

Form of order sought

- Declare the action brought by Longevity Health Products, Inc. admissible;
- annul the decision of the Fourth Board of Appeal of 28 August 2008 and dismiss the nullity proceedings of Merck KGaA against registration of Community trade mark 003 979 143; and
- order the Office for Harmonisation in the Internal Market to pay the costs.

Pleas in law and main arguments

Applicant for a Community trade mark: The applicant.

Community trade mark concerned: Word mark 'Kids Vits' for goods and services in Classes 3, 5 and 35 (Community trade mark No 3 979 143).

Proprietor of the mark or sign cited in the opposition proceedings: Merck KGaA.

Mark or sign cited in opposition: Word mark 'VIDS4KIDS' for goods in Class 5 (mark No 3 128 196).

Decision of the Opposition Division: Upholding of the opposition.

Decision of the Board of Appeal: Dismissal of the appeal.

Pleas in law: Breach of Article 8(1)(b) of Regulation (EC) No 40/94 ⁽¹⁾, since there is no likelihood of confusion between the opposing marks.

⁽¹⁾ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

Appeal brought on 17 November 2008 by Philippe Bui Van against the judgment of the Civil Service Tribunal delivered on 11 September 2008 in Case F-51/07 Bui Van v Commission

(Case T-491/08 P)

(2009/C 32/76)

Language of the case: French

Parties

Appellant: Philippe Bui Van (Hettange-Grande, France) (represented by P. Nelissen Grade, lawyer)

Other party to the proceedings: Commission of the European Communities

Form of order sought by the appellant

- Declare the appeal admissible and well-founded;
- Set aside the judgment of the Civil Service Tribunal of the European Union (Second Chamber) of 11 September 2008 in Case F-51/07;

- Annul the decision of the Appointing Authority of 5 March 2007 not to accept the appellant's complaint;
- Annul the decision of the Director General of the JRC of 4 October 2006, in so far as it reclassifies the appellant in Grade AST 3, Step 2, whereas he was initially classified in Grade AST 4, Step 2;
- Confirm the decision of 28 June 2006 which appoints the appellant in Grade AST 4, Step 2;
- State to the Appointing Authority the consequences of the annulment of the contested decisions and, in particular, classification in Grade AST 4, Step 2, and the retroactive effect of appointment in Grade AST 4, Step 2, from the date the post was first taken up;
- Order the respondent to bear the costs.

Pleas in law and main arguments

By the present appeal, the appellant seeks to have set aside the judgment of the Civil Service Tribunal (CST) of 11 September 2008 in Case F-51/07 *Bui Van v Commission*, by which the CST ordered the respondent to pay the appellant the sum of EUR 1 500 by way of damages and dismissed, as to the remainder, the action for annulment of the decision reclassifying the appellant in Grade AST 3, whereas he had initially been classified in Grade AST 4.

In support of his appeal, the appellant puts forward three pleas in law.

First, the judgment under appeal ought to be set aside in so far as it considers, while acknowledging that the Commission infringed the appellant's rights of defence, that the fact that the appellant was not heard did not affect the validity of the Commission's contested decision.

Second, in connection with the appellant's plea at first instance alleging that there had been a manifest error of assessment and breach of the principles of legal certainty and protection of legitimate expectations, the CST was wrong to uphold the administrative decision of 4 October 2006, downgrading the appellant from Grade AST 4 to Grade AST 3, by holding, wrongly, that the appellant did not have reason to have legitimate expectations in the act appointing him in Grade AST 4, on the ground that the appellant should have known, because of a footnote in the competition notice, that his appointment in Grade AST 4 was unlawful and that the new Staff Regulations of Officials of the European Communities — which, according to the competition notice, were the ones to apply — could be pleaded against him. The appellant submits that that footnote could not alter the provisions of the Staff Regulations in force at the time of the competition notice.

Third, the CST was wrong to dismiss the plea that there was an infringement of the principle of equal treatment even though the Appointing Authority, while it downgraded the appellant to Grade AST 3, responded positively to the complaints brought by three other officials who were essentially in the same situation as the appellant.