



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

4 July 2024*

(Appeal – Civil service – Members of the temporary staff – Staff report – Obligation to state reasons – Duty to have regard for the welfare of officials – Action for annulment and for damages)

In Case C-5/23 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 January 2023,

European Union Intellectual Property Office (EUIPO), represented initially by G. Predonzani and K. Tóth, and subsequently by K. Tóth, acting as Agents,

appellant,

the other party to the proceedings being:

KD, represented by D.-A. Pappa, dikigoros, and by A. Pappas and S. Pappas, avocats,

applicant at first instance,

THE COURT (Ninth Chamber),

composed of O. Spineanu-Matei, President of the Chamber, J.-C. Bonichot (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: English.

Judgment

- 1 By its appeal, the European Union Intellectual Property Office (EUIPO) seeks the setting aside of the judgment of the General Court of the European Union of 26 October 2022, *KD v EUIPO* (T-298/20, EU:T:2022:671; ‘the judgment under appeal’), by which that court annulled KD’s appraisal report in respect of the 2019 appraisal exercise (‘the report at issue’).

Legal context

Staff Regulations of Officials of the European Union

- 2 Article 43 of the Staff Regulations of Officials of the European Union (‘the Staff Regulations’) provides:

‘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).

As of grade AST 5, the report may also contain an opinion as to whether the official, on the basis of his performance, has the potential to carry out an administrator’s function.

The report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant.’

- 3 Article 90 of the Staff Regulations provides, in paragraph 2 thereof:

‘Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. The period shall start to run:

- on the date of publication of the act if it is a measure of a general nature;
- on the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification, if the measure affects a specified person; if, however, an act affecting a specified person is such as to affect adversely another person, the period shall start to run in respect of that other person on the date on which he receives notification thereof but in no case later than the date of publication;
- on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided in paragraph 1.

The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 91.’

4 Article 110 of the Staff Regulations is worded as follows:

‘1. The general provisions implementing these Staff Regulations shall be adopted by the appointing authority of each institution after consulting the Staff Committee and the Staff Regulations Committee.

2. Implementing rules adopted by the [European] Commission to give effect to these Staff Regulations, including the general implementing provisions referred to in paragraph 1, shall apply by analogy to the agencies. To that end, the Commission shall inform the agencies of any such implementing rule without delay after adoption.

Such implementing rules shall enter into force at the agencies nine months after their entry into force at the Commission or nine months after the date on which the Commission informed the agencies of the adoption of the respective implementing rule, whichever is later. Notwithstanding the foregoing, an agency may also decide that such implementing rules are to enter into force at an earlier date.

By way of derogation, an agency may, before the expiry of the nine-month period referred to in the second subparagraph of this paragraph and after consulting its Staff Committee, submit to the Commission for its agreement implementing rules which are different from those adopted by the Commission. Under the same conditions, an agency may request the agreement of the Commission to the non-application of certain of those implementing rules. In the latter case, the Commission may, instead of accepting or rejecting the request, require the agency to submit for its agreement implementing rules which are different from those adopted by the Commission.

The nine-month period referred to in the second subparagraph of this paragraph shall be suspended from the date on which the agency has requested the Commission’s agreement until the date on which the Commission has expressed its position.

An agency may also, after consulting its Staff Committee, submit to the Commission for its agreement implementing rules which concern subjects other than the implementing rules adopted by the Commission.

For the purposes of the adoption of implementing rules, the agencies shall be represented by the management board or the equivalent body referred to in the Union act establishing them.

3. For the purposes of the adoption of rules by agreement between the institutions, the agencies shall not be treated as institutions. However, the Commission shall consult the agencies before the adoption of those rules.

4. Rules giving effect to these Staff Regulations, including the general implementing provisions referred to in paragraph 1, and rules adopted by agreement between the appointing authorities of the institutions, shall be brought to the attention of the staff.

5. The administrative departments of the institutions and the agencies shall consult each other regularly concerning the application of these Staff Regulations. Agencies shall be jointly represented in those consultations in accordance with rules to be fixed by agreement between them.

6. The Court of Justice of the European Union shall administer a register of the rules adopted by the appointing authority of each institution to give effect to these Staff Regulations, and those rules adopted by the agencies to the extent that they derogate from the rules adopted by the Commission, in accordance with the procedure provided in paragraph 2, including any amendments thereto. Institutions and agencies shall have direct access to that register and the full right to amend their own rules. Member States shall have direct access to it. Moreover, every three years, the Commission shall present a report to the European Parliament and the Council on the rules adopted by the appointing authority of each institution to give effect to these Staff Regulations.'

GIP 43

- 5 For the purpose of implementing Article 43 of the Staff Regulations, EUIPO applies Commission Decision C(2013) 8985 of 16 December 2013 laying down general provisions for implementing Article 43 of the Staff Regulations and implementing the first paragraph of Article 44 of the Staff Regulations ('GIP 43'). Article 7 of GIP 43 provides:

'1. The jobholder's reasoned refusal to accept the report ... shall automatically mean referral of the matter to the appeal assessor. ...

...

3. Within 20 working days of the date of the reasoned refusal to accept the report and following the dialogue provided for in paragraph 2, the appeal assessor shall confirm the report or amend it, giving reasons.

...

4. The report shall become final by decision of the appeal assessor. ...'

Background to the dispute

- 6 The background to the dispute is set out in paragraphs 2 to 14 of the judgment under appeal as follows:

'2 On 16 July 2015, [KD, the applicant at first instance,] was recruited by [EUIPO] as a member of the temporary staff for a five-year period, under Article 2(f) of the Conditions of Employment of Other Servants of the European Union ... She was assigned to the "Academy" department of EUIPO.

3 On 15 February 2016, [KD] was appointed a team leader.

4 From 2015 onwards, [KD] experienced personal difficulties and health problems. The latter required [*confidential*]. [KD] also made use of [*confidential*].

- 5 In mid-2019, [KD] was notified of a mid-year feedback report. The latter states, inter alia, that she “attained her objectives until Q2, with the exception of the implementation of the [talent bank] (pending for [data protection] issues) and IPDentical (pending procurement procedures)”, that she is “comfortable in the role of Team Leader” and that she “[was] very active and result-orientated [during the first semester of 2019]”.
- 6 In July 2019, a dialogue took place between [KD] and the administration.
- 7 On 3 February 2020, [KD]’s appraisal interview in respect of 2019 took place.
- 8 On 11 March 2020, [KD] received [the report at issue].
- 9 [The report at issue] begins with sections entitled “General Information”, “Employee Information”, “Appraisal Dialogue” and “Comments on working conditions including teleworking (if applies)”. The following section, entitled “Assessment of Objectives”, “contains the assessment of the results achieved including quality of deliverables and engagement of the jobholder in relation to the objectives and [key performance indicators] set for the period covered by the present appraisal”. That section covers team objectives, each of which is accompanied by a description of [KD]’s individual contribution, key performance indicators, the strategic areas concerned and the “Objective achieved” assessment. The key performance indicators of the objective entitled “Implementation of the activities and projects defined and approved in [the Strategic Plan 2020] and [the annual work programme]” include, in particular, the setting up, in the first quarter, of the talent bank. This is followed by the “Overall comments on objectives” in which it is stated that [KD] “achieved most goals assigned”, the implementation of the talent bank having nevertheless been delayed due to data protection issues.
- 10 The next section is entitled “Conduct in the service”. That section states that [KD] “fully meets expectations”, “interacts well with her colleagues in a way that is direct, straightforward and honest” and is “able to understand when compromise is needed”.
- 11 The following section, entitled “Assessment of Competencies”, contains the “assessment of competencies of the jobholder in relation to the skills required by his/her function group and grade”. That section covers nine competencies. For each of them, [the report at issue] mentions the level required, which corresponds to the mark which EUIPO expects from the jobholder, and the mark actually obtained. EUIPO’s marking scale has several levels, including “developing” (1), “adequate” (2) and “proficient” (3).
- 12 [KD] obtained the required mark of 3 for six competencies. In respect of another competency, she obtained a mark of 3, higher than the required mark of 2. On the other hand, in respect of the competencies “Prioritisation and Organisation” and “Resilience”, [KD] obtained a mark of 2, whereas the mark required was 3. The “Overall comments on Competencies” explain that she “writes quickly, clearly and correctly” and “has a sound level of job knowledge in Academic matters and understands its implications at [EUIPO] level”. Those observations state, however, as regards “her prioritisation and organisation, [that] on [a] few occasions she was reminded to keep deadlines and anticipate”.

13 The following sections are entitled “Review of Development Plan” and “Overall Appraisal Rating”. In respect of the latter, the assessment awarded to [KD] is “CLR” or “corresponds to the level required for the post occupied”, that is to say, the antepenultimate level on the general assessment scale of six levels of EUIPO and a satisfactory level within the meaning of Article 43 of the Staff Regulations ... That mark is followed by the “Manager’s overall assessment comments”:

“In addition to what has been provided during the dialogue in July, and during the second semester, [KD] has attained her objectives. ... [KD] is an Administrator and should be seen as a role model for the Academy staff by demonstrating the adequate skills, anticipating tasks and striving to maintain and deliver consistently high levels of work output and looking to improve quality at all times. In that context, and [on a] few occasions, she had to be reminded to keep deadlines and to show the proactiveness that she is capable of.”

14 On 1 April 2020, the authority empowered to conclude contracts of employment ... notified [KD] of its decision not to renew her contract ... In that decision, [that authority] stated that it had taken account of [the report at issue].’

The procedure before the General Court and the judgment under appeal

- 7 By application lodged at the Registry of the General Court on 22 May 2020, KD brought an action seeking, first, annulment of the report at issue and, second, compensation in respect of the non-material damage which she claimed to have suffered as a result of that report.
- 8 In support of her action, KD raised three pleas in law. Those pleas alleged, in essence, (i) failure to fulfil the obligation to state reasons and infringement of the rights of the defence as well as an error of fact, (ii) manifest errors of assessment, and (iii) breach of the duty to have regard for the welfare of officials.
- 9 By the judgment under appeal, the General Court annulled the report at issue on the grounds of a failure to state reasons, an error of fact, and breach of the duty to have regard for the welfare of officials.
- 10 First, it found that the reporting officer had not stated the reasons for the mark assigned to KD under the competency ‘Resilience’.
- 11 Second, it held that the reporting officer had not established the truth of the reminders, allegedly issued to KD during the reference period, regarding compliance with deadlines.
- 12 Third, it held that the reporting officer had failed to take KD’s health problems – of which he was aware and which had persisted during the reference period – into account, in breach of his duty to have regard for the welfare of officials.
- 13 By contrast, the General Court held that the annulment of the report at issue was in itself adequate and sufficient compensation for the damage claimed and dismissed the claim for compensation.

Forms of order sought by the parties to the appeal

- 14 EUIPO claims that the Court should:
- set aside the judgment under appeal;
 - dismiss the action for annulment as inadmissible or unfounded or, in the alternative, refer the case back to the General Court; and
 - order KD to pay the costs of the proceedings on appeal and the proceedings before the General Court.
- 15 KD contends that the appeal should be dismissed and EUIPO should be ordered to pay the costs.

The appeal

- 16 In support of its appeal, EUIPO raises four grounds of appeal. The first ground of appeal alleges that the General Court erred in law in its interpretation of Article 43 of the Staff Regulations, read in conjunction with Article 110 thereof. The second ground of appeal alleges errors of law concerning the legal nature of the reporting officer's practical dossier, the sanctioned failure to fulfil the obligation to state reasons, and the consequences derived therefrom. The third ground of appeal alleges a distortion of the facts and an incorrect appraisal of the evidence. The fourth ground of appeal alleges that the General Court erred in law in its interpretation of the duty to have regard for the welfare of officials, and that it failed to fulfil the obligation to state reasons.

The first ground of appeal

Arguments of the parties

- 17 By its first ground of appeal, EUIPO claims that the General Court, in paragraphs 23 to 31 of the judgment under appeal, erred in law in its interpretation of Article 43 of the Staff Regulations, read in conjunction with Article 110 thereof, by concluding that the admissibility of an action contesting an appraisal report is not subject to the exhaustion of internal remedies. It argues that Article 7 of GIP 43, which applies to it by analogy by virtue of Article 110(2) of the Staff Regulations, also requires the official or member of staff wishing to contest his or her appraisal report to lodge an internal appeal beforehand.
- 18 KD contends that the first ground of appeal should be rejected.

Findings of the Court

- 19 The Court has previously held that, in view of the nature of the appraisal report provided for in Article 43 of the Staff Regulations, which expresses the freely drawn-up opinion of the reporting officers and not the assessment of the appointing authority, the lodging of a formal complaint under Article 90(2) of the Staff Regulations is not a necessary prerequisite for the bringing of an

action directed against such an act. An action thus lies as from the date on which the appraisal report may be regarded as final (see, to that effect, judgment of 3 July 1980, *Grassi v Council*, 6/79 and 97/79, EU:C:1980:178, paragraph 15).

- 20 However, EUIPO maintains that that case-law does not prevent the appointing authority from introducing an internal remedy which the official or member of staff who intends to contest his or her appraisal must pursue before being permitted to bring proceedings before a court.
- 21 It argues that such a power is conferred on the appointing authority by the first paragraph of Article 43 of the Staff Regulations, the last sentence of which provides that ‘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)’.
- 22 However, such an interpretation cannot be accepted. Although the last sentence of the first paragraph of Article 43 of the Staff Regulations provides that the appointing authority of each institution is to lay down provisions conferring the right to lodge an internal appeal within the reporting procedure, it in no way states that the pursuit of such a remedy is an obligation for the official or member of staff concerned.
- 23 Consequently, Article 7 of GIP 43, whereby the Commission, implementing Article 43 of the Staff Regulations, laid down the conditions under which the official or member of staff concerned may pursue an internal remedy against his or her appraisal report, also cannot be interpreted as introducing a prerequisite for the bringing of an action.
- 24 Moreover, the Commission would have exceeded the power conferred on it by Article 110(1) of the Staff Regulations to adopt general provisions implementing those Regulations if, in enacting Article 7 of GIP 43, it had added to the specific conditions for access to a court for officials and members of staff laid down in Article 90(2) and Article 91 of the Staff Regulations.
- 25 Therefore, EUIPO is not justified in claiming that the General Court erred in law in holding that KD was entitled to bring an action against the report at issue without having first pursued the internal remedy provided for in Article 7 of GIP 43.
- 26 The first ground of appeal must, accordingly, be rejected.

The second ground of appeal

Arguments of the parties

- 27 By its second ground of appeal, EUIPO claims that the General Court vitiated the judgment under appeal by errors of law in holding that KD’s reporting officer had failed to fulfil his obligation to state reasons by failing to explain why KD had been assigned a mark lower than the required mark for the competency ‘Resilience’ and that that failure justified annulling the report at issue.
- 28 In the first place, EUIPO criticises the statement made by the General Court, set out in paragraph 67 of the judgment under appeal, that the reporting officer’s practical dossier lays down, in point 3.5.5 of Annex A thereto, a mandatory rule for assessors. According to EUIPO, that practical dossier is neither a legal act nor a set of rules of conduct, but merely provides

guidance and comments regarding the application of Articles 43 and 44 of the Staff Regulations and GIP 43. EUIPO concludes from this that a failure to follow the recommendation, set out in point 3.5.5 of Annex A to the practical dossier, to provide explanations where competencies are assessed at a level below the required mark does not mean the report at issue is vitiated by a defective statement of reasons, contrary to what was held by the General Court in paragraphs 79 and 80 of the judgment under appeal.

- 29 In the second place, EUIPO submits that the recommendation to assessors set out in point 3.5.5 of Annex A to the reporting officer's practical dossier goes beyond the requirements regarding the statement of reasons for the appraisal report which are derived from case-law. The appraisal report is not required to draw up an exhaustive list of the tasks performed by the member of staff but must simply set forth the relevant elements thereof.
- 30 In the third place, the lack of explanation, in the report at issue, relating to the mark obtained under the competency 'Resilience' did not have an effect on KD's appraisal that was such as to justify annulling that report.
- 31 KD contends that the second ground of appeal should be rejected.

Findings of the Court

- 32 In the first place, EUIPO claims that the recommendation set out in point 3.5.5 of Annex A to the reporting officer's practical dossier, according to which the assessor is to provide explanations where one or more competencies are assessed below the required rating, is not mandatory, contrary to what was held by the General Court in paragraph 67 of the judgment under appeal.
- 33 However, the Court of Justice has held that, where an institution adopts rules of conduct which are indicative of the administration's intention and where it announces by publishing them that they will apply to the cases to which they relate, that institution imposes a limit on its discretion and cannot, in principle, depart from those rules without running the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see, to that effect, judgments of 1 December 1983, *Blomefield v Commission*, 190/82, EU:C:1983:358, paragraph 20, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 40).
- 34 In this instance, not only was the rule set out in point 3.5.5 of Annex A to the reporting officer's practical dossier published, but its content was also expressly reproduced in the report at issue in the form of an instruction given to the reporting officer and worded as follows: 'In case competencies are assessed below the required rating affecting performance, please provide explanations in the section "Overall comments on competencies"'.
- 35 In those circumstances, the General Court did not err in law by holding that that rule was mandatory, notwithstanding the fact that it is stated in the reporting officer's practical dossier that that dossier has no legal value.
- 36 In the second place, EUIPO criticises the General Court for having imposed an obligation to state reasons on the reporting officer which is more burdensome than what is required by case-law. However, as has been explained above, the General Court merely held that EUIPO, in enacting point 3.5.5 of Annex A to the reporting officer's practical dossier, had itself imposed on assessors an additional obligation to state reasons in respect of appraisal reports for its officials and

members of staff, and recalled that, by virtue of the case-law referred to in paragraph 33 of the present judgment, respect for equal treatment and legitimate expectations therefore called for compliance with that obligation.

- 37 In the third place, EUIPO argues that, in any event, the failure to state reasons for which it is criticised did not affect the merits of KD's overall assessment, so that the General Court was incorrect in holding that such a failure to state reasons was such as to justify, in itself, the annulment of the appraisal report.
- 38 However, the obligation to state reasons referred to in Article 296 TFEU and reaffirmed in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union is an essential principle of EU law which is intended, first, to provide the person concerned with sufficient information to allow him or her to ascertain whether or not the decision adversely affecting him or her is well founded and whether it would be expedient to bring legal proceedings to contest its legality, and, second, to enable the EU judicature to exercise its power of review (see, to that effect, judgment of 24 November 2022, *Thunus and Others v EIB*, C-91/21 P, EU:C:2022:928, paragraph 81).
- 39 That is why, according to settled case-law, the obligation to state reasons thus laid down in Article 296 TFEU constitutes an essential procedural requirement for the purposes of Article 263 TFEU (see, to that effect, judgment of 13 January 2022, *YG v Commission*, C-361/20 P, EU:C:2022:17, paragraph 41), non-compliance with which entails the annulment of the decision vitiated thereby.
- 40 Accordingly, the General Court did not err in law in holding that the fact that the report at issue was vitiated by a lack of reasoning justified annulling that report.
- 41 It follows from the foregoing that the second ground of appeal must be rejected.

The third ground of appeal

Arguments of the parties

- 42 By its third ground of appeal, EUIPO submits that, in paragraph 93 and paragraphs 96 to 103 of the judgment under appeal, the General Court distorted the facts and incorrectly assessed the evidence in the dispute.
- 43 In the first place, it argues that the General Court reversed the burden of proof, requiring EUIPO to establish that it had indeed issued reminders regarding compliance with deadlines to KD during the reference period. In addition, the administration is not required to issue written reminders or warnings regarding a given deadline to a member of staff whenever reminders or warnings are needed.
- 44 In the second place, the General Court vitiated its reasoning by a manifest contradiction as regards the issue of the existence of those reminders regarding compliance with deadlines. On the one hand, in paragraph 100 of the judgment under appeal, it held that EUIPO had failed to adduce any evidence to establish the truth of the reminders concerned. On the other hand, in paragraph 93 of that judgment, it rejected as inadmissible the items produced by EUIPO in Annexes D1 to D5 to the rejoinder as evidence of those reminders.

45 KD contends that the third ground of appeal is unfounded.

Findings of the Court

- 46 In the first place, the complaint that the General Court unduly reversed the burden of proof by imposing an obligation on EUIPO to prove the truth of the reminders regarding compliance with deadlines which had allegedly been issued to KD by her line manager during the reference period is unfounded.
- 47 As the Court of Justice has consistently held, the rules of EU law do not require a person to prove a negative (see, to that effect, judgment of 24 March 1988, *Commission v Italy*, 104/86, EU:C:1988:171, paragraph 11).
- 48 Consequently, KD could not be required to provide evidence that she had not been issued with any reminders regarding compliance with deadlines during the reference period.
- 49 Thus, the General Court did not err in law in holding that it was for EUIPO to provide at least prima facie evidence of the truth of those reminders, as referred to in the report at issue. That burden of proof requires EUIPO, not to issue its officials and members of staff with reminders or warnings only in writing, but to preserve evidence of significant or repeated failures where it wishes to rely on that evidence later.
- 50 In the second place, EUIPO notes a contradiction by which the General Court allegedly vitiated the judgment under appeal through calling into question the truth of the reminders after having rejected as inadmissible, in paragraph 93 of the judgment under appeal, the evidence of those reminders which EUIPO had produced before that court in Annexes D1 to D5 to the rejoinder.
- 51 However, as was recalled by the General Court in paragraph 88 of the judgment under appeal, Article 85 of the Rules of Procedure of the General Court provides, in paragraph 1 thereof, that evidence is to be submitted in the first exchange of pleadings, and states, in paragraph 2 thereof, that it cannot be submitted in the reply or the rejoinder unless its late submission is duly justified.
- 52 As the evidence which EUIPO considers to be such as to establish the truth of the reminders issued to KD was produced, without justification, at the stage of the rejoinder, the General Court rejected it as inadmissible, applying its own Rules of Procedure, an approach which has not been criticised in the appeal.
- 53 Consequently, by holding that, in the light of the file that had been submitted to it, the truth of the reminders regarding compliance with deadlines which had allegedly been issued to KD by her line manager during the reference period had not been established, the General Court did not vitiate its judgment either by an error of law or by contradictory reasoning.
- 54 Lastly, assuming that the complaint alleging a distortion of the facts by the General Court – also relied on by EUIPO in its third ground of appeal – is distinct from the first two complaints in that ground, that complaint must, given that it is not accompanied by explanations enabling its scope to be assessed, be rejected as inadmissible.
- 55 The third ground of appeal must, accordingly, be rejected.

The fourth ground of appeal

Arguments of the parties

- 56 By its fourth ground of appeal, directed against paragraphs 121 to 129 of the judgment under appeal, EUIPO complains that the General Court erred in law in its interpretation of the duty to have regard for the welfare of officials and that it disregarded its obligation to state reasons.
- 57 In the first place, it argues that the General Court erred in law by concluding that EUIPO should have taken due account of KD's health problems when adopting the report at issue.
- 58 First, when the reporting officer has no reason to consider that the jobholder's absences which are justified by his or her health problems could have had a significant impact on his or her performance, the reporting officer cannot be criticised for not having mentioned those problems or taken them into account in his or her report.
- 59 Second, appraisal reports assess the member of staff's ability, efficiency, and conduct in the service during the period in which that member of staff has actually worked. The period during which the member of staff has been absent for justified reasons (for example, illness, accident, parental or family leave, maternity leave) is excluded from the reference period. If the absence has been so extensive or significant as to have had an impact on performance, the yearly objectives of the member of staff can be adapted accordingly, or their non-achievement can be justified.
- 60 Third, medical data are directly received and processed by EUIPO's medical service and are not released to reporting officers or, more broadly, to the administration. This is why personal data concerning the health of members of staff are not referred to in appraisal reports.
- 61 In the second place, EUIPO complains that the General Court did not explain why the reporting officer had acted in breach of his duty to have regard for the welfare of officials; nor did it explain what that duty required him to do.
- 62 First, EUIPO does not see why the reporting officer should have set out KD's health problems in the report at issue, when he had given an assessment of her work that was, overall, positive.
- 63 Second, EUIPO submits that the judgment under appeal does not make it possible to understand how KD's health problems should have been referred to in the report at issue, when the reporting officer was not in a position to assess that member of staff's state of health.
- 64 Lastly, EUIPO questions whether the consideration which the General Court requires it to give KD's health problems entails improving or upgrading her assessment. It seems to EUIPO that it would be as unjustified to grant a member of staff an advantage because that member of staff has been absent on the ground of illness as it would be to criticise the member of staff concerned for such an absence.
- 65 KD contends that the fourth ground of appeal is unfounded.

Findings of the Court

- 66 It should be borne in mind that the duty to have regard for the welfare of officials reflects the balance of reciprocal rights and obligations established by the Staff Regulations and, by analogy, the Conditions of Employment of Other Servants in the relationship between a public authority and its staff. Like the right to good administration, that balance implies, in particular, that, when the relevant authority takes a decision concerning the situation 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 member of staff concerned (see, to that effect, judgment of 15 April 2021, *FV v Council*, C-875/19 P, EU:C:2021:283, paragraph 98).
- 67 As the General Court correctly held in paragraph 125 of the judgment under appeal, the duty to have regard for the welfare of officials requires the administration, *inter alia*, to take due account of the health problems of the official or member of staff concerned when adopting his or her appraisal report.
- 68 In the case at hand, the General Court noted, in paragraph 126 of the judgment under appeal, that the report at issue did not contain the slightest reference to the health problems – which were nonetheless significant – experienced by KD during the reference period, with the result that that court concluded that there had been a breach of the duty to have regard for the welfare of officials.
- 69 EUIPO criticises that conclusion by arguing, in the first place, that the health problems experienced by an official or a member of staff must not be taken into account in the appraisal report unless the state of health of that official or member of staff has justified absences so extensive or frequent as to prevent the official or member of staff from being fully assessed for the exercise in question.
- 70 Nevertheless, such a restrictive construction of the taking into account, by the reporting officer, of the state of health of the official or member of staff concerned cannot be accepted, because the health problems experienced by that official or member of staff may also have an impact on his or her performance during the periods in which he or she works.
- 71 In the second place, EUIPO claims that the confidential nature of medical information precludes reference being made to that information in the appraisal report.
- 72 However, the confidential nature of that information does not prevent the managers of a member of staff who suffers from chronic illness giving rise to frequent absences from being aware of that member of staff's health problems, even if the exact nature of the illness is unknown to them.
- 73 In the present case, it is not disputed that (i) KD had had serious health problems from 2015 to 2018 and had not yet overcome those problems during the reference period, as is made clear by her absences on health grounds during that period, and (ii) her reporting officer was aware of those problems.
- 74 Accordingly, the confidential nature of medical data could not justify the silence maintained by the report at issue regarding KD's health problems.

- 75 In the third place, EUIPO complains that the General Court disregarded its obligation to state reasons, in so far as it did not explain why the reporting officer had failed to fulfil his duty to have regard for the welfare of officials; nor did it explain how KD's health problems should have been reflected in the report at issue.
- 76 However, as has been recalled in paragraph 68 of the present judgment, the General Court did indicate, in paragraph 126 of the judgment under appeal, what constituted the breach of the duty to have regard for the welfare of officials vitiating the report at issue, namely the fact that the report at issue does not contain the slightest reference to KD's health problems.
- 77 Moreover, the General Court cannot be criticised for not having explained how the reporting officer should have taken those health problems into account, given that the failure to fulfil the duty to have regard for the welfare of officials found in the judgment under appeal results not from the health problems having been taken into account in a way that was inappropriate, but from the fact that those health problems were not referred to in any way in the report at issue.
- 78 Accordingly, the complaint alleging that the General Court found – without providing reasons for that finding – that EUIPO had acted in breach of its duty to have regard for the welfare of officials is unfounded.
- 79 It follows from the foregoing that the fourth ground of appeal must be rejected.
- 80 As none of the grounds of appeal have been upheld, the appeal must be dismissed.

Costs

- 81 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As KD has applied for costs and EUIPO has been unsuccessful, EUIPO must be ordered to pay the costs.

On those grounds, the Court (Ninth Chamber) hereby:

1. Dismisses the appeal;

2. Orders the European Union Intellectual Property Office (EUIPO) to pay the costs.

Spineanu-Matei

Bonichot

Rodin

Delivered in open court in Luxembourg on 4 July 2024.

A. Calot Escobar
Registrar

O. Spineanu-Matei
President of the Chamber