Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

25 June 2020*

(Appeal — Arbitration clause — Staff of EU international missions — Internal competition — Non-renewal of a contract of employment — Measure separable from the contract)

In Case C-730/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 November 2018,

SC, represented by A. Kunst, Rechtsanwältin and L. Moro, avvocatessa,

appellant,

the other party to the proceedings being:

Eulex Kosovo, represented by E. Raoult, avocate,

defendant at first instance,

THE COURT (First Chamber),

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

Advocate General: E. Tanchev,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2019,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2020,

gives the following

Judgment

1 By her appeal, SC asks the Court of Justice to set aside the order of the General Court of the European Union of 19 September 2018, *SC* v *Eulex Kosovo* (T-242/17, EU:T:2018:586) ('the order under appeal'), by which the General Court dismissed her action seeking, on the basis of Articles 272 and 340 TFEU, first, a declaration that Eulex Kosovo had breached its contractual and non-contractual obligations towards her, secondly, a declaration that the internal competition organised by Eulex Kosovo in 2016

* Language of the case: English.

to fill the post of prosecutor (competition EK30077) ('the 2016 internal competition') and the non-renewal of her contract of employment were unlawful and, thirdly, to obtain compensation for the material and non-material damage resulting from the breach, by Eulex Kosovo, of its contractual and non-contractual obligations.

Legal context

2 Article 10(3) of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, Eulex Kosovo (OJ 2008 L 42, p. 92), provides:

'The conditions of employment and the rights and obligations of international and local staff shall be laid down in the contracts to be concluded between Eulex Kosovo and the staff member concerned.'

Background to the dispute

3 The Eulex Kosovo mission was established by Joint Action 2008/124 and has subsequently been extended several times.

4 SC was employed by Eulex Kosovo as a prosecutor on the basis of five successive fixed-term contracts during the period from 4 January 2014 to 14 November 2016. The first two contracts contained an arbitration clause designating the 'courts of Brussels' (Belgium) as having jurisdiction in the event of any dispute arising out of the contract. The last three contracts provided, in Article 21 thereof, that disputes relating to the contract were to be 'referred to the jurisdiction of the Court of Justice of the European Union, pursuant to Article 272 [TFEU]'.

5 Article 1.2 of the last contract between Eulex Kosovo and the appellant states that 'the following documents shall form an integral part of the contract (once approved): the CONOPS/OPLAN, including the Code of Conduct (CoC) and the relevant Standard Operating Procedures (SOP)'.

6 On 1 July 2014, SC received notification from her direct supervisor that an internal competition was being organised for the post of prosecutor, as, under the Operation Plan ('OPLAN'), the number of prosecutors was to be reduced and Article 4.3 of the standard operating procedures for the reorganisation ('the SOP relating to the reorganisation') provided for the holding of a competition in such circumstances. The internal competition took place in summer 2014 and was subsequently annulled.

7 On 24 June 2016, SC was informed by letter from Eulex Kosovo's human resources unit that a new internal competition for the post of prosecutor was planned for July 2016, due to the reduction in the number of available posts.

8 By letter, from the head of the human resources unit of 30 September 2016, SC was informed that she had not passed the 2016 internal competition ('the decision relating to the 2016 internal competition'). By the same letter, SC was informed that her employment contract, which expired on 14 November 2016, would not be renewed and that the arrangements in respect thereof would be notified to her at a later date ('the decision not to renew the contract of employment').

9 By letter of 10 October 2016, SC lodged a complaint with the Head of Mission against the decision relating to the 2016 internal competition and the decision not to renew the contract of employment.

10 By letter of 31 October 2016, the Head of Mission rejected SC's complaint.

The action before the General Court and the order under appeal

11 By application lodged at the Registry of the General Court on 25 April 2017, SC brought an action comprising, in essence, four heads of claim. The first and second heads of claim, requested the General Court to find that Eulex Kosovo had failed to fulfil its contractual and non-contractual obligations. By the third head of claim, SC asked the General Court to find that the decision relating to the 2016 internal competition and the decision not to renew the contract of employment were unlawful. The fourth head of claim sought an order that Eulex Kosovo pay compensation for the material and non-material damage which resulted from the breach of its contractual and non-contractual obligations.

12 In support of that action, SC put forward five pleas in law. The first plea was based on an infringement of the SOP relating to the reorganisation and of the standard operating procedures relating to the selection of staff. The second plea was based on infringement of those standard operating procedures, the code of conduct and discipline of Eulex Kosovo, the contractual principles of fairness and good faith and the right to sound administration. The third to fifth pleas were based, in essence, on infringement of various principles of EU law and of decisions adopted by Eulex Kosovo. In addition, SC invoked the contractual and non-contractual liability of Eulex Kosovo.

13 By separate document lodged at the General Court Registry on 24 August 2017, Eulex Kosovo raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court. The appellant submitted her observations in that regard on 20 October 2017.

14 By the order under appeal, the General Court, without examining that plea of inadmissibility, dismissed, pursuant to Article 126 of its Rules of Procedure, the action brought by SC as being, in part, manifestly inadmissible and, in part, manifestly lacking any foundation in law.

15 In order to establish the manifest inadmissibility of the third head of claim in that action, first, the General Court held that the decision relating to the 2016 internal competition was separable from the contract of employment between SC and Eulex Kosovo ('the contract of employment'). Secondly, the General Court held that the decision not to renew the contract of employment was also separable from that contract. On the basis of those factors, thirdly, the General Court held that that head of claim should be regarded as an application for annulment under Article 263 TFEU and that that application should be dismissed as manifestly inadmissible in so far as it was brought out of time by SC.

Forms of order sought

16 By her appeal, SC claims that the Court of Justice should:

– set aside the order under appeal;

– principally, allow the action at first instance, except as regards the fifth plea in law;

– in the alternative, refer the case back to the General Court; and

– order Eulex Kosovo to pay the costs of both sets of proceedings.

17 Eulex Kosovo contends that the Court should:

– dismiss the appeal; and

– order SC to pay the costs.

The appeal

18 SC relies on five grounds in support of her appeal. The first ground alleges infringement of Article 272 TFEU. The second ground alleges infringement of that article, of the right to an effective remedy and of the principle of equal treatment. The third ground alleges infringement of the SOP relating to the reorganisation, the right to sound administration, the principle of impartiality and the obligation to state reasons. The fourth ground alleges infringement of Articles 268 and 270 TFEU. The fifth ground alleges infringement of those articles and of Article 272 TFEU and of Articles 31 and 41 of the Charter of Fundamental Rights of the European Union.

Arguments of the parties

19 By the third part of her second ground of appeal, which should be examined first, SC submits that the General Court erred in law by holding that the decision relating to the 2016 internal competition and the decision not to renew the contract of employment were to be regarded as administrative decisions separable from that contract and, consequently, that they could not be challenged on the basis of Article 272 TFEU.

20 As regards, in the first place, the decision relating to the 2016 internal competition, SC submits that that decision was taken on the basis of the SOP relating to the reorganisation. In that context, the General Court could not validly consider that that decision had not been taken on the basis of the contract of employment, as Article 1.2 of that contract expressly stated that the standard operating procedures 'form an integral part of the contract' in the same way as the OPLAN.

21 In those circumstances, the General Court erred in law in holding that SC had not raised any plea alleging breach of the terms of the contract between her and Eulex Kosovo, whereas she had raised several pleas alleging breach of the SOP relating to the reorganisation.

22 As regards, in the second place, the decision not to renew the contract of employment, SC submits that the General Court has held in several cases that such a decision was linked to the contract. The mere absence in the contract of a clause providing for its renewal does not affect the validity of such a conclusion.

23 SC adds that the approach adopted by the General Court in the order under appeal would lead to Eulex Kosovo's contract staff being systematically prevented from challenging the major part of their employment grievances before the Court of Justice and, in particular, from calling into question the most serious decisions taken concerning them. Such an approach constitutes an infringement of Article 47 of the Charter of Fundamental Rights and of the principle of equal treatment.

24 Eulex Kosovo argues that the approach adopted by the General Court is in line with the Court of Justice's settled case-law that Article 272 TFEU must be interpreted restrictively.

25 The arbitration clause set out in the contract of employment covers only disputes arising out of or in connection with that contract. Therefore, only issues which cannot be separated from the contract fall within the jurisdiction of the General Court under Article 272 TFEU. However, while the measures adopted to implement the decisions of the Council of the European Union do have consequences for Eulex Kosovo's contract staff, they should nevertheless be considered as administrative acts separable from that contract.

26 Thus, the decision relating to the 2016 internal competition is based on a decision external to Eulex Kosovo and not on the contract. That external decision was transcribed in the OPLAN and then implemented within the framework defined by the standard operating procedures.

27 In this respect, the OPLAN and the standard operating procedures cannot be regarded as contractual documents. Admittedly, it is apparent from Article 1.2 of the contract of employment that those documents form an integral part of that contract. These are, however, measures of general scope and are not necessarily limited to contractual issues.

28 As regards the decision not to renew the contract of employment, the General Court rightly based its conclusions on the absence of a clause, in the contract between Eulex Kosovo and SC, relating to its renewal.

29 Furthermore, SC is not justified in criticising the General Court for having declined its general jurisdiction on the basis of the arbitration clause, since the General Court merely dismissed the action as being, in part, manifestly inadmissible and, in part, manifestly lacking any foundation in law, without precluding the possibility of an action being brought under Article 263 TFEU.

Findings of the Court

30 As a preliminary point, it should be recalled that Article 272 TFEU is a specific provision allowing the Courts of the European Union to be seised under an arbitration clause agreed by the parties for contracts governed by either public or private law, and without restriction as regards the nature of the action to be brought before the Courts of the European Union (judgments of 26 February 2015, *Planet* v *Commission*, C-564/13 P, EU:C:2015:124, paragraph 23, and of 7 November 2019, *Rose Vision* v *Commission*, C-346/18 P, not published, EU:C:2019:939, paragraph 99).

31 Moreover, it is clear from the Court's settled case-law that an action for annulment for the purposes of Article 263 TFEU must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 16; see also, to that effect, judgment of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 8).

32 Nevertheless, as the General Court pointed out in paragraph 36 of the order under appeal, where there is a contract between the applicant and one of the institutions, an action may be brought before the EU judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside of the contractual relationship between the parties and which involve the exercise of public powers conferred on the contracting institution in its capacity as administrative authority (judgments of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 20, and of 28 February 2019, *Alfamicro* v *Commission*, C-14/18 P, EU:C:2019:159, paragraph 50).

33 In the present case, the General Court held, in paragraphs 39 and 45, respectively, of the order under appeal, that the decision relating to the 2016 internal competition and the decision not to renew the contract of employment were not based on the contract of employment. It inferred from this, in paragraph 46 of the order under appeal, that, although SC expressly based the third head of claim in her action at first instance on Article 272 TFEU, that head of claim had to be regarded as an application for annulment brought on the basis of Article 263 TFEU.

34 In the first place, in order to find that the decision relating to the 2016 internal competition was separable from the contract of employment, the General Court noted, first, in paragraph 40 of the order under appeal, that that competition was organised by Eulex Kosovo following the decision to reduce staff for that mission which resulted from the approval of the OPLAN by the Council and the

approval of the Eulex Kosovo deployment plan by the Civilian Operations Commander. The General Court concluded from this that the decision to hold the competition was an administrative act which was not taken on the basis of the contract of employment.

35 The General Court then relied, in paragraph 41 of the order under appeal, on the fact that the decision on the 2016 internal competition was adopted by the selection board in the context of the scheme described in paragraph 40 of that order and concluded, in paragraph 42 of that order, that the decision relating to the 2016 internal competition was outside the contractual relationship between SC and Eulex Kosovo and resulted from the exercise of the prerogatives of public authority conferred on Eulex Kosovo in its capacity as an administrative authority.

36 However, it should be noted, first, that, in holding that the decision relating to the 2016 internal competition was taken in the context of a scheme defined by the OPLAN and the Eulex Kosovo deployment plan, the General Court described incompletely the legal framework governing the adoption of that decision. As SC submits and as, moreover, is agreed by Eulex Kosovo, the arrangements for organising that competition were also defined, in part, by the SOP relating to the reorganisation.

37 Secondly, as regards the contractual or statutory nature of the rules provided for in the OPLAN and the SOP relating to the reorganisation, it is apparent from Article 10(3) of Joint Action 2008/124 that the conditions of employment and the rights and obligations of international and local staff are to be laid down in the contracts to be concluded between Eulex Kosovo and the staff member concerned.

38 However, it is common ground that Article 1.2 of the contract of employment expressly states that the OPLAN and the standard operating procedures are an integral part of that contract.

39 Accordingly, it was for the General Court to interpret Article 1.2 of the contract of employment in order to assess the scope of that provision and, in particular, its possible effects on the contractual or statutory nature of the rules set out in the OPLAN and the SOP relating to the reorganisation concerning SC. As the General Court did not make that interpretation beforehand, it could not validly consider that an individual decision relating to SC's situation within Eulex Kosovo, adopted within the framework of a scheme defined in particular by the OPLAN and the SOP relating to the reorganisation, produced binding legal effects which lay outside the contractual relationship between SC and Eulex Kosovo.

40 In that regard, the finding that the decision relating to the 2016 internal competition was adopted in order to give effect to the decision to reduce the staff of Eulex Kosovo, a decision which it was not disputed was separable from the contract of employment, does not permit the General Court to give judgment without also determining the scope of Article 1.2 of that contract.

41 Since Article 10(3) of Joint Action 2008/124 provides that the rights and obligations of the international staff of Eulex Kosovo are defined by contract, it cannot automatically be ruled out that general decisions relating to the organisation of Eulex Kosovo may be implemented by individual decisions on the status of the members of such staff within the framework of the contractual relationships between Eulex Kosovo and those members of staff.

42 It follows from the foregoing that the General Court erred in law in ruling, in paragraph 42 of the order under appeal, that the contract of employment was separable from the decision relating to the 2016 internal competition, without first interpreting Article 1.2 of that contract.

43 Secondly, in order to find that the decision not to renew the contract of employment was separable from that contract, the General Court relied, in paragraph 45 of the order under appeal, on the assertion that that contract did not contain a clause providing for its renewal. The General Court

inferred from this that the decision whether to offer a new contract to SC did not stem from the terms of the contract between herself and Eulex Kosovo, but merely gave due effect to the decision relating to the 2016 internal competition.

44 In that regard, it should be noted, first, that it follows from the conclusion in paragraph 42 of this judgment that the General Court could not validly rely on the link existing between the decision relating to the 2016 internal competition and the decision not to renew the contract of employment in order to establish that the latter decision produced binding legal effects which were outside the contractual relationship between SC and Eulex Kosovo.

45 Secondly, although the fact that the contract of employment does not contain a term expressly providing for its renewal in predetermined circumstances may be relevant to an assessment of the merits of the action at first instance brought by SC, it does not necessarily imply that the lawfulness of the decision not to renew that contract may be assessed without taking account of the terms of that contract.

46 Thus, since it is apparent from the wording of Article 4.3 of the SOP relating to the reorganisation, the contractual nature of which the General Court should have assessed, that that article establishes a link between the results of the internal competition and the non-renewal of the contract of employment, the lawfulness of that decision must be assessed in the light of that article.

47 It follows that the reasons given by the General Court in paragraph 45 of the order under appeal were insufficient to justify the conclusion that the decision not to renew the contract of employment was separable from that contract.

48 Thirdly, the ground set out in paragraph 43 of the order under appeal, that SC did not raise any plea in law, head of claim or argument based on the terms of the contract of employment, cannot suffice to justify the conclusion reached by the General Court.

49 It is not disputed that SC relied to a very large extent, in support of the third head of her claim, on various infringements of the provisions of the SOP relating to the reorganisation. However, the General Court could not establish that those provisions were not contractual in nature as regards SC without first interpreting Article 1.2 of the contract of employment.

50 In the light of all the foregoing considerations, it must be concluded that the General Court could not validly rely on the findings made in paragraphs 42 and 45 of the order under appeal in order, in paragraph 46 of that order, to reclassify the application made in the third head of claim in the action at first instance and then determine on that basis, in paragraph 51 of that order, that that application was out of time, resulting in the inadmissibility of that head of claim.

51 The third part of the second ground of appeal raised by SC should therefore be upheld.

52 Since the General Court relied, in paragraphs 54, 55, 71 and 72 of the order under appeal, on the inadmissibility of the third head of claim in the action at first instance in order to dismiss the other heads of claim in that action, that order should be set aside in its entirety, without it being necessary to examine the other parts of the second ground of appeal or the other grounds of appeal.

The action before the General Court

53 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court of Justice quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

54 That is not the case here.

55 First of all, it is still for the General Court, in the light of the ground for setting aside upheld, to interpret Article 1.2 of the contract of employment, which is an assessment of fact (see, to that effect, judgment of 29 October 2015, *Commission* v *ANKO*, C-78/14 P, EU:C:2015:732, paragraph 23, and order of 21 April 2016, *Borde and Carbonium* v *Commission*, C-279/15 P, not published, EU:C:2016:297, paragraphs 30 to 32), in order to rule on whether that contract is separable from the decision relating to the 2016 internal competition and the decision not to renew that contract.

56 Next it is important to note that the General Court did not examine either the plea of inadmissibility raised by Eulex Kosovo or the merits of the third head of claim in the action at first instance, although such an examination is necessary if the decisions referred to in the preceding paragraph of this judgment are to be regarded as relating to the contractual relationship between SC and Eulex Kosovo.

57 Finally, should the General Court ultimately find that that head of claim is admissible, it will be required, in the light of the considerations set out in paragraph 52 of this judgment, to re-examine the other heads of claim in the action.

58 Consequently, the case must be referred back to the General Court.

Costs

59 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

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

1. **Sets aside the order of the General Court of the European Union of 19 September 2018, *SC* v *Eulex Kosovo* (T-242/17, EU:T:2018:586);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

Bonichot Safjan Bay Larsen

Toader Jääskinen

Delivered in open court in Luxembourg on 25 June 2020.

A. Calot Escobar
Registrar

J.-C. Bonichot
President of the First Chamber