

Judgment of the Court of 4 June 2002

Katia Beckmann v Dynamco Whichloe Macfarlane Ltd - Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division - United Kingdom

Directive 77/187/EEC - Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses - Conditions for applying exceptions to maintenance of rights - Benefits provided for in the event of dismissal

Case C-164/00

European Court reports 2002 Page I-04893

In Case C-164/00,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division, for a preliminary ruling in the proceedings pending before that court between

Katia Beckmann

and

Dynamco Whicheloe Macfarlane Ltd,

on the interpretation of Article 3 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 COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric, and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet (Rapporteur), M. Wathelet, R. Schintgen, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mrs Beckmann, by G. Millar QC and M. Ford, Barrister, instructed by Thompsons, Solicitors,
- Dynamco Whicheloe Macfarlane Ltd, by A. Clarke QC and P. Trepte, barrister, instructed by N. Speed and M. Hunt, Solicitors,
- the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by S. Moore, Barrister,
- the Commission of the European Communities, by J. Sack and C. O'Reilly, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Beckmann, of Dynamco Whicheloe Macfarlane Ltd, of the United Kingdom Government and of the Commission at the hearing on 13 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

Grounds

1 By order of 1 March 2000, received by the Court on 5 May 2000, the High Court of Justice of England and Wales, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 3 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, hereinafter the Directive).

2 Those questions were raised in proceedings between Mrs Beckman and her former employer, Dynamco Whicheloe Macfarlane Ltd (hereinafter DWM), concerning an early retirement pension and other benefits which Mrs Beckman considered to be due to her following her dismissal for redundancy by DWM and which DWM refuses to pay to her. Mrs Beckman considers that she is entitled to those payments as a former employee of the National Health Service (hereinafter the NHS), an undertaking or business of which was transferred to DWM within the meaning of the Directive.

The Directive

3 According to Article 1(1) of the Directive, the Directive is to apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

4 Article 2 of the Directive provides that, for its purposes:

...

(a) "transferor" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the business;

(b) "transferee" means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business;

...

5 Article 3 of the Directive reads as follows:

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.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

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 provision that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.

National law

The Transfer of Undertakings (Protection of Employment) Regulations 1981

6 The Directive was transposed into national law by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (hereinafter TUPE). The relevant passages, for purposes of the main proceedings, of TUPE, which transpose Article 3 of the Directive, provide:

5. Effect of relevant transfer on contracts of employment ...

(1) ... a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) above, ... on completion of a relevant transfer

- all the transferor's rights, powers, duties and liabilities under or in connection with such a contract shall be transferred by virtue of this regulation to the transferee; and

- anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee ...

6. Effect of relevant transfer on collective agreements

Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by Regulation 5(1) above, then:

(a) ... that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee ...

7. Exclusion of occupational pension schemes

(1) Regulations 5 and 6 above shall not apply:

(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the "Social Security Pensions Act 1975" or the "Social Security Pensions (Northern Ireland) Order 1975"; or

(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.

7 The referring court specifies that the NHS Superannuation Scheme is an occupational pension scheme as defined in Regulation 7(1) of TUPE.

The General Whitley Council conditions of service

8 The Whitley Council's system is a system of establishing conditions of service in the public sector through joint negotiations between employers and employees.

9 Section 45 of the General Whitley Council conditions of service (hereinafter the GWC conditions of service), sets out the provisions on lump sum payments on dismissal for employees of the various bodies of the NHS where they are dismissed by reason of redundancy (lump sum redundancy payment). Such redundancy payments are paid by the employer.

10 Section 46 of the GWC conditions of service sets out the terms of the Collective Agreement on Premature Payment of Superannuation and Compensation Benefits, concluded between the various employers within the NHS and recognised trades unions. For employees aged between 50 and retirement age and with at least five years' service within the NHS Superannuation Scheme, Section 46 provides for early retirement with immediate payment of a retirement pension and compensation in three circumstances, that is to say dismissal for redundancy, retirement in the interests of the efficiency of the service or premature retirement on organisational change. There is also provision for enhancement of the number of years service taken into account for such employees.

11 The relevant implementing provisions in the case in the main proceedings for Section 46 of the GWC conditions of service are to be found in the NHS Superannuation Scheme Regulations 1995 and the NHS (Compensation for Premature Retirement) Regulations 1981. They provide for:

- an early retirement pension, based on actual years of pensionable service, paid from the date of redundancy to the normal age of retirement (early retirement pension);
- early payment of a lump sum normally payable on retirement, the amount of which is three times the yearly rate of the early retirement pension (lump sum on retirement);
- compensation in the form of an annual allowance to make up the early retirement pension (annual allowance), and
- a lump sum compensation payment being three times the annual allowance (lump sum compensation).

12 These various benefits are paid by the Secretary of State, in the case of the first two from the NHS Superannuation Scheme. However, they have to be reimbursed to the Secretary of State by the NHS administration.

13 Where these benefits reach a certain level, the lump sum redundancy payments under Section 45 of the GWC conditions of service are reduced or cancelled.

The facts of the main dispute and the questions referred

14 Mrs Beckmann worked within the NHS for the North West Regional Health Authority (hereinafter the NWRHA) under the GWC conditions of service. She contributed to the NHS Superannuation Scheme. On 1 June 1995, the body for which Mrs Beckmann worked was transferred within the meaning of Article 1(1) of the Directive and within the meaning of TUPE to DWM. Mrs Beckmann continued to work for DWM until she was dismissed for redundancy as from 6 May 1997.

15 On her dismissal for redundancy DWM paid Mrs Beckmann the lump sum redundancy payments calculated in accordance with Section 45 of the GWC conditions of service without any reduction to reflect payments under Section 46 of those conditions. Although Mrs Beckmann met the conditions of that section, as she was over 50 and had more than five years' service in the NHS Superannuation Scheme, she received none of the benefits it provided for.

16 Mrs Beckmann brought legal proceedings seeking a declaration that she is entitled to those benefits and an order that DWM pay them.

17 It is against that background that the High Court of Justice of England and Wales, Queen's Bench Division, referred the following two questions to the Court of Justice for a preliminary ruling:

(1) Is the employee's entitlement to early payment of pension and retirement lump sum and/or to the annual allowance and lump sum compensation, a right to an old-age, invalidity or survivors' benefit within the meaning of Article 3(3) of Council Directive 77/187/EEC?

(2) If and to the extent that the answer to Question 1 is "no", is there an obligation of the transferor arising from the contract of employment, the employment relationship or the collective agreement within the meaning of

Article 3(1) and/or 3(2) which transfers by reason of the transfer of the undertaking and renders the transferee liable to pay the benefits to the employee upon dismissal?

The first question

18 Mrs Beckmann and the United Kingdom Government contend that the benefits provided for by Section 46 of the GWC conditions of service do not fall within the scope of the exception laid down by Article 3(3) of the Directive and that they are, therefore, amongst the rights of the employee which are transferred. They are not tied to the risk of old-age, even though they are only paid from a certain age. They derive from a specific mechanism applicable to redundancy in specific circumstances.

19 In determining whether those benefits fall within the exception provided for by Article 3(3) of the Directive, which should be applied narrowly in the light of the general objectives of the legislation, it is necessary to focus only on the purpose of those benefits. The United Kingdom Government submits that this approach was followed by the Court in its judgment in Case 151/84 Roberts [1986] ECR 703, in which it was held that the conditions for granting early retirement pensions in the case of mass redundancies cannot be considered equivalent to the conditions for granting normal old-age pensions. Mrs Beckmann, for her part, points out that, in its judgment in Case C-262/88 Barber [1990] ECR I-1889, the Court made no distinction between early retirement allowances paid in the event of redundancy and other types of allowance paid in those circumstances and treated both as pay within the meaning of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC).

20 Mrs Beckmann adds that to consider an early retirement pension paid in the event of redundancy to be an old-age benefit would be to allow discrimination between employees dismissed after a transfer of an undertaking: some of those employees would always be able to claim benefits linked to redundancy as a result of undertakings by their previous employer, whereas others would no longer be able to claim the early retirement pension which their previous employer would have been obliged to pay them in the same circumstances. Mrs Beckmann argues further that neither the form of the arrangement implemented on redundancy - which may be described as early retirement or be given some other name, bearing in mind that employees individually have no real choice between the different formulas, which depend on their particular circumstances - nor the body which actually makes the payments of the benefits to the persons concerned, can be taken as decisive. What is relevant in the present case is that the benefits would ultimately have been paid, not by the retirement scheme proper, but by the employer, that is to say the NHS, if Mrs Beckmann were to have continued to be employed by it until her dismissal.

21 DWM, on the other hand, contends that the benefits at issue in the main proceedings are old-age benefits falling within the exception laid down by Article 3(3) of the Directive. The early payment of benefits which are, by their nature, old-age benefits does not alter their nature in any way. DWM points out in that connection that it is undisputed that the NHS Superannuation Scheme is a supplementary company pension scheme within the meaning of that article. The benefits at issue in the main proceedings are calculated exactly like the usual NHS old-age benefits, using a particular mechanism intended to compensate the lowest possible number of years of contribution by the persons concerned. DWM adds that the benefits under Section 46 of the GWC conditions of service are not paid to compensate for loss of a job, which is the purpose of the lump sum redundancy payment provided for by Article 45 of those conditions, which was, in any case, paid to Mrs Beckmann.

22 The Commission, for its part, maintains that it is necessary to enquire whether the constituent elements and other features of the benefits at issue in the main proceedings are such that they should be grouped with the benefits which need not be maintained for the benefit of an employee in the event of a transfer of an undertaking under the provisions of Article 3(3) of the Directive. The decisive criterion in that regard is the nature of the pension scheme which provides for the benefits in each case.

23 The Commission argues that the exception provided for by Article 3(3) of the Directive is explained by the characteristics of the supplementary company and inter-company pension schemes to which it relates, as is clear from the preparatory work for the Directive. The structure and, at the same time, the diversity of those schemes were such that it was impossible to require transferees generally to assume obligations under schemes with their own equilibrium, in which the transferees often do not participate.

24 The Commission proposes that the following criteria should be taken into account in determining whether the benefits at issue in the main proceedings fall within the exception provided for by Article 3(3) of the Directive: method of financing, nature and purpose, conditions for grant and method of calculation.

25 As regards the early retirement pension and the lump sum on retirement the Commission infers from the information provided by the national court that these are benefits paid under a company pension scheme within the meaning of Article 3(3) of the Directive. It notes in particular that DWM can certainly not participate in the NHS Superannuation Scheme, whereas the conditions for grant and the purposes of the two benefits seem to accord with those of the normal retirement benefits under the scheme. The Commission points out, however, that the NHS employer has to pay to the Secretary of State a contribution to compensate for the costs of the payment of the two benefits but does not know how this contribution is financed. The Commission also raises the question whether, in the event of the death of the persons concerned, their survivors would retain the benefits, as in the case of a retirement pension. The Commission none the less concludes that they appear to fall within the exception provided for by Article 3(3) of the Directive.

26 As regards the annual allowance and the lump sum compensation payment at issue in the main proceedings, the Commission states that the order for reference does not indicate clearly whether those benefits are paid under the NHS Superannuation Scheme or not, or whether they are intended to provide a sufficient income during the period preceding retirement proper or to pay compensation for redundancy. The Commission notes that their amount does not appear proportionate to the number of years for which the person concerned paid

contributions to the scheme and that the employer is also obliged to pay to the Secretary of State a contribution to compensate for the costs of the payment of those allowances. The Commission also wonders what happens in the event of the death of the person concerned. In the end it reserves its position on the two benefits.

27 As a preliminary point, it is to be noted that there is no dispute between the parties to the main proceedings and the United Kingdom Government that, although the NHS belongs to the public sector, NHS employees are covered by national employment law and are, therefore, eligible to benefit from the provisions of the Directive (see Case C-343/98 Collino and Chiappero [2000] ECR I-6659, paragraph 41).

28 An arrangement such as that under Article 46 of the GWC conditions of service, provides, *inter alia* in the event of a certain form of dismissal, for an early retirement pension together with payments to enhance that benefit.

29 Given the general objective of safeguarding the rights of employees in the event of transfers of undertakings pursued by the Directive when it provides, in Article 3(1) and (2), for transfer to the transferee of the transferor's rights and obligations arising from a contract of employment, from an employment relationship or collective agreement, the exception to that rule provided for by Article 3(3) must be interpreted strictly.

30 That exception can therefore apply only to the benefits listed exhaustively in that provision and they must be construed in a narrow sense.

31 In that connection, it is only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question, and not benefits paid in circumstances such as those in point in the main proceedings (dismissal for redundancy) that can be classified as old-age benefits, even if they are calculated by reference to the rules for calculating normal pension benefits.

32 The answer to the first question must therefore be that early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) of the Directive.

The second question

33 By its second question, the referring court is seeking essentially to ascertain whether, if benefits such as the benefits at issue in the main proceedings are not covered by the exception laid down by Article 3(3) of the Directive, the obligations arising on dismissal of an employee from a contract of employment, an employment relationship or a collective agreement binding the transferor in respect of that employee are transferred to the transferee subject to the conditions and limitations of Article 3 of the Directive, even if those obligations derive from statutory instruments or are implemented by such instruments under arrangements such as those applied for the benefits at issue in the main proceedings.

34 Mrs Beckmann, supported by the United Kingdom Government and the Commission, submits that the right to the benefits at issue in the main proceedings derived from her contract of employment or her employment relationship with the NHS and that her contract expressly provided that she would be able to benefit from the provisions of Section 46 of the GWC conditions of service. Moreover, as that section derived from a collective agreement, the obligation corresponding to that right was transferred to the transferee not only by virtue of Article 3(1) of the Directive, but also by virtue of Article 3(2) thereof. The fact that various statutory instruments were adopted to provide for that right, since the NWRHA was in the public sector, is no more relevant than the fact that benefits are paid by the Secretary of State before being reimbursed by the NWRHA, which is merely an arrangement for its implementation.

35 DWM, on the other hand, contends that the fact that the rights to the benefits at issue in the main proceedings were provided for by statutory instruments and that the payments are made by the Secretary of State rules out the applicability of Article 3(1) and (2) of the Directive, which only cover the rights employees can invoke against their employer as such under a contract of employment or employment relationship or collective agreement. Under the system in the case in the main proceedings, the transferor employer, that is to say the NWRHA, had obligations towards the Secretary of State and not to the employees. Moreover, DWM itself had no obligation towards the Secretary of State.

36 With regard to that point, Article 3(1) and (2) of the Directive provides that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking, and by the terms and conditions agreed in a collective agreement on the same terms as are 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, provided that the Member State concerned has not limited the period for observing such terms and conditions pursuant to the second subparagraph of Article 3(2) of the Directive.

37 Apart from the exceptions under Article 3(3) of the Directive relating to old-age, invalidity or survivors' benefits, no exception to those rules is provided for by the Directive and the existence of such a specific clause leads to the conclusion that Article 3(1) and (2) relates to all the rights of employees mentioned therein which are not covered by those exceptions (see Case 135/83 Abels [1985] EC 469, paragraph 37).

38 Accordingly, neither the fact that the rights and obligations arising from a contract of employment, an employment relationship or a collective agreement binding the transferor on the terms described in paragraph 37 of this judgment derive from statutory instruments or were implemented by such instruments, nor the practical arrangements adopted for such implementation can have the effect that such rights or obligations are not transferred to the transferee.

39 In the case in the main proceedings, in order to decide whether Mrs Beckmann can require DWM, as transferee, to pay the benefits in question, it is for the referring court, if necessary, to determine whether these benefits arose from her contract of employment or her employment relationship with the transferor employer or from a collective agreement which bound the transferor and would also bind the transferee under Article 3(2) of the Directive.

40 The answer to the second question must therefore be that, on a proper construction of Article 3 of the Directive, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.

Decision on costs

Costs

41 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division, by order of 1 March 2000, hereby rules:

1. Early retirement benefits and benefits intended to enhance the conditions of such retirement, paid in the event of dismissal to employees who have reached a certain age, such as the benefits at issue in the main proceedings, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes within the meaning of Article 3(3) 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.

2. On a proper construction of Article 3 of Directive 77/187, the obligations applicable in the event of the dismissal of an employee, arising from a contract of employment, an employment relationship or a collective agreement binding the transferor as regards that employee, are transferred to the transferee subject to the conditions and limitations laid down by that article, regardless of the fact that those obligations derive from statutory instruments or are implemented by such instruments and regardless of the practical arrangements adopted for such implementation.