JUDGMENTS and ORDERS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2020

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2020

27th session (24 March 2020)

AT-J(2020)0003 Case No. 2019/1292	P	*v.*	NSPA

28th session (28-29 September 2020)

AT-J(2020)0004 Case No. 2020/1294-1296	B *et al.*	*v.*	NATO IS
AT-J(2020)0005 Case No. 2019/1287	L	*v.*	NATO IS
AT-J(2020)0006 Case No. 2020/1304	L	*v.*	NATO IS
AT-J(2020)0007 Case No. 2020/1297	T	*v.*	NCIA
AT-J(2020)0008 Case No. 2020/1293	W	*v.*	NSPA

29th session (14-15 December 2020)

AT-J(2021)0001 Case No. 2020/1305	D	v.	SACT
AT-J(2021)0002 Case No. 2019/1289-2020/1301	G	v.	NAGSMA
AT-J(2021)0003 Case No. 2020/1300	E	v.	NATO IS
AT-J(2021)0004 Case No. 2019/1284,1285,1291	H	v.	NATO IS

Orders of the NATO Administrative Tribunal

2020

AT(PRE-O)(2020)0001	Case No. 2020/1294,1295,1296	B *et al*.	*v.*	NATO IS	
AT(PRE-O)(2020)0002	Case No. 2019/1290-2020/1298	W	*v.*	NATO IS	
AT(PRE-O)(2020)0003	Case No. 2020/1299	C	*v.*	NATO IS	
AT(PRE-O)(2020)0004	Cases Nos 2020/1312,1313,1314	A,C,K	*v.*	NCIA	
AT(PRE-O)(2020)0005	Cases Nos 2020/1306,1316	D	*v.*	NSPA	
AT(TRI-O)(2020)0001	Case No. 2020/1305	D	*v*.	SACT	

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

6 May 2020 AT-J(2020)0003

Judgment

Case No. 2019/1292

CP

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 5 May 2020

Original: French

Keywords: summary dismissal; exhaustion of pre-litigation procedures.

(This page is left blank intentionally)

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, Ms María-Lourdes Arastey-Sahún and Mr Christos Vassilopoulos, judges, having regard to the written procedure and having deliberated on the matter at the hearing on 4 May 2020 following the Tribunal's order AT(PRE-O)(2019)0001.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Ms CP ("Ms P") dated 2 September 2019 and registered on 9 October 2019 (Case No. 2019/1292). The appellant is seeking as primary relief an internal audit of the complaints and appeals she has filed against the NATO Support and Procurement Agency ("the NSPA" or "the Agency") since May 2010.

2. The respondent's answer, dated 25 November 2019, was registered on 3 December 2019.

3. On 6 December 2019, the Tribunal's President issued Order AT(PRE-O)(2019)0001 on the basis of Rule 10, paragraph 1 of the Tribunal's Rules of Procedure. On 16 January 2020, the appellant presented her additional written views.

4. In accordance with the provisions of Rule 10.2 of its Rules of Procedure, the Tribunal deliberated on the matter on 4 May 2020.

B. Factual background of the case

5. The material facts may be summarized as follows.

6. Ms P, who had worked at the NATO Maintenance and Supply Agency (NAMSA) as a logistics expert since 1984, was put on sick leave on 3 May 2010 then on extended sick leave from 3 August 2010. After having Ms P undergo a medical examination, on 6 May 2011 the insurance company, Vanbreda International, informed NAMSA that Ms P "should be able to resume her professional activities on 16 May 2011". On 11 May 2011, the Head of the NAMSA Human Resources Division asked Ms P to resume working on 16 May 2011. In view of the short notice given, Ms P asked to take her remaining annual leave and not start working again until 14 June 2011, and NAMSA agreed to this. Having received the Head of NAMSA Human Resources Division's request that she return to work in the next few days, in a letter dated 9 June 2011, Ms P lodged a complaint and requested the convening of a Complaints Committee, and also requested implementation of the appeals procedure laid down by the agreement between Vanbreda International and NATO. NAMSA did not grant either of her two requests, and continued the procedure in course, decreasing Ms P's emoluments as of 10 June 2011, and then terminating her contract as of 30 June 2011, by a decision taken on 28 June 2011 and notified to her on 5 July 2011.

7. The NATO Appeals Board, to which Ms P had referred her appeal of the legality of this decision terminating her contract, decided to cancel the decision terminating Ms

P's contract, order her reinstatement in her position, and pay compensation of €5,000 for non-material damage (see Appeals Board Decision No. 840-845-849 of 1 June 2012).

8. In response to this Appeals Board decision, the NSPA General Manager sent various letters to Ms P indicating the conditions under which he was prepared to apply the Appeals Board's decision. Late in August 2012, the NSPA General Manager received a new medical certificate stating that Ms P was unfit for work as she had a 100% disability through 31 August 2012 and a 50% disability "for approximately one month" thereafter. However, Ms P did not come to work on 3 September 2012, the first working day when she was fit to work 50%. Consequently, the NSPA General Manager decided on 3 September 2012 to terminate Ms P's contract effective immediately, on the basis of Article 45.7.3 of the Civilian Personnel Regulations (CPR). On 20 October 2012, Ms P filed an appeal with the Appeals Board requesting the annulment of this decision. The appeal was registered on 31 October 2012 (Case No. 883). NATO having established the Tribunal on 1 July 2013, the cases pending before the Appeals Board on 30 June 2013 were transferred to the Tribunal.

9. In its judgment of 14 November 2013, the Tribunal decided that:

> The decision of 3 September 2012, whereby the NSPA General Manager decided to terminate Ms P's contract, is annulled insofar as it was effective on 3 September and not 1 October 2012.
> The NSPA shall pay Ms P, in reparation for the material damage suffered, compensation equal to the difference between the emoluments she would have received from 2 May to 1 October 2012 in her position and any income of a professional nature that she earned during her illegal dismissal, plus interest at the Central European Bank rate.
> The NSPA shall pay Ms P the sum of €10,000 in compensation for the non-material damage suffered by her.
> […]

10. On 2 September 2019, the appellant filed the present appeal.

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

(i) The appellant's contentions

11. The appellant asks the Tribunal to order an internal audit within NATO of the complaints/appeals and to verify that procedures were respected in relation to the proceedings she has initiated against the NSPA since May 2010, in support of the following requests:
- as primary relief: review of the decision handed down by Vanbreda International's Arbitration Board on 20 November 2012;
- in the alternative:
    - a new request for an invalidity pension under the Allianz medical coverage;
    - a request for review and recognition of a permanent partial disability following the incident of 16 May 1997;
    - an orphan's pension for her son;

- compensation for the nine-year ordeal she has been through and that has affected her and her family physically, psychologically, emotionally, socially and financially; and
- the appointment of a mediator and executor at NATO Headquarters to settle the decisions of the NATO Administrative Tribunal and protect her from any attempted harassment by the NSPA.

12. The appellant also requests administrative and legal support from NATO Headquarters to organize her pension and obtain the various reimbursements, given the harassment by the NSPA and her health problems.

13. In her written submissions, the appellant states the main facts and events of her dispute with the Agency over the years. She refers to her past and current medical state, the harassment endured during her employment, the NSPA's general attitude towards her, the fact that the Agency did not grant her requests (including the unsuccessful request to have her 1997 car accident treated as an occupational accident), the medical arbitration and the implementation of the judgments by the Appeals Board and this Tribunal.

14. At annex to the appeal, the appellant provides copies of the registered letters, dated 9 April 2016, that she sent respectively to the NSPA General Manager, the NATO Invalidity Board, and Allianz Worldwide Care. In these letters, appellant requests the review of the arbitration of 20 November 2012, and makes a new request for an invalidity pension and the review of the permanent partial disability attributed following the accident of 16 May 1997.

15. The appellant emphasizes the Agency's silence in respect of this letter in particular.

16. The appellant has attached to the appeal a copy of a medical certificate dated 9 July 2019, prepared at her request by a psychiatric and psychotherapeutic clinic, which reads as follows:

> Ms CP, born on 12/08/1960, hereby appeals to the NATO Administrative Tribunal. She has been treated by Dr PF since December 2013 and has been totally incapacitated for work since May 2010. Her psychological condition is quite fragile and vulnerable, and has been examined and analysed by various specialists since May 2010. Her incapacity explains the delay in dealing with her affairs with NATO.

17. The appellant considers her request for an audit by NATO to be an attempt to bring equity and transparency to her dispute and restore her rights and her dignity.

(ii) The respondent's contentions

18. The respondent states first that the Tribunal is not competent to rule on the appellant's request insofar as the request is not an appeal against the decision made by the NSPA General Manager affecting her working or employment conditions, in line with the provisions of the CPR.

19. The respondent underlines that only requests directed against a decision by a Head of NATO Body are admissible. In the present case, the appellant requests, as primary relief, that the Tribunal order "an internal audit within NATO of the complaints/appeals and to verify that procedures were respected in relation to the proceedings she has initiated against the NSPA since May 2010". The respondent notes that Ms P neither contests the validity of a decision made by the NSPA General Manager nor asks for it to be annulled, but instead requests an injunction.

20. The respondent observes that the aim of this request for an audit, presented as primary relief, is not to support requests seeking the annulment of a decision made by the NSPA General Manager. On the contrary, these requests relate to a decision made following arbitration organized by a health insurance company and to requests for injunctions specifically to recognize a certain level of permanent partial disability, and grant an invalidity pension and an orphan's pension for her son.

21. The respondent comments that the most the appellant could do would be to attempt to cite the NSPA General Manager's silence in response to her letter dated 9 April 2016.

22. The respondent explains that the General Manager did not respond to the letter as it clearly lacked merit, and he was not competent to fulfil the request.

23. In this regard, the respondent recalls the provisions of Article 6.3.1 of Annex IX to the CPR and observes that it could be considered that an implicit rejection decision by the General Manager arose on 16 May 2016, at the end of the 30-day period from the date of receipt of the letter (14 April 2016).

24. The appeal would therefore clearly be inadmissible *ratione temporis* because it was lodged long after the deadline of 60 days set by Annex IX to the CPR (*i.e*. three years, one month and 23 days after the deadline).

25. The respondent also submits that, in the unlikely event that the Tribunal should declare itself competent and acknowledge the admissibility of the request, the request should nonetheless be dismissed as being devoid of merit, since it has no legal or factual basis pursuant to the provisions required by Article 9 of Appendix 1 to Annex IX to the CPR.

26. The respondent highlights that the statements relating to the appellant's medical state or distress are not sufficient on their own to identify the legal basis for the request and, in any case, are not supported by evidence proving them to be real.

27. For the above reasons, the respondent asks the Tribunal to reject the appeal on the basis of Article 10 of Appendix 1 to Annex IX to the CPR.

D. Considerations and conclusions

28. As the Tribunal has consistently recalled in its judgments, in January 2013 the Council adopted a new internal dispute resolution system, which entered into force on 1

July 2013 and was amended in 2019, and which is presented in Chapter XIV and Annex IX of the CPR. The new system places great importance on the pre-litigation procedures. It provides for a comprehensive administrative review procedure, greater use of mediation and an improved appeals process. This reform has meant that NATO managers and, ultimately, Heads of NATO Bodies have greater responsibility and must now address and, whenever possible, resolve disputes rather than resorting to an adversarial procedure before the Tribunal.

29. The system has a number of steps that all complainants must follow before they may submit an appeal. Under Article 61.1 of the CPR:

> Staff members, consultants, temporary staff or retired NATO staff, who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment, including their contracts, NATO regulations governing personnel and other terms of appointment, and wish to challenge such decision, shall exhaust administrative review as prescribed in Article 2 of Annex IX to these Regulations.

30. Article 6.3.1 of Annex IX to the CPR provides that a request submitted to the Tribunal is only admissible if the appellant has first exhausted all available channels for submitting complaints under this Annex. The only circumstances in which this condition does not apply, either fully or partially, are if the disputed decision was made directly by the NATO Head of Body or if the parties have agreed to appeal directly to the Tribunal. Neither party may unilaterally dispense with all the pre-litigation procedures.

Article 6.3.1 of Annex IX to the CPR stipulates:

> Except with respect to decisions for which there are no channels for submitting complaint or where an appeal was submitted directly to the Administrative Tribunal as provided in article 62.2 of the Civilian Personnel Regulations and in Articles 1.4 or 4.4 of this Annex, the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex. In cases where channels for submitting complaints are available and have been pursued, the appeal must be submitted within 60 days of the latest of the following to occur:
> (a) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will not be granted; or
> (b) the appellant has been notified by the Head of the NATO body concerned that the relief sought or recommended will be granted, but such relief has not been granted within 30 days after receipt of such notice; or
> (c) the Head of the NATO body concerned has failed to notify the staff member or a member of the retired NATO staff within 45 days of receiving the report and recommendation of the Complaints Committee in the matter, which shall be considered as equivalent to a decision that the relief sought will not be granted; or
> (d) the Head of the NATO body did not take any action towards the complainant within 30 days following receipt of a complaint, which shall be considered as equivalent to a decision that the relief sought will not be granted.

Article 6.3.2 provides:

> With respect to appeals against decision for which there are no channels for submitting complaints, or where the appellant and the Head of the NATO body have agreed to submit

> the matter directly to the Tribunal, the appeal must be submitted within 60 days of the notification of the decision to the appellant or agreement to submit the matter to the Tribunal.

31. It follows from the foregoing that the above-mentioned provisions subordinate the admissibility of an appeal submitted to the Tribunal to the condition of having properly gone through the prior administrative procedure set out in these articles.

32. The way in which this procedure was gone through in the present case shows a lack of awareness of, or respect for, the dispute resolution system that has now been in force since 2013.

33. The appellant not having previously or in a timely manner undertaken the necessary pre-litigation procedures, nor having any information provided for by the CPR that would allow her to submit the appeal directly to the Tribunal, the Tribunal, in accordance with Rule 10.2 of its Rules of Procedure, can only conclude that the appeal is clearly inadmissible on the grounds that it does not meet the requirements of Article 61.1 of the CPR. It must be summarily dismissed.

E. Costs

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

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

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

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is summarily dismissed.

Done in Brussels, 5 May 2020.

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

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

26 October 2020 AT-J(2020)0004

Judgment

Joined Cases No. 2020/1294-1296

LB, GP, and RH
Appellants

v.

NATO International Staff
Respondent

Brussels, 23 October 2020

Original: English

Keywords: financing of medical insurance scheme.

(This page is left blank intentionally)

This judgment is rendered by a full Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún, Mr John Crook, Mr Laurent Touvet, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 29 September 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 23 December 2019, and registered on 2 January 2020, as Case No. 2020/1294, by Mr LB, against the NATO International Staff (IS). On the same day a similar appeal was lodged by Mr GP, which was also registered on 2 January 2020 as Case No. 2020/1295. On 27 January 2020 a similar appeal was lodged by Mr RH, which was registered on 28 January 2020 as Case No. 2020/1296. The Appellants challenge administrative decisions implementing the decision of the NATO Council (NAC) dated 2 February 2016 to amend the footnote to Article 51.2 of the NATO Civilian Personnel Regulations (CPR). The footnote concerns the financing of the group medical insurance scheme and, in particular, the payment of contributions by certain long-serving and retired staff.

2. By Order AT(PRE-O)(2020)0001 dated 12 February 2020 the President of the Tribunal joined these three cases.

3. The respondent's answer, dated 16 March 2020, was registered on 31 March 2020, the appellants' reply, dated 7 May 2020 was registered on 11 May 2020. The respondent's rejoinder, dated 12 June 2020, was registered on 22 June 2020.

4. On 11 June 2020, the Tribunal received an *amicus curiae* brief from Mr WH, Chairman of the Confederation of NATO Civilian Staff Committees (CNCSC) submitted on behalf of the CNCSC. The brief was transmitted to the President and members of the Tribunal as well as to the parties. The appellants submitted their observations thereon on 15 July 2020.

5. Having regard to Article 6.1.4 of Annex IX to the CPR, the President decided that the cases be heard by a full Panel, consisting of the President and the four members of the Tribunal.

6. In view of the prevailing public health situation the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 29 September 2020 utilizing facilities provided by NATO Headquarters. It heard arguments by the representatives of the appellants and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

8. It is useful to recall that in 2017 a number of staff and retired staff lodged appeals

against the 2 February 2016 decision by the NAC to amend the footnote to Article 51.2 of the NATO Civilian Personnel Regulations (CPR). On 30 August 2018, the Tribunal in Judgments in Cases Nos. 2017/1114-1124, and 2017/1127-1242 held that the appeals were inadmissible since none of the appellants had been directly and adversely affected by a decision implementing the change to the CPR. The Tribunal noted, however, the need for staff and retired staff to obtain legal certainty, further noting that the inadmissibility conclusion did not prevent them from challenging the lawfulness of the amendment to the footnote in future challenges of implementing decisions applying it to them.

9. Some further background is necessary to provide the context for the appellants' claims. The undisputed evidence shows that before the appellants joined NATO, the Organization introduced in 1967 premium-free lifelong medical insurance coverage for retirees and their dependents. In order to keep this scheme financially sustainable in the face of changing circumstances, various amendments and conditions were subsequently introduced.

10. Thus, for example, in 1974, it was decided that to qualify for free lifelong medical coverage for retirees and their dependents, staff recruited after 1 May 1974 who retired at age 60 or above must have been employed for at least five years. Those retiring between the ages of 55 and 60 must have been employed for at least ten years. Active staff had to pay 1/3 of the total premium. Qualified retirees were not required to contribute.

11. Further amendments were made in 1988. The qualifying period of employment for those retiring at age 60 and above was raised from five to ten years, and the premium was indexed and rose from 0.906 % of gross salary to 2.188%.

12. A bridging cover was introduced in 1995. Staff members retiring between the ages of 55 and 60 had to pay a bridging premium until age 65, after which they were entitled to free coverage. This premium was 2.591% of a (theoretical) pension. Retirees aged between 55 and 65 who were recruited before 1 January 1988 were entitled to free coverage if they had been employed for at least five years. The qualifying period was set at ten years (consecutive or otherwise) for staff members recruited between 1 January 1988 and 1 January 1995, and at ten consecutive years for those recruited after 1 January 1995.

13. Medical coverage for retirees was initially underwritten by a private insurance company. When the insurer was no longer prepared to underwrite the scheme for persons over the age of 65, the Organization created in 2001 the Retirees' Medical Claims Fund (RMCF or Fund). Under this new system, staff aged 55 or over who left NATO after a minimum of ten years of uninterrupted service were permanently entitled to reimbursement of medical expenses for themselves and their dependents, but subject to paying a premium. However, certain long-serving staff members were not required to pay after the age of 65, as provided in a footnote added to CPR Article 51.2:

> Provided they were recruited before 1st January 2001, staff members who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.

14. Under the new system introduced in 2001, the premium paid to the RMCF after the age of 65 was set at 4.5% of gross salary for active staff and at 3% for retirees recruited before 1 January 2001 who did not have 25 years of contributions. Staff or retirees paid one third of the applicable premium, with the remaining two-thirds paid by the Organization.

15. Also as part of the 2001 changes, a Supervisory Committee was set up to oversee management of the RMCF. This committee is composed of representatives from NATO administrations, active staff, and retired staff.

16. There was a further amendment in 2006. The premium for the bridging cover (for retirees between the ages of 55 and 65) was increased from 2.591% of theoretical pension to 3% of last salary. This premium was again increased in 2013, from 3% to 5%.

17. In 2009 the Secretary General informed the NAC that the Fund held €103 million at the end of 2008. He added that a 2008 actuarial study conducted on the initiative of the Supervisory Committee projected that the RMCF could be depleted between 2030 and 2047, depending on different assumptions regarding the return on assets (3, 5, or 8%). The Secretary General undertook to engage experts to estimate the minimum financial injection necessary to make the Fund sustainable.

18. In 2013, the NATO International Board of Auditors (IBAN) noted that the Fund's assets were estimated to be depleted between 2032 and 2051 based on an actuarial study performed in 2010. In 2016, an update of the IBAN's 2013 study concluded that the RMCF would be depleted somewhere between 2038 and 2043, and that remedial measures were needed to make the RMCF sustainable. The IBAN recommended in particular that the International Staff provide an estimate of the minimum financial injection necessary. The Board also recommended that the IS provide all necessary information and undertake any remedial actions to limit the level of obligations.

19. Several scenarios for strengthening the RMCF were then discussed in the Supervisory Committee and in the Joint Consultative Board, the permanent body set up under CPR Annex XI for consultation among the Administrations, the Confederation of NATO Civilian Staff Committees, and the Confederation of NATO Retired Civilian Staff Associations.

20. Following this process of discussion and consultation, the amendment to the footnote to CPR Article 51.2 mentioned above was proposed to the NAC by the Deputy Secretary General. As the *amicus curiae* brief records, and as the appellants do not dispute, major elements of the proposed amendment reflected proposals by the active and retired staff representatives who endorsed the proposal as a whole. On 2 February 2016 the NAC adopted the amendment, which was issued on 8 February 2016 as Amendment 24 to the CPR. Each staff member received an individual nominative copy of the amendment (ON(2016)0008 dated 8 February 2016). While representatives of active and retired staff supported the amended footnote, there was not univeral agreement, as the present appeals challenging the amended footnote demonstrate.

21. As amended, the footnote now provides:

> Provided they were recruited before 1st January 2001, staff members who on 3 August 2016 have contributed to the group insurance scheme for a minimum of 25 years shall

> not be required to pay premium after the age of 65, under the condition they retire from service by 3 August 2016. Retired staff who have not contributed to the group insurance scheme for a minimum of 25 years by 3 August 2016 shall be required to pay a premium after the age of 65 to continue coverage under the scheme.

22. The appellant in Case No. 2020/1294 joined the NATO Airborne Early Warning & Control Force E-3A Component (NAEW&CF) on 13 April 1981. He retired on 31 December 2018. By letter dated 10 January 2019, received on 6 February 2019, the Head of the IS Pension Unit forwarded a statement showing the entitlement at 1 January 2019 and giving details of the calculations, which included deductions for medical insurance. On 12 February 2019, the appellant in Case No. 2020/1294 wrote to the Head of Human Resources (HR) requesting an administrative review.

23. The Head of HR replied by letter dated 8 March 2019 and received on 15 March 2019, recalling the background and history of amendments made to staff contributions and setting out the reasons why the request could not be granted.

24. On 3 April 2019 the appellant in Case No. 2020/1294 submitted a complaint to the Secretary General (SG). He expressed his willingness to submit the matter directly to the Tribunal, in view of the purely legal nature of the issues in dispute.

25. By letter dated 8 May 2019, received on 17 May 2019, the Assistant Secretary General informed him on behalf of the SG that no agreement could be given to submit the matter directly to the Tribunal and that it was decided to submit the case to the IS Complaints Committee (CC or Committee).

26. On 1 June 2019, the appellant in case No. 2020/1294 wrote to the SG expressing concern with the way his complaint was being handled by NATO IS. He considered that the CC had already considered the same matter in 2017, and observed that time-limits were not respected by the IS.

27. The appellant in Case No. 2020/1295 joined NAEW&CF on 1 July 1982. He also retired on 31 December 2018. By letter dated 10 January 2019, received on 24 January 2019, the Head of the IS Pension Unit forwarded a statement showing the entitlement at 1 January 2019 and giving details of the calculations, which included deductions for medical insurance. On 13 February 2019, the appellant in Case No. 2020/1295 wrote to the Head of Human Resources (HR) requesting an administrative review.

28. The Head of HR replied by letter dated 8 March 2019, which was received on 13 March 2019, recalling the background and history of amendments made to staff contributions and setting out the reasons why the request could not be granted.

29. On 8 April 2019 the appellant in Case No. 2020/1295 submitted a complaint to the SG. He expressed his willingness to submit the matter directly to the Tribunal, in view of the purely legal nature of the issues in dispute.

30. By letter dated 8 May 2019, received on 17 May 2019, the Assistant Secretary General informed him on behalf of the SG that no agreement could be given to submit the matter directly to the Tribunal and that it was decided to submit the case to the CC.

31. The CC met on 19 June, 5 July, and 3 September 2019. The complainants were invited to be heard but the appellant in Case No. 2020/1294 responded that due to the delays already experienced in meeting the deadline, and the fact that a hearing before the CC would not be possible until September 2019, he preferred that a report be issued as soon as possible without a hearing. No response was received from the other complainant.

32. After having submitted its report to the SG regarding the complaints of, the chair of the CC forwarded copies to both complainants on 10 September 2019, inviting them to submit their views in writing to the SG within 15 days. The complainants received this on 1 October 2019. They did not utilize the opportunity to comment on the report.

33. Given that the situation with respect to the amended footnote had remained unchanged since 2017, the CC reiterated its previous recommendations.

34. The CC recognized the significant shortcomings of the RMCF and agreed that action needed to be taken to mitigate the costs and that staff could no longer expect free medical coverage for the rest of their life. The Committee was, however, of the opinion that the transition period of less than six months under the amended footnote was much too short and did not provide adequate time for staff to take the life-changing decision to retire before the cut-off date. It therefore recommended that any future changes be introduced with an appropriate transition period. The CC also noted that communication between staff associations had been inadequate, as had communication between the HR departments of the various NATO bodies, and recommended that steps be taken to improve/institutionalize contacts both between the different NATO Staff Associations and between HR departments of the various NATO bodies. With regard to the delays in addressing the appellant's complaints, the Committee recommended that Executive Management ensure that the required procedures for lodging complaints and requesting administrative review are clearly communicated to other NATO bodies, and that every effort is made to ensure that deadlines in the processing of such complaints are met.

35. By letter dated 18 October 2019 addressed to both Complainants, the Assistant Secretary General on behalf of the SG reiterated that the change to the footnote was introduced to ensure that all covered retirees and their dependents can enjoy the benefits of a robust medical plan for a reasonable cost until the end of their lives. As a result of the change, all active staff who did not retire before 3 August 2016 would contribute to the medical insurance plan, as would all retired staff who did not yet have the right to free medical coverage. The change only had effect for the future and was not retroactive in nature. It also could not be considered discriminatory because, as of the date of implementation, both active and retired staff must contribute for life. He added that the measure did not violate any acquired vested rights or affect any contractual rights. It is a change to statutory elements governed by the CPR which can be changed for duly justified reasons. He noted that the contribution to be paid after retirement is not of a nature that can be considered to change working conditions in an unacceptable manner. He concluded that he was unable to give a favorable response to their requests.

36. On 23 December 2019 the appellants in Cases Nos. 2020/1294 and 2020/1295 submitted the present appeals.

37. The appellant in Case No. 2020/1296 joined NAEW&CF on 1 July 1990 and retired on 31 July 2019. By letter dated 6 August 2019, received on 21 August 2019, the

Head of the IS Pension Unit forwarded a statement showing the entitlement at 1 August 2019 and giving details of the calculations, which included deductions for medical insurance. On 11 September 2019, the appellant in Case No. 2020/1296 wrote to the Head of Human Resources (HR) requesting an administrative review.

38. The Head of HR replied by letter dated 3 October 2019, received on 9 October 2019, recalling the background and history of amendments made to staff contributions and setting out the reasons why the request could not be granted.

39. On 28 October 2019 the appellant in Case No. 2020/1296 submitted a complaint to the SG. He expressed his willingness to submit the matter directly to the Tribunal, in view of the purely legal nature of the issues in dispute.

40. The Assistant Secretary General replied on 13 December 2019 informing on behalf of the SG that no agreement could be given to submit the matter directly to the Tribunal and that, as a consequence, the normal procedures as laid down in the CPR continued to apply. He then explained the reasons why he could not give a favorable response to the request. The matter was not referred to the CC.

41. On 27 January 2020 the appellant in Case No. 2020/1296 lodged the present appeal "directed against the implicit decision, deemed to have been taken on 28 November 2019, in the absence of any action by the NATO Secretary General … within 30 days following receipt of the complaint."

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

(i) The appellants' contentions

42. The appellants consider the appeals admissible, as all available channels for seeking administrative review and submitting complaints were exhausted in accordance with the relevant CPR provisions and the appeals were submitted within the applicable time-limits.

43. As to the merits, the appellants do not contend that retired staff cannot be required to pay a premium to continue medical coverage after retirement, nor do they assert that the conditions of continued medical coverage can never be amended. They do submit, however, that this particular impugned measure - the amendment to the footnote - seriously violates several general principles of international public service law. They note that the Tribunal has, in accordance with the footnote to Article 6.2.1 of Annex IX to the CPR, the authority to rule on the CPR if a CPR provision seriously violates a general principle of international public service law. They add that since the underlying decision is illegal, the implementing decisions purporting to apply the underlying decision in the appellants' individual cases are, as a consequence, illegal as well.

44. The appellants develop six pleas in this respect.

45. In a first plea, the appellants allege a violation of the principle of equal treatment and non-discrimination, in that they are treated differently from staff members in a comparable situation who retired before 3 August 2016. Both groups have contributed to the group insurance scheme for a minimum of 25 years, but one category has the right

to free continued medical coverage and the other does not. The only difference is the date of retirement, which is arbitrary and does not constitute an objective reason for abolishing the right to free medical cover for those not retiring before 3 August 2016. The appellants maintain that there is no actuarial difference between these two categories of retirees.

46. Secondly, the appellants allege a violation of the principle requiring protection of legal certainty and legitimate expectations. They argue that they had a legitimate expectation to benefit from free medical coverage after the age of 65 and that NATO gave assurances concerning continued free medical cover. They refer in this respect to a statement in 2000 by the then Head of HR that active staff have been paying one-third of each year's premium to cover the lifetime medical costs of their colleagues who reach 65 that year in the expectation that, when their own turn comes, their colleagues would pay for them.

47. In a third plea, the appellants claim negligence and violation of the principle of good administration and the duty of care. They point first to the short transition period between adoption of the underlying decision by the North Atlantic Council and its coming into force. They consider the absence of adequate transitional measures to violate the principle of good administration and the duty of care. Secondly, the appellants allege negligence in the initial establishment of the RMCF without proper funding and in the subsequent failure to manage it properly and to rectify its financial shortcomings. The appellants maintain that NATO failed to govern its finances so as to enable the Organization to honor its obligations toward the existing staff. NATO did not rectify the RMCF's weak financial position, but opted to transfer the burden of its financial obligations to its staff members, including the appellants.

48. As to the appellants' first argument, that the Organization did not provide a sufficient transition period or transitional measures, they refer to a Judgment of this Tribunal in Case No. 2014/1028. The Tribunal held there that "the principle of good administration and the duty of care mean, in particular, that the administration adopting a decision must take into account all the factors which may influence such decision, including the interest of the service and also the interest of the staff member concerned." By providing for a transition period of only six months before the change came into force, the North Atlantic Council did not take the appellants' interests into account. In order to take their retirement on 3 August 2016, they needed to resign with a 180 days notice period. The NAC decision was communicated to them on 8 February 2016, which did not allow sufficient time to consider options. They add that alternative insurance cover would either be impossible or expensive. Rather than completely abolishing the right to free cover, the NAC should have amended the length-of-contribution requirement or raised the contribution, which would have better taken the interest of appellants into account.

49. The appellants argue secondly that, contrary to its duty of good governance, the Organization knew (or should have known) that the RMCF was underfunded from the outset and knows today that the RMCF as currently financed is not viable for the future. The Organization will need to take further measures, such as increasing the amount of contributions, which will be further to the appellants' detriment. The Organization was therefore negligent in the manner the Fund was created and has since been administered.

50. They add that the impact of the contribution is higher than the 1.67% that is presented, since that percentage applies to the last salary, whereas the pension amount is lower.

51. In their fourth plea, the appellants contend that the change to the footnote violated their acquired rights. They submit that they acquired the right to continued free medical coverage in retirement upon 25 years of contributions to the insurance scheme. They maintain in this regard that the CPR contain two fundamentally different kinds of provisions: the first category, which can be changed, relates to the organization of the international civil service and to impersonal and variable benefits. The second category consists of provisions that establish the personal situations of staff members, provisions that can be a determining factor in their decision to accept employment. This second category can give rise to acquired rights. The appellants maintain that the right to free continued medical coverage guaranteed to them through the footnote to Article 51.2 of the CPR applies to them specifically, and is a significant right belonging to the second category. It establishes the individual position of the appellants and constitutes an acquired right that cannot be unilaterally changed by the Organization.

52. The fifth plea concerns violation of the principle of non-retroactivity. The appellants consider a provision to be retroactive if it effects some change in legal status, rights, liabilities or interests in existence prior to the measure's proclamation. They submit that until the impugned decision all changes to the medical coverage system applied only to new staff members recruited after the entry into force of the change. The impugned decision, however, does not respect the existing rights of the staff members in post. They conclude that by taking away the appellant's right to free continued medical coverage, the underlying decision seriously violates the principle of non-retroactivity.

53. In their sixth plea, the appellants contend that, should the Tribunal decide that the right to free continued medical coverage constitutes a statutory provision of the first category described above, its power to amend that provision is not unlimited. Here, the underlying decision upsets the balance of their contracts and entitles them to compensation. They acknowledge that statutory provisions – or provisions of general application to staff members – can be amended at any time in the interest of the service. However, as shown by the Tribunal's jurisprudence in Case No. 2014/1017, such amendments are subject to certain limitations. If an amendment disrupts the balance of the contract, the staff member is entitled to compensation. The notion of upsetting the balance of the contract involves a significant realignment of the employment relationship, as occurred here. Social security and health insurance are among the main terms of employment, which the appellants took into consideration for accepting their appointments, in particular the right to free medical coverage after the age of 65. By revoking the right to free continued medical coverage, the contested decision significantly realigned the appellants' employment relationships and hence upset the balance of their contracts, for which they should be compensated.

54. The appellants in Cases Nos. 2020/1294 and 2020/1295 submit an additional plea. They contend that the Organization violated several procedural rules during the internal appeal procedure, causing them moral damage. Firstly, the Organization did not respect the time limits foreseen in the CPR for responding to the appellants' requests for administrative review and complaints, for submitting the complaints to the CC, and for

the CC to provide its report. They conclude that the Organization has unnecessarily protracted the proceedings to their detriment, as they lost the opportunity to explore alternative options for medical coverage earlier.

55. The appellants in Cases Nos. 2020/1294 and 2020/1295 request the Tribunal:
- to hold that the appeals are admissible;
- to hold that the appeals are well-founded;
- to declare the underlying decisions illegal;
- to order the respondent not to apply the underlying decisions to the appellants, or, at the very least, to declare the underlying decisions inapplicable to the appellants;
- to annul the implementing decisions;
- to the extent that the underlying decisions and/or the implementing decisions would be applied to the appellants, to order the respondent to fully compensate all damages that such an application entails for the appellants, including paying premiums in order to benefit from continued medical coverage;
- to order the respondent to fully compensate all damages entailed the respondent's violations of procedural rules and time-limits, the amount of which is to be determined later in the course of the proceedings whilst being provisionally estimated at one EURO; and
- to order the respondent to reimburse to the appellants the costs of retaining legal counsel as well as the travel and subsistence costs associated with his presence at the hearing(s), the amount of which is to be determined later in the course of the proceedings whilst being provisionally estimated at EUR 5,000.00 per appellant.

56. The appellant in Case No. 2020/1296 requests the Tribunal:
- to hold that the appeal is admissible;
- to hold that the appeal is well-founded;
- to declare the underlying decision illegal;
- to order the respondent not to apply the underlying decision to the appellant, or, at the very least, to declare the underlying decision inapplicable to the appellant;
- to annul the implementing decision;
- to the extent that the underlying decision and/or the implementing decision would be applied to the appellant, to order the respondent to fully compensate all damages that such an application entails for the appellant, including paying premiums in order to benefit from continued medical coverage;
- to order the respondent to reimburse to the appellant the costs of retaining legal counsel as well as the travel and subsistence costs associated with his presence at the hearing(s), the amount of which is to be determined later in the course of the proceedings whilst being provisionally estimated at EUR 5,000.00.

57. In their reply, the appellants make a further request, namely that in case the Tribunal cannot determine, based on the available argumentation and exhibits, that principles of international civil service law are being violated, it order the appointment of an expert to advise the Tribunal, and to request the expert to verify whether the financing of continued medical coverage was properly and prudently governed with a realistic guarantee that the benefits promised could be provided on the long term. They suggest a procedural framework to this effect.

(ii) The respondent's contentions

58. The respondent does not dispute admissibility of the appeals, but is of the view that they should be declared without merit.

59. The respondent observes that the appellants were among the appellants in Cases Nos. 2017/1127-1242 and that, once retired, they voluntarily chose to opt for the continued medical coverage. As the result, they were asked to pay a premium in accordance with the amended footnote, which they now dispute.

60. Regarding the non-respect of deadlines in the pre-litigation procedures, the respondent observes that the allegations are unfounded and that any claim for financial compensation should be rejected. It recalls that under the CPR an implicit decision rejecting the claim is deemed to have been taken when a decision is not rendered within the prescribed time limits; the appellants, however, did not avail themselves of this possibility. It considers the delay taken by the Complaints Committee regrettable, but submits that such delay did not affect the validity nor the outcome of the decision made. It did not, in itself, adversely affect the appellants and did not cause any additional damages.

61. The respondent reiterates that the NATO medical group insurance is a solidarity system, relying heavily on the contributions of the active staff. Over the years a number of changes have been introduced, based on objective considerations and general interest, to ensure the financial viability of the system and to preserve a robust medical plan given increases in healthcare costs and life expectancy. These changes were introduced on the basis of objective actuarial studies.

62. It considers the contribution rates for retirees reasonable, at 1.67% of the retiree's last salary, with the Organization contributing a further 3.33%. It recalls that the insurance also covers retiree's dependants at no additional cost to the retiree.

63. The respondent adds that the change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001 and who have either not reached 25 years of contributions to the NATO group insurance before 3 August 2016 or who have reached the 25 years mark but have chosen not to retire by that date. Staff who joined the Organization after 1 January 2001 and who are eligible for continued medical coverage are already required to pay the premium on a lifelong basis. The amendment therefore cannot be considered to lead to discriminatory treatment because, as of the date of implementation, both active staff who did not retire before 3 August 2016 - like the appellants - and retired staff who did not yet obtain the right to free medical coverage are required to contribute to the medical insurance plan for life.

64. Regarding the claimed violation of the principle of non-retroactivity, the respondent submits that the change does not violate this principle, as the modifications are only applied prospectively. In particular, staff members and retirees were not asked to contribute for previous years, their previous contributions were not called in question, and their entitlement to lifelong coverage remains unchanged.

65. The respondent continues that the amendment to the footnote does not violate any acquired or vested rights, as the appellants have not been deprived of the benefit of their previous contributions and the conditions to be met to benefit from continued medical coverage have not changed. The amendment also does not affect any contractual rights. In addition, the premium to be paid once staff members are retired is not of such a nature that can be considered to upset the balance of the appellants' contracts or to change working conditions in an unacceptable manner. In any event, although the Organization is obliged to organize a healthcare system for serving and retired staff, this obligation does not create a right to a cost-free coverage.

66. The change to the footnote is a change to statutory elements that are governed by the CPR. It is an established principle that international administrative law distinguishes between provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. Statutory elements can be changed for duly justified reasons by the Organization, as is obviously the case for modification of the continued medical coverage because of financial conditions. In addition, while one may claim a legitimate expectation to remain eligible for lifelong coverage, neither such expectation, or the principle of legal certainty, can reasonably extend to the non-payment of any premium. This is particularly true when payment of premiums is justified by longer life expectancy and the higher cost of medical treatments, as is the case here.

67. The respondent observes with respect to the length of the transition period that all staff were immediately informed. Although the appellants satisfied the conditions to benefit from the transition period, they chose not to take advantage of it when the possibility was offered to them. Moreover, this transition period should not be confused with the notice period to be given in case of resignation. The respondent recalls that such a transitional period is not required when a change to statutory rules is justified on objective grounds with arguments of an actuarial nature. It emphasizes that prior to the NAC's decision, the change to the footnote was extensively discussed in order to find a satisfactory solution protecting the interests of the Organization and of the staff. The issue was the subject of consultations between representatives of the Administrations and of active and retired staff, both in the context of the RMCF Supervisory Committee and of the Joint Consultative Board, following the proposal made by the Confederation of NATO Civilian Staff Committees in 2014.

68. The respondent does not see merit in appointing an expert. Should the Tribunal consider otherwise, the respondent suggests that a representative of IBAN or of the International Service for Remunerations and Pensions be invited to the hearing.

D. The *amicus curiae* brief

69. In an *amicus curiae* submitted by the Chairman of the Confederation of NATO Civilian Staff Committees (CNCSC), the CNCSC explained that for many years staff representatives had expressed their concern regarding the RMCF's long-term viability and ability to meet its objective, defined in Article 1 of Annex XIII to the NCPR to be "the establishment of a reserve to ensure that sufficient funds are available for the years to come to enable NATO to meet its obligations under Article 51.2 of the Civilian Personnel Regulations."

70. The CNCSC recalled that in April 2014, after years of exchanges with its NATO interlocutors, it presented a paper proposing deletion of the footnote, because the point in time when expenses would exceed contributions was rapidly approaching (it was finally reached in 2019).

71. The *amicus* brief stated that the CNCSC was perfectly aware that the deletion of the footnote alone would not solve all the problems and therefore its paper also mentioned other areas to be critically examined in order to ensure the long-term viability of the RMCF:
- the scope of the current medical cover;
- the present contributions and their repartition amongst (former) staff;
- the level of reimbursement to currently retired staff not contributing to the fund.

72. The *amicus* brief underlined that these points were repeatedly discussed at the CNCSC level by the representatives of all NATO Civilian Staff Committees, and that the CNCSC decision to propose the deletion of the footnote in 2014 was not easy to take, because it effectively meant that staff representatives were suggesting changes to the CPR that could be perceived as detrimental to the staff, whereas staff representatives were actually trying to protect staff members' interests in the long term. But this proposal was meant to be a first step that would pave the way for further badly needed changes.

73. The brief stated that discussion on these other points is suspended pending the outcome of the present appeal.

74. The CNCSC highlighted that it took a difficult and responsible decision on the face of an alarming situation.

E. Considerations and conclusions

(i) Admissibility

75. On 30 August 2018, the Tribunal in its Judgment in Cases Nos. 2017/1127-1242 held that the appeals were inadmissible since none of the appellants had at that time been directly and adversely affected by a decision implementing the change in the CPR. The Tribunal, however, recognizing the need for staff and retired staff to obtain legal certainty, noted that the inadmissibility conclusion did not prevent them from challenging the lawfulness of the underlying general decision when challenging a future implementing decision applying it to them. The present appellants were among the appellants in Cases Nos. 2017/1127-1242.

76. The present appeals challenge letters of the Head of the IS Pension Unit forwarding statements showing the appellants' pension entitlements and giving details of the calculations including deductions for medical insurance, as was the case in Case No. 2017/1126, which the Tribunal considered admissible. Since no pay slips were presented in the present appeals, the Tribunal confirmed at the hearing that deductions have indeed been made. The appeals are admissible.

(ii) Merits

77. This is not the first time that the Tribunal and its predecessor have considered appeals concerning the adjustment of contributions to the medical insurance scheme. See, for example, Cases Nos. 425, 723 and 901.

78. As a preamble, the Tribunal recalls that it is inherent in any medical plan that contributions evolve in the light of increases in life expectancy and in medical costs. It is, moreover, not in dispute that the funding of the RMCF was not sustainable and that remedial measures were needed as a matter of urgency. In this regard, the appellants made clear that they do not contest that retired staff can be required to pay a premium to continue medical coverage after retirement, nor do they assert that the conditions of continued medical coverage can never be amended. They instead submit that the particular measure under challenge seriously violates general principles of international public service law.

79. The Tribunal also notes the undisputed evidence showing that the impugned decision was taken on the basis of a number of actuarial studies and following detailed discussions among the representatives of the stakeholders, *i.e.* of management, staff, and retirees. The record also shows that between 2014 and 2016 the stakeholders devoted significant efforts to remedying the financial shortcomings of the RMCF and took indeed far-reaching decisions resulting in the NAC decision in dispute.

80. The Tribunal must now assess whether the impugned decision was lawful.

1. Violation of the principle of equal treatment and non-discrimination

81. The appellants allege that they are treated differently from staff members in a comparable situation who retired before 3 August 2016, both groups having contributed to the group insurance scheme for a minimum of 25 years, but one category has the right to free continued medical coverage and the other does not. The only difference is the date of retirement, which is said to be arbitrary and not to constitute an objective reason for abolishing the right to free medical cover. In this regard, the appellants maintain that there is no actuarial difference between these two categories of retirees.

82. The respondent counters that the change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001, and who have either not reached 25 years of contributions to the NATO group insurance before 3 August 2016 or who have reached the 25 years mark but chose not to retire by that date. Staff who joined the Organization after 1 January 2001 and who are eligible for continued medical coverage are already required to pay the premium on a lifelong basis. The amendment therefore cannot be considered to lead to discriminatory treatment because, as of the date of implementation, both active staff who did not retire before 3 August 2016 - like the appellants - and retired staff who did not yet obtain the right to free medical coverage are required to contribute to the medical insurance plan for life.

83. The Tribunal recalls that it held in Case No. 903:

> 71. …there can be violation of the principle of equal treatment only when two categories of persons, whose factual and legal situations are essentially the same, are subject to different treatment, or when different situations are treated in the same way.

And in Case No. 2017/1109:

> 49. ... it is a fundamental principle of international administrative law that similarly situated staff members must be treated consistently. This principle applies equally in matters involving an organization's exercise of discretion; the organization is equally bound to treat similarly situated staff members similarly when taking discretionary action…

84. It is obvious that with the changes that have been introduced to the RMCF over time a number of different groups were created, each having different rights. Thus, for example, those in post before 1 January 2001 and those entering into duty after that date; those retirees with more than 25 years of service paying contributions and those with less; and those who retired before 3 August 2016 and those who did not, are all in different situations. Differences do exist between these different groups, but this is inherent in the administration of a program such as the RMCF, which requires that lines be drawn to define which persons fall into which groups. The 3 August 2016 retirement date is such a line. The appellants were informed of this date, and had the possibility to retire before 3 August 2016, as well as the right at the time of retirement the right to discontinue their enrolment in NATO's medical plan. The Tribunal therefore does not accept that the drawing of this line violates the principle of equal treatment. Further, the Tribunal is satisfied that within these groups everyone in the same situation is being treated equally. The contrary has not been established. This plea is therefore rejected.

2. Violation of the principle of the protection of legal certainty and legitimate expectations

85. The appellants submit that they had a legitimate expectation to benefit from free medical coverage after the age of 65 and refer to the Tribunal's jurisprudence regarding this principle. The Tribunal has indeed held in Case No. 2014/1028 that the principle of the protection of legitimate expectations "applies to any individual in whom the administration has instilled justified and clear hopes by giving specific assurances in the form of precise, unconditional and consistent information from authoritative and reliable sources."

And in Case No. 887 it held that three conditions must be fulfilled in this respect:

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

86. The appellants' claim of legitimate expectations seems at variance with their claim that they do not deny that retired staff can be required to pay a premium to continue medical coverage after retirement, or their acceptance that the conditions of continued medical coverage, such as the percentages of reimbursement, can be amended. Moreover, the history of the RMCF clearly shows that the rules regarding the financing of the medical cover have repeatedly changed. This process of evolution over time shows that the appellants' claim of legitimate expectations to a static *status quo* has no basis in the facts.

87. The appellants refer in support of their claim to a statement made in 2000, *i.e.* twenty years ago, by the then Head of HR to the effect that active staff have been paying one-third of the premium due each year to cover the lifetime medical costs of their colleagues who reach 65 that year in the expectation that, when their own turn comes, their colleagues would pay for them. This statement is a general observation made by someone who was perhaps involved in reviewing the matter at the time, but certainly was not empowered to take a decision committing the Organization to a static course of conduct over the next two decades. This cannot be considered to be "precise, unconditional and consistent assurances originating from authorized and reliable sources." The plea of violation of the principle of the protection of legal certainty and legitimate expectations therefore fails.

3. Display of negligence and violation of the principle of good administration and the duty of care

88. The appellants develop essentially two pleas under this heading. They first point to the short transition period between the adoption of the underlying decision by the NAC and its coming into force, which did not leave them sufficient time to consider options. They consider that this, as well as the absence of transitional measures, violate the principle of good administration and the duty of care.

89. The respondent submits that there was no requirement to have a transition period.

90. The Tribunal notes that it is consistent with good administration to provide a transition period. The Tribunal considers that even if the transitional period appears short, on the basis of the information in the file, it is set at a sufficient duration. The Tribunal cannot therefore conclude that it was not lawful. Moreover, the appellants have failed to establish the existence of any options that they may have been considering, for example in seeking alternative medical cover, that were frustrated by this deadline, or how a longer transition period of say twelve months would have materially improved their situations.

91. Secondly, the appellants contend that they are entitled to expect NATO to govern its finances so as to enable the Organization to honor its obligations toward the existing staff, and that the Organization failed to meet a legal obligation to do so. This argument is not convincing. It is undisputed that the Organization continues to provide a robust program of medical coverage for its active and retired staff, including the appellants. The Organization pays two-thirds of the costs of the appellants' medical care, and under the impugned decision will continue to do so. Active staff and now (part of) the retirees together pay the other third. The split between active and retired staff is not equal in percentage terms; active staff pay much more than the retirees. But this is a discretionary matter.

92. The appellants argue that the Organization did not rectify the financial challenges facing the RCMF, but instead opted to transfer the financial burden involved to its staff members, including the appellants. The Tribunal disagrees. The appellants contend that they have a legal right to free lifetime medical coverage for themselves and their dependents. This is inconsistent with the basic character of the Organization's medical coverage program as a solidarity system, albeit as one in which the Organization and the active staff pay the overwhelming` proportion of the costs resulting from rising medical costs and demographic changes. The impugned decision is a significant step to reinforce the financial foundations of this system. Most likely further measures need to be taken to fully finance the RMCF, but that is for the stakeholders to decide. However, the Tribunal can find no lack of care or negligence on the part of the Organization in connection with the impugned decision.

93. The Tribunal concludes that this plea fails.

4. Violation of the principle of non-retroactivity

94. The appellants allege violation of the principle of non-retroactivity. They consider a provision to be retroactive if it effects some change in legal status, rights, liabilities or interests that existed prior to its proclamation. They submit that, until the impugned decision, all changes to the medical coverage system only applied to new staff members recruited after the entry into force of the change. The impugned decision, however, does not respect the existing rights of the staff members in post. The appellants conclude that, by taking away their right to free continued medical coverage, the underlying decision seriously violates the principle of non-retroactivity.

95. The respondent argues that the change does not violate this principle, as the modifications are only applied for the future. In particular, staff members and retirees were not asked to contribute for previous years, their previous contributions were not called in question and their entitlement to lifelong coverage remains unchanged.

96. The appellants consider a provision retroactive if it effects some change in legal status, rights, liabilities or interests existing prior to its proclamation. This is an unorthodox and unconvincing interpretation of the principle of non-retroactivity. The principle of non-retroactivity does not mean that matters of rights and status are frozen and cannot be changed going forward in time. An existing legal status may be amended going forward, subject to certain conditions such as respect for any acquired rights, and, indeed, respect for the principle of non-retroactivity. Here the impugned decision indeed changed a legal status, but only going forward. It did not reach back in time to alter previously existing situations. The decision is prospective in operation and does therefore not violate the principle of non-retroactivity (*cf.* NATO AT Judgment in Case No. 2014/1017, paragraph 48).

97. The Tribunal also disagrees with the second point raised, *i.e.* that in the past changes were designed to apply only to new staff and not to staff in post. This, first of all, is unrelated to the principle of non-retroactivity as normally understood. Secondly, whatever past practices may have been, there is no principle of law requiring that changes in regulations or regimes apply only to new staff and never to staff in post.

98. The plea of violation of the principle of non-retroactivity must be rejected.

5. Violation of acquired rights and/or upsetting the balance of contract

99. The Tribunal will deal with the plea of violation of acquired rights and that of upsetting the balance of contract in this single sub-chapter.

100. The appellants submit that the right to free continued medical coverage in retirement previously guaranteed through the footnote to Article 51.2 of the CPR applies to them specifically. In their view, it is part of the provisions establishing their individual positions that were a determining factor in their decisions to accept employment with the Organization. These provisions therefore give rise to acquired rights. Alternatively, the appellants claim that, should the Tribunal decide that the right to free continued medical coverage constitutes a statutory provision, the underlying decision to revise the footnote upsets the balance of their contracts and entitles them to compensation.

101. The respondent responds that the change to the footnote is a change to statutory elements governed by the CPR. It adds that it is established that international administrative law distinguishes between provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. Statutory elements can be changed for duly justified reasons by the Organization, as is obviously the case here, involving modification of the continued medical coverage to meet evolving financial conditions.

102. The Tribunal concurs with the positions taken by its predecessor, the NATO Appeals Board, and other international administrative tribunals with respect to the legal principles applicable to this claim. The NATO Appeals Board consistently held that the provisions concerning the medical plan are statutory provisions. Staff and retirees cannot in general expect to retain the benefit of such general and non-personal provisions in force at the date of entry into their employment contracts, even when their individual contract makes reference to the said terms, as is normally the case. These terms, which are regulatory in nature, can be modified at any time by the competent administrative authority in the interests of the service, subject to the principle of no retroactive effects and to any limitations the competent authority may itself impose on its power to modify them. However, if the effect of the modifications is to upset the balance of the contract between the staff member and the Organization, the former is entitled to compensation *(cf.*, amongst others, NATO Appeals Board Decisions Nos. 80, 338, 425, 723, and 726).

103. The appellants, referring to the Tribunal's jurisprudence, submit that the impugned amendment to the footnote disrupts the balance of their contracts, entitling them to compensation. They contend that social security and health insurance are among the main terms of employment, and that they took into consideration in accepting their appointments the right to free medical coverage after the age of 65 as an essential term of employment. By revoking the right to free continued medical coverage, the contested decision therefore significantly realigned the appellants' employment relationships and hence upset the balance of their contracts, for which they should be compensated.

104. The ILO Administrative Tribunal (ILOAT) has extensively analyzed the concepts of acquired rights and the balance of contracts and, while it has a slightly different

analytical approach, the main thrust of its jurisprudence is consistent with that of the NATO Appeals Board. The ILOAT thus held in its landmark Judgment No. 832:

> 14.There are three tests it will apply.
> The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.
> The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.
> The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?

105. The ILOAT refined its jurisprudence in Judgment No. 2682:

> 6. … an acquired right is breached only when such an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential….

106. More recently it articulated principles in Judgment No. 3538 regarding pension contributions that apply *mutatis mutandis* to contributions to medical plans:

> 10. As to the complainants' argument that there had been a violation of an acquired right, it should be rejected. The decision of the Tribunal in Judgment 1392… provides firm precedent for the rejection of this argument. As the Tribunal said (at consideration 34):
>
> > "[A] pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits."
>
> 11. It is to be recalled that the Administrative Council made its decision to increase contributions on the basis of advice that had been provided by the Actuarial Advisory Group constituted by three actuaries. An actuary is a highly skilled professional who would ordinarily acquire the knowledge to undertake the work of an actuary during years of tertiary study at a high level.

107. Lastly, the ILOAT held in Judgment 4274:

> 17. As the Tribunal has pointed out on a number of occasions, the staff members of international organisations are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see Judgments 3876, under 7, 3909, under 12, and 4028, under 13). The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach

> of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on.

108. In returning to the case before us, it is appropriate to recall that following notification by the insurers in 2000 that they were not willing to continue to underwrite the existing scheme, the NAC agreed that NATO would itself assume responsibility for continued medical cover. NATO would as from 1 January 2001 fulfill its obligations by means of a group insurance policy for which it would pay yearly premiums, funded in part by contributions both from serving staff members and from retired staff members, except for retirees recruited before 1 January 2001 with 25 years of reckonable service at the time of their retirement. When that decision was challenged, the Appeals Board held in Case No. 425:

> The pension scheme and the amount of pension are undoubtedly decisive factors for the staff member at the time he signs his contract. Nonetheless, the new scheme which, given present market conditions, calls for a deduction at source from the pension payment of an amount equivalent to a percentage of the basic salary at the final grade held does not, in itself, appear to be a measure tending to disrupt the contract. The fact that, after taking retirement, the staff member continues to participate in funding the continuing medical insurance scheme does not deprive him of the benefit of previous contributions but can be explained by longer life expectancy and the higher cost of medical treatment. Although, in the previous scheme, the contributions of staff members to continuing medical cover were offset by the insurer's guarantee of post-retirement medical cover without the retiree having to contribute to the scheme, the same guarantee is currently provided by the Organization in return for a contribution which has proven necessary today in the light of insurance market trends linked to higher life expectancy and the escalating cost of medical treatment. The argument advanced that there is a disruption of the balance of the contract cannot be accepted.

109. When the decision to increase the contribution rate at 1 January 2006 was challenged, the Appeals Board held in Case No. 723:

> It is appropriate to determine whether the modifications made to the health insurance system of the staff in question did in fact upset the balance of their contract in a manner which entitles them to compensation. Purely and simply doing away with the guarantee of continued medical coverage for the Organization’s former staff would surely amount to upsetting the balance of their contracts. Conversely, introducing a new contribution to meet the requirements of funding that guarantee and changing the rate of that contribution do not, by themselves, constitute a contractual change sufficient to give entitlement to compensation.

110. In its Judgment in Case No. 2014/1017 this Tribunal recalled these and other NATO Appeals Board’s Decisions. It then held:

> The notion of “upsetting the balance of the contract” involves a much more significant realignment of the employment relationship than has occurred here.

111. The Tribunal repeats that the changes were prospective in operation and that the appellants had the opportunity to take alternative measures to avoid the impact of the impugned decision. It considers that the amounts involved, which are very reasonable compared to similar schemes elsewhere, and which guarantee continued medical cover

without any changes in the reimbursement scheme, do not significantly realign the employment relationship, affect the economic balance of the appellants' prior contracts, or alter a fundamental term of employment in consideration of which they accepted their appointments many years ago, or which subsequently induced them to stay on. The impugned decision did not violate acquired rights or affect the economic balance of the contracts.

6. Violation of procedural rules

112. The appellants in Cases Nos. 1294 and 1295 submit an additional claim. They allege that the Organization violated several procedural rules during the internal appeal procedure, causing them moral damage. In particular they contend that the respondent did not respect the time limits foreseen in the CPR for responding to their requests for administrative review and complaints, for submitting the complaints to the CC, and for the CC to provide its report. They conclude that the Organization has unnecessarily protracted the proceedings to their detriment, causing them to lose the opportunity to explore alternative options for medical coverage.

113. The dates mentioned in Chapter B *supra* of the sending and of the receipt of correspondence are those given by the parties in their respective submissions. They show delays and discrepancies, with sometimes major intervals between the alleged sending and alleged receipt of mail. The exact dates cannot in many cases be established. At the hearing the representative of the appellant in Case No. 1296, stated that he had never received the 13 December 2019 decision (*cf.* paragraph 40 supra).

114. This is not the first time that the Tribunal has to consider delays in the mail or missing mail. Some essential conclusions can be drawn from its jurisprudence. First of all, the CPR unfortunately do not require that requests for review or complaints be communicated by any particular method of delivery or class of postal service. Secondly, the date of receipt is the date on which the letter arrived, not when it is opened. It is indeed difficult to determine when a simple letter has arrived (*cf.* NATO Appeals Board in Decision 666(a)), but the Tribunal reiterates what it observed in Case No. 901, paragraph 27, *i.e.* that many national legal systems contain rebuttable presumptions that a properly prepared and addressed letter introduced into the national postal system has been delivered to and received by the recipient. To this may be added a presumption that the letter is delivered within a reasonable time period. Again, these presumptions under national law are not controlling, but they provide a useful reference point in weighing the issue presented. The date of receipt is furthermore the date as of which time-limits start running.

115. Although there are no copies of relevant documents in the record, as was, for example, the case in Case No. 901, and no testimony was provided in support of any of the dates submitted, the Tribunal does not doubt the good faith of the parties' representations regarding relevant dates.

116. However, and very importantly, the Tribunal held in its Judgment in Case No. 2015/1047 that respect for time limits is mandatory.

117. One may question the advisability of resubmitting the matter at issue in these appeals to the Complaints Committee, but not the right of the Secretary General to do so. Moreover, the respondent correctly observes that in a related case currently before the Tribunal the CC did amend its conclusions and recommendations in favor of the appellant.

118. Some of the delays in the present cases are not significant, but still are not acceptable. In particular the time it took for the CC to submit its report should not recur.

119. On the other hand, the appellants also contributed to the delay in completing the present proceedings. For example, no convincing explanation was given why the appeal of the appellant in Case No 1296 was not submitted together with the other two, but more than a month later.

120. The appellants have not established how these delays have entailed additional damages. They have not brought forward any evidence in support of their claim that they lost the opportunity to explore alternative options for medical coverage on account of the delays in these appeals.

121. The Tribunal, while regretting some of the delays mentioned above, does in the present circumstances not consider it appropriate to award compensation in respect of them.

7. Appointment of an expert

122. In their reply, the appellants make an additional request, namely that "… in case the Tribunal cannot determine, based on the available argumentation and exhibits, that principles of international civil service law are being violated, it orders the appointment of an expert to advise the Tribunal…" and "… to request the expert … to verify whether the financing of the continued medical coverage was properly and prudently governed with a realistic guarantee that the benefits promised could be provided on the long term."

123. The Tribunal notes that this plea was not part of the initial appeals. Secondly, the Tribunal is quite capable of assessing the facts of this case and whether principles of international civil service law have been violated. It does not require assistance in this regard.

124. In a similar situation involving a request for appointment of an expert, the ILOAT held in Judgment No. 3538:

> 4… the request is misconceived. Plainly enough there is a power vested in the Tribunal to order measures of investigation that might include an expert enquiry. However this power fundamentally serves to assist the Tribunal in resolving issues raised by the parties and supported by the evidence adduced by the parties. For example, it is a power that might be used if expert evidence was adduced by both the complainant and the defendant organisation but there was some unresolved difference of opinion between the experts. In such a case either the Tribunal of its own motion might order an expert enquiry or might do so on the application of a party. However, Article 11 does not create a mechanism intended to enable one party to make good a case which is otherwise deficient. This appears, in substance, to be the basis of the complainants' request. It should be rejected.

125. The request is rejected.

126. It is not the Tribunal's responsibility to determine whether different and better decisions with a similar effect could have been taken, as the appellants at one point suggest. That is the discretion of the decision-makers, in this particular case *co*-decision makers, who made on the face of it a *bona fide* attempt to secure the financing of the RMCF into the future and which is based on what appears to be reasoned actuarial advice (*cf.* ILOAT Judgment No. 3538, consideration 15). It is constant that international administrative tribunals do not substitute their own view for the Organization's assessment in such cases, unless there is an abuse of the discretionary power. No such abuse has been alleged or shown here.

127. To sum up, it is inevitable that the amount of contributions for medical insurance schemes are regularly reviewed in order to take account of increases in life expectancy and of medical costs. It is also not uncommon to expect that beneficiaries pay a premium. In amending the footnote, NATO stakeholders took a far-reaching decision to put the RMCF on a sounder financial footing. It is to be emphasized that representatives of active and retired staff took a very active part in the decision-making process. In taking the impugned decision, NATO did not act in breach of its legal obligations. The impugned decision does not create any form of discrimination within the respective groups of staff and retired staff. It does not violate the principle of the protection of legal certainty and legitimate expectations. It does not reflect negligence or violate the principle of good administration and the duty of care. It does not apply retroactively. And, lastly, it does not violate acquired rights or affect the economic balance of the appellants' contracts. And although the impugned decision does impose financial costs on the appellants, the reasons for doing so are objective and the costs involved are reasonable.

128. In conclusion, the appeals are rejected in their entirety.

F. Costs

129. 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 [...].

130. The appellants submit that they have raised before the Tribunal several new and sensitive legal questions, which are liable to recur in a number of disputes, namely all questions pertaining to the continued medical coverage scheme. They request the Tribunal to order reimbursements of legal costs as well as of travel and subsistence costs, even if the Tribunal finds that there are no good grounds for this appeal.

131. Without entering in a discussion on the force of these arguments, the Tribunal must note that in accordance with Article 6.2.3 of Annex IX to the CPR it does "not have any powers beyond those conferred under this Annex." The wording of Article 6.8.2 of

Annex IX quoted *supra* being clear and unambiguous, the appellants' request cannot be granted.

132. The appeals being dismissed, no reimbursement of costs is due.

G. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 23 October 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 November 2020 AT-J(2020)0005

Judgment

Case No. 2019/1287

VCL

Appellant

v.

NATO International Staff

Respondent

Brussels, 29 October 2020

Original: English

Keywords: financing of medical insurance scheme.

(This page is left blank intentionally)

This judgment is rendered by a full Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún, Mr John Crook, Mr Laurent Touvet, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 29 September 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 3 July 2019, and registered on 24 July 2020, as Case No. 2019/1287, by Mrs VCL, against the NATO International Staff (IS). The appellant challenges administrative decisions implementing the decision of the NATO Council (NAC) dated 2 February 2016 to amend the footnote to Article 51.2 of the NATO Civilian Personnel Regulations (CPR). The footnote concerns the financing of the group medical insurance scheme and, in particular, the payment of contributions by certain long-serving and retired staff.

2. The respondent's answer, dated 9 October 2019, was registered on 21 October 2020. The appellant's reply, dated 15 November 2019 was registered on 26 November 2020. The respondent's rejoinder, dated 17 January 2020, was registered on 22 January 2020.

3. On 11 June 2020, the Tribunal received an *amicus curiae* brief from Mr WH, Chairman of the Confederation of NATO Civilian Staff Committees (CNCSC) submitted on behalf of the CNCSC. The brief was transmitted to the President and members of the Tribunal as well as to the parties. The appellant submitted her observations thereon on 7 September 2020.

4. Having regard to Article 6.1.4 of Annex IX to the CPR, the President decided that the case be heard by a full Panel, consisting of the President and the four members of the Tribunal.

5. In view of the prevailing public health situation the Tribunal held with the agreement of the parties an oral hearing by videoconference on 29 September 2020 utilizing facilities provided by NATO Headquarters. It heard the appellant's statement and arguments by her representative and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

7. On 5 September 2018, the Tribunal found in its judgment in Case No. 2017/1126 concerning the same appellant that the pre-litigation procedure was not properly followed in that she was not heard by the full IS Complaints Committee, but only by its Chair. The Tribunal remanded the case for a correct application of the complaints procedure.

8. Some further background is necessary to provide the context for the appellant's claims. The undisputed evidence shows that well before the appellant joined NATO, the Organization in 1967 introduced premium-free lifelong medical insurance coverage for retirees and their dependents. In order to keep this scheme financially sustainable in the face of changing circumstances, various amendments and conditions were subsequently introduced over time.

9. Thus, for example, in 1974, it was decided that to qualify for free lifelong medical coverage for retirees and their dependents, staff recruited after 1 May 1974 who retired at age 60 or above must have been employed for at least five years. Those retiring between the ages of 55 and 60 must have been employed for at least ten years. Active staff had to pay one-third of the total premium; the Organization paid the remaining two-thirds. Qualified retirees were not required to contribute.

10. Further amendments were made in 1988. The qualifying period of employment for those retiring at age 60 and above was raised from five to ten years, and the premium was indexed and rose from 0.906 % of gross salary to 2.188%.

11. A bridging cover was introduced in 1995. Staff members retiring between the ages of 55 and 60 had to pay a bridging premium until age 65, after which they were entitled to free coverage. This premium was 2.591% of a (theoretical) pension. Retirees aged between 55 and 65 who were recruited before 1 January 1988 were entitled to free coverage if they had been employed for at least five years. The qualifying period was set at ten years (consecutive or otherwise) for staff members recruited between 1 January 1988 and 1 January 1995, and at ten consecutive years for those recruited after 1 January 1995.

12. Medical coverage for retirees was initially underwritten by a private insurance company. When the insurer was no longer prepared to underwrite the scheme for persons over the age of 65, the Organization created in 2001 the Retirees' Medical Claims Fund (RMCF or Fund). Under this new system, staff aged 55 or over who left NATO after a minimum of ten years of uninterrupted service were permanently entitled to reimbursement of medical expenses for themselves and their dependents, but subject to paying a premium. However, certain long-serving staff members were not required to pay after the age of 65, as provided in a footnote added to CPR Article 51.2:

> Provided they were recruited before 1st January 2001, staff members who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.

13. Under the new system introduced in 2001, the premium paid to the RMCF after the age of 65 was set at 4.5% of gross salary for active staff and at 3% for retirees recruited before 1 January 2001 who did not have 25 years of contributions. Staff or retirees paid one-third of the applicable premium, with the remaining two-thirds paid by the Organization.

14. Also as part of the 2001 changes, a Supervisory Committee was set up to oversee management of the RMCF. This committee is composed of representatives from NATO administrations, active staff, and retired staff.

15. There was a further amendment in 2006. The premium for the bridging cover (for retirees between the ages of 55 and 65) was increased from 2.591% of theoretical pension to 3% of last salary. This premium was again increased in 2013, from 3% to 5%.

16. In 2009 the Secretary General informed the NAC that the Fund held €103 million at the end of 2008. He added that a 2008 actuarial study conducted on the initiative of the Supervisory Committee projected that the RMCF could be depleted between 2030 and 2047, depending on different assumptions regarding the return on assets (3, 5, or 8%). The Secretary General undertook to engage experts to estimate the minimum financial injection necessary to make the Fund sustainable.

17. In 2013, the NATO International Board of Auditors (IBAN) noted that the Fund's assets were estimated to be depleted between 2032 and 2051 based on an actuarial study performed in 2010. In 2016, an update of the IBAN's 2013 study concluded that the RMCF would be depleted somewhere between 2038 and 2043, and that remedial measures were needed to make the RMCF sustainable. The IBAN recommended in particular that the International Staff provide an estimate of the minimum financial injection necessary. The Board also recommended that the IS provide all necessary information and undertake any remedial actions to limit the level of obligations.

18. Several scenarios for strengthening the RMCF were then discussed in the Supervisory Committee and in the Joint Consultative Board, the permanent body set up under CPR Annex XI for consultation among the Administrations, the Confederation of NATO Civilian Staff Committees, and the Confederation of NATO Retired Civilian Staff Associations.

19. Following this process of discussion and consultation, the amendment to the footnote to CPR Article 51.2 mentioned above was proposed to the NAC by the Deputy Secretary General. As the *amicus curiae* brief records, and as appellant does not dispute, major elements of the proposed amendment reflected proposals were proposed by the active and retired staff representaives who endorsed the proposal as a whole. On 2 February 2016 the NAC adopted the amendment, which was issued on 8 February 2016 as Amendment 24 to the CPR. While representatives of active and retired staff supported the amended footnote, there was not univeral agreement, as the present and other appeals challenging the amended footnote demonstrate.

20. As amended, the footnote now provides:

> Provided they were recruited before 1st January 2001, staff members who on 3 August 2016 have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay premium after the age of 65, under the condition they retire from service by 3 August 2016. Retired staff who have not contributed to the group insurance scheme for a minimum of 25 years by 3 August 2016 shall be required to pay a premium after the age of 65 to continue coverage under the scheme.

21. The appellant joined the NATO Allied Joint Force Command Headquarters Naples on 1 September 1991. She retired on 30 September 2010.

22. Under Article 51.2 of the CPR in force at that time, she continued to pay her medical insurance premiums, thinking she would have to do so until such time as she

fulfilled the condition of contributing for 25 years, *i.e.* until 31 August 2016.

23. However, as mentioned in paragraph 19 *supra*, on 2 February 2016, the NAC amended the CPR and decided that effective 3 August 2016, all retired NATO staff who had not yet contributed to the group insurance scheme for a minimum of 25 years would henceforth have to continue to pay a premium, even after 25 years' contributions. This is the origin of the dispute.

24. On 23 March 2016, the Head of the NATO Pensions Unit wrote to the appellant to inform her of the new rule applicable to retired staff and to tell her that this rule would directly affect her personal situation.

25. The appellant undertook to challenge this decision and initiated the pre-litigation procedure. On 19 April 2016, she sought an administrative review, which was rejected on 28 April 2016. She then submitted a complaint on 27 May 2016, requesting that an IS Complaints Committee (CC) be convened. The NATO IS having received a great number of complaints about the same matter, *i.e.* the application of the new version of the footnote to Article 51.2, decided to join the complaints and convene a single CC for more than one hundred complainants. At the conclusion of a lengthy procedure, the CC issued its report, which was submitted to the appellant for comment on 4 May 2017 and to which she replied on 12 May 2017. On 5 July 2017 the Secretary General confirmed the initial decision.

26. As outlined in paragraphs 34 - 37 of the Tribunal's Judgment in Case No. 2017/1126 in the appellant's prior appeal, the Tribunal annulled the 5 July 2017 decision, which was taken following an irregular pre-litigation procedure. As a consequence, the pre-litigation procedure was to be reopened by the Administration by reviewing the complaint of 27 May 2016 again and by providing the follow-up that the Administration deemed appropriate.

27. The Administration submitted the matter to the IS Complaints Committee, which heard the appellant on 13 March 2019. On 29 April 2019, the CC forwarded an addendum to its initial report to the complainant, who submitted her comments to the Secretary General on 8 May 2019.

28. The CC recommended, given that the complainant had already retired when the amendment to the footnote was applied and that only 23 days remained before she would have been eligible for receive free medical coverage, that on an exceptional basis her request be considered favourably. It suggested that the complainant be asked to pay for these 23 days and then be exempted from the amendment. It added that in the case the recommendation was not followed she should not be required to pay retroactively, since the non-collection of the premiums was due to an administrative error.

29. On 29 May 2019, the acting Assistant Secretary General, Executive Management, on behalf of the Secretary General rejected the appellant's administrative appeal. He stated that the NATO medical group insurance is a solidarity system relying heavily on the contributions of active staff, which permits the retiree population to benefit from the group insurance at a low cost. Over the years many amendments have been introduced, based on objective considerations, to preserve NATO's group insurance plan, given that free and unconditional lifelong coverage is unsustainable in the long run. The change to

the footnote was introduced to ensure that all entitled retirees and their dependents can enjoy the benefits of a robust medical plan for a reasonable cost until the end of their lives. As a result of the change, all active staff who did not retire before 3 August 2016 would contribute to the medical insurance plan. The same applies to all retired staff who did not yet obtain the right to free medical coverage. The change only had effect for the future and was not retroactive in nature. It can also not be considered discriminatory because, as of the date of implementation, both active and retired staff have to contribute for life. He added that the measure did not violate any acquired vested rights and did not affect any contractual rights. It is a change to statutory elements that are governed by the CPR and which can be changed for duly justified reasons. He stated that the contribution to be paid, once retired, is not of such a nature that it can be considered to change working conditions in an unacceptable manner. He concluded by saying that he was unable to give a favorable response to their requests. He added that the unpaid premiums, payment of which was suspended pending the outcome of the complaint procedure, would be deducted from her pension in installments.

30. On 3 July 2019, the appellant lodged the present appeal.

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

(i) The appellant's contentions

31. The appellant contends that a number of general principles of law have been violated.

32. In a first argument the appellant alleges a violation of her contractual rights, submitting that her contract stipulated that it was governed by the CPR and other NATO regulations "in effect during the course of the validity of this contract." The amended version of the footnote did not enter into force during the validity of her contract, but after. It can thus not be applied to her.

33. Second, the appellant contends a violation of the principle of non-retroactivity, which she contends prevents a change in the legal status of staff in existence at the time of their retirement.

34. Third, the appellant contends violation of her acquired rights. In her view, a provision of fundamental importance to the balance of a staff member's rights and duties must be respected, notwithstanding any amendment to the rules. She refers to the jurisprudence of the ILO Administrative Tribunal (ILOAT), which applies three tests: the nature of the altered term, the reason for the change, and the consequence of allowing or disallowing the claimed right.

35. As her fourth plea, the appellant claims violation of the principle of equal treatment. The appellant contends that the new footnote creates different groups of retirees: those whose contractual rights have been safeguarded and those whose rights have not. In her submission, there is no legitimate justification for the different treatment.

36. Fifth, the appellant claims violation of the principles of legitimate expectations and legal certainty. The first principle confirms that international administrations must honor their commitments. The second principle guarantees that the relations between an

Organization and its staff are stable. The appellant maintains that she had a legitimate expectation to receive lifetime free medical care after making a limited number of additional contributions to the RMCF. The change to the footnote defeated this expectation and denied her the stability she was legally entitled to expect.

37. The appellant requests:
-annulment of the decision of 20 May 2019 whereby the NATO Secretary General confirmed his decision to apply the amendments to the footnote to Article 51.2 of the Civilian Personnel Regulations (CPR) to the appellant and to retain a schedule for reimbursement of unpaid premiums; and
-the award of €6.000 in costs incurred for her defence.

(ii) The respondent's contentions

38. The respondent is of the view that the appeal should be declared without merit.

39. The respondent recalls the history of the NATO medical plan, the creation of the RMCF and the introduction of measures to ensure its viability, most recently the amendment to the footnote.

40. The respondent contends that the NATO medical group insurance is a solidarity system, relying heavily on the contributions of the active staff. Over the years a number of changes have been introduced, based on objective considerations and general interest, to ensure the financial viability of the system and to preserve a robust medical plan, given increases in healthcare costs and life expectancy. These changes were introduced on the basis of objective actuarial studies. As a result of these interventions, all beneficiaries with the requisite years of service, including entitled retirees and their dependents, remain eligible for lifelong coverage.

41. It considers the contribution rates for retirees reasonable, at 1.67% of the retiree's last salary, with the Organization contributing a further 3.33%. It recalls that the insurance also covers retiree's dependants at no additional cost to the retiree.

42. The respondent adds that the change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001, and who have either not reached 25 years of contribution to the NATO group insurance before 3 August 2016 or who have reached the 25 years mark but chosen not to retire by that date. The amendment can therefore not be considered to result in discriminatory treatment because, as of the date of implementation, both active staff who did not retire before 3 August 2016 and retired staff who did not yet obtain the right to free medical coverage are required to contribute to the medical insurance plan for life.

43. The respondent points out that prior to the entry into effect of the amendment, the appellant did not meet the conditions to free medical coverage. As a result, her situation was not identical to that of retired staff members who had contributed 25 years to the medical insurance for 25 years.

44. It also submits that the amendment to the footnote does not violate the principle of non-retroactivity, as the modifications are only applied for the future. It adds that this change does not violate any acquired or vested rights, since the appellant has not been

deprived of the benefit of her previous contributions and the conditions to be met to benefit from continued medical coverage have not changed nor does the change affect any contractual rights. In addition, the premium to be paid once retired is not of a nature that can be considered to upset the balance of the appellant's contract or to change working conditions in an unacceptable manner. It emphasizes that the amendment a change to statutory elements that are governed by the CPR.

45. Regarding the appellant's claim of violation of her legitimate expectation to receive free life-long coverage after making the required years of payments, the respondent contends that neither such claimed expectation, nor the principle of legal certainty, can reasonably extend to the non-payment of any premium for life-long medical coverage.

D. The *amicus curiae* brief

46. In an *amicus curiae* submitted by the Chairman of the Confederation of NATO Civilian Staff Committees (CNCSC), the CNCSC explained that for many years staff representatives had expressed their concern regarding the RMCF's long-term viability and ability to meet its objective, defined in Article 1 of Annex XIII to the CPR to be "the establishment of a reserve to ensure that sufficient funds are available for the years to come to enable NATO to meet its obligations under Article 51.2 of the Civilian Personnel Regulations."

47. The CNCSC recalled that in April 2014, after years of exchanges with its NATO interlocutors, it presented a paper proposing deletion of the footnote, because the point in time when expenses would exceed contributions was rapidly approaching (it was finally reached in 2019).

48. The *amicus* brief stated that the CNCSC was perfectly aware that the deletion of the footnote alone would not solve all the problems and therefore its paper also mentioned other areas to be critically examined in order to ensure the long-term viability of the RMCF:
- the scope of the current medical cover;
- the present contributions and their repartition amongst (former) staff;
- the level of reimbursement to currently retired staff not contributing to the fund.

49. The *amicus* brief underlined that these points were repeatedly discussed at the CNCSC level by the representatives of all NATO Civilian Staff Committees, and that the CNCSC decision to propose the deletion of the footnote in 2014 was not easy to take, because it effectively meant that staff representatives were suggesting changes to the CPR that could be perceived as detrimental to the staff, whereas staff representatives were actually trying to protect staff members' interests in the long term. But this proposal was meant to be a first step that would pave the way for further badly needed changes.

50. The brief stated that discussion on these other points is suspended pending the outcome of the present appeal.

51. The CNCSC highlighted that it took a difficult and responsible decision on the face of an alarming situation.

E. Considerations and conclusions

(i) Admissibility

52. The admissibility of the case is not in dispute. The case is admissible.

(ii) Merits

53. This is not the first time that the Tribunal and its predecessor have had to deal with appeals concerning the adjustment of contributions to the medical plan. See, for example, Cases Nos. 425, 723 and 901.

54. As a preamble, the Tribunal wishes to recall the evidence showing that it is inherent to any medical plan that contributions evolve in the light of increases in life expectancy and in medical costs. It is, moreover, not in dispute that the funding of the RMCF was not sustainable and that measures needed to be taken as a matter of urgency.

55. The Tribunal also notes the undisputed evidence showing that the impugned decision was taken on the basis of a number of actuarial studies and following detailed discussions among the representatives of the stakeholders, *i.e.* of management, staff, and retirees. The record also shows that between 2014 and 2016 the stakeholders devoted significant efforts to remedying the financial shortcomings of the RMCF and took indeed far-reaching decisions resulting in the NAC decision in dispute.

56. The Tribunal must now assess whether the impugned decision was lawful.

1. Violation of contractual obligations

57. In a first argument the appellant contends that the terms of her employment contract made her employment subject to the CPR provisions and other regulations in effect at that time, and that therefore only those NATO regulations in effect during the validity of her contract now apply to her.

58. The Tribunal disagrees. The employment contract has ceased to exist, and with it the contract provision the appellant now invokes. A good number of provisions in the CPR, however, currently apply to her, including the dispute resolution system that she is utilizing in this appeal, a system that was not yet in existence when she retired in 2010. It is also obvious that the CPR provisions regarding the pension scheme and the medical plan continue to apply to her. These provisions are not static or frozen in the past. They may evolve and will most likely continue do so in view of the evolution of life expectancy and rising costs of medical care. The appellant cannot invoke provisions of a no longer existing contract to establish the contrary.

2. Violation of the principle of non-retroactivity

59. The appellant alleges violation of the principle of non-retroactivity, which in her submission prevents a change in the legal status of retired staff as it existed at the time

of their retirement. She contends that, by taking away her right to free continued medical coverage, the amendment to the footnote thus violates the principle of non-retroactivity.

60. The respondent argues that the change does not violate this principle, as the modifications are only applied for the future.

61. The Tribunal observes that the principle of non-retroactivity does not mean that matters of rights and status are frozen and cannot be changed going forward in time. An existing legal status may be amended going forward, subject to certain conditions such as respect for any acquired rights, and, indeed, respect for the principle of non-retroactivity. Here the impugned decision indeed changed a legal status, but only going forward. It did not reach back in time to alter previously existing situations. The decision is prospective in operation and does therefore not violate the principle of non-retroactivity (*cf.* NATO AT Judgment in Case No. 2014/1017, paragraph 48).

62. The plea of violation of the principle of non-retroactivity must be rejected.

3. Violation of acquired rights and/or upsetting the balance of contract

63. The appellant submits that the amendment to the footnote violates her acquired right to lifetime free medical coverage upon satisfying the previous terms of the footnote. She contends that she has this right because of its fundamental importance to the balance of the rights and duties that defined her relationship of employment with NATO. Given the fundamental importance of the promise of free lifetime medical care in her situation, the promise to provide such care must be respected notwithstanding any amendment to the rules. The entitlement to free medical cover was an essential element of her contract, but the change to the footnote upsets the economic balance of that relationship.

64. The respondent contends that the change in the footnote does not violate any acquired or vested rights. The appellant has not been deprived of the benefit of her previous contributions, the conditions to benefit from continued medical coverage have not changed, and the revised footnote does not affect any contractual rights. In addition, the premium to be paid by appellant is not of such a nature that it can be considered to upset the balance of her contract or to change her prior working conditions in an unacceptable manner. It emphasizes that the amendment a change to statutory elements that are governed by the CPR.

65. The Tribunal, first of all, concurs with the positions taken by its predecessor, the NATO Appeals Board, and other international administrative tribunals with respect to the legal principles applicable to this claim. The NATO Appeals Board consistently held that the provisions concerning the medical plan are general and non-personal statutory provisions. Staff and retirees cannot in general expect to retain the benefit of such provisions in force when they entered into their employment contracts, even when their individual contract makes reference to them, as is normally the case. These terms, which are regulatory in nature, can be modified at any time by the competent administrative authority in the interests of the service, subject to the principle of no retroactive effects and to any limitations the competent authority may itself impose on its power to modify them. However, if the effect of the modifications is to upset the balance of the contract between the staff member and the Organization, the former is entitled to compensation

(cf., amongst others, NATO Appeals Board Decisions Nos. 80, 338, 425, 723, and 726).

66. The appellant submits that the impugned amendment to the footnote violates an essential element of her contract and disrupts the balance thereof. She contends that provisions dealing with social security and health insurance, particularly the right to free medical coverage after the age of 65, were among the main terms of employment bearing on her decision to accept her appointment.

67. As the appellant observes, the ILO Administrative Tribunal (ILOAT) has extensively analyzed the concepts of acquired rights and the balance of contracts and, while it has a slightly different analytical approach, the main thrust of its jurisprudence is consistent with that of the NATO Appeals Board. The ILOAT thus held in its landmark Judgment No. 832:

> 14.There are three tests it will apply.
>
> The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.
>
> The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.
>
> The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?

68. The ILOAT refined its jurisprudence in Judgment No. 2682:

> 6. … an acquired right is breached only when such an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential….

69. More recently it articulated principles in Judgment No. 3538 regarding pension contributions that apply *mutatis mutandis* to contributions to medical plans:

> 10. As to the complainants' argument that there had been a violation of an acquired right, it should be rejected. The decision of the Tribunal in Judgment 1392… provides firm precedent for the rejection of this argument. As the Tribunal said (at consideration 34):
>
> > "[A] pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits."
>
> 11. It is to be recalled that the Administrative Council made its decision to increase contributions on the basis of advice that had been provided by the Actuarial Advisory Group constituted by three actuaries. An actuary is a highly skilled professional who

> would ordinarily acquire the knowledge to undertake the work of an actuary during years of tertiary study at a high level.

70. Lastly, the ILOAT held in Judgment 4274:

> 17. As the Tribunal has pointed out on a number of occasions, the staff members of international organisations are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see Judgments 3876, under 7, 3909, under 12, and 4028, under 13). The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on…

71. In considering the relevance of this jurisprudence to the case before us, it is appropriate to recall that following notification by the insurers in 2000 that they were not willing to continue to underwrite the existing scheme, the NAC agreed that NATO would itself assume responsibility for continued medical cover. NATO would as from 1 January 2001 fulfill its obligations by means of a group insurance policy for which it would pay yearly premiums, funded in part by contributions both from serving staff members and from retired staff members, except for retirees recruited before 1 January 2001 with 25 years of reckonable service at the time of their retirement. When that decision was challenged, the Appeals Board held in Case No. 425:

> The pension scheme and the amount of pension are undoubtedly decisive factors for the staff member at the time he signs his contract. Nonetheless, the new scheme which, given present market conditions, calls for a deduction at source from the pension payment of an amount equivalent to a percentage of the basic salary at the final grade held does not, in itself, appear to be a measure tending to disrupt the contract. The fact that, after taking retirement, the staff member continues to participate in funding the continuing medical insurance scheme does not deprive him of the benefit of previous contributions but can be explained by longer life expectancy and the higher cost of medical treatment. Although, in the previous scheme, the contributions of staff members to continuing medical cover were offset by the insurer's guarantee of post-retirement medical cover without the retiree having to contribute to the scheme, the same guarantee is currently provided by the Organization in return for a contribution which has proven necessary today in the light of insurance market trends linked to higher life expectancy and the escalating cost of medical treatment. The argument advanced that there is a disruption of the balance of the contract cannot be accepted.

72. When the decision to increase the contribution rate at 1 January 2006 was challenged, the Appeals Board held in Case No. 723:

> It is appropriate to determine whether the modifications made to the health insurance system of the staff in question did in fact upset the balance of their contract in a manner which entitles them to compensation. Purely and simply doing away with the guarantee

> of continued medical coverage for the Organization's former staff would surely amount to upsetting the balance of their contracts. Conversely, introducing a new contribution to meet the requirements of funding that guarantee and changing the rate of that contribution do not, by themselves, constitute a contractual change sufficient to give entitlement to compensation.

73. In its Judgment in Case No. 2014/1017 this Tribunal recalled these and other NATO Appeals Board's Decisions. It then held:

> The notion of "upsetting the balance of the contract" involves a much more significant realignment of the employment relationship than has occurred here.

74. The Tribunal considers that the amounts involved, which are very reasonable compared to similar schemes elsewhere, and which guarantee continued medical cover without any changes in the reimbursement scheme, do not significantly realign the employment relationship, affect the economic balance of the appellant's contract, or alter a fundamental term of employment in consideration of which she accepted her appointment many years ago, or which subsequently induced her to stay on. The impugned decision did not violate acquired rights or affect the economic balance of the contracts.

4. Violation of the principle of equal treatment

75. The appellant further contends violation of the principle of equal treatment with the argument that the new footnote creates different groups of retirees: those who reached the age of 65 and had contributed for at least 25 years to the medical plan and whose contractual rights were safeguarded, on the one hand, and those to whom the amended footnote is being applied, on the other hand.

76. The respondent observes that the change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001, and who have either not reached 25 years of contribution to the NATO group insurance before 3 August 2016 or who have reached the 25 years mark but chosen not to retire by that date. The amendment can therefore not be considered to lead to discriminatory treatment because, as of the date of implementation, both active staff who did not retire before 3 August 2016 - like the appellant - and retired staff who did not yet obtain the right to free medical coverage are required to contribute to the medical insurance plan for life.

77. The Tribunal recalls that it held in Case 903:

> 71. …there can be violation of the principle of equal treatment only when two categories of persons, whose factual and legal situations are essentially the same, are subject to different treatment, or when different situations are treated in the same way.

And in 2017/1109:

> 49. ... it is a fundamental principle of international administrative law that similarly situated staff members must be treated consistently. This principle applies equally in matters involving an organization's exercise of discretion; the organization is equally

> bound to treat similarly situated staff members similarly when taking discretionary action…

78. The appellant here contends that all retirees should be treated in the same manner. The Tribunal does not agree. The design and administration of the RMCF have always involved distinctions in the treatment of different persons and groups. The changes that have been introduced over time have led to the creation of a number of different groups, each with different rights and obligations. There is a difference in the treatment of those in post before 1 January 2001, and those joining after. Indeed, the original footnote to CPR Article 51.2 – which appellant contends should apply in her case – differentiated between persons who had contributed for a minimum of 25 years and those who had not. The revision to the footnote in 2016 draws a further distinction between persons who retired before 3 August 2016, and those who did not. Differences do exist, but these are inherent to the nature of the RMCF. The Tribunal is satisfied that within these groups everyone in the same situation is being treated equally. The contrary has not been established. This plea fails.

5. Violation of the principles of legitimate expectations and of legal certainty

79. The appellant contends that the change to the footnote violated the obligation to respect legitimate expectations, which confirms that international administrations must honor their commitments, as well as of the principle of legal certainty, which guarantees that the relations between an Organization and its staff are stable.

80. The respondent submits that these principles cannot reasonably extend to the appellant's claim to be free of the obligation to pay future premiums after she meets the eligibility requirements established under the prior version of the footnote.

81. The Tribunal has held in Case No. 2014/1028 that the principle of protection of legitimate expectations "applies to any individual in whom the administration has instilled justified and clear hopes by giving specific assurances in the form of precise, unconditional and consistent information from authoritative and reliable sources." And in Case No. 887 it held that three conditions must be fulfilled: (1) "precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the NATO body", (2) "those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed", and (3) "the assurances given must comply with the applicable rules."

82. It must be noted that the record clearly shows that the rules regarding the financing of the medical cover have constantly changed and this may well continue.

83. The case file does not show any precise and unconditional assurance given to the appellant by a NATO authority that the rules regarding the financing of the medical plan, and in particular the footnote in question, would never change and so give rise to a legitimate expectation. The appellant may regard the footnote itself as constituting such an assurance, but the Tribunal cannot agree. As noted, statutory provisions such as the one at issue here are subject to change as required to meet changing circumstances. The Tribunal finds the plea of violation of the principle of legal certainty and legitimate expectations fails.

84. It is not the Tribunal's responsibility to determine whether different and better decisions with a similar effect to the change to the footnote could have been taken. Such decisions involve the discretion of the responsible decision-makers, in this particular case *co*-decision makers, who made on the face of it a *bona fide* attempt to secure the financing of the RMCF into the future based on what appears to be reasoned actuarial advice (*cf.* ILOAT Judgment No. 3538, consideration 15). It is constant that international administrative tribunals do not substitute their own view for the Organization's assessment in such cases, unless there is an abuse of the discretionary power. No such abuse has been alleged or shown here.

85. The record here shows how the structure and amount of contributions for medical insurance schemes are subject to periodic review and possible modification in order to take account of increases in life expectancy and of medical costs. In amending the footnote, NATO stakeholders took a decision intended to put the RMCF on a sounder financial footing. It is not disputed that representatives of active and retired staff took a very active part in the decision-making process. The appellant here has not shown that in taking the impugned decision, NATO acted in breach of its legal obligations. The impugned decision does not violate contractual rights. It does not apply retroactively. It does not violate acquired rights or affect the economic balance of the appellant's contract. It did not create any form of inappropriate discrimination within affected groups of staff and retired staff. It does not violate the principle of the protection of legal certainty and legitimate expectations.

86. The Tribunal appreciates that application of the amended footnote to the appellant so close to meeting the conditions of the former version thereof may appear harsh or unreasonable. And, as the respondent has correctly observed, the appellant is not the only one in that situation. Nevertheless, although the impugned decision does impose financial costs on the appellant, the reasons for doing so are objective and the costs of providing life-long medical coverage to the appellant are reasonable.

87. In conclusion, the appeal is rejected in its entirety.

F. Costs

88. 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 [...].

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

G. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 29 October 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 November 2020 AT-J(2020)0006

Judgment

Case No. 2020/1304

AL

Appellant

v.

NATO International Staff

Respondent

Brussels, 29 October 2020

Original: English

Keywords: financing of medical insurance scheme.

(This page is left blank intentionally)

This judgment is rendered by a full Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún, Mr John Crook, Mr Laurent Touvet, and Mr Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 29 September 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 13 February 2020, and registered on 29 May 2020, as Case No. 2020/1304, by Mr AL, against the NATO International Staff (IS). The appellant challenges the administrative decision implementing the decision of the NATO Council (NAC) dated 2 February 2016 to amend the footnote to CPR Article 51.2 of the NATO Civilian Personnel Regulations (CPR). The footnote concerns the financing of the group medical insurance scheme and, in particular, the payment of contributions by certain long-serving and retired staff.

2. The respondent's answer, dated 8 June 2020, was registered on 9 June 2020, the appellant's reply, dated 6 July 2020 was registered on 7 July 2020. The respondent's rejoinder, dated 13 July 2020, was registered on 16 July 2020.

3. On 11 June 2020, the Tribunal received an *amicus curiae* brief from Mr WH, Chairman of the Confederation of NATO Civilian Staff Committees (CNCSC) submitted on behalf of the CNCSC. The brief was transmitted to the President and members of the Tribunal as well as to the parties. The appellant submitted his observations thereon on 6 July 2020.

4. Having regard to Article 6.1.4 of Annex IX to the CPR, the President decided that the cases be heard by a full Panel, consisting of the President and the four members of the Tribunal.

5. In view of the prevailing public health situation the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 29 September 2020 utilizing facilities provided by NATO Headquarters. It heard arguments by the appellant and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

7. It is useful to recall that in 2017 a number of staff and retired staff lodged appeals against the 2 February 2016 decision by the NAC to amend the footnote to Article 51.2 of the NATO Civilian Personnel Regulations (CPR). On 30 August 2018, the Tribunal in Judgments in Cases Nos. 2017/1114-1124, and 2017/1127-1242 held that the appeals were inadmissible since none of the appellants had been directly and adversely affected by a decision implementing the change to the CPR. The Tribunal noted, however, the need for staff and retired staff to obtain legal certainty, further noting that the inadmissibility conclusion did not prevent them from challenging the lawfulness of the

amendment to the footnote in future challenges of implementing decisions applying it to them.

8. Some further background is necessary to provide the context for the appellant's claims. The undisputed evidence shows that before appellant joined NATO, the Organization introduced in 1967 premium-free lifelong medical insurance coverage for retirees and their dependents. In order to keep this scheme financially sustainable in the face of changing circumstances, various amendments and conditions were subsequently introduced.

9. Thus, for example, in 1974, it was decided that to qualify for free lifelong medical coverage for retirees and their dependents, staff recruited after 1 May 1974 who retired at age 60 or above must have been employed for at least five years. Those retiring between the ages of 55 and 60 must have been employed for at least ten years. Active staff had to pay 1/3 of the total premium. Qualified retirees were not required to contribute.

10. Further amendments were made in 1988. The qualifying period of employment for those retiring at age 60 and above was raised from five to ten years, and the premium was indexed and rose from 0.906 % of gross salary to 2.188%.

11. A bridging cover was introduced in 1995. Staff members retiring between the ages of 55 and 60 had to pay a bridging premium until age 65, after which they were entitled to free coverage. This premium was 2.591% of a (theoretical) pension. Retirees aged between 55 and 65 who were recruited before 1 January 1988 were entitled to free coverage if they had been employed for at least five years. The qualifying period was set at ten years (consecutive or otherwise) for staff members recruited between 1 January 1988 and 1 January 1995, and at ten consecutive years for those recruited after 1 January 1995.

12. Medical coverage for retirees was initially underwritten by a private insurance company. When the insurer was no longer prepared to underwrite the scheme for persons over the age of 65, the Organization created in 2001 the Retirees' Medical Claims Fund (RMCF or Fund). Under this new system, staff aged 55 or over who left NATO after a minimum of ten years of uninterrupted service were permanently entitled to reimbursement of medical expenses for themselves and their dependents, but subject to paying a premium. However, certain long-serving staff members were not required to pay after the age of 65, as provided in a footnote added to CPR Article 51.2:

> Provided they were recruited before 1st January 2001, staff members who have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay a premium after the age of 65.

13. Under the new system introduced in 2001, the premium paid to the RMCF after the age of 65 was set at 4.5% of gross salary for active staff and at 3% for retirees recruited before 1 January 2001 who did not have 25 years of contributions. Staff or retirees paid one-third of the applicable premium, with the remaining two-thirds paid by the Organization.

14. Also as part of the 2001 changes, a Supervisory Committee was set up to oversee management of the RMCF. This committee is composed of representatives from NATO administrations, active staff, and retired staff.

15. There was a further amendment in 2006. The premium for the bridging cover (for retirees between the ages of 55 and 65) was increased from 2.591% of theoretical pension to 3% of last salary. This premium was again increased in 2013, from 3% to 5%.

16. In 2009 the Secretary General informed the NAC that the Fund held €103 million at the end of 2008. He added that a 2008 actuarial study conducted on the initiative of the Supervisory Committee projected that the RMCF could be depleted between 2030 and 2047, depending on different assumptions regarding the return on assets (3, 5, or 8%). The Secretary General undertook to engage experts to estimate the minimum financial injection necessary to make the Fund sustainable.

17. In 2013, the NATO International Board of Auditors (IBAN) noted that the Fund's assets were estimated to be depleted between 2032 and 2051 based on an actuarial study performed in 2010. In 2016, an update of the IBAN's 2013 study concluded that the RMCF would be depleted somewhere between 2038 and 2043, and that remedial measures were needed to make the RMCF sustainable. The IBAN recommended in particular that the International Staff provide an estimate of the minimum financial injection necessary. The Board also recommended that the IS provide all necessary information and undertake any remedial actions to limit the level of obligations.

18. Several scenarios for strengthening the RMCF were then discussed in the Supervisory Committee and in the Joint Consultative Board, the permanent body set up under CPR Annex XI for consultation among the Administrations, the Confederation of NATO Civilian Staff Committees, and the Confederation of NATO Retired Civilian Staff Associations.

19. Following this process of discussion and consultation, the amendment to the footnote to CPR Article 51.2 mentioned above was proposed to the NAC by the Deputy Secretary General. As the *amicus curiae* brief records, and as appellant does not dispute, major elements of the proposed amendment reflected proposals by the active and retired staff representatives who endorsed the proposal as a whole. On 2 February 2016 the NAC adopted the amendment, which was issued on 8 February 2016 as Amendment 24 to the CPR. Each staff member received an individual nominative copy of the amendment (ON(2016)0008 dated 8 February 2016). While representatives of active and retired staff supported the amended footnote, there was not univeral agreement, as the present appeal challenging the amended footnote demonstrate.

20. As amended, the footnote now provides:

> Provided they were recruited before 1st January 2001, staff members who on 3 August 2016 have contributed to the group insurance scheme for a minimum of 25 years shall not be required to pay premium after the age of 65, under the condition they retire from service by 3 August 2016. Retired staff who have not contributed to the group insurance scheme for a minimum of 25 years by 3 August 2016 shall be required to pay a premium after the age of 65 to continue coverage under the scheme.

21. The appellant joined the NATO Airborne Early Warning & Control Force E-3A Component (NAEW&CF) on 3 August 1982. He retired on 31 May 2018. On 5 October 2019, the appellant ~~i~~wrote to the Head of Human Resources (HR) requesting an administrative review of the pension slip of September 2019, received by email from the NATO Pension Unit on 23 September 2019, in which the premium for continued medical cover was deducted from his pension. The request was rejected by the Head HR by letter dated 15 October 2018 recalling the background and history of amendments made to staff contributions and setting out the reasons why the request could not be granted.

22. On 11 November 2019 appellant submitted a complaint to the Secretary General (SG). He expressed his willingness to submit the matter directly to the Tribunal, in view of the purely legal nature of the issues in dispute. He added that he would consider a failure to respond within 30 days to be a decision rejecting the complaint. By letter dated 13 December 2018 the Assistant Secretary General informed on behalf of the SG that no agreement could be given to submit the matter directly to the Tribunal and that, as a consequence, the normal procedures as laid down in the CPR continued to apply. He then explained the reasons why he could not give a favorable response to the request. The matter was not referred to the CC.

23. On 13 February 2020, the appellant lodged the present appeal.

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

(i) The appellant's' contentions

24. The appellant presents arguments that are identical with the ones he developed in his appeal, which was part of the joined Cases Nos. 2017/1127-1242.

25. He considers the appeal admissible, as all available channels for seeking administrative review and submitting complaints were exhausted in accordance with the relevant CPR provisions and the appeal was submitted within the applicable time-limits.

26. As to the merits, the appellant does not contend that retired staff cannot be required to pay a premium to continue medical coverage after retirement, nor does he assert that the conditions of continued medical coverage can never be amended. He does submit, however, that this particular impugned measure - the amendment to the footnote - seriously violates several general principles of international public service law. He notes that the Tribunal has, in accordance with the footnote to Article 6.2.1 of Annex IX to the CPR, the authority to rule on the CPR if a CPR provision seriously violates a general principle of international public service law. He adds that since the underlying decision is illegal, the implementing decision purporting to apply the underlying decision his individual case is, as a consequence, illegal as well.

27. The appellant develops six pleas in this respect.

28. In a first plea, the appellant alleges a violation of the principle of equal treatment and non-discrimination, in that he is treated differently from staff members in a comparable situation who retired before 3 August 2016. Both groups have contributed to the group insurance scheme for a minimum of 25 years, but one category has the right

to free continued medical coverage and the other does not. The only difference is the date of retirement, which is arbitrary and does not constitute an objective reason for abolishing the right to free medical cover for those not retiring before 3 August 2016. The appellant maintains that there is no actuarial difference between these two categories of retirees.

29. Secondly, the appellant alleges a violation of the principle requiring protection of legal certainty and legitimate expectations. He argues that he had a legitimate expectation to benefit from free medical coverage after the age of 65 and that NATO gave assurances concerning continued free medical cover. He refers in this respect to a statement in 2000 by the then Head of HR that active staff have been paying one-third of each year's premium to cover the lifetime medical costs of their colleagues who reach 65 that year in the expectation that, when their own turn comes, their colleagues would pay for them.

30. In a third plea, the appellant claims negligence and violation of the principle of good administration and the duty of care. He points first to the short transition period between adoption of the underlying decision by the North Atlantic Council and its coming into force. He considers the absence of adequate transitional measures to violate the principle of good administration and the duty of care. Secondly, the appellant alleges negligence in the initial establishment of the RMCF without proper funding and in the subsequent failure to manage it properly and to rectify its financial shortcomings. He maintains that NATO failed to govern its finances so as to enable the Organization to honor its obligations toward the existing staff. NATO did not rectify the RMCF's weak financial position, but opted to transfer the burden of its financial obligations to its staff members, including the appellant.

31. As to the appellant's first argument, that the Organization did not provide a sufficient transition period or transitional measures, he refers to a Judgment of this Tribunal in Case No. 2014/1028. The Tribunal held there that "the principle of good administration and the duty of care mean, in particular, that the administration adopting a decision must take into account all the factors which may influence such decision, including the interest of the service and also the interest of the staff member concerned." By providing for a transition period of only six months before the change came into force, the North Atlantic Council did not take appellant's interests into account. In order to take his retirement on 3 August 2016, he needed to resign with a 180 days notice period. The NAC decision was communicated to him on 8 February 2016, which did not allow sufficient time to consider options. He adds that alternative insurance cover would either be impossible or expensive. Rather than completely abolishing the right to free cover, the NAC should have amended the length-of-contribution requirement or raised the contribution, which would have better taken the interest of appellants into account.

32. The appellant argues secondly that, contrary to its duty of good governance, the Organization knew (or should have known) that the RMCF was underfunded from the outset and knows today that the RMCF as currently financed is not viable for the future. The Organization will need to take further measures, such as increasing the amount of contributions, which will be further to appellant's detriment. The Organization was therefore negligent in the manner the Fund was created and has since been administered.

33. He adds that the impact of the contribution is higher than the 1.67% that is presented, since that percentage applies to the last salary, whereas the pension amount is lower.

34. In their fourth plea, the appellant contends that the change to the footnote violated his acquired rights. He submits that he acquired the right to continued free medical coverage in retirement upon 25 years of contributions to the insurance scheme. He maintains in this regard that the CPR contain two fundamentally different kinds of provisions: the first category, which can be changed, relates to the organization of the international civil service and to impersonal and variable benefits. The second category consists of provisions that establish the personal situations of staff members, provisions that can be a determining factor in their decision to accept employment. This second category can give rise to acquired rights. The appellant maintains that the right to free continued medical coverage guaranteed to them through the footnote to Article 51.2 of the CPR applies to him specifically, and is a significant right belonging to the second category. It establishes the individual position of the appellant and constitutes an acquired right that cannot be unilaterally changed by the Organization.

35. The fifth plea concerns violation of the principle of non-retroactivity. The appellant considers a provision to be retroactive if it effects some change in legal status, rights, liabilities or interests in existence prior to the measure's proclamation. He submits that until the impugned decision all changes to the medical coverage system applied only to new staff members recruited after the entry into force of the change. The impugned decision, however, does not respect the existing rights of the staff members in post. He concludes that by taking away his right to free continued medical coverage, the underlying decision seriously violates the principle of non-retroactivity.

36. In their sixth plea, the appellant contends that, should the Tribunal decide that the right to free continued medical coverage constitutes a statutory provision of the first category described above, its power to amend that provision is not unlimited. Here, the underlying decision upsets the balance of their contracts and entitles him to compensation. He acknowledges that statutory provisions – or provisions of general application to staff members – can be amended at any time in the interest of the service. However, as shown by the Tribunal's jurisprudence in Case No. 2014/1017, such amendments are subject to certain limitations. If an amendment disrupts the balance of the contract, the staff member is entitled to compensation. The notion of upsetting the balance of the contract involves a significant realignment of the employment relationship, as occurred here. Social security and health insurance are among the main terms of employment, which the appellant took into consideration for accepting their appointments, in particular the right to free medical coverage after the age of 65. By revoking the right to free continued medical coverage, the contested decision significantly realigned the appellants' employment relationships and hence upset the balance of their contracts, for which they should be compensated.

37. The appellant requests the Tribunal:

- to hold that the appeal is admissible;
- to hold that the appeal is well-founded;
- to declare the underlying decision illegal;
- to order the respondent not to apply the underlying decision to the appellant, or,

at the very least, to declare the underlying decision inapplicable to the appellant;
- to annul the implementing decision;
- to the extent that the underlying decision and/or the implementing decision would be applied to the appellant, to order the respondent to fully compensate all damages that such an application entails for the appellant, including paying premiums in order to benefit from continued medical coverage;
- to order the respondent to reimburse to the appellant all the costs of retaining legal counsel as well as the travel and subsistence costs associated with his presence at the hearing(s).

(ii) The respondent's contentions

38. The respondent does not dispute the admissibility of the appeal, but is of the view that they should be declared without merit.

39. The respondent observes that appellant was among the appellants in Cases Nos. 2017/1127-1242 and that, once retired, they voluntarily chose to opt for the continued medical coverage. As the result, he was asked to pay a premium in accordance with the amended footnote, which he now disputes.

40. The respondent reiterates that the NATO medical group insurance is a solidarity system, relying heavily on the contributions of the active staff. Over the years a number of changes have been introduced, based on objective considerations and general interest, to ensure the financial viability of the system and to preserve a robust medical plan given increases in healthcare costs and life expectancy. These changes were introduced on the basis of objective actuarial studies.

41. It considers the contribution rates for retirees reasonable, at 1.67% of the retiree's last salary, with the Organization contributing a further 3.33%. It recalls that the insurance also covers retiree's dependants at no additional cost to the retiree.

42. The respondent adds that the change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001 and who have either not reached 25 years of contributions to the NATO group insurance before 3 August 2016 or who have reached the 25 years mark but have chosen not to retire by that date. Staff who joined the Organization after 1 January 2001 and who are eligible for continued medical coverage are already required to pay the premium on a lifelong basis. The amendment therefore cannot be considered to lead to discriminatory treatment because, as of the date of implementation, both active staff who did not retire before 3 August 2016 - like the appellant - and retired staff who did not yet obtain the right to free medical coverage are required to contribute to the medical insurance plan for life.

43. Regarding the claimed violation of the principle of non-retroactivity, the respondent submits that the change does not violate this principle, as the modifications are only applied prospectively. In particular, staff members and retirees were not asked to contribute for previous years, their previous contributions were not called in question, and their entitlement to lifelong coverage remains unchanged.

44. The respondent continues that the amendment to the footnote does not violate any acquired or vested rights, as the appellants have not been deprived of the benefit of their previous contributions and the conditions to be met to benefit from continued medical coverage have not changed. The amendment also does not affect any contractual rights. In addition, the premium to be paid once staff members are retired is not of such a nature that can be considered to upset the balance of the appellant's contract or to change working conditions in an unacceptable manner. In any event, although the Organization is obliged to organize a healthcare system for serving and retired staff, this obligation does not create a right to a cost-free coverage.

45. The change to the footnote is a change to statutory elements that are governed by the CPR. It is an established principle that international administrative law distinguishes between provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may give rise to acquired rights. Statutory elements can be changed for duly justified reasons by the Organization, as is obviously the case for modification of the continued medical coverage because of financial conditions. In addition, while one may claim a legitimate expectation to remain eligible for lifelong coverage, neither such expectation, or the principle of legal certainty, can reasonably extend to the non-payment of any premium. This is particularly true when payment of premiums is justified by longer life expectancy and the higher cost of medical treatments, as is the case here.

46. The respondent observes with respect to the length of the transition period that all staff were immediately informed. Although the appellant satisfied the conditions to benefit from the transition period, he chose not to take advantage of it when the possibility was offered to him. Moreover, this transition period should not be confused with the notice period to be given in case of resignation. The respondent recalls that such a transitional period is not required when a change to statutory rules is justified on objective grounds with arguments of an actuarial nature. It emphasizes that prior to the NAC's decision, the change to the footnote was extensively discussed in order to find a satisfactory solution protecting the interests of the Organization and of the staff. The issue was the subject of consultations between representatives of the Administrations and of active and retired staff, both in the context of the RMCF Supervisory Committee and of the Joint Consultative Board, following the proposal made by the Confederation of NATO Civilian Staff Committees in 2014.

D. The *amicus curiae* brief

47. In an *amicus curiae* submitted by the Chairman of the Confederation of NATO Civilian Staff Committees (CNCSC), the CNCSC explained that for many years staff representatives had expressed their concern regarding the RMCF's long-term viability and ability to meet its objective, defined in Article 1 of Annex XIII to the NCPR to be "the establishment of a reserve to ensure that sufficient funds are available for the years to come to enable NATO to meet its obligations under Article 51.2 of the Civilian Personnel Regulations."

48. The CNCSC recalled that in April 2014, after years of exchanges with its NATO interlocutors, it presented a paper proposing deletion of the footnote, because the point in time when expenses would exceed contributions was rapidly approaching (it was finally reached in 2019).

49. The *amicus* brief stated that the CNCSC was perfectly aware that the deletion of the footnote alone would not solve all the problems and therefore its paper also mentioned other areas to be critically examined in order to ensure the long-term viability of the RMCF:
- the scope of the current medical cover;
- the present contributions and their repartition amongst (former) staff;
- the level of reimbursement to currently retired staff not contributing to the fund.

50. The *amicus* brief underlined that these points were repeatedly discussed at the CNCSC level by the representatives of all NATO Civilian Staff Committees, and that the CNCSC decision to propose the deletion of the footnote in 2014 was not easy to take, because it effectively meant that staff representatives were suggesting changes to the CPR that could be perceived as detrimental to the staff, whereas staff representatives were actually trying to protect staff members' interests in the long term. But this proposal was meant to be a first step that would pave the way for further badly needed changes.

51. The brief stated that discussion on these other points is suspended pending the outcome of the present appeal.

52. The CNCSC highlighted that it took a difficult and responsible decision on the face of an alarming situation.

E. Considerations and conclusions

(i) Admissibility

53. The respondent has no observations regarding the admissibility of the appeal. The Tribunal notes that the appeal challenges a pension slip, which implements the amended footnote. The appeal is admissible.

(ii) Merits

54. This is not the first time that the Tribunal and its predecessor have considered appeals concerning the adjustment of contributions to the medical insurance scheme. See, for example, Cases Nos. 425, 723 and 901.

55. As a preamble, the Tribunal recalls that it is inherent in any medical plan that contributions evolve in the light of increases in life expectancy and in medical costs. It is, moreover, not in dispute that the funding of the RMCF was not sustainable and that remedial measures were needed as a matter of urgency. In this regard, the appellant made clear that he does not contest that retired staff can be required to pay a premium to continue medical coverage after retirement, nor does he assert that the conditions of continued medical coverage can never be amended. He instead submits that the particular measure under challenge seriously violates general principles of international public service law.

56. The Tribunal also notes the undisputed evidence showing that the impugned decision was taken on the basis of a number of actuarial studies and following detailed

discussions among the representatives of the stakeholders, *i.e.* of management, staff, and retirees. The record also shows that between 2014 and 2016 the stakeholders devoted significant efforts to remedying the financial shortcomings of the RMCF and took indeed far-reaching decisions resulting in the NAC decision in dispute.

57. The Tribunal must now assess whether the impugned decision was lawful.

1. Violation of the principle of equal treatment and non-discrimination

58. The appellant alleges that he is treated differently from staff members in a comparable situation who retired before 3 August 2016, both groups having contributed to the group insurance scheme for a minimum of 25 years, but one category has the right to free continued medical coverage and the other does not. The only difference is the date of retirement, which is said to be arbitrary and not to constitute an objective reason for abolishing the right to free medical cover. In this regard, the appellant maintains that there is no actuarial difference between these two categories of retirees.

59. The respondent counters that the change to the footnote applies without exception to the whole population of staff who joined the Organization before 1 January 2001, and who have either not reached 25 years of contributions to the NATO group insurance before 3 August 2016 or who have reached the 25 years mark but chose not to retire by that date. Staff who joined the Organization after 1 January 2001 and who are eligible for continued medical coverage are already required to pay the premium on a lifelong basis. The amendment therefore cannot be considered to lead to discriminatory treatment because, as of the date of implementation, both active staff who did not retire before 3 August 2016 - like the appellant - and retired staff who did not yet obtain the right to free medical coverage are required to contribute to the medical insurance plan for life.

60. The Tribunal recalls that it held in Case No. 903:

> 71. …there can be violation of the principle of equal treatment only when two categories of persons, whose factual and legal situations are essentially the same, are subject to different treatment, or when different situations are treated in the same way.

And in Case No. 2017/1109:

> 49. ... it is a fundamental principle of international administrative law that similarly situated staff members must be treated consistently. This principle applies equally in matters involving an organization's exercise of discretion; the organization is equally bound to treat similarly situated staff members similarly when taking discretionary action…

61. It is obvious that with the changes that have been introduced to the RMCF over time a number of different groups were created, each having different rights. Thus, for example, those in post before 1 January 2001 and those entering into duty after that date; those retirees with more than 25 years of service paying contributions and those with less; and those who retired before 3 August 2016 and those who did not, are all in different situations. Differences do exist between these different groups, but this is inherent in the administration of a program such as the RMCF, which requires that lines

be drawn to define which persons fall into which groups. The 3 August 2016 retirement date is such a line. The appellants were informed of this date, and had the possibility to retire before 3 August 2016, as well as the right at the time of retirement the right to discontinue their enrolment in NATO's medical plan. The Tribunal therefore does not accept that the drawing of this line violates the principle of equal treatment. Further, the Tribunal is satisfied that within these groups everyone in the same situation is being treated equally. The contrary has not been established. This plea is therefore rejected.

2. *Violation of the principle of the protection of legal certainty and legitimate expectations*

62. The appellant submits that he had a legitimate expectation to benefit from free medical coverage after the age of 65 and refer to the Tribunal's jurisprudence regarding this principle. The Tribunal has indeed held in Case No. 2014/1028 that the principle of the protection of legitimate expectations "applies to any individual in whom the administration has instilled justified and clear hopes by giving specific assurances in the form of precise, unconditional and consistent information from authoritative and reliable sources."

And in Case No. 887 it held that three conditions must be fulfilled in this respect:

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

63. The appellant's claim of legitimate expectations seems at variance with his claim that he does not deny that retired staff can be required to pay a premium to continue medical coverage after retirement, or their acceptance that the conditions of continued medical coverage, such as the percentages of reimbursement, can be amended. Moreover, the history of the RMCF clearly shows that the rules regarding the financing of the medical cover have repeatedly changed. This process of evolution over time shows that the appellant's claim of legitimate expectations to a static *status quo* has no basis in the facts.

64. The appellant refers in support of his claim to a statement made in 2000, *i.e.* twenty years ago, by the then Head of HR to the effect that active staff have been paying one-third of the premium due each year to cover the lifetime medical costs of their colleagues who reach 65 that year in the expectation that, when their own turn comes, their colleagues would pay for them. This statement is a general observation made by someone who was perhaps involved in reviewing the matter at the time, but certainly was not empowered to take a decision committing the Organization to a static course of conduct over the next two decades. This cannot be considered to be "precise, unconditional and consistent assurances originating from authorized and reliable sources." The plea of violation of the principle of the protection of legal certainty and legitimate expectations therefore fails.

3. Display of negligence and violation of the principle of good administration and the duty of care

65. The appellant develops essentially two pleas under this heading. He first points to the short transition period between the adoption of the underlying decision by the NAC and its coming into force, which did not leave him sufficient time to consider options. He considers that this, as well as the absence of transitional measures, violate the principle of good administration and the duty of care.

66. The respondent submits that there was no requirement to have a transition period.

67. The Tribunal notes that it is consistent with good administration to provide a transition period. The Tribunal considers that even if the transitional period appears short, on the basis of the information in the file, it is set at a sufficient duration. The Tribunal cannot therefore conclude that it was not lawful. Moreover, the appellants have failed to establish the existence of any options that they may have been considering, for example in seeking alternative medical cover, that were frustrated by this deadline, or how a longer transition period of say twelve months would have materially improved their situations.

68. Secondly, the appellant contends that he is entitled to expect NATO to govern its finances so as to enable the Organization to honor its obligations toward the existing staff, and that the Organization failed to meet a legal obligation to do so. This argument is not convincing. It is undisputed that the Organization continues to provide a robust program of medical coverage for its active and retired staff, including the appellants. The Organization pays two-thirds of the costs of the appellants' medical care, and under the impugned decision will continue to do so. Active staff and now (part of) the retirees together pay the other third. The split between active and retired staff is not equal in percentage terms; active staff pay much more than the retirees. But this is a discretionary matter.

69. The appellant argues that the Organization did not rectify the financial challenges facing the RCMF, but instead opted to transfer the financial burden involved to its staff members, including the appellants. The Tribunal disagrees. The appellant contends that he has a legal right to free lifetime medical coverage for himself and his dependents. This is inconsistent with the basic character of the Organization's medical coverage program as a solidarity system, albeit as one in which the Organization and the active staff pay the overwhelming` proportion of the costs resulting from rising medical costs and demographic changes. The impugned decision is a significant step to reinforce the financial foundations of this system. Most likely further measures need to be taken to fully finance the RMCF, but that is for the stakeholders to decide. However, the Tribunal can find no lack of care or negligence on the part of the Organization in connection with the impugned decision.

70. The Tribunal concludes that this plea fails.

4. Violation of the principle of non-retroactivity

71. The appellant alleges violation of the principle of non-retroactivity. He considers a provision to be retroactive if it effects some change in legal status, rights, liabilities or

interests that existed prior to its proclamation. He submits that, until the impugned decision, all changes to the medical coverage system only applied to new staff members recruited after the entry into force of the change. The impugned decision, however, does not respect the existing rights of the staff members in post. The appellant concludes that, by taking away their right to free continued medical coverage, the underlying decision seriously violates the principle of non-retroactivity.

72. The respondent argues that the change does not violate this principle, as the modifications are only applied for the future. In particular, staff members and retirees were not asked to contribute for previous years, their previous contributions were not called in question and their entitlement to lifelong coverage remains unchanged.

73. The appellant considers a provision retroactive if it effects some change in legal status, rights, liabilities or interests existing prior to its proclamation. This is an unorthodox and unconvincing interpretation of the principle of non-retroactivity. The principle of non-retroactivity does not mean that matters of rights and status are frozen and cannot be changed going forward in time. An existing legal status may be amended going forward, subject to certain conditions such as respect for any acquired rights, and, indeed, respect for the principle of non-retroactivity. Here the impugned decision indeed changed a legal status, but only going forward. It did not reach back in time to alter previously existing situations. The decision is prospective in operation and does therefore not violate the principle of non-retroactivity (*cf.* NATO AT Judgment in Case No. 2014/1017, paragraph 48).

74. The Tribunal also disagrees with the second point raised, *i.e.* that in the past changes were designed to apply only to new staff and not to staff in post. This, first of all, is unrelated to the principle of non-retroactivity as normally understood. Secondly, whatever past practices may have been, there is no principle of law requiring that changes in regulations or regimes apply only to new staff and never to staff in post.

75. The plea of violation of the principle of non-retroactivity must be rejected.

5. Violation of acquired rights and/or upsetting the balance of contract

76. The Tribunal will deal with the plea of violation of acquired rights and that of upsetting the balance of contract in this single sub-chapter.

77. The appellant submits that the right to free continued medical coverage in retirement previously guaranteed through the footnote to Article 51.2 of the CPR applies to them specifically. In their view, it is part of the provisions establishing their individual positions that were a determining factor in their decisions to accept employment with the Organization. These provisions therefore give rise to acquired rights. Alternatively, the appellants claim that, should the Tribunal decide that the right to free continued medical coverage constitutes a statutory provision, the underlying decision to revise the footnote upsets the balance of their contracts and entitles them to compensation.

78. The respondent responds that the change to the footnote is a change to statutory elements governed by the CPR. It adds that it is established that international administrative law distinguishes between provisions in an organization's regulations, which may be altered, and contract conditions personal to the staff member, which may

give rise to acquired rights. Statutory elements can be changed for duly justified reasons by the Organization, as is obviously the case here, involving modification of the continued medical coverage to meet evolving financial conditions.

79. The Tribunal concurs with the positions taken by its predecessor, the NATO Appeals Board, and other international administrative tribunals with respect to the legal principles applicable to this claim. The NATO Appeals Board consistently held that the provisions concerning the medical plan are statutory provisions. Staff and retirees cannot in general expect to retain the benefit of such general and non-personal provisions in force at the date of entry into their employment contracts, even when their individual contract makes reference to the said terms, as is normally the case. These terms, which are regulatory in nature, can be modified at any time by the competent administrative authority in the interests of the service, subject to the principle of no retroactive effects and to any limitations the competent authority may itself impose on its power to modify them. However, if the effect of the modifications is to upset the balance of the contract between the staff member and the Organization, the former is entitled to compensation (*cf.*, amongst others, NATO Appeals Board Decisions Nos. 80, 338, 425, 723, and 726).

80. The appellant, referring to the Tribunal's jurisprudence, submits that the impugned amendment to the footnote disrupts the balance of their contracts, entitling them to compensation. He contends that social security and health insurance are among the main terms of employment, and that they took into consideration in accepting their appointments the right to free medical coverage after the age of 65 as an essential term of employment. By revoking the right to free continued medical coverage, the contested decision therefore significantly realigned the appellant's employment relationships and hence upset the balance of his contract, for which he should be compensated.

81. The ILO Administrative Tribunal (ILOAT) has extensively analyzed the concepts of acquired rights and the balance of contracts and, while it has a slightly different analytical approach, the main thrust of its jurisprudence is consistent with that of the NATO Appeals Board. The ILOAT thus held in its landmark Judgment No. 832:

> 14.There are three tests it will apply.
>
> The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.
>
> The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.
> The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?

82. The ILOAT refined its jurisprudence in Judgment No. 2682:

> 6. … an acquired right is breached only when such an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in

> consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential….

83. More recently it articulated principles in Judgment No. 3538 regarding pension contributions that apply *mutatis mutandis* to contributions to medical plans:

> 10. As to the complainants' argument that there had been a violation of an acquired right, it should be rejected. The decision of the Tribunal in Judgment 1392… provides firm precedent for the rejection of this argument. As the Tribunal said (at consideration 34):
>
> > "[A] pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits."
>
> 11. It is to be recalled that the Administrative Council made its decision to increase contributions on the basis of advice that had been provided by the Actuarial Advisory Group constituted by three actuaries. An actuary is a highly skilled professional who would ordinarily acquire the knowledge to undertake the work of an actuary during years of tertiary study at a high level.

84. Lastly, the ILOAT held in Judgment 4274:

> 17. As the Tribunal has pointed out on a number of occasions, the staff members of international organisations are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions (see Judgments 3876, under 7, 3909, under 12, and 4028, under 13). The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on…

85. In returning to the case before us, it is appropriate to recall that following notification by the insurers in 2000 that they were not willing to continue to underwrite the existing scheme, the NAC agreed that NATO would itself assume responsibility for continued medical cover. NATO would as from 1 January 2001 fulfill its obligations by means of a group insurance policy for which it would pay yearly premiums, funded in part by contributions both from serving staff members and from retired staff members, except for retirees recruited before 1 January 2001 with 25 years of reckonable service at the time of their retirement. When that decision was challenged, the Appeals Board held in Case No. 425:

> The pension scheme and the amount of pension are undoubtedly decisive factors for the staff member at the time he signs his contract. Nonetheless, the new scheme which, given present market conditions, calls for a deduction at source from the pension payment of an amount equivalent to a percentage of the basic salary at the final grade held does

> not, in itself, appear to be a measure tending to disrupt the contract. The fact that, after taking retirement, the staff member continues to participate in funding the continuing medical insurance scheme does not deprive him of the benefit of previous contributions but can be explained by longer life expectancy and the higher cost of medical treatment. Although, in the previous scheme, the contributions of staff members to continuing medical cover were offset by the insurer's guarantee of post-retirement medical cover without the retiree having to contribute to the scheme, the same guarantee is currently provided by the Organization in return for a contribution which has proven necessary today in the light of insurance market trends linked to higher life expectancy and the escalating cost of medical treatment. The argument advanced that there is a disruption of the balance of the contract cannot be accepted.

86. When the decision to increase the contribution rate at 1 January 2006 was challenged, the Appeals Board held in Case No. 723:

> It is appropriate to determine whether the modifications made to the health insurance system of the staff in question did in fact upset the balance of their contract in a manner which entitles them to compensation. Purely and simply doing away with the guarantee of continued medical coverage for the Organization's former staff would surely amount to upsetting the balance of their contracts. Conversely, introducing a new contribution to meet the requirements of funding that guarantee and changing the rate of that contribution do not, by themselves, constitute a contractual change sufficient to give entitlement to compensation.

87. In its Judgment in Case No. 2014/1017 this Tribunal recalled these and other NATO Appeals Board's Decisions. It then held:

> The notion of "upsetting the balance of the contract" involves a much more significant realignment of the employment relationship than has occurred here.

88. The Tribunal repeats that the changes were prospective in operation and that the appellant had the opportunity to take alternative measures to avoid the impact of the impugned decision. It considers that the amounts involved, which are very reasonable compared to similar schemes elsewhere, and which guarantee continued medical cover without any changes in the reimbursement scheme, do not significantly realign the employment relationship, affect the economic balance of the appellant's prior contract, or alter a fundamental term of employment in consideration of which he accepted his appointment many years ago, or which subsequently induced him to stay on. The impugned decision did not violate acquired rights or affect the economic balance of the contracts.

89. It is not the Tribunal's responsibility to determine whether different and better decisions with a similar effect could have been taken, as the appellant at one point suggests. That is the discretion of the decision-makers, in this particular case *co*-decision makers, who made on the face of it a *bona fide* attempt to secure the financing of the RMCF into the future and which is based on what appears to be reasoned actuarial advice (*cf.* ILOAT Judgment No. 3538, consideration 15). It is constant that international administrative tribunals do not substitute their own view for the Organization's assessment in such cases, unless there is an abuse of the discretionary power. No such abuse has been alleged or shown here.

90. To sum up, it is inevitable that the amount of contributions for medical insurance

schemes are regularly reviewed in order to take account of increases in life expectancy and of medical costs. It is also not uncommon to expect that beneficiaries pay a premium. In amending the footnote, NATO stakeholders took a far-reaching decision to put the RMCF on a sounder financial footing. It is to be emphasized that representatives of active and retired staff took a very active part in the decision-making process. In taking the impugned decision, NATO did not act in breach of its legal obligations. The impugned decision does not create any form of discrimination within the respective groups of staff and retired staff. It does not violate the principle of the protection of legal certainty and legitimate expectations. It does not reflect negligence or violate the principle of good administration and the duty of care. It does not apply retroactively. And, lastly, it does not violate acquired rights or affect the economic balance of the appellant's contract. And although the impugned decision does impose financial costs on the appellant, the reasons for doing so are objective and the costs involved are reasonable.

91. In conclusion, the appeal is rejected in its entirety.

F. Costs

92. 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 [...].

93. The appellant submits that he has raised before the Tribunal several new and sensitive legal questions, which are liable to recur in a number of disputes, namely all questions pertaining to the continued medical coverage scheme. He requests the Tribunal to order reimbursements of all legal costs as well as of travel and subsistence costs, even if the Tribunal finds that there are no good grounds for this appeal.

94. Without entering in a discussion on the force of these arguments, the Tribunal must note that in accordance with Article 6.2.3 of Annex IX to the CPR it does "not have any powers beyond those conferred under this Annex." The wording of Article 6.8.2 of Annex IX quoted *supra* being clear and unambiguous, the appellants' request cannot be granted.

95. Moreover, at the oral hearing the appellant admitted that he was self-represented in the present appeal, but that he was seeking reimbursement of the costs incurred by him in the joined Cases Nos. 2017/1127-1242. The Tribunal recalls that in those cases costs were denied. That decision is final and binding.

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

G. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 29 October 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

4 November 2020 AT-J(2020)0007

Judgment

Case No. 2020/1297

DT

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 29 October 2020

Original: English

Keywords: Article 26.1.of the CPR; installation allowance, continuous residence; previous contractor at the same duty station; duty of care.

(This page is left blank intentionally)

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 Christos Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 28 September 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 5 February 2020 and registered on 19 February 2020 as Case No. 2020/1297, by Mr DT against the NATO Communications and Information Agency (NCIA). The appeal relates to the denial by NCIA of the appellant's request for an installation allowance and reimbursement of removal expenses. The appellant requests also the production of documentation by the respondent.

2. The respondent's answer, dated 17 April 2020, was registered on 24 April 2020. The appellant's reply, dated 26 May 2020, was registered on 9 June 2020. The respondent's rejoinder, dated 9 July 2020, was registered on 16 July 2020.

3. In view of the prevailing public health situation the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 28 September 2020 utilizing facilities provided by NATO Headquarters. It heard arguments by the appellant and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. The appellant worked as a contractor for a company supporting NCIA operations in Glons, Belgium from Mars 2015 to April 2017 and then in The Hague, the Netherlands, from 21 April 2017 to 17 April 2018.

6. On 16 April 2018 the appellant accepted the NCIA's offer to work as a NATO staff member under a definite duration contract for three years in the post of Specialist-Documentation, grade B5 with duty location The Hague, the Netherlands. The start date for this contract was agreed to be 18 April 2018.

7. As the record of the present case shows, on 17 April 2018, the appellant was informed of the decision of the Human Resources service (HR) to deny him entitlement to the installation allowance and reimbursement of removal expenses in view of the fact that, at the time of his recruitment, his residence was in The Hague. The appellant contested this decision with his immediate line manager who by e-mail of the same day suggested to HR that the appellant should receive the allowance in question and be reimbursed for removal expenses. By e-mail of 23 April 2018, the appellant also expressly contested HR's decision and offered to provide evidence that his habitual residence was in fact in the United Kingdom and not in the Netherlands.

8. By e-mails of 14 and 15 May 2018, the respondent invited the appellant to correct the date of his registration with the Dutch Ministry of Foreign Affairs (MFA) and to mention

in the relevant form the exact date of his arrival in the Netherlands in 2017 to work as a contractor supporting NCIA's operations.

9. By e-mail of 23 May 2018, HR informed the appellant that his situation would be reviewed to see if he is eligible for the above-mentioned allowance and reimbursement of removal expenses. By e-mail of 24 August 2018, the Head of HR informed the appellant that, according to the information provided regarding his residence, his situation could be considered as an exceptional circumstance. By e-mail of 6 December 2018, the same person informed the appellant that, on the basis of the additional information provided, the appellant could be granted "in principle … the installation allowance as an exception". In this regard, the Deputy Head of the HR was requested to ensure the follow-up of this decision in the absence of the Head of HR.

10. By e-mail of 14 December 2018, the Deputy Head of HR informed the appellant that she was not aware of the above information and relevant documentation and offered to review the information with the Head of HR upon her return in mid-January. The Head of HR left NCIA in January 2019.

11. By e-mails dated 18 February 2019 and 6 March 2019, the appellant asked HR if his file had been processed and finalized as discussed in December 2018.

12. By e-mail dated 13 May 2019, the acting Head of HR answered that, after investigation within the service, the appellant was not entitled to the installation allowance nor, therefore, to reimbursement of removal expenses. The same e-mail stated that review of the complete file showed that the service's previous assessments were incorrect and this is confirmed by the case law of the Tribunal, which, in a situation very similar to that of the appellant, concluded that a staff member's claim was unfounded. In this e-mail, the acting Head of HR apologized for this very late definitive decision and in particular for the confusion and incorrect information provided by the HR service in December 2018.

13. After exchanges of e-mails on 14 May 2019 with the respondent, in particular on the subject of the case law applicable and the conditions for granting the installation allowance, on 5 June 2019, the appellant requested an administrative review of the previous decision refusing to grant the allowance and the reimbursement of removal expenses.

14. On 12 July 2019, the respondent rejected the requested administrative review, concluding that the previous decision not to grant the appellant the installation allowance and reimbursement of removal expenses was in accordance with the NATO Civilian Personnel Regulations (CPR).

15. By e-mail dated 16 July 2019, the appellant challenged this decision, focusing on the fact that the legal framework was unclear and that the interpretation of "residence" and the concept of "habitual residence" is not defined in the NCIA contractual policy. Further, by e-mail dated 10 August 2019, the appellant decided to request that the complaint be submitted to a Complaints Committee (CC).

16. By decision on 26 August 2019, the Agency General Manager notified the submission of the complaint to this committee, which on 21 October 2019 issued its

report concluding, by a majority decision, that the appellant's complaint was without merit. On 4 November 2019, the appellant presented his comment on this report.

17. By decision dated 5 December 2019, and in accordance with the recommendation of the CC report, the NCIA General Manager confirmed that the appellant was not eligible for the installation allowance and reimbursement of the removal expenses (the contested decision).

18. It is in this context that appellant brought the present action before the Tribunal.

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

(i) The appellant's contentions

19. The appellant seeks the annulment of the contested decision, putting forward two pleas.

20. By his first plea, the appellant contends that the respondent incorrectly applied the criteria provided in the CPR, and in particular Articles 26.1.1 and 39.1, in order to refuse the installation allowance and consequently reimbursement of removal expenses. He contends that the respondent did not take into account the fact that during the period prior to his recruitment as an NCIA agent, he did not have effective residence in the Netherlands and urges that he did not have the opportunity to prove that his actual residence was in the United Kingdom. In this context, the appellant argues that the absence of a definition of "habitual residence" and of "residence" in the Agency's contractual policy gives the Agency a very wide margin of appreciation to unjustifiably refuse this allowance. In addition, he contends that the applicable legal framework provided by the CPR contains conflicting references when the term "residence" is used in different situations. This allows the Agency to follow an inconsistent approach.

21. As to the respondent's arguments drawn from the case law of the Tribunal, which respondent understands to show that the appellant cannot claim to benefit from the installation allowance, the appellant considers that the factual circumstances in the judgments invoked are not similar to his situation, so this case law is not relevant. In contrast, the case law of the NATO Appeals Board (Decision No. 776) leads to a different conclusion. Indeed, the appellant was not effectively established in The Hague while maintaining his center of interest in the United Kingdom. In any case, the appellant contends that his eligibility for the expatriation allowance shows he is also eligible for the installation allowance and reimbursement of removal expenses.

22. By a second plea, the appellant claims that the contested decision is illegal because it was adopted in breach of the principle of good administration and the duty of care.

23. The appellant claims that the respondent initially granted him the installation allowance, but this decision was never implemented before HR decided to reverse it in an unjustified and illegal manner. Thus, the respondent did not demonstrate proper management of his case by constantly postponing execution of the decision authorizing the installation allowance; it was only after repeated requests by the appellant that the

contested decision was made. This approach constitutes a flagrant violation of the above-mentioned principle.

24. The appellant contends that documents he submitted show that the respondent sought for almost five months to find a way not to grant him the installation allowance and reimburse his removal expenses. He further contends that the respondent led him to take steps with the national authorities showing that for several months prior to his recruitment, the appellant had his residence in the Netherlands. Indeed, the appellant was invited to rectify the registration with MFA, indicating in the MFA's form that he arrived in the Netherlands on 21 April 2017. This conferred the appellant permanent resident status under the national law. And it was only on this basis that HR concluded that the appellant was considered as a resident in the Netherlands and therefore could not be entitled to the installation allowance and reimbursement of removal expenses.

25. In this regard, the appellant requests respondent "to provide him with a report of the investigation made by respondent into his registration with the MFA". He considers that this claim is admissible because only the Agency can contact the Dutch MFA directly and act as mediator between the Dutch government and the agents. The appellant contends that refusing this request compromises his rights as an EU citizen.

26. The appellant submits that he repeatedly asked respondent to provide him with the relevant definitions and criteria for determining the notion of "habitual residence" within the meaning of Article 26.1.1 of the CPR, and that the respondent has never complied. In addition, at the time of his recruitment, he was not properly informed how the respondent intended to implement the provisions of this Article, particularly for an agent like him who already worked at The Hague before becoming an NCIA staff member. These omissions constitute blatant breaches of the duty of care, which deprived him of the possibility, of having at his disposal all the elements necessary to usefully defend his position and of assessing the financial impact of the respondent's decision not to grant him the installation allowance. This is aggravated by the fact that the respondent initially notified him in December 2018 that he was to receive the installation allowance.

27. Secondly, the appellant makes claims for damages, considering that the contested decision caused him material damage for loss of income. He considers that this claim is admissible because it was partially discussed during the pre-litigation process. Further, he sufficiently explained in his comments on the CC report that the decision to deny the installation allowance has caused significant material damage. Under these conditions, he seeks the difference in salary he could have continued to earn as a contractor before starting to work as a NATO staff member. This amounts, according to the calculation and justification he provided, to 9,623.46 EUR He also claims that he suffered non-material damage as a result of the breach of the duty of care, since for six months he had to wait in vain for implementation of the decision in his favor.

28. The appellant requests to:

- deem him eligible for the installation allowance and order payment of the amounts due;
- order reimbursement of his removal costs from the United Kingdom to the Netherlands;
- order amendment of his registration with the Dutch MFA on the basis of the report

he requested concerning his residential status in the Netherlands and
- order payment of the difference in salary (9,623.46 EUR) he could have continued to earn as a contractor before starting to work as a NCIA staff member.

(ii) The respondent's contentions

29. The respondent notes preliminarily that two of the appellant's claims are inadmissible, namely the claim for material damages for loss of revenue and the claim that the respondent produce a report into its investigation of his registration with the Dutch MFA. These claims were not raised during the pre-litigation procedure and in any event do not relate to a decision by the respondent.

30. Regarding the appellant's request for annulment and his first plea claiming violation of Article 26.1.1 of the CPR, the respondent replies that the appellant has been resident since April 2017 in The Hague. Therefore, at the time of his recruitment in April 2018 his habitual residence for purposes of this Article had been in The Hague for almost a year. Under these conditions, the appellant could not benefit from the installation allowance under this provision or reimbursement of the removal expenses under Article 39.1 of the CPR. The fact that the appellant has kept various and important links with the United Kingdom before joining the Agency is not relevant in this regard. This is expressly confirmed by the case law of the Tribunal as reflected in the conclusions of the CC report.

31. As to the argument that the appellant benefits from the expatriation allowance, so that he should also be entitled to the installation allowance and reimbursement of removal expenses, the respondent replies that the two allowances are governed by different rules. The appellant was eligible for the expatriation allowance because he is not a national of the host state (the Netherlands) and he had been continuously resident in this country for less than one year. According to the respondent, the appellant, not being eligible for the installation allowance, is not eligible for reimbursement of removal expenses. This is clearly derived from Article 39.1 of the CPR, which makes the reimbursement of his expenses conditional on the staff member being eligible for the installation allowance.

32. The respondent rejects the plea of violation of the principle of good administration and the duty of care.

33. As to the appellant's argument that he did not have the necessary information to assess the financial impact on his situation in case of a refusal to grant him the installation allowance, the respondent replies that when he was recruited, he was given all the necessary information by e-mail of 28 February 2018. This e-mail and the attached documentation specified that the information transmitted was subject to verification by the respondent. Thus, the appellant had the opportunity to contest, even before the day he took up his duties, the decision not to grant him the installation allowance.

34. Concerning the argument that the former Head of HR granted him the installation allowance by a decision that was not implemented in violation of the duty of care, the respondent replied that this decision indicated to the appellant that the allowance could be granted to him on an exceptional basis. However, the exceptions provided for in Article 26.9.1 of the CPR fall within the competence of the Head of the NATO body and not the Head of the HR except in cases of delegation not applicable here. Therefore, in the

respondent's follow-up of the alleged decision, it appeared that this decision could not be implemented because it had no legal basis. It was only for this reason that the initial decision not to grant the appellant the installation allowance was confirmed. From this point of view, there is no violation of the duty of care.

35. As regards the registration of the appellant with the Dutch MFA and the appellant's corrections to the registration following the indications of the Agency, the respondent rejects any argument that the Agency sought through these corrections indirectly to confirm the appellant's status of permanent residence in the Netherlands. The Agency only invited the appellant to modify incorrect information already provided concerning his arrival in the Netherlands. Furthermore, the Agency has no power over the decisions of national authorities concerning a status member's status. The appellant's request for a report on the investigation of the appellant's registration with the Dutch MFA, is according to the respondent in any event unfounded and is beyond the Agency's competence.

36. Finally, as regards the claims for compensation (loss of revenue and non-material damage) and subject to their admissibility, the respondent considers that they are not sufficiently quantified and are devoid of any merit and must be rejected as a whole. For the reasons set out above, the respondent requests the Tribunal to declare the present appeal partially inadmissible and fully unfounded.

D. Considerations and conclusions

37. First of all, the Tribunal observes that the appellant's submissions are formally addressed to the respondent and request a review of its decisions. In this context, the appellant repeats the arguments and contentions developed in the pre-litigation procedure. In a spirit of open-mindedness and care and taking into account that appellant is not assisted by a lawyer, the Tribunal considers that his submissions must be interpreted as requesting the Tribunal to annul the contested decision in so far as the respondent refuses to grant the installation allowance and reimburse his removal expenses.

On the submissions for annulment

38. The appellant puts forward two pleas. The first in effect alleges an error of assessment by the respondent in the application of Articles 26.1.1 and 39.1 of the CPR. The second alleges a violation of the principle of good administration and the duty of care.

On the error of assessment in applying Articles 26.1.1 and 39.1 of the CPR

39. Firstly, according to Article 26.1.1 of the CPR:

> Eligible staff members whose actual and habitual residence at the time of their appointment by NATO for an appointment of at least one year, or of their transfer for at least one year to a different duty station, is more than 100 km away from their assigned duty station and who can prove and confirm by submitting the appropriate documentation

that they have in fact moved their residence in order to take up duty, are eligible for the installation allowance.

40. The appellant claims that by adopting the contested decision, the respondent made an error of assessment on the conditions of application of this Article by refusing to grant him the installation allowance on the ground that at the date of his appointment with NCIA his actual and habitual residence was in The Hague. In this regard, appellant argues that, for the relevant period, his residence was in the United Kingdom, because he had his principal center of interests there and not in The Hague, regardless of his work as a contractor for a company supporting the NCIA in The Hague before being hired by the Agency.

41. Assuming that the appellant had, as claimed, retained links with the United Kingdom, it is not disputed that since 21 April 2017 and until the date of his appointment as an NCIA staff member in April 2018, he worked continuously in The Hague as a contractor for a company supporting NCIA operations. Appellant does not dispute that he worked in The Hague on a continuous basis during this period.

42. The appellant tries to show that even if this is correct, his habitual residence was not in The Hague and the Netherlands but in the United Kingdom, where he maintained his centers of interest. In this regard, he argues that during the first months of his work as a contractor he was not really installed in the Netherlands, so that his habitual residence was not in this country since April 2017 as indicated in different forms. In addition, he claims that the terms “actual and habitual residence” remain vague and can be interpreted in a less strict and formal manner than claimed by the respondent.

43. These arguments must be rejected. It follows from the Tribunal’s settled case law that what is important in determining the “actual and habitual residence” of a staff member in order to decide on the eligibility for the installation allowance is that the staff member has his residence at the duty station on a continuous basis. On this point it also results from the same case law that it is irrelevant that the staff member kept various links with his country of origin, such as taxation, social security benefits, maintenance of a home and its basic supplies, and even administrative residence (Case No. 2018/1268 paragraphs 41 to 45). This is clearly the case of appellant who, as a contractor of a company supporting the NCIA operations, worked continuously for almost a year before joining the NCIA in The Hague as a staff member.

44. It is also necessary to reject the appellant's argument that the combined reading of Articles 26.1.1 and 28.4.1 of the CPR imply that the fact that appellant benefits from the expatriation allowance means that he can also benefit from the installation allowance. Neither the reading of Articles 26.1.1 and 28.4.1 of the CPR, nor the case law of the Tribunal, supports the interpretation put forward by the appellant.

45. It follows that by the contested decision, the respondent correctly refused to grant appellant the installation allowance, the appellant having his habitual residence within the meaning of Article 26.1.1 of the CPR at the time of his recruitment in The Hague.

46. Secondly, according to Article 39.1 of the CPR:

> Members of the staff eligible for the payment of installation allowance under Article 26.1 shall be entitled to the removal, at the expense of the Organization, of their household goods and personal effects. (…)

47. It follows from this provision that in order to be eligible for reimbursement of removal expenses, the staff member concerned must be eligible for the installation allowance under Article 26.1 of the CPR.

48. As the appellant is not entitled to the installation allowance, the contested decision by the respondent correctly rejected his claim for reimbursement of removal expenses. It follows that the first plea must be rejected.

On the violation of the principle of good administration and of the duty of care

49. The Tribunal recalls that the principle of good administration and the duty of care reflect the balance of reciprocal rights and obligations that the CPR has created in relations between the Organization and staff members. These require the administration, when deciding on the situation of a staff member, to take account not only of the interests of the service but also of the staff member.

50. The appellant claims that the above-mentioned principle was violated in the handling of his case. Indeed, the installation allowance was initially authorized by the e-mail of 6 December 2018, which was not implemented before the administration communicated a new decision refusing him this allowance.

51. To start, it should be noted that HR has refused the appellant the installation allowance since 17 April 2018 and that the appellant contested this decision on the same day through his immediate line manager and then himself on 23 April 2018. The aforementioned e-mail of 6 December 2018 is part of the relevant context.

52. The Tribunal finds, firstly, that the appellant's assertion is based on an erroneous assumption. Indeed, contrary to the appellant’s allegations and assuming that there is a decision in his favor, by the email of 6 December 2018, HR did not recognize that the appellant met the conditions laid down in Article 26.1.1 of the CPR. This email – together with the email of 24 August 2018 (see *supra* para. 9) from the same person - only acknowledge that HR sought to find under which conditions the appellant could have qualified from the exceptional regime provided for by the CPR.

53. There is also no question that the email of 6 December 2018 was written precisely because appellant did not meet the conditions for entitlement to the installation allowance under Article 26.1.1 of the CPR.

54. The Tribunal also considers that the respondent did not make an unreasonable and incorrect interpretation of the terms "habitual residence" in Article 26.1.1 of the CPR. HR did not consider that the appellant’s habitual residence was in the United Kingdom and then change its position that it was in The Hague in order to deny him the installation allowance. Contrary to the applicant's allegations, the respondent did not interpret Article

26.1.1 of the CPR in an idiosyncratic way that did not take into account the appellant's own situation in violation of the duty of care.

55. The Tribunal secondly finds that by its email of 6 December 2018, HR did not adopt a final decision with respect to the appellant, even if the decision contained in this email speaks of authorizing the benefit by way of derogation from the regime provided under Article 26.1.1 of the CPR. This is confirmed by the Deputy Head's email of 14 December 2018, which reminded the appellant that, in the absence of knowledge of the relevant documentation and information, the alleged exceptional decision of 6 December 2018 could not be implemented. The appellant was aware of this situation and for this reason contacted HR and communicated the missing information.

56. In this regard, the Tribunal observes that, by the contested decision, after noting that the appellant did not meet the conditions for receiving the installation allowance and reimbursement of removal expenses, the respondent found that the appellant, on the basis of the documents submitted by him,, could not benefit from the exception of special hardship provided for in Articles 26.9.1 and 39.11 of the CPR.

57. As to the special hardship exception, the appellant does not put forward any argument to contest denial thereof, although during the proceedings he has constantly repeated that he has the evidence on this matter. It appears that the appellant was convinced that his habitual residence was in the United Kingdom and that the documents he transmitted to HR demonstrated that he should receive the installation allowance. In any event, the Tribunal notes that there is no proof that the appellant is entitled to an exception to the aforementioned Articles by reason of special hardship.

58. The appellant’s allegations that the decision to deny the installation allowance is based on his registration status with the national authorities and the Dutch MFA are in any case unfounded. Contrary to the appellant's contention, there is no evidence that by its emails in May 2018 inviting the appellant to correct his registration, the respondent intended to deny him the installation allowance contrary to the duty of care. The respondent had already refused the allowance since April 2018. In the meantime, the administration examined whether the appellant could benefit from an exception to the CPR regime. This is the meaning of the emails of 24 August and 6 December 2018. In these circumstances, it is not appropriate to grant the appellant's request to require the respondent to seek a report of the national authorities without it being necessary to rule on the ground of the respondent’s objection to admissibility of the appeal.

59. Finally, as regards the respondent's alleged failure to provide the appellant with the relevant documents and information necessary for him to act, the Tribunal concludes that this allegation is also unfounded. Indeed, while refusing the installation allowance, the administration provided the appellant with sufficient information to understand the reasons for its decision since April 2018.

60. It follows that the contested decision was not taken in disregard of the duty of care; consequently, the second plea must be rejected, as well as the submissions for annulment in their entirety.

61. As to the appellant’s other submissions, and in particular those for compensation related to damage he allegedly suffered, the Tribunal recalls that when a claim for

damage originates in the adoption of a decision which is sought to be annulled, the rejection of these submissions entails, as a matter of principle, the rejection of the related claim for compensation. In the present appeal, the damage claims have their origin in the contested decision. The claims for its annulment have all been rejected. As a consequence, the claims for compensation must be dismissed, without it being necessary to rule on the respondent's claim of inadmissibility as well as on the appellant's submissions seeking damages.

62. It follows from all of the foregoing that the present appeal must be dismissed.

E. Costs

63. 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 [...].

64. As the appellant's claims have been dismissed, he is not entitled to reimbursement of costs. None were, in fact, requested.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 29 October 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

16 November 2020 AT-J(2020)0008

Judgment

Case No. 2019/1293

MW

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 9 November 2020

Original: English

Keywords: lack of cause; interim assignment in the event of post suppression and definitive new post.

(This page is left blank intentionally)

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, Ms María-Lourdes Arastey Sahún and Mr Laurent Touvet, judges, having regard to the written procedure and further to the hearing on 28 September 2020.

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 8 October 2020 and registered on 21 October 2020 as Case No. 2019/1293, by Mr MW. With this action the appellant seeks the annulment of the NSPA decision dated 15 April 2019 to inform him about the intention of the General Manager (GM) to transfer him to another post (O-006), and the annulment of the NSPA decision dated 9 August 2019 to maintain the decision to transfer the appellant to the new post.

2. The respondent's answer, dated 27 November 2019, was registered on 3 December 2019. The appellant's reply, dated 30 January 2020, was registered on 2 February 2020. The respondent's rejoinder, dated 25 February 2020, was registered on 2 March 2020.

3. In view of the prevailing public health situation the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 28 September 2020 utilizing facilities provided by NATO Headquarters. It heard arguments by the representatives of the appellant and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. The appellant joined the NSPA in 1984. He covered different positions and, effective 1 August 2015, held the position of e-Business Branch Chief at A4 level, in charge of the General Procurement Shared Services (GPSS) project (post LB-102).

6. A reorganization of the service aimed at cutting GPSS project costs to customers resulted in plans to eliminate three of the five existing posts. As part of his duties the appellant was tasked to propose a transition plan for such a reorganization, which he presented on 17 June 2019.

7. On 3 April 2019, the appellant received by email the post description for a position (I-XXX Principal IT Architecture and Standardization Officer) to which he would have been transferred starting 1 January 2020. The appellant acknowledged the email and its content on 6 May 2020.

8. On 15 April 2019, the GM notified the appellant "Please, be informed that I intend, in the interest of the Agency, to transfer you from your current post LB-102, to post O-006, as of 1 April 2019. In accordance with Article 4.4.1 of the NATO Civilian Personnel Regulations, the purpose of this letter is to consult you on this matter".

9. On 15 May 2019, the appellant wrote a letter to the GM entitled "Feedback on the current situation and complaint based on your letter (*of 15 April 2019*)". He raised several issues including, *inter alia*, with regard to post O-006, the modifications to the fundamental conditions of his employment not in line with his skills, the unusual procedure followed by the Agency concerning the suppression of his post and the lack of consultation in the process. He finally stated: "I therefore need to introduce a formal complaint in accordance with the NATO CPR, this to preserve my rights, by contesting the selected decision to unilaterally transfer me into the O-006 Position and express the hope that we can find a mutually satisfactory solution".

10. On 13 June 2019, the GM wrote back to the appellant. He suggested that the appellant request a meeting so they could both discuss the matter. However, in the meantime, he explained the reasons for the suppression of the GPSS programme (not meeting the customers' expectations any longer), and stressed the interim nature of the solution proposed to ensure his retention "until we could find a more permanent solution to you". It was further highlighted that the Agency would ensure that "you perform tasks and responsibilities that match your professional experience and profile".

11. On 12 July 2019, the appellant met with the GM.

12. On 18 July 2019, the appellant wrote a letter to the GM, entitled "Feedback and complaint letter", summarizing their exchanges and reiterating his strong interest in post IT-1 Deputy CIO, at the same A4 level, which was advertised and open.

13. On 6 August 2019, the appellant submitted a "Transfer Request Form" for post IT-1 Deputy CIO.

14. On 9 August 2019, the GM replied to the complaint, rejecting the appellant's request to be transferred to post IT-1 Deputy CIO without following the competitive selection process, and maintaining his decision to transfer the appellant to post O-006 "in the interest of service".

15. On 8 October 2019, the appellant submitted the present appeal.

16. On 19 December 2019, the NSPA informed the appellant that as of 1 January 2020 he would be transferred to the newly created post I-5, and that therefore his contract would be amended. The appellant signed the transfer on 9 January 2020, adding "Please note that I do sign this document without any detrimental recognition of my rights".

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

(i) The appellant's contentions

17. The appellant contends violations of Articles 10.7 and 10.9 of the NATO Civilian Personnel Regulations (CPR), Annex V to the CPR and Article 9, paragraph 1 (iii) of the CPR, entitling him to the payment of an indemnity, since his post was suppressed and his indefinite duration contract was terminated.

18. The appellant recalls that on 15 April 2019, well before the suppression of his post came into effect (post LB-102 was officially suppressed on 26 August 2019), he was notified that the GM had decided to transfer him from his post LB-102 to post O-006 in the interests of the Agency because his post was slated to be suppressed. The appellant maintains that in line with the aforementioned articles, he should have been notified that his contract was being terminated, subject to approval by the appropriate authority (the Agency Supervisory Board (ASB)).

19. In the present case, the appellant highlights that even if he was assigned to a post matching his grade, it did not match his profile. Post O-006 requires extensive knowledge of operational logistics and the management of military logistics support activities. This is a specialized field that is very different to the functions and skills required for post LB-102, which concerns e-business and general procurement shared services. Despite the decision to suppress the post, the appellant continued to work on the GPSS project (carrying out the duties of post LB-102) to close the outstanding actions, including the transition plan, until 25 July 2019, the date when he was formally assigned to post O-006 in the CIO Office. Thus, though administratively assigned to post O-006, he effectively worked for another organizational unit, while waiting for another post matching his profile to be created within the same unit as from 2020.

20. The appellant refers to the GM's decision of 13 June 2019 whereby it is written "As you were informed by the HRE, in 2020, the Agency will propose the creation of an A-4 post in the CIO office which matches your profile and experience (...) If the Agency Supervisory Board (ASB) endorses the proposal, I intend to exercise my authority under Article 4.1.1 of the CPR once again and transfer you to that post. If the ASB does not approve the creation of the proposed post, the Agency will apply the procedure that it is required to follow under the CPR when it suppresses a post encumbered by staff member holding an indefinite contract"

21. It is the appellant's view that, with this letter, the GM acknowledged that if the ASB did not ultimately approve the creation of the proposed post, the appellant would be entitled to the procedure to be followed when a post occupied by a staff member holding an indefinite contract is suppressed: a 180-day notice period, and, upon completion of that period, payment of the loss-of-job indemnity (unless a suitable post was identified within the 180-day period).

22. However, in the present case, the appellant stresses that the correct procedure was not followed as his post was suppressed, but this was done intentionally after he was reassigned to another post. The appellant therefore considers that the reassignment was not done in the interests of the service as part of a suitable reorganization of the appellant's service, but only to circumvent the proper procedure and to avoid having to pay out the loss-of-job indemnity. The appellant adds that by doing so the respondent not only lacked due regard for the interests of the service, it also misused its powers.

23. The appellant also contends a violation of Article 57.2 of the CPR.

24. The appellant claims that during the six-month notice period (which should have started on 15 April 2019 for the period defined in his contract*, i.e.* 180 days), the Agency should have taken all the necessary steps to find a new post. Further, as a redundant staff member during his notice period, he was entitled to priority consideration of his

application for a post, and failing all the above, he ought to have been granted the loss-of-job indemnity provided for in Annex V to the CPR.

25. The appellant states that this did not happen, and that in his 18 July letter he had formally expressed his interest in the post of Deputy CIO (a position he had successfully held in the past and for which his performance had been rated excellent), but instead he was artificially assigned to post O-006, without being given the priority consideration he was entitled to.

26. Further, the appellant alleges a violation of the basic terms of the contract, a violation of the principle of good administration and duty of care, and a violation of Article 4.1.1 of the CPR.

27. The appellant asserts that the decision to transfer him was taken without involving him, presented as a *fait accompli,* and that he was unable to give his views beforehand.

28. Also, the duties described for the new post O-006 were different to the ones he had carried out previously and he found himself transferred to a post which did not match his expertise. Furthermore, the new job description contained a deployment clause.

29. The appellant maintains that these are substantial changes to his contract and because of this, not only should he have been heard, but his consent should have been sought.

30. The appellant refers to Article 4.1.1 of the CPR, which states: "When it is in the interests of the service, the Head of NATO body, having consulted with the staff member concerned, may transfer the staff member to another post in the same geographical location."

31. The appellant points out that when he was transferred to his post LB-102 on 1 August 2015, this was also done on the basis of Article 4.1.1 and that at the time he was consulted and gave his consent by signing a contract extension on 23 July 2015, but this was never done for post O-006.

32. The appellant concludes that by unilaterally deciding to transfer him to a new, substantially different post, with a potentially different geographical location, the Agency infringed on the appellant’s contractual rights, disregarding its obligation to consult. Moreover, it also disregarded his family situation and failed to fulfill its duty of care after 35 years of loyal and committed service.

33. The appellant requests the Tribunal to:
- annul the decision dated 9 August 2019 insofar as it rejects the appellant’s complaint dated 15 May 2019;
- if necessary, annul the initial decision of 15 April 2019; and
- reimburse all costs.

(ii) The respondent's contentions

34. The respondent maintains that the appeal is inadmissible *ratione temporis* for not having been lodged within the 60-day time frame for lodging appeals provided for in the CPR.

35. The respondent considers that the 15 May letter sent by the appellant to the GM (and received by the GM on the same day) constitutes the official complaint to which the GM failed to reply within 30 days, hence leading to an implicit decision of rejection on 17 June 2019. This implicit decision constituted the grounds for grievance and was appealable within 60 days, *i.e.* by 19 August 2019 at the latest.

36. The respondent rejects the alleged violations of Articles 10.7 and 10.9 of the CPR, Annex V to the CPR and Article 9, paragraph 1 (iii) of the CPR as lacking legal merit and being irrelevant.

37. The respondent requests the rejection of the appellant's argument that the contested decision violates the CPR provisions requiring payment of a loss-of-job indemnity, considering moreover that the appellant is not disputing the legality of the suppression of post LB-102, but challenging his transfer to post O-006 on the grounds that the NSPA should have terminated his contract.

38. The respondent notes that there was no requirement for contract termination as the post had not yet been suppressed as of the date of the transfer and the appellant was no longer in the post at the time it was suppressed justifying the contract termination.

39. It continues by saying that the provisions of the CPR invoked by the appellant with respect to the payment of an indemnity do not apply to the present case as the contested decision did not result in termination of the appellant's contract. The respondent stresses that it was merely a transfer from one post to another and that it did not sever the contractual relationship between the NSPA and the appellant. Further, it emphasizes that there can be no payment of the loss-of-job indemnity if the staff member in question continues to be employed under a new contract that does not substantially alter the conditions of employment.

40. Concerning the right to priority consideration, the respondent advances that a staff member only has such a right if their contract has been terminated, owing to the suppression of their post. It notes that the appellant's transfer predated the post suppression and he was never made redundant - moreover, even if redundancy were considered, the respondent remarks that the appellant's formal request would have been too late. In addition, the respondent also comments that it cannot see how the right to priority consideration would be relevant if the appellant was interested in losing his job rather than being transferred to another post.

41. The respondent maintains that the allegation of a supposed lack of consultation is factually inaccurate. It highlights that Article 4.1.1 of the CPR requires the GM to consult the staff member who is supposed to be transferred. In accordance with this provision, the GM, in his letter of 13 June 2019, wrote: "I understand that the former HRE [Human Resources Executive] and his interim successor had met and had discussed this matter with you on more than one occasion. I also understand that the Director of

Operations had consulted you as well". This fact is noted by the appellant himself in his 6 May email. Further, the transfer letter of 15 April 2019 contained a section for the appellant to sign his acknowledgment of having been duly consulted; this was properly signed by the appellant.

42. Moreover, the respondent notes that, in accordance with the provisions of the CPR, the staff member must only be consulted, but their prior agreement is not required, in order for the post transfer to become effective.

43. On the allegation that the transfer substantially modified his contract, given the new job description and the presence of a deployment clause, the respondent remarks that the reality of the duties assigned should be taken into consideration.

44. It stresses that the appellant acknowledged that after his transfer he "continued to work on the GPSS project (carrying out the duties of post LB-102) ... until 25 July 2019, the date when he was formally assigned to post O-006 in the CIO office". Further, the GM confirmed in his letter of 13 June 2019 that: "The post to which I decided to transfer you, though not ideal, was the most suitable position available in the Agency. It is important to understand that this is an interim solution. In the meantime, the Agency will ensure that you perform tasks and responsibilities that match your professional experience and profile".

45. Furthermore, in his letter of 9 August 2019, the GM recalled that: "The post O-006 is an existing position in the same geographical location and at the same level. Your transfer does not affect your emoluments, benefits or entitlements. Similarly, as a result of this transfer, you are not required to carry out roles and responsibilities for which you do not have adequate qualifications". In addition, despite the automatic inclusion of the deployment clause, the respondent stresses that the Director of Support to Operations confirmed in writing that the appellant would not be required to be deployed

46. The respondent maintains that the allegation of a supposed violation of the principle of good administration and the duty of care lacks factual merit. On the contrary, in consideration also of the appellant's vulnerable health and family situation, it considers that it was good administration and the duty of care that prompted the NSPA GM to transfer the appellant from post LB-102 to post O-006, rather than terminating his contract.

47. The respondent highlights that the NSPA has always been guided by the interests of both the service (GPSS restructuring to meet clients' requirements) and the staff member (avoiding contract termination), and all steps were taken to allow the appellant to keep his job and assign him to duties that matched his skills. Paradoxically the appellant seems to think that contract termination was the right choice. In its rejoinder, the NSPA informed the Tribunal that the appellant was transferred to newly created post 1-005 effective 1 January 2020, confirming that the NSPA was acting in good faith and that the transfer to a post with an initially imperfect description was temporary.

48. The respondent adds that should the Tribunal find that there were good grounds for the appeal and annul the transfer decision, deeming the appellant to be assigned to post LB-102, which has already been suppressed, it should set the amount of damages suffered in accordance with Article 6.9.2 of Annex IX to the CPR. However, the appellant

has not submitted any request in this regard. Therefore, the annulment would have no consequences.

49. The respondent requests the Tribunal to:
- reject the appeal as inadmissible for failure to comply with the time limit; and
- in the alternative, to reject it as lacking grounds.

D. Considerations

(i) Admissibility

50. The respondent considers that the legal deadline for the administrative review and further appeal starts from the decision of 15 April 2019. Consequently the organization considers that the appeal is inadmissible because it does not meet the legal deadline.

51. During the hearing the respondent admitted the ambiguity of the letter of 15 April 2019 and the Tribunal concurs with this assessment. Even if the appellant took that letter as a decision that could harm his interests and reacted to it, its wording only indicates the early announcement of the commencement of the decision process. The letter informed the appellant of the Agency's intention and invited him to participate in a discussion on its outcomes.

52. The GM's decision was not adopted until 9 August 2019. Hence, in accordance with Article 61 of the CPR and Article 6.3 of Annex IX to the CPR, the appeal can be submitted to the Tribunal against the above-mentioned decision. In the present case, the appeal did meet the provided deadline and is formally admissible.

(ii) Merits

53. By his submissions for annulment, the appellant challenges the NSPA's decision to transfer him to an interim post. This transfer was followed by the suppression of the appellant's previous position. It was intended to cover the period that remained until an available, suitable and stable post was found. Such a position was offered on 19 December 2019 and the transfer of the appellant to this definitive post entered into force on 1 January 2020.

54. No action has been directed against the suppression of the appellant's previous post and/or the transfer to the definitive position. During the hearing, the appellant asserted that he had not suffered from harmful financial effects. The appellant also explained that his disagreement with the whole process of post process was due to his understanding that the organization should have opted for the termination of his contract with payment of the indemnity provided for in the CPR.

55. In fact, as it was in the appellant's interests to be granted the indemnities linked to a termination of his contract, his only explicit request at the administrative level was to be recruited in a specific position chosen by himself as suitable – IT-1 Deputy CIO. Nor does the present appeal challenge the refusal of his candidacy.

56. The Tribunal observes that the uncontested suppression of the appellant's previous post renders ineffective the eventual annulment of the contested decision. By challenging his transfer to the interim post the appellant is neither seeking to recover a position that no longer exists, nor to re-establish that position.

57. Furthermore, the appellant kept his professional activity within the organization without loss of benefits. He mentioned at the hearing that the only consequences of the interim reassignment were of a psychological nature. However, no claim has been submitted and no evidence has been offered, either during the proceedings of this appeal or during the previous administrative process.

58. Finally, the temporary nature of the appellant's reassignment has been proven since a definitive post was created to satisfy both the interests of the organization and the professional capacities and expectations of the appellant. Moreover, the Tribunal considers the interim solution adopted by the organization to be reasonable and fairly respectful of the appellant's rights.

59. In any case, the request for annulment is devoid of purpose. The appellant has been developing his career through the reassignments provided by the organization, and it is impossible to reinstate him in the post he initially covered as it has been suppressed.

60. It follows from the foregoing that the appellant's submissions for annulment must be rejected.

E. Costs

61. 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 […]

62. 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 9 November 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 January 2021 AT-J(2021)0001

Judgment

Case No. 2020/1305

PD

Appellant

v.

Headquarters Supreme Allied Command Transformation

Respondent

Brussels, 18 January 2021

Original: English

Keywords: legal privilege; Budget Committee; Financial Controller; contract renewal.

(This page is left blank intentionally)

This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún and Mr John Crook, judges, having regard to the written procedure and further to the hearing on 14 December 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 16 June 2020, and registered on 23 June 2020, as Case No. 2020/1305, by Mr PD, against the Headquarters, Supreme Allied Commander Transformation (SACT). The appellant challenges SACT's decision reflected in an email dated 5 May 2020 notifying him that he would not be offered a further three-year contract as the respondent's Financial Controller (FC).

2. The respondent's answer, dated 18 September 2020, was registered on 1 October 2020. The appellant's' reply, received on 23 October 2020, was registered on 26 October 2020. The respondent's rejoinder, dated 24 November 2020, was registered on 25 November 2020.

3. In view of the prevailing public health situation, the Tribunal held, with the agreement of the parties, an oral hearing by videoconference on 14 December 2020 utilizing facilities provided by NATO Headquarters. It heard arguments by the appellant and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar. It also heard a statement by and posed questions to a representative of the Office of Legal Affairs (OLA) regarding OLA's claim that four documents submitted by the appellant were protected by attorney-client privilege.

B. Factual background of the case

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

5. The appellant is currently serving as SACT's FC under an eight-month contract that expires in February 2021. He has been respondent's FC under multiple multi-year contracts beginning in 2008. The record shows that the respondent valued the appellant's performance as FC and wished to offer him a further three-year contract when his previous three-year contract expired in June 2020.

6. However, under Article 9.2 of the NATO Financial Regulations (NFR), appointments to FC positions are not under the sole control of the Head of a NATO Body (HONB). Pursuant to this provision, the respondent's HONB can recommend a person for appointment or contract renewal, but the HONB's recommendation must be approved by the NATO Budget Committee (BC) and then by the North Atlantic Council (NAC).

7. The record indicates continuing interest and concern among national representatives in the BC regarding the length of FCs' service in their positions. The appeal refers in this regard to "the emotions surrounding FC reappointments," and observes "that the discussion of FC appointments has generated many strongly held beliefs by national representatives (particularly in the BC) as to how long an FC should

serve." Such concerns led to inclusion of Article 10.1 addressing FCs' length of service in a NAC-approved 2015 revision of the NFR. Article 10.1 states that "[t]he Financial Controller of a NATO body shall be appointed for a period of three years which may be renewed one time only for a further three-year period."

8. When Article 10.1 was approved by the NAC in 2015, the appellant was already serving as the respondent's FC under a three-year contract covering the years 2014 to 2017. The appeal refers to differing views regarding the application of Article 10.1 to a person in the appellant's situation, *i.e.,* already serving as FC under a three-year contract when Article 10.1 was adopted in 2015.

9. In 2016, the respondent recommended that the appellant receive a further three-year contract covering June 2017 to June 2020. This recommendation was approved by the BC and the NAC. However, the NAC's approval expressly provided that his 2017 reappointment would be "for a final period of three years starting on 28 June 2017 and ending on 27 June 2020."

10. As the term of the appellant's 2017-2020 contract neared its end, the respondent wished to retain his services as FC and requested that the BC and the NAC approve a further contract as an exception to Article 10.1. The BC could not reach consensus on the request. It made no recommendation to the NAC, which took no action on the respondent's request. Accordingly, the requirements for the appellant to receive a new multi-year contract commencing in 2020 were not met.

11. On 10 December 2019, apparently after an earlier request for approval of a three-year contract did not win BC endorsement, the respondent recommended to the BC that the appellant receive a two-year contract, contending that changing its FC at that time "would represent a significant risk to the command…" There was no consensus on this recommendation in the BC, and no action was taken by the NAC. The respondent accordingly initiated recruitment of a new FC. However, given the impact of the public health situation on the recruitment process, the respondent requested a short-term extension of the appellant's contract, and an eight-month extension (through 27 February 2021) was ultimately approved by the BC and the NAC.

12. On 5 May 2020, the respondent's Chief of Staff (COS) sent an e-mail to the appellant stating "I have appreciated your forbearance as we sought a BC recommendation for a NAC legal exception to the NFRs to offer you a further contract. Unfortunately, our efforts were not successful and as a result we will not be able to offer you a new contract." This e-mail is the decision under appeal.

13. As the impugned decision was taken by the COS on behalf of the HONB, the appellant lodged a direct appeal to the Administrative Tribunal under Article 1.6 of Annex IX of the NATO Civilian Personnel Regulations (CPR).

14. On 18 November 2020, pursuant to Article 6.7.8 of Annex IX of the CPRs, the NATO IS Legal Adviser filed written observations in the appeal in answer to a request two months earlier by the Tribunal's Registrar to declassify a document carrying a "NATO Restricted" classification that was submitted by the appellant. The Legal Adviser's observations referred to the NATO Restricted document and three others. The four documents included three emanating from OLA and a fourth signed jointly by the Legal

Adviser and the Deputy Assistant Secretary General for Human Resources. He maintained that regardless of their classification all four documents were privileged, should not form part of the case file, and could not be relied upon by the Tribunal.

15. Three of the four documents, which were classified as "NATO Unclassified," had already been submitted to the Tribunal by the appellant. The fourth document was in the possession of both the appellant and the respondent, but not of the Tribunal. It not being possible, in view of the prevailing public health situation, for the Tribunal to physically review that document during or in the margin of the hearing, and following OLA's refusal to declassify it, the Tribunal on 3 December 2020 issued Order AT(TRI-O)(2020)0001 ordering the Secretary General, as Head of IS, to instruct OLA to provide the Tribunal with an unclassified version of the document.

16. By letter dated 8 December 2020, the Legal Adviser submitted an unclassified copy of the document "for use by the Tribunal in case No. 2020/1305 only." The Legal Adviser's letter affirmed that declassification of the document did not affect OLA's position on the privileged nature of the four documents.

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

(i) The appellant's contentions

17. The appellant considers the appeal admissible, as it is a direct appeal brought of a 5 May 2020 decision that was submitted on 16 June 2020, within the 60-day period for bringing appeals under Article 6.3.1 of Annex IX of the CPR.

18. As to the merits, the appellant contends that the three-year term of his contract in effect when NFR Article 10.1 was adopted in 2015 should not be deducted from the six years allowed by that provision, so that he should have been eligible to receive two more three-year contacts when the contract in force in 2015 expired in 2017. The appeal thus summarizes the claim to be that the appellant's employment as the respondent's FC:

> … is being terminated prematurely for no performance-based reason. Instead, the reason given is based on the improper application of a NATO Financial Regulation (NFR), which does not apply retroactively. In addition, the Budget Committee (BC), which recommends FC employment but lacks authority to act on such employment, has interfered with the contracting process and prevented the North Atlantic Council from timely filling the June 2020 vacancy…

19. The appellant's first line of argument therefore is that the respondent wished to grant him a new three-year contract, but was prevented from doing so by the BC's failure to reach consensus, based on an incorrect interpretation of the NFR as limiting an FC already serving in 2015 to a single additional three-year contract. As stated in the appeal, "[u]pon information and belief, the BC would not recommend an extension of my contract for three years based on an inaccurate claim that I had already served two three-year contracts and that I could not receive another multiyear contract under Article 10.1 of the 2015 NFRs."

20. As noted supra, the appellant refers in this regard to the four documents originating in OLA included as exhibits to his appeal that he contends support his interpretation of Article 10.1. OLA objects to inclusion of the documents in the case record, on the basis that they contain privileged legal advice. The Tribunal addresses these matters at the conclusion of this judgment.

21. Second, the appellant contends that due to the delays involved in the dispute between the respondent and the BC, he was not notified that he would not be offered a new contract at least six months prior to expiration of his existing contract. This is said to be in breach of that contract, which provides that "[y]ou will be informed not less than 6 months before the expiry of this contract whether or not the Organization intends to offer you a further appointment."

22. The appellant maintains that the NAC's 2016 decision that his 2017-2020 contract was to be "for a final period" was not sufficient notice that he would not be offered a new contract in 2020, as it was not reflected in his 2017 contract or given effect through any notice or directive. According to the appellant, "[t]he contract which was presented to me…contained no verbiage to suggest that this was the final contract I could be offered as Financial Controller." In the appellant's view, the respondent "failed to properly action the [NAC] document by failing to incorporate it into the contract that I reviewed and signed."

23. The appellant further contends that the six-month notification provision in his contract is inconsistent with Financial Rule and Procedures (FRP) Rule VIII. This provides that "not later than nine months prior to the expiration" of an FC's contract, the HONB shall decide whether to propose reappointment.

24. Third, the appellant contends that the BC interfered with his "employment expectations and rights" by discussing his situation in an open meeting and by allowing some BC members who themselves sought FC jobs to vote rather than requiring recusal. According to the appellant, "[u]pon information and belief, the BC … allowed its members, many of whom are seeking FC jobs like mine, to vote on whether to recommend my reappointment to the NATO Council …Those BC members seeking FC contracts should have recused themselves…in accordance with basic legal conflict requirements."

25. The appellant requests:
- a final three-year reappointment contract from 28 June 2020;
- in the alternative, a two-year reappointment;
- five-and-a-half month's compensation for failure to provide six-month's notice that the appellant would not be renewed; and
- reimbursement of any travel expenses and expenses incurred in obtaining legal counsel.

26. The appellant further requested that "the NATO Council share with me any communications" between the NAC and the respondent regarding the requested extension of his contract "including but not limited to communications exchanged between General L and Vice Admiral B," "any communications between BC members concerning my contract extensions," and "any cases the Tribunal has decided concerning retroactivity of the NFRs, the interpretation of NFR Article 10, and the extension of

definite duration contracts."

(ii) The respondent's contentions

27. The respondent does not contest jurisdiction or admissibility of the appeal.

28. The respondent denies the merits of the claim. The respondent maintains that it wished to offer the appellant a further three-year contract commencing in June 2020, but that it lacked authority to do so because the BC did not approve its request for approval. The respondent maintains in this regard that the appeal "involves decisions residing outside SACT's authority as Head of NATO Body" involving application of the NFR and the BC's interpretation of the 2016 NAC decision deeming the appellant's 2017 contract as his final contract.

29. In this regard, in the respondent's view, "the decisions leading to the appeal taken by the national representatives serving on the BC and NAC are and have always been outside of SACT's unilateral authority." "It is simply not, nor has it ever been, within the gift of SACT to offer [the appellant] a new contract as Financial Controller without first receiving the recommendation of the BC and NAC endorsement on his nomination."

30. In response to the appellant's claim of insufficient notice of non-renewal pursuant to his contract, the respondent maintains, inter alia, that the appellant knew when he signed his contract in 2017 that the NAC had expressly stated that it was his final contact. Hence, he was on notice that there would be no further renewals.

31. The respondent also observes that "even without the 2015 changes to the NFR, there has never been any guarantee that a Financial Controller would be issued an additional contract, as doing so has always required the support of the HONB, the BC and the approval of the NAC, none of which can ever be assumed as an entitlement." The respondent adds that the appellant's employment "has not been terminated prematurely nor has there been a lack of notice on the part of HO SACT" and that the appellant "had no reasonable expectation that the NAC 2016 decision to approve his reappointment until June 2020 would be altered."

32. As to the appellant's claims for financial compensation, the respondent observes that he is eligible for loss of job indemnity.

33. In answer to the appellant's request for production of documents, the respondent states that "HQ SACT is not aware of any documents or exchanges relevant to the query." However, any such documents would be "internal, privileged and/or pre-decisional" and not subject to disclosure. The respondent further stated that the other requested documents involved other NATO entities and are "a matter to be decided outside HQ SACT."

D. Considerations and conclusions

(i) Admissibility and Jurisdiction

34. The appellant lodged a timely direct appeal to the Tribunal of the respondent's e-mail of 5 May 2020 notifying him that he would not be offered a further three-year contract. Accordingly, the claim satisfies the CPR's procedural requirements for bringing an appeal.

35. The appeal was directed against SACT, which has appeared and filed written submissions as the respondent. However, as discussed *infra*, the appeal at its heart concerns actions and decisions by the BC, a body of national representatives that is not represented in these proceedings. This raises significant issues bearing on the Tribunal's capacity or authority to adjudicate the claims raised. For clarity and convenience, these will be addressed in connection with the Tribunal's consideration of the merits.

(ii) Merits

36. The core of the appeal is the appellant's claim that the BC should have approved SACT's request that he be given another three-year contract to commence in June 2020. According to the appeal, "[m]y grievance remains that the BC should have acted on SACT's original requests for an additional three-year contract…and that the BC unnecessarily impeded the approval of these requests." The appellant reaffirmed this position in the reply, maintaining that the BC "failed to properly submit" the HONB's recommendation for a new contract to the NAC "based on misinterpretation and misapplication of the NFRs."

37. This raises significant difficulties. First, there is a major issue of proof. As the appellant acknowledged at the hearing, there is no clear basis in the record, other than the appellant's own beliefs as stated in the appeal, that the members of the BC and the NAC acted as they did on the basis of an allegedly incorrect interpretation of Article 10.1. Perhaps some BC members did so, but the record indicates that the BC's inability to reach consensus on SACT's recommendations may have reflected other factors, including some national representatives' opposition to long service by FCs as a matter of policy, or even some BC members' interest in competing for the appellant's job.

38. A further fundamental difficulty, as the respondent points out, is that SACT did not take the disputed actions. They were taken - or not taken - by the BC, a body composed of national representatives that is not represented in these proceedings and that is not a NATO body within the scope of Article A(v)(a) of the Preamble to the CPR. Whether viewed as a matter of jurisdiction or admissibility, the Tribunal does not have legal competence in the context of the facts alleged here to inquire into the BC's proceedings and to, in effect, substitute its judgment for decisions that lie within the competence of the BC and the NAC.

39. In any case, as the respondent correctly points out, the appellant did not have a right to a further three-year contract. "[T]there has never been any guarantee that a Financial Controller would be issued an additional contract, as doing so has always required the support of the HONB, the BC and the approval of the NAC, none of which can ever be assumed as an entitlement." The appellant seems to agree, acknowledging

in his reply that "there has never been a 'promise of reappointment'."

40. The Tribunal has repeatedly held that a staff member on a fixed term contract does not have a right to a further contract, and that the decision whether or not to offer one lies within the discretion of the HONB, subject only to certain conditions limiting abuses of discretion that are not relevant here (see for example AT Judgment of 4 February 2020, Case No. 2019/1284; AT Judgment of 16 June 2019, Case No. 2019/1278; AT Judgment of 6 June 2018, Case No. 2017/1125).

41. There is no suggestion of any abuse of discretion by the respondent. To the contrary, the record shows that the respondent hoped to retain the appellant's services, and sought approvals required to permit this. However, in the case of possible reappointment of an FC, the HONB did not have unlimited discretion to offer a further fixed-term contract. Under the NFR, he could only do so with the approval of the BC and the NAC. Such approval was not forthcoming, so the HONB did not offer a further three-year contract. This course of conduct did not violate the CPR or any other NATO policies or regulations.

42. The appellant makes a further argument, that he did not receive notice that he would not be offered a further contract at least six months prior to contract expiration, contrary to the provision in his contract requiring such notice. This argument has little force. The NAC expressly decided in 2016 when it approved the appellant's 2017-2020 contract that the contract would be "for a final period of three years starting on 28 June 2017 and ending on 27 June 2020." The appellant was well aware of the NAC's decision.

43. The appellant contends that the NAC's 2016 decision had no bearing on his situation because it was not "properly actioned" in his contract. The Tribunal finds this argument unpersuasive. The appellant knew full well of the NAC's 2016 decision. So did the respondent, which made multiple timely efforts to secure BC and NAC approval of a further contract notwithstanding it. The appeal states that "[m]y reappointment for a three-year period was repeatedly proposed by SACT and deferred by BC." At the hearing, the appellant stated that these efforts began in the summer of 2019, roughly a year before his contract ended. The record includes a 10 December 2019 letter from the respondent's COS to the chair of the BC proposing alternatively a two-year extension, a proposal that was not approved. The 5 May 2020 e-mail from the COS notifying the appellant that he will not be offered a new contract expresses appreciation "for your forbearance as we sought a BC recommendation…"

44. The respondent could have given formal notice to the appellant six months prior to contract expiration that he would not be offered a new contract, but that was a result neither party wanted. Instead, the respondent persisted in its efforts to secure BC approval, efforts that ultimately failed, leading to the 5 May 2020 email. Given these circumstances, the Tribunal cannot find any compensable breach by the respondent of its obligations under the contract.

45. The appellant seeks substantial monetary compensation for his claims. The parties agree that he will receive loss of job indemnity. Further, at the hearing, the respondent indicated that, although the appellant could not be offered a further contract as FC, he was offered employment in another position at a grade one step below his grade as FC, but with no reduction in salary and benefits. The parties disagreed as to

the concreteness of this offer, but it appears not to have been of interest to the appellant, and nothing came of it. In the circumstances, no compensation is warranted.

46. In conclusion, the appeal is rejected in its entirety.

E. The OLA documents

47. On 18 November, 2020, pursuant to Article 6.7.8 of Annex IX of the CPR, the NATO IS Legal Adviser filed written observations in the appeal. The Legal Adviser's observations referred to three documents emanating from OLA and a fourth document signed jointly by the Legal Adviser and the Deputy Assistant Secretary General for Human Resources. As to these four documents, the Legal Adviser observed in part (paragraph numbering in original):

> 4. Regardless of the security classification attached to any documentation, legal advice should be in confidence between the lawyer and the client. The rule of law demands that clients should not feel inhibited from seeking legal advice – and nor should lawyers feel inhibited in the way they give such advice – by the prospect of the advice subsequently being aired in court.
>
> 5. This "well-accepted privilege" is reflected in article 6.7.4 of Annex IX to the CPRs.
>
> 6. It follows that third parties should not generally have access to confidential legal advice without express waiver nor should staff or former staff, acting in their personal capacity, be able to rely on that advice as evidence.
>
> 7. The issue is all the more acute when OLA is instructed by the Organization and may be asked, quite properly, to make submissions at odds with earlier advice it has given.
>
> 8. Notwithstanding any appearance of prejudice to proceedings, IS OLA is concerned that the inclusion of legal advice in Tribunal proceedings has had a chilling effect on the way lawyers and clients interact.
>
> 9. As such, OLA objects to its legal advice being adduced in Tribunal proceedings without the relevant clients waiving that privilege.
> …
>
> 11. In view of the above, IS OLA requests the Tribunal to order that the above-mentioned advices should not form part of the case file and cannot be relied on in accordance with the principles of legal privilege.

48. The appellant represented that the four documents cited by the Legal Adviser supported his contentions regarding the BC's allegedly incorrect interpretation of Article 10.1 of the NFR. The Tribunal has determined, *supra*, that the actions and decisions of the BC and its members, including any interpretation of Article 10.1, are not matters that can be addressed by the Tribunal in the context of this appeal. Accordingly, these documents are not relevant to the appeal, and the Tribunal need not consider them or the claim of privilege with respect to them.

49. Going forward, the Tribunal does not recall previous claims of legal privilege being made by OLA in the years since the present Tribunal was constituted in 2013. However,

the Tribunal is in principle prepared to address and give effect to appropriate claims of privilege with respect to documents involving legal (but not policy) advice provided in confidence by OLA attorneys to NATO bodies and staff members, or involving communications between OLA attorneys and outside counsel. The Tribunal would anticipate that such claims would be made only where the circumstances indicate that legal advice was provided with the expectation of confidentiality, and where the recipient does not defeat that expectation by disseminating the legal advice beyond the circle of persons who require knowledge of it in order to perform their duties.

50. The Tribunal notes that there is no uniform international practice with respect to legal privilege and that there is much variation in national legal systems' approaches with respect to such matters as waiver of privilege. The Tribunal can address any questions involving the scope of legal privilege where there is no settled international practice if any such questions arise in future appeals.

F. Costs

51. 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 [...].

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

G. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 18 January 2021.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 January 2021 AT-J(2021)0002

Judgment

Case No. 2019/1289

Case No. 2020/1301

HG

Appellant

v.

NATO AGS Management Agency

Respondent

Brussels, 18 January 2021

Original: French

Keywords: suspected unethical behaviour; suspension – conditions (Article 60.2) – accusations must be sufficiently substantiated – termination – procedure – irregular procedure – a) Disciplinary Board not properly composed (Article 6.1 of Annex X) – b) no preliminary report as required by Article 5.2 of Annex X.

(This page is left blank intentionally)

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 videoconference hearing on 14 December 2020.

A. Proceedings

1. Under Case No. 2019/1289, the NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr HG, registered on 29 July 2019, seeking:
- annulment of the decision by the General Manager of the NATO AGS Management Agency (NAGSMA) dated 6 June 2019 to suspend him with immediate effect;
- compensation for the non-material damage suffered, assessed at €10,000;
- reimbursement of his travel and subsistence expenses and the cost of retaining legal counsel.

2. Under Case No. 2020/1301, the NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr HG registered on 2 April 2020 seeking:
- annulment of the NATO AGS Management Agency (NAGSMA) General Manager's decision of 17 February 2020 to terminate his contract effective 29 February 2020;
- compensation for the non-material damage suffered, assessed at €10,000;
- reimbursement of his travel and subsistence expenses and the cost of retaining legal counsel.

3. For Case No. 2019/1289, the respondent's answer, dated 29 October 2019, was registered on 4 November 2019. The appellant's reply, dated 4 December 2019, was registered on 5 December 2020. The respondent's rejoinder, dated 4 February 2020, was registered on 5 February 2020.

4. For Case No. 2020/1301, the respondent's answer, dated 8 June 2020, was registered on 10 June 2020. The appellant's reply, dated 10 July 2020, was registered on 24 July 2020. The respondent's rejoinder, dated 22 September 2020, was registered on 10 October 2020.

5. Owing to the public health crisis, and with the parties' agreement, the Tribunal held the hearing on 14 December 2020 by videoconference using the NATO Headquarters system. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

6. The material facts may be summarized as follows.

7. The appellant joined NAGSMA on 1 November 2016. He was employed on his second definite duration contract as a Configuration/Data Manager from 1 January 2019 to 31 December 2020.

8. On 6 June 2019, the NAGSMA General Manager received a whistleblowing letter from two people from outside the service claiming that the appellant had demonstrated behaviour incompatible with NATO's rules. The letter accused him in particular of breaches of confidentiality, defamation of the service, its management and its employees, sexual abuse, harassment and surveillance of people, and using his job for personal gain. The General Manager thought the accusations were credible, particularly as one of the accusers was the appellant's girlfriend, and immediately launched an enquiry. That same day, the appellant was informed in a meeting with the General Manager and three other agency managers that he was immediately suspended from his duties for serious misconduct, with no further details. He was barred from his workplace and from access to his computer. The General Manager told him that he would receive an email with more information on 7 or 10 June.

9. On 20 June 2019, the appellant's legal counsel challenged the decision by requesting more details regarding the misconduct he was being charged with. On 26 June, the NAGSMA General Manager sent two emails: the first merely explained the nature of a suspension, and the second informed the appellant that disciplinary proceedings against him were being initiated, as part of which a Disciplinary Board would be convened soon.

10. On 2 July 2019, the appellant refuted the composition of the Disciplinary Board and requested replacement of one of its members with whom he had had a dispute earlier that year. He reiterated his request to be told the allegations against him in order to prepare his defence. On 12 July, the respondent dismissed his request for recusal.

11. On 29 July 2019 the appellant referred to the Administrative Tribunal a request for annulment of the decision to suspend him. It was registered as Case No. 2019/1289.

12. The disciplinary proceedings went ahead. The administration continued its investigation by questioning the accusers and other Agency employees.

13. On 13 August 2019, the administration asked the appellant to attend an informal hearing before the Disciplinary Board. The email outlined the allegations against him:

- personal gain from contacts made through his job;
- denigration of NAGSMA employees;
- workplace bullying; and
- harassment and sexual abuse.

That email informed him that he would be given further information at the meeting to which he was being convened.

14. On 19 August 2019, the legal counsel recalled that this convocation was not in line with Articles 5.2 and 5.3 of the Annex X to the Civilian Personnel Regulations (CPR), and that Mr G had to receive all the documents to prepare his defence; he therefore refused to go to the proposed meeting. NAGSMA replied on 18 September that the initial meeting was merely a preparatory step aimed at establishing the facts, and that the Disciplinary Board would provide him with all the documents required by the CPR at a later date; it reiterated its proposal for a meeting.

15. The appellant recalled his reservations and underscored that this request was not compliant with the CPR, but agreed to the informal hearing on 24 September as a gesture of cooperation and goodwill.

16. That informal hearing was held on 21 October 2019. No other meeting was subsequently held.

17. It was on 4 November 2019 that the appellant was thus for the first time informed in writing of the details regarding the allegations against him, when he received a copy of the respondent administration's answer in Case No. 2019/1289.

18. On 23 December 2019, the appellant was notified of the Disciplinary Board's report of 12 December plus its ten annexes, whereby the Board proposed his dismissal in accordance with Article 59.3(e). The appellant replied to it on 10 January 2020.

19. On 18 February 2020, the appellant received the previous day's decision to terminate his contract as of 29 February 2020. That is the decision that he challenged before the Tribunal on 3 April 2020. That appeal was registered as Case No. 2020/1301.

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

(i) The appellant's contentions in Case No. 2019/1289

20. To begin with, the appellant cites a violation of the rights of the defence. Every staff member has the right to be informed of and understand the allegations against them in order to be able to prepare their defence. In the present case, the appellant has not received any documents explaining the allegations against him.

21. Secondly, the appellant asserts that the decision is insufficiently substantiated, in violation of the NATO Appeals Board's case law, which became the Tribunal's. The appellant refers to AT Judgment in Case No. 2018/1270 of 12 April 2019 to argue that the three conditions set out in CPR Article 60.2 – a charge of serious misconduct, the charge's being *prima facie* well founded, and possible prejudice to the Organization if the staff member is kept in office – have not been met. The decision does not in fact describe the misconduct with which he is charged.

22. Thirdly, the appellant asserts that the principle of proportionality of the decision has been violated. He faults the administration for not having considered whether a less serious disciplinary measure would have been more appropriate.

23. Fourthly, the appellant argues that the administration failed in its duty of care toward any staff member, because it did not offer to let the appellant put forward his views, particularly as he did not have access to his computer and could not justify his actions. Furthermore, the appellant's reputation has been severely affected by the contested decision being publicized.

24. For all these reasons, the appellant requests annulment of the decision on to suspend him and seeks compensation for the non-material damage suffered by him, which he assesses at €10,000.

(ii) The respondent's contentions in Case No. 2019/1289

25. In Case No. 2019/1289, the respondent challenges each of the appellant's arguments. It recalls the legal framework of a suspension in accordance with CPR Article 60.2. In the present case, it is based on an accusation of serious misconduct, the apparent well-founded nature of the charges, and the ensuing prejudice to the Organization. The case law does not require, at the stage of the suspension, that the misconduct be proven. A suspension does not mean that a staff member has been found guilty; rather, it is a precaution that enables an objective enquiry to be conducted unaffected by the presence of the staff member concerned.

26. The respondent rejects the arguments regarding insufficient substantiation; in its view, by using the terms "serious misconduct", the decision provides enough clarity and precision about the reasons for the suspension. It recalls that an enquiry is under way, and further details about the allegations cannot be presented at the start of the enquiry.

27. For the respondent, the principle of proportionality was not violated; for the serenity and objectivity of the enquiry, the staff member had to be removed from the service to keep them from communicating with other Agency staff.

28. Lastly, the appellant's interests were preserved, because the very nature of the suspension protects those interests by removing the staff member temporarily from the enquiry process.

29. For all these reasons, the respondent seeks dismissal of the request to annul the suspension and of the claim regarding the supposed damage, for which there are no grounds.

(iii) The appellant's contentions in Case No. 2020/1301

30. Firstly, the appellant invokes a violation of Article 5.1 of Annex X to the CPR, whereby the disciplinary proceedings are initiated by the appellant's immediate superior. In the present case this provision was violated, because it was the General Manager himself who initiated it.

31. The appellant argues that the disciplinary proceedings did not comply with the requirements of Articles 5.2 and 5.3 of Annex X to the CPR. In particular, the administration did not, at the start of the proceedings, make a report on the allegations and the circumstances in which they occurred. What's more, the appellant asserts that he was only ever invited to comment on the Disciplinary Board's report, not a preliminary report submitted to that board.

32. Next the appellant argues that the composition of the Disciplinary Board was improper. He disputes the number of members in it: five, whereas the CPR provides for three Disciplinary Board members. Further, the appellant reiterates his criticism of his line manager's participating, and the fact that two of the five appointed members were not present at the hearing to which the appellant submitted on 21 October 2019.

33. At his hearing, the appellant had not been informed of the charges against him and could therefore neither comment on them nor present his defence.

34. The decision to suspend the appellant was taken in the space of just four hours, which precludes any serious investigation of the validity of the accusations against him.

35. Regarding the legality of the decision, the appellant begins by citing firstly a lack of substantiation of the challenged decision and a manifest error of judgment.

36. He faults the administration for failing in its duty of care and for not having taken into account the interests of all the parties involved.

37. The appellant denounces the disproportionate nature of the penalty. He disputes the seriousness of each of the allegations. The appellant recalls that the accusers are people from outside NATO, and there is no proof that they are telling the truth.

38. The appellant does not deny his relationship with the S company but vehemently argues that he only acted to help out a friend, and derived no financial or personal gain from that. He has never been employed by that company, and the Disciplinary Board acknowledged that it is impossible to know whether the appellant has a stake in it. The appellant denies that he ever sought to be put up in different hotels than the NAGSMA delegation or took part in meetings with S instead of NAGSMA. With regard to his participation in the work of the S company, the appellant argues that he only ever provided some advice, and put one of his two accusers in touch with a few people. With regard to the undertakings related to firefighter training at W Airport (near Düsseldorf), the appellant underscored that his only role was to enable one of the accusers to get the chance to translate documents there. Further, the appellant states that he had obtained the verbal authorization of his successive managers, the NAGSMA General Manager (Mr E) and the Head of the Programme Control Branch (Mr F), to get involved.

39. The Disciplinary Board raised accusations of denigration of NAGSMA that it is claimed the appellant committed. When questioned by the Disciplinary Board, the appellant said he could not recall making disparaging remarks about his work colleagues. Before the Tribunal he asserts that there is no proof of the accusation, and that in his reply, he denied ever making such remarks.

40. With regard to the accusations of harassment and surveillance of his work colleagues, the appellant underscores that neither the administration nor the accusers was able to produce a single one of the hundreds of emails he is accused of having written. He is puzzled at the approach of the administration, which questioned other Agency employees but did not say which ones, and noted that none of those people had made a complaint of harassment.

41. Lastly, the appellant is requesting to be reinstated on the Agency’s staff. Should that be impossible, he is seeking compensation for material damage in the form of a lump sum corresponding to 16 months’ gross salary, covering the period in which he should have continued to be employed under his contract plus the six-month extension granted to all Agency staff. He is also seeking to have the entire case file removed from his personnel file. In his view, the Agency's actions caused him non-material damage that may be redressed by way of €10,000 in compensation.

(iv) The respondent's contentions in Case No. 2020/1301

42. The administration begins by refuting the appellant's arguments regarding the disciplinary proceedings. The procedure was initiated by the Agency's Head of Personnel, in line with the CPR.

43. The respondent argues that on 23 December 2019 the appellant received the report required by Article 5.2 of Annex X, and that he even replied to it but did not avail himself of the possibility of making additional comments. He was therefore sufficiently informed of the allegations against him.

44. With regard to the composition of the Disciplinary Board, the respondent recalls that it was initially made up of four members, and that the fifth member had been added to allay the appellant's concern about its supposed bias after he had disputed the presence of his line manager on the Board. Further, even if two of the five members were not present at the hearing for reasons of leave and service, all five had signed the Board's report.

45. The respondent underscores the extent to which the appellant took part in the work of the S and S companies. In the case of S, the respondent observes that he had committed occupational misconduct by working for an entity other than NATO, and had even used his status as a NAGSMA official to satisfy the interests of a third party. Even if his participation had been on a voluntary basis, this was a violation of the regulatory obligations incumbent upon NATO staff and undermined the trust necessary to continue working for NAGSMA. In the case of S, the respondent notes the appellant's active participation and even operations management for that company, which he could not say was limited to making a few suggestions.

46. The respondent emphasizes the fact, confirmed by an enquiry to appellant's previous managers, that he had never been given any kind of authorization by the Agency to work for a third party. The people by whom the appellant claims to have been authorized were in no position to do so.

47. The respondent emphasizes the complaints by women colleagues about his inappropriate behaviour; if their testimonies have not been produced, it is out of their fear of retaliation by the appellant.

48. Lastly, the appellant's violation of several major obligations constitutes serious misconduct involving a breach of the obligations under CPR Articles 12.1.4 and 13.2 and NAGSMA Code of Conduct paragraph 7. What is more, the appellant deliberately harmed NATO's reputation and thus violated the provisions of CPR Article 13.2.

49. Thus the respondent is seeking dismissal of all the submissions in the two appeals.

D. Considerations and conclusions

50. Both appeals, 2019/1289 and 2020/1301, have been presented by the same appellant; they are directed at two administrative decisions taken with respect to the

same facts and by and large drawing on the same reasoning. The Tribunal has decided to rule on them in a single judgment.

On the request for annulment of the 6 June 2019 decision to suspend the appellant

51. Under Article 60.2 of the CPR: "Members of the staff against whom a charge of serious misconduct is made may be suspended immediately from their functions if the Head of the NATO body considers that the charge is prima facie well-founded and that the staff members' continuance in office during investigation of the charge might prejudice the Organization. The order for suspension from office will stipulate whether or not such members of the staff shall be deprived of their emoluments in whole or in part pending the results of the enquiry."

52. When the General Manager received the email complaining of the appellant on 6 June at 11:13, he took action surprisingly swiftly, replying to one of the letter's authors at 17:23 that he had decided to launch an enquiry to determine whether there were grounds for their accusations of serious misconduct against the appellant. That same day the General Manager took the decision to suspend the appellant but did not give him any information about the nature of the allegations against him; he told him only that the information would be provided soon.

53. The wording that was used and the enquiries conducted in the weeks that followed showed that as of the date of the decision, the administration had no proof of the accusations it had received that same morning from people from outside the Organization whose credibility could not be established in such a short time.

54. While the accusations did meet the conditions of being serious, they were not even *prima facie* well founded. It was only several weeks later that the administration went to great lengths, for example by sending several staff members serving in Luxembourg to Poland, to try to establish the materiality of the allegations.

55. Thus, as the Tribunal has found (AT Judgment of 30 November 2016 in Case No. 2016/1073, paragraph 32), given that the Administration had launched an enquiry to determine whether there were grounds for the charges against appellant, it could not suspend him before that enquiry had been concluded unless the enquiry turned up information that was sufficiently serious and certain as to justify an urgent decision to bar him from the service.

56. It is clear that no evidence of that kind was turned up on the same day that the administration received the accusations, whereas it had a duty of diligence and assistance toward its staff when faced with accusations from the outside. The decision to suspend the appellant is therefore illegal, and at the very least premature. There is therefore no need to examine the appellant's other contentions.

On the request for annulment of the termination decision of 17 February 2020

57. Disciplinary proceedings are governed by Articles 5 and 6 of Annex X to the CPR.

58. Under Article 5.2: “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.” Article 5.3 provides: “After receiving the report, the staff member shall have 15 working days in which to submit written or verbal comments to the authority initiating the proceedings. These comments shall be forwarded to the official responsible for personnel management for inclusion in the file to be submitted to the authority responsible for taking disciplinary action and, where appropriate, to the Disciplinary Board.”

59. This report is an essential element of the disciplinary proceedings: it is necessary for the staff member concerned to be informed of and understand the allegations and to present their arguments regarding the alleged misconduct as verbal comments to the Disciplinary Board or in writing.

60. The appellant claims never to have received that report. The respondent notes that he received the Disciplinary Board’s report on 23 December but does not claim that he received another document prior to that. The Disciplinary Board’s report, which concludes its mission, cannot take the place of the report required by Article 5.2. Consequently it is an established fact that the appellant never received a written document before his hearing, which was moreover presented as “informal”, before the Disciplinary Board took its decision. Further, Article 5.3 of Annex X, which provides that the staff member may make written or verbal comments to the Disciplinary Board, could not have been abided by because the Disciplinary Board took its decision without the staff member having received a report on the allegations, nor *de facto* being able to comment on that report. The procedure set out in Article 5.2 of Annex X, which is a substantial guarantee of the rights of the defence in disciplinary proceedings, was therefore violated.

61. Secondly, in accordance with Article 6.1 of Annex X: “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.”

62. It is not disputed that on 26 June 2019, the administration told the appellant that the Disciplinary Board would be composed of four members, whose names were given to him at that time. Faced with the appellant's objection to his line manager's presence on the Board, the respondent on 12 July 2019 confirmed that manager’s presence and decided to add a fifth member to the Board, with the stated aim of building trust in disciplinary enquiries. The Disciplinary Board was therefore composed of five members, all five of whom signed the report on 12 December 2019.

63. Yet the composition of the Disciplinary Board plays a key role in the disciplinary proceedings. It is this Board that discusses the administration's report, hears the staff member who could be disciplined, and discusses that person's comments, after which it drafts and approves a report that proposes the way forward for the disciplinary proceedings to the administration. The Board’s impartiality must therefore be beyond doubt; it is for that reason that Annex X to the CPR spells out its composition, so that the

conclusions of the report cannot be influenced in advance by including or removing anyone who might be assumed to be biased for or against the administration or the staff member.

64. That is why a disciplinary penalty decided on after the draft penalty was put to a Disciplinary Board that was not properly composed was the result of an irregular procedure, making the decision taken illegal. The appellant therefore has grounds to assert that the contested decision of 18 February 2020 is illegal.

65. Given that the two reasons given here offer grounds for annulment, either of which on its own would suffice, there is no need to examine the other submissions in the appeal.

On the other submissions in the appeals

66. As a result of the annulment of the 6 June 2019 decision to suspend the appellant with immediate effect, and of the 17 February 2020 decision to terminate his contract as of 29 February 2020, the appellant has grounds to seek compensation for the non-material damage, which may be fairly assessed by ordering NAGSMA to pay him the sum of €5,000. As the Tribunal does not have all the material elements necessary to assess the amount of material damage suffered by the appellant, it invites him to approach the administration about getting this. In any event, given that the end date of the contract, set by that contract as 31 December 2020, has passed, reinstatement of the appellant in the Agency is no longer possible.

E. Costs

67. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

68. In the circumstances of the case, the appeal being successful in its near-entirety, the appellant is entitled to be granted €4,000 as reimbursement of the costs of retaining counsel to appear before the Tribunal.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The NATO AGS Management Agency (NAGSMA) General Manager's decisions of 6 June 2019 to suspend Mr G with immediate effect and of 17 February 2020 to terminate his contract effective 29 February 2020 are annulled;
- Mr G's non-material damage may be fairly assessed by ordering NAGSMA to pay him €5,000 in compensation.
- NAGSMA shall reimburse Mr G for the costs of retaining legal counsel, up to a maximum of €4,000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 18 January 2021.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 January 2021 AT-J(2021)0003

Judgment

Case No. 2020/1300

KE

Appellant

v.

NATO International Staff

Respondent

Brussels, 18 January 2021

Original: English

Keywords: special salary adjustment; high inflation duty station.

(This page is left blank intentionally)

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 14 December 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 23 March 2020, and registered on 27 March 2020, as Case No. 2020/1300, by Mr KE against the NATO International Staff (IS). The appellant, a retired NATO staff member, challenges the refusal to grant a special adjustment of his pension to take account of high inflation during the months of June, July and August 2018.

2. The respondent's answer, dated 26 May 2020, was registered on 4 June 2020. The appellant's reply, dated 2 July 2020, was registered on 16 July 2020. The respondent's rejoinder, dated 15 September 2020, was registered on 6 October 2020.

3. In view of the prevailing public health situation the Tribunal held with the agreement of the parties an oral hearing by videoconference on 14 December 2020 utilizing facilities provided by NATO Headquarters. It heard the appellant's statement and arguments by his representative and by representatives of the respondent. It also heard an expert from the International Service for Remuneration and Pensions, all in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. NATO is one of the six so-called Co-ordinated Organizations.[1] Their respective Governing Bodies adopted the Regulations concerning the Co-ordination System, which establish a mechanism that provides recommendations on matters, such as salaries, allowances and pensions. The main actors in this mechanism are the Co-ordinating Committee on Remuneration (CCR), composed of government representatives; the Committee of Representatives of the Secretaries/Directors General (CRSG); and the Committee of Staff Representatives (CRP). These committees meet separately, as well as in bilateral and tripartite meetings. The International Service for Remuneration and Pensions (IRSP) is the common service platform that provides technical and secretariat services.

6. The appellant joined NATO Headquarters Allied Land Forces Southeastern Europe (HQ LANDSOUTHEAST) in Izmir, Turkey, in 1979. He retired in 2013. He is the Regional Delegate for Turkey of the Association of Pensioned Staff of the Co-ordinated Organizations and of their Dependents (AAPOCAD).

[1] The others are the Council of Europe, the European Centre for Medium-Range Weather Forecasts (ECMWF), the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), the European Space Agency (ESA), and the Organisation for Economic Co-operation and Development (OECD).

7. The adjustment of pensions during the period under discussion followed the remuneration adjustment method set out in the 244th report of the CCR. This method was adopted by the NATO Council (NAC) on 20 October 2017 and was incorporated in Annex II to the NATO Civilian Personnel Regulations (CPR). It entered into force on 1 January 2017.

8. Article 2 of Annex II to the CPR (Frequency of adjustments) stipulates:

> 2.1 Salary scales shall be adjusted annually at 1 January subject to the provisions in Article 6.
>
> 2.2 Special adjustments may be made in accordance with the provisions in Article 7.

9. Article 7 of Annex II to the CPR (Special adjustments to remuneration) provides:

> 7.1 Within the reference period, each time that the relevant consumer price index in a country, as indicated in Appendix 3 of the present rules, shows an increase over three consecutive months of more than 7%, the CCR shall send a recommendation to Governing bodies of the CO providing for a special adjustment of remuneration. The first of the three consecutive months shall fall within the reference period.
>
> 7.2 Each time the threshold of 7% is exceeded, the special adjustment shall be equivalent to the threshold, i.e. 7%. Any special adjustment shall take effect the month following the first month when the threshold is exceeded.
>
> 7.3 The 7% threshold is measured as from the preceding 1 July or, if a special adjustment has already been granted during this period, as from the date of effect of this special adjustment.
>
> 7.4 Any special adjustment granted during the reference period used for the calculation of the annual adjustment at 1 January shall be deducted from this annual adjustment.

10. In accordance with Article 4.1.3 of Annex II to the CPR the reference period means the period from 1 July to the following 1 July preceding the 1 January annual adjustment.

11. Appendix 3 of Annex II to the CPR provides:

> The indices to be used shall measure the trend in prices during the reference period as defined in Article 4.1.3 of the Annex. Such indices shall be brought back to base 100 at the end date of the reference period of the previous adjustment.

12. The relevant data are collected by the ISRP from the national statistical offices.

13. During the 1 July 2017 - 1 July 2018 reference period the indices of consumer prices (HICP) for Turkey exceeded the 7% threshold in February, March and April 2018 (respectively 107.6, 108.6 and 110.7) compared to the end of the previous reference period. As a consequence, the CCR recommended in its 254th Report a special adjustment of 7% as of 1 March 2018 of the salaries and pensions paid in Turkey. The report was adopted by the NAC on 6 July 2018, and salaries and pensions were adjusted accordingly.

14. This special adjustment for February, March and April 2018 was taken into account in determining the final annual adjustment for this country at 1 January 2019.

15. The appellant in his capacity as Regional Delegate of AAPOCAD for Turkey wrote two letters to the Head of the ISRP, respectively on 16 October 2018 and on 13 November 2018, enquiring about a second, additional special adjustment covering the months of June, July and August 2018. In his view, this should have been recommended by the CCR with effect from 1 July 2018, prior to the 1 January 2019 annual adjustment. Similar letters were sent on 13 November 2018 by his colleagues to the CCR Chairman and to NATO's Deputy Assistant Secretary General for Human Resources.

16. In his reply of 13 November 2018, the Head of the ISRP explained that it is not the ISRP's role to deal directly with staff or retirees of the Coordinated Organizations. He added that he had given detailed explanations to NATO Management, and trusted that the appellant would be informed via official NATO channels. He concluded by saying that queries should be addressed to the Coordinated bodies, *i.e.* the CRP or the CRSG. On 30 November 2018 he replied further to the appellant's 13 November 2018 letter, stating that the relevant information had been provided to the NATO HR service.

17. On 28 February 2019, the appellant in his capacity of Regional Delegate of AAPOCAD for Turkey wrote to NATO's Deputy Assistant Secretary General for Human Resources. He requested the latter's expeditious intervention at the level of the CRSG to ensure that the ISRP correct its approach and authorize the additional adjustment from 1 July 2018. He submitted he had lost six months' worth of a special adjustment of 7% due to incorrect application of the rules.

18. On 4 March 2019, the appellant, again in his capacity as Regional Delegate of AAPOCAD for Turkey, wrote to NATO's Head of Human Resources Policy and Strategy. He indicated that he had learned from the AAPOCAD that the ISRP had not calculated a further special adjustment for the 1 July 2017 – 1 July 2018 reference period, and that the ISRP based itself on an internal document entitled "the ISRP's Explanatory Notes on the 244th Report". According to these Notes, the index of the month in which a previous special adjustment takes effect is left out of the cumulation of indices. The appellant contended that this interpretation contravenes the relevant CPR Article establishing the method. He observed that the previous (2011) Explanatory Notes provided that the index of the month in which the previous special adjustment took effect was taken into account, and that this was in accordance with Article 7.3 of Annex II to the CPR.

19. In response, NATO's Head of Human Resources Policy and Strategy urged the appellant to raise the matter through AAPOCAD at the forthcoming Coordination meetings. Following these meetings, AAPOCAD reported that the Chairman of the CRSG, NATO's Deputy Assistant Secretary General for Human Resources, had noted the request for a further special assessment.

20. On 9 April 2019, the appellant wrote once again in his capacity as Regional Delegate for Turkey of AAPOCAD to NATO's Deputy Assistant Secretary General for Human Resources, inquiring about NATO's position concerning a special adjustment for Turkey, which he maintained was due with effect from 1 July 2018. He recalled previous correspondence and submitted that the ISRP had not correctly applied Article 7.3 of the 244th Report, *i.e.* Annex II to the CPR, because it had omitted the increase in the HICP

for Turkey for March 2018 (+0.99%) from their calculations. In his view, the ISRP's statement to CRSG that the index for the month of March became the base 100 for the subsequent measurement of the threshold could not be accepted in view of Article 7.3 requirement to measure indices "as from the *date* of effect" of the previous special adjustment (1 March 2018). He contended that this clearly required the setting of the index for March 2018 as 100.99, not merely 100.

21. The appellant added that the increase in the HICP within the relevant three-month period of June, July and August 2018 remained consistently greater than the threshold of 7%. Efforts by AAPOCAD/CRP at CRSG/CRP meetings from September 2018 through January 2019 had not yielded any result. The Chairman of the AAPOCAD had advised him to raise the issue with NATO IS. He asked NATO to ensure that the Turkish pensioners' plea is acknowledged at CRSG level, with a view to seeking corrective action by the CCR Chairman to secure the CCR's approval of a special adjustment report for Turkey with effect from 1 July 2018.

22. On 28 May 2019, not having received a reply to this letter, the appellant in his capacity of AAPOCAD Regional Delegate for Turkey wrote, together with two other representatives of retired staff in Turkey, to the Assistant Secretary General for Executive Management of NATO IS. They repeated their claim that the HICP figures for the final four months of the relevant reference period and the following two months in the next reference period were all known by the beginning of September 2018. However, the CRSG had failed to request the ISRP to prepare a report for an additional special adjustment, based on the ISRP's incorrect claim that the relevant HICP had not exceeded the 7% threshold from March through July 2018 as required. Instead, the ISRP had omitted the HICP for March 2018 from their calculations in clear contravention of the method required by Article 7.3.

23. They added that the ISRP had erroneously concluded that the 2011 Explanatory Notes were not correct, but that those concerning the 244th Report were correct. They recalled that the CCR had met in tri-partite meetings with the CRSG and CRP many times since September 2018, and that NATO's Deputy for Human Resources, who was also the Chairman of the CRSG, had chosen to ignore their recurring pleas conveyed through AAPOCAD and CRP. They argued that the HICP increase for Turkey recorded by ISRP as 15.4% for the relevant 2017-2018 reference period is greater than the twice-compounded value of the special adjustment threshold of 7%. They submitted that this is undisputed mathematical proof that a second special adjustment was due, based on CCR's officially-approved figures for the relevant reference period. Accordingly, a special adjustment report should have been drafted and approved prior to that for the annual adjustment at 1 January 2019. They concluded that the least that could be expected was NATO's formal response whether it will honor the repetitively justified view of their long-serving pensioners in Turkey, or allow NATO's Human Resources management to continue to uphold the ISRP's pretextual explanations, explanations that are inconsistent with the figures recorded in the CCR and NATO approved 254th and 257th Reports.

24. On 11 June 2019, the Deputy Assistant Secretary General for Human Resources answered, assuring the appellant and his co-correspondents that their concerns had been forwarded to the ISRP, the body responsible for the technical calculations regarding the salary scales. He added that if any changes would be made as a result of the points raised, he would immediately inform them.

25. On 18 June 2019, not satisfied with this reply, the appellant and his two colleagues wrote another letter to the Assistant Secretary General for Executive Management. They recalled their many interventions seeking correction of ISRP's erroneous omission of the relevant price index for March 2018 and its erroneous claim that the 7% threshold was not breached for a second time during the reference period. They asked if IS agreed with an ISRP claim negating NAC approved remuneration adjustment reports. They added that they had no choice but to request initiation of Administrative Review under Annex IX to the CPR.

26. On 23 July 2019, the Deputy Assistant Secretary General for Human Resources replied, seeking to clarify, with input received from ISRP, the procedure for special adjustments. He explained that special adjustments are triggered when the HICP is over 7% during three consecutive months following the previous adjustment, and that the date of effect is the second month of this three-month period. In 2018, the HICP was 107.6 for February 2018, 108.6 for March, and 110.7 for April (with June 2017 being equal to 100, since June 2017 was the starting point to track inflation in the 1 July 2017 – 1 July 2018 reference period). The date of effect of the special adjustment that was authorized was the second month of this three-month period, *i.e.* March 2018. March, and not February, then also became the base month of 100 from which to monitor inflation. The HICP measured from March 2018 during the remainder of the reference period (April, May, June 2018) did not exceed the threshold. The inflation during the period March to June 2018 was 6.2%. On 1 July 2018 a new reference period started, with June 2018 becoming a new base of 100 to monitor inflation in this new reference period. The threshold was again exceeded during the months of September, October and November 2018, and a special adjustment was granted. Since then the threshold had not been exceeded. He added that the 2011 Explanatory Note contained an error, since it referred to a past method, and the 2018 Note was correct. He concluded that he believed that the special adjustment method in force was correctly applied for the most recent special adjustments in Turkey.

27. On 25 July 2019, the appellant and his colleagues again wrote to the Assistant Secretary General for Executive Management. They complained that the Deputy Assistant Secretary General for Human Resources' reply of 23 July 2019 was based on old and unchanging information received from the ISRP and did not provide an equitable solution to their grievance. They reiterated that a special adjustment with effect from 1 July 2018 was wrongly omitted, attaching a detailed supporting rationale. They requested strict adherence to their right to invoke all appeal measures foreseen in CPR Article 61 and Annex IX, with prompt initiation of an Administrative Review followed rapidly by an Administrative Tribunal process, as necessary. In accordance with Article 2.1 of Annex IX to the CPR, the Administrative Review was to be initiated by NATO IS, as the sole NATO Body with authority to rescind or modify the contested decision in the 23 July 2019 letter. They also requested that their current letter be acknowledged as a request by the appellant, in his capacity of retired member of NATO civilian staff, to initiate the Administrative Review process.

28. The Assistant Secretary General for Executive Management replied on 2 August 2019. He pointed out that a new reference period started on 1 July 2018 and that the index to measure subsequent inflation was then set again at a base of 100. With a reset of the inflation at the end of February at 100, the threshold of 7% would indeed have been exceeded starting in June, but a three-month period would flow into a new

reference period, where the inflation index was reset. He added that the inflation index in March 2018 had been reset in accordance with Article 7.3, as the date of effect of the special adjustment. He concluded that the information given by the Deputy Assistant Secretary General for Human Resources was correct.

29. On 5 August 2019, the appellant and his colleagues replied. They did not agree that all three months of the period to determine a special adjustment had to fall within the July 2017- July 2018 reference period, emphasizing in this regard the last sentence of Article 7.1, which stipulates that the first month of the three months shall fall within the reference period. They added that the indices of the following two months did not alter the fact that the threshold was breached during the last month of the July 2017-July 2018 reference period. In their view, there were two processes in parallel: one monitoring the HICP in the new reference period, the other monitoring whether the trend that started in the previous reference period continued. They also disagreed that the inflation index was correctly reset in March 2018, repeating their argument that the HICP had not been measured as from the date of the special adjustment, since the inflation for March was not taken into account. They requested initiation of the Administrative Review.

30. On 10 September 2019, the Assistant Secretary General for Executive Management thanked the appellant and his colleagues for their inputs and informed them that the matter had been discussed at CRSG level on 5 September 2019 and would be discussed again on 12 September 2019.

31. On 7 October 2019, the appellant wrote to the Secretary General recalling the exchanges and reiterating his arguments. He concluded that the decision as to which side's argument is technically correct could not and should not be at the discretion of one of the sides, and certainly not at that of ISRP. He added that no further time should be lost for arguments that have already been exchanged for an inordinately long period. Since all channels for objection had been exhausted at the levels of both the CRSG and NATO Assistant Secretary General for Executive Management, with no remedial action, he requested agreement to initiate the Administrative Tribunal process through direct referral of his appeal to the Tribunal.

32. On 14 October 2019, the Assistant Secretary General for Executive Management, referring to his letter of 10 September 2019, informed the appellant and his colleagues that discussions in the CRSG were continuing and that he would keep them informed.

33. On 15 November 2019, the appellant wrote to the Assistant Secretary General for Executive Management, referring to the 14 October 2019 letter and recalling that he had in the meantime lodged an appeal on 7 October 2019. Not having received a response he requested support in the expeditious processing of the appeal.

34. On 29 November 2019, the appellant wrote to the Director of the Private Office recalling that he had written to the Secretary General on 7 October 2019 requesting initiation of the appeal process and that he had not received any indication whether NATO honored or rejected his request. He requested the Secretary General to either accept or reject his request, so that he could initiate the Administrative Tribunal process.

35. On 14 January 2020, the (new) Assistant Secretary General for Executive Management replied. He explained that the matter was discussed further in a December

2019 meeting between ISRP and NATO and at a CRSG meeting on 9 January 2020. The CRSG had decided to maintain the position adopted on 12 September 2019 and its interpretation of the salary adjustment method. He noted that the information given in previous correspondence was correct, concluding that no special adjustment should be granted at 1 July 2018. He added that should the appellant disagree and wish to pursue the matter he could lodge a complaint, meaning that his request to directly lodge an appeal with the Tribunal was rejected.

36. The following day, *i.e*. on 15 January 2020, the appellant replied, underlining that the Assistant Secretary General for Executive Management's arguments were the same as those presented in the letters of 23 July 2019 (*cf.* paragraph 26 *supra*) and 2 August 2019 (*cf.* paragraph 28 *supra*). He recalled that the gist of the problem was that the ISRP, supported by the CRSG, persisted in not taking into account the price index for March 2018 in the four-month tracking between 1 March and 1 July, which he considered to be contrary to Article 7.3 of Annex II to the CPR. He complained that he had not been allowed to explain his point of view before the CRSG, and repeated his view that the fact that two of the three months for which the special assessment is sought fall in the next reference period does not affect entitlement to a special adjustment, since Article 7.1 stipulates that the first month must fall in the (previous) reference period. He concluded that he had no choice but to submit a formal complaint, and that if the issue would not be settled in his favor the dispute should be expeditiously referred to the Tribunal.

37. The Assistant Secretary General for Executive Management replied on 10 February, 2020 affirming that the Administration's position was correct. He noted that inflation measured since March 2018 in the 1 July 2017 – 1 July 2018 reference period did not exceed the threshold of 7%. A new reference period started on 1 July 2018. Even if the threshold were exceeded in June 2018, the two following months fell in the new reference period, so no special adjustment would be due. He added that any other interpretation would run counter to the very clear time limits in Article 7, and that the last sentence of Article 7.1 should not be read in isolation of the rest of the Article. Special adjustments are meant to provide compensation for high inflation within a single twelve-month reference period, pending the outcome of the annual salary adjustment at the end of that period. He also referred to the special adjustment that was granted later in 2018. He concluded by rejecting the complaint and confirming the earlier decision. Should the appellant disagree, he could appeal to the Tribunal.

38. On 23 March 2020, the appellant lodged the present appeal.

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

(i) The appellant's contentions

39. The appellant puts forward two claims.

40. In his first claim the Appellant considers that the administrative decision refusing to grant a second special adjustment at 1 July 2018 on the basis of the rates of inflation in the months of June, July, and August 2018, measured from a properly determined benchmark for the rate of inflation in March 2018, violates Article 7 of Annex II to the CPR.

41. The appellant submits in this respect that the 254th Report monitored not only the inflation indices of the first eight months of the reference period 1 July 2017 - 1 July 2018 (7.6%) (*i.e.* July 2017- February 2018), but also inflation for two following months (*i.e.* March and April 2018) in accordance with Article 7.1. The known inflation increase for March 2018 (0.99%) as monitored in the 254th Report should also have been tracked for the purpose of a potential second special adjustment in accordance with Article 7.3. However, the incorrect calculation method that was applied did not include March, leading to tracking the HICPs of three months instead of all four months remaining in the relevant reference period. Omitting March and taking account of only April, May and June 2018 resulted in the HICP increase computed to be 6.2%. However, in the appellant's view, the HICP for the four-month period March - June 2018 (with 1st March = 100) was 107.3, an increase of 7.3%. The appellant contends in this regard that the base measure of inflation for March 2018 for monitoring purposes was not 100, but 100.99. As a consequence, three-month inflation-monitoring period of June, July and August justified a second special adjustment, as during those three months the HICP increases exceeded 7%. The CCR should therefore have recommended a special adjustment with effect from 1 July 2018.

42. The appellant adds that Article 7.1 *in fine* expressly takes into consideration the fact that the calculations of HICPs may well happen to span two reference periods, when it provides: "The first of the three consecutive months shall fall within the reference period."

43. In his second claim, the appellant objects to the time taken since October 2018 to obtain explanations of the respondent's reasons for its interpretation of the applicable texts and of the decision not to grant a special adjustment at 1 July 2018. He contends that letters remained unanswered and that only in June 2019 was he informed that the matter would be referred to the ISRP and CRSG. He considers this a violation of the duty of care.

44. The appellant requests the Tribunal to:
- rescind the decision of 10 February 2020; and
- condemn NATO IS to the reimbursement of his legal expenses.

(ii) The respondent's contentions

45. The respondent argues that following the special adjustment at 1 March 2018, the index used to monitor inflation for the remainder of the reference period ending June 30, 2018 was brought back to base 100 for March.

46. The respondent rejects the appellant's contention that a special adjustment can be granted with respect to a three-month period spanning two reference periods. In the respondent's view, the last sentence of Article 7.1 highlighted by the appellant must be read and understood in light of the other provisions of the Article, in particular the requirement in the first sentence of Article 7.1 that that the three consecutive months be "within the reference period." It contends that, contrary to the appellant's contention, the month of June of any given year can never be considered as the first month of the three consecutive months justifying a special adjustment.

47. Regarding the appellant's second claim of violation of the duty of care, the respondent observes that the proper procedures were followed and that it acted with due diligence in the circumstances. It adds that the appellant could also have initiated the administrative review, complaint and appeal mechanism at an earlier stage but had chosen not to do so. The procedure followed did not affect the validity or the outcome of the decision made, did not in itself adversely affect the appellant, and did not cause any additional damages to those being claimed.

48. The respondent requests the Tribunal to dismiss the Appeal as being without any merit.

D. Considerations and conclusions

(i) Admissibility

49. The Tribunal notes that the respondent has no observations with regard to the admissibility of the present appeal, but observes that to the extent that the appeal is lodged by the appellant in his capacity of Regional Delegate of AAPOCAD for Turkey it should be declared inadmissible. The appellant confirms that he lodged the appeal in his individual capacity as a retired staff member. The Tribunal holds that the appeal is admissible.

(ii) Merits

50. The appellant submits two claims. His first claim contends that a special adjustment should have been granted at 1 July 2018. In a second claim he submits violation of the duty of care in view of the length of the procedures.

51. In his first claim the appellant contends that the administrative decision refusing to grant a second special adjustment at 1 July 2018 in respect of inflation during the months of June, July and August 2018 violates Article 7 of Annex II to the CPR.

52. Without entering here into some jurisdictional aspects of the matter, the Tribunal deems it appropriate to recall the process that is followed in both annual and special remuneration adjustments for staff of the six Coordinated Organizations. In a first step the IRSP collects and processes all the necessary statistical data. Based on this, the CRSG, after the necessary consultations, makes a proposal to the CCR. The CCR then "shall" make recommendations to the Councils of the Coordinated Organizations, who take the final decisions for their respective organizations. It is important to note that these recommendations apply a methodology that has been approved by the Councils and, for example in the case of NATO, has been incorporated in the CPR (Annex II).

53. In view of the process outlined above, the terms used by the appellant, particularly his submission that there is an administrative decision refusing to grant a special adjustment, do not correspond to the actual situation.

54. The Tribunal recalls that in accordance with Article 6.2.1 of Annex IX to the CPR, it is competent to hear challenges against decisions taken by the Head of a NATO body

either on his or her own authority or in application of a decision of the NAC, it being understood that the Tribunal has the authority to rule on CPR provisions should such provisions seriously violate a general principle of international public service law. These provisions thus narrow the competence of the Tribunal. The Tribunal, however, takes into account that the respondent, in its 10 February 2020 letter (*cf.* paragraph 37 *supra*) has accepted that the appellant could lodge an appeal. This letter notifies and confirms the information provided that the special adjustment method was correctly applied. The underlying question being the interpretation to be given to Article 7 of Annex II to the CPR, the Tribunal will review that legal issue.

55. The essence of Article 7 is that each time that within a twelve-month reference period the relevant consumer price index in a country shows an increase over three consecutive months of more than 7%, the CCR shall send a recommendation to the Governing bodies providing for a special adjustment of remuneration. A special adjustment was granted by the NAC for staff and retired staff in Turkey with effect from 1 March 2018 following the CCR's 254th report (*cf.* paragraph 13 *supra*). This special adjustment was taken into account in the annual salary adjustment at 1 January 2019.

56. The appellant submits that the 254th Report monitored not only the indices of the first eight months of the reference period 1 July 2017 - 1 July 2018 (7.6%), but also the inflation for two immediately following months in accordance with Article 7.1, *i.e.* those for March and April 2018. The known inflation increase for March 2018 (0.99%), which was monitored in the 254th Report, should have been tracked also for the purposes of a potential second special adjustment (Article 7.3). The calculation method that was being applied did not provide for this, leading to the unjustified tracking of the HICPs of three months instead of four months that remained in the relevant reference period. The inflation of March was omitted and only those for April, May and June 2018 were taken into account, with the result that the balance of the HICP increase was computed to have reached 6.2%. In reality, the HICP for the four-month period March - June 2018 (with 1st March = 100) was 107.3. The appellant contends that the inflation for March 2018 for the purpose of monitoring inflation was not 100 but 100.99. As a consequence, the three-month inflation-monitoring period for the second special adjustment covered the months of June, July and August 2018 within which the HICP increases exceeded 7%. A special adjustment with effect from 1 July 2018 should thus have been recommended by the CCR.

57. The appellant adds that Article 7.1 *in fine* expressly takes into consideration the possibility that the calculations of HICPs may well happen to span two reference periods, when it provides: "The first of the three consecutive months shall fall within the reference period."

58. The respondent argues that after the special adjustment at 1 March 2018 the indices used to monitor the inflation until the end of that reference period was brought back to base 100 for March.

59. It disagrees with the appellant's contention that a special adjustment can be granted with respect to a three-month period that spans two reference periods. It observes that the last sentence of Article 7.1 relating to the first of the three consecutive months must be read and understood in light of the other provisions, in particular with the requirement in the first sentence of Article 7.1 that the three consecutive months be

in the same reference period. It contends that, contrary to what the appellant claims, the month of June of any given year can never be considered as the first month of the three consecutive months.

60. It is thus appropriate for the Tribunal, before entertaining any other arguments, to rule on the interpretation to be given to Article 7 of the salary adjustment method (Annex II to the CPR). The parties agree, and the Tribunal concurs, that Article 31 of the 1969 Vienna Convention on the Law of Treaties, although formally speaking not binding on the Tribunal, does effectively reflect the current prevailing doctrine and practice concerning the interpretation of international legal instruments. It reads as follows:

> SECTION 3. INTERPRETATION OF TREATIES
>
> *Article 31*
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> > (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> > (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> > (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> > (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> > (*c*) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

61. The Tribunal will be guided by this approach in its interpretation of Article 7, which it is recalled provides as follows:

> 7.1 Within the reference period, each time that the relevant consumer price index in a country, as indicated in Appendix 3 of the present rules, shows an increase over three consecutive months of more than 7%, the CCR shall send a recommendation to Governing bodies of the CO providing for a special adjustment of remuneration. The first of the three consecutive months shall fall within the reference period.
>
> 7.2 Each time the threshold of 7% is exceeded, the special adjustment shall be equivalent to the threshold, i.e. 7%. Any special adjustment shall take effect the month following the first month when the threshold is exceeded.

> 7.3 The 7% threshold is measured as from the preceding 1 July or, if a special adjustment has already been granted during this period, as from the date of effect of this special adjustment.
>
> 7.4 Any special adjustment granted during the reference period used for the calculation of the annual adjustment at 1 January shall be deducted from this annual adjustment.

62. The ordinary meaning of this Article as a whole and in its context is that each time the price index shows an increase of more than 7 % over three consecutive months *within* a given reference period, a special adjustment of 7 % is recommended. The reference period is 1 July – 1 July of the following year. Inflation identified and special adjustments made *during* that reference period will be taken into account in the annual adjustment at 1 January of the following year. Any inflation and special adjustment during the following reference period will be taken into account in the next annual adjustment. The context, object and purpose of this Article are thus clear.

63. Nowhere does Article 7 specify that the three month period may span two reference periods, *i.e.* one or two months in one reference period and one or two in the following period. The last sentence of Article 7.1 ("The first of the three consecutive months shall fall within the reference period") does indeed not bring clarity to the matter, and one may question its usefulness at all, but it can only be read and interpreted in the overall context of Article 7.1 and of Article 7 as a whole. It cannot be interpreted as completely overturning the ordinary meaning of Article 7 as a whole and defeating its object and purpose. It is repeated that the ordinary meaning of Article 7 as a whole and in its context is that each time the price index shows an increase of more than 7 % over three consecutive months *within* a given reference period a special adjustment of 7 % is recommended. The argument of the appellant that the three months may span two different reference periods must thus be rejected.

64. It is not in dispute that there is no additional three-month period within the same reference period following the special adjustment at 1 March 2018 where the inflation exceeded the 7 % threshold. The question whether the inflation of the month of March itself should be taken into account has thus become moot.

65. In his second claim, the appellant objects to the time it took since October 2018 to obtain explanations on the basis for interpreting applicable texts to preclude a special adjustment at 1 July 2018. He contends that letters remained unanswered and that he was only in June 2019 informed that the matter would be referred to the ISRP and CRSG. He considers this a violation of the duty of care.

66. The respondent observes in this respect that the proper procedures were followed and that it acted with due diligence in the circumstances of the case. It adds that the appellant could also have initiated the administrative review, complaint and appeal mechanism at an earlier stage but that he had chosen not to do so. The procedure followed did not affect the validity or the outcome of the decision made. It did in itself not adversely affect the appellant and it did not cause any additional damages to those he claims.

67. The Tribunal notes that the Coordinated system has developed a very detailed methodology regarding the salary adjustment method, as well as explanatory notes. The

system has three expert bodies (CCR, CRSG and CRP) plus a common service platform for the six Co-ordinated Organizations (the ISRP). These bodies regularly meet either alone or in bilateral and tripartite sessions. It is the responsibility of these bodies to see to it that the methodology to be followed is clear and unambiguous. It was the correct decision for the respondent to refer the appellant's queries to the ISRP for technical advice and ultimately to the CRSG. Moreover, the appellant had access to the CRP. The respondent has repeatedly and consistently advised the appellant of its points of view and provided detailed explanations. It never indicated that it would change its points of view. It was only seeking additional arguments (from ISRP and CRSG) in support of the positions taken in the expectation that the appellant would better understand. The appellant may disagree with the respondent's points of view, but he cannot consider them unclear.

68. The Tribunal also notes that the appellant himself initially addressed the Head of the ISRP and months later urged the NATO's Deputy Assistant Secretary General for Human Resources to raise the matter at the level of the CRSG.

69. The Tribunal concludes that the time it took between the first enquiries and the date of the present judgment is not unreasonably long. Moreover, the appellant has not established to what extent these delays additionally and adversely affected him. He has not qualified or quantified adverse effects, if any, and he has not requested a specific remedy in this respect. Moreover, any positive outcome of the appeal for him would have had retroactive effect. This claim must be rejected.

70. In conclusion, the appeal is rejected in its entirety.

E. Costs

71. 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 [...].

72. 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 18 January 2021.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

15 March 2021 AT-J(2021)0004

Judgment

Joined Cases Nos 2019/1284, 2019/1285 and 2019/1291

PH

Appellant

v.

NATO International Staff

Respondent

Brussels, 9 March 2021

Original: French

Keywords: NATO policy on the prevention and management of harassment, discrimination and bullying in the workplace; request for assistance; enquiry report; action causing harm; reasonable time frame; substantiation; error of judgment; Invalidity Board; administrative case file; occupational illness; oversight; duty of care; damage.

(This page is left blank intentionally)

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 Christos A. Vassilopoulos, judges, having regard to the written procedure and further to the hearing on 15 December 2020.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") was seized of an appeal by PH, a former NATO staff member, against the NATO International Staff (IS), which was dated 14 May 2019. That appeal was registered on 17 May 2019 (Case No. 2019/1284). It mainly sought annulment of respondent's decision of 15 March 2019 refusing to acknowledge that the appellant had been the victim of bullying and harassment. On 17 June 2019, the appellant lodged a second appeal against the IS, which was registered on 19 June 2019 (Case No. 2019/1285). That appeal sought in particular annulment of respondent's decision of 16 May 2019 refusing to acknowledge that the appellant had been the victim of bullying and harassment.

2. By order of the Tribunal President AT(PRE-O)(2019)0008 dated 28 June 2019, Cases Nos 2019/1284 and 2019/1285 were joined.

3. The respondent's answer in the two aforementioned cases, dated 15 July 2019, was registered on 24 July 2019. The appellant's reply, dated 4 October 2019, was registered on 7 October 2019. The respondent's rejoinder, dated 6 November 2019, was registered on 8 November 2019.

4. On 20 September 2019, the Tribunal was seized by a third appeal by the appellant against the IS, which was registered on 1 October 2019 (Case No. 2019/1291). In that appeal, the appellant sought in particular annulment of the respondent's decision of 23 July 2019 refusing to grant her a professional invalidity pension.

5. The respondent's answer in Case No. 2019/1291, dated 2 December 2019, was registered on 3 December 2019. The appellant's reply, dated 3 February 2020, was registered the same day. The respondent's rejoinder, dated 3 March 2020, was registered on 4 March 2020.

6. By order of the Tribunal President AT(PRE-O)(2019)0010 dated 7 October 2019, Cases Nos 2019/1284-1285 and 2019/1291 were joined.

7. Owing to the public health crisis, with the parties' agreement, the Tribunal held the hearing on 15 December 2020 by videoconference using the NATO-provided system. It heard arguments by the appellant's representative and the respondent's representatives, in the presence of Ms Laura Maglia, Registrar. At the end of the hearing, the appellant's representative gave the Tribunal the appellant's written statements, which the Tribunal noted.

B. Factual background of the case

8. The appellant joined the IS Interpretation Service in 1985, and before that service was restructured in 2014–2015, she held the posts of principal interpreter and supervisor. Following the restructuring, the appellant was appointed team leader, principal interpreter in a decision dated 29 May 2015.

9. As part of the same restructuring in 2015, Mr F., Head of the Interpretation Service since 2011 and the appellant's line manager, became Head of Interpretation and Conference Services (ICS). Ms M. joined that service in 2015 and subsequently became Deputy Head of ICS.

10. In a letter dated 9 November 2015, the International Association of Conference Interpreters (AIIC) informed the IS that the interpreters (both NATO staff and freelance) working for ICS had working conditions that were harmful to their health and their careers. The AIIC President asked the Organization to take the necessary steps and initiatives to implement the existing agreements on the provision of interpretation services and the associated specific guidelines and rules. Other letters about this were also sent to the Organization by other AIIC officials.

11. Citing medical and scientific articles on the specific situation of booth work and simultaneous interpretation, and the rules in the specific agreements on the exercise of the profession of interpreter, ICS staff and their team leaders drafted a memorandum, dated 24 November 2015, and an addendum thereto dated 26 November 2015, addressed to Mr F. to denounce the situation in ICS and spur a debate on improving working conditions. They emphasized that beyond the fact that the applicable guidelines on interpretation were not being followed, Mr F. and Ms M. were not communicating enough with the service's staff.

12. In a letter dated 27 January 2016, the Deputy Assistant Secretary General for Headquarters Support and Transformation provided some information in response to the AIIC President's letter in particular.

13. In March 2016, at the meeting for the appellant's 2015 performance review, Mr F. criticized her for having been very patient with her team members and thus not having acted the right way to get the staff under her authority to perform better. In essence, the appellant's generally caring attitude did not make her an energetic, effective team leader, which obliged Mr F. to downgrade the appellant's rating for 2015 from "very good" to "good". Thus there was a poor relational climate between the appellant and Mr F., who questioned her ability to serve as a team leader.

14. On 18 April 2016, the appellant was placed on part-time medical leave. The case file for the present proceedings shows that because of that, Mr F. asked the appellant openly to step down from the team leader role. Furthermore, on 2 November 2016 at a meeting held by Ms M. with all the team leaders apart from the appellant, Ms M. concluded by saying that if the appellant's role was causing her stress that was detrimental to her health, she would have to step down.

15. On 3 November 2016, the appellant resumed working. Mr F. again asked her to step down for medical reasons, and planned to replace her. When the service's

organizational chart was updated (in late November 2016), the appellant was no longer on it as a team leader.

16. As the appellant was unable to resume working, the appellant initiated proceedings aimed at placing her on invalidity in the decision communicated by letter dated 25 July 2017, which was notified to her on 18 August 2017.

17. Following informal meetings with the respondent's services, on 7 September 2017 the appellant made a request for assistance/complaint by asking to open an administrative enquiry to establish the harassment and seeking compensation for the harm suffered, in accordance with the NATO policy on the prevention and management of harassment, discrimination and bullying in the workplace (ON(2013)0076). In that request, the appellant described an overall situation of sexual and managerial harassment in ICS perpetrated by Mr F. and Ms M.; she cited the names of the people concerned. The appellant also recalled the events that constituted harassment and bullying toward her, and listed the people who could give statements confirming her allegations. She attached three written attestations of the harassment to which she was subjected to the request.

18. In the framework of the invalidity procedure initiated by the respondent (see paragraph 16 above), the IS Medical Service concluded, in a note dated 14 September 2017, that any invalidity from which the appellant was suffering did not arise from an accident in the course of her professional duties, from an occupational disease, from a public-spirited act or from risking her life to save another human being.

19. In a letter dated 15 September 2017, the respondent informed the appellant that the administrative file on the invalidity pension procedure would be forwarded to the Invalidity Board for a decision. The file contained the aforementioned note from the Medical Service dated 14 September 2017, the appellant's job description, and passages (Chapter III of Annex IV) from the NATO Civilian Personnel Regulations (CPR).

20. In a letter dated 29 September 2017, the appellant complained that the administrative file concerning her job description did not contain the one from the ICS restructuring in 2015 (team leader, principal interpreter) but rather the one from before the restructuring. Further, the Medical Service opinion that was forwarded to the Invalidity Board was not substantiated and disregarded several medical reports sent to the respondent which found that the appellant's illness was linked to the performance of her duties. In that letter, the appellant also recalled that the respondent had already received a request for assistance which stressed that the situation in ICS was toxic and detrimental to the appellant's health, and that she was being harassed and bullied by her management.

21. In a decision dated 3 October 2017, the respondent decided to open an internal enquiry led by Ms S. to look into the incidents of harassment reported by the appellant in her request of 7 September 2017 (see paragraph 17 above). That decision was taken in accordance with the legal framework set out in the policy in ON(2013)0076.

22. In a letter dated 5 October 2017, the appellant expressed doubts about the appointment of Ms S. to lead the enquiry, emphasizing that someone from outside the Organization might be a better choice to conduct the enquiry fully independently and

impartially. In a reply to her letter dated 17 October 2017, the respondent indicated that Ms S. had all the required professional qualities to carry out the enquiry. As the case file shows, the appellant was heard by Ms S. as part of the enquiry.

23. In the meantime, the respondent informed the appellant by letter dated 11 October 2017 of the correction made to her team leader job description, in line with the decision of 29 May 2015 (see paragraph 8 above). As for the medical reports that could be included in the administrative file (beyond the opinion of the Organization's Medical Service), the appellant was invited to include all the relevant medical reports and other documentation. In that same letter, the appellant was informed of changes to the composition of the Invalidity Board.

24. On 18 December 2017, Ms S. sent the respondent a preliminary report which noted that it would be sent a consolidated version by the end of January 2018, and that what the appellant had reported were not isolated incidents but seemed to reveal a more widespread problem in ICS.

25. On 30 January 2018, Ms S. submitted the enquiry report in the framework of the appellant’s request of 7 September 2017, in accordance with the policy in ON(2013)0076. In that report, and based on interviews with 32 interpreters in ICS, it is noted (in parts 11 and 12) that the appellant’s allegations detailed at annex to the report were borne out, and that the interviews revealed a situation that was even more serious than what the appellant had reported. In part 13 (conclusion), the report notes that in an attempt to achieve their ends, Mr F. and Ms M. were harassing and intimidating the staff of the service, abusing their authority and discriminating against the oldest interpreters. Lastly, in part 14, the report recommended that the Organization's leadership take appropriate steps regarding the conduct of Mr F. and Ms M. At a minimum, those steps had to consist in immediately and permanently removing Mr F. and Ms M. from any role in which they could have authority over the staff of the service. That same part notes that because the appellant’s allegations were borne out, the Organization’s leadership was being asked to consider disciplinary action against Mr F. and Ms M.

26. The appellant was not informed of the actions pursued and carried out as part of the enquiry nor of the report on them, despite her repeated requests to the respondent to be informed accordingly (letter of 20 April 2018 and email of 8 May 2018). The report was only sent to appellant as part of the proceedings before the Tribunal as an annex to the respondent’s answer.

27. As the appellant had observed at the Invalidity Board’s meeting on 23 February 2018 that the administrative file only contained her own documentation, she asked the respondent, by letter of 1 March 2018, to communicate the regulations in force to the Invalidity Board, and asked specifically for her illness to be qualified as an occupational illness.

28. In response to that request, the respondent informed the appellant by letter of 21 March 2018 that the relevant legislation in force in this case was that of the group insurance contract (Article 5B), which referred to Belgian national legislation for the definition of an occupational illness and an accident occurring on duty. That letter notes the conditions that must be met in order for an illness to be qualified as an occupational illness.

29. By letter dated 28 March 2018, the appellant challenged the respondent's restrictive approach to defining occupational illness; in her view, the occupational illness risk was also covered by the Pension Scheme Rules (Annex IV to the CPR).

30. On 3 April 2018, the appellant notified the respondent that her long-term sick leave would end on 18 April 2018, and if a decision on the invalidity procedure in question was still pending, she risked being penalized financially as from that date. In an email dated 5 April 2018, the respondent assured the appellant that she would receive her full remuneration if the decision on her invalidity came in after 18 April 2018.

31. By letter dated 17 April 2018, the respondent informed the appellant that as the Invalidity Board had recognized her as unfit for service, she was entitled to an invalidity pension under Article 17.1 of Annex IV to the CPR as from 1 May 2018.

32. In response to that letter, in a letter dated 20 April 2018, the appellant requested, firstly, access to the Invalidity Board's report and, secondly, information about whether the Invalidity Board had ruled on whether she had been found to have an occupational illness and, more generally, about the concept of occupational illness used by the Invalidity Board in examining her case. The appellant also asked the respondent for information about the scope of the oversight of the Invalidity Board's reports and findings.

33. In a letter dated 17 May 2018, the respondent noted that the Invalidity Board had made no obvious factual error in its decision to place the respondent on invalidity. Further, the respondent reminded the appellant that the proceedings of the Invalidity Board were secret, and invited her to request the report in question from her doctor, who had been on the Board. The appellant had access to that report.

34. That same day (17 May 2018), the appellant submitted a request for administrative review against the aforementioned decision of 17 April 2018 inasmuch as in the respondent's not acknowledging that the appellant's invalidity arose from an occupational illness, the decision had been taken based on a number of errors made in the handling of the appellant's case. Further, the appellant emphasized in that letter that in the light of the background of the case, the respondent had not demonstrated the requisite duty of care toward her.

35. The respondent rejected that request for administrative review on 12 June 2018, having found that no irregularity had been committed in placing the appellant on invalidity. On 28 June 2018, the appellant lodged a complaint against that decision and requested that a Complaints Committee be convened.

36. In parallel, with respect to Ms S.'s investigation (see paragraphs 21 to 26 above), the Deputy Assistant Secretary General for Human Resources informed the appellant by letter dated 15 May 2018 that the enquiry had come to an end, and had revealed that the harassment and repeated bullying were not established, yet there was ample evidence that the Heads of ICS were managing that service in a problematic way. That same letter noted that the investigation of the case had revealed that the way in which the managers were managing the staff was problematic in various ways and had to be addressed. It also noted that the managers had broken general rules of conduct, and that disciplinary

action was under consideration. On 16 June 2018, the appellant lodged a complaint against that decision.

37. By letter dated 20 July 2018, the respondent, which qualified the aforementioned complaint as a request for administrative review, dismissed the appellant's request on grounds that no procedural irregularity had been committed and no harassment proven. On 16 August 2018, the appellant lodged a complaint against that decision and requested that a Complaints Committee be convened.

38. The Complaints Committee issued its report on 6 February 2019 in support of the appellant's complaint, noting that there was proof that the appellant had been subjected to bullying and harassment. Further, it highlighted the fact that Ms S.'s report was well substantiated and documented, and that the respondent had sought an enquiry and received a report in line with the policy in ON(2013)0076 but had not put it to good use. In its recommendations, the Complaints Committee invited the respondent to acknowledge that the appellant had been subjected to harassment and bullying, to send her a letter of apology for what had happened, to forward her Ms S.'s report, and to compensate her for the material and non-material damage suffered. On 18 February 2019, the appellant presented her views on the Complaints Committee's report.

39. By letter dated 15 March 2019, the respondent told the appellant that it had "carefully examined the elements of the case, including the findings and recommendations of the Complaints Committee", but was "not in a position given the information available to [it] at the present time to uphold the requests in [her] complaint". The respondent went on to say that it intended to review the issues raised in her complaint and that it would "provide [her] with any information relevant to [her] complaint within 60 days". Not having received any further information within the time frame noted by the respondent, on 14 May 2019 the appellant lodged an appeal (Case No. 2019/1284) against the decision in the letter of 15 March 2019 and the decisions in the respondent's letters of 15 May 2018 and 20 July 2018 (see paragraphs 36 and 37 above).

40. The respondent sent the appellant another decision by letter dated 16 May 2019, the decision to dismiss the appellant's request based on the report of another expert, Ms Sz, dated 13 May 2019, which found that the reported incidents did not constitute harassment of the appellant. On 17 June 2019, the appellant lodged a second appeal (Case No. 2019/1285) against the decision of 16 May 2019 and the decisions in the respondent's letters of 15 May 2018 and 20 July 2018 (see paragraphs 36 and 37 above).

41. That same day (17 June 2019), the Complaints Committee handed down its report in response to the appellant's request regarding her placement on invalidity, which, in accordance with the respondent's decision, did not arise from an occupational illness. In its findings, the Complaints Committee noted irregularities regarding the documents that had to be taken into consideration by the Invalidity Board and the procedure followed, in particular the fact that the latter had not had access to Ms S.'s enquiry report. The Complaints Committee recommended, among other things, that the Invalidity Board be reconvened to take a decision based on a complete administrative file, which at a minimum should contain the enquiry report in question and the Complaints Committee's report of 6 February 2019. On 24 June 2019, the appellant presented her views on this Complaints Committee report.

42. On 23 July 2019, the respondent dismissed the appellant's complaint dated 28 June 2019. It is against that decision, and against the aforementioned decisions of 17 April 2018 (see paragraph 31 above) and of 12 June 2018 (see paragraph 35 above), that the appellant lodged the third complaint on 20 September 2019 (Case No. 2019/1291).

C. Summary of parties' contentions, arguments and submissions

(i) Appeals in Cases Nos 2019/1284 and 2019/1285

Admissibility

43. The respondent argues that the appeal in Case No. 2019/1284 is inadmissible insofar as that appeal was rendered inapplicable by the decision of 16 May 2019 to formally dismiss the appellant's complaint after the Complaints Committee handed down its report on 6 February 2019. The respondent is also of the view that the appeal in Case No. 2019/1285 must be dismissed as inadmissible for being time-barred, given that the pre-litigation phase concerned events that went as far back as 2015–2016. Further, the respondent submits that the appellant is reporting incidents and decisions taken by her managers in 2015–2016 but did not challenge them within a reasonable time frame.

44. The appellant argues that the two appeals concern the annulment of different acts, and that they were entered on time. Moreover in her view, in the light of the incidents being challenged, she lodged both appeals within a reasonable time frame.

Merits

Appellant

On the submissions seeking annulment

45. The Tribunal observes that the appellant is directing her submissions seeking annulment against the decisions of 15 March 2019 and 16 May 2019 (hereinafter the “contested decisions”), decisions that may be substituted for the decisions of 15 May 2018 and 20 July 2018. In this framework, the appellant puts forward four arguments in support of those submissions. Firstly, she argues that the respondent failed in its duty to substantiate the contested decisions. Secondly, she asserts that there was an obvious error of judgment regarding the existence of harassment of the appellant. Thirdly, she argues a violation of the rules of procedure and the right of the appellant to be heard in accordance with the policy in ON(2013)0076. Fourthly, she submits that the contested decisions violate ON(2013)0076 with respect to appropriate punishment of the people who committed the harassment and bullying.

On the obligation to state reasons

46. The appellant asserts that no reasons whatsoever were given for the contested decisions. It was proven, and obvious, that the appellant had been harassed and bullied by her managers, yet the respondent sought to delay taking a decision without providing any plausible explanation, while seeking opinions and having an additional enquiry

conducted on top of those that had already been done. The respondent used the contested decisions to attempt to depart from findings that were established beyond any doubt, in accordance with the relevant procedure, both by Ms S. in her enquiry report and by the Complaints Committee in its report dated 6 February 2019. The respondent has confirmed that it based its decision on a third report that it commissioned. Thus it is clear that the respondent failed in its obligation to state reasons, as enshrined in the Tribunal's case law and the established case law of other administrative tribunals in this respect. Moreover the respondent cannot remedy the total absence of substantiation by providing explanations after the appeals have been lodged.

47. If the respondent wished to depart from the findings in Ms S.'s report of 28 January 2019 and those of the Complaints Committee's report of 6 February 2019, it ought to have substantiated the contested decisions accordingly. Yet the respondent merely noted that the harassment of the appellant was not established, and bases this statement on a third report, but did not explain in what way the findings in Ms S.'s report and the Complaints Committee's report were not relevant.

On the obvious error of judgment

48. The appellant asserts that the contested decisions are tainted by an obvious error of judgment insofar as the respondent found there was no evidence of harassment or bullying, whereas Ms S.'s report and the Complaints Committee's report of 6 February 2019 found that the harassment and bullying of the appellant were clearly established.

49. Whereas the respondent's analysis limited its examination of the alleged harassment to three factual situations (pressuring the appellant to quit, downgrade of her rating for 2015, being taken off the updated organizational chart of the service in 2017), the appellant argues that she laid out in detail an overall situation of working conditions that were harmful to her and to all ICS staff in her request for assistance of 7 September 2017.

50. The appellant expressly cited her managers' non-communication or aggressive communication, excessively long assignments in the booths (in violation of agreements on booth time), a failure to respect rest and recuperation times, her managers' publicly denigrating attitude toward her and desire to get rid of her as a team leader by pushing her to quit every way they could, including by using her age, and so forth. The respondent disregarded those elements and cherry-picked the incidents that allowed it to deny the established harassment. Further, the appellant added to the file testimonies confirming her statements and supporting her allegations, which the respondent in no way challenged.

51. Consequently, the appellant is of the view that the respondent had found there was no harassment or bullying based on incidents that it selected on its own, disregarding the findings of Ms S.'s report and the Complaints Committee's report of 6 February 2019, which had been established in line with the procedures set out by the CPR and internal policies. To corroborate its position, which has no merit whatsoever, the respondent based its decision on a report that it had itself commissioned, on which yet again the appellant never had the chance to present her views. Under these conditions, the contested decisions were taken based on an obvious error of judgment, in clear violation of the policy in ON(2013)0076.

On non-compliance with procedural guarantees and the appellant's right to be heard

52. The appellant argues that the contested decisions were taken in violation of the procedural guarantees to which she was entitled. The decisions were taken without the appellant's having received a copy of Ms S.'s report and without her having been made aware of the procedural steps to follow or any decisions to be taken by the respondent. In that context, and before it took the initial decision to dismiss the appellant's complaint, the respondent never heard the appellant, in clear violation of the latter's procedural rights. Such a violation is all the more obvious in the light of Ms SZ's report. Not only has the respondent never shared with the appellant the reasons why such a report was necessary, but it commissioned it without, once again, the appellant's having the chance to exercise her procedural rights.

On the violation of ON(2013)0076 with regard to appropriate punishment of the people who committed the harassment and bullying

53. The appellant argues that in accordance with the policy in ON(2013)0076, a staff member found to be responsible for harassment, bullying or discrimination is subject to appropriate disciplinary action. Yet despite the findings to this effect in Ms S.'s report and the Complaints Committee's report of 6 February 2019, no disciplinary proceedings were initiated against Ms M. With regard to Mr F., breaking with the principle of proportionality to the harassment committed, he was issued a reprimand for harassment of another person and a written warning for the acts committed against the appellant.

On the submissions seeking compensation

54. Firstly, the appellant argues that she suffered non-material damage caused by the behaviour of her managers, who harassed her. Throughout the pre-litigation proceedings, senior stakeholders failed in their duty to protect her from the actions that resulted in her being placed on invalidity. Several of the respondent's services were informed of the dysfunctional situation in ICS and the harassment of the appellant. In that context, the appellant was given no support for pursuing her professional career decently.

55. The appellant submits that the harm in question concerns the fact that even before her request for assistance, the situation she was experiencing at work was not taken into consideration. She was left in uncertainty for a long period, in which her procedural rights were violated while her health worsened due to her managers' harassment. The respondent denied the evidence (the findings in Ms S.'s enquiry report and the Complaints Committee's report of 6 February 2019) throughout the pre-litigation proceedings, and it commissioned a third opinion to justify its position after the fact. This constant hostile attitude from the respondent's services toward the appellant caused her clear non-material damage, which the appellant assesses at €50,000.

56. In reparation of the non-material damage, the appellant is also requesting that the respondent be ordered to write her a letter of apology. Additionally she is asking to have her performance and her annual review for 2015 upgraded; the downgrading of her review from "very good" to "good" was one of the established acts of harassment that occurred after the memorandum of 24 November 2015.

57. Secondly, the appellant reckons that she suffered material damage consisting in the difference in her income from 1 May 2018, the date she was placed on invalidity, and 1 October 2019, the date she retired. Taking into account the net remuneration, the amount of invalidity pension received, the tax adjustment and the tax withheld (not yet known precisely), the appellant assesses this damage based on detailed calculations as €56,634.08 for 2018 and €42,475.56 for 2019, for a total of €99,109.64.

58. In further material damage the appellant adds the legal costs she incurred to make a request for assistance and complete the steps that followed (up to her Complaints Committee hearing). In her view, the respondent's ongoing bad faith shown to her and the exceptional circumstances of the case allow those costs, estimated at €3,000, to be included in the material damage suffered.

59. Lastly, the appellant requests that the respondent be ordered to reimburse her for all her costs and expenses, and asks the Tribunal to increase the €4,000 lump sum for reimbursement, which she reckons is far too low in this case.

60. Under these conditions, the respondent asks the Tribunal:
- to rule that the appeals in Cases Nos 2019/1284 and 2019/1285 are admissible and have merit;
- to annul the decision dated 15 March 2019 insofar as it consisted in dismissing the appellant's complaint of 16 August 2018 (Case No. 2019/1284);
- to annul the decision dated 16 May 2019 insofar as it consisted in dismissing the appellant's complaint of 16 August 2018 (Case No. 2019/1285);
- to annul, if need be, the decision dated 20 July 2018 insofar as it consisted in denying the appellant's request for administrative review of 16 June 2018, and to annul the initial decision of 15 May 2018 (notified on 17 August 2018) whereby the request for assistance in respect of bullying and harassment was denied (Cases Nos 2019/1284 and 2019/1285);
- to order the respondent:
  - to pay damages, provisionally estimated at €50,000 in non-material damage and €102,100 in material damage (Cases Nos 2019/1284 and 2019/1285);
  - to write the appellant a letter of apology for how she was treated (Cases Nos 2019/1284 and 2019/1285);
  - to upgrade her 2015 annual review so that it reflects the appellant's actual performance and skills over the year in question (Cases Nos 2019/1284 and 2019/1285);
- to order the respondent to pay all costs (Cases No. 2019/1284 and 2019/1285).

Respondent

On the submissions seeking annulment

On the obligation to state reasons

61. The respondent argues that the contested decisions are sufficiently substantiated and that, during the pre-litigation phase, the appellant received the necessary information that justified denying her request. The appellant was aware, as from the first decision dated 15 May 2018, of the reasons why her request had been denied. Additional

information was provided to her in the letter of 20 June 2018 and the decision of 16 May 2019. During that period, the respondent stressed the fact that the appellant had not provided sufficient proof of the alleged harassment against her. The contested decisions, and the letters sent to her during the pre-litigation phase, are in fact evidence of the respondent's having explained the reasons why it could not support the appellant's request.

On the obvious error of judgment

62. In the respondent's view, the appellant provided no evidence that the alleged events constituted harassment, bullying or discrimination against her. In order for reported incidents to be qualified as falling under the scope of the policy in ON(2013)0076, proof must be provided of repeated actions or direct behaviour toward a specific individual aimed at causing them personal harm. That is not the case here, however, with regard to the relevant incidents, namely the downgrading of the appellant's 2015 review, the pressuring of the appellant to quit, and the removal of her duties from the organizational chart in November 2017.

63. Firstly, with regard to the appellant's performance in 2015, the case file shows that the appellant did not share her managers' views on management, but that difference in opinion did not constitute harassment or bullying, and the CPR contains specific procedures for handling differences of opinion in such cases. Also, it is not because in the appellant's view her manager's behaviour was disrespectful, impolite or unprofessional during the review process that she was automatically being harassed or bullied. Further, regarding the alleged pressure on appellant to get her to step down as team leader or to quit entirely, the respondent asserts that the necessary documentation to support such allegations has not been provided. The same goes for the allegations about the service's organizational chart and, in particular, the fact that the appellant's duties are not shown on it.

64. The respondent adds that the aforementioned considerations are confirmed by Ms S.'s report and the Complaints Committee's report of 6 February 2019. The former describes an overall dysfunctional situation over a long period and indeed shows that several people were clearly affected by the acts committed by Mr F. and Ms M., but does not indicate that there is specific proof regarding the appellant's own situation. The same observation applies to the findings in the Complaints Committee's report of 6 February 2019.

On non-compliance with procedural guarantees and the appellant's right to be heard

65. In the respondent's view, no irregularity was committed in the enquiries that were conducted, and the appellant was fully involved in the assistance procedure, in compliance with the policy in ON(2013)0076.

On the violation of ON(2013)0076 with regard to appropriate punishment of the people who committed the harassment and bullying

66. The respondent argues that unlike what the appellant is claiming, the disciplinary actions that were taken did not follow from any kind of alleged harassment of the

appellant. A variety of actions, including disciplinary actions, were taken as part of the overall examination of the existing situation in ICS as a consequence of Ms S.'s enquiry, and were unrelated to the incidents that concerned the appellant personally.

On the submissions seeking compensation

67. The respondent observes that the appellant had originally, in her request for assistance, sought compensation of €15,000 in alleged non-material damage, an amount that she later raised to €20,000 and then to €50,000 without any justification. In the respondent's view, such requests are not justified insofar as the case file did not reveal that the appellant had been harassed. With regard to the appellant's request to have the respondent send her a letter of apology or upgrade her review for 2015, the respondent finds that such requests can only be denied insofar as no error was committed by the Organization. As for her claim for compensation for material damage, the respondent considers that it must be denied insofar as the appellant was placed on invalidity for a cause that did not arise from an occupational illness.

68. In the light of the aforementioned considerations, the respondent asks the Tribunal to find the appeals inadmissible and, if the Tribunal were to find them admissible, to dismiss them as groundless.

(ii) Appeal in Case No. 2019/1291

Appellant

On the submissions seeking annulment

69. The appellant has put forward three arguments in support of her submissions directed against the decision of 23 July 2019 (hereinafter the "contested decision"), a decision that supersedes the decisions of 14 April 2018 and 12 June 2018. The first argument is that the contested decision does not comply with the concept of occupational illness and therefore the principle of legal certainty. The second is that an obvious error of judgment was made in examining the Invalidity Board's findings and that an irregularity was committed in the procedure for rendering the actions in question, based on which the contested decision was taken. The final argument is that the respondent failed in its duty of care.

On the concept of occupational illness and the principle of legal certainty

70. Firstly, the appellant argues that the CPR, and in particular Article 14.2 to Annex IV, does not define the concept of occupational illness and that the Organization has never communicated a definition of that concept to the staff. Also, the respondent never told the staff that this concept had to be understood as stipulated in the group insurance contract and article 5b thereof, which refers to Belgian legislation and regulations on occupational illness. Consequently the provisions in question cannot be applicable to the Organization's staff. The fact that the Secretary General has the authority to conclude a group insurance contract in no way prejudges that Belgian law is the applicable regulation for the purpose of defining occupational illness in the framework of the pension scheme. This arises from the will of the parties to the said insurance contract, and therefore does not concern the staff.

71. Moreover it is indisputable that there are no “Rules applicable in the Organization for the definition of the risks of work accident and occupational disease” within the meaning of Article 14.2 of Annex IV to the CPR. So in order for the Secretary General to consider that references to the group insurance contract were the right references, he would have to take a public, explicit decision on that. Which in this case he has not done.

72. Under those circumstances, the Invalidity Board members were unaware of what was covered by the concept of occupational illness at the level of the Organization, and therefore their judgment of whether the appellant was suffering from an occupational illness could only be flawed and based on erroneous considerations. A general reference to the aforementioned article 5B in the Invalidity Board’s report in no way changes the fact that the Board members lacked clear, practical information about the scope of that article. The Complaints Committee, in its report dated 17 June 2019, clearly stresses the fact that there are shortcomings in the rules, and that the Invalidity Board did not have all the necessary information about the applicable legislation.

73. Secondly, with regard to the definition of occupational illness given by the respondent in its letter of 21 March 2018 (see paragraph 28 above), which was not communicated to the Invalidity Board for it to rule on the appellant's case (in itself a violation of procedure), the appellant considers that this definition even departs from the definition of occupational illness as covered by the aforementioned national legislation and regulations. Either the illness is on a list of such illnesses or it is not. If it is, a person is required to be suffering from an illness on the list and to have been exposed to a professional risk that can cause the illness. If it is not, the person must prove that the direct, definitive cause of the illness was performing their professional duties, in which case it is for them to prove the causal link between the illness and the exposure to the professional risk of that illness. Yet in its letter of 21 March 2018, the respondent combines the two systems somewhat while departing from national legislation.

74. In the appellant’s view, the Invalidity Board was not forwarded the relevant information and so drew on a highly restrictive definition of occupational illness, and did not consider an illness that the staff member contracted as a result of or during the performance of their duties as an occupational illness. This approach would render Article 13 of Annex IV to the CPR completely ineffective.

75. In the appellant’s view, under Belgian legislation and regulations, her illness in any event meets the necessary conditions to be considered as an occupational illness. While the appellant's illness is not on the list in the national legislation, her state of health meets the requirements of that legislation and those regulations because its direct, definitive cause was the performance of her duties. It is undisputed that all the medical reports on the appellant, which were not challenged by the Medical Service of the Organization, refer expressly to the fact that the medical problems that resulted in the appellant being placed on invalidity are directly linked to the practice of her profession.

76. Lastly, the appellant is of the view that her illness is partly the result of the conditions of the practice of her profession, which her managers made intolerable and which were not discussed by the Invalidity Board, thereby vitiating the latter's report and by extension the contested decision. It is indisputable that the appellant was subjected

to working conditions that were harmful to her health and caused her to be placed on invalidity.

On the respondent's obvious error of judgment in reviewing the Invalidity Board's report and findings, and on the procedural irregularities

77. The appellant asserts that the respondent did not check whether the Invalidity Board had followed the procedure correctly and provided no oversight over its report. In the pre-litigation proceedings, the appellant had reported the irregularities committed and the fact that the Invalidity Board had made a ruling without receiving any instructions about the concept of occupational illness and without taking account of her comments on the legislation applicable to the case. She submits that the respondent merely denied her requests without examining whether her allegations were justified, operating on the principle that the Invalidity Board's work and the NATO Medical Service's opinion were not tainted with irregularity and, moreover, without providing any reasons, whereas the obligation to state reasons is enshrined in the case law of the Tribunal and other administrative tribunals.

78. The appellant begins by noting that the Invalidity Board did not take account of Ms S.'s report, which was available before the Board met, as the Complaints Committee also highlighted in its report of 17 June 2019. Ms S.'s report clearly showed the deleterious effects of the professional climate in which the appellant was working, and the pressures on her which resulted in her being placed on invalidity. The Administration never explained why there had been no reason to forward that report to the Invalidity Board, a report which clearly supported the appellant's case. Generally speaking, the Invalidity Board did not take account of the conditions specific to the practice of the profession of interpreter, which requires the enforcement of standards arising from specific agreements that apply to all interpreters, with which the ICS managers did not comply, thus jeopardizing the health of their staff.

79. Next the appellant puts forward that the Invalidity Board members had not received a tasking explaining the context of the procedure in question and, as the medical report shows, they thought they had to intervene in a different context. This observation was also made by the Complaints Committee in its report of 17 June 2019. The Invalidity Board did not request the necessary information about that, and the respondent did not provide them with the required assistance despite various interventions by the appellant in respect of that. Further, the proceedings lasted from mid-August 2017 to mid-April 2018, and were concluded only for reasons of urgency (see paragraph 30 above), without in-depth examination, as the Complaints Committee noted in its report of 17 June 2019. It is likely for that reason that the appellant's lengthy medical file was not actually taken into account by the Invalidity Board as part of the bigger picture, and that no explanations were given regarding in what way the medical file was not relevant to the case.

80. Furthermore, it is because it did not have all the information about the appellant's situation that the Invalidity Board made contradictory and even erroneous observations, in particular when it stated that the appellant could work somewhere other than NATO, which would confirm that her inability to work in ICS was indeed of occupational origin, or when it found that the appellant was completely unfit for her duties but might be fit to perform other duties elsewhere, in a climate where she felt more at ease. In its report of 17 June 2019, the Complaints Committee highlighted those contradictions and the fact

that the Invalidity Board had clearly never taken its reasoning to its logical conclusion, *i.e.* that the climate in which the appellant was working had caused her medical problems, whereas that is what is written in Ms S.'s report and the Complaints Committee report of 6 February 2019.

81. Finally, the appellant argues that, despite her requests, the respondent never responded to the allegations regarding the scope of the Administration's oversight of the Invalidity Board's work, the irregularities committed, and the many contradictions regarding the appellant's state of health. In its findings, the Invalidity Board raises another solution, the possibility of the appellant's taking another interpretation job in another professional setting, but notes that this solution would not be workable in her current professional situation. The same observations were made in the Complaints Committee's report of 17 June 2019.

On the duty of care

82. The appellant asserts that the respondent did not take her situation and interests into account and thus failed in its duty of care. Even though it had been alerted to errors in the Invalidity Board's work, it did not intervene in any way and did not take care to provide assistance or support the Invalidity Board in its work. It overlooked all the relevant information reported by the appellant in the pre-litigation proceedings and disregarded the Complaints Committee's report. It is under these conditions that, through its omissions, the respondent led the appellant to refer her case to the Tribunal. The violation is all the more flagrant as the appellant is recognized as being ill. In reality, the respondent did not want to challenge the Invalidity Board's work and decided not to give it the relevant information. This attitude clearly shows that the objective of social protection covered by Article 13 of Annex IV to the CPR is far from met.

On the submissions seeking compensation

83. The appellant claims that the respondent ignored her requests for clarification of the applicable legal framework throughout the pre-litigation proceedings by dismissing them without in any way looking into their merits, and says that this attitude caused her non-material damage. In her view, the fact that the respondent did not take account of the Complaints Committee's findings, which clearly noted that the Invalidity Board had made a ruling without having a complete case file on the appellant, also caused her non-material damage. The appellant assesses this non-material damage as €1,000.

84. The appellant also requests that the respondent be ordered to reimburse her for all her costs and expenses, and therefore asks the Tribunal to increase the €4,000 lump sum for reimbursement.

85. Under these conditions, the respondent asks the Tribunal:
- to declare that the appeal in Case No. 2019/1291 is admissible and has merit;
- to annul the decision dated 23 July 2019 insofar as it consisted in dismissing the appellant's complaint of 28 June 2019;
- if necessary, to annul the decision dated 12 June 2018 insofar as it consisted in denying the appellant's request for administrative review of 17 May 2018, and to annul the initial decision of 17 April 2018 whereby the appellant was placed on

invalidity insofar as that decision does not acknowledge the occupational origin of the invalidity;
- consequently to acknowledge the occupational origin of the appellant's invalidity and all the additional rights arising from such acknowledgement;
- to order the respondent to compensate the non-material damage suffered;
- to order the respondent to pay all costs.

Respondent

On the submissions seeking annulment

On the concept of occupational illness and the principle of legal certainty

86. The respondent considers that the CPR defines the concept of occupational illness, and that the appellant was informed of that definition by letter dated 21 March 2018. The matter was discussed by the parties in the pre-litigation proceedings. For the respondent, the Organization took the necessary steps to define the concept of occupational illness by referring to Chapter X of the CPR, which states that the Secretary General has authority to determine the method of insurance. The appellant was duly informed that to define occupational illness, the instructions for Article 14.2 of Annex IV to the CPR refer to the "Rules applicable in the Organization", and that those rules are reflected in the group insurance contract, in particular at article 5B, which refers to Belgian legislation and regulations.

87. In the respondent's opinion, the respondent's allegation that the Invalidity Board members did not have clear instructions on the situation to assess and disregarded the applicable situation for the concept of occupational illness has no merit. Indeed, the Board members were well aware of the situation to assess and, as physicians in Belgium, they were familiar with the applicable regulations.

On the obvious error of judgment in reviewing the Invalidity Board's report and findings, and on the procedural irregularities

88. Firstly, the respondent argues that it is not for the Organization to substitute its judgment for the Invalidity Board's work and findings. The work of determining whether a person is an invalid, and whether that invalidity is occupational in origin is medical, and the Administration plays a limited role in that. The Administration must make sure the Invalidity Board is set up in accordance with the rules and receives all the relevant information to carry out its mission, and once the Invalidity Board has formulated its findings, it must check that they are not tainted by an obvious factual error. If there has been no obvious factual error, the medical findings are definitive and binding on the Administration. That was precisely the case here; it was based on a complete case file containing all the relevant information that the Invalidity Board found that the appellant suffered from permanent invalidity and determined that her illness was not occupational.

89. Secondly, with regard to the arguments regarding the lack of substantiation of the decisions taken in the Invalidity Board's work, the respondent considers those arguments to be lacking in merit. The contested decision is based on the decision of the Invalidity Board, which was aware of the appellant's medical history and the accusations of harassment directed at her managers. As it had that information, in the respondent's

view it was not necessary for Ms S.'s report also to be forwarded to the Invalidity Board. Moreover, the respondent had invited the appellant to give the Invalidity Board all the relevant information in support of her allegations, which she did. Consequently, she had all the information necessary to understand the reasons for the contested decision whereby her illness was not recognized as being occupational.

90. Finally, with regard to the information in the documents prepared by the Invalidity Board, the respondent notes that this information was subject to medical confidentiality and that the Administration did not have the right to share it. In any event, the appellant had access to the information in those documents in the pre-litigation proceedings and through her doctor.

On the duty of care

91. The respondent denies the appellant's allegations that it failed in its duty of care to her. It recalls, in this regard, that the appellant was informed that she had the possibility of submitting any relevant document or information for the Invalidity Board to review, which she did. The respondent asserts that every time the appellant requested information, such as regarding the concept of occupational illness, it had replied to her immediately. In the respondent's view, overall it demonstrated a duty of care to the appellant. For example, when the Invalidity Board was taking a long time to produce its report and the appellant's extended sick leave was about to end, on 18 April 2018, which meant she risked being penalized financially, the respondent did not take a purely formalistic position but rather looked into the appellant's situation.

On the submissions seeking compensation

92. In the respondent's view, given that it did not make any error or omission in the assessment of the appellant's invalidity, the latter's submissions seeking compensation must be dismissed. The same goes for the arguments that the procedure for determining whether the appellant's illness was occupational in origin was vitiated. In the absence of any irregularity, no request for compensation can be supported.

93. In the light of the foregoing, the respondent asks the Tribunal to dismiss the appeal in Case No. 2019/1291 as groundless.

D. Considerations and conclusions

(i) Admissibility

94. The respondent formally argues that the appeals in Cases Nos. 2019/1284 and 2019/1285 are inadmissible, considering that the first is moot and that the second is time-barred. Regarding the second more specifically, the respondent submits that the alleged harassment and bullying of the appellant took place several months before the request for assistance was made on 7 September 2017, which officially triggered the investigation into the allegations.

95. Regarding the plea of inadmissibility, precisely which act caused harm to the appellant should be ascertained.

96. The respondent dismissed the appellant's complaint of 16 August 2018 with the decision of 15 March 2019, stating that it had investigated "the facts of the case carefully, including the findings and recommendations of the Complaints Committee" of 7 February 2019 and the appellant's comments of 18 February 2019 on this report. With this decision, the respondent recognizes that it knew that the Complaints Committee report of 6 February 2019 invited it to acknowledge that the appellant had been the victim of harassment and bullying and consequently to write her a letter of apology, send her Ms S.'s report and compensate her for the harm suffered. Based on the appellant's comments on this report, the respondent also had information on the appellant's complaints.

97. However, in the same decision of 15 March 2019, the respondent considered that it was "not in a position given the information available [...] to uphold the request in [her] complaint." It follows, based on the "careful" investigation of the case, to employ the term used, that the respondent considered that the appellant's complaint could not be supported despite the Complaints Committee's findings in the report of 6 February 2019. Based on this assumption, the respondent subsequently announced to the appellant that it intended to review the issues raised in her complaint and that it would "provide [her] with any information relevant to [the] complaint within 60 days".

98. In its decision of 16 May 2019, the respondent recalled that it would inform the appellant and that it would provide her with additional information concerning her request for annulment. In this regard, it referred to a report commissioned from an independent expert, which concluded that the appellant had not been the victim of harassment or bullying. In reality, with this decision the respondent is providing some reasons for the dismissal on principle of her complaint, despite the conflicting conclusions of the Complaints Committee report of 6 February 2019.

99. This information is not new. In its decisions of 15 May 2018 and 20 July 2018, the respondent had already expressed the opinion that, despite the statements contained in Ms S.'s enquiry report, there was no proof that the appellant had been the victim of harassment and bullying. In essence, with its decision of 16 May 2019 the respondent is reiterating its initial position, which it maintained throughout the pre-litigation proceedings. Consequently, despite appearances, with the decision of 16 May 2019 the respondent did not actually provide any new information in comparison to its successive decisions and did not really review the appellant's situation.

100. Consequently, by the nature of its substance, the decision of 15 March 2019, challenged within the time limits, directly affects the appellant's legal situation in that it constitutes the Administration's definitive decision to deny her request after a careful investigation of the case, and it states that she would be provided with additional information on the matter within 60 days.

101. Thus the action causing harm to the appellant is the decision of 15 March 2019, read jointly with that of 16 May 2019, the latter containing only additional information on the respondent's position, which had already been clearly expressed.

102. It follows from the foregoing that the respondent's separate plea of inadmissibility concerning the request in Case No. 2019/1284 must be dismissed.

103. Concerning the second plea of inadmissibility, the respondent essentially argues that the appellant submitted her request for assistance – and subsequently initiated the pre-litigation proceedings to bring the case before the Tribunal – after the deadline or not within a reasonable period. The alleged events date back to 2015–2016, while the request for assistance was submitted on 7 September 2017.

104. The Tribunal notes that the policy contained in ON(2013)0076 does not specify a time frame for requesting assistance from the Administration when a staff member considers that they have been a victim of harassment or bullying.

105. Thus the text does not impose a time frame for making such a request, but nevertheless it is necessary to react within a reasonable period. This obligation is based on the need to adhere to the principle of legal certainty; this principle means that there must be a time limit on challenges to the Administration's actions that produce legal effects, otherwise the stability of existing legal situations is jeopardized. Consequently, the lack of time frame in ON(2013)0076 should not be considered as suggesting, in itself, that the principle of legal certainty is not adhered to when a request for assistance is submitted to the Administration.

106. In this respect, the Tribunal is of the view that whether or not a time frame is reasonable depends on a number of considerations specific to each case and, particularly, in this case, on the indications contained in the regulations on the one hand, namely the policy contained in ON(2013)0076, and on the conduct of the parties on the other hand.

107. Concerning, on the one hand, what the regulations say, it should be noted that ON(2013)0076 advises that before initiating the official conflict-resolution procedure, less formal steps should be taken. This is clear from the preamble to the second part of ON(2013)0076, on the procedures to follow in the case of discrimination, harassment and bullying in the workplace. For example, it states that "staff members [...] may prefer a less formal approach to resolving an issue, than to pursue resolution of an issue through the complaints and appeals process". This means that investigations into alleged harassment and bullying may take time, with the aim of finding an informal solution to the issue, but this should not stand in the way of the staff member subsequently initiating the procedures set out in ON(2013)0076 and the CPR.

108. Concerning, on the other hand, the conduct of the parties, the Tribunal recalls that after the Interpretation Service was restructured in 2015 and became the ICS, the team leaders including the appellant, with the support of the service's staff members, clearly challenged the way in which their managers were handling the staff in the memorandum of 24 November 2015. This initiative had a number of consequences. As part of the first performance review for staff members in March 2016 (for 2015), the appellant's rating was downgraded, as were those of the two other team leaders; in addition, the appellant's managers directly challenged her abilities as a team leader and her professionalism with actions that the appellant considered to be harassment and bullying and which she subsequently listed in her request for assistance of 7 September 2017. The appellant was placed on part-time medical leave from 18 April 2016.

109. The Tribunal notes that before requesting assistance from the Administration, the appellant opted for an informal method of resolving the dispute with her managers, which the respondent does not contest. Indeed, she preferred not to initiate the mediation procedure since it had a connotation of litigation, nor did she contact Human Resources, which, in her view, was very unwilling to intervene in harassment cases. However, she did inform the Staff Association of the situation, which informed the Deputy Assistant Secretary General. As a consequence, the latter met with Mr F. in July 2016, but the meeting did not bring about any change in the situation.

110. The Tribunal also observes that when she returned to work on 3 November 2016, the appellant was again confronted with what she considered to be harassment and bullying. In particular, with the emails listed subsequently in her request for assistance, the appellant sought to demonstrate that her managers were scorning her and pushing her to resign; she claims that to increase this pressure, her managers also initiated procedures to find her replacement, hoping thereby to pressure her psychologically to resign. The appellant states that her managers also used other methods to achieve this, for example not including her as team leader in the organizational chart updated in November 2016.

111. In June 2017, while she was on long-term sick leave, the appellant contacted the respondent once again about the outcome of the procedure, to get a response about the harassment and bullying she was reporting. The respondent held a meeting with her on 16 August 2017 to discuss the alleged events and told her that an official complaint was required to open an investigation into the alleged events.

112. This is the context in which the appellant submitted a request for assistance on 7 September 2017, following which the pre-litigation proceedings were officially initiated, resulting in the contested decisions and the appellant's submitting an appeal to the Tribunal.

113. The Tribunal notes that a long time did pass between the period in which the events constituting harassment and bullying took place, between March and November 2016, the period in which the informal contact and meetings took place, between June 2017 and August 2017, and the request for assistance, submitted on 7 September 2017. However, the Tribunal observes that from November 2016 – the period in which the appellant alleges the last harassment and bullying by her managers took place – to her making contact again with the Administration in June 2017, the appellant was unable to resume working, and that on 25 July 2017 the respondent initiated the procedure to place her on invalidity.

114. Under these conditions, and owing to the circumstances of the case, the Tribunal considers that the request for assistance of 7 September 2017 was submitted in a reasonable time frame to report the harassment and bullying in question in this case.

115. Consequently, the second plea of inadmissibility must also be dismissed and, therefore, the appeals in Cases Nos 2019/1284-1285 must be declared admissible.

(ii) Merits

Of the appeals in Cases Nos 2019/1284-1285

On the submissions seeking annulment

On the obligation to state reasons

116. The Tribunal recalls that the aim of the Administration's obligation to state reasons for decisions constituting grounds for grievance is to provide the staff member in question with enough information to allow them to determine whether the contested decision is justified, or tainted by an error that makes its legality questionable and enables the Tribunal to perform oversight thereof.

117. Such reasons do not need to include all the relevant legal and factual considerations insofar as the reasons for a decision must be assessed not only in light of the wording of the decision, but also the context and all the legal rules governing the issue in question.

118. In the present case, the appellant argues that no reasons were provided for the contested decisions.

119. It should be noted that the contested decisions dismiss appellant's complaint of 16 August 2018 for one reason alone: despite the Complaints Committee's findings, recommendations and conclusions of 6 February 2019, which essentially repeat the conclusions of Ms S.'s report, the appellant did not provide the necessary proof that the events reported in her request for assistance constituted harassment and bullying within the meaning of the policy contained in ON(2013)0076. In deciding that, the respondent also draws on the report by an independent expert, Ms SZ.

120. The Tribunal recalls that, in the contested decisions, the respondent repeats the reasons already stated in its decisions of 15 May 2018 and 20 July 2018, *i.e.* that the facts submitted for the respondent's consideration did not constitute harassment. In addition, the respondent sent the report by Ms S. and the report by Ms SZ. to the appellant at annex to its answer, and drew on the latter report to justify the contested decisions.

121. It must be acknowledged that the contested decisions do not include specific reasons explaining how the conclusions of Ms S.'s report and those of the Complaints Committee's report of 6 February 2019 are not relevant in this case. Nor is it explained why another report (Ms SZ.'s report) was required. Such explanations would have made it possible to understand the context in which the respondent decided to continue the proceedings and make the contested decisions. However, the decisions contain information to justify the respondent's refusal to grant the appellant's request, namely the absence of relevant evidence in support of her allegations of harassment and bullying. This is, in essence, the same conclusion as in Ms SZ.'s report.

122. The Tribunal is of the opinion that the elements mentioned above contain enough information to allow the appellant to determine whether the contested decisions are sound or if they are tainted by an error that makes it possible to challenge their legality before the Tribunal. It is precisely in these circumstances that the appellant was able to plead the illegality of the contested decisions by submitting other arguments for

annulment, such as the respondent's manifest error of judgment in implementing the policy in ON(2013)0076.

123. It follows from the foregoing that in light of the rules set out in paragraphs 116 and 117 of this judgment, the argument regarding the obligation to state reasons for the contested decisions must be dismissed.

On the error of judgment in respect of the existence of harassment and bullying against the appellant in relation to ON(2013)0076

124. In essence, the respondent argues that it did not make an error of judgment in relation to ON(2013)0076 insofar as the case file does not contain any evidence that make the assessments of the facts in the contested decisions implausible.

125. As a preliminary remark, the Tribunal considers that it has enough information from the material in the case file and does not think it is necessary to order investigatory measures or measures of organization of procedure. In these circumstances, the Tribunal will first examine the relevant provisions of the policy in ON(2013)0076, applicable in the present case; second, it will rule on the materiality of the alleged harassment and bullying; third, it will decide on the respondent's assessment of the facts in the contested decisions in light of the aforementioned policy.

On the provisions of the policy contained in ON(2013)0076

126. To start with, the Tribunal considers that when a staff member submits a request for assistance pursuant to ON(2013)0076, the Administration in question must take into consideration the information provided by that staff member and inform them of the outcome of their request.

127. It is in exactly these circumstances that the respondent, having received the appellant's request for assistance of 7 September 2017, decided, pursuant to ON(2013)0076, to ask Ms S. to open an enquiry on 3 October 2017.

128. As a consequence of its decision of 3 October 2017, confirmed by the decision of 17 October 2017, the respondent put itself in the framework of ON(2013)0076 and is bound by its provisions. Another element confirms this. When the appellant expressed doubts about Ms S.'s qualifications and suggested that someone from outside the Organization should conduct the enquiry, the respondent, in its letter of 17 October 2017, reassured the appellant that Ms S.'s skills and experience made her the best person to conduct the enquiry required by ON(2013)0076, and that she would do so completely independently. Further, the respondent did not inform the appellant of its decision to request a second report, Ms SZ.'s report. This is a breach of the letter and the spirit of the policy contained in ON(2013)0076 and of the respondent's duty of care.

129. Under ON(2013)0076, harassment is defined as "any improper and unwelcome visual, verbal, non-verbal or physical repetitive behaviour or conduct, that might be expected or perceived to unreasonably interfere with an individual's working performance, or which creates an intimidating, hostile or offensive work environment, or causes personal humiliation or embarrassment to a staff member". The same policy defines bullying as "the use of force or coercion to abuse or intimidate others". According

to the same definition “the behavior can be habitual and involve an imbalance of social or physical power. It can include verbal harassment or threat, physical assault or coercion and may be directed repeatedly towards particular victims, perhaps on grounds of race, religion, gender, sexuality, or ability”.

130. Therefore, in light of the above, the Tribunal should rule on the materiality of the harassment and bullying alleged by the appellant in her request for assistance.

On the materiality of the alleged harassment and bullying

131. The Tribunal observes that, as part of her request for assistance, the appellant describes in detail events that could be considered to constitute harassment and bullying. Some of the alleged events are borne out by written statements, which moreover clearly show that the managerial situation within the ICS was very problematic. The appellant includes various items at annex to her request that support not only the allegations directly concerning her but also the fact that the ICS managers’ failure to comply with the requirements of specific agreements on the work of conference interpreters had already been the subject of discussion for some time, and that the Organization had been aware of the existing problems since the AIIC’s intervention in the matter.

132. Thus, the Tribunal notes firstly that based on the results of the exhaustive interviews conducted and the examination of the relevant documents, Ms S. unreservedly concludes in her report that the allegations of harassment and bullying by Mr F. and Ms M. and sexual harassment by Mr F. are confirmed. According to that same report, this conclusion is based on a strict comparison of the numerous incidents mentioned in the request for assistance and the definitions in ON(2013)0076. In particular, the report makes clear that the statements by the majority of the interpreters and former interpreters interviewed unreservedly show that Mr F. and Ms M. perpetrated harassment and bullying. The report contains lengthy descriptions of events concerning the ICS’s two managers.

133. These general considerations are accompanied by specific considerations regarding the appellant. Part 11 of the report specifically indicates that the harassment and bullying alleged in and listed at annex to the appellant's request are confirmed by the enquiry conducted; this conclusion is repeated in part 13 on the general conclusions, and in part 14 it is recommended, because of the aforementioned findings, that disciplinary actions be considered against Mr F. and Ms M.

134. Moreover, the Tribunal observes that the Complaints Committee report of 6 February 2019 completely confirms the conclusions of Ms S.’s report, based on interviews with 14 people. After reiterating in its recommendations, yet again and unreservedly, that it is proven that the appellant was the victim of bullying and harassment, the report in question also invites the respondent to send her a letter of apology.

135. In these circumstances, the Tribunal concludes that the respondent cannot deviate from the conclusions of the aforementioned reports unless it can demonstrate that the conclusions in question are based on factual findings that are clearly wrong and require further investigation. When the Organization establishes a Complaints Committee or similar procedure that results in recommendations being made to the

Administration, if it then fails to take these recommendations into consideration, it must provide an adequate explanation for this.

136. However, in the framework of the procedure provided for by ON(2013)0076, the pre-litigation proceedings and the procedure before the Tribunal (answer), the respondent at no point asserts that the conclusions of the reports in questions were based on incorrect factual findings and, generally, it does not challenge the materiality of the events alleged by the appellant in her request for assistance (NATO Appeals Board Decision no. 672 of 3 March 2005). Even though it criticized the appellant's allegations, the respondent in no way considered the alleged events to be inaccurate or wrong.

137. Thus, in the contested decisions, it is the respondent's view that in spite of the conclusions in Ms S.'s report about these events and in the Complaints Committee report of 6 February 2019, the appellant did not provide the necessary proof that the alleged events constituted harassment and bullying within the meaning of the policy in ON(2013)0076. As a consequence, the respondent actually maintains that Ms S. made an error of judgment with regard to the events in the enquiry conducted pursuant to ON(2013)0076 owing to a lack of evidence.

On the error of judgment with regard to the alleged events pursuant to ON(2013)0076 owing to a lack of evidence

138. Firstly, it is the respondent's position that although the conclusions of Ms S.'s report, confirmed by the Complaints Committee report of 6 February 2019, are general in scope and establish that there is serious managerial dysfunction in the ICS, the fact remains that with regard to the appellant, there is no detailed, evidence-based analysis proving that the alleged harassment and bullying took place.

139. This position is flawed and cannot be accepted. As indicated in paragraphs 132 to 134 of this judgment, Ms S.'s report unambiguously shows that the events alleged by the appellant in her request for assistance have been established; this is also unreservedly confirmed by the Complaints Committee report of 6 February 2019.

140. Secondly, the respondent maintains that the managerial dysfunction observed, and even acknowledged, within the ICS does not necessarily lead to the conclusion that the appellant was the victim of harassment and bullying within the meaning of the policy in ON(2013)0076. In effect, assuming that events constituting harassment were observed, the appellant was not necessarily a victim of them.

141. The Tribunal observes that the fact that there was a problem in the ICS work environment and with Mr F. and Ms M.'s management of this service, and that numerous staff members (the majority) witnessed and reported events that they considered to constitute harassment, bullying, intimidation, sexual harassment, abuse of authority and discrimination, does not constitute a mitigating factor in favour of the managers of the service in question. On the contrary, this element is added to a body of evidence that suggests that the appellant's allegations are valid.

142. Thirdly, the respondent considers that only three of the events reported in the appellant's request (downgrading of her rating, pressure on her to resign, change to the service's organizational chart) are relevant and can be taken into consideration, but that,

contrary to the conclusions of Ms S.'s enquiry report and the Complaints Committee report of 6 February 2019, they do not constitute harassment and bullying within the meaning of the policy in ON(2013)0076.

143. The Tribunal is of the view that the respondent's argument separates the reported events with the sole aim of demonstrating that these events, taken in isolation, do not constitute harassment and bullying. The Tribunal will examine the validity of the appellant's allegations concerning the events reported, the evidential value of which, recognized by Ms S. in the enquiry report and confirmed by the Complaints Committee in the report of 6 February 2019, is challenged by the respondent.

144. Concerning, firstly, the downgrading of the appellant's rating for 2015 from "Very Good" to "Good", and without there being any need to reproduce the comments of the parties involved in the PRD review in question, the Tribunal considers that the pleadings submitted before the Tribunal unambiguously show that this downgrading was part of the action undertaken by the ICS managers against the three team leaders (out of four) who questioned their management methods in the memorandum of 24 November 2015. It is obvious that in doing so Mr F. unreasonably interfered in the appellant's working performance within the meaning of the policy in ON(2013)0076; this was clearly highlighted in Ms S.'s report and in the Complaints Committee's report of 6 February 2019.

145. The Tribunal certainly recognizes that the downgrading of the rating given to a staff member, taken in isolation, cannot in principle be considered managerial harassment. This point is even confirmed by ON(2013)0076, part 1 of which specifically concerns harassment and provides that "Disagreement on work performance or on another work related issue is not normally considered to be harassment. Such matters should normally be considered within the framework of staff appraisal/performance management". It follows from this provision of ON(2013)0076 that downgrading a staff member's rating because of disagreement on a work-related issue does not necessarily constitute an act of harassment.

146. However, this is no isolated event that in itself does not constitute harassment. In view of how the ICS functioned generally, the Tribunal observes that after the service was restructured in 2015, a large number of staff members and team leaders denounced Mr F. and Ms M.'s management methods. In these circumstances, the downgrading of the rating given to a staff member with the appellant's seniority and duties manifestly constitutes harassment, which is prohibited by ON(2013)0076. This is corroborated in particular by the fact that the ratings of three of the four ICS team leaders, including the appellant, were downgraded for the same review period.

147. Concerning, next, the pressure on the appellant to resign, the respondent once again isolates the reported events to insist that the appellant was not actually pressured to resign. In the respondent's view, in a concrete factual situation such as a staff member with a serious health problem, resigning could be a possible solution and would not in itself be the result of harassment or bullying.

148. The Tribunal notes that following the appellant's health problems in April 2016, the ICS's managers, in the performance review for 2015, did not show the empathy required towards a staff member who had had health problems. Without it being

necessary to go over in detail the events alleged and not contested by the respondent, the case file reveals that on the instructions of the ICS's managers, the respondent considered immediately replacing the appellant, even though she had been obliged to take medical leave.

149. In addition, on the basis of the same events, following the appellant's first period of sick leave, the service's managers felt that the appellant would not be able to perform her duties, clearly suggesting, without it being challenged, that by resigning she would avoid a difficult relationship with the heads of service which would in turn affect her health. In the circumstances of this case, it is the Tribunal's view that this kind of attitude is clearly contrary to the provisions of the policy in ON(2013)0076.

150. Concerning, lastly, the change to the organizational chart in November 2016, in which the appellant was no longer shown as team leader, the respondent's view essentially is that it in no way constitutes harassment and/or bullying within the meaning of ON(2013)0076 and is simply the result of an administrative error or omission.

151. It is certainly true that an error in the ICS organizational chart taken on its own would not constitute harassment of the appellant by Mr F. or Ms M. However, the Tribunal notes that one of the justifications for downgrading the appellant's rating was, according to Mr F. and Ms M., the appellant's lack of managerial skill as team leader. In addition, from the first months of her sick leave, and without this being contested, consideration was given to replacing the appellant, and on Mr F. and Ms M.'s instructions people were contacted to replace her as team leader. Contrary to the respondent's argument, acting so hastily to replace a team leader on sick leave is not an appropriate way to manage the workload.

152. In this context, the fact that a staff member – whose managerial skills had been called into question during the same period – had her role as team leader removed from the organizational chart is further evidence that the managers' attitude towards the appellant did not comply with the requirements of the policy in ON(2013)0076.

153. Fourthly, the respondent bases its judgment of the alleged events on another report, which it requested following Ms S.'s report, and which concludes that the appellant did not provide, in her request for assistance, the required, relevant evidence of the events that she was alleging constituted harassment and bully within the meaning of ON(2013)0076.

154. In this way, by asking for a new report and not basing it on a factual error that undermined the conclusions of Ms S.'s report, the respondent was substituting its judgment based on Ms SZ.'s report for the one based on the conclusions of Ms S.'s report.

155. As for the respondent's argument, put to the Tribunal at the hearing, that the report in question was established by an independent expert to provide clarity, fill in the gaps in Ms S.'s enquiry report and correct the inaccuracies in the Complaints Committee's report of 6 February 2019, the Tribunal observes the following.

156. Essentially, the respondent refers to the need to entrust the preparation of a report of this kind to an independent third party. Yet it was precisely using this kind of argument

that the respondent considered that, because of her skills and expertise, Ms S. was the best person to conduct the enquiry and draw up the report in question. As for the supposed gaps in Ms S.'s report and the lack of clarity in the Complaint Committee's report of 6 February 2019 on the validity of the evidence presented by the appellant in her request for assistance, the Tribunal notes that there is no element in either of these reports that would indicate the existence of doubts over the validity of the evidence submitted for assessment.

157. It must also be noted that Ms SZ.'s report is dated 13 May 2019, *i.e.* three days before the decision of 16 May 2019 was taken. Further, the Tribunal observes that this report, communicated to the appellant as part of these proceedings, does not mention any interviews that Ms SZ. conducted as part of her enquiry to essentially draw conclusions that conflict with those in Ms S.'s report.

158. In light of the above, the Tribunal is of the opinion that there is substantial evidence that the appellant was subjected to harassment and bullying by her managers. This is proven by a review of the evidence and the unfavourable working conditions of the ICS staff members included in the reports by Ms S. and the Complaints Committee. Yet the case file does not indicate that the respondent took into consideration this evidence and the review conducted, including the one set out in the Complaints Committee report, to reach a contrary conclusion rejecting the appellant's complaint.

159. Under these conditions, the Tribunal is of the opinion that it is appropriate to grant this argument, declare the contested decisions illegal and annul them insofar as the respondent has made an error of judgment regarding the requirements of the policy in ON(2013)0076, without it being necessary to rule on the appellant's other arguments.

On the submissions seeking compensation and the appellant's other submissions

160. As part of the appeals in Cases Nos 2019/1284-1285, the appellant develops submissions seeking compensation for the material damage suffered as a result of the contested decisions and the non-material damage allegedly suffered. The appellant also requests that the Tribunal order the respondent to send her a letter of apology and correct her performance review for 2015.

161. Firstly, concerning the damage suffered, the Tribunal recalls that entitlement to compensation is only recognized if three conditions are met: the unlawfulness of the alleged conduct; the actual occurrence of harm; and a causal connection between the unlawful conduct and the alleged harm.

162. The Tribunal considers that the criteria described above are fulfilled in the present case, the harm resulting on the one hand from the unlawfulness of the contested decisions and, on the other hand, from the measures taken by the respondent throughout the proceedings, which caused the appellant distress.

163. Given the highly questionable conditions and context in which the contested decisions were taken and the fact that the annulment of these decisions does not in itself constitute compensation for the harm suffered, the Tribunal sets, in the particular circumstances of the case, *ex æquo et bono*, the compensation for the harm suffered by

the appellant at a total of €75,000. The remainder of the appellant's claims for compensation must be dismissed.

164. Secondly, concerning the request for a letter of apology, the Tribunal considers that, in her submissions, the appellant is asking the Tribunal to issue an order to the respondent's services. The Tribunal does not have any such authority to do so.

165. The same applies to the appellant's request to have her performance review for 2015 corrected. However, it is incumbent upon the respondent to take the necessary steps deriving from this judgment to correct the errors made and which account for the unlawfulness of the contested decisions.

On the appeal in Case No. 2019/1291

On the submissions seeking annulment

On the principle of legal certainty and the concept of occupational illness

166. The appellant argues that the respondent has not adopted rules on the concept of occupational illness that are applicable to staff members, which goes against the principle of legal certainty. In this context, the appellant's case was put before the Invalidity Board in the absence of rules providing a basis for reviewing the appellant's situation and determining whether or not she was suffering from an occupational illness.

167. Article 14.2 of Annex IV to the CPR provides that where the invalidity arises from an accident in the course of the performance of one's duties, from an occupational disease, from a public-spirited act or from risking one's life to save another human being, the invalidity pension shall be 70% of salary. The instructions concerning this provision state that "for the purposes of Article 14, paragraph 2, reference shall be made to the Rules applicable in the Organization for the definition of the risks of work accident and occupational disease".

168. The Tribunal observes that it is based on the instructions for Article 14.2 of Annex IV to the CPR that the appellant argues that the Organization should have adopted rules defining the concept of occupational illness. However, it follows from these instructions that the reference to applicable rules does not necessarily mean that the Organization must adopt its own technical rules on the matter. The instructions suggest that the Organization applies a regime on occupational illness, by referring to specific rules.

169. The case file reveals that the rules whereby the Invalidity Board was asked to determine if the appellant's illness should be considered an occupational illness do exist. The respondent's letter of 21 March 2018 clearly shows that the conditions that must be fulfilled for an illness to be considered an occupational illness are covered by Belgian laws and regulations.

170. The Tribunal notes that these Belgian legal and regulatory references were used by the doctor appointed by the appellant to sit on the Invalidity Board. This is shown by the discussions that this doctor had with his colleagues following the meeting of the Invalidity Board on 23 February 2018. Therefore, this doctor was fully aware of the

applicable regime and it was on the basis of this applicable framework that he made his own assessment of the appellant's case.

171. It follows that the appellant cannot claim that the Organization does not have applicable rules that determine the concept of occupational illness or that the Invalidity Board ruled on her situation without any such rules. In these conditions, the complaints of a violation of the principle of legal certainty in relation to the concept of occupational illness and, more generally, a violation of Article 14.2 of Annex IV to the CPR cannot be accepted.

172. Consequently, the first argument must be dismissed.

On the error of judgment in the review of the report and the conclusions of the Invalidity Board and on the procedural irregularities

173. With this argument, firstly, the appellant invokes irregularities in the referral to the Invalidity Board that taint with irregularity the process following which the respondent took the contested decision. In this regard, she argues, on the one hand, that the members of the Invalidity Board did not have a clearly defined mandate and, on the other hand, that that they did not have all the relevant documentation to make an informed decision.

174. Concerning the first grievance, the appellant seeks to demonstrate that, in view of the context of the case, the members of the Invalidity Board actually considered that they were ruling on a simple request to place the appellant on permanent invalidity. Yet it was not merely a matter of placing a staff member on an invalidity pension, but also of knowing whether this invalidity resulted from an occupational illness and, specifically, from the toxic environment in which the appellant worked.

175. In accordance with point viii) of instruction 13/3, to Articles 13.1 and 14.2 of Annex IV to the CPR, the Invalidity Board has an administrative file and a medical file on the staff member in question. Point xii) of the same instructions stipulates that the findings of the Invalidity Board shall state a) whether or not the staff member is suffering from permanent invalidity, b) whether the invalidity results from an incident recognized by the Organization as falling within the scope of Article 14, paragraph 2 of Annex IV to the CPR (work accident, occupational disease or public-spirited act) and c) the date on which the disability became lasting.

176. The Tribunal notes that the respondent's transmission of the appellant's medical and administrative files to the Invalidity Board clearly shows that, in accordance with the aforementioned provision, the latter was asked to rule on both placing the appellant on invalidity and on whether this invalidity resulted from an occupational illness. The Tribunal's view is that the members of the Invalidity Board clearly discussed whether the appellant's invalidity resulted from an occupational illness and they found that this was not the case.

177. Consequently, and contrary to the appellant's allegations, there was no confusion over the Invalidity Board's mandate to determine whether the appellant was suffering from an occupational illness resulting from the respondent's conduct.

178. Concerning the second grievance, the appellant argues that the Invalidity Board did not have the relevant documentation applicable to the case, *i.e.* the rules on occupational illnesses and in particular Ms S.'s report, which was crucial and which clearly confirmed that the appellant's position on the occupational origin of her illness was valid.

179. Regarding the applicable rules relevant to this case, these must be examined in the light of point viii) of instructions 13/3, relating to Articles 13.1 and 14.2 of Annex IV to the CPR, which define the relevant documentation by virtue of which the Invalidity Board makes a ruling.

180. In this respect, the aforementioned instructions refer, on the one hand, to the staff member's administrative file. This file is "submitted by the Head of Personnel containing, in particular, an indication of the post occupied by the staff member in the Organization together with a description of his duties and of any duties proposed to him by the Organization corresponding to his experience and qualifications, so that the Board can give its opinion as to whether the staff member is incapable of carrying out those duties. This file shall also specify whether the application to be declared an invalid is likely to fall within the scope of Article 14, paragraph 2 [of Annex IV to the CPR]".

181. On the other hand, these same instructions refer to a medical file. This file contains the report presented by the Organization's doctor and, if appropriate, the medical report presented by the other party, as well as any reports or certificates from the staff member's doctor or from doctors whom the parties have consulted. This medical file also contains details of the length of the staff member's absences which have provided grounds for the Board to be convened, as well as the nature of the disability on which the Board is asked to make a ruling.

182. Concerning the grievance regarding the applicable rules for occupational illnesses, the Tribunal notes that these rules are not included in the documentation that must be transmitted when an Invalidity Board is convened. Clarifications on the applicable legal framework can also be transmitted but their absence, assuming that this is established, does not affect the regularity of the proceedings in the framework of which the Invalidity Board gives its ruling.

183. In any event, the Tribunal observes that in this case, the respondent had already communicated to the appellant, in its letter of 21 March 2018 (see para. 28 above), the conditions under which an illness can be considered, in the light of the medical file of the staff member in question, to be an occupational illness. The doctor nominated by the appellant to the Invalidity Board also made reference to the same conditions during discussions with the other members of the Invalidity Board following their meeting of 23 February 2018. Consequently, the appellant cannot claim that the Invalidity Board essentially gave a ruling in ignorance of the rules applicable to occupational illnesses and that the respondent did not fulfil its obligation to communicate the relevant documents to the Invalidity Board.

184. Concerning Ms S.'s report, the Tribunal recalls that the respondent transmitted the appellant's administrative and medical files to the Invalidity Board, in accordance with the applicable rules, and that it invited the appellant to forward any other documents to the Invalidity Board. However, Ms S.'s report, written in accordance with ON(2013)0076,

did not as such relate to the appellant's medical file and, as a consequence, the Invalidity Board should not in principle have had this report. Nor was this report part of the administrative file, because it did not contain the description of the appellant's duties for the Invalidity Board to give its opinion as to whether the appellant was incapable of carrying out her duties.

185. It is certainly true that the respondent could have communicated this report to the Invalidity Board for information purposes. However, and in light of the foregoing, the Tribunal concludes that the failure to communicate this report does not taint the Invalidity Board proceedings with irregularity.

186. As for the argument that Ms S.'s report showed that the appellant's work environment was sufficiently toxic and potentially the origin of her illness, the Tribunal considers that, with this argument, appellant is actually trying to substitute her assessment for that of the experts on the Invalidity Board; consequently, this argument cannot be accepted.

187. With this argument, secondly, the appellant further contends that the respondent never had proper oversight over the work and findings of the Invalidity Board and took the contested decision without examining the procedural irregularities and the contradictions contained in its reports. Throughout the entire pre-litigation proceedings, the appellant communicated to the respondent her arguments regarding the Invalidity Board's supposed errors, without the respondent examining their merits, as it considered the Invalidity Board's findings to be definitive and indisputable.

188. The Tribunal recalls that in accordance with point viii) of instructions 13/3 for Articles 13.1 and 14.2 of Annex IV to the CPR, the findings of the Invalidity Board shall be determined by a majority vote; they shall be final except in the case of obvious factual errors. Point vi) of Instructions 13/4 for the same articles, provides that "in accordance with the findings of the Invalidity Board and without prejudice to the competence of the [...] Administrative Tribunal, the Secretary/Director-General of the Organization shall decide either: a) to grant to the staff member concerned an invalidity pension under Article 13, paragraph 1, or Article 14, paragraph 2 [...]; or, b) not to recognize the staff member as an invalid within the meaning of the Rules. Point iii) of the same instructions states that "in the event of an obvious factual error, the Secretary/Director-General shall again refer the case to the Invalidity Board".

189. In light of the provisions above, we should determine the extent of the Tribunal's oversight over the decisions taken by the Administration on the basis of a report established by an Invalidity Board.

190. On the one hand, the Tribunal examines whether there is a factual error on which the Invalidity Board's judgment is based that could taint the Administration's decision with illegality. On the other hand, the Tribunal seeks to determine whether it is an obvious factual error. Therefore, the Tribunal has limited oversight in the context of examining the findings and reports drawn up by the Invalidity Board. Consequently, in respect of the appellant's allegations, we must check whether there is an obvious factual error in the Invalidity Board's findings concerning the refusal to qualify the appellant's illness as an occupational illness, which would affect the legality of the contested decision.

191. Yet, it should be noted at the outset that, on the one hand, the appellant's arguments do not invoke any factual error on which the Invalidity Board's judgment is based. In her allegations, the appellant actually says that the doctors made an error of judgment about her in finding that she was not suffering from an occupational illness. More generally, the appellant considers that the Invalidity Board's assessments about her are wrong and therefore illegal, because of the vague, or inaccurate, information on the legal framework applicable to occupational illnesses. The appellant also challenges the Invalidity Board's reasoning, considering that it did not take its reasoning to its logical conclusion, in that, based on the information made available to it, experts should have logically and naturally recognized that the appellant's illness was occupational in origin. It is also claimed that the appellant's allegations on these points are confirmed by the Complaints Committee's report of 17 June 2019.

192. On this point, the Tribunal concludes that the aforementioned arguments do not establish any factual error in the Invalidity Board's decision that would taint the contested decision with illegality.

193. The appellant also develops a series of considerations to show that the Invalidity Board's report does not state reasons, contrary to the requirements of the case law. In this respect, the Tribunal observes that it could recognize a failure to give reasons if the Invalidity Board's findings were not accompanied by clarifications making it possible to assess the factual accuracy of the situation (see NATO Appeals Board Decision no. 34 of 16 July 2002). Yet, the appellant does not put forward any arguments to prove the existence of a factual error.

194. On the other hand, a simple factual error in the Invalidity Board's assessment is not enough to require it to give another ruling. The error must also be obvious. It is sufficient to note that, supposing that a factual error had been detected in this case, the appellant does not put forward any arguments to demonstrate that this error could be recognized as an obvious error.

195. As for the fact that the Complaints Committee suggests in its report of 17 June 2019 that the Invalidity Board be reconvened to examine the appellant's situation because it did not have Ms S.'s report, the Tribunal recalls that at present, its oversight is limited by Articles 13 and 14 of Annex IV to the CPR. It would only be possible to annul the contested decision if it was taken based on an Invalidity Board decision that was itself tainted by an obvious factual error. Yet that is not the case.

196. It follows from all the foregoing provisions that the second argument must be dismissed in its entirety as groundless.

On the duty of care

197. In this argument the appellant submits, in connection with the previous argument, that the respondent failed in its duty of care in the Invalidity Board's handling of the appellant's file. She argues that the respondent deliberately disregarded her requests regarding the irregularities committed in the Invalidity Board's handling of her case. She asserts, in that connection, that it did not take any steps to assist the Invalidity Board either, whereas it was obvious that the Invalidity Board did not have all the necessary information to handle the appellant's case. She added that the respondent did not provide

the necessary support to a staff member whose state of health was clearly fragile. Through this lack of care, the respondent took the contested decision without balancing the respective interests of the staff member concerned with those of the service.

198. The Tribunal recalls that the Organization's services are bound by the duty of care and the principle of good administration; these imply in particular that when taking a decision on a staff member's situation, the Organization must take into consideration all the elements to weigh in its decision, and thus take account of not only the interests of the service but also of the staff member concerned.

199. The Tribunal observes that, in her arguments, the appellant is in substance criticizing the respondent for not having intervened with the Invalidity Board in connection with the handling of her case to discuss the alleged irregularities, which in her opinion were likely to lead to errors of judgment.

200. The Tribunal considers, firstly, that the respondent's duty of care certainly obliged it to take account of the appellant's state of health. However, that obligation could not interfere with experts' pragmatic, in-depth examination of a medical assessment.

201. In the present case, the respondent demonstrated its care for the appellant, firstly by having asked her, on 11 October 2017, to add all the documentation she considered relevant to the examination of her case to her administrative and medical file for transfer to the Invalidity Board. The respondent sent her that letter after having forwarded the file in question to her on 15 September 2017 for comments. The Tribunal observes that the appellant forwarded all the documentation she deemed necessary.

202. Likewise, at the Invalidity Board meeting of 23 February 2018, the appellant observed that her file did not contain all the documents that the respondent should have forwarded to the Invalidity Board. So on 1 March 2018 she asked the defendant for information about the applicable rules on occupational illnesses, and asked it to communicate those rules to the Invalidity Board. The Tribunal observes that in the letter dated 21 March 2018, the respondent answered the appellant by explaining the applicable rules on occupational illnesses. Those same rules were taken into account by the Invalidity Board. The fact that the appellant did not agree about the application of the rules in question in no way means that the respondent failed in its duty of care to her.

203. In this context, the Tribunal notes that in response to a letter from the appellant dated 3 April 2018 complaining about the fact that the Invalidity Board's decision was slow in coming and she was at risk financially if it came in after 18 April 2018, the respondent assured the appellant, in a letter dated 5 April 2018, that if the decision were to come in after that date, the Organization would pay her full emoluments. Such a decision was clearly taken out of a duty of care for the appellant.

204. Lastly, regarding the fact that Ms S.'s report was not forwarded to the Invalidity Board, the Tribunal is of the view that even if such a document is not medical in nature, it would have been useful to forward it. Nonetheless, the Tribunal considers that given the Invalidity Board's mandate, it had sufficient documentation to make a ruling on the appellant's case, and even not forwarding the report in question does not, in the present case, constitute a failure of the duty of care.

205. The appellant is also of the view that the Invalidity Board's work took too long, and that it was only at her insistence that the work was concluded, without an in-depth examination of the file being done, however. There again, she considers there was a failure of the duty of care and the principle of good administration. The Tribunal finds that this argument does not hold up. It has not been proven that the Invalidity Board rushed its report without doing a comprehensive examination of the appellant's file. The case file reveals that on 23 February 2018, the Invalidity Board members met to discuss the appellant's file and, on 13 April 2018, the final report was drafted in line with the discussions that the Invalidity Board members had had in early April. It is true that the Invalidity Board members were well aware that on 18 April 2018, the appellant had been incapacitated for work for two years. Yet such a circumstance does not make it possible to conclude that the file was not handled attentively by the Invalidity Board, nor that there had been a failure of the duty of care.

206. Thus as opposed to what the appellant argues, in taking the contested decision the respondent balanced the interests of the service and the interests of the appellant in this case appropriately, given the relevant circumstances, and did not violate its duty of care.

207. It follows that the argument of a failure of the duty of care must also be rejected, as must the submissions seeking annulment in their entirety.

On the submissions seeking compensation

208. The Tribunal recalls that when submissions seeking compensation for material or non-material damage are closely connected to submissions seeking annulment, if the latter are rejected as groundless, the submissions seeking compensation are also rejected. In the present case, the appellant's submissions seeking compensation are closely linked to the submissions seeking annulment. Insofar as the submissions seeking annulment have been rejected as groundless, the submissions seeking compensation must also be rejected as groundless.

209. It follows from the foregoing that the submissions seeking compensation must be rejected and, consequently, that the appeal in Case No. 2019/1291 is dismissed in its entirety.

E. Costs

210. Article 6.8.2 of Annex IX to the CPR stipulates:

> 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.

211. With regard to Cases Nos 2019/1284-1285, the appeals being successful in their near-entirety, the appellant is entitled to be granted €4,000 in reimbursement of the costs of retaining counsel to appear before the Tribunal. The appeal in Case No. 2019/1291 having been dismissed, it is not appropriate to reimburse her for the costs of retaining counsel in that case.

F. Decision

FOR THESE REASONS,

the Tribunal decides:

- to annul the respondent's decisions of 15 March 2019 and 16 May 2019 whereby the latter refused to acknowledge that the appellant had been subjected to harassment and bullying;
- to award the appellant appropriate compensation for the harm to her by ordering the respondent to pay her €75,000 in damages;
- to order the respondent to reimburse the appellant for the costs of retaining legal counsel in Cases Nos 2019/1284-1285, up to a maximum of €4,000;
- to reject the other submissions of the appeals in Cases Nos 2019/1284-1285;
- to dismiss the appeal in Case No. 2019/1291.

Done in Brussels, on 9 March 2021.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2020)0002

Order

Case No. 2019/1290 and Case No. 2020/1298

BW

Appellant

v.

NATO International Staff

Respondent

Brussels, 19 February 2020

Original: English

Keywords: joining cases.

(This page is left blank intentionally)

The President of the NATO Administrative Tribunal,

- Considering that Mr BW submitted a first appeal with the NATO Administrative Tribunal (AT) against the NATO International Staff, on 6 September 2019, registered under Case No. 2019/1290;

- Considering that Mr BW submitted a second appeal, on 10 February 2020, registered under Case No. 2020/1298;

- 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. 2019/1290 and Case No. 2020/1298 are joined.

- Both Cases shall be heard once the written procedure in Case No. 2020/1298 is completed.

Done in Brussels, on 19 February 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2020)0001

Order

Case No. 2020/1294

LB

Case No. 2020/1295

GP

Case No. 2020/1296

RH

Appellants

v.

NATO International Staff

Respondent

Brussels, 12 February 2020

Original: English

Keywords: joining cases.

(This page is left blank intentionally)

The President of the NATO Administrative Tribunal,

- Considering that Mr LB submitted an appeal with the NATO Administrative Tribunal (AT) against the NATO International Staff, on 23 December 2019, registered under Case No. 2020/1294;

- Considering that Mr GP submitted an appeal with AT against the NATO International Staff, on 23 December 2019, registered under Case No. 2020/1295;

- Considering that Mr RH submitted an appeal with AT against the NATO International Staff, on 27 January 2020, registered under Case No. 2020/1296;

- 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. 2020/1294, Case No. 2020/1295 and Case No. 2020/1296 are joined.

- The Cases shall be heard once the written procedure in Case No. 2020/1296 is completed.

Done in Brussels, on 12 February 2019.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2020)0003

Order

Case No. 2020/1299

RC

Appellant

v.

NATO International Staff

Respondent

Brussels, 15 May 2020

Original: English

Keywords: withdrawal.

North Atlantic Treaty Organization - Organisation du Traité de l'Atlantique Nord
B-1110 Bruxelles - Belgique
Tel.: +32 (0)2 707 3831 - www.nato.int/adm-trib/

(This page is left blank intentionally)

The President of the NATO Administrative Tribunal,

- Considering that Mr RC submitted an appeal with the NATO Administrative Tribunal (AT) on 16 March 2020, and registered under Case No. 2020/1299, against the NATO International Staff (IS);

- Considering that the AT Registrar office received, on 14 May 2020, 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 15 May 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2020)0005

Order

Case No. 2020/1309 and Case No. 2020/1316

GD

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 14 October 2020

Original: English

Keywords: joining cases.

(This page is left blank intentionally)

The President of the NATO Administrative Tribunal,

- Considering that Mr GD submitted a first appeal with the NATO Administrative Tribunal (AT) against the NATO Support and Procurement Agency, on 4 August 2020, registered under Case No. 2020/1309;

- Considering that Mr GD submitted a second appeal, on 28 September 2020, registered under Case No. 2020/1316;

- 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. 2020/1309 and Case No. 2020/1316 are joined.

- Both Cases shall be heard once the written procedure in Case No. 2020/1316 is completed.

Done in Brussels, on 14 October 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2020)0004

Order

Case No. 2020/1312
Case No. 2020/1313
Case No. 2020/1314

Appellants

v.

NATO Communications and Information Agency
Respondent

Brussels, 16 September 2020

Original: English

Keywords: Article 6.2.1 of Annex IX to the CPR.

(This page is left blank intentionally)

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 on 24 August 2020 by Mr RA, Ms SC and Ms EK, registered on 16 September 2020 under, respectively, Case No. 2020/1312, Case No. 2020/1313 and Case No. 2020/1304;

- 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 (HONB);

- Noting that the appeal relates to potentially different individual situations;

DECIDES

- The appeals shall be disjoined.

- Case No. 2020/1312, Case No. 2020/1313 and Case No. 2020/1314 shall be dealt with individually for each appellant.

Done in Brussels, on 16 September 2020.

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

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2020)0001

Order

Case No. 2020/1305

PD

Appellant

v.

Supreme Allied Command Transformation

Respondent

Brussels, 3 December 2020

Original: English

Keywords: access to documents.

(This page is left blank intentionally)

This Order is rendered by a Panel of the NATO Administrative Tribunal, composed of Mr Chris de Cooker, President, Ms María-Lourdes Arastey Sahún and Mr John Crook, judges.

The Tribunal,

- Considering the appeal lodged by Mr PD dated 16 June 2020 against the Supreme Allied Command Transformation (SACT), registered on 23 June 2020 under Case No. 2020/1305;

- Considering one document, which originated in the Office of Legal Affairs (OLA) of the International Staff (IS) (reference OLA(2016)068 dated 14 April 2016), and which the appellant submitted as Annex 9 of Pièce A carrying a NATO Restricted classification;

- Considering the email sent by the AT Registrar to OLA on 28 August 2020 reading:

  […] concerning the above mentioned case and in particular its Annex 9, document OLA(2016)068 dated 19 April 2016 "Budget Committee 14 April 2016 meeting – Request for legal advice". The document is currently NATO Restricted and, as a facilitator between the parties, I'm writing you to seek if, as the originator, consideration could be given to declassify the document to NU or to use relevant extracts in an NU form. This would be to allow to distribute it to all parties in the proceedings, also taking in consideration the very likely scenario that the hearing in the present case will take place in an online form and no advantage can be taken of an *in camera* viewing of the document.

- Considering OLA's memo OLA(2020)0071 dated 18 November 2020, whereby written observations were submitted, pursuant to Article 6.7.8 of Annex IX to the CPR, and stating, *inter alia*:

  […] the Appellant has referred to other OLA advices, respectively addressed to the Budget Committee and to the SHAPE Legal Office, namely: […]

  […] Regardless of the security classification attached to any documentation, legal advice should be in confidence between the lawyer and the client. The rule of law demands that clients should not feel inhibited from seeking legal advice – and nor should lawyers feel inhibited in the way they give such advice - by the prospect of the advice subsequently being aired in court.

  It follows that third parties should not generally have access to confidential legal advice without express waiver and nor should staff or former staff, acting in their personal capacity, be able to rely on that advice as evidence.

  […]

  As such, OLA objects to its legal advice being adduced in Tribunal proceedings without the relevant clients waiving that privilege.

For the purpose of case No. 2020/1305 and since the legal interest of our clients are engaged in the proceedings, we have therefore duly taken instructions. Following specific objections raised by Nations, the Chairman of the Budget Committee has informed us that we should object to this material being adduced in order to maintain the privilege of legal advice between my Office and the Budget Committee. In view of the position taken by Nations, and following consultations with the SHAPE Legal Adviser, we must also object to the OLA advice to SHAPE being adduced in these proceedings.

OLA advices should not form part of the case file and cannot be relied on in accordance with the principle of legal privilege.

- Having regard to the establishment of the present Tribunal by decision of the North Atlantic Council of 23 January 2013 and the powers conferred to it;

- Having regard to Article 6.7.3 of the CPR stating "(t)he Tribunal may […] require the production of any document which it deems useful for the consideration of an appeal before it' and Article 6.7.5: "(t)he Tribunal shall use all appropriate means to ascertain the validity of reasons given for not providing the requested information or documents and shall ultimately decide on the validity of such reasons";

- Noting that three of the four documents cited in OLA's memo OLA(2020)0071 dated 18 November 2020 are NATO Unclassified, can be found in Annexes 12, 13 and 18 of Pièce A, and are, accordingly in the possession of the parties and the Tribunal;

- Noting that the Tribunal will in due course decide on the validity of OLA's claim of privilege and determine whether these three Annexes shall be included as part of the case file for consideration by the Tribunal or not;

- Emphasizing the need in judicial proceedings to clearly determine the status of the documents at issue;

- Having regard to the prevailing public health situation, which prevents the Tribunal from meeting in person at NATO Headquarters, and which would have allowed for the handing over of the above-mentioned Restricted document without restraint;

- Having regard to the relevant dispositions concerning NATO information and in particular the authority vested in the originator to declassify a document;

- Without prejudice to the Tribunal's position in law regarding the inclusion of the documents in the proceedings of the case;

DECIDES

- Orders the Secretary General, as Head of IS, to instruct OLA to provide the Tribunal with an unclassified version of document OLA(2016)068 dated 14 April 2016, by COB 4 December 2020.

- In accordance with Article 6.7.8 of Annex IX to the CPR, requests OLA to participate in the hearing in Case No. 2020/1305 D v. SACT, to be held on 15 December 2020 at 4.30pm.

Done in Brussels, on 3 December 2020.

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

Certified by
the Registrar
(signed) Laura Maglia