2013

ANNUAL REPORT OF THE

NATO ADMINISTRATIVE TRIBUNAL

2013 Annual Report of the NATO Administrative Tribunal

This is the first annual report of the Administrative Tribunal of the North Atlantic Treaty Organization (NATO). It covers the first six months of the Administrative Tribunal's existence (1 July 2013 – 31 December 2013), and is issued, on the initiative of the Administrative Tribunal, pursuant to Rule 4(h) of its Rules of Procedure.

Background and establishment

On 23 January 2013, the NATO Council approved a number of important amendments to the NATO Civilian Personnel Regulations (NCPR), introducing a new internal justice system and creating the Tribunal. The changes concerned Chapter XIV of the NCPR ("Administrative review, complaints and appeals") and Annex IX thereto ("Regulations governing administrative review, mediation, complaints and appeals").[1] The amended Regulations entered into force on 1 July 2013.

One of the new provisions is Article 62 of the NCPR, which now provides, amongst other things, for complainants to seek relief through an administrative and complaints procedure before appealing to the Tribunal. Further details on the Tribunal's composition, competence and procedure are given in Article 6 of Annex IX to the NCPR. As this is the first annual report, these will be explained *infra*.

The changes to NATO's internal justice system involve much more than establishing the Tribunal as the successor to NATO's Appeals Board. The new system puts major emphasis on pre-litigation procedures, providing for a thorough - where necessary two-step – administrative review, greater use of mediation, and an improved complaints procedure. The reform thus places greater responsibilities on NATO managers, and ultimately the Heads of the NATO bodies, to address, and wherever possible, to resolve, issues instead of leaving them for resolution by the Tribunal through a contested legal proceeding. The new internal justice system is therefore substantially different from the previous one.

[1] PO(2013)0004-Rev 1.

Composition[2]

The Tribunal is appointed by the NATO Council and is composed of the President of the Tribunal (President) and four other members. The five members must be of different nationalities, and each must be of the nationality of one of the Member states of NATO. They may not be staff members or members of the retired NATO staff or of national delegations to the Council. They are appointed on the basis of merit. Each must be a competent citizen of good character, integrity, reason, intelligence and judgment, and must possess the qualifications required for appointment to high judicial office or be a jurisconsult of recognized competence in a field or fields relevant to the Tribunal's work. Each member must, from the date his or her term in office begins, hold a security clearance authorizing access to information classified NATO SECRET.

The President and other members of the Tribunal are proposed by the member States and appointed for five-year terms. Their terms of office began on 1 July 2013. As a transitional measure, two of the four initial Tribunal members (other than the President) serve for terms of three years, determined by drawing lots. Members may be reappointed for one further five-year term, following the same procedure.

If a Tribunal member does not complete his or her term, a replacement member shall be appointed following the same procedure to serve the remainder of his/her predecessor's term. Such interim appointments are not taken into account when applying the two-term limit. If current or former members of the NATO Appeals Board are appointed as members of the Tribunal, the time spent serving on the Appeals Board is not taken into account for purposes of the term limits. A former member of the Tribunal may not be employed as a staff member of the Organization for five years after completing service on the Tribunal.

[2] The following paragraphs describing the Tribunal's rules and procedures are for information purposes only, and have no legal standing. Readers are referred to the NCPR, the Tribunal's Rules of Procedure and other relevant NATO texts for precise information regarding matters summarized here.

The Tribunal's members are completely independent in the exercise of their duties, and shall not receive any instructions or be subject to any constraint. They shall enjoy, so far as is necessary for the effective exercise of their functions, the privileges and immunities specified in Article 21 of the Ottawa Agreement of 20th September, 1951 under the conditions laid down in that Agreement.

On 22 April 2013, under the silence procedure, the NATO Council approved the appointment of the following five individuals as President and members of the Administrative Tribunal:

Mr Chris de Cooker (Netherlands), President;
Mrs Maria-Lourdes Arastey Sahún (Spain), Member;
Mr John R. Crook (United States), Member;
Mr Laurent Touvet (France), Member; and
Mr Christos A. Vassilopoulos (Greece), Member.[3]

The President and members of the Tribunal held a first informal meeting on 28 and 29 May 2013 at NATO Headquarters (HQ). They discussed possible procedures and were briefed by management and staff representatives on ongoing issues important to their work. During that meeting, and in the weeks to follow, they drafted the Tribunal's Rules of Procedure and a Code of Judicial Conduct. These were formally adopted on 1 July 2013, allowing the Tribunal to become fully operational on that day.

Also during the May meeting, and in the presence of representatives of management and staff, the President drew lots, which determined that Mrs Maria-Lourdes Arastey Sahún, and Mr John R. Crook would serve for initial terms of three years.

The NATO Secretary General makes the administrative arrangements necessary for the Tribunal's functioning. Of particular importance, these include designating a Registrar who, in the discharge of his or her duties in support of the Tribunal, is responsible only to the Tribunal. The Registrar provides such professional,

[3] PO(2013)0187-AS1.

technical and administrative support as the Tribunal deems useful for its work. Mrs Laura Maglia Registrar currently covers this full-time function on an ad interim basis. The Tribunal highly appreciates her outstanding assistance particularly during this challenging start-up period.

Competence

The Tribunal has jurisdiction to decide any individual dispute brought by a current or retired NATO staff member or his or her legal successors alleging that a decision affecting the appellant's conditions of work or service does not comply with the appellant's terms and conditions of employment. In this respect, the Tribunal is directed to make decisions according to the NCPR, other pertinent rules, contracts or other terms of appointment, as applied to the staff in individual cases. Annex IX affirms that the Tribunal is authorized to rule on the NCPR in the event that a provision thereof "seriously violates a general principle of international public service law." In case of a dispute as to whether a particular matter falls within the Tribunal's competence, the Tribunal is to decide.

The new regulations state that "the Tribunal shall not have any powers beyond" those they confer, and that nothing in the regulations "limits or modifies the authority of the Organization or the Head of the NATO body, including the lawful exercise of their discretionary authority to establish and amend the terms and conditions of employment of staff."

The new regulations' transitional provisions provide for appeals pending before the NATO Appeals Board on 30 June 2013 to be transferred to the Tribunal for decision in accordance with the provisions of Annex IX in effect on 30 June 2013, *i.e.* the regulations governing complaints and appeals as approved by the Council on 20 October 1965, and amended by PO/73/151 of 22 November 1973. The preamble of the new version of Annex IX further provides that any proceedings initiated before 1 July 2013 will continue be governed by the previous regulations until they are finally resolved.

Appeals, proceedings

The essential provisions concerning appeals and their procedure are given in Articles 6.3, 6.5, 6.6, 6.8 and 6.9 of Annex IX to the NCPR. In addition, Article 6.2.4 of Annex IX directs the Tribunal to establish written rules of procedure in accordance with the provisions of the Annex. These rules of procedure were adopted on 1 July 2013 and are included in Appendix 1 to Annex IX.

Except for decisions for which there are no channels for submitting complaints, or where the appellant and the HONB concerned have agreed to submit the matter directly to the Tribunal, the Tribunal may only entertain appeals after the appellant has exhausted all available channels for seeking relief administratively. Where such channels for submitting complaints are available and have been pursued without success, the appeal must be submitted to the Tribunal within 60 days of the latest of the following:

(a) the appellant has been notified by the HONB concerned that the relief sought or recommended will not be granted; or

(b) the appellant has been notified by the HONB concerned that the relief sought or recommended will be granted, but such relief has not been granted within 30 days after receipt of such notice; or

(c) the HONB concerned has failed to notify the staff member or a member of the retired NATO staff within 30 days of receiving the report and recommendation of a Complaints Committee established to consider the matter, which shall be considered as equivalent to a decision that the relief sought will not be granted.

For appeals against decisions for which there are no channels for seeking administrative relief, or where the appellant and the HONB have agreed to submit the matter directly to the Tribunal, the appeal must be submitted within 60 days of notification of the decision to the appellant or the agreement to submit the matter to the Tribunal.

In very exceptional cases and for duly justified reasons, the Tribunal may admit appeals lodged up to a further 30 days after the time allowed.

An appeal does not stay execution of the decisions appealed against. However, at the appellant's request pending conclusion of the case, the HONB may suspend the contested decision, and/or refrain from taking any further action that would change the position within the NATO body by rendering the relief sought impossible or impractical if the appeal is upheld. The President may at any time during the proceedings request that the HONB consider taking such action.

Written procedure

Appeals must be submitted to the Tribunal in writing in one of the official languages. They must state all grounds of appeal asserted by the appellant and shall be accompanied by all relevant documentary evidence, including, the report and recommendations of any Complaints Committee constituted in the matter. At the same time an electronic version must be submitted by e-mail at *mailbox.tribunal@hq.nato.int*.

If the Registrar determines that the appeal contains minor defects or omissions, the appellant will be advised and given a reasonable time, not to exceed 15 days, to correct them. If this is done within the prescribed time, the appeal is considered filed on the original date. If corrections are not made by that date, the filing date shall be the later date.

The Tribunal's Rules of Procedure provide that if the President considers that an appeal is clearly inadmissible, outside the Tribunal's jurisdiction, or devoid of merit, he may instruct the Registrar to take no further action on it until the Tribunal's next session. This suspends all procedural time limits. After notifying the appellant and considering any additional written views from the appellant, the Tribunal at its next session may either (1) summarily dismiss the appeal as being clearly inadmissible, outside its jurisdiction, or devoid of merit, stating the grounds therefor, or (2) decide to proceed with the case in the normal way.

The Tribunal Registrar transmits the appeal as soon as possible to the Tribunal President and communicates a copy to the HONB concerned and to the Office of the

Legal Adviser of the International Staff (OLA). At the request of the Tribunal President, OLA shall submit written observations, attend and participate in the hearing, or both. OLA also may do either or both on its own initiative. Any observations submitted by OLA are made available to all parties in the case.

The HONB concerned must answer the appeal in writing within 60 days of its receipt, unless the President sets another time limit. At the same time an electronic version of the answer must be submitted by e-mail at *mailbox.tribunal@hq.nato.int*.

Upon ascertaining that the formal requirements of the rules have been met, the Registrar communicates a copy of the answer to the President of the Tribunal, to the appellant and, as appropriate, to OLA.

The Tribunal's decisions in each case are taken by a panel consisting of the President and two other members designated by the President with due consideration to the principle of rotation and to equitable distribution of workload. If the President recuses him/herself or is otherwise unable to hear a case, s/he names a third member to serve on the panel. A case is assigned to a Panel after the answer has been received. At that time, the parties are informed of the composition of the panel, and the appeal and answer are transmitted to the panel.

After a case is assigned to a Panel, the President designates him/herself or another member of the Panel to serve as judge-rapporteur, whose task it is to brief the other Panel members before the oral hearing on the main issues of the case and to prepare after the hearing a first draft of the judgment for the Panel's consideration. Any member of the Tribunal who has a conflict of interest in a case is expected to recuse him/herself. Each party may ask for a change in the composition of the Panel on account of presumed partiality, but parties may not invoke the nationality of a Panel member to this effect. The two remaining members of the Panel decide on the request in the absence of the member concerned.

The appellant may file a reply to the answer within 30 days. If the appellant does so, the HONB may file a rejoinder to the reply within 30 days.

If the Tribunal is examining the HONB's direct implementation of a decision of the Council, the Council, on its own initiative, may submit written observations to the Tribunal. These are made available to all parties to the case.

The Tribunal or, when the Tribunal is not in session, the President may decide to join cases.

The President may decide that an appeal should be communicated to a third party who is invited to participate in the proceedings. Should the third party accept this invitation and submit comments within the time limit fixed, s/he becomes a party to the proceedings. The third party's comments are communicated to the President and other members of the panel, to the parties and, as appropriate, to OLA.

Any person who could be materially affected by the judgment and wishes to express views on an issue or issues in a case potentially affecting his or her interests may draw up an application of intervention. Applications in intervention must be filed no later than 30 days after the filing of the reply. The Tribunal rules on the request in its judgment.

The Tribunal may, at its discretion, permit any person or persons, including duly authorized staff representatives and the Confederation of NATO Retired Civilian Staff Associations, to communicate written views to the Tribunal as *amici curiae*. The Tribunal may permit an *amicus curiae* access to the pleadings of the parties. The Tribunal enables the parties to submit timely observations on an *amicus* brief.

An appellant may request at any time prior to the judgment that the Tribunal not make his/her name or other information public. The HONB may request in the answer that the Tribunal not make the name of any other individual public. An intervener may request anonymity in the application for intervention. The Tribunal grants a request for anonymity if good cause has been shown for protecting the privacy of an individual

from public disclosure, but a grant of anonymity does not extend to the parties or to the oral procedure.

The Tribunal or, when the Tribunal is not in session, the President may rule on any request by the parties to suspend the proceedings for the purpose of examining the possibilities of an amicable settlement. The Tribunal or, when the Tribunal is not in session, the President may also at any time encourage negotiation aimed at ending the dispute and adopt appropriate measures to facilitate a settlement. With the consent of the parties, the proceedings may be suspended for a specified time. If no agreement is reached within this period, the proceedings resume. No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of seeking an amicable settlement may be relied on for any purpose by the Tribunal or the parties in the contentious proceedings.

Oral procedure

Unless all parties agree otherwise, the Tribunal will hold an audience in the form of an oral hearing where all concerned parties in a case may be present and/or represented.

In general, oral hearings may be attended by any interested staff members or retired NATO staff, or a member of the delegation of any of the member States who hold appropriate security clearance. However, the Tribunal may decide, on a party's request and taking into account the views of the other party, that exceptional circumstances, such as the personal and private nature of the matters raised, require that the hearing be held in private.

Both the HONB and the appellant may attend the oral hearings and make statements in support of the arguments put forward in their written submissions. The Tribunal may hold the hearing in the absence of one of the parties, provided that the date has been duly notified to both parties.

Parties may be aided or represented by other persons, including counsel they select. If the Tribunal considers it necessary at the request of either party to take cognizance of NATO classified material included in the file, and if the material cannot be declassified, the parties may only be assisted or represented by a member of the NATO civilian staff, retired NATO staff, military personnel, or by counsel who have received appropriate security clearance.

Subject to well-accepted privileges accorded to certain types of communications, including those relating to attorney-client communications and settlement discussions, the Tribunal may require the production of any document it deems useful in considering an appeal. Documents so communicated to the Tribunal are also communicated to the HONB and to the appellant, respecting procedures relating to the transmission of classified information. Hence, the appellant must hold the appropriate security clearance with respect to the documents in question.

The Tribunal may hear any witnesses whose evidence it deems may be useful in the proceedings, including persons whose attendance a party has requested in writing. Any NATO official, whether civilian or military, called as a witness must appear before the Tribunal and may not refuse required information. The Tribunal may authorize witnesses to be heard using videoconferencing, Internet telephony, or other similar techniques. Where a witness is not able to appear before the Tribunal for reasons of health or other reasons acceptable to the Tribunal, the Tribunal may allow the witness to reply in writing to the parties' questions; in this case, the parties retain the right to comment on the witness's written reply.

If the interests of the Alliance necessitate the use of classified information or documents in the Tribunal, the Secretary General, acting as Chair of the Council, either on his/her own initiative or at the request of the HONB concerned, may personally decide that certain information or documents shall not be communicated to the Tribunal, or instruct a staff member not to reply to certain questions. Classified material originating from a Member state may in any event not be disclosed without the consent of the Member state concerned. However, recourse to these provisions may in no case be interpreted to the disadvantage of the appellant. The Tribunal must use all

appropriate means to ascertain the validity of reasons given for not providing requested information or documents, and shall ultimately decide on their validity and whether a staff member shall reply to all questions.

All those attending a hearing of the Tribunal must preserve the utmost secrecy concerning the facts that come to their knowledge and the views expressed during the hearing.

Judgments

The Tribunal deliberates in closed session and in secret. All deliberations of the Tribunal remain confidential.

The Tribunal's judgments are taken by majority vote. They are delivered in writing, address the parties' arguments, and explain the reasons on which they are based. Judgments contain the names of the members who took part in the panel, and a panel member may attach a dissenting opinion. Once the final text of a judgment has been approved and adopted, the President and the Registrar sign it. Judgments are delivered in one of the official languages and translated into the other under the responsibility of the Registrar. The only authentic text is the original version. A copy of the judgment, attested to by the President, is delivered to each of the parties concerned and to OLA; copies are also provided to the Confederation of NATO Civilian Staff Associations, interveners and *amici curiae*. Judgments are also circulated by the Registrar for the benefit of national delegations and HONBs.

The original of each judgment is filed in the Tribunal's archives at NATO HQ. The Registrar makes a copy available to any interested active or retired NATO staff member in an appropriate electronic format. However, the Tribunal may decide that the identities or any other means of identification of the appellant or other persons, or any classified or other sensitive information, are deleted from the judgment made available to staff members and retired NATO staff.

The Tribunal's judgments are final and are not subject to any type of appeal by either party, although there are limited procedures for clarifying or correcting them. After a judgment is rendered, a party may, within three months of its notification, request the Tribunal to clarify its operative provisions. A request for clarification is admissible only if it states with sufficient particularity the manner in which the operative provisions appear obscure, incomplete or inconsistent. After giving the other party or parties a reasonable opportunity to present views on the matter, the Tribunal decides whether to admit the request for clarification. If it is admitted, the Tribunal issues its clarification, which thereupon becomes part of the original judgment.

Either party may request the Tribunal within 30 days from the date of a judgment to rectify a clerical or arithmetical mistake in a judgment as delivered. The Tribunal may also on its own initiative correct such errors.

Finally, either party may petition the Tribunal for a re-hearing should a determinative fact not have been known by the Tribunal and by the party requesting a re-hearing at the time of the Tribunal's judgment. Petitions for a re-hearing must be made within 30 days from the date on which the new fact becomes known, or, in any case, within 5 years from the date of the judgment.

Remedies

If the Tribunal finds the appeal well founded in whole or in part, it may grant, in whole or in part, the remedies sought by the appellant. These may include annulment of HONBs' decisions that are contrary to staff members' contracts or other terms of appointment or to the relevant provisions of NATO personnel regulations; specific performance of an obligation such as a pay increase, promotion, transfer or reinstatement of employment; and payment of monetary relief. The Tribunal may also order the NATO body to pay compensation for injury resulting from any irregularity committed by the HONB.

Nevertheless, if the HONB concerned or, as regards bodies to which the Paris Protocol applies, the Supreme Commander concerned, affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal may instead determine the amount of compensation to be paid to the appellant for the injury sustained.

In a judgment annulling a contested decision that applies or gives effect to a rule, regulation or other decision generally applicable to current or retired NATO staff, the Tribunal may find the rule, regulation or decision to be invalid, in whole or in part. In this event, the rule, regulation, decision or invalid portion thereof may not thereafter be applied to similarly-situated current or retired NATO staff.

If the Tribunal concludes that there were good grounds for the appeal, it may also order the NATO body to reimburse, within reasonable limits, justified expenses incurred by the appellant, for example for retaining counsel and travel costs. An appellant is not entitled to recover expenses if he/she was assisted by another staff member or a member of the retired NATO staff, or in respect of his/her own time spent in pursuing the appeal. The Tribunal may also order the NATO body to reimburse justified expenses incurred by witnesses who have been heard, within limits to be fixed by the Tribunal.

Should the Tribunal find that the appellant intended to delay resolution of the case or harass NATO or any of its officials, or intended abusive use of the appeals procedure, it may order that reasonable compensation - which may not exceed 50% of one month’s basic salary for the staff member - be made by the appellant to the NATO body in question. Any such amount awarded by the Tribunal shall be collected by way of deductions from payments owed by NATO to the appellant or otherwise, as determined by the HONB in question.

Proceedings of the Tribunal in 2013

Seventeen cases pending before the NATO Appeals Board were, in accordance with the above-mentioned provisions, transferred to the Tribunal when it began operations on 1 July 2013 (Cases Nos. 883, 885, 887, 889-892, 896, 897, and 899-906). Cases 899 and 890 were heard together, since they dealt with the same subject matter in the same administrative unit. Two cases (Cases Nos. 2013/1001 and 2013/1002) were lodged before 1 July 2013, but registered thereafter. In another case, an appellant lodged an appeal (Case No. 906) before 1 July 2013, but the same appellant lodged another appeal (Case No. 2013/1004) after 1 July 2013 concerning the same issue; the cases were joined by Order of the President dated 22 November 2013. In several cases lodged after 1 July 2013, the pre-litigation proceedings started before that date, so the former regulations were applied. During the reference period two appeals (2013/1008 and 2013/1009) were lodged to which the new rules apply.

In 2013, the Tribunal rendered eight judgments (in Cases Nos. 883, 885, 887, 889-892, 896, and 897) and one Decision (Case No. 905). The Decision concerned a settlement reached between the parties through the good offices of the Tribunal's President in the margin of the oral hearing. In five cases the respondent was the NATO International Staff, and in two, NSPA. NAMEADSMA and JWC were respondent in one case each. The case that was settled concerned NAHEMA.

The Tribunal held oral hearings in 2013 in six more cases, but the corresponding judgments were issued in 2014 and will be subject of the next annual report.

During the reporting period, each member of the Tribunal was at least twice assigned to a panel and at least once assigned to serve as judge-rapporteur.

The Tribunal's jurisprudence in 2013[4]

Case 883 concerns the termination of employment of a staff member on extended sick leave. The staff member's situation was previously subject of an appeal before the NATO Appeals Board (Decision of 1 June 2012 in cases Nos. 840-845-849). In the prior appeal, the Appeals Board annulled the decision to terminate the staff member's employment because of procedural defects, and ordered the administration to follow the correct procedure should it wish to continue with the termination. Following a number of exchanges and medical controls, the NATO body considered that the staff member was fit for work. When she did not return to work, her employment was terminated immediately.

The Tribunal concluded that the HONB could rightfully terminate the staff member's employment on account of her extended sick leave, but could not do so with immediate or retroactive effect. It held that the relevant rules require assessment of the circumstances of each case, and that the staff member against whom the administration is preparing to take such a decision must be able to discuss that decision and then receive notification of the decision taken. The Tribunal thus nullified the immediate effect of the termination decision, instead establishing the effective date of termination to be the last day of the month in which the decision was taken. It also granted compensation for non-material damages.

Case No. 885 concerns termination of a contract at the end of the staff member's probationary period. The Tribunal held that decisions concerning appointments, and *a fortiori* decisions concerning confirmation in an appointment at the end of the probationary period, are within the discretionary power of the HONB. The Tribunal concurred with the principle, reflected in the jurisprudence of other international administrative tribunals, that a decision in the exercise of discretion is subject to only limited review by a tribunal. The Tribunal held that the procedure followed by the NATO body was regular, and that respondent had exercised its discretion reasonably in deciding that appellant had not demonstrated suitability for

[4] The following summaries of Tribunal judgments are for information purposes only and have no legal standing.

continued employment. The Tribunal further concluded that the decision not to confirm appellant in his appointment was not based on a manifest error of appraisal, did not constitute an abuse of power, and was not disproportionate. The appeal was dismissed.

In Case No. 887 a number of appellants alleged various failures in relation to the administration and calculation of reimbursements to pay their U.S. federal and state taxes pursuant to the 18 July 1990 Tax Reimbursement Agreement (TRA) between NATO and the United States of America. Administering the TRA and determining the amounts are complex. During the relevant period these functions were centralized in the Office of NATO's Financial Controller at NATO HQ in Brussels.

In assessing the parties' actions, the Tribunal found shortcomings on both sides. The NATO Agency concerned did not consistently provide to the appellants detailed guidance issued by the Office of the Financial Controller, and gave some of the appellants inaccurate advice regarding tax reimbursement and their obligations under local law.

On the other hand, the Tribunal observed that at least some of the appellants had not made appropriate and prudent inquiries regarding their situations. Each appellant was a U.S. citizen with prior experience in the U.S. work force outside of NATO. Each was therefore familiar with U.S. citizens' normal obligation to pay U.S. income and Social Security taxes. The Tribunal also noted that information regarding U.S. tax laws and procedures was readily available, including on the Internet.

Given that the appeal revealed shortcomings on both sides, the Tribunal held that the NATO Agency should compensate those employees who had to pay penalties and interest on account of their late filing in reliance on the certificates or other incorrect advice it provided.

Cases No. 889 + 890 were heard together. For several years, both appellants were members of the Close Protection Unit of NATO's Office of Security and, in particular, the Residence Unit. Following a restructuring of the unit they were

transferred to the HQ Security Force. Appellants challenged the sufficiency of the reasons for their transfer and appropriateness of the criteria applied in selecting them. The Tribunal held that respondent had provided sufficient reasons for the contested decisions. Regarding the appellants' claim of violation of their rights of defense, the Tribunal concluded that prior to taking the disputed decisions, respondent had told appellants about the appraisals that justified taking these decisions, and appellants had the opportunity to challenge the validity of the decisions taken both during the complaints procedure and before the Tribunal. Lastly, the Tribunal ruled that the disputed decisions to transfer appellants were not based on arbitrary criteria, and hence did not infringe the principle of equality of treatment and non-discrimination. The appeals were dismissed.

Case No. 891 concerns a dismissal following a disciplinary procedure. Appellant had previously lodged an unsuccessful appeal regarding the requalification of her post (NATO Appeals Board Decision of 9 March 2012 in Case No. 843). The appellant responded by widely publishing harsh criticisms of the Board decision and of NATO generally, including dissemination of NATO RESTRICTED information using electronic media. The Tribunal confirmed that disciplinary decisions are within the discretionary power of the Head of the Organization and that a decision in the exercise of this discretion is subject to only limited review by a tribunal. It added that disciplinary measures constitute a very special exercise of discretionary powers and that the review by tribunals of this quasi-judicial power must be of a particular nature. The organization's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily.

In exercising the limited review applicable to the case, the Tribunal first observed that the procedure as foreseen in the NCPR was correctly followed, that the decision was taken on the basis of facts that were clearly identified and communicated, and that no irregularity in procedure or substance could be identified. The Tribunal concluded that the appellant's conduct as established legally amounted to misconduct that warranted a disciplinary penalty, and that the disciplinary sanction of dismissal was not disproportionate. Regarding appellant's claim of freedom of expression, the Tribunal

held that the freedom of expression was not unlimited. National and international law systematically provide that the exercise of this freedom may be subject to restrictions, for example in the interest of security, for the protection of the reputation or rights of others, or for preventing the disclosure of information received in confidence. Regarding appellant's claim that she was a whistleblower, the Tribunal observed that whistleblowing generally refers to the reporting of illegal, irregular, dangerous or unethical practices through appropriate channels to those authorities that have the power to act on it. The issue must have a public interest dimension, *i.e.* the whistleblower should not pursue a personal grievance. The Tribunal concluded that this is not the case here. The appeal was dismissed.

Case No. 892 concerns a staff member on unpaid leave who twice competed unsuccessfully for a post at a higher grade. During the pre-litigation phase appellant, seeking an annulment of the second decision to reject her application, asked for the establishment of a Complaints Committee. This was refused with the argument that the committee did not serve a purpose, since the post was already filled. Appellant also requested the Tribunal to annul the decision not to establish a Complaints Committee. The Tribunal, first of all, held that a staff member on leave of absence cannot be considered to be outside of the Organization to the extent that (s)he is not permitted to lodge a complaint or to challenge an individual decision taken by the HONB. Regarding the establishment of a Complaints Committee, the Tribunal observed that the NCPR are unequivocal in this respect. Consideration by such a committee constitutes a right of the staff member, and the HONB does not have a margin of discretion in the matter. The decision not to establish the Complaints Committee was set aside and the case was referred back to the Administration in order to reconsider appellant's complaint in a procedurally correct manner.

In Case 896 a staff member found himself for some time without a genuine post following a reorganization. During the hearing the parties informed the Tribunal that a permanent and satisfactory solution had been found for appellant, rendering the appeal to a large extent moot. The Tribunal did, however, address the legality of the impact of the process on appellant, and his claims for compensation for damages and for reimbursement of costs. The Tribunal found that in the circumstances, there had been

a breach of the appellant's contract that rendered him *de facto* redundant for a time, and awarded compensation for immaterial damages.

Case No. 897 concerns a staff member who, after having served a number of successive temporary contracts, requested requalification of her contractual status. She was advised that NATO could not accede to her request. The Tribunal held that respondent did not satisfy its obligation to provide substantiation for its decision, and annulled the impugned decision rejecting her request for reclassification. The Tribunal therefore could not investigate whether certain illegalities alleged by appellant were well-founded. It held that the request for annulment based on these alleged illegalities can only be considered, if need be, in light of the reasons given for a future decision taking the place of the impugned decision.

In Case No. 905 a staff member alleged procedural flaws in the process of preparing his staff report and disagreed with the overall rating. Prior to the oral hearing, and through the good offices of the President of the Tribunal, both parties entered into discussion of a possible settlement of the appeal and requested a suspension of the hearing and of the proceedings. The parties subsequently concluded a settlement agreement, and the Tribunal granted a request for withdrawal of the appeal with final effect.

Organizational and administrative matters

The President and all other members of the Tribunal were also actively involved in a number of time consuming organizational matters. In addition to preparing the Tribunal's Rules of Procedure and Code of Judicial Conduct, the Tribunal, for example, prepared Practice Directions to assist the parties in understanding the procedures for the proceedings before the Tribunal.

The Tribunal was established as part of an overall decision to bring NATO's dispute resolution system in line with good, if not best, practices in other international organizations. The Tribunal's prime role in this system is to see to it that justice is

done, preferably in an expeditious manner. It is, however, also important that justice can be seen to be done. This entails a certain level of transparency. The present report is only one part of the effort to enhance transparency.

As was indicated above, the NCPR require the Tribunal to make copies of the judgments available to interested staff (including consultants and temporary staff) and retired staff, as well as to the persons entitled under them and their counsels. They will, together with the Practice Directions and other relevant texts, be published on the Tribunal's Intranet and Internet websites. The Intranet is functioning and contains basic documents, the schedule of sessions, and the Tribunal's jurisprudence. Progress has been made on the design and approval process of the Internet website which is expected to be operational in 2014. The Tribunal is also working on an e-submission tool for appeal proceedings.

The NCPR guarantee the Tribunal's independence. The judges are all non-resident and sit in sessions three or four times a year at NATO HQ. The Registrar has been given an ad-hoc space on NATO HQ premises and reports for administrative matters such as leave to the Secretary of the Council, who acts in consultation with the President of the Tribunal. As the NCPR provide, the expenses of the Tribunal are borne by NATO; they also provide that the Tribunal is to prepare and manage its budget independently. A beginning has been made in establishing the Tribunal's independent budget authority in 2013, and it is expected that this matter will be finalized in the course of 2014.

On 13 December 2013 the NATO Council adopted a remuneration scheme for the members of the Tribunal based on the estimated time spent on cases. The Council estimated this to be fourteen days on average, split according to a formula between the President, the judge-rapporteur and the third judge. It is the Tribunal's experience that all cases adjudicated in 2013 have required more time than the fourteen days indicated.

It was agreed that the overall system would be reviewed after one year, but experience under the new system is still limited. As indicated above, in 2013 only two appeals governed by the new rules were lodged. It is expected that the judgments in these cases will be issued in the second trimester of 2014. However, the Tribunal has already identified a number of matters that could be clarified or improved. One example is that the Tribunal is of the view that it should in certain important cases sit in a panel of five, *i.e.* the full Tribunal, for example in cases that concern all or a large group of staff or retired staff (salaries, allowances, etc.). It is felt opportune, however, to have the advantage of a full year's actual experience with the new dispute resolution system as a whole when undertaking a comprehensive review.