Appeal incorrectly decided that the mark has not become distinctive in relation to the goods or services, for which registration is requested in consequence of the use, which has been made of it.

Appeal brought on 3 August 2011 by Carlo De Nicola against the judgment of the Civil Service Tribunal of 28 June 2011 in Case F-49/10, De Nicola v EIB

(Case T-418/11 P)

(2011/C 282/79)

Language of the case: Italian

Parties

Appellant: Carlo De Nicola (Strassen, Luxembourg) (represented by L. Isloa, lawye)

Other party to the proceedings: European Investment Bank

Form of order sought by the appellant

The appellant claims that the Court should:

— Vary the judgment delivered on 28 June 2011 by the Civil Service Tribunal in Case F-49/10, concerning:

— the annulment of the decision in the e-mail of 11 May 2010, in so far as the EIB refused to allow the administrative procedure to be completed and obstructed the attempted amicable settlement of the matter, rejecting by implication the claim for reimbursement of medical expenses in the sum of EUR 3 000,00;

— order the EIB to reimburse the sum of EUR 3 000 incurred by the appellant for laser therapy treatment prescribed for him and carried out in Italy, together with interest, monetary inflation and the costs of the proceedings.

Pleas in law and main arguments

In support of his claims, the appellant submits as follows:

A. The facts:

1. The appellant alleges distortion of one claim and failure to rule on another.

2. The appellant also complains of the privileged position enjoyed by the Institution, which, once again, has confined itself to asserting certain facts, which the Tribunal then found to be proved.

B. The application for annulment

3. The appellant sought annulment of the decision communicated to him by e-mail on 11 May 2010, in so far as the EIB refused to appoint a third doctor, refused to initiate the mediation procedure under Article 41 of the Staff Regulations and refused to reimburse expenditure in the sum of EUR 3 000 incurred for laser therapy treatment prescribed for the appellant and carried out in Italy.

4. As regards the challenge of the refusal to appoint a third doctor, the Civil Service Tribunal found that the claim was inadmissible, on the assumption that the appellant should have challenged a non-existent provision of 24 March 2008, without explaining the link between the provision challenged and that which it assumes to be in breach of the law, and without clarifying under which rules the opinion attributed to the EIB's representative became a decision refusing a claim on the part of the EIB.

5. The appellant submits that, since it forms part of an internal procedure, an opinion is without prejudice and can never be challenged automatically.

   The General Court, however, overturned all previous case-law and held that it was entitled to introduce a three-month period for challenging any measure forming part of an internal procedure, stating that the time-limit for bringing court proceedings starts to run from the same date on which the employee submits an application, irrespective of whether a measure has been adopted and without the employee's even being aware of the reasons.

6. The appellant challenges the entire system of rules laid down for public institutions, which the Tribunal claims apply to the EIB, which is organised as a private bank and whose employees have a private-law contract of employment. The effect of this is that measures affecting such employees are not administrative measures, do not represent the exercise of public authority, are not authoritative acts and do not enjoy a presumption of legitimacy, so that no analogy can be made with public employees and nor is there any need to confer immediate effect on measures of internal organisation adopted in the same way as in any private bank.

7. Moreover, the appellant complains that the reasoning is illogical, in so far as it fails to have regard to his excusable error, attributing to him knowledge of a measure notified only to his lawyer.

8. Lastly, the appellant states that, under any legal system, an act that is null and void may be challenged at any time, not solely within the time limit laid down for measures capable of being annulled.

9. The appellant submits that the mediation procedure under Article 41 of the Staff Regulations is not a procedural requirement. Nevertheless, the Tribunal unlawfully claims that it may be treated in the same was as an administrative appeal, which public employees of the European Union are required to lodge and which is, by contrast, obligatory, establishing the limits of any subsequent court proceedings.

10. As regards the challenge of the refusal to initiate the mediation procedure, the appellant submits that the decision of the Civil Service Tribunal is unlawful, since the bank can never refuse such a procedure.

    It follows from the above, first, that no reasons can legitimately justify such a refusal and, second, that the upholding of the employee's claim should give rise to aggravated liability on the part of the bank and it being ordered without question to pay the costs of the proceedings.

11. As regards the refusal by implication to reimburse the laser therapy treatment expenditure, the appellant submits that the lack of reasoning is a clear sign of misuse of power, given that reimbursement may lawfully be refused in only three cases, and the fact that there existed no formal measure provides grounds for absolute nullity, which can as such be challenged at any time.

12. Lastly, the decision by which the Civil Service Tribunal failed to give a ruling on the basis of the assumption that it did not have before it the necessary evidence must clearly be regarded as unlawful.

C. The order as to costs

13. The Tribunal found that the application was inadmissible on grounds of *litis pendenza*, whereas no provision is made for the defect of *litis pendenza* in the Code of Procedure. Moreover, it failed to explain how there can be identity of claims between a case pending at first instance and a case pending on appeal and also failed to clarify how the facts on which that decision was based were established and by whom.

14. Lastly, the appellant claims that the granting of the appeal and the variation of the judgment under appeal should give rise to a new ruling as to costs, including the costs of the proceedings at first instance.

Action brought on 29 July 2011 — Ellinika Touristika Akinita v Commission

(Case T-419/11)

(2011/C 282/80)

Language of the case: Greek

Parties

Applicant: Ellinika Touristika Akinita A.E. (Athens, Greece) (represented by: N. Fragkakis, lawyer)

Defendant: European Commission

Form of order sought

The applicant claims that the General Court should:

— allow the application in its entirety;

— annul and set aside the contested decision of the Commission addressed to the Hellenic Republic;

— order that any sum that may have been 'recovered' directly or indirectly from the applicant in implementation of the contested decision be refunded with interest;

— order the Commission to pay the applicant's costs.

Pleas in law and main arguments

By the present action, the applicant seeks the annulment of Commission Decision C(2011) 3504 final of 24 May 2011 relating to State aid to certain Greek casinos, No C 16/2010 (ex NN 22/2010, ex CP 318/2009), which was implemented by the Hellenic Republic.

The applicant puts forward the following grounds for annulment.

The first ground is derived from the incorrect interpretation and application of Article 107(1) TFEU and insufficient reasoning in breach of Article 296 TFEU. In particular, the measure under consideration: (i) does not ensure an economic advantage for the casino of Parnitha and that of Corfu through the transfer of State resources, (ii) is not selective in nature and (iii) is not capable of affecting trade between Member States and does not distort or threaten to distort competition.

The second ground is derived from the incorrect interpretation and application of Article 14(1)(a) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1). In particular: (i) the recovery of unlawful State aid can be sought only from the actual beneficiaries of the aid and (ii) there is no identity between the actual beneficiaries of the measure at issue (the casinos' customers) and the persons to which the order for recovery is addressed (the casinos of Corfu, Parnitha and Thessaloniki), which were not charged for admission tickets.

The third ground is derived from the incorrect interpretation and application of Article 14(1)(b) of that regulation. Recovery of the aid at issue is contrary to: (i) the principle of the protection of legitimate expectations and (ii) the principle of proportionality.