

JUDGMENT OF THE COURT (Third Chamber)

18 July 2013 (\*)

(Transfer of undertakings – Directive 2001/23/EC – Safeguarding of employees' rights – Collective agreement applicable to the transferor and to the employee at the time of the transfer)

In Case C-426/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 10 August 2011, received at the Court on 12 August 2011, in the proceedings

**Mark Alemo-Herron and Others**

v

**Parkwood Leisure Ltd,**

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts, G. Arestis, J. Malenovský (Rapporteur) and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 September 2012,

after considering the observations submitted on behalf of:

- M. Alemo-Herron and Others, by T. Linden QC, and L. Prince, Barrister,
- Parkwood Leisure Ltd, by A. Lynch QC,
- the United Kingdom Government, by H. Walker, acting as Agent,
- European Commission, by G. Rozet and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2013,

gives the following

**Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 3 of Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses (OJ 2001 L 82, p. 16).

- 2 The request has been made in proceedings between, on the one hand, Mr Alemo-Herron and Others and, on the other hand, Parkwood Leisure Ltd ('Parkwood'), concerning the application of a collective agreement.

### **Legal context**

#### *European Union law*

- 3 Directive 2001/23 codifies 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 undertakings or businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88; 'Directive 77/187').
- 4 Article 3(1) to (3) of Directive 2001/23 provide:

'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 shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

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

- 5 Under Article 8 of that directive:

'This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.'

#### *United Kingdom law*

6 Directive 77/187 was implemented in the United Kingdom in the form of the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('TUPE').

7 Article 5(2)(a) of TUPE, which transposes Article 3(2) of Directive 2001/23, provides:

'[A]ll the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee'.

8 Under national law, it is possible for the parties to include a term in their contract that the employee's pay is to be determined from time to time by a third party, such as the National Joint Council for Local Government Services ('the NJC'), of which the employer is not a member or on which it is not represented. Under the United Kingdom's system of industrial relations, collective agreements of this kind are presumed not to be legally binding unless the parties expressly agree to the contrary. Nonetheless, the terms of such a collective agreement can take effect as the terms of the individual contract between the employer and the employee. That can be achieved, as in this case, by the incorporation into that contract of a term that the employee is entitled to the benefit of terms agreed between the employer and a trade union or negotiated by some other body such as the NJC. Once such terms have been incorporated they take effect as terms of the contract of employment.

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

9 In 2002, one of the London borough councils, Lewisham London Borough Council ('Lewisham'), contracted out its 'leisure' services to a private sector undertaking, CCL Limited ('CCL'), and the employees working in that leisure department became part of the staff of CCL. In May 2004, CCL sold that business to Parkwood, another private sector undertaking.

10 When the leisure department was the responsibility of Lewisham, the employment contracts between Lewisham and the employees working in that department had the benefit of the terms and conditions negotiated by the NJC, the local government collective bargaining body. The agreements negotiated by the NJC were not binding as a matter of law but as a result of the following contractual term contained in the relevant contracts of employment:

'During your employment with [Lewisham], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [NJC] ..., supplemented by agreements reached locally through [Lewisham]'s negotiating committees.'

11 At the time of the contracting out of the 'leisure' services to CCL, the NJC agreement for 1 April 2002 to 31 March 2004 applied. The undertaking operating those services was transferred to Parkwood in May 2004.

12 Parkwood does not participate in the NJC, and would, in any event, be unable to do so, since it is a private sector undertaking and not a public authority.

13 In June 2004, a new agreement was reached within the NJC, which was retrospectively effective from 1 April 2004 and was to continue in force until 31 March 2007. The new agreement was therefore reached after the transfer of the undertaking to Parkwood. Parkwood concluded that the new agreement was not binding on it and notified the employees to that effect, refusing to grant the pay increase agreed within the NJC for the period from April 2004 to March 2007.

- 14 In the light of Parkwood's refusal to abide by the terms agreed by the NJC, the employees brought a claim before an employment tribunal, which was dismissed in 2008. They appealed against that decision to the Employment Appeal Tribunal, which upheld their appeal on 12 January 2009. Parkwood appealed against that decision to the Court of Appeal (England & Wales) (Civil Division).
- 15 On 29 January 2010, the Court of Appeal (England & Wales) (Civil Division) upheld the appeal brought by Parkwood and restored the decision of the employment tribunal dismissing the claims brought by the appellants in the main proceedings. The Court of Appeal (England & Wales) (Civil Division) took the view that the consequence of the judgment delivered by the Court of Justice in Case C-499/04 *Werhof* [2006] ECR I-2397 was that Article 3(1) of Directive 77/187 did not bind the transferee to any collective agreement that was made after the transfer.
- 16 The appellants in the main proceedings appealed against that decision of the Court of Appeal (England & Wales) (Civil Division) to the Supreme Court of the United Kingdom, which decided to refer a number of questions concerning the interpretation and effect of Directive 2001/23 to the Court of Justice for a preliminary ruling. The Supreme Court takes the view that the question addressed by the Court in *Werhof* is not the same as that which is required to be answered in the present case.
- 17 In that respect, the Supreme Court states that German law, at issue in the case which gave rise to the judgment in *Werhof*, adopts a 'static' approach to the protection of employees after a transfer of an undertaking or business. It provides that collectively agreed rules become part of the employment contract with the content only that they possess at the time when the business is transferred, and that they are not updated after the transfer.
- 18 By contrast, the question in the case in the main proceedings is whether a Member State is prohibited from extending to employees, in the event of a transfer of an undertaking or business, 'dynamic' protection as a result of the application of domestic contract law, namely a protection by virtue of which the transferee may be bound not only by the collective agreements in force at the time of the transfer at issue, but also subsequent to that transfer.
- 19 In those circumstances, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:
  - '(1) Where, as in the present case, an employee has a contractual right as against the transferor to the benefit of terms and conditions which are negotiated and agreed by a third party collective bargaining body from time to time, and such right is recognised under national law as dynamic rather than static in nature as between the employee and the transferor employer, does Article 3 of Directive [2001/23] read with *Werhof* [cited above] –
    - (a) require that such right be protected and enforceable against the transferee in the event of a relevant transfer to which [that directive] applies; or
    - (b) entitle national courts to hold that such right is protected and enforceable against the transferee in the event of a relevant transfer to which [that directive] applies; or
    - (c) prohibit national courts from holding that such right is protected and enforceable against the transferee in the event of a relevant transfer to which [that directive] applies?

- (2) In circumstances where a Member State has fulfilled its obligations to implement the minimum requirements of Article 3 of Directive 2001/23 but the question arises whether the implementing measures are to be interpreted as going beyond those requirements in a way which is favourable to the protected employees by providing dynamic contractual rights as against the transferee, is it the case that the courts of the Member State are free to apply national law to the interpretation of the implementing legislation subject, always, to such interpretation not being contrary to Community law, or must some other approach to interpretation be adopted and, if so, what approach?
- (3) In the present case, there being no contention by the employer that the standing of the employees' dynamic right under national law to collectively agreed terms and conditions would amount to breach of that employer's rights under Article 11 of the European Convention on Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950], is the national court free to apply the interpretation of TUPE contended for by the employees?'

### **Consideration of the questions referred**

- 20 By its three questions, which should be examined together, the referring court asks, in essence, whether Article 3 of Directive 2001/23 must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking such as that at issue in the main proceedings, that dynamic clauses referring to collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee.
- 21 It is important to note at the outset that several aspects of the judgment in *Werhof*, in relation to Article 3 of Directive 77/187, are relevant to the case in the main proceedings. Although the case in the main proceedings concerns Directive 2001/23, those aspects are fully transposable to it, in so far as that directive codifies Directive 77/187 and the wording of the relevant provisions of Article 3 of each of those directives is identical.
- 22 First, in paragraph 37 of *Werhof*, the Court held that Article 3(1) of Directive 77/187 must be interpreted as not precluding, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.
- 23 Next, it is apparent from Article 8 of Directive 2001/23 that that directive does not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.
- 24 As regards the case in the main proceedings, it is established, as is apparent from the very wording of the second question, that the clauses referring to collective agreements negotiated and agreed after the date of transfer of the undertaking concerned, providing dynamic contractual rights, are more favourable to employees.
- 25 However, Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the

adjustments and changes necessary to carry on its operations (see, to that effect, *Werhof*, paragraph 31).

- 26 In that regard, it must be pointed out that the transfer of the undertaking at issue in the main proceedings took place between a legal person governed by public law and a legal person governed by private law.
- 27 Since the transfer is of an undertaking from the public sector to the private sector, the continuation of the transferee's operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors.
- 28 However, a dynamic clause referring to collective agreements negotiated and agreed after the date of transfer of the undertaking concerned that are intended to regulate changes in working conditions in the public sector is liable to limit considerably the room for manoeuvre necessary for a private transferee to make such adjustments and changes.
- 29 In such a situation, such a clause is liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other.
- 30 Secondly, it is settled case-law that the provisions of Directive 2001/23 must be interpreted in a manner consistent with the fundamental rights as set out by the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, Case C-179/11 *Cimade and GSTI* [2012] ECR I-0000, paragraph 42).
- 31 In that regard, the referring court does indeed indicate that the right not to join an association is not at issue in the main proceedings. However, the interpretation of Article 3 of Directive 2001/23 must in any event comply with Article 16 of the Charter, laying down the freedom to conduct a business.
- 32 That fundamental right covers, inter alia, freedom of contract, as is apparent from the explanations provided as guidance to the interpretation of the Charter (OJ 2007 C 303, p. 17) and which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into account for the interpretation of the Charter (Case C-283/11 *Sky Österreich* [2013] ECR I-0000, paragraph 42).
- 33 In the light of Article 3 of Directive 2001/23, it is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.
- 34 However, the transferee in the main proceedings is unable to participate in the collective bargaining body at issue. In those circumstances, the transferee can neither assert its interests effectively in a contractual process nor negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity.
- 35 In those circumstances, the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business.
- 36 Article 3 of Directive 2001/23, read in conjunction with Article 8 of that directive, cannot be interpreted as entitling the Member States to take measures which, while being more

favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business (see, by analogy, Case C-544/10 *Deutsches Weintor* [2012] ECR I-0000, paragraphs 54 and 58).

- 37 Having regard to all the foregoing, the answer to the three questions referred is that Article 3 of Directive 2001/23 must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.

### **Costs**

- 38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 3 of Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses, must be interpreted as precluding a Member State from providing, in the event of a transfer of an undertaking, that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer.**

[Signatures]

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\* Language of the case: English.