Form of order sought

— Annul the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 30 September 2008 in case R 221/2007-1 to the extent that the opposition filed by the applicant has been rejected; and

— Order the defendant and the other party to the proceedings before the Board of Appeal to pay the costs.

Pleas in law and main arguments

Applicant for the Community trade mark: The other party to the proceedings before the Board of Appeal

Community trade mark concerned: The figurative mark 'MPAY', for goods and services in classes 9, 35, 36, 37, 38 and 42 — application No 3 587 896

Proprietor of the mark or sign cited in the opposition proceedings: The applicant

Mark or sign cited: Community trade mark registration No 2 061 656 of the word mark 'MPAY24' for goods and services in classes 9, 16, 35, 36 and 38; Austrian trade mark registration No 200 373 of the word mark 'MPAY24' for goods and services in classes 9, 16, 35, 36 and 38.

Decision of the Opposition Division: Rejected the trade mark application in its entirety

Decision of the Board of Appeal: Partial dismissal of the appeal

Pleas in law: Infringement of Article 8(1) and (4) of Council Regulation 40/94 as the Board of Appeal wrongly assessed the likelihood of confusion between the trade marks concerned.

Appeal brought on 19 December 2008 by the Commission of the European Communities against the judgment of the Civil Service Tribunal delivered on 14 October 2008 in Case F-74/07 Meierhofer v Commission

(Case T-560/08 P)

(2009/C 55/66)

Language of the case: German

Parties

Appellant: Commission of the European Communities (represented by J. Currall and B. Eggers, acting as Agents)

Other party to the proceedings: S. Meierhofer (Munich, Germany)

Form of order sought by the appellant

— Set aside the judgment of the Civil Service Tribunal of 14 October 2008 in Case F-74/07 *Meierhofer* v *Commission*;

— Each party to bear its own costs.

Pleas in law and main arguments

The appeal is brought against the judgment of the Civil Service Tribunal of the European Union of 14 October 2008 in Case F-74/07 *Meierhofer* v *Commission*, in which the Tribunal set aside the decision of the selection board in Competition EPSO/AD/26/05 of 19 June 2007 for infringement of the duty to state reasons.

By the contested decision, the candidate's request for review of the selection board's decision that the candidate had not passed the oral test of the competition was dismissed. The candidate had fallen short of the required minimum mark in the oral test by half a point. According to the competition notice, the oral test was assessed by a single overall mark.

The appeal is directed against the requirements of the duty to state reasons on a selection board and the review criteria of the Community judicature. The Commission challenges in particular the conclusion of the Civil Service Tribunal that in 'particular circumstances', for example in the case of a mark just under the minimum number of points, the duty to state reasons was not satisfied by communicating to the candidate excluded at the oral stage only a single mark leading to exclusion.

The Commission argues that that approach leads to legal uncertainty:

— First, the duty to state reasons must, in accordance with consistent case-law, be reconciled with the preservation of confidentiality which applies to the work of a selection board pursuant to Article 6 of Annex III to the Staff Regulations, and which forbids the dissemination of the opinions of individual members of the selection board and the disclosure of details in relation to the assessment of the applicants personally or in comparison with others.

— Second, the comparison drawn by the Tribunal with cases concerning access to documents is inappropriate, since Article 6 of Annex III makes no provision for exceptional cases or the balancing of interests.

— Third, the Tribunal overlooked the case-law according to which the duty to state reasons must stand in a proportionate relationship to the measure in question, and is simply designed to enable the Tribunal to review the legality of the decision. Since subsequent review of an oral test by the Community judicature is impossible in the nature of things, the latter has hitherto essentially confined its review to compliance with the competition regulations and the advertising of the competition.

The judgment creates further legal uncertainty in relation to the distinction between various types of procedural measures, concerning requests for the production of confidential documents by an entity and the circumstances in which such requests may be refused (measures of organisation of procedure and orders for evidence to be taken). In the present case, the Tribunal also fundamentally misinterpreted the Commission's position, as the latter did not in any way refuse such production. The Commission merely explained that it could not produce the relevant documents on the basis of the measures of organisation of procedure ordered by the Tribunal, but was awaiting an order (for the production of evidence) of the Tribunal.

Action brought on 15 December 2008 — Bactria and Gutknecht v Commission

(Case T-561/08)

(2009/C 55/67)

Language of the case: English

Parties

Applicants: Bactria Industriehygiene-Service Verwaltungs GmbH (Kirchheimbolanden, Germany), Jürgen Gutknecht (Kirchheimbolanden, Germany) (represented by: K. Van Maldegem and C. Mereu, lawyers)

Defendant: Commission of the European Communities

Form of order sought

— declare the application admissible and well founded;

— order the European Community to pay the damages suffered by the applicants as a result of (i) the unlawful adoption of Article 6(2) of the First Review Regulation together with the Second Review Regulation and Commission Regulation 1451/2007; or, in the alternative (ii) the Commission's failure to take the necessary measures to ensure that the applicants' data protection rights under the Directive 98/8/EC were maintained and free-riding avoided during the review programme, estimated at a total amount of EUR 3 912 569, or other amount as further established by the applicants in the course of these proceedings or by the Court *ex aequo et bono*;

— in the alternative, rule on interlocutory judgment that the European Community is obliged to make reparation for the loss suffered and order the parties to produce to the Court within a reasonable period from the date of the judgment figures as to the amount of the compensation agreed between the parties or, failing agreement, order the parties to produce to the Court within the same period their submissions with detailed figures in support;

— order the European Community to pay the applicants' compensatory interest at the default rate from the date of the losses suffered;

— order the European Community to pay default interest of 8 % or any other appropriate rate to be determined by the Court, calculated on the amount payable as from the date of the Court's judgment until actual payment; and

— order the Commission to pay all costs of these proceedings.

Pleas in law and main arguments

By means of their application, the applicants claim compensation, pursuant to Article 235 EC, for the damages allegedly suffered form the adoption of Article 6(2) of Commission Regulation 1896/2000 of 7 September 2000 ([1]) on the first phase of the programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market ([2]) together with Commission Regulation 2032/2003 ([3]) and Commission Regulation 1451/2007 ([4]).

In the alternative, the applicants claim compensation for the damages allegedly suffered from the failure of the Commission to ensure protection of the data protection rights granted to notifiers pursuant to Article 12 of Directive 98/8/EC. They further submit that the damage suffered by the applicants as a result of the Commission's unlawful conduct consists of a significant reduction in the value of the first applicant's business and the lost profit (*lucrum cessans*) which the first applicant would have made by selling the biocidal products at issue an the active substances contained in those biocidal products but for the conduct of the Community.

In addition to the damage allegedly suffered by the second applicant as a shareholder of and therefore owner of the business of the first applicant, it is submitted that the second applicant has also suffered the loss of his livelihood. Finally, the applicants claim compensatory interest at the default rate from the date the losses claimed occurred.

([1]) Commission Regulation (EC) No 1896/2000 of 7 September 2000 on the first phase of the programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council on biocidal products (OJ 2000 L 228, p. 6).

([2]) Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, p. 1).

([3]) Commission Regulation (EC) No 2032/2003 of 4 November 2003 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market, and amending Regulation (EC) No 1896/2000 (OJ 2003 L 307, p. 1).

([4]) Commission Regulation (EC) No 1451/2007 of 4 December 2007 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market (OJ 2007 L 325, p. 3).