Judgment of the Court (Sixth Chamber) of 14 September 2000

Renato Collino and Luisella Chiappero v Telecom Italia SpA

Reference for a preliminary ruling: Pretore di Pinerolo – Italy

Directive 77/187/EEC - Safeguarding employees' rights in the event of transfers of undertakings - Transfer of an entity managed by a public body forming part of the State administration to a private company whose capital is publicly owned - Definition of an employee - Taking into account of remployees' total length of service by the transferee

Case C-343/98

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In Case C-343/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Pretore di Pinerolo, Italy, for a preliminary ruling in the proceedings pending before that judge between

Renato Collino,

Luisella Chiappero

and

Telecom Italia SpA,

on the interpretation 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 (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann and J.-P. Puissochet (Rapporteur), Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Collino and Ms Chiappero, by C. Dal Piaz and S. Viale, of the Turin Bar,

- Telecom Italia SpA, by R. Pessi and M. Rigi Luperti, of the Rome Bar,

- the Austrian Government, by C. Pesendorfer, Oberrätin in the Federal Chancellor's Office, acting as Agent,

- the Finnish Government, by H. Rotkirch, Valtionasiamies, acting as Agent,

- the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, assisted by C. Lewis, Barrister,

- the Commission of the European Communities, represented by D. Gouloussis, Legal Adviser, and A. Aresu, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Collino and Ms Chiappero, represented by C. Dal Piaz and S. Viale; Telecom Italia SpA, represented by M. Rigi Luperti; the Finnish Government, represented by T. Pynnä, Valtionasiamies, acting as Agent; and the Commission, represented by D. Gouloussis and E. Traversa, of its Legal Service, acting as Agent, at the hearing on 25 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2000,

gives the following

Judgment

Grounds

1 By order of 3 September 1998, received at the Court on 21 September 1998, the Pretore di Pinerolo (District Magistrate, Pinerolo) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation 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 The two questions have been raised in proceedings between Mr Collino and Ms Chiappero and Telecom Italia SpA.

Community provisions

3 Article 1(1) of the Directive states that it applies 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 The first subparagraph of Article 3(1) of the Directive provides that 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) are, by reason of such transfer, transferred to the transferee.

National provisions

5 The Directive is implemented in Italy by Article 2112 of the Codice Civile (Civil Code), which provides inter alia that, on the transfer of an undertaking, the employment relationship continues with the transferee and the employee retains all rights under that relationship.

6 Article 34 of Legislative Decree No 29 of 3 February 1993 on rationalisation of the organisation of the public administration and revision of the regulations on public employment (GURI No 30 of 3 February 1993, ordinary supplement), as amended, provides that in the event of a transfer or contribution of activities operated by the public administration, public entities or establishments or structures thereof to other subjects of public or private law, Article 2112 of the Civil Code is to apply to the employees transferred, without prejudice to special provisions.

7 Article 1(1) of Law No 58 of 29 January 1992 on reform of the telecommunications sector (GURI No 29 of 5 February 1992) authorised the Minister for Posts and Telecommunications to grant the exclusive concession for the telecommunications services for public use operated until then by the Posts and Telecommunications Office and the Azienda di Stato per i Servizi Telefonici (ASST) to a company established for that purpose by the State-owned holding company Istituto per la Ricostruzione Industriale (IRI). Law No 58/92 also provided for all the rights and obligations attached to the operation of the services concerned to pass to the new company and for ASST to be dissolved.

8 Law No 58/92 further established a special scheme which derogated from the general rules on transfers of undertakings in Article 2112 of the Civil Code. First, employees of ASST could either stay in the public administration or become employees of the new company (Article 4(3)). Next, Law No 58/92 left it to collective bargaining at trade union level to ensure that the new company's employees received economic treatment which overall is not less than that previously enjoyed (Article 4(5)). Finally, employees who did not opt to stay in the public administration were entitled to payment of severance pay (trattamento di buonuscita) on the date of termination of their relationship with the administration (Article 5(5)).

9 By decree of 29 December 1992 (GURI No 306 of 31 December 1992), the Minister for Posts and Telecommunications awarded the concession for the telecommunications services for public use operated by the Posts and Telecommunications Office and ASST to Iritel SpA. On 18 April 1994, Società Italiana per le Telecommunicazioni SpA (SIP), another subsidiary of IRI, absorbed Iritel and then took the name Telecom Italia SpA.

The main proceedings

10 Until 31 October 1993 Mr Collino and Ms Chiappero were employed by ASST, the State body then responsible for operating certain telecommunications services for public use in Italy. On 1 November 1993, they were transferred to Iritel, the company set up by IRI to succeed ASST in accordance with Law No 58/92. On 16 May 1994, they were taken on by SIP, now Telecom Italia, when SIP absorbed Iritel.

11 Mr Collino and Ms Chiappero, who are now retired, brought an action against Telecom Italia before the Pretore di Pinerolo on 16 October 1997 challenging the conditions of their transfer from ASST to Iritel.

12 They claimed, first, that the trade-union agreement of 8 April 1993, concluded by Iritel and SIP of the one part and the most representative trade unions of the other part with a view to implementing Article 4(5) of Law No 58/92, was void in part. That agreement provided that salary increases for length of service after 1 November 1993 were to be calculated, for former employees of ASST transferred to Iritel, in accordance with the criteria laid down in the third paragraph of Article 24 of the Contratto Collettivo Nazionale Lavoratori (Workers' National Collective Agreement) for newly employed employees. The applicants considered that they should have benefited from the rules for calculating length of service laid down in the first and second paragraphs of Article 24 of that agreement which applied to employees who were already employed by SIP on the date when the agreement was concluded, 30 June 1992. They argued that this result, which took account of the single nature of their employment relationship since joining ASST, was required by Article 2112 of the Civil Code, which states that in the event of a transfer of an undertaking the employment relationship continues with the transferee.

13 They challenged, second, the fact that the severance pay which all public-law employees are entitled to receive when they leave the public administration had been paid to them when they left ASST and, for reasons outside their control, they had not been able to pay it back to SIP. Had they been able to, their termination payment (trattamento di fine rapporto), to which all private-law employees are entitled in the event of termination of their employment relationship and which they received when they retired, would have been calculated on the basis of their entire length of service. That single payment would have been greater than the two payments they received.

14 Telecom Italia argued that both those claims were unfounded, as no transfer of an undertaking within the meaning of Article 2112 of the Civil Code had taken place between ASST and Iritel. First, a public body such as ASST did not constitute an undertaking within the meaning of that provision, and, second, exercise of the activity in question was subject to the grant of an administrative concession.

15 In his order for reference, the Pretore considers that a transfer of an undertaking took place objectively in the present case, in that all the property and rights held by ASST were transferred to Iritel and the great majority of ASST's employees were taken on by Iritel to perform the same work on the same premises as before.

16 The Pretore observes, however, that while the Directive is transposed into Italian law by Article 2112 of the Civil Code, Article 34 of Legislative Decree No 29/93 provides that that provision is to apply, in the event of a transfer of an undertaking between a public-law body and a private-law body, only subject to special provisions. Law No 58/92 precisely introduced a special scheme derogating from the general law on transfers of undertakings. Under Italian law, therefore, the applicants cannot rely on Article 2112 of the Civil Code to support their claims.

17 The Pretore has doubts, however, as to whether the derogating rules introduced by Law No 58/92 are compatible with the Directive. He asks, first, whether the Directive applies to a transfer, on the basis of decisions of the public authorities and by means of an administrative concession, between a public body and a private-law company controlled by another public body. He is uncertain, second, as to the extent of the transfer required by the Directive - should it be applicable - of the rights and obligations of the transferor to the transferee.

18 Since he considered that in those circumstances the outcome of the case depended on the interpretation of the Directive, the Pretore di Pinerolo stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

1. Does a transfer for value, authorised by law enacted by the State and implemented by ministerial decree, of an undertaking managed by a public body which is a direct emanation of the State to a private company formed by another public body which holds all its shares, where the activity transferred is assigned to the private company under an administrative concession, fall within the scope of Article 1 of Directive 77/187/EEC?

If Question 1 is answered in the affirmative,

2. (a) Does Article 3(1) of Directive 77/187/EEC require it to be held that the continuation of the employment relationship with the transferee is mandatory, so that the worker's length of service continues as from the date on which he was engaged by the transferor and he continues to be entitled to receive a single termination payment which treats as a whole the period spent by him in the transferor and transferee's employment?

(b) Must Article 3(1) be interpreted in any event as meaning that the worker's "rights" transferred to the transferee also include the advantages acquired by him while employed by the transferor, such as length of service, if rights of a financial nature are attached thereto under the collective agreements applicable to the transferee?

Admissibility of the reference for a preliminary ruling

19 Telecom Italia submits that the Pretore's questions are inadmissible, in that he could not in any event apply provisions of the Directive to the main proceedings, all the parties to which are private individuals.

20 It is indeed correct that, in accordance with settled case-law, a directive may not of itself impose obligations on a private individual and may not therefore be relied on as such against such a person (see, inter alia, Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 20, and Case C-192/94 El Corte Inglés v Blázquez Rivero [1996] ECR I-1281, paragraph 15).

21 However, when applying national law, whether adopted before or after the directive, the national court having to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC) (see, inter alia, Faccini Dori, paragraph 26, and Case C-63/97 BMW v Deenik [1999] ECR I-905, paragraph 22).

22 Moreover, where persons are able to rely on a directive as against the State they may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law (see, inter alia, Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723, paragraph 49, and Case C-188/89 Foster and Others v British Gas [1990] ECR I-3313, paragraph 17).

23 Thus the Court has held that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between private individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied on (Foster and Others, paragraph 20).

24 It is for the national court to ascertain, on the basis of the above considerations, whether the Directive may be relied on against Iritel, now succeeded by Telecom Italia.

25 Subject to all the above considerations, the questions which have been referred should be answered by the Court.

The first question

26 By his first question the Pretore seeks to know whether Article 1(1) of the Directive is to be interpreted as meaning that the Directive applies to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of a transfer for value, in the form of an administrative concession, to a private-law company established by another public body which holds its entire capital.

27 Telecom Italia considers that the Directive does not apply in such a case, in that the transfer is not the result of a legal transfer or merger within the meaning of Article 1(1). Moreover, the Directive assumes that the transfer relates to an economic entity. But when ASST operated telecommunications services for public use, it carried on, for the benefit of society, a service in the public interest and did not pursue any objective of an economic nature.

28 Mr Collino and Ms Chiappero, the Austrian, Finnish and United Kingdom Governments and the Commission consider, on the other hand, referring to the Court's case-law, that the Directive is applicable, since the transfer in question related to an entity responsible for an economic activity. Neither the original integration of that body into the State, nor the fact that the transfer resulted from a law and a decree, nor the fact that the activity pursued is subject to an administrative concession arrangement affects that conclusion, in their opinion.

29 The Commission observes, however, that the employees of ASST were subject to a public-law status until they were transferred to Iritel. The Court has held that the Directive may be relied on only by persons who are, in one way or another, protected as employees under the law of the Member State concerned (Case 105/84 Foreningen af Arbejdsledere i Danmark v Danmols Inventar [1985] ECR 2639, paragraph 27). The Commission, supported at the hearing by the Finnish Government, considers, however, that the Directive would apply if it were the case that the tasks performed by the ASST employees were substantially the same as those performed by the employees of a private-law company governed by national labour law. That interpretation is supported, in its view, by the fact that Article 3 of the Directive refers not only to contracts of employment but also more generally to employment relationships.

30 First, it is settled case-law that the Directive applies to all transfers of entities which are engaged in economic activities, whether or not they operate with a view to profit (see, in particular, Case C-382/92 Commission v United Kingdom [1994] ECR I-2435, paragraphs 44 to 46).

31 On the other hand, the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a transfer of an undertaking within the meaning of the Directive. In those cases the transfer concerns activities involving the exercise of public authority (Case C-298/94 Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken [1996] ECR I-4989, paragraphs 14 and 17).

32 So, the fact that the service transferred was the subject of a concession by a public body such as a municipality cannot exclude application of the Directive if the activity in question does not involve the exercise of public authority (Joined Cases C-173/96 and C-247/96 Sánchez Hidalgo and Others [1998] ECR I-8237, paragraph 24).

33 The Court has held - in the context of competition law, admittedly, but the ruling may be applied to the present case - that the management of public telecommunications equipment and the placing of such equipment at the disposal of users on payment of a fee amount to a business activity (Case 41/83 Italy v Commission [1985] ECR 873, paragraph 18, and, impliedly, Joined Cases C-271/90, C-281/90 and C-289/90 Spain and Others v Commission [1992] ECR I-5833). Moreover, the circumstance that the operation of the public telecommunications network is entrusted to a body forming part of the public administration cannot prevent that body from being classified as a public undertaking (Case C-69/91 Decoster [1993] ECR I-5335, paragraph 15, and Case C-92/91 Taillandier [1993] ECR I-5383, paragraph 14).

34 Second, the circumstance that the transfer results from unilateral decisions of the public authority rather than from an agreement does not render the directive inapplicable (Case C-29/91 Redmond Stichting v Bartol [1992] ECR I-3189, paragraphs 15 to 17). The Court thus held that the Directive applies in a situation in which a public authority decides to terminate the subsidy paid to one legal person engaged in assisting drug addicts, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim (Redmond Stichting, paragraph 21).

35 In those circumstances, a transfer such as that in the main proceedings falls within the material scope of the Directive.

36 It should be noted, however, that the Directive may be relied upon only by persons who are protected in the Member State concerned as workers under national labour law (Danmols Inventar, paragraphs 27 and 28, Redmond Stichting, paragraph 18, and Sánchez Hidalgo, paragraph 24).

37 That interpretation derives from the fact that the Directive is intended to achieve only partial harmonisation in this area, essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. Its aim is therefore to ensure, as far as possible, that the contract of employment or the employment relationship continues unchanged with the transferee, so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria (Danmols Inventar, paragraph 26).

38 It follows from that judgment that, contrary to the submissions of the Finnish Government and the Commission, the Directive does not apply to persons who are not protected as employees under national employment law, regardless of the nature of the tasks those persons perform.

39 The judgment in Danmols Inventar has, moreover, been confirmed by Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187 (OJ 1998 L 201, p. 88), which is to be transposed into the laws of the Member States by 17 July 2001 at the latest. Article 2(1)(d) of the Directive as amended defines employee as any person who, in the Member State concerned, is protected as an employee under national employment law.

40 In the present case, the case-file suggests that, at the time of the transfer at issue in the main proceedings, ASST's employees were subject to a public-law status, not to employment law. That, however, is for the national court to verify.

41 Consequently, the answer to be given to the first question must be that Article 1(1) of the Directive is to be interpreted as meaning that the Directive may apply to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of a transfer for value, in the form of an administrative concession, to a private-law company established by another public body which holds its entire capital. The persons concerned by such a transfer must, however, originally have been protected as employees under national employment law.

The second question

42 By the two parts of his second question, which should be considered together, the Pretore seeks to know whether Article 3(1) of the Directive is to be interpreted as meaning that, in calculating the rights of a financial nature attached, in the transferee's business, to employees' length of service, such as a termination payment or salary increases, the transferee must take into account the entire service, in both his employment and that of the transferor, of the employees transferred.

43 Telecom Italia considers that the first part of the second question, relating to calculation of the termination payment, is inadmissible in that it is not objectively necessary for the resolution of the main proceedings (see, inter alia, Case C-319/94 Dethier Équipement v Dassy [1998] ECR I-1061). It submits that Italian law expressly made it possible for the ASST employees transferred to Iritel to obtain, by repaying their severance payment to Iritel, a single termination payment calculated on the basis of their entire length of service with both employers.

44 On this point, it should be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C-200/97 Ecotrade v Altiforni e Ferriere di Servola [1998] ECR I-7907, paragraph 25, and Case C-295/97 Piaggio v Ifitalia and Others [1999] ECR I-3735, paragraph 24). A request for a preliminary ruling may be rejected as inadmissible only where it is plain that the interpretation or the examination of the validity of a Community rule requested by the national court has no bearing on the actual facts or subject-matter of the main proceedings (see, inter alia, Joined Cases C-215/96 and C-216/96 Bagnasco and Others v BPN and Carige [1999] ECR I-135, paragraph 20).

45 In the present case, the Pretore states in his order for reference that under Law No 58/92 the employees of ASST who did not opt to stay in the public administration were entitled to payment of severance pay on the date of termination of their relationship with the administration. He also states that Mr Collino and Ms Chiappero challenged the payment of that sum on the ground that when they retired it had deprived them, for reasons beyond their control, of a termination payment calculated on the basis of their entire length of service with the transferor and the transferee.

46 It follows that the interpretation of Community law sought by the Pretore in the first part of his second question is not manifestly unconnected with the subject-matter of the main proceedings, and the question is therefore admissible.

47 On the substance, Telecom Italia proposes that both parts of the question should be answered in the negative. It submits that while transferred employees retain the rights which derive from their employment relationship with the former employer, they cannot enjoy the benefits provided by the new employer on the basis of their length of service before the transfer.

48 Mr Collino and Ms Chiappero, the Austrian, Finnish and United Kingdom Governments and the Commission submit, on the other hand, that in accordance with Article 3(1) of the Directive the transferee is bound by all the contractual obligations entered into by the transferor towards his employees, including those which have arisen before the transfer. It follows that in calculating an employee's rights related to length of service the transferee must also take into account the employee's period of service before the transfer.

49 Under the first subparagraph of Article 3(1) of the Directive, 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) are, by reason of such transfer, transferred to the transferee. The Directive is thus intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor (Joined Cases 144/87 and 145/87 Berg and Buschers [1988] ECR 2559, paragraph 12, and Case C-362/89 D'Urso and Others v EMG [1991] ECR I-4105, paragraph 9).

50 As the Advocate General observes in point 91 of his Opinion, the transferred employees' length of service with their former employer does not as such constitute a right which they may assert against the new employer. On the other hand, length of service is used to determine certain rights of employees of a financial nature, and it is those rights which will have to be maintained by the transferee in the same way as by the transferor.

51 Consequently, in calculating rights of a financial nature such as a termination payment or salary increases, the transferee must take into account the entire length of service of the employees transferred, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship.

52 However, where national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal and conditions of remuneration, such an alteration is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3(1) of the Directive the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment (see, inter alia, Case 324/86 Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall [1988] ECR 739, paragraph 17, and Case C-209/91 Watson Rask and Christensen v ISS Kantineservice [1992] ECR I-5755, paragraph 28).

53 The answer to be given to the second question must therefore be that Article 3(1) of the Directive is to be interpreted as meaning that, in calculating the rights of a financial nature attached, in the transferee's business, to employees' length of service, such as a termination payment or salary increases, the transferee must take into account the entire length of service of the employees transferred, both in his employment and that of the transferor, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship. The Directive does not, however, preclude the transferee from altering the terms of the employment relationship where national law allows such an alteration in situations other than the transfer of an undertaking.

Decision on costs

Costs

54 The costs incurred by the Austrian, Finnish and United Kingdom Governments 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Pretore di Pinerolo by order of 3 September 1998, hereby rules:

1. Article 1(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 meaning that that directive may apply to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of a transfer for value, in the form of an administrative concession, to a private-law company established by another public body which holds its entire capital. The persons concerned by such a transfer must, however, originally have been protected as employees under national employment law.

2. The first paragraph of Article 3(1) of Directive 77/187 must be interpreted as meaning that, in calculating the rights of a financial nature attached, in the transferee's business, to employees' length of service, such as a termination payment or salary increases, the transferee must take into account the entire length of service, in both his employment and that of the transferor, of the employees transferred, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship. Directive 77/187 does not, however, preclude the transferee from altering the terms of the employment relationship where national law allows such an alteration in situations other than the transfer of an undertaking.