ORDER OF THE COURT (Fourth Chamber)

26 May 2005 *

In Case C-297/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 4 June 2003, received at the Court on 10 July 2003, in the proceedings

Sozialhilfeverband Rohrbach

v

Arbeiterkammer Oberösterreich,

Österreichischer Gewerkschaftsbund,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, N. Colneric (Rapporteur) and J.N. Cunha Rodrigues, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by reasoned order in accordance with Article 104(3) of its Rules of Procedure,

the persons referred to in Article 23 of the Statute of the Court of Justice having been invited to submit their observations in that regard,

after hearing the Advocate General,

makes the following

Order

1 The reference for a preliminary ruling concerns the interpretation of Articles 1(1)(c) and 3(1) 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 This reference was made in the context of a dispute between the Sozialhilfeverband Rohrbach (a social assistance association governed by public law) ('Sozialhilfeverband') and (i) the Arbeiterkammer Oberösterreich (Regional Employment Chamber) ('Arbeiterkammer') and (ii) the Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst (an association representing employees of the public sector) ('Gewerkschaftsbund') on the question whether the employment contracts of employees of the Sozialhilfeverband were transferred to two new limited liability companies governed by public law.

Law

Community legislation

3 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88), was codified by Directive 2001/23. The latter entered into force on 11 April 2001. No new deadline for transposition was set by it.

4 In the first question referred, the national court made reference to 'Directive 77/187/EEC, as amended by Directive 98/50/EC (now Directive 2001/23/EC)'.

5 Given that the transfer at issue in the main proceedings took place after the entry into force of Directive 2001/23, this directive is the relevant one.

6 Article 1(1) of that directive states that:

'1. (a) This directive shall 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.

(b) ...

(c) This directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this directive.'

7 Article 3(1) of the same directive states that:

'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.'

National legislation

8 The Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contract legislation) of 9 July 1993 (BGBl. 459/1993; 'AVRAG') was adopted with the view of transposing Directive 77/187 into Austrian law. It is not apparent from the decision to refer that the national system has been amended as a result of Directives 98/50 and 2001/23.

9 Paragraph 1(2)(1) of the AVRAG provides that the law does not apply to employment contracts with *Länder* (provinces), local authority associations or local authorities, even if those contracts are governed by private law. The employees to whom the main proceedings relate are subject to the Oberösterreichisches Gemeindebedienstetengesetz 2001 (Law applicable to Upper Austrian Local Authority Association Employees, LGBl. 48/2001). According to the decision to refer, neither this law nor any other provision of the law of the *Land* of Upper Austria provides for the transposition of the directive into domestic law as regards such employees.

10 Paragraph 3 of the AVRAG, entitled 'Transfers of undertakings, businesses or parts of businesses to another employer', provides that:

'(1) Where an undertaking, a business or part of a business is transferred to another employer (transfer of undertaking), the latter takes over, in the capacity of employer, all the rights and obligations deriving from employment relationships existing on the date of transfer.

...

(4) An employee may oppose the transfer of its employment relationship if the transferee does not adopt the collective agreement (Paragraph 4) or employees' rights to old age insurance benefits (Paragraph 5). ... In this case, the employment relationship with the transferor remains unchanged. ...'

Main proceedings and the questions referred for preliminary ruling

11 It is apparent from the decision to refer that the Sozialhilfeverband is a local authority association established by the law of a *Land*, and carries out social assistance functions within the meaning of Article 31 of the Oberösterreichisches Sozialhilfegesetz 1998 (Upper Austrian Law on Social Assistance 1998, LGBl. 82/1998), within its jurisdiction under Article 29(2) of that law as a regional body.

12 In its two operations it employs about 100 people, some of whom are physically or mentally disabled within the meaning of the Behinderteneinstellungsgesetz (Law on the Employment of Disabled Persons, BGBl. 22/1970). The Sozialhilfeverband's activities in managing and maintaining the workplaces for disabled persons are not acts of a public authority, but rather activities in the context of a private sector authority.

13 For economic and organisational reasons, the Sozialhilfeverband drew up a plan to hive off the two operations and transfer them to two newly-formed limited liability companies.

14 For the purpose of putting this plan into effect, on 28 December 2002 Altenfeldner Werkstätten gemeinnützige Gesellschaft GmbH ('Altenfeldner Werkstätten') was registered in the register of companies as carrying on the business of 'the operation of workplaces for disabled persons'. On the same day, Artegra Werkstätten gemeinnützige Gesellschaft GmbH ('Artegra Werkstätten') was registered in the register of companies as carrying on the business of 'market garden and laundrette'. Both undertakings are limited liability companies operating in the public interest. The Sozialhilfeverband holds the entire capital of both of those companies.

15 The two undertakings of the Sozialhilfeverband were transferred as contributions in kind to the limited liability companies Altenfeldner Werkstätten and Artegra Werkstätten under the contract between Sozialhilfeverband and the limited liability companies. The rights of disposal over the facilities of the Sozialhilfeverband affected by the hive-off were also transferred to the respective companies. Under the contracts the new companies are to step into the shoes of the Sozialhilfeverband in all existing legal relationships between the Sozialhilfeverband and third parties relating to the undertakings transferred. By virtue of a genuine contract in favour of third parties ('echter Vertrag zugunsten Dritter'), the Sozialhilfeverband guarantees that all the rights of the employees transferred will be preserved in the future by the transferee companies.

16 It is then provided that the Sozialhilfeverband's shareholding in the two companies will be transferred to Arcus Sozialnetzwerk gemeinnützige Gesellschaft GmbH ('Arcus Sozialnetzwerk'), a limited liability company operating in the public interest, whose sole shareholder is a private association. Both that association and Arcus Sozialnetzwerk are involved in the provision of care to disabled persons. Its members are private individuals and private companies. This transfer of shares had not been effected at the date of the decision to refer, since it was conditional on a specific resolution by the Sozialhilfeverband's board which had not yet been passed.

17 According to the transfer contract it has concluded with the Sozialhilfeverband, Arcus Sozialnetzwerk cannot dispose of or grant a charge over its shares in the two newly-formed companies without the Sozialhilfeverband's consent. The contract also contains specific provisions for the reversion of the shares in case of breach of contract, failure of its underlying purpose and voluntary liquidation. The transfer of the shares to Arcus Sozialnetzwerk is not intended to affect the Sozialhifeverband's agreement to guarantee the claims of the transferred employees. The reason for not transferring the Sozialhilfeverband's undertakings directly to Arcus Sozialnetzwerk is that that company intends to carry on the two operations within its own accounting group but also to avoid certain liabilities.

18 According to the Oberster Gerichtshof (Supreme Court) (Austria), the employees disputed that their employment contracts had been transferred to the newly-formed companies. They insisted that they were still in a contractual relationship with the Sozialhilfeverband.

19 Sozialhilfeverband brought an action before the Oberster Gerichtshof based on Paragraph 54(2) of the Arbeits- und Sozialgerichtsgesetz (Law on Labour and Social Courts, BGBl. 104/1985) for a declaration that the effect of the hiving-off of certain operations by the Sozialhilfeverband and the transfer of rights of disposal in that respect to Artegra Werkstätten and Altenfeldner Werkstätten was also to transfer to those same companies the employment contracts between the Sozialhilfeverband and the persons it had employed until then.

20 It submitted that it was possible to rely on the directive's direct application, even though Paragraph 3 of the AVRAG did not, by virtue of Paragraph 1(2)(1) thereof, apply to employment relationships entered into with local authority associations,

and despite the fact that Upper Austria, as the competent *Land* legislature, had not enacted any rules in respect of local authority employees for the purposes of transposing that directive.

21 Referring to the judgments in Case 8/81 *Becker* [1982] ECR 53 and Case 103/88 *Fratelli Costanzo* [1989] ECR 1839 the national court observes, in relation to the first question referred, that the Sozialhilfeverband is undoubtedly a State entity within the meaning of the Court's case-law, against which individuals are entitled to rely on provisions of a directive which are unconditional and sufficiently precise. The position of the private-law companies to whom the operations have been transferred may give rise to doubt. This could be significant in so far as, according to Case C-91/92 *Faccini Dori* [1994] ECR I-3325, a directive does not have direct effect against private persons. The consequences of the transfer of an undertaking as foreseen by the directive could not then have direct effect.

22 It is true that in the light of Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, it may be considered to be established that the transferee private-law companies in the main proceedings are also to be regarded as part of the State, with the consequence that the directive in question is directly applicable, since the transferor local authority association owns 100% of the shares in the transferee companies. However, it must also be borne in mind that it is intended that the shares in the transferee companies remain in the hands of the transferor local authority association only temporarily, and, subject to the consent of the association's board, there is already a contract for those shares to be transferred to a wholly private company. Were the transferee companies therefore not to be regarded as State entities, that sole reason would be sufficient to preclude the direct application of the directive in question.

23 As regards the second question referred, the national court observes in addition that, to date, the Court of Justice has considered only cases raising the possibility of

individuals relying on the direct applicability of directives against State entities. In the present case, however, the employees concerned do not want to rely on the direct applicability to them of a directive which is otherwise directly applicable. It is a State entity which seeks to rely upon the directive's direct application, for the benefit of itself and of the transferee company. In addition there is the fact that the State entity relying on the application of the directive in question does not itself have any competence to transpose that directive into national law.

24 The national court points out that if a State entity could not rely upon the direct application of the directive in question, it could not rely upon a transfer of employment contracts as against its employees, whereas individual employees could themselves rely upon the direct effect of the directive.

25 In those circumstances, the Oberster Gerichtshof decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is a limited liability company governed by private law, whose sole shareholder is a social assistance association governed by public law (local authority association) and which has been entrusted with tasks of a private sector authority (social assistance by way of the operation of a workplace for disabled persons), nevertheless still to be regarded as a "State entity", with the effect that Article 3(1), in conjunction with Article 1(1)(c) of Directive 77/187/EEC, as amended by Directive 98/50/EC (now Directive 2001/23/EC), which was not correctly transposed into national law, is directly applicable against it if, under a contract of transfer which is subject only to the agreement of the association's board, the social assistance association's shareholding is to be transferred to a purely private limited liability company?

If the answer to the first question is in the affirmative:

(2) As a "State entity" within the meaning of the case-law of the Court of Justice of the European Communities, can a social assistance association (local authority association) which transfers its operations itself rely on the direct application of Article 3(1), in conjunction with Article 1(1)(c) of the directive referred to in Question 1, against its employees, who are contesting the transfer of their employment contracts to a transferee (within the meaning of Question 1) and who insist that their employment relationships with the transferor continue to exist, where the provision of the directive referred to in Question 1 has not been correctly transposed, with the effect that the employment contracts are deemed to have been transferred to the transferee? In that connection, is it material that the transferor "State entity" has no legislative competence to transpose a directive into national law, that competence lying with a superior legislative body (the *Land*)?'

Consideration of the questions referred

26 Taking the view that the answer to the questions raised can clearly be deduced from the existing case-law, the Court, in accordance with Article 104(3) of its Rules of Procedure, informed the national court that it intended to rule on the case by reasoned order and invited the parties referred to in Article 23 of the Statute of the Court of Justice to submit observations on that point.

The first question

27 It is apparent from the Court's case-law that individuals are entitled to rely on provisions of a directive which are unconditional and sufficiently precise against organisations and bodies forming part of or subject to the supervision of a public authority such as local authorities (Case 152/84 *Marshall* [1986] ECR 723, paragraphs 46 and 49, *Fratelli Costanzo*, cited above, paragraph 31, and Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 18).

28 Given that Article 3(1) and the first sentence of Article 1(1)(c) of Directive 2001/23 satisfy the conditions for direct effect, the abovementioned provisions can consequently be relied upon against a limited liability company governed by private law, whose sole shareholder is a social assistance association governed by public law.

29 In this respect, the fact that, due to a share transfer which is subject only to the agreement of the association's board, the shareholding of such an association is to be transferred to a limited liability company, whose sole shareholder is a private association, is irrelevant. This is a plan which, as such, is not able to alter the legal nature of the first company.

30 The answer to the first question is therefore that a limited liability company governed by private law, whose sole shareholder is a social assistance association governed by public law, is among the entities subject to Article 3(1) and the first sentence of Article 1(1)(c) of Directive 2001/23.

The second question

31 The substance of the national court's second question is whether a State entity which transfers its operations can as such rely on Article 3(1), in conjunction with Article 1(1)(c), of Directive 2001/23, against an employee in order to force him to continue his employment relationship with a transferee.

32 In this respect, it is necessary to bear in mind that, according to settled case-law (see in particular Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 36 and the case-law cited above), a directive cannot by itself create obligations for a private individual and that a provision of a directive may not therefore be relied upon as such against the latter.

33 Therefore, a State entity cannot rely on Directive 2001/23 against an employee in order to force him to continue his employment relationship with one or more transferees.

34 In that respect, it is irrelevant whether the State entity in question is or is not itself responsible for the non-transposition of the directive.

35 The answer to the second question is that a State entity which transfers its operations may not rely on Article 3(1) and Article 1(1)(c) of Directive 2001/23 against an employee in order to force him to continue his employment relationship with a transferee.

Costs

36 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 (Fourth Chamber) hereby orders:

1. **A limited liability company governed by private law, whose sole shareholder is a social assistance association governed by public law, is among the entities subject to Article 3(1) and the first sentence of Article 1(1)(c) 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.**

2. **A State entity which transfers its operations may not rely on Article 3(1) and Article 1(1)(c) of Directive 2001/23 against an employee in order to force him to continue his employment relationship with a transferee.**

[Signatures]