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NEWSLETTER
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Staff Matters

Legal News from Union Syndicale

Case T-298/20, KD / EUIPO
of 26 October 2022

Appraisal report – Pre-litigation procedure - Art. 43 SR - GIP – Obligation to state reasons – Art. 296 TFEU – Art. 47 FR Charter - error of fact – enhanced duty of care

Appraisal Report:
on the importance to state reasons, adhere to the facts, and take into account any health problems of staff

In this newsletter we present a recent judgment of the General Court on the review of an appraisal report. An action against such report (once final) can be filed directly, without going through the complaint procedure and without being obliged to lodge an appeal. In the present case, the Court annulled the appraisal report, because
(a) it lacked the reasoning in respect to an assessment that lead to a lower than the required mark,
(b) it was vitiated by an error of fact, because an allegation in the appraisal could not be proven and
(c) the report did not take into account the health problems of the staff member.

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Legal Background

An appraisal report is the "annual report" in Art. 43(1) Staff Regulations (SR), which stipulates: "The ability, efficiency and conduct in the service of each official shall be the subject of an annual report as provided for by the appointing authority of each institution in accordance with Article 110. That report shall state whether or not the performance level of the official has been satisfactory. The appointing authority of each institution shall lay down provisions conferring the right to lodge an appeal within the reporting procedure, which has to be exercised before the lodging of a complaint as referred to in Article 90(2)."

Facts of the Case

In 2015, the applicant was recruited as temporary agent at EUIPO for a five-year period under Art. 2f of the Conditions of Employment of Other Servants of the European Union (CEOS). In February 2020, an appraisal interview for the year 2019 took place. In March 2020, the applicant received the contested appraisal report relating to the year 2019. The report contained the sections 'General Information', 'Employee Information', 'Appraisal Dialogue', 'Comments on working conditions including teleworking (if applies)', 'Assessment of Objectives', 'Objective achieved assessment', 'Conduct in the service', 'Assessment of Competencies', 'Review of Development Plan' and 'Overall Appraisal Rating'. The marks attributed to various competencies contained the mark of 2 in respect of the competencies 'Prioritisation and Organisation' and 'Resilience', whereas the mark required was 3. In the section 'Overall comments on Competencies' the report stated that she 'writes quickly, clearly and correctly' and 'has a sound level of job knowledge (...)'.

Those observations state, however, as regards 'her prioritisation and organisation, [that] on [a] few occasions she was reminded to keep deadlines and anticipate'. The overall assessment closes with the statement that the applicant has attained her objectives, demonstrates the adequate skills, anticipates tasks and strives to maintain and deliver consistently high levels of work output and looks to improve quality at all times. One month after this report, the administration informed the applicant that her contract will not be renewed, and that – in the non-renewal-decision – it had taken account of the said appraisal report.

Decision of the General Court

The Court annuls the contested appraisal report, on grounds of failure to state reasons, error of fact and breach of the duty of care. The claim for compensation in respect to non-material harm is dismissed by the Court.

Admissibility

The defendant EUIPO raises an important question on the admissibility of an action against an appraisal report: what does Art. 7 of the Commission Decision laying down general provisions for implementing Art. 43 SR ("GIP": general implementing provisions) mean when it stipulates an obligation to lodge an appeal before lodging a complaint within the meaning of Art. 90 SR? And, secondly, can a direct action to the General Court be filed even if the appeal had not been lodged? EUIPO had claimed that staff may not bring an action directly before the Court against an appraisal report where there is an internal appeals procedure available, such as the one provided for by the GIP.

The Court dismisses this argumentation and states that due to the nature of the appraisal report, which expresses the opinions freely drawn up by reporting officers, and not the appointing authority's assessment, the lodging of a formal complaint under Art. 90 SR is not a necessary precondition for bringing an action against such a measure. **An action against the appraisal report lies as from the date on which that report can be regarded as final.**

The Court considers an internal appeal not to be an additional condition of admissibility of complaints, but specifies that it would be inadmissible to start an internal appeal only in later stages of the litigation. If the complaint is not a necessary precondition for bringing legal proceedings, the Court states, "it cannot a fortiori be considered that the Council thus impliedly intended to make the admissibility of such an action subject to the lodging of an internal appeal". Further, the Court adds that the institutions have no power to derogate from a right under the Staff Regulations by means of an implementing provision. Assuming an internal appeal procedure had to be exhausted, before being able to challenge an appraisal report at the Court, would amount to an infringement of the fundamental right to an effective remedy and access to an independent tribunal (Art. 47, Art. 52(1) of the Charter of Fundamental Rights).

Substance

On the merits of the case, the applicant put forward three pleas in law in support of her claim for annulment: first, a breach of the duty to state reasons, an infringement of the rights of the defence and an error of fact, secondly, breach of the duty of care and, thirdly, manifest errors of assessment. First, the Court finds that the contested report is vitiated by a breach of EUIPO's **duty to state reasons** (Art. 296 TFEU and Art. 41(2)(c) Charter of Fundamental Rights) for the mark awarded to the applicant under the 'Resilience' competency. The purpose of this principle of EU law is to provide the person concerned with sufficient details to enable him or her to assess whether the act adversely affecting him or her is well founded and whether it would be expedient to bring legal proceedings to contest its legality.

Further, it enables the judge to review that act. The contested report defined 'Resilience' competency as the ability to 'remain effective under work pressure, be flexible and adapt to a changing work environment'. The Court found that the appraisal report was devoid of any observation as to this competency: "Neither the 'Overall comments on competencies' nor the 'Manager's overall assessment comments' contain the slightest express reference to that competency." The report's comment on deadlines concerns the competency 'Prioritisation and Organisation', the qualities of anticipation and proactivity are primarily associated with organisation and compliance with deadlines and not with resilience. Since this could have influenced the reporting officer's decision on the overall mark, the Court found this ground sufficient for the contested report to be annulled.

Secondly, in regard to the other grounds relied on by the applicant, the Court reminds that it is not for the Court to substitute its assessment for that of the appraising officers, who enjoy a wide discretion when appraising. The Court is on its side limited to ensuring that the **procedure is conducted in a regular manner, the facts are materially correct, and there is no manifest error of assessment or misuse of powers.**

The court further found that the reporting officer does not have to include all relevant matters of fact and law in support his/her observations, but still has to **establish the facts and other concrete examples** relied on in support of the observations. In the case, the criticism in the appraisal report that the applicant had "to be reminded to keep deadlines" amounts in the opinion of the Court to an **error of fact,** because the material in the file casts doubt on the truthfulness of the reminders. The applicant could rely on the substantive inaccuracy of the comment in question, which is the only one in the contested report to be negative and in respect of which, consequently, it cannot be ruled out that it had a negative influence on the applicant's overall mark.

Finally, the Court found an infringement of the **duty of care.** The duty of care reflects the balance of the reciprocal rights and obligations established by the Staff Regulations, and by analogy the CEOS, in the relationship between a public authority and its civil servants. Like the right to sound administration, that balance implies in particular that when the authority takes a decision concerning the position of a member of staff, it should take into consideration all the factors which may affect its decision and that when doing so it **should take into account not only the interests of the service but also those of the staff member concerned**.

As the Court further states, the administration is bound by substantially **enhanced obligations** under the duty of care where the physical or mental health of a staff member is involved. In such a case, the administration must take due account of those health problems for the purposes of adopting the act in question. The Court concludes that the duty of care was infringed, because the contested report did "not contain the slightest reference to those problems", nor did EUIPO take into account those problems in any way in the appraisal procedure.

Comments:

1. The various institutions apply the appraisal exercise differently. This case shows some common basic principles that always have to be respected. The concrete appraisal report of the applicant was vitiated by a failure to state reasons, an error of fact and a breach of the duty of care. Central point of the decision is that the reasoning of the report was not sufficient on the competency 'Resilience' in the appraisal report – for which the required mark was not attributed. It is important to note that the non-attribution of the (lower) mark was or could have been decisive for the overall assessment.

2. The **advice** to be drawn from this judgment is (1) that appraisal reports should be checked against their sound reasoning (a) as to the pertinence and truthfulness of the facts mentioned therein, (b) as to the sound reasoning and justification of the assessment, particularly, where the assessment leads to a lower mark than the required mark; (2) that the administration has to take into account health problems of the staff member when adopting the appraisal report.

3. The Court primarily found a **lack of reasoning in the appraisal report, Art. 296 TFEU,** thus a horizontally applicable criterion of legality. As already treated in **StaffMatters newsletter No. 16,** the duty to state reasons must be considered with reference not only to the wording, but also to its context which was known to the person concerned in order to understand the scope of the measure. According to case law it is sufficient, in principle, for the reporting officer to set out the salient points of the official's performance on efficiency, ability and conduct in service. The reporting officer is not required to specify all the relevant factual and legal elements of the appraisal. The report must, however, give reasons for the assessment of the work under the various mandatory sections of the appraisal report.

4. The benchmark for the annulment of an appraisal report is that the review by the Courts of its content is limited to ensuring that the **procedure is conducted in a regular manner, the facts are materially correct, and there is no manifest error of assessment or misuse of powers.**

5. The duty of care – reflecting the balance of the reciprocal rights and obligations - was subject of our **StaffMatters newsletter No. 22**. The specificity of the present case is that it points to the **enhanced** obligations under the duty of care where the **physical or mental health** of a staff member is involved. This obviously presupposes that the staff member timely brings health problems to the attention of the administration.

6. As to the admissibility of the action, the Court confirms that an action for annulment of the appraisal report can be filed directly **without having to appeal** against the report to the appeal assessor and without having to lodge a complaint under Art. 90 SR. Thus, the appeal mentioned in the GIP only serves as an additional instrument in the hands of the staff member which (should the staff member wish to do so) is to be lodged timewise before a formal complaint and – a fortiori – before an action for annulment. In other words, the appeal under the GIP is not an additional precondition for the admissibility of an action. In the interpretation of the Court, this is meant when Art. 43 SR speaks about the "right to lodge an appeal": an optional instrument. Whether or not to lodge an appeal and/or to use the complaint procedure against appraisal reports anyway, before going to court, is a matter to be decided on a case by case basis and after thorough legal advice.

7. It can be concluded that the appeal procedure mentioned in the GIP has a separate significance mostly as long as the appraisal report is not yet final, because during that time an action is not yet admissible.

8. The same exception - of a direct action without need to go through a complaint procedure - applies, by the way, against the decisions of a selection board in a competition. Here, the argument is that the appointing authority is not empowered to amend such decisions (cf. Case 7/77, Ritter von Wüllerstorff; Case 144/82, Detti; Case F-66/11, Cristina). In both constellations (competition and appraisal reports), it is safe to conclude that - should a complaint have been lodged nevertheless - there is no need to await the decision on the complaint before filing the action.