Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 April 2018 [1]

Case C-43/17 P

Liam Jenkinson
v
European External Action Service (EEAS),
Council of the European Union,
European Commission,

Eulex Kosovo

(Appeal — EU international mission staff — Law applicable and jurisdiction to hear disputes relating to employment contracts — Consecutive fixed-term employment contracts — Decision not to renew the final contract — Claim for compensation — Determination of the defendant)

Introduction

1. These appeal proceedings originate from a dispute between a former employee of the Eulex Kosovo Mission, [2] Mr Liam Jenkinson ('the appellant'), and the Council of the European Union, the European Commission, the European External Action Service (EEAS) and the Eulex Kosovo Mission ('the respondents') concerning the failure by the Eulex Kosovo Mission to renew the appellant's last contract in a series of fixed-term contracts ('FTCs') entered into by the appellant and three EU missions between 1994 and 2014. [3]

2. By his appeal, the appellant requests the Court to set aside the order in *Jenkinson* v *Council and Others*, [4] by which the General Court dismissed his action, in which his principal claim was based on Article 272 TFEU and sought, first, the reclassification of his contractual relationship as an employment contract of indefinite duration and the award of compensation for the loss he allegedly suffered due to the abusive use of consecutive FTCs and unfair dismissal and, secondly, a declaration that the EEAS, the Council and the Commission had treated him in a discriminatory manner and should therefore be ordered to pay him compensation, and his alternative claim was based on the non-contractual liability of European institutions.

3. In the first ground of appeal put forward in support of his first head of claim, the appellant contends that the General Court made several errors of law and provided insufficient reasoning in the order under appeal with regard to the scope of the jurisdiction of the EU Courts to hear and determine the contractual aspects of the dispute.

1 Original language: French.

2 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).

3 According to the documents in the case, the appellant was employed between 1994 and 2014 by three different EU missions operating under the common foreign and security policy (CFSP) under consecutive FTCs for each of those missions (see points 11 to 13 of this Opinion).

4 Order of 9 November 2016 (T-602/15, 'the order under appeal', EU:T:2016:660).

4. By that ground, the appellant raises a novel question, which is one that warrants attention. Although the Court has already ruled on the scope of an arbitration clause within the meaning of Article 272 TFEU in connection with a continuous employment relationship based on a series of consecutive FTCs,[5] in the present case it is called upon for the first time to rule on the scope of such a clause contained in the final contract entered into by the parties where the previous contracts contained an arbitration clause in favour of the Brussels courts. This Opinion will, in accordance with the wishes of the Court, be confined to an analysis of that specific question.

Legal framework

Joint Action 2008/124

5. Article 1 of Joint Action 2008/124, entitled 'The mission', states that the European Union is to establish a Rule of Law Mission in Kosovo named 'Eulex Kosovo'.

6. The first paragraph of Article 2 of Joint Action 2008/124, entitled 'Mission Statement', provides:

'EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.'

7. Joint Action 2008/124 has been extended several times.[6] It was extended, inter alia, until 14 June 2016 by Decision 2014/349/CFSP,[7] applicable to the present case.

8. That decision inserted into Joint Action 2008/124 an Article 15a, which provides:

'EULEX KOSOVO shall have the capacity to procure services and supplies, to enter into contracts and administrative arrangements, to employ staff, to hold bank accounts, to acquire and dispose of assets …'

9. Lastly, Joint Action 2008/124 was extended until 14 June 2018 by Decision (CFSP) 2016/947.[8]

Background to the proceedings

10. The background to the proceedings, as described in the order under appeal, may be summarised as follows.

5 See judgment of 1 July 1982, *Porta* v *Commission* (109/81, EU:C:1982:253, paragraph 10).

6 First of all it was extended until 14 June 2012 by Council Decision 2010/322/CFSP of 8 June 2010 amending and extending Joint Action 2008/124/CFSP (OJ 2010 L 145, p. 13), and then until 14 June 2014 by Council Decision 2012/291/CFSP of 5 June 2012 amending and extending Joint Action 2008/124/CFSP (OJ 2012 L 146, p. 46).

7 Council Decision of 12 June 2014 amending Joint Action 2008/124/CFSP (OJ 2014 L 174, p. 42).

8 Council Decision of 14 June 2016 amending Joint Action 2008/124/CFSP (OJ 2016 L 157, p. 26).

11. The appellant was first employed during the period from 20 August 1994 to 5 June 2002, under a series of FTCs, by the European Union Monitoring Mission. [9] He was then employed during the period from 17 June 2002 to 31 December 2009, under a series of FTCs, by the European Union Police Mission. [10] Finally, the appellant was employed by the Eulex Kosovo Mission during the period from 5 April 2010 to 14 November 2014 under 11 successive FTCs. [11]

12. During the course of his employment contract covering the period from 15 June to 14 October 2014, the appellant was informed by letter of 26 June 2014 from the Head of the Eulex Kosovo Mission that his assignment would end and his contract would not be renewed after 14 November 2014.

13. A final FTC was concluded between Eulex Kosovo and the appellant for the period from 15 October to 14 November 2014 ('the final FTC') and was not renewed. Article 21 of the final FTC provides for the Court of Justice of the European Union to have jurisdiction over any dispute relating to the contract, on the basis of Article 272 TFEU. [12]

Procedure before the General Court and the order under appeal

14. By application lodged at the Registry of the General Court on 23 October 2015, the appellant brought an action in which he claimed, principally, that the General Court should, first, reclassify his contractual relationship as an employment contract of indefinite duration, find that the respondents had infringed their contractual obligations, in particular the obligation to give notice of termination of a contract of indefinite duration, find that his dismissal was unfair and, in consequence, order the respondents to pay compensation for the loss suffered as a result of the abusive use of consecutive FTCs, of infringement of the obligation to give notice of termination and of unfair dismissal. He claimed that the General Court should, secondly, declare that the Council, the Commission and the EEAS had treated him in a discriminatory manner during the period of his employment with the missions as regards his remuneration, pension rights and other benefits, find that he ought to have been recruited as a member of the temporary staff of one of the respondents and, in consequence, order them to pay compensation. In the alternative, he claimed that the General Court should order the respondents, on the basis of their non-contractual liability, to compensate him for the harm resulting from their failure to fulfil their obligations.

15. By the order under appeal, the General Court declared that it manifestly lacked jurisdiction to rule on the two principal heads of claim and dismissed the alternative head of claim as manifestly inadmissible. The General Court therefore dismissed the action in its entirety and ordered the appellant to pay the costs.

9 The European Community Monitoring Mission (ECMM) had been present in the western Balkans since 1991 and was established by a Memorandum of Understanding signed at Belgrade on 13 July 1991. The European Union Monitoring Mission was created by Council Joint Action 2000/811/CFSP of 22 December 2000 on the European Union Monitoring Mission (OJ 2000 L 328, p. 53). It appears from the background to the case that there was a break of only 16 days between the end of the appellant's contract with the European Union Monitoring Mission and the start of the contract with the European Union Police Mission.

10 That mission was created by Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission (OJ 2002 L 70, p. 1).

11 It appears from the background to the proceedings that there was a break of three months between the end of his final contract with the European Union Police Mission and the start of his contractual relationship with Eulex Kosovo.

12 In his appeal, the appellant notes that he entered into some 40 consecutive FTCs within those missions. He also notes that before and after the end of his final FTC he took measures to initiate an arbitration procedure, but Eulex Kosovo took no action in response to those measures.

Procedure before the Court of Justice and forms of order sought

16. The appellant claims that the Court should set aside the order under appeal, uphold the action and order the respondents to pay the costs of both sets of proceedings. The Council and the Commission contend that the appeal should be dismissed and the appellant ordered to pay the costs. The EEAS and Eulex Kosovo contend, principally, that the Court should declare that it does not have jurisdiction to rule on the appeal and, in the alternative, that it should dismiss the appeal and order the appellant to pay the costs. Furthermore, the Council and the EEAS contend that, in the event that the appeal is held to be well founded, the Court should dismiss the appeal and the main action as inadmissible so far as they are concerned.

17. The appeal was examined before the Court on the basis of the written pleadings. A request for the focusing of oral argument on the first ground put forward in support of the first head of claim was addressed to the parties. The hearing was held on 17 January 2018.

Analysis of the first ground put forward in support of the first head of claim

Arguments of the parties

18. The first ground put forward in support of the first head of claim relates to the assessment by the General Court of the scope of the jurisdiction of the EU Courts to hear and determine the contractual aspects of the dispute. The plea can, essentially, be broken down into four parts.

First part: an error of law on the part of the General Court and the absence of sufficient reasoning regarding determination of its jurisdiction over the contractual relationship as a whole

19. The appellant complains that the General Court failed to address the argument, put forward at first instance, that, in his view, although the Court of Justice has jurisdiction to hear contractual disputes only if such jurisdiction is agreed on by the parties in an arbitration clause included in a contract, in so far as the contract is valid, the validity, scope and effects of the clause at issue must be assessed in the light of the national law applicable to the contract, which is Belgian law in this case.

20. Furthermore, according to the appellant, the General Court erred in law in adjudicating on the pleas of inadmissibility without considering the merits of the case. Under Belgian law, a contract of employment must be signed before the employee takes up his post, failing which the clauses of the contract become unenforceable, with the consequence that only the appellant can rely on an arbitration clause.

21. In any event, with regard to the interpretation and scope of the clause at issue, the appellant claims that the General Court should have assessed, in the light of Belgian law, the actual intention of the parties at the time the final FTC was signed so far as the arbitration clause is concerned, since Belgian law provides that, in the event of doubt, the interpretation most favourable to the weaker party to the contract will prevail. As the arbitration clause relates to a long-standing contractual relationship, it is clear from the context of the inclusion of that clause that it was not the intention of the parties to divide up any dispute, awarding jurisdiction to the EU Courts merely over the final FTC. According to the appellant, the interpretation adopted by the General Court would also mean that missions need only include a clause awarding different jurisdiction in each of the FTCs in order to preclude staff being able to bring legal proceedings, in accordance with their right to a fair trial, and so that they are therefore obliged to bring proceedings in as many courts as they have signed FTCs. The order under appeal therefore fails to provide sufficient reasoning in that regard and is wrong in law.

22. The EEAS, the Council, the Commission and Eulex Kosovo challenge the appellant's arguments put forward in support of the first part.

Second part: error of law in respect of infringement of the provisions of Belgian law and of the principle of lis pendens

23. The appellant complains that the General Court declined jurisdiction in paragraph 41 of the order under appeal, holding that the Belgian courts would declare that they had jurisdiction to decide the dispute in relation to all the FTCs apart from the final FTC. According to the appellant, it cannot be excluded that the Belgian courts would interpret the arbitration clause in the final FTC as applying to the whole of his contractual relationship with the respondents. In any event, he asserts, the Belgian courts are not in a position to annul an individual administrative act served by the mission or the institutions or attributable to them; the most they could do is to suspend its effects. Consequently, the order under appeal is vitiated not only by a lack of sufficient reasoning but also by errors of law in respect of Belgian law and of the principle of *lis pendens*.

24. The EEAS and the Commission challenge the appellant's arguments in support of the second part.

Third part: the General Court erred in law in holding that it did not have jurisdiction to rule on the effects of the employment contracts concluded previously between the appellant and the respondents

25. The appellant complains that the General Court was wrong to find, in paragraph 39 of the order under appeal, that since it had jurisdiction to rule only in respect of the final FTC, it could not rule on the effects of the employment contracts concluded previously. According to the appellant, the reclassification of his contractual relationship as a whole as a contract of indefinite duration cannot in any case be considered in isolation from the existence of the final FTC and, more specifically, from the end of that contract. It would be impossible for the appellant to obtain reclassification of his contractual relationship partly before the national courts and partly before the EU Courts. The General Court thus failed to address the arguments put before it and vitiated the order under appeal by an error of law.

26. The EEAS, the Council and the Commission challenge the appellant's arguments.

Fourth part: failure to assess the claim regarding the final FTC

27. The appellant contends that, in any event, the General Court failed to examine his claim regarding notification of end-of-employment documents as provided for by Belgian law upon the expiry of the final FTC and considers that such failure constitutes a denial of justice.

28. The Council and the Commission challenge the appellant's arguments in respect of the fourth part.

Assessment

29. This analysis concerns only the question of the scope of the jurisdiction of the EU Courts to hear and determine the contractual aspects of the dispute which stems from the arbitration clause on the basis of Article 272 TFEU. Consequently, that analysis calls for an autonomous interpretation of that provision. This Opinion is therefore without prejudice to the question of the reclassification of the contractual relationship which forms the subject matter of the dispute. That question should be

assessed in the light of the law applicable to the substance of the dispute.[13]

The scope of Article 272 TFEU

30. It should be noted first of all that, as regards which court has jurisdiction to decide disputes to which the European Union is a party, Article 274 TFEU provides that 'save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'. According to the Court, the attribution of jurisdiction established by the TFEU 'does not allow the parties to opt for either the Community courts or the national courts in disputes'. Under that system, the jurisdiction of the EU Courts 'precludes that of the national courts'.[14]

31. With regard to the exclusive jurisdiction of the EU Courts, Article 272 TFEU provides that 'the Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'.[15] That article is a specific provision allowing the courts of the European Union to be seised under an arbitration clause agreed by the parties in respect of contracts governed by either public or private law.[16] The jurisdiction of the Court of Justice is therefore linked to the existence, first, of a contract between the EU institution, body or authority and the private party and, secondly, of an arbitration clause in the contract in question.[17]

13 Even though this matter concerns the CFSP, I take the view that EU missions must, in accordance with their duty to act in good faith, take account, in their actions as employer, of the legislation adopted at Union level. See, by analogy, judgment of 13 December 2016, *IPSO* v *ECB* (T-713/14, EU:T:2016:727, paragraph 106). In any event, two important factors should in my view be noted. In the first place, although Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), which put into effect the framework agreement, is addressed to the Member States, the rules and principles laid down in or derived from that directive can be relied on against EU institutions (bodies and other authorities) when they themselves simply appear to be the specific expression of fundamental rules of the Treaty and of general principles which are directly applicable to those institutions. See, to that effect, judgment of 9 September 2003, *Rinke* (C-25/02, EU:C:2003:435, paragraphs 24 and 25). Thus, the principle prohibiting abuse of rights, under which no one may seek to misuse rules of law, is one of the general principles of law compliance with which is ensured by the courts. In the second place, in view of the fact that, under a clause entered into pursuant to Article 272 TFEU, the Court may be called on to decide a dispute on the basis of the national law governing the contract, I note that the national rules have transposed Directive 1999/70 and, hence, those rules are applicable to a series of FTCs, such as that in the present case.

14 See judgment of 9 October 2001, *Flemmer and Others* (C-80/99 to C-82/99, EU:C:2001:525, paragraph 41). The case giving rise to that judgment concerned compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade and Article 238 EC (now Article 272 TFEU) was therefore not applicable.

15 Regarding the nature of an arbitration clause within the meaning of Article 272 TFEU, some authors consider that the term 'arbitration clause' may be 'deceptive' or inappropriate since the EU Courts having jurisdiction on the basis of such clauses do not act as arbitrators but as courts delivering judgments that may be directly applicable. See, in that respect, Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, Oxford University Press, Oxford, 2014, Chapter 19, pp. 686 to 699, in particular, paragraph 19.8. To the same effect, see Kremlis, G., 'De quelques clauses d'élection de for et de droit applicable stipulées dans les contrats de droit privé conclus par les Communautés européennes dans le cadre de leurs activités d'emprunt et de prêt', *Diritto comunitario e degli scambi internazionali*, Milan, 1986, p. 782: 'lorsque [la Cour de justice] est saisie en vertu d'une telle clause, elle ne se transforme pas en tribunal arbitral …'. To consider an arbitration clause not as clause relating to arbitration but as a clause attributing jurisdiction, see the points made by D'Alessandro, E., 'L'art. 272 del Trattato sul funzionamento dell'Unione europea: mero accordo attributivo della competenza guirisizionale o convenzione arbitrale? (nota a Trib. Unione europea, 17 dicembre 2010, causa T-460/08)', *Rivista dell'arbitrato*, Rome, 2011, Vol. 4, pp. 622 to 628.

16 See, to that effect, judgment of 26 February 2015, *Planet* v *Commission* (C-564/13 P, EU:C:2015:124, paragraph 23).

17 It should be noted that the Court has previously held that it had jurisdiction on the basis of an arbitration clause in an unsigned 'draft agreement' serving as a preliminary agreement to the relationship between the parties. See, in that regard, judgment of 7 December 1976, *Pellegrini* v *Commission and Flexon-Italia* (23/76, EU:C:1976:174, paragraphs 8 to 10). See, also, Opinion of Advocate General Mayras in *Pellegrini* v *Commission and Flexon-Italia* (23/76, EU:C:1976:143): 'But in my view it would be an excessive insistence upon form to deny all validity to the arbitration clause simply on the grounds that the draft agreement was only referred to, though expressly, in the letters confirming the agreement between the parties.' However, in the absence of an arbitration clause within the meaning of Article 272 TFEU, the EU Courts do not have jurisdiction to adjudicate on the renewal of a contract of employment concluded between the appellant and the Commission in the context of technical cooperation between the European Union and a third State funded by the European Development Fund. See judgment of 20 May 2009, *Guigard* v *Commission* (C-214/08 P, not published, EU:C:2009:330, paragraph 41).

32. While, under such a clause entered into pursuant to Article 272 TFEU, the Court may be called on to decide a dispute on the basis of the national law governing the contract,[18] it has previously had occasion to rule that its jurisdiction to adjudicate on a dispute concerning that contract falls to be determined solely with regard to Article 272 TFEU and the terms of the arbitration clause, and this cannot be affected by provisions of national law which allegedly exclude its jurisdiction.[19] Hence, in order to determine whether it has jurisdiction, the Court must ascertain whether there is such a clause in the contract forming the subject matter of the dispute. The existence of such a clause therefore implies exclusion of the jurisdiction of any other court.[20]

33. Thus, it follows from Article 272 TFEU in conjunction with Article 274 TFEU that, as a general rule, disputes concerning contracts to which the European Union is a party, or in which, in any event, one of the contracting parties acts as an agent of the European Union, fall within the jurisdiction of the national court.[21] However, the jurisdiction of the EU Court excludes that of the national courts.[22] Where the EU Courts consider that the claims made in an action are covered by an arbitration clause, national courts cease to have jurisdiction to hear the application. Those courts must therefore decline jurisdiction, first, by reason of the primacy of EU law[23] and, secondly, in order to respect the wishes of the parties.

34. Problems arise, however, when another court is also designated as having jurisdiction, either in the same contract (concurrent jurisdictions),[24] or, as in the present case, in FTCs preceding a final contract that have been concluded between the parties in the context of an employment relationship.[25]

35. According to case law, the jurisdiction of the Court, which is based on an arbitration clause, derogates from the ordinary rules of law and must therefore be given a restrictive interpretation. The Court may hear and determine only claims arising from a contract which was concluded with the European Union and which contains the arbitration clause or claims that are directly connected with the obligations arising from that contract.[26]

36. In that context, in view of the fact that all the appellant's claims in the first ground of appeal are based either on the alleged abusive use of consecutive FTCs or on his unfair dismissal, consideration must be given to the links between the appellant's claims, on the one hand, and the various FTCs (including the final FTC) or the obligations arising from them, on the other hand.

18 With regard to the law applicable to private-law contracts containing an arbitration clause, see Kohler, C., 'La Cour de justice des Communautés européennes et le droit international privé', *Droit international privé: travaux du Comité français de droit international privé*, 12th year, 1993-1995, Éditions A. Pedone, Paris, 1996, pp. 71 to 95, in particular, p. 78: '[l'Union] doit se voir appliquer, dans toute la mesure du possible, les règles de droit commun, dans le double sens du mot, ce qui conduit presque nécessairement à la convention de Rome.'

19 See judgments of 18 December 1986, *Commission* v *Zoubek* (426/85, EU:C:1986:501, paragraph 10); of 8 April 1992, *Commission* v *Feilhauer* (C-209/90, EU:C:1992:172, paragraph 13); and of 26 February 2015, *Planet* v *Commission* (C-564/13 P, EU:C:2015:124, paragraph 21).

20 Judgment of 26 November 1985, *Commission* v *CO.DE.MI.* (318/81, EU:C:1985:467, paragraph 9).

21 See Opinion of Advocate General Tizzano in Joined Cases *Flemmer and Others* (C-80/99 to C-82/99, EU:C:2001:57, point 41).

22 See judgment of 9 October 2001, *Flemmer and Others* (C-80/99 to C-82/99, EU:C:2001:525, paragraph 39).

23 See Lenaerts, K., Maselis, I., and Gutman, K., op. cit., p. 689, paragraph 19.9: 'If the clause confers an exclusive right on the Court of Justice of the EU to hear and determine disputes concerning a contract, courts in Member States must decline jurisdiction by reason of the primacy of Union Law (i.e. compliance with the arbitration clause concluded pursuant to art. 272 TFEU).'

24 Sometimes even concurrent jurisdiction of the Court of Justice of the European Union and specified national courts is provided for (concurrent clauses). See, Kohler, C., op. cit., p. 78. That is the case, inter alia, where certain clauses are included in loan agreements concluded between the European Union and one or more banks which form a syndicate to carry out an operation. Concurrent clauses may give rise to problems linked to positive conflicts of jurisdiction. On that question, see Kremlis, G., 'De quelques clauses d'élection de for et de droit applicable stipulées dans des contrats de droit privé conclus par les Communautés européennes dans le cadre de leurs activités d'emprunt et de prêt', *Diritto comunitario e degli scambi internazionali*, Milan, 1986, pp. 777 to 792, in particular, p. 783.

25 See Lenaerts, K., Maselis, I., and Gutman, K., op. cit., p. 689, paragraph 19.9: 'If a number of Courts, including the GC, are entitled to determine disputes under the arbitration clause, a problem of lis alibi pendens may arise. No specific rules are set forth in the Treaties for resolving this problem'.

26 See judgment of 18 December 1986, *Commission* v *Zoubek* (426/85, EU:C:1986:501, paragraph 11).

The classification of the employment relationship between the appellant and Eulex Kosovo

37. As a preliminary point, in order to ascertain whether the appellant's claims in the first ground of appeal derive directly from the final FTC entered into by the parties, which contains an arbitration clause, or whether those claims are directly connected with the obligations arising from the final FTC, it is necessary to clarify whether the employment relationship between the appellant and Eulex Kosovo, based on a series of 11 FTCs, should be classified as a single and continuous employment relationship or whether, on the other hand, the final FTC constitutes the basis for an employment relationship that is separate from that under the previous FTCs.

38. I would point out that the appellant was employed for almost 20 years by 3 different EU missions operating under the foreign common and security policy (CFSP). With regard, in particular, to the appellant's employment relationship within Eulex Kosovo, it should be noted that the work done by the appellant on behalf of that mission during the period from 5 April 2010 to 14 November 2014 gave rise to an employment relationship based on 11 consecutive FTCs.

39. The relationship between the appellant and Eulex Kosovo is therefore an employment relationship of a contractual nature. The question arises, however, as to whether or not such a contractual relationship constitutes a single and continuous relationship.

40. There is no doubt that that question must be answered in the affirmative. First, it is clear from the background to the dispute that the final FTC was concluded between Eulex Kosovo and the appellant for the period from 15 October to 14 November 2014. In the letter of 26 June 2014 the Head of Mission informed the appellant that his 'final FTC' would not be renewed by Eulex Kosovo after 14 November 2014. That letter therefore makes reference to the *end date of the final FTC*, namely 14 November 2014. That reference to the final FTC shows that that contract was part of the same employment relationship between the appellant and Eulex Kosovo. Secondly, as Eulex Kosovo itself admitted in reply to a question raised at the hearing concerning the nature of the employment relationship between the parties, since the appellant began working for Eulex Kosovo in 2010, the post he occupied until the end of his final FTC had existed since that date and the duties performed by the appellant were identical in nature to those he performed under the previous FTCs.

41. Consequently, I take the view that such an employment relationship, under which the appellant worked for Eulex Kosovo during the period from 5 April 2010 to 14 November 2014 on the basis of a series of FTCs, must be classified as a single and continuous employment relationship between the parties.

The court having jurisdiction over a contractual employment relationship based on consecutive FTCs

42. It should be noted first of all that the consecutive FTCs concluded between the appellant and Eulex Kosovo during the period from 5 April 2010 to 14 October 2014 contain an arbitration clause in favour of the Brussels courts. However, Article 21 of the final FTC provides for the Court of Justice of the European Union to have jurisdiction on the basis of Article 272 TFEU. The article states that the EU Courts are to have jurisdiction over any dispute relating to the contract.

43. In that context, the question arises as to which court has jurisdiction over contractual relationships based on consecutive FTCs where the majority of those contracts confer jurisdiction on the courts of a Member State, whilst the final contract concerning that relationship contains an arbitration clause on the basis of Article 272 TFEU conferring jurisdiction on the EU Courts. [27]

44. In order to answer that question it is necessary to make a choice between two alternatives. Thus, the court having jurisdiction in disputes relating to one and the same employment relationship will be either the court provided for in the majority of the FTCs on which that employment relationship is based (in the present case, the Brussels courts) or the court provided for in the final FTC (in the present case, the EU Courts). I am convinced that, of those two alternatives, it is necessary to endorse the second.

45. In that regard, it is appropriate to refer to the case that gave rise to the judgment in *Porta* v *Commission* (judgment of 1 July 1982 (109/81, EU:C:1982:253)), which concerned an employment relationship similar to that in the present case and related to a series of consecutive contracts which Ms Porta had concluded each year with the Director of the Ispra Joint Research Centre to give Italian classes over a period of 15 years, the first 5 years without any written contract and subsequently on the basis of letter-contracts. For the final four years the employment relationship between the parties was based on more detailed contracts including an arbitration clause within the meaning of Article 181 EEC (now Article 272 TFEU), under which the Court of Justice was to have 'sole jurisdiction to settle all disputes relating to the validity, interpretation or performance of the said contracts'.

46. In its judgment, the Court held that 'the fact that the same [arbitration] clause does not appear in the previous contracts and that, as regards the first years, there were not even any written contracts is no obstacle to the Court's having regard, in its assessment of the relations between the parties, to all the contracts entered into'. [28] Thus, despite the fact that only the later contracts contained an arbitration clause referring to the Court of Justice of the European Union, the Court took all the earlier relationships between the parties into account in its assessment of the situation.

47. In the present case, it should be noted that appellant's claims are linked to the existence of a single and continuous employment relationship based on consecutive FTCs. Thus, it is clear that both the appellant's claim based on the abusive use of FTCs and his claim alleging unfair dismissal are based on all the contracts concluded between 5 April 2010 and 14 November 2014, which undoubtedly include the final FTC. It is the decision not to renew that final FTC which put an end to the appellant's employment relationship with Eulex Kosovo, as is clear from the letter giving notice. [29] The end of the employment relationship between the parties cannot in any event be analysed without reference to the final FTC at issue. Hence, it is the arbitration clause included in that final FTC which must determine which court has jurisdiction over all disputes concerning the entire employment relationship. Adopting the contrary position might have the effect of dividing up a dispute relating to a single employment relationship according to the number of arbitration clauses — conferring jurisdiction on different courts. That position would conflict with the right to an effective remedy.

27 It should be noted that in *Bitiqi and Others* v *Commission and Others* (order of 30 September 2014 (T-410/13, not published, EU:T:2014:871, paragraph 8)), concerning a decision of the Head of the Eulex Kosovo Mission not to renew the employment contracts of contract staff, the General Court dismissed the applicants' action, holding that it manifestly lacked jurisdiction. However, in that case all the FTCs contained a clause providing that disputes arising out of those contracts would fall under the jurisdiction of the Brussels courts. Thus, *no arbitration clause within the meaning of Article 272 TFEU was included in those contracts*.

28 See judgment of 1 July 1982, *Porta* v *Commission* (109/81, EU:C:1982:253, paragraph 10). See, also, the Opinion of Advocate General Capotorti in *Porta* v *Commission* (109/81, EU:C:1982:143, point 2): 'The question might also be asked whether the fact that the clause conferring jurisdiction appears only in the contracts entered into as from 1977 prevents the Court from considering the nature of the relationship between the parties during the earlier period, from 1963 to 1977. The reply must be negative, since *the dispute raises the question whether the employment relationship* by virtue of which the applicant taught at the Joint Research Centre from 1963 to 1980 *was continuous and therefore whether or not it constituted a single period*.' Italics added.

29 See point 40 of the present Opinion.

48. Consequently, given the continuous nature of the employment relationship by virtue of which the appellant worked for Eulex Kosovo between 2010 and 2014, the court having jurisdiction over all disputes relating to that employment relationship based on consecutive FTCs must, in the light of the principle of legal certainty and the right to an effective remedy,[30] be the court named in the final FTC. It is clear that it is to that final FTC that the trigger for the end of the appellant's employment relationship with Eulex Kosovo — the decision not to renew the final FTC — is linked, irrespective of the point in time when the letter giving notice was sent to the appellant.

49. That reasoning is supported by the fact that the parties' decision to include an arbitration clause based on Article 272 TFEU in the final FTC shows their deliberate intention to make their employment relationship subject to the jurisdiction of the Court of Justice. I would point out in that regard the legal principle that it is the most recently stated intention of the parties that must take precedence. Thus, compliance with that principle means, inter alia, that the Court of Justice has jurisdiction to decide a dispute concerning a contractual relationship as it existed at the time of the first steps taken prior to the initiation of proceedings.[31] Consequently, if in that context the parties have chosen to change the court having jurisdiction to hear disputes relating to their contractual relationship, it is necessary to respect their choice.

Analysis of the findings of the General Court

50. The criticisms made by the appellant in his first ground of appeal concern, first, paragraphs 23 to 26 and, secondly, paragraphs 39 and 41 of the order under appeal.

51. In paragraphs 23 to 26 of the order under appeal, the General Court held, on the basis of the case-law concerning Article 272 TFEU, that it had jurisdiction only in respect of the final FTC by virtue of the arbitration clause contained in that contract and that therefore it manifestly lacked jurisdiction to deal with disputes that might arise from the performance of the appellant's contracts of employment prior to the final FTC since they contained a clause expressly conferring jurisdiction on the Belgian courts.

52. I would point out that that legal argument cannot be accepted in the case of a single and continuous employment relationship between the appellant and his employer based on a series of consecutive FTCs.

53. As the appellant points out, that interpretation by the General Court means that missions need only include a clause conferring different jurisdiction in each of the FTCs of its employees in order to prevent them bringing legal proceedings on the basis of their right to an effective remedy.

54. In paragraph 39 of the order under appeal the General Court examined the appellant's claim concerning the reclassification of his contractual relationship as a whole as a contract of indefinite duration.

55. In that regard, the General Court stated that its jurisdiction, being limited to the final FTC, did not permit it to rule on the effects of the employment contracts concluded previously and that it therefore manifestly had no jurisdiction to rule on the claims relating to the giving of notice of termination and of the end-of-employment documents provided for by Belgian law upon the expiry of the final FTC.

30 In this regard, the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union provides that everyone whose rights and freedoms guaranteed by European Union law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. Under the second paragraph of that article, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. See, by analogy, Decision of 12 July 2012, *Review Arango Jaramillo and Others* v *EIB* (C-334/12 RX, EU:C:2012:468).

31 See footnote 12.

56. In paragraph 41 of the order under appeal, the General Court declined jurisdiction on the ground that the Belgian courts would declare that they had jurisdiction to decide the dispute in relation to all the FTCs apart from the final FTC.

57. I note that the General Court overlooked the fact that, as indicated in point 47 above, the end of the employment relationship between the parties cannot be considered in isolation, without taking account of the existence of the final FTC. It is to the latter contract that the trigger for the end of the appellant's employment relationship with Eulex Kosovo — the decision not to renew the final contract — is linked.

58. As I stated in points 48 and 49 above, since the case raises the question of the continuous nature of the employment relationship, and therefore the perception of that relationship as a single relationship, it is the arbitration clause contained in the final FTC which must determine which court has jurisdiction over all disputes concerning the employment relationship as a whole.

59. It follows that, since the General Court's reasoning fails to take account of the continuous nature of the employment relationship between the appellant and Eulex Kosovo, or of the consequence of the parties' freely expressed intention in the arbitration clause, it was not possible for that Court, without erring in law, to rely on the consideration that the scope of the arbitration clause is expressly limited to disputes concerning the final FTC and cannot extend to the earlier contracts.

60. Since the General Court erred in law with regard to its jurisdiction to hear the action, there is no need to examine the appellant's arguments concerning the absence of sufficient reasoning in the order under appeal and the failure to assess the claim relating to the final FTC.

61. The first ground of appeal should therefore be upheld.

62. In the light of all the foregoing, I propose that the order under appeal should be set aside in so far as the General Court held that it manifestly lacked jurisdiction to hear and determine the appellant's application.

The consequences of setting aside the order under appeal

63. In accordance with Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

64. I do not consider that the state of the proceedings is such as to permit the Court of Justice to give judgment. Indeed, if the merits of the appellant's arguments were examined, that would lead the Court of Justice to rule on points of fact on the basis of evidence that was not considered by the General Court in the order under appeal, as it held that it manifestly lacked jurisdiction to hear the case. Moreover, the factual claims relating to the substance of the dispute have not been the subject of debate before the Court of Justice.

Conclusion

65. In the light of the foregoing, I consider that the first ground of appeal relied on by the appellant in support of the first head of claim should be upheld and I propose that the Court of Justice should set aside the order of the General Court of the European Union of 9 November 2016, *Jenkinson* v *Council and Others* (T-602/15, EU:T:2016:660) on that ground alone and without prejudice to examination of the other grounds of appeal, and refer the case back to the General Court for a decision on the substance, the costs being reserved.