

In the case of (orthopaedic) footwear a sign is *inter alia* perceived as an indication of origin if it — as is normal in characterising footwear — is affixed to the rear of the middle part of the insole sock, to a label or to a shoebox. Against the background of those obvious possibilities for use, the General Court's assumption that the mark for which protection is sought consists of the representation of a component of the product itself cannot be accepted.

Furthermore, the General Court failed in the present case to examine the obvious practice of characterisation in the sport and leisure shoes sector, which the appellant explained, although it was obliged to do so on the basis of the principle, laid down in the first sentence of Article [76(1)] of Regulation No 207/2009, that OHIM is obliged to examine the facts of its own motion.

Lastly, the General Court was not entitled to find that the mark in question had no distinctive character on the ground that it was for the appellant to provide specific and substantiated information to establish that the mark applied for has distinctive character.

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**Appeal brought on 20 June 2011 by Smart Technologies ULC against the judgment of the General Court (Second Chamber) delivered on 13 April 2011 in Case T-523/09: Smart Technologies ULC v Office for Harmonisation in the Internal Market (Trade Marks and Designs)**

(Case C-311/11 P)

(2011/C 269/50)

*Language of the case: English*

**Parties**

*Appellant:* Smart Technologies ULC (represented by: M. Edenborough QC, T. Elias, Barrister, R. Harrison, Solicitor)

*Other party to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

**Form of order sought**

The appellant seeks an order that:

- the Judgment of 13 April 2011 in Case T-523/09 *Smart Technologies v OHIM (WIR MACHEN DAS BESONDERE EINFACH)* be set aside;
- The Decision of the Board of Appeal of OHIM of 29 September 2009 be altered to state that the mark applied for possesses sufficient distinctive character such that no objection to its registration may be raised under Article 7(1)(b) of Regulation No. 207/2009;
- In the alternative, that the Decision of the Second Board of Appeal of OHIM of 29 September 2009 be annulled;
- The Defendant pay to the Appellant the Appellant's costs of and occasioned by this appeal and of the proceedings before the General Court and the Board of Appeal.

**Pleas in law and main arguments**

The Appellant contests the Judgment of the General Court on the following grounds:

- The General Court did not analyse the distinctiveness of the Appellant's application on its own terms, but by reference as to whether it was or was not a 'mere' advertising slogan. The Appellant submits that this is wrong in law and that the correct approach is to analyse distinctiveness by reference to the relevant goods and service and the relevant public. To conclude that there is no distinctive character in the Application because the Application is a mere advertising slogan is to carry out the wrong test as set out in established case law.
- The General Court erred in law by considering that it is harder to establish distinctiveness in relation to an advertising slogan than in relation to any other form of word mark.
- The General Court erred in law in asserting that it was entitled to assume as a well-known fact a matter which required to be proved by evidence, i.e. that consumers do not accord trade mark value to marketing claims.
- The Appellant finally submits that a mark need have only a minimum degree of distinctive character in order to render refusal under Article 7(1)(b) of Council Regulation (EC) n° 207/2009 <sup>(1)</sup> on the Community trade mark inapplicable.

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<sup>(1)</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark  
OJ L 78, p. 1

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**Reference for a preliminary ruling from the Rechtbank Breda (Netherlands) lodged on 27 June 2011 — A. T. G. M. Van de Ven & M. A. H. T. Van de Ven-Janssen v Koninklijke Luchtvaart Maatschappij N.V.**

(Case C-315/11)

(2011/C 269/51)

*Language of the case: Dutch*

**Referring court**

Rechtbank Breda

**Parties to the main proceedings**

*Applicants:* A. T. G. M. Van de Ven

M. A. H. T. Van de Ven-Janssen

*Defendant:* Koninklijke Luchtvaart Maatschappij N.V.

**Questions referred**

1. Is a right to compensation in case of delay, as described in Article 7 of Regulation No 261/2004, <sup>(1)</sup> consistent with the last sentence of Article 29 of the Montreal Convention, <sup>(2)</sup> given the fact that, according to the first sentence of Article 29 of the Montreal Convention, actions for damages founded in contract, in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in the Montreal Convention?

2. If a right to compensation in case of delay, as described in Article 7 of Regulation No 261/2004, is not consistent with Article 29 of the Montreal Convention, are any limitations then imposed in respect of the moment when the ruling of the Court of Justice enters into effect as regards the present case and/or in general?

- (<sup>1</sup>) Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1)
- (<sup>2</sup>) See Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194, p. 38)

**Appeal brought on 22 June 2011 by Longevity Health Products, Inc. against the order of the General Court (Second Chamber) delivered on 15/04/2011 in Case T-96/11: Longevity Health Products, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**

**(Case C-316/11 P)**

(2011/C 269/52)

*Language of the case: English*

#### Parties

*Appellant:* Longevity Health Products, Inc. (represented by: J. Korab, Rechtsanwalt)

*Other party to the proceedings:* Office for Harmonisation in the Internal Market (Trade Marks and Designs)

#### Form of order sought

The applicant claims that the Court should:

- Admit the complaint filed by the company Longevity Health Products, Inc.;
- Annul the decision of the General Court of April 15, 2011, T-96/11;
- Order the Office for Harmonisation in the Internal Market to pay the costs.

#### Pleas in law and main arguments

The applicant submits that the contested order should be annulled on the following grounds:

- The reasoning of the General Court is defective;
- The General Court did not consider the arguments advanced by the holder of the trade mark.

**Reference for a preliminary ruling from the Landesarbeitsgericht Berlin-Brandenburg (Germany) lodged on 27 June 2011 — Rainer Reimann v Philipp Halter GmbH & Co. Sprengunternehmen KG**

**(Case C-317/11)**

(2011/C 269/53)

*Language of the case: German*

#### Referring court

Landesarbeitsgericht Berlin-Brandenburg

#### Parties to the main proceedings

*Applicant:* Rainer Reimann

*Defendant:* Philipp Halter GmbH & Co. Sprengunternehmen KG

#### Questions referred

1. Do Article 31 of the Charter of Fundamental Rights and Article 7(1) of Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time (<sup>1</sup>) preclude a national rule such as the one in Paragraph 13(2) of the Bundesurlaubsgesetz (Federal law on leave), pursuant to which in certain trades the duration of the annual minimum leave of four weeks may be reduced by means of collective agreement?
2. Do Article 31 of the Charter of Fundamental Rights and Article 7(1) of Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time preclude a rule in a national collective agreement such as that in the Bundesrahmentarifvertrag Bau (Collective agreement laying down a general framework for the construction industry), pursuant to which a leave entitlement does not accrue in those years in which a certain total gross wage is not earned as a result of illness?

3. If the first and second questions are answered in the affirmative:

Is a rule such as that in Paragraph 13(2) of the Bundesurlaubsgesetz inapplicable in those circumstances?

4. If the first to third questions are answered in the affirmative:

Should legitimate expectations be protected with regard to the validity of the rule in Paragraph 13(2) of the Bundesurlaubsgesetz and the rules of the Bundesrahmentarifvertrag Bau, if periods prior to 1 December 2009, when the Treaty of Lisbon and the Charter of Fundamental Rights came into force, are affected? Should the parties to the Bundesrahmentarifvertrag Bau collective agreement be granted a period in which they may agree another rule themselves?

(<sup>1</sup>) Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).