Opinion of Advocate General Bot delivered on 3 June 2010.
Albron Catering BV v FNV Bondgenoten and John Roest.
Reference for a preliminary ruling: Gerechtshof te Amsterdam - Netherlands.

Social policy - Transfers of undertakings - Directive 2001/23/EC - Safeguarding of employees’ rights - Group of companies in which staff employed by an ‘employer’ company and assigned on a permanent basis to an ‘operating’ company - Transfer of an operating company.

Case C-242/09.

European Court reports 2010 Page 00000

1. The aim of Council Directive 2001/23/EC (2) is to safeguard employees’ rights in the event of the transfer of their undertaking by ensuring, in particular, the continuity of employment relationships. For that purpose it provides that contracts of employment existing at the time of the transfer are to be transferred automatically from the transferor to the transferee.

2. In this case it is necessary to establish whether Directive 2001/23 applies in the event of a transfer from a company forming part of a group, where the employees who work on a permanent basis for that company are in the formal employ of another company within that group.

3. In this Opinion I shall submit that, having regard to the aim it pursues as well as to case-law, Directive 2001/23 is applicable in a situation of this kind.

I – Relevant legislation

A – European Union law


5. As set out in recital 3 in the preamble to Directive 2001/23, the aim of the directive is to protect employees in the event of a change of employer, in particular to ensure that their rights are safeguarded.

6. Under Article 1(1)(a) of Directive 2001/23, the directive is to apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. Under Article 1(1)(b) of the directive, there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether that activity is central or ancillary.

7. Article 2(1) of Directive 2001/23 contains the following definitions:

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

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

(d) “employee” shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.’

8. As provided in Article 2(2) of Directive 2001/23, the directive is to be without prejudice to national law as regards the definition of contract of employment or employment relationship.

9. Article 3 of that directive provides:

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.

10. Article 4 of Directive 2001/23 states:

‘1. The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of...’
dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce. Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissals.

2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.’

B – National law

11. Article 610(1) of Book 7 of the Netherlands Civil Code (Burgerlijk Wetboek) defines ‘contract of employment’ for the purposes of Netherlands law as follows:

‘An employment contract is a contract whereby one party, the employee, undertakes for a defined period and for a salary to work for the other party, the employer.’

12. Article 663 of Book 7 of the Netherlands Civil Code provides:

‘By virtue of the transfer of an undertaking, the employer’s rights and obligations, at the time of the transfer, under an employment contract concluded between the latter and an employee in that undertaking are automatically transferred to the transferee. For a period of one year after the transfer, that employer remains jointly and severally liable with the transferee for compliance with the obligations under the employment contract which came into being before the transfer.’

II – The dispute in the main proceedings and the questions referred for a preliminary ruling

13. Within the Heineken group, all personnel are in the employ of Heineken Nederlands Beheer BV. HNB accordingly functions as the central employer and second personnel to the various operating companies of the Heineken group in the Netherlands.

14. From 17 July 1985 to 1 March 2005 Mr Roest was in the employ of HNB as a member of the catering staff. Together with some 70 other catering staff, he was seconded by HNB to Heineken Nederland BV which, until 1 March 2005, provided catering for workers in the Heineken group on various sites. The HNB-based collective labour agreement applied in the context of that secondment.

15. Mr Roest is a member of FNV Bondgenoten, a trade union whose objectives include protecting the interests of its members in the context of terms and conditions of employment and remuneration, in particular by concluding collective labour agreements.

16. Heineken Nederland took the decision to outsource its catering operations to Albron Catering BV from 1 March 2005.

17. Albron is involved throughout the Netherlands in, amongst other things, contract catering, namely the management and operation of catering services, particularly in staff restaurants in the private and public sectors on the basis of appropriate contracts with clients.

18. Mr Roest entered the service of Albron as a member of the catering staff in a company restaurant as from 1 March 2005.

19. FNV and Mr Roest brought legal proceedings against Albron before the Kantonrechter (Cantonal Court) for a judgment that the transfer of the catering operations on 1 March 2005 between Heineken Nederland and Albron was a transfer of an undertaking within the meaning of Directive 2001/23 and that employees in the employ of HNB who were seconded to Heineken Nederland automatically entered the service of Albron as from that date.

20. FNV and Mr Roest also claimed that Albron should be ordered to apply to the employment contract concluded between Albron and Mr Roest, with retroactive effect to 1 March 2005, the terms and conditions that were in force between HNB and Mr Roest until that date and, as regards the arrears in remuneration outstanding from 1 March 2005, that Albron should be ordered to pay the statutory 50% increase as well as the statutory interest from the date of incurrence of the debt. FNV and Mr Roest claimed, lastly, that Albron should be ordered to pay costs.

21. By judgment delivered on 15 March 2006, the Kantonrechter allowed those claims, with the exception of the statutory 50% increase. Albron appealed against that judgment.

22. The Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) (Netherlands) points out that the preponderance of opinion is that, for Article 633 of Book 7 of the Netherlands Civil Code to apply, the transferer must be the employer of the employees concerned.

23. In those circumstances the Gerechtshof te Amsterdam decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

1. Should Directive 2001/23 ... be interpreted as meaning that there is a transfer of rights and obligations to the transferee as provided for in the first sentence of Article 3(1) only if the transferor of the undertaking to be transferred is also the formal employer of the employees concerned, or does the protection of employees envisaged by the directive imply that, upon transfer of an undertaking from an operating company belonging to a group, the rights and obligations pertaining to the employees working for that undertaking are transferred to the transferee if all the personnel working in the group are in the employ of a personnel company (which also belongs to that group) which functions as the central employer?

2. What would be the answer to the second part of the first question if the employees referred to there who work for an undertaking belonging to a group are in the employ of another company which also belongs to that group, which is not a personnel company as described in the first question?’

III – Analysis

24. By those questions referred for a preliminary ruling, the referring court is asking, in essence, whether Article 3(1) of Directive 2001/23 applies in the event of the transfer of an undertaking from a company belonging to a group, where the employees working on a permanent basis for that company were in the formal employ of another company in the group.

25. Before addressing the substance of the questions, it may be worth pointing out that Directive 2001/23, in so far as the dispute in the main proceedings is between two private parties, cannot be applied directly by the national court in the context of that dispute. In accordance with settled case-law, a directive cannot impose obligations on an individual and therefore has no 'horizontal direct' effect, even if the provisions of the directive were clear and precise. (9)

26. None the less, the questions referred cannot be considered to be irrelevant since it is likewise established that the national court, in such circumstances, is bound to interpret its entire domestic law, so far as possible, in the light of the wording and the purpose of the relevant directive in order to achieve the result sought by the directive. (10) It is also settled case-law that if the result prescribed by the directive at issue, where it confers rights on individuals, cannot be achieved by such means, European Union law requires the Member States to make good the damage caused to those individuals through failure by the Member States to transpose that directive. (11)

27. The question whether Article 3(1) of Directive 2001/23 applies in the dispute in the main proceedings is therefore designed to establish whether Netherlands law, in particular Article 663 of Book 7 of the Netherlands Civil Code, must be applied in this case so as to achieve the result envisaged by the directive.

28. Albbron and the Netherlands Government submit that Directive 2001/23 does not apply in the circumstances under examination for various reasons which may be summarised as follows.

29. They claim that it is evident from a reading of Article 2(1) in conjunction with Article 3(1) of Directive 2001/23 that employees fall within the scope of that directive only if they have a contract of employment linking them to the undertaking transferred and they carry out their activities in that undertaking. Those criteria have been come out in the case-law of the Court.

30. The situation in which employees are seconded within a group can be compared to that of temporary employees, who are part of the economic entity formed by the temporary employment business and may be caught by Directive 2001/23 only if that business, not the user undertaking, is transferred. Adopting that line of reasoning, the Netherlands Government expresses doubt as to whether seconded employees can be considered to be part of the long-lasting economic entity which must be formed by the transferred undertaking.

31. Furthermore, different companies in the same group cannot be treated as a single employer, bearing in mind that it was held in the judgment in Allen and Others (12) that Directive 2001/23 applied in the event of a transfer within a group of companies.

32. They claim, lastly, that extending the scope of Directive 2001/23 to cases of secondment would create considerable legal uncertainty. In such circumstances questions would be raised as to whether that course of action is valid only in respect of secondments effected within a group and as to the minimum duration of secondment that could result in the transfer of obligations to the transferee.

33. The Netherlands Government notes that an extension of that kind might make the prospect of taking over an undertaking highly unattractive to the transferee. It would also lead to seconded employees being granted dual protection since they would additionally be covered by Directive 2001/23 in the event of transfer of the undertaking which formally employs them.

34. I do not agree with those objections. Like the defendants in the dispute in the main proceedings and the Commission of the European Communities, I take the view that Directive 2001/23 indeed applies in the situation at issue on the following grounds.

35. A clear and precise answer to the question under consideration does not lie in the wording of the provisions of Directive 2001/23, in particular in the definition of the term 'transferor' set out in Article 2(1)(a) of the directive, or in Article 3(1) thereof relating to the safeguarding of employees' rights. In accordance with the case-law, whether or not Directive 2001/23 is intended to apply in the situation at issue must be assessed, therefore, in the light of the scheme of the directive and the objective it pursues. (13)

36. The aim of Directive 2001/23, let us recall, is to protect the position of employees in the event of a transfer. According to settled case-law, its aim is to ensure the continuity of employment relationships within an economic entity, irrespective of any change of ownership. (14) Having regard to that aim, the Court has – systematically since it found it necessary to interpret Directive 77/187 – set out the conditions for applying European Union law on the transfer of undertakings. (15)

37. By examining the case-law on those conditions governing application it is possible to draw the following lessons, which are relevant to the question under consideration.

38. First, Directive 2001/23 is intended to apply to any transfer of an economic entity, that is to say, a grouping of persons and assets organised in a stable manner, enabling the exercise of an economic activity and pursuing a specific objective. (16)

39. Therefore, employees may avail themselves of the rights conferred by the directive by virtue of their belonging to the transferred entity. Accordingly, in the judgment in Botzen and Others, (17) the Court ruled that, in the event of a partial transfer of an undertaking, only the employees belonging to the transferred part could rely on the guarantees afforded by Directive 77/187. The Court held that the only decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organisational framework within which their employment relationship took effect. (18)

40. Secondly, the rules laid down in Directive 2001/23 are mandatory, and thus it is not possible to derogate from them in a manner unfavourable to employees. (19) The employment relationships existing in the transferred entity are transferred automatically to the transferee on the date of the transfer. The transfer of
those relationships may not, therefore, be made subject to the intention of the transferor or the transferee, and the transferee may not obstruct the transfer by refusing to fulfil its obligations. (20)

41. On examining the situation at issue in light of those factors, I am able to draw the following conclusions.

42. First, an employee who, within the context of a relationship between companies belonging to the same group, is in the formal employ of a company within that group and works on a permanent basis for another company in that group has, of course, a stable relationship with the latter company which can be compared to a considerable extent to the relationship that would exist if he had been employed directly by that company.

43. On the one hand, such an employee is integrated into the structure of the company to which he is assigned and he contributes to the exercise of the company’s economic activity. On the other hand, on account of the permanence of his assignment, the employment relationship with that company is of the same duration as that deriving from the employment contract with the employer company. The company to which he is assigned may accordingly make use of an employee for an indeterminate length of time, training him according to its needs. It also derives benefit from the experience acquired by the employee in performing his duties in its service, as the case may be, for the entire duration of the employee’s working life, just as it could if it was his formal employer.

44. An employment relationship of that kind is, therefore, clearly separate from the relationship that such a company could have with a temporary employee: a temporary employee is assigned to work for a company making use of his services only on a temporary basis. (21) He was not chosen personally by that company but was selected by the temporary employment business which singled him out from all its employees based on his ability to meet the needs expressed by the user company in its order.

45. The Court’s analysis in Jouini and Others that a temporary employee, in the light of the conditions for applying Directive 2001/23, is attached to the temporary employment business which employs him, cannot therefore be applied to the situation of an employee who is seconded within a group, as in the circumstances of this case.

46. In view of the objective and scheme of Directive 2001/23, the method by which employment relationships are organised within a group of companies such as that at issue in the dispute in the main proceedings should therefore be construed, in my view, as though the employer company was concluding the employment contracts of the group’s employees on behalf of each of the operating companies to which they are assigned.

47. Therefore, the fact that the employment contracts of employees working for the transferred company were concluded with another company in the group must not stand in the way of the rights and obligations under those contracts being transferred to the transferee. I would also cite as evidence the fact that, in this case, the employment contracts of the employees of the transferred company were terminated by the employer company from the date of the transfer.

48. Unlike Albrou and the Netherlands Government, I do not consider that the position adopted by the Court in Allen and Others precludes that view. The upshot of that position is that an employee working for Heineken Nederland could also have benefited from the application of Directive 2001/23 if, instead of being transferred to Albrou – a company outside the Heineken group – it had been transferred to another operating company in that group. I fail to see how the fact that the directive would also apply in such circumstances should preclude its application in the event of the transfer of a company which does not belong to that group. The possibility of applying that directive in those two cases is, on the contrary, consistent with its aim of safeguarding employees’ rights in all cases of transfer of their undertaking.

49. Lastly, I take the view that the application of Directive 2001/23 in the situation at issue is mandatory in order to prevent groups of companies being able to refrain from applying the directive by organising their employment relationships as the Heineken group has done.

50. It is important to bear in mind that, in providing for the obligations arising from employment relationships to be transferred automatically to the transferee on the date of transfer, Directive 2001/23 imposes on the transferor the burden of ensuring that those obligations are transferred, and reduces accordingly the economic interest of such an operation. If the Court were to consider that the directive does not apply in the situation at issue, there would be a definite risk that groups of companies would adopt that method of organisation for their employment relationships in order to refrain from its application in the event of a transfer.

51. The application of Directive 2001/23 could therefore be left to the discretion of groups of companies, which is contrary to the mandatory nature of the directive as well as to the objective that it pursues.

52. I likewise find no valid reasons in the other objections raised by Albrou and the Netherlands Government for coming to the opposite decision.

53. As regards, first, the danger of conferring dual protection on employees accordingly seconded, that is to say, in the event of the transfer of the company to which they are assigned as well as in the event of the transfer of the employer company, I do not see how – assuming that such circumstances could arise – this would constitute a real difficulty. On a first view, that possibility, if it is compatible with Directive 2001/23, would in fact aid the protection of employees.

54. As regards, next, the risk of legal uncertainty which could be created by applying Directive 2001/23 in the situation at issue, having regard to the possibility of extending that approach in other cases of secondment, I likewise do not consider this to constitute an obstacle.

55. We have seen that, as regards the question examined, the determining criterion for applying Directive 2001/23 is the stability of the link between the employee and the transferred economic entity. In this case, assessing that stability does not pose a problem, since the employee at issue was assigned upon recruitment and on a permanent basis to the transferred company. It will be for the Court, where appropriate, to state subsequently whether and under which circumstances that solution must be extended to other cases of secondment. Interpretation of European Union law on the transfer of an undertaking has consisted, inter alia, in defining the scope of the law in the light of the broad diversity of situations which the national courts have to address. The possibility of extending the approach that I am proposing to other circumstances cannot, in any event, justify precluding the application of Directive 2001/23 in this case.
56. One final point is worthy of consideration. In its written observations Albron claimed that, if the Court were to rule that Directive 2001/23 applies in the situation at issue, it should confine the retroactive effect of its judgment to the cases pending before it.

57. It maintains that the number of actions brought against HNB and other undertakings which have carried out a transfer will be ‘considerable’ and that HNB already paid a severance bonus to employees who entered the service of Albron. It also explains that economic operators may have had a legitimate expectation, in light of the case-law, in the fact that application of Directive 2001/23 was conditional on the conclusion of an employment contract with the transferee.

58. I do not consider it possible to uphold that claim. According to settled case-law, it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Union’s legal order, the Court may decide to restrict the right to rely upon a provision which it has interpreted, with a view to calling in question legal relations established in good faith. (22) A restriction of that kind is possible only if, inter alia, it is shown that the retroactive effect of the judgment by the Court could lead to a risk of serious economic repercussions. (23)

59. Albron’s statements are not supported by any evidence that such a risk exists. In any event, the fact that HNB already paid a severance bonus to employees who entered the service of Albron is irrelevant.

60. In the light of those factors, I therefore propose that the Court should rule that Article 3(1) of Directive 2001/23 must be interpreted as applying in the event of the transfer of a company belonging to a group, where the employees working on a permanent basis for that company were in the formal employ of another company in the group.

IV – Conclusion

61. In the light of the foregoing considerations, I propose that the questions referred by the Gerechtshof te Amsterdam should be answered as follows:

18 – Ibid., paragraph 14.

19 – Case C-561/07 Commission v Italy [2009] ECR I-0000.


23 – Case C-209/03 Bidar [2005] ECR I-2119, paragraph 69.