JUDGMENT OF THE COURT (Third Chamber)
17 April 1997 *

In Case C-336/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Juzgado de lo Social No 16, Barcelona (Spain), for a preliminary ruling in the proceedings pending before that court between

Pedro Burdalo Trevejo and Others

and

Fondo de Garantía Salarial

on the interpretation of Article 1(1) and the second subparagraph of Article 3(3) 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 (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, C. Gulmann and J.-P. Puissochet (Rapporteur), Judges,

* Language of the case: Spanish.

Advocate General: G. Cosmas,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Spanish Government, by Alberto José Navarro González, Director General for Community Legal and Institutional Affairs, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, of the State Legal Service, acting as Agents,

— the Commission of the European Communities, by Maria Patakia and Isabel Martínez del Peral, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

1 By order of 1 September 1995, received at the Court on 25 October 1995, the Juzgado de lo Social No 16 (Social Court No 16), Barcelona, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 1(1) and the second subparagraph of Article 3(3) 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, hereinafter 'the directive').

2 That question was raised in proceedings brought by Pedro Burdalo Trevejo, José Soriano Marco, Miguel Casa Alonso and Vicente Pérez de la Cruz against the Fondo de Garantía Salarial (Wages Guarantee Fund) relating to the account taken of experience for calculating the payments due for dismissal or premature termination of a contract of employment (redundancy payments).

3 Article 1(1) of the directive states:

'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.'

4 Article 3(1) provides:

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.'

5 Finally, Article 3(3) is worded as follows:

'Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.'

6 The plaintiffs worked for many years (between 24 and 42) in a textile undertaking founded by Enrique Capellà which changed ownership on several occasions. It thus became, in turn, Hijos de Enrique Capellà SA on 19 May 1978, Ennoblecimiento Textil SA on 29 June 1981 and Hiades SA on 7 January 1986. Those changes did not affect the plaintiffs' employment relationships.

7 The relationships between the plaintiffs and Hiades were declared terminated on 10 May 1993 by the Labour Department of Catalonia, and the Fondo de Garantía Salarial was accordingly responsible for making the payments laid down by Spanish law for termination of contracts of employment for economic or technological reasons or for reasons of *force majeure* in undertakings with fewer than 25 employees.

8 Since the Fondo de Garantía Salarial refused to take account, for the purpose of calculating those payments, of the periods of work prior to 19 May 1978, the date of the first transfer of the undertaking, the plaintiffs brought an action which was assigned to the Juzgado de lo Social No 16, Barcelona.

9 That court took the view that the directive required interpretation in order for it to give judgment on the case and therefore decided to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with Article 1(1) and the second subparagraph of Article 3(3) of Council Directive 77/187/EEC of 14 February 1977 for the legislation or the courts of a Member State to reduce the payments to be made by the Fondo de Garantía Salarial by excluding certain periods of employment from the total experience to be taken into account, notwithstanding the fact that the employment continued without interruption for an undertaking which was transferred?'

10 It is apparent from the order for reference that, although the Fondo de Garantía Salarial is a guarantee institution within the meaning of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23), the national court considers that the payments at issue are not covered by that directive. However, it raises the question of the scope of certain provisions in Directive 77/187 and asks whether, in view of those provisions, the institution may exclude from the total experience to be taken into account for calculating redundancy payments the period prior to the first transfer of the undertaking, which took place on 19 May 1978.

11 The Spanish Government observes, first, that as the date at issue, 19 May 1978, precedes the date on which the Kingdom of Spain joined the Community and even precedes the expiry of the two-year period laid down for implementation of the

directive, the directive cannot be relied on in the main proceedings. It then points out that Article 3(3) of the directive, which relates exclusively to old-age or invalidity benefits under supplementary schemes, does not apply to the payments at issue. Finally, with regard to the general rule in Article 3(1), it refers to the case-law of the Court of Justice to the effect that the directive is intended merely to ensure that the relationship between the employee and the transferee is governed by the same terms and conditions as was his relationship with the transferor, in accordance with the law of the State in question.

12 The Commission considers that although the directive, which governs the obligations of transferees, does not apply directly to a guarantee institution such as the Fondo de Garantía Salarial, legislation relating to that type of institution must not limit the effectiveness of the directive. In particular, the experience taken into account for calculating redundancy payments must not be affected by any transfer of the undertaking for which the employee worked. It agrees with the Spanish Government that Article 3(3) of the directive does not apply to the payments at issue in the main proceedings.

13 The Spanish Government stated in reply to a question put by the Court that the case-law of the Tribunal Supremo (Supreme Court) drew a distinction between experience (*antigüedad*), which refers to the total time spent in a given occupation, and length of service, which refers to the time spent in a given undertaking. In the main proceedings, employment before 1978 could not be taken into account because a new undertaking was set up at that time, which recruited and declared to the social security authorities the employees who had been working for another undertaking with which their employment relationship had come to an end. That was not so, on the other hand, as regards the transfers in 1981 and 1986, where the rights and obligations of the undertakings were subrogated by law.

14 As the Advocate General has pointed out in points 23 to 26 of his Opinion, it follows from the above facts that, irrespective of the material scope of the directive in circumstances such as those described by the national court, it cannot assist the

employees concerned, since the transfer of the undertaking which is at issue took place prior to the date on which the directive first produced legal effects in the Member State concerned.

15 The date of 19 May 1978 precedes the accession of the Kingdom of Spain to the Communities, which produced legal effects only from 1 January 1986 (Article 2 of the Treaty concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, OJ 1985 L 302, p. 9). As the Spanish Government has pointed out, that date even precedes the expiry of the two-year period laid down for implementation of the directive by the Member States (Article 8(1) of the directive). Accordingly, the directive cannot in any event be relied on in relation to a transfer of an undertaking which took place on that date (see, for example, Joined Cases C-140/91, C-141/91, C-278/91 and C-279/91 *Suffritti and Others* v *INPS* [1992] ECR I-6337, paragraphs 11, 12 and 13, and Case C-316/93 *Vaneetveld* v *Le Foyer* [1994] ECR I-763, paragraph 16).

16 The answer to the question referred for a preliminary ruling must therefore be that the directive cannot be relied on in relation to a transfer of an undertaking which took place before the directive had begun to produce legal effects in the Member State concerned.

Costs

17 The costs incurred by the Spanish Government and the Commission of the European Communities, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Juzgado de lo Social No 16, Barcelona by order of 1 September 1995, hereby rules:

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 cannot be relied on in relation to a transfer of an undertaking which took place before the directive had begun to produce legal effects in the Member State concerned.

Moitinho de Almeida Gulmann Puissochet

Delivered in open court in Luxembourg on 17 April 1997.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber