JUDGMENT OF THE COURT
15 April 1986 *

In Case 237/84

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by the Minister for Foreign Relations and by Robert Hoebaer, Director at the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 rue des Girondins,

defendant,

APPLICATION for a declaration that, by failing to adopt within the prescribed period all the measures necessary to comply in full with the provisions of Council Directive No 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 Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling and R. Joliet, Presidents of Chambers, G. Bosco, Y. Galmot and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 18 February 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 18 September 1984 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by failing to adopt within the prescribed period all the measures necessary to comply in full with the provisions of Council Directive No 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 Kingdom of Belgium had failed to fulfil its obligations under the EEC Treaty.

2 According to its preamble, Directive No 77/187/EEC, which was adopted on the basis in particular of Article 100 of the Treaty, seeks to 'provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. It is based on the principle that as far as possible the employment relationship should be maintained unchanged with the transferee.

3 More specifically, Article 3 (1) of the directive provides for the transfer of the transferor's rights and obligations arising from a contract of employment or from an employment relationship. The directive protects the employees concerned against dismissal by providing in the first subparagraph of Article 4 (1) that 'the transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee'; this is without prejudice to 'dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce'. However, according to the second subparagraph of Article 4 (1), 'Member States may provide that the first

subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal'.

4 As regards the latter provision, it appears from the documents before the Court that, according to a statement recorded in the Council minutes, Member States undertook to inform the Commission within six months of the notification of the directive of the categories of employee excluded from the scope of Article 4 (1) pursuant to the second subparagraph of that provision. In accordance with that undertaking, the Belgian Government informed the Commission, by letter of 4 August 1977, that in Belgium employees undergoing a trial period and employees dismissed at the approach of pensionable age would be so excluded.

5 Article 8 provided that Member States were to comply with Directive No 77/187/EEC within two years of its notification. Since the directive was notified to the Kingdom of Belgium on 16 February 1977, that period expired on 16 February 1979.

6 The Commission considered that, despite the expiry of that period, the Kingdom of Belgium had not adopted legislation meeting all the requirements arising from the directive. First, the Belgian legislation in force did not protect rights to old-age benefits under supplementary social security schemes (second subparagraph of Article 3 (3) of the directive). Secondly, it excluded certain categories of employees from the protection against dismissal in the event of transfers of undertakings (Article 4 (1] of the directive. As a result, following an exchange of letters with the Belgian Government and after delivering a reasoned opinion pursuant to the first paragraph of Article 169 of the Treaty, the Commission brought this action for a declaration that the Kingdom of Belgium has failed to fulfil its obligations.

7 By notice of 6 January 1986, which was received at the Court on 8 January 1986, the Commission stated that it would abandon that part of its action relating to the first complaint, namely the alleged infringement of the second subparagraph of Article 3 (3) of the directive. It explained that on 1 January 1986 three royal decrees, of such a nature as to make Belgian law compatible with the directive, had entered into force and that, in consequence, the complaint in question was redundant.

8 Accordingly, the Court has to adjudicate on the second complaint only, namely the alleged failure fully to transpose the whole of Article 4 (1) of Directive No 77/187/EEC into Belgian law.

9 On 19 April 1978, the Kingdom of Belgium adopted, for the purposes of the implementation of, *inter alia*, Article 4 (1) of the directive, the Royal Decree making obligatory Collective Bargaining Agreement No 32 of 28 February 1978 on the safeguarding of employees' rights in the event of a change of employer as a result of an agreed transfer of an undertaking concluded within the National Labour Council (*Moniteur belge* of 25.8.1978). Article 6 of that Agreement provides that 'a change of employer shall not in itself constitute grounds for dismissal'. However, Article 7 of the Agreement provides as follows:

'the following persons shall not be covered by the provisions of Article 6:

(1) employees undergoing a trial period;

(2) employees dismissed at the approach of pensionable age;

(3) persons bound by a student's employment contract pursuant to the Law of 9 June 1970 on the employment of students'.

10 The Commission submits that the provision quoted above has the effect of excluding from the protection afforded by Article 4 (1) of the directive categories of employee whose exclusion is not covered by the derogation set out in the second subparagraph of Article 4 (1). That derogation should be interpreted strictly so as to cover only employees who have no protection under national law against dismissal. In its view, that is not the case with the categories of employee specified in Article 7 of Collective Bargaining Agreement No 32 since each of those three categories of employee are protected by some period of notice, even though the periods of notice due to them are shorter than those due to other categories of worker.

11 The Belgian Government objects to that interpretation. It argues that protection against dismissal, within the meaning of the second subparagraph of Article 4 (1) of the directive, means a measure to dissuade employers from dismissing employees so that employees do not suffer an interruption of their working life. In its view, no such dissuasive effect exists in the case of the categories of employees

excluded by the Belgian legislation, in particular employees dismissed at the approach of pensionable age and employees undergoing a trial period. The former are at the end of their working lives and the element of dissuasion no longer operates. As for employees undergoing a trial period, they are subject to a very short period of notice for the reason that the employer must remain entirely at liberty to dismiss employees when they are not suited to the job.

12 That objection of the Belgian Government cannot be upheld. It is clear both from the wording of Article 4 (1) and from the scheme of the directive that the provision in question is designed to ensure that employees' rights are maintained by extending the protection against dismissal by the employer afforded by national law to cover the case in which a change in employer occurs upon the transfer of an undertaking.

13 Consequently, that provision applies to any situation in which employees affected by a transfer enjoy some, albeit limited, protection against dismissal under national law, with the result that, under the directive, that protection may not be taken away from them or curtailed solely because of the transfer.

14 In this case, the Belgian Law of 3 July 1978 on contracts of employment *(Moniteur belge* of 22.8.1978) makes the dismissal of the three categories of employee mentioned in Article 7 of Collective Bargaining Agreement No 32 subject to specific minimum periods of notice. It is common ground that, under that law, employees undergoing a trial period may be lawfully dismissed only if given at least seven days' notice in the absence of serious cause; however, the termination of the employment contract may not take effect before the last day of the first month of the trial period in the case of employees' and commercial travellers' employment contracts (Articles 48 (4), 60 and 81 in conjunction with Article 87 of the Law of 3 July 1978). Moreover, employees dismissed at the approach of pensionable age are entitled to a period of notice of between 28 days and six months, depending on the case (Articles 59 and 83 in conjunction with Article 87 of the Law of 3 July 1978). Lastly, the dismissal of persons bound by a student's employment contract is subject to a period of notice of three or seven days, depending on the length of employment (Article 130 of the Law of 3 July 1978); however, the provisions more favourable to employees, relating to the contracts of

employment of manual workers serving a trial period, apply where the student's employment contract includes a trial period clause (Article 48 (4) in conjunction with Article 127 of the Law of 3 July 1978).

15 Consequently, Article 4 (1) of Directive No 77/187/EEC requires the abovementioned periods of notice to be complied with also in the case where the transferor or the transferee dismisses the employees concerned in connection with the transfer of an undertaking.

16 The Belgian Government further argues in this connection that the Kingdom of Belgium was entitled to exclude from the protection afforded by Article 4 (1) of Directive No 77/187/EEC at least employees undergoing a trial period and employees dismissed at the approach of pensionable age. It notified those two categories of employee to the Commission on 4 August 1977 in accordance with the statement to that effect inserted in the Council minutes. Since the Commission did not signify its disagreement within a reasonable time, it thus allowed it to be believed that the notified categories of employee could in fact be covered by the exception provided for in the second subparagraph of Article 4 (1).

17 That argument is irrelevant. The Court has consistently held that the true meaning of rules of Community law can be derived only from those rules themselves, having regard to their context. That meaning cannot therefore be affected by such a statement.

18 Consequently, the Kingdom of Belgium cannot effectively rely on such an uncontested notification in order to alter the scope of its obligations under Article 4 (1) of Directive No 77/187/EEC.

19 For those reasons, it must be concluded that, by failing to adopt within the prescribed period all the measures necessary to comply in full with Article 4 (1) of Council Directive No 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 Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty.

Costs

20 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs; under Article 69 (4), a party who discontinues or withdraws from proceedings is to be ordered to pay the costs, unless the discontinuance or withdrawal is justified by the conduct of the opposite party. In this case, the defendant was unsuccessful as regards the second complaint whilst the withdrawal of the first complaint was justified by its conduct. It should therefore be ordered to pay the whole of the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by failing to adopt within the prescribed period all the measures necessary to comply in full with Article 4 (1) of Council Directive No 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 Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;

(2) Orders the Kingdom of Belgium to pay the costs.

Mackenzie Stuart Koopmans Everling

Joliet Bosco Galmot Kakouris

Delivered in open court in Luxembourg on 15 April 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President