JUDGMENT OF THE COURT (Sixth Chamber)
10 April 2003 *

In Case C-217/01 P,

Michel Hendrickx, an official of the Council of the European Union, residing in Brussels (Belgium), represented by J.-N. Louis and V. Peere, avocats,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities (Fifth Chamber) of 12 March 2001 in Case T-298/00 *Hendrickx* v *Cedefop* (not published in the ECR), seeking to have that order set aside,

the other party to the proceedings being:

Centre européen pour le développement de la formation professionnelle (Cedefop), represented by B. Wägenbaur, Rechtsanwalt,

defendant at first instance,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, F. Macken, N. Colneric (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2002,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 25 May 2001, Mr Hendrickx brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the order of the Court of First Instance of 12 March 2001 in Case T-298/00 *Hendrickx* v *Cedefop* (not published in the

ECR, hereinafter 'the contested order'), by which it held that there was no need to adjudicate on his action for annulment of the implied rejection by the Centre européen pour le développement de la formation professionnelle (European Centre for the Development of Vocational Training, hereinafter 'Cedefop') of his request for payment of a resettlement allowance (hereinafter 'the disputed decision').

Relevant provisions

2 Article 24(1) and (2) of the Conditions of employment of other servants of the European Communities (hereinafter 'the Conditions of Employment') provides:

'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 allowance as provided for 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 service but less than four years' service shall receive a resettlement allowance proportionate to his length of service, incomplete years being disregarded.'

3 Article 6(1) and (4) of Annex VII to the Staff Regulations of the European Communities (hereinafter '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 service and does not receive a similar allowance in his new employment. In cases where a husband and wife who are officials of the Communities are both entitled to the resettlement allowance, this shall be payable only to the person whose basic salary is the higher.

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.

...

4. The resettlement allowance shall be paid against evidence that the official and his family, or, where the official has died, his family only, have resettled at a place situated not less than 70 km from the place where the official was employed.

Resettlement of an official or of the family of a deceased official shall take place within three years of the date of termination of his service.

...'

4 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.'

Facts giving rise to the dispute

5 By contract of 20 December 1996, Cedefop, which is established at Thessalonika (Greece), engaged Mr Hendrickx as a member of its temporary staff in Grade A 7 for a period of one year from 1 January 1997. Mr Hendrickx, a Council official in Grade B 5, had previously obtained, by Council decision of 5 December 1996, his secondment to Cedefop for a period of one year.

6 On taking up his post, he was paid an installation allowance corresponding to his basic salary for two months.

7 On 10 December 1997, the Council extended Mr Hendrickx's secondment to Cedefop for a year.

8 By decision of 15 December 1997, the Director of Cedefop extended Mr Hendrickx's contract as a member of the temporary staff for six months, until 30 June 1998. No extension beyond that date was accorded to him, in spite of his request.

9 An action brought by Mr Hendrickx against the decision not to renew his contract was dismissed by judgment of the Court of First Instance of 13 July 2000 in Case T-87/99 *Hendrickx* v *Cedefop* (ECR-SC I-A-147 and II-679). Mr Hendrickx's appeal against that judgment was dismissed by order of the Court of Justice of 13 March 2002 in Case C-344/00 P *Hendrickx* v *Cedefop* (not published in the ECR).

10 By decision 6 July 1998, the Council reinstated Mr Hendrickx in a post of assistant in Financial Control with effect from 1 July 1998. After taking leave on personal grounds, he resumed his duties at the Council on 1 April 1999.

11 On 22 July 1999, he informed the Director of Cedefop of his and his family's resettlement in Brussels and requested payment of the resettlement allowance.

12 With regard to the fate of that request, the Court of First Instance found as follows:

'11 On 15 September 1999, the applicant sent an electronic mail to Cedefop's finance unit asking what document he had to forward to be entitled to payment of the resettlement allowance and on what bases it was calculated.

12 Since he was informed that his request had been forwarded to Mr Paraskevaïdis, Cedefop's head of administration responsible for advising the AIPN on the establishment of the entitlements of officials and other servants, the applicant sent him on 18 October 1999, an electronic mail requesting contain information as to the settlement of his reinstallation allowance.

13 On 22 November 1999, since Cedefop had made no decision on the applicant's request for payment, it became the subject of an implied rejection (hereinafter "the disputed decision").

14 Since he received no reply from Mr Paraskevaïdis, the applicant repeated his request to him on 29 November 1999.

15 On 23 December 1999 Mr Paraskevaïdis sent the applicant the following reply:

"As you know perhaps, there has recently been a decision of the Court of First Instance in a case brought by another of our former members of the temporary staff against Cedefop, which makes clear that, if the installation allowance has been paid at the outset in its entirety (3/3) and if it is established that the member of the temporary staff did not complete four years of service prior to his departure, any difference between what has been paid and the sum properly due must be repaid to the Centre.

Given that you have [completed] less than half of the period of four years mentioned in the regulations, and that at the outset you received the full sum for the three years, you would first have to reimburse half of it and then receive back part of that sum by way of resettlement allowance. In net terms therefore, you would owe money to the Centre rather than being entitled to a payment from it.

I think, anyway, that it is better now to await the conclusion of the case which you have brought before the CFI before doing anything else in this matter. The reasoning of the judgment to be delivered should largely determine the actions of those concerned, since one will then know whether the conditions under the Staff Regulations for the Centre to be required to call for repayment of half of the installation allowance are met or whether (according to the CFI) you are, on the contrary, entitled to payment of the full resettlement allowance without any deduction or set-off.

We shall therefore return to this particular matter when we know more of the main case...."

16 By fax dated 18 February 2000, the applicant sent Cedefop's AIPN a complaint under Article 90(2) of the Staff Regulations...

17 In the absence of a reply from the AIPN, that claim became the subject of an implied rejection.'

Proceedings before the Court of First Instance

13 It was in those circumstances that Mr Hendrickx, by application lodged at the Registry of the Court of First Instance on 18 September 2000, brought an action for annulment of the disputed decision and an order that Cedefop pay the costs.

14 The steps taken in the proceedings are described in the contested order as follows: By document lodged at the Registry of the Court of First Instance on 14 November 2000, Cedefop asked the Court of First Instance to declare that there was no need to adjudicate on the action. It annexed to its request a decision of 14 November 2000 relating to the payment of the resettlement allowance claimed by the applicant.

15 That decision stated:

'...

1. Pursuant to the provisions of Article 24(2) of the [Conditions of employment of other servants of the European Communities] and to Article 6 of Annex VII to the Staff Regulations, a resettlement allowance of [GRD] 908 485 Greek drachmas is to be paid to Mr Hendrickx in respect of his services as a member of the temporary staff of the Centre for the period 01.01.1997-30.06.1998.

2. Pursuant to the provisions of Article 24(1) of the [Conditions of employment of other servants of the European Communities] and to Article 85 of the Staff Regulations, the overpaid part of the installation allowance amounting to [GRD] 1 213 572 is to be recovered.

3. Following the usual practice of the Community institutions, the set-off between the two amounts is to be effected by the payment by Mr Hendrickx of the balance of [GRD] 305 087 to Cedefop's bank account no later than 31 December 2000.

4. This decision takes effect on 14.11.2000.'

16 In support of its request for a declaration that there was no need to adjudicate, Cedefop argued that it was clear from Mr Paraskevaïdis's letter of 23 December 1999 that the applicant's right to payment of a resettlement allowance had never been disputed, but that, on the contrary, it had been confirmed to him. His action had therefore become devoid of purpose.

17 Mr Hendrickx argued that he still had an interest in pursuing the proceedings before the Court of First Instance. He submitted that the decision of 14 November

2000 partially replaced the disputed decision. Consequently, the decision of 14 November 2000 constituted, according to him, a new factor entitling him to amend his heads of claim and pleas in law. Mr Hendrickx therefore formally claimed that the application for a declaration that there was no need to adjudicate be rejected and that he be given leave to amend his heads of claim and pleas in law.

The contested order

18 By the contested order the Court of First Instance declared that there was no need to adjudicate on Mr Hendrickx's action.

19 The Court of First Instance explained that decision, in paragraphs 44 to 48 of the contested order, in the following terms:

'44 It is, admittedly, true that in the interests of the proper administration of justice and of the requirement of procedural economy, heads of claim directed against a decision which is replaced, during the course of proceedings, by a decision with the same subject-matter, may be regarded as being directed against the replacement decision because the latter decision constitutes a new factor which entitles the applicant to amend his heads of claim and pleas in law (see, among others, Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8, and Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988] ECR 4131, paragraph 11).

45 However, the subject of the applicant's action is the claim for annulment of Cedefop's implied decision refusing him the benefit of the resettlement allowance following his transfer back to Brussels.

46 By the decision of 14 November 2000 the applicant specifically obtained payment of that allowance. In the terms of that decision, "a resettlement allowance of GRD 908 485 is to be paid to Mr Hendrickx in respect of his services as a member of the temporary staff of the Centre for the period 01.01.1997-30.06.1998".

47 That finding is not undermined by the fact that Cedefop decided to recover simultaneously the overpayment of part of the allowance paid to the applicant following his installation at Thessalonika.

48. Therefore, in view of the decision of 14 November 2000, this action has become devoid of purpose.'

The appeal

20 In his appeal, in support of which he raises two pleas in law, Mr Hendrickx claims that the Court should:

— set aside the contested order and, giving judgment itself:

— grant him leave to amend his pleas in law and heads of claim;

— in the alternative, declare that the decision of the Director of Cedefop of 14 November 2000 was taken by an incompetent authority; consequently, annul that decision as well as Cedefop's implied decision rejecting the appellant's claim for payment of a resettlement allowance corresponding to two months' basic salary; and

— order Cedefop to pay him the sum of BEF 361 292 together with default interest at the rate of 7% per annum from 22 July 1999;

— order Cedefop to pay the costs of both sets of proceedings.

21 Cedefop contends that the appeal should be dismissed and the appellant ordered to pay all the costs.

The plea in law based on the refusal to grant Mr Hendrickx leave to amend his pleas in law and heads of claim in respect of the decision of 14 November 2000

Arguments of the parties

22 Under his second plea in law, which it is appropriate to consider first, Mr Hendrickx claims that the Court of First Instance committed an error of law by not allowing him to amend his heads of claim and pleas in law and, as a

result, by not enabling him to submit to the Community Court the dispute between him and Cedefop, first, as to the determination of the resettlement allowance to which he is entitled by reason of his transfer back to the Council in Brussels and, second, as to the recovery of a so-called overpayment of the installation allowance which was paid to him when he took up his duties in Thessalonika.

23 Mr Hendrickx submits that the decision of 14 November 2000 was a decision confirming the disputed decision. He points out, in that regard, the content of Mr Paraskevaïdis's message of 23 December 1999. Mr Paraskevaïdis encouraged him to submit a complaint against the implied rejection of his request, setting out in it the plea establishing that, as a seconded established official, he was entitled, on taking up his duties at Cedefop, to an installation allowance corresponding to his basic salary for two months and to the payment of the same allowance on his transfer back to Brussels in accordance with Article 20 of the Staff Regulations, Articles 5 and 6 of Annex VII thereto, as well as Article 24(2) of the Conditions of Employment.

24 Mr Hendrickx argues that, since his complaint had been made the subject only of an implied rejection, it was open to him to put forward, in his action for annulment, only pleas directly related to the disputed decision. In the light of the case-law of the Court of First Instance and of the Court of Justice, according to which an applicant may amend his pleas in law and heads of claim following the replacement, in the course of proceedings, of the contested decision by a decision with the same subject-matter (*Alpha Steel* v *Commission*, cited above, paragraph 8; *Stahlwerke Peine-Salzgitter* v *Commission*, cited above, paragraph 11, and Case T-23/96 *De Persio* v *Commission* [1998] ECR-SC I-A-483 and II-1413, paragraphs 32 to 34), he maintains that the Court of First Instance could not refuse him leave to amend his pleas and claims and, in particular, those establishing that Cedefop calculated the installation and resettlement allowances in disregard of his status as a seconded official.

25 Mr Hendrickx also complains that he has been deprived, first, of the right to dispute the application to his resettlement allowance of the weighting applicable

to officials posted to Greece and, second, of the right to plead infringement of the second subparagraph of Article 6(1) of Annex VII to the Staff Regulations, as well as of the principles resulting from the judgments of the Court of First Instance in Case T-42/89 *Yorck von Wartenburg* v *Parliament* [1990] ECR II-31 and Case T-42/89 OP *Parliament* v *Yorck von Wartenburg* [1990] ECR II-299.

26 Cedefop disputes the relevance of the case-law cited by Mr Hendrickx. The decision of 14 November 2000 was not a replacement measure in the sense contemplated in that case-law since it does not replace the decision of implied rejection of the request for grant of the resettlement allowance. The decision of 14 November 2000 accorded Mr Hendrickx the payment of the resettlement allowance which was the subject of his action at first instance. As a result of this, the action has become devoid of purpose.

27 Cedefop points out that the object of the recovery of the installation allowance, just like the set-off between the two sums with which the decision of 14 November 2000 dealt simultaneously, is clearly distinct from the resettlement allowance.

28 Cedefop notes that Mr Hendrickx did not submit a complaint, within the meaning of Article 90(2) of the Staff Regulations in relation to the decision of 14 November 2000. According to Cedefop, Mr Hendrickx cannot avoid the rule according to which an action against a challengeable act must be preceded by a complaint within the meaning of the Article 90(2) of the Staff Regulations. Granting the appellant leave to amend his claims and pleas at first instance would entail enabling him to evade his obligation to submit a prior complaint.

Findings of the Court

29 According to the case-law of the Court of Justice, an applicant may amend his heads of claim and pleas in law following the replacement, in the course of the proceedings, of the contested decision by a decision with the same subject-matter (see, in particular, *Alpha Steel* v *Commission*, paragraph 8, and *Stahlwerke Peine-Salzgitter* v *Commission*, paragraph 11).

30 In this case, the disputed decision impliedly rejects the request for payment of a resettlement allowance submitted by Mr Hendrickx whereas the decision of 14 November 2000, while it leads, in the end, to an even more unfavourable result for him, recognises his right to payment of the allowance claimed. Thus, the express decision of 14 November 2000, whose purpose was to effect a set-off between the amount overpaid to Mr Hendrickx on his installation at Thessalonika and the amount of the sums which are due to him in respect of his return to Brussels, cannot be regarded as having the same subject as the earlier implied rejection.

31 It follows that amendment of the claims and pleas at first instance was not permitted. The Court of First Instance therefore correctly decided, at paragraphs 43 to 49 of the contested order, to refuse the appellant leave to amend his claims and pleas.

32 In those circumstances, this plea in law must be rejected.

The plea in law alleging lack of competence on the part of the Director of Cedefop

Arguments of the parties

33 Mr Hendrickx submits that the decision of 14 November 2000, taken by the Director of Cedefop, is a non-existent decision since it was adopted by an authority which lacked competence.

34 In that respect, Mr Hendrickx sets out in detail the division of spheres of competence in relation to the powers of the appointing authority/authority authorised to conclude contracts 'AHCC' at Cedefop. He maintains that the powers of the appointing authority/AHCC in respect of complaints within the meaning of Article 90(2) of the Staff Regulations have been delegated to the Claims Committee and that therefore that committee was the only authority competent to decide on the merits of his complaint submitted on 18 February 2000. However, the President of the Staff Committee informed him, by letter of 15 September 2000, that the Claims Committee did not, on that date, know of that letter.

35 Cedefop contends that this plea in law is inadmissible because Mr Hendrickx has no *locus standi* since the decision of 14 November 2000 granted his request in full.

36 In any event, the first plea is unfounded because the Director of Cedefop was the authority competent to adopt the decision of 14 November 2000.

Findings of the Court

37 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 former, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the Court of First Instance (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59; and the orders in Case C-422/97 P *Sateba* v *Commission* [1998] ECR I-4913, paragraph 30; Case C-437/98 P *Infrisa* v *Commission* [1999] ECR I-7145, paragraphs 28 and 29, and in Case C-274/00 P *Simon* v *Commission* [2002] ECR I-5999, paragraph 39).

38 It is clear from the documents before the Court that, at first instance, Mr Hendrickx never raised the issue of the lack of competence on the part of Cedefop's Director to take the decision of 14 November 2000. This plea in law must therefore be rejected as inadmissible.

39 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

40 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Cedefop has applied for costs and the latter has been unsuccessful in his appeal, he must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Mr Hendrickx to pay the costs.**

Puissochet Gulmann Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 10 April 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber