DECISION OF THE COURT
(special Chamber provided for by Article 123b of the Rules of Procedure)

24 June 2009

'Review'

In Case C-197/09 RX,

PROPOSAL for review made by the First Advocate General in accordance with Article 62 of the Statute of the Court of Justice on 4 June 2009,

THE COURT
(special Chamber provided for by Article 123b of the Rules of Procedure),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts (Rapporteur), Presidents of Chamber,

having regard to the second subparagraph of Article 225(2) EC,

having regard to Article 62 of the Statute of the Court of Justice,

having regard to the proposal of the First Advocate General, E. Sharpston,

gives the following

Decision

1 This proposal for review made by the First Advocate General concerns the judgment of the Court of First Instance of the European Communities (Appeal Chamber) of 6 May 2009 in Case T-12/08 P *M* v *EMEA* ('the judgment of 6 May 2009') by which that court, first, set aside the order of the European Union Civil Service Tribunal (First Chamber) of 19 October 2007 in Case F-23/07 *M* v *EMEA* and the decision of the European Medicines Agency (EMEA) of 25 October 2006 in so far as it rejected the request by Mr M of 8 August 2006 for the referral of his case to the Invalidity Committee ('the decision of 25 October 2006'), and, second, ordered the EMEA to pay damages of EUR 3 000 to the applicant.

Background to the case

2 According to the judgment of 6 May 2009 Mr M, a member of the temporary staff who entered the service of the EMEA in October 1996, was the victim of an accident at work in March 2005 and has been on sick leave since then. His contract with the EMEA expired on 15 October 2006.

3 On 17 February 2006 Mr M requested that an Invalidity Committee be convened. The EMEA refused that request by letter of 31 March 2006.

4 On 3 July 2006 Mr M lodged a complaint against that refusal, which was rejected by the decision of 25 October 2006.

5 In the meantime, on 8 August 2006, Mr M submitted another request that an Invalidity Committee be convened, attaching a medical report by Dr W.

6 By letter of 29 November 2006 the EMEA informed Mr M that that request could not be considered to be a new request under Article 59(4) of the Staff Regulations of Officials of the European Communities and that it therefore had to be rejected for the same reasons as those set out in the decision of 25 October 2006.

7 By letter of 25 January 2007 Mr M lodged a complaint seeking the withdrawal of the decision of 25 October 2006 in so far as it rejected his request of 8 August 2006. The following day he also sent the EMEA a request for compensation for the material and non-material damage he had suffered.

8 A letter from the EMEA of 31 January 2007 rejected that complaint and that request.

9 On 19 March 2007 Mr M lodged before the Civil Service Tribunal an action seeking, first, the annulment of the decision of 25 October 2006 and, second, an order that the EMEA pay EUR 100 000 by way of damages for wrongful acts in the performance of public duties.

10 Following a plea of inadmissibility raised by the EMEA, the Civil Service Tribunal, by its order in *M* v *EMEA*, dismissed the action as inadmissible, as regards both the claims for annulment and the claims for damages. In particular, it held that the claims directed against the decision of 25 October 2006, in so far as it had rejected the request by Mr M of 8 August 2006, were inadmissible, on the ground that that decision had to be construed as a decision which merely confirmed the decision contained in the letter of the EMEA of 31 March 2006.

11 Following an appeal brought by Mr M against that order, the Court of First Instance, in its judgment of 6 May 2009, set aside that order, finding that it was vitiated by an error of law in so far as it had held Mr M's claims for annulment and claims for damages to be inadmissible.

12 Taking the view that the state of proceedings permitted it to give final judgment, the Court of First Instance then held inter alia that the claims for damages by Mr M were admissible. As to the substance, it ordered the EMEA to pay damages of EUR 3 000 to make good the non-material damage alleged by Mr M.

Assessment

13 It must be observed that, in the present case, as a consequence of the preliminary issue under Article 114 of the Rules of Procedure of the Court of First Instance, which were applicable at the time to the Civil Service Tribunal, raised by the EMEA before the Civil Service Tribunal by the plea of inadmissibility, the argument at first instance before that tribunal and the assessment it made concerned only the admissibility of the action brought by Mr M and of the claims made in it.

14 In those circumstances the claims for damages made by Mr M seeking, inter alia, compensation for the non-material damage he alleged did not give rise to a written, or even oral, exchange of arguments on the substance before the Civil Service Tribunal. Nor were those claims the subject of an assessment and a decision on the substance by that tribunal.

15 Moreover, it is not apparent from the written pleadings lodged by the parties in the appeal procedure before the Court of First Instance that those claims were the subject of a written exchange of arguments on the substance, before that court, ruling on the merits of the application made by Mr M for compensation for the non-material damage, decided to award him damages, against the EMEA, of EUR 3 000 by way of compensation for that damage. Moreover, neither the record of the hearing held on 23 January 2009 by the Court of First Instance nor the judgment of 6 May 2009 give any indication that the merits of that application, in particular the exact scope of the right of Mr M to compensation for non-material damage, were discussed at that hearing.

16 It follows that, in the judgment of 6 May 2009, the Court of First Instance upheld in part, as to the substance, the application for compensation for the damage alleged by Mr M even though the preliminary issue which arose before the Civil Service Tribunal did not permit a written or oral exchange of arguments on the substance before that tribunal, and it appears that no such exchange of arguments took place before the Court of First Instance either.

17 In those circumstances, it must be held that there is a serious risk of the unity or consistency of Community law being affected in that the judgment of 6 May 2009 ruled on the application for compensation for non-material damage alleged by Mr M, as regards the substance.

18 Accordingly, the judgment of 6 May 2009 must be reviewed.

19 In that regard, consideration must first be given to the meaning of the expression 'where the state of the proceedings … permits' in Article 61 of the Statute of the Court of Justice and Article 13(1) of the Annex to that Statute, in a situation where at first instance, in this case before the Civil Service Tribunal, the defendant asked the Tribunal to rule on a plea of inadmissibility not going to the substance of the case and the appeal court, in this case the Court of First Instance, set aside the order made at first instance which upheld that plea of inadmissibility.

20 Second, it must be considered whether or not the fact that, having set aside that order and held the action admissible, including the claims for damages made in it, the appeal court, in this case the Court of First Instance, ruled on the substance of a claim for compensation for non-material damage alleged by the applicant, when no written or oral exchange of arguments was held in that regard at first instance, in this case before the Civil Service Tribunal, and it does not appear that any such exchange of arguments was heard before the appeal court, constitutes a breach of the requirements of the right to a fair hearing, and in particular the requirement of respect for the rights of the defence.

21 Third, if it is held that the judgment of 6 May 2009 infringes Article 61 of the Statute of the Court of Justice and Article 13(1) of the Annex to that Statute and/or disregards the requirements of the right to a fair hearing, in particular the requirement of respect for the rights of the defence, it must be considered whether and, if so, to what extent, that judgment affects the unity or consistency of Community law.

On those grounds,

The Court (special Chamber provided for by Article 123b of the Rules of Procedure) hereby decides:

1. **There should be a review of the judgment of 6 May 2009 of the Court of First Instance of the European Communities (Appeal Chamber) in Case T-12/08 P *M* v *EMEA*.**

2. **The review shall cover the question whether the judgment of 6 May 2009 of the Court of First Instance of the European Communities in Case T-12/08 P *M* v *EMEA* affects the unity or consistency of Community law in that the Court of First Instance, as the appeal court, interpreted the expression 'where the state of the proceedings ... permits' in Article 61 of the Statute of the Court of Justice and Article 13(1) of the Annex to that Statute, as allowing it to dispose of a case and rule as to the substance, despite the fact that the appeal before it concerned the examination of the treatment given at first instance to a plea of inadmissibility and that, as regards the aspect of the case which was disposed of, there had been no exchange of arguments before it or before the European Union Civil Service Tribunal as the court seised at first instance.**

3. **The persons referred to in Article 23 of the Statute of the Court of Justice and the parties to the proceedings before the Court of First Instance of the European Communities are invited to lodge their written observations on that question at the Court of Justice of the European Communities within one month of the service of the present decision.**

[Signatures]