

Judgment of the Court (Fifth Chamber) of 10 December 1998

Francisco Hernández Vidal SA v Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96), Friedrich Santner v Hoechst AG (C-229/96), and Mercedes Gómez Montaña v Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97)

References for a preliminary ruling: Tribunal Superior de Justicia de Murcia - Spain, Arbeitsgericht Frankfurt am Main - Germany and Juzgado de la Social nº 1 de Pontevedra - Spain

Safeguarding of employees' rights in the event of transfers of undertakings

Joined cases C-127/96, C-229/96 and C-74/97

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In Joined Cases C-127/96, C-229/96 and C-74/97,

REFERENCES to the Court under Article 177 of the EC Treaty by the Tribunal Superior de Justicia de Murcia (Spain) (C-127/96), by the Arbeitsgericht Frankfurt am Main (Germany) (C-229/96) and by the Juzgado de lo Social No 1 de Pontevedra (Spain) (C-74/97) for a preliminary ruling in the proceedings pending before those courts between

Francisco Hernández Vidal SA

and

Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (C-127/96),

and between

Friedrich Santner

and

Hoechst AG (C-229/96),

and between

Mercedes Gómez Montaña

and

Claro Sol SA and Red Nacional de Ferrocarriles Españoles (Renfe) (C-74/97),

"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

(Fifth Chamber),

composed of: J.-P. Puissechot (Rapporteur), President of the Chamber, P. Jann, J.C. Moitinho de Almeida, C. Gulmann and D.A.O. Edward, Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Francisco Hernández Vidal SA, by Ángel Hernández Martín, of the Murcia Bar,
- Friedrich Santner, by Stephan Baier, Rechtsanwalt, Frankfurt am Main,
- Hoechst AG, by Mathias Becker, Assessor at the Arbeitsgeberverband Chemie und verwandte Industrien für das Land Hessen e.V., acting as Agent,
- Claro Sol SA, by José Antonio Otero Martín, of the Madrid Bar,
- Red Nacional de Ferrocarriles Españoles (Renfe), by Luis Fernando Díaz-Guerra Alvarez, of the Madrid Bar,
- the Spanish Government, by Rosario Silva de Lapuerta, Abogado del Estado, acting as Agent (C-74/97),
- the German Government, by Sabine Maass, Regierungsrätin z.A. in the Federal Ministry of Economic Affairs, acting as Agent (C-127/96 and C-229/96), and Ernst Röder, Ministerialrat in the same Ministry, acting as Agent (C-229/96 and C-74/97),
- the Belgian Government, by Jan Devadder, Director of Administration in the Legal Department, Ministry of Foreign Affairs, Trade and Cooperation with Developing Countries, acting as Agent (C-127/96),
- the French Government, by Jean-François Dobelle, Deputy Director at the Foreign Affairs Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same directorate, acting as Agents (C-127/96),

- the United Kingdom Government, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Clive Lewis, Barrister (C-127/96), and by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Sarah Moore, Barrister (C-74/97),

- the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent (C-127/96, C-229/96 and C-74/97), and Isabel Martínez Del Peral, of its Legal Service, acting as Agent (C-127/96 and C-74/97) and Peter Hillenkamp, Legal Adviser, acting as Agent (C-229/96),

having regard to the Report for the Hearing,

after hearing the oral observations of Francisco Hernández Vidal SA, represented by Ángel Hernández Martín; of Prudencia and María Gómez Pérez, represented by Joaquín Martínez Jiménez, of the Murcia Bar; of Hoechst AG, represented by Mathias Becker; of Red Nacional de Ferrocarriles Españoles (Renfe), represented by Luis Fernando Díaz-Guerra Alvarez; of the Spanish Government, represented by Rosario Silva de Lapuerta; of the French Government, represented by Jean-François Dobbelle and Anne de Bourgoing; and of the Commission, represented by Peter Hillenkamp and Manuel Desantes, a national civil servant on secondment to its Legal Service, acting as Agent, at the hearing on 11 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1998,

gives the following

Judgment

Grounds

1 By orders of 22 February 1996 (C-127/96), 11 June 1996 (C-229/96) and 28 January 1997 (C-74/97), received at the Court on 22 April 1996, 1 July 1996 and 20 February 1997 respectively, the Tribunal Superior de Justicia (High Court of Justice) Murcia, the Arbeitsgericht (Labour Court) Frankfurt am Main and the Juzgado de lo Social No 1 (Social Court, No 1) Pontevedra, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty 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).

2 The questions have been raised in the case of Francisco Hernández Vidal SA (hereinafter `Hernández Vidal') versus Prudencia Gómez Pérez, María Gómez Pérez and Contratas y Limpiezas SL (hereinafter `Contratas y Limpiezas'), in the case of Friedrich Santner versus Hoechst AG (hereinafter `Hoechst') and in the case of Mercedes Gómez Montaña versus Claro Sol SA (hereinafter `Claro Sol') and Red Nacional de Ferrocarriles Españoles (Spanish National Railways, hereinafter `Renfe').

3 Following pronouncement on 11 March 1997 of the judgment in Case C-13/95 Süzen [1997] ECR I-1259, the procedure in these cases was suspended by decisions of the President of the Court of 18 March 1997 and the Court asked the national courts which had made the references to indicate whether they wished to maintain their questions in view of that judgment and the judgment of 14 April 1994 in Case C-392/92 Schmidt [1994] ECR I-1311. By letters of 6 May 1997 (C-127/96), 24 July 1997 (C-229/96) and 22 April 1997 (C-74/97), those courts informed the Court that they wished to maintain their questions. By decisions of the President of the Court of 2 June 1997 (C-127/96), 27 August 1997 (C-229/96) and 5 June 1997 (C-74/97), the procedure was resumed in these cases.

4 By order of the President of the Fifth Chamber of 31 March 1998, the three cases were joined for the purposes of the oral proceedings and the judgment.

Case C-127/96

5 Prudencia Gómez Pérez and María Gómez Pérez were employed by the cleaning company Contratas y Limpiezas as cleaning ladies for several years. They were allocated to cleaning the premises of Hernández Vidal, a company engaged in the manufacture of sweets and chewing gum, pursuant to a cleaning contract between that undertaking and Contratas y Limpiezas.

6 The cleaning contract in question, which took effect on 1 January 1992 and was tacitly renewable each year, was terminated on 28 November 1994 with effect from 31 December 1994 by Hernández Vidal, which in future wished to assume itself the task of cleaning its own premises. Neither that company nor Contratas y Limpiezas wished to continue the employment relationships with Prudencia and María Gómez Pérez after 2 January 1995.

7 The two women then brought an action for unlawful dismissal against the two companies concerned before the Juzgado de lo Social No 5 (Social Court, No 5), Murcia. By judgment of 23 March 1995, that court upheld their claims but only with regard to Hernández Vidal. It ordered that company to re-employ the two women or to pay them damages and to pay them wages in respect of the period which elapsed between the date of their dismissal and the date of service of its judgment.

8 Taking the view that no transfer of a business or of part of a business had taken place and that it could not therefore be held to be a transferee, Hernández Vidal appealed against that judgment to the Tribunal Superior de Justicia (High Court of Justice), Murcia.

9 After deciding that the outcome of the case depended on the interpretation of Directive 77/187, that court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

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1. Is the work of cleaning the premises of an undertaking whose main business is not cleaning, being in this case the production of chewing gum and sweets, but which has a permanent need for that secondary activity "part of a business"?

2. May the term "legal transfer" cover the termination of a mercantile contract for the provision of cleaning services, after three years, with annual renewals, at the end of the third year, by decision of the undertaking hiring the services; if that is the case, may it depend on whether the undertaking hiring the services carries out the cleaning using its own workers or using workers under a new contractual arrangement?'

Case C-229/96

10 From 1980 Friedrich Santner was employed as a cleaner, first by Dörhöffer+Schmitt GmbH (hereinafter 'Dörhöffer+Schmitt'), then by B+S GmbH (hereinafter 'B+S'), which was created after the business of Dörhöffer+Schmitt was split up. He was engaged solely in the cleaning of part of Hoechst's bathhouses under cleaning contracts which Hoechst had concluded with the two previous companies in turn.

11 However, Hoechst terminated its contract with B+S and reorganised the cleaning of its bathhouses. It now does the cleaning work itself, in part using its own workers and in part in cooperation with other outside firms.

12 On 27 April 1995, B+S terminated its employment relationship with Mr Santner.

13 Mr Santner took the view that a transfer of an undertaking had occurred and that his employment relationship should therefore be continued with Hoechst. He therefore brought an action against Hoechst before the Arbeitsgericht Frankfurt am Main.

14 Considering that the outcome of the case depended on the interpretation of Directive 77/187, that court decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Where, following termination of the legal transfer to an outside firm of the cleaning operations of individual parts of a business, those operations are again carried out by the undertaking itself, can they be treated as part of a business within the meaning of Directive 77/187/EEC?

2. Is the position the same where, following their retransfer to the undertaking, those cleaning operations of individual parts of the business are re-merged into the cleaning operations of the business as a whole?'

Case C-74/97

15 Between 16 October 1994 and 15 October 1996 Renfe had entrusted the cleaning and maintenance of Pontevedra railway station to the cleaning company Claro Sol.

16 After winning that contract Claro Sol had engaged Mercedes Gómez Montaña and assigned her to the cleaning and maintenance of Pontevedra railway station. For a number of years previously Mrs Gómez Montaña had performed the same work as an employee of different service companies which preceded Claro Sol.

17 At the end of the contractual period, Renfe decided not to renew the contract with Claro Sol and in future to carry out the cleaning and maintenance of Pontevedra railway station itself. On 1 October 1996, Claro Sol informed Mrs Gómez Montaña that loss of its contract with Renfe meant that it had to terminate her employment relationship as from the following 15 October.

18 Mrs Gómez Montaña then brought an action for unlawful dismissal against Claro Sol and Renfe before the Juzgado de lo Social No 1, Pontevedra.

19 Considering that the outcome of the case depended on the interpretation of Directive 77/187, that court decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Directive 77/187/EEC of 14 February 1977 cover circumstances in which the termination of a contract with a cleaning company results in the dismissal of the worker employed by the contractor and the cleaning is taken over by the principal, a rail transport undertaking, using its own employees?'

The questions referred for a preliminary ruling

20 By their questions, which must be examined together, the national courts which have submitted them for a preliminary ruling seek to ascertain whether, and under what conditions, Directive 77/187 applies to a situation in which an undertaking which used to entrust the cleaning of its premises or part of them to another undertaking decides to terminate the contract which it had with that other undertaking and in future to carry out that cleaning work itself.

21 Article 1(1) of Directive 77/187 provides that 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.

22 According to the case-law of the Court, the aim of Directive 77/187 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the directive is, therefore, whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed (Case 24/85 Spijkers [1986] ECR 1119, paragraphs 11 and 12, and, most recently, Sözen, cited above, paragraph 10).

23 As regards the mode of such a transfer, it is established that Directive 77/187 is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who incurs the obligations of an

employer towards employees of the undertaking (see, in particular, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28).

24 Thus, the Court has held that a situation in which an undertaking entrusts to another undertaking by contract the responsibility for performing cleaning operations which it previously carried out directly (*Schmidt*, cited above, paragraph 14) and a situation in which a contractor who had entrusted the cleaning of its premises to a first undertaking terminates the contract binding it to that undertaking and concludes, for the purposes of similar operations, a new contract with a second undertaking (*Süzen*, cited above, paragraphs 11 and 12) may come within the scope of Directive 77/187.

25 Similarly, Directive 77/187 must be capable of applying where, as in these cases before the national courts, an undertaking which used to have recourse to another undertaking for the cleaning of its premises or part of them decides to terminate its contract with that other undertaking and in future to carry out that work itself.

26 In order for Directive 77/187 to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term 'entity' thus refers to an organised grouping of persons and of assets enabling an economic activity which pursues a specific objective to be exercised (*Süzen*, cited above, paragraph 13).

27 Whilst such an entity must be sufficiently structured and autonomous, it will not necessarily have significant assets, tangible or intangible. Indeed, in certain sectors, such as cleaning, these assets are often reduced to their most basic and the activity is essentially based on manpower. Thus, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity.

28 It is for the national courts which have made the references to determine, in the light of the criteria set forth above, whether the maintenance of the premises of the contract-awarding undertaking was organised in the form of an economic entity within the outside cleaning firm before the first undertaking decided to carry out the work itself.

29 In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, *Spijkers and Süzen*, paragraphs 13 and 14 respectively).

30 So, the mere fact that the maintenance work carried out by the cleaning firm and the work then carried out itself by the undertaking which owns the premises is similar does not justify the conclusion that there has been a transfer of an economic entity between the two undertakings. Such an entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (*Süzen*, cited above, paragraph 15).

31 As pointed out in paragraph 29 of this judgment, the national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets (*Süzen*, cited above, paragraph 18).

32 Since, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis (*Süzen*, cited above, paragraph 21).

33 Finally, the fact that, for the undertaking which has decided in future to carry it out itself, the cleaning work is merely an ancillary activity not necessarily connected with its objects cannot have the effect of excluding the operation from the scope of Directive 77/187 (Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 17, and *Schmidt*, cited above, paragraph 14).

34 It is for the national courts which have made the references to determine, in the light of the criteria set forth above, whether a transfer has occurred in the cases now before them.

35 The answer to be given to the questions submitted to the Court must therefore be that Article 1(1) of Directive 77/187 is to be interpreted as meaning that the directive applies to a situation in which an undertaking which used to entrust the cleaning of its premises to another undertaking decides to terminate its contract with that other undertaking and in future to carry out that cleaning work itself, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings. The term 'economic entity' refers to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. The mere fact that the maintenance work carried out first by the cleaning firm and

then by the undertaking owning the premises is similar does not justify the conclusion that a transfer of such an entity has occurred.

Decision on costs

Costs

36 The costs incurred by the Spanish, German, Belgian, French 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 proceedings pending before the national courts, the decision on costs is a matter for those courts.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia de Murcia, by the Arbeitsgericht Frankfurt am Main and by the Juzgado de lo Social No 1 de Pontevedra by orders of 22 February 1996, 11 June 1996 and 28 January 1997, hereby rules:

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 is to be interpreted as meaning that the directive applies to a situation in which an undertaking which used to entrust the cleaning of its premises to another undertaking decides to terminate the contract which it had with that other undertaking and in future to carry out that cleaning work itself, provided that the operation is accompanied by the transfer of an economic entity between the two undertakings. The term 'economic entity' refers to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. The mere fact that the maintenance work carried out first by the cleaning firm and then by the undertaking owning the premises is similar does not justify the conclusion that a transfer of such an entity has occurred.