JUDGMENT OF THE COURT (Third Chamber)
17 December 1987 *

In Case 287/86

REFERENCE to the Court under Article 177 of the EEC Treaty by Arbejdsretten (Labour Court), Copenhagen, for a preliminary ruling in the proceedings pending before that court between

Landsorganisationen i Danmark (Danish Trades Union Congress) for **Tjenerforbundet i Danmark** (Danish Union of Waiters and Waitresses)

and

Ny Mølle Kro, represented by its owner, Ella Marie Hannibalsen,

intervener: **Dansk Arbejdsgiverforening** (Danish Employers' Organization),

on the interpretation of certain provisions 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 (Official Journal 1977, L 61, p. 26),

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Landsorganisationen i Danmark by Knud Christensen, Finn Thorgrimson and Rønnow Bruun,

* Language of the Case: Danish.

the Dansk Arbejdsgiverforening by H. C. Springborg, J. U. Brink and H. Werner,

the United Kingdom by H. R. L. Purse, and

the Commission of the European Communities by Johannes Føns Buhl and Enrico Traversa,

having regard to the Report for the Hearing and further to the hearing on 2 July 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 October 1987,

gives the following

Judgment

1 By a decision of 12 November 1986, which was received at the Court on 21 November 1986, Arbejdsretten, Copenhagen, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions concerning the interpretation of Articles 1 (1) and 3 (2) of Council Directive 77/187 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 (Official Journal 1977, L 61, p. 26).

2 The questions were raised in the context of proceedings brought by Landsorganisationen i Danmark on behalf of Tjenerforbundet i Danmark against Mrs Hannibalsen.

3 In 1980 Mrs Hannibalsen leased the Ny Mølle Kro to Inger Larsen, who on 1 October 1980 concluded an agreement with the Hotel- og Restaurationspersonalets Samvirke (Association of Hotel and Restaurant Employees). According to that agreement, Mrs Larsen was to comply with the terms of any collective agreement concluded by that association.

4 In January 1981 Mrs Hannibalsen rescinded the lease and took over the operation of the restaurant herself on the ground that Mrs Larsen had failed to comply with the terms of the lease. Nevertheless, the restaurant was closed until the end of March 1981, since when Mrs Hannibalsen has managed the restaurant herself. It is clear from the documents before the Court that the business in question is operated on a regular basis as a restaurant solely during the summer season and that outside that season it may be hired for private parties.

5 In essence the dispute in the main proceedings concerns the obligation of Mrs Hannibalsen to pay arrears of wages to Mrs Hansen, an employee of the tavern, who worked there as a waitress from 12 May to 19 August 1983, that is to say, after Mrs Hannibalsen had taken over the business. The plaintiff in the main proceedings claims that the remuneration paid to Mrs Hansen was lower than the amount required to be paid under the collective agreement with which Mrs Larsen had undertaken to comply and which, by virtue of a transfer of the undertaking, was binding on Mrs Hannibalsen as transferee, inasmuch as she succeeded to the transferor's obligations under the contract of employment.

6 Arbejdsretten took the view that its decision on the dispute depended on the interpretation of certain provisions of Directive 77/187 and, consequently, it stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the words "transfer ... to another employer as a result of a legal transfer or merger" in Article 1 (1) 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 cover the situation in which, following the lessee's breach of a lease agreement, the owner of a leased undertaking rescinds that agreement and subsequently himself takes over the running of the undertaking?

(2) Does the directive apply where the transferred undertaking was temporarily closed at the time of the transfer, so that at that time no employees were employed by the undertaking?

(3) Is it material to the answer to question 2 that the undertaking concerned closes regularly for part of the year, as in the case of a hotel, a boarding house or a restaurant which is open only during the summer?

(4) Must Article 3 (2) of the directive be interpreted as meaning that the transferee must continue to observe the terms of a collective agreement

binding the transferor regarding pay and working conditions notwithstanding the fact that at the time of the transfer no employees were employed by the undertaking?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the provisions of Community law in question, the course of the procedure and the submissions made to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

8 By the first question Arbejdsretten seeks to ascertain, in essence, whether Article 1 (1) of Directive 77/187 of 14 February 1977 must be interpreted as meaning that the directive is applicable where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee.

9 Dansk Arbejdsgiverforening, the intervener in the main proceedings, proposes that the reply to that question should be in the negative because the lessee cannot be equated with an owner as regards his relations with employees of the undertaking and because, in any event, the taking over by the owner of the operation of the business following a breach of the lease is in the nature of an enforcement measure and there is therefore no transfer by agreement.

10 On the other hand, Landsorganisationen i Danmark, the United Kingdom and the Commission propose that the reply to the question should be in the affirmative on the ground that the lessee is the employer during the term of the lease and that the taking over by the owner of the operation of the undertaking following a breach of the lease takes place on the basis of an agreement between the owner and the lessee.

11 In that connection it must be pointed out that according to its preamble Directive 77/187 is intended 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. To that end the directive provides *inter alia* for the transfer of the transferor's rights and obligations arising from a contract of employment or from an employment

relationship (Article 3 (1)), the continued observance by the transferee of the terms and conditions agreed in any collective agreement (Article 3 (2)) and protection for the employees concerned against dismissal by the transferor or the transferee solely by reason of the transfer (Article 4 (1)). Article 1 (1), the interpretation of which is sought in this case, defines the scope of the directive by providing that it 'shall apply to the transfer of an undertaking, business or part of the business to another employer as a result of a legal transfer or merger'.

12 It follows from the preamble and from those provisions that the purpose of the directive is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor. The directive is therefore applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer *vis-à-vis* employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred. Employees of an undertaking whose employer changes without any change in ownership are in a situation comparable to that of employees of an undertaking which is sold, and require equivalent protection.

13 It follows that in so far as the lessee, by virtue of the lease, becomes the employer in the sense set out above, the transfer must be regarded as a transfer of an undertaking to another employer as a result of a legal transfer within the meaning of Article 1 (1) of the directive.

14 Similar considerations apply where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee. Such a takeover also occurs on the basis of the lease. Consequently, in so far as its effect is that the lessee ceases to be the employer and the owner reacquires that status, it must also be regarded as a transfer of the undertaking to another employer as a result of a legal transfer within the meaning of Article 1 (1) of the directive.

15 For those reasons the reply to the first question must be that Article 1 (1) of Council Directive 77/187 of 14 February 1977 must be interpreted as meaning that the directive is applicable where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee.

The second and third questions

16 By the second and third questions Arbejdsretten seeks to ascertain in essence whether Article 1 (1) of Directive 77/187, properly construed, covers the situation where at the time of the transfer the undertaking transferred is temporarily closed and has no employees. The question is put in particular with regard to the situation where the undertaking in question is regularly closed for part of the year and the transfer takes place during the season when it is closed.

17 In that connection Landsorganisationen i Danmark contends that the fact that the undertaking is temporarily closed at the time of the transfer does not prevent the directive from applying where the undertaking is engaged in seasonal activities and the period of closure coincides with the normal season when it is closed. That view is disputed by Dansk Arbejdsgiverforening, which argues that the directive is not applicable where the undertaking is temporarily closed and has no employees at the time of the transfer. The United Kingdom and the Commission adopt an intermediate position, maintaining that the directive is applicable so long as the undertaking retains its identity and that it is irrelevant whether or not staff are employed during a specific limited period.

18 The view taken by the United Kingdom and the Commission must be upheld. As the Court ruled in its judgment of 18 March 1986 in Case 24/85 *Spijkers* v *Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV* [1986] ECR 1119, Article 1 (1) of Directive 77/187 envisages the case in which the business retains its identity inasmuch as it is transferred as a going concern, which may be indicated in particular by the fact that its operation is actually continued or resumed by the new employer, with the same or similar activities.

19 In order to determine whether those conditions are satisfied it is necessary to take account of all the facts characterizing the transaction in question. The fact that the undertaking in question was temporarily closed at the time of the transfer and therefore had no employees certainly constitutes one factor to be taken into account in determining whether a business was transferred as a going concern. However, the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking within the meaning of Article 1 (1) of the directive.

20 That is true in particular in the case of a seasonal business, especially where, as in this case, the transfer takes place during the season when it is closed. As a general rule such closure does not mean that the undertaking has ceased to be a going concern.

21 It is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation set out above, in order to establish whether or not there has been a transfer in the sense indicated.

22 For those reasons the reply to the second and third questions must be that Article 1 (1) of Directive 77/187, properly construed, envisages the transfer of a business as a going concern. In order to ascertain whether that is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including, where appropriate, the temporary closure of the undertaking and the fact that there were no employees at the time of the transfer, although these facts alone do not preclude the applicability of the directive, especially in the case of a seasonal business.

The fourth question

23 By the fourth question Arbejdsretten asks essentially whether Article 3 (2) of Directive 77/187 must be interpreted as obliging the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who were not employed by the undertaking at the time of its transfer.

24 According to Landsorganisationen i Danmark that question must be answered in the affirmative. On the other hand, Dansk Arbejdsgiverforening, the United Kingdom and the Commission emphasize that only persons who are employed by the undertaking at the time of the transfer may take advantage of the directive, and not persons who are engaged after the transfer.

25 As the Court has already stated, in particular in its judgment of 11 July 1985 in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, the purpose of the directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer. It is therefore consistent with the scheme of the directive to interpret it as meaning that unless otherwise expressly provided it may be relied on solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer, subject, however, to compliance with the mandatory provisions of the directive concerning protection of employees from dismissal as a result of the transfer.

26 It follows that Article 3 (2) of the directive is intended to ensure the continued observance by the transferee of the terms and conditions of employment agreed in a collective agreement only in respect of workers who were already employed by the undertaking at the date of the transfer, and not as regards persons who were engaged after that date.

27 For those reasons the reply to the fourth question must be that Article 3 (2) of Directive 77/187, properly construed, does not oblige the transferee to continue to observe the terms and conditions agreed in a collective agreement in respect of workers who were not employed by the undertaking at the time of the transfer.

Costs

28 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings brought 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 questions referred to it by Arbejdsretten, Copenhagen, by a decision of 12 November 1986, hereby rules:

(1) Article 1 (1) of Council Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive is applicable where the owner of a leased undertaking takes over its operation following a breach of the lease by the lessee.

(2) Article 1 (1) of Directive 77/187, properly construed, envisages the transfer of a business as a going concern. In order to ascertain whether this is the case, account must be taken of all the factual circumstances surrounding the transaction in question, including, where appropriate, the temporary closure of the undertaking and the fact that there were no employees at the time of the transfer, although these facts alone do not preclude the applicability of the directive, especially in the case of a seasonal business.

(3) Article 3 (2) of Directive 77/187, properly construed, does not oblige the transferee to continue to observe the terms and conditions agreed in any collective agreement in respect of workers who were not employed by the undertaking at the time of the transfer.

Moitinho de Almeida Everling Galmot

Delivered in open court in Luxembourg on 17 December 1987.

P. Heim
Registrar

J. C. Moitinho de Almeida
President of the Third Chamber