JUDGMENTS and ORDERS

OF THE NATO ADMINISTRATIVE TRIBUNAL

2024

North Atlantic Treaty Organization
B-1110 Brussels - Belgium

Judgments of the NATO Administrative Tribunal

2024

39th session (29-31 January 2024)

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Orders of the NATO Administrative Tribunal

2024

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AT(PRE-O)(2024)0008 Case No. 2024/1386	B	*v.*	NATO IS

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AT(TRI-O)(2025)0001 Case No. 2023/1368-2024/1383	P	*v.*	NAEW
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ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0001

Judgment

Case No. 2023/1351

PD

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 13 February 2024

Original: English

Keywords: decision; education allowance; unavoidable educational costs.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louse Otis, President, Ms Anne Trebilcock, and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearing on 30 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 31 January 2023 and registered on 2 February 2023 as Case No. 2023/1351, by Mr PD, against the NATO Support and Procurement Agency (NSPA). The appellant requests, *inter alia*, to be granted an allowance for his daughters' attendance at a private school in the United Kingdom (UK) at the exceptional rate of 90% rather than the standard rate of 70% of the educational costs.

2. In its answer, dated 30 March 2023 and registered on 17 April 2023, the respondent invites the Tribunal to reject the appeal as inadmissible and without merit.

3. The appellant's reply, dated 19 May 2023, was registered on 7 June 2023. The respondent's rejoinder, dated 22 June 2023, was registered on 11 July 2023.

4. An oral hearing, initially scheduled for 17 October 2023, had to be postponed and was held on 30 January 2024 at NATO Headquarters. The Tribunal heard the appellant's statement and arguments by his representatives and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

6. The appellant, a British national, joined NSPA in March 2022, working in Hungary. His wife, a civil servant working for the UK government, as well as his two daughters, aged 11 and 13 years at the time of the appeal, stayed in the UK and live there.

7. A few days after his entry into service, on 20 March 2022, the appellant sent an email entitled "Request for the Application of the Education Allowance Exceptional Rate", alleging that, as from September 2022 on, his two daughters needed to attend a local private school in the UK with tuition fees of 23,700 British Pounds (£) per year and per child.

8. The appellant stated that otherwise his wife would "have to bear the negative impact professionally, downgrading her role and reducing her hours as a geographically single parent", since in the local state school "there is no wrap-around childcare". Whereas the selected private school "is a girl's school with a great reputation … which will improve our daughters' well-being and academic performance", they "are currently

both in large co-ed state schools and academically suffer from lack of attention from the teaching staff as class sizes are excessive (30 plus)". Also, the appellant expressed concerns that his eldest daughter "may have some form of undiagnosed dyslexia" and "will be able to more readily access the support needed to help her with this challenge" at the selected private school.

9. After having requested (and received) additional information from the appellant on 4 April 2022, on 6 May 2022 the NSPA Head of HR, who is in charge of taking decisions on requests for educational allowances, informed the appellant that she would "provide [him] with a decision beginning of next week".

10. On 11 May 2022, the appellant received an email from the said official, informing him about the applicable criteria for granting the exceptional rate of 90% of the educational costs. The email continued with an explanation of why the change of school was not considered to be unavoidable, concluding that "the decision to change them from school is mainly related on personal choices (small classes, work schedules, quality). We may then only confirm that the reimbursement for such studies will be dealt under the standard rate of 70%."

11. Having received no answer to his follow-up emails of 11 May 2022 and of 15 May 2022, the appellant submitted a "Request for Administrative Review" on 5 June 2022. As "main reasons as to why education costs for [his] children are unavoidable and excessively high" he summarized:

- lack of employment opportunities for his wife at his duty station, resulting in a need to stay in the UK where no adequate day care is provided by the state school;
- material loss in living standards as a family;
- his wife's career will be negatively impacted;
- due to his absence from home, the children require extra learning and pastoral support which is not available within the state system;
- as he is paid in Hungarian currency, the school fees payable in £ are even less affordable.

12. In a section titled "Description of the remedies sought", the appellant asked that the "rate for 'excessively high and unavoidable' educational costs …" be granted.

13. On 29 June 2022, the request for administrative review was rejected, with the explicit conclusion to "reject [the] request for the 90% reimbursement".

14. On 2 July 2022, the appellant submitted a formal complaint, repeating his initial arguments and asking for the convening of a Complaint Committee (CC).

15. On 27 July 2022, following a brief exchange of information, the appellant was informed that the complaint had been referred to a CC.

16. On 8 and on 18 August 2022, the appellant submitted additional information concerning an alleged unequal treatment of his request and the timeline of his case. On 21 August 2022, the CC invited him to provide additional statements, which he did on 4

September 2022. On 8 November 2022, the CC delivered its final report, recommending not to rescind or modify the contested decisions.

17. On 2 December 2022, having received the appellant's comments on the CC's report, the NSPA General Manager confirmed "the administrative decisions you are challenging". This final decision states, inter alia, that the request "does not stem as much from [the appellant's] children's educational needs as it does from the necessity to secure after-school childcare services". Further, the General Manager "found no evidence corroborating the assertion that the Agency treated [him] differently". She stated that in other cases at his duty station the exceptional rate was granted due to different factual circumstances.

18. On 31 January 2023, the present appeal was submitted.

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

(i) The appellant's contentions

19. In the appellant's view, the appeal is receivable since, during the pre-litigation procedure, the respondent itself refers to "decisions" taken by the administration regarding his request to receive the exceptional educational allowance of 90%. He also recalls that the initial decision of 11 May 2022 was taken by the competent official.

20. Regarding the merits, the appellant firstly complains about an alleged breach of the duty to state reasons, since the administration did not properly take into account all the arguments he raised during the pre-litigation procedure.

21. Further, the educational costs for the children are exceptional, excessively high and, within the meaning of the applicable internal law of the Organization, unavoidable. In particular, the appellant believes that he "had no choice but to enroll his daughters at" the selected private school because of their educational needs. In this respect, as an annex to his appeal, he now submits an extensive report by an expert psychologist, dated 21 January 2023, pursuant to which the elder child "has the specific learning difficulty known as dyslexia, with concurrent weakness within the area of working memory". In addition, it is recommended to discuss the report with the teaching staff of the selected private school: "It will be important to develop a suitable support plan with [the elder daughter] which implements support in order of priority, without overloading her".

22. Thirdly, the appellant claims that the principle of equal treatment has been breached since all other colleagues in a similar situation at his duty station in Hungary were awarded the exceptional 90% rate.

23. Finally, in the appellant's view there was a breach of the duty of care, and the whole matter has not been dealt with within a reasonable time.

24. The appellant requests:

- annulment of the contested decisions;
- reimbursement of the difference between the standard 70% and the exceptional 90% rate, calculated on the basis of £ 23,349.48 in total;
- moral damages of € 2,000;
- the respondent to pay all costs.

(ii) The respondent's contentions

25. Pursuant to the respondent, the appeal is not admissible because it is premature. In the respondent's view, the communication between the parties was purely informal, and no administrative decision was taken: "A reply to an enquiry relating to hypothetical future educational costs is necessarily provisional and informative in nature."

26. With respect to the merits, the respondent does not see a lack of motivation regarding the contested decision. The decision "is not illegal, let alone irremediably illegal, if it does not contain reasons addressing every aspect of the matter, or every point raised by the official in support of his request."

27. In the respondent's view, the educational costs at stake are neither exceptional nor unavoidable, as required by the internal law. They are not exceptional because tuition fees of around £20,000 for independent schools are common in the UK. They are not unavoidable because educational costs are only "deemed unavoidable if the child cannot receive an adequate education without such costs being incurred." In the present case, the after-school childcare problem evoked by the appellant is not an educational issue.

28. The delay in the pre-litigation procedure is unfortunate; however, the respondent notes that it can be explained by the specific circumstances of the case, including additional research and examination done by the CC.

29. In the respondent's view, there was no breach of the duty of care. If the conditions of the applicable rules were not fulfilled, the duty of care cannot lead to the granting of additional benefits.

30. The respondent requests dismissal of the appeal.

D. Considerations and conclusions

(i) Admissibility

31. Pursuant to Articles 61.1 and 62.1 of the Civilian Personnel Regulations (CPR), staff members may submit an appeal only against "a decision affecting their conditions of work or of service". In this respect, the respondent argues that the

message of 11 May 2022 merely included information about future possible educational costs, whereas claims for reimbursement are not to be submitted in advance, i.e. before enrolment, as the situation is too uncertain. As the appellant's request was related to the following school year, his action was premature and could not give rise to a decision, the respondent maintains.

32. In the Tribunal's view, whether or not a message from a competent administrative body merely shares information or includes a contestable decision needs to be assessed in the circumstances of the individual case. In particular, the perspective and understanding of its addressee must be taken into consideration.

33. In the present case, since the beginning of the proceedings in March 2022 the appellant has been asking for a decision about the application of the exceptional 90% compensation rate to the potential educational costs of his daughters' attendance at a specific British private school. Having submitted additional information to the competent official, on 6 May 2022 this official confirmed that he would soon be provided "with a decision". Indeed, on 11 May 2022, the appellant received an email from this official, including an explanation of why the change of school was not considered to be unavoidable and was mainly related to the appellant's personal choices; it concluded that the administration "may then only confirm that the reimbursement for such studies will be dealt under the standard rate of 70%."

34. Reading the messages of 6 and 11 May 2022 together, from an impartial observer's critical appraisal there can be no doubt that the administration wanted to take, and actually took, a (final) decision, rejecting the appellant's explicit request "for the Application of the Education Allowance Exceptional Rate" rather than merely informing him about a potential situation. Moreover, at no point in the proceedings was the appellant's request considered as premature, as the respondent now submits to the Tribunal. On the contrary, during all steps of the pre-litigation process, neither the appellant's request for administrative review nor his formal complaint were considered to be inadmissible.

35. Given the clear and unambiguous reactions to his request, the appellant correctly submitted his admissible appeal to the Tribunal. If he had waited until the beginning of the school year in September and/or for the private school's bill before taking legal action, it might well have been too late to seek review of the message of 11 May 2022, thus precluding him from further access to administrative and judicial review.

(ii) Merits

36. Pursuant to Article 2, paragraph 2 of Annex III.C to the CPR, the calculation of the education allowance is based on real costs and gives rise to reimbursement at the following rates:

> "a) Standard rate: 70% of the educational costs;
> b) Exceptional rate: up to 90% of the educational costs, provided that educational costs … are exceptional, unavoidable and excessively high, according to the

judgement of the Secretary/Director-General of the Co-ordinated Organisation concerned."

37. With respect to the three criteria established in the above provision, in the present case, it is undisputed that the annual fees of the selected private school in the UK are "excessively high" (about £23,000 per annum).

38. The respondent's view - which was never raised in the pre-litigation procedure - that the fees are not "exceptional" is unfounded. As the example of the UK shows, normal education at state schools is free of charge. Private schools are the exception, and so are the tuition fees they charge.

39. Here, the crucial question is whether the educational costs of attending the selected private school are "unavoidable".

40. From the outset, the Tribunal emphasizes that educational costs are to be considered unavoidable if the child cannot receive an adequate education without such costs being incurred. Indeed, as the allowance serves to compensate for the financial burden of education, the standard for assessing the unavoidability is limited to educational needs whereas other aspects, including a potential decline in living standards or career prospects, cannot be taken into account.

41. In this respect, the specific educational needs of each dependent child concerned have to be presented by the staff member and then be verified by the administration on an individual basis. Therefore, the Tribunal will assess the educational needs of the appellant's children in turn.

42. In the Tribunal's view, no educational needs to attend a private school can be found for the appellant's younger child. There are no compelling educational reasons that preclude her from attending the local state school. Difficulties in finding appropriate childcare may be an issue, but no obvious or proven educational impact as a result of this has been shown. Also, the available state school possibly does not provide the same academic level as the selected private school. However, not even the appellant alleges that the state school in the UK does not offer a decent and adequate education to its pupils.

43. The Tribunal finds the situation of the elder child to be different. Pursuant to a well-founded diagnosis from an expert psychologist, she suffers from 'dyslexia'. As a matter of fact, the appellant raised this concern from the beginning of the proceedings (see his request of 20 March 2022). However, there was no proof of his child's dyslexia before the expert's report of 12 January 2023 was submitted together with the appeal. Based on the recommendations of the said report, the elder child needs the special and extensive support to master her learning difficulties that the selected private school can provide. Although it is not impossible that the state school may offer some help in this respect, the undisputed size of their classes (with more than 30 pupils) would limit the teaching staff's attention to the child's specific needs in an inappropriate manner. As such a problem is clearly linked to an adequate education, the educational costs for attending the selected private school are unavoidable in the case of the appellant's elder daughter.

44. The appellant's other complaints are without merit. Firstly, there was no breach of the duty to state reasons. On the contrary, the administration's decisions at stake were always accompanied by grounds. Not addressing each and every aspect of a request does not amount to a breach of the duty to state reasons.

45. Secondly, there was no breach of the principle of equal treatment. This principle establishes the legal obligation to treat equal cases equally. However, the circumstances in the cases of the appellant's colleagues in Hungary are different from his case.

46. Finally, the principle of duty of care does not offer an opportunity to circumvent the conditions prescribed in the written law of an organization. Therefore, no breach of the duty of care can be found where the administration correctly applies the criteria established in the internal provisions on the education allowance, as it did in the case of the appellant's younger child.

47. Moreover, the appellant's request for compensation for non-material damage is not founded. Not each and every mere misinterpretation of legal provisions justifies the award of such compensation. In the present case, it has also to be taken into account that the appellant submitted the decisive expert's report about his child's dyslexia only at a late stage of the proceedings, i.e. together with his appeal.

E. Costs

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

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

49. The Tribunal finds that there were good grounds for the appeal. The appeal being successful in part, respective reimbursement of legal fees is justified.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 11 May 2022 is annulled in part, as regards the percentage applicable to the education allowance for the appellant's elder child.
- The respondent is ordered to pay to the appellant the difference between 70% and 90% of the educational costs for the appellant's elder daughter with effect from September 2022.
- The respondent is ordered to reimburse legal costs up to the amount of €3,000 to the appellant.
- All other pleas are rejected.

Done in Brussels, on 13 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0002

Judgment

Joined Cases Nos 2023/1358-1359

AH

KS

Appellants

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 13 February 2024

Original: English

Keywords: sick leave; compensation for overtime.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Ms Louise Otis, President, Mr Thomas Laker and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearings on 29 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "Tribunal") has been seized of appeals by Mr AH and Mr KS, dated 27 March 2023. These appeals have been respectively registered as Cases Nos. 2023/1358 and 2023/1359 on 14 April 2023.

2. In accordance with Rule 13.3 of Appendix 1 to Annex IX of the NATO Civilian Personnel Regulations (hereinafter "CPR"), and by order of the Tribunal's President dated 15 January 2023, Cases Nos. 2023/1358 and 2023/1359 were joined for purposes of rendering the present judgment.

3. The respondent's answers in Cases Nos 2023/1358 and 2023/1359, dated 15 June 2023, were registered on 4 July 2023, the appellants' replies, dated 31 August 2023 were registered on 26 September 2023. The respondent's rejoinders, dated 20 October 2023, were registered on 10 November 2023.

4. The appellants are requesting compensation for sick leave periods that include scheduled overtime hours beyond the standard working hours of a 40-hour week.

5. An oral hearing was held on 29 January 2023 at NATO Headquarters. The Tribunal heard arguments by the appellants, their representatives, and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

6. The appellants are members of the HQ NATO Airborne Early Warning and Control Force Geilenkirchen (hereinafter "HQ NAEW&CF GK") and belong to Category C staff. The appellants joined the HQ NAEW&CF GK in 2015.

7. The HQ NAEW&CF GK operates on a monthly shift cycle, comprising three types of shifts: 24-hour shifts (S) for basic incident protection with 10 firefighters on duty, 14.5-hour shifts (SF) with 3-5 additional firefighters on duty from 7.30 to 22.00 hours, depending on the flying operation crash category, and 8-hour shifts (T) for daytime duty and various training purposes. These shifts encompass periods on alert and sleeping periods while present at the NATO Airbase Geilenkirchen.

8. In accordance with Article 15.1 of the CPR, the Head of the NATO body (hereinafter "HONB") has prescribed a 40-hour, 5-day working week in alignment with Force Policy 1.2.5, dated 25 May 2021. The appellants' employment contracts also stipulate a workweek of 40 hours.

9. The monthly shift cycles are designed to include pre-approved authorized overtime in accordance with Article 17.2.2 of the CPR. Both parties acknowledge that the unique circumstances at the fire department result in the appellants regularly working a significant number of overtime hours.

10. The appellants are compensated at the applicable hourly rate for overtime performed in accordance with Article 17.4.3 of the CPR. This includes allowances for all time and overtime present on shift. Compensation for overtime during shift work is determined in accordance with Article 17.4.6 of the CPR. Due to staff shortages, the appellants' compensatory leave for overtime accrued during shift work has commonly been substituted by payment.

11. Until 30 March 2022, the Civilian Human Resources Management Branch (hereinafter "FHMC") credited hours to the appellants on sick leave based on the scheduled hours from the pre-approved monthly shift cycle. The credit allocation varied depending on the specific shift plan in effect. One day of sick leave was calculated as either 24 hours, 14.5 hours, or 8 hours, consistent with the shift cycle. Thus, the FHMC awarded full credit for scheduled overtime during sick leave it if was included in the shift plan, regardless of whether the overtime was actually worked.

12. This practice, based on German labour rules, was retained in 2003 following the conversion of firefighter positions from Local Wage Rate to NATO International Civilian posts.

13. From 1 April 2022, the FHMC changed this practice. It applied a uniform accounting practice of crediting 8 hours for each day on the planned shift cycle during sick leave. This change was adopted to ensure equal treatment with other staff members who do not receive compensation for scheduled overtime not worked.

C. Parties' contentions and arguments

14. The parties' contentions and arguments are summarized and discussed below, as part of the analysis of each of the appellants' grounds.

D. Considerations and conclusions

(i) Preliminary observations about the nature of the changes

15. These cases are all concerned with the interpretation and application of the CPR in relation to changes made to the calculation of the appellants' overtime during sick leave.

16. The Tribunal observes that its own case law and that of its predecessor consistently holds that statutory provisions can be changed by competent administrative authorities, provided these changes do not have retroactive effects. This principle is highlighted in the Tribunal's judgment in Joined Cases No. 2020/1294-1296. In the context of these cases, the provisions regarding compensation for overtime are statutory in nature, and the decision by the FHMC to apply a uniform accounting practice to sick leave has no retroactive effect.

17. Moreover, the FHMC's decision does not infringe upon any acquired rights. The concept of acquired rights has been extensively discussed by the ILO Administrative Tribunal (hereinafter "ILOAT"). In Judgment No. 2682, the ILOAT stated that "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." In these cases, the record does not indicate that changes to compensation of overtime during sick leave altered a fundamental term of employment in consideration of which the appellants accepted their appointments.

18. With these preliminary observations in mind, the Tribunal has identified three principal grounds for the appellants' appeals. The appellants contend that a) the changes put in place after 1 April 2022 disadvantage the appellants during sick leave; b) overtime compensation has to meet the minimum legal standards of the host nation's labour rules; and c) compensation for sick leave should be calculated as annual leave.

19. As explained in greater detail below, the Tribunal concludes that these grounds of appeal are without merit. Consequently, the appeals must be dismissed.

(ii) The changes put in place after 1 April 2022 do not disadvantage the appellants during sick leave

20. In their first ground of appeal, the appellants argue that the changes put in place after 1 April 2022 disadvantage the appellants during sick leave. The appellants note that prior to 1 April 2022 and since 2003, the appellants received credit hours that reflected the scheduled hours from the pre-approved monthly duty cycle, including overtime.

According to the appellants, this offered neither advantage nor disadvantage due to sick leave.

21. The appellants contend that the practice implemented after 1 April 2022, to credit 8 hours for each day on the planned shift cycle, disadvantages the appellants during sick leave and is akin to a disciplinary measure. They notably reference Article 45.6 of the CPR in support of their argument, which states:

> The first 3 months of sick leave are considered as normal service with the Organization and the member of the staff concerned continues to receive salary increments and to accrue leave.

22. The appellants explain that Article 45.6 of the CPR is intended to ensure that there is no monetary punishment for sick leave. They consider the decision taken after 1 April 2022 as a "punishment" on their emoluments as it reduces overtime compensation for duly justified sick leave.

23. The respondent maintains that the appellants are not disadvantaged during sick leave for two main reasons. First, they argue that the practice followed from 2003 to 1 April 2022 was not in conformity with the wording of the CPR. The changes made to this practice from 1 April 2022 bring it into alignment with the CPR to ensure equal treatment with other staff members. They cite in support Article 17.2.1 of the CPR, which stipulates that staff are entitled to additional leave for overtime worked, not for expected overtime. Consequently, the respondent posits that the reduction in overtime compensation is justified when no overtime work is performed due to sick leave. Second, the respondent contends that compensation payments for overtime are not classified as "emoluments" under Article 22 of the CPR. Sick leave, they argue, affects only monthly overtime, not the emoluments themselves. Therefore, monthly emoluments remain unaffected during sick leave, in accordance with Article 45.6 of the CPR.

24. This ground of appeal is principally concerned with the interpretation of the CPR as it relates to the calculation of the appellants' overtime while on sick leave. The relevant provisions of the CPR are to be interpreted following the method of interpretation set out in Article 31 of the 1969 Vienna convention on the Law of Treaties (hereinafter "VCLT"). Although not binding on the Tribunal, the VCLT was recognized by this Tribunal in Cases Nos 2016/1086 and 2016/1093 as a reflection of the "current prevailing doctrine and practice concerning the interpretation of international legal instruments". Most recently, it was used by the Tribunal in Case No. 2023/1356 to interpret the CPR.

25. According to Article 31 of the VCLT, the CPR should 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".

26. The Tribunal finds that the terms relating to the calculation of the appellants' overtime in the CPR are clear and unambiguous. They specify that compensation is due for overtime that is actually worked. Article 17.2.1 of the CPR defines overtime as "the

time worked in excess of the total of weekly working hours prescribed [emphasis added]." This definition is consistent with the use of "overtime worked" and "overtime was worked" in Article 17.3.4 of the CPR. Additionally, this interpretation is supported by Force Policy 1.2-5, dated 25 May 2021, issued by the HONB, which sets out working hours and authorized absences. This policy similarly defines overtime as "[t]ime worked in excess of the total of weekly working hours prescribed [emphasis added]."

27. Rather than a "punishment', the Tribunal observes that this interpretation ensures equal treatment with other staff members. Recalling its decision in Case No. 2017/1109, the Tribunal reiterates that "it is a fundamental principle of international administrative law that similarly situated staff members must be treated consistently". In Case No. 903, the Tribunal clarified that a violation of the principle of equal treatment occurs "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." The Tribunal is satisfied that the changes implemented by the FHMC from 1 April 2022 ensure equal treatment of staff members by calculating compensation only for overtime actually worked.

28. Consequently, the appellants do not incur any disadvantage from taking sick leave following the changes from 1 April 2022. The calculation of their overtime during this period conforms to the CPR, and ensures that they receive equal treatment to that of other staff members.

(iii) Overtime compensation does not have to meet the minimum legal standards of the host nation's labour rules

29. In their second ground of appeal, the appellants assert that the CPR must meet the minimum legal standards of the host nation's labour rules. They argue that NATO is prohibited from establishing working conditions, including payments, that fall below the minimum legal standard of the host nation country.

30. The respondent contends that the appellants' argument is incorrect, both legally and factually. They clarify that while Article 16.1 of the CPR requires maintaining adequate health and safety conditions in line with the host nation's standards, it does not extend to remuneration. The respondent emphasizes that NATO International Civilians are compensated according to approved salary scales, allowances, and overtime compensations outlined in the CPR. This framework is standardized across the Alliance ensuring that compensation practices are independent of the laws of host nations. The respondent also emphasizes that the concept of employment relationships within international organizations being governed by the national law of the host state is refuted by international administrative tribunals and national courts. They further affirm that this view aligns with Article 6.2.1 of Annex IX of the CPR, which stipulates that the Tribunal's decisions are based on the CPR and its interpretation, rather than the legal framework of the host state.

31. It is a well-known principle of public international law that to ensure their independence from state interference, international organizations typically possess immunity from jurisdiction, also formulated as immunity from legal process (see Christian Dominicé, 'L'immunité de juridiction et d'exécution des organisations internationales', Collected Courses of the Hague Academy of International Law (1984-IV) 187 Recueil des Cours). This principle ensures that international organizations can independently fulfil their functions. It prevents, in particular, the host nation from imposing its national legislation and jurisdiction, which would otherwise give it an advantageous position over other member states. The constitutive instruments of international organizations and related instruments usually contain such a general provision on the immunity of the organization. Thus, the 1951 Ottawa Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, under Article V, grants NATO absolute immunity from jurisdiction, and Article XVIII extends this immunity from legal process to its staff "in respect of words spoken or written and of acts done by them in their official capacity and within the limits of their authority."

32. This principle is reflected in the CPR. Its Preamble, specifically in Section A concerning the applicability of the CPR, states that it "shall govern personnel administration in each NATO body". Section D addresses the privileges and immunities of staff by reference to the 1951 Ottawa Agreement. This principle is further reflected in Article 6.2.1 of Annex IX of the CPR, which stipulates that the Tribunal shall make decisions according to the CPR and its interpretation. Exceptions to this principle are expressly outlined, such as in Article 16.1 of the CPR, which requires maintaining adequate health and safety conditions according to the standards of the host nation. No such exception exists for the compensation of overtime.

33. Authors Alain Plantey and François Loriot underscore this principle, explaining [TRANSLATION] "the professional situation of international civil servants should not be assessed based on the legislation applicable, either in their country of origin or in the host country." They also observe that [TRANSLATION] "From the overall case law, it follows that, unless otherwise provided, the relationship between an intergovernmental organization and its staff is not governed by national law" (Alain Plantey & François Loriot, Fonction publique internationale, Paris, CNRS Éditions, 2005, paragraphs 133 & 135).

34. In light of the above, the Tribunal concludes that overtime compensation does not have to meet the minimum legal standards of the host nation's labour rules.

(iv) Compensation for sick leave should not be calculated as annual leave

35. In their third ground of appeal, the appellants offer a subsidiary argument, requesting that compensation for sick leave should be calculated as annual leave, based on a Monday to Friday, 40-hour week schedule, effective retroactively from 1 April 2022. This would entail the appellants receiving 8 hours of credit for every weekday they are on sick leave, irrespective of whether they were scheduled to work on those days according to the pre-approved monthly shift cycle.

36. In support of their argument, the appellants note that when rejecting their request, the FHMC stated that one-day leave entitlements equals 8 working hours as per AD (ACO Directive) 50-13, Serial # 31. They maintain that this regulation relates to annual leave, not sick leave, and requires the appellants to take 5 days of annual leave for each working week regardless of the pre-approved shift cycle. The appellants argue that, should the FHMC's interpretation prevail, compensation for sick leave should be calculated on the same basis as annual leave.

37. The respondent contends that there is no basis for crediting annual leave for periods of sick leave. They emphasize that the appellant is already credited with 8 hours for each day of sick leave when they are scheduled to work, which ensures equal treatment with other staff members.

38. The Tribunal recalls its interpretations of the CPR regarding the compensation of overtime as outlined in paragraph 27, along with its observations about equal treatment in paragraph 28. Based on these considerations, it concludes that compensation for sick leave should not be calculated as annual leave. Such an interpretation would be inconsistent with the CPR's provisions on the compensation of overtime and would result in unequal treatment with other staff members.

E. Costs

39. 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 […]

40. The Tribunal finds that there were no good grounds for the appeal. The appeal being without success, reimbursement of expenses is not justified.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 13 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0003

Judgment

Joined Cases Nos 2023/1360-1363

AS, DK, FR, JW

Appellants

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 13 February 2024

Original: English

Keywords: sick leave; compensation for overtime.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Ms Louise Otis, President, Mr Thomas Laker and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearings on 29 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "Tribunal") has been seized of multiple related appeals by Mr AS, Mr DK, Mr FR, and Mr JW, dated respectively 27 March 2023, 30 March 2023, 29 March 2023 and 31 March 2023. These appeals have been registered as Cases Nos. 2023/1360, 2023/1361, 2023/1362, and 2023/1363, on 14 April 2023.

2. At the hearing, in accordance with Rule 13.3 of Appendix 1 to Annex IX of the NATO Civilian Personnel Regulations (hereinafter "CPR"), Cases Nos. 2023/1360, 2023/1361, 2023/1362 and 2023/1363 were joined for purposes of rendering the present judgment.

3. The respondent's answer in Case No. 2023/1360, dated 15 June 2023, was registered on 4 July 2023, the appellant's reply, dated 29 August 2023 was registered on 26 September 2023. The respondent's rejoinder, dated 20 October 2023, was registered on 10 November 2023. The respondent's answer in Case No. 2023/1361, dated 15 June 2023, was registered on 4 July 2023, the appellant's reply, dated 2 September 2023 was registered on 26 September 2023. The respondent's rejoinder, dated 20 October 2023, was registered on 10 November 2023. The respondent's answer in Case No. 2023/1362, dated 15 June 2023, was registered on 4 July 2023, the appellant's reply, dated 4 September 2023 was registered on 26 September 2023. The respondent's rejoinder, dated 20 October 2023, was registered on 10 November 2023. The respondent's answer in Case No. 2023/1363, dated 15 June 2023, was registered on 4 July 2023.

4. In accordance with Article 6.5.3 of Annex IX of the CPR and Rule 12.4 of the Rules of Procedure of the Tribunal, the appellant's reply in Case no. 2023/1363 had to be submitted before 4 September 2023 COB. The Office of the Registrar received the reply on 19 September 2023. The appellant was unable to provide a proof of sending within the established deadline. Accordingly, on 26 September 2023, the appellant was informed that the case would be examined on the basis of the appeal and respondent's answer only.

5. The appellants are requesting compensation for sick leave periods that include scheduled overtime hours beyond the standard working hours of a 40-hour week.

6. Oral hearings in all of these cases were held on 29 January 2023 at NATO Headquarters. The Tribunal heard arguments by the appellants and by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

7. The appellants are all members of the HQ NATO Airborne Early Warning and Control Force Geilenkirchen (hereinafter “HQ NAEW&CF GK”) and belong to Category C staff. The appellants joined the HQ NAEW&CF GK as follows: in 2015 for 2023/1960, in 2017 for Case No. 2023/1361, in 2022 for Case No. 2023/1962, and in 2021 for Case No. 2023/1963.

8. The HQ NAEW&CF GK operates on a monthly shift cycle, comprising three types of shifts: 24-hour shifts (S) for basic incident protection with 10 firefighters on duty, 14.5-hour shifts (SF) with 3-5 additional firefighters on duty from 7.30 to 22.00 hours, depending on the flying operation crash category, and 8-hour shifts (T) for daytime duty and various training purposes. These shifts encompass periods on alert and sleeping periods while present at the NATO Airbase Geilenkirchen.

9. In accordance with Article 15.1 of the CPR, the Head of the NATO body (hereinafter “HONB”) has prescribed a 40-hour, 5-day working week in alignment with Force Policy 1.2.5, dated 25 May 2021. The appellants’ employment contracts also stipulate a workweek of 40 hours.

10. The monthly shift cycles are designed to include pre-approved authorized overtime in accordance with Article 17.2.2 of the CPR. Both parties acknowledge that the unique circumstances at the fire department result in the appellants regularly working a significant number of overtime hours.

11. The appellants are compensated at the applicable hourly rate for overtime performed in accordance with Article 17.4.3 of the CPR. This includes allowances for all time and overtime present on shift. Compensation for overtime during shift work is determined in accordance with Article 17.4.6 of the CPR. Due to staff shortages, the appellants’ compensatory leave for overtime accrued during shift work has commonly been substituted by payment.

12. Until 30 March 2022, the Civilian Human Resources Management Branch (hereinafter “FHMC”) credited hours to the appellants on sick leave based on the scheduled hours from the pre-approved monthly shift cycle. The credit allocation varied depending on the specific shift plan in effect. One day of sick leave was calculated as either 24 hours, 14.5 hours, or 8 hours, consistent with the shift cycle. Thus, the FHMC awarded full credit for scheduled overtime during sick leave it if was included in the shift plan, regardless of whether the overtime was actually worked.

13. This practice, based on German labour rules, was retained in 2003 following the conversion of firefighter positions from Local Wage Rate to NATO International Civilian posts.

14. From 1 April 2022, the FHMC changed this practice. It applied a uniform accounting practice of crediting 8 hours for each day on the planned shift cycle during sick leave. This change was adopted to ensure equal treatment with other staff members who do not receive compensation for scheduled overtime not worked.

C. Parties' contentions and arguments

15. The parties' contentions and arguments are summarized and discussed below, as part of the analysis of each of the appellants' grounds.

D. Considerations and conclusions

(i) Preliminary observations about the nature of the changes

16. These cases are all concerned with the interpretation and application of the CPR in relation to changes made to the calculation of the appellants' overtime during sick leave.

17. The Tribunal observes that its own case law and that of its predecessor consistently holds that statutory provisions can be changed by competent administrative authorities, provided these changes do not have retroactive effects. This principle is highlighted in the Tribunal's judgment in Joined Cases No. 2020/1294-1296. In the context of these cases, the provisions regarding compensation for overtime are statutory in nature, and the decision by the FHMC to apply a uniform accounting practice to sick leave has no retroactive effect.

18. Moreover, the FHMC's decision does not infringe upon any acquired rights. The concept of acquired rights has been extensively discussed by the ILO Administrative Tribunal (hereinafter "ILOAT"). In Judgment No. 2682, the ILOAT stated that "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." In these cases, the record does not indicate that changes to compensation of overtime during sick leave altered a fundamental term of employment in consideration of which the appellants accepted their appointments.

19. With these preliminary observations in mind, the Tribunal has identified three principal grounds for the appellants' appeals. The appellants contend that a) the changes put in place after 1 April 2022 disadvantage the appellants during sick leave; b) overtime compensation has to meet the minimum legal standards of the host nation's labour rules; and c) compensation for sick leave should be calculated as annual leave.

20. As explained in greater detail below, the Tribunal concludes that these grounds of appeal are without merit. Consequently, the appeals must be dismissed.

(ii) The changes put in place after 1 April 2022 do not disadvantage the appellants during sick leave

21. In their first ground of appeal, the appellants argue that the changes put in place after 1 April 2022 disadvantage the appellants during sick leave. The appellants note that prior to 1 April 2022 and since 2003, the appellants received credit hours that reflected the scheduled hours from the pre-approved monthly duty cycle, including overtime. According to the appellants, this offered neither advantage nor disadvantage due to sick leave.

22. The appellants contend that the practice implemented after 1 April 2022, to credit 8 hours for each day on the planned shift cycle, disadvantages the appellants during sick leave and is akin to a disciplinary measure. They notably reference Article 45.6 of the CPR in support of their argument, which states:

> The first 3 months of sick leave are considered as normal service with the Organization and the member of the staff concerned continues to receive salary increments and to accrue leave.

23. The appellants explain that Article 45.6 of the CPR is intended to ensure that there is no monetary punishment for sick leave. They consider the decision taken after 1 April 2022 as a "punishment" on their emoluments as it reduces overtime compensation for duly justified sick leave.

24. The respondent maintains that the appellants are not disadvantaged during sick leave for two main reasons. First, they argue that the practice followed from 2003 to 1 April 2022 was not in conformity with the wording of the CPR. The changes made to this practice from 1 April 2022 bring it into alignment with the CPR to ensure equal treatment with other staff members. They cite in support Article 17.2.1 of the CPR, which stipulates that staff are entitled to additional leave for overtime worked, not for expected overtime. Consequently, the respondent posits that the reduction in overtime compensation is justified when no overtime work is performed due to sick leave. Second, the respondent contends that compensation payments for overtime are not classified as "emoluments" under Article 22 of the CPR. Sick leave, they argue, affects only monthly overtime, not the emoluments themselves. Therefore, monthly emoluments remain unaffected during sick leave, in accordance with Article 45.6 of the CPR.

25. This ground of appeal is principally concerned with the interpretation of the CPR as it relates to the calculation of the appellants' overtime while on sick leave. The relevant provisions of the CPR are to be interpreted following the method of interpretation set out in Article 31 of the 1969 Vienna convention on the Law of Treaties (hereinafter "VCLT"). Although not binding on the Tribunal, the VCLT was recognized by this Tribunal in Cases Nos 2016/1086 and 2016/1093 as a reflection of the "current prevailing doctrine and

practice concerning the interpretation of international legal instruments". Most recently, it was used by the Tribunal in Case No. 2023/1356 to interpret the CPR.

26. According to Article 31 of the VCLT, the CPR should 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".

27. The Tribunal finds that the terms relating to the calculation of the appellants' overtime in the CPR are clear and unambiguous. They specify that compensation is due for overtime that is actually worked. Article 17.2.1 of the CPR defines overtime as "the time worked in excess of the total of weekly working hours prescribed [emphasis added]." This definition is consistent with the use of "overtime worked" and "overtime was worked" in Article 17.3.4 of the CPR. Additionally, this interpretation is supported by Force Policy 1.2-5, dated 25 May 2021, issued by the HONB, which sets out working hours and authorized absences. This policy similarly defines overtime as "[t]ime worked in excess of the total of weekly working hours prescribed [emphasis added]."

28. Rather than a "punishment', the Tribunal observes that this interpretation ensures equal treatment with other staff members. Recalling its decision in Case No. 2017/1109, the Tribunal reiterates that "it is a fundamental principle of international administrative law that similarly situated staff members must be treated consistently". In Case No. 903, the Tribunal clarified that a violation of the principle of equal treatment occurs "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." The Tribunal is satisfied that the changes implemented by the FHMC from 1 April 2022 ensure equal treatment of staff members by calculating compensation only for overtime actually worked.

29. Consequently, the appellants do not incur any disadvantage from taking sick leave following the changes from 1 April 2022. The calculation of their overtime during this period conforms to the CPR, and ensures that they receive equal treatment to that of other staff members.

(iii) Overtime compensation does not have to meet the minimum legal standards of the host nation's labour rules

30. In their second ground of appeal, the appellants assert that the CPR must meet the minimum legal standards of the host nation's labour rules. They argue that NATO is prohibited from establishing working conditions, including payments, that fall below the minimum legal standard of the host nation country.

31. The respondent contends that the appellants' argument is incorrect, both legally and factually. They clarify that while Article 16.1 of the CPR requires maintaining adequate health and safety conditions in line with the host nation's standards, it does not extend to remuneration. The respondent emphasizes that NATO International Civilians are compensated according to approved salary scales, allowances, and overtime

compensations outlined in the CPR. This framework is standardized across the Alliance ensuring that compensation practices are independent of the laws of host nations. The respondent also emphasizes that the concept of employment relationships within international organizations being governed by the national law of the host state is refuted by international administrative tribunals and national courts. They further affirm that this view aligns with Article 6.2.1 of Annex IX of the CPR, which stipulates that the Tribunal's decisions are based on the CPR and its interpretation, rather than the legal framework of the host state.

32. It is a well-known principle of public international law that to ensure their independence from state interference, international organizations typically possess immunity from jurisdiction, also formulated as immunity from legal process (see Christian Dominicé, 'L'immunité de juridiction et d'exécution des organisations internationales', Collected Courses of the Hague Academy of International Law (1984-IV) 187 Recueil des Cours). This principle ensures that international organizations can independently fulfil their functions. It prevents, in particular, the host nation from imposing its national legislation and jurisdiction, which would otherwise give it an advantageous position over other member states. The constitutive instruments of international organizations and related instruments usually contain such a general provision on the immunity of the organization. Thus, the 1951 Ottawa Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, under Article V, grants NATO absolute immunity from jurisdiction, and Article XVIII extends this immunity from legal process to its staff "in respect of words spoken or written and of acts done by them in their official capacity and within the limits of their authority."

33. This principle is reflected in the CPR. Its Preamble, specifically in Section A concerning the applicability of the CPR, states that it "shall govern personnel administration in each NATO body". Section D addresses the privileges and immunities of staff by reference to the 1951 Ottawa Agreement. This principle is further reflected in Article 6.2.1 of Annex IX of the CPR, which stipulates that the Tribunal shall make decisions according to the CPR and its interpretation. Exceptions to this principle are expressly outlined, such as in Article 16.1 of the CPR, which requires maintaining adequate health and safety conditions according to the standards of the host nation. No such exception exists for the compensation of overtime.

34. Authors Alain Plantey and François Loriot underscore this principle, explaining [TRANSLATION] "the professional situation of international civil servants should not be assessed based on the legislation applicable, either in their country of origin or in the host country." They also observe that [TRANSLATION] "From the overall case law, it follows that, unless otherwise provided, the relationship between an intergovernmental organization and its staff is not governed by national law" (Alain Plantey & François Loriot, Fonction publique internationale, Paris, CNRS Éditions, 2005, paragraphs 133 & 135).

35. In light of the above, the Tribunal concludes that overtime compensation does not have to meet the minimum legal standards of the host nation's labour rules.

(iv) Compensation for sick leave should not be calculated as annual leave

36. In their third ground of appeal, the appellants offer a subsidiary argument, requesting that compensation for sick leave should be calculated as annual leave, based on a Monday to Friday, 40-hour week schedule, effective retroactively from 1 April 2022. This would entail the appellants receiving 8 hours of credit for every weekday they are on sick leave, irrespective of whether they were scheduled to work on those days according to the pre-approved monthly shift cycle.

37. In support of their argument, the appellants note that when rejecting their request, the FHMC stated that one-day leave entitlements equals 8 working hours as per AD (ACO Directive) 50-13, Serial # 31. They maintain that this regulation relates to annual leave, not sick leave, and requires the appellants to take 5 days of annual leave for each working week regardless of the pre-approved shift cycle. The appellants argue that, should the FHMC's interpretation prevail, compensation for sick leave should be calculated on the same basis as annual leave.

38. The respondent contends that there is no basis for crediting annual leave for periods of sick leave. They emphasize that the appellant is already credited with 8 hours for each day of sick leave when they are scheduled to work, which ensures equal treatment with other staff members.

39. The Tribunal recalls its interpretations of the CPR regarding the compensation of overtime as outlined in paragraph 28, along with its observations about equal treatment in paragraph 29. Based on these considerations, it concludes that compensation for sick leave should not be calculated as annual leave. Such an interpretation would be inconsistent with the CPR's provisions on the compensation of overtime and would result in unequal treatment with other staff members.

E. Costs

40. 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 […]

41. The Tribunal finds that there were no good grounds for the appeal. The appeal being without success, reimbursement of expenses is not justified.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 13 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0004

Judgment

Case No. 2023/1370

SK

Appellant

v.

Supreme Headquarters Allied Powers Europe

Respondent

Brussels, 13 February 2024

Original: French

Keywords: inadmissibility of the appeal.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Thomas Laker and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearing on 29 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal dated 10 May 2023 and registered on 17 May 2023 (Case No. 2023/1370), by Mr SK (hereinafter “the appellant”) against the Supreme Headquarters Allied Powers Europe (SHAPE, hereinafter “the respondent”).

2. The appellant, who is on extended sick leave, is contesting the termination of his contract, as notified by the SHAPE Civilian Personnel Branch Head under Article 45.7.1 of NATO’s Civilian Personnel Regulations (CPR).

3. The respondent's answer, dated 11 July 2023, was registered on 21 July 2023. The appellant’s reply, dated 21 September 2023, was registered on 21 October 2023. The respondent opted not to file a rejoinder under Article 15 of the Tribunal’s Rules of Procedure.

4. An oral hearing was held in the presence of both parties on 29 January 2024. The Tribunal heard the appellant’s counsel and the respondent’s representative, in the presence of Ms Laura Maglia, Registrar.

5. The Tribunal took the appeal under advisement on 29 January 2024, in line with Article 10.2 of its Rules of Procedure.

B. Factual background of the case

6. The appellant started working for SHAPE on 1 March 2011 as a corrector/reviewer of official documents, on a definite-duration contract renewed periodically. He was then awarded an indefinite-duration contract on 19 August 2020, backdated to 1 August 2020, for a B3, step 8 position as a proofreader.

7. The appellant started taking repeated absences for health reasons as from May 2016. Over the years, he produced several sick leave certificates. That situation went on until 10 May 2021, when the appellant was placed on extended sick leave.

8. At the request of Allianz Care, the appellant was assessed by medical experts. On 17 January 2022, following consolidation of his injuries, the appellant was recognized as having 15% permanent incapacity.

9. On 16 March 2023, the Civilian Personnel Branch Head gave notice to the appellant that his contract would be terminated on 9 May 2023, upon expiration of the

maximum period of 21 consecutive months of extended sick leave. As the rate of invalidity was below 33.33%, he was not entitled to an invalidity pension under Article 12 of the group insurance policy. Following this, the appellant's counsel sent the Civilian Personnel Branch Head an email demanding 180 days' notice. The email never reached the addressee owing to a mistake in the address.

10. In this appeal, the appellant argues that he should have been given 180 days' notice in writing at the end of the maximum period of extended sick leave. Referring to Articles 10.7.3 and 45 of the CPR, he is claiming compensation equivalent to 180 days' work.

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

(i) The appellant's contentions

11. First, the appellant claims that his appeal is admissible despite his not having first exhausted all available channels for submitting a complaint, as per Article 6.3.1 of Annex IX to the CPR.

12. The appellant explains that submitting an appeal directly with the Tribunal is admissible under Articles 1.4, 6.3.1 and 6.3.2 of Annex IX to the CPR. The appellant refers to Article 1.4 of Annex IX to the CPR, whereby "where the contested issue is the result of a decision taken directly by the Head of a NATO body, the aggrieved party may lodge an appeal directly with the Administrative Tribunal". In the present case, the appellant claims that the contested decision of 16 March 2023 was taken directly by NATO's Civilian Personnel Branch Head on behalf of the "Head of NATO body".

13. Regarding the merits, the appellant bases his argument that the Organization had a duty to give him 180 days' notice on Articles 7, 9, 10 and 45 of the CPR.

(ii) The respondent's contentions

14. First, the respondent rejects the appellant's appeal insofar as he did not exhaust all available channels for submitting a complaint before lodging his appeal with the Tribunal.

15. In particular, the respondent explains that Article 1.4 of Annex IX to the CPR, which provides an exception to the obligation to exhaust all available channels for submitting a complaint, does not apply in the present case because the contested decision was signed by SHAPE's Civilian Personnel Branch Head and not by the Head of NATO body. Thus, the appeal is not admissible.

16. Regarding the merits of the appeal, the respondent claims that the appellant's contract was terminated not as per Article 10.3 of the CPR, but rather as being one of the situations set out in Article 45.7.1 of the CPR (period of 21 consecutive months of extended sick leave). The 180 days' notice is thus not required because the situation

amounts to an expiration of contract as provided for in Article 7.1(i) of the CPR, as a combined result of Articles 3(d) and 45.7.1 of the CPR.

D. Considerations and conclusions

(i) Admissibility

17. The decision of 16 March 2023 was taken by SHAPE's Civilian Personnel Branch Head, not by the Head of NATO body.

18. In this respect, the Tribunal notes that the decision of 16 March 2023 does not refer to the Head of NATO body; it was only signed by the Civilian Personnel Branch Head.

19. Consequently, Article 1.4 of Annex IX to the CPR, which, exceptionally, must be interpreted strictly,[1] does not apply in the present case. Thus, the appeal is inadmissible since the aforementioned decision was not preceded by the administrative review procedures set out in the CPR under Article 6.3.1 of Annex IX to the CPR.

(ii) Merits

20. While the appeal is inadmissible for the abovementioned reason, the Tribunal considers that it would have been dismissed on the merits regardless, as in its case law the Tribunal has unequivocally held that Article 45.7.1 of the CPR applies whenever an employment contract is terminated at the end of the maximum period of 21 consecutive months of extended sick leave.

21. As per the Tribunal's case law, termination of the contract under Article 45.7.1 is governed by different rules to the ones set out in Articles 10.3 and 10.4 of the CPR, particularly regarding notice periods. Termination of an employment contract under Article 45.7.1 at the expiration of the maximum period of 21 months does not mean that the regular period of notice must be applied, as the Tribunal has ruled in the past:

> The procedure for termination for extended sick leave follows specific rules that do not leave any room for the notice period given to a staff member in an ordinary situation; in a way, the 21-month period in Article 45.7.1 of the CPR is in itself a notice period known by the staff member.[2]

22. The stipulations on the notice period in the contract cannot prevent Article 45.7.1 from being applied.[3] Thus, even had the appeal been admissible, the Tribunal would have held that there were not good grounds for it.

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[1] AT-J(2023)0003, paragraphs 25–31.
[2] AT-J(2016)0009, paragraph 34.
[3] AT-J(2013)0006 paragraph 24; AT-J(2016)0009, paragraph 34

E. Costs

23. As there were not good grounds for the appeal, no reimbursement of costs is due under Article 6.8.2 of Annex IX to the CPR.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is inadmissible and consequently dismissed with no reimbursement of costs.

Done in Brussels, 13 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0005

Judgment

Case No. 2023/1373

BP

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 14 February 2024

Original: English

Keywords: shift work, prescribed official holiday, additional payment, lex specialis.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Fabien Raynaud, and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearing on 29 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 27 June 2023 and registered on 11 July 2023 as Case No. 2023/1373, by Mr BP, against the Headquarters NATO Airborne Early Warning and Control Force (NAEW). The appellant requests to be granted days of leave in compensation for work performed on prescribed official holidays.

2. In its answer, registered on 28 September 2023, the respondent does not contest the receivability of the appeal but invites the Tribunal to dismiss it as unfounded.

3. An oral hearing was held on 29 January 2024 at NATO Headquarters. The Tribunal heard the appellant's statement and arguments by a representative of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. The appellant performs shift work at the respondent's airbase on a regular basis. He also did so for two hours on 2 May 2022 and on 3 October 2022 respectively. Both days are considered as official holidays. He requested unsuccessfully to be granted two days holiday for this work, referring to Article 15.7.1 of the Civilian Personal Regulations (CPR).

6. On 6 March 2023, the appellant requested an administrative review which was rejected on 28 March 2023.

7. On 26 April 2023, the appellant submitted a formal complaint, and received a negative response on 17 May 2023.

8. On 28 June 2023, the present appeal was submitted.

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

(i) The appellant's contentions

9. Pursuant to the appellant, he needs to be granted additional holidays as foreseen in Article 15.7.1 of the CPR since he did work on a prescribed public holiday. In his view, it is irrelevant whether he did so for a full day or only for two hours. He thinks that the said provision has to be applied regardless of the rules on shift work, which provide for specific additional compensation for shift work performed on official holidays.

(ii) The respondent's contentions

10. Pursuant to the respondent, it follows from the CPR that one full day of compensation can only be granted when one full day of a public holiday is worked. It is clear in the French version since the expression "un jour" indicates that only a full day should be taken into account. In any case, the respondent argues that Article 15 of the CPR regulates the normal working week, having regular office work in mind, whereas Article 17 of the CPR establishes a special regime for shift work and night work.

D. Considerations and conclusions

11. At the outset, the Tribunal emphasizes that Chapter V of the CPR, under the heading "Work", establishes a system of provisions for different types of work. Article 15, under the sub-heading "Working week", explicitly allows the introduction of a shift system, including "night work and/or work on Saturdays, Sundays or prescribed public holidays". Therefore, the CPR obviously consider work on public holidays to be a normal part of shift work.

12. Further, the Tribunal notes that Article 17 of the CPR, under the sub–heading "Special working hours", includes, *inter alia,* specific rules with a view to compensating for the hardship of working weekends and public holidays. In particular, Article 17.4.3 provides additional payment of 25% of hourly basic salary for shift work performed between 07.00 and 22.00 hours "on Saturdays, Sundays and prescribed public holidays", and 33% of hourly basic salary "for shift work performed between the hours of 22.00 and 7.00."

13. It follows from the above that the CPR establishes not only different types of work, rather it includes different kinds of compensation for work on prescribed public holidays: whereas such work in the context of normal office work is to be compensated by additional holidays, shift work on such days is compensated by additional financial payment.

14. Finally, the Tribunal recalls the general principle "*lex specialis derogat leges generali",* meaning that more specific rules will prevail over general rules. In the present context, the specific provisions of Article 17.4 of the CPR, under the heading "Shift work", including the rules on compensation for shift work on prescribed public

holidays, supersede the more general rules on the working week of Article 15 of the CPR.

15. It follows from the above that the applicant, having received the additional financial compensation as foreseen in Article 17.4.3 of the CPR, has no right to additional compensation for his work on prescribed public holidays in the form of additional holidays.

E. Costs

16. 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 […]

17. The Tribunal finds that there were no good grounds for the appeal. The appeal being without success, reimbursement of expenses is not justified.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 14 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0006

Judgment

Case No. 2023/1371

CE

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 14 February 2024

Original: English

Keywords: shift work, prescribed official holiday, additional payment, lex specialis.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Fabien Raynaud, and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearing on 29 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 17 May 2023 and registered on 9 June 2023 as Case No. 2023/1371, by Mr CE, against the Headquarters NATO Airborne Early Warning and Control Force (NAEW). The appellant requests to be granted days of leave in compensation for work performed on official holidays.

2. In its answer registered on 28 September 2023, the respondent does not contest the receivability of the appeal but invites the Tribunal to dismiss it as unfounded.

3. An oral hearing was held on 29 January 2024 at NATO Headquarters. The Tribunal heard the appellant's statement and arguments by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. The appellant performs shift work at the respondent's airbase on a regular basis. He also did so for two hours on 2 May 2022 and on 6 June 2022 respectively. Both days are considered as official holidays. He requested unsuccessfully to be granted two days holiday for this work, referring to Article 15.7.1 of the Civilian Personal Regulations (CPR).

6. On 14 December 2022, the appellant requested an administrative review which was rejected on 27 January 2023.

7. On 24 February 2023, the appellant submitted a formal complaint, and received a negative response on 21 March 2023.

8. On 22 May 2023, the present appeal was submitted.

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

(i) The appellant's contentions

9. Pursuant to the appellant, he needs to be granted additional holidays as foreseen in Article 15.7.1 of the CPR since he did work on a prescribed public holiday. In his view, it is irrelevant whether he did so for a full day or only for two hours. He thinks that the said provision has to be applied regardless of the rules on shift work, which provide for specific additional compensation for shift work performed on official holidays.

(ii) The respondent's contentions

10. Pursuant to the respondent, it follows from the CPR that one full day of compensation can only be granted when one full public holiday is worked. It is very clear in the French version since the expression "un jour" indicates that only a full day should be taken into account. In any case, the respondent argues that Article 15 of the CPR regulates the normal working week and has regular office hours in mind, whereas Article 17 of the CPR establishes a special regime for shift work and night work.

D. Considerations and conclusions

11. At the outset, the Tribunal emphasizes that Chapter V of the CPR, under the heading "Work", establishes a system of provisions for different types of work. Article 15, under the sub-heading "Working week", explicitly allows the introduction of a shift system, including "night work and/or work on Saturdays, Sundays or prescribed public holidays". Therefore, the CPR obviously consider work on public holidays to be a normal part of shift work.

12. Further, the Tribunal notes that Article 17 of the CPR, under the sub-heading "Special working hours", includes, *inter alia*, specific rules with a view to compensating for the hardship of working weekends and public holidays. In particular, Article 17.4.3 provides additional payment of 25% of hourly basic salary for shift work performed between 07.00 and 22.00 hours "on Saturdays, Sundays and prescribed public holidays", and 33% of hourly basic salary "for shift work performed between the hours of 22.00 and 7.00."

13. It follows from the above that the CPR not only establishes different types of work, rather it includes different kinds of compensation for work on prescribed public holidays: whereas such work in the context of normal office work is to be compensated by additional holidays, shift work on such days is compensated by additional financial payment.

14. Finally, the Tribunal recalls the general principle "*lex specialis derogat leges generali*", meaning that more specific rules will prevail over general rules. In the present context, the specific provisions of Article 17.4 of the CPR, under the heading

"Shift work", including the rules on compensation for shift work on prescribed public holidays, supersede the more general rules on the working week of Article 15 of the CPR.

15. It follows from the above that the applicant, having received the additional financial compensation as foreseen in Article 17.4.3 of the CPR, has no right to additional compensation for his work on prescribed public holidays in the form of additional holidays.

E. Costs

16. 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 […]

17. The Tribunal finds that there were no good grounds for the appeal. The appeal being without success, reimbursement of expenses is not justified.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 14 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0007

Judgment

Case No. 2023/1365

SV

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 15 February 2024

Original: English

Keywords: non-renewal; unsatisfactory performance; complaint procedure.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü, and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearing on 30 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 11 April 2023 and registered on 8 May 2023 as Case No. 2023/1365, by Mr SV, against the NATO Support and Procurement Agency (NSPA). The appellant mainly contests the decision not to renew his contract.

2. In its answer, dated 7 July 2023 and registered on 12 July 2023, the respondent invites the Tribunal to dismiss the appeal as inadmissible and unfounded.

3. The appellant's reply, dated 23 August 2023, was registered on 11 September 2023. The respondent's rejoinder, dated 11 October 2023, was registered on the same day.

4. An oral hearing was held on 30 January 2024 at NATO Headquarters. The Tribunal heard the appellant's statement and arguments by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

6. The appellant joined the NSPA on 1 June 2017 as Senior Technical Officer at the level A3 and was assigned to post LD-211.1 Concerns with respect to his attitude and performance prompted discussions with his managers which led to the decision to extend his probationary period by six months, namely until 31 May 2018.

7. In March 2018, the appellant was transferred upon his request to post LD-215. A few months later, his appointment was confirmed.

8. Despite discussions where concerns about his performance were expressed, his contract was renewed for 3 years in October 2019.

9. The appellant's overall performance for 2019 was rated "fair". A performance improvement plan (PIP) was established in March 2020. Interim performance reviews were conducted on 20 May, 15 July and 30 October 2020.

10. The appellant's overall performance for 2020 was rated "unsatisfactory". This rating was later changed to "fair" at the first stage (out of three) of the conflict resolution process, as provided for in the operating instruction 4400-12 "NSPA Policy for Employee Performance Management System". The appellant did not pursue this process any further.

11. The appellant was subjected to another PIP in 2021 and therefore to further regular performance reviews. His overall performance was rated “unsatisfactory” for 2021. This rating was confirmed after exhaustion of the three-phase conflict resolution process, which ended with the binding decision rendered by the Joint Review Board (JRB) on 28 September 2022.

12. By letter of 22 November 2022, the NSPA’s Human Resources Executive notified the appellant of her decision not to offer him another contract due to his poor performance and lack of improvement.

13. The appellant filed a request for administrative review with the Organization’s General Manager, i.e. the Head of this NATO body, by letter of 6 December 2022, in which he challenged his performance appraisal reports for 2020 and 2021, and asked for their withdrawal, the offer of a new contract and reassignment in a different programme.

14. By letter of 3 January 2023, the General Manager confirmed the contested decision.

15. On 30 January 2023, the appellant lodged a complaint, in which he requested that the matter be referred to a Complaint Committee (CC).

16. On 6 February 2023, the General Manager rejected the complaint. She made two procedural remarks: on the one hand, she rejected the appellant’s request for referral to a CC, on the other hand, she declined to enter into mediation. The complaint as such was not considered to be inadmissible, rather, it was rejected on the merits.

17. The present appeal was filed with the Tribunal on 11 April 2023.

18. On 23 May 2023, the JRB rendered its report regarding the appellant’s performance report for 2022, concluding that the rating “unsatisfactory” was acceptable.

C. Summary of parties’ contentions and legal arguments

(i) The appellant’s contentions

Admissibility

19. The appeal is admissible since the appellant went through all the pre-litigation steps foreseen in the Civilian Personnel Regulations (CPR), i.e. a request for review, and a complaint, including the submission of the present appeal, in a timely way.

Merits

20. The appellant claims that he should have been granted an indefinite contract at an earlier stage. In his view, all performance appraisal reports were wrong and biased; also, the JRB committed errors. He argues that the proceedings were flawed.

21. The appellant requests:
- annulment of the decision not to renew his definite contract;
- "proposal of a new indefinite duration appointment/contract";
- reassignment to another post; and
- compensation for material and non-material damage.

(ii) The respondent's contentions

Admissibility

22. The respondent argues that as the decision on the request for administrative review was taken by the General Manager, i.e. the Head of the respective NATO body, the appeal should have been filed directly with the Tribunal. Having submitted a complaint instead, the appellant missed the 60-day time limit for filing the appeal, and his appeal is time-barred.

Merits

23. The respondent contends that the request for referral to a CC should have been submitted at the level of the administrative review. As the appellant did not do so, he was excluded from this option at the level of the complaint procedure.

24. The appellant does not fulfil the requirements for renewal of his contract since his performance was not satisfactory. It is also not in the interests of the Organization to renew a contract of a staff member who fails to meet the required standard of performance.

D. Considerations and conclusions

(i) Admissibility

25. The respondent argues that in the present case, the complaint procedure was not available because the Head of NSPA had already rejected the appellant's request for administrative review.

26. Indeed, Appendix 3 to Annex IX of the CPR stipulates that the complaint procedure must be "seeking to have altered or annulled an administrative decision … by a subordinate authority". The Tribunal notes that the initial (and contested) decision was taken by a subordinate authority, i.e. NSPA's Human Resources Executive.

27. In the rules, there is no clear indication that the complaint procedure is unavailable in the present case. The normal pre-litigation procedure, i.e. a request for administrative review followed by a complaint, as described in Article 61 of the CPR, includes exceptions. However, the case at stake does not fulfil the central condition for an exception, i.e. that the initial decision was taken by the Head of the NATO body. Rather, as pointed out above, the initial decision on non-renewal was taken by the Human Resources Executive.

28. It may be considered superfluous to seize the NSPA's General Manager in cases like the present one with the same issue twice: first in her role as supervising manager of the decision-maker in the administrative review process (see Article 2.2 of Annex IX to the CPR), and second as Head of the NATO body in the complaint process (see Article 4.1 of Annex IX to the CPR). However, relevant circumstances may change between these two steps of pre-litigation, or new arguments may be raised.

29. It follows from the above that the appeal is admissible.

(ii) Merits

Procedural issue

30. The appellant criticizes that his complaint was rejected before being forwarded to a CC. Indeed, the General Manager had denied such an option, arguing that the appellant should have asked for the participation of a CC at the stage of his request for administrative review. The respondent defends this view.

31. Pursuant to Article 2.3(e) of Annex IX, at the level of the request for administrative review "in case the supervising manager is the Head of NATO body, the requestor may also … if deemed to be appropriate, refer the matter to a Complaint Committee …" It follows from the use of the word "may" that this is a mere option, rather than an obligation. Pursuant to Article 4.2 of Annex IX: "Claimants shall be entitled to request that, before a decision is taken, the complaint be submitted to a Complaint Committee … The Head of the NATO body shall accept the request to submit the complaint to the Complaint Committee unless, within 15 days of receiving the complaint, he/she agrees to rescind or modify the contested decision." Therefore, it was incorrect to deny the referral to a CC.

Substance

32. At the outset, the Tribunal recalls its established jurisprudence with respect to renewal of contracts, as outlined in its judgment in Case No. 2019/1278, paragraph 46:

> This Tribunal has consistently held that decisions concerning renewal or non-renewal of contracts are within the discretionary power of the Head of the Organization. There is consensus among international administrative tribunals that a decision in the exercise of discretion is subject to only limited review by a tribunal. A tribunal would interfere with a non-extension of contract decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority. Tribunals have also consistently held that they will not substitute

their own view for the organizations' assessments in such cases (*cf.* Judgment in Case No. 885).

33. Further, the Tribunal notes that some of the appellant's relief sought, including a "proposal of a new indefinite duration appointment/contract" and "reassignment of the appellant to another post", exceed its jurisdiction, whereas other claims like "material compensation" and/or non-material compensation fully depend on whether the contested decision not to renew the appellant's contract was legal. Therefore, only the latter question will be dealt with.

34. Pursuant to Article 5.2.3 of the CPR, definite duration contracts may be renewed subject to four requirements, including (i) that renewal is in the interests of the Organization, and (iii) performance to the required standard as defined by the Head of NATO body.

35. In the contested decision of 22 November 2022, the non-renewal of the appellant's contract is based on both those requirements not being met, arguing that due to the appellant's poor performance a renewal of his contract would not be in the interests of the service.

36. The Tribunal takes note that from the beginning of the appellant's professional relationship with NSPA in June 2017, performance issues arose: his probationary period was extended due to "unfocused behaviour" until end of May 2018, PIPs were established in 2020 and in 2021, and the performance appraisals regularly were under dispute. Pursuant to the latest JRB report of 23 May 2023, this was the third consecutive year when a conflict resolution process was initiated. In 2020, the appellant was rated "fair", in 2021 "unsatisfactory", and in 2022 "unsatisfactory" again.

37. The Tribunal is aware of the appellant's criticism of many details of the performance appraisals. However, it is not for the Tribunal to enter into a discussion about his performance as long as the relevant rules were adhered to. This is the case here, all the more as for all three periods of time, internal review processes took place.

38. In light of the appellant's clear and unmistakable shortcomings, the involvement of a CC at the pre-litigation level could not have had any influence on the assessment. Therefore, in the circumstances of the present case, the lack of participation by a CC does not justify the award of financial compensation.

E. Costs

39. 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 […]

40. The Tribunal finds that there were not good grounds for the appeal. The appeal being dismissed, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed in full.

Done in Brussels, on 15 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0008

Judgment

Case No. 2023/1372

PK

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 20 February 2024

Original: English

Keywords: suppression of post; duty to provide information; redundancy status (Article 57.2 CPR); awarding of damages.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Anne Trebilcock and Ms Seran Karataru Köstü, judges, having regard to the written procedure and further to the hearing on 30 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal by Mr PK, dated 27 June 2023 and registered on 11 July 2023 as Case No. 2023/1372, seeking annulment of the decision of 5 May 2023 by the NATO Support and Procurement Agency ("NSPA"), which has rejected his claim for damages, compensation for moral prejudice, and costs.

2. The respondent's answer, dated 11 October 2023, was registered on 19 October 2023. The appellant's reply, dated 17 November 2023, was registered on the same day. The respondent's rejoinder, dated 18 December 2023, was registered on 19 December 2023.

3. An oral hearing was held on 30 January 2024 at NATO Headquarters. The Tribunal heard arguments by the appellant, his representative and representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

4. The appellant, a citizen of Greece and the United Kingdom, joined NATO in 2005, and moved to NSPA in 2010. As from 25 March 2013, he had a contract of indefinite duration at the A2 level. The NSPA terminated his contract on very short notice following a decision to suppress the post he held in the finance division. He was notified on 6 December of termination of his employment effective 31 December 2022.

5. An initial draft of the Organization and Personnel Establishment ("O&PE") was drawn up in September 2022. On 18 October 2022, the Agency proposed a restructuring of the relevant directorate for 2023 onwards. A revised draft of the O&PE for 2023, dated 18 November 2022, noted that since the earlier submission, the Agency's "needs have further evolved as a result of customer requirements," leading it to propose additional post creations and suppressions. An annex to this document showed the reorganization of the finance unit; this entailed creation of a new chief post, offset by the suppression of one vacant post and one filled post.

6. The NSPA division then concluded on 23 November 2022 that there was insufficient funding to maintain the post held by the appellant. At its meeting on 6-7 December, the Agency Supervisory Board (ASB) approved suppression of this post as part of a package that involved a number of newly created and suppressed posts in the context of the reorganization proposed in mid-November.

7. Paragraph 6 of the appellant's indefinite duration contract provided for notice of termination "for due and valid reasons" with at least 180 days in advance. On 5 December

2022, the General Manager (GM) of NSPA wrote to the appellant, regretting to inform him of the termination of his contract as from 31 December of that year. The GM wrote, "The Agency learned recently that the post you currently hold … will be proposed for suppression due to lack of funding …". She set out the regulatory framework relevant to the situation (Civilian Personnel Regulations ("CPR") Articles 9, 10 and 57.2) and referred to his contract. The appellant was invited to contact the Human Resources office if he had questions about his entitlements. He received this message on 6 December 2022.

8. The letter from the GM stated that if he was not selected for a suitable post before the end of the year, he would be entitled to an indemnity for loss of job under Article 10.5 of the CPR. Following the end of his employment, he was paid an allowance to substitute for the 5 months and four days' lack of notice, plus a loss of job indemnity equivalent to 18 months' salary.

9. Since the applicant did not know his job was endangered, he did not place himself on the roster to be considered for other posts until after receiving notification of termination. In the short period between notification and the holiday closing period, he did not find a suitable available post. The respondent showed that there was no such A2 post available within the NSPA in the second half of 2022. There was no evidence cited to show that such a post was available elsewhere in NATO between 18 November and 6 December.

10. The appellant filed a complaint under Article 61.4 of the CPR on 3 January 2023. He claimed that the decision of 5 December had infringed Articles 10.5 and 57.4 of the CPR and that the NSPA had disregarded the duty of care for not taking his interests into account. He requested compensation for the adverse consequences of the decision, which he said had not been compensated by the payments received.

11. The letter from the GM dated 23 January 2023, which was headed "reply to your complaint…./termination of contract following post suppression…", contained her explanation of how the loss of post and her decision had come about. She also recalled the payments made to him, and stated, "you were adequately compensated for any inconvenience a short notice period may have caused you" (noting also that these were granted without any obligation to work). Then, while terming a loss of the chance to apply for vacant posts on a priority basis as "speculative," she said that his request to be compensated had no factual basis.

12. The GM added, however, that she had instructed the Human Resources unit to consider in priority any application he might make in accordance with Article 57 during the entire notice period – but that any offer would be conditional upon a complete reimbursement of the loss of job indemnity and a prorated reimbursement of the paid notice of termination. The letter concluded, "I trust you will find the proposed course of action satisfactory".

13. Early in 2023, the appellant applied for an A3 post in his field, but received notification on 2 March 2023 that his candidacy would not be considered further. In his A2 post, he had received appraisals of "good" over a number of years.

14. On 20 March 2023, the appellant wrote to NSPA, disputing its reliance on a loss of funding and an absence of available posts. He amended his claim (no longer seeking placement, since he was "psychologically tired," and reducing the damages from six to three months' salary).

15. On 3 May 2023, the NSPA replied to his claim for damages, dismissing the request as inadmissible because it was time-barred. This communication stated that the letter of 23 January had already "dismissed" his complaint. The Agency said that no unlawful decision was involved, nor was there any quantum of alleged damages.

16. The appeal was filed with the Tribunal within 60 days of the NSPA reply. At the time of the hearing, the appellant was still seeking new employment.

C. Summary of parties' contentions and legal arguments

(i) The appellant's contentions

17. The appellant seeks:
- annulment of the decision of 3 May 2023 whereby the NSPA rejected the appellant's claim for damages;
- an award of moral damages assessed *ex aequo et bono* at three months' salary; and
- payment of all costs.

18. The appellant contends that the appeal is admissible and that the respondent:
- made a manifest error of appreciation and breached CPR Articles 57.2 and 57.4 as well as provisions of the appellant's indefinite duration contract;
- breached the duty to state reasons for its decision; and
- breached the duty of care through its negligence.

19. The appellant pointed out that the notice given was effectively only about 15 days, once the end-of-year NSPA closure was taken into account. He recalled that the purposes of the notice period foreseen were first, to afford an effective possibility to have employment maintained in another post (citing Article 57.2 on priority consideration for vacant posts), and second, to allow staff to organize/reorganize their professional and personal life. He contended that the decision to terminate the contract on such short notice infringed Articles 10.5 (allowance in lieu of notice) and 57.4 (on transfers) of the CPR, displayed negligence, breached the duty to state reasons, and disregarded the duty of care.

20. The appellant claimed that he should have been notified of the possible post suppression as from mid-September. Instead, he claimed, he had been approached during this period about a possible promotion. He said that a management decision, rather than funding problems themselves, had led to the suppression of his post. Other staff in his unit had been reassigned or, in one case, promoted. The applicant also complained about the lack of priority given to an application for an A3 post he had submitted in the early part of 2023.

21. In response to information provided by the respondent in this appeal, the applicant observed that a late suggestion to apply for a possible position at SHAPE had been of no use to him. It ignored the fact that he no longer had access to NATO communications when this message was sent. He reproached the Agency for failing to notify him through his private contact details. In any event, the deadline for applying had expired when the message was sent.

22. As harm, he cited having no income (aside from the indemnity/allowances received) and a mortgage that he would no longer be able to bear. This prejudice, evaluated in the appeal at three months' remuneration, was in his view not compensated by the sums paid by the respondent.

(ii) The respondent's contentions

23. The respondent contends that:
- the appeal is inadmissible;
- the agency lawfully applied the CPR;
- the duty of care has not been breached;
- the appellant has not suffered any uncompensated prejudice; and
- the Tribunal has no jurisdiction to decide *ex aequo et bono*.

24. The respondent argues that the appellant is attempting a collateral attack on a decision (the GM's letter of 23 January 2023) which he chose not to appeal in a timely manner. He has not challenged the suppression of his post or his termination of employment. He is claiming only damages, not requesting reinstatement. But to succeed, he must prove that the organization breached specific contractual or legal obligations, and that such a violation caused him direct prejudice. The respondent argues that he has not done so.

25. The respondent explains that the Agency could know only in late November 2022 of the funding shortfall, and it had no discretion to maintain an unfunded post. It had notified the appellant before the termination took effect, as required. The Agency had rightfully made recourse to CPR Article 10.5 and awarded a loss of job indemnity, in addition to the payment due under the applicant's contract in lieu of the full notice period. The respondent argues that it had provided reasons for the contested decision, and that the alleged prejudice to the applicant is in any event speculative.

26. In its answer, the respondent noted that the HRE head had contacted the appellant on 21 December 2022 to make him aware of an opening in SHAPE for which he might wish to apply. There was no breach of the duty of care or negligence, the respondent maintains, and no damages are owing.

D. Considerations and conclusions

(i) Admissibility

27. Although the reply of 23 January 2023 stated in relation to the complaint that the appellant had already been adequately compensated, it was not an explicit rejection of his claim. The final sentence referred to a "proposed course of action" relating to his possible priority treatment for vacant posts. Containing these mixed messages, the reply of 23 January was ambiguous and did not express a final decision. In contrast to the January letter, the 3 May 2023 letter stated clearly that the request was dismissed as "inadmissible and unfounded," citing various grounds. This rejection was challenged on a timely basis with the filing of the appeal on 27 June 2023. The appeal is therefore admissible.

(ii) Merits

28. As a general rule, the period of notice of termination is 180 days (Article 10.3), as reflected in paragraph 6 of the appellant's contract of indefinite duration. The contract permitted termination "for due and valid reasons" in accordance with the Article 9 of the Civilian Personnel Regulations ("CPR"). This practice normally affords a staff member time to plan and, if they wish, to apply for other posts. However, recognizing that due to special circumstances it may not be possible to respect this time-frame, Article 10.5 of the CPR provides that the Head of the NATO body "may substitute for all or part of the contractual period of notice an allowance…", calculated in accordance with Article 10.7.

29. The appellant's indefinite duration contract was terminated due to a valid reason, i.e. suppression of the post he held (see CPR, Article 9.1(iii)), linked to funding shortfalls and in exercise of managerial decision-making without abuse of authority.

30. The appellant claimed that he had been told in autumn of 2022 that he was being considered for a higher-level post, but he provided no proof of this. Nor has the appellant put forward evidence to call into question the motive behind the suppression of the post and the related termination of his employment. In the absence of a showing of discrimination on prohibited grounds or other serious flaw, the fact that other staff members were transferred in the reorganization does not show that the suppression of his own post was illegal.

31. The respondent provided the appellant with an adequate reason for the decision (funding shortfall), even if this did not convey the entire picture (since managerial decisions as to which posts would be cut were also in play). It later supplied reasons for its decision to deny the appellant's claims.

32. In its judgment in Case No. 2021/1333 SS *v.* CMRE of 12 May 2022, the Tribunal noted that it would not review the choices made by an organization to ensure its financial stability (paragraph 52). However, in confronting financial difficulties, the Organization must first identify the posts to be abolished and then inform the person(s) concerned. The duty to provide information derives from the principle of good administration (ibid.,

paragraph 61). A key question here is thus whether the appellant should have been informed earlier of the decision to suppress his post.

33. The Agency had no certainty about the impact on the division in question until after the proposed revision of the O&PE, submitted on 11 November, had been cleared on 23 November 2023. Had the notification to the appellant occurred the following day, he would have had less than two weeks more notice than he received. The appellant himself pointed to A2 posts available earlier in 2022, but not to any vacancies occurring after 23 November 2022 in the same location, and at the same grade and level of responsibility (as foreseen in CPR Article 57.4). Nor has the appellant shown that there was a post NATO-wide to which he could have been transferred before his contract ended. The feasibility of arranging such a transfer in the short time-period was in any event low. His loss of the chance to do so was speculative.

34. The opportunity for priority consideration for vacant posts under Article 57.2 applied until the end of December 2022. The communication from the Human Resources unit about a post in SHAPE was sent on 21 December, several days after the appellant no longer had access to his Agency email account. In any event, the application deadline had already passed, and the vacancy mentioned supervision of another staff at the A2 level, so priority under Article 57.4 would not have applied. This last-minute effort was of no help to him, but did not constitute negligence causing him harm.

35. In contrast to the impression given in the letter of 23 January 2023, the GM had no authority to offer priority consideration to non-staff members, which was the appellant's situation as from 1 January 2023. In relation to the A3 post for which the appellant applied following his termination of employment, he was not entitled to priority treatment. He has in any event not appealed the decision to reject that application.

36. The notice of termination provided to the appellant was indeed extremely short. For a staff member with annual ratings of "good" over many years, the news must have come as a shock. But the appellant has received the required allowance equivalent to the contractual period of notice in line with CPR Article 10.5 (salary plus allowances), as well as a loss of job indemnity under CPR Annex V (representing another 18 months of salary in his case). The Agency proceeded in conformity with the rules.

37. In addition, the appellant has not proven facts that would point to a breach of the duty of care through proven negligence. There is no legal basis for awarding him damages.

38. The appeal is therefore rejected.

39. Finally, the Tribunal notes that the respondent asserts that this body lacks jurisdiction to award *ex aequo et bono* damages. This is not correct; see for example the Tribunal's judgment in Joined Cases Nos. 2019/1284, 2019/1285 and 2019/1291 PH *v.* NATO IS of 9 March 2021. It is up to the Tribunal to determine whether a particular matter, such as remedies in specific circumstances, falls within its competence or not (CPR, Annex IX, Articles 6.2.2 and 6.9). The respondent has cited cases decided by the predecessor body, the NATO Appeals Board, under its rules.

E. Costs

40. 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 […]

41. The appeal having been rejected, no costs are owing under Article 6.8.2 of Annex IX of the CPR.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

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

Done in Brussels, on 20 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0009

Judgment

Case No. 2023/1375

MK

Appellant

v.

NATO International Staff

Respondent

Brussels, 22 February 2024

Original: English

Keywords: inadmissibility; ratione materiae; lack of interest; res iudicata; abuse of process.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Thomas Laker, and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 31 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, filed on 21 August 2023 and registered on 5 September 2023 as Case No. 2023/1375, by Mr MK, against the NATO International Staff (IS). The appellant primarily seeks an order for the IS to respond to his request for administrative review dated 13 November 2022, along with his subsequent complaint dated 1 February 2023.

2. In its answer, dated 6 November 2023 registered on 14 November 2023, the respondent requests the summary dismissal of the appeal on the grounds that it is inadmissible, devoid of merits and outside the Tribunal's jurisdiction. Furthermore, the respondent requests that the Tribunal award compensation for abuse of process.

3. The appellant's reply, dated 10 December 2023, was registered on 11 December 2023. The respondent's rejoinder, dated 20 December 2023, was registered on 21 December 2023.

4. An oral hearing was held on 31 January 2024 at NATO Headquarters. The Tribunal heard the appellant's statement and arguments, as well as those made by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

5. Between 1 July 1979 and his retirement on 1 August 2012, the appellant was a member of the civilian personnel working at the NATO Headquarters Allied Air Command (Headquarters Ramstein).

6. On 19 November 2013, the appellant was tried and convicted by a German court on two (2) counts of treasonous espionage and one (1) count of attempted treasonous espionage while he was employed as a NATO staff member.

7. The appeal of the appellant's conviction was dismissed on 23 October 2014.The appellant was sentenced to seven (7) years of prison in Germany.

8. The conviction being related to a breach of his duties of secrecy and discretion under the NATO Civilian Personnel Regulations (CPR), the appellant's pension was reduced by 67%.

9. Following an appeal dated 6 January 2017 and registered under Case No. 2017/1104, in its judgment of 21 November 2017 the Tribunal decided to follow the initial recommendation of the Disciplinary Board and the pension was reduced by 60% rather than 67%.

10. Since this judgment, the appellant has made multiple requests for revision, requests for administrative review, appeals, not to mention the incessant correspondence with the Tribunal's Registrar.

11. Parts of the background and relevant facts of the case were summarized in the Tribunal's order dated 23 January 2023 as follows:

> It is recalled that in, its judgment of 21 November 2017, the Tribunal decided that:
>
> - the decision to reduce the appellant's pension by 67%, instead of 60% as recommended by the Disciplinary Board, is annulled for failure to give reasons;
> - the appellant's other claims are denied; and
> - the respondent shall reimburse appellant's justified expenses, as well as the costs of retaining counsel up to a maximum of €1,000.
>
> On 14 December 2017, the appellant requested "a revision of the appeal 1104 with a rehearing in accordance with Rule 29, Annex IX, Appendix 1, NCPR / Article 6.8.4 (b) Annex IX, NCPR, 'due to the fact that a determining fact and evidence had been ignored at the hearing and had not been known by the Tribunal and the appellant at the time of the Tribunal's judgment'."
>
> In an Order dated 26 March 2018, the Tribunal denied the appellant's request for revision of the judgment in Case No. 2017/1104 and for a rehearing.
>
> On 4 September 2022, the appellant made a second request for revision of the judgment of 21 November 2017. He requested in particular that the Tribunal annul the disciplinary decision of COMAIRCOM, communicated to him by letter dated 7 November 2016, reducing the appellant's pension permanently and which the Tribunal corrected only partly; that the Tribunal order COMAIRCOM payment of the full NATO-Pension to the appellant as of 1 November 2016; that he be compensated for the damage caused by the malicious application of the disciplinary procedure; and that he be reimbursed the costs of retaining counsel, travel and subsistence. He submits that he has recently become aware of the fact that falsified documents were given by the respondent to the German authorities, which he claims lie at the basis of his seven-year prison term.
> ….

12. The appellant's second request for revision and a rehearing was denied by the said order of 23 January 2023. The Tribunal held, inter alia, "that the Registrar of the Tribunal acted correctly and in accordance with the relevant rules" (paragraph 27). Furthermore, the Tribunal added that the appellant had "resorted to insulting language. This is at variance with the decorum of this Tribunal and its proceedings and cannot be accepted" (paragraph 31).

13. In the meantime, the appellant had submitted a further request for administrative review to the respondent, dated 13 November 2022, "in regards to illegal activities by the NATO Administrative Tribunal." Among the remedies the appellant sought are: "The

members of the present Tribunal are biased. Different judges should be tasked to treat my case 2017/04."

14. Having received no answer, the appellant submitted a complaint, dated 1 February 2023, in which he argued that the "Organization has intentionally ignored action causing damage to me and refusing clarification in my case for the benefit of the organization. The non-activity of the Secretary General has helped the [Tribunal] to illegally proceed and produce an illegal order causing harm, trouble, work and effort". The appellant sought remedies in the form of compensation totaling 5 000 EUR.

15. On 23 April 2023, the appellant filed a new appeal with the Tribunal. This appeal was registered as Case No. 2023/1366. The appellant requested that the Tribunal, *inter alia*, "order the staff of the Secretary General to … respond to the Appellant's Administrative Request dated 13 November 2022… and to respond to the Appellant's Complaint dated 1 February 2023 …".

16. By message of 16 August 2023, the appellant withdrew his appeal in Case No. 2023/1366. The case was closed by order dated 25 August 2023.

17. It was only by message of 28 August 2023 that the respondent confirmed receipt of the request for administrative review and of the complaint, alleging that "the receipt of these letters was recorded by the International Staff, but the letters never reached their respective addresses."

18. The Tribunal is aware of the fact that, in addition to the aforementioned documents, numerous other messages and letters were exchanged between the parties. For the sake of clarity and with a view to concentrating on the relevant material, these are not considered.

19. The present appeal was filed with the Tribunal on 21 August 2023.

C. Summary of parties' contentions and legal arguments

(i) The appellant's contentions

Admissibility

20. The appellant insists from the outset that the appeal "is not about the contents or a dispute of the Administrative Review and the Complaint, but about the neglect of the organization for processing them according to the [Civilian Personnel Regulations] NCPR". Further, in his reply, the appellant emphasizes: "Appeal 1375 requests the [Tribunal] NAT only to judge that my documents, a Request for Administrative Review…dated 13 Nov 2022, …and a succeeding Complaint …dated 1 Feb 2023 were legally received by the Organization … but that they had not been handled as laid down in the NCPR but ignored by the NATO International Staff".

21. The appellant is of the view that “the legal interest … in this Appeal is to ensure that legal documents according to the NCPR are, and will be correctly handled by the Organization, regardless of their contents”.

Merits

22. The appellant alleges that he “suffers not only financially and by dedicating his life-time to the illegal practices applied by the [International Staff] IS, but they cause grievance, harm and anger, affecting his health and his social life”.

23. In his last written submission, the appellant asks the Tribunal to order:

- the Respondent to provide evidence of the “letters” …, i.e. that they are the Administrative Review, the Reminder and the Complaint according to the NCPR of the Appellant and their delivery dates;
- the Respondent to provide a response from the Organization's Postal Service to the request of the Appellant, dated 23 June 2023, … and the reason, why the Appellant's request had not been answered;
- the [Head of NATO Body] HoNB to process “ex tunc” the “letters”, … supposed to be the Request for an Administrative Review dated 13 Nov 2023, the referencing Reminder dated 23 Dec 2022 and the Complaint dated 1 Feb 2023 of the Appellant and have a Complaints committee established;
- the HoNB to pay compensation of an amount of the pension reduction from Nov 2022 to the Appellant until settlement of the Complaint dated 1 Feb 2023;
- the HoNB to reimburse expenses for the travel and subsistence for the Appellant and his wife.

(ii) The respondent's contentions

Admissibility

24. Pursuant to the respondent, the appeal is manifestly inadmissible as:

- it is time-barred;
- it is not within the Tribunal’s jurisdiction;
- it is moot because the relevant issues were decided by the Tribunal in its order of 23 January 2023; and
- the appellant has no *locus standi* (legal interest).

Merits

25. In the respondent’s view, the appeal is manifestly unfounded as well. The respondent believes that IS cannot be faulted for not responding promptly to the appellant’s request for administrative review and/or to the complaint since both were filed outside applicable time limits, and both were making demands which were manifestly beyond the competences of the IS.

26. The appellant was provided with a substantive answer to the request for administrative review as well as to his complaint. Any inefficiencies in communications

should be seen against the backdrop of a “veritable avalanche of opaque letters and emails from the appellant”.

27. The respondent requests dismissal of the appeal and seeks compensation from the appellant for abuse of process.

D. Considerations and conclusions

(i) Admissibility

28. Article 62, when read in conjunction with Article 61.1 of the CPR, stipulates that for an appeal to be admissible, appellants must consider “that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment, including … contracts, NATO regulations governing personnel and other terms of appointment and wish to challenge such decision…”. Footnote 1 clarifies that for “retired staff this includes any decision on a matter deriving from or related to their conditions of work or of service”.

29. Accordingly, it is an indispensable element for the admissibility of an appeal that it deals with a decision affecting the conditions of work or service. The appellant does not contest any such decision. On the contrary, by insisting that his appeal is not about the contents of his request for administrative review and the complaint itself, but rather about the organization’s neglect in processing them in accordance with the CPR, the appellant obviously and intentionally fails to meet minimum requirements for admissibility. Bound by the CPR regarding its competence, the Tribunal is not empowered to deal with the present case (*cf.* also Article 6.2.3 of Annex IX to the CPR) *ratione materiae* (subject matter).

30. Further, the pre-litigation proceedings as prescribed by the CPR are strictly connected to their purpose, i.e. the oversight of decisions that affect the conditions of work and service of staff and former staff. Contrary to the appellant’s belief, there is no abstract right to the adherence to procedural rules without submitting a substantive decision to judicial review. Pre-litigation proceedings are not an end in themselves. Since the appellant expressly refuses to include the contents of his request for administrative review and/or complaint into the appeal, he has no legal interest worthy of protection.

31. Also, the Tribunal takes note that the present appeal is identical to the previous appeal in Case No. 2023/1366. The latter appeal was withdrawn, and the case was closed by order of 25 August 2023. Therefore, the issues addressed by the previous appeal are to be regarded as being definitively resolved. It is not within the appellant’s discretion to revisit the issues of his previous appeal by filing a new one. Legally speaking, the current appeal is considered *res judicata* and cannot be reconsidered by the Tribunal.

32. Finally, the Tribunal recalls that it shall only entertain appeals which have been submitted within the prescribed timelines. In this respect, pursuant to Article 6.3.1 (d) of Annex IX to the CPR, a 60-day time limit starts to run when the Head of the NATO body has failed to act on a complaint within 30 days of receiving it. The Tribunal observes that,

according to the appellant's submission, his complaint was delivered to the IS on 7 February 2023, and it did not elicit any response from the respondent. It follows that the relevant deadline started to run on 10 March 2023, and expired on 9 May 2023. However, the present appeal was submitted only on 21 August 2023, well past the prescribed deadline. Therefore, the Tribunal concludes that the appeal is submitted late.

33. It follows that the appeal is inadmissible for each of the various reasons stated above.

(ii) Merits

34. In light of its inadmissibility, it is neither necessary nor useful to address any potential merits of the appeal.

E. Costs

35. 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 […]

36. The Tribunal finds that there were no good grounds for the appeal. Given the appeal's lack of success, reimbursement of expenses is not justified.

37. The Tribunal takes note of the respondent's request to apply Article 6.8.3 of Annex IX to the CPR provision in the present case. Article 6.8.3, *inter alia*, reads:

> In cases where the Tribunal finds that the appellant intended […] abusive use of the appeals procedure, it may order that reasonable compensation be made by the appellant to the NATO body in question. If so ordered, the amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the NATO to the appellant or otherwise, as determined by the Head of the NATO body in question.

38. Echoing the principles described above, the International Labour Organization Administrative Tribunal, in its Judgment no. 4357, noted at consideration 17 that: "*The complainant ought to have appreciated that a right to bring proceedings in the Tribunal is not a license to litigate on any topic raising any conceivable argument and do so repeatedly. It unreasonably taxes the resources of the defendant organization and also the resources of the Tribunal. It is tantamount to an abuse of process that needs to be deprecated in the strongest terms*."

39. Until now, the Tribunal has met the appellant's attitude with generous understanding and has decided to dismiss the respondent's request in this case. However, the appellant is informed that the Tribunal is ready to apply this article in future instances should he not refrain from further abuse of the appeal procedures.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed in full.

Done in Brussels, on 22 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0010

Judgment

Joined Cases Nos. 2023/1354-1376

PF

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 23 February 2024

Original: English

Keywords: disciplinary proceedings, additional investigations, disciplinary sanction; post transfer (Articles 4.1.1 and 57.4 CPR; compensation for non-material damage.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization ("NATO"), composed of Ms Louise Otis, President, Ms Anne Trebilcock and Ms Seran Karatarı Köstü, judges, having regard to the written procedure and further to the hearing on 30 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (the "Tribunal") has been seized of two appeals by Mr PF brought against the NATO Support and Procurement Agency ("NSPA"). The first, dated 10 February 2023 and registered as Case No. 2023/1354 on 15 February 2023, seeks annulment of a disciplinary measure involving a suspension without emoluments for six months, plus damages and costs. On 13 July 2023, under Rule 16 of the Tribunal's Rules of Procedure, the appellant requested submission of additional documents, to which the respondent objected on 8 August 2023. On 21 August 2023, the President of the Tribunal agreed to the inclusion of additional documentation, without prejudice to the merits.

2. The second appeal, dated 1 September 2023 and registered as Case No. 2023/1376 on 7 September 2023, seeks to annul a transfer and amendment of the appellant's contract, or if this is not possible, an award of an indemnity for loss of job, plus costs. Cases Nos. 1354 and 1376 were joined by order of the President dated 12 September 2023.

3. In Case No. 2023/1354, the respondent's answer, dated 17 April 2023, was registered on 28 April 2023. The appellant's reply, dated 31 May 2023, was registered on 7 June 2023. The respondent's rejoinder, dated 5 July 2023, was registered on 11 July 2023.

4. In Case No. 2023/1376, the respondent's answer, dated 10 November 2023, was registered on the same day. The appellant's reply, dated 4 December 2023, was registered on the same day. The respondent's rejoinder, dated 14 December 2023, was registered on the same day.

5. A hearing of both cases took place in the same sitting at NATO Headquarters on 30 January 2024; in the light of the disciplinary aspects involved, the Tribunal held the hearing in camera. The Tribunal heard arguments by the representatives of the appellant and the respondent, 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, a citizen of France, joined NATO (in the NATO Maintenance and Supply Agency, NAMSA) in 2000 at Grade A5. He became Director of Procurement, Grade A6, on 1 November 2001. As from 1 January 2008, he had a contract of indefinite duration. In line with a NATO organizational reform, his contract has, as from 1 July 2012, been with the NSPA; it specified that all other conditions remained unchanged.

(i) Disciplinary action

8. On 23 February 2022, the Principal Legal Advisor filed a complaint alleging inappropriate behaviour by the appellant, with reference to Chapters 3 and 7 of the NSPA Code of Conduct. At the time, both were members of the NSPA's executive leadership. Around 8 March 2022, the NSPA General Manager ("GM") notified the appellant orally that a complaint against him had been filed, without more information. Having found that the complaint was not filed in bad faith, frivolous, harassing ["vexatoire"], or manifestly unfounded, she appointed an investigation panel of two external individuals. They were mandated to "examine the veracity of the alleged facts through a thorough investigation." They notified the appellant of the complaint on 21 March 2022, and sent him a copy by email on 25 March 2022, while inviting him for an interview. He sent written comments on 11 April 2022.

9. On the same day, he wrote an email to the GM evoking the possibility of applying a rule that would entitle him to a loss of job indemnity, with a proposed retirement date of 30 June 2023. He also stated his "perception … that you do not want me as a full-fledged member of your Senior team," with alleged consequences for his health and family life. She replied on 25 April 2022, rejecting that allegation and stating that she would take a decision on his proposal "after evaluating all due and valid reasons and consequences…". She wrote, "Please be assured you remain an important member of the EMB [Executive Management Board]."

10. The GM received the Investigation Panel Report on 27 April 2022. The report explained its mandate, methodology, references used, and validity of proof in relation to the six incidents referred to in the complaint. It examined each of the accusations and the accused's comments on them in detail. The panel found, inter alia, that the appellant was unwilling to accept the complainant's role in relation to contracting and instructions given on a recurring taxation issue. This had led a difficult relationship between them and their respective subordinates.

11. The panel further found that while the appellant had acted out of concern to protect the interests of the Agency, he had repeatedly questioned his colleague's legal opinion in several important matters, with copies to many colleagues within NSPA, thereby undermining legal advice and causing a professional and personal impact (headaches, etc.). Most seriously, the panel found that the appellant had made disparaging comments which disrespected and undermined the complainant's professional reputation with an authority outside the NSPA.

12. The complainant had also alleged that similar behaviour had been directed against other individuals in NSPA in cases of differences of opinion. The panel stated that the complainant had offered no proof of this, and that further investigation of this went beyond its remit. The Investigation Panel thus found the alleged facts to have been proven for some but not all of the claims in the complaint.

13. In general conclusions, the panel referred inter alia to misunderstandings between the appellant and his colleague about their respective roles, a lack of a spirit of cooperation and openness, provocation of bad feelings for both, the complainant's

genuine feeling of impact on his well-being by the interaction with the appellant, and a lack of ill intent on the part of the appellant towards his colleague.

14. On 13 May 2022, the GM wrote to her (now former) Chief of Staff (CoS), delegating to him "the authority to decide whether or not disciplinary proceedings should be initiated," and citing her reasons for the delegation.

15. The CoS undertook four supplementary witness interviews between 30 May and 3 June "to further clarify and understand what had occurred." Two confirmed some accusations in the complaint, while the other two staff members held the view that the appellant had not tried to undermine the complainant. The questions posed to each tracked the original complaint, but the CoS added a new question for each: had the person witnessed "any other conduct by the Director of Procurement which you considered inappropriate behaviour"?

16. On the basis of the investigation report and the supplementary evidence he had gathered, the CoS concluded that the following facts were established and constituted misconduct by the appellant (details are omitted):

(a) he had humiliated and undermined the complaining colleague in relation to a legal case;
(b) he had undermined legal advice regarding a tax issue;
(c) he had made offensive remarks about the colleague to a third party; and
(d) he had attempted to undermine the colleague's legal opinion on another issue.

17. The CoS's report, dated 13 June 2022, also set out "mitigating and aggravating circumstances" (most of which were aggravating), before recommending the appellant's dismissal. The appellant was granted 15 days to submit documents or evidence, which he did on 5 July 2022.

18. On 11 July 2022, the CoS wrote to the GM, saying that he had concluded that the appellant's conduct "clearly constituted misconduct," and had decided to maintain the disciplinary action he had proposed. On the same day, the GM mandated him to chair the Disciplinary Board ("the Board") set up to hear the case. The other members were a Programme Manager and a staff member nominated by the Staff Association.

19. The appellant expressed his reservations as to the CoS's impartiality in a message to him of 18 July 2022. In a communication of 4 August 2022, the CoS notified the appellant of his rights under the disciplinary procedure. The appellant replied on 8 August 2022, inter alia objecting to the CoS as a member of the Board on grounds of bias and conflict of interest.

20. On 10 August 2022, the CoS asked the GM to permit him to step down as chair of the Board. She agreed, while rejecting the objections brought forward earlier by the appellant. The CoS directed the Board to suspend its work pending the designation of a new chair and informed the appellant of this on 22 August 2022.

21. On the day of her appointment in mid-September, the newly appointed NSPA Head of Human Resources (HR) was tasked with chairing the Board and informed the appellant of this on 28 September 2022. She noted that the Board had decided to contact

the three additional witnesses proposed by the appellant before hearing from him, and that it would "disregard any information gathered in the interviews by the former chair." The Chair of the Board shared with the appellant the written responses received from the new witnesses.

22. The HR Head asked the appellant to maintain confidentiality. She later reported that he had entered her office without an appointment on 12 October 2022, seeking an informal discussion about the case, which she refused. The Board interviewed him on 17 October 2022.

23. The Board's report, completed on 31 October 2022, found that misconduct had occurred in the instances referred to above, except for the exclusion of the complainant from a meeting, which it found not to constitute misconduct. The report was unanimous except as to the penalty to be imposed; the required majority of two recommended dismissal, while the third member recommended written censure.

24. In a letter delivered in person on 11 November 2022, the GM informed the appellant of the Board's recommendations and her intent to follow the majority recommendation of the sanction of dismissal. The appellant submitted his comments to the GM on 24 November 2022, and they met several times. Between September and December 2022, the appellant also initiated discussions about the disciplinary action with an official of the NSPO (which is external to NSPA).

25. On 5 December 2022, the appellant wrote to the GM, referring to a possible amicable settlement that could involve his retirement. He recognized inter alia that, "I read and understand that my opinions and recommendations may have been perceived as discomfort by [his colleague] and I do regret the annoyance caused[;] this was unwillingly [sic] to him." The same day, a government representative to NATO asked the Head of HR for an update on the disciplinary procedure involving the appellant, but she declined to discuss it. The appellant later stated that as the only French staff member at the highest grade in the Agency, he had felt it important to mention the impending disciplinary sanction to this government representative.

26. On 12 December 2022, the GM communicated her final decision on the disciplinary sanction. This letter also referred to exchanges in which the possibility of the appellant's resignation had been discussed. In this regard, she said, "I would be prepared to suspend the entire disciplinary process sine die if, before taking my final decision, you notified me of your resignation in writing and if you sincerely expressed genuine remorse and responsibility for your actions, which I would then be able to use to justify and support my decision."

27. The letter continued, "In light of the established facts as well as of the content of the entire disciplinary file, I am of the opinion, as were all members of the DB, that your actions imperatively warrant a sanction. … [Y]our misconduct is very serious; you repeatedly, consistently and over a certain period of time humiliated and undermined [the complainant] … (and/or attempted to do so) in direct contravention of your obligations under Article 12.1.4 of the NATO Civilian Personnel Regulations (NCPR) and NSPA Operating Instruction 4400-01." She then set out the various options for sanctions before deciding to impose the sanction of temporary suspension as from 1 January 2023,

entailing the withholding of his “emoluments in whole” for a period of 6 months, pursuant to CPR Article 59(3)(d). This is the final decision that is being appealed.

28. In her letter, the GM also stated that the appellant had inappropriately sought information from members of the Board. While stating that she had not taken this into account for purposes of determining the suitability of suspension, she expressed her “valid concerns” about his continued role as a senior executive in the Agency, and that his eventual return to it “may present an unacceptable level of risk.” On the same day, the appellant wrote to ask for a suspension of the penalty, without giving reasons; the GM rejected this the next day.

29. Subsequently, the Head of HR reported that the appellant had announced to all participants at a staff meeting on 15 December 2022 that he had received a six-month suspension. On the same date, the GM sent an NSPA notification designating the Acting Director of Procurement as from 1 January 2023, pending further notice. On 9 January 2023, the appellant was informed by HR that he was not to conduct any professional activity on behalf of NSPA, directly or indirectly, and that he should not contact any NSPA staff, with the exception of the GM and the Head of HR. He agreed to this on 11 January 2023.

30. In the communication from the Head of HR dated 16 January 2023 regarding the impact of the suspension on his benefits, the appellant was advised that in relation to his pension rights, “the period of suspension will not be included in the length of service and will not be included in the calculation of the pension rights.” As established at the hearing, the GM did not seek permission for this measure from the Secretary General of NATO. The appellant was able to maintain his health insurance by paying the employee premium, while the Agency covered the employer’s two-thirds portion of this cost. He also retained the education grant for his dependent child.

31. In early February, the appellant asked for suspension of the contested decision under Article 6.3.5 of Annex IX of the CPR. This was refused.

32. Documentation showed that in 2020, a previous GM had imposed a written censure on the appellant, under Article 59.3(b) of the CPR, on the basis of a complaint by several other staff members. The Fact-Finding Panel established to examine it, which had included the current complainant, had concluded that three of seven allegations were founded. The behaviour complained of was of a similar nature as in the current complaint, although the appellant believed the earlier complaints had been in response to his ratings of the complainants’ performance. Performance reviews for the appellant for 2015 and 2017-2019 mentioned some “informal” complaints from staff, without details. The earlier complaints had led to the written censure in 2020.

33. The appellant’s performance report for 2021, prepared by the current GM, gave an overall rating of “fair.” The GM noted a continuing challenge around team building, with the Procurement Office often failing to include the Office of the Legal Advisor and competition advocate early in the process. She further wrote, “The last 3 appraisal cycles revealed that [the appellant’s] skills and competencies no longer match the agency’s needs”. The appellant objected to this statement, maintaining that those reviews had

been tainted by personal considerations that were not related to his professional qualifications.

(ii) Transfer and amendment of contract

34. Beginning in 2022, discussions were underway regarding changes to the organization and staffing of the NSPA. These resulted in a directive amendment dated 28 March 2023, approved on 25 April, to remove various references to the post of Director of Procurement ["directeur des achats"]. The annexed organigram showed the function of a director of acquisitions ["direction/acquisitions"] in a new post just below the top tier management.

35. On 28 April 2023, the GM requested that the Agency Supervisory Board (ASB) grant a temporary delegation to enable her to change the Organization and Personnel Establishment (O&PE) between 1 July and 31 December of that year, within the authorized budget and number of posts. Under a silence procedure, as from 27 June 2023 she was permitted to create a post outside the normal review cycle while freezing the existing post of Director of Procurement, which was being filled ad interim. In a town hall meeting of 30 June 2023, the GM stated that she had been working on a reorganization over about the last six months. During this period, the appellant had no access to internal NSPA communications.

36. In a telephone call of 5 June 2023, the appellant was invited to an appointment with the respondent's health service, scheduled for 30 June 2023, for medical clearance to return to work. After this appointment, the doctor escorted the appellant to the office of the GM, who was accompanied by the Head of HR and the latter's assistant. Information was provided orally about a decision to create a new directorate of acquisition and a new A-6 advisory post. The appellant's and the respondent's understandings about the two posts differed. The appellant neither accepted nor rejected the transfer.

37. The appellant returned to work on Monday, 3 July 2023, the first working day following the suspension. The GM immediately informed him, in the presence of other staff, that he had been reassigned from his post as Director of Procurement to become Principal Advisor to the General Manager for Procurement and Contracting Innovation, in the same location and at the same grade. She told him that no job description was yet available, but would be by the end of that week. Then and later, he voiced his view that there had been a misunderstanding about the post to which he would be transferred.

38. The GM provided him with a communication of the same date which stated: "After having consulted with you regarding my intent to transfer you to another post …., in accordance with NCPR Article 4.1.1, I will assign you to the new post we discussed on Friday as soon as the post in question is established. The post description will soon be finalized and shared with you. …I consider your transition to these new duties to be in the best interest of the Agency. In your new post, you will serve as Principal Advisor to the General Manager for Procurement and Contracting Innovation….." The appellant acknowledged receipt with the notation, "transfer not consistent with the Director of Procurement position description."

39. On 5 July 2023 the appellant objected by email to the transfer, noting that the advisory post did not exist, was not funded, differed considerably from his post and was subordinated to the GM rather than being part of the EMB. Not long after, the appellant's office was moved to a location next to the GM's office.

40. In her written confirmation of the transfer, dated 13 July 2023, the GM indicated that it was effective as from 17 July, and explained that this entailed amendment of his contract. The appellant rejected what he saw as a change from his contract of indefinite duration into one of fixed duration. At the hearing, the respondent clearly stated that the appellant retains a contract of indefinite duration. The transfer was officially announced on 13 July internally and on 18 July to the Nations.

41. In an email of 20 July 2023, the appellant explained why he could not agree to sign the contract amendment, saying he had not been consulted, or to the transfer to a position that "does not reflect the same level of responsibility" as before, and for which future funding was uncertain. The appellant nonetheless submitted an outline of his recent activities, and he and the GM met in late July and late August.

42. Following the appellant's sick leave from 5 September to 2 October 2023, he worked in home office for medical reasons for the next month. He notified the GM of the authorization to return to work using telework on 10 October 2023, when he also asked to participate remotely in senior staff meetings. This elicited a reply on 17 October in which the GM referred to "micro-aggressions" and stated that she was "now reaching the stage where I consider your behaviour to constitute harassment" and suggested that "further disciplinary measures" might be necessary. In his response of 23 October 2023, he expressed confusion, a desire that nothing should be construed as a microaggression, and an explanation of his query about the meetings. He also informed her that he would be returning to the workplace on 2 November 2023.

43. The GM submitted a proposal for reorganization of the Agency, with a staffing table for 2024, to the ASB on 25 October 2023. A revised version, submitted to it on 29 November 2023, included eliminating the post of Director of Procurement and creating a post of Director of Acquisition as from 1 January 2024. This was among many other changes the respondent has described as aiming at improving efficiency, effectiveness and speed in response to client needs.

44. As part of the EMB, the post of Director of Procurement had entailed responsibility for the work of around 350 staff. The post to which the appellant has been transferred involves no such responsibilities and has much more limited consultations with other staff. Meetings scheduled every two weeks (aside from leave periods) occur only in the presence of a third party, in an effort to avoid misunderstandings between the GM and the appellant.

C. Summary of parties' principal contentions legal arguments and relief sought in Case No. 2023/1354

(i) The appellant's submissions

45. The appellant seeks:
- annulment of the decision of 12 December 2022 imposing a temporary suspension from duties entailing the withholding of emoluments in whole for a period of six months, pursuant to CPR Article 59.3(d);
- compensation for non-material damage suffered, assessed at €25,000; and
- reimbursement of all expenses.

(ii) The appellant's contentions

46. The appellant's claims in Case No. 1354 are:
a) violation of Annex X, Article 5.2 of the CPR; lack of mandate; violation of the principles of good administration and impartiality;
b) manifest errors of judgement/violation of the principle of proportionality/violation of Annex X, Article 3.3; and
c) abuse of power/violation of the duty of care.

He is seeking reinstatement as Director of Procurement or, if this is not possible, an award of indemnity for loss of job under Article 10.7 of the CPR, and expenses.

47. In Case No. 2023/1354, the appellant first claims a violation of Articles 5.1 and 5.2 of Annex X to the CPR, alleging that the GM had improperly delegated to the CoS the decision of whether to refer the matter to a Disciplinary Board following receipt of the investigation report. In addition, the appellant alleges a difficult relationship between him and the CoS dating back to 2019, pointing to the latter's impartiality, and that the GM knew of this. Moreover, the appellant was given no opportunity to challenge the CoS's impartiality at the time; he was only invited to acknowledge receipt of the unauthorized report. The appellant argues that the delegation provisions of Section C of the CPR, (vii)(b) (preamble) are irrelevant, and even if they were applicable, such a delegation must be made public. Citing Article 7.4.9 of the NSPA Code of Conduct (CoC), the appellant further argues that the CoS exceeded the mandate given to him, by posing a question unrelated to the complaint at hand, and ignoring the general conclusions of the external investigators.

48. The appellant alleges that the Board did not establish a new report, but rather accepted the CoS's report as "valid, adequate and proportionate". The appellant points to a contradiction between the Disciplinary Board's claiming to disregard any information gathered by the CoS and its later adoption of his report without change. The Board's report did not refer to the new witness testimony provided, and it should not have referred to events of 2018, since OI-4400-01 (the revised NPSA Code of Conduct, effective 14 February 2022) could not be applied retroactively. A further claim is that attenuating circumstances had been ignored. In sum, it is argued, the decision taken was illegal because it was made on the basis of the recommendations of the Board, which had relied on the unauthorized report of the CoS, in violation of Articles 5.1 and 5.2 of the CPR.

49. Further, the appellant alleges manifest errors of judgment and violations of the principle of proportionality and of Article 3.3 of Annex X to the CPR. He cites a large amount of documentation relating to the substance of the various situations that were mentioned in the underlying complaint, stressing that his own views on the issues had been the correct ones. He contends that such differences of opinion with the complainant merely reflected his own concern for protecting the interests of the Agency, and that they did not constitute misconduct (citing Article 3.2.8 of the NSPA CoC).

50. Finally, the Appellant claims that there was an abuse of authority and violation of the duty of care. The allegations here revolve around the GM's proposal of 25 November 2022 to delay the imposition of the penalty sine die if the appellant submitted his resignation and apologized, and the announced future reorganization of the agency.

51. The appellant criticized an announcement by a member of the leadership that his suspension had occurred, claiming harm to his reputation. As further justification for moral damages, he alleges harm to his mental wellbeing as well as financial loss. He vigorously rejects the picture of him painted by the respondent and stresses his long years of faithful service and cordial interactions with other colleagues (several of whose statements he had submitted). He also contests the claim that the GM's decision to impose a lesser penalty than that proposed by the Disciplinary Board meant that the lesser penalty was proportional. She could have opted for suspension without a pay reduction, he argues.

(iii) The respondent's contentions

52. In Case No. 2023/1354, the respondent rejects most of the appellant's contentions, and requests dismissal of the appeal and rejection of all claims. It notes that the investigation report had substantiated the facts in five of the six allegations made in the complaint. In delegating the recommendation on referral to a Disciplinary Board, the GM acted within her mandate, as she did in naming her CoS as chair of the Board. The respondent denies awareness of any difficult relationship between the CoS and the appellant.

53. The respondent argues that it is too late to challenge the delegation by the GM to the CoS, a point the appellant concedes while insisting that the mandate was irregular. The respondent says that in any event, she had the authority to delegate under Section C of the Preamble (vii(b)) of the CPR, as well as under paragraphs 1.4.3 and 1.1.4 of OI-4400-01 and paragraph 2.3 of OI 4400-15.

54. The respondent rejects the accusations of lack of impartiality of the CoS. His request to be recused did not establish that he lacked impartiality; on the contrary. In addition, explanations are offered as to why, in the light of the few high-level posts in the Agency and the vacancy of the HR post at the time, other possible candidates to chair the Disciplinary Board had not been feasible alternatives.

55. The claim that the CoS exceeded his mandate is not in line with the procedure foreseen in Article 5 of Annex X to the CPR. The respondent argues that the Board

engaged in its own examination, including interviews of the persons proposed by the appellant. The Board could have rejected the CoS's findings, but it adopted them.

56. The fact that the GM reduced the sanction testifies to the fact that the appellant's comments and views were in the end taken into account.

57. The respondent also rejects the allegations of non-respect of Article 3.3 of Annex X to the CPR (manifest errors of judgement and non-respect of the principle of proportionality). The latter question was addressed in the GM's notification of the penalty being imposed, when she explained why other options would not have been appropriate.

58. The respondent reproaches the appellant for maintaining that mere professional differences were involved; even so, this would be no justification for inappropriate behaviour. The appellant's role was not as Legal Advisor.

59. The respondent points out that OI-4400-01 (the CoC) applied to any procedure initiated after entry into force on 14 February 2022. The appellant's statement that he meant no harm was no excuse for misconduct, harassment or abuse of authority (referring to the definitions in OI-4400-01). His conduct was intentional. The wording of the GM's letter of 12 December 2022 was aimed at stressing the importance for the appellant to change his behaviour.

60. The respondent recalls the jurisprudence of international administrative tribunals, holding that their role is limited in relation to a disciplinary penalty imposed.

61. The respondent further rejects the allegations regarding Article 3.3 of Annex X to the CPR. It was appropriate to take into account the written censure imposed on the appellant in 2020 when rendering the current decision on a sanction. At the time, the appellant had not objected to the presence of the current complainant as part of the investigatory body for the earlier complaint, and he may not do so now. The respondent also refers to performance reviews from 2015 and 2017-2019 that had referred to earlier complaints against the appellant.

62. In relation to the claims of abuse of authority and respect of the duty of care, the respondent points out that throughout the affair, it has been the appellant seeking a negotiated outcome in his favour, including his intention, expressed to the GM several times, to retire on 30 June 2023. This was the context in which she had mentioned plans for changes in the organization. The respondent refutes the suggestion that it was trying to force him out.

63. The respondent rejects accusations of breaches of confidentiality on its part and refers instead to statements showing that the appellant himself divulged confidential information within and outside of NSPA about the disciplinary situation.

64. While rejecting having caused the appellant harm, the respondent argues that if there was harm, it was self-inflicted. In relation to alleged financial hardship, the respondent notes that the appellant had received the highest salary in the Agency for some time.

65. The respondent refers to various declarations, characterized as "informal complaints", to support its view that the appellant that he posed "a potential threat". It stated that it would take whatever measures were needed for the appellant's reintegration, while making sure that every staff member has the right to a healthy and safe working environment.

D. Summary of parties' principal contentions legal arguments and relief sought in Case No. 2023/1376

(i) The appellant's submissions

66. In Case No. 2023/1376, the appellant seeks:
- annulment of a transfer, decided 3 July 2023, from his post as Director of Procurement to a post as Principal Advisor to the General Manager for Procurement and Contracting Innovation;
- annulment of an amendment of his contract from an indefinite one to one with "definite tenure";
- his reinstatement as Director of Procurement of the NSPA or, should this prove impossible, payment of an indemnity for loss of job as foreseen in Article 10.7 of the CPR; and
- reimbursement of all expenses.

(ii) The appellant's contentions

66. The legal claims in Case 2023/1376 are:
a) violation of Article 4.1.1 and 57.4 of the CPR (right to be heard, violation of contract);
b) abuse of power and abuse of procedure (citing various documents of NSPO and NSPA); and
c) violation of the duty of care.

67. The appellant maintains that the impromptu meeting of 30 June 2023 did not constitute a consultation as required by Article 4.1.1 of the CPR and the right to be heard. It was known when he would go in for medical clearance to return to work. He has no recollection from the meeting of 30 June that the GM had mentioned placing the post dealing with procurement at a lower level, or why a transfer was required in the interest of the service. He did not understand that he was being transferred to an advisory post, and argues that this function was already included in the post of Director of Procurement. The changes also entailed unilateral substantive changes to his contract, he contends. No document was provided to him at this meeting.

69. The appellant complains that the GM ignored his concerns about the new advisory post (not being invited to executive committees, not having the same level of responsibility). He maintains that the action violated both Article 57.4 of the CPR on transfers and his contract, since he was not properly consulted. Moreover, he contends that the rules were changed while he was on suspension, in a way that eliminated the requirement of referral of a proposed transfer to a competent committee. He does not

see any relationship between his dispute with the complainant in the disciplinary matter and the successful functioning of his unit. The appellant submits statements of several colleagues who refute the portrait painted of his behaviour by the respondent. He argues that the disagreements with the complainant had no impact on the unit's results, which in 2022 had achieved a new record.

70. The appellant cites various texts involving reorganization, along with the rarity of creating a new A6 post, in support of his claims of abuse of authority and of procedure. The allegation of breach of the duty of care relies on his transfer without prior consultation to a post of lesser responsibility, without his agreement and without explanation. In support of this claim, he recalls having to move from his office to a smaller one within a week of the 3 July meeting, when he was still Director of Procurement. The appellant has seen this, together with his exclusion from various meetings, as humiliation in front of his colleagues. The appellant claims that the transfer was a disguised sanction to lead him to resign, and that he has been isolated by the GM, who has refused his participation in various working groups.

71. The appellant contests the respondent's claim that Article 4.1.1 of the CPR can validate a transfer to any kind of post. Here, the functions and responsibilities have been substantially altered. He also maintains that the GM used her authority to achieve an aim other than the one having justified it (which was increasing flexibility and responding to client needs in a rapidly evolving geopolitical environment). Nor had she informed the ASB of the creation of the new advisory post – this was an abuse of authority, in the appellant's view. She transferred the appellant to a new post that was not yet recognized by the Nations, after having emptied the post of Director of Procurement of its content. This post was then later eliminated, thus avoiding payment of indemnity for loss of job, he contends. He adds that this option had been mentioned as possible relief in his appeal simply in case there was a difficulty in restoring him to his former post.

(iii) The respondent's contentions

72. In Case No. 2023/1367, the respondent urges dismissal of the complaint as inadmissibly vague, and argues moreover that the claim for an award of an indemnity for loss of job is inadmissible for several reasons.

73. The respondent maintains that the GM had shared her plans for restructuring with the appellant some time ago, and that he had expressed a desire to retire several times before and after he was suspended. The reorganization plans became concrete in April 2023, when the ASB was asked to decide on the GM's proposal for the second half of the year. This included transferring several units, among them purchasing, which was to fall under the supervision of the new Chief of Staff, and a temporary delegation of authority to the GM to carry out the changes. Approval for these came only on 27-28 June 2023.

74. The respondent maintains that the GM told the appellant on 30 June and 3 July 2023 that it was not in the interest of the service to re-establish him as Director of Procurement, and that she intended to assign him to another post under Article 4.1.1 of the CPR. The HR Head corroborates this recollection, and the respondent finds the

appellant's alleged misunderstanding as not credible. Sufficient consultation took place, and the CPR required no particular form or time frame for this, the respondent maintains.

75. Citing various precedents in international administrative law, the respondent justifies the transfer as necessary to ensure the harmonious functioning of the service, in the light of the official and unofficial complaints about his behaviour. His temporary suspension would not have achieved this result. Through his own behaviour, the respondent himself had made it impossible for him to return to his previous post. Transferring him reduced the risk of fresh incidents. The respondent thus rejects the claim of abuse of authority. That the appellant is popular with some is beside the point, as are past procurement results.

76. The respondent considers the reference to Article 57.4 of the CPR to be irrelevant, since the transfer occurred under Article 4.1.1. The latter requires only a new placement in the same location. There is no point in comparing the old and new posts, it argues. They were at the same grade, the new post can have a significant impact on the effectiveness of the Agency and its position in NATO, and it is not for the Tribunal to substitute its evaluation for the administration's. Under the appellant's contract, which refers to the CPR, he has no right to exercise only functions similar to those of Director of Procurement or to refuse other duties. The transfer was thus valid, the respondent maintains.

77. The respondent rejects having violated the duty of care. In November 2022, the GM had written to the appellant that she did not believe he could change his behaviour; the message delivered on 30 June 2023 that he would be transferred in the interest of the service was not a surprise. Ideally, the move out of the former post into the new one should have been simultaneous, but the administration had to react as quickly as possible in the light of events. The possibility for reassignment was quite limited, given the official's high grade; he could not be guaranteed a role that was as attractive or prestigious. The description of the new job was ready by 13 July, not long after the appellant's return to work.

78. The respondent states that the appellant has no right under his contract or Article 4.1.1 to hold a particular post. The respondent also sees the appellant's claims as speculative, as he seems to argue that his job should have been eliminated in the restructuring, thus entitling him to an indemnity for loss of job. Such an indemnity is payable only when it is due.

79. The respondent denied that the appellant was being ignored. He was not invited to certain meetings because they were not related to his new tasks, and in any event the GM was awaiting his work plan as a guide. There has been no violation of the duty of care, especially considering the appellant's expressed wish to retire. It is up to him to adapt to the new post.

80. The respondent considers the claim for payment of a loss of job indemnity to be inadmissible. There has been no decision on this point that could be appealed. Nor has his employment ended. The question is hypothetical. None of the situations listed in Annex V of the CPR is involved, it adds.

E. Admissibility

81. The challenged decisions were taken directly by the Head of the NATO body, and can thus be appealed directly to the Tribunal. Both cases were filed within the relevant time-limits. There was no objection to admissibility in Case No 2023/1354. In Case No. 2023/1376, the respondent argues that the appellant's claims are too obscure and vague to be receivable. Without prejudice to the merits, the Tribunal does not find this to be the case. In addition, the respondent objected in that case to admissibility of a claim for alternative relief in the form of a possible award of a loss of job indemnity. The Tribunal notes that the latter involves a possible remedy rather than grounds for the complaint, and is thus not pertinent to the issue of admissibility of the underlying claims.

82. Both cases fall within the jurisdiction of the Tribunal under Article 6.2 of its Statute. They are admissible.

F. Considerations and conclusions

(i) The disciplinary action

83. Articles 59-60 and Annex X of the CPR and the NSPA Code of Conduct (CoC) set out the framework for the conduct of investigation of complaints and proceedings. The underlying complaint was filed after 22 February 2022, when IO-4400-01 on misconduct (the CoC) revised OI-4400-05 (inappropriate behaviour) and OI-4400-11 (integrity and ethics). The incidents complained of here occurred prior to that date, which meant that the earlier substantive rules on conduct which could be subject to disciplinary action applied to the allegations, whereas the procedure for handling them was governed by the new IO. However, this differentiation had no practical impact on the appellant, since the behaviour complained of was encompassed by both the earlier and later versions.

84. Disciplinary action is taken under the authority of the Heads of NATO bodies in accordance with the prescribed procedure (CPR 60.1, Annex X and the NSPA Code of Conduct (CoC)). Staff members are to be informed of the allegations against them and be entitled to submit comments (CPR, Article 60.3 and 60.4; Annex X, Article 3.2). Disciplinary proceedings are to be initiated by the immediate superior of an A-category staff member (Annex X, Article 5.1(a)), in this case the GM. Under the CoC, the "responsible official" (defined in Article 1.3.25) means the "immediate superior of the alleged offender or HR" who had received the complaint and has the authority to review and investigate it and/or initiate disciplinary proceedings. The responsible official may initiate an investigation (Article 7.3.3), which may be outsourced (Article 7.4.3); the GM chose that option. The investigation report is not to contain legal determinations about the established facts nor indicate whether disciplinary action should be taken (Article 7.8.5). The alleged offender has an opportunity to comment on the report.

85. When an investigation has confirmed allegations, the authority initiating disciplinary proceedings is to prepare a report setting out the facts complained of and the circumstances in which they occurred, along with a proposal of a penalty (Annex X, Article 5.2 of the CPR). The next step is an opportunity for the staff member to submit comments, before possible referral to a Disciplinary Board. The Head of the NATO body is to prescribe disciplinary action after consulting a Disciplinary Board (Annex X, Article 4.1, subject to Article 4.4) and hearing from the staff member accused of misconduct.

86. The Tribunal has held that an agency has significant discretion in administering disciplinary measures, provided basic due process requirements are met (see AT judgment in Case No. 2018/1275 dated 12 April 2019, paragraph 42). Here, as the immediate superior of the appellant, the GM conducted a preliminary review of the complaint (see CoC, Article 7.2) and properly referred it to a panel of external investigators (see CoC, Articles 7.4, 7.5). The GM explained why she, as the person to take the final decision, thought it best to distance herself after this point. The Tribunal finds that under these circumstances, the GM had the authority to delegate the next steps in the process to her CoS, pursuant to Preambular paragraph C (vii)(b) of the CPR, which foresees designation of an official who is authorized to exercise the powers granted to the Head of a NATO body. The GM resumed personal exercise of authority in this matter after receiving the report of the Disciplinary Board.

87. The next question is whether or not the CoS overstepped the authority given to him by doing the additional investigation. Such an interim procedure is not explicitly foreseen in the regulations. However, the Tribunal sees nothing to prevent an administration from undertaking additional investigation of the allegations in a complaint to clarify matters, so long as it remains within that framework and the accused official benefits from the necessary procedural guarantees in disciplinary matters. In this case, in addition to posing questions to witnesses about the specific allegations in the complaint, the CoS added a more general question to probe whether they were aware of instances of improper behaviour by the appellant towards other staff. This went beyond his mandate, since it extended to matters beyond the complaint, and was potentially prejudicial, particularly since he had taken a harsher stance to the appellant than the Investigation Panel.

88. The CoS's report included reference to the imposition of the written censure in 2020. His report concluded with a recommendation of referral to a Disciplinary Board and dismissal of the accused. The appellant was unaware of the CoS's role until receiving a copy of his report on 13 June 2023. The CoS acted properly in asking to be recused from his role as the chair of the Disciplinary Board, following the appellant's objections about his impartiality. But overall, the role played by the CoS in this matter had resulted in several months of avoidable delay in the referral of the disciplinary matter to the Board, since a new chair then had to be named. The handling of the situation was not in line with due process or the principle of good administration.

89. While the new chair of the Disciplinary Board stated that it would consider only the conclusions of the Investigation Panel and disregard information from supplementary interviews, the report itself contradicted this by closely tracking the CoS's conclusions. In the light of the Tribunal's limited scope of review regarding the outcome of disciplinary procedures, the Tribunal cannot say that the Board, on the basis of only the findings of

the earlier investigation report, would not have reached the same majority result. In any event, whether the majority recommendation to dismiss the appellant would have passed the test of proportionality is not a question before the Tribunal.

90. Under Article 8.7.1 of the CoC, the GM was to follow the majority recommendations of the Board unless they were "manifestly unreasonable." She followed it initially, but on further consideration, after hearing the appellant's views, ultimately reduced the sanction to the six-month suspension without emoluments. This reduction of the penalty to suspension rather than dismissal counteracted possible prejudice the appellant may have suffered by the CoS's earlier report and its possible influence on the majority view of the Board. The claim to annul the disciplinary action on procedural grounds is thus rejected.

91. The appellant's claim that his actions did not amount to misconduct is also rejected. Although he correctly points out that disagreement on work-related issues is normally not considered inappropriate behaviour, their manner of communication to others may. Another factor in this case was that both staff members were members of the highest-level executive circle. Once a decision has been taken by the administration, it is to be followed without seeking to undermine another staff member's position, especially vis-à-vis persons outside the Agency. While the appellant insists that he did not seek to harm the complainant, his actions were taken deliberately and on several occasions. Some of the appellant's statements and their tone had the effect of undermining the complainant's authority, humiliating him both internally and externally.

92. The purpose of the NSPA policy on preventing misconduct includes avoiding inappropriate behaviour in the workplace and ensuring that all NSPA personnel are treated with dignity and respect (CoC, Article 1.1.1.2). Such behaviour encompasses "any unwelcome conduct that might reasonably be expected or be perceived to cause offense or humiliation to another person …" (CoC, Article 1.3.1.14.2). A failure to observe the standards of conduct can constitute misconduct (CoC, Article 1.3.1.21). The alleged conduct was similarly discouraged in the earlier versions of the CoC. The appellant's conduct made him liable to disciplinary action (CPR, Article 59.1; Annex X, Article 3.1).

93. The impugned decision is a discretionary one, and as such is subject to limited review by the Tribunal. It can be annulled only if the decision was taken "without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was abuse of authority" (see AT judgment in Case No. 2021/1326 dated 20 February 2022). In deciding on the level of sanction, it was appropriate for the organization to take into account that this was not the first time such behaviour had elicited a complaint against the appellant, who occupied one of the highest-level posts in the Agency.

94. The appellant claims that the six-month suspension without emoluments was disproportionate to the type of behaviour involved, taking into account "the scope and gravity of the fault" (Annex X, Article 3.3). The penalty imposed may appear somewhat harsh when each incident is seen separately, but they were multiple and repeated, with negative effects on the complainant and the smooth functioning of the Agency. The ultimate decision necessarily involved a judgment call on the part of the NSPA, which

reduced the sanction to suspension rather than imposing the Board's majority recommendation of dismissal. As indicated, the Tribunal will annul such a decision only on limited grounds that are not present in this case. The plea to annul the sanction is rejected.

95. The Tribunal has one further observation in relation to part of the sanction as implemented: the GM's final decision of 12 December 2022 referred only to the withholding of the appellant's "emoluments" (i.e. pay and allowances) in whole for a period of six months, under Article 59.3(d). In carrying out the decision, the HR Head notified the appellant in January 2023 that "the period of suspension will not be included in the length of service and will not be included in the calculation of the pension rights." The Tribunal observes that Article 59 of the CPR mentions reduction or suspension of pension benefits only in the case of the more severe sanctions foreseen under Article 59(3)(e) and (f). This reduction or suspension in turn requires the prior approval of the NATO Secretary General, as provided by Article 4.1, referring to 4.4 of Annex X of the CPR, and Article 8.7.3 of the NSPA Code of Conduct. Either the pension-related measure had no basis in law (not being an "emolument"), or it lacked what would also have been logically required as well in such a case, i.e. prior approval by the Secretary General. However, the appellant did not challenge this aspect of the application of the final decision, and the Tribunal must apply the rule of *non ultra petita* (the Tribunal cannot grant more than what was requested).

96. The appellant's allegations of breach of the duty of care in relation to claims of harm to his reputation through disclosure are negated by his own statements to colleagues about the suspension and his seeking support from a government representative. This claim therefore fails.

97. In sum, for the reasons given, the request to annul the disciplinary penalty is rejected. The request for an award of non-material damages is granted in part due to procedural irregularities in the actions involving the role of the CoS, and denied in all other respects.

(ii) The transfer

98. Decisions concerning reorganizations and appointments are within the discretionary power of the Head of the Organization; they are subject to limited review by an administrative tribunal (see AT judgment in Case No. 896 dated 24 October 2013, paragraph 32).

99. The parties disagree over whether this transfer is subject to CPR Article 4.1.1 or Article 57.4. Article 4.1.1 permits the Head of a NATO body "when it is in the interests of the service, … having consulted with the staff member concerned" to transfer the staff member "to another post in the same geographical location." The appellant argues that the rule of Article 57.4 of the CPR is to apply: "Within a system of performance management, the Head of NATO body, having taken account of the views of the staff member, may transfer a staff member to another vacant post in the same location in the same grade and level of responsibility for which the staff member possesses the required qualifications and experience" (CPR, Article 57.4). Its purpose is to provide guidance in relation to filling vacant posts.

100. The post to which the appellant was transferred was vacant (having just been created), and in the same location and in the same grade, but it certainly did not entail the same level of responsibility or prestige as Director of Procurement. The respondent has thus stressed that the transfer was instead based on the "interests of the service".

101. Article 4.1.1 does not create a blank check; reasons must be given. The respondent cited two types. The first entailed broader reorganizational issues relating to the procurement function. In Case No. 896 dated 24 October 2013, the Tribunal found that both Article 4 and 57 "are applicable during a reorganization" (paragraph 39). The second justification offered by the respondent involved concerns about the appellant's past conduct, as established in the disciplinary complaint in this case, in an earlier written censure, and in performance reports (the Tribunal has not countenanced so-called "informal" complaints put forward in declarations as part of the respondent's pleadings), and its fear about future misbehaviour.

102. The Tribunal finds that the main concern in this case was to avoid future incidents involving this type of behaviour. The GM, in her final decision of 12 December 2022, invoked this justification when she suggested that his eventual return to his role as a senior executive "may present an unacceptable level of risk". This points to the interests of the service, i.e. the maintenance of a safe and harmonious work environment (see Article 3.2.1 of the CoC), as the main concern motivating the transfer. Thus in this case, the Tribunal considers that Article 4.1.1 rather than Article 57.4 applies.

103. Prior to a transfer under Article 4.1.1, consultation of the staff member is required. The respondent points to earlier discussions about reorganization and the GM's final decision. But these were general statements that could hardly be seen as a consultation about a specific new post. The parties differ over what was said at the impromptu meeting of 30 June 2023, but it was clear to all concerned by the end of the meeting of 3 July that the post to which the appellant was being transferred was that of Principal Advisor rather than a reconfigured procurement/purchasing executive role. At that point, the written job description was still under preparation, with communication of it to the appellant on 17 July 2023.

104. Although approval for the organizational and staffing changes had come only at the end of June, the GM had been preparing for them at least since before late March, when the proposals were submitted for review. The respondent offers no explanation as to why in the meantime the job description could not have been prepared at least in draft form to share with the appellant immediately upon his return to work, or even before. Good administration involves advising a staff member of the administration's intentions in relation to his or her situation (see AT judgment in Case No. 896 dated 24 October 2013, paragraph 37). Consultations must be based on adequate information, but this was not available to the appellant in writing until around two weeks after his transfer was announced. This failure to consult properly, causing him harm, was not compatible with the respondent's duty of care.

105. In relation to the claim of a violation of the appellant's contract, the contract did not entitle him to hold any specific post, and any claim to the contrary must be rejected. The "Amendment No. 1 to contract of indefinite duration" delivered to him on 13 July

(which the appellant did not countersign) indicated that the post to which the appellant was being transferred was “a Set Duration Post (SDP) and more precisely a Definite Tenure (DT) post,” with all other provisions unchanged. This did not transform the contract from one of indefinite duration into one of limited term. At the hearing, the respondent reaffirmed that the appellant continues to have a contract of indefinite duration. On this basis, the appellant’s claim to annul this aspect of the amendment has become irrelevant.

106. Finally, the appellant’s perception that the administration is trying to force him out, while supported by several statements it had made, cannot overcome the fact that he remains employed in his grade. His contract has not been breached in the process.

107. In sum, in Case No. 2023/1376, the request to annul the transfer is rejected; the continuation of his contract of indefinite duration is confirmed; and non-material damages are justified for a breach of the duty of care.

G. Costs

104. Article 6.8.2 of Annex IX to the NATO Civilian Personnel Regulations 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 […].

105. In the circumstances of this case, where relief has been granted in part, the NSPA shall reimburse the appellant for a portion of the costs of retaining counsel, up to a maximum of €3,000.

H. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The request to annul the decision of suspension dated 12 December 2022 is rejected;
- The request to annul the transfer decided on 3 July 2023 and the related request to have the appellant reinstated in his former post is rejected;
- The status of the contract between the NSPA and the appellant is confirmed as being one of indefinite duration; it has not been breached;
- The request for non-material damages in the joined cases is awarded in the total amount of €15,000;
- The NSPA shall pay the appellant the sum of €15,000 in compensation for the non-material damage suffered by him;
- The NSPA shall reimburse the appellant for the costs of retaining counsel, up to a maximum of €3,000.

Done in Brussels, on 23 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0011

Judgment

Case No. 2023/1374

AL, LR
Appellants

v.

Headquarters Allied Joint Force Command Brunssum
Respondent

Brussels, 23 February 2024

Original: English

Keywords: recruitment, discretionary decision of the HONB, no annulment selection; compensation for non-material damages.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization ("NATO"), composed of Ms Louise Otis, President, Ms Anne Trebilcock and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearing on 31 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (the "Tribunal") was seized of an appeal, dated 6 July 2023 and registered on 11 July 2023 as Case No. 2023/1374, by Ms AL and Ms LR against the Headquarters Allied Joint Force Command Brunssum (known as "JFCBS"). The appellants challenge the decisions to select another applicant for a post and not to select either of the appellants for it, while also alleging several procedural irregularities in relation to the selection process and ensuing harm.

2. The respondent's answer, dated 6 October 2023, was registered on 19 October 2023. The appellant's reply, dated 16 November 2023, was registered on 17 November 2023. The respondent's rejoinder, dated 13 December 2023 was registered on 14 December 2023.

3. The Panel held an oral hearing on 31 January 2024 at NATO Headquarters. It heard the appellants' statements as well as arguments by their joint representative and by the respondent's representative, in the presence of Ms Laura Maglia, the Tribunal Registrar.

B. Factual background of the case

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

5. Ms L ("Ms A") joined the JFCBS in 2011; Ms R ("Ms B"), did so in 2013. Both hold indefinite duration contracts at the A2 level in the Intelligence Division of the JFCBS.

6. Both appellants were included in some of the consultations that occurred in the first half of 2022 about the revision of a job description for a vacant A3 post. The JFCBS opened recruitment in June 2022 for the post of Head of one of the sections in the division. The vacancy announcement briefly described the job and listed "required qualifications," "desirable qualifications" and "personal attributes" sought for this post. The selection board first identified the candidates who in its view possessed the "required qualifications." These individuals were then invited for written tests, oral presentations and interviews that were conducted in late September.

7. The vacancy and job description specified under "required qualifications," inter alia, a minimum of eight years of experience "in intelligence analysis in a national or multinational function, including execution of assessment, planning and managing activities." It listed in addition several "desirable qualifications" and "personal attributes" for the post.

8. Both appellants had over ten years of relevant experience, with ratings as "excellent" in each of their recent performance reviews. As they possessed the "required

qualifications," they were among the eight individuals who were invited to take the examination and be interviewed. On 13 October, the selection board (the "CPSB") made its unanimous recommendation to the Chief of Staff (CoS), who took the selection decision on 25 October in favour of an external candidate. From involvement in an earlier recruitment procedure, one of the appellants had learned of this candidate's profile. On 27 October 2022, each appellant was notified by telephone of the results. Three days later, the CoS called together the internal candidates, including the appellants and in the presence of another staff member, and informed them of the outcome of the selection process.

9. The appellants alleged, with no denial by the respondent, that the successful candidate did not have eight years of experience in intelligence analysis in a non-civilian national or multinational function. The appellants brought this to the attention of their ranking officer, Colonel X, who had been a member of the selection panel. According to the appellants, he admitted that there had been a mistake, and would try to have it corrected; when this did not occur, he allegedly stated that the only way to proceed would be by filing a complaint. In a later statement, he recalled saying that if he had made a mistake, there was no other option than to submit a complaint. The Complaints Committee established in this matter found that a third person had corroborated this.

10. On 21 November 2022, acting without legal counsel at that point, each appellant sent a communication identified as a "complaint". The wording and emphasis differed somewhat for each, but both expressed concern over the selection of a candidate for the position in question "who does not have the required qualifications….". Each alleged that this would place a significant burden on their unit to train and pick up the tasks of the selected individual. Ms B provided details of what was expected in the post. Both expressed a fear that the selection of this individual would result in a loss of credibility and reputation for the division and the agency as a whole. As Ms A put it, "something, be it procedural, administrative or something else – has so obviously gone wrong." The appellants stressed that they were concerned with finding "the best qualified and experienced candidate for the position" in the interest of NATO.

11. Commander Y's identical replies, dated 15 December 2022, noted that each "complaint" was directed against the decision taken on selection for the position in question and that it "does not contest the rejection of your application to the position." Citing Article 61 of the CPR, he concluded that the complaint against the selection, based on a perceived lack of qualifications and experience of that individual, did not relate to a decision directly affecting their conditions of work or of service. He therefore considered each of the submissions to be inadmissible. He ended his replies by noting that no irregularities had been encountered in the selection board process.

12. On 13 January 2023, the joint legal representative of the appellants submitted complaints on behalf of each of them, noting that the earlier "complaints" should be identified as requests for administrative review. In the meantime, the appellants were notified separately in writing on 11 January 2023 that each had not been chosen for the post. They were at some point offered an opportunity to receive individual feedback, but had declined pending the outcome of their challenges.

13. After the actual complaints were lodged in January, the respondent set up a Complaints Committee (CC) to examine the claims. Following several interviews and examination of documents, the CC found in its report of 27 March 2023 that the nominated candidate had met the essential requirements. It also concluded that the selection board had correctly conducted its selection based on the merits, through a competitive process, in accordance with the official job description as presented in the vacancy notice. The CC noted that a specification of "non-civilian" experience had not been included as part of the essential requirements, rejecting the appellants' argument that it should have been. The CC also found that a deliberate choice had been made to hold the written tests as they had been carried out, as part of the assessment of suitability for a leadership role. The CC also concluded that the unsuccessful candidates did not fall within the category of staff to which priority was to be given (e.g. in case of redundancy). The CC recommended rejection of their claims.

14. At the same time, the CC found the following irregularities:
- open discussions took place in advance of the recruitment for this position that involved three internal candidates and three members of the selection board, which later contributed to deteriorating relations, but involved no breach of confidentiality;
- in preparing for the use of the additional test, the administration had failed to review and comply with certain aspects of data protection policies, including failure to state reasons for the use, storage and handling of personal data;
- sending the late written notification of non-selection was not in line with the JBCBS Directive 50-04 (on the recruitment of NATO International and AF Local Wage Rate Civilian Personnel);
- the supervisor had not yet provided individual feedback to the appellants.

15. Since the irregularities did not touch upon the substance of the selection and non-selection decisions, the CC recommended upholding the decisions. In relation to the irregularities, the CC said, however, "it is imaginable that compensation consists of partly money and partly other measures such as an apology."

16. After reviewing the appellants' comments on the findings and recommendations of the CC, Commander Y rejected the complaints in a letter of 8 May 2023. He explained in his five-page letters to each why he considered the complaint inadmissible and that he "acknowledged" the CC recommendation as to possible compensation. This is the final decision being appealed by each applicant here. The person recruited took up duties as the appellants' supervisor in late 2023.

17. At the hearing, the respondent referred to a pending offer of compensation, but each appellant denied any knowledge of this. One of the appellants testified that the new supervisor had been informed that they were pursuing this appeal. A claim that they were being ostracized by some (unnamed) colleagues was also made.

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

(i) The appellants' contentions

18. Both appellants maintain breaches of the following:
- the duty to state reasons – they assert that the decisions challenged state only that the claims are inadmissible, without addressing the substantive comments they had made;
- Civilian Personnel Regulations (CPR) and Directive 50-04, since the successful applicant did not meet the criteria to be called to the test, rendering the outcome of the process illegal;
- the principle of equal treatment – holding the exam in an unclassified setting; use of an example involving a particular country whereas one of the appellant's expertise was in another; questions posed not reflecting the position and job description; and
- the duties regarding confidentiality, the handling of personal data, and feedback.

19. The appellants request:
- annulment of the challenged decisions of 8 May 2023, rejecting the appellants' complaints, and the decisions of 15 December 2022 rejecting the administrative reviews;
- annulment of the decision to select the successful candidate;
- automatic selection of one of the appellants;
- payment of compensation for the prejudice suffered (€8,000 each in moral damages, plus calculation of loss of opportunity and lost financial entitlements); and
- reimbursement of all costs.

20. The appellants submit that the selected candidate should have been disqualified for not complying with an "essential requirement" as listed in the vacancy and job description: a minimum of 8 years of experience "in intelligence analysis in a national or multinational function, including execution of assessment, planning and managing activities." They maintain that the phrase "national or multinational function" excluded experience in a civilian setting, and that experience in knowledge management cannot count as experience in intelligence analysis. They explain in detail what the post entails, and why they have reached their conclusions of the candidate's unsuitability for it. In relation to this, they contest the CC's decision not to hear a witness whose later written statement describing intelligence analysis was submitted with their comments on the CC report.

21. As harm to themselves, the appellants note that the person is to serve as their direct supervisor without holding the qualifications required for the post. This is a source of stress and extra work. They also allege harm to NATO from the decisions taken. In their view, "good and legal" decisions have not been taken, creating a "feeling of injustice" for them.

(ii) The respondent's contentions

22. The respondent rejects the admissibility of both appeals. By focusing on challenging the selection of the successful candidate, and the impossibility of appointing both applicants instead, the appellants' claims are not directed against an act or omission adversely affecting their working conditions (as required for an appeal). Their non-selection was not caused by an incorrect interpretation of the job description, the respondent argues. It also points to their having introduced new claims at various stages of the procedure.

23. On the merits, the respondent describes the selection board's interpretation of the essential and desirable qualifications as "coherent and unambiguous". The phrase "national or multinational function" does not exclude civilian experience. This interpretation does not violate a substantive or procedural rule, and did not disadvantage the applicants. The vetting of candidates was "done holistically" and in accordance with Directive 50-04, the respondent maintains.

24. The respondent stresses that the appellants have failed to say why their non-selection would have affected their working conditions, other than by speculation. There is no right to be selected for a contested post. The respondent says that the appellants have failed to show that they are better qualified and more suitable than the selected candidate. The unclassified test gave all candidates equal opportunity; the candidates were not denied this by not having personal circumstances taken into account. The same interview questions were posed to all.

25. As for the CC findings of procedural deficiencies, the respondent notes that they did not involve "significant errors warranting the setting aside of the results of the competition". There was no causal link between any injury or damage caused and their non-selection, it argues, and the claim for loss of earnings could apply, if at all, only to one of the appellants. The claim for material and non-material damages and injury is unsubstantiated and unfounded, the respondent concludes.

D. Considerations and conclusions

(i) Admissibility

26. The wording of the initial documents submitted by the appellants in November 2022 challenged only the selection of the successful candidate and sought to have it thoroughly reviewed. Given the Tribunal's scope of jurisdiction, this would make their claims inadmissible and preclude adding additional grounds at a later stage (see AT judgment in Case No. 2014/1019 dated 24 October 2014, paragraphs 37-38).

27. However, the appellants took this step before they had received the required written notification of their own rejections for the post. Each of the complaints which the appellants lodged shortly after receiving such notification in January 2023 was directed against the decision to select the successful candidate, the decision not to select the complainant and the decision of 15 December 2022 rejecting the administrative review. Their complaints noted that the decisions to select one candidate and not another were indissociable decisions.

28. Each appellant was not selected for a post for which she had applied, and the result leaves them both under the direct supervision of a person whom they believe does not meet all of the "required qualifications" for the post. The result for them is additional work and stress (according to Ms A) and undermining the value of their own work (as alleged by Ms B). Without prejudice to the merits, the Tribunal considers this claim as potentially having a direct and adverse effect on each of the appellants. In addition, the complaints also listed a number of alleged illegalities in the recruitment process and its results that went beyond the issue of the qualifications/suitability of the successful candidate. Taken as a whole, the appeals are thus considered by the Tribunal to be admissible.

(ii) Merits

29. In relation to the alleged breach of the duty to state reasons, the Tribunal finds that the respondent has provided reasons for rejecting their claims. Seeing the claims as inadmissible, the respondent explained to each appellant why it held this view. This claim of the appeal is thus rejected.

30. Before turning to the allegations of breach of the CPR and Directive 50-04, the Tribunal recalls that decisions concerning appointments are within the discretionary powers of the management of an organization. Thus a decision taken in exercise of this discretion is subject to only limited review by the Tribunal, which "can only interfere with a non-selection decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority" (see AT judgment in Case No 2016/1083 dated 17 March 2017, paragraph 28).

31. The Tribunal finds that the CC engaged in a thorough examination of how the CPSB had proceeded in reaching its conclusion that the process was in line with Article 1 of the CPR, which aims at recruitment based on merit. The selection board's consideration that civilian experience counted towards meeting the essential requirement was a reasonable reading of the somewhat ambiguous wording of the vacancy announcement when it spoke of a "national or multinational function". The Tribunal rejects the appellants' contention that a clearly mistaken conclusion was drawn by the respondent.

32. There was also no abuse of authority in the agency's discretionary decision to consider that "knowledge management" and "intelligence assessment" were — while certainly not the same — sufficiently interchangeable for purposes of screening candidates for a managerial post. The agency conducted a thorough review of the situation, and there is no basis for the Tribunal to conclude that the decision to follow the selection board's unanimous recommendation, and to reject the appellants' related claims, involved a clearly mistaken conclusion.

33. Nor, given the discretion to be afforded to the organization, was there any breach of a rule or obligation in the choices made about the types of examinations administered or in the problem topic selected.

34. There was also no breach of the principle of equal treatment in relation to the examination process. It was proper to choose a topic, in this case signalled in the vacancy announcement, without regard to which particular applicants might have expertise in that area, or their personal circumstances. There was no obligation to pose questions in relation to all aspects of the job or to place enhanced focus on intelligence questions for this post that encompassed managerial duties. No rule was broken, and this claim therefore fails.

35. As a result, the first element of relief requested, annulment of the selection decision taken by the respondent, is denied. It is thus not necessary to address the request to appoint one of the appellants instead, or to examine the claims relating to possible compensation for loss of earnings/emoluments.

36. The Tribunal now turns to consideration of the appellants' claims for damages in relation to breaches that did not affect the outcome of the recruitment process.

37. The appellants have made two types of allegations relating to a breach of the duty of confidentiality. The allegations of a breach prior to the examination and interview phase were not proven. On the other hand, as claimed, the post-decision feedback was given initially to the internal applicants in a group. This was not in line with guidelines in Directive 50-04 regarding confidentiality of the process or their purpose, which is to provide such feedback to each person separately. This part of the claim is therefore granted.

38. Although the outcome of the recruitment process was known by late October, the appellants were not notified of their rejection in writing until January. This was certainly not a timely notification, and the appeal succeeds in relation to this claim. An annex to Directive 50-04 of 28 January 2020 contains a template which provides model wording to inform an unsuccessful applicant of the result, and of the possibility of receiving feedback. The respondent stated at the hearing that feedback may still be provided on an individual basis, and this is to be encouraged.

39. The CC report went into detail about shortcomings in relation to the handling of each appellant's personal data, with effects that extended beyond the period of examination/recruitment. The organization did not act in accordance with the provisions of Annex G to Directive 50-04, inter alia, on this subject. The Tribunal finds this to be the case.

40. As supported by the findings of the CC, the Tribunal finds that the respondent failed to follow certain rules, and that this had given rise to "the hurt sense of justice" claimed by the appellants. As noted in AT judgment in Case No. 2017/1111 dated 23 February 2018, paragraph 110, a "sense of injustice and anxiety suffered by a staff member … may justify a request for compensation for non-material damage suffered if it is found that the administration has committed irregularities and has not met its obligations in applying the legal rules (see AT judgment in Case No. 2014/1022, paragraph 63)." The Tribunal finds this to be the case here.

41. Taking into account the various irregularities and the injury noted, the Tribunal concludes that non-material damages are to be awarded for the breaches of duty shown in relation to confidentiality, receiving information and feedback on a timely basis, and proper handling of personal data. All other claims are dismissed.

42. The Tribunal makes no finding regarding the allegations at the hearing made in relation to the current situation in the section. It draws the attention of the parties to the provisions of Article 5.3.1 of Annex IX to the CPR ("No individual shall be subject to adverse action of any kind because of pursuing a complaint through administrative channels….").

E. Costs

43. 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….

44. The appeal having succeeded in part, the appellants are together entitled to reimbursement of justified attorney fees and expenses up to the amount of €3,000 in total.

F. Decision

FOR THESE REASONS

The Tribunal decides that:

- The appeal is denied in part (annulment of decisions) and granted in part (regarding some compensation for non-material damage).
- JFC Brunssum is ordered to pay compensation for non-material damages in the amount of €4,000 to each of the appellants, for a total of €8,000.
- The respondent shall reimburse the appellant's justified expenses and legal fees up to a maximum amount of €3,000.

Done in Brussels, on 23 February 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0012

Judgment

Joined Cases Nos. 2023/1349–1350

UB

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 5 March 2024

Original: English

Keywords: change in reporting line, admissibility; abusive use of appeals procedure.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü, and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 31 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 27 January 2023 and registered on 13 February 2023 as Case No. 2023/1349, by Mr UB, against the NATO Communications and Information Agency (NCIA). The appellant contests that the decision dated 10 August 2022 allegedly disregarded his job description when assigning duties /tasks.

2. On 27 January 2023 the appellant introduced a second appeal, registered on 14 February 2023 as Case No. 2023/1350, contesting the decision dated 16 August 2022, to change his "TAS" ("timesheet") approval and performance reviewer.

3. The respondent's single answer in Case No. 2023/1349 and Case No. 2023/1350, dated 17 April 2023, was registered on 8 May 2023. The appellant's replies, both dated 17 May 2023, were registered on 4 July 2023. The respondent's single rejoinder in Case No. 2023/1349 and Case No. 2023/1350, dated 4 September 2023, was registered on 28 September 2023.

4. Considering that the appellant also submitted a third appeal, registered on 31 March 2023 as Case No. 2023/1364, and that there was a request from the parties to join the three appeals, by Order AT(PRE-O)(2023)0006 dated 13 October 2023 the Tribunal's President decided to join two of the cases (i.e., Case No. 2023/1349 and Case No. 2023/1350) and to hold the oral hearing for all cases once the written procedure in Case No. 2023/1364 had been completed.

5. An oral hearing was held on 31 January 2024 at NATO Headquarters. The Tribunal 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 relevant facts of the two cases may be summarized as follows.

7. The appellant joined NATO in 2008 and was assigned to the "Engineer (IP Technology Specialist)" post (A2/G15) at the NATO CIS Services Agency (NCSA) in 2020. Following the 2012 NATO Agencies Reform, NCSA was merged into the NCIA, and the appellant has held an indefinite duration contract with the NCIA since 2018. After the establishment of Service, Management, and Control (SMC) as a separate branch within the Chief Operating Office (COO), the appellant's post name was changed to "Data Analyst," effective 1 July 2022.

8. In 2021, a recruitment campaign took place within the Monitoring, Analysis and Reporting (MAR) Section to select two candidates, one for an A2/G15 Data Analyst (same grade as the appellant's post) and another for an A3/G17 Senior Data Analyst (one grade higher than the appellant's post). The recruitment panel found the appellant to be qualified but not suitable for the A3 post for which he had applied.

9. The appellant, in his email dated 14 May 2021, stated that since 2010, he had not hesitated to perform additional tasks as requested; nevertheless he was found not qualified for the above-mentioned position and was not selected. As the position was to perform some of these additional tasks he had been doing, he decided to no longer perform duties for which he was not qualified and to limit his work to remain within the scope of his current job description (JD).

10. On 6 July 2022, in his email to the MAR Section Head (SH) with the subject heading "clarifications of some topics", he requested clarification about his supervisor. He also asked "When asked, do I have a requirement to perform duties which are outside my contract (JD) scope? If yes, do I have to do anything asked without any limitation or is there a limit? If there is a limit what is the limit(s)?"

11. By email dated 10 August 2022, the SH informed him that Mr SC as the Data Analysis & Tools (DAT) team leader was his supervisor, and that she was certain that he had not been asked to do anything out of their agreed strategic objectives and job requirements.

12. On the same day, the appellant requested clarification again, stating that he had previously been asked to perform tasks outside of his JD (except the additional things he did willingly) and wondered if this would continue in the future.

13. In her email dated 10 August 2022, the SH stated that: "We will continue performing the tasks aligning with NCIA GM's strategic goals. All of us receive and execute specific tasks cascaded from that level, I don't believe there is an exception to that…".

14. On 16 August 2022, by email, the SH asked the appellant and the other data analyst (A2) in the MAR to change their reviewing manager to Mr SC (A3/G17 Senior Data Analyst). The appellant made the change under protest.

15. On 9 and 13 September 2022, the appellant raised two requests for administrative review against the decisions dated 10 and 16 August 2022, concerning his job description scope and his reporting line, respectively, which were both rejected on 9 October 2022. He filed complaints on 2 and 3 November 2022 which were both rejected on 30 November 2022 by the General Manager. These are the final decisions being contested in the present joined appeals, Nos. 2023/1349 and2023/1350.

C. Summary of parties' principal contentions, legal arguments and relief sought in Case No. 2023/1349

(i) The appellant's submissions

16. In his appeal to the Tribunal, appellant seeks:
- annulment of the decision dated 10 August 2022, as confirmed by the decisions of 9 October and 30 November 2022;
- compensation for non-material damages, assessed at €5,000;
- reimbursement of the costs of retaining counsel; and
- rejection of the respondent's request regarding reasonable compensation under Article 6.8.3 of Annex IX to the Civilian Personnel Regulations (CPR).

(ii) The appellant's contentions

Admissibility

17. The appeal is admissible since all available channels were exhausted before the appeal was lodged, in accordance with the CPR.

Merits

18. In the contested decision, the "NCIA's General Manager's strategic goals" were used as the only criteria to determine the appellant's tasks/duties, and his job description was disregarded. Disregarding his job description in favour of these strategic objectives results in the assignment of performance objectives and tasks to him that do not match his competencies, or that are above or below his grade, consequently causing some problems such as stress, low performance, unfair performance reviews, and dissatisfaction.

(iii) The respondent's submissions

19 The respondent submits that the appeal is inadmissible and should be dismissed on that basis and, if necessary, on the merits. Considering the appellant's vexatious use of the appeals and complaints procedure, the respondent requests that the appellant be ordered to pay reasonable compensation as per Article 6.8.3 of Annex IX to the CPR.

(iv) The respondent's contentions

Admissibility

20. The appeal is inadmissible due to the lack of a decision directly and adversely affecting the appellant. Having not provided a single decision affecting him directly and adversely in the entire pre-litigation procedure, the appellant is appealing against a general rule of management.

Merits

21. The appellant did not provide any evidence to support his claims that his duties were incompatible with the NATO rules and regulations covering his employment; therefore, the appeal should be dismissed.

D. Summary of parties' principal contentions, legal arguments and relief sought in Case No. 2023/1350

(i) The appellant's submissions

22. In his appeal to the Tribunal, appellant seeks:
- annulment of the decision dated 16 August 2022 as confirmed by the decisions of 9 October and 30 November 2022;
- compensation for non-material damages, assessed at €5,000;
- reimbursement of the costs of retaining counsel; and
- rejection of the respondent's request regarding reasonable compensation under to Article 6.8.3 of Annex IX to the CPR.

(ii) The appellant's contentions

Admissibility

23. The appeal is admissible since all available channels were exhausted before the appeal was lodged, in accordance with the CPR.

Merits

24. The contested decision was taken beyond the authority of the SH since decisions changing the NCIA Personnel Establishment Plans (PE), organizational structure and reporting lines may only be made by the General Manager and also require the Agency Supervisory Board's (ASB) approval. Within the approved PE, there is neither a DAT team nor a team leader in the MAR Section.

(iii) The respondent's submissions

25. The respondent submits that the appeal is inadmissible and should be dismissed on that basis and, if necessary, on the merits. Considering the appellant's vexatious use of the appeals and complaints procedure, the respondent requests that the appellant be ordered to pay reasonable compensation as per Article 6.8.3 of Annex IX to the CPR.

(iv) The respondent's contentions

Admissibility

26. The appeal is inadmissible due to the lack of a decision directly and adversely affecting the appellant.

Merits

27. The appellant has become a disgruntled employee after not being selected for the A3 position, and his behaviour has changed vis-à-vis the Agency. The new A3 Senior Data Analyst became the appellant's team leader and effectively his direct supervisor (first-level), and thus the SH became the appellant's second-level supervisor. The contested decision was taken fully in line with the Agency's regulations, within the discretionary powers of the Organization and with the appropriate authority. The appeal should be dismissed, the respondent contends.

D. Considerations and conclusions

(i) On the submissions in Case No. 2023/1349

Admissibility

28. The case file reveals that the appellant mainly seeks the annulment of the respondent's reply to his emails seeking clarifications on the boundaries of the scope of his JD, alleging that it leaves a gap in terms of the tasks and duties that can be assigned to him. However, aside from the contested decision, the appellant did not refer to any implementing decision, e.g., a specific task or duty assigned to him outside his job description, either in his emails to the SH or in his requests for administrative review and complaint.

29. The Tribunal has consistently held that staff members or former staff members cannot challenge general rules or decisions but only implementing decisions directly and adversely affecting them (cf. Cases Nos. 2022/1346 and 2022/1339). An appellant can contest a decision only if it directly affects her/him, and cannot contest a general decision unless and until it is applied in a manner prejudicial to her/him. The appellant has provided no proof of detrimental effects.

30. Considering that the contested decision in the first appeal did not produce any direct legal consequences that adversely affected the appellant, the appeal (Case No. 2023/1349) is inadmissible in its entirety.

Merits

31. Given that the first appeal is inadmissible, it is not necessary for the Tribunal to examine the validity of the submissions in Case No. 2023/1349.

(ii) On the submissions in Case No. 2023/1350

Admissibility

32. In Case No. 2023/1350, the appellant contests the decision requesting him to change his reviewing manager through the system manually, alleging that the change was arbitrary and unlawful.

33. The United Nations Appeals Tribunal (UNAT) and the United Nations Dispute Tribunal (UNDT) have confirmed in their jurisprudence that reporting lines relate directly to the core of the employee-employer relationship and have an impact not only on the daily functions that the staff member performs but also on his or her evaluation and future career prospects. Hierarchy and reporting lines are an essential part of the normative framework for performance management, impact directly on the staff member's terms of employment and constitute "a core element of the relationship between staff members and the Organization". Therefore, decisions taken in relation to reporting lines have an obvious impact on the daily performance and conditions of service of staff members (cf. UNAT Judgment No. 2020/1030; UNDT Judgment No. 2020/031; UNDT/NBI/2023/049).

34. Considering this, the Tribunal is of the opinion that the approach illustrated by the above-mentioned case law is to be followed and, therefore, must conclude that the appeal in Case No. 2023/1350 is admissible.

Merits

35. The respondent confirms that the PE shows the biggest structures, and that only major changes to the principal business structures are reported to the ASB, not the working-level changes or changes to the reporting lines. The PE tables (for 2022 and 2023) are "flat", giving each Business or Functional Area the role of defining the different levels of detail to avoid managerial aggregation, and with the General Manager delegating to Business and Functional Areas the way to organize as best possible. In this regard, it is stated by the respondent that the MAR Section is divided into 4 teams, including the DAT team; the Senior Data Analyst (A3) post was created with the intention of leading the DAT team. The Agency's management has authority to determine reporting lines, and such decisions do not require the agreement of the staff member absent a material change in his job description.

36. Indeed, as per the Charter of the NCIA, the main role of the ASB is to provide strategic direction and guidance to the NCIA and to oversee its activities and performance. The Tribunal notes that the Charter provides that the General Manager is responsible to the ASB for the efficient and effective operation and administration of the Agency, with authority to "direct and manage the activities of the NCIA", "exercise the role of Peacetime Establishment Authority (PEA) for all NCIA's civilian and military posts", and "act as Head of NATO body for the NCIA and hold the responsibility for the selection, appointment and release of the NCIA staff".

37. Considering these rules and section C of the Preamble to the CPR, the Tribunal recognizes the Organization's broad discretion and the General Manager's authority, as the Head of NATO Body, to change its staff members' reporting lines.

38. The Tribunal has consistently held that it can interfere with a discretionary decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

39. In this regard, in addition to the respondent's statement confirming that the General Manager delegated appropriate reporting line decisions to Business Areas, the case file reveals that, at the pre-litigation stage prior to filing the appeal, the appellant was informed that the contested decision taken by the SH had been approved by the SMC Branch Head (who was also the Acting COO at the time) and by the General Manager. The appellant's claim questioning the proper authority for the impugned decision is therefore dismissed.

40. The NCIA Staff Performance Management Directive provides that a reviewing manager is typically the day-to-day supervisor/manager of the staff member, such as a group head or equivalent. The Tribunal observes that the Senior Data Analyst assigned as the reviewing manager had been given the role of "group head" (DAT team leader) by the respondent, he had the highest grade in the DAT team (A3) and, as confirmed by the respondent, the change in reporting line was not specific to the appellant because it also applied to other Data Analyst (A2) in the same team.

41. Considering these facts, the Tribunal concludes that the contested decision was regular and taken in the exercise of the respondent's discretionary powers and finds no basis to annul the contested decision.

42. Finally, the respondent's submissions seeking the appellant's payment of a fine for abusive use of the appeals procedure are also rejected. The appellant's submissions show that he did not make abusive use of the appeals procedure; rather, he only used it in the exercise of his right to contest a decision under the CPR.

E. Costs

43. 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 [...].

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

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 5 March 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0013

Judgment

Case No. 2023/1364

UB

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 5 March 2024

Original: English

Keywords: written harassment complaint, admissibility; failure to comply with the pre-litigation procedure.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü, and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 31 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 31 March 2023 and registered on 27 April 2023 as Case No. 2023/1364, by Mr UB, against the NATO Communications and Information Agency ("NCIA"). The appellant mainly contests the decision whereby his written complaint of harassment, bullying, discrimination, and abuse of authority was rejected.

2. The respondent's answer, dated 29 June 2023, was registered on 5 July 2023. The appellant's reply, dated 3 September 2023, was registered on 28 September 2023. The respondent's rejoinder, dated 30 October 2023, was registered on 27 November 2023.

3. An oral hearing was held on 31 January 2024 at NATO Headquarters. The Tribunal 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 relevant facts of the case may be summarized as follows.

5. The appellant joined NATO in 2008 and was assigned to the "Engineer (IP Technology Specialist)" post (A2/G15) at the NATO CIS Services Agency (NCSA) in 2020. Following the 2012 NATO Agencies Reform, NCSA was merged into the NCIA, and the appellant has held an indefinite duration contract with the NCIA since 2018. After the establishment of Service, Management, and Control (SMC) as a separate branch within the Chief Operating Office (COO), the appellant's post name was changed to "Data Analyst," effective 1 July 2022.

6. On 2 December 2022, in line with the NATO Policy on the Prevention, Management and Combating of Harassment, Bullying and Discrimination in the Workplace (hereafter referred to as "the NATO Harassment Policy" or "the Policy"), the appellant submitted a written complaint against Mr C, the Data Analysis & Tools (DAT) team leader, and Ms U, the Monitoring, Analysis and Reporting (MAR) Section Head, alleging "a coordinated abuse of authority, bullying, discrimination and harassment".

7. The NCIA Acting Chief People Office consulted with the Office of the Legal Adviser and, after an initial review, rejected the complaint on 31 January 2023, finding that the appellant's claims were not prima facie substantiated.

8. The present appeal was filed with the Tribunal on 31 March 2023.

C. Summary of parties' contentions and legal arguments

(i) The appellant's submissions

9. In his appeal to the Tribunal, appellant seeks:
- annulment of the decision dated 31 January 2023;
- compensation for material damages, assessed at €75,000;
- compensation for non-material damages, assessed at €75,000;
- reimbursement of the medical expenses for his ongoing treatment;
- additional compensation for non-material damages as a victim of mobbing, in an amount to be assessed by the court;
- reimbursement of the costs of retaining counsel;
- rejection of the respondent's request regarding reasonable compensation under Article 6.8.3 of Annex IX to the Civilian Personnel Regulations (CPR); and
- to join the present case with Cases Nos. 2023/1349 and 2023/1350.

(ii) The appellant's contentions

Admissibility

10. The written complaint was made to the Head of NATO Body (HONB), and since the Acting Chief People Officer (CPO) who replied to his complaint was an officer designated by the HONB, her decision should be considered as the HONB's decision according to the Civilian Personnel Regulations (CPR). The appeal is, therefore, in the appellant's view admissible.

Merits

11. The appellant maintains that the respondent failed to handle the harassment complaint properly, and that the contested decision was taken without proper investigation.

(iii) The respondent's submissions

12. The respondent submits that the appeal is inadmissible, and in any event rejects it on the merits. Considering the appellant's vexatious use of the appeals and complaints procedure, the respondent also requests that the appellant be ordered to pay reasonable compensation as per Article 6.8.3 of Annex IX to the CPR.

(iv) The respondent's contentions

Admissibility

13. The appellant's complaint was not a complaint under Article 61.3 of the CPR, but a written harassment complaint under the NATO Harassment Policy. Therefore, the Acting CPO had the appropriate authority to respond to the appellant's harassment complaint; she was not acting as the HONB for the purposes of the complaint. In

accordance with the Policy, the appellant should have followed the pre-litigation procedure against the impugned decision which found his harassment complaint prima facie unsubstantiated. Having submitted a case directly with the Tribunal instead, the appellant failed to exhaust all available channels before lodging an appeal and, therefore, the appeal is in the respondent's view inadmissible.

Merits

14. A thorough assessment of the appellant's harassment complaint was conducted under the NATO Harassment Policy and the allegations brought forward were found to be prima facie unsubstantiated. His arguments, without any substance or proof, only indicate the regular management activities of the Agency, in the respondent's view.

D. Considerations and conclusions

15. With the present appeal containing formally different pleas from the joined appeals (Cases Nos. 2023/1349 and 2023/1350) brought forward by the appellant, the Tribunal deemed it appropriate not to join all three appeals but to hold the oral hearing for all cases at the same time.

(i) Admissibility

16. The question of admissibility concerns the regularity of the procedure followed by appellant to contest the decision of 31 January 2023, which was signed by the Acting CPO.

17. The Tribunal notes that the procedures set out in the NATO Harassment Policy for making a written complaint and in the CPR for a pre-litigation procedure differ from each other.

18. With regard to the written complaint procedure, Part II/B of the Harassment Policy provides that:

> Persons working at NATO who consider that they have been subjected to harassment, bullying or discrimination may submit a written complaint in one of the two official languages of the Organization, to the official in charge for personnel management as designated by the relevant Head of NATO body for this purpose, normally the Human Resources Office in the respective NATO Body. In case the complaint is directed against a member of the Human Resources Office, it will be addressed directly to the Head of NATO body concerned …;
> 2. After a written complaint of harassment, bullying or discrimination has been submitted, the next steps will be as follows:
> 3. Initial Review: The objective of this stage is for the official responsible for personnel management to conduct a preliminary assessment as to whether, at face value, the allegation(s), if substantiated, would raise a legitimate concern of possible misconduct. The relevant legal office of the NATO Body, as applicable, should also be consulted before the conclusions of the preliminary assessment are finalized. If the conclusion of the preliminary assessment is that there is no prima facie case, the matter will not proceed

> to a full inquiry, and the complainant will be so informed. If the conclusion is that there is a prima facie case, the next step will be to inquire into the matter as provided in this Policy.

19. Given the rules above, a written harassment complaint should be submitted to and conducted by the official in charge of personnel management as designated by the relevant HONB for this purpose. The Tribunal observes in the present case that although the written complaint request was made to the General Manager, the complaint was assessed and the response to the complaint (the impugned decision) was signed by the Acting CPO after initial review, in accordance with the Policy.

20. As to "Post-Decision Review and Appeal", the Harassment Policy makes a distinction in Part II/B.7. As per the Policy, staff members who remain dissatisfied after the outcome of the Complaint Committee process and final decision by the HoNB, as applicable, may appeal to the Tribunal as provided at Article 62 of the CPR, whereas staff members who consider that their complaints of harassment, bullying or discrimination were not fairly considered and appropriately addressed in accordance with this Policy may seek further review as set out in Chapter XIV, Articles 61 and 62 of the CPR.

21. The Tribunal notes that the contested decision which found the written complaint prima facie unsubstantiated was not the final decision taken by the HONB. The Tribunal also observes that the contested decision neither indicated that it was taken in the name of the General Manager nor took the form of a notification of the decision personally made by the General Manager (cf. NATO Appeals Board Decisions Nos. 693 and 697). The appellant, who believed that his complaint of harassment, bullying, or discrimination was not fairly considered, thus contesting it, had to exhaust the required pre-litigation procedure set out in the CPR, in accordance with the Policy.

22. It follows from the foregoing considerations that the appellant failed to follow the steps that precede the submission of an appeal. Therefore, the appeal is premature and must be dismissed as inadmissible.

(ii) Merits

23. Given that the appeal is inadmissible, it is not necessary for the Tribunal to examine the validity of the submissions.

24. The respondent's submissions seeking the appellant's payment of a fine for abusive use of the appeals procedure are also rejected. The appellant's submissions show that he did not make abusive use of the appeals procedure; rather, he only used it in exercise of his rights to contest a decision under the CPR.

E. Costs

25. 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 [...].

26. 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 5 March 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

2 April 2024 AT-J(2024)0014

Judgment

Case No. 2023/1369

FC

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 8 March 2024

Original: English

Keywords: extended sick leave; termination of contact after 21 months (Article 45.7.3); duty of care.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü, and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 30 January 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 9 May 2023 and registered on 17 May 2023 as Case No. 2023/1369, by Mr FC against the NATO Support and Procurement Agency ("NSPA"). The appellant mainly contests the decision dated 25 January 2023 terminating his employment contract, with the cessation of his duties effective on 29 March 2023.

2. The respondent's answer, dated 19 June 2023, was registered on 5 July 2023. The appellant's reply, dated 4 September 2023, was registered on 28 September 2023. The respondent's rejoinder, dated 19 October 2023, was registered on 10 November 2023.

3. An oral hearing was held on 30 January 2024 at NATO Headquarters. The Tribunal 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 relevant facts of the case may be summarized as follows.

5. The appellant joined NATO as a driver in 2005 and signed an indefinite duration contract with the NSPA in 2014 as a material handler (warehouse).

6. As of 2016, the appellant began to suffer from herniated discs; therefore, he was placed on sick leave in 2016 and 2018 for some periods, had conservative physiotherapy treatment, and then returned to work.

7. Due to a herniated disc, the appellant went on sick leave on 29 March 2021, which subsequently became extended sick leave. During that period, doctors advised him not to engage in his professional activity, as there was a risk of aggravating the situation, and jointly suggested surgery as a possible solution, noting, however, that such an operation, even if successful, would not enable him to return to his occupation in view of the job description.

8. After 18 months of extended sick leave, the Allianz insurance report of 2 October 2022 confirmed the appellant's permanent disability of 6% and stated that his medical condition was deemed consolidated as of 29 March 2022, and added that adaptation of the workstation should enable him to return to suitable work. The disability was below 33.33%, so he was not found eligible for a permanent disability pension. The summary of these conclusions – but not the report itself – was sent by Allianz to the respondent and was communicated to the appellant.

9. On 23 November 2022, the appellant requested a meeting to discuss his professional situation and was informed that an appointment would be arranged once the report itself had been received by the respondent.

10. On 5 December 2022, the appellant requested authorization to travel to Italy from 26 December 2022 to 8 January 2023 for family reasons, and he was asked to submit a medical certificate covering him until at least 8 January 2023.

11. On 7 December 2022, the appellant was notified by the Human Resources Executive (HRE) that his contract would be proposed for termination to the General Manager (GM) once the deadline set in Article 45.7.1 of the Civilian Personnel Regulations (CPR) was reached (i.e. on 29 March 2023). On the same day, the appellant reiterated his request for a meeting.

12. The appellant sent the respondent the expert report received from Allianz on 8 December 2022, and on 12 December he met with Dr P, an NSPA medical advisor, to discuss the results of the report. Dr P concluded that the appellant could return to work full-time in another position, with the following permanent limitations and recommendations: he was able to lift weights of up to 15-20 kg, but not repetitively; he must comply with the ergonomic guidelines for handling weights; he should move regularly, for example every 50 minutes; he could flex and rotate his trunk, but must avoid doing so frequently.

13. On 11 January 2023, the appellant met with HRE to discuss his state of health, the conditions necessary for his return to work and the search for a post to which he could be reassigned.

14. On 16 January 2023, the appellant attempted to resume work after his medical certificate's validity expired, but the officials present prevented him from doing so and directed him to see Dr B, another NSPA medical advisor. Dr B. placed him on sick leave until 20 January 2023. The appellant’s sick leave was extended to 29 March 2023, although he was not inclined to accept the certificate and considered himself fit to return to work. Both HRE and the Return to Work Coordinator informed him that he was not entitled to return to work in the absence of a medical statement finding him fit to return to work.

15. On 25 January 2023, the GM notified him of the termination of his contract with the cessation of his duties effective on 29 March 2023, on the grounds of his incapacity for service in accordance with Articles 9.1, 45.7.1 and 45.7.3 of the CPR.

16. The appellant’s complaint of 23 February 2023 against the contract termination decision was rejected by the GM on 10 March 2023.

17. The present appeal was filed with the Tribunal on 10 May 2023.

C. Summary of parties' contentions and legal arguments

(i) The appellant's submissions

18. In his appeal to the Tribunal, the appellant seeks:
- annulment of the decision dated 25 January 2023, as confirmed by the decision of 10 March 2023;
- compensation for material damages (subject to increase during the proceedings), assessed at €66,252.48, corresponding to a sum equal to the emoluments of any kind that he would have received if he had remained in office in NATO beyond 25 January 2023, calculated with statutory interest;
- compensation for non-material damages, assessed at €16,563.12, or any other amount higher to be assessed *ex aequo et bono*, with statutory interest;
- reimbursement of all the legal costs incurred and the costs of retaining counsel, assessed at €5,000 or any other amount higher to be assessed *ex aequo et bono*, with statutory interest.

(ii) The appellant's contentions

19. The appellant claims that in addition to the medical certificates submitted by himself, he was provided with medical certificates by the respondent, in bad faith, in order to make him complete 21 consecutive months on sick leave.

20. The respondent made a manifest error of assessment when recognizing the appellant as unfit to work, since his incapacity is only partial (6%) and he could have returned to work with a simple adaptation regarding his position.

21. The respondent breached its duty of care by using deceitful tactics to prolong the appellant's sick leave and by never responding to his concerns or his repeatedly expressed desire to return to work. He also alleges that his permanent partial disability is causally linked to the repeated carrying of heavy loads, since the Agency did not provide him with training to prevent the risks associated with carrying heavy loads.

(iii) The respondent's submissions

22. The respondent requests that the Tribunal declare the present appeal unfounded. The respondent also objects to the increase in the requested amount of non-material damages (€16,563.12), since the sum was only €1,500 in the complaint dated 23 February 2023.

(iv) The respondent's contentions

23. Since all the conditions of Articles 45.7.1 and 45.7.3 of the CPR have been met, the respondent was entitled to terminate the appellant's contract on 29 March 2023.

24. There is no obligation on the part of the respondent to modify the appellant's post or to transfer him to another vacant position. Modifying his current position would not be

in the interests of the department; however, a total of eleven different positions were considered for the appellant's internal transfer. His reassignment was challenging due to his inadequate skills.

D. Considerations and conclusions

(i) Admissibility

25. Admissibility is not contested. The appeal is admissible.

(ii) Merits

26. In this appeal, the appellant is mainly contesting the decision on termination of his contract.

27. Article 9.1 of the CPR states:

> The Head of NATO body has the right to terminate contracts for due and valid reasons, e.g.: … (ii) if the staff member is incapacitated for service; […]
>
> Article 45.7 of the CPR states:
>
> 45.7.1. Members of the staff who are absent for more than 3 consecutive months owing to sickness or accident duly recognized under Article 45.2 above shall be entitled to paid extended sick leave for a maximum period of 21 consecutive months, or until they are recognized either as fit to resume their duties or as being permanently incapacitated under the terms of the group insurance policy or by the invalidity board set up under the Coordinated Pension Scheme, as appropriate, or until the end of the calendar month in which they reach the age of 65, whichever is the sooner. […]
>
> 45.7.3. Extended sick leave may be regarded by the Head of the NATO body as grounds for termination of contract on the conditions laid down therein. However, separation will not become effective until one of the conditions as stipulated in Article 45.7.1 is fulfilled.

28. It is not contested that the decision to terminate the appellant‘s contract was taken pursuant to those provisions.

29. It also follows from these provisions [Articles 9.1, 45.7.3 of the CPR] that there is no bar to the termination of the employment contract of a staff member on extended sick leave either for this reason alone, for any other real and valid reason, or for both such reasons taken together; however, such termination is subject to the observance of legal procedure and must not be arbitrary or abusive in nature (cf. Appeals Board Decision No. 409).

30. The present case file reveals that the appellant claiming partial incapacity at a rate of 6% expressed a willingness to return to work on the condition that his role be adjusted to accommodate his health status. It is also indicated in several medical reports, including the medical expertise report dated 2 October 2022 (by the group insurance specialist Dr

B), that “adaptation of the workstation should enable the patient to return to suitable work”. It is also evident that the appellant failed to present a certificate declaring him fit to resume work and therefore was provided with medical certificates until 29 March by the respondent stating its intention to protect the appellant from potential administrative or disciplinary consequences of “unjustified absence.”

31. Being aware that the appellant had truly intended to resume working, the respondent argues that carrying heavy materials is an essential component of the appellant’s job, and modifying this position would be tantamount to rendering it meaningless and result in burdening other handlers with additional tasks, which is not in the department’s best interest. The respondent further points out that eleven positions in total were evaluated for the appellant’s internal transfer; however, his reassignment was challenging due to his limited proficiency in the English language, his physical limitations, and his lack of specialized experience in information technology, administration, or organization.

32. In this regard, the Tribunal recalls that the respondent has a duty to have regard to the welfare of its staff members, reflecting the balance of reciprocal rights and obligations established by the CPR in the relationship between a NATO body and its staff members. This duty implies that when the administration took decisions concerning the situation of a staff member, it was obliged to take into consideration all the factors that may affect its decision. Further, when doing so it must take into account not only the interests of the service but also those of the staff member concerned. This duty to have regard for the welfare of a staff member is particularly compelling where decisions involve a staff member whose physical or mental health is known to be involved (cf. AT Judgment Cases Nos. 2016/1087 and 2016/1091, paragraph 46).

33. Given the fact that the appellant did not possess the mentioned disability upon joining the Organization, and that the onset of his injury was in 2016, the Tribunal considers that NATO, as an exemplary international organization, should have found a sustainable solution to address the appellant’s challenges, in line with its standard managerial responsibilities and duty to have regard to the welfare of its staff members, by taking into consideration factors such as the appellant’s lengthy 18-year tenure at NATO, the physically demanding nature of his position so far, his contract of indefinite duration, and his physiological permanent disability with a degree of 6%.

34. Although the appellant did not meet the requirements and thus was not found eligible for other positions, the Tribunal believes that, with minor adjustments, many tasks outlined in the appellant's job description could have been assigned to him, excluding the handling and moving of heavy loads, taking into consideration his health condition, such as assisting in executing inspection and verification of incoming and outgoing materials, using terminals and other Electronic Data Processing (EDP) systems to record necessary transactions, controlling and processing hazardous material in accordance with applicable procedures and regulations, etc. By assigning him to such tasks, the respondent could have enabled the appellant to resume work and ended his extended sick leave; however, it failed to act appropriately.

35. The Tribunal observes that, had the respondent fulfilled its duty to have regard to the welfare of its staff member, the appellant's extended sick leave would not have lasted for the 21 months mentioned in Article 45.7.1 of the CPR. In other words, the respondent itself caused the completion of the 21-month period by remaining inactive regarding the appellant's requests to make a reasonable accommodation or reassign him. That being so, the respondent cannot use that duration as grounds to apply Article 45.7.1 of the CPR and terminate the appellant's contract.

36. Consequently, the decision dated 25 January 2023, as confirmed by the decision of 10 March 2023 dismissing the appellant's complaint, must be annulled.

37. The annulment of a decision of termination of employment entails, in principle, the reinstatement of the illegally dismissed staff member in his or her last position, or in an equivalent position if this is materially impossible (*cf.* AT Judgment Case No. 2021/1333, paragraph 66). In this particular case, reasonable accommodation of the appellant's employment to his partial disability is also required.

38. The appellant also seeks compensation for material and non-material damage he suffered as a result of the contested decision to terminate his contract.

39. The appellant seeks compensation for his material damage corresponding to a sum equal to the emoluments he would have received if he had remained in his position beyond 25 January 2023; however, as confirmed by the respondent, the effective date of the contract termination was 29 March 2023.

40. As regards the material damage caused by the annulled contested decision, the appellant is entitled to an amount equal to the emoluments of all kinds that he would have received had he remained in his post within NATO as from 29 March 2023, i.e. the effective date of the contract termination, until the date of the ruling of the present judgment plus interest at the latest European Central Bank rate increased by two points. This amount shall be calculated by deducting any professional income that the appellant might have received over the same period (see in particular the Tribunal's judgment in Case No. 883, and Appeals Board Decisions Nos. 406, 703(a), 733 and 870).

41. As regards the appellant's claims concerning non-material damage caused by the contested decision, the Tribunal recalls that the annulment of a decision may not in itself constitute appropriate and sufficient compensation for non-material damage when an appellant shows that he or she has suffered non-material damage which is separate from the unlawfulness justifying the annulment and which may not be entirely remedied by said annulment (*cf.* AT judgment in Case No. 2017/1111, paragraph 108).

42. In this particular case, the appellant, due to being engaged in an arduous task as an employee without having received adequate training to prevent injuries when lifting and moving heavy objects, and being subsequently dismissed due to his physical incapacity, seeks non-material compensation, for the sense of injustice, the grief, and the anxiety he suffered.

43. Regarding the facts discussed in the preceding paragraphs, as well as the data and records provided during the hearing, it is believed that the respondent failed to take the necessary steps in handling the case of the appellant, who was an employee with a good reputation at work and who was known to always be ready to take on exceptional tasks. The appellant, at the age of 54, was left unemployed with an uncertain future and no means of support due to his physical disability, following his many years of service to the Agency under an indefinite duration contract.

44. The Tribunal also recalls that Article 16 bis of the CPR provides that “the Head of each NATO body shall establish a program to ensure the training of staff, based on a continuous assessment of the skills needed for efficient performance of their duty now and in the future”. Neither the documents submitted to the file nor the respondent’s statements at the hearing refuted the appellant’s claim regarding a lack of training; therefore, the Tribunal considers that the respondent also failed to ensure the appellant had received the training that is crucial to avoiding debilitating injuries while performing work.

45. In light of these considerations, the Tribunal considers that the appellant suffered distinct non-material damage because of the respondent's conduct, which constitutes a serious breach of the duty of care given the specific situation of the appellant.

46. Under these conditions, fair compensation is afforded by the Tribunal by ordering the respondent to pay the appellant €5,000 in compensation for non-material damage.

47. The remaining submissions in the appeal are dismissed.

E. Costs

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

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

49. The appellant, having good grounds for most of the submissions in his appeal, is entitled to reimbursement of justified expenses incurred by him and the costs of retaining counsel up to a maximum of €6,000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 25 January 2023, confirmed on 10 March 2023, to terminate the appellant's contract as from 29 March 2023 is annulled.
- The respondent shall pay the appellant, in compensation for the material damage suffered, an amount equal to the emoluments of all kinds that he would have received had he remained in his post within NATO as from 29 March 2023, minus any professional income that the appellant may have received as from that date.
- The respondent shall pay the appellant the sum of €5,000 in compensation for the non-material damage suffered by him.
- The respondent shall reimburse appellant justified expenses incurred by him and the costs of retaining counsel up to a maximum of €6,000.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 8 March 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

25 June 2024 AT-J(2024)0015

Judgment

Joined Cases Nos. 2024/1388 and 1390

CG

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 21 June 2024

Original: French

Keywords: extended sick leave; suspension without pay (Article 60.2); resignation.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearing on 6 June 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Ms CG (hereinafter “the appellant”), against the NATO Support and Procurement Agency (hereinafter “the NSPA”) dated 1 March 2024 and registered on 12 March 2024 (Case No. 2024/1388), seeking annulment of the decision taken by the Organization (hereinafter “the respondent”) on 6 December 2023 to suspend the appellant without pay.

2. On 11 March 2024, the appellant submitted a second appeal, registered on 12 March 2024 (Case No. 2024/1390), seeking annulment of the letter of 28 February 2024 confirming her continued suspension without pay.

3. The two cases were joined by the Tribunal President’s Order AT(PRE-O)(2024)0003, dated 13 March 2024.

4. The appellant requested an expedited hearing of both appeals. In a letter dated 14 March 2024, the Tribunal President asked the NSPA for its comments, in accordance with Article 6.6.4 of Annex IX to the Civilian Personnel Regulations (CPR). The NSPA submitted its comments that same day. In a letter dated 19 March 2024, the Tribunal’s Registrar informed the Parties of the Tribunal’s decision to grant the appellant an expedited hearing.

5. The respondent's answer, dated 17 April 2024, was registered on 17 April 2024. The appellant's reply, dated 30 April 2024, was registered on 30 April 2024. The respondent's rejoinder, dated 15 May 2024, was registered on 15 May 2024.

6. These appeals mainly concern the decision to suspend the appellant and deprive her of pay following accusations of professional misconduct for having an unauthorized professional activity that was incompatible with her stated medical condition.

7. The Tribunal held the hearing on 6 June 2024 at NATO Headquarters. It heard arguments by both parties, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

8. The appellant joined the NSPA on 1 August 2008. From 1 September 2009, she served as Head of the NATO Codification Section, Customer Dedicated Applications Branch, IT Application and SLA Division.

9. The appellant was put on sick leave as from 11 July 2022, then on extended sick leave as from 11 October 2022.

10. On 23 November 2023, the NSPA Chief Human Resources Officer informed the NSPA General Manager of the appellant's professional activity outside of the Agency. In particular, she informed her of the appellant's inclusion on the Luxembourg Trade and Companies Register, the appellant's website, and comments made by supposed customers on Google Maps. The Chief Human Resources Officer recommended suspending the appellant without pay for the duration of the investigation, in accordance with Article 60.2 of the CPR.

11. On 5 December 2023, the NSPA Medical Adviser visited the appellant's home for a medical examination. She saw the name of the appellant's business on her letterbox. On 6 December 2023, the Medical Adviser informed the appellant that she did not acknowledge the validity of her most recent medical certificate, dated 15 November 2023, and that she would not acknowledge any further certificates issued for her.

12. On 6 December 2023, the NSPA General Manager ordered that the appellant be suspended without pay. On 19 December 2023, the appellant lodged a complaint against this decision, and on 19 January 2024 the complaint was rejected by the General Manager.

13. On 18 December 2023, the appellant submitted another medical certificate and requested medical arbitration. On 31 January 2024, the respondent rejected this request on the grounds that it was premature.

14. On 19 December 2023, the appellant lodged a complaint against the decision of 6 December 2023. This complaint was rejected by a decision dated 19 January 2024.

15. On 11 January 2024, the Chief Human Resources Officer appointed an investigator. The investigator interviewed the appellant on 22 February 2024. Following this interview, the investigator requested that the appellant provide documentation to corroborate her statements. The appellant informed the investigator that she would send in the documentation on 29 February 2024, but that the company's accounts would be sent in at a later date.

16. On 28 February 2024, the NSPA General Manager confirmed the continuation of the suspension on the grounds that the investigator did not have all the information required to reach a conclusion.

17. On 29 February 2024, the appellant provided some documentation and corrected certain statements made during the interview. In particular, she confirmed that she had completed a 120-day course during her sick leave. However, she never submitted her company's accounts.

18. On 4 March 2024, the appellant informed the Chief Human Resources Officer of her decision to resign and requested the right not to work her notice period. The Chief Human Resources Officer agreed to her request that same day, and informed her that she was terminating the disciplinary procedure.

C. Parties' principal contentions, legal arguments and relief sought

19. The parties' principal contentions and arguments are summarized and discussed below, as part of the analysis of each of the appellant's contentions.

D. Considerations and conclusions

(i) Preliminary remarks

20. It is the NSPA's financial resource management practices that are at issue in these appeals.

21. It has long been recognized that access to financial and other resources is critical to the development of international organizations (IOs) and their ability to fulfil their mandates. The disparity between IOs' mandates, which are determined by member states, and the resources available to fulfil these mandates is a recurring source of concern.[1] A major part of most IOs' funding comes from member state contributions.[2] Therefore, IOs' budgets, which include administrative expenses such as emoluments, have an impact on their member states' budgets and, ultimately, on their taxpayers. Consequently, IOs must take particular care to show their member states that they are managing their resources responsibly. For these reasons, effective and efficient management of resource allocation by IOs is extremely important, and the Tribunal must bear this in mind when considering decisions relating to this area.

22. To ensure effective and efficient management of resources, the NATO Financial Regulations (NFRs) provide for the establishment of financial governance, resource management practices, internal controls and financial information systems.[3] All NATO staff, military and civilian, are obligated to comply with the NFRs.[4]

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[1] See Kofi Annan, "The Secretary-General and the U.N. Budget" in *The Challenging Role of the UN Secretary-General* (Praeger 1993).
[2] See Jacob Katz Cogen, "Financing and Budgets" in *The Oxford Handbook of International Organizations* (OUP 2016).
[3] Article 3.1, NATO Financial Regulations, see also NATO Code of Conduct.
[4] Article 3.3, NATO Financial Regulations.

23. With these preliminary remarks in mind, the Tribunal identified two principal contentions put forward by the appellant. The appellant maintains that a) the decision to suspend her did not meet the conditions set out in Article 60.2 of the CPR, and b) the decision to suspend her could not be combined with total deprivation of her pay.

24. As explained in more detail below, the Tribunal finds that there are not good grounds for these contentions. Consequently, the appeals must be rejected.

(ii) The suspension decision meets the conditions set out in Article 60.2 of the CPR

25. The parties acknowledge that Article 60.2 of the CPR sets out three cumulative conditions to justify immediate suspension of a staff member: 1) a charge of serious misconduct, 2) a charge that is prima facie well-founded, and 3) the staff member's continuance in office might prejudice the Organization.

26. The appellant maintains that procedural failures affected the validity of the suspension decision. She claims that the accusation made by the respondent in its letter dated 6 December 2023 was not sufficiently detailed, as it did not provide any justification other than the nature of the accusations. The appellant also argues that the accusations were not prima facie well-founded, as the facts had not been substantiated as of the date she was suspended. Lastly, according to the appellant, the nature of the allegations against her was not so serious as to prejudice the Organization.

27. The respondent maintains that the conditions of Article 60.2 of the CPR were met in the present case. In the respondent's view, the appellant does not dispute that a serious accusation has been made or that the accusations are well-founded. As regards procedural failures, the respondent asserts that sufficient reasons were given for the suspension decision: it mentions the nature of the allegations of professional misconduct and states that these allegations constitute fraud; moreover, the appellant was well aware of the context in which the decision was taken.

28. Firstly, concerning the requirement for the accusation to be serious and the procedural failures, the Tribunal recalls that in Joined Cases Nos 2019/1284, 2019/1285 and 2019/1291 it had noted that "the aim [...] is to provide the staff member in question with enough information to allow them to determine whether the contested decision is justified". The Tribunal is of the opinion that the letter dated 6 December 2023 contains enough information. In the letter, the respondent clearly indicates the nature of the serious accusation and what the appellant is being charged with: she is accused of engaging in an unauthorized professional activity while on long-term sick leave. The letter also refers to the findings of the medical examination and the legal basis for the suspension. The appellant, who had retrained for a new career, and admitted to having completed a 120-day course during her sick leave, necessarily knew the nature of this activity and the publicly available information it was based on. Yet she had not requested authorization to engage in an outside occupation, as per Article 12.2.1(b) of the CPR.

29. Secondly, the Tribunal finds, on the basis of the information gathered by the respondent on 23 November 2023, that the accusation was prima facie well-founded. The appellant was entered on the Luxembourg Trade and Companies Register, she had a website for her new business, and there were customer comments on Google Maps. Contrary to the appellant's statements, and as the Tribunal confirmed in Case No. 2020/1317, when the facts are established "unambiguously", as in the present case, it is not necessary to await the conclusion of the investigation before deciding whether to suspend a staff member.

30. Thirdly, the Tribunal is of the opinion that the appellant's remaining in office could have prejudiced the Organization owing to the unhealthy atmosphere the allegations created on her team. The Tribunal notes that, in an email dated 21 November 2023, a staff member of the Organization said that morale among the appellant's colleagues had been affected by publicly available information suggesting that she was engaged in an unauthorized outside occupation while on sick leave.

31. Consequently, the Tribunal finds that the three cumulative conditions necessary for suspension as per Article 60.2 of the CPR are met. This contention is dismissed.

(iii) The suspension decision could be combined with total deprivation of the appellant's pay

32. Article 8.11.4 of the NSPA Code of Conduct clarifies the conditions that justify suspension without pay:

> 8.11.4 A suspension shall normally be with full pay. A suspension shall be without pay if:
> 8.11.4.1 The alleged misconduct is a fraudulent activity;
> 8.11.4.2 The alleged misconduct constitutes theft; or
> 8.11.4.3 The General Manager deems it necessary to protect the interests of NSPA and/or NATO.

33. The appellant maintains that the respondent could not deprive her of her pay while she was suspended. She argues that such a decision should be proportionate to the seriousness of the allegations against the staff member. In the appellant's view, the allegations in the present case were not so serious as to justify deprivation of pay; the decision was therefore disproportionate.

34. In the respondent's view, the appellant submitted irregular medical certificates in order to unfairly obtain long-term sick leave and the associated remuneration whilst engaged in a full-time, remunerated professional activity. For the respondent this constitutes fraud, the perpetration of which prejudiced the Organization. Consequently, the deprivation of pay during the period of suspension was justified.

35. The Tribunal observes that it is impossible to conclude whether fraud took place on the basis of the medical certificates alone, as the respondent maintains. The respondent denied the request for medical arbitration on 31 January 2024 on grounds

that it was premature. In the end there would not be any arbitration, because the appellant resigned from her position, thereby putting an end to the disciplinary procedure. Absent medical arbitration, the respondent cannot now definitively assert, based solely on the opinion of its medical adviser, that the appellant's medical certificates were irregular.

36. However, the Tribunal notes that Article 8.11.4 of the NSPA Code of Conduct provides that in cases of fraud, suspension without pay is justified to protect the Organization's interests. In its preliminary remarks, the Tribunal recalled the importance of effective and efficient management of the resources allocated to an IO. Such management is intended to reassure member states of the IO's accountability and thereby ensure the IO has access to sufficient resources to fulfil its mandate. Paying emoluments to a staff member of the Organization who has been accused of engaging in an unauthorized outside professional activity for remuneration damages the Organization's credibility. Indeed, in her letter dated 19 January 2024, the NSPA General Manager mentions the effect of these allegations on "the Organization's finances". In addition, the appellant, like all of the Organization's staff, had a duty to respect the letter and the spirit of the NFRs, which are intended to ensure that the Organization's resources are managed faithfully, responsibly and with integrity. Consequently, suspension without pay was justified to protect the Organization's interests.

37. Lastly, contrary to the Tribunal's findings in Case No. 2020/1317, cited by the appellant, in which the Tribunal considered it disproportionate to deprive a staff member of all pay over an indefinite period, the respondent, in its letter dated 6 December 2023, had communicated when the period of suspension without pay would end, i.e. when the investigation concluded at the end of February 2024.

38. For these reasons, the Tribunal concludes that the decision to suspend the appellant could be combined with total deprivation of emoluments.

E. Costs

39. 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.

40. The two appeals being dismissed as inadmissible, no reimbursement of costs is due.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeals are dismissed.

Done in Brussels, on 21 June 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

17 July 2024 AT-J(2024)0016

Judgment

Case No. 2023/1378

MP
Appellant

v.

NATO Communications and Information Agency
Respondent

Brussels, 16 July 2024

Original: English

Keywords: legality of disciplinary sanction; expatriation allowance; elements of fraud/fraudulent acts.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü, and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearing on 7 June 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the "Tribunal") has been seized of an appeal, dated 29 September 2023 and registered on 12 October 2023 as Case No. 2023/1378, by Ms MP against the NATO Communications and Information Agency (NCIA). The appeal, inter alia, is primarily directed against the General Manager's (GM) disciplinary decision of 2 August 2023 concerning the appellant.

2. The respondent's answer, dated 13 December 2023, was registered on 19 December 2023 The appellant's reply, dated 14 February 2024, was registered on 20 February 2024.

3. By letter dated 14 February 2023, the appellant's counsel requested the presence of two witnesses to be examined at the hearing. In its rejoinder, dated 21 March 2024 and registered on 28 March 2024, the respondent opposed the appellant's request for witnesses, arguing that the time limit had expired and the request did not meet the requirement of Rule 9 of the Tribunal's Rules of Procedure, as no written witness testimonies had been provided.

4. The Tribunal did not request the presence of any witnesses at the hearing; however, the AT President, by letter dated 4 April 2024, authorized the filing of two written statements of a maximum of five pages each within 20 days, and the respondent was allowed to respond in the same way within 20 days of receipt of the statements.

5. The two written statements, dated 17 April 2024, were registered on 17 April 2024. The respondent's answer dated 10 May 2024, was registered on 14 May 2024.

6. An oral hearing was held on 7 June 2024 at NATO Headquarters. The Tribunal heard arguments by the appellant, her representative, and the respondent's representative, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

8. The appellant joined the NCIA as a Principal System Engineer under a three-year contract effective on 1 January 2022, with the duty station of The Hague (Netherlands). For more than three years before that, she had been a senior operational consultant for the NCIA on an Interim Workforce Capacity basis (IWC) at

the Combined Air Operation Centre (CAOC) in Uedem, Germany, and resided in Goch, Germany.

9. She was assigned to perform duties at her previous work location (CAOC) from 4 to 28 January 2022 and the mission was repeatedly extended throughout the year.

10. Since a stay in one locality in excess of 30 days results in a 25% reduction in the subsistence allowance as per the Civilian Personnel Regulations (CPR), artificially splitting long-term Travel on Duty (TDY) into successive periods of less than 30 days is considered fraudulent. A preliminary investigation was conducted into the appellant as per the NCIA's Directive 05.04 on "Enhancing Transparency and Accountability-Fraud Prevention" (hereinafter referred to as the Fraud Prevention Directive).

11. Following fact-finding interviews, the Fraud, Prevention, and Detection Manager (FPDM) identified a recurring pattern of partly false claims in the appellant's TDY claims during 2022 amounting to €13,882, and also questioned the appellant's actual residence status. On 13 October 2022, a fraud investigation was initiated against her, her line manager, and her fund manager.

12. On 27 January 2023, the Fraud Investigations Findings Report concluded that she had made false representations and misrepresentations, as her travel claims included: i) repeated non-existent travel between The Hague and Uedem; ii) TDY during non-working weekends; and iii) breakfast, even though breakfast was already included in the hotel invoices.

13. On 27 January 2023, the GM notified her that disciplinary proceedings were being initiated following the fraud investigation findings and that her eligibility for the expatriation allowance was to be questioned. In addition, the appellant was suspended from her duties without emoluments, as the accusations against her were deemed to be prima facie substantiated. On 10 February 2023, the appellant submitted comments on the initiation of disciplinary proceedings and the fraud investigation findings.

14. As the appellant did not relocate to the Netherlands and was therefore not considered an expatriate, she was notified on 21 February 2023 that the scope of the disciplinary proceedings was being extended. On 28 February and 8 March 2023, she submitted her comments regarding this.

15. On 15 March 2023, she was informed that the Disciplinary Board (DB) had been convened. She was provided with the composition of the DB and the schedule of proceedings on 4 April, interviewed by the DB on 5 April, and notified of the extension of the deadline for the DB's report on 13 April 2023.

16. In its report of 21 April 2023, the DB recommended a written censure for the appellant, due to "*various acts of repeated negligence*" in handling claims and a lack of familiarity with Agency TDY/Travel policies. The DB found no evidence that she had acted wilfully or deliberately to defraud the NCIA and recommended she receive

remedial training to address her inaccuracies. She was also required to reimburse €13,882 in erroneously paid allowances. It was not recommended that the expatriation allowance be recovered due to her extended TDY situation as a result of her management tasking, which prevented her from completing the relocation process. The DB also recommended written censure for the appellant's line manager due to a lack of attention to detail, and repeated negligence in monitoring, reviewing, and approving her claims.

17. The GM, considering that the report did not constitute a balanced account based on concrete evidence, decided to request clarifications from the DB. Since this would result in some delay, he lifted the suspension on 27 April and requested clarifications on 3 May. Following the DB's additional interviews with the appellant, the DB's report on clarifications was submitted on 30 June 2023, which states that: *"…The accumulation of mistakes, issues, and errors points to serious negligence. However, the DB still found no compelling evidence that there were deliberate or wilful acts to obtain non-entitled payments."*

18. The GM, upon reviewing the DB's report and subsequent clarifications, determined that the appellant had acted in violation of Article 4 of the NCIA Code of Conduct, particularly regarding the principles of integrity, loyalty, and accountability. Additionally, the appellant's acts were deemed to violate Article 7 of the Fraud Prevention Directive concerning fraud categories and examples. Specifically, Article 7.1.c, which addresses "*false accounting and/or making fraudulent statements with a view to personal gain*," and Article 7.2, which encompasses "*any dishonest or fraudulent act*" and "*impropriety in the handling or reporting of money or financial transactions*," were cited as having been breached by the appellant's acts. Additionally, considerations included the NATO-Wide Strategy on the Prevention, Detection, and Response to Fraud and Corruption, and the importance of maintaining trustworthiness within the Agency and NATO and ensuring proper use of taxpayer funds. Taking into account the DB's recommendation, the appellant's comments, and the lack of convincing exculpatory evidence, the GM made the contested decision on 2 August 2023, which included the following measures for the appellant: the postponement of step increment, reimbursement of the amounts unduly paid (€13,882.00); and reimbursement of the expatriation allowance (€12,716.05) until her residence was actually established in the Netherlands. Furthermore, a copy of the decision was to be retained in the appellant's personal file, and the DB's findings were to be communicated to the appellant's National Security Authorities (NSA).

19. In response to her request of 4 August, the appellant was provided with the DB's report, the GM's request for clarifications, and the DB's clarification report on 18 August. She accepted the reimbursement plan proposed by the respondent on 24 August 2023.

20. On 21 September 2023, the appellant also requested disclosure of the DB's general recommendations to the administration, as well as its communication with the NSA, if this had taken place. This request was rejected since the DB's general recommendations were deemed confidential internal communications and she had already been provided with the documents on which the disciplinary action was based.

21. On 29 September 2023, the present appeal was lodged by the appellant.

C. Summary of parties' contentions and legal arguments

(i) The appellant's contentions

22. The appellant challenges the GM's decision dated 2 August 2023 and raises several pleas concerning procedural irregularities, manifest errors of assessment, the legal qualification of the alleged facts, and violations of the duty to state reasons, the principle of proportionality, and the duty of care.

23. As to the TDY claims, she alleges that there is a shared responsibility as her claims were approved by her line manager and the Travel Office (TO). Her multiple contacts with the TO indicate her good faith and desire to act properly when submitting her travel claims. She argues that the Enterprise Business Application (EBA) is deficient and not user-friendly; therefore, the system forced her to keep using The Hague as a departure location.

24. As to the claims related to the weekends, the 30-day rule, and the breakfasts, the appellant states that it was unfortunately a case of poor handling and poor knowledge of the EBA and the 30-day rule. Reiterating a shared responsibility with the TO, she also asserts that she is arguably entitled to be paid for those weekends as she could not return to The Hague due to COVID-19 travel restrictions.

25. As to the expatriation allowance, she alleges that, despite her intention to establish her residence in The Hague, she could not stay there for a long period due to her official temporary duty assignment and alleged COVID restrictions in Germany.

26. The appellant points out that the approval of her initial TDY claims reinforced her belief in their accuracy. Moreover, she argues that, when making his decision, the GM should have considered mitigating factors in the DB's reports and the appellant's circumstances, including her fragile health as a cancer survivor, prolonged TDY upon joining the Agency, and being the sole breadwinner suspended without salary. Therefore, the respondent is alleged to have violated the principle of duty of care.

27. Lastly, the appellant argues that her rights of defence were breached and alleges procedural irregularities during the investigation and the disciplinary process.

28. The appellant requests that the Tribunal:
- suspend the NCIA's communication to the NSA;
- annul the GM's decision dated 2 August 2023;
- order compensation for material damages assessed at €30,727.00 (equivalent to three months' salary as a result of the three-month suspension);
- order compensation for non-material damages assessed at €20,000; and
- order payment of all costs.

(ii) The respondent's submissions

29. The respondent alleges that the appeal is partly inadmissible. The respondent argues that the request for compensation for material damages of three months' salary as a result of the suspension constitutes an indirect challenge to the suspension decision, which the appellant never formally challenged. Therefore, the request is inadmissible to the extent that it challenges the suspension decision as well as its consequences.

30. The respondent asserts that the appellant, who holds a G20 position and was previously an IWC contractor, is assumed to be familiar with Agency processes and is expected to ensure the accuracy of her claims as per the Code of Conduct. Through her submission of the claims via the EBA system, she affirmed the accuracy of the data. Furthermore, confirming that there is no particular training on generating TDY claims, the respondent emphasizes that the appellant attended induction training, which consisted of a briefing/presentation covering pertinent allowances and procedures.

31. Regarding the appellant's TDY claims, the respondent alleges that she had no reason to travel to The Hague since she was residing in Goch, Germany, which is 20 km from Uedem, Germany. Regarding the claims for weekends, she was ineligible as she did not work on weekends. As for the COVID-related claims, the respondent states that the appellant should have discussed them with her line manager. The appellant was, for the entire period concerned, not an expatriate, and as a result, she should reasonably reimburse the payments received in relation to the expatriation allowance.

32. The respondent maintains that it is regrettable that the appellant's erroneous claims continued for months without any intervention from authorities; however, the failures of others in the chain of approval do not negate the appellant's responsibility for her actions. There is no evidence that, before the investigation, she had ever specifically contacted the TO or her line manager for any guidance specific to the disputed claims and/or received any inaccurate information from them.

33. Finally, stating that the appellant's procedural rights were respected throughout the investigation and disciplinary process, the respondent seeks dismissal of the submissions in the appeal.

D. Considerations and conclusions

(i) Admissibility

34. The appellant in this appeal seeks, inter alia, compensation for material damages of three months' income assessed at €30,727.00, as a result of a three-month suspension from duties without emoluments. The Tribunal considers that this request by the appellant was directly related to the GM's suspension decision dated 27 January 2023, but not to the contested decision dated 2 August 2023.

35. The Tribunal recalls that it held in Case No. 2016/1073 that a decision to suspend is a decision that causes a grievance against which an appeal can be lodged. Since there is nothing in the case file indicating that the appellant exhausted all available channels required by the CPR to challenge the decision of a three-month suspension, the appellant's compensation claims for material damages must be rejected as inadmissible. Therefore, the appeal is admissible insofar as it challenges the GM's decision dated 2 August 2023.

(ii) Merits

Whether the appellant's due process rights were respected

36. In assessing whether the appellant's procedural rights were breached during the proceedings, the Tribunal will below consider the arguments raised by the appellant.

37. The appellant argues that, before the fact-finding interview, she was not duly informed about what she was accused of and as a result, was not allowed to consult a lawyer. In this regard, the Tribunal notes that due process entitlements only come into play in their entirety once a disciplinary proceeding is initiated. As the investigation phase is not a disciplinary proceeding, it is only after the investigative process is over and the disciplinary process has begun that the staff member has a right to receive written notification of the formal allegations and to respond to them; these due process entitlements do not exist during the investigation stage (see Judgment No. 2017-UNAT-797). Similarly, there is no right to be apprised of the assistance of counsel during the investigation stage (see Judgment No. 2013-UNAT-336).

38. The appellant asserts that, whereas she was able to provide additional evidence to the DB's clarification report, the evidence was not available to her in her original defence as she was denied access to the system during her suspension. However, it is confirmed by the respondent that, during the suspension, the appellant never requested to access her IT system and/or to receive any specific document for her defence, and once her suspension was lifted, she had ample time to enter the system. Since it is observed that the appellant's argument is not supported by any evidence to suggest that she had no opportunity to present her case fully during the whole process, the argument must be set aside.

39. The appellant also argues that, according to Article 9.2.14 of the Disciplinary Proceedings Directive, it is not the GM but only a legal advisor who can ask the DB to provide additional elements or conduct further work to support their findings, and that the issuance of two discipline reports represent a procedural irregularity. The Tribunal finds that the first argument is not valid since Article 8.1 of the Fraud Prevention Directive provides that the GM has the primary responsibility for preventing, monitoring, and rectifying fraud and potentially fraudulent behavior. As to the latter argument, the Tribunal sees nothing to prevent an administration from undertaking an additional investigation of the allegations in a complaint to clarify matters, so long as it remains within that framework and the accused official benefits

from the necessary procedural guarantees in disciplinary matters (see AT Judgment Joined Cases Nos. 2023/1354-1376).

40. Concerning the allegation that the appellant was not provided with the DB's general recommendations for the services of the Agency, the respondent claims that the document sought is pertinent to the DB's function as an internal auditor for reviewing internal procedures and that the appellant is not entitled to obtain such internal information. In this regard, the Tribunal recalls that the right to access a disciplinary file generally includes all relevant documents to ensure staff can understand the allegations and defend themselves. The evidence in the file demonstrates that the appellant was provided with the documents and information necessary, to enable her to be informed of and understand all the charges against her and to prepare her defence. In the absence of any other evidence or proof to the contrary, the Tribunal considers that the argument is not substantiated.

Whether the facts subject to the contested decision were established

41. The Tribunal recalls at the outset that the legality of any disciplinary sanction requires that the veracity of the facts on which the person concerned is charged be established. Once the facts have been established, given the wide discretionary power enjoyed by the administration in disciplinary matters, judicial review must be limited to verifying the absence of a manifest error of assessment and misuse of power (see AT Judgment in Case No. 2021/1322).

42. To this effect and with respect, the Tribunal will first examine the facts regarding the findings forming the basis for the contested decision.

43. Firstly, concerning the findings related to the appellant's TDY claims of repeated travel, the case file indicates that she claimed for privately owned motor vehicle (POMV) transport from The Hague, the Netherlands, to Uedem, Germany, and back; but in fact, she was effectively residing in Goch, Germany and, as per the DB's findings, her residence in Goch is approximately 14–20 km away from the CAOC in Uedem by car. Therefore, the respondent alleges that the appellant should have instead claimed the cost of local transportation as an incidental expense item.

44. Secondly, concerning the findings related to the TDY claims for weekends; it is observed that the appellant had claimed for continuous TDYs over several weeks with duty starts/ends on the first/last day of TDY; and, by doing so, she received an unjustified per diem allowance for non-working weekends.

45. Thirdly, concerning the findings related to the TDY claims for breakfast expenses, it has been established by the records that, in some TDYs, although the hotel invoice included breakfast, the appellant declared "no breakfast", which gave her 10% per diem more.

46. Fourthly, concerning the findings related to the 30-day rule, the file reveals that TDY periods requested by the appellant were always less than 30 days. In this context, Article 41.4.1 of the CPR stipulates that *"Unless the Head of the NATO body rules otherwise, the full approved rate of subsistence allowance shall be reduced by*

25% for a stay of any period in excess of 30 continuous days in any one locality. A stay shall be considered broken if interrupted for more than seven consecutive days and provided that the members of the staff concerned could not know in advance that they would necessarily have to return to the same locality." The NCIA Directive 14.03 on "Travel on Official Duty" also includes a similar rule with that in the CPR. The respondent highlights that the periods on TDY were normally not longer than 30 days, which is not correct as most of the time the TDY was only interrupted for a weekend. As a result, it appears that this deduction was not applied to the appellant.

47. As for the above-mentioned findings, the appellant mainly asserts that her lack of knowledge in submitting TDY claims, insufficient support provided due to her immediate assignment to the CAOC, and deficiencies in the EBA application contributed to her errors. The appellant acknowledges having made some mistakes with TDY claims and reiterates that it was not her intention to deceive the NCIA. However, stating that the approval of her initial TDY claims reinforced her belief in their accuracy, the appellant alleges that, in any case, when taking the contested decision, the GM should have considered the mitigating factors mentioned in the DB's reports. She also claims that she is arguably entitled to be paid for those weekends as she could not return to The Hague due to COVID-19 travel restrictions.

48. The Tribunal notes that all staff members have a responsibility, established within the NCIA Code of Conduct (AD 05.00), to ensure the accuracy and truthfulness of any information provided in the submission of claims. Moreover, the respondent confirms that there is a digital 'Individual Declaration' in EBA requiring staff members to certify that the information given in their travel claims is true, complete and accurate by clicking "ok", before submitting their claims.

49. It follows from the above that the appellant is responsible for ensuring the accuracy of her TDY submissions and the Tribunal considers that she should have sought guidance before submitting if she was unsure about her TDY requests or using the EBA system. Thus, excluding the expatriation allowance, it is apparent in the file that the appellant made repeated errors in her claims over a year, resulting in her receiving €13,882.00 to which she was not entitled.

50. Finally, with regard to the findings related to the expatriation allowance, the question of entitlement arises. The records reveal that the appellant had received an expatriation allowance due to her contractual status as a Netherlands-based staff member. The appellant, in her statements, indicates that she had provided an initial residential address—*a friend's address in The Hague that she used to open a Dutch bank account, register her interest in local schools for her son, and enroll with Hague-based housing agents*—and that she had planned to update this address once she had secured a permanent residence. However, it appears that despite triggering automatic payment of expatriation allowance by submitting an expatriation form to the Chief People Office (CPO) and providing the address in question via e-mail, the appellant did not move to the Hague and therefore was never a resident there.

51. The appellant refers to the mitigating factors in the DB's report, which states that she was not allowed to formally relocate and settle her family in The Hague due

to being immediately assigned to such a prolonged TDY after being hired by the Agency. She cites the COVID restrictions in Germany as an additional factor.

52. The Tribunal reiterates its constant opinion that the purpose of the expatriation allowance is to partially compensate for added costs for staff members having to live, because of their professional activities, in a given country while maintaining sentimental and, in some cases, material ties to the country of which they are a national, and the vital element for assessing eligibility for expatriation allowance remains whether that person was working and living in the country of the duty station when the recruitment procedure started (see AT Judgment in Case No. 2020/1302, 2018/1268). Therefore, to be entitled to expatriation allowance, staff members are obliged to change their residence, move to the country of employment and integrate themselves into a new environment (see General Court of the European Union, Judgment Case T 39/21, 19.04.2023).

53. Based on the records provided in the present case, the Tribunal observes that the appellant did not relocate to the Netherlands, the country of her duty station; yet, she continued to receive an expatriation allowance during 2022. The Tribunal also observes that the appellant incurred neither financial nor moral burdens due to her temporary duty in Germany since she had already been residing continuously at the same address in Germany for several years as a consequence of her prior professional engagement.

54. The Tribunal notes that the expatriation allowance remains part of a staff member's monthly salary until any changes in residence are reported to the Organization, as per Article 24.3 of the CPR, which stipulates that *"at the time of appointment members of the staff shall furnish all information necessary for the determination of their eligibility for allowances/supplements. Members of the staff must at once bring subsequent changes affecting eligibility to the attention of the Head of the NATO body."* The respondent clarifies that while temporary addresses for up to three months are common, permanent moves require immediate notification to the CPO, as no automated follow-up exists. The respondent refutes the appellant's argument that she had initially been unaware that she would be staying in Germany for an extended period of time by highlighting the statements of the appellant and her line manager, showing that they both acknowledged that the work in Uedem was expected to last at least six months. However, even assuming the applicant's ignorance in this regard, the Tribunal considers that the appellant had ample opportunity over the course of the year to update her residency status yet repeatedly failed to inform the NCIA, thereby breaching Article 24.3 of the CPR. As a result, the Tribunal determines that the appellant was not entitled to the expatriation allowance she received.

55. As per Article 59.6 of the CPR *"members of the staff may be required to reimburse, either in part or in full, any loss sustained by the Organization through their gross negligence or wilful act."* The Tribunal believes that the appellant's acts, deemed as either serious negligence by the DB or a violation of fraud provisions by the GM, resulted in her receiving payments she was not entitled to, ultimately causing the losses experienced by the Organization; thus, the criteria for reimbursement outlined in Article 59.6 of the CPR have been satisfied. Therefore, the Tribunal

considers that the decision requiring her to reimburse the Agency for the incurred loss was made lawfully, exercising the respondent's discretionary power in alignment with the relevant CPR rule.

Whether the verified facts constitute fraud/fraudulent acts

56. The appellant alleges that the contested decision was affected by a manifest error of assessment as her actions did not violate the Fraud Prevention Directive or Code of Conduct. She denies having committed fraud and submits that no evidence was presented by the respondent to demonstrate her intent to defraud the Agency. She states that she never attempted to conceal any of her actions, given that the respondent was always aware of her temporary assignment and gave approval for all of her TDY requests.

57. The respondent states that negligent behavior may lead to a disciplinary sanction under Article 59.1 and Article 3.1 of Annex X to the CPR; and maintains that *"…the Decision referred to Articles 7.1 and 7.2 of the Fraud Prevention Directive, as an implementation of the NATO-Wide Strategy on the Prevention, Detection and Response to Fraud and Corruption (hereinafter NATO Fraud Strategy), in order to explain why Appellant's actions were considered "fraudulent behaviour" by NCI Agency…"*

58. Upon reviewing the case record, the Tribunal notes that, following a fraud investigation that revealed no evidence of the appellant's intention to commit fraud, the DB initially characterized the appellant's acts as repeated negligence. Subsequently, the DB revised its classification in its clarification report, characterizing the acts as serious negligence, stating that "*the accumulation of mistakes, issues, and errors point to serious negligence*." However, in the contested decision, these same acts were deemed by the GM to fall under the categories and examples of fraud provided in Article 7 of the Fraud Prevention Directive.

59. It is further observed that referring to the NATO-Wide Strategy on the Prevention, Detection, and Response to Fraud and Corruption which states that there *exists "a "zero-tolerance" strategy for all reported allegations of fraudulent activities"* and, emphasizing NCIA/NATO's reliance on staff trustworthiness and proper use of taxpayer funds, considering the DB's report, appellant's comments, and lack of convincing exculpatory evidence, the GM decided on "*postponement of step increment*," which is a more severe penalty than the DB's recommendation of "*written censure*".

60. In this regard, the Tribunal needs to reiterate its constant opinion that where a decision-making authority intends to disregard the conclusions and recommendations of an advisory body it has itself created, it must state clearly in its decision the objective grounds that led it to opt for a divergent conclusion (see AT Judgment Case No. 2017/1104, Joined Cases Nos. 2019/1284,1285 and 1291).

61. The Tribunal further draws attention to the NATO-wide Fraud Strategy, which defines fraud as *"any intentional act or omission designed to deceive others, resulting in the victim suffering a loss and/or the perpetrator achieving a gain"* (NATO-wide

Fraud Strategy, 3.1.1). The Strategy also highlights, for illustrative purposes, that fraudulent activities may include *“knowingly submitting an education grant, medical, travel, or other entitlement claim and documentation containing false information...”* (NATO-wide Fraud Strategy, 3.3.3).

62. Moreover, it is important to emphasize that a finding of fraud against a staff member of the Organization is a serious matter that could have grave implications for the staff member’s reputation, professional standing, and future employment prospects, and therefore, a legal conclusion should be reached after each element of fraud (the making of a misrepresentation, the intent to deceive and prejudice) has been established in accordance with the standard of clear and convincing evidence. (see Judgment No. 2020-UNAT-982).

63. In the present file, the Tribunal notes that the GM categorized the appellant's acts as violations of the Fraud Prevention Directive and, by doing so, departed from the DB's characterization of serious negligence. However, the GM did not present any evidence or explanation to substantiate the essential element of fraud: the appellant's intent to deceive others through an intentional act or omission. The Tribunal concludes that the respondent has failed in its obligations by diverging from the DB's conclusions without providing clear justification or evidence, which is a fundamental requirement for good administration.

64. It follows from the foregoing that the impugned decision must be annulled and the case must be referred back to the respondent.

65. When an appeal against a disciplinary measure is referred to the Tribunal, it is for the Tribunal to verify the legality of the decision taken by the administration, not to substitute another decision for it, and it is for the administrative authority—in the present case, the GM—to make a new decision by taking into account the concerns in the above-mentioned paragraphs to decide what misconduct took place and what sanctions to impose accordingly. In this case, the written censure recommended by the DB was probably the appropriate disciplinary measure given the facts established at the end of the administrative investigation. It is deemed neither necessary nor useful to address the other arguments for annulment put forward by the appellant.

66. The appellant seeks compensation for non-material damage resulting from the disciplinary proceedings against her and the serious allegation of fraud, which has had a profound impact on her honor, integrity, and reputation. In this regard, the Tribunal must recall its constant opinion that the protection of the rights and interests of a staff member must always find its limit in respect of the applicable rules. Thus, the requirements of the duty of care cannot be interpreted as preventing the administration from initiating and conducting disciplinary proceedings against a staff member. Furthermore, in its present judgment, the Tribunal states that it doubts only the lack of clear grounds for the qualification of the appellant’s acts, however, this does not negate the blameworthy nature of those acts. Consequently, the appellant’s request for compensation for non-material damage must be dismissed.

67. Concerning the request for suspension of the NCIA’s communication to the NSA, the Tribunal considers that, in her submissions, the appellant is asking the

Tribunal to issue an order for the respondent's services. The Tribunal does not have any such authority to do so.

E. Costs

68. 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 [...].

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

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The decision of 2 August 2023 is annulled and the case is referred back to the respondent, i.e. the GM, to make a new decision.
- The remaining submissions in the appeal are dismissed.

Done in Brussels, on 16 July 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

17 July 2024 AT-J(2024)0017

Judgment

Case No. 2023/1379

RS

Appellant

v.

NATO Communications and Information Agency

Respondent

Brussels, 16 July 2024

Original: English

Keywords: termination of a contract at the end of the probationary period; request for a letter of apology; request for appointment of a mediator.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karatarı Köstü, and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearing on 7 June 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter the “Tribunal”) has been seized of an appeal, dated 1 October 2023 and registered on 12 October 2023 as Case No. 2023/1379, by Ms RS against the NATO Communications and Information Agency (NCIA). The appellant contests the decision of the General Manager (GM) to terminate her contract at the end of the probationary period for the reason that she failed to meet the required standard for contract confirmation.

2. The respondent's answer, dated 13 December 2023, was registered on 19 December 2023. The appellant's reply, dated 6 February 2024, was registered on 15 February 2024. The respondent's rejoinder, dated 18 March 2024, was registered on 19 March 2024.

3. An oral hearing was held on 7 June 2024 at NATO Headquarters. The Tribunal heard arguments by the appellant via videoconference using the NATO Headquarters system and by the respondent’s representative, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. The appellant was recruited on 1 April 2023 as a “Financial Officer” in the Operating Costs and Transversal Controls (OCTC) Office/Business Management Section/Finance Division of the NCIA. Her contract included the standard six-month probationary period clause, ending in the present case on 30 September 2023.

6. On 11 September 2023, the “end of probationary period” form was signed by the Chief of Business Management (CBM), the Financial Controller (FC), and the Chief People Office (CPO), with the recommendation of termination of her contract.

7. On 15 September 2023, during her meeting with the Office Head and the CBM, the appellant was informed that her probationary period had not been confirmed and that a formal notice would follow. In response to an email from an HR advisor from the CPO on the same day, the appellant provided a detailed account of her situation and requested a review of the decision on 17 September. She also sent emails to other CPO officers on 18 and 19 September.

8. Following an online meeting with the FC on 19 September, the appellant was notified of the contested decision made by the GM on 18 September 2023. The decision stated that the appellant had not met the required standards for confirmation

of her contract of employment, resulting in the termination of her employment with a 30-day notice period, concluding on 20 October 2023.

9. On 19 September, the appellant sent emails to the FC seeking clarification regarding the reasons for her termination and to the GM requesting the appointment of an impartial observer (mediator) to comprehensively assess her situation, including also a letter requesting that her contract termination be re-evaluated. On 25 September, she had an online meeting with an HR advisor from the CPO.

10. On 1 October, the present appeal was filed against the GM's decision dated 18 September 2023.

11. On 10 October, the GM replied to the appellant with a formal letter stating that *"…Specific shortfalls as reported to me included a lack of productivity and an inability to learn the process and effectively deliver tasks. Mediation will neither change nor postpone my decision, which was already implemented, so I therefore respectfully decline your request to mediate… I have waived the standard requirement whereby you would normally be required to reimburse expenses already incurred for your household removals when moving to Belgium. In addition, I have granted exceptional approval for the repatriation of your household goods upon your departure."*

C. Summary of parties' contentions and legal arguments

(i) The appellant's contentions

12. The appellant claims that, because she was facing time constraints and impending visa-related issues, to be able to protect her rights, she had to appeal to the Tribunal without waiting for the GM's response.

13. The appellant challenges the GM's decision primarily by alleging procedural irregularities that occurred during the 6-month probationary period. The appellant claims there was misalignment of role expectations, insufficient onboarding support, inadequate training, unclear organizational structure, and ineffective communication. Additionally, the appellant criticizes the unprofessional notification of the termination decision and points out other irregularities within the framework of the Civilian Personnel Regulations (CPR), Agency Directives AD 02.09 and AD 02.10, and the "How2 Guide – Line Manager Probationary Period."

14. The appellant requests that the Tribunal:
- review her case and appoint an impartial observer (a mediator);
- reinstatement;
- order an apology for the GM's learning-related assessments in his response dated 10 October 2023; and
- order compensation for material damages, assessed at €33,362.22 (including car sale losses: €7,512.22 + obligations regarding the termination of the lease €3,850 + disposal of house items that could not be moved to home country €2,000 + unpaid salaries since her departure from NATO €20,000).

(ii) The respondent's submissions

15. The respondent contends that the appeal is inadmissible, observing that the appellant initiated the pre-litigation process but then abandoned it and instead appealed the GM's decision directly to the Tribunal. In the respondent's view, the failure to follow through with the review process renders the appellant's claims inadmissible.

16. The respondent also asserts that reviewing the merits of the GM's decision wherein he exercised his discretion to determine whether the appellant had satisfactorily completed her probationary period, and the appellant's requests for additional remedies, i.e. an apology and a mediator, fall outside the Tribunal's jurisdiction.

17. The respondent maintains that it exercised reasonable discretion when concluding that the appellant was unsuitable for continued employment within the Agency. Furthermore, the respondent contends that the appellant's probationary period was conducted in full compliance with the applicable rules, and there were no irregularities during the period that would invalidate the contested decision.

18. The respondent is therefore seeking dismissal of the submissions in the appeal, primarily on the grounds of inadmissibility, in the alternative as being without merit.

D. Considerations and conclusions

(i) Admissibility

19. The contract termination decision at the end of the probationary period was made by the GM. Accordingly, the appellant has the right, under Article 1.4 of CPR Annex IX, to appeal directly to the Tribunal. Despite the appellant's initial pursuit and abandonment of the pre-litigation procedure under other provisions of Annex IX, the Tribunal recalls its case-law in Case No. 2018/1270 and affirms that this did not erase the appellant's right to appeal directly under Article 1.4. Therefore, the appeal is admissible. Additionally, the appellant's arguments made in the present appeal but not in the pre-litigation procedure are admissible to this extent.

(ii) Merits

20. The probationary period allows the Organization to decide whether the staff member indeed has the professional qualifications and capabilities, but also whether the person fits in his or her job in the Organization. Therefore, decisions concerning appointments, and a *fortiori* decisions concerning the confirmation of the appointment at the end of the probationary period, are within the discretionary power of the Head of the Organization (see AT Judgment in Case No. 885).

21. It is also well settled in the Tribunal's case-law that decisions in the exercise of the discretionary powers are subject to only limited review by the Tribunal. The

Tribunal can only interfere if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority.

22. In the present appeal, the appellant mainly argues that the disputed decision was invalidated by several procedural irregularities that occurred during the probationary period. The Tribunal will consider below those arguments.

23. The appellant first argues that the duties expected of her were not clearly communicated during the hiring process, in response to the respondent's claim that she fell short of leadership and managerial competencies. She contends that there is a discrepancy between the advertised mid-level financial control role (encompassing financial planning, reporting, and control) and the actual demands of the position, which she characterizes as a higher-level pre-management role.

24. The Tribunal notes, as is apparent from the appellant's Job Description (JD) submitted to the file, that the appellant was given a precise description of the duties required by the position. Within the "Duties" section of the JD, it is stated that *"under the direction of the Branch Chief and consistent with the foregoing key tasks, the incumbent is responsible to lead and take the initiative for the delivery of a range of activities and outputs for the OCTC Branch"*. In the JD, the competences and personal attributes are also listed with details as required for her role: "*Deciding and Initiating Action*", "*Relating and Networking*", "*Formulating Strategies and Concepts*". The Tribunal further observes, in the present appeal, that the respondent has furnished a detailed explanation outlining the appellant's shortcomings in each of the listed professional competencies. This explanation specifically addresses the leadership and managerial requirements delineated within the JD. Therefore, the argument must be rejected.

25. Regarding the appellant's second argument that she did not receive adequate onboarding support and training from the Agency, the case file indicates that upon her arrival on 3 April 2023, the appellant participated in the NCIA Bootcamp and the New Hire First Day Orientation on 5 April 2023, along with other new hires. She was provided with monthly one-on-one meetings with the Office Head, as well as daily interactions and multiple hand-over sessions with her colleagues during the initial weeks. Concerning the appellant's assertion that her opportunities for interaction were significantly limited during her early days due to the absence of team members in the first two weeks of her employment, it is noted that some colleagues were on leave during this period, specifically as Friday, 7 April and Monday, 10 April 2023 were NATO Official Holidays (Easter). However, the respondent confirms that during this time, staff coverage for the OCTC was maintained and the appellant received multiple calls and support, both in person and online via Skype.

26. The appellant also contends that the Office Head's communication with her was ineffective and improper, resulting in inadequate support and guidance. Based on the records, the Tribunal concludes that the appellant's email requests for assistance with tasks were met with clear and direct guidance from the Office Head. Furthermore, the Tribunal notes that the file contains no formal or informal complaints

filed by the appellant regarding ineffective communication or improper management style of the Office Head.

27. It follows from the above that those claims of the appellant must also be set aside.

28. Thirdly, the appellant claims a lack of a clear organizational structure by alleging that she was never supported by her first-level supervisor (Senior Administrator); instead, her primary point of contact was always her second-level supervisor (Office Head). She invokes Article 5 of the NCIA Directive AD 02.09 “Staff Performance Management” regulating changes during a performance management cycle: *“If there is a change of the staff member’s reviewing manager, there shall be a formal handover involving the staff member, the reviewing manager(s) and approving manager(s)...“*

29. The respondent rejects the appellant’s claims regarding a lack of a clear organizational structure by emphasizing that, to observe the appellant’s ability to cope with tasks, take the lead, and provide the opportunity for her to raise any difficulties related to expatriation or other issues outside of the regular daily work, the Office Head personally wanted to engage with a direct hands-on approach with her, and the management decided to assign the Office Head as her de facto line manager.

30. Given the above-mentioned facts, the Tribunal considers that a formal handover procedure, as outlined in the relevant Directive, was not necessary in this case as there was no formal handover within the appellant’s line management. The Tribunal further observes that the appellant, who received a higher level of managerial supervision, has not submitted any explanation as to why working with a higher authority had a negative impact on her and the disputed decision. Moreover, it should also be mentioned that the non-confirmation recommendation about her probationary performance was signed by her senior office managers (the FC and the CBM), not by her line manager or the Office Head. Therefore, the Tribunal finds the appellant’s claims unsubstantiated.

31. Fourthly, the appellant asserts that Articles 55.1–55.4 to Annex VIII to the CPR, as well as the “How2 Guide - Line Manager Probationary Period” and NCIA's Directives AD 02.09 on "Staff Performance Management" and AD 02.10 on "Management of Staff Performance Below Requirement" have been violated. In this regard, she argues that up to 15 September, she had not been made aware of any performance deficiencies during the scheduled meetings, nor had she received any formal performance evaluations, Performance Improvement Plans (PIPs), warnings, or written feedback regarding her inadequate performance throughout the probationary period. She also asserts that there was a failure to adhere to the end of probationary period form timeline outlined in the Guide. She further argues that the decision to terminate her contract was made on 11 September, only four days before she was notified. According to her, this deviated from NATO standards concerning timely and constructive employee communication, and the notification was hasty and sudden.

32. Concerning the appellant's assertions pointing to the absence of performance reports, evaluations etc. prior to the contested decision, it is important to note that the Tribunal and its predecessor consistently held that a decision to terminate a contract during the probationary period can be taken at any time and does not have to be preceded by the performance review discussed in Article 55 of the CPR. It added that the administration must, however, respect the rights of the defence. This exercise, which consists in enabling the staff member to familiarize himself/herself with his/her personal file and present his/her arguments, can take place in a relatively short time frame (see AT Judgment in Case No. 885 and AB Decision Nos. 842 and 209).

33. Regarding the appellant's claim that she was not made aware of any performance deficiencies during the scheduled meetings, the Tribunal refers to Article 9 of the Staff Performance Management Directive which provides that *"Feedback and coaching on performance should be a regular and frequent two-way dialogue between the manager and the staff member throughout the cycle, and should focus on the progress of meeting objectives and competency levels, acknowledging success and providing guidance when a change of performance is needed. This is to ensure that the formal performance assessment at the end of the cycle does not present surprises for a staff member."* The Tribunal notes that the present file shows no conflict over the scheduling of the appellant's monthly one-on-one meetings with her line management during her probationary period. Given the presumption that official acts are regularly performed, the file does not provide convincing evidence to substantiate the appellant's claim of inadequate feedback or guidance during these meetings. It even appears that she did not raise any of the concerns now presented in this appeal – such as the tasks being too demanding for her role, the need for training in specific work-related areas, or confusion about the line management structure – during those meetings promising a two-way dialogue before 15 September 2023. As a result, the claim must be set aside.

34. The appellant further alleges that there was a failure to adhere to the timeline for the end of probationary period form as outlined in the "How2 Guide - Line Manager Probationary Period".

35. As per the Guide, the end of probationary period form should be received by the line manager from the CPO Staff Services 1-2 months before the probationary period ends and it needs to be completed, signed, and returned to the CPO staff services before the deadline mentioned on the form. Upon receipt of the completed form, the CPO will inform the staff member of the outcome (e.g. whether the contract is confirmed or not, or the probationary period extended). Deadlines on the forms must be respected for the CPO to have time to take appropriate action (non-confirmation or extension of the probationary period cannot be accepted after the deadline expires).

36. In the present case, the form was due by 10 September 2023 but was signed on 11 September, slightly missing the deadline, and confirmed by the CPO on 15 September. Although the form was not processed a month before the probationary period ended on 30 September, the Tribunal considers that the appellant's rights were not prejudiced, as she was granted a 30-day notice period until 20 October.

37. In any event, even if the respondent had committed a procedural irregularity, the Tribunal points out that such an irregularity could be penalized by the cancellation of the contested decision only if it were established that this irregularity could have influenced the content of the contested decision (see AT Judgment in Case No. 903).

38. That is not the situation in this case. The Tribunal considers that adhering to form deadlines is an internal requirement foreseen by the How2 Guide to ensure the timely and proper functioning of the administration, and the alleged delay in the present case cannot be said to have had any effect on the content of the contested decision or to have caused any adverse consequence for the appellant.

39. In her final argument, the appellant asserts that the notification timetable during the decision-making process did not adhere to NATO procedures, and that the notification of the contested decision was hasty and sudden.

40. The Tribunal notes, based on the information in the case file, that on 11 September 2023, the end of probationary period form recommending contract termination was signed by the CBM, the FC, and the CPO. On 15 September 2023, during a meeting with the Office Head and the CBM, the appellant was informed of significant concerns regarding her performance and the non-confirmation of her appointment. In response to an email received from the CPO officer on 15 September, the appellant provided a detailed explanation of her situation and requested a review of the contested decision via email dated 17 September 2023. It appears that the appellant was thus aware of the contested decision and its reasoning since 15 September, was given the time to reflect on the situation and submitted extensive written comments before the contested decision taken by the GM on 18 September.

41. The Tribunal further notes that paragraph 7 of the appellant's contract stipulates that she would be informed in writing, at or before the end of the probationary period, whether the contract was confirmed or terminated with 30 days' notice. Articles 6.4 and 10.1 of the CPR, as well as Article 4.4 of NCIA Directive 2.1 "Contract Policy" contain similar provisions. The case file reveals that on 19 September, after discussing the situation with the FC in an online meeting, the appellant received an email from him including the contested decision, and was given 30 days' notice in writing, from 19 September until 20 October 2023.

42. Consequently, the Tribunal concludes that the notification procedure was conducted in a regular manner and did not infringe upon the appellant’s right of defence.

43. It follows from the foregoing that the submissions of the appellant on annulment must be dismissed in their entirety, as must the submissions seeking the appellant's reinstatement in the respondent's services.

44. In the framework of her appeal, the appellant puts forward several grievances, claiming that she and her family have suffered material damages as a result of the contested decision.

45. The Tribunal points out that, in accordance with its case-law, submissions on compensation must be dismissed when they are closely linked with submissions on cancellation which have themselves been dismissed as groundless (see AT judgment in Case No. 903, paragraph 98).

46. In the present case, study of all the arguments put forward by the appellant to support her submissions on cancellation of the contested decision has revealed no illegal action by the respondent and thus no misconduct for which the respondent could be held liable. Therefore, the submissions on compensation must be dismissed as groundless.

47. 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 for the respondent's services. The Tribunal does not have any such authority to do so.

48. Similarly, the Tribunal cannot grant the appellant's request for the appointment of a mediator. Indeed, the Tribunal does not have any authority to issue an order to appoint a mediator. It may only propose to return the matter to mediation at any time during the appeal procedure as per Article 6.7.9 to Annex IX to the CPR.

49. It follows from all the foregoing considerations that the appeal is dismissed in its entirety.

E. Costs

50. 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 [...].

51. The appeal being dismissed, no reimbursement of costs is due. None were, in fact, requested.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 16 July 2024.

signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

26 August 2024 AT-J(2024)0018

Judgment

Case No. 2023/1381

LK

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 16 August 2024

Original: French

Keywords: contract termination; medical unfitness; sick leave: maximum duration.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearing on 7 June 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 15 December 2023 and registered on 19 December 2024 as Case No. 2023/1381, by Ms LK (hereinafter "the appellant") against the NATO Support and Procurement Agency (hereinafter "the Agency"). In the appeal the Tribunal is asked, in particular, to annul the decision of 17 October 2023 by the Agency's General Manager to terminate the appellant's contract pursuant to Article 45.7.3 of the NATO Civilian Personnel Regulations (hereinafter "the CPR") and to order the Agency to compensate for the damage arising from that decision.

2. The Agency's answer, seeking dismissal of the appeal, was submitted on 14 March 2024 and registered the same day.

3. The appellant's reply, seeking the same relief as in the appeal, was submitted on 15 April 2024 and registered on 16 April 2024.

4. The Agency's rejoinder, seeking dismissal of the appeal, was submitted on 16 May 2024 and registered the same day.

5. An oral hearing was held on 7 June 2024 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

B. The parties' submissions

6. The appellant is seeking annulment of the decision dated 17 October 2023 to terminate her indefinite-duration contract pursuant to the provisions of Article 45.7.3 of the CPR. She is also seeking an order for the Agency to pay her €20,000 in non-material damages as well as the loss-of-job indemnity, since she is not seeking reinstatement. Lastly, she is seeking an order for the Agency to pay the costs.

7. The Agency is seeking dismissal of the appeal.

C. Legal framework of the case

8. Article 9 of the CPR states that:

> 9.1 The Head of NATO body has the right to terminate contracts for due and valid reasons, e.g.: [...] (ii) if the staff member is incapacitated for service; [...]

9. Article 45.7.1 of the CPR provides that:

> Members of the staff who are absent for more than 3 consecutive months owing to sickness or accident duly recognized under Article 45.2 above shall be entitled to paid extended sick leave for a maximum period of 21 consecutive months, or until they are recognized either as fit to resume their duties or as being permanently incapacitated [...]. [...] The sick leave of staff members who have a relapse within 2 months of having resumed their duties will not be considered as interrupted.

10. Article 45.7.3 of the CPR states that:

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

11. It follows from these provisions that a staff member may not be on sick leave for more than 24 months, and resumption of work for a period of less than 2 months does not interrupt that period of sick leave.

D. Factual background of the case

12. The appellant is a Belgian national born in 1984 who joined the Agency on a temporary basis in 2009 and then on a permanent basis in 2010. She has been on an indefinite-duration contract at grade 12/B5 since 1 November 2019.

13. In October 2020, the appellant was diagnosed with depression. She was placed on sick leave on 4 October 2021, and then on extended sick leave from 4 January 2022 to 22 December 2022. From 2 January 2023 to 31 March 2023, she was allowed to work on a medical part-time basis under the medical adviser's supervision. After a course of treatment, she was set to resume working on 24 April 2023, in anticipation of which she sought authorization to work part-time. That request was turned down on 4 April 2023 on grounds of a business requirement for her to work full-time.

14. On 24 April 2023, the day she was to resume working, the appellant met with the medical adviser, Dr B., in whose view she was "fit to resume working on a full-time basis". She resumed working full-time as from that date.

15. In a follow-up consultation with the medical adviser on 8 June 2023, the appellant said she was experiencing insomnia and anxiety, mentioned that her request to work part-time had been rejected, and said that she was thinking about taking leave without pay, all with a view to planning for her return to work. Unsure about her fitness to resume working, the medical adviser suggested that she go back on sick leave. The appellant refused, in particular to avoid running the risk of having her contract terminated, given the amount of time she had already been out on sick leave, which could only be interrupted by resuming work for a period of at least two months. Since the appellant was refusing and was planning to take leave without pay, the medical adviser decided against putting the appellant back on sick leave immediately and instead scheduled another follow-up consultation for Tuesday 27 June. However, the appellant's request for leave without pay was later denied on grounds of business requirements.

16. Concerned about changes in the appellant's state of health following the denial of her request for leave without pay in particular, the medical adviser decided in the end to move the medical check-up initially scheduled for 27 June forward to 20 June, i.e. before the end of the two-month period that, if completed, would make it possible to interrupt the extended sick leave for someone placed back on sick leave.

17. At the medical check-up on the morning of Tuesday 20 June, the medical adviser found that the appellant's health had taken a serious turn for the worse, and decided to place her back on sick leave immediately, to which the appellant objected. The medical adviser asked the appellant to think about the situation, given the risks to her health in particular, and told her that she would give her decision by the end of the day. In the afternoon of that same day, the medical adviser again observed how tired the appellant was at a work meeting she attended; later that day, after trying to reach her (unsuccessfully), the medical adviser sent her an email to tell her that she thought she was unfit to work ("It was clear to me at our appointment this morning, and again this afternoon, that you are exhausted and relapsing into a major depression"), to inform her that she was putting her on one month's sick leave, from 20 June to 20 July, and to urge her to go see her general practitioner and her psychiatrist "as soon as possible".

18. On Wednesday 21 June, the appellant replied to the medical adviser that she did not want to be placed "on extended sick leave" after all the efforts she had made to "emerge from this period ... not to mention the impact that such a sick leave might have on my contract right now". When she went in to work that morning, the medical adviser called her in immediately and, in the presence of the doctor who was going to replace her, Dr I, reminded her that she was on sick leave, that she was not authorized to work and that she had to go home immediately; she had a security guard escort the appellant out.

19. On Thursday 22 June, the appellant sent the medical adviser an email to go back over their meetings on 8, 20 and 21 June, to reiterate her disagreement with being made to stop working, and to complain of how she had been treated the previous day, which she perceived as "undue work pressure". On Monday 26 June, the medical adviser replied that she could not confirm this record of their meetings and that she was "convinced that you are temporarily unfit to carry out your work duties".

20. The appellant's extended sick leave was further extended by Dr I. on 25 July, and again from 16 August to 20 September.

21. The appellant submitted the opinion of a doctor she had consulted, dated 24 August, in whose view it was possible for her to go back to work; it was therefore decided that the appellant could resume working on a medical part-time basis under medical supervision from 20 September to 15 October, in anticipation of a consultation with an independent medical expert, Dr B., that was initially scheduled for 4 October but later postponed until 11 October at the appellant's request. Following the consultation, Dr B. found that the appellant was again unfit to work, noting that it was "unlikely that she will be fit to resume working full-time satisfactorily in the short term". On 16 October, the medical adviser concluded that the appellant was unfit to resume working full-time.

22. On 17 October 2023, the General Manager took the decision to terminate the appellant's contract pursuant to Article 45.7.3 of the CPR as from the next day, 18 October 2023.

23. On 15 December 2023, the appellant lodged the present appeal with the Tribunal seeking annulment of that decision.

E. The parties' arguments

24. The appellant submits that the decision is tainted by a manifest error of judgment, was taken on inadequate grounds, and violates the principle of legal certainty and the duty of care.

25. The Agency begins by disputing the admissibility of the submissions seeking payment of the loss-of-job indemnity, absent a prior decision by the General Manager refusing to grant it to her. The admissibility of such submissions may only be examined if the impugned decision is tainted by illegality, however. This must therefore be examined.

26. The appellant contends that the impugned decision is illegal insofar as it is tainted by a manifest error of judgment and "because of the illegality of the decisions of 21 June, 25 July and 16 August insofar as they placed the appellant on invalidity [...]. The impugned decision of 17 October that is based on these decisions has therefore been taken on irregular grounds."

27. Firstly, the appellant argues that she had disputed the decisions of 21 June, 25 July and 16 August in requests for administrative review that the Administration found inadmissible because they were preparatory decisions that did not constitute grounds for grievance; that she had made requests to work part-time and to take leave without pay, which had been denied; that the service in which she worked was understaffed and that her way of working, which had always been appreciated prior to her sick leave, had not been questioned once she was back at work; that the medical adviser's attitude had been biased, in particular because she had moved the consultation scheduled for 27 June (after expiry of the two-month period that would allow for interruption of the extended sick leave period) forward to 20 June (before expiry of that two-month period) and because her opinion was unclear (because she alternated between using the pronouns "I", "we" and "one"); and lastly that she had been treated in an unacceptable manner on 20 June and in particular on 21 June. From this she concludes that the impugned decision was based on irregular grounds and is tainted by a manifest error of judgment.

28. The Administration chiefly challenges the admissibility of that claim insofar as it is directed at the decisions of 20 June, 25 July and 16 August, on grounds that contrary to what it had stated in the administrative review, these decisions do constitute grounds for grievance and should have been disputed within the time frames for doing so. Since they were not, they have become final and can no longer be disputed. In the alternative, it argues that these decisions are not tainted by any irregularity, since the medical adviser expressed her opinions solely based on medical considerations and in the interests of protecting the appellant's health. From this it concludes the impugned decision was not taken on irregular grounds or tainted by a manifest error of judgment.

29. Secondly, the appellant argues that the impugned decision violated the principle of legal certainty on grounds that she was authorized to go back to work from 20 September to 15 October 2023 whereas, according to the Agency's reasoning, she had already gone beyond the limit of 24 months' sick leave. She also argues that the impugned decision was taken in violation of the duty of care, given her state of health and how poorly she was treated when the consultation of 27 June was moved forward to 20 June and when she was forcibly evicted from her workplace on 21 June.

30. The Administration counters that the impugned decision on contract termination merely draws the consequences of the appellant's inability to work full-time after 24 months' paid sick leave in accordance with the relevant provisions of the CPR, and that it violates neither the principle of legal certainty nor the duty of care, as it was taken only as a last resort.

F. Ruling of the Tribunal

On the claims that the impugned decision is tainted by a manifest error of judgment and based on erroneous grounds

31. It is not disputed that starting in October 2021 the appellant was severely depressed, which led to her being placed on three months' sick leave on 4 October 2021, and then on extended sick leave starting on 4 January 2022. She was only able to return to work as from 24 April 2023. This situation is furthermore corroborated by the two independent medical assessments by two different practitioners, one on 20 April and the other on 21 September 2022, which found that the appellant was unfit to work owing to her state of health.

32. This case is centred on the Agency medical adviser's decision on 20 June 2023 to put the appellant back on extended sick leave as from 20 June 2023, resulting in the appellant's return to work being interrupted less than two months after she had gone back, which meant that the tally of the duration of sick leave was unbroken as from 4 October 2021, in accordance with the provisions of Article 45.7.1 cited at paragraph 9 of this judgment. It was on the basis of that decision plus the decisions of 25 July and 16 August to prolong the sick leave that the impugned decision to terminate the appellant's contract was taken, given that these are the decisions that kept the period of sick leave that began on 4 October 2021 from being interrupted by her return to work between 24 April and 20 June 2023.

33. Although the appellant disputed the medical adviser's decision to put her back on sick leave for one month as from 20 June 2023 as well as the decisions of 25 July and 16 August extending her sick leave through 14 September 2023, she did not appeal those decisions before the Tribunal. In any case, the case file and in particular the documents from the medical adviser show that each of those decisions was taken based on a medical opinion from a medical assessment of the appellant, which found that her state of health made her unfit to work because she had relapsed into depression. These decisions, which contrary to what the appellant maintains in the appeal are drafted clearly and unambiguously, are rooted in the medical adviser's duty: to protect staff members' health. In addition, as the Agency points out, the appellant produced an analysis of her

state of health by the doctor of her choice only on 24 August 2023, i.e. after the three contested decisions, despite having been asked to do so at each of her consultations with the medical adviser. Following the medical opinion submitted by the appellant on 24 August 2023 which found no unfitness to work, it was arranged for her to work on a medical part-time schedule between 20 September and 15 October, pending an independent medical expert's examination of the appellant as well as the medical adviser's opinion. The medical expert, who examined the appellant on 11 October, concluded that it was "unlikely" that the appellant would be "fit to resume working full-time satisfactorily". The medical adviser, for her part, ultimately informed the Administration that in her view the appellant was unfit to resume working full-time. It was based on all these elements that the impugned decision to terminate the contract was taken.

34. While the appellant disputes the decision of 20 June 2023 in particular for having been hasty, since the consultation based on which it was taken had initially been scheduled for 27 June, it is in any case the duty of the medical adviser to take the necessary steps to ensure that staff members' health is not in jeopardy, and she cannot be criticized for having moved a consultation forward by one week (to Tuesday 20 June) if in her view that consultation was urgently needed from a medical standpoint, given her concerns about the state of health of someone who had gone back to work just a few weeks earlier after months of absence for medical reasons, and if it is clear from the case file that this doctor had, already at the previous consultation on 8 June, expressed doubts about the appellant's fitness to resume work owing to another decline in her state of health. Nothing in the case file indicates that the medical adviser moved that consultation forward hastily to keep the tally of sick leave from being interrupted.

35 Under these conditions, the case file does not reveal either that there were irregular grounds for the impugned decision owing to the illegality of the decisions of 20 June, 25 July and 16 August 2023, there being no need to rule on the admissibility of the argument regarding disputing those decisions, or that the decision was tainted by a manifest error of judgment.

On the claim of a violation of the principle of legal certainty and of the duty of care

36. The impugned decision terminated the appellant's contract on grounds that she was unfit to resume working for medical reasons and that her entitlement to sick leave under the aforementioned CPR provisions had lapsed. Although the appellant was authorized to work on a medical part-time basis between Wednesday 20 September and Sunday 15 October 2023, that was at her request, and in line with the favourable opinion dated 24 August 2023 from the doctor she had consulted and whose opinion she had sought pending the consultation with an independent medical expert that was supposed to take place on Wednesday 4 October but that was postponed to 11 October at the appellant's request, prior to the final opinion of the medical adviser, which was issued on 16 October. Under those conditions, even though the maximum period of sick leave to which the appellant was entitled under the CPR had expired on 3 October at midnight, as the impugned decision moreover notes, the appellant does not have grounds to maintain that the impugned decision, taken on 17 October 2023, violated the principle of legal certainty.

37. With regard to the duty of care, the Tribunal recalls that this only means that when the Administration takes a decision, it takes account of all the relevant information, which includes the interests of the service but also the interests of the staff member concerned. In the present case, the case file shows that the decision to terminate the appellant's contract was taken after expiry of the period of sick leave following several medical opinions, including from independent medical experts, which found that she was unfit to resume working owing to her state of health. Although the appellant argues that the consultation with the medical adviser initially scheduled for 27 June 2023 was moved forward against her will to 20 June 2023 and that the medical adviser's opinion based on that consultation of her unfitness to resume working did not take account of her desire to continue working at least through 24 June to allow for interruption of her first period of sick leave that ran from 4 October 2021 or of her plans to take annual leave as from 7 July 2023, the case file does not show that the medical adviser acted with any aim other than to protect the appellant's health, as was her duty. With the impugned decision, the Administration merely drew the consequences of the medical assessment that she was unfit to resume working, whereas the maximum 24 months' sick leave had lapsed. Under these conditions, the claim of a violation of the duty of care must be rejected.

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

G. Costs

39. 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.

40. In accordance with those provisions, the appeal having been dismissed, no reimbursement of costs to the appellant is due.

H. Decision

FOR ALL THESE REASONS:

the Tribunal decides:

- The appeal is dismissed.

Done in Brussels on 16 August 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

29 August 2024 AT-J(2024)0019

Judgment

Case no. 2023/1377

BN

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 19 August 2024

Original: French

Keywords: non-renewal of contract; unsatisfactory performance.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Seran Karataru Köstü and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the hearing on 6 June 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 8 September 2023 and registered on 29 September 2023, as Case no. 2023/1377, by Mr BN (hereinafter "the appellant") against the NATO Support and Procurement Agency (hereinafter "the Agency"). In the appeal the Tribunal is asked, in particular, to annul the decision of 14 July 2023 not to renew the appellant's contract pursuant to Article 45.7.3 of the NATO Civilian Personnel Regulations (hereinafter the "CPR") and to order the Agency to pay him €408,498.04 in material and non-material damages.

2. The Agency's answer, seeking dismissal of the appeal, was submitted on 28 November 2023 and registered on 8 December 2023.

3. The appellant's reply, seeking the same relief as in the appeal, was submitted on 5 January 2024 and registered on 24 January 2024.

4. The Agency's rejoinder, seeking dismissal of the appeal, was submitted on 23 February 2024 and registered on 29 February 2024.

5. An oral hearing was held on 6 June 2024 at NATO Headquarters. The Tribunal heard arguments by the parties, in the presence of Ms Laura Maglia, Registrar.

B. The parties' submissions

6. The appellant is seeking annulment of the decision dated 14 July 2023 not to renew his three-year contract. He is also seeking an order for the Agency to pay him €408,498.04, which corresponds to three years' salary, in material and non-material damages arising from the impugned decision. Lastly, he is seeking an order for the Agency to pay the costs.

7. The Agency is seeking dismissal of the appeal.

C. Legal background

8. Article 5.2 of NATO's Civilian Personnel Regulations states:

> 5.2.3. Definite duration contracts may be renewed for a period of up to 5 years and subject to the following factors being met:
>
> i) renewal is in the interests of the Organization;
>
> ii) availability of budget post;
>
> iii) performance to the required standard as defined by the Head of NATO body; [...]
>
> 5.5.1. The staff member shall be informed in writing not less than 6 months before the expiry of the contract whether or not it is intended to offer a further contract. […]
>
> 5.5.3. Following satisfactory performance during a definite duration contract, the Head of the NATO body may, in the interests of the service, offer: - the renewal of the definite duration contract under the conditions of Article 5.2 […].

D. Factual background of the case

9. Mr BN is a French national born in 1975 who had been working for the Agency since 2011, first as a temporary staff member and then as a consultant, before being recruited in 2017 as a staff member to perform technician duties at B5 level. In 2021, the post he held was deleted as part of a service reorganization following the end of the operation in Afghanistan. He was then reassigned, as from 1 October 2021, to the naval support section.

10. On 15 June 2022, he was called in by his N+2 (Mr K.), who informed him that his three-year definite-duration contract that was scheduled to end on 31 December 2022 would be renewed for a period of one year only, on grounds that he was not performing sufficiently well in his new post, and that a Performance Improvement Plan (PIP) would soon be drawn up to give him the chance to give full satisfaction.

11. On 28 June 2022, he was officially notified that his contract was being renewed for a period of one year only. On 25 July 2022, he filed a request for administrative review against that decision insofar as his contract was being renewed for a period of just one year. He claimed that the post he had been assigned to since 1 October 2021 was very technical, that his managers had never criticized the quality of his work since the moment he started in the position until the 15 June meeting, and that his team was understaffed, meaning that he had had to work intensely even though he was just starting in the position. The request for administrative review was dismissed on 10 August 2022. The appellant did not appeal it with the Tribunal.

12. On Tuesday 9 August 2022, the appellant had another meeting with Mr K. in which the latter explained where the shortcomings lay and the PIP was effectively put in place. The case file shows that while the appellant agreed with one of the objectives assigned to him, he disagreed with the second (improve teamwork), considering it unfair. The meeting did not go well and was inconclusive. Straight after the meeting, Mr K. sent a message to Human Resources, in which he stated that the appellant had accused him of racism. As for the appellant, he was placed on sick leave from Thursday 11 to Friday

19 August, and again from Wednesday 24 to Tuesday 30 August, and then without interruption starting from Monday 12 September.

13. On Tuesday 23 August, upon learning that Mr K. had complained to Human Resources that he had accused him of racism, the appellant sent an email to Human Resources, entitled "request to file a grievance against Mr K.", in which he: 1) complained that he had been falsely accused by Mr K., 2) denied calling him a racist in their 9 August meeting, 3) claimed he was being harassed and victimized by Mr K. and 4) stated that he was "extremely affected by these events" and asked the service to "act as quickly as possible so as to re-establish the balance of treatment any staff member is entitled to", highlighting that it was "the NSPA's duty to protect its staff".

14. On 2 March 2023, the service's medical adviser (Dr B.) informed him that in her view his period of sick leave could end and that he could resume working on a medical part-time basis, only remotely, and explained that if he produced a sick note attesting that that would not be possible, the Agency would initiate arbitration in which a third-party medical practitioner would settle the matter following assessment of the appellant's medical situation. As the appellant's general practitioner disagreed with the assessment of the service's medical adviser, an independent neuropsychiatrist (Dr G.) was called upon to arbitrate. Dr G. found that the appellant would be unfit to work in any form for at least six months as from 8 March 2023.

15. On 26 May 2023, the appellant was informed in a letter that it had been decided not to renew his contract beyond 31 December 2023 owing to his unsatisfactory performance. He filed a request for administrative review on 22 June 2023 but that request was dismissed and the non-renewal confirmed on 14 July 2023.

16. This is the decision that the appellant is asking the Tribunal to annul.

E. The parties' arguments

17. The appellant argues that the decision not to renew his contract is illegal for the following reasons:

- he is serving a term as a staff representative expiring on 30 June 2024;
- the impugned decision is in any case premature as it was taken while he was on sick leave until at least 8 September 2023;
- the impugned decision is tainted by a manifest error of judgment; and
- the impugned decision is tainted by misuse of power.

18. The Agency argues that the appeal is partly inadmissible (the submissions whereby the Tribunal is asked to declare the appeal admissible as well as the claims for compensation, insofar as the compensation sought is higher than the €20,000 sought in the 22 June 2023 request for administrative review). For the remainder, it argues that the non-renewal of the contract was not illegal and that the appeal must be dismissed.

F. Ruling of the Tribunal

On the submissions seeking annulment of the impugned decision

19. The case file, and in particular the letter of 26 May 2023 informing the appellant that his contract would not be renewed, shows that that decision was based on the appellant's unsatisfactory performance in the position he had held since October 2021.

20. First, the appellant claims – without this being seriously refuted by the respondent – that he had been giving full satisfaction in his previous position, and the case file shows that his 2020 rating was "very good". While his 2021 rating was only "good", it was still positive and, as highlighted by the appellant, that rating was given only in September 2022 by people who had not been his managers in his previous duties, which, incidentally, the appellant complained to the administration about in a letter dated 5 August 2022.

21. Second, regarding the duties at issue, which were assigned to him following the reorganization of the service in which he had previously worked, it is not disputed that the appellant took them up only in October 2021 and that, in the period leading up to March 2023, he took several training modules because of the very technical nature of the job, which required checking the compliance of many invoices of widely varying types that were governed by very strict procedures.

22. It is also clear from the case file that it was only in March 2022 that the appellant was asked, just like his colleagues but for the first time in his case, to set his objectives for 2022. It was at that point, in a discussion with his N+1 (Mr B.) and his N+2 (Mr K.), that the objective of handling an average of 8 invoices a day seems to have been presented to the appellant, since that figure appears as an addition suggested by Mr K. in the draft objectives prepared by the appellant ("*B, an individual goal for your consideration: 8 invoices a day*").

23. Though the Agency states that the appellant's colleagues were complaining of too often having to correct the mistakes he made when checking and certifying the invoices assigned to him, it added to the case file just one email dated 10 April 2022 from one of the appellant's colleagues complaining about a number of mistakes made by him in the previous two weeks. In any case, nothing in the case file shows that the appellant had been informed by his managers that his performance was considered unsatisfactory before 15 June 2022; on the contrary, his N+1 asked him to deputize for him for 48 hours when he was absent in early June 2022.

24. It was only on 9 August 2022 that a meeting was held between the appellant and Mr K. to discuss the shortcomings the appellant was being accused of and to put in place the PIP mentioned in their 15 June 2022 meeting, even though the appellant claims – without this being seriously refuted by the respondent – that he had been at work most of the time between 15 June and 9 August.

25. It is true, as the Agency notes, that the appellant refused to sign the PIP presented to him that day. The case file shows that that was because of one of the two objectives set, on improving teamwork. The appellant disagreed with that objective, considering that

by setting it his N+2, Mr K., was discriminating against him. In turn, Mr K. criticized the appellant for calling him a racist on that occasion. It is to be noted that following that meeting, the appellant, who since his joining the Agency in 2011 had only taken an average of 8.5 days of sick leave a year, went out on sick leave for 220 days from 11 August 2022 until his contract expired on 24 July 2023. Furthermore, nothing in the case file shows that an administrative investigation was launched following the appellant's email of 23 August 2022 in which he complained that he was being harassed and discriminated against by Mr K., and called upon the service to protect him. The reply to that email, dated 25 August 2022, simply acknowledged the email and advised him to contact another person, whereas he had gone out on sick leave again the day before and had been put in that position several days earlier.

26. The case file – in particular his sick leave from 11 to 19 August, from 24 to 30 August and from 12 September 2022 onward – shows that following the one-year renewal of his contract on 28 June 2022, the appellant worked in the service for only about 20 days, including fewer than 10 days after 9 August, the day of the meeting at which his shortcomings were noted and a Performance Improvement Plan (PIP) proposed. In any event, in the impugned decision itself, it is noted that the "periods of sick leave limited the number of actual days of work, making it impossible to complete the Performance Improvement Plan".

27. While in March 2023 the service's medical adviser suggested that the appellant resume working part-time and "only remotely" to avoid relapsing in a work environment considered "toxic", she also highlighted that it was "truly in your interest to prove that you are fit to work to keep your contract with the Agency". However, as the appellant's general practitioner disagreed that he should return to work given his state of health, an independent medical expert was called upon, in whose view the appellant was too sick to return to work for at least six months. Because he was on sick leave, after 28 June 2022 (the date on which his contract was renewed for one year), the appellant did not work between 11 and 19 August 2022, between 24 and 30 August 2022 and from 12 September 2022 until the end of the contract period at issue.

28. However, in the impugned decision it is stated that "the period worked since June 2022 is sufficient to reveal a total lack of improvement in your performance, which continued to be unsatisfactory during your current definite duration contract. "

29. The appellant started his position only in October 2021, as of March 2022 he could not have been considered fully trained for what was a very technical job, nothing in the case file showed that his managers had expressed any criticism before 15 June 2022, and a Performance Improvement Plan was presented to him only on 9 August 2022. Under those conditions, it could not be stated in the impugned decision, without a manifest error of judgment, that "the period worked since June 2022 [was] sufficient to show a total lack of improvement in [the appellant's] performance" when in fact the latter had, under that particular contract, worked only a few days owing to his periods of sick leave.

30. Without there being any need to look into the other submissions in the appeal, the main submission must be allowed, and the decision of 14 July 2023 not to renew the appellant's contract must thus be annulled.

On the claims for compensation

31. In light of the above, the Tribunal orders the Agency to pay €5,000 to the appellant to compensate for the non-material damage arising from the illegality of the impugned decision.

G. Costs

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

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

33. The appeal being successful, the appellant is entitled to reimbursement of €6,000 in material and legal costs.

H. Decision

FOR ALL THESE REASONS,

the Tribunal decides:

- The decision not to renew the appellant's contract is annulled.
- The Agency shall pay €5,000 to the appellant to compensate for the non-material damage arising from the illegality of the impugned decision.
- The Agency shall reimburse Mr N. for justified expenses incurred by him, including the costs of retaining counsel, up to €6,000.
- The other submissions in the appeal are dismissed.

Done in Brussels on 19 August 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 November 2024 AT-J(2024)0020

Judgment

Joined Cases Nos. 2023/1380 and 2024/1389

RA

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 22 October 2024

Original: English

Keywords: Performance Improvement Plan; termination of contract; Article 9.1(i) of the CPR; damages.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Ms Louise Otis, President, Ms Anne Trebilcock and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearings on 26 September 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Mr RA (hereinafter "the appellant"), against the NATO Support and Procurement Agency (hereinafter "the NSPA") dated 23 November 2023 and registered on the same day (Case No. 2023/1380), seeking annulment of the decision taken by the Organization (hereinafter "the respondent") on 15 August 2023 to impose on the appellant a Performance Improvement Plan (hereinafter "PIP"), annulment of the decision dated 9 October 2023 rejecting his request for administrative review, compensation for non-material damage and reimbursement of legal costs and fees.

2. On 11 March 2024, the appellant submitted a second appeal, registered on 12 March 2024 (Case No. 2024/1389), seeking annulment of the decision to terminate his contract, compensation for material and non-material damage and reimbursement of legal costs and fees.

3. In accordance with Rule 13.3 of Annex IX of the NATO Civilian Personnel Regulations (hereinafter "CPR"), and by order of the Tribunal's President (13 March 2024), Cases Nos. 2023/1380 and 2024/1389 were joined for the purposes of the decision closing the proceedings.

4. The respondent's answer in Case no. 2024/1380, dated 23 February 2024, was registered on 29 February 2024. The appellant's reply, dated 3 April 2024, was registered on 9 April 2024. The respondent's rejoinder, dated 13 May 2024, was registered on 24 May 2024. The respondent's answer in Case No. 2024/1389, dated 15 May 2024, was registered on 29 May 2024. The appellant's reply, dated 28 June 2024, was registered on 1 July 2024. The respondent's rejoinder, dated 2 September 2024, was registered on the same day.

5. These appeals mainly concern the decision to establish a PIP and terminate the appellant's contract on grounds of unsatisfactory performance.

6. The Tribunal held the hearing on 26 September 2024 at NATO Headquarters. It heard arguments by both parties, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

7. The appellant joined the NSPA on 2 August 2021 as Deputy Director of the Support to Operations Directorate at A5 level. He held a 3-year definite duration contract expiring on 1 August 2024.

8. On 1 February 2023, the Human Resources Executive (HRE) was informed of allegations of possible misconduct by the appellant towards his colleagues.

9. In March 2023, the appellant received his performance appraisal for the 2022–2023 cycle. While the appellant's performance was rated "Good", the performance appraisal report identified behavioural issues towards other staff members.

10. The manager emphasized in her final overall performance appraisal comment: "…I also noted that there were some negative aspects, and approach regarding his relationship with personnel, and also received a number of feedbacks from several personnel during the course of the year. In several occasions, I mentioned this to R and asked him to pay attention to his approach towards personnel. I strongly encourage him to work on these aspects and show improvements, which is sensitive and must be solved...".

11. On 1 May 2023, the appellant was transferred to the position of Programme Manager of the Operations and Support Programme Office due to informal complaints pertaining to his behaviour.

12. In June 2023, the respondent offered the appellant training guidance organized by the Leadership Circle in order to develop leadership skills.

13. On 13 July 2023, the investigator tasked with investigating the allegations of misconduct issued a detailed and thorough report which, on the basis of converging testimonies, established a number of factual findings about the overall attitude of the appellant towards one of his colleagues. According to the investigator, the appellant had "displayed a pattern of conduct that adversely impacted the work environment of his colleagues".

14. The report also identified two aggravating circumstances. Notably, the investigator highlighted that the appellant "did not appear to be self-aware of his attitude and the impact it has on his colleagues, even after explicit feedbacks were provided to him such as the ones reported by his line manager in his EPMS 2022 or the ones provided by some individuals on an ad hoc basis".

15. On 31 July 2023, a disciplinary process was initiated against the appellant and details regarding the allegations and the findings of the investigation report were provided to him.

16. On 16 August 2023, the appellant's line manager established a PIP to assess whether the appellant's performance was improving, and on the same day, the appellant received a copy of the investigation report. The PIP was set up for a duration of four (4) months expiring on 16 December 2023.

17. On 17 August 2023, the appellant provided comments on the content of the PIP.

18. On 15 September 2023, the appellant submitted a request for administrative review challenging the establishment of the PIP, which was rejected on 9 October 2023 on the basis that it did not affect the appellant's conditions of work or service.

19. On 24 October 2023, the appellant received a progress report on the implementation of the PIP which noted that the appellant had failed to improve his behaviour. On 6 November 2023, the appellant provided comments on the PIP progress report.

20. On 8 November 2023, the appellant met with his line manager to discuss the objectives set in the PIP and the appellant's development. On 14 November 2023, in the context of the PIP mid-review, the appellant's line manager determined that the PIP was still necessary.

21. On 23 November 2023, the appellant filed an appeal challenging the establishment of the PIP and the rejection of his request for administrative review.

22. On 12 January 2024, a meeting was held to discuss the appellant's performance under the PIP and to conduct an end-of-year review. On that same day, the appellant's contract was terminated pursuant to Article 9.1(i) of the CPR. The decision was predicated on the appellant's performance being deemed unsatisfactory subsequent to evaluations conducted under the PIP.

23. On 7 February 2024, the respondent sent the appellant his final performance appraisal and the final version of the PIP via registered letter and email. The appellant was also informed that he had the option to challenge his appraisal.

C. Parties' principal contentions, legal arguments and relief sought

24. The parties' principal contentions and arguments are summarized and discussed below, as part of the analysis of each of the appellant's grounds.

D. Considerations and conclusions

Preliminary remarks

25. At issue in these appeals are alleged irregularities in the establishment of the PIP (A), and irregularities in the performance appraisal of the appellant which ultimately led to his termination (B). Each of these grounds of appeal, along with the associated arguments, is examined in the following sections.

26. Before proceeding with this analysis, the Tribunal recalls that both its own case law and that of other international tribunals establish that it has limited review authority in cases involving performance assessments of staff members, such as the PIP. The

Administrative Tribunal of the International Labour Organization (hereinafter "ILOAT") in Judgment No. 4543 stated that "assessment of an employee's merit during a specified period involves a value judgement; for this reason, the Tribunal must recognize the discretionary authority of the bodies responsible for conducting such an assessment". Similarly, in Case No. 2013/1001, this Tribunal observed that it "cannot substitute its own judgment for that of the Administration in respect of the assessment and abilities of a staff member".

27. The Tribunal can only intervene with respect to performance assessments in limited circumstances. In Case No. 2013/1001, cited recently with approval in Case No. 2023/1353, the Tribunal explained that it could intervene to verify the absence of "any manifest error of judgment or misuse of power" by the authorities, with manifest being defined as "easily visible and evident". Relatedly, in Case No. 2022/1336, the Tribunal specified that it could intervene in decisions involving the exercise of discretionary authority, such as performance assessments, only "if a decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority". These principles are also reflected in the ILOAT's Judgment No. 4543.

28. With these preliminary observations in mind, the Tribunal proceeds to its examination of the appellant's principal grounds of appeal.

A) There were no irregularities in the establishment of the PIP

(i) The PIP is subject to appeal in limited circumstances

29. The appellant alleges that the establishment of the PIP constitutes a decision that affects his conditions of work. Accordingly, it can be challenged under Article 2.1 of Annex IX of the CPR, which states that "Staff members … who consider that a decision affecting their conditions of work or of service does not comply with the terms and conditions of their employment…may…initiate the process for seeking an administrative review of the decision".

30. In support of this, the appellant cites ILOAT precedents and references the text of the PIP itself, which warns that "failure to meet the expectations outlined in the PIP may result in disciplinary action, up to and including non-renewal of your employment contract". He further argues that since the PIP does not constitute a periodic performance report, the prohibition on appeals specified in Article 55.4 of the CPR does not apply.

31. The respondent asserts that under the CPR, appeals concerning the establishment of the PIP are not permissible. It refers to Article 55.4 of the CPR which states that: "The assessments and recommendations made on the staff report… represent the personal assessments and recommendations of the officials in question against which the staff member cannot invoke the complaints and appeals procedures". Furthermore, the respondent argues that the PIP does not alter the appellant's conditions

of work since its purpose is to assist with improving the staff member's performance, and thus cannot be challenged under Article 2.1 of Annex IX of the CPR.

32. The Tribunal observes that the PIP is an integral component of the system designed to evaluate periodically the proficiency of staff members in the performance of their duties, as outlined in Article 55.1 of the CPR. The PIP, a "Performance Improvement Plan", clearly functions as a performance assessment tool, and stems from the NSPA Operating Instruction on Employment Performance Management (OI 4400-12).

33. Although the PIP is not a periodic performance report, such as an annual review, the Tribunal recognizes it as part of the broader performance management system, alongside periodic reviews. Indeed, Annex VIII of the CPR outlines the basic principles of performance management and assessment, specifically noting in Paragraph 2.3 that "[o]ngoing feedback and coaching should occur throughout the [performance management] cycle". Therefore, the PIP, which serves as a mechanism for managerial feedback and appraisal outside of periodic reviews, is inherently a component of the performance management system.

34. The Tribunal's determination has two key consequences. First, the PIP forms part of an ongoing feedback system that may lead to a decision that alters the appellant's conditions of work. The appellant's PIP states that "failure to meet the expectations outlined in the PIP may result in disciplinary action, up to and including non-renewal of your employment contract". As the Tribunal established in Case No. 2014/903, only measures that alter the legal situation of the appellant are appealable, while the ILOAT, in Judgment No. 4072, recognized that the PIP "entails potentially serious consequences for those subjected to it". Therefore, only the consequences of the PIP are subject to appeal, i.e. the alteration of the appellant's conditions of work.

35. Second, given the Tribunal's determination that the PIP is an integral component of the performance assessment system, the Tribunal recalls its preliminary remarks, regarding the discretionary authority granted to bodies responsible for such assessments. As emphasized in its own case law and that of other international tribunals, the Tribunal can intervene with respect to these assessments only in limited circumstances, to verify the absence of any manifest error of judgment or misuse of power.

(ii) The respondent did not violate procedural rules in the establishment of the PIP

36. The appellant also argues that he was not consulted prior to the establishment of the PIP. He contends that this lack of consultation constitutes a violation of procedural rules. The appellant cites NSPA Operating Instruction on Employee Performance Management (OI 4400-12), which, he asserts, explicitly requires prior consultation of the employee in Paragraph 5.2.2.1.13. This paragraph mandates that the direct manager is responsible for:

> Establishing a Performance Improvement Plan (PIP), with input from the staff member and support from Human Resources, to formally address identified performance issues for which informal feedback, coaching and guidance have proven insufficient in situations where a staff member's performance is assessed as "Fair" or "Unsatisfactory"

37. The appellant further contends that, given that his performance was rated as "Good" in his 2022 review, the establishment of the PIP contravenes another procedural rule. This rule stipulates, according to Paragraph 5.2.2.1.13, that a PIP should only be initiated if performance has been assessed as "Fair" or "Unsatisfactory".

38. The respondent maintains that Paragraph 5.2.2.1.13 does not require input from the staff member prior to the adoption of the PIP, but rather requires input to ensure that the reasons for establishing the PIP and its details are accurate. The respondent argues that this requirement has been met, as the conduct leading to the PIP and the PIP itself was extensively discussed with the appellant. Additionally, the respondent contends that the establishment of the PIP is not dependent on the type of performance assessment received in the previous year, arguing that such a restriction would impractically hinder the establishment of PIPs during, for instance, an employee's first year of service.

39. The Tribunal recalls that, given the discretionary authority of bodies responsible for undertaking performance assessments, its role in reviewing the establishment of such assessments is limited to verifying the absence of any manifest error of judgment or misuse of power. In this instance, the appellant's argument is primarily concerned with alleged misuse of power. Indeed, the ILOAT, in Judgment No. 2414, held that the validity of an unsatisfactory performance assessment by an organization depends on whether it "complied with the rules established to evaluate that performance". Echoing this view, the ILOAT in Judgment No. 4383 set aside a PIP due to procedural violations in its establishment.

40. The appellant's argument hinges on the interpretation of Paragraph 5.2.2.1.13 of the OI 4400-12 concerning the required procedural steps when establishing a PIP. The procedural requirements in Paragraph 5.2.2.1.13 of the OI 4400-12 are to be interpreted according to the principles set forth in Article 31 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "VCLT"). Although not binding on the Tribunal, the VCLT was recognized by this Tribunal in Cases Nos. 2016/1086 and 2016/1093 as a reflection of the "current prevailing doctrine and practice concerning the interpretation of international legal instruments". According to Article 31 of the VCLT, Paragraph 5.2.2.1.13 should 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".

41. The Tribunal determines that the terms regarding the establishment of the PIP are clear and unambiguous. They state that the staff member is to provide "input" on the establishment of the PIP. Input is not required before the PIP is established, but rather the appellant must be given the opportunity to contribute at some point during this process. The Tribunal notes that the appellant had multiple opportunities to provide input

on the PIP: he made numerous comments on the PIP, participated in meetings to discuss the PIP with his line manager, and submitted an administrative request challenging its establishment. Additionally, prior to the initiation of the PIP, the appellant was provided, on 31 July 2023, with a detailed account of the misconduct allegations and the findings from the investigation report that led to the establishment of the PIP.

42. Furthermore, the Tribunal finds that the language of Paragraph 5.2.2.1.13 does not condition the establishment of a PIP on a formal performance review being assessed as "Fair" or "Unsatisfactory". Rather, it stipulates that the PIP is initiated to address "performance issues" identified to have reached such levels. This allows for assessments to be made independently of periodic performance reviews, in line with the need to provide ongoing feedback to staff members. Any other interpretation would significantly curtail the very purpose of a PIP, particularly in situations where performance has quickly deteriorated after a positive review or, as in the current case, where the staff member has recently started a new role.

43. Accordingly, the Tribunal is satisfied that there was no manifest misuse of power in the establishment of the PIP. The PIP was established with the necessary input from the appellant and its establishment was not contingent on the complement of a periodic review.

B) There were no irregularities in the performance appraisal of the appellant which would invalidate the termination decision

(i) The respondent assessed the appellant's performance but did not meet the conditions of Article 9.1(i)

44. The appellant asserts that there are no valid grounds for terminating his contract. He argues a breach of Article 9.1(i) of the CPR which provides that: "The Head of NATO body has the right to terminate contracts for due and valid reasons, e.g. (i) if the staff member does not perform to the standard determined by the Head of NATO body, as assessed under the system established by the Head of NATO body in accordance with Article 55.1 or 55.5".

45. The appellant contends that at the time the decision to terminate his contract was made, he had not had a mid-year review, nor was there a final version of the PIP or a final appraisal in place. He claims that these last two documents were fabricated and only communicated to him after the decision. Consequently, he asserts that the Head of the NATO body did not have a proper basis to assess his performance, and therefore, the prerequisites for contract termination under Article 9.1(i) of the CPR were not satisfied.

46. The respondent argues that the appellant's argument is without merit. They allege that the appellant's performance was indeed assessed, as the PIP is an integral component of the system for evaluating staff members' performance, as stipulated under Article 55.1 of the CPR. In this context, the PIP fulfilled in essence the same function as

a mid-year and year-end review, providing feedback and opportunities for improvement. Furthermore, the respondent argues that the termination was adequately motivated. The decision to terminate was made in a context known to the appellant, as the respondent had repeatedly informed him of his performance shortcomings, primarily through the PIP. The respondent argues that the timing of the communication of the final PIP and the final appraisal, which occurred after the decision to terminate the contract, does not undermine the validity of the decision itself, which was based on the appellant's unsatisfactory performance.

47. The relevant provisions of the CPR applicable to this ground of appeal are as follows:

> **Article 9**
> 9.1 The Head of NATO body has the right to terminate contracts for due and valid reasons, e.g.
>
> (i) if the staff member does not perform to the standard determined by the Head of NATO body, as assessed under the system established by the Head of NATO body in accordance with Article 55.1 or 55.5.
>
> **Article 55.1**
> The Head of each NATO body shall establish a system designed to evaluate periodically the proficiency of staff members in the performance of their duties…
>
> **Article 55.2**
> The system may include periodic performance reports submitted in accordance with the criteria set out in Annex VIII.A.
>
> **Article 55.4**
> The assessments and recommendations made on the staff report shall be given to the staff member concerned. … [who] … has the right to make written comments on the assessments … which will be attached to the report and included in the staff member's personal file.
>
> **Article 55.5**
> In the event that the Head of the NATO body establishes a system of performance management, the performance assessment criteria shall be set out in Annex VIII.B.

48. Applying these rules and considering the "ordinary meaning" of the terms as set out in the rules of interpretation under the VCLT, the Tribunal observes that Article 9.1 (i) establishes two distinct standards for assessing performance. Performance must be assessed either in accordance with Article 55.1 or Article 55.5. The ordinary meaning of these terms is clear: these provisions offer alternative standards for performance assessment, not cumulative ones, each capable of satisfying the requirements of Article 9.1 (i).

49. Under Article 55.5, performance is assessed in accordance with Annex VIII.A (now Annex VIII) to the CPR ("Basic principles of performance management and criteria for performance assessment"). These principles provide *inter alia*:

> 2.4 … the cycle should include a formal mid-term review. Its main purpose should be to let staff member know, before the annual review, how they are doing ..
>
> 3.2 The proposed assessment should then be vetted by a second level supervisor, …. and signed by the supervisors and staff member. The staff member will be given the opportunity to comment formally should he or she wish to….

50. It is evident from the record that the appellant's performance was not "assessed" in accordance with Annex VIII and, therefore, Article 55.5. No mid-term or annual review occurred before the termination, and the assessment was not reviewed by a second-level supervisor.

51. However, the Tribunal recalls that the appellant's performance was assessed using a PIP, which, as it determined previously, is part of a broader performance management system and thus aligns with Article 55.1. Indeed, a year and a half after the appellant joined the Organization, HRE received allegations of possible misconduct. In March 2023, the appellant received his performance appraisal relating to the 2022–2023 cycle, which identified behavioural issues towards other staff members. This appraisal was based on complaints received regarding the appellant's conduct in February 2023, and which prompted an investigation. The resulting investigation report established certain facts which were communicated to the appellant on 31 July 2023 and led to the initiation of a PIP on 16 August 2023. The PIP was established for a four-month period, ending on 16 December 2023.

52. The Tribunal also observes that the respondent's decision to terminate on 11 January 2024 relied on the "most recent performance appraisal rated as unsatisfactory following a PIP". This final performance appraisal and PIP were communicated to the appellant on 7 February 2024.

53. In any event, Article 55.1 does not derogate from Article 55.4, which establishes the right of staff members to receive their assessments and recommendations and to submit written comments. This right then forms a substantial pre-condition for fulfilling the requirements of both Article 55.1 and Article 55.5, and consequently, Article 9.1 (i) of the CPR.

54. It is undisputed that on 12 January 2024, the day the termination decision was communicated to the appellant, he had not yet received a written copy of his final performance appraisal or PIP. Therefore, he was not given the opportunity to review and comment on these assessments or their recommendation for termination, as required by Article 55.4, despite both documents being dated that same day.

55. As the Tribunal has previously noted, the requirement to notify the appellant of the final appraisal and PIP and afford him or her the opportunity to comment constitute substantial pre-conditions to termination. These requirements are mandated under Article 55.4, are integral to the system to evaluate performance periodically in Article 55.1, and are thus essential for termination under Article 9.1(i). However, such

notification occurred only on 7 February 2024, nearly a month after the termination decision.

56. Therefore, the Tribunal concludes that even if the appellant's performance was assessed, the conditions for terminating the appellant's contract under Article 9.1(i) of the CPR were not met before 7 February 2024. Consequently, the Tribunal awards the appellant emoluments from the date the termination decision was communicated to him, 12 January 2024, until the date he was notified of the final appraisal and PIP, 7 February 2024.

(ii) The respondent infringed upon the appellant's right to be heard

57. The appellant also contends that his right to be heard was infringed upon. He argues that by receiving the final version of the PIP and his final performance appraisal on 7 February, after the decision to terminate his contract on 12 January, he was deprived of the opportunity to understand the rationale of the decision and to offer his comments.

58. The respondent contends that the right to be heard prior to decisions affecting staff is not widely recognized in international administrative law. Furthermore, even if such a right is recognized, the respondent maintains that extensive discussions about performance were held with the appellant. Additionally, the appellant was provided with his final PIP and performance appraisal, which he had the opportunity to challenge.

59. The Tribunal observes that the appellant was given numerous opportunities to understand the nature of his performance shortcomings and to comment on them. The establishment of the PIP itself serves as evidence of these opportunities. The PIP expressly stated the serious consequences of failing to meet expectations, and the appellant had multiple opportunities to comment on the PIP, notably via an email dated 17 August 2023, the progress report dated 6 November 2023, and a meeting with his line manager on 8 November 2023.

60. However, the Tribunal notes that despite these opportunities, the appellant was not given the right to be heard prior to the decision to terminate his contract. Specifically, he was never informed of the Organization's intention to terminate his contract, which is the most severe measure possible. Further, this omission contravenes Article 55.4 of the CPR, which requires the notification of assessments and recommendations as well as the opportunity to comment on them. The language used in in the PIP only indicated the possibility of non-renewal, noting that "failure to meet the expectations outlined in the PIP may result in disciplinary action, up to and including non-renewal of your employment contract". This phrasing does not explicitly communicate the potential for early termination, thereby failing to provide the appellant with an opportunity to be informed and respond to the possibility of termination.

61. Based on the above considerations, the Tribunal concludes that the appellant's right to be heard with respect to the termination decision was not exercised in this case.

Therefore, the appellant should be awarded €4,000 in compensation for non-material damage.

(iii) The respondent did not breach its duty of care towards the appellant

62. Finally, the appellant argues that the respondent violated its duty of care towards the appellant by establishing a PIP by "total surprise" and through actions following his termination that he describes as humiliating and deplorable. Specifically, he was required to collect his personal effects while others were present at the NSPA, was escorted off the premises, and was not afforded the opportunity to say goodbye to his team.

63. In response, the respondent maintains that the PIP was instituted as part of its duty of care towards its other staff. Furthermore, the respondent denies any breach of duty of care towards the appellant, arguing namely that arrangements were made for the appellant to collect his belongings at a time when the NSPA was mostly empty, that the escort from the premises followed standard practice, and that no requests were made for him to say goodbye to his team.

64. The Tribunal recalls that both its own case law and that of other international tribunals recognizes that organizations bear a duty of care towards their staff members. As the ILOAT stated in Judgment No. 3213, "International organizations have a duty of care towards their employees". More recently, in Case No. 2021/1332, this Tribunal elaborated that the duty of care requires 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 those of the staff member concerned".

65. The Tribunal has previously determined that, prior to the establishment of the PIP, the appellant was informed about the disciplinary process initiated against him and was provided with a detailed account of the findings related to his alleged misconduct. Therefore, the establishment of the PIP could not have been a "total surprise".

66. Additionally, the case file does not support claims of humiliating or deplorable treatment by the respondent following the appellant's termination. The Tribunal notes that the appellant has not demonstrated that escorting former staff members off the premises deviates from standard practice. Furthermore, the respondent made accommodations for the appellant to collect his personal effects after working hours when minimal staff were present. This request, formulated by the appellant, contradicts his desire to say goodbye to his team.

67. In light of the aforementioned considerations, the Tribunal concludes that the respondent did not breach its duty of care towards the appellant.

E. Costs

68. 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.

69. The appeal having succeeded in part, the Tribunal awards costs of retaining counsel, up to a maximum amount of €3,000.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appellant shall be awarded the emoluments to which he would have been entitled for the period from 12 January to 7 February 2024.
- The appellant shall be awarded €4,000 in compensation for non-material damage due to the respondent's failure to respect the appellant's right to be heard.
- Costs shall be awarded in the amount of €3,000.
- The remaining claims are dismissed.

Done in Brussels, on 22 October 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

5 November 2024 AT-J(2024)0021

Judgment

Case No. 2024/1387

SV

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 22 October 2024

Original: English

Keywords: res judicata; unsatisfactory performance; complaint procedure.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Ms Louise Otis, President, Ms Anne Trebilcock and Mr Thomas Laker, judges, having regard to the written procedure and further to the hearings on 26 September 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 10 January 2024 and registered on 27 February 2024 as Case No. 2024/1387, by Mr SV, against the NATO Support and Procurement Agency (NSPA). The appellant mainly contests the decision not to renew his contract.

2. In its answer, dated 29 April 2024 and registered on 16 May 2024, the respondent invites the Tribunal to dismiss the appeal as inadmissible in part, and unfounded. The appellant's reply, dated 30 May 2024, was registered on 14 June 2024. The respondent's rejoinder, dated 9 July 2024, was registered on 10 July 2024.

3. An oral hearing was held on 26 September 2024 at NATO Headquarters. The Tribunal heard the appellant's statement and arguments by representatives of the respondent, in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

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

5. The appellant joined the NSPA on 1 June 2017 as a Senior Technical Officer at A3 level and was assigned to post LD-211. Concerns with respect to his attitude and performance prompted discussions with his managers, which led to the decision to extend his probationary period by six months, namely until 31 May 2018.

6. In March 2018, the appellant was transferred upon his request to post LD-215. A few months later, his appointment was confirmed.

7. Despite discussions in which concerns about his performance were expressed, his contract was renewed for 3 years in October 2019.

8. The appellant's overall performance for 2019 was rated "Fair". A Performance Improvement Plan (PIP) was established in March 2020. Interim performance reviews were conducted on 20 May, 15 July and 30 October 2020.

9. The appellant's overall performance for 2020 was rated "Unsatisfactory". This rating was later changed to "Fair" in the first stage (out of three) of the conflict resolution process, as provided for in operating instruction 4400-12 "NSPA Policy for Employee Performance Management System". The appellant did not pursue this process any further.

10. The appellant was subjected to another PIP in 2021 and therefore to further regular performance reviews. His overall performance was rated “Unsatisfactory” for 2021. This rating was confirmed after exhaustion of the three-phase conflict resolution process, which ended with the binding decision rendered by the Joint Review Board (JRB) on 28 September 2022.

11. By letter of 22 November 2022, the NSPA’s Human Resources Executive (HRE) notified the appellant of her decision not to offer him another contract due to his poor performance and lack of improvement.

12. The appellant filed a request for administrative review with the Organization’s General Manager, i.e. the Head of the NATO body, by letter of 6 December 2022, in which he challenged his performance appraisal reports for 2020 and 2021, and asked for their withdrawal, the offer of a new contract and his reassignment to a different programme.

13. By letter of 3 January 2023, the General Manager confirmed the contested decision.

14. On 30 January 2023, the appellant lodged a complaint in which he requested that the matter be referred to a Complaint Committee (CC); this was rejected on 6 February 2023.

15. In this respect, the appellant filed a first appeal with the Tribunal on 11 April 2023, registered as Case No. 2023/1365. In this appeal, the appellant requested:

- annulment of the decision of 22 November 2022 not to renew his contract;
- proposal of a new indefinite-duration appointment/contract;
- reassignment to another post; and
- compensation for material and non-material damage.

16. This appeal was dismissed in full by decision of 15 February 2024.

17. Additionally, on 23 January 2023, the appellant had submitted a complaint of inappropriate behaviour to the HRE, in which he alleged that his first and second line managers had abused their authority and harassed him.

18. On 30 March 2023, the HRE informed the appellant that in conformity with the NSPA Code of Conduct, she had declined to launch disciplinary proceedings on the grounds that his complaint was ill-founded and that the acts described therein could not support a finding of inappropriate behaviour.

19. On 14 April 2023, the appellant submitted a complaint against this decision to the NSPA General Manager. In his complaint, he requested that the matter be submitted to a Complaint Committee, which the General Manager assented to on 2 May 2023. On that same day, the General Manager requested the Chair of the Complaint Committee to convene a Complaint Committee.

20. On 28 June 2023, the Chair convened the Complaint Committee. On 1 July 2023, the Complaint Committee requested the appellant to attend an oral meeting on 5 July

2023, either in person or by VTC. On 3 July 2023, the appellant informed the Complaint Committee that this date would interfere with his vacation schedule, and that he would not be available before 3 August 2023.

21. On 3 August 2023, the Complaint Committee held an oral hearing with the appellant by VTC. On 24 October 2023, the Committee received the official sworn statements of Mr F. and Mr T., whom the appellant had proposed as witnesses. The following day, the Committee received the statements of Mr X. and Mr Y.

22. On 26 October 2023, the Complaint Committee issued its report, recommending that the complaint be dismissed. On 13 November 2023, the appellant provided the General Manager with his observations on the Complaint Committee report.

23. On 16 November 2023, the General Manager dismissed the complaint.

24. On 10 January 2024, the appellant submitted the present appeal.

C. Summary of parties' contentions and legal arguments

(i) The appellant's contentions

Admissibility

25. In the appellant's view, the appeal is admissible in its entirety since the present case and the former appeal in Case No. 2023/1365 are interrelated insofar as his line managers misused the performance appraisal procedure to justify the non-renewal of his contract, thus committing an abuse of authority.

Merits

26. The appellant argues that the HRE erred in the determination not to introduce disciplinary proceedings, and that the alleged conduct warranted launching an investigation pursuant to Article 7.3.3. of the Code of Conduct. More specifically, he insists that the alleged facts give rise to two instances of abuse of authority and one instance of harassment. The appellant alleges that the individuals responsible are his first line manager from 2021 onwards, and his first line manager from 2019 to 2021 and his second line manager from 2021 onwards.

27. According to the appellant, both line managers committed abuse of authority during the Employee Performance Management System (EPMS) in 2020, 2021, and 2023 in order to prepare his separation from service.

28. Further, the appellant believes that he was harassed by his supervisor when the latter decided during the COVID crisis that he had to move to other offices, whereas others were allowed to stay in their offices.

29. In addition, the appellant thinks that his supervisor abused his authority and/or committed retaliation when the latter declined to support the appellant's transfer to a different post.

30. Finally, the appellant alleges that the report of the Complaint Committee was submitted beyond the time limits.

31. Pursuant to his last submission, the appellant requests:

- annulment of the decision dated 30 March 2023 not to launch disciplinary proceedings against his line managers on the grounds that the appellant's complaint was ill-founded and that the acts described therein could not support a finding of inappropriate behaviour;
- annulment of the decision dated 22 November 2022 regarding the non-renewal of his contract; and
- €30,000 as compensation for non-material damage.

(ii) The respondent's contentions

Admissibility

32. The respondent maintains that the appeal is inadmissible in part, as one of its conclusions challenges a decision which has already been subject of a final decision by the Tribunal in Case No. 2023/1365. The arguments and conclusions in the present appeal that are directed towards the non-renewal of the appellant's contract must be rejected by the principle of *res judicata* as they already have been rejected by the Tribunal.

Merits

33. The appellant's allegations regarding the behaviour of his line managers do not *prima facie* constitute misconduct. The decision not to launch an investigation was correct.

34. Work-related and performance disagreements are excluded from the rules of the Code of Conduct. In the present case, all three appraisals went through the EPMS Conflict Resolution process, which in no case resulted in any finding of bias.

35. The measures taken during the COVID crisis were grounded in real concerns, including the appellant's own vulnerability.

36. The supervisor was not obliged to support the appellant's wish to be transferred. The transfer request was evaluated, and the appellant was found unsuitable for the position.

37. The delay in submitting the investigation report had no effect on the outcome of the decision. Further, no compensation can be granted for alleged irregularities of the Chair of the Complaint Committee since the latter is not under the supervision of the respondent's Head.

D. Considerations and conclusions

(i) Admissibility

38. The Tribunal notes that the decision not to renew the appellant's contract has already been reviewed and confirmed in Case No. 2023/1365. Therefore, in the interest of legal certainty, the general procedural principle of *res judicata* prevents the Tribunal from re-opening this matter.

39. Pursuant to Rule 29 of the Tribunal's Rules of Procedure (Annex IX to the CPR, Appendix 1), a party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. The Tribunal notes that the appellant does not base his appeal on Rule 29. Even if he did so, in the present case, no new determining fact needs to be considered. At the time of the oral hearing of Case No. 2023/1365, i.e. on 30 January 2024, the appellant had already lodged his appeal in the present case.

40. It follows from the above that the appeal is inadmissible with respect to the appellant's request to annul the decision not to renew his contract, dated 22 November 2022. The other claim is admissible.

(ii) Merits

Allegations of inappropriate behaviour

41. The Tribunal notes that, in the contested decision dated 30 March 2023, the appellant's complaint for inappropriate behaviour was dismissed "as it is not prima facie well-founded". In this context, the decision also concludes that the complaint "is manifestly unfounded".

42. The legal basis for this decision is Chapter 7 of the NSPA Code of Conduct. In particular, Article 7.3.1 asks for a preliminary assessment to determine whether the complaint has been submitted in good faith, it is not frivolous or vexatious or "manifestly unfounded". Pursuant to Article 7.3.4.3, a complaint shall be dismissed if the preliminary assessment reveals that "[t]here is no likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case". This is the case here. During the duly conducted investigation, no sufficient signs could be found that the appellant might have been a victim of abuse of power, nor been harassed or retaliated against.

43. Firstly, the appellant's performance appraisals of 2020, 2021, and 2022 all went through a review process which did not produce any proof of irregularity. The testimony of all witnesses presented by the appellant also do not indicate any form of inappropriate behaviour by his first and his second line manager. Finally, it is clear that work-related disagreements are out of the scope of ethical misconduct (see Article 3.2.8 of the NSPA Code of Conduct).

44. Secondly, there is no evidence that the measures of the appellant's supervisors during the COVID crisis were directed against the appellant in order to punish or harass him; rather they were taken with the intention to protect the appellant's health. None of the appellant's witnesses confirmed the appellant's view in this respect.

45. Thirdly, the fact that the appellant might have lacked support regarding his application for a transfer does not amount to any kind of inappropriate behaviour. There was no obligation for the appellant's supervisors to support him, and the selection process adhered to the rules, as confirmed by an involved witness.

46. In sum, the Tribunal has no reason to consider as incorrect the preliminary determination that the appellant's complaint was manifestly unfounded and that there was no likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case.

Procedural delay

47. The Tribunal takes note that, in the present case, the Complaint Committee exceeded the time limit for the submission of its report for more than three months, thus taking more than double the regular time. In the oral hearing, the respondent admitted that such a delay should never had happened.

48. The fact that the Chair of the Complaint Committee acts independently does not limit the NSPA's overall responsibility for the proper conduct of its complaint proceedings. The respondent has to bear the consequences if a body of its review system neglects the time limits set in the internal rules of the Organization.

49. The Tribunal recalls that the decision to award damages is independent from a decision to annul an administrative decision or not (see AT judgment in Case No. 892, paragraph 49; see also Article 6.9.1 of Annex IX to the CPR). Even if the delay in the present case may not have had an impact on its outcome, the appellant was left in limbo for a considerable amount of time (see AT judgment in Case No. 2022/1342, paragraph 39), contrary to the established legal timeframe. In light of these circumstances, the Tribunal awards the appellant €2,000 in non-material damages.

E. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appellant shall be awarded €2,000 in damages.
- All other pleas are rejected.

Done in Brussels, on 22 October 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

12 November 2024 AT-J(2024)0022

Judgment

Case No. 2024/1386

BB

Appellant

v.

NATO International Staff

Respondent

Brussels, 5 November 2024

Original: English

Keywords: harassment and discrimination; disciplinary dismissal (Article 59.3(e)); witnesses; duty of care.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of Ms Louise Otis, President, Mr Thomas Laker and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 27 September 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal, dated 22 January 2024 and registered on 5 February 2024 as Case No. 2024/1386, by Ms BB, against the NATO International Staff (NATO IS). She seeks:

- annulment of the respondent's decision of 23 November 2023 dismissing the appellant pursuant to Article 59.3(e) of the Civilian Personnel Regulations (CPR);
- an order to the respondent to compensate the appellant for the non-material damage allegedly suffered, as further detailed; and
- an order for the respondent to pay all costs.

2. The respondent's answer, dated 8 April 2024, was registered on 9 April 2024. The appellant's reply, dated 13 May 2024, was registered on 24 May 2024. The respondent's rejoinder, dated 26 June 2024, was registered on 28 June 2024. Following the written exchanges, the hearing in this case took place on 27 September 2024. The Tribunal heard arguments by the parties and the testimony of two witnesses (one named by the appellant and one named by the respondent, pursuant to the provisions of Annex IX to the CPR, Article 6.7.4 and the Tribunal's Rules of Procedure (RoP), Appendix I to Annex IX, Rule 25(4) and Rule 26. The hearing took place in the presence of Ms Laura Maglia, Registrar.

B. Factual background of the case

3. At the time of the contested decision, the appellant was an A4 Team Leader in an Operations Division unit at NATO HQ, on an indefinite-duration contract since 2019. Her career had begun with an internship with NATO, followed by temporary contracts and then a definite-duration contract. In 2011, she passed an internal competition at A3/A4 grade and served in an A3 post until promotion to grade A4 in 2016. She became a programme leader in 2020, and was a Staff Association committee member as from 2016. The programme she led underwent a number of changes in its relationship to parallel and hierarchically superior entities, as well as some staff movements, in the relevant period.

Complaint filed

4. On 12 May 2022, a new member of the appellant's small team filed a complaint against the appellant, alleging harassment and discrimination, while wishing to remain anonymous. The complainant (Ms Y.) had joined the team a few months earlier. In light of duty travel and absences, the appellant and Ms Y. had had only a few weeks of interaction in the period between Ms Y. joining the team and her filing the complaint. Written and oral statements by a staff member who had participated in online meetings with the Headquarters team in this period (Ms A.) indicated that Ms Y. had on several

occasions acted in a disrespectful manner with regard to the appellant, who had remained polite and professional.

5. In a preliminary assessment of the complaint, the Human Resources (HR) unit concluded that if substantiated, the allegations would raise a legitimate concern of possible misconduct. HR then mandated a large, internationally well-known consulting firm to conduct an investigation, which began in June 2022.

Report of the external firm

6. The firm's final report, submitted on 24 January 2023, took into account information gathered up to 28 November 2022 and concluded that the appellant's behaviour "fits the applicable [NATO] definitions of harassment, bullying, discrimination and abuse of authority". The mandate given to the firm was not disclosed, but its report included the relevant NATO policies.

7. In the report, it was stated that a large number of documents provided by the complainant (including statements from other staff members regarding similar behaviour) as well as by the alleged offender (statements attesting to harmonious work relationships with her) had been examined. The conclusions noted a number of elements "that speak in support" of the appellant. The firm had interviewed the complainant, the appellant (twice, accompanied by a staff association representative) and seven other persons.

8. Only two persons speaking in favour of the appellant were interviewed, but she submitted numerous additional supporting statements from colleagues who had worked with her in various ways. All interviewees were given the opportunity to review and amend the notes of their interviews. In the words of the firm's report, the appellant was widely praised for her "professionalism, hard work, dedication, meticulousness and perfectionism… [while] many people interviewed indicated that she was a poor people manager".

9. The report found that the following accusations had not been sufficiently proven: yelling at subordinates; terrorizing with micro-aggressions; discrimination against a pregnant woman. It considered the accusation regarding exclusion and isolation of staff to be too light to fit within the given definition of harassment.

10. The report found the following accusations to have been substantiated: openly and publicly criticizing and belittling someone, with numerous examples; criticizing people in a derogatory and destructive or negative manner, with numerous examples; knowingly or unknowingly creating a hostile and toxic work environment which negatively affected others; bad-mouthing and/or smearing reputations, for several individuals; discrimination on the basis of nationality. The report concluded, "The examples are too numerous to ignore. [The appellant's] behaviour has consequences on the team…".

11. In its general conclusion, the firm's report stated that it had not identified many concrete elements to support the complaint made, but that during the investigation, "several written testimonies and additional interviews supported us with much more relevant and additional information about the different allegations indicated by the complainant". The report considered that the appellant's behaviour fitted the NATO definition of harassment, bullying and discrimination.

HR investigation and opening of disciplinary proceedings

12. After receipt of the firm's report, HR conducted an additional investigation. In a letter dated 30 March 2023, the Deputy Assistant Secretary General for Human Resources (DASG/HR) informed the appellant that disciplinary proceedings were being opened against her on the basis of ON(2022)0028 on harassment and similar behaviour and Article 5.2 of Annex X to the CPR, with a recommended sanction of dismissal. This letter enclosed the firm's report, noting its conclusion that the appellant had engaged in behaviour involving harassment, bullying and discrimination. The letter stated that HR had in addition examined several other facts and circumstances and had taken on board additional information about the situation [French original: "*examiné un certain nombre d'autres faits et circonstances, et pris des renseignements complémentaires sur la situation*"]. It referred to the number of accusations and the number of staff (current and former) who made them, as well as the "presumed impact" [original: "*incidences présumées*"] of the appellant's conduct on her team and her colleagues ["*votre équipe et vos pairs*"]. The letter informed the appellant of an immediate transfer to one of two possible posts. Instead, the appellant went out on sick leave the same day; after three months, this became extended sick leave which, since she has an indefinite-duration contract, is set to end at the latest on 30 March 2025.

13. On 6 April 2023, the appellant asked for transmittal of all documents examined by HR in this matter, disclosure of the mandate of the external firm, and then repeated these requests in the disciplinary proceedings. She was told by HR that she had already received sufficient information to provide comments. On 24 April 2023, she made her extensive preliminary observations on the firm's report and on the HR letter, with additional observations submitted on 18 July and 26 September 2023. These included a number of statements in her favour and her annual review report for 2020.

Examination by the Disciplinary Board and its report

14. On 17 May 2023, DASG/HR informed the appellant that a Disciplinary Board had been established and would contact her. The Board's three members were an Assistant Secretary General as Chair, the head of the appellant's Division, and a staff member nominated by the Staff Committee. DASG/HR's letter also denied the appellant's request for transmittal of all documents examined by HR and the external firm, on the grounds that that their respective reports had provided sufficient information to permit the appellant to understand the allegations made, the conclusions drawn and the reasons for initiating the disciplinary proceedings.

15. The counsel for the appellant reiterated in a letter of 9 June 2023 the request for the entire disciplinary file to be made available, citing the right to self-defence, and asked for the legal basis of HR's investigation of other events between April 2022 and January 2023. On 27 June 2023, DASG/HR reiterated the earlier position, adding that if further information was provided in the disciplinary proceedings, this would be done on the basis of respecting the anonymity of the persons concerned.

16. The Disciplinary Board had been established on 24 March 2023, and first met to discuss this matter on 27 June 2023. By email of 3 July, the Chair of the Disciplinary Board invited the appellant to appear before it on 20 July 2023. On 10 July, DASG/HR provided the appellant with around 200 pages of copies of documents which the

Disciplinary Board had requested of HR, some with markings to preserve anonymity. The statements came from current and former members of the appellant's team as well as former supervisors, going back to 2019. Among these were notes from her previous second-level supervisor (Mr B.), who had left NATO in early 2022.

17. The appellant provided extensive written observations on 18 July 2023, with multiple annexes, and reserved the right to make further comments. She reiterated her request to receive the mandate given to the firm, HR's preliminary evaluation of the allegations, and witness testimony or proof used in HR's additional investigation. The appellant commented on several of the witness statements that had been supplied and attached statements in her support from four colleagues, one of them from the field-based colleague who had interacted often with her team (Ms A.).

18. After the Board hearing of 20 July 2023, the appellant submitted additional comments on the notes of her former supervisor, which he had kept – without the appellant's knowledge – from 2019 until he left NATO in early 2022. The appellant challenged the credibility of the information, denying that she was the cause of team members' decisions to leave, and citing various counter-indications and annexing some past correspondence.

19. The Disciplinary Board heard another three witnesses (DASG/HR and the Deputy Assistant Secretary General for Operations (DASG/OPS), and one of the four staff members reporting to the appellant) at HQ on 26, 27 and 29 September, without informing the appellant in advance. The counsel for the appellant provided additional written comments on 26 September 2023.

20. On 24 October 2023, the Board issued its 7-page report, which unanimously recommended the appellant's dismissal, having found that her behaviour constituted harassment, bullying and discrimination within the definitions of ON(2020)0057-COR1, further operationalized through an implementing directive of May 2022, ON(2022)0028. The Board said it had comprehensively reviewed the case before submitting its recommendations, and referred to the complaint and written statement of the complainant, the DASG/HR report and the appellant's comments on it, documents assembled by the firm, further observations by the appellant and her performance reviews from the last four years, plus the interviews conducted later and the additional observations from the appellant. It pointed to NATO's zero tolerance towards inappropriate behaviour.

21. The Board noted that the complainant may have acted more as a whistle-blower than as a direct victim, and that "there is an extensive body of evidence, corroborated by multiple staff members … depicting [the appellant's] misbehaviour over an extended period of time". It found that she had "created a toxic work environment in the … team that had a detrimental impact on the physical or psychological well-being of several members or former members of staff …". The Board report acknowledged challenges faced by the unit and the appellant's lack of prior management experience as mitigating circumstances, but noted that these did not excuse her behaviour. It concluded that her behaviour constituted a breach of the NATO Code of Conduct, Articles 12.1.4 and 13.2 of the CPR and the relevant NATO policy. It found dismissal to be appropriate considering the "consistent pattern of [her] misbehaviour over the years, and its

continuation after coaching and notification that she was under investigation [in 2022]" and because she had failed to change.

22. The case file included emails confirming that a minor incident involving a former staff member (Ms X.) had taken place during a weekly staff meeting in May 2020 and that supervisors had discussed this with the appellant at the time. The file also contained the annual performance review received by the appellant from her previous first-level supervisor (Ms C.) for 2020, with an overall rating of "very good" by this manager (who has since retired), but which also referred to the challenges of keeping two team members motivated and happy. The performance review for 2021 contained the same overall high rating, but with a reference to "team management challenges".

23. In 2022, the appellant's overall rating had declined to "fair". This performance review gave the appellant good marks for achievement of most objectives, but in relation to "team management", the objective was not met. The supervisor's comments on this point noted that "all of the team members who left felt that they could not work with [the appellant] as a manager … [She] struggles to develop an inclusive team environment … She needs to consider more rigorously and consistently the impact she has on others". In addition, the objective on collaboration was not met either, and the supervisor commented, "[she] has prevented her team members to go to other people's team meetings or made condescending remarks about other colleagues…".

24. In the appellant's comments on this report, she refuted these views and provided some details about staff movements; she noted that she could not be held responsible for team members' sick leave or maternity leave. The supervisor had also stated, "it will be important for her to adjust some of her attitudes… Management will fully support [her] in achieving these objectives". At the hearing, the higher-level manager confirmed that two temporary staff and one member of the appellant's team had complained directly to him about the appellant's behaviour after he took over that role in autumn 2022.

The contested decision

25. The Secretary General (SG) followed the Disciplinary Board's recommendation and, on 23 November 2023, imposed the sanction of dismissal under Article 59.3(e) of the CPR against the appellant, who was still on extended sick leave. This is the decision contested here. It stated that her actions were in violation of Articles 12.1.4 and 13.2 of the CPR and NATO's policy on harassment, bullying and discrimination, and added that her actions had irreparably violated the confidence NATO had placed in her.

26. The SG approved the sanction of dismissal as recommended by DASG/HR and the Disciplinary Board. The SG referred in particular to the conclusions of the Board, which had found a constant tendency to behave inappropriately over several years, and the fact that this continued even once she had been notified of a formal complaint against her. [Fr.: "*une tendance constante à se conduire de façon inappropriée et ceci durant plusieurs années, et le fait que cela ait continué après que vous ayez été notifié de l'existence d'une plainte formelle à votre encontre … vous n'avez fait prevue d'aucune notion d'un quelquonque besoin de changer votre comportement*…"]. The sanction did not include any impact on her pension. The letter referred to the basis on which the decision had been taken (the reports of the Board and of the external firm, HR communications to the appellant, and her written submissions).

27. The final decision was dated within 30 working days of receipt of the recommendations of the Board. Since the appellant was on sick leave, the dismissal would not be effective until 24 months following her going out on sick leave, which would be on 1 April 2025. She received her full salary for the first nine months of sick leave, and since then has received 80% of it, as foreseen in CPR Article 45.7.

28. In a letter accompanying the appellant's reply of 13 May 2024 in this matter, she requested that four witnesses be heard by the Tribunal. Following a short hearing on this request in June 2024, the President of the Tribunal called on the parties to submit their observations on this request, and as appropriate to submit a list of potential witnesses (referring to Articles 6.7.4, 25 and 26 of the CPR and Articles 25.3 and 25.4 of the Tribunal's Rules of Procedure (RoP)). Written exchanges followed and each party was invited to present one witness each, which they did. The Tribunal found the testimony of both witnesses, who were cross-examined by the other party, to be useful for its deliberations.

C. Summary of parties' contentions and legal arguments

(i) The appellant's contentions

29. The appellant contests the imposition of dismissal dated 23 November 2023. She maintains that the investigating firm's report, whose mandate remained undisclosed, was biased and based on hearsay. She says she was not aware of the subsequent HR investigation so could not exercise her right to be heard or to defend herself.

30. She reproaches the Disciplinary Board for not acting within its mandate, ignoring witness credibility issues and not hearing additional witnesses. She claims that the Board failed to respect both its mandate (since it did not verify that the allegations as a whole were sufficiently established) and the appellant's right to defence; and moreover, had not supported its decision with reasons. The appellant has queried why, if her earlier supervisor (Mr B.) had had such concerns about her behaviour, there was no reflection of this in her annual reviews in this period or a discussion with her at the time. In her view, the various procedural flaws also meant that her right to defence was not respected.

31. The appellant contends that the sanction of dismissal proposed by the Board was unfounded and that, even if certain facts were established, it was disproportionate.

32. In addition, she claims violation of the duty of care because the repeated requests for information in the disciplinary file were refused until 10 days before the hearing and no additional time was given, despite the effect on the appellant's health.

33. On the basis of these acts by the respondent, the appellant seeks compensation for damage to her professional reputation and prospects, harm to her health, compensation for non-material damage ex aequo et bono (€30,000), and annulment of the contested dismissal, plus award of all expenses even if the appeal does not succeed.

(ii) The respondent's contentions

34. The respondent requests dismissal of the appeal as unfounded. After its review of the facts, the respondent recalls the jurisprudence relating to discretionary decisions. It says that the appellant indeed had access to the file and exercised her right to be heard. The respondent says the file was examined in its entirety by the Board, including testimony by two witnesses relied upon by the appellant. According to the respondent, the facts were sufficiently established and there was no manifest error of appreciation.

35. In its view, the sanction was also proportionate. Moreover, it argues, reasons were given for the decision, and there was no breach of the duty of care. The respondent recalls the Tribunal's limited scope of review in such cases.

D. Considerations and conclusions

(i) Admissibility

36. The appeal was timely filed, it concerned a decision taken directly by the Head of a NATO body (see CPR, Annex IX, Article 1.4), and its admissibility has not been contested. The appeal is admissible.

(ii) Merits

37. Dismissal is a discretionary decision, albeit a matter of the most serious nature. This is particularly the case for a staff member who had served the organization for a number of years and had an indefinite-duration contract. The Tribunal can annul such a decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was abuse of authority (see Case No. 2023/1354-1376 of 23 February 2024). A disciplinary decision must be taken within the parameters laid down in the CPR.

38. In order to address the merits, the Tribunal recalls the legal framework against which the arguments may be assessed. Article 3.2 of Annex X to the CPR (Disciplinary powers and procedures) states that "the grounds on which disciplinary action is taken must be specified and the staff members concerned informed of the grievances against them". The staff member has 15 working days in which to submit written or verbal comments to the authority that initiated disciplinary proceedings (here, DASG/HR) (Article 5.2-5.3 of Annex X). Where, as here, the official responsible for personnel management considered that the staff member should be subject to disciplinary action under Article 59.3(e) (dismissal), the Disciplinary Board is to be convened. This is what happened in this case.

39. The Board may require a staff member to appear before it and may invite anyone else to testify. “The Board must hear the staff member, who may also submit written or verbal comments and ask that certain witnesses be heard” (Annex X, Article 6.2). Article 6.3 of that Annex requires the Board to state the grounds for its recommendation to the Head of NATO body. No disciplinary action may be taken until the staff member has been informed of the allegations against him/her (Article 60.3 of the CPR). Overall, the Tribunal finds this to have been the case here.

40. The standard against which the appellant’s conduct was to be measured for the purposes of possible disciplinary action was Article 12.1.4 and 13.2 of the CPR, plus relevant policy circulars. Article 12.1.4 provides:

> Members of the staff shall treat their colleagues and others, with whom they come into contact in the course of their duties, with respect and courtesy at all times.
> (a) They shall not discriminate against them on the grounds of gender, race or ethnic origin, religion or belief, age or sexual orientation.
> (b) They shall not harass, bully or otherwise abuse another staff member.

Article 13.2 provides that:

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

41. The relevant policy documents were, for the period from 1 January 2014 to 4 November 2020, ON(2013)00076 of 17 December 2013, and – with reference to the original complaint – ON(2020)0057-COR1 as from 5 November 2020. While the more recent document goes into the matter in more detail, the thrust of the two is similar. The 2020 version provides a general definition of harassment and refers to intent (which is not necessary to show), impact, frequency (normally a series of incidents), types of harassment, and hostile work environment. It defines harassment as generally referring to “any unwelcome or offensive conduct that has had, or might reasonably be expected to have, the effect of offending, humiliating, embarrassing or intimidating another person, or creating an intimidating or hostile work environment…”.

42. In relation to possible sanctions that may be imposed under Article 59.3 of the CRP, Article 3.3 of Annex X to the CPR specifies that the measures imposed “must take account of the scope and gravity of the fault (e.g. voluntary omission, serious negligence, whether or not premediated, deliberate harmful intention, etc.)”.

43. The contested decision relied upon the report of the Disciplinary Board, which also had access to the information from the HR investigation, and the external investigation report. The appellant’s contentions that the investigating firm’s report and the Board ignored the many written testimonials in her favour and the email exchanges she provided were not substantiated; the fact that the report did not refer to specific items of evidence submitted by the appellant did not automatically mean that they had not been examined and taken into account.

44. The allegations of bias are also unfounded. The external firm's report itself concluded that the appellant was highly regarded professionally and that some of the accusations against her were not sufficiently supported. Yet it found that other allegations had been, and it was on the basis of the substantiated statements from and about several staff members' perceptions of the appellant's behaviour that the firm concluded that there had been a number of instances of harassment, bullying and discrimination, with an impact on the team. Overall, the Tribunal is not convinced by the appellant's critique of this report. However, the respondent has provided no reasonable explanation for why it refused to disclose the mandate of the firm that was tasked with conducting the investigation; it could have shared the parameters of the investigation without disclosing proprietary commercial details.

45. Following receipt of the investigation report, HR undertook its own investigation, going back in time to incidents that predated the complaint of May 2022. It alluded to the results of its own investigation, without any details, when notifying the appellant, in its letter of 30 March 2023, of the referral to the Disciplinary Board with a recommendation of dismissal. The respondent refused to divulge this information to the appellant until after the Board had set an interview with her in July 2023; it simply stated that the appellant already had sufficient information. The appellant received this information 10 days before testifying, while she was on sick leave. Thus, eventually the appellant received all of the documents on which the charges of misconduct were based. She had the chance to provide additional written comments to the Board, which she later did, and ably so. The appellant provided two sets of comments and appeared before the Board, with accompaniment. In these circumstances, she was able to exercise her right to defence.

46. However, as examined below (paragraphs 52 to 55), this aspect of handling of the complaint, while not fundamentally flawed in a manner that would justify annulment of the contested decision, was not in line with the respondent's duty of care towards the appellant.

47. In addition, the Board's characterization of the complainant as a whistleblower was not accurate; as the appellant pointed out, this complainant did not have direct knowledge of most of the information unearthed in the course of the firm's investigation, suggesting that someone else had been feeding her these accounts of alleged past behaviour. Their verification or non-verification, however, drew on later interviews with a range of individuals.

48. The HR investigation referred to some earlier instances of behaviour that had not led to any complaints or disciplinary action against the appellant at the time. Aside from a vague reference in the 2020 performance review, it was not until after the complaint was filed that an annual performance review (for 2022) specifically mentioned difficulties in relation to the appellant's team leadership and staff turnover. Through this performance review, as well as earlier discussion with her about a conflict with a former staff member (confirmed by emails supplied by the respondent), she was already on notice of concerns over her managerial style and its effect on staff at the time the disciplinary procedure was invoked.

49. The respondent was not required to divulge the reports of the interviews conducted (see Case No. 2020/1308, TF v. NATO IS, paragraph 38), although it did so

in redacted form to preserve anonymity. Similarly, the Disciplinary Board was not obligated to hear all of the witnesses requested by the appellant. However, the automatic rejection of all witnesses in favour of the appellant simply on the basis that they did not report directly to the appellant was not appropriate. In particular, neither the external firm nor the Board interviewed a witness whose written statements had called into question the behaviour of the complainant herself vis-à-vis the appellant (displaying rudeness to the appellant during online team meetings, confirmed by Ms A.). This witness (Ms A.) had also been present at and had direct knowledge of an off-site event following which another staff member had alleged harassment by the appellant. The dual role of participant and as assistant at this training event was understandably a source of stress for that staff member (who, in an A-level post, was not entitled to compensation for overtime), but allegations that she had been undermined by the appellant were not demonstrated. However, there were a number of other instances of behaviour inconsistent with the policy on bullying and harassment that were demonstrated.

50. The appellant's complaint that the Board did not respect its mandate is unfounded, however. She herself was heard by the panel and had the opportunity to submit written comments afterwards, as required by the procedure. Her claim that the Board was obligated to verify that the allegations as a whole were sufficiently established should also be rejected. Drawing on the range of sources it cited, the Board concluded that there was an ample basis for finding that she had engaged in certain alleged improper conduct; with such ample basis, it was not necessary for it to confirm each and every accusation made against her. In the face of the scope of the substantiated findings of instances of harassment and bullying on the part of the appellant, the shortcomings found here in relation to the investigation underlying the administrative decision did not rise to the level of irregularity that would lead to annulment of the decision to dismiss.

51. The Tribunal now turns to the allegation that dismissal was a disproportionate measure here. Once the organization triggers disciplinary action, it has the following actions at its disposal for a person still on staff: reprimand, written censure, postponement of a salary increment, temporary suspension from duties entailing the withholding of emoluments in whole or in part, or dismissal. NATO has placed increasing emphasis on combatting harassment, bullying and discrimination at work, a task described by a witness (Mr A.), as "an uphill battle". Each single incident that was corroborated in the investigations here may not on its own have seemed all that serious, but there were multiple instances of behaviour by the appellant that had negatively affected a number of team members, at least contributing to the departure of some from the unit and in some cases NATO altogether. The multiplicity of incidents over time fell under the scope of the misconduct that was confirmed. Under these circumstances, the Tribunal is not able to conclude that the sanction of dismissal without pension implications was disproportionate.

52. The appellant also alleged breach of the duty of care owed to her by the respondent. It recalls that the organization, when taking account of all factors that may influence its decision, needs to take into account the interests of both the service and the staff member (see Case No. 2021/1332 JT v. NSPA, of 19 May 2022, paragraph 40). The Tribunal finds there has been a failure to take account of the staff member's interests in three respects.

53. Firstly, the original complaint against the appellant alleging harassment, bullying and discrimination was submitted by one individual who had been under her direct supervision for a short period of time in early 2022. Other information was brought to the attention of the external investigating firm, involving other staff and former staff over a longer time period, which led it and HR to investigate further before establishing the Disciplinary Board. These investigations occurred at a time when the respondent had, in the appellant's performance review for 2022, pledged its full support for her to address the management challenges. Instead, HR appears to have marshalled its energies in this period to mount a case against her.

54. Secondly, the refusals to share information with the appellant on a timely basis and, in the case of the mandate of the external investigation firm, at all, were not in line with the duty of care. While the appellant was on sick leave, she was given only 10 days to deal with a large quantity of information prior to being heard by the Disciplinary Board. There was no compelling reason to schedule the interview then, rather than giving her more time to confront the evidence against her. While she was in fact still able to defend herself, and ably so, the added stress of time pressure was unnecessary. In addition, the excuse given for not divulging the information earlier, i.e. that she already had sufficient information, did not take the appellant's genuine concerns about being able to defend herself seriously.

55. Thirdly, the evidence produced from Mr D., her former higher-level supervisor, revealed that he had been compiling a dossier on the appellant, without her knowledge, and without having the information reflected in annual reviews for the relevant period. While the motives for this were unclear, this diverged from the procedures foreseen in the CPR for performance management and discipline and was disrespectful towards the appellant.

56. For these reasons, the duty of care has been violated and compensation in the amount of €12,000 should be granted to the appellant.

E. Costs

57. In relation to costs, the Tribunal rejects the appellant's claim that it may award costs even if the appeal fails. The basis for an award of costs is Article 6.8.2 of Annex IX to the CPR, which empowers the Tribunal to order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant, "where it is admitted that there were good grounds for the appeal". The instant judgment has concluded that this was the case in relation to the duty of care owed by the respondent to the appellant.

59. In the circumstances of the case, the appeal having succeeded in part, the appellant is entitled to be granted €4,000 as reimbursement of the costs of retaining counsel in this appeal.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The claims challenging the decision ordering dismissal are rejected.
- The appellant's claim for non-material damages in relation to breach of the duty of care by IS is fairly assessed by ordering it to pay her €12,000 (twelve thousand Euros) in compensation.
- The claim to reimburse the appellant for the costs of legal counsel is granted, up to a maximum of €4,000 (four thousand Euros).
- All other claims are dismissed.

Done in Brussels, on 5 November 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

29 November 2024 AT-J(2024)0023

Judgment

Case No. 2024/1382

JP

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 18 November 2024

Original: English

Keywords: admissibility (ratione personae/locus standi), data protection, recruitment.

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This judgment is rendered by a Panel of the North Atlantic Treaty Organization ("NATO") Administrative Tribunal, composed of Ms Louise Otis, President, Ms Anne Trebilcock, Judge, and Mr Thomas Laker, Judge, having regard to the written procedure and further to the hearing held on 26 September 2024.

A. Proceedings

1. The NATO Administrative Tribunal ("the Tribunal") has been seized of an appeal by Mr JP ("the appellant"), submitted on 23 December 2023 and registered on 9 January 2024 as Case No. 2023/1382.

2. The answer by the respondent, the NATO Support and Procurement Agency ("NSPA"), was dated 14 March 2024; it was registered on 19 March 2024. The appellant's reply, dated 1 April 2024, was registered on 25 April 2024. The respondent's rejoinder, dated 7 June 2024, was registered on 14 June 2024.

3. The appellant is appealing the decision of 23 October 2023 by the General Manager ("GM") of the NSPA. The appellant seeks to have the recruitment process continued by the NSPA, and to be compensated for material and non-material damages (€73,704) and legal costs (€4,000). The appellant has also filed appeals against his former employer, the NATO Airborne Early Warning and Control Force Headquarters ("NAEW") in Geilenkirchen in two cases which have been joined (Case No. 2023/1368 and Case No. 2023/1383) and are addressed in a separate judgment.

4. On 6 June 2024, the appellant requested the recusal of the President of the Tribunal in the present case (and in Cases Nos. 2023/1368 and 2023/1383). After reviewing the relevant information, the other two judges on the Panel assigned to this case issued a decision on 27 June 2024, rejecting this request as unfounded. A copy of this decision, based on Article 6.1.5 of Annex IX to the Civilian Personnel Regulations ("CPR") and Rule 13(2) of the Rules of Procedure ("ROP") of the NATO AT, is annexed to this judgment. The appellant then claimed procedural irregularities in relation to the signature of the decision.

5. On 17 June 2024, the appellant submitted a request for the NSPA to provide an unaltered version of evidence it had supplied to the Tribunal, with the appellant to be granted 10 days to respond. In accordance with the Tribunal's Rule 16 on additional pleadings, the President had this request distributed on 3 July 2024, with an indication that the Tribunal would take a position on the matter in due time. Having examined the pleadings of the parties on this point, the Tribunal determined that in the light of the inadmissibility of the appeal on jurisdictional grounds (see Part D below), it was not necessary for the respondent to divulge the portions of the text that had been crossed out from a document it had submitted with its rejoinder.

6. The parties in the current appeal were informed on 22 August 2024 of the date, time and place of the hearing in this case (26 September 2024, commencing at 14:30, in Brussels), pursuant to Rule 25(2) of the ROP. The appellant confirmed receipt of this notification and noted on 20 September 2024 that he would participate in the hearing online.

7. In the period from 9 to 25 September 2024, the appellant contacted the Registrar on multiple occasions, in relation to his earlier requests about the possible introduction of additional evidence and pleadings (which he was told the Tribunal would address, as indicated to him earlier), the possibility of nominating assistance (which he was told was still possible), the calling of witnesses (which, as indicated to him earlier, occurred only when the Tribunal determined that such evidence would be useful to the proceedings), and allegations of ex-parte communications, parallel procedures and delays in receiving responses (for the most part, he had received responses on the same or the following day; there were no ex-parte communications).

8. On 23 September 2024, three days before the scheduled hearing, the appellant lodged a "Submission of Complaint concerning procedural corruption by NATO Administrative Panel and Registrar," asking for withdrawal of all three of his pending cases, cancellation of hearings, and transfer of his cases to the International Labour Organization Administrative Tribunal. The President rejected this in a letter of 24 September 2024. The appellant contested this, again asked for transfer of the cases, and requested removal of documents which he alleged were unsigned or signed only digitally. Submission of additional documents and requests for motivated decisions and signed resolutions followed on 25 and 26 September. Shortly before the hearing on 26 September 2024, he wrote to the Registrar to say that he had no reason to appear before the Tribunal.

9. On 25 September 2024, the appellant submitted a Request for Recusal of the entire Panel assigned to the cases. Under Article 6.1.5 of Annex IX to the CPR, each party may ask for "a change in the composition of the Panel constituted in a case on account of presumed partiality." This must be done within 15 days after such notification, as foreseen by Rule 13(2) of the ROP of the Tribunal. The Rule further states, "No further requests for a change in the composition may be submitted unless on the basis of new information or developments."

10. The appellant's challenge to the composition of the Panel occurred after the 15-day period, and stated no new information or developments. It contained no specific allegations against the Panel members. This last-minute call for recusal of the Panel was without foundation and indeed abusive of the procedures available to the appellant. The Tribunal therefore rejected this request and proceeded to conduct the pre-announced hearing in the appellant's appeals before the Panel.

11. The appellant was not present at the hearing and did not make use of the facilities made available to him to participate through videoconference. In accordance with Rule 26(3) of the ROP, the Tribunal held the hearing in the absence of the appellant, who had elected not to participate in person or by videoconference.

12. The appellant requested anonymity in the joined cases. The Tribunal recalls that all Tribunal judgments are anonymized. The appellant's name appears only in the version "as delivered," which is sent to the parties. Only the anonymized version is used for circulation or distribution pursuant to Articles 6.8.1 and 6.10.2 of Annex IX to the CPR, and later on the public website. The appellant's request is thus redundant and in any event he has not stated any specific reasons for it. The request is therefore denied.

B. Factual background of the case

13. On 14 February 2023, while still under contract to the NAEW and on long-term sick leave, the appellant applied for a vacancy at the NSPA which he had seen on its website. As a reference in support of his application, he named a former colleague at the NAEW. On the form the appellant checked "yes" in response to the question, "Do you have any objections to our making inquiries of your current supervisor before a firm offer is made?" In his cover letter he mentioned that he had been happy at the NAEW "until I started to suffer a case of bullying and harassment still under investigation, this case directly and indirectly forced me to look forward to finish my contract next 29th March."

14. The appellant was interviewed online by the NSPA and the interviewer then described him as a highly skilled technician. The appellant received a "notification of selection" from the NSPA on 3 April 2023. This requested him to indicate his willingness to accept the job, and then to undergo a medical check and security clearance. This document stated in bold-faced type, "Please be informed that this is not a firm job offer," while stating that he was "recommended for selection" pending the necessary additional checks (medical and security clearances). As part of this process, he was declared fit for duty on 10 May 2023 by a medical doctor of his own choosing. On 16 May 2023, however, the Head of Talent Acquisition informed him that the NSPA was "not in a position to extend" recruitment for the post in question.

15. In the meantime, on 8 May 2023, he had submitted his appeal against the NAEW in Case No. 2023/1368, registered by the Tribunal on 12 May 2023, in relation to a decision that had denied a claim to reopen an investigation into allegations of harassment.

16. On 16 and 22 May 2023, the appellant asked the NSPA about the reasons for the non-recruitment and requested reimbursement of medical fees he had paid as a candidate. On 24 May, the respondent informed him that in relation to his reference check "unfortunately the outcome was not positive and prevented the Organization from making a firm offer." He was also told that no reimbursement of medical expenses was foreseen by applicable regulations and could not be paid. He began raising data protection issues and claimed that the NAEW had engaged in defamation against him.

17. On 16 June 2023, the appellant requested an administrative review, seeking annulment of the decision and evidence to permit him to pursue criminal prosecution against certain individuals, as well as the reimbursement requested earlier. The NSPA GM denied these requests, stating that the reasons had been provided in the letter of 16 May and the email of 24 May. She indicated that the NSPA had no written record of the reference check but that the appellant could access his file by making an appointment. She stated that the NAEW had not informed the NSPA of his legal proceedings and added that the NSPA had no duty to contact references mentioned by the applicant. Mistakenly, she wrote that his legal proceedings against the NAEW had been filed on 15 May 2023, by which date the NSPA had completed all its reference checks. She told him that European and national laws on privacy did not apply to NATO. She added that the CPR did not authorize reimbursement of medical expenses during recruitment, confirming the denial of his request on this point.

18. On 4 July 2023, the appellant asked the Head of Talent Acquisition at the NSPA to produce written declarations as to the contents of the reference, to be used in criminal prosecutions in domestic courts. This was denied. On 3 August 2023, the appellant submitted a complaint to the GM relating to his non-recruitment and claim for reimbursement of medical expenses, and on 7 August 2023 she referred it to a Complaint Committee. The appellant challenged the chair's neutrality after the chair had taken decisions with which the appellant did not agree.

19. In its report of 26 September 2023, the Complaint Committee found against the appellant, while also recommending improved communication to future applicants that medical expenses would not be reimbursed. Accepting the Committee's findings, the GM rejected the appellant's complaint on 23 October 2023.

C. Parties' principal contentions, legal arguments and relief sought

(a) Summary of contentions of the appellant

20. In his appeal of the GM's decision, the appellant contends that his non-recruitment by the NSPA was invalid due to a breach of the duty to state reasons, errors in judgement, breach of data regulations and of national and European Union (EU) data protection laws, and breach of the CPR by the Complaint Committee. He makes claims for damages on the basis of lost wages, medical expenses incurred, and unlawful transfer of personal data without consent, along with a request for legal fees.

21. The appellant further maintains that the respondent misrepresented the facts. He claims that there was a lack of transparency and of procedural fairness by both the NAEW and the NSPA, while adding arguments about data protection rules in his reply.

(b) Summary of contentions of the respondent

22. The respondent contests the admissibility of the appeal *ratione personae*, as the appellant is not a staff member of the NSPA and the decision does not derive from his conditions of work or service. It also contests the compensation claims.

23. On the merits, the respondent maintains that its decision was correct and sufficiently reasoned, and notes that granting appointments lies within the sole discretion of the Head of NATO body. The reference check here had revealed that there were performance issues leading to the non-renewal of the contract. A reference check is a reasonable expectation in any application process, and there was no infringement of any data transfer rules.

24. In its rejoinder, the respondent stressed the arguments on the inadmissibility of the appeal and its lack of merit. It recalled that the appellant had fully separated from the NAEW when the challenged decision by the NSPA occurred. It rejected the additional claims regarding violation of internal NSPA rules.

D. Considerations and conclusions

(i) Admissibility

25. The right to bring an appeal to the Tribunal is granted to "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, …." (CPR, Article 61.1). The competence of the Tribunal is to "decide any individual dispute brought by a staff member or a member of the retired NATO staff… concerning the legality of a decision …." (CPR, Annex IX, Article 6.2.1; see also Annex IX, Article 1(1.1)(f), defining "appellant")). "Retired NATO staff … means former members of the staff who have served with a NATO Body…" (CPR, Preamble, B.(v)(g)), i.e. it is not limited to persons having reached retirement age. As the respondent acknowledged, the appellant fell within the definition of this provision, i.e. he was considered to be a retired NATO staff member.

26. In case of a dispute over the Tribunal's competence, the issue is to be settled by the Tribunal (Article 6.2.2 of Annex IX to the CPR). The appellant has contended that his appeal is admissible, which the respondent has contested.

27. The appellant here was a former member of staff of the NAEW, not the NSPA. He was not a staff member of the NSPA. His circumstances did not involve a transfer from one NATO body to another. As an external candidate for a post, the appellant had no "conditions of work or of service" in the NSPA about which he could appeal to the Tribunal. The NSPA GM was under no legal duty to entertain a contested administrative decision in the case of an external applicant.

28. For these reasons, the appeal must be dismissed for lack of jurisdiction *ratione personae* (the person bringing the claim must be entitled to do so), as the appellant in this case has no *locus standi* (no standing to bring the appeal against this respondent to the Tribunal).

29. In addition, the national and EU sources cited by the appellant in relation to data protection do not apply to NATO bodies, and the Tribunal has no jurisdiction over such claims. Nor does it have the power to refer a case to the International Labour Organization Administrative Tribunal, which is governed by its own Statute and Rules. Article 6.2.3 of Annex IX to the CPR states that the Tribunal has no powers beyond those conferred in that Annex. This provision also applies to various other requests made by the appellant in relation to pursuit of his complaints about the President, the Registrar and Panel members that were addressed to the Head of NATO or to the Chair of the North Atlantic Council.

(ii) Merits

30. In the light of the grounds for dismissal just noted, it is not necessary to go into the merits in any detail. The Tribunal would, however, note that there was no legal basis for contesting the decision of the NSPA GM, since the matter involved an external candidate, but annulling this decision would not have led to granting the relief sought by the appellant. It would simply have resulted in a nullity, without recommencement of the recruitment process or an award of compensation to the appellant. In any event, the recruitment process involves several stages that had not been completed here, in particular the conclusion of a contract of employment with the appellant. His damage claims were therefore speculative.

31. Furthermore, the CPR makes no provision for the reimbursement of medical expenses incurred by job applicants in obtaining a medical clearance for possible employment, and thus no legal basis existed for such a claim against the NSPA.

E. Costs

32. In relation to the appellant's plea for reimbursement of costs, Article 6.8.2 of Annex IX to the CPR provides as follows:

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

33. The appeal having been dismissed, no reimbursement of costs is ordered.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed as inadmissible.

Done in Brussels, on 18 November 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Annex: Judgment on a request for recusal, dated 27 June 2024

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
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Decision on a Request for Recusal

Joined Cases Nos 2023/1368 and 1383

JP

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen
Respondent

Case No. 2024/1382

JP

Appellant

v.

NATO Support and Procurement Agency

Brussels, 27 June 2024

Original: English

Keywords: request for recusal.

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This decision is rendered by Ms Anne Trebilcock and Mr Thomas Laker, members of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), having regard to the appellant's request of 6 June 2024.

A. Proceedings and background

1. On 6 June 2024, the appellant formally requested recusal of the President of the NATO Administrative Tribunal in the following cases that are currently pending before this Tribunal: Joined Cases Nos. 2023/1368 and 2024/1383, both against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen (NAEW) and Case No. 2024/1382, against the NATO Support and Procurement Agency (NSPA) (Case No. 2024/1391 *v.* NAEW having been withdrawn by Order AT(PRE-O)(2024)0007 dated 21 May 2024).

2. The NATO Regulations governing Administrative Review, Mediation, Complaint and Appeal (Annex IX to the Civilian Personnel Regulations) and the Rules of the Tribunal (Appendix 1 to Annex IX) set out the procedure for examining a request for recusal. As provided in Article 6.1.5 of Annex IX:

> Any member of the Tribunal who has a conflict of interest in a case shall recuse him/herself. Each party may ask for a change in the composition of the Tribunal panel constituted in a case on account of presumed partiality. The parties may not, however, invoke the nationality of a member of the Tribunal to this effect. The two remaining members of the Panel shall take a decision on the request submitted in the absence of the member concerned and, if they disagree, the longest serving of the two, or in if both are of equal seniority, the eldest shall decide."
>
> The Tribunal's Rule of Procedure 6 states in para. 1: "The President or other members of the Tribunal shall recuse themselves:
>
> (a) In cases involving persons with whom the member has a personal, familial or professional relationship;
> (b) in cases concerning which the member has previously been called upon in another capacity, including as advisor, representative, expert or witness; or
> (c) If there exist any other circumstances that would make the member's participation inappropriate.

3. The Panel constituted to hear the appellant's pending appeals during the hearings that are currently scheduled for the end of September 2024 is comprised of the President and the two undersigned members of the Tribunal. The President has referred the appellant's request for her recusal to the two other panel members for decision. They have reviewed the request in her absence, as required by the procedure.

4. In support of his request for recusal, the appellant stated in his message of 6 June that it is:

> […] necessitated by several concerns regarding the absence of remedial action due [to] missing neutrality and procedural integrity of the Tribunal's Registrar, compounded by the actions and statements detailed in my formal Complaint 2nd May, and correspondence dated 14th May 2024. As my formal Complaint submitted to your office on 2nd May 2024 remains unaddressed, surpassing the 30-day response window. This inaction appears to constitute a tacit denial of my complaint, from which I am unable to appeal.
> Moreover, your communication dated on 15th May 2024, which disclosed details to all involved parties introducing regarding to a supposed private and ex-parte approach, has compromised the perceived impartiality of your figure. While I have urged for equal transparency regarding the communications I sent to your office on 2nd May 2024, to allow for corrective measures addressing these disclosures, such transparency has not been forthcoming. This lack of action has not only further prejudiced my position in the ongoing proceedings, but also yours.
> Given these developments, and having lodged a formal complaint against your authority to the NATO Secretary General, it is imperative that the circumstances be recognized as fundamentally prejudicial. Accordingly, it is both necessary and appropriate for your authority to be recused from the panel examining my cases, in accordance with the NATO Civilian Personnel Regulations (CPR).

5. The standard against which to assess this request for recusal is whether or not there is a conflict of interest that would entail a personal, familial or professional relationship or involvement in previous cases (as detailed in Rule 6(a) and (b)) or "if there exist any other circumstances that would make the member's participation inappropriate" (Rule 6(c)). Only such an instance would justify granting a request for a change in the composition of the Tribunal panel on account of presumed partiality (Article 6.1.5).

6. The President automatically has a professional relationship with the Registrar in all cases brought to the Tribunal; this general fact cannot be grounds for recusal in a particular case. The question thus becomes whether other circumstances would make the President's participation in the appellants' cases inappropriate. The appellant has made allegations of "an absence of remedial action" relating to neutrality and procedural integrity on the part of the Tribunal's Registrar (who acts "under the authority of the President" (CPR, Annex IX, Rule 5(1)). This presumes that such remedial action was in fact required for the President to avoid a conflict of interest that would entail recusal in the appellant's cases. This was however not the case.

7. The appellant has sent multiple messages and requests to the Registrar in relation to his various appeals over a number of months. While the Registrar is, pursuant to Annex IX, Rule 5(g), under a duty to perform her duties "expeditiously," this does not imply that each communication must be replied to within a particular short time-limit, taking into account the range of duties the Registrar is to perform and the overall caseload of the Tribunal. Nor would the "detailed incidents," even if they were to be verified, constitute "a pattern of administrative practice that requires urgent address" or "continuous procedural non-compliance by the Registrar…," as asserted in the appellant's message of 2 May 2024. An examination of the correspondence in question reveals that under the circumstances, the Registrar has not acted improperly or without impartiality vis-à-vis the appellant. Indeed, she has repeatedly assured the appellant that

"all communications sent to this office are dealt with" (in reply to one of the appellant's messages of 14 May 2024). Thus the President has in turn not failed in her own duties, and her participation in the appeals is not "inappropriate".

8. The appellant has also argued that the President's sending of copies of her 14/15 May 2024 communication to the Commander, NAEW; General Manager, NSPA; Legal Advisor and Director, NATO HQ; and members of the Tribunal provides further grounds for requiring her recusal. This communication recalled the cases then pending, "which will be heard once the procedure will be completed." The President then indicated the dates foreseen for the session in September 2024 and pointed out that the appellant would have "ample opportunities at that time to express [his] grievances before all the judges assigned to examine your cases". This simply summarized the applicable orderly Tribunal procedure that operates through pleadings and an oral hearing, rather than through multiple exchanges of email messages.

9. The indication by the President to the appellant to "refrain from contacting any member of the Tribunal through private messages expressing your disappointment or point of view on how the AT procedures shall be applied" served as a reminder that the proper avenue for communication with the Tribunal is through the Registrar (mailbox.tribunal@hq.nato.int), and that the place for argument is in pleadings and at the oral hearing.

10. The President's message that the "parties shall not send any ex parte communications to the members of the Tribunal" applied to all parties. Other than by speculation, the appellant does not explain why such an instruction to them would be prejudicial to his cases. In any event, the appellant had, in a message of 23 April 2024 to [*NAEW email address*] (with a copy to the Tribunal email address, the Registrar, and two individuals at NAEW) suggested "a streamlined approach for future communications to prevent further issues," and that "we avoid using the NATO Administrative Tribunal as an intermediary for document exchange…". This would not be in line with the rules and regulations governing the work of the Tribunal in all cases brought before it.

B. Decision

11. The undersigned members of the panel in the appellants' pending cases before the Tribunal have unanimously decided that the appellant's request for the President to recuse herself does not show a conflict of interest or other circumstances that would make her participation in them inappropriate. The appellant's request is therefore denied.

Done in Brussels, on 27 June 2024.

_____/s/_____

Anne Trebilcock, member

_____/s/_____

Thomas Laker, member

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

28 November 2024 AT-J(2024)0024

Judgment

Joined Cases Nos. 2023/1368 and 2024/1383

JP

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 25 November 2024

Original: English

Keywords: bullying and harassment, investigation, data protection, recruitment, recusal, retaliation.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Thomas Laker and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing of 26 September 2024.

1. The NATO Administrative Tribunal ("the Tribunal") has been seized of two appeals by former staff member Mr JP ("the appellant") against decisions of the NATO Airborne Early Warning & Control Force ("NAEW") Headquarters Geilenkirchen ("the respondent"): Joined Cases Nos. 2023/1368 and 2024/1383. Case No. 2023/1368 is addressed primarily in Part I of this judgment and Case No 2024/1383 is addressed primarily under Part II of this judgment.

I. Case No. 2023/1368

A. Proceedings

2. The appeal in Case No. 2023/1368 was submitted to the Tribunal on 8 May 2023 and registered on 12 May 2023. The appellant seeks, inter alia, completion of an investigation into alleged bullying and harassment at the NAEW, recognition of the effects of that alleged conduct as a workplace accident, and compensation for material and non-material damages.

3. The appellant was initially represented by counsel in this case, but on 3 September 2023 he requested the removal of legal representation from his case. Since then, he has not notified the Tribunal of another legal representative.

4. The respondent's answer in Case No. 2023/1368, dated 13 July 2023, was registered on 21 July 2023. Following the granting of an extension requested by the appellant on 20 September, the latter submitted his reply on 29 September 2023; it was registered on 12 October 2023. The rejoinder, dated 10 November 2023, was registered on 27 November 2023.

5. On 28 November 2023, the appellant made the first of several requests for the Tribunal to accept an additional pleading under Rule 16 of the Rules of Procedure (ROP) of the Tribunal. This rule provision applies only "if necessary in exceptional cases", and the request was accordingly denied as not meeting that requirement (notification to the appellant on 11 December 2023).

6. On 13 December 2023, the appellant requested initiation of the process to hear witnesses, which the Tribunal rejected with an explanation that witnesses are heard only when the Panel in the case considers that their evidence would be useful (as provided under Rule 25(4) of the ROP). Email exchanges focusing on this issue ensued between the Registrar of the Tribunal and the appellant, in which he sought to complain to a higher level.

7. On 4 January 2024, under Rule 16 of the ROP, the President of the Tribunal requested that the respondent provide the report of the Complaint Committee that the

NAEW had established to examine the appellant's claims of bullying and harassment. This report was then included in the case file on 15 January 2024.

8. Initially, the present case was set for a hearing on 29 January 2024, but since a second case against the respondent, Case No. 2024/1383, had been submitted by the appellant on 23 December 2023 and registered on 9 January 2024, the original hearing was cancelled. The two cases were joined by decision of the President, as notified to the parties on 17 January 2024. (For the proceedings relating primarily to Case No. 2024/1383, see Part II.A of this judgment).

9. On 31 January 2024, the appellant sought, unsuccessfully, to submit another additional pleading in Case No. 2023/1368 under Rule 16 of the ROP. He then on 13 March 2024 submitted a further appeal against the respondent (Case No. 2024/1391), which was joined to the two existing appeals against the NAEW, but was subsequently unconditionally withdrawn under Rule 17 of the ROP on 14 May 2023.

10. In the meantime, the appellant requested support from the Registrar to receive documentation for his defence (emails of 20–28 March and 4 April 2024); the Registrar referred the appellant to his former employer. Additional documentation was received from the respondent on 19 April 2024 and included in the case file. The appellant then complained of "missed impartiality" on the part of the Registrar, with further exchanges on 22 April and 9 May 2024, including emails sent directly to the President.

11. An exchange of communications dated 14 May 2024 involved the Tribunal President's request to the appellant, with copies to the parties, not to contact Tribunal members directly, with particular reference to the appellant's complaints about the actions of the Registrar and the President.

12. On 6 June 2024, the appellant requested recusal of the President of the Tribunal in Cases Nos. 2023/1368 and 2024/1383. After reviewing the relevant information, the two other judges on the Panel assigned to the cases issued a decision on 27 June 2024, rejecting this request as unfounded. A copy of this decision, based on Article 6.1.5 of Annex IX to the Civilian Personnel Regulations (CPR) and Rule 13(2) of the ROP, is annexed to this judgment. The appellant then claimed procedural irregularities in relation to the signature of the decision.

13. On 19 June 2024, the appellant requested "original, unaltered copies" of the respondent's electronic communications in his appeals against NAEW in Cases Nos. 2023/1368 and 2024/1383.

14. The appellant made another request to submit an additional pleading in Case No. 2023/1368 on 2 July 2024; this was distributed on 5 July 2024, and the Registrar informed the appellant that the Tribunal would take a position on its admissibility in due time. The Tribunal's decision on this material, which primarily related to Case No. 2024/1383, is contained in Part II.A of this judgment.

15. The parties in the current appeal were informed on 22 August 2024 of the date, time and place of the hearing in this case (26 September 2024, commencing at 14.30, in Brussels), pursuant to Rule 25(2) of the ROP. The appellant confirmed receipt of this

notification and wrote on 20 September 2024 that he would participate in the hearing by videoconference.

16. In the period from 9 to 25 September, he contacted the Registrar on multiple occasions, in relation to his earlier requests about the possible introduction of additional evidence and pleadings (which he was told the Tribunal would address, as indicated to him earlier), the possibility of nominating assistance (which he was told was still possible), the calling of witnesses (which, as told to him earlier, occurred only when the Tribunal determined that such evidence would be useful to the proceedings), and allegations of *ex parte* communications, parallel procedures and delays in receiving responses (for the most part, he had received responses on the same or the following day; there were no *ex parte* communications).

17. On 23 September 2024, three days before the scheduled hearing, the appellant lodged a "Submission of Complaint concerning procedural corruption by NATO Administrative Panel and Registrar", asking for withdrawal of all three of his pending cases, cancellation of hearings, and transfer of his cases to the International Labour Organization Administrative Tribunal. The President of the Tribunal rejected this in a letter dated 24 September 2024. The appellant contested this, again asked for transfer of the cases, and requested removal of documents which he alleged were unsigned or signed only digitally. Submission of additional documents and requests for motivated decisions and signed resolutions followed on 25 and 26 September 2024. Shortly before the hearing on 26 September 2024, he wrote to the Registrar to say that he had no reason to appear before the Tribunal.

18. On 25 September 2024, the appellant submitted a Request for Recusal of the entire Panel assigned to the cases. Under Article 6.1.5 of Annex IX to the CPR, "each party may ask for a change in the composition of the Tribunal panel constituted in a case on account of presumed partiality". This must be done within 15 days after such notification, as foreseen by Rule 13(2) of the ROP. The Rule further states, "No further requests for a change in composition may be submitted unless on the basis of new information or developments".

19. The appellant's challenge to the composition of the Panel occurred after the 15-day period, and stated no new information or developments. It contained no specific allegations against the Panel members. This last-minute call for recusal of the Panel was without foundation and indeed abusive of the procedures available to the appellant. The Tribunal therefore rejected this request and proceeded to conduct the pre-announced hearing in the appellant's appeals before the Panel.

20. The appellant was not present at the hearing and did not make use of the facilities made available to him to participate through videoconference. In accordance with Rule 26(3) of the ROP, the Tribunal held the hearing in the absence of the appellant, who had elected not to participate in person or by videoconference.

21. The appellant requested anonymity in the joined cases. The Tribunal recalls that all Tribunal judgments are anonymized. The appellant's name appears only in the version "as delivered" which is sent to the parties. Only the anonymized version is used for circulation or distribution pursuant to Articles 6.8.1 and 6.10.2 of Annex IX to the CPR

and later on the public website. The appellant's request is thus redundant, and in any event he has not stated any specific reasons for it. The request is therefore denied.

B. Factual background of the case

22. The appellant joined the Force Medical Squadron Commander of NAEW as a B-4 senior technician on 29 March 2021 on a contract of definite duration (two years). He successfully completed his probationary period. In September 2021, the composition of his team changed. The appellant reported behaviour on the part of one colleague (Mr R.) beginning in autumn of 2021, and that of another colleague (Mr D.) in February 2022. Tensions rose notably during training exercises involving several staff in May 2022.

Allegations of misconduct by two colleagues

23. On 21 March 2022, the appellant approached a staff member of the Human Resources (HR) unit with information he considered as showing misconduct against him by these two colleagues. The appellant submitted two reports, dated 7 and 8 April 2022, to HR in relation to this, and met with Mr V. of HR on 12 May 2022. On 18 May 2022, he found an email sent by another colleague (Mr L.) to Mr D., informing Mr D. that in the training course, the appellant had continued a testing action even after Mr R., the trainer, had asked him to stop. The appellant informed Mr V. on the same day. Not long thereafter, the appellant was suspended from the group training.

24. On 25 May 2022, the appellant was granted an interview with his supervisor (Mr P.) and another staff member. The appellant sent a report regarding alleged harassment against him to Mr P. and Mr V. Around this time, he began seeking medical advice for stress. On 24 June 2022, he sent Mr V. a statement dated 1 June 2022 regarding the incidents of 18–20 May 2022 which he said had occurred during the training. There was no reply. In this period, there was also some controversy over the assignment of shifts and overtime. On 21 July 2022, the appellant indicated to Mr V. that he had decided not to report Mr R., saying that doing so would only antagonize him further. The appellant also indicated that he would not be renewing his contract upon its expiration the following year.

Verbal censure against the appellant

25. On 4 August 2022, the appellant was called into a meeting by Mr P., his supervisor, who gave him a letter imposing a "verbal censure" on the appellant for "a pattern of threatening behaviour to your peers and supervisors", for not properly utilizing his chain of command, and for disrupting training. On 11 August 2022, the appellant requested administrative review of the disciplinary measure. He contacted the Person of Confidence for Bullying and Harassment (PoC) on 13 September 2022 and provided him with the April reports and the 1 June statement. On 15 September 2022, the PoC emailed the appellant, stating that he saw "an ongoing and somewhat open conflict" between the appellant and Messrs. D. and R., rather than bullying or discrimination.

26. On 8 September 2022, while at home ill with COVID, the appellant had a telephone call with Mr V., who allegedly said that if the appellant were to change his

behaviour, his contract could be renewed. The appellant later indicated that he had recorded this conversation (apparently without the other party's knowledge).

27. As from 21 September 2022, the appellant was on sick leave (due to what he describes in his appeal as a diagnosis of anxious-depressive mixed adjustment disorder motivated, he says, by a situation of workplace bullying). He was informed on 22 September 2022 that his contract would not be renewed upon its expiration at the end of March 2023.

28. The appellant received notification on 11 October 2022 that his request for administrative review of 11 August concerning the disciplinary action against him was considered to be unfounded. On 7 November 2022, he contested that decision.

Launch of the "informal investigation"

29. Also on 7 November 2022, the respondent decided there was sufficient information to initiate an investigation into the appellant's allegations, irrespective of whether he had lodged a formal complaint. The appellant's challenge of the disciplinary action was suspended pending that investigation, which was to be completed within 30 days. The appellant submitted information to the investigators, including the names of initially four potential witnesses (two of whom were later heard by the Investigation Board).

30. The respondent undertook what it termed an "informal investigation" under the NATO Policy on the Prevention, Management and Combatting of Harassment, Bullying and Discrimination in the Workplace to establish the veracity of the allegations and to investigate potential misconduct. The notification stated that the informal investigation was being initiated "in accordance with" Force Policy 1.2-1 in relation to alleged harassment and bullying as defined by JCB-D(2020)0002. The Investigation Board ("the Board") thus appointed began its inquiry on 8 November 2022.

Challenge to the composition of the Investigation Board

31. In the meantime, on 22 November 2022, the appellant repeated and expanded his allegations and provided additional information about interactions with colleagues and supervisors. On 29 November 2022, he submitted a request for administrative review, asking for rescission of the appointments for the investigation and seeking a new composition "free from conflict of interest, and the preservation of all rights belonging to a victim of bullying and harassment". This was rejected by the responsible official on 19 December 2022 on the basis that the decision to appoint an informal board of investigation neither affected the appellant's terms and conditions of employment nor violated his terms and conditions of employment or other NATO regulations. The rejection defended the decision to order an informal investigation.

32. The Board informed the appellant on 23 November 2022 about who would be interviewed as alleged offenders (Mr R. and Mr D.) and as witnesses (Mr P., Mr L., and two other former colleagues), and invited the appellant to be interviewed or to submit written statements or evidence of his medical status. He did not appear at the scheduled interview or ask for a rescheduling. Instead, he provided a medical report that recommended him not attending until his emotional state had stabilized. Two of the

witnesses he had proposed were interviewed. On 6 December 2022, the respondent invalidated the imposition of a "verbal censure" imposed on the appellant in August, since this is not on the list of disciplinary actions at Art. 59.3 of the CPR.

Findings and report of the Investigation Board

33. The Board dated its report 7 December 2022, but one witness and one signatory provided their electronic signatures only in the days following, thus casting doubt on the date of the report.

34. The appellant had made eight specific allegations of bullying and harassment, none of which the Investigation Board found to have been proven. On the first allegation (personal and offensive acts in October 2021), the Board noted that one of the interviewees had said he had heard the statement in question (remarks about the appellant's clothing), and confirmed that the appellant was often criticized. However, this witness had considered the statement a normal joke, and the Board questioned his credibility.

35. Regarding the second allegation, one witness confirmed that he had heard another colleague (Mr R. in September 2021) tell the appellant, in an aggressive manner and a raised voice, that if he did not like it at the shop he could leave. The Board found this to have been a discussion about rules and procedures that was not intended to push the complainant out of NATO.

36. The third allegation involved a meeting on 24 November 2021 at which three colleagues (including Mr R. and Mr D.) met with the appellant, who claimed they were highly aggressive; this was not substantiated by evidence. Allegations four (alleged anonymous offensive letter found on a computer) and five (on 18 March 2022, Mr D. allegedly saying he would write a bad evaluation if the appellant reported him) were not supported by evidence either. Regarding the fifth allegation, the Board found that it was likely that Mr D. "felt undermined" by the appellant. Allegation six related to a change in shift assignment, which was confirmed, but it was found that this had affected others as well as the appellant and was related to low staffing and a higher workload.

37. The seventh allegation was that colleagues Mr D. and Mr L. were "constructing evidence to build false proof against" the appellant. It was supported by an email of 17 May 2022 that the appellant had found and submitted; the message stated that he had not stopped doing something during testing after Mr R. had asked him to cease. However, the Board found this not to be proven, because it was the procedure in military units to report incidents, and by this time "the atmosphere had gotten highly tense, i.e. due to the reports submitted" by the applicant.

38. Allegation eight was that on or around 18 and 20 May 2022, Mr R. was "verbally violent toward the appellant, and organized a premeditated attack with the collaboration of all members of the training". The Board noted that a colleague originally relied on to support the allegations had denied the situation as described and stated that the complainant had overreacted. Others testified that they had arrived on 20 May after a one-on-one discussion between Mr R. and the appellant, whom they described as "disturbed and exasperated". The Board noted, "Their testimony also concurs with

general statements that [the appellant] often misinterpreted situations and felt threatened or attacked by objectively casual actions".

39. The Board report stated that based on interviews and available documents, the investigation "found it more likely that there were interpersonal difficulties at the workplace that were below the threshold of bullying or harassment", referring to "raised voices, tense conversations based on escalating animosities rather than unilaterally excessive actions".

Developments following notification of the Board report

40. The appellant was informed on 7 December 2022 that the Board's report had been submitted but he did not receive a copy. In a reply to a request the appellant had made on 13 December 2022, the NAEW Legal Adviser indicated on 22 December 2022 that since the appellant was for the time being unable to make use of his right to be heard due to his ongoing medical condition, "this investigation is not finally closed and awaiting your participation, which you may provide when your medical condition permits". Since the appellant remained on sick leave until the expiration of his contract, this did not occur.

41. In addition, on 13 December 2022, the appellant wrote to the Force Commander to seek assistance in denouncing alleged criminal actions by certain staff and requesting permission to use certain documents to file criminal complaints. The Commander rejected this request on 22 December 2022, and reminded the appellant of the professional secrecy obligation of staff.

42. In January 2023, the appellant attempted to return to work, but was told not to do so on medical grounds; his extended sick leave continued. On 15 February 2023, he found his computer account blocked.

43. The appellant sent the respondent a 30-page statement on 20 February 2023, in which he alleged violations of the CPR, Regulation ON(2020)0057, JCB-D(2020)00002, the NATO Code of Conduct, and the criminal codes of Belgium, Germany, the Netherlands and Spain by specified individuals in two groups: firstly, those accused of concealment, active hindering, participation in internal investigation under conflict of interest, breach of duty, and secondly, five staff members allegedly involved in direct actions of bullying and harassment. The appellant requested that a named high-level NATO HQ Brussels staff member obtain permission to intervene in this case, that the NAEW recognize the appellant's accident on duty, and that he be compensated for all the damages incurred. He provided a list of thirteen possible witnesses.

44. In reply, on behalf of the respondent, the Force Commander made an internal assessment of the investigation report, continued to engage with the appellant's requests, and informed him on 8 March 2023 that so far, there was not sufficient proof of bullying or harassment. He rejected the plea to have NATO Headquarters take over responsibility for such an investigation, since each NATO body has responsibility for dealing with the NATO Policy on the Prevention, Management and Combating of Harassment, Bullying and Discrimination in the Workplace. In his reply, the Force Commander also told the appellant that due process had been followed, and that, taking into account the preliminary result of the investigation, there was no indication of an accident on duty or substantiation of the appellant's claims for damages.

45. Noting the preliminary result of the investigation already conducted, the appellant was again invited to be interviewed if he wished. He did not pursue this invitation until 23 March 2023, when he offered to be interviewed via email, VTC or at his home. Under these conditions and in the light of the expiry of his contract on 28 March 2023, no interview was scheduled.

46. In relation to his out-processing, the applicant learned on 13 March 2023 that his security permissions had been suspended. He objected to the fact that instructions were received from a unit's email address rather than from an individual, while copying various individuals, which he maintained was defamatory. He was afforded two opportunities to appear for out-processing. In response to the first notification, on 26 March 2023, he submitted a statement in lieu of appearing, citing medical advice to avoid being at NAEW.

47. In a further statement on 26 March 2023, the appellant referred to two workplace accidents. The first involved an ankle injury. The second he mentioned was "an extreme situation of stress and anxiety, caused by a case sustained of bullying and harassment at the workplace…" from which he said he had not recovered. In support, he pointed out that on 27 April 2021, he had been certified by the NAEW as "NRF deployable without restriction" and able to perform his assigned duties. However, this was no longer the case as from 21 September 2022.

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

(i) The appellant's contentions

48. The challenged decision is the communication by the Force Commander of 8 March 2023, described above, which rejected the appellant's claims of 20 February 2023, in which the appellant had alleged violations of several NATO regulations and criminal activity under various national laws, and sought compensation in relation to an alleged accident on duty related to the alleged bullying and harassment.

49. The second challenged decision is implied from the alleged failure to respond to the appellant's request to be interviewed by means other than in person at the NAEW base, and to finalize the investigation into his allegations of bullying and harassment.

50. Specifically, the appellant alleges:

> *First*, a failure to properly respond to harassment and bullying, to commence and lead an investigation concerning it, and to provide a report, in violation of NATO policy JCB-D (2020)0002 and of the duty of care, and constituting an error of judgment.
>
> *Second*, violation of the NATO Policy on the Prevention, Management and Combating of Harassment, Bullying and Discrimination, involving a manifest error of judgment.

51. In addition, he contends that he suffered a workplace accident due to the health effects of the respondent's treatment of him in relation to harassment and bullying. Initially, he sought compensation for material and non-material damages caused by the unlawful conduct of the offenders, set at €70,000, plus costs of €4,000.

52. In the appellant's reply, he reiterated a number of points, and supplied a number of additional documents. He also "updated" his claim for compensation to €309,212 in material and non-material damages in relation to health effects and exposure to sub-standard working conditions, pain and suffering, and harm to employment prospects, as further specified.

(ii) The respondent's contentions

53. The respondent urges dismissal of the appeal. On the first issue (appellant's request to annul the Head of NATO Body's decisions of 8 March 2023), there is no indication that the appellant was subject to an accident on duty; the respondent argues that in any event it does not fall to the Head of the NATO Body to determine this question. Under Article 47.1(c)(i) of the CPR, this is rather a matter for the group insurer. Thus, there was no decision that could be challenged before this Tribunal, and this claim should be dismissed. If it is not, the respondent states that the appeal should be rejected on the merits.

54. On the second issue, the respondent argues that the appellant is attempting to appeal an "implied decision to refuse to complete the investigation regarding harassment and bullying" within a short time frame set by the appellant. This is not an appealable decision. Similarly, the alleged refusal to pay damages is inadmissible, the respondent argues.

55. As to the merits, the respondent claims that there was no refusal to interview the applicant, and no refusal to complete the investigation into the allegations of bullying and harassment. It argues that an investigation under Annex 1 to ON(2020)0057 is not a tool for complainants, but rather permits the NATO Body to investigate facts of potential bullying and harassment cases and to manage reported situations, even if it is found that they remain below the threshold of misconduct.

56. After the respondent informed the appellant that so far there was not sufficient proof of bullying or harassment, the appellant was further invited to be interviewed if he wished; it did not refuse to interview him. The respondent contends that the appellant never provided more information than what was submitted in his complaint of 8 November 2022. His submission of 20 February 2023 also did not raise doubts as to the investigation results.

57. According to the respondent, the appellant threatened staff from his former workplace and announced his intention to pursue criminal proceedings. That is why the respondent has not provided him with a copy of the investigation report interviews.

58. The respondent considers the claim for damages to be unfounded, as no compensable harm occurred, since due process was followed and there was no basis for any payments, as he has already received his salary while on sick leave, and was not entitled to accrue annual leave, per diem or shift allowances while on such leave.

59. The respondent urges non-payment of costs since one claim is inadmissible and the other is unfounded.

60. In its rejoinder, the respondent stated that the appellant had not submitted additional evidence or arguments to make his claims admissible or substantiated. His claim to order the respondent to initiate an inquiry into a duty accident was not contained in the original appeal and in any event the respondent cannot make determinations of the legal effects of accidents. The "implied decision" in response to the appellant's unsolicited email of 23 March 2023 did not lay the basis for a complaint as provided for under Article 6.3.1 of Annex IX to the CPR.

61. The respondent argues that it has attempted to address the appellant's requests made at various levels, and to manage the employment relationship appropriately. In relation to the much larger amount now claimed by the appellant, the respondent notes that this is essentially a new request, first raised in the answer, and is thus inadmissible.

62. As to the allegation of refusal to complete the investigation, the respondent recalls that it had invited the appellant to participate after 8 March 2023, but that his reply proposing other ways to have an interview had addressed only his being on sick leave, and his view that he was under no obligation to participate. Based on this, his medical status, and his letter of 20 February 2023, the respondent did not attempt to schedule a further interview, and following the end of his contract, no further communication followed. The respondent contends that there were no grounds to perform another investigation, since the matter had already been thoroughly and independently investigated.

63. The respondent disputes any basis for the inflated damages claim, due to a lack of causal connection, unsubstantiated "pain and suffering", overlap with earlier claims, inapplicability of compensation for time off not granted, and a baseless claim relating to his inability to regain employment/speculative loss of opportunity.

D. Considerations and conclusions in Case No. 2023/1368

(i) Admissibility

64. The appeal of the decisions stated in the communication of 8 March 2023 from the Force Commander was timely filed and admissible. The additional claims and pleas for relief introduced by the appellant only at the rejoinder stage are not admissible, since, pursuant to Article 6, paragraph 6.3.1 of Annex IX to the CPR, the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under Annex IX. The appellant did not do so.

(ii) Merits

65. The admissible allegations to some extent overlap in relation to the claims of errors of judgment, failure to follow the policy on bullying and harassment, and breach of the duty of care. The Tribunal therefore addresses them together.

66. Article 12.1.4 of the CPR sets out the basic obligation of staff to treat each other with courtesy and respect at all times, without bullying, harassment or discrimination. The NATO Policy on the Prevention, Management and Combating of Harassment, Bullying and Discrimination in the Workplace, JCB-D (2020)0002, contains general definitions of harassment and bullying (with some examples), indicates that intent to cause harm is not necessary, describes behaviour that is not considered misconduct, addresses roles and responsibilities and channels for raising concerns (both non-contentious and through written complaints) and sets out the process of inquiry and complaint handling.

67. The record shows that the appellant did try to raise concerns over several incidents with multiple interlocutors in the NAEW, beginning in the autumn of 2021 and increasing in the spring of 2022, without anyone taking him seriously until the Investigation Board was set up in November 2022. Indeed, the applicant's early efforts to inform others of what he perceived to be bullying and harassment met with little reaction until 7 November 2022, when he challenged having been disciplined with a "verbal censure" (a sanction not foreseen by the CPR, and later annulled by the respondent) for having himself engaged in harassment (without any complaint having been lodged against him).

68. At the same time, however – as the Investigation Board remarked – the appellant could also overreact to casual actions. The record in the three cases filed by the appellant reveals a pattern of behaviour that involves demanding replies within a short time limit, wishing to set the conditions himself for a process or an interview and then not testifying, complaining when emails sent to him are copied to other individuals, and challenging the neutrality of investigators/decision-makers.

69. Nevertheless, the respondent was under a duty to take managerial action to foster a climate of respect and courtesy among colleagues (see Article 12.1.4 of the CPR). In this regard, by not managing the "interpersonal difficulties" it acknowledged, the respondent failed to a certain extent to meet its duty of care. The respondent should also have shared the Investigation Board report – whether considered final or not – with the appellant without his having to file an appeal to obtain it. On the other hand, the appellant's own behaviour towards some of his colleagues (such as threatening to file criminal complaints against them) mitigates the amount of damages to be awarded in connection with the respondent's breach of the principle of good administration and duty of care.

70. The Investigation Board was set up to conduct what it called an "informal investigation". This term does not appear in the relevant legal documents, which speak only of "initial review" involving a preliminary assessment to see if there is a *prima facie* case, and a "process of inquiry" by an appointed person or investigation board. The respondent also thus mischaracterized its action as an "informal investigation". However, since the Board largely proceeded in the manner foreseen for a formal investigation, this had no detrimental legal effect for the appellant once its report had been provided to him. In addition, as noted by the decision of 8 March 2023 and in earlier correspondence, the respondent considered that in any event the investigation had not been concluded with the submission of the Investigation Board report, and opportunities for his possible engagement in the process had remained open.

71. The appellant has claimed errors of judgment in the Board's report. The Tribunal recalls its scope of review in relation to discretionary decisions, such as those taken in the handling of investigations into allegations of harassment and bullying: if a decision is taken without authority, if a rule of form or procedure was breached, if it were based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was an abuse of authority. When such a situation is found, it must then be shown by the appellant that this flaw was the cause of the harm claimed. The Tribunal does not engage in a *de novo* investigation itself.

72. In this connection, the Tribunal notes the overall conclusions of the Investigation Board, i.e. no findings of bullying or harassment. A close look at the report reveals that the Board had actually verified a few of the appellant's several accusations as having occurred. The first and second allegations were backed up by at least one witness. The first involved remarks by Mr D. about the appellant's clothing, and the second concerned Mr R. telling the appellant, in an aggressive manner and a raised voice, that if the latter did not like it, he could go home.

73. While each of these interactions was not on its own all that serious, both of these incidents in fact fell within the definition of harassment and bullying under JCB-D(2020)0002. Contrary to the Board's findings, the speakers' presumed intentions were irrelevant under the legal standards governing harassment. These two instances of verified actions by Mr D. and Mr R. were not "under the threshold" of bullying and harassment, as the Board had found. On these two points, the Investigation Board can be seen as having drawn a mistaken conclusion. That does not, however, invalidate the report as a whole as an error of judgment.

74. In addition, allegation seven was backed up by an email that had reported the appellant's behaviour during a testing exercise, which clearly revealed a tense situation; however, the respondent provided a reasonable explanation of why that email could have been justified for legitimate reasons of safety. Thus overall, the conclusions of the Board appear to be based on a credible application of the legal standard to the facts (or lack thereof) for six of the eight allegations. In any event, the report was – as later stated by the respondent – not considered to have been the end of the investigation.

75. The appellant did not avail himself of the opportunities to testify before the Board or to provide additional evidence that the respondent had offered on several occasions. In reaction to the decision of 8 March 2023, he proposed some alternative means to in-person testimony on 23 March 2023, but he had also asserted that there was no obligation on his part to testify, which undermined his claim of willingness to participate in the process. In the light of the expiration of the appellant's contract looming at the end of March 2023, it was not unreasonable for the respondent to take no further action in relation to the investigation. There is no point now in ordering a new investigation into the findings of the Investigation Board as regards specific allegations as noted above, since the appellant no longer works for the Organization following the expiration of his two-year contract.

76. In the appeal, it was additionally alleged that harassment and bullying had caused depression and thus sick leave, "which should be considered an accident on duty". The decision of 8 March 2023 stated that, taking into account the preliminary result of the investigation, there was no indication of an accident on duty. In fact, the appellant's claim

regarding alleged on-duty accidents did not fall within the decision-taking power of the respondent. The CPR sets out a separate procedure for making such claims, and the appellant did not pursue it. He cannot do so through another avenue. This claim is therefore dismissed. In addition, the Tribunal notes that in Case No. 2024/1383, the applicant submitted information showing his "fitness for duty" as of 10 May 2023, supplied by a physician he had consulted in connection with his application for employment with the NSPA.

E. Costs in Case No. 2023/1368

77. When it comes to the quantum of damages incurred, the applicant's own contentious behaviour vis-à-vis the respondent and reluctance to testify must be taken into account. Thus the Tribunal finds that the respondent's limited breach of its duty of care, as noted above, is to be compensated by an award of the sum of €2,000 (two thousand euros) in damages to be awarded to the appellant. Since the appeal was successful in part in this case, and the appellant was represented by counsel in the initial phase, the Tribunal also awards costs in the amount of €2,000 (two thousand euros). All other claims are dismissed.

II. Case No. 2024/1383

A. Proceedings

78. This case relates to allegations against the NAEW concerning the appellant's non-recruitment by another NATO body, the NATO Support and Procurement Agency ("NSPA"), in May 2023 (this is also the subject of the appeal in Case No 2023/1382). Further background regarding the appellant's employment with the NAEW, which ended on 29 March 2023, appears in Part I of this judgment. The proceedings in Case No. 2024/1383 that also involved joined Case No. 2023/1368 are set out in Part I.A of this judgment.

79. The appeal in Case No. 2024/1383 was filed on 23 December 2023 and registered on 9 January 2024. The answer, dated 15 March 2024, was registered on 19 March 2024. The Tribunal granted the appellant's request for an extension to file his answer on three occasions, with the final date set as 15 July 2024. With no reply having been received, on 16 July 2024 the Registrar confirmed with the appellant that he had not sent a reply. On 25 July 2024, he indicated that this course of action was a litigation strategy. With no reply having been submitted, no rejoinder was required of the respondent.

80. On 20 March 2024, in Case No. 2024/1383 the appellant had requested the Registrar to provide him with documentation to support his claims. The Registrar replied that this was not the type of assistance that the Tribunal could provide, directing him to the Human Resources (HR) services of his former employer.

81. On 5 April 2024, the appellant requested an extension of time limits to submit his reply, on grounds of his request for documentation from various NATO bodies; the Tribunal granted a one-week extension. The respondent provided documentation on 18

April 2024, which the Tribunal distributed in accordance with its Rules while granting the appellant a further extension of two weeks to reply. This led to a series of email exchanges as from 19 April 2024, with the appellant reproaching the Registrar for "missed neutrality" and insisting on receiving notification of receipt of each email.

82. On 22 April 2024, the appellant requested a further extension of time limits, on grounds that he had submitted a request for administrative review, linked to the current appeal, to the data protection officer. The Tribunal granted this. On 23 May 2024, he requested a further extension of time limits in Case No. 2024/1383, which was also granted.

83. With its submission of 19 June 2024, the respondent had annexed a document prepared by an HR staff member of the NSPA on 14 September 2023, which contained some cross-outs; the document recounted a telephone conversation of 11 May 2023 between that staff member and an HR staff member of NAEW. On 19 June 2024, the appellant requested the original unaltered copies of the respondent's electronic submissions in Cases Nos. 2023/1368, 2024/1382 and 2024/1383. The Tribunal then requested an unredacted version or a statement of legitimate reasons for not doing so. On 25 June 2024, the respondent indicated its willingness to disclose the unredacted document to the Tribunal on an *ex parte* basis. The respondent stated that the redaction had been done to protect the individuals named (since the appellant had indicated his intent to institute criminal proceedings against NATO and its staff members) and to delete communications with the NSPA's medical advisor.

84. On 2 July 2024, the appellant, acting on his own initiative, submitted an "additional pleading requested in accordance with Rule 16"; this was registered on 5 July and the appellant was subsequently informed that the Tribunal would rule on its admissibility in due course. The respondent was informed and offered the opportunity to comment, which it did not.

85. This pleading drew on information provided by the respondent in its answer/rejoinder and by the NSPA in the related case against it (see the judgment in Case No. 2023/1382). As part of this submission, the appellant also sent an MP3 file of conversations he had recorded; there was a subsequent exchange of correspondence between the appellant and the Registrar regarding possible means of converting this material into a format usable by the Tribunal, should it decide to admit it and the other content in the case proceedings. The Registrar noted that "the Tribunal will take a position on this matter in due time".

86. Under the Tribunal's Rules of Procedure (ROP), the file in a case closes after the rejoinder has been filed by the respondent (Rule 15). The rejoinder in Case No. 2023/1368 was filed on 10 November 2023, and registered on 27 November 2023; there was no rejoinder in Case No. 2024/1383 since the appellant had chosen not to submit a reply. Rule 16 of the ROP permits the President of the Tribunal, *sua sponte* or at the request of a party, to call upon the parties to submit additional written statements or documents. In his document, the appellant has made several requests to the Tribunal, i.e. to admit the additional pleading, to establish an independent external investigation pursuant to a contract awarded for such services, to order preventive measures "to stop the spread of false information" by NAEW HR to potential employers, and to extend the

calculation of damages already presented to include current delays and additional damages.

87. In relation to possible admission of the pleading (or portions of it) under Rule 16, the Tribunal has examined the appellant's 147-page document of 3 July 2024 in detail. The documentary annexes submitted by the appellant fall into three categories.

88. First, certain annexes that mainly relate to information disclosed by the NSPA in its reply or rejoinder in Case No. 2023/1382; these were disclosed to the appellant after the last closing date in Joined Cases Nos. 2023/1368 and 2024/1383. As newly disclosed evidence, this information has been examined by the Tribunal for purposes of this judgment. This information includes the material disclosed by the respondent NSPA in its reply and rejoinder in Case No. 2023/1382 (in particular the account, written on 14 September 2023, of the telephone call of 11 May 2023 between the HR units of the NSPA and NAEW), an email exchange relating to the NATO Data Protection Directive (ACO 015-026) which also applies to NAEW (22 April 2024), and an email exchange regarding the appellant obtaining a security clearance (4 April 2024).

89. Secondly, the pleading of 3 July 2024 included information that did not fall into the category of new evidence. It may have been obtained by the appellant after the last rejoinder was filed in the joined cases, but the information was or could have been in his possession before the last rejoinder was filed in Case No. 2024/1383. This was instead a late endeavour to introduce documents that he believed would support his claims, but this material did not fall within the parameters of Rule 16. These items included, for example, his initial and last performance reports of August 2021 and May 2022, information on bullying and harassment and practice guidelines for managers dating from 2018, various job descriptions in his former unit (dated 30 August 2021 and printed on 6 September 2021), a Directive applicable to SHAPE, and an MP3 drive allegedly containing recordings of conversations (without the other parties' notice or consent) from 2022/2023. As outside the scope of Rule 16 requirements, such material has therefore not been taken into account by the Tribunal in arriving at its decision.

90. Thirdly, Annex 5 to the additional pleading in the joined cases reproduced the contents of an appeal that the appellant had lodged against the NAEW on 13 March 2024 and withdrawn on 14 May 2024. In that appeal, he had requested an independent investigation into allegations of harassment and put forward a new claim alleging emotional stress and harm to health (seeking USD 2,750,000). Before accepting this withdrawal, the President had verified that the appellant knew that a withdrawal would be unconditional, as provided by Rule 17 of the ROP. The material in this Annex, which in any event largely repeated what the appellant had submitted in the joined cases, is therefore not properly before this Tribunal.

91. The date for the reply had been extended until 15 July 2024; the following day, the Tribunal asked for confirmation that the appellant had not supplied a reply by that date, with a follow-up email on 23 July 2024. On 25 July 2024, the appellant confirmed that he had not submitted a reply. As noted above, the invitation to the hearing was extended to the parties, with the appellant confirming receipt on 23 August 2024. As there was no reply, no rejoinder was required.

92. As regards events several days before the pre-announced hearing in Case No. 2024/1383, which was held on 26 September 2024, see under Part I.A (Proceedings) of this judgment. For the reasons stated, the Tribunal proceeded to conduct the hearing as announced in advance, with the respondent present and the appellant having chosen not to participate in person or by electronic means.

B. Factual background of the case

93. On 14 February 2023, while still under contract with the NAEW and on long-term sick leave, the appellant applied for a vacancy at the NSPA that was advertised on its website. As a reference, he named a former colleague. On the form he checked "no" in response to the question of whether his supervisor could be contacted. The applicant was interviewed online by the NSPA; the interviewer characterized him as a highly qualified technician.

94. He received a "notification of selection" from the NSPA on 3 April 2023. This requested him to indicate his willingness to accept the job, and then to undergo a medical check with a physician of his choice and to supply his security clearance. This document stated in bold-faced type, "Please be informed that this is not a firm job offer", while stating that he was "recommended for selection" pending the necessary additional medical check and security clearance. He was declared fit for duty on 10 May 2023 by a medical doctor of his own choice.

95. In the meantime, he had prepared his appeal against the NAEW in Case No. 2023/1368, dated 8 May 2023 and registered by the Tribunal on 12 May 2023. He had also contacted a data protection officer at the NAEW on 4 April 2023, alleging a data breach.

96. As part of its regular procedure when a candidate had been employed by another NATO Agency, an NSPA HR official contacted the HR unit at the NAEW (not the appellant's former supervisor) on 11 May 2023 for a reference check on the appellant. The information received indicated that while he was a first-class technician and the initial year of his employment had gone well, he had demonstrated difficulty working in a team and his contract had not been renewed. NAEW had indicated that "since communication became impossible with him, he was [i.e. had been] disciplined," that an investigation board had considered his allegations of harassment and bullying to be unfounded, and that "he was the one harassing his colleagues". The statement regarding the disciplinary action was not correct, as it had been annulled by the NAEW because the "verbal censure" imposed was not one of the sanctions provided for in the CPR. There also had been no complaints lodged against him by other colleagues alleging bullying or harassment, although he had threatened to file criminal complaints against some of them. The information provided by the NAEW was therefore partially correct and partially incorrect.

97. Following internal consultations in the NSPA, the Head of Talent Acquisition and Development Office of the NSPA notified the appellant on 16 May 2023 that the agency was not in a position to continue with his recruitment. She indicated that the NSPA had performed a reference check and "unfortunately the outcome was not positive and prevented the organization from making a firm offer" to him.

98. The appellant inquired into the reasons for this decision on 16 and 22 May 2023 and requested reimbursement of the medical fees he had incurred as a candidate. On 24 May 2023, the respondent informed him that his reference check was unfavourable, and that the CPR did not provide for the reimbursement of candidates' medical fees. On 26 May 2023, he replied that he accepted non-reimbursement.

99. On 16 June 2023, the appellant requested an administrative review, seeking annulment of the NSPA's decision and evidence to permit him to pursue criminal prosecution of various individuals, as well as the reimbursement requested earlier. The General Manager of NSPA denied these requests, stating that the reasons had been provided in the letter of 16 May 2023 and the email of 24 May 2024. She indicated that the NSPA had no written record of the reference check but that the appellant could access his file by making an appointment. She said that the NAEW had not informed the NSPA of his legal proceedings. She told him that European and national laws on privacy did not apply to NATO. She added that the CPR did not authorize reimbursement of medical expenses during recruitment, confirming the denial of his request on this point.

100. Eventually, the appellant filed a complaint and the NSPA General Manager referred it to a Complaint Committee. The appellant challenged the chair's neutrality after the chair took decisions that did not please the appellant. In its report of 26 September 2023, this Committee found against the appellant. Following its recommendations, the General Manager of NSPA rejected the appellant's complaint on 23 October 2023, and an appeal followed. Further details appear in Case No. 2023/1382.

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

(i) The appellant's contentions

101. The claims of the appellant are threefold; he seeks: (1) a ruling that the claim is admissible and has merit; (2) production of documents identifying the NAEW staff who released information to the NSPA and disclosure of that information, and (3) annulment of the 12 May 2023 decision to provide a negative reference and notification of this to the NSPA. He claims compensation in material and non-material damages in the amount of €179,543, plus costs of €4,000.

102. The appellant contends that his de-selection from recruitment was the result of a phone call between NAEW and NSPA officials, in breach of the principles of non-retaliation, discrimination, defamation, the NATO Code of Conduct and the CPR. In addition, he maintains that the phone call was in breach of the NATO data protection policy as well as host nation and European Union data protection legislation, since the NAEW disclosed personal data without the applicant's consent. He also portrays this new claim as a continuation of his underlying allegations concerning the alleged failure of the NAEW to handle the bullying and harassment investigation properly.

(ii) The respondent's contentions

103. The respondent contends that the appeal is inadmissible (since a phone call is not a decision) and lacking merit, since the claims do not fall within the scope of review encompassed by Articles 61 and 62 of the CPR. Moreover, the claims deal with matters of another NATO body. A procedure exists under JCB-WP(99)(7)(FINAL) for staff and former staff to be informed of personnel data relating to them processed by computerized means, but not a phone call.

104. There are no provisions prohibiting a telephone conversation between two NATO bodies in the process of a recruitment or transfer of a (former) staff member. No causal link exists between the phone call with NAEW HR, the NSPA's decision and the applicant's request for damages, the respondent urges. The NSPA had not yet made a firm job offer, and his claim for damages was speculative, the respondent states.

105. Furthermore, the status of NATO in international law means that it is exempt from the application of data protection legislation in other international organizations, the European Union and the NATO Member States. In support of this, the respondent supplied a legal opinion that had been prepared for other purposes on this subject.

D. Considerations and conclusions in Case No. 2024/1383

(i) Admissibility

106. The appellant, a former NAEW staff member, is contesting a telephone call of 12 May 2023 between an HR official in the NSPA and an HR official in the NAEW. He alleges unlawful conduct by the NAEW and various of its officials. This response to an inquiry from another NATO agency was not a "decision" by the NAEW whose legality is appealable to this Tribunal under the provisions of Articles 61 and 62 of the CPR and Article 6.2.1 of the Tribunal's Statute set out in Annex IX to the CPR, which provide for review only of "a decision" affecting the conditions of work or of service of a staff member or former staff member (Article 61.1 of the CPR, and Article 62 of the CPR relating to appeals of such decisions). It was not alleged that the contents of the phone call had been included in the electronic records maintained by the NAEW relating to the appellant's employment, which had ceased with that agency on 29 March 2023.

107. Nor has the appellant shown that the response by the NAEW to the reference query by the HR official of the NSPA was a continuation of the underlying claim regarding the NAEW's handling of his harassment and bullying allegation or its alleged retaliation. In the circumstances here, the NAEW would have had no advantage or disadvantage from the employment or non-employment of a former staff member in another NATO agency. As for the claim of retaliation by the NAEW, the phone call at issue took place on 11 May 2023, and the registration of his appeal in Case No. 2023/1368, dated 8 May, occurred only on 12 May 2023. There was no proof that the first appeal against the NAEW was mentioned in the phone call at issue; indeed, the NSPA denied this.

108. As to allegations of breaches of European and national law, NATO enjoys immunity from jurisdiction which exempts it from being subject to such legislation. Pursuant to Article 6.2.3 of its Statute, which states that the Tribunal shall not have any powers beyond those conferred to it, the Tribunal has no jurisdiction over such claims.

109. For the reasons stated, the appellant's appeal in this case is thus dismissed.

(ii) Merits

110. Having declared this appeal inadmissible, there is no reason to go into the merits in any detail. In the current case, the appellant had advanced to a late stage in the recruitment process conducted by another agency, the NSPA, but its communication to him had stated in bold-face type that it had not yet made "a firm job offer". The procedural path taken by the NSPA, which contacted the HR unit rather than the appellant's supervisor, was a normal consultative practice between two cooperating NATO agencies. The appellant has not shown that this was a continuation of his underlying claim regarding the NAEW's handling of his harassment and bullying allegations.

111. While some of the information provided by the NAEW to the NSPA in the phone call was inaccurate, as noted above, such statements were only some of a number of elements mentioned in the reconstructed report of the phone call. The appellant himself provided evidence of not having worked well in a team. Nonetheless, the NAEW should ensure that its electronic record of the appellant's employment does not contain references to action that it had annulled (the disciplinary measure against the appellant) or that were not found, by formal procedures, to have occurred (accusations of bullying or harassment committed by the appellant).

112. As for the claim of retaliation by the NAEW, the phone call at issue took place on 11 May 2023, and the registration of his appeal in Case No. 2023/1368, dated 8 May, occurred only on 12 May 2023. There was no proof that the first appeal against the NAEW was mentioned in the phone call at issue; indeed, the NSPA denied this.

113. Thus, even if the appeal in this case had been found admissible, it would have failed.

E. Costs

114. Since the appeal in Case No. 2024/1383 fails, no costs are to be awarded in relation to it.

F. Decision in Joined Cases Nos. 2023/1368 and 2024/1383

FOR THESE REASONS,

The Tribunal decides that:

- The respondent breached its duty of care in certain respects, as detailed in Case No. 2023/1368, and the Tribunal therefore awards the appellant compensation in the amount of €2,000 (two thousand euros).
- The appeal in Case No. 2023/1368 having succeeded in part, costs in the amount of €2,000 (two thousand euros) are awarded to the appellant.
- The appeal in Case No. 2024/1383 is dismissed.
- All remaining submissions and claims are dismissed.

Done in Brussels, on 25 November 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Annex: Judgment on a request for recusal, dated 27 June 2024

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 December 2024 AT-J(2024)0025

Judgment

Case No. 2024/1393

MC

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 16 December 2024

Original: English

Keywords: appeal against NSPA Operating Instruction on Medical Fitness, Absence and Reintegration Policy; admissibility.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Fabien Raynaud and Ms Anne Trebilcock, judges, having regard to the written procedure and further to the hearing on 9 December 2024.

A. Proceedings

1. The NATO Administrative Tribunal ("the Tribunal") has been seized of an appeal by Mr MC, filed on 14 June 2024 and registered on 24 June 2024 as Case No. 2024/1393, seeking suspension of implementation of certain clauses from an Operating Instruction or, in the alternative, deletion of his confidential medical data from the respondent's servers, plus compensation for non-material damage and costs.

2. The respondent's answer, dated 16 September 2024, was registered on 19 September 2024. The appellant's reply, dated 18 October 2024, was registered on 21 October 2024. The respondent chose not to file a rejoinder.

3. An oral hearing was held on 9 December 2024 through videoconferencing, in accordance with Rule 26 of the Rules of Procedure (ROP) and paragraph 37 of the Practice Directions of the Tribunal.

B. Factual background of the case

4. The appellant holds an indefinite-duration contract with the NATO Support and Procurement Agency ("the NSPA"), where he has been employed for over 20 years.

5. The appeal is filed against the decision of the NSPA General Manager (GM), Head of a NATO Body (HONB), dated 17 April 2024, which denied the appellant's request to remove certain clauses from a revised version of an Operating Instruction (OI) that was first adopted in 2014 (OI 4400-04, Operating Instruction on Medical Fitness, Absence and Reintegration Policy, revision dated 24 February 2024). In the appellant's request for administrative review in the form he submitted on 12 April 2024, he specified "NSPA OI 4400-04" as the administrative decision he wished to have reviewed.

6. In her decision of 17 April 2024, the GM asserted that the revised policy complies with the applicable legal framework. She also noted that the request submitted did not identify any decision implementing the OI that was directed at the appellant or adversely affected him. The GM further stated that his request, submitted more than 30 days after issuance of the OI, was time-barred.

7. Since the appellant had asked for his complaint be submitted to a Complaint Committee, which the GM did not do, her silence is taken as an implicit rejection of this request, but this request was withdrawn by the appellant in his reply in the current case.

8. After urging suspension of implementation of the OI, the appellant had added in his complaint of 12 April 2024 that if its implementation went ahead, he requested deletion of all his confidential medical data on the NSPA servers (aside from dates of beginning and end of sickness, and prognosis). This request was not directly addressed in the decision either, and may also be considered as having been denied by the GM.

9. While the OI bore the date of 24 February 2024, the appellant submitted evidence to show that it was signed on 19 March 2024 and communicated to staff on 21 March 2024, which the respondent did not refute.

10. The appellant was on sick leave in relation to an accident from 19 March to 12 April 2024. His physician authorized him to leave his house during this period. The appellant submitted a medical certificate to the NSPA attesting to his sick leave.

11. In an earlier appeal in which the appellant had challenged the COVID-19 policy put in place by the NSPA (Case No. 2022/1339), the appellant had come to NATO HQ to attend the hearing in that case on 29 September 2022, contrary to instructions given by the NSPA Medical Service to quarantine at that time. The appellant was then subject to an investigation as from 2 February 2023 on allegations that he had violated this policy. On 11 September 2024, the Head of HR at NSPA had informed the appellant that the Disciplinary Board had decided, in view of the long delay since the start of the investigation, not to pursue this matter any further. The Board reminded him of his obligation to comply with all policies issued by NATO and NSPA, even when he disagreed with them.

C. Parties' principal contentions, legal arguments and relief sought

(i) The appellant's contentions

12. The appellant alleges that specific provisions of the OI in question were inconsistent with the Code of Personnel Regulations (CPR, Article 46.5), the safety and health regulations of Luxembourg, the International Covenant on Civil and Political Rights, and the Council of Europe Convention on Human Rights and Biomedicine. The six OI provisions at issue are paragraph 4.2.4 on mandating vaccinations, paragraph 4.2.5 on teleworking, paragraph 5.1.7(3) on medical visits without prior notice, paragraph 5.11 on the validity of the medical certificate, paragraph 5.6.1 on return to work and reintegration, and paragraph 6.6. on confidentiality of medical information. In his reply, the appellant cited in addition the Data Protection Framework Policy (ON(2024)00019 dated 15 May 2024, in force since 1 September 2024) and documents from national jurisdictions.

13. The appellant contends that the decisions taken by the HONB affected his conditions of work and fundamental freedoms and that certain provisions of the OI must be changed. He claims "arbitrary detention at home" during his sick leave, since the doctor signing his medical certificate had said that leaving the house was authorized. He

alleges that access by the Head of Human Resources (HR) to his confidential medical records without authorization severely affects his conditions of work or service. In support of this, he produced a notification from the NSPA medical advisor dated over three years prior stating that personal information would be safe within the medical service, and that other people would not have access to it.

14. The appellant calls on the Tribunal to put an end to "this attack on Democracy, Human Rights, and the Rule of Law". Finally, he argues that his claim was not time-barred. At the hearing, the appellant stressed his quest for legal certainty and expressed his frustration at not having his views on what he saw as erroneous policy decisions prevail.

15. Initially, the appellant sought the following relief:
- suspension of the implementation of specified paragraphs of OI 4400-04 and an Annex to it;
- either suspension of paragraph 6.6 of the OI or, if this is not granted, deletion of all his confidential medical data aside from the date of the beginning and end of sickness, and the prognosis;
- compensation of €6,000 in moral damages from being arbitrarily detained at home (having been unlawfully restrained for 22 days during sick leave), the perception of impunity of the HONB, unauthorized access to confidential medical information, a sense of injustice, and coverage of his expenses for legal counsel.

16. In his reply, the appellant increased the compensation sought to add €6,600 for the unlawful use of his confidential medical information, plus €200 per day until the deletion of such data is confirmed or a proper implementation of Provision 6.6 of OI 4400-04 in line with the Data Protection Framework Policy (ON(2024)00019 dated 15 May 2024, in force since 1 September 2024) is put into place.

17. The appellant argues that that he is not contesting the OI, but rather the consequences of its implementation. He pointed to the respondent's denial of his requests to have confidential medical data protected and erased, and cited the deprivation of his free movement during sick leave and the accessing of personal confidential medical data by a non-authorized person. Both affect his rights and conditions of work, he argues, causing negative physical and psychological effects.

18. The appellant argues that the OI was not promulgated on 20 February, but rather upon signature by the HONB on 19 March 2024. He contends that the date of notification within the terms of CPR, Annex IX, Article 2.1 should be 21 March 2024, the date on which the publication of the revision was communicated to the appellant by the Programme Quality Focal Point. The appeal is thus in his view not time-barred.

19. The appellant alleges that the Head of HR accessed confidential medical information without consent. He further alleges a lack of duty of care towards the appellant's private life and protection of the law.

20. The appellant objected to his personal medical information having been divulged in relation an earlier diagnosis of COVID, alleging violation of Article 3.3.1 of the Code of Conduct and contesting the need for self-isolation. This led to messages from the Head of HR to the appellant (dated 10 May 2023 and 18 October 2024), saying that the staff members of the medical service had felt harassed by his emails. The appellant denied any intention to harass.

(ii) The respondent's contentions

21. The respondent, the NSPA, argues that the appeal is not admissible, because the appellant is not challenging any decision implementing the contested policy or any other decision affecting his conditions of work or of service. He has alleged only hypothetical situations or referred to alleged incidents in the past. In relation to certain claims now made, the respondent argues, the appellant did not exhaust internal dispute resolution mechanisms by first submitting a complaint. The respondent urged dismissal on the basis of Rule 10 of the ROP, as being time-barred (with the OI published on 20 February 2024, and the appeal filed on 12 April 2024, i.e. more than 30 days later).

22. The respondent argues that the appeal is clearly devoid of merit, and that the appellant did not suffer any damages. It disputes his assertion that he was not free to leave his house during a period of sick leave, and notes that NATO's standard form for certifying sick leave already stipulated that the physician may authorize a patient to leave their house.

23. In relation to the allegations and claims concerning the appellant's medical records, the respondent notes that its respect for confidentiality of such material does not foreclose its use to justify administrative decisions, on a strictly "need to know" basis. The respondent stresses that the appellant's concerns remain hypothetical.

D. Considerations and conclusions

(i) Admissibility

24. The appellant's request for administrative review of 12 April 2024 referred only to "NSPA OI 4400-04" as the administrative decision he wished to have reviewed, without reference to any individual impact it had had on him. As a remedy he sought to (1) have the "illegal/unlawful clauses" which he had specified removed and their implementation suspended until they had been corrected, and (2) guarantee that confidential medical data will be protected and delete all confidential medical data that concerns him from the respondent's servers. The assertions made about a breach of confidentiality related to an alleged incident involving the Head of HR before the notification of the revisions to the OI in question. The appellant has not alleged that there has been such a data breach in the relevant time interval covered by his appeal.

25. In his appeal of the GM's decision of 17 April 2024, the appellant similarly sought suspension of implementation of selected paragraphs of the OI and, failing this, to have all his confidential medical data deleted from the respondent's servers. However, this was not supported by any proven allegations of an actual breach of confidentiality in violation of the CPR.

26. The appellant further claimed that he had been arbitrarily detained at home during sick leave from 19 March to 12 April 2024, but he has not shown how this situation related to the most recent revision of the OI or indeed violated any other NATO rule. Rather, the allegations remain hypothetical. The reminder from the Complaint Committee, when notifying him that the complaint against him would no longer be pursued, which urged him to follow rules even when he did not agree with them, was simply a statement to that effect, and not a threat to the appellant (as he had perceived it).

27. The Tribunal recalls the relevant provisions of the CPR regarding absence for health reasons and sick leave, which state in CPR 45.1 and 45.2:

> 45.1 Members of the staff absent owing to sickness or accident shall at once notify their heads of service, who will advise the Personnel Service […]
>
> 45.2 Members of the staff absent owing to sickness or accident for more than 2 consecutive calendar days shall be required to obtain a medical certificate within 4 days of ceasing work and to submit it the Personnel Service as soon as possible thereafter…The Organization may require a staff member to undergo a medical control before recognizing any certificate as valid.

The appellant's allegations do not show how the implementation of the OI violates this or other provisions of the CPR in relation to him personally.

28. Similarly, the appellant's assertions that the revised OI improperly implements Article 46.5 of the CPR, which concerns in particular quarantine and vaccination or inoculation of staff members (Article 46.5.1 and Article 46.5.4), do not show a connection to his current personal situation. The appellant has evoked only potential harm he sees in possible application of the other provisions of the OI to which he has objected. The Data Protection Framework Policy (ON(2024)00019 dated 15 May 2024,) which the appellant cited in support of his claims, entered into force only on 1 September 2024, i.e. subsequent to the decision of the GM and the appeal.

29. The Tribunal recalls that it has competence to "decide any individual dispute" brought by a staff member concerning the legality of a decision (CPR, Annex IX, Article 6.2.1) "affecting their conditions of work or of service" (CPR, Annex IX, Article 2.1). This Tribunal has consistently held that to be admissible, an appeal must challenge an administrative decision that directly and adversely affects the appellant (see for instance Case No. 2022/1339, Case No. 2022/1346, Case No. 2018/1262 and Case No. 2018/1263). An appeal must specify the ways in which the appellant has been personally affected by the decision. Such a claim must go beyond perceptions of injustice or of alleged illegality in relation to provisions of the OI.

30. In essence, the appellant has challenged aspects of the overall legality of a generally applicable OI. His concerns remain hypothetical. This appeal is thus inadmissible.

31. In addition, as regards the new claims contained in the appellant's reply, he had not first exhausted administrative review, as required under Article 61.1 of the CPR. Article 6.3.1 of Annex IX to the CPR further provides in part that "the Tribunal shall only entertain appeals after the appellant has exhausted all available channels for submitting complaints under this Annex". The appeal is to state "all grounds of appeal asserted by the appellant and shall be accompanied by all documentary evidence relevant thereto…" (Article 6.3.4 of Annex IX). This is to be done when filing the appeal.

(ii) Merits

32. For the reasons stated, the Tribunal has found the appeal to be inadmissible. There is thus no need to examine the merits.

E. Costs

33. Article 6.8.2 of Annex IX provides:

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

34. The appeal having been dismissed, no reimbursement of costs is ordered.

F. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 16 December 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

19 December 2024 AT-J(2024)0026

Judgment

Case no. 2024/1392

CB

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 18 December 2024

Original: French

Keywords: appeal inadmissible on the grounds that it is time-barred.

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This judgment is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Ms Ann Trebilcock and Mr Fabien Raynaud, judges, having regard to the written procedure and further to the public hearing on 9 December 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Ms CB (hereinafter “the appellant”), against the NATO Support and Procurement Agency (hereinafter “the Agency”). The appeal, dated 2 April 2024, was registered on 9 April 2024 as Case no. 2024/1392. The appellant is seeking to have the Tribunal annul the decision of 12 February 2024 rejecting the request to have an Invalidity Board convened, and all the associated decisions, in particular the decision to terminate the appellant’s contract without convening an Invalidity Board, the effective termination, and the decisions of 30 March, 6 May and 7 July 2022 and of 5 December 2023, relating to termination of the contract and the refusal to convene an Invalidity Board.

2. The Agency’s answer, seeking dismissal of the appeal, was submitted on 6 June 2024 and registered on 14 June 2024.

3. The appellant’s reply, seeking the same relief as in the appeal, was submitted on 29 July 2024 and registered on 5 August 2024.

4. The Agency’s rejoinder, seeking dismissal of the appeal, was submitted on 27 September 2024 and registered on 2 October 2024.

B. The parties’ submissions

5. The appellant is seeking to have an Invalidity Board convened, in line with Annex IV, Chapter III, Article 13/3 iii) of the Civilian Personnel Regulations (CPR). This was denied to her in the decision of 12 February 2024. She is also seeking to have the Agency’s General Manager enjoined to fulfil her duty of care obligations towards her until the end of the appeals procedure. Furthermore, she is asking that the emoluments she was receiving as a B3-graded staff member continue to be paid to her, retroactively, as from March 2024 and up until the decision of the Invalidity Board. In the alternative, if the Board is not convened, she is seeking financial compensation in an amount equivalent to the invalidity pension she would have received had it been possible to convene the Invalidity Board in a timely manner. She is also asking that the Agency’s General Manager be enjoined to send her full medical file either to her or to her psychiatrist. Lastly, she is seeking an order for the Agency to pay the costs.

6. The Agency is asking that the appeal be dismissed as inadmissible and, in the alternative, as unfounded.

C. Factual background of the case

7. The appellant, who has been working for the Agency since 2003 (and on an indefinite-duration contract since 2004), went out on sick leave then on extended sick leave several times in 2018 and 2019, and then from 18 February 2020 to 30 November 2021. In the framework of that extended sick leave, an Invalidity Board was convened and met on 12 October 2021. The Board found that the appellant was not suffering from permanent invalidity which totally prevented her from performing her job as per Article 13 of Annex IV to the CPR.

8. Following that finding, the appellant resumed her duties full-time on 1 December 2021, but on 1 March 2022, she submitted another medical certificate stating that she was unfit to work. The appellant underwent two medical check-ups, on 11 and 23 March 2022, at the request of the Agency's Medical Adviser. It was found both times that the appellant's absence was for the same medical condition as when she had gone out on sick leave previously, and that there was no prospect of her returning to work full-time on a permanent basis.

9. In a letter dated 30 March 2022, the Agency's General Manager informed the appellant that given her repeated absences and the Medical Adviser's finding that the appellant would not be able to return to work full-time on a permanent basis, she had decided to terminate the appellant's contract in line with Articles 9.1 (ii) and 45.4 of the CPR. She invited the appellant to submit any comments she might have.

10. In response to that letter, the appellant, in a letter dated 19 April 2022, countered that her contract could not be terminated while she was out on sick leave, requested notice of at least 180 days and criticized the conditions in which the Invalidity Board had established its findings, concluding that she "could therefore not accept the decision to terminate her contract in the abovementioned conditions". In another letter dated 28 April, she gave further details about her state of health.

11. In a letter dated 6 May 2022, the Agency's General Manager stated that the contract termination would become effective only at the end of the sick leave, in line with Article 45.8 of the CPR, and acknowledged receipt of the new medical information sent in by the appellant. She reserved the right to convene the Invalidity Board again if that appeared necessary. In an email dated 6 May 2022, the appellant requested that the Invalidity Board be convened again. On 15 June 2022, the Administration sent that new medical information to the three medical practitioners on the Invalidity Board that had established the finding of 12 October 2021 to ask them whether the information was sufficiently new as to warrant another assessment by the Board of the appellant's medical situation. Two out of the three medical practitioners said it was not.

12. In a letter dated 7 July 2022, the Agency's General Manager informed the appellant that she had decided to terminate her contract for the reasons set out in her letter of 30 March 2022, without the need for the Invalidity Board to be convened again, and that the contract termination would become effective at the end of the ongoing period of sick leave, under the conditions set out in Article 45.7.1 of the CPR.

13. In a letter dated 5 August 2022, the appellant stated that she was “contesting any decision that could result in termination” and, based on the opinion of her medical practitioner, argued that “the decision not to convene the board in charge of establishing whether or not she was suffering from invalidity was unacceptable”. The Administration did not reply to that letter.

14. Yet it was only on 31 August 2023, i.e. over a year after the previous letter, that the appellant sent another letter to the Agency stating that, under the provisions of Articles 2 and 13.2 of the CPR, she was requesting that the Invalidity Board be convened again to establish that she was permanently incapacitated. In another letter dated 20 November 2023, the appellant informed the Agency of her intention to contest the decision to terminate her contract, on the grounds that she considered it “illegal, premature and not founded on information that could justify it”, as soon as the decision came into effect.

15. In a letter dated 5 December 2023, the Agency underscored that the decision of 7 July 2022 to terminate the appellant’s contract without convening the Invalidity Board again had become final since it had not been contested within the timeframe set out in Annex IX of the CPR.

16. In a letter dated 12 January 2024, the appellant stated that she was making an official complaint against the decision to terminate her contract and not to convene the Invalidity Board.

17. In a letter dated 12 February 2024, the Agency rejected the appellant’s claims as inadmissible for being time-barred (in the case of the submissions disputing the decision to terminate the contract without convening the Invalidity Board again) and on the grounds that they were not directed against a decision constituting grounds for grievance (in the case of the submissions concerning the letter of 5 December 2023). In the alternative, the Agency rejected the claims as unfounded.

18. In the present appeal, the appellant is contesting these decisions. She is asking the Tribunal to have an Invalidity Board convened, to have the Agency’s General Manager enjoined to fulfil her duty of care obligations towards her and to have her salary continue to be paid to her until the end of the appeals procedure. In the alternative, if the Invalidity Board is not convened, she is seeking financial compensation in the amount of the invalidity pension she would have received had the Invalidity Board been convened in a timely manner to recognize her permanent invalidity. At the hearing, she highlighted that she was not asking to resume working in the service she used to belong to, and that in any case she did not wish to be reinstated there given the workplace harassment she considers she was subjected to.

On admissibility

D. The parties’ contentions

19. The Agency contends that the submissions in the appeal are inadmissible insofar as they were directed against administrative decisions that had become final as they had not been contested in line with the procedures and timeframes set out in Annex IX to the CPR: the decisions were taken and notified to the appellant in a letter dated 7 July 2022, and the appellant only officially contested them in a letter dated 12 January 2024. As for the other contested acts, they simply confirm the decisions of 7 July 2022 without impacting the legal rules and without resetting the timeframe for appealing the decisions of 7 July 2022.

20. The appellant contends that the submissions in her appeal are admissible because on 12 January 2024, for the fifth time, she requested that an Invalidity Board be convened, which she was entitled to do under Articles 45.7.1 and 45.7.4 of the CPR insofar as her contract still had not been effectively terminated.

E. Ruling of the Tribunal

21. In essence, the appellant is contesting the decisions whereby the General Manager terminated her contract and refused before such termination to convene the Invalidity Board again in order for the latter to establish that she was totally unfit to perform her duties within the meaning of Article 13 of Annex IV to the CPR.

22. It follows from Article 6 of Annex IX to the CPR that staff members who wish to contest a decision that constitutes a grievance against them have sixty days from the date of notification of the decision to submit an appeal to the Tribunal.

23. In the present case, the case file shows that the decisions to terminate the appellant’s contract and not convene the Invalidity Board again were taken on 7 July 2022. However, while the appellant sent a letter on 5 August 2022 saying that she disagreed with those decisions, it was only on 31 August 2023 at the earliest that she expressly contested the decision not to convene the Invalidity Board again, on 30 November 2023 that she stated her intention to contest the decision to terminate her contract, and furthermore only on 12 January 2024 that she filed an official complaint against the decisions. That complaint was dismissed on 12 February 2024 by the Agency, which made it clear from the outset that it was time-barred.

24. Contrary to what the appellant states, the letter of 12 February 2024, whereby the Agency simply dismissed as time-barred the appellant's complaint against the decisions not to convene the Invalidity Board and to terminate her contract because those decisions had been taken and notified to her on 7 July 2022, is not a new decision constituting grounds for grievance and did not reset the timeframe to appeal the decisions of 7 July 2022. The same goes for the letter of 5 December 2023, which was also being contested by the appellant. As noted by the appellant herself in fact, her request to have the Invalidity Board convened again was denied for the fifth time on 12 February 2024.

25. The fact that the 7 July 2022 decision to terminate the appellant's contract had not yet become effective because the appellant was still out on sick leave does not affect the missed deadline for the appellant to contest the decisions of 7 July 2022 that were notified to her.

26. In these circumstances, the Agency's objection to the appeal must be upheld, and there is no other option but to dismiss the latter as inadmissible.

F. Costs

27. Under Article 6.8.2 of Annex IX to the CPR:

> 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.

28. In accordance with these provisions, the appellant's claims for reimbursement of costs must be dismissed.

G. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels on 18 December 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified copy
Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0001

Order

Case No. 2023/1358

AH

Case No. 2023/1359

KS

Appellants

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen
Respondent

Brussels, 15 January 2024

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that Mr H submitted an appeal with the NATO Administrative Tribunal (AT) against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen ("HQ NAEW&CF GK") on 27 March 2023, registered under Case No. 2023/1358;

- Considering that Mr S submitted an appeal with AT against the HQ NAEW&CF GK on 27 March 2023, registered under Case No. 2023/1359;

- Having regard to Rule 13 of the AT Rules of Procedure, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Case No. 2023/1358 and Case No. 2023/1359 are joined.

Done in Brussels, on 15 January 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0002

Order

Case No. 2023/1368 and Case No. 2024/1383

JP

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 17 January 2024

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that Mr JP submitted a first appeal with the NATO Administrative Tribunal (AT) against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen ("HQ NAEW&CF GK"), on 8 May 2023 and registered under Case No. 2023/1368;

- Considering that Mr P submitted a second appeal, on 23 December 2023, and registered under Case No. 2024/1383;

- Having regard to Rule 13 of the AT Rules of Procedure, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Case No. 2023/1368 and Case No. 2024/1383 are joined.

- Both Cases shall be heard once the written procedure in Case No. 2024/1383 is completed.

Done in Brussels, on 17 January 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0003

Order

Case No. 2024/1388 and Case No. 2024/1390

CG

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 13 March 2024

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that Ms CG submitted a first appeal with the NATO Administrative Tribunal (AT) against the NATO Support and Procurement Agency (“NSPA”), on 1 March 2024 and registered under Case No. 2024/1388;

- Considering that Ms G submitted a second appeal, on 12 March 2024, and registered under Case No. 2024/1390;

- Having regard to Rule 13 of the AT Rules of Procedure, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Case No. 2024/1388 and Case No. 2024/1390 are joined.

Done in Brussels, on 13 March 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0004

Order

Case No. 2023/1380 and Case No. 2024/1389

RA

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 13 March 2024

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that Mr RA submitted a first appeal with the NATO Administrative Tribunal (AT) against the NATO Support and Procurement Agency (“NSPA”), on 23 November 2023 and registered under Case No. 2023/1380;

- Considering that Mr A submitted a second appeal, on 12 March 2024, and registered under Case No. 2024/1389;

- Having regard to Rule 13 of the AT Rules of Procedure, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Case No. 2023/1380 and Case No. 2024/1389 are joined.
- Both Cases shall be heard once the written procedure in Case No. 2024/1389 is completed.

Done in Brussels, on 13 March 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0005

Order

Joined Cases Nos 2023/1368-2024/1383
Case No. 2024/1391

JP
Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen
Respondent

Brussels, 8 April 2024

Original: English

Keywords: joining cases.

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The President of the NATO Administrative Tribunal,

- Considering that by Order AT(PRE-O)(2023)0002 dated 17 January 2024, the NATO Administrative Tribunal ("AT") joined Mr P's first and second appeal, Case No. 2023/1368 and Case No. 2024/1384 respectively, submitted against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen ("HQ NAEW&CF GK");

- Considering that on 13 March 2024, Mr P submitted a third appeal with AT against HQ NAEW&CF GK, registered under Case No. 2024/1391;

- Having regard to Rule 13 of the AT Rules of Procedure, which provides:

> The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

DECIDES

- Joined Cases Nos 2023/1368-2024/1383 and Case No. 2024/1391 are joined.

- All cases shall be heard once the written procedure in Case No. 2024/1391 is completed.

Done in Brussels, on 8 April 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0006

Order

Case No. 2024/1385

PD

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 16 April 2024

Original: English

Keywords: withdrawal.

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The President of the NATO Administrative Tribunal,

- Considering that Mr PD submitted an appeal with the NATO Administrative Tribunal ("AT") on 18 January 2024, registered under Case No. 2024/1385 on 23 January 2024, against the NATO Support and Procurement Agency ("NSPA");

- Considering that the AT Registrar received, on 15 April 2024, communication from the appellant that the appeal can be withdrawn ;

- 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 16 April 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0007

Order

Joined Cases Nos 2023/1368-2024/1383.1391

JP

Appellant

v.

Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen

Respondent

Brussels, 21 May 2024

Original: English

Keywords: withdrawal.

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The President of the NATO Administrative Tribunal,

- Considering that by Order AT(PRE-O)(2024)0005 dated 8 April 2024, the NATO Administrative Tribunal ("AT") joined Mr JP's third appeal (Case No. 2024/1391) submitted against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen ("HQ NAEW&CF GK") with Joined Cases Nos 2023/1368-2024/1383;

- Considering that the AT Registrar received, on 14 May 2024, communication that the appellant decided to withdraw his appeal;

- Having regard to Rule 17 of the AT Rules of Procedure, 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 in Case No. 2024/1391 is granted and the appeal is dismissed.

- The procedure in Joined Cases Nos 2023/1368-2024/1383 shall continue and the cases be heard once the written procedure in Case No. 2024/1383 is completed.

Done in Brussels, on 21 May 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(PRE-O)(2024)0008

Order

Case No. 2024/1386

BB

Appellant

v.

NATO International Staff

Respondent

Brussels, 17 July 2024

Original: French

Keywords: hearing of witnesses.

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This order is rendered by Louise Otis, the President of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, having regard to the written procedure and following a brief hearing on 6 June 2024.

A. Proceedings

1. The NATO Administrative Tribunal (hereinafter "the Tribunal") has been seized of an appeal by Bénédicte Borel (hereinafter "the appellant") against the NATO International Staff (hereinafter "the IS") dated 21 January 2024 and registered on 5 February 2024 as Case No. 2024/1386, seeking annulment of the decision taken on 23 November 2023 by the Organization (hereinafter "the respondent") to dismiss her.

2. The written procedure was completed on 28 June 2024. The respondent's comments, the appellant's reply and the respondent's rejoinder were produced on time.

3. In her reply dated 13 May 2024, the appellant requested that witnesses be heard at the hearing. Following a brief hearing on the matter, the President of the Tribunal asked the parties to submit their comments on whether testimonial evidence should be allowed, and, subsidiarily, to produce their list of potential witnesses.

B. Factual background of the case

4. The appellant joined the Organization (IS) on 3 June 2013 following a competition for an A3/A4-graded post. After three (3) years at A3 level, the appellant was promoted to A4 level in 2016. In 2019, her contract was converted to an indefinite-duration contract.

5. In January 2020, the appellant became Team Leader for the Building Integrity (hereinafter "BI") programme. The appellant went out on sick leave as from 11 July 2022, then on extended sick leave as from 11 October 2022.

6. On 12 May 2022, a member of the BI team filed a harassment and discrimination complaint against the appellant.

7. It was in this context that PwC was tasked by the IS with conducting an investigation, following which it was found, on 24 January 2023, that the appellant's alleged actions could be qualified as harassment. The HR Directorate also found against the appellant in another report on 30 March 2023 following further allegations against the appellant.

8. In these circumstances, the Deputy Assistant Secretary General for HR initiated disciplinary proceedings before the Disciplinary Board, which invited the appellant and members of staff to appear before it. On 29 September 2023, the Disciplinary Board unanimously recommended dismissal of the appellant.

9. On 23 November 2023, the Secretary General followed the Disciplinary Board's recommendation, and took disciplinary action in the form of dismissal (Article 59.3(e) of the Civilian Personnel Regulations, hereinafter "CPR") of the appellant, who was at that time on sick leave.

C. Hearing of witnesses before the Administrative Tribunal

10. Articles 6.7.4, 25 and 26 of Annex IX to the CPR specifically state that any witnesses may be heard whose evidence will be useful in the proceedings. Article 6.7.4 provides as follows:

> 6.7.4 The Tribunal may hear any witnesses, including persons whose attendance has been requested by a party in writing, whose evidence it deems may be useful in the proceedings. Any official, whether civilian or military, of NATO called as a witness, shall appear before the Tribunal and may not refuse the required information, except under the conditions laid down in the Tribunal's rules of procedure.

11. Rules 25.3 and 25.4 of the Rules of Procedure of the Administrative Tribunal provide as follows regarding the calling of witnesses:

> 3. As soon as the time limit for submitting written documents has expired, the Registrar shall inform the parties, who then have seven days in which to notify the Registrar in writing of the names and description of the witnesses they wish to have called, together with the reasons why they wish to question them. The Registrar shall notify each party of the witnesses the other wishes to have called; each party may within seven days offer any observations on whether witnesses named by the other should be called.
>
> 4. If the Panel considers that their evidence would be useful, witnesses cited by the parties shall be summoned by the Registrar, as a general rule, at least two weeks before the day of the hearing. The Panel may authorize witnesses to be heard using videoconferencing, Internet telephony, or other similar techniques.

12. In the present case, two investigations were conducted: one by an investigator that was external to the Organization (PwC) and the other by the Disciplinary Board, a joint disciplinary body. Witnesses were heard by both bodies.

13. In her appeal, the appellant asked the Tribunal to review the legality of the impugned decision, claiming that her rights had been infringed by the Organization during the investigative and disciplinary proceedings, and in particular that the investigation had been biased. The appellant had been heard by both bodies, and the Disciplinary Board had also heard the witnesses she put forward.

14. More specifically, the appellant claimed that a manifest error was made insofar as the case file had not been thoroughly examined by the two investigative bodies. All the relevant items were already attached as annexes and will be carefully examined by the Tribunal. The exchanges with the Disciplinary Board show that the documents sent by the appellant were received, and that the appellant had access to the disciplinary bodies'

files. The Tribunal will analyse the matter of the manifest error as well as the duty to state reasons and the duty of care in the light of the complete case file produced. There is no need for additional witnesses in this regard.

15. The Disciplinary Board heard four witnesses, including the appellant and two people who testified in her favour.

16. The appellant is requesting that four additional witnesses be heard by the Tribunal. To this request she has annexed written statements by those witnesses. One of them, Mr P, has already been interviewed by PwC and the Disciplinary Board; nothing further will be gained by including his written statement. The Tribunal agrees only to the two additional statements by Mr O and Mr B, which constitute character evidence that is extrinsic to the case.

17. Out of the proposed witnesses, only Ms K was working for BI at the time of the alleged events. She was not interviewed by the PwC investigator or by the Disciplinary Board, despite the appellant's request. She may therefore be examined and cross-examined as appropriate. The appellant, who is a party to the dispute, may give a statement and, as appropriate, be examined by the Tribunal members or the other party. The respondent may arrange for a witness to be heard if it deems it necessary, in which case it must produce a written statement by 1 September 2024.

D. Decision

The Tribunal decides that:

- Ms K may act as a witness for the appellant.
- The respondent may arrange for a witness to be heard, provided it produces a written statement by 1 September 2024.

Done in Brussels on 17 July 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2024)0001

Order

Case No. 2024/1384

MK

Appellant

v.

Supreme Headquarters Allied Powers Europe

Respondent

Brussels, 18 March 2024

Original: English

Keywords: Rule 10, summary dismissal.

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This order is rendered by a Panel of the North Atlantic Treaty Organization (NATO) Administrative Tribunal, composed of **Ms Louise Otis**, President, **Ms Anne Trebilcock** and **Mr Thomas Laker**, judges.

A. Proceedings

1. On 10 January 2024, the NATO Administrative Tribunal (hereinafter the "Tribunal") received the appeal of Mr MK, against the Supreme Headquarters Allied Powers Europe ("SHAPE), registered as Case No. 2024/1384.

2. The appeal submission under the section "Remedies" states:

> 1. In order to correct the violations, the Appellant requests to order the Head of the NATO body SHAPE
> - to accept and process the Appellant's Request for an Administrative Review dated 8.11.2023;
> […]

3. On 9 February 2024, the Tribunal asked the appellant to file the petition for administrative review alleged in the submission and conclusion.

4. On 13 February 2024, the appellant refused to provide the request for administrative review alleging that it contains private and confidential information. In addition, the appellant informed the Tribunal that:

> […] information which is for the parties eyes only …(not by the Tribunal). Any breach of the confidentiality would be considered as a violation […].

5. On 5 March 2024, the President of the Tribunal sent the appellant a letter stating as follows:

> On 9 February 2024 and 12 February 2024, the Tribunal requested the production of the Request for Administrative Review which procedure is the aim and the conclusion of your appeal:
>
> "Ordering SACEUR to accept my Request for an Administrative Review dated 8.11.203."
>
> On 13 February 2024, your response denied the Tribunal's request by failing to produce the Request for an Administrative Review directly and unequivocally. Therefore, the appellant is asking the Tribunal to order the production of an anonymous, unidentified document.
>
> The President considers that your appeal is inadmissible and devoid of merit.
>
> Therefore, according to Rule 10.1 of the Tribunal's Rules of Procedure, the President has instructed the Registrar to take no further action.

6. On 12 March 2024, the appellant sent a letter with additional details stating that the Tribunal is not allowed to verify whether the letter - to stay unopened - contains a request for administrative review.

B. Legal background

7. Rule 10.2 of the Tribunal's Rules of Procedure provide as follows:

> After notifying the parties and considering any additional written views of the appellant, and if the Tribunal considers that the appeal is clearly inadmissible, outside its jurisdiction, or devoid of merit, the Tribunal shall dismiss the appeal, stating the grounds therefor.

C. Considerations and conclusions

8. The appellant's responses of 13 February and 12 March 2024 rejected the Tribunal's request by failing to produce the request for an administrative review in a manner which would permit the Tribunal to examine it.

9. Further, the appellant reiterated that the purpose of the appeal is only to order the respondent to accept the request for an administrative review without the Tribunal having access to it or being able to examine it as a document "*related to a decision affecting their conditions of work or of service"* - (Article 2, Annex of Annex IX to the Civilian Personnel Regulations) that includes the reason(s) for contesting the decision.

10. In its Judgment in Case No. 2023/1375, the Tribunal recalls that:

> 28. Article 62, when read in conjunction with Article 61.1 of the CPR, stipulates that for an appeal to be admissible, appellants must consider "that a decision affecting their conditions of work or of service does not comply with the terms and conditions of [his/her] employment, including … contracts, NATO regulations governing personnel and other terms of appointment and wish[es] to challenge such decision…". Footnote 1 clarifies that for "retired staff this includes any decision on a matter deriving from or related to their conditions of work or of service".
>
> 29. Accordingly, it is an indispensable element for the admissibility of an appeal that it deals with a decision affecting the conditions of work or service. The appellant does not contest any such decision. On the contrary, by insisting that his appeal is not about the contents of his request for administrative review and the complaint itself, but rather about the organization's neglect in processing them in accordance with the CPR, the appellant obviously and intentionally fails to meet minimum requirements for admissibility. Bound by the CPR regarding its competence, the Tribunal is not empowered to deal with the present case (*cf.* also Article 6.2.3 of Annex IX to the CPR) *ratione materiae* (subject matter).
>
> 30. Further, the pre-litigation proceedings as prescribed by the CPR are strictly connected to their purpose, i.e. the oversight of decisions that affect the conditions of work and service of staff and former staff. Contrary to the appellant's belief, there is no abstract right to the adherence to procedural rules without submitting a substantive

> decision to judicial review. Pre-litigation proceedings are not an end in themselves. Since the appellant expressly refuses to include the contents of his request for administrative review and/or complaint into the appeal, he has no legal interest worthy of protection.
>
> […]
>
> 38. Echoing the principles described above, the International Labour Organization Administrative Tribunal, in its Judgment no. 4357, noted at consideration 17 that: " *..The complainant ought to have appreciated that a right to bring proceedings in the Tribunal is not a license to litigate on any topic raising any conceivable argument and do so repeatedly. It unreasonably taxes the resources of the defendant organization and also the resources of the Tribunal. It is tantamount to an abuse of process that needs to be deprecated in the strongest terms*."
>
> 39. Until now, the Tribunal has met the appellant's attitude with generous understanding and has decided to dismiss the respondent's request in this case. However, the appellant is informed that the Tribunal is ready to apply this article in future instances should he not refrain from further abuse of the appeal procedures.

11. In the light of the above and, according to Rule 10.2, the Tribunal, having been provided with all views and additional views of the appellant and notifying the parties, concluded that the appeal is clearly inadmissible as outside the Tribunal's jurisdiction.

12. Finally, The Tribunal reminds the appellant to stop using the Tribunal's time and resources for dilatory appeals.

D. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The appeal is dismissed.

Done in Brussels, on 18 March 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2024)0001

Order

Joined Cases Nos 2023/1354.1376

PF

Appellant

v.

NATO Support and Procurement Agency

Respondent

Brussels, 2 April 2024

Original: English

Keywords: Rule 30 – clarification of judgments.

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This order is rendered by a Panel of the North Atlantic Treaty Organization ("NATO") Administrative Tribunal, composed of Ms Louise Otis, President, Ms Seran Karataru Köstü and Anne Trebilcock, judges, having regard to the appellant's request dated 25 April 2024.

A. Proceedings

1. On 25 February 2024, the NATO Administrative Tribunal (hereinafter the "Tribunal") rendered a judgment in Joined Cases Nos 2023/1354 and1376 on the appeal submitted by Mr F against decisions of the NATO Support and Procurement Agency ("NSPA"). In Case No. 2023/1354 the appellant challenged the disciplinary measure involving a suspension without emoluments for six months. In Case No. 2023/1376 the appellant sought to annul a transfer and an amendment to his contract. In both cases, he also requested the award of non-material damages. The Tribunal annulled the decision of suspension and rejected the request to annul the transfer and the reinstatement in his former post. It granted in part the requests for non-material damages.

2. On 25 April 2024, the appellant wrote to the Tribunal requesting clarification of this judgment pursuant to Rule 30 of the Tribunal's Rules of Procedure (ROP).

3. In his letter the appellant states:

> 6. A cet égard, le requérant souhaite par la présente requête respectueusement demander une clarification quant au montant de la réparation financière accorder pour préjudice morale dans chacune des affaires 2023/1354 et 2023/1376.
>
> 7. En effet, il ressort de la lecture du jugement que la partie F(i) ainsi que la partie F (ii) font chacune mention d'une réparation financière, en telle sorte que le requérant s'interroge sur les 15.000 euros mentionnes à deux reprises dans le dispositif final.
>
> 8. Plus précisément, cette somme dit-elle s'entendre comme devant être versée dans chaque affaire séparément, d'une part, au titre de la demande de dommages-intérêts formulée par le requérant pour le préjudice moral subi dans l'affaire 2023/1354 « acceptée en partie en raison d'irrégularités de procédure » et, d'autre part, au titre de la réparation du préjudice moral justifiée par un manquement au devoir de diligence relevé par le Tribunal dans l'affaire 2023/1376 (cf. § 107 du jugement), ou cette somme dit-elle s'entendre comme devant être versée pour le préjudice subi globalement ?

4. The respondent provided its views on the matter on 26 March 2024, and asked the Tribunal to declare the request inadmissible.

5. In its letter the respondent stated:

> **D'une part**, une lecture littérale du dispositif dudit jugement révèle que le Tribunal fait droit à la demande de réparation d'un préjudice immatériel pour un montant total de 15, 000 euros pour les deux affaires jointes :
>
> « The request for non-material damages in the joined cases is awarded in the total amount of €15,000. [emphasis added] »

La réponse à la question posée par le requérant au paragraphe 8 de sa demande1 se trouve donc explicitement dans le dispositif du jugement faisant l'objet de la demande de clarification.

D'autre part, la partie défenderesse n'identifie aucune ambiguïté dans la mention à deux reprises du montant total de 15 000 euros. La première mention porte quantification du préjudice. La deuxième mention comporte une injonction à l'endroit de la NSPA de verser cette même somme. Le jugement ne contient donc qu'une seule demande de paiement de dommages et intérêts adressée à la NSPA pour un montant total de 15 000 euros. Le seul fait que le montant du préjudice évalué par le Tribunal apparaisse à deux reprises dans le dispositif n'est pas de nature à faire naître un doute sur le montant devant être versé par la NSPA au requérant.

La partie défenderesse n'identifie donc aucun aspect du dispositif du jugement qui ne paraisse obscur, incomplet ou incohérent. La partie défenderesse est donc d'avis que la demande en clarification est irrecevable.

B. Legal background

5. Rule 30 of the Tribunal's ROP provides:

> 1. After a judgment has been rendered, a party may, within three months of the notification of the judgment, request from the Tribunal a clarification of the operative provisions of the judgment.
>
> 2. The request for clarification shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent.
>
> 3. The Tribunal shall, after giving the other party or parties a reasonable opportunity to present its or their views on the matter, decide whether to admit the request for clarification. If the request is admitted, the Tribunal shall issue its clarification, which shall thereupon become part of the original document.

C. Considerations and conclusions

6. Under Rule 30.2 of the ROP such a request for clarification "shall be admissible only if it states with sufficient particularity in what respect the operative provisions of the judgment appear obscure, incomplete or inconsistent."

7. The Tribunal finds that the request stated with sufficient particularity the following operative provisions of the judgment which were in the appellant's view "obscure, incomplete or inconsistent":

- "The request for non-material damages in the joined cases is awarded in the total amount of €15,000.
- The NSPA shall pay the appellant the sum of €15,000 in compensation for the non-material damage suffered by him."

8. Taking into account that the two cases had been joined, the Tribunal finds that the request is admissible. At the same time, it confirms the respondent‘s understanding of these provisions, which is that the amount in question is €15,000 and not €30,000.

9. The first of the two statements cited above from the judgment refers to the Tribunal’s ruling on the requests for non-material damages that were made in each of the joined cases; as stated in the ruling, these are granted to the extent of a total amount of €15,000.

10. The second statement orders the respondent to pay that sum as total compensation for the non-material damage suffered by him in both cases, taken together and not separately.

D. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The request for clarification is admissible.
- In line with paragraph 3 of Rule 30, this clarification becomes part of the original judgment.

Done in Brussels, on 2 April 2024.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia

ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

AT(TRI-O)(2025)0001

Order

Joined Cases Nos 2023/1368 and 2024/1383
JP
Appellant

v.
Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen
Respondent

Case No. 2024/1382
JP
Appellant

v.

NATO Support and Procurement Agency
Respondent

Brussels, 4 February 2025

Original: English

Keywords: Rule 28 and Rule 29 ROP.

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This order is rendered by a Panel of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO), composed of Ms Louise Otis, President, Mr Thomas Laker and Ms Anne Trebilcock, judges, having regard to the appellant's requests dated 7 and 9 December 2024.

A. Procedural background

1. On 18 November 2024, the NATO Administrative Tribunal ("Tribunal") rendered its judgment in Case No. 2024/1382. It dismissed the appellant's contentions against the NATO Support and Procurement Agency ("NSPA") for lack of jurisdiction *ratione personae* as the appellant had no *locus standi*.

2. On 25 November 2024, the Tribunal rendered its judgment in Joined Cases Nos 2023/1368 and 2024/1383 both submitted by the appellant against the Headquarters NATO Airborne Early Warning and Control Force Geilenkirchen ("NAEW"). In Case No. 2023/1368 the Tribunal held that the respondent breached its duty of care in certain respects, and awarded to the appellant compensation in the amount of €2,000. Case No. 2024/1383 had been dismissed as inadmissible.

3. On 7 December 2024, the Tribunal's Registrar received from the appellant a petition for re-hearing under Rule 29 of the Tribunal's Rules of Procedure (ROP) in the abovementioned cases.

4. Rule 29 "Revision of Judgments" of the Tribunal's ROP reads as follows:

> 1. In accordance with Article 6.8.4 of Annex IX, either party may petition the Tribunal for a re-hearing should a determining fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment.
>
> 2. Petitions for a re-hearing must be made within 30 days from the date on which he above-mentioned fact becomes known, or, in any case within 5 years from the date of the judgment. The Registrar shall transmit the petition to the President, and transmit copies to the HONB and OLA. The HONB will have fifteen days to submit comments.
>
> 3. The Tribunal may decide in a given case that no oral hearing is required and a decision can be taken on the basis of the written record before it.

5. On 9 December 2024, the Tribunal's Registrar also received from the appellant a request for rectification of error under Rule 28 ROP in the above-mentioned cases.

6. Rule 28 "Rectification of error" of the Tribunal's ROP reads as follows:

> Clerical and arithmetical errors in the judgment may be corrected by the Tribunal on its own initiative or at the request of a party.

B. Considerations and conclusions

Request on Rule 28 ROP

7. In his request filed under Rule 28, the appellant sets out a detailed explanation of why he is seeking "a thorough reconsideration of the evidence and arguments presented" in the Tribunal's judgments in Cases Nos 2023/1368, 2023/1382 and 2024/1383.

8. The appellant has requested the following relief:

> Correction of Errors:
> a. Pursuant to NCPR RPNAT Rule 28, I request the correction of all clerical, factual, and procedural errors identified in the judgments rendered in joined Cases 1368, 1383, and 1382.
>
> Correction of False Statements, Omissions and Factual Inaccuracies:
> b. In accordance with the Code of Judicial Conduct of the NATO Administrative Tribunal, I request the rectification of false statements introduced by the Tribunal, as their presence represent[s] a breach and undermines the integrity and viability of the judgments.

9. The appellant's request goes well beyond the scope of this Rule, which is limited to purely clerical and arithmetic errors. Without pointing any clerical error, he is in fact seeking to relitigate his case.

10. Rectification of judgment is a procedural measure. Its application is limited to very specific cases. These are generally minor typographical, numerical or wording errors that do not affect the merits of the case and do not modify the decision rendered or the conclusion reached. This is in line with Article 6.8.3(a) of Annex IX to the Civilian Personnel Regulations (CPR), which states in part that "[t]he judgments of the Tribunal shall be final and not subject to any type of appeal by either party…".

11. The appellant's request does not seek the rectification of a clerical error. The remedies sought by the appellant would essentially involve reopening his appeal and modifying the conclusion of the final judgement.

12. The request also invokes the NATO Tribunal's Code of Judicial Conduct. The Tribunal recalls that the provisions of the Code of Judicial Coduct do not entail any tools for relitigating a case.

13. For the reasons stated above, the appellant's request under Rule 28 must be denied.

Petition on Rule 29 ROP

14. The petition of the appellant alleges, *inter alia,* procedural violations directly undermining the judgments and provides new evidence which he maintains could correct the Tribunal's wrongful assumptions regarding teamwork.

15. The appellant suggests his own interpretation of procedural rules and claims therefore that the Tribunal committed errors of law in its analysis and conclusions which justify a re-hearing of the cases.

16. The appellant has failed to identify any determinative fact that has not already been taken into consideration by the Tribunal. His petition under Rule 29 ROP is an attempt to obtain a right to appeal of the Tribunal's judgments, contrary to Article 6.8.4 of Annex IX. In this respect, the Tribunal recalls its previous case law (see for example the AT rendered orders in Case No. 2021/1329 and Case 2021/1327, both dated 18 October 2022, and in Case No. 2017/1104 MK v. Allied Air Command Ramstein, dated 23 January 2023).

17. In addition, in support of his petition, the appellant introduces new evidence in support of his teamwork competence in the form of a letter of reference issued by another employer. First, it should be remembered the appellant chose not to attend his appeals' hearing, thus waiving his right to plead his cases. Most importantly, it should be recalled that the cases were dismissed as inadmissible and none of the alleged new facts pertains to the admissibility of the cases.

18. As the result of the foregoing, the petition is dismissed.

Costs

19. As already stated in the rendered judgments, since 2023, the appellant has monopolized the Tribunal's registry with constant requests. He has asked for the President of the Tribunal to be recused, and then for the Tribunal to be recused.

20. Article 6.8.3 of Annex IX to CPR reads as follows:

> In cases where the Tribunal finds that the appellant intended to delay the resolution of the case or harass NATO or any of its officials, or that the appellant intended abusive use of the appeals procedure, it may order that reasonable compensation be made by the appellant to the NATO body in question.

Until now, the Tribunal has shown indulgence and understanding towards the abuse of the appeals procedure. However, the appellant is informed that the Tribunal is ready to apply Article 6.8.3 quoted above in future instances should he not refrain from further abuse of the appeal procedures.

21. Echoing the principles described above, the International Labour Organization Administrative Tribunal, in its Judgment No. 4357, noted at consideration 17 that: " ..The complainant ought to have appreciated that a right to bring proceedings in the Tribunal is not a license to litigate on any topic raising any conceivable argument and do so repeatedly. It unreasonably taxes the resources of the defendant organization and also the resources of the Tribunal. It is tantamount to an abuse of process that needs to be deprecated in the strongest terms."

C. Decision

FOR THESE REASONS,

The Tribunal decides that:

- The request for rectification of error under Rule 28 ROP is dismissed as unfounded.
- The petition for re-hearing under Rule 29 ROP is dismissed as unfounded.

Done in Brussels, on 4 February 2025.

(signed) Louise Otis, President
(signed) Laura Maglia, Registrar

Certified by
the Registrar
(signed) Laura Maglia