Opinion of Advocate General La Pergola delivered on 15 October 1996

Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice

Reference for a preliminary ruling: Arbeitsgericht Bonn – Germany

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

Case C-13/95

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Opinion of the Advocate-General

I - Introduction

1 The questions which form the subject-matter of this case call upon the Court to define the scope 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 (1) and to determine, in particular, whether the termination of a cleaning contract with an undertaking and its subsequent award to another undertaking constitutes a `transfer of an undertaking, business or part of a business' as a result of a `legal transfer' within the meaning of the aforesaid directive.

II - Background

2 The plaintiff in the main proceedings, Mrs Ayse Süzen, was employed by the defendant from April 1987 as a cleaner at Aloisiuskolleg GmbH, a private church-run secondary school in Bonn-Bad Godesberg, whose premises the defendant had contracted to clean.

By letter of 15 February 1994 the defendant informed the plaintiff that the contract in question was expected to end on 30 June 1994 and that it was therefore compelled, as a precautionary measure, to terminate the plaintiff's employment, in compliance with the statutory period of notice, with effect from 30 June 1994. In that letter, however, the defendant offered to continue to employ the plaintiff if it was again awarded the cleaning contract in question.

The defendant's contractual relationship with Aloisiuskolleg in fact came to an end on 30 June 1994. Aloisiuskolleg thereupon transferred the contract to Lefarth GmbH, which has intervened in the main proceedings in support of the defendant, with effect from 1 August 1994. The plaintiff accordingly instituted proceedings against the defendant before the national court for a declaration that the dismissal was invalid on the ground that the time-limits prescribed by law had not been complied with.

3 In order to determine whether the plaintiff's dismissal was lawful, it is necessary, according to the national court, first to ascertain whether the termination of the cleaning contract in question with the defendant and its subsequent award to the intervener may be regarded as a transfer of a business or part of a business within the meaning of the directive. If so, according to the national court, the plaintiff's employment relationship would continue in existence unchanged with the intervener in the main proceedings. For that reason, the national court has found it necessary to seek a preliminary ruling from the Court on the following questions:

`(1) On the basis of the judgments of the Court of Justice of 14 April 1994 in Case C-392/92 and of 19 May 1992 in Case C-29/91, is Directive 77/187/EEC applicable if an undertaking terminates a contract with an outside undertaking in order then to transfer it to another outside undertaking?

(2) Is there a legal transfer within the meaning of the directive in the case of the operation described in Question 1 even if no tangible or intangible business assets are transferred?'

III - The relevant Community legislation

Article 1(1) of the directive provides as follows:

`1. This directive shall 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'.

The first subparagraph of Article 4(1) of the directive provides as follows:

`1. The transfer of an undertaking, business or part of a 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 organizational reasons entailing changes in the workforce (...).'

IV - The dispute

4 The questions raised by the national court require the Court to choose between two theoretical alternatives. On the one hand, as I shall explain in detail, it is possible to take the view in the light of the Court's case-law that the events which have given rise to this dispute constitute the transfer of an undertaking, entailing classification of this case amongst those governed by the directive. On the other hand, the facts of the case constitute an opportunity to reflect on the criteria laid down in the relevant rulings. The concept of transfers of undertakings set out in the directive calls for a better definition. The interpretation of Community law admittedly involves

defining that concept as required by the system and in particular the provision of the directive laid down for the protection of workers in order to prevent the transfer from constituting in itself a ground for dismissal by the transferor or the transferee. The transfer of an undertaking or business constitutes a transaction whose standard content has not been expressly provided for but is taken for granted by the Community legislature. The Court has repeatedly stated that transfers of undertakings within the meaning of the directive cannot `be appraised solely on the basis of a textual interpretation' of the relevant provision `on account of the ... divergences between the laws of the Member States with regard to the concept of legal transfer'. (2) However, the fact that the concept of transfers of undertakings varies from one national legal system to another, and that Community law has not referred to any of those systems for a definition, does not in my view rule out the possibility that the directive may still have endowed the concept in question with a specific technical meaning, as was the case, moreover, with regard to the other concept considered in the provision in question alongside transfer, namely the concept of merger. A ruling on interpretation therefore needs to specify at the very least the essential minimum content of the phrase `transfers of undertakings' by means of a legal transfer. This being a preliminary issue, I consider that the solution in this case must be based on it.

5 It is clear from the case-law that the Court has sought not to treat transfers of undertakings, businesses or parts of businesses in a formalistic manner, thereby avoiding a firm definition based on strict criteria, but has instead revealed a tendency to examine the concept in question and to define it while applying it, in the light of the specific features of each individual case. In so doing, the Court's intention is to provide the widest possible basis for assessing each case, without disregarding any details which might be useful for the proper classification of the transfer, which, it is worth bearing in mind, is more often than not a complicated transaction. The Court has often confined itself to setting forth the criteria which the national court will have to apply in order to classify a particular case in one or other of the categories covered by Community law. By the same token, the Court leaves to the national court, the dominus litis in that it decides whether to make a reference for a preliminary ruling, the task of carrying out that classification, since that court has at its disposal factual data relevant for the exact reconstruction of the underlying transactions.

The aforesaid criteria are set out especially in the judgment in Spijkers, (3) according to which it is necessary to take into account `all the facts characterizing the transaction in question'. That approach has consistently been followed in subsequent decisions. (4)

6 It is also apparent from the Court's case-law (5) that an ancillary facility in an undertaking, when the service it provides is entrusted to a third party, takes on for that reason alone an independent economic and functional identity in its own right, and the activity so classified is brought within the relevant category for the purposes of the directive. In Schmidt, (6) expressly cited by the national court in its order for reference, the Court goes so far as to hold that even an activity carried on by a single employee falls within that sphere.

Another feature of the rulings given by the Court in this area is the irrelevance of the method of transfer. More specifically, no significance has been attached to the fact that the transfer of an undertaking or part of it takes place directly between two individuals, the transferor and the transferee, or that the transfer of ownership, which may be effected by different contractual means, is carried out only indirectly, resulting in a trilateral transaction. This is illustrated by the Court's judgments in Daddy's Dance Hall, (7) Bork, (8) Redmond Stichting, (9) and Merckx. (10)

7 As I noted earlier, the criteria laid down by the Court on other occasions, in particular in the Schmidt case, may be used in order to treat the case under consideration on the same footing as those decided in the past and bring it within the scope of the directive. That would be an easy solution. I have misgivings, however, for several reasons. To transfer the facilities (of whatever kind) required by an undertaking to another body is a decision made in competitive circumstances, which ensures a choice between several competing rivals. I fail to see how there can be any justification for the transferee of the service being required to keep on such staff of the undertaking as provided services of that kind in the past, if it has been excluded or, in any event, whose tender, submitted on that occasion, has been unsuccessful.

In this case, moreover, there is no relationship whatsoever between the two firms which have alternated in providing the service. The only factor which they do in some respects have in common is that the contracting body for which the service is provided is the same. (11) It does not seem to me, however, that that is sufficient to treat this case on the same footing as those previously examined by the Court in Daddy's Dance Hall, Schmidt and Merckx. It is noteworthy, as the defendant in this case has pointed out moreover, that in previous cases decided by the Court there was always in any event a link with a body to which the undertakings between whom the transfer was deemed to take place were accountable. That was also the case, for instance, in Redmond Stichting where two foundations were funded by the State (the Municipality of Groningen, to be precise), which was thus the arbiter of their existence and determined their conduct. It was thus possible to take the view, albeit by implication, that the transfer in that case had been carried out because the interests involved coincided and were informed by a single purpose, that of the State, from which the foundations derived their means of support. The two foundations cooperated with each other within the framework of their accountability to the public authority and concluded an agreement for the transfer of know-how and resources.

It is this manifestation of intent, whether it takes the form of consent in the event of a legal transfer or a merger, which characterizes transfers of undertakings or parts of businesses and which is evidently lacking in this case.

8 A further key aspect of this case, however, which is connected with the second question raised by the national court, calls for further reflection: it concerns the very concept of transfers of undertakings, businesses or parts of businesses. As we have seen, the Court views that concept in broad terms, whilst considering that the details of the transfer are to be verified in each individual case. That approach allows for a suitable degree of flexibility in applying the relevant criteria to the various economic circumstances that may arise in the Community. Notwithstanding that merit, however, it is still necessary, as I have noted, to identify the essential content of the

transfer of an undertaking. The core requirement for applying the directive must be determined. However, it does not seem to me that the criterion laid down by the Court in Spijkers has drawn a definitive distinction between a situation in which an undertaking or business is transferred and a situation where the features of that transaction are not present.

9 That is why I consider that transfers of undertakings should be more clearly defined and distinguished from other situations which do not come within the terms of the directive. This case is, moreover, symbolic of the need to define the concept in question and set precise limits to its scope. It is one thing to terminate a contract with an undertaking and subsequently award it to another undertaking, as is the case here; it is quite another to effect a transfer.

At the very least, a transfer must - and on this point I agree with the observations of the United Kingdom, French and German Governments, as well as those of the defendant in the main proceedings - involve the actual transfer of tangible or intangible assets, always evidently on the voluntary basis of the relationship which must exist between transferor and transferee. Any other criterion, such as the mere pursuit of the activity previously carried on by another undertaking, without any assets or rights being transferred, is not sufficient to distinguish the two situations involved. (12) Instead, the converse is true: the transfer by one individual to another of tangible or intangible assets, coupled with the pursuit of the activity in question, can undoubtedly constitute the decisive factor when it comes to establishing whether the conditions for the application of the directive are fulfilled.

My conclusion is not, as I see it, in any way invalidated by the consideration that the undertakings which provide services of the type under consideration have negligible fixed assets. Even though the transfer of rights and assets which contribute to the formation and identity of the undertaking may be minimal, it also arises in the event of transfers of undertakings or businesses operating in the services sector.

10 A final consideration regarding the re-employment of staff. The aim pursued by the directive is undoubtedly to safeguard employment in the circumstances provided for. However, the fact that the majority of workers engaged in a particular activity may subsequently have been employed, with corresponding duties, by another undertaking, is not in my view the decisive criterion (or controlling test) for establishing whether the activity in question exhibits the characteristics of organizational independence which distinguish the concept of undertaking, business or part of a business. That factor alone does not point to the existence of a transfer of an undertaking, which necessarily leaves intact the employment relationship of staff not taken on by the transferee in carrying on the activity or providing the service in question. If anything, as the Court has frequently stated, (13) the re-employment by the latter undertaking of essential staff can be no more than a criterion for assessment, to be taken into account alongside the other criteria laid down in the case-law, in order to establish whether or not the activity in question is being pursued. There is a transfer of an undertaking, business or part of a business within the meaning of the directive only if the activity is being pursued and at the same time one undertaking has transferred tangible and intangible assets to the other.

V - Conclusion

11 In the light of the foregoing considerations, therefore, I suggest that the Court answer the questions referred by the Arbeitsgericht Bonn as follows:

The termination of a cleaning contract with an undertaking and the subsequent award of that contract to another undertaking does not, in the absence of other factors which may lead to a different classification of the situation in question, fall within the scope of Directive 77/187/EEC.

(1) - OJ 1977 L 61, p. 26.

(2) - Case 135/83 Abels [1985] ECR 469, and Case C-29/91 Redmond Stichting [1992] ECR I-3189.

(3) - Case 24/85 Spijkers [1986] ECR 1119, in particular paragraph 13.

(4) - Case C-29/91 Redmond Stichting, cited above, and Case C-209/91 Watson Rask and Christensen [1992] ECR I-5755.

(5) - Case C-209/91 Watson Rask and Christensen, cited above.

(6) - Case C-392/92 Schmidt [1994] ECR I-1311.

(7) - Case 324/86 Daddy's Dance Hall [1988] ECR 739.

(8) - Case 101/87 Bork [1988] ECR 3057.

(9) - Case C-29/91 Redmond Stichting, cited in footnote 2 above.

(10) - Joined Cases C-171/94 and C-172/94 Merckx and Neuhuys [1996] ECR I-1253.

(11) - See, in this regard, the solution arrived at by the Court in Case C-48/94 Rygaard [1995] ECR I-2745, in circumstances broadly similar to those now under consideration.

(12) - Case C-48/94 Rygaard, already cited in footnote 11.

(13) - Case 24/85 Spijkers, cited in footnote 3, and Case C-209/91 Watson Rask and Christensen, cited in footnote 4.