OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 19 September 2002 [1]

1. In these proceedings Mr Michel Hendrickx, an official of the Council of the European Union, asks the Court of Justice to set aside the order of the Court of First Instance (Fifth Chamber) of 12 March 2001 in Case T-298/00 *Hendrickx* v *Cedefop* (not published in the ECR) ('the contested order') and the decision of the Centre européen pour le développement de la formation professionnelle ('Cedefop' or 'the Centre') which was unsuccessfully challenged in those proceedings.

2. By the contested order the Court of First Instance declared that the action brought by Mr Hendrickx to have set aside that decision of Cedefop rejecting his request for payment of a resettlement allowance which he had made upon his return to Brussels (Belgium) after having worked on a temporary contract for the Centre at Thessalonika (Greece) had become devoid of purpose.

1 — Original language: Italian.

Legislative framework

3. Article 20 of the Staff Regulations of officials of the European Communities ('the Staff Regulations') provides:

'An official shall reside in the place where he is employed or at no greater distance therefrom as [sic] is compatible with the proper performance of his duties.'

4. Article 24 of the Conditions of employment of other servants of the European Communities ('the Conditions of Employment') provides as follows:

'1. A member of the temporary staff engaged for a fixed period of not less than one year, or deemed by the authority referred to in the first paragraph of Article 6 to be engaged for an equivalent period if his contract is for an indefinite period, shall receive an installation allow-

ance as provided in Article 5 of Annex VII to the Staff Regulations amounting, for an expected period of service of:

— not less than one year but less than two years, to one third of the rate laid down in Article 5 of Annex VII to the Staff Regulations

— not less than two years but less than three years, to two thirds of the rate laid down in Article 5 of Annex VII to the Staff Regulations

— three years or more, to three thirds of the rate laid down in Article 5 of Annex VII to the Staff Regulations.

2. The resettlement allowance provided for in Article 6 of Annex VII to the Staff Regulations shall be granted to temporary staff who have completed four years' service. A servant who has completed more than one year's but less than four years' service shall receive a resettlement allowance proportionate to his length of service, incomplete years being disregarded.'

5. Article 5 of Annex VII to the Staff Regulations provides:

'1. An installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in other cases shall be paid to an established official who qualifies for expatriation allowance or who furnishes evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations....

The installation allowance shall be weighted at the rate fixed for the place where the official is employed.

...'

6. Article 6 of Annex VII to the Staff Regulations provides:

'1. An established official who satisfies the requirements of Article 5(1) shall be entitled on termination of service to a resettlement allowance equal to two months' basic salary in the case of an official who is entitled to the household

allowance or to one month's basic salary in other cases, provided that he has completed four years of the service and does not receive a similar allowance in his new employment.

For the purpose of calculating his service, account shall be taken of years spent in any administrative status listed in Article 35 of the Staff Regulations other than leave on personal grounds.

...

The resettlement allowance shall be weighted at the rate fixed for the place where the official was last employed.'

7. Under Article 85 of the Staff Regulations: 'Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.'

8. Article 90 of the Staff Regulations provides:

'1. Any person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations... The period shall start to run:

...

— on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request as provided for in paragraph 1.

The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 91.'

9. Next, Article 91 provides that:

'1. The Court of Justice of the European Communities shall have jurisdiction in any dispute between the Communities and any person to whom these Staff Regulations apply regarding the legality of an act adversely affecting such person within the meaning of Article 90(2).

2. An appeal to the Court of Justice of the European Communities shall lie only if:

— the appointing authority has previously had a complaint submitted to it pursuant to Article 90(2) within the period prescribed therein, and

— the complaint has been rejected by express decisions or by implied decision.

...'

Background and proceedings before the Court of First Instance

10. The facts giving rise to this action are adequately set out in paragraphs 2 to 10 of the contested order; I shall therefore note only some essential points, leaving the rest to be gleaned from the order.

11. Mr Hendrickx, an official of the Council resident in Brussels, was seconded at his own request to Cedefop, Thessalonika, to which he was transferred, working for a year and a half from 1 January 1997 under a contract as a member of the temporary staff. By reason of that transfer he was entitled to an installation allowance payable by Cedefop in accordance with Article 24(1) of the Conditions of Employment.

12. When that contract came to an end and after enjoying a period of leave, the applicant resumed service with the Council and

returned to Brussels. On 22 July 1999 he informed the Director of Cedefop of his resettlement and made a request to the Centre's appointing authority for the payment of the relevant resettlement allowance.

13. On 22 November 1999, at the expiry of the period of four months prescribed by Article 90(1) of the Staff Regulations, Mr Hendrickx's request had to be regarded as having been impliedly refused. On 18 February 2000 he lodged a complaint against that implied refusal pursuant to Article 90(2) of the Staff Regulations. That complaint, in turn, was impliedly refused by the appointing authority, which took no decision within the prescribed period of four months. In consequence, on 18 September 2000, Mr Hendrickx brought an action before the Court of First Instance against this implied refusal ('the contested decision').

14. On 14 November 2000 the Director of Cedefop took a new decision awarding the applicant the requested resettlement allowance in the sum of GRD 908 485 pursuant to Article 24(2) of the Conditions of Employment. By the same decision, but pursuant to Article 24(1) of the Conditions of Employment and Article 85 of the Staff Regulations, the Director of Cedefop required the recovery of a sum equal to GRD 1 213 572 which had been overpaid to the applicant by way of a resettlement allowance at the time he took up service in Thessalonika, since his service there turned out to be less than the period of four years upon which the allowance had initially been calculated. Balancing out therefore the amounts paid as debits and credits, the decision required Mr Hendrickx to pay the difference, an amount of GRD 305 087.

15. The decision was produced in the proceedings by Cedefop which asked the Court of First Instance to rule that the action had become devoid of purpose. Mr Hendrickx opposed that request and, arguing that the new decision in part replaced the contested one, sought leave to amend the form of order originally sought in the action.

16. By the contested order the Court of First Instance found that the decision of 14 November 2000 in fact gave the applicant what he was seeking to obtain by his action, as a result of which he had no legal interest in bringing proceedings, and consequently declared that the action had become devoid of purpose.

The appeal before the Court of Justice

The parties' submissions

17. In the present proceedings, with his appeal which, I must confess, does not fall into the error of excessive clarity, the appellant challenges the order of the Court of First Instance and brings two claims before the Court. The main one seeks the annulment of the contested order and leave to amend the heads of claim in the action at first instance to take account of the decision of the Director of Cedefop of 14 November 2000. The alternative, though in reality better seen as a further, separate claim, seeks a declaration from the Court that the abovementioned decision of Cedefop was adopted by an authority lacking competence, and therefore seeks to have the decision set aside, and an order that the defendant should pay the appellant BEF 361 292, by way of resettlement allowance, together with interest and the costs of the proceedings before both courts.

18. In support of his claims, the appellant submits that the Court of First Instance erred in law by ruling that the decision of 14 November 2000 accepted his request for a resettlement allowance without, however, ascertaining whether the amount given to him was that to which he was entitled. Moreover, in the appellant's view, before giving the disputed ruling, the Court of First Instance ought to have ascertained whether that decision was lawful, with regard to the recovery of the alleged overpayment to Mr Hendrickx and the corresponding setting off.

19. As a 'second claim', 'in the alternative', but clearly in support of the first claim described by the appellant as the principal claim, he alleges an error of law on the part of the Court of First Instance in refusing to allow him to amend his heads of claim to take account of the new decision. The latter, he argues, merely confirms the contested decision and therefore, according to the case-law,[2] replaces it thereby constituting the new matter, which, in accordance with Article 42(2) of the Rules of Procedure, may allow the party to make consequential changes to his heads of claim and pleas in law. The appellant claims in particular that he ought to be allowed to argue that the decision of 14 November 2000 prejudices his rights under Article 20 of the Staff Regulations, Articles 5 and 6 of Annex VII thereto, and also under Article 24(2) of the Conditions of Employment in respect both of the fixing of the resettlement allowance and of the recovery of the overpayment of the installation allowance.

2 — In particular, the appellant refers to Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8; Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988] ECR 4131 paragraph 11; and Case T-23/96 *De Persio* v *Commission* [1998] ECR-SC I-A-483 and ECR II-1413, paragraphs 32 to 34.

20. As has been seen, Mr Hendrickx claims 'in the alternative' (though he describes it as the 'principal claim') that the President of Cedefop lacked competence to adopt the decision of 14 November 2000. In essence, he argues that, once the administrative complaint under Article 90(2) had been made, that body was no longer competent to determine a request made in accordance with Article 90(1).

21. First and foremost, Cedefop counters that Mr Hendrickx does not have a legal interest in bringing proceedings, given that the decision of 14 November 2000 accepted his requests in their entirety. The appeal is therefore inadmissible.

22. As to the substance, and in the alternative, the action is in any event unfounded. In contrast to the position maintained by Mr Hendrickx, the decision of 14 November 2000 was taken by a competent authority. The fact that the appellant had made a complaint in accordance with Article 90(2) of the Staff Regulations against the implied refusal of his request for a resettlement allowance does not strip the President of Cedefop of competence to rule on that request under Article 90(1) of the regulations. Moreover, he made his decision only after the administrative procedure had been exhausted, inasmuch as the appeal had been impliedly dismissed by the competent committee within the Centre.

23. As to the appellant's application to adjust his heads of claim to the decision of 14 November 2000, Cedefop contends that the case-law cited by the appellant is not applicable in this case, given that the decision is not only not confirmatory of the contested one, but it also in fact accords to the appellant precisely the allowance which the latter decision refused him. Moreover, it contains two further decisions whose subject-matter is quite distinct from that of the contested decision since they relate, in the first case, to the recovery of the sum overpaid to the appellant by way of installation allowance and, in the second case, to the setting off of the reciprocal credit and debit amounts existing between the two parties. For the Court of First Instance to have allowed the appellant to extend the subject-matter of the dispute to encompass the new decisions just referred to would have meant permitting him to avoid the obligation of making a prior complaint under Article 90(2) of the Staff Regulations. For this reason too, therefore, Cedefop asks that the appeal be declared unfounded.

Assessment

Introduction

24. Notwithstanding the ambiguities of the appeal which have been pointed out, I shall examine the 'principal plea' and 'alternative plea' separately.

25. So as to attempt to bring some small degree of order to the intricate disentangling of the arguments, I think it opportune to note that in my view the decision of the Director of Cedefop of 14 November 2000 is to be seen as a complex act. It consists as a matter of fact of three distinct decisions: a decision on the resettlement allowance, paying credit claimed as such by the appellant from Cedefop; a decision on the installation allowance and the recovery of the overpayment of that allowance; a decision on the setting off of reciprocal debits and credits between the parties, as determined by that decision.

The 'principal plea'

26. I note that the appellant seeks as his 'principal claim' the setting aside of the contested order, on the basis that it did not allow him to amend his pleadings to take account of the 'new' decision which replaced the decision forming the subject-matter of the Court of First Instance's decision, both in respect of the part of the decision relating to the resettlement allowance and of the part relating to the installation allowance and the consequential setting off. Within the principal claim, therefore, two parts may be distinguished, which call for separate consideration which I shall deal with in order.

(a) The part relating to the installation allowance

27. As to this head of claim, I would point out at the outset that I am not at all convinced by Cedefop's argument that, given that the order takes formal note of a decision favourable to the appellant (the decision specifically awarding him the resettlement allowance), the appellant no longer has a legal interest in challenging it, for he is not an unsuccessful party within the meaning of Article 49 (now Article 56) of the EC Statute of the Court of Justice. [3] It seems to me, in fact, that the possibility that the allowance in question was assessed incorrectly, causing loss to the appellant, may give rise to his having an interest in bringing proceedings. This is, moreover, precisely what appears to emerge from the generic and confused complaint about a violation of rights which the appellant seems to make against the decision which forms the basis of the order (see paragraph 19 above).

28. Nor do I find convincing Cedefop's further argument that, in respect of the allowance in question, the decision of 14 November 2000 does not constitute a new factor enabling the appellant — in accordance with Community case-law —

3 — According to which, I note, '[an] appeal [against final decisions of the Court of First Instance] may be brought by any party which has been unsuccessful, in whole or in part, in its submissions'.

to amend his pleadings,[4] because it is hard to deny that the decision of 14 November 2000 constitutes a 'new factor'. Having said that, however, I consider that it is not necessary to dwell on that point since, in my view, the contested order is justified by the fact that the declaration that the action had become devoid of purpose is the necessary consequence of the manner in which the applicant had conducted the proceedings at first instance.

29. Indeed, on that occasion, Mr Hendrickx was given the opportunity of making observations on Cedefop's decision of 14 November 2000 and on the consequent objection of the defendant that the action had become devoid of purpose. Nevertheless, he confined himself to opposing, without giving any reasons, the making of the order taking formal note that the action had become devoid of purpose. Rather, Mr Hendrickx was primarily concerned with requesting the Court of First Instance for leave to amend his pleadings without however offering reasons for that request or at the very least indicating the amendments he intended to make to his pleadings. It is apparent from the case-file that Mr Hendrickx did not argue on that occasion that his rights had been infringed, nor did he dispute the competence of the authority which took the new decision.

4 — See, in addition to *Alpha Steel* v *Commission*, paragraph 8, Joined Cases 351/85 and 360/85 *Fabrique de fer de Charleroi and Dillinger Hüttenwerke* v *Commission* [1987] ECR 3639, paragraphs 10 and 11, and *Stahlwerke Peine-Salzgitter* v *Commission*, paragraph 11.

30. However, I must note that in accordance with Article 38(1) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings is to be stated in the application; Article 42(2) of those rules lays down that no new pleas may be introduced, save in the exceptional circumstances provided for therein, in which matters of law or fact which come to light in the course of the procedure justify a derogation from that prohibition. The party intending to make use of this exceptional opportunity must, moreover, put forward its new pleas in law at the same time as it lodges its application for them to be admitted: this is, indeed, the only possible construction of the content of the last subparagraph of Article 42(2), which states that '[t]he decision on the admissibility of the plea shall be reserved for the final judgment'. Since, in the circumstances of this case, Mr Hendrickx never indicated before the Court of First Instance what new pleas he sought to introduce, his request clearly had to be held to be irregular and devoid of purpose. As such, it could not fittingly serve to broaden the subject-matter of the proceedings, because the latter cannot go beyond the applications and pleadings which the parties have put before the Court.

31. In such a situation it is quite clear that the Court of First Instance could not have allowed the proceedings to continue, giving the appellant leave (even supposing the conditions to have been satisfied) to amend his original pleadings in a sense of which he had given no further details, in relation to an unforeseen act which not only granted him what he had asked for but to which, in addition, he took care not to make specific objections.

32. I conclude that this appeal, in so far as it contends that the Court of First Instance erred in law in not allowing the appellant to amend his pleadings to take account of the unexpected decision granting him the resettlement allowance, is manifestly unfounded.

(b) The part relating to recovery of the overpayment

33. I now turn to the request for the contested order to be set aside inasmuch as it did not allow the appellant to amend his pleadings to take account of the decision on the recovery of the overpayment by way of installation allowance contained in the decision of 14 November 2000. It seems to me that this part of the appeal has in reality the effect of broadening the subject-matter of the proceedings in a way which is irregular and wrongful.

34. The appellant seeks to argue before the Court that the decision on the overpayment of the installation allowance was unlawful, without there being evidence of that argument's having been made before the Court of First Instance. In particular, no evidence whatsoever is to be found in the document in which the appellant made submissions in relation to the defendant's argument that the action had become devoid of purpose and requested leave to amend his original pleadings.

35. Therefore, to allow Mr Hendrickx now to amend his pleadings in the manner indicated would entail the result pointed out in recent Community case-law: 'to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance'. [5]

36. What we find, therefore, in this situation, unlike that previously examined, is not just that the appeal is unfounded: it is a case of manifest inadmissibility which must be declared so by the Court of its own motion.

37. I conclude therefore that this appeal, in so far as it challenges the contested order for not having given the appellant leave to amend his pleadings to take into account the decision of 14 November 2000 relating to the recovery of overpayment of the

5 — See Case C-274/00 P *Simon* v *Commission* [2002] ECR I-5999, paragraph 39. To the same effect, see also, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 62; and Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, paragraph 112.

installation allowance, must be declared manifestly inadmissible.

As to the competence of the Director of Cedefop

38. Finally, as regards the claim made by the appellant in the alternative — but based on that which the appellant himself describes as the 'principal claim' — for a declaration that the decision of 14 November 2000 was taken by an authority lacking competence, I would observe only that it was raised for the first time when challenging the order of the Court of First Instance. This claim too must therefore be rejected as manifestly inadmissible.

Costs

39. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the defendant has applied for costs and as Article 70, which provides that the institutions are to bear their own costs in proceedings between the Communities and their servants, cannot be relied upon in this type of case, since, in accordance with Article 122 of those rules, it applies only to appeals brought by the institutions, I propose that Mr Hendrickx should be ordered to pay the costs of the proceedings before this Court.

Conclusion

40. In the light of the foregoing, I propose that the Court should dismiss the appeal against the order of the Court of First Instance as in part manifestly inadmissible and in part manifestly unfounded, and order the appellant to pay the costs incurred by Cedefop in the proceedings before this Court.