the Deputy Director of Support to Operations (Deputy Director) an invitation to a meeting to discuss the renewal of his contract. The meeting was an office call which took place on the same day and to which the Deputy Director followed up by sending an email to appellant. The email reported the points outlined in the interview which had led to the decision not to renew his contract.

7. On 17 January 2019, appellant replied to the email, expressing his views on the accuracy of the information and facts provided. On the same day the Deputy Director answered by informing him that he did not intend to revisit the discussion, and provided appellant with clarification of a few of the points raised, namely that the appellant would not be provided with the findings of a fact-finding report, as they were only released to the NSPA General Manager (GM), and that the Chief of Branch of the Operational Logistics Planning and Support Programme Office (Chief of Branch) would, if asked, certainly provide him with the comments made on the question of his contract renewal. He concluded by saying that the Human Resources (HR) department would contact him with a formal response concerning his contract.

8. On 18 January 2019, the Chief of Branch, at appellant's request, provided a copy of the report he had made for HR concerning appellant's contract renewal.

9. On 31 January 2019, the NSPA Head of NATO body (HONB) sent a letter to appellant notifying him that in accordance with Article 5.5.1 of the NATO Civilian Personnel Regulations (CPR) and the terms and conditions of his contract, no further appointment would be offered to him beyond its current expiration date. He further specified that appellant would receive a separate communication stating the reasons for such a decision.

10. On 5 February 2019, the Deputy Director sent a letter to appellant indicating that as "[he] has not met the highest standards of diligence, competence and integrity as required by Article 1.2 of the NATO Civilian Personnel Regulations (CPR), the renewal of [his] contract was determined not to be in the interests of the Agency within the meaning of paragraph 5.2.3(i) of the CPR".

11. On 14 February 2019, appellant submitted a complaint pursuant to Article 61.1 of the CPR and Article 4 of Annex IX to the CPR. He requested that the complaint be submitted to a Complaints Committee.

12. By letter dated 14 March 2019, the NSPA GM maintained his earlier decision. With respect to the request to submit the matter to a Complaints Committee, he advised appellant that pursuant to Article 1 of Appendix 3 to Annex IX to the CPR, a staff member may request a Complaints Committee when the decision maker is not the HONB.

13. On 13 May 2019, appellant submitted the present appeal.

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

(i) *The appellant's contentions*

14. Appellant introduces the appeal outlining factual elements which, in his view, are key in understanding the context of his claim and the *ratione materiae* behind the non-renewal. He refers to incidents that occurred during his deployment in Afghanistan involving his team and hierarchy, in particular a Fact-Finding Panel which was set up to conduct a review of the in-theatre management and operations, and a VTC meeting held on 3 July 2018 following which appellant was labelled as "insubordinate" and his question considered an "outburst" by his hierarchy.

15. Appellant claims that the reasons put forward to justify his non-renewal are false and conflicting and that the non-renewal decision was taken in violation of the duty to state reasons and the right to be heard.

16. Appellant affirms that before the 16 January 2019 meeting he did not receive any signal or warnings that there was an issue with his suitability for future employment. He notes that his last three performance reports described his performance as outstanding and adds that he had received various awards and letters of appreciation from a variety of sources, including the NATO Meritorious Service Medal in 2016.

17. He emphasizes that all conditions were in place to be offered a contract renewal (outstanding performance, no behavioural issue before, post not suppressed, additional senior academic qualifications obtained), whereas the reasons put forward to justify the non-renewal are not valid.

18. Appellant refers to the 16 January 2019 meeting and states that even if he was able to have an open discussion, it was clear that the decision was definitive. In his estimation, he was not given the opportunity to provide his comments before that decision was taken. Appellant argues that the authority must take a well-informed decision, which implies that the staff member concerned by an intended adverse action must have been put in a position to provide his comments. He maintains that had he been heard and been informed that such non-renewal decision was under consideration, he could have raised observations. Appellant therefore advances that he had been deprived of his right to be heard.

19. Appellant details the reasons he was given following the 16 January 2019 meeting, what was received by the Chief of Branch and what was finally contained in the 5 February 2019 letter, and assesses that he was given subsequent and different reasons which could not allow him to appropriately react, comment, and clearly and unequivocally understand the non-renewal.

20. Appellant refers also to this Tribunal's case-law and in particular the role "NATO managers and NATO bodies have to address, and whenever possible, to resolve, issues instead of leaving them for resolution by the Tribunal through a contested legal proceeding," and submits that because his claims and concerns were ignored, the decision was taken in breach of the duty to state reasons.

21. Further, appellant refers to his 14 February 2019 letter to the NSPA GM and his request to submit the complaint to a Complaints Committee (CC), which was denied. He underlines previous case-law of the present Tribunal establishing the CC as an unequivocal right of the staff member.

22. Appellant contends a violation of the NSPA Implementing Instruction for Employee Performance Management System (EPMS), in particular its Article 14 and the process of the signing and countersigning managers. Appellant criticizes that the countersigning manager is the Chief of Branch, which did not represent his direct hierarchy. He submits that the report was tarnished by senior leadership who did not know him and ignored the true reporting officers. He argues that the breach of procedure can influence the contested decisions, which are therefore vitiated and should be annulled.

23. Appellant recalls the context in which the decisions were taken. He refers back to January 2018 when it was decided to dismantle the Operation Section by the end of June 2018. This decision was difficult to implement and appellant's former managers concluded that it was better to delay its implementation. The new managers did not agree with the proposal; this created a lot of tensions which expanded to managerial areas that also involved appellant (reporting letters concerning individuals, complaints involving vendors on the premises, International Military Police conducting raids on the compound in search of alcohol – with a negative result, the Fact-Finding Panel, etc.).

24. Appellant expresses that he reported in-theatre irregularities he was aware of (and which involved part of his hierarchy), in accordance with the Code of Conduct. He argues that it was acting in bad faith to use his sense of duty to discredit him and to use so-called behavioural issues, whereas his behaviour has always been irreproachable, in order to justify decisions. Appellant refers to the 3 July 2018 VTC and the comments he made on the change of the programme. He strongly disagrees that raising questions in the exercise of his freedom of expression had to be understood as what was referred to as “publicly exhibited disrespect towards the Director of Operations ... by using foul language”, moreover without this being supported by any witnesses.

25. In addition, appellant advances that all the reasons given to him (meeting on 16 January 2019, content of the HR report, letters of 5 February 2019 and 14 March 2019) are manifestly erroneous and do not justify the non-renewal of his contract. He argues that he was targeted and needs protection from what he considers consistent attempts to remove and belittle him unjustly. He alleges that the decision was taken based on a manifest error of assessment.

26. Appellant divides the reasons given to him into allegations that: 1) he lacks the necessary competence to fulfil his duties; 2) he is unstable and insubordinate; 3) he failed to guarantee a proper hand-over to his successor.

27. Appellant recalls his outstanding performance reports as well as senior-level appreciation and awards received. In his submission he quotes several letters from colleagues expressing positive feedback and *disgust* at the allegations made against him. Appellant expresses astonishment at how the Chief of Branch, who took up his duties on 3 July 2018, could evaluate his capacities in the short time they had a professional relationship with one another.

28. Appellant further notes that in 2018 he underwent the mandatory post and pre-deployment assessment by the NSPA psychiatrist and he was certified healthy without any issues. He confirms he never suffered from any mental illness.

29. Appellant rejects the accusations on the proper lack of hand-over for his successor, and submits that the difficulties, if any, were due to the lack of the necessary experience and the limited technical knowledge of the newcomer.

30. Appellant believes that the real reason for not renewing his contract is retaliation. He also recalls that he had been refused requested home leave, and he considers that the decision on non-renewal was taken in an abuse of power by his hierarchy.

31. Appellant requests that the Tribunal:

- annul the decision dated 14 March 2019 rejecting appellant’s complaint;
- annul the oral decision of 16 January 2019 and the two written decisions of 31 January and 5 February 2019;
- reinstate him in his contract and position with retroactive effect on 31 July 2019 (including the payment of his remuneration and all related financial entitlements and benefits from the same date);
- issue a letter clearing his name and with formal apologies;

- grant him the benefit of the expedited hearing; and
- reimburse all legal costs incurred and counsel's fees.

(ii) The respondent's contentions

32. Respondent rejects appellant's allegations. It emphasizes that in accordance with Article 5.5.1 of the CPR, appellant was notified in writing within the prescribed time limit that no further contract would be offered to him. The decision was taken by the HONB for valid and justified reasons, which led him to decide that the renewal of appellant's definite duration contract would not be in the interests of the service.

33. Respondent notes that appellant's post is a set-duration post, formalized by a definite duration contract of three years, expiring on 31 July 2019. It stresses that the Agency has no obligation to offer a subsequent contract at the date of expiration, the only formal condition being, in accordance with Article 5.5.1 of the CPR, that the staff member is informed in writing not less than 6 months before the expiry of his contract whether a further one will be offered to him. Respondent notes that appellant was notified on 31 January 2019, six months before the expiration date, by the HONB, who exercised his discretionary power not to renew appellant's contract.

34. Respondent rejects the allegation that the non-renewal is subject to the requirement for explanation. It nevertheless highlights that appellant was duly informed on different occasions of the reasons behind the decision. It refers in particular to the 16 January 2019 meeting and follow-up email, the 31 January 2019 letter by the GM and the further explanation of 5 February 2019. It maintains that appellant was put in a position to clearly understand the decision-maker's reasoning.

35. Respondent further rejects the allegation that it had a duty to give appellant an opportunity to be heard before taking the decision. It states that there is no statutory or jurisprudential requirement for an international organization to give its staff members an opportunity to be heard before deciding whether to offer them a contract. Notwithstanding this, it stresses that appellant was given the opportunity to express his views three times, and that the fact that the HONB did not consider that the presented arguments justified the annulment of his decision does not mean that appellant did not have the opportunity to be heard.

36. Concerning the denial to have the grievance examined by the Complaints Committee, in respondent's view the contested decision was taken directly by the HONB and, in such cases, the procedure foreseen in Article 1 of Appendix 3 to Annex IX to the CPR is not applicable.

37. Respondent disagrees that the reasons given were not consistent. It notes that they refer to similar events or facts that are intrinsically related and which have been discussed and shared with appellant.

38. Respondent discards the claims that appellant makes in support of his contentions that the allegations against him are erroneous. Respondent considers the documentation provided by appellant as self-serving evidence, representing his own interpretation of the facts without constituting valid objective evidence.

39. Respondent denies that the EPMS procedure was vitiated. It notes that the changes in the programme were agreed with appellant's line manager and implemented by HR, and that the Chief of Branch was a valid registered countersigner. It also contests that this kind of procedural irregularity could have influenced the content of the contested decision.

40. Respondent highlights that in accordance with Article 5.5.3 of the CPR, the HONB is not obliged to offer a further definite duration contract to a staff member. It is his prerogative to decide to do so or not. However, if a staff member is offered a further contract, two cumulative conditions apply: 1) the staff member must have "satisfactory performance"; and 2) the offer must be in the "interests of the service".

41. Respondent explains that the two conditions are not necessarily related or similar: a staff member may have satisfactory performance assessments while his behaviour is inappropriate and unprofessional by being openly hostile to his leadership, thereby disturbing the service. Respondent notes that this is what happened with appellant; it is not denied that he was praised for his work, but towards the last half of 2018 his behaviour was inappropriate and unprofessional. Respondent states that due to the sensitive context within which NSPA operates in Afghanistan, managers must ensure that projects are executed smoothly and efficiently, as lives may depend on it. A single individual obstructing efforts and generating opposition may have dramatic consequences. Appellant's hierarchy lost confidence in him, in his performance as a manager and in his ability to represent the interests of the Agency. Hence respondent argues that the allegations concerning his performance are irrelevant and do not support his argument that the GM's decision was made in a manifest error of assessment.

42. Respondent elaborates on the events reported by appellant. It annexes testimonies of the inappropriate and injurious behaviour and contends that appellant was particularly "obsessed" and interpreted random events (such as the alcohol search on the premises) as believing that people were plotting against him. It stresses that irrelevant and unsupported allegations are still being made in his pleadings before the present Tribunal, thus demonstrating that the relationship between appellant and his line of command has been irreversibly damaged by his own actions. It further reports that appellant was showing hostility and was reluctant to share information with his successor. Respondent further notes that if appellant identified irregularities, he chose not to have recourse to the existing procedures for reporting misconduct, fraud or harassment.

43. Respondent therefore concludes that the decision not to renew his contract was justified by valid reasons which were supported by objective, tangible evidence.

44. Finally, respondent considers unfounded appellant's allegations that the decision not to renew his contract was the result of a misuse of power. It argues that appellant created a story from random facts from which he became persuaded that he's a victim of a scheme, without supporting the facts with any valid evidence.

45. Respondent advances that the request for an expedited hearing is not justified by the procedural calendar, given the unlikelihood of arranging a hearing before the expiry of the contract.

46. Respondent requests that the Tribunal reject all appellant's claims. Alternatively, it requests that Article 6.9.2 of Annex IX to the CPR be applied and the amount of compensation to be paid in lieu of his reinstatement be determined. Respondent notes that appellant did not claim damages, and requests that, should the Tribunal annul the contested decision, the parties be invited to submit further written observations on the *quantum* of damages.

D. Considerations and conclusions

47. First of all, the Tribunal must clarify that although appellant requested an expedited hearing, the reasons given to justify the application of Article 6.6.4 of Annex IX of the CPR precluded such a procedural measure from serving to achieve the aim that is envisaged in the mentioned rule, namely to avoid irreparable harm. Appellant argued that his contract was coming to an end on 31 July 2019 and that the uncertainty of this procedure placed him in an unbearable position. However, regardless of the decisions this Tribunal could have made in order to fulfil this expectation of an advance of the deadlines, the end of the contract could not have been avoided in view of the narrow time from when the appeal was lodged. Lastly, the Tribunal also points out that, inconsistent with this plea for an expedited hearing, on 16 July 2019 appellant requested an extension of the deadline.

48. The main issue to be addressed is that of the expiration of appellant's contract and the Organization's decision not to renew it. In this regard, Article 5.5.3 of the CPR provides that the Head of the NATO body "may" offer the renewal of a definite contract if it is "in the interests of the service". From this it follows that the Organization has wide discretion to decide whether to renew it or not, and that the renewal of such a contract must be decided on a case-by-case basis, based on the assessment of the needs and interests of the Organization made by the hierarchy (see AT Judgment of 12 November 2014, Case no. 2014/1011). Consequently, the respondent's decision is within its discretionary powers, provided that decision was taken in accordance with its policies and not tainted with any abuse of authority.

49. Without departing from these premises, the Tribunal has underlined in numerous previous cases 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. Moreover, the lack of a minimum explanation could jeopardize the concerned agent's right to a proper judicial review.

50. In the current case it is clear from the appeal itself that the Organization provided appellant with a wide variety of explanations, removing potential defects on this behalf. Furthermore, appellant presents himself as well informed, and the appeal and the hearing showed that he disagrees in detail with the bulk of the factual elements that the defendant put on the table during the administrative procedure.

52. As a matter of fact, the Tribunal notices that respondent went very, not to say too, far in bringing up past events and making assessments that unnecessarily called appellant's personal and professional skills into question. The balance between the statement of reasons for non-renewal of the contract and the care for the staff member's dignity should have been carefully preserved once the Organization had decided not to

order disciplinary action.

53. Since no such disciplinary situation was at stake, the critical comments on events that might have occurred before the non-renewal decision shall be set aside by the Tribunal. In this respect, even though the Organization took an inconsistent position by incidentally pointing out appellant's personal and behavioural circumstances, the fairness of the challenged decision offers no doubt from the point of view of the extent of its powers. They permit non-renewal of the contract on the above-mentioned basis, regardless of the perception and expectations of appellant's performance up to the expiry date of the contract. There was no need to make reference to such considerations and, therefore, once the debate on the specific aspects that were raised is eliminated, the decision must be upheld.

54. Finally, appellant alleges some points related to potential formal defects. The first refers to a lack of a hearing prior to the decision. However, this allegation is much more related to the facts that emerged as one of the possible backgrounds of the decision, which have been addressed previously. It is necessary to limit this judgment to a strict examination of the termination of the contract due to its time limits. Therefore, from that perspective it cannot be said that the appellant was deprived of any right to be informed and heard. On the contrary, he was allowed to interact with the respondent sufficiently prior to this appeal.

55. The appeal also raises the question of the lack of convening of a Complaints Committee (CC). The Tribunal has declared that the right of the staff member to request submission of his/her claim to a CC gives no margin of discretion to the HONB in convening the CC. Hence, if such a request is made, the HONB must comply with it (see NATO Administrative Tribunal Judgments in Case No. 982 of 8 November 2013 and Case No. 2015/1068 of 19 September 2016). However, whenever the contested decision has been taken by the HONB himself, and consequently appellant can lodge the appeal directly with the Tribunal (in accordance with Article 61.3 and Appendix 3 to Annex IX to the CPR), the decision is not subject to an administrative review and the Complaints Committee procedure is not applicable (NATO Administrative Tribunal Judgment in Case No. 2016/1074 of 8 December 2016).

56. It follows from the above reasoning that the appeal must be dismissed, which renders useless any position by the Tribunal on the alternative provided by Article 6.9.2 of Annex IX to the CPR invoked by the respondent.

E. Costs

57. 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 [...].

58. 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 February 2020.

(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)(2019)0001

Order

Case No. 2018/1274

AM
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 5 March 2019

Original: English

Keywords: withdrawal.



AT(PRE-O)(2019)0001

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The President of the NATO Administrative Tribunal,

- Considering that Mr AM submitted an appeal with the NATO Administrative Tribunal (AT) on 14 September 2018, and registered under Case No. 2018/1274, against the NATO Communications and Information Agency (NCIA);
- 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 M 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 5 March 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)(2019)0002

Order

Case No. 2018/1273

**DC
Appellant**

v.

**NATO AEW&C Programme Management Agency
Respondent**

Brussels, 7 March 2019

Original: English

Keywords: withdrawal.



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The President of the NATO Administrative Tribunal,

- Considering that Mr DC submitted an appeal with the NATO Administrative Tribunal (AT) on 30 July 2018, and registered under Case No. 2018/1273, against the NATO AEW&C Programme Management Agency (NAPMA);
- Considering that the AT Registrar office received, on 4 March 2019, appellant's communication 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 7 March 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)(2019)0003

Order

Case No. 2018/1276

JM
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 18 March 2019

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 JM against the NATO Communications and Information Agency (NCIA) dated 4 December 2018, and registered on 20 December 2018 under Case No. 2018/1276;
- Considering the submission provided by respondent dated 18 February 2019;
- Considering the submission provided by appellant dated 18 March 2019;
- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear individual 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.

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 18 March 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
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AT(PRE-O)(2019)0004

Order

Joined Cases Nos. 2018/1256 and 2018/1257

**TV
Appellant**

v.

**NATO Communications and Information Agency
Respondent**

Brussels, 30 April 2019

Keywords: request for rectification of errors (Rule 28).



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The present Order is rendered by the President of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO).

A. Factual background and procedure

1. On 6 December 2018 the NATO Administrative Tribunal (hereinafter “Tribunal”) rendered its judgment in Joined Cases Nos. 2018/1256 and 2018/1257 (hereinafter “the judgment”), dismissing the appeals that Mr TV had lodged against the NATO Communications and Information Agency (NCIA).

2. It is to be recalled that by the first appeal (Case No. 2018/1256), appellant requested the annulment of respondent’s decision dismissing his request to be granted redundant status. By the second appeal (Case No. 2018/1257), appellant requested the annulment of respondent’s 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 NCIA Contract Policy framework. In this appeal, appellant contended that respondent did not “adhere” to this framework.

3. By letter dated 3 March 2019, appellant submitted, in accordance with Annex IX to the NATO Civilian Personnel Regulations (CPR) and Rule 28 of the Tribunal’s Rules of Procedure (ROP), a request for rectification of errors in the Tribunal’s judgment in Joined Cases Nos. 2018/1256 and 2018/1257.

B. The request for rectification of errors

4. By his request, appellant is seeking rectification of the following alleged errors in the judgment:

- paragraphs 3 and 36: the Tribunal wrongly states that the purpose of the appeal was to challenge respondent’s decision on non-renewal of appellant’s contract. According to appellant, the vitiation of the non-renewal of his contract is consequential to respondent’s lack of adherence to the NCIA Contract Policy framework;
- paragraphs 1-10: there is a clerical error of omission concerning appellant’s request for a statement/witness attendance in the hearing; indeed, appellant made a witness statement/witness request, which was denied by the Tribunal;
- paragraph 14: this should read “the CPMB decided to offer the appellant a new Definite Duration Contract of a duration of four months”;
- paragraph 15: replace the word “additional” with “new”;
- paragraph 16: replace the word “extension” with “new”;
- paragraphs 20 to 24, 35 and 44: there is an error of omission of reference and missing information concerning the definition of redundancy and provisional status, and NATO Clearing House rules and documentation; the omission of such information could be seen as a breach of the NATO Code of Conduct and international employment law;
- paragraphs 25 and 26: there is an omission in failing to mention appellant’s letter to respondent concerning the need to “adhere” to CPR process and timelines;

- paragraph 29: the statement in this paragraph that respondent provided several documents to appellant is erroneous; indeed, it was only after appellant's request for disclosure of relevant documentation and the lack of adequate response in this regard that appellant and the Tribunal reiterated the need for disclosure of the missing documents; it is under these conditions that respondent provided only a number of the requested documents; in addition, in the same paragraph, reference is made to the disclosure of a "classified" document without relevant analysis in this regard; according to appellant the judgment should be clear on the classification level of the concerned document;
- paragraph 33: the sentence "given the ongoing process for reducing staff in the Agency" is factually incorrect; appellant has not made any statement about the ongoing process in question;
- paragraph 38: this paragraph is missing the reference to a statement by the Chief of Staff during the pre-litigation process.
- paragraph 55: there is an error and omission in this paragraph because no indication is given that the respondent failed to adhere to the process and timelines specified in the CPR;
- paragraph 57: the last sentence in this paragraph stating that "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" is factually incorrect, contains an error concerning the "non-renewable" period and must be deleted;
- paragraph 58: there are errors and omissions of time information in this paragraph;
- paragraph 59: in this paragraph the judgment focuses on appellant's contract and not on the process in relation to appellant's second definite duration contract; in addition, this paragraph does not reflect that the contract renewal was based also on welfare factors and must be reworded in order to reflect this element;
- paragraph 60: this paragraph contains an error in that the CPR defines what is meant by redundant; in addition, this paragraph contains statements and information which as such are not available to the NATO staff member and consequently must be clarified;
- paragraph 65: there is an error and a factually incorrect statement, which means that it should be replaced with the sentence "four-month extension of his contract" with "the new definite duration contract";
- paragraph 66: there is an error in this paragraph because the issue is not related to the lack of consultation of the CPMB for examining the renewal of his first three-year contract but to the failure to follow the process associated with the appellant's second definite duration contract; and
- paragraph 67: this paragraph is incorrect and does not take into account several facts which as such could also justify the need for a rehearing of the case.

C. Considerations

5. Article 6.8.4 (a) of Annex IX of the CPR provides:

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.

6. Rule 27(7) of the Tribunal's ROP provides that "*subject to Article 6.8.4 of Annex IX, judgments are final and binding*".

7. Rule 28 of the Tribunal's ROP provides:

Clerical and arithmetical errors in the judgment may be corrected by the Tribunal on its own initiative or at the request of a party.

8. To start, with all the errors alleged, appellant has not raised any clerical or arithmetical error in the judgment within the meaning of articles 6.8.4 (a) of Annex IX to the CPR and 28 of the Tribunal's ROP which must be corrected (see for instance AT(TRI-O)(2016)0001, Cases Nos. 2014/1027 and 2015/1043, para 8).

9. In fact, appellant is contesting the considerations and statements of the Tribunal in the judgment of 6 December 2018, considering that in several parts of the said judgment the Tribunal did not interpret adequately the relevant provisions of the CPR or that the Tribunal wrongly applied the concerned provisions. On several occasions appellant quotes the alleged factual errors of the said judgment which according to him led the Tribunal to commit an error of assessment in its consideration and to misunderstand its submissions. These allegations could not be considered as clerical and arithmetical errors in the judgment which may be corrected.

10. As was the case in appellant's petition for a rehearing of Joined Cases Nos. 2018/1256 and 2018/1257, dated 18 December 2018, the Tribunal observes that by the present request appellant is continuing to criticize the Tribunal's judgement of 6 December 2018 by reiterating the same pleas and arguments developed therein, which in any event have been rejected by the Tribunal. By the present request, appellant is in fact seeking a reopening of the conclusions of the Tribunal's judgment of 6 December 2018. This is at variance with the rule that the Tribunal's judgments are final and not subject to appeal.

10. The Tribunal therefore concludes that the appellant's request for rectification of errors in the judgment of 6 December 2018 in Joined Cases Nos. 2018/1256 and 2018/1257 is unfounded and consequently his request under Article 28 of the Tribunal's ROP must be rejected.

D. Decision

FOR THESE REASONS

It is hereby ordered that:

- Appellant's request for rectification of errors of the Tribunal's judgment in Joined Cases Nos. 2018/1256 and 2018/1257 is rejected.

Done in Brussels, on 30 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
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AT(PRE-O)(2019)0005

Order

Joined Cases Nos. 2018/1256 and 2018/1257

**TV
Appellant**

v.

**NATO Communications and Information Agency
Respondent**

Brussels, 30 April 2019

Keywords: request for re-hearing (Rule 29).



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The present Order is rendered by the President of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO).

A. Factual background and procedure

1. On 6 December 2018 the NATO Administrative Tribunal (hereinafter “Tribunal”) rendered its judgment in Joined Cases Nos. 2018/1256 and 2018/1257, dismissing the appeals that Mr TV had lodged against the NATO Communications and Information Agency (NCIA).

2. It is to be recalled that by the first appeal (Case No. 2018/1256), appellant requested the annulment of respondent’s decision dismissing his request to be granted redundant status. By the second appeal (Case No. 2018/1257), appellant requested the annulment of respondent’s 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 NCIA Contract Policy framework. In this appeal, appellant contended that respondent did not “adhere” to this framework.

3. By letter dated 18 December 2018, appellant submitted, in accordance with Annex IX to the NATO Civilian Personnel Regulations (CPR) and Rule 29 of the Tribunal’s Rules of Procedure (ROP), a request for a re-hearing of Joined Cases Nos. 2018/1256 and 2018/1257 on the basis of a determining fact not known by the Tribunal. In this regard, appellant asserts that respondent exhibited clear “adverse action” against him within the meaning of Article 5.3 of Annex IX to the CPR according to which “no individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels [or] presenting any testimony to the Complaints Committee”.

B. Appellant’s arguments

4. By his request, appellant argues, first, that respondent was missing documents concerning his contractual situation in order to start the proceedings properly. Under these conditions, respondent could not initiate the proceedings in an appropriate manner because it could not have a full background of the contractual history of the staff member in question. Appellant secondly contends that when he started preliminary proceedings, he received an automated reply from respondent stating that he would receive a response in three working days; however, after a number of reminders, appellant finally received a response more than 85 days after his request.

5. In the light of the above mentioned considerations, appellant’s view is that respondent’s action is to be considered as a whole as an “adverse action” within the meaning of Article 5.3 of Annex IX to the CPR and is detrimental to him.

6. According to appellant, the above-mentioned “adverse action” reinforces respondent’s lack of adherence to the NCIA Contract Policy framework as elaborated under the CPR. The evidence of this lack of adherence to the CPR derives from the fact

that respondent joined appellant's two separate complaints during the pre-litigation process, despite this only being possible in the litigation phase. However, despite appellant's objections, respondent continued the proceedings.

7. In addition, during the pre-litigation process, respondent did not meet the time limits laid down by the CPR in relation to the establishment of the Complaints Committee and the issuing of the report in question. This vitiated the process and, given the fact that the judgment of the Tribunal is based on the findings of the report, also vitiated the judgment of 8 December 2018.

C. Considerations

8. Article 6.8.4 of Annex IX to the CPR provides:

(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.

9. Rule 27(7) of the Tribunal's ROP provides that "subject to Article 6.8.4 of Annex IX, judgments are final and binding".

10. 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.

11. 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 (AT(TRI-O)(2018)0002, Case No. 2017/1104, para 9).

12. The Tribunal observes that appellant has failed to show that the above-mentioned

requirements have been met. The Tribunal notes that all elements put forward by appellant in his letter were known by him at the time of the Tribunal's judgment.

13. The Tribunal further notes that by his petition for a re-hearing, appellant criticizes in fact the Tribunal judgement of 6 December 2018 insofar as that with this judgment the Tribunal did not develop further considerations on his contention related to the existence of an adverse action which could vitiate the whole process. In this regard, appellant submitted documentation and arguments in order to demonstrate that the respondent did not comply with the requirements provided and governing the pre-litigation process. This assumption must be rejected.

14. In addition to the fact that none of the above arguments put forward by appellant with a view to obtaining a re-hearing constitutes a new fact within the meaning of the above-mentioned provisions indicated in paragraphs 8 to 10 of the present order, the Tribunal considers that by his request appellant is in fact seeking a re-opening of the conclusions of the Tribunal's judgment of 6 December 2018. This is at variance with the rule that the Tribunal's judgments are final and not subject to appeal.

15. In any event, in paragraphs 61 and 67 respectively of the said judgment, the Tribunal stated the requisite legal standards on the basis of which the conclusions and appellant's closely connected claims developed in Joined Cases Nos. 2018/1256 and 2018/1257 – including those related to the violation of Article 5.3 of Annex IX to the CPR – must be rejected.

16. The Tribunal therefore concludes that the conditions for a re-hearing of the Joined Cases Nos. 2018/1256 and 2018/1257 have not been met and consequently his request under Article 29 of the Tribunal's ROP must be denied.

D. Decision

FOR THESE REASONS

It is hereby ordered that:

- Appellant's request for revision of the judgment in Joined Cases Nos. 2018/1256 and 2018/1257 and a re-hearing is denied.

Done in Brussels, on 30 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

AT(PRE-O)(2019)0006

Order

Joined Cases Nos. 2018/1256 and 2018/1257

**TV
Appellant**

v.

**NATO Communications and Information Agency
Respondent**

Brussels, 30 April 2019

Keywords: clarification of the operative provisions of the judgment (Rule 30).



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The present Order is rendered by the President of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO).

A. Factual background and procedure

1. On 6 December 2018 the NATO Administrative Tribunal (hereinafter “Tribunal”) rendered its judgment in Joined Cases Nos. 2018/1256 and 2018/1257 (hereinafter “the judgment”), dismissing the appeals that Mr TV had lodged against the NATO Communications and Information Agency (NCIA).

2. It is to be recalled that by the first appeal (Case No. 2018/1256), appellant requested the annulment of the respondent’s decision dismissing his request to be granted redundant status. By the second appeal (Case No. 2018/1257), appellant requested the annulment of the respondent’s 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 NCIA Contract Policy framework. In this appeal, appellant contented that respondent did not “adhere” to this framework.

3. By letter dated 4 March 2019, appellant submitted, in accordance with Annex IX to the NATO Civilian Personnel Regulations (CPR) and Rule 30 of the Tribunal’s Rules of Procedure (ROP), a request for clarification of the operative provisions of the Tribunal’s judgment in Joined Cases Nos. 2018/1256 and 2018/1257.

B. The request for clarification of the operative provisions of the judgment

4. By his request, appellant is seeking clarification of the following paragraphs of the judgment:

- paragraph 66: there is an error in this paragraph because the issue is not related to the lack of consultation of the CPMB for examining the renewal of his first three-year contract as stated by the Tribunal but to the failure to follow the process associated with the appellant’s second definite duration contract;
- paragraph 67: this paragraph is incorrect and does not take into account several facts which as such could also justify the need of a re-hearing of the joined cases; and
- paragraphs 3 and 36: the Tribunal wrongly states that the purpose of the appeal was to challenge the respondent decision on non-renewal of his contract; according to appellant, the vitiation of the non-renewal of his contract is consequential to respondent’s lack of adherence to the NCIA Contract Policy framework.

5. By his request, appellant also points out other inconsistencies in the Tribunal’s judgment:

- paragraph 14 to 16: the CPMB offered the appellant a new definite duration Contract with a specified start date and end date;
- paragraphs 20 to 24: there is an error of omission of reference and missing

information concerning, on the one hand, the definition of redundancy and provisional redundancy status and, on the other hand, the NATO Clearing House rules and documentation; the omission of such information could be seen as a breach of the NATO Code of Conduct and international employment law;

- paragraphs 25 and 26: there is an omission in failing to mention appellant's letter to respondent concerning the need to "adhere" to CPR process and timelines;

- paragraph 29: the statement in this paragraph that respondent provided several documents to appellant is erroneous; indeed, it was only after appellant's request for disclosure of relevant documentation and the lack of adequate response in this regard that appellant and the Tribunal reiterated repeated the need for disclosure of the missing documents; it was under these conditions that respondent provided only a number of the requested documents; in addition, in the same paragraph reference is made to the disclosure of a "classified" document without relevant analysis in this regard; according to appellant the judgment should be clear on the classification level of the concerned document;

- paragraph 33: the sentence "given the ongoing process for reducing staff in the Agency" is factually incorrect as appellant has not made any statement about the ongoing process in question;

- paragraph 57: the last sentence in this paragraph stating that "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" is factually incorrect, contains an error concerning the "non-renewable" period and must be deleted;

- paragraph 59: in this paragraph the judgment focuses on appellant's contract and not on the process in relation to appellant's second definite duration contract; in addition, this paragraph does not reflect that the contract renewal was based also on welfare factors, and must be reworded in order to reflect this element; and

- paragraph 60: this paragraph contains an error in that the CPR defines what is meant by redundant; in addition, this paragraph contains statements and information which as such are not available to the NATO staff member and consequently must be clarified.

C. Considerations

6. Article 6.8.4 of Annex IX of the CPR provides:

(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 ROP provides that "subject to Article 6.8.4 of Annex IX, judgments are final and binding".

8. 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. To start, with all the alleged requests appellant has not demonstrated to the requisite legal standard that the *operative provisions of the judgment appear obscure, incomplete or inconsistent* within the meaning of articles 6.8.4 (a) of Annex IX to the CPR and 30 of the Tribunal's ROP and consequently that the provisions in question must be clarified (see for instance AT(TRI-O)(2016)0001, Cases Nos. 2014/1027 and 2015/1043, para 8).

9. In fact, appellant is contesting the considerations and statements of the Tribunal in the judgment of 6 December 2018, considering that in several parts of the said judgment the Tribunal did not interpret adequately the relevant provisions of the CPR or that the Tribunal wrongly applied the concerned provisions. On several occasions, appellant quotes alleged factual errors of the said judgment which according to him led the Tribunal to commit an error of assessment in its consideration and to misunderstand its submissions.

10. As was the case with appellant's petition for a rehearing of Joined Cases Nos. 2018/1256 and 2018/1257, dated 18 December 2018, and the request for rectification of errors of the same cases dated 3 March 2019, the Tribunal observes that by the present request appellant is again continuing to contest the considerations developed by the Tribunal in the judgment of 6 December 2018. By a list of alleged facts, appellant is discussing the statements of the Tribunal in this judgment in order to reopen the procedure and is again submitting contentions, which are in any case in the record of the proceedings. The Tribunal is of the view that appellant is, in fact again, seeking none other than a reopening 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.

11. Furthermore the Tribunal recalls, as it clearly stated in the judgment of 6 December 2018 (paragraph 64), that despite the development of appellant's claims in an inconsistent and contradictory manner, the Tribunal interpreted its submissions and contentions with an open mind in a spirit of goodwill towards and examine the substance of his submission. Appellant, however, is continuing to contest the considerations of the

Tribunal on the basis of which his appeal was declared admissible by a set of three successive requests contesting the interpretation of the Tribunal and requesting abusively through the same unfounded and repetitive arguments to revise the judgment of 6 December 2018. To this effect, the Tribunal underlines that in the present request appellant is reproducing the same arguments which were developed as such under his request based on Article 28 of the ROP of the Tribunal and submitted to the Tribunal one day before (3 March 2019). These kinds of successive actions, combined with his petition for revision of the same judgment dated 18 December 2018, are demonstrative of an abusive attitude which goes against the good administration of justice.

12. Taking again into account that appellant is not being assisted by a lawyer and with regard to the duty of care towards him, the Tribunal considers only that appellant has failed to identify “in which respect the operative provisions of the judgment appear obscure, incomplete or inconsistent”, and consequently his request must be declared inadmissible in accordance with Article 30.2 of the Tribunal ROP.

D. Decision

FOR THESE REASONS

It is hereby ordered that:

- Appellant’s request for clarification of the Tribunal’s judgment in Joined Cases Nos. 2018/1256 and 2018/1257 must be rejected as inadmissible.

Done in Brussels, on 30 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)(2019)0007

Order

Case No. 2019/1284 and Case No. 2019/1285

PH
Appellant

v.

NATO International Staff
Respondent

Brussels, 28 June 2019

Original: English

Keywords: joining cases.



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The President of the NATO Administrative Tribunal,

- Considering that Mrs PH submitted an appeal with the NATO Administrative Tribunal (AT) on 17 May 2019 against the NATO International Staff, which was registered under Case No. 2019/1284;
- Considering that Mrs PH submitted a second appeal with the AT on 19 June 2019, against the IS, which was registered under Case No. 2019/1285;
- 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

- Case No. 2019/1284 and Case No. 2019/1285 are joined.
- Both cases shall be heard once the written procedure in Case No. 2019/1285 is completed.

Done in Brussels, on 28 June 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2019)0008

Order

Case No. 2019/1288

**AW
Appellant**

v.

**NATO International Staff
Respondent**

Brussels, 4 September 2019

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 as Amendment 32 to the CPR;
- Considering the appeal lodged by Mr AW against the NATO International Staff dated 5 July 2019, and registered on 10 July 2019 under Case No. 2019/1288;
- Considering the submission provided by respondent dated 22 August 2019;
- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear individual 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/she may instruct the Registrar to take no further action. Such an instruction by the President shall suspend all procedural time limits.
 2. After notifying the appellant and considering any additional written views of the appellant, and if the Tribunal considers that the appeal is clearly inadmissible, outside its jurisdiction, or devoid of merit, the Tribunal shall dismiss the appeal, stating the grounds therefor.
 3. If the Tribunal considers the appeal admissible, within its jurisdiction, or not manifestly devoid of merit, the parties will be notified and the case will proceed in the normal way.

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, which should reach the Tribunal's Registry no later than 16 September 2019.
- 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 4 September 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2019)0009

Order

Case No. 2018/1275

JM
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 17 September 2019

Original: English

Keywords: conduct of the proceedings.

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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 as Amendment 32 to the CPR;
- Considering the appeal lodged by Mr JM against the NATO Communications and Information Agency (NCIA) dated 4 December 2018, and registered on 17 December 2018 under Case No. 2018/1275;
- Considering the submission of respondent's answer, appellant's reply and respondent's rejoinder;
- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear individual disputes concerning the legality of a decision taken by the Head of a NATO body;
- Having regard to the excessive voluminous documentation in the file and the need of an expeditious conduct of the judicial proceedings

DECIDES

- Parties shall provide the Tribunal, before **20 September 2019 COB**, a schedule listing by annexes and page numbers, the material in the annexes which are regarded as most important to the defence of the case.

Done in Brussels, on 17 September 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2019)0010

Order

Cases Nos 2019/1284-1285 and Case No. 2019/1291

PH
Appellant

v.

NATO International Staff
Respondent

Brussels, 7 October 2019

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that Mrs PH submitted a first appeal with the NATO Administrative Tribunal (AT) against the NATO International Staff, on 17 May 2019, registered under Case No. 2019/1284, and a second appeal, on 19 June 2019, registered under Case No. 2019/1285;
- Taking into consideration Order AT(PRE-O)(2019)0008 rendered by the Tribunal on 28 June 2019, joining the two above mentioned appeals;
- Considering that Mrs PH submitted a third appeal, on 20 September 2019, registered under Case No. 2019/1291;
- Having regard to Rule 13 of the Rules of procedure of the AT, which provides:

The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Cases Nos 2019/1284-1285 and Case No. 2019/1291 are joined.
- Both cases shall be heard once the written procedure in Case No. 2019/1291 is completed.

Done in Brussels, on 7 October 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2019)0011

Order

Case No. 2019/1292

**CP
Appellant**

v.

**NATO Support and Procurement Agency
Respondent**

Brussels, 6 December 2019

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 as Amendment 32 to the CPR;
- Considering the appeal lodged by Mrs CP against the NATO Support and Procurement Agency (NSPA) dated 2 September 2019, and registered on 9 October 2019 under Case No. 2019/1292;
- Considering the submission provided by respondent dated 25 November 2019;
- Considering the provisions of the CPR which foresee that the Tribunal is competent to hear individual 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/she may instruct the Registrar to take no further action. Such an instruction by the President shall suspend all procedural time limits.
 2. After notifying the parties and considering any additional written views of the appellant, and if the Tribunal considers that the appeal is clearly inadmissible, outside its jurisdiction, or devoid of merit, the Tribunal shall dismiss the appeal, stating the grounds therefor.
 3. If the Tribunal considers the appeal admissible, within its jurisdiction, or not manifestly devoid of merit, the parties will be notified and the case will proceed in the normal way.

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, which should reach the Tribunal's Registry no later than 16 January 2020.
- 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 6 December 2019.

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

Certified by
the Registrar
(signed) Laura Maglia



ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2019)0001

Order

Case No. 2017/1245

IM

Appellant

v.

**NATO Communications and Information Agency
Respondent**

Brussels, 4 September 2019

Original: French

Keywords: petition for a re-hearing.

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This Order 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 20 June 2019.

A. Proceedings

1. On 8 April 2019, the NATO Administrative Tribunal (hereinafter the “Tribunal”) rendered a judgment in Case No. 2017/1245 on the appeal submitted by Mrs IM. The Tribunal dismissed her appeal seeking annulment of the decision of 22 March 2017 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. On 21 May 2019, the appellant wrote to the Tribunal to petition for a re-hearing of this judgment on the basis of Article 6.8.4 (b) of Annex IX to the Civilian Personnel Regulations (CPR).
3. In this letter, the appellant challenges the applicability of Articles 2 and 4 of Annex IX on the administrative review and appeals procedures to the judgment.
4. In particular, the appellant stresses that, according to Article 1.6 of Annex IX, submitting an appeal is merely an option, and concludes from this that administrative reviews are possible, including for Case no. 2017/1245 submitted to the Tribunal. She also cites the assurances she received from the NCIA’s Head of Human Resources that she could make a request for administrative review.

B. Considerations and conclusions

5. Article 6.8.4 of Annex IX to the CPR states that “The judgments of the Tribunal shall be final and not subject to any type of appeal”, with the exception of appeals to rectify a clerical or arithmetical mistake, as provided in Article 6.8.4 a), and re-hearings, as provided in Article 6.8.4 b), “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”.
6. In its judgment no. 2017/1245 dated 8 April 2019, the Tribunal ruled that:
 24. Under Article 6.3.1 of Annex IX to 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. 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.

7. Appellant challenges the judgment on the basis of Article 6.8.4 b) of Annex IX to the CPR. Although she cites this article, the appellant's argument questions the Tribunal's legal assessment of the facts, but does not claim that the Tribunal was unaware of certain elements when it rendered its judgment.

8. The argument for this petition for a re-hearing is based on two points. The first has to do with the interpretation of Article 2.1 of Annex IX, on the possible scope of the option to submit an appeal. But this is not a fact that the Tribunal would have been unaware of when it rendered its judgment on 8 April 2019. The petition is actually challenging a legal interpretation of a provision of the CPR.

9. The second point has to do with an interpretation of the rule that the NCIA's Head of Human Resources is said to have given. But the appellant does not provide any evidence of his verbal statement, which was, in any case, already noted in the case file.

10. As none of the conditions established in Article 6.8.4 of Annex IX to the CPR for a petition for re-hearing have been met, the petition must be dismissed.

C. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The petition is dismissed.

Done in Brussels on 4 September 2019.

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

Certified by
the Registrar
(signed) Laura Maglia