Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 March 2020*

(Reference for a preliminary ruling — Directive 2001/23/EC — Article 3(1) — Transfers of undertakings — Safeguarding of employees' rights — Public contract for cleaning services — Award of market lots to two new contractors — Re-engagement of a worker assigned to all the market lots)

In Case C-344/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the arbeidshof te Gent (Higher Labour Court, Ghent, Belgium), made by decision of 14 May 2018, received at the Court on 25 May 2018, in the proceedings

ISS Facility Services NV

v

Sonia Govaerts,

Atalian NV, formerly Euroclean NV,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, principal administrator,

having regard to the written procedure and further to the hearing on 8 May 2019,

after considering the observations submitted on behalf of:

– ISS Facility Services NV, by J. Dubaere, avocat,

– Ms Govaerts, by S. De Beul,

– Atalian NV, by S. Diels and E. Carlier, advocaten,

– the European Commission, by M. van Beek, M. Kellerbauer and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2019,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(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 request has been made in proceedings between Ms Sonia Govaerts, on the one hand, and ISS Facility Services ('ISS') and Atalian NV, formerly Euroclean NV, on the other, concerning her dismissal and the consequences of that dismissal.

Legal context

European Union law

3 Recital 3 of Directive 2001/23 states:

'It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.'

4 Article 1(1) of that directive provides:

'(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(2) of that directive provides:

'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:

(a) of the number of working hours performed or to be performed;

…'

6 The first paragraph of Article 3(1) of that directive provides:

'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 Article 4 of Directive 2001/23 provides:

‘1. 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.

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.

2. 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.’

Belgian law

8 Directive 2001/23 was transposed into Belgian law by Collective Agreement No 32a of 7 June 1985 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 32d of 13 March 2002, rendered mandatory by Royal Decree of 14 March 2002 (*Moniteur Belge*, 29 March 2002, p. 13382). It is not disputed that that transposition was in conformity with that directive.

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

9 Ms Govaerts had been employed since 16 November 1992 by Multiple Immo Services NV, and by its legal successors, the latest of those being ISS. Ms Govaerts entered into a new contract of employment with ISS for an indefinite period on 1 September 2004, while retaining the length of service acquired since 16 November 1992.

10 ISS was responsible for the cleaning and maintenance of various buildings in the city of Ghent (Belgium), divided into three lots. Lot 1 comprised the museums and historical buildings, Lot 2 comprised the libraries and community centres, and Lot 3 comprised the administrative buildings. On 1 April 2013 Ms Govaerts became project manager of the three areas of work corresponding to those lots.

11 Subsequently, the city of Ghent issued a call for tenders in relation to all the abovementioned lots for the period from 1 September 2013 until 31 August 2016. On the conclusion of that procedure, on 13 June 2013, the tender submitted by ISS was unsuccessful. Lots 1 and 3 were awarded to Atalian, while Lot 2 was awarded to Cleaning Masters NV.

12 On 1 July 2013 ISS informed Atalian that Ms Govaerts, as a full–time employee in the relevant areas of work, should have the benefit of the collective agreement No 32a. On 3 July 2013 Atalian disputed that analysis.

13 By registered letter of 30 August 2013, ISS informed Ms Govaerts that, because of the transfer of undertaking and the fact that she was employed in the areas of work corresponding to Lots 1 and 3, she would become an employee of Atalian as from 1 September 2013, from which date she would cease to be a member of staff of ISS. Consequently, ISS issued to Ms Govaerts a certificate of unemployment specifying 31 August 2013 as the last day of employment.

14 By a second registered letter on 30 August 2013, ISS notified Atalian that Ms Govaerts' contract of employment was automatically transferred to it as from 1 September 2013.

15 On 3 September 2013 Atalian informed ISS that in its view there had been no transfer of undertaking, within the meaning of collective agreement No 32a, and, consequently, that Atalian considered that it had no binding contract with Ms Govaerts.

16 On 18 November 2013 Ms Govaerts brought an action against both ISS and Atalian before the arbeidsrechtbank te Gent (Labour Court, Ghent, Belgium), seeking compensation in lieu of notice, an end-of-year bonus *pro rata temporis* and leave pay for the leave years 2012 and 2013.

17 By judgment of 15 October 2015, that court held that the dismissal of Ms Govaerts was unlawful and ordered ISS to pay compensation in lieu of notice, an end-of-year bonus *pro rata temporis* and leave pay. The action brought against Atalian, on the other hand, was held to be inadmissible.

18 In the opinion of that court, the collective agreement No 32a was not applicable to Ms Govaerts since she performed administrative and organisational tasks and did not take part, in the city of Ghent areas of work, in the cleaning work that was the subject of the transfer.

19 ISS brought an appeal against the judgment at first instance before the arbeidshof te Gent (Higher Labour Court, Ghent, Belgium). ISS maintains that Ms Govaerts' contract of employment was transferred, as from 1 September 2013, in a proportion of 85% to Atalian and in a proportion of 15% to Cleaning Masters.

20 Contrary to the view of the court at first instance, the referring court considers that, in the main proceedings, an economic entity had retained its identity, within the meaning of Article 1 of Directive 2001/23 and, consequently, that there had been a transfer of undertaking, within the meaning of that article. The referring court concludes that, in accordance with Article 7 of collective agreement No 32a, which transposes Article 3(1) of Directive 2001/23, the rights and obligations arising, for the transferor, from the contracts of employment existing on the date of transfer, that is, 1 September 2013, were, by reason of that transfer, transferred automatically to Atalian and Cleaning Masters as the transferees.

21 Since the tasks assigned to Ms Govaerts relate exclusively to the city of Ghent areas of work, the referring court considers that the person concerned, on 1 September 2013, formed part of the undertaking transferred and questions, therefore, the effects, in the light of Article 3(1) of Directive 2001/23, of that transfer of undertaking on Ms Govaerts' contract of employment.

22 In those circumstances, the arbeidshof te Gent (Higher Labour Court, Ghent) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 3(1) of Directive [2001/23] to be interpreted as meaning that in the event of a simultaneous transfer of various parts of an undertaking, within the meaning of Article 1(1) of that directive, to various transferees, the rights and obligations arising from the contract of employment, as it existed at the time of transfer of a worker who was employed in each of the parts transferred, are to be transferred to each of the transferees, albeit in proportion to the extent of employment of the worker in question in the part of the undertaking acquired by each of the transferees,

or is Article 3(1) to be interpreted as meaning that the aforementioned rights and obligations are to be transferred in their entirety to the transferee that acquired the part of the undertaking in which the worker in question was principally employed,

or as meaning that, if the provisions of the directive cannot be interpreted in any of the aforementioned ways, there is no transfer to any transferee of the rights and obligations arising from the employment contract of the aforementioned worker, which is also the case if it is not possible to determine separately the extent of the worker's employment in each of the transferred parts of the undertaking?'

Consideration of the question referred

23 By its question, the referring court seeks, in essence, to ascertain whether, when there occurs a transfer of an undertaking, within the meaning of Article 1(1) of Directive 2001/23, involving a number of transferees, the first paragraph of Article 3(1) of that directive must be interpreted as meaning that the rights and obligations arising from a contract of employment existing at the time of that transfer are transferred to each of the transferees, in proportion to tasks performed by that worker, or only to the transferee for whom the worker will perform his or her principal tasks. In the alternative, the referring court asks whether that provision must be interpreted as meaning that the rights and obligations arising from the contract of employment cannot be asserted against either of the transferees.

24 It must be noted at the outset that the first paragraph of Article 3(1) of Directive 2001/23 provides that a transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer are, by reason of that transfer, to be transferred to the transferee, but does not envisage a situation where a transfer involves a number of transferees.

25 In that regard, it must be recalled, first, that Directive 2001/23 is intended to safeguard the rights of employees in the event of a change of employer by enabling them to continue to work for the new employer on the same terms and conditions as those with the transferor. The purpose of that 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 (judgment of 7 August 2018, *Colino Sigüenza*, C-472/16, EU:C:2018:646, paragraph 48). However, that directive cannot with advantage be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a transfer of an undertaking (see, to that effect, judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 77).

26 In addition, it must be stated that although, in accordance with the objective of that directive, the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his business, cannot be disregarded (see, to that effect, judgment of 9 March 2006, *Werhof*, C-499/04, EU:C:2006:168, paragraph 31). Directive 2001/23 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other (see, to that effect, judgment of 18 July 2013, *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 25).

27 That being the case, the Court must concur with what is said by Advocate General in point 70 of his Opinion, that where the economic entity to which a worker was attached has been transferred, within the meaning of Article 1(1) of Directive 2001/23, the fact that it has been transferred to one or more transferees has no effect on the transfer of the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer of that entity.

28 It follows that the possibility envisaged in the alternative by the referring court must be rejected, since that amounts to excluding the safeguarding of the rights and obligations arising from a contract of employment existing on the date of the transfer of an undertaking and consequently deprives Directive 2001/23 of any effectiveness.

29 It is necessary, last, to examine the two possibilities primarily envisaged by the referring court, mentioned in paragraph 23 of the present judgment.

30 As regards, first, the possibility of transferring the contract of employment solely to the transferee with whom the worker is to perform his or her principal tasks, it must be observed that that interpretation of the first paragraph of Article 3(1) of Directive 2001/23 ensures the safeguarding of the rights and obligations arising from the contract of employment vis-á-vis that transferee and protects, accordingly, the interests of the worker.

31 However, that interpretation of the first paragraph of Article 3(1) of Directive 2001/23 has the effect of disregarding the interests of the transferee, to whom there are transferred the rights and obligations arising from a full-time employment contract although the worker concerned is to perform his or her tasks with that transferee only part-time.

32 As regards, second, the possibility of transferring to each of the transferees the rights and obligations arising from the contract of employment entered into with the transferor, in proportion to the tasks performed by the worker, it must be stated, in the first place, that, in accordance with Article 2(2) of Directive 2001/23, that directive is to be without prejudice to national law as regards the definition of a contract of employment or employment relationship. Accordingly, it is for the referring court to determine how any distribution of the contract of employment might take place. In that regard, the referring court may take into consideration the economic value of the lots to which the worker is assigned, as suggested by ISS, or the time that the worker actually devotes to each lot, as proposed by the European Commission.

33 In the second place, to the extent that such a possibility amounts to dividing one full-time employment contract into a number of part-time employment contracts, it must be borne in mind that, under Article 2(2)(a) of Directive 2001/23, the Member States may not exclude from the scope of that directive contracts of employment or employment relationships solely because of the number of working hours performed or to be performed. Consequently, such a division cannot be excluded merely because it involves the transfer to one of the transferees of a contract of employment that covers a small number of hours of work.

34 Further, such a transfer of the rights and obligations arising from a contract of employment to each of the transferees, in proportion to the tasks performed by the worker, makes it possible, in principle, to ensure a fair balance between protection of interests of workers and protection of the interests of transferees, since the worker obtains the safeguarding of the rights arising from his or her contract of employment, while the transferees do not have imposed on them obligations that are greater than those entailed by the transfer to them of the undertaking concerned.

35 However, it is for the referring court to take account of the practical implications of that division of the contract of employment in the light of the objectives pursued by Directive 2001/23, as set out in paragraphs 25 and 26 of the present judgment. As stated by the Advocate General in point 77 of his Opinion, that directive cannot be a basis for the working conditions of the worker concerned to become worse as a result of a transfer of undertaking (see, to that effect, judgments of 7 March1996, *Merckx and Neuhuys*, C-171/94 and C-172/94, EU:C:1996:87, paragraph 38, and of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraphs 81 and 82).

36 It is important, in that regard, to recall that, under Article 4(1) of that directive, while the transfer of an undertaking or part of an undertaking cannot constitute in itself a ground for dismissal for the transferor or the transferee, other than in the situations mentioned in Article 4(1) of that directive, that provision does not however preclude the possibility of dismissals occurring for economic, technical or organisational reasons entailing changes in the workforce. Further, Article 4(2) states that if the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for termination.

37 Consequently, as stated by the Advocate General in point 79 of his Opinion, if the division of the contract of employment proves to be impossible or entails a deterioration in the working conditions and rights of the worker guaranteed by Directive 2001/23, that contract may be terminated, and the termination must be regarded, under Article 4(2) of Directive 2001/23, as the responsibility of the transferee(s), even when that termination has been initiated by the worker.

38 In the light of all the foregoing, the answer to the question referred is that, where a transfer of undertaking involves a number of transferees, Article 3(1) of Directive 2001/23 must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive, which it is for the referring court to determine. If such a division were impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that directive, even if that termination were to be initiated by the worker.

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 (Fourth Chamber) hereby rules:

Where there is a transfer of undertaking involving a number of transferees, Article 3(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 meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive, which it is for the referring court to determine. If such a division were to be impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that directive, even if that termination were to be initiated by the worker.

[Signatures]