ORDER OF THE COURT (Seventh Chamber)

15 September 2010 *

In Case C-386/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour du travail Bruxelles (Belgium), made by decision of 21 September 2009, received at the Court on 30 September 2009, in the proceedings

Jhonny Briot

v

Randstad Interim,

Sodexho SA,

* Language of the case: French.

Council of the European Union,

THE COURT (Seventh Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

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

having invited the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations they may have on that subject,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Articles 2 to 4 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 has been made in proceedings between (i) Mr Briot and (ii) the temporary employment agency Randstad Interim ('Randstad'), the company Sodexho ('Sodexho') and the Council of the European Union ('the Council') in relation to various claims brought by Mr Briot concerning, first, the conditions under which he worked in the Council restaurant in Brussels under a temporary contract with Randstad and, second, the fact that he was not re-engaged in the service of Sodexho after the operation of the restaurant was transferred to it.

Legal context

European Union 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 undertakings or 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).

4 Under Article 1(1)(a) and (b) of Directive 2001/23:

'(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.'

5 Article 2 of Directive 2001/23 provides:

‘1. For the purposes of this Directive:

(a) “transferor” shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) “transferee” shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;

…

2. 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, 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.'

6 Under the terms of the first subparagraph of 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.'

7 The first subparagraph of Article 4(1) of that directive provides:

'The transfer of the undertaking, business or part of the undertaking or 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 organisational reasons entailing changes in the workforce.'

National legislation

8 The provisions of Directive 77/187 were transposed into Belgian law by Collective Agreement No 32a of 7 June 1985, concluded within the Conseil national du travail (National Labour Council), concerning the safeguarding of employees' rights in the

event of a change of employer as a result of the legal transfer of an undertaking and regulating the rights of employees re-engaged in the event of a takeover of assets following insolvency or judicial composition with transfer of assets, rendered mandatory by Royal Decree of 25 July 1985 (*Moniteur Belge*, 9 August 1985, p. 11527), as amended by Collective Agreement No 32c of 19 December 1989, in turn rendered mandatory by Royal Decree of 6 March 1990 (*Moniteur Belge*, 21 March 1990, p. 5114).

9 As regards its scope *ratione personae*, the collective agreement adopts the definitions of the concepts of 'transferor' and 'transferee' set out in the directive and further provides that:

'— for the application of the present collective labour agreement, "employees" must be understood as meaning persons who perform work under a contract of employment or apprenticeship.

— the following shall be treated as employees: persons who, otherwise than under a contract of employment, perform work under the authority of another person.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 On 1 September 1998, a framework contract was entered into between the Secretariat General of the Council of the European Union and Randstad. Under that framework contract Randstad was to make available, at the request of the Council, temporary workers qualified to work as cooks, chefs de rang, stock keepers, waiters, demi chefs de rang and dishwashers.

11 From 3 September 1998, Mr Briot was made available to the Council under various fixed-term contracts of employment with the temporary employment agency Daoust and then, from 15 January 2001, with Randstad.

12 Mr Briot first worked as a dishwasher and then, from 15 January 2001, as a cook.

13 From 1 January 2003, the Council changed the way in which its restaurant was run and entrusted its management to a single subcontractor, Sodexho.

14 After being awarded the contract, Sodexho wrote to Compass Group Belgilux and Iris Cleaning in order to ascertain which members of the staff of those companies were to be taken over under the collective agreements on the safeguarding of employees' rights in the event of the transfer of an undertaking.

15 Mr Briot's temporary contract came to an end on 20 December 2002 and no further temporary contract was offered to him from that date by Randstad.

16 By letter of 3 June 2003, Mr Briot's trade union formally requested the Council and Randstad to pay to Mr Briot a severance allowance, compensation for wrongful dismissal, a supplementary allowance in connection with the early pension and the difference in salary between a Council official's salary and the salary which had been paid.

17 By letter of 29 July 2003, the Secretariat General of the Council denied that the making available of Mr Briot was unlawful and that the salary received by him was insufficient and pointed out that, according to the judgment of the Court of Justice in Case C-232/84 *Tordeur* [1985] ECR I-3223, the civil penalty provided for in Article 31 of the Law of 24 July 1987 on temporary employment, provisional employment and the making of workers available to hirers (*Moniteur belge* of 20 August 1987, p. 12405) could not be applied to the Community institutions.

18 In the absence of an amicable solution, Mr Briot decided to bring proceedings before the tribunal du travail de Bruxelles (Labour Tribunal, Brussels).

19 The Labour Tribunal decided that the making of Mr Briot available to the Council had been in breach of the Law of 24 July 1987, but that no penalty could be applied to the Council. It also held that, in so far as there was no contract of employment between Mr Briot and the Council, first, the latter could not be ordered to pay compensation for breach of the contract of employment of Mr Briot and, second, the rights and obligations arising from this contract of employment could not have been transferred to Sodexho when the operation of the Council restaurant was transferred to it.

20 On 5 December 2007 Mr Briot lodged an appeal against this decision before the Cour du travail Bruxelles (Higher Labour Court, Brussels).

21 In its judgment of 19 January 2009, that court decided to reopen the oral procedure with regard to the existence and possible consequences of a transfer of undertakings. In this context, Mr Briot submitted that the transfer of the operation of the Council's restaurant to Sodexho on 1 January 2003 constitutes a transfer of an undertaking and that Sodexho was therefore required to reemploy him. He requested that the first

instance judgment be varied in that it was decided that, in the absence of a contract of employment between Mr Briot and the Council, the rights and obligations regarding Mr Briot could not be transferred to Sodexho.

22 In these circumstances, the Cour du travail Bruxelles decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Where, in the framework of a transfer of an undertaking within the meaning of Article 1(1) of Directive 2001/23, it appears that the entity transferred, namely the staff restaurant of a Community institution, used a significant number of temporary workers under a framework contract concluded with various temporary employment agencies, must the temporary employment agency, or failing that the institution under whose control and direction the temporary workers worked, be regarded as an employer-transferor within the meaning of Article 2(1)(a) of that directive?

(b) Where neither the temporary employment agency nor the undertaking using the worker can be recognised as having the status of employer-transferor, must the temporary workers be considered not to be entitled to the safeguards offered by Directive 2001/23?

(2) Must Article 4(1) of Directive 2001/23 … be interpreted as meaning that the non-renewal of the fixed-term contracts of employment of the temporary workers attributable to the transfer of the activity to which they were assigned disregards the prohibition laid down in that provision in such a way that those temporary workers must be regarded as still being available to the user on the date of the transfer?

(3) (a) Must Article 3(1) of Directive 2001/23 …, read where appropriate in conjunction with Article 2(2)(c) [thereof], be interpreted as requiring the transferee to maintain an employment relationship with the temporary workers who were assigned to the activity that is being transferred or who must be regarded as still being available to the user on the date of the transfer?

(b) If that question is answered in the affirmative, must Article 3(1) [of that directive] be interpreted as requiring the conclusion of an employment contract of indeterminate duration where the transferee is not a temporary employment agency and cannot conclude a temporary agency contract of employment?'

The questions referred to the Court

The second question

23 By its second question, which should be considered first, the national court asks, in essence, whether the non-renewal of the fixed-term contracts of employment of the temporary workers attributable to the transfer of the activity to which they were assigned disregards the prohibition laid down in Article 4(l) of Directive 2001/23 in such a way that those temporary workers must be regarded as still being available to the user business on the date of the transfer.

24 Since it considered that the answer to that question left no room for reasonable doubt, the Court, pursuant to the second subparagraph of Article 104(3) of its Rules of Procedure, informed the national court that it was proposing to give its decision by reasoned order and invited the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union to submit any observations they might have in that regard.

25 Mr Briot and the Belgian and German Governments replied to the Court's invitation. Mr Briot requested that a hearing be held, given the importance of this case for temporary workers who are regularly employed by a user business. In this regard, he submits that the situation of temporary workers who are regularly employed by users must be distinguished from that in which more that one hundred workers are employed by that user on a non-regular basis, over a period of more than three years. In this case, the entity consisting of temporary staff could be identified both within the company and within the user business. However, in so far as these observations relate to an element that is outside the scope of the legal issue at the centre of this reference for a preliminary ruling, they cannot persuade the Court to refrain from following the proposed procedure. The Belgian and German Governments have not objected to the Court's intention to rule by way of reasoned order.

26 At the outset, it should be borne in mind that, as the Court has repeatedly held, Directive 2001/23 is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the new employer in the same conditions as those agreed with the transferor (see, inter alia, Case C-396/07 *Juuri* [2008] ECR I-8883, paragraph 28 and the case-law cited). 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 (see, by analogy, in relation to Directive 77/187, Case C-287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 25, and Case C-478/03 *Celtec* [2005] ECR I-4389, paragraph 26).

27 That being so, as is clear from the very wording of the first subparagraph of Article 3(1) of Directive 2001/23, the protection that the directive is intended to provide only concerns workers who have an employment contract or employment relationship existing at the date of the transfer.

28 In this regard, the Court has held, in relation to Directive 77/187, that unless otherwise expressly provided, as the Directive may be relied upon solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer, the question whether or not such a contract or relationship exists at that time must be assessed on the basis of national law, subject, however, to compliance with the mandatory provisions of the Directive concerning protection of employees from dismissal as a result of the transfer (see Case C-101/87 *Bork International* [1988] ECR 3057, paragraph 17).

29 On this point, it must be observed that, under Article 4(1) of Directive 2001/23, the transfer of an undertaking, business or part of an undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee.

30 Thus, workers employed by the company whose contract of employment or employment relationship has terminated with effect from a date prior to the transfer, contrary to Article 4(1) of Directive 2001/23, must be regarded as still being employed by the company on the date of the transfer, with the result, in particular, that the employer's obligations towards them are automatically transferred from the transferor to the transferee, in accordance with Article 3(1) of the Directive (see, by analogy, *Bork International*, cited above, paragraph 18).

31 As is clear from the decision making the reference, the applicant in the main proceedings was made available to the Council, from 3 September 1998, under various fixed-term contracts of employment with the temporary agency Daoust and then, from 15 January 2001, with Randstad. His employment contract with Randstad ended on

20 December 2002, and therefore prior to the transfer of the activity to which he was assigned, which took place on 1 January 2003, and no further temporary employment contract was offered to him by his former employer after that date. Furthermore, nothing in the case file indicates that any other type of employment relationship existed between Randstad and Mr Briot at the date of the transfer.

32 In this respect, in concluding a fixed-term employment contract, the worker is fully aware that this employment contract will end, *ipso facto*, on the contractually agreed date. He must expect, from the beginning of this contractual relationship, that the other party will exercise his right to rely on the termination of this relationship once the fixed term expires.

33 It follows, in principle, that the worker is not entitled to renewal of a fixed-term contract. The fact that the expiry date of such a contract precedes the date laid down for the transfer of the activity to which the worker was assigned cannot create such a right.

34 For a renewal to occur, it is therefore necessary for there to be a new agreement between the employer and the employee. On the other hand, in the case of a dismissal, the employment contract or employment relationship is terminated by a unilateral decision of the employer. It must be noted, therefore, that the non-renewal of a fixed-term temporary employment contract, due to the absence of a new agreement between the employer and the employee, cannot be regarded as dismissal within the meaning of Article 4(1) of Directive 2001/23 (see, by analogy, Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915, paragraph 45).

35 It follows from the above that, in circumstances such as those of the main proceedings, the non-renewal of a fixed-term employment contract that ended, due to expiry of its term, on a date prior to the transfer of the activity to which the temporary

worker was assigned, does not disregard the prohibition laid down in Article 4(1) of Directive 2001/23.

36 Finally, it must be stated that this solution, in so far as the Court is only ruling on the applicability of Directive 2001/23, does not prejudice the protection that a temporary worker, such as the applicant in the main proceedings, could, if necessary, receive against the misuse of successive fixed-term employment contracts, under other provisions of European Union law, in particular, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), nor the interpretation thereof by the Court.

37 In view of the foregoing, the answer to the second question referred is that, in circumstances such as those of the main proceedings, where the fixed-term employment contract of a temporary worker has ended, due to expiry of the agreed term, on a date prior to that of the transfer of the activity to which he was assigned, the non-renewal of this contract because of that transfer does not disregard the prohibition set out in Article 4(1) of Directive 2001/23. Thus, that temporary worker must not be regarded as still being available to the user company on the date of the transfer.

The first and third questions

38 Given that, for the reasons set out in the reply to the second question, a worker in a situation such as that of the applicant in the main proceedings cannot benefit from the safeguards set out in Directive 2001/23, it is unnecessary to answer the first and third questions referred.

Costs

39 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 (Seventh Chamber) hereby rules:

In circumstances such as those of the main proceedings, where the fixed-term employment contract of a temporary worker has ended, due to expiry of the agreed term, on a date prior to that of the transfer of the activity to which he was assigned, the non-renewal of this contract because of that transfer does not disregard the prohibition set out in Article 4(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. Thus, that temporary worker must not be regarded as still being available to the user company on the date of the transfer.

[Signatures]