

WERHOF

JUDGMENT OF THE COURT (Third Chamber)

9 March 2006<sup>\*</sup>

In Case C-499/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesarbeitsgericht Düsseldorf (Germany), made by decision of 8 October 2004, received at the Court on 2 December 2004, in the proceedings

**Hans Werhof**

v

**Freeway Traffic Systems GmbH & Co. KG,**

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský (Rapporteur), J.-P. Puissechet, S. von Bahr and U. Löhmus, Judges,

\* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 October 2005,

after considering the observations submitted on behalf of:

- Hans Werhof, by R. Buschmann, Assessor,
- Freeway Traffic Systems GmbH & Co. KG, by A. Löffler, Rechtsanwalt,
- the German Government, by C. Schulze-Bahr, acting as Agent,
- the Commission of the European Communities, by G. Rozet and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2005,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws

of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26) ('the Directive').

- 2 The reference was made in proceedings between Mr Werhof ('the claimant') and Freeway Traffic Systems GmbH & Co. KG ('the defendant') concerning the application of a collective agreement.

## Legal context

### *Community legislation*

- 3 Article 3 of the Directive provides:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

...

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of

termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.’

- 4 Those provisions were reproduced, in substance, in Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187 (OJ 1998 L 201, p. 88), the time-limit for implementation of which expired on 17 July 2001.

### *National legislation*

- 5 Article 3 of the Directive was transposed into German law by Paragraph 613a(1) of the Bürgerliches Gesetzbuch (German Civil Code; ‘the BGB’), of which the first and second sentences read as follows:

‘Where a business or part of a business is transferred to another owner by a legal transaction, the rights and obligations arising from the employment relationships existing on the date of the transfer shall pass to that owner. Where those rights and obligations are governed by the provisions of a collective agreement or works agreement, they shall be incorporated into the employment relationship between the new owner and the employee and may not be amended to the employee’s disadvantage for at least one year following the date of the transfer.’

**The main proceedings and the questions referred for a preliminary ruling**

- 6 The claimant was taken on by DUEWAG AG on 1 April 1985. Under his contract of employment, the employment relationship was to be governed by the framework collective agreement, and by the wage agreement in force for the North Rhine-Westphalia iron and steel, metal and electrical industry.
- 7 That collective agreement had been concluded between the North Rhine-Westphalia Metal and Electrical Industry Federation ('the AGV') and the Trade Union for the Metal Industry ('IG Metall'). When the claimant was taken on, DUEWAG AG was a member of the AGV.
- 8 On 1 April 1999 that company was converted into Siemens DUEWAG GmbH. On 1 October 1999 Siemens DUEWAG GmbH transferred to the defendant part of its business, in which the claimant was employed. The defendant is not a member of any employers' association which concludes collective agreements.
- 9 By works agreement concluded on 2 August 2001, the defendant agreed with the works council a grid for the grading of employees on the basis of the provisions of the abovementioned collective agreement. On 13 August 2001 the defendant concluded a further works agreement providing for a one-off wage payment.
- 10 By letter of the same date, the claimant declared that, in return for the one-off payment, he irrevocably waived as against the defendant all individual rights that he might be able to claim to wage increases pursuant to a collective agreement applicable to the period before the works agreement came into force. On 29 August

2001, the defendant concluded with the claimant a supplement to the contract of employment according to which the claimant was to receive basic pay under salary bracket 8 and a performance bonus.

- 11 IG Metall and the AGV concluded a new collective agreement for the North Rhine-Westphalia metal and electrical industry on 23 May 2002, which provided for an increase in the wage rate of 2.6% and an additional payment from 1 June 2003.
  
- 12 The claimant brought an action before the Arbeitsgericht Wuppertal (Labour Court, Wuppertal) claiming, with effect from 1 June 2003, payment by the defendant of the difference between his basic salary and the sum provided for under the collective agreement of 23 May 2002, and the additional payment provided for by that agreement. That action was dismissed by judgment of 7 January 2004.
  
- 13 The claimant lodged an appeal before the Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf). That court took the view that under the settled case-law of the Bundesarbeitsgericht (Federal Labour Court) the claimant could not base his claims on Paragraph 613a(1) of the BGB. However, since it was uncertain as to the compatibility of that case-law with Article 3(1) of Directive 98/50, the Landesarbeitsgericht Düsseldorf decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is it compatible with Article 3(1) of ... Directive 98/50 ... amending Directive 77/187 ... if a transferee of a business — who is not subject to a collective agreement — is bound by an agreement between the transferor of the business — who is subject to a collective agreement — and the employee, under which

the collective wage agreements in force binding the transferor of the business are to apply, in such a way that the collective wage agreement in force at the time of the transfer of the business applies but collective wage agreements entering into force subsequently do not?

(2) If that is to be answered in the negative:

Is it compatible with Article 3(1) of Directive 98/50 if the transferee of the business — who is not subject to a collective agreement — is bound by collective wage agreements which have entered into force after the transfer of the business only so long as the transferor of the business is so bound?

## **The questions**

### *Preliminary observation*

- 14 The preliminary point must be made that the national court raises questions concerning the interpretation of Article 3(1) of the Directive as amended by Directive 98/50.
  
- 15 However, the main proceedings relate to the legal consequences of a transfer of part of a business on 1 October 1999, that is, a date on which the period prescribed for implementation of Directive 98/50 had not yet expired (see, inter alia, Case C-425/02 *Delahaye* [2004] ECR I-10823, paragraph 28).

- 16 It is not therefore necessary, in connection with the questions raised, to consider the interpretation of the Directive as amended by Directive 98/50.

*The first question*

- 17 By its first question, the national court asks, essentially, whether Article 3(1) of the Directive must be interpreted as meaning that, where an undertaking is transferred and a contract of employment refers to a collective agreement to which the transferor is a party but not the transferee, the transferee is not bound by collective agreements subsequent to the one in force at the time of that transfer.

Observations submitted to the Court

- 18 The claimant submits that it follows from the case-law of the Court that, when an individual contract of employment includes a clause referring to collective agreements concluded in a particular sector, that clause must necessarily be 'dynamic' and, in accordance with Article 3(1) of the Directive, refers to collective agreements concluded after the date of transfer of the undertaking (see, *inter alia*, Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 53, and Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraphs 29, 48 and 54). Furthermore, such an interpretation of the Directive follows from its spirit and purpose, namely, the protection of employees in the event of a change of owner of the undertaking and, in particular, the safeguarding of their rights.

- 19 The defendant and the German Government take the view, on the other hand, that only the collective agreement in force at the time of the transfer is applicable. Otherwise, that is to say if collective agreements which came into force after the date of the transfer were to apply to employers who did not take part in the negotiations, employers' freedom to contract would be hindered, which would equate to expropriation. Moreover, it is important to take account of freedom of association which includes an employer's right not to join an association or trade federation. Finally, it may be inferred from the objective of the directive and the wording of Article 3(1) thereof that only the transferor's rights and obligations arising from a contract of employment existing on the date of a transfer are transferred to the transferee.
- 20 The Commission of the European Communities submits that Article 3(2) of the Directive, which is intended to safeguard the rights of employees acquired under collective agreements and requires employers to preserve employment relationships governed by a collective agreement, contains two requirements which apply in this case.
- 21 First, under the 'parity clause' which makes collective agreements concluded by the transferor applicable to the contract of employment, the transferee's obligation to continue to pay the claimant the wage which the transferor had agreed on an individual basis and the additional payments then provided for by the collective agreement lasts only 'until the date of termination or expiry' of that collective agreement. The Commission takes the view that, with effect from 1 June 2003, the new collective agreement concluded on 23 May 2002 replaced the collective agreement which bound the transferee by reason of the transfer, so that the transferee was no longer bound by that agreement from 1 June 2003.
- 22 Secondly, since the right, provided for by the second subparagraph of Article 3(2) of the Directive, to limit the period for continued observance of terms and conditions was transposed into German law by the second sentence of Paragraph 613a(1) of the BGB, the defendant was also entitled to free itself from its obligation to observe the collective agreement before the latter expired, at the end of a period of one year from the transfer.

## The Court's answer

- 23 First, the general point should be made that a contract is characterised by the principle of freedom of the parties to arrange their own affairs, according to which, in particular, parties are free to enter into obligations with each other. Under that principle, and in a situation such as the one in the main proceedings where the defendant is not a member of any employers' association and is not bound by any collective agreement, the rights and obligations arising from such an agreement do not therefore apply to it, as a rule. Otherwise, as the Advocate General noted in point 52 of his Opinion, the principle that contracts cannot impose obligations on third parties would be infringed.
- 24 However, in respect of the transfer of an undertaking and its consequences on employment relationships, unconditional application of the abovementioned principle could result in erosion of the rights which the employee has under his contract of employment and the collective agreement to which the employer transferring the undertaking was party, but not the transferee. That is why the Community legislature sought to ensure that, on transfer of an undertaking, employees enjoy special protection designed to prevent the erosion which could result from application of that principle.
- 25 Furthermore, according to the case-law of the Court, the Directive is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the new employer on the same conditions as those agreed with the transferor (see, inter alia, Case 324/86 *Daddy's Dance Hall* [1988] ECR 739, paragraph 9, Case C-362/89 *D'Urso and Others* [1991] ECR I-4105, paragraph 9, and Case C-399/96 *Europièces* [1998] ECR I-6965, paragraph 37).
- 26 It is also settled case-law that the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner

unfavourable to employees (see *Martin*, paragraph 39). It follows that the contracts of employment and employment relationships existing, on the date of the transfer of an undertaking, between the transferor and the workers employed in the undertaking transferred are automatically transferred to the transferee by the mere fact of the transfer of the undertaking (see, to that effect, *D'Urso and Others*, paragraph 20, and Case C-305/94 *Rotsart de Hertaing* [1996] ECR I-5927, paragraph 18).

- 27 Here, the contract of employment of the claimant in the main proceedings refers, as regards wages, to a collective agreement. That clause in the contract of employment is covered by Article 3(1) of the Directive. By virtue of the Directive, the rights and obligations arising from a collective agreement to which the contract of employment refers are automatically transferred to the new owner, even if, as in the main proceedings, the latter is not a party to any collective agreement. Accordingly, the rights and obligations arising out of a collective agreement continue to bind the new owner after the transfer of the business.
- 28 In respect of the interpretation of Article 3(1) of the Directive, a clause referring to a collective agreement cannot have a wider scope than the agreement to which it refers. Consequently, account must be taken of Article 3(2) of the Directive, which contains limitations to the principle that the collective agreement to which the contract of employment refers is applicable.
- 29 First, the terms and conditions under that collective agreement are to continue to be observed only until the date of its termination or expiry, or the entry into force or application of another collective agreement. Thus the wording of the Directive does not in any way indicate that the Community legislature intended that the transferee be bound by collective agreements other than the one in force at the time of the transfer and, consequently, that the terms and conditions be subsequently amended through the application of a new collective agreement concluded after the transfer. Such an assessment is, moreover, consistent with the objective of the Directive, which is merely to safeguard the rights and obligations of employees in force on the

day of the transfer. On the other hand, the Directive was not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements.

30 Secondly, the Member States may limit the period for observing the terms and conditions arising from a collective agreement, provided that that period is not less than one year. In a way, this limitation is subsidiary, since it is applicable if none of the abovementioned situations, that is, termination or expiry of the existing collective agreement, or entry into force or application of a new collective agreement, arises within a period of one year after the transfer.

31 In addition, although in accordance with the objective of the Directive the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his operations, cannot be disregarded.

32 In this connection, in accordance with the Court's settled case-law, when interpreting the provisions of a directive account must be taken of the principle of the coherence of the Community legal order which requires secondary Community legislation to be interpreted in accordance with the general principles of Community law (see, to that effect, Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 30).

33 Freedom of association, which also includes the right not to join an association or union (see, to that effect, Eur. Court of H.R., *Sigurjónsson v Iceland*, judgment of 30 June 1993, Series A, No 264, § 35, and *Gustafsson v Sweden*, judgment of 25 April 1996, *Reports of Judgments and Decisions*, 1996-II, p. 637, § 45) is enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and is one of the

fundamental rights which, in accordance with the Court's settled case-law, are protected in the Community legal order (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 79), as is restated in Article 6(2) EU (see Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611).

- 34 If the 'dynamic' interpretation, supported by the claimant, of the contractual reference clause mentioned in paragraph 18 of this judgment were applied, that would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected.
- 35 On the other hand, the 'static' interpretation, supported by the defendant in the main proceedings and the German Government, makes it possible to avoid a situation in which the transferee of a business who is not party to a collective agreement is bound by future changes to that agreement. His right not to join an association is thus fully safeguarded.
- 36 In those circumstances, the claimant cannot maintain that a clause contained in an individual contract of employment and referring to collective agreements concluded in a particular sector must necessarily be 'dynamic' and refers, by application of Article 3(1) of the Directive, to collective agreements concluded after the date of transfer of the undertaking.
- 37 It follows from the foregoing that the answer to the first question must be that Article 3(1) of the Directive must be interpreted as not precluding, in a situation where the contract of employment refers to a collective agreement binding the transferor; that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.

*The second question*

- 38 In the light of the answer given to the first question, there is no need to answer the second question.

**Costs**

- 39 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 (Third Chamber) hereby rules:

**Article 3(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as not precluding, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.**

[Signatures]