Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

*Registry's translation,
the French text alone
being authoritative.*

**G. (No. 8)**

***v.***

**EPO**

**138th Session** **Judgment No. 4897**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Ms M.-F. G. against the European Patent Organisation (EPO) on 17 January 2020, the EPO's reply of 22 May 2020, the complainant's rejoinder of 4 September 2020, the EPO's surrejoinder of 17 December 2020, the complainant's additional submissions of 5 March 2021 and the EPO's final comments thereon of 10 March 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges her appraisal report for 2018.

The regulatory framework within the EPO for creating and reviewing staff reports was amended with effect from 1 January 2015. Before that date, the framework was embodied in Circular No. 246, entitled "General Guidelines on Reporting", and, on and from that date, it was governed by Circular No. 366, entitled "General Guidelines on Performance Management". This coincided with the introduction of a new career system in the EPO by Administrative Council decision CA/D 10/14 of 11 December 2014, effective 1 January 2015.

By Communiqué 8/2017 of 22 December 2017, the President of the Office notified staff that new "Guidelines on Performance Development", adopted on 20 December 2017, would enter into force on 1 January 2018, replacing Circular No. 366. The President clarified that the new Guidelines would also apply to setting performance objective for 2018.

A document entitled "Guidance to performance assessment 2018" was subsequently circulated in a communiqué from the Vice-President of Directorate-General 1 of 19 February 2019.

The complainant joined the European Patent Office, the EPO's secretariat, in 2006 as a patent examiner.

In the 2018 performance assessment, the complainant's production goals were set at 38 searches and 37 final actions over a 180-day period, which, according to her reporting officer, was "below the expected level of performance". By an email of 13 April 2018, the complainant expressed her "reservations"[*] regarding the production goals set for her.

During the complainant's interim review on 16 July 2018, her reporting officer commented that her productivity had met the goals assigned to her but fell below the level expected given her experience and grade.

In the complainant's final appraisal report, drawn up in March 2019, the reporting officer highlighted the quality of her work but noted an alarming decrease in her productivity in the last five months of 2018. He pointed out that she had only completed 22 searches and 26 final actions in 140 days, and concluded that she had not met her production goals. He also stated that she needed to improve her communication skills. The reporting officer added that this assessment took into account the fact that the complainant had changed fields eight years previously. He concluded his assessment by indicating that the complainant's performance fell below the expected level for an examiner of her grade in her technical field. That assessment was confirmed by the countersigning officer, who wrote in the complainant's appraisal report

[*] Registry's translation.

that her productivity had been very poor, below the level expected from her grade, and that a significant improvement was expected in 2019.

By an email of 11 April 2019, the complainant expressed her disagreement with her appraisal report and requested that a conciliation procedure be initiated. The conciliation report, which made two amendments to the appraisal report but rejected most of the complainant's arguments, was notified to her on 13 May 2019. As she was dissatisfied with the outcome of this procedure, the complainant filed an objection against her appraisal report on 15 May 2019.

In its opinion issued on 18 September 2019, the Appraisals Committee concluded that the complainant's appraisal report was neither discriminatory nor arbitrary, and recommended that her objection be rejected. By a letter of 14 October 2019, the Vice-President of Directorate-General 4 informed the complainant of her decision to follow that recommendation. That is the impugned decision.

The complainant asks the Tribunal to order that the opinion of the Appraisals Committee be withdrawn from her personal file and that a new, "neutral"[*] appraisal report be drawn up for 2018. She claims compensation in the amount of 3,500 euros for the moral injury she considers she has suffered, of which 1,500 euros are intended "to compensate for the failure [of the Appraisals Committee] to properly examine"[*] her claims, 1,000 euros "for the failure to follow all the rules applicable at the material time"[*], and 1,000 euros "for delays and inconvenience"[*]. She adds that "[s]hould the process leading to the issuance of this report be found unlawful in another cause"[*], she requests that "a new report be issued in compliance with those rules"[*]. Lastly, she seeks "[a]ny other compensation considered fair by the Tribunal"[*].

The EPO asks the Tribunal to dismiss the complaint as unfounded in its entirety. It further submits that one of the complainant's claims is irreceivable because it is unintelligible.

[*] Registry's translation.

## CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 14 October 2019 by which the Vice-President of the European Patent Office responsible for Directorate-General 4 rejected, in accordance with the opinion of the Appraisals Committee, the complainant's objection against her appraisal report for 2018.

It should be noted that the contested report was issued in the first performance assessment carried out in compliance with the new "Guidelines on performance development" of 20 December 2017, which repealed and replaced previous Circular No. 366 from 1 January 2018. According to the EPO, the Guidelines, adopted three years after the entry into force of the new careers system established by Administrative Council decision CA/D 10/14 of 11 December 2014, were intended, in particular, through the introduction of a "new paradigm"[*] for appraisal known as "performance development"[*], to encourage the engagement of the Office's staff members in achieving its strategic objectives and to strengthen the merit-based career management approach promoted by decision CA/D 10/14.

2. In support of her claims, the complainant submits first of all that the impugned decision is unlawful owing to flaws that, according to her, affected the objection procedure following which it was adopted.

3. In this regard, in the first place, the complainant takes issue with the fact that the Appraisals Committee, established from 1 January 2015 by Article 110a of the Service Regulations, does not include a staff representative, unlike the Internal Appeals Committee which had until then been responsible for dealing with challenges to appraisal reports. However, the Tribunal has already held that this characteristic does not mean that the composition of the new body is inadequate (see Judgments 4795, consideration 7, 4637, consideration 11, and 4257, consideration 13). This plea will therefore be dismissed.

[*] Registry's translation.

4. In the second place, the complainant complains that she was only allowed the very short time limit of two days to raise her objection with the Appraisals Committee.

This is factually correct. Section III.7 of the aforementioned Guidelines of 20 December 2017 indeed provides that, where the conciliation procedure fails, a staff member may raise an objection against her or his appraisal report "within two weeks of receipt of the conciliation report or by 15 May, whichever is the sooner". In the present case, the evidence shows that the conciliation report was notified to the complainant on 13 May 2019. Under those provisions, the applicable time limit was therefore 15 May, which did indeed leave the complainant only two days to raise her objection.

The Tribunal finds that – even though, as the Appraisals Committee noted, this period in fact amounted to three days because the notification was made in the morning of 13 May – such a time limit is undeniably very short.

However, firstly, this short timescale, linked to the final deadline of 15 May set by the Guidelines and evidently explained by a wish to prevent appeals proceedings significantly disrupting the annual assessment cycle, is partly due in the present case to the actions of the complainant herself. The evidence submitted to the Tribunal shows that the complainant, who had been invited to a conciliation meeting scheduled for 12 April 2019, had then asked for a postponement, and the meeting could not in the end be held until 30 April. While admittedly it would have been preferable for the EPO to have endeavoured to send the conciliation report to the complainant more quickly after the meeting given how close 15 May was, it is clear that the report would have been forwarded earlier had there not been such a postponement.

Secondly and more importantly, the evidence does not show that the short time limit in practice significantly interfered with the complainant's exercise of her right to raise an objection. The complainant had her appraisal report in her possession and had taken part in the aforementioned meeting assisted by a staff representative, and she was thus able to prepare the case for the objection before she

received the conciliation report, the content of which she could, for the most part, anticipate. Moreover, the Tribunal observes that, if the complainant considered that she did not have sufficient time to submit her case as she wished, she could have requested the Appraisals Committee for permission to raise her objection in summary form and to supplement it later, which – whatever the response to such a request would have been – she does not show that she did. Furthermore, it should be noted that, in her complaint to the Tribunal, the complainant does not put forward any substantive elements in support of her challenge to the contested appraisal report other than those which she cited in her objection, which confirms that she was not denied the opportunity to advance such elements when raising that objection.

In these circumstances, the Tribunal finds that, however regrettable, the short time limit granted to the complainant to refer the matter to the Appraisals Committee was not, in this case, such as to breach her rights to an effective appeal or due process (see, as regards the requirements of the case law on this point, Judgment 4795, consideration 7).

5. In the third and last place, the complainant points to errors in the summary of her arguments set out in the Appraisals Committee's opinion. However, it is evident from the file that, although in some respects the summary does not appear to reflect with complete accuracy the points which the complainant intended to put in her objection, these inaccuracies did not in any event have a tangible bearing on the outcome of the objection and do not therefore affect the lawfulness of that opinion.

6. Aside from these criticisms of the objection procedure, the complainant challenges her appraisal report itself on several grounds and alleges that it is "arbitrary"[*].

[*] Registry's translation.

As the Tribunal has repeatedly held in its case law, assessment of an employee's merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment. Of course, it must ascertain whether the ratings given to the employee have been determined in full conformity with the rules, but it cannot substitute its own opinion for the assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene only if the appraisal report was drawn up without authority or in breach of a rule of form or procedure, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 4795, consideration 9, 4564, consideration 3, 4267, consideration 4, 3692, consideration 8, 3228, consideration 3, or 3062, consideration 3).

7. In support of her challenge to the contested appraisal report, the complainant firstly submits that a number of breaches were committed when her goals for 2018, in particular her production goals, were set.

8. In the first place, the complainant perceives a breach in the fact that those goals were imposed on her by her reporting officer although she had expressed reservations in their regard, in an email of 13 April 2018, following the meeting at which they were set. She submits that the new assessment system applicable from 2018 requires the goals set to receive the assent of the staff member concerned.

However, the Tribunal disagrees with this argument.

It is true that the Guidelines of 20 December 2017 define performance development as "the process by which managers and staff collaboratively agree upon the contribution to be made by individual staff members to enable the EPO to fulfil its mission". But this statement, which merely aims to explain the general principle underlying the assessment system introduced by the Guidelines, cannot be construed as having intended to lay down a rule according to which

any individual goal assigned to a staff member by her or his reporting officer must mandatorily be adopted by mutual agreement.

In Section III.1 concerning "[g]oal setting", the Guidelines provide that "[t]he translation of business area goals into individual goals [...] is discussed by the reporting officer [...] and the staff member at a meeting". Even if the text goes on to refer – somewhat awkwardly – to the goals set following that meeting as "the agreed goals", the Tribunal considers that these provisions must be construed as only requiring that the reporting officer consult the staff member concerned on the goals that the reporting officer intends to assign to her or him, and not that those goals must receive the staff member's assent. The English version of the Guidelines, which states in the corresponding passage that goal setting is to be "discussed" during the meeting in question, confirms this understanding, which moreover makes common sense, as it could hardly be imagined that staff members might be granted the right to object to the establishment of the professional requirements that the Office considers legitimate to impose on them.

Thus, in the present case, the fact that the complainant expressed her disagreement with the production goals set by her reporting officer did not prevent him from maintaining them as she had been consulted on them.

9. In the second place, the complainant submits that the production goals assigned to her – namely 38 searches and 37 final actions over 180 days – were set in the light of "financial results to be achieved"[*] by the Office, and not her individual capacity. It follows that, in her view, the goals were so high as to be unreasonable.

However, firstly, aforementioned Section III.1 of the Guidelines of 20 December 2017 provides, in respect of the manner in which goals are set, that "the EPO's strategic goals are cascaded down through the different hierarchical levels of the Office to individual staff member level". Whether or not the strategic goals in question take account of financial considerations, the approach outlined in this provision forms

[*] Registry's translation.

part of the Organisation's management policy, which is plainly not the Tribunal's concern. Moreover, the evidence shows that the complainant's goals were in fact set on an individual basis as they were different from those assigned to other members of the team to which she belonged and, as the appraisal report stated, they were lower than those corresponding to the level of performance usually expected of an examiner with her profile.

Secondly, it cannot be considered, in the light of the other evidence submitted to the Tribunal, that the goals in question were obviously inappropriate, especially when, as has just been stated, they were lower than those normally set for staff members with the same profile. The Tribunal further notes that the complainant does not convincingly refute the Organisation's observation that the productivity goal resulting from the abovementioned figures of 2.4 days per "product" was close to the one assigned to her for 2017 and therefore did not demonstrate a marked increase in the requirements placed on her by the Office.

Lastly, the complainant's contention that another examiner in her team was set lower production goals than hers, even if proved, is not capable of demonstrating in itself that her goals were abnormally high.

10. On this point, the complainant submits in the third place that she was not able to ascertain whether her production goals were in line with those assigned to the other examiners in her team. She thereby implicitly casts doubt on her reporting officer's sincerity and even complains of a supposed "policy of data concealment"[*] in this regard.

However, under the Tribunal's settled case law, bad faith cannot be presumed and must be proven by the evidence (see, for example, Judgments 4675, consideration 6, 4333, consideration 15, 4161, consideration 9, 3902, consideration 11, or 2800, consideration 21). In the present case, it is clear that the complainant does not bring any *prima facie* evidence to support her challenge to her superior's sincerity.

[*] Registry's translation.

Moreover, the EPO submits, without being effectively contradicted by the complainant, that over the course of 2018 the reporting officer distributed to team members statistical data relating to average productivity observed in comparable departments, which were published on the Office's intranet. As the EPO points out, that information allowed the complainant to understand how the Organisation's strategic goals were implemented at an individual level and to assess her level of performance in relation to her peers.

The complainant's argument in this regard is therefore unfounded.

11. Although the complainant alleges in the fourth place that no account was taken when setting her production goals of the time she had to spend on meetings with the human resources department regarding her personal situation, the Tribunal finds that – except in exceptional circumstances, which are not demonstrated in this case – that factor does not need to be taken into consideration when setting a staff member's annual goals.

12. In the fifth and last place, the complainant argues that the goals assigned to her should have been updated during the year. However, aforementioned Section III.1 of the Guidelines provides in this connection that the goals set "may [...] be reviewed in the course of the year, depending on business requirements". This is therefore merely an option which the reporting officer is free not to use depending on her or his assessment of those requirements. Moreover, the Tribunal observes that the file does not show that the complainant formally requested such a review of her goals during the reporting period.

13. Regarding the year-end appraisal performed by means of the contested report, it is also challenged by the complainant on several grounds.

14. In the first place, the complainant submits that the appraisal was flawed in that it was based on the "Guidance to performance assessment 2018", issued by the Vice-President of Directorate-General 1, which was published in a communiqué of 19 February 2019

and therefore postdated the reporting period to which it related. In essence, the complainant argues that the Guidance stipulated in particular that a staff member's performance must be assessed in comparison with that normally expected of staff members in her or his grade performing the same function, by reference to a four-point scale. She infers that the contested appraisal, which, in terms of that assessment, found her performance to be "below the level expected from an examiner in her grade and technical field", was therefore conducted on the basis of criteria that were "unknown"[*] to staff members during the reporting period.

This is undeniably a tricky plea.

It is true that, under the Tribunal's case law, the regulatory framework of an appraisal procedure, or in any event the substantive elements thereof, may not be amended by a provision adopted after the beginning of the reporting period concerned (see in particular Judgment 4257, consideration 10, explaining the content of Judgment 3185, consideration 7). That approach, which of course applies first and foremost to the setting of the criteria on the basis of which the assessment is performed, is justified by the need to observe both the principle of the non-retroactivity of administrative acts and the requirements of good faith, transparency and fairness that are incumbent in the matter of staff appraisals. It therefore seems somewhat unusual that the rules applicable to the 2018 performance assessment could have been established, in this case, by guidance adopted on 19 February 2019, after the reporting period had begun and even ended.

Moreover, the file shows that the comparison, referred to in the Guidance, between the staff member's level of performance and that which would normally be expected in view of her or his function and grade is understood as a separate appraisal criterion, which, although it overlaps *de facto* with the criterion of achievement of goals set in the usual scenario where those goals correspond to the expected level, is distinct from and additional to it where – as in the present case – those goals have been set at a lower level because of the staff member's

[*] Registry's translation.

particular situation. The use of this criterion is therefore a substantive element of the appraisal procedure in question.

15. However, a close reading of the respective content of the Guidelines of 20 December 2017 and the Guidance of 19 February 2019 nevertheless leads the Tribunal to reject this plea for the following reasons.

The fourth paragraph of Section II.2 of the aforementioned Guidelines, concerning the content of the appraisal report, provides that:

> "The year-end report [...] contains comments relating to the staff member's ability, contribution, effectiveness and conduct in the service. The comments compare the level of individual performance (goals achieved and competencies demonstrated) with the level expected for the staff member's function and grade." (Emphasis added.)

These provisions show that the contested appraisal criterion based on a comparison between the staff member's level of performance with that normally expected in view of her or his function and grade was indeed established by the Guidelines themselves, issued before 1 January 2018, and not by the Guidance of 19 February 2019, which merely explained how the Guidelines were to be applied.

Section II.1 of the Guidelines, which among other matters deals with the role and responsibilities of the vice-presidents of the Office in respect of assessment, provides as follows:

> "As part of their role in harmonising the application of the performance development guidelines, [...] vice-presidents [...] may issue complementary guidance specifying how the guidelines are to be applied in their business areas.
>
> The [vice-presidents] are responsible for the calibration process. Before the reporting officers start drafting the year-end reports, the [vice-presidents] ensure that the performance review standards and methods used by the reporting and countersigning officers in their area are consistent and harmonised. [...]"

It is evident from these provisions that, in order to ensure harmonisation in the appraisals of staff members in their respective areas of responsibility, vice-presidents are authorised to issue

complementary guidance specifying how the aforementioned Guidelines are to be applied and that this guidance may be adopted, whenever necessary, including after the reporting period.

It does not appear to the Tribunal that the legal mechanism introduced by the Guidelines is in itself flawed, and such guidance may therefore lawfully be adopted on that basis, as long as it does not substantially amend the previously established assessment procedure.

The Tribunal considers that the Vice-President of Directorate-General 1 did not abuse this mechanism in the present case by issuing the aforementioned Guidance of 19 February 2019.

Indeed, since, as previously stated, the principle of using the criterion of a staff member's level of performance compared to that which would normally be expected in view of her or his function and grade was established in the Guidelines themselves, the only new elements added to the assessment rules by the aforementioned Guidance of 19 February 2019 were the adoption of the assessment scale referred to above (distinguishing between the categories of "above the expected level", "at [that] level", "below" and "far below that level"), the instruction that the assessment of that criterion should be included in the appraisal report's conclusion, and the definition of the benchmark population used to harmonise performance assessment in terms of production and productivity (namely subject to adaptation, the population consisting of all staff in the same directorate in a comparable grade and function). The sole purpose of these provisions was indeed to specify how the Guidelines were to be applied so as to ensure consistency in appraisals. Moreover, the Tribunal considers that these additional rules cannot be regarded as having substantially altered the assessment procedure set out in the Guidelines, especially since prior knowledge of these rules would not in any event have influenced the professional conduct of the staff members concerned during the reporting period.

16. In the second place, the complainant argues that the four-point assessment scale thus applied does not allow staff members to be assessed as accurately as the eight-point rating scale used in the former

assessment system. However, firstly, it must be observed that the two assessment scales are not the same, at least in theory. The old scale involved awarding marks based on a staff member's merits and, as the principle of this type of rating was abolished as part of the reform that came into force in 2018, the new scale simply involves assessing the criterion of performance discussed above in order to ensure consistency. Secondly and more importantly, the establishment of such assessment scales is a policy choice falling within the Organisation's discretion with which – apart from in the extreme case of a clear abuse of that power, which does not arise here – it is not for the Tribunal to concern itself.

17. In the third place, the complainant – who produced only 22 searches and 26 final actions in 140 days – submits that her appraisal is flawed in that it did not take account of particular factors explaining her failure to meet her production goals. In this connection, she argues that she had previously been forced to change technical field and had not received adequate training in her new field. She also points to health difficulties over the year that had resulted in frequent absences. Lastly, she complains that several files that she had begun to prepare and that were subsequently reassigned to colleagues were not included when counting the cases she had dealt with.

But none of these arguments can be accepted by the Tribunal.

Indeed, the appraisal report explicitly states that the change in the complainant's technical field had been taken into consideration in assessing whether she had achieved her goals. Moreover, the file shows that this change took place in August 2009, that is more than eight years before the reporting period in question, and so, even assuming that she had not received the necessary training at that point, those circumstances could not provide a proper justification for her insufficient production.

In respect of the health issues raised, it is common ground that the days of sick leave granted to the complainant in 2018 were properly taken into account when calculating her productivity. She maintains that the deduction of working time allowed for that reason is insufficient, in her view, to reflect the full impact of her poor health on

the achievement of her production goals. However, the Tribunal considers that this argument is, in any event, irrelevant in the present case since the goals had themselves been set at a lower level than those normally assigned to examiners, for reasons evidently linked largely to that medical situation.

Regarding the transfer of files on which the complainant had begun to work, the conciliation report drawn up after the meeting of 30 April 2019 shows that only one such file was transferred in 2018. Thus, even assuming that it would have been appropriate to include it in the complainant's production statistics, such a rectification would have had no bearing on the contested appraisal in any event, given the size of the shortfall observed in this case in comparison to the goals set.

18. In the fourth and last place, the complainant challenges the assessment in her appraisal report that it would be desirable for her to endeavour to improve her communication with her colleagues. However, the pleas on this point before the Tribunal do not show that this assessment was unwarranted.

19. It follows from all of the above that the complainant's request that the impugned decision and the contested appraisal report be set aside is unfounded.

20. Lastly, while the complainant takes issue with the slowness with which her challenge to the contested appraisal was examined, her claim for compensation under this head – which is, incidentally, highly perfunctory – must be rejected. The evidence shows that the conciliation and objection procedures lasted, in this case, a total of six months. The Tribunal considers – notwithstanding the detailed observation made above concerning the time taken to notify the conciliation report – that this length of time cannot be considered unreasonable in the light of the nature and circumstances of the case.

21. It follows from all the foregoing that the complaint must be dismissed in its entirety, without there being any need to rule on the EPO's objection to one of the complainant's claims.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER