JUDGMENT OF THE COURT (Fourth Chamber)

27 November 2008 *

In Case C-396/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Korkein oikeus (Finland), made by decision of 24 August 2007, received at the Court on 27 August 2007, in the proceedings

Mirja Juuri

v

Fazer Amica Oy,

THE COURT (Fourth Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

* Language of the case: Finnish.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Finnish Government, by J. Himmanen, acting as Agent,

— the Hungarian Government, by J. Fazekas, R. Somssich and K. Borvölgyi, acting as Agents,

— the Commission of the European Communities, by M. Huttunen and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(2) 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 proceedings between Ms Juuri and her former employer, Fazer Amica Oy ('Amica'), concerning the refusal by the latter to grant Ms Juuri various benefits after the termination of her contract following the transfer of an undertaking.

Legal context

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).

4 Under Article 3(3) of Directive 2001/23:

'Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

…'

5 Article 4(2) of Directive 2001/23 provides:

'If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'

6 Article 4(2) of Directive 2001/23 is drafted in terms identical to those of Article 4(2) of Directive 77/187, as amended by Directive 98/50.

National legislation

7 Under Paragraph 6 of Chapter 7 of Law 55/2001 on employment contracts (Työsopimuslaki (55/2001)) of 26 January 2001; 'the Law on employment contracts') which transposes Article 4(2) of Directive 2001/23 into Finnish law:

'If a contract of employment is terminated because the employee's working conditions become substantially worse as a result of a transfer of the undertaking, the employer shall be regarded as responsible for ending the employment relationship.'

8 Paragraph 2 of Chapter 12 of the Law on employment contracts grants an employee the right to obtain compensation from his employer for unfair dismissal. Under that provision, where the employer has terminated the employment contract in

breach of the grounds laid down in that law, the employer is to be ordered to pay compensation. Furthermore, the employer may be ordered to pay compensation where the employee is regarded as having the right to terminate the employment contract himself.

9 However, an employee is not entitled to the compensation provided for in Paragraph 2 of Chapter 12 of the Law on employment contracts in a situation where the employer has terminated the contract of employment on material and serious grounds. Nevertheless, even in such a case, the employee is to receive his salary and other benefits during the notice period.

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

10 Ms Juuri worked for Rautaruukki Oyj ('Rautaruukki') from 5 April 1994 as an employee in the staff canteen in Hämeenlinna. The metal industry collective agreement applied to her employment relationship.

11 On 31 January 2003 — the last day of validity of that metal industry collective agreement — the canteen undertaking in Hämeenlinna was transferred from Rautaruukki to Amica. Amica informed Ms Juuri that as from 1 February 2003 the collective agreement for the accommodation and catering sector, binding on Amica, would apply to her employment. Ms Juuri insisted, however, that a metal industry collective agreement should continue to apply to her. When Amica did not agree to that, Ms Juuri terminated her contract of employment on 19 February 2003 with immediate effect.

12 Ms Juuri then brought an action before the Helsingin käräjäoikeus (Helsinki District Court), claiming that Amica should pay compensation in lieu of notice in an amount corresponding to four months' pay; compensation for holiday leave in respect of the notice period; and compensation for unlawful termination of the employment contract in an amount corresponding to 14 months' pay.

13 To that end, Ms Juuri relied, inter alia, on Paragraph 2 of Chapter 12 of the Law on employment contracts and argued that her income had fallen by EUR 300 per month as a result of the application of the collective agreement for the accommodation and catering sector. Furthermore, she was obliged to move to other Amica workplaces. Thus, her working conditions had become substantially worse as a result of the transfer of the undertaking. Accordingly, pursuant to Paragraph 6 of Chapter 7 of the Law on employment contracts, the transferee employer — Amica — was responsible for the termination of the contract of employment.

14 Amica contested Ms Juuri's claims. It contended, first, that it was not responsible for the termination of Ms Juuri's contract of employment and, second, that it had not acted, intentionally or through carelessness, contrary to the contract of employment or the Law on employment contracts. It could not be held liable, therefore, for the harm brought about by the termination of that contract.

15 The Helsingin käräjäoikeus dismissed Ms Juuri's action on 11 February 2005. It held that Paragraph 6 of Chapter 7 of the Law on employment contracts could not be interpreted as supplementing the rules laid down in that law on compensation for damage by introducing new grounds for the compensation of employees. In consequence, Ms Juuri was not entitled to the compensation she claimed on the basis of that provision. Furthermore, the transferee employer — Amica — was not in breach of any of its obligations.

16 Upon that decision being confirmed by the Helsingin hovioikeus (Court of Appeal, Helsinki), Ms Juuri brought an appeal before the Korkein oikeus (Supreme Court). In support of her appeal, she claimed that the purpose of Directive 2001/23 is to establish liability on the part of employers with respect to employees where the employment relationship is terminated as a result of substantial changes to it, even where — as in the case before the referring court — the transferee employer has admittedly observed, within the meaning of Article 3(3) of that directive, the collective agreement binding on the transferor and guaranteeing the employee better working conditions until the date on which the validity of that agreement expired.

17 The Korkein oikeus states that such an interpretation means that an employer could be liable to pay compensation for the loss sustained by an employee who terminates his contract of employment even where the employer has behaved in all respects in accordance with the applicable laws and every collective agreement binding upon it.

18 If such an interpretation were to be adopted, it would then be necessary, in the view of the Korkein oikeus, to decide whether the employee's compensation falls to be assessed on the basis of Paragraph 2 of Chapter 12 of the Law on employment contracts — which would involve payment of an amount corresponding to at most 24 months' pay — or whether the compensation should correspond at most to the amounts payable by an employer who has material and serious grounds for terminating the contract of employment, that is to say, the pay relating to the four-month notice period and the associated compensation for holiday leave.

19 In those circumstances, the Korkein oikeus decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 4(2) of [Directive 2001/23] to be interpreted as meaning that a Member State must, in a situation in which an employee has himself given notice to terminate his contract of employment after his working conditions have become substantially worse following the transfer of an undertaking, in its law guarantee the employee the right to obtain financial compensation from the employer in the same way as in the case where the employer has unlawfully terminated the employment contract, having regard to the fact that, as permitted by Article 3(3) of [that] directive, the employer has observed a collective agreement, binding on the transferor and guaranteeing the employee better working conditions, only until its expiry, and the worsening of the working conditions arises from that?

(2) If the employer's responsibility in accordance with Directive [2001/23] is not as extensive as described in Question 1, must the responsibility of the employer nevertheless be implemented by providing compensation, for example, for pay and other benefits for the notice period to be observed by the employer?'

The questions referred for a preliminary ruling

20 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 4(2) of Directive 2001/23 must be interpreted as requiring Member States, in cases where a contract of employment or an employment relationship falling within the scope of that provision is terminated, to guarantee

employees the right to financial compensation, for which the transferee employer is liable, in accordance with conditions identical to the right on which the employee can rely where an employer unlawfully terminates the employment contract or the employment relationship, or, at least, on which he can rely by virtue of the notice period to be observed by an employer under the applicable national law where the employment contract is terminated on material and serious grounds.

21 In that connection, the referring court also has doubts concerning the implications of the fact that the transferee employer observed, within the meaning of Article 3(3) of Directive 2001/23, the collective agreement — which was binding on the transferor and guaranteed better working conditions for employees — only until the date of its expiry, the deterioration in working conditions being the result, according to the employee, of that expiry.

The principle of financial compensation for which the employer is liable

22 It is clear from the wording of Article 4(2) of Directive 2001/23 that it establishes a rule that the employer is to be regarded as responsible for the termination of a contract of employment or employment relationship, whichever party is technically responsible for the termination. However, that provision does not set out the legal consequences of that responsibility. Thus it does not impose on the Member States any obligation to guarantee employees a particular compensation scheme or, accordingly, to ensure that the detailed rules under that scheme are the same as those under the scheme from which employees can benefit if the employer unlawfully terminates the contract of employment or by virtue of the notice period to be observed by the employer.

23 That is consistent with the aim of Directive 2001/23, which is intended to achieve only partial harmonisation in the field in question, essentially by extending the protection guaranteed to employees independently under the laws of the individual Member

States to cover the case where an undertaking is transferred. It is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria. Thus Directive 2001/23 can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned (Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraph 41).

24 Furthermore, it is clear from the explanatory memorandum in the proposal for Directive 77/187 (COM (74) 351) that, although the employee's termination of his contract of employment must be treated as if it were due to the action of his employer, the legal consequences involved, such as severance payment or compensation, must be prescribed by the laws, regulations and administrative provisions of the Member States.

25 In those circumstances, Article 4(2) of Directive 2001/23 cannot be regarded as having impliedly fixed a uniform level of protection for employees above and beyond the rule it lays down regarding the responsibility to be attributed to employers. Thus, in particular, that provision does not specify the financial consequences flowing from the fact that, in the above circumstances, responsibility for termination of the contract of employment or the employment relationship can be attributed to the employer. Accordingly, those consequences must be established in each Member State in accordance with the applicable rules of national law.

26 However, it should also be borne in mind that the freedom to choose the ways and means of ensuring that a directive is implemented does not affect the obligation incumbent upon on all Member States to which the directive is addressed to adopt, in their national legal systems, all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it pursues (see Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 15, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 40).

27 The Member States' obligation arising from a directive to achieve the result envisaged by that directive, as well as their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (*von Colson and Kamann*, paragraph 26, and *Impact*, paragraph 41).

28 In that connection, it should be borne in mind that 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 transferee employer on the same conditions as those agreed with the transferor (see, inter alia, Case 324/86 *Tellerup ('Daddy's Dance Hall')* [1988] ECR 739, paragraph 9, and Case C-499/04 *Werhof* [2006] ECR I-2397, paragraph 25).

29 Directive 2001/23 pursues that objective a stage further in that it makes the transferee employer responsible for the termination of the contract of employment or employment relationship where the transfer of the undertaking involves a substantial change in working conditions, the consequences of that responsibility being governed by the applicable national law.

30 In the light of the foregoing, Article 4(2) of Directive 2001/23 must be interpreted as meaning that, in cases where the termination of a contract of employment or an employment relationship is brought about because the conditions for the applicability of that provision have been met, independently of any failure on the part of the transferee employer to fulfil its obligations under that directive, the Member States are not required to guarantee the employee a right to financial compensation, for which the transferee employer is liable, in accordance with the same conditions as the right upon which an employee can rely where the contract of employment or the employment relationship is unlawfully terminated by his employer. However, the national court is required, in a case within its jurisdiction, to ensure that, at the very least, the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of

employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.

The scope of Article 3(3) of Directive 2001/23

31 As was mentioned in paragraph 21 of this judgment, the referring court has doubts in the case before it concerning the conduct of the transferee employer in the light of Article 3(3) of Directive 2001/23, given that it observed the metal industry collective agreement only until the expiry date of that agreement, which coincided with the date on which the undertaking was transferred.

32 Under Article 3(3) of Directive 2001/23, following the transfer of an undertaking, the transferee is to continue to observe the terms and conditions agreed in a collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another.

33 Thus that provision aims to ensure that, despite the transfer of the undertaking, all the working conditions continue to be observed in accordance with the intention of the contracting parties to the collective agreement. However, that provision cannot derogate from the intention of those parties as expressed in the collective agreement. Accordingly, if the contracting parties have agreed not to guarantee certain working conditions beyond a particular date, Article 3(3) of Directive 2001/23 cannot impose on the transferee the obligation to observe those working conditions after the agreed date of expiry of the collective agreement, as after that date the agreement is no longer in force.

34 It follows that Article 3(3) of Directive 2001/23 does not require the transferee to ensure that the working conditions agreed with the transferor are observed after the date of expiry of the collective agreement, even though that date coincides with the date on which the undertaking was transferred.

35 In those circumstances, the answer to the questions referred for a preliminary ruling must be that Article 4(2) of Directive 2001/23 must be interpreted as meaning that, in cases where the termination of a contract of employment or an employment relationship is brought about because the conditions for the applicability of that provision have been met, independently of any failure on the part of the transferee employer to fulfil its obligations under that directive, the Member States are not required to guarantee the employee a right to financial compensation, for which the transferee employer is liable, in accordance with the same conditions as the right upon which an employee can rely where the contract of employment or the employment relationship is unlawfully terminated by his employer. However, the national court is required, in a case within its jurisdiction, to ensure that, at the very least, the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.

36 It is for the referring court to assess the situation at issue in the case before it in the light of the interpretation of Article 3(3) of Directive 2001/23 as meaning that the continued observance of the terms and conditions agreed in a collective agreement which expires on the date of the transfer of the undertaking is not guaranteed after that date.

Costs

37 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 4(2) 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 meaning that, in cases where the termination of a contract of employment or an employment relationship is brought about because the conditions for the applicability of that provision have been met, independently of any failure on the part of the transferee employer to fulfil its obligations under that directive, the Member States are not required to guarantee the employee a right to financial compensation, for which the transferee employer is liable, in accordance with the same conditions as the right upon which an employee can rely where the contract of employment or the employment relationship is unlawfully terminated by his employer. However, the national court is required, in a case within its jurisdiction, to ensure that, at the very least, the transferee employer in such a case bears the consequences that the applicable national law attaches to termination by an employer of the contract of employment or the employment relationship, such as the payment of the salary and other benefits relating, under that law, to the notice period with which an employer must comply.

It is for the referring court to assess the situation at issue in the case before it in the light of the interpretation of Article 3(3) of Directive 2001/23 as meaning that the continued observance of the terms and conditions agreed in a collective agreement which expires on the date of the transfer of the undertaking is not guaranteed after that date.

[Signatures]