JUDGMENT OF THE COURT (Fourth Chamber)

13 September 2007 *

In Case C-458/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 16 November 2005, received at the Court on 29 December 2005, in the proceedings

Mohamed Jouini,

Okay Gönen,

Hasan Bajric,

Gerald Huber,

Manfred Ortner,

Sükran Karacatepe,

Franz Mühlberger,

Nakil Bakii,

* Language of the case: German.

Hannes Kranzler,

Jürgen Mörth,

Anton Schneeberger,

Dietmar Susteric,

Sascha Wörnhör,

Aynur Savci,

Elena Peter,

Egon Schmöger,

Mehmet Yaman,

Dejan Preradovic,

Andreas Mitter,

Wolfgang Sorger,

Franz Schachenhofer,

Herbert Weiss,

Harald Kaineder,

Ognen Stajkovski, and

Jovica Vidovic

v

Princess Personal Service GmbH (PPS),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, E. Juhász, G. Arestis, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: Y. Bot,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 13 December 2006,

after considering the observations submitted on behalf of:

— Mr Jouini and others, by E. Frischenschlager and D. Gallistl, Rechtsanwälte,

— Princess Personal Service GmbH (PPS), by G. Minichmayr, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer and G. Hesse, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 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 The reference was made in the course of an action brought by Mr Jouini and 24 other plaintiffs against Princess Personal Service GmbH (PPS) ('PPS'), a company, for payment of claims for salary and for a declaration of a transfer of employment relationships to PPS for the purpose of calculating their claims.

Legal framework

Community legislation

3 Directive 2001/23 codifies 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; 'Directive 77/187').

4 The eighth recital of the preamble to Directive 2001/23 states:

'Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive 77/187/EEC as interpreted by the Court of Justice.'

5 Article 1(1)(a) and 1(b) of Directive 2001/23 provide:

'(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) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where 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 or not that activity is central or ancillary.'

6 Article 2(2) of Directive 2001/23 states:

'This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because:

...

(c) they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC [Council Directive of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19)], and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.'

7 According to Article 3(1) of Directive 2001/23:

'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.

...'

8 The drafting of the abovementioned provisions of Articles 1(1), 2(2) and 3(1) of Directive 2001/23 is identical in substance to that of the provisions of Articles 1(1), 2(2) and 3(1) of Directive 77/187.

National legislation

9 Article 3 of the Law amending the Law relating to employment contracts (Arbeitsvertragsrechts-Anpassungsgesetz, BGBl. 459/1993) provides that when part of a business is transferred to a new owner, that person assumes the status of employer, and acquires all the rights and obligations arising from the employment relationships which existed at the time of the transfer.

The main action and the question referred for a preliminary ruling

10 Mayer & Co GmbH ('Mayer'), a temporary employment business, which had been in existence since 1976, was last managed by the current business director of PPS, acting as managing director. He is married to the commercial director of PPS, who was also employed by Mayer, for office duties.

11 In 2001, at the request of one of Mayer's principal clients, that employee, with her husband's support, developed an industry-specific concept. Mayer's financial difficulties were already known. After the client had approved that concept, spouses and client then agreed to put it into operation in the framework of a new business to be set up, carrying out the same kind of economic activity, for the reason that it would have been very difficult to put through the structural changes required in Mayer.

12 This new temporary employment business, PPS, was set up at the beginning of 2002. The spouses took on the respective roles of business and commercial directors. Owing to the needs of their abovementioned principal client, they gave instructions to Mayer's branch manager, the person responsible in that regard, to suggest to 40 employees assigned to that principal client that they transfer to PPS as soon as possible, which they did.

13 That transfer did not result in any alteration to the activities carried out by those employees for that client. On the other hand, their employment relationships with Mayer ceased on 30 November 2002 and those with PPS commenced on 1 December 2002. Other clients were also taken on, with as few as three or four or as many as nine persons per client. A branch manager and some customer advisers were also taken on by PPS. In total, PPS took on one-third of the personnel employed by Mayer before insolvency proceedings were commenced in respect of Mayer.

14 The plaintiffs in the main action, who were taken on by PPS, brought an action for payment by PPS of outstanding salary claims which had not been honoured by Mayer and for a declaration that the employment relationships had been transferred to PPS for the purpose of calculating their claims. The case concerned in particular

the temporary workers assigned to the clients as labourers, crane drivers and fitters. They founded their claims on the fact that a transfer of a business had taken place and that PPS, as 'acquirer of the business', was therefore obliged to guarantee payment of the old debts and to take into account previous periods of employment.

15 PPS rejected those claims, arguing that there had been no transfer of a business and that it had not entered into any contract with Mayer. The transfer of the plaintiffs in the main action to its business had been carried out in a manner customary in the temporary employment businesses sector. It was not possible to identify a business or 'part of a business' taken on by PPS.

16 Since the Landesgericht Wels at first instance and the Oberlandesgericht Linz, on appeal, allowed the plaintiffs' action, PPS brought an appeal on a point of law ('Revision') before the Oberster Gerichtshof. In particular, it challenges the classification by those courts of the transaction in question as a 'transfer of a business'.

17 The Oberster Gerichtshof points out that, according to the Court's case-law, in principle, when examining whether there is a transfer of a business, the first issue to consider is whether there is a stable economic entity in the sense of an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. Second, it must be established whether the conditions for the transfer of such an entity to new control are met, taking into consideration all the facts characterising the transaction in question (see, to that effect, Case C-13/95 *Süzen* [1997] ECR I-1259, paragraphs 13 and 14).

18 In the opinion of the referring court, a particular issue therefore arises, in this case, when determining whether there has been a transfer of a business, given that one is dealing with a temporary employment business. That court makes the point that such a business by definition has hardly any employees working in its 'own business' in the sense of an organisational unit, its employees being in fact assigned to work for other employers, the user undertakings. The user undertakings integrate those employees in their own organisation according to their needs. The majority of the employees of a temporary employment business are therefore not integrated in its own business but in that of other employers.

19 The referring court therefore raises the question whether the approach developed for other undertakings, which relies in very large measure on the existence of an organisational entity in the sense of a 'business' or 'part of a business' can be applied in the same way to temporary employment businesses. They are also essentially distinguishable from undertakings entrusted with cleaning or security functions in that the assigned employees do not work in the employer's business for a specific purpose (such as cleaning or security) — which could help identify the part of the business — but perform a number of different functions, according to the preference of the user undertaking.

20 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is there a transfer of a business or part of a business, for the purposes of Article 1 of Directive [2001/23/EC] where, in the course of collaboration between two temporary employment businesses, without there being an identifiable organisational structure of the first temporary employment business, an office worker, branch manager, some customer advisers and the managing director transfer from the first temporary employment business to the second temporary employment business in order to carry out comparable work there, and, also in collaboration between both businesses, approximately one-third of the assigned employees and the respective clients to whom they are assigned (varying from 3 to 50 employees per temporary assignment) transfer with them, in part or entirely?'

On the question referred for a preliminary ruling

21 By its question, the referring court seeks essentially to ascertain whether Article 1(1) of Directive 2001/23 applies to a situation such as that in the main action, in which there is a transfer of employees between two temporary employment businesses.

22 Directive 2001/23 applies in accordance with Article 1(1) of the Directive 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.

23 According to settled case-law, the aim of Directive 2001/23 is to ensure the continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of that directive is therefore whether the entity in question retains its identity, as indicated inter alia by the fact that its operation is actually continued or resumed (see, inter alia, Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12, and Joined Cases C-232/04 and C-233/04 *Güney-Görres and Demir* [2005] ECR I-11237, paragraph 31 and case-law cited).

24 With regard to the requirement that there be a legal transfer, there is settled case-law to the effect that the scope of Article 1(1) of Directive 2001/23 cannot be appraised solely on the basis of a textual interpretation (see, with regard to Article 1(1) of Directive 77/187, Case 135/83 *Abels* [1985] ECR 469, paragraphs 11 to 13, and Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 10). On account of the differences between the language versions of Directive 2001/23 and the divergences between the laws of the Member States with regard to the concept of legal transfer, the Court has given that concept a sufficiently flexible interpretation in keeping with the objective of Directive 2001/23, which is to safeguard employees in the event of a transfer of their undertaking (*Redmond Stichting*, paragraph 11, and Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28).

25 That flexible interpretation also relates to the form that the 'legal' transfer must take. The concept of legal transfer is thus capable of covering, as the case may be, a written or oral agreement between the transferor and the transferee relating to a change in the person responsible for the operation of the economic entity concerned and a tacit agreement between them resulting from aspects of practical co-operation which imply a common intention to make such a change.

26 In the main proceedings, according to the referring court the employees concerned were taken on in the course of collaboration between Mayer and PPS, who essentially shared the same directors, which enabled PPS to start up an identical activity. Furthermore, according to the case file, the mutual co-operation rendered it possible for PPS to carry out the same activity for the same clients and largely using

the same employees who had previously worked for Mayer. In those circumstances, it seems evident that the aim of such cooperation was to transfer assets of Mayer to PPS.

27 The concept of legal transfer, as interpreted by the Court, does not therefore preclude the finding of a transfer of a business between Mayer and PPS, even if, as maintained by PPS at the oral hearing, the businesses concerned did not enter into any written or oral agreement.

28 In circumstances such as those in the main action, it must be examined whether the transaction under consideration concerns the whole business or only part of it, and, in the latter case, the part of the business concerned must be identified.

29 In that regard, it is clear that the taking on of employees to the extent carried out in the main action cannot constitute a transfer of the whole business. According to the case file, PPS took over only part of the management personnel and a third of the employees assigned on a temporary basis, and Mayer continued to carry out that economic activity until insolvency proceedings were commenced. In the course of that procedure, a competitor of PPS purchased Mayer from the insolvent company's assets and pursued Mayer's economic activity by using some of its employees and some of its other assets.

30 Any transfer of the assets at issue in the main action — that is to say the taking over of the employees concerned — from Mayer to PPS can therefore concern only part of that business.

31 For Directive 2001/23 to be applicable, that taking over of employees must relate to a stable economic entity whose activity is not limited to performing one specific works contract. The concept of economic entity thus refers to an organised grouping of persons and assets enabling the exercise of an economic activity which pursues a specific objective (Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraph 26, and *Güney-Görres and Demir*, paragraph 32), and which is sufficiently structured and autonomous (*Hernández Vidal and Others*, paragraph 27).

32 Such an entity need not have significant tangible or intangible assets. Indeed, in certain economic sectors, those assets are often reduced to their most basic and the activity is essentially based on the labour force. Thus, an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity (*Hernández Vidal and Others*, paragraph 27).

33 That applies with even more force to temporary employment businesses in the light of Article 2(2)(c) of Directive 2001/23. It follows from this provision that temporary employment relationships with such businesses fall, in principle, under Directive

2001/23, implying that their special characteristics must be taken into account when analysing the taking over of such relationships. Such businesses are characterised, in general, as pointed out in the order for reference, by the lack of a suitable business structure from which it is possible to identify, within such a business, various economic entities which can be detached on the basis of the transferor's organisational arrangements.

34 As a result, in the absence of an identifiable organisational structure of the temporary employment business, an analysis should take account of its special characteristics rather than aim to establish whether an economic entity exists at the level of its organisational structure. In that context, the assessment of the existence of an economic entity for the purposes of Article 1(1) of Directive 2001/23 requires an assessment whether the assets transferred by the transferor constituted for its purposes an operational grouping sufficient in itself to provide services characterising the business's economic activity, without recourse to other significant assets or to other parts of the business.

35 In that regard, it must be pointed out that the activity of temporary employment businesses is characterised by the temporary assignment of employees to user undertakings in order that they may carry out a diverse range of tasks according to the needs and instructions of those undertakings. The pursuit of such an activity requires, inter alia, expertise, an administrative structure capable of organising that assignment of employees and a grouping of temporary workers who are capable of integrating in the user undertakings and of carrying out the tasks required of them. On the other hand, other significant assets are not indispensable for the pursuit of the economic activity in question.

36 As pointed out by the referring court, the fact that the workers assigned on a temporary basis are integrated in the organisational structure of the client to whom they are assigned is not capable, as such, of precluding a finding that an economic entity has been transferred. Those workers are nonetheless essential assets, without which the temporary employment business would, by definition, not be capable of performing its economic activity. Moreover, the fact that, in terms of point 2 of Article 1 of Directive 91/383, which is referred to in Article 2(2)(c) of Directive 2001/23, they are linked to the transferor by a working relationship and are remunerated by him directly, serves to confirm their connection to the transferor's business and furthermore their contribution to the existence of an economic entity within it.

37 It can be concluded from the foregoing that a single grouping consisting of management personnel, temporary workers and know-how, can pursue an objective of its own, namely the provision of services consisting in the temporary assignment of workers to user undertakings in return for remuneration, and that such a grouping can constitute an economic entity which can operate without recourse to other significant assets or to other parts of the transferor. That may in particular be the case in the main action, since the grouping consisted of an office worker, branch manager, some customer advisors, one-third of the temporary workers and some management personnel possessing certain expertise. It is for the national court to establish whether that is the case.

38 The answer to the question referred must therefore be that Article 1(1) of Directive 2001/23 must be interpreted as applying to a situation where part of the administrative personnel and part of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that business for the same clients and — which is a matter for the referring court to establish — the assets affected by the transfer are sufficient in themselves to allow the services characterising the economic activity in question to be provided without recourse to other significant assets or to other parts of the business.

Costs

39 Since these proceedings are, for the parties to the main action, 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 rules:

Article 1(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 must be interpreted as applying to a situation where part of the administrative personnel and part of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that business for the same clients and — which is a matter for the referring court to establish — the assets affected by the transfer are sufficient in themselves to allow the services characterising the economic activity in question to be provided without recourse to other significant assets or to other parts of the business.

[Signatures]