Judgment of the Court (Sixth Chamber) of 12 March 1998

Jules Dethier Équipement SA v Jules Dassy and Sovam SPR

Reference for a preliminary ruling: Cour du travail de Liège - Belgium

Safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses - Transfer of an undertaking being wound up voluntarily or by the court - Power of the transferor and transferee to dismiss employees for economic, technical or organisational reasons - Employees dismissed shortly before the transfer and not taken on by the transferee

Case C-319/94

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In Case C-319/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Cour du Travail, Liège, Belgium, for a preliminary ruling in the proceedings pending before that court between

Jules Dethier Équipement SA

and

Jules Dassy,

Sovam SPRL, in liquidation,

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: H. Ragnemalm, President of the Chamber, G.F. Mancini (Rapporteur) and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Belgian Government, by Jan Devadder, General Adviser in the Ministry of Foreign Affairs, External Trade and Cooperation with Developing Countries, acting as Agent,

- the Commission of the European Communities, by Marie Wolfcarius, of its Legal Service, and Horstpeter Kreppel, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1996,

gives the following

Judgment

Grounds

1 By judgment of 1 December 1994, received at the Court on 8 December 1994, the Cour du Travail (Higher Labour Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of 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 Those questions have been raised in proceedings between Jules Dethier Équipement SA (`Dethier'), on the one hand, and Jules Dassy and Sovam SPRL (`Sovam'), on the other, concerning payment of compensation in lieu of notice and of other sums of compensation.

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 Under the first subparagraph of Article 3(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 are, by reason of such transfer, to be transferred to the transferee.

5 Article 4(1) of the Directive provides that the transfer of an undertaking, business or part of a business is not in itself to constitute grounds for dismissal by the transferor or the transferee. That provision is not, however, to stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

6 The Directive was transposed into Belgian law in the second chapter of Collective Agreement No 32 bis of 7 June 1985 concerning the safeguarding of employees' rights in the event of a change of employer as a result of the contractual transfer of an undertaking and regulating the rights of employees re-engaged in the event of a takeover of assets following insolvency or judicial composition with transfer of assets, made mandatory by Royal Decree of 25 July 1985 (Moniteur Belge, 9 August 1985, p. 11527). That agreement was amended by Collective Agreement No 32 quater of 19 December 1989, made mandatory by Royal Decree of 6 March 1990.

7 The procedure for winding up companies under Belgian law is dealt with in Articles 178 to 188 of the Lois Coordonnées sur les Sociétés Commerciales (Consolidated Laws on Commercial Companies; `the Consolidated Laws'). It applies following the dissolution of a commercial company and is designed to allow the company to conclude business transactions already entered into while precluding it, as a rule, from engaging in new business. Article 178 of the Consolidated Laws provides that, following their dissolution, commercial companies are deemed to exist for the purposes of their liquidation even if they have already ceased all trading.

8 Dissolution automatically brings to an end the functions of all the organs of the company, which are replaced by one or more liquidators. The liquidator, who represents the company vis-à-vis third parties, may already be named in the company's articles of association. In the absence of contrary agreement, liquidators are appointed by the members in general meeting or, if the majority laid down by law is not obtained, by the court: in the first case the liquidation is called voluntary winding up (`liquidation volontaire'), while in the second it is referred to as winding up by the court (`liquidation judiciaire').

9 Although the national court states in its judgment making the reference that the objectives pursued in a winding up, whether voluntary or by the court, are very close to those in an insolvency, that is to say realisation of the company's assets, it draws attention to a number of points where the two procedures differ, which may be summarised as follows:

- the decision to wind up the company, the appointment of liquidators and the definition of their powers are matters for the general meeting of the company. It is only where the requisite majority of the members is not achieved that the company must apply to the court for a winding up order; the court appoints the liquidators in accordance with the articles of association of the company, or in accordance with the resolution of the general meeting, except where it appears certain that disagreement amongst the members will prevent the general meeting from passing a resolution, in which case a liquidator is appointed by the court. As regards insolvency, the company may declare itself insolvent, but it may also be declared insolvent following an action by a creditor or work by the investigation commission, the court appointing the administrator whose powers are laid down by law;

- the legal personality of the company survives for the purposes of the liquidation (Article 178 of the Consolidated Laws), which is not the case with a company in insolvency;

- the company retains its commercial character throughout the winding up; thus, if it ceases subsequently to make payments or is unable to raise credit it could be declared insolvent; in that case winding up is a procedure which precedes insolvency;

- while there is a special insolvency procedure for establishing liabilities under the supervision of the court, that is not so in the case of a winding up, whether voluntary or ordered by the court, where the liquidator may recognise a debt without referring to anybody else; responsibility for that decision, which does not require sanctioning by court order, rests with the liquidator;

- while, in an insolvency, creditors may only register their debts as liabilities of the company, the position is different in a winding up where creditors may obtain judgment against it;

- in the case of a winding up, creditors may levy execution against the company and the liquidator can oppose that step only if its effect is to prejudice the rights of the other creditors, while, in an insolvency, such levying of execution is prohibited since the management and liquidation of the assets to be used to pay off creditors are governed by law;

- the general meeting may revoke its appointment of a liquidator, whereas only the court may revoke the appointment of a court-appointed liquidator or of an administrator in an insolvency; from that point of view a distinction must thus be drawn between voluntary winding up, on the one hand, and winding up by the court and insolvency proceedings, on the other;

- a liquidator is the organ of the company during its winding up whereas an administrator is a third party. An administrator represents the creditors as well as the company, while a liquidator represents only the company even though he must ensure that the interests of creditors are safeguarded;

- unlike an administrator in an insolvency, a liquidator cannot challenge certain payments in the absence of a `suspect period' before the beginning of the winding up, nor can he bring an action to make good a deficiency in assets or to establish liability on the part of the founders;

- an administrator sells the assets under the supervision of the insolvency judge and with the authorisation of the court in certain cases, while a liquidator performs that task under the supervision of the general meeting, so that the transfer of the undertaking is not subject to court approval;

- in conclusion, insolvency proceedings afford the creditors greater guarantees than liquidation proceedings in that the administrator is supervised by the court and the creditors are more directly represented.

10 Mr Dassy had been employed by Sovam since 1974. On 15 May 1991 the Tribunal de Commerce (Commercial Court), Huy, made an order putting that company into liquidation and appointing a liquidator. On 5 June 1991 the liquidator dismissed Mr Dassy.

11 On 27 June 1991 the liquidator transferred the assets of Sovam to Dethier under an agreement which the Tribunal de Commerce approved on 10 July 1991.

12 On 22 May 1992 Mr Dassy brought an action before the Tribunal du Travail (Labour Court), Huy, for Sovam and Dethier to be held jointly and severally liable to pay the sums due to him by way of compensation in lieu of notice, paid holiday leave and end-of-year bonuses. He contended that the transfer of the undertaking was contractual and that Dethier was therefore jointly and severally liable for those payments.

13 On 17 December 1993 the Tribunal du Travail, Huy, gave judgment against Sovam, in liquidation, and Dethier, finding them jointly and severally liable to pay Mr Dassy the sum of BFR 1 643 726. It held in particular that the second chapter of Collective Agreement No 32 bis should be applied, since winding up by the court could not be treated in the same way as insolvency where, as in this case, the transfer resulted from a takeover plan which predated the winding up. It also considered that liability had to be joint and several even where a contract was prematurely terminated before the date of the transfer because, according to the case-law of the Court of Justice, staff unlawfully dismissed before a transfer had to be regarded as still employed by the undertaking on the date of the transfer.

14 Dethier appealed against that judgment to the Cour du Travail, Liège, contending that the liquidation of Sovam was comparable to an insolvency. Furthermore, any joint and several liability on the part of the transferee could benefit only those employees taken on by the transferee and not those dismissed before the transfer.

15 After finding that in this case the entity formed by the assets of Sovam had retained its identity after its being taken over, in accordance with the judgment in Case 24/85 Spijkers v Benedik [1986] ECR 1119, and that there had therefore been a transfer of an undertaking within the meaning of the Directive, the national court raised the question whether that transfer could be regarded as a legal transfer within the meaning thereof and, in particular, whether the winding up of a company amounted to a procedure analogous to insolvency proceedings, which would then fall outside the field of application of the Directive.

16 As regards the dismissal of Mr Dassy, the national court is unsure as to the interpretation of Article 4 of the Directive in a case where an employee is dismissed by the liquidator shortly before the transfer and not subsequently taken on by the transferee.

17 The Cour du Travail, Liège, therefore decided to stay proceedings and to refer the following questions to the Court:

`(1) Does Council Directive 77/187 apply where the transfer is effected by a company in voluntary liquidation, a procedure whose aim, in the absence of continued trading, is liquidation by realisation of the assets? Is the answer the same where the transferor is being wound up by the court?

(2) Where the contracts of employment of all the employees have been terminated by the liquidator and only some of those employees have been re-engaged for the purposes of the liquidation, may the dismissals of the employees not subsequently taken on by the transferee be regarded as having taken place for economic, technical or organisational reasons within the meaning of Article 4(1) of the directive? Must the power to dismiss such employees for such reasons be left, on the contrary, to the transferee alone?

May staff not taken on by the transferee claim, as against him, merely because an economic entity was transferred shortly after their dismissal for economic, technical or organisational reasons, that the measure taken in their regard by the transferor was unlawful if the transfer agreement does not provide for their re-engagement?'

The first question

18 By its first question, the national court essentially seeks to ascertain whether, on a proper construction of Article 1(1) of the Directive, the Directive applies in the event of the transfer of an undertaking which is being wound up voluntarily or by the court.

19 It should be noted first of all that the Court has consistently held that it cannot give preliminary rulings on questions which bear no relation to the facts and the subject-matter of the main action and are therefore not strictly needed in order to decide the case (see, in particular, Case 126/80 Salonia v Poidomani and Giglio [1981] ECR 1563, paragraph 6; Case C-343/90 Lourenço Dias v Director da Alfândega do Porto [1992] ECR I-4673, paragraph 20; Case C-18/93 Corsica Ferries v Corpo dei Piloti del Porto di Genova [1994] ECR I-1783, paragraph 14; and Case C-96/94 Centro Servizi Spediporto v Spedizioni Marittima del Golfo [1995] ECR I-2883, paragraph 45).

20 Since the main proceedings concern the transfer of an undertaking being wound up by the court, the Court is not required to interpret the Directive with regard to the transfer of an undertaking being wound up voluntarily, a situation which is unrelated to the subject-matter of the main proceedings, whatever the similarities between the procedure governing winding up by the court and that governing voluntary winding up.

21 Next, as the Court ruled in Case 135/83 Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie [1985] ECR 469, the Directive does not apply to the transfer of an undertaking, business or part of a business in the course of insolvency proceedings.

22 However, it is clear from paragraphs 28 and 29 of that judgment that the Directive is applicable to proceedings such as a `surséance van betaling' (judicial leave to suspend payment of debts), even though they have certain features in common with insolvency proceedings. The Court in fact considered that the reasons for not having the Directive apply in the case of insolvency proceedings were not valid when the proceedings in question involved supervision by the court which was more limited than in the case of insolvency and when they were intended primarily to safeguard the assets of the undertaking and, if possible, to keep the undertaking in

business by means of a collective suspension of debt payment with a view to reaching a settlement allowing the undertaking to continue operating in the future.

23 Similarly, the Court held in Case C-362/89 D'Urso and Others [1991] ECR I-4105 that the Directive did not apply to transfers of undertakings, businesses or parts of a business made as part of a creditors' arrangement procedure of the kind provided for by the Italian legislation on compulsory administrative liquidation, whose effects were comparable to those of bankruptcy proceedings (paragraphs 28, 31 and 34). Conversely, it did apply when it was decided, under a body of legislation such as that governing special administration for large undertakings in critical difficulties, that the undertaking was to continue trading for as long as that decision remained in force. In such cases, the primary purpose of the special administration procedure was to give the undertaking some stability allowing its future activity to be safeguarded. The social and economic objectives thus pursued could not explain or justify the circumstance that, when all or part of the undertaking was transferred, its employees lost the rights which the Directive conferred on them under the conditions which it laid down (D'Urso and Others, paragraphs 29 and 32, 33 and 34).

24 More recently, the Court held in Case C-472/93 Spano and Others v Fiat Geotech and Fiat Hitachi [1995] ECR I-4321 that the Directive applied to the transfer of an undertaking declared to be in critical difficulties pursuant to Italian Law No 675 of 12 August 1977. It pointed out in particular that the purpose of a declaration that an undertaking was in critical difficulties was to enable the undertaking to retrieve its economic and financial situation and above all to preserve jobs, that the procedure in question was designed to promote the continuation of its business with a view to its subsequent recovery and that, by contrast with insolvency proceedings, it did not involve any judicial supervision or any measure whereby the assets of the undertaking were put under administration and did not provide for any suspension of payments (paragraphs 26, 28 and 29).

25 It follows from that case-law that, in deciding whether the Directive applies to the transfer of an undertaking subject to an administrative or judicial procedure, the determining factor to be taken into consideration is the purpose of the procedure in question (D'Urso and Others, paragraph 26, and Spano and Others, paragraph 24). However, as the Advocate General has stated in points 31, 41 and 45 of his Opinion, account should also be taken of the form of the procedure in question, in particular in so far as it means that the undertaking continues or ceases trading, and also of the Directive's objectives.

26 In this case, it is apparent from the information provided by the Cour du Travail that the objective of the Belgian procedure under which a company is wound up by the court is liquidation by realising the company's assets for the benefit of the company itself and, subsidiarily, of any creditors. It is not a condition for putting a company into liquidation that its liabilities must exceed its assets. Although liquidation may be a stage which precedes insolvency, it can also occur, as the Belgian Government states, when the members no longer wish to cooperate.

27 It follows that, although the objectives of a winding up by the court may sometimes be similar to those of insolvency proceedings, this is not necessarily the case, since liquidation proceedings may be used whenever it is wished to bring a company's activities to an end and whatever the reasons for that course.

28 Since the criterion relating to the purpose of the procedure for winding up by the court appears not to be conclusive, it is necessary to consider that procedure in detail.

29 According to the reference by the national court, in the case of a liquidation the liquidator, although appointed by the court, is an organ of the company who sells the assets under the supervision of the general meeting; there is no special procedure for establishing liabilities under the supervision of the court; and a creditor may as a rule enforce his debt against the company and obtain judgment against it. By contrast, in the case of an insolvency, the administrator, inasmuch as he represents the creditors, is a third party vis-à-vis the company and realises the assets under the supervision of the court; the liabilities of the company are established in accordance with a special procedure and individual enforcement actions are prohibited.

30 It is thus apparent that the situation of an undertaking being wound up by the court presents considerable differences from that of an undertaking subject to insolvency proceedings and that the reasons which have led the Court to rule out application of the Directive in the latter situation may be absent in the case of an undertaking being wound up by the court.

31 That is the case where, as in the main proceedings, the undertaking continues to trade while it is being wound up by the court. In such circumstances continuity of the business is assured when the undertaking is transferred. There is accordingly no justification for depriving the employees of the rights which the Directive guarantees them on the conditions it lays down.

32 The answer to the first question submitted for a preliminary ruling must therefore be that, on a proper construction of Article 1(1) of the Directive, the Directive applies in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade.

The second question

33 By the first part of the second question, the national court essentially asks whether, on a proper construction of Article 4(1) of the Directive, only the transferee may dismiss employees for economic, technical or organisational reasons or whether the transferor must also be accorded that power.

34 Article 4(1) protects the rights of employees against a dismissal whose sole justification is the transfer, both vis-à-vis the transferor as well as vis-à-vis the transferee.

35 The Court has held that employees whose contract of employment or employment relationship comes to an end with effect from a date prior to that of the transfer, contrary to Article 4(1), must be regarded as still

employed by the undertaking on the date of the transfer, with the result, in particular, that the employer's obligations towards them are automatically transferred from the transferor to the transferee (Case 101/87 Bork International and Others v Foreningen af Arbejdsledere i Danmark [1988] ECR 3057, paragraph 18).

36 Accordingly, inasmuch as Article 4(1) precludes dismissals from taking place solely by reason of the transfer, it does not restrict the power of the transferor any more than that of the transferee to effect dismissals for the reasons which it allows.

37 The answer to the first part of the second question referred for a preliminary ruling must therefore be that, on a proper construction of Article 4(1) of the Directive, both the transferor and the transferee may dismiss employees for economic, technical or organisational reasons.

38 By the second part of the second question, the national court essentially seeks to ascertain whether employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful.

39 First, it follows from the judgment in Bork International and Others that employees dismissed before the undertaking was transferred, contrary to Article 4(1), must be regarded as still employed by the undertaking on the date of the transfer.

40 Secondly, it is settled case-law (see, in particular, Case 324/86 Tellerup v Daddy's Dance Hall [1988] ECR 739, paragraph 14) that the rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.

41 Therefore, the contract of employment of a person unlawfully dismissed shortly before the transfer must be regarded as still extant as against the transferee even if the dismissed employee was not taken on by him after the undertaking was transferred.

42 For those reasons, the answer to the second part of the second question referred for a preliminary ruling must be that employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful.

Decision on costs

Costs

43 The costs incurred by the Belgian Government and by the Commission of the European Communities, 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 Cour du Travail, Liège, by judgment of 1 December 1994, hereby rules:

1. On a proper construction of 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, that directive applies in the event of the transfer of an undertaking which is being wound up by the court if the undertaking continues to trade.

2. On a proper construction of Article 4(1) of Directive 77/187, both the transferor and the transferee may dismiss employees for economic, technical or organisational reasons. Employees unlawfully dismissed by the transferor shortly before the undertaking is transferred and not taken on by the transferee may claim, as against the transferee, that their dismissal was unlawful.