Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

15 July 2021 *

(Reference for a preliminary ruling – Articles 268, 270, 340 and 343 TFEU – Protocol (No 7) on the privileges and immunities of the European Union – Articles 11, 17 and 19 – Former member of the European Commission – Immunity from jurisdiction – Claim for non-contractual liability – Waiver of immunity – Jurisdiction of the Court of Justice of the European Union)

In Case C-758/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece), made by decision of 18 June 2019, received at the Court on 16 October 2019, in the proceedings

OH

v

ID,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– OH, by G. Trantas, dikigoros,

– ID, by E. Politis, dikigoros,

– the European Commission, by M. Konstantinidis, T.S. Bohr and S. Delaude, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2021,

* Language of the case: Greek.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 343 TFEU and of Articles 11, 17 and 19 of the Protocol (No 7) on the privileges and immunities of the European Union (OJ 2016 C 202, p. 266; 'the Protocol on privileges and immunities').

2 The request has been made in proceedings between OH, a former member of the temporary staff of the European Commission, and ID, a former European Commissioner of Greek nationality ('the member of the Commission') concerning wrongful conduct which OH attributes to ID and which, it is claimed, led the Commission to terminate OH's employment contract.

Legal context

EU law

3 Under Article 11(a) of the Protocol on privileges and immunities:

'In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office.'

4 Article 17 of the Protocol provides:

'Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union.

Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.'

5 Article 19 of that protocol states:

'Articles 11 to 14 and Article 17 shall apply to the President of the European Council.

They shall also apply to Members of the Commission.'

Greek law

6 In accordance with Article 3(2) of the Kodikas Politikis Dikonomias (Code of Civil Procedure), foreign nationals who enjoy immunity from jurisdiction fall outside the jurisdiction of the Greek courts, unless the dispute concerns substantive rights in immovable property.

7 Furthermore, pursuant to Article 24 of the Code of Civil Procedure, Greek nationals who enjoy jurisdictional immunity and employees of the State serving abroad are subject to the jurisdiction of the courts of their place of residence before they were expatriated or, if they were not resident in Greece, the courts of the capital of that Member State.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 On 1 November 2014, OH was recruited as a member of the temporary staff by the Commission, pursuant to Article 2(c) of the Conditions of Employment of Other Servants of the European Union ('the CEOS'), to serve as Deputy Head of Cabinet in the office of the member of the Commission, classifying him in grade AD 12, step 2.

9 From 1 October 2015, OH was given the post of expert in that cabinet, and was classified in grade AD 13, step 2.

10 By letter of 27 April 2016, the Commission notified OH of the termination of his employment contract as a member of the temporary staff with effect from 1 August 2016, on grounds of the breakdown in the relationship of trust with the member of the Commission.

11 On 27 July 2016, OH lodged a complaint under Article 90 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') against the decision to terminate his contract, which the Commission rejected on 28 November 2016.

12 On 10 March 2017, OH brought an action before the General Court of the European Union against that decision to reject the complaint.

13 By judgment of 10 January 2019, *RY* v *Commission* (T-160/17, EU:T:2019:1), the General Court annulled the Commission's decision terminating OH's contract on the ground that his right to a prior hearing had not been respected. According to the General Court, the Commission had failed to prove that OH had been afforded the opportunity to effectively make his views known before the termination of his contract.

14 Following that judgment, OH was heard by the Commission, which, again, terminated his employment contract by decision of 10 April 2019. OH then lodged a fresh complaint under Article 90 of the Staff Regulations against that decision, which the Commission rejected on 14 August 2019.

15 On 2 December 2019, OH brought an action before the General Court for annulment of the latter rejection decision. By judgment of 13 January 2021, *RY* v *Commission* (T-824/19, not published, EU:T:2021:6), the General Court dismissed that action.

16 In September 2017, in parallel with the proceedings brought before the General Court, OH brought an action before the referring court, the Polymeles Protodikeio Athinon (Court of First Instance, Athens, Greece), seeking an order requiring the member of the Commission to compensate him for the damage which he claims to have suffered as a result of the latter's defamatory allegations against him, accusing him of being the cause of the breakdown in the relationship of mutual trust and of deficiencies in the performance of his duties. That conduct on the part of the member of the Commission led to the termination of OH's employment contract by the Commission, thereby causing him material damage, which he assesses in the amount of EUR 452 299, corresponding to a loss of earnings for the period from 1 November 2016 to 31 October 2019. OH also asks the referring court to order the member of the Commission to pay him the sum of EUR 600 000 in respect of non-material damage, and to order him to withdraw the false and defamatory allegations which OH claims have caused him damage.

17 The referring court notes that OH's action is directed against a former European Commissioner who, although a Greek national, enjoys a privilege of jurisdictional immunity under Article 343 TFEU and Articles 11, 17 and 19 of the Protocol on privileges and immunities. In that context, that court entertains doubts as to the interpretation to be given to the relevant EU rules and its jurisdiction to hear such a dispute.

18 Furthermore, it is apparent from the order for reference that, on 22 December 2017, the Commission's Directorate-General for Human Resources and Security issued a certificate to the effect that '[the member of the Commission] is immune from legal proceedings in respect of acts performed by him in [that] capacity, including his words spoken or written, in accordance with Articles 11 and 19 of [the Protocol on privileges and immunities]. Immunity may be waived by the College of Commissioners at the request of a national court, unless waiver of such immunity is contrary to the interests of the Union'.

19 In those circumstances, the Polymeles Protodikeio Athinon (Court of First Instance, Athens) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the terms "immunity from legal proceedings" and "immunity", as formulated and for the purpose which they serve in Article 11 of the [Protocol on privileges and immunities], identical?

(2) Does the immunity from legal proceedings/immunity envisaged in Article 11 of the [Protocol on privileges and immunities] include and cover, in addition to criminal prosecutions, civil claims made in actions against members of the Commission by injured third parties?

(3) Is waiver of the Commissioner's immunity from legal proceedings/immunity also possible in the context of a civil action brought against him, such as the action under consideration? If it is, who must initiate the waiver procedure in question?

(4) Do the Courts of the European Union have jurisdiction to rule on a non-contractual claim in tort, such as that at issue here, against a member of the Commission?'

Consideration of the questions referred

The fourth question

20 By its fourth question, which it is appropriate to examine in the first place, the referring court is asking, in essence, whether the Court of Justice of the European Union has jurisdiction to hear and determine an action for non-contractual liability brought by a former member of the temporary staff of the Commission on account of wrongful conduct which he attributes to the member of that institution for whom he was an employee and which, it is claimed, led the institution to terminate the employment relationship with that member of staff.

21 In the first place, it must be pointed out that, in accordance with Article 268 TFEU, read in conjunction with the second and third paragraphs of Article 340 TFEU, the Court of Justice has jurisdiction in disputes relating to compensation for damage caused by the institutions of the European Union or by their servants in the performance of their duties.

22 Furthermore, it is settled case-law that the Court of Justice has exclusive jurisdiction in disputes involving the non-contractual liability of the European Union, to the exclusion of national courts and tribunals (see, to that effect, judgments of 13 February 1979, *Granaria*, 101/78, EU:C:1979:38, paragraph 16, and of 29 July 2010, *Hanssens-Ensch*, C-377/09, EU:C:2010:459, paragraph 17).

23 That is the case, in particular, for an action for compensation in respect of damage allegedly caused by servants of the European Union as a result of acts which, by virtue of an internal and direct relationship, constitute the necessary extension of tasks entrusted to the institutions (see, to that effect, judgment of 10 July 1969, *Sayag*, 9/69, EU:C:1969:37, paragraph 7).

24 In the second place, as the Court has stated on numerous occasions, any dispute between an official or servant of the European Union and the institution to which he or she belongs, where that dispute originates in the employment relationship between the person concerned and that institution, even in the case of an action for compensation, falls within the scope of Article 270 TFEU and Article 91(1) of the Staff Regulations (judgments of 10 September 2015, *Review Missir Mamachi di Lusignano* v *Commission*, C-417/14 RX-II, EU:C:2015:588, paragraph 38, and of 4 June 2020, *Schokker* v *EASA*, C-310/19 P, not published, EU:C:2020:435, paragraph 50).

25 First, Article 270 TFEU provides that the Court of Justice is to have jurisdiction in any dispute between the European Union and its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS. Second, Article 91(1) of the Staff Regulations provides that the Court of Justice is to have jurisdiction in any dispute between the European Union and any person to whom the Staff Regulations apply concerning the legality of an act affecting such person adversely.

26 In the present case, it is apparent from the request for a preliminary ruling that the action for non-contractual liability was brought before the referring court by OH, in his capacity as a former member of the temporary staff of the Commission, against a former European Commissioner.

27 Moreover, the referring court states that the material and non-material damage in respect of which OH seeks compensation from the member of the Commission is based on that member's allegedly defamatory allegations, in that he complained that OH was the cause of the breakdown in the relationship of mutual trust and that he had failed to perform his duties, which allegations led the Commission to terminate his employment contract with that institution.

28 In that connection, as the Advocate General observes in points 37 and 42 of his Opinion, in the main proceedings, the alleged damage follows from the breakdown in the working relationship itself, since the member of the Commission stated that he no longer trusted OH. Such a statement is necessarily part of the performance of the duties entrusted to the member of the Commission. That statement was provided in support of the latter's decision that he no longer wished to avail of OH's services, since that decision came within his assigned powers to organise his cabinet by surrounding himself with persons with whom he has a relationship of trust, in such a way as to enable him to best perform the tasks entrusted to him as a European Commissioner.

29 It follows that conduct, such as that alleged by OH against the member of the Commission, relates in reality to the management by the latter of the staff of his cabinet. Such conduct must therefore be regarded as an inextricable part of the performance of that member's duties, as a necessary extension of the tasks entrusted to him in that capacity, within the meaning of the case-law of the Court cited in paragraph 23 of the present judgment.

30 Furthermore, it is clear from the documents before the Court that the applicant in the main proceedings was recruited, in accordance with Article 2(c) of the CEOS, as a member of the temporary staff of the Commission.

31 Accordingly, if it were to transpire that the causal link between, on the one hand, the conduct alleged against the member of the Commission and, on the other hand, the damage alleged by OH, is not direct – inasmuch as that damage was caused by the final dismissal decision adopted on 27 April 2016 by the Director-General of the Commission's Directorate-General for Human Resources and Security, even if the member of the Commission had been the cause of the procedure which led to the adoption of that decision – the dispute in the main proceedings would stem from the employment relationship between OH and an EU institution, namely the Commission.

32 Furthermore, OH maintains that the conduct for which he criticises the member of the Commission not only harmed his future and professional activity within the European Union, but also resulted in a loss of earnings in the amount of EUR 452 299.32 which he would have received from the Commission had his employment contract not been terminated prematurely.

33 In those circumstances, the action for non-contractual liability brought by a former member of the temporary staff of the European Union, such as OH, for alleged misconduct on the part of the former member of the Commission, for whom he was a direct employee, against the latter's decision not to pursue that collaboration, stems from the employment relationship between that member of the temporary staff and the Commission. Such an action therefore falls within the scope of Article 270 TFEU and Article 91(1) of the Staff Regulations, made applicable by Article 46 of the CEOS. The action also falls within the scope of Article 268 TFEU, read in conjunction with Article 340 TFEU, since it seeks compensation for the harmful consequences of allegedly wrongful acts committed by a member of the Commission in the performance of his duties.

34 Consequently, in accordance with those provisions, the Court of Justice has exclusive jurisdiction to rule on such a dispute.

35 In the light of the foregoing considerations, the answer to the fourth question is that the Court of Justice has exclusive jurisdiction, to the exclusion of national courts, to hear and determine an action for non-contractual liability brought by a former member of the temporary staff of the Commission on account of wrongful conduct which he attributes to the member of that institution, for whom he was an employee and which, it is claimed, led the institution to terminate the employment relationship with that member of staff. Such an action must be directed not against the member of the Commission concerned, but against the European Union, represented by the Commission.

The first, second and third questions

36 Given the answer given to the fourth question, there is no need to answer the first, second and third questions, since the referring court does not have jurisdiction to rule on the dispute in the main proceedings.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The Court of Justice of the European Union has exclusive jurisdiction, to the exclusion of national courts, to hear and determine an action for non-contractual liability brought by a former member of the temporary staff of the European Commission on account of wrongful conduct which he attributes to the member of that institution, for whom he was an employee and which, it is claimed, led the institution to terminate the employment relationship with that member of staff. Such an action must be directed not against the member of the Commission concerned, but against the European Union, represented by the Commission.

[Signatures]