OPINION OF ADVOCATE GENERAL COSMAS

delivered on 20 February 1997 *

1. In this case, the Juzgado de lo Social No 16 (Social Court No 16), Barcelona, has referred to the Court for a preliminary ruling a question on the interpretation of 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 [1] ('the Directive').

I — The legal framework

A — *Community law*

2. In Section I of the Directive, entitled 'Scope and definitions', Article 1 provides as follows:

'1. This directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

2. This directive shall apply where and in so far as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty.

3. ...'

3. Article 2 states:

'For the purposes of this directive:

(a) "transferor" means 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 business;

* Original language: Greek.

1 — OJ 1977 L 61, p. 26.

(b) "transferee" means 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 business;

...'

4. In Section II, which relates to 'Safeguarding of employees' rights', Article 3 provides:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

...

2. ...

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph.'

5. Article 4(1) states as follows:

'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 provision shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.

...'

6. Article 7 states:

'This directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.'

7. Article 8 states:

'1. Member States shall bring into force the laws, regulations and administrative provisions needed to comply with this directive within two years of its notification and shall forthwith inform the Commission thereof.

2. ...'

8. It follows from an interpretation of the above provisions read in conjunction with each other that where an undertaking has been transferred from one employer to another, for the reasons referred to therein, the employees in that undertaking retain their rights arising from their employment relationship with it, [2] provided that the transfer took place after the Directive had acquired full force and effect in the internal legal order of the Member State concerned. The Member States may additionally grant employees greater protection than that provided for by the Directive.

9. Also, the Court has consistently held that a directive may not be relied on by individuals before national courts where the pertinent events, in so far as they relate to them, took place before expiry of the time-limit for implementation of the directive. [3]

2 — According to the settled case-law of the Court, 'the purpose of Directive 77/187 is to ensure that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor. The directive is therefore applicable wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking' (see Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057, paragraph 13). See also Joined Cases 144/87 and 145/87 *Berg and Busschers* v *Beselsen* [1988] ECR 2559, paragraph 12, and Case C-305/94 *Rotsart de Hertaing* v *Benoidt* [1996] ECR I-5927, paragraphs 16 to 21.

3 — See, for example, Joined Cases C-140/91, C-141/91, C-278/91 and C-279/91 *Suffritti and Others* v *INPS* [1992] ECR I-6337, paragraphs 11, 12 and 13, and Case C-316/93 *Vaneetveld* v *Le Foyer* [1994] ECR I-763, paragraph 16).

B — *National law*

10. Real Decreto No 505/1985 of 6 March 1985 ('the Royal Decree') relates to the organization and operation of the Fondo de Garantía Salarial (Wages Guarantee Fund). [4] The Fondo de Garantía Salarial is a public administrative body falling under the Ministry of Labour and Social Security and constitutes one of the guarantee institutions envisaged by Directive 80/987 for the payment of outstanding claims from employees in the event of the insolvency of their employer. [5]

11. Article 2 of the Royal Decree provides, *inter alia*, that the Fondo de Garantía Salarial is to pay to employees the compensation awarded to them for dismissal or termination of their employment relationship by judicial or administrative decision, in accordance with Articles 50 and 51 of the Estatuto de los Trabajadores (Law on Workers). [6]

12. Under Article 19(1) of the Royal Decree, the Fondo de Garantía Salarial pays compensation awarded on termination of an employment relationship for economic or technological reasons or for reasons of *force majeure*, whose amount is calculated on the basis of 20 days' salary for each year of service. For periods shorter than a year, a *pro rata* monthly calculation is carried out. The total amount may not exceed the sum allowed as a year's salary. The years of service used to calculate the payment are those shown by the certificate issued by the Tesorería General de la Seguridad Social (Social Security General Fund) relating to the period spent by the dismissed worker with the debtor undertaking, unless the employee proves an employment relationship of greater duration.

13. Finally, Article 19(3) of the Royal Decree provides that, in the case of undertakings which employ fewer than 25 employees, the Fondo de Garantía Salarial is to pay an amount equivalent to 40% of the compensation due on account of termination of an employment relationship for economic or technological reasons or for reasons of *force majeure* in accordance with Article 19(1), without it being necessary to prove that the business is insolvent, has ceased the making of payments, is in liquidation or has collectively settled its debts.

II — The facts

14. The plaintiffs in the main proceedings, Pedro Burdalo Trevejo, José Soriano Marco, Miguel Casa Alonso and Vicente Pérez de la Cruz, worked for the limited liability company Hiades, which employed fewer than 25 permanent workers.

4 — *Boletín Oficial del Estado* ('BOE') of 17 April 1985, No 92, as corrected on 27 May 1985 (BOE No 126) and 19 June 1985 (BOE No 146).

5 — Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

6 — The legislation in question is Real Decreto Legislativo (Royal Legislative Decree) No 1/1995 of 24 March 1995 (BOE of 29 March 1995, No 75).

15. Their employment relationships with the textile undertaking had begun on 14 July 1969, 14 November 1966, 13 August 1950 and 3 June 1957 respectively. The undertaking had been founded by Enrique Capellà and subsequently changed ownership on a number of occasions. In particular, that occurred on 19 May 1978 when Hijos de Enrique Capellà SA was set up, which became Ennoblecimiento Textil SA on 29 June 1981 and Hiades SA on 7 January 1986. Those transfers did not, however, affect the employment relationships of the above employees, which continued under the new owner.

16. On 10 May 1993, the employment relationships between them and Hiades were declared terminated by a decision of the Ministry of Labour of the local government for Catalonia.

17. It fell to the Fondo de Garantía Salarial to pay the dismissed employees the compensation laid down by Spanish law.

18. On 24 January 1994, the Administrative Unit of the Fondo de Garantía Salarial, Barcelona, issued a decision upholding in part the decision previously adopted by the Ministry.

19. The Fondo de Garantía Salarial refused to take into account, for the purposes of calculating the compensation, periods of work prior to 19 May 1978, the date of the first transfer of the undertaking, because that time was not recorded on the certificate issued by the social security institution (the Tesorería de la Seguridad Social) and it was not required to pay compensation when undertakings had replaced one another before 19 May 1978. It relied in that regard on the case-law of the Tribunal Superior de Justicia de Catalunya (High Court of Justice of Catalonia) and the Tribunal Supremo (Supreme Court).

20. The Court of Justice put a question to the Spanish Government seeking clarification of the relevant case-law of the Tribunal Supremo referred to by the national court. The written reply of the Spanish Government and the judgments of the Tribunal Supremo of 31 October 1983 and 17 December 1985 annexed thereto show, *inter alia*, that in the case-law of that court a distinction is drawn between *length of service*, that is to say the period actually spent in a specific undertaking, and *experience* (*'antigüedad'*), which refers to the total time spent in a given occupation. That distinction is important inasmuch as length of service is taken into account in order to calculate compensation for dismissal, whereas experience is taken into account in order to determine the period which forms the basis for calculation of the amount of pay, allowances and so forth.

21. The abovementioned employees brought an action against the decision of the Fondo de Garantía Salarial. The case was assigned to the Juzgado de lo Social No 16, Barcelona.

III — The question referred for a preliminary ruling

22. Since the national court considered that the case raised a question of interpretation of certain provisions of the Directive, it decided to refer the following question to the Court of Justice:

'Is it compatible with Article 1(1) and the second subparagraph of Article 3(3) of Council Directive 77/187/EEC of 14 February 1977 for the legislation or the courts of a Member State to reduce the payments to be made by the Fondo de Garantía Salarial by excluding certain periods of employment from the total experience to be taken into account, notwithstanding the fact that the employment continued without interruption for an undertaking which was transferred?'

IV — Reply to the question referred for a preliminary ruling

23. It is apparent from the pertinent facts, as set out in the order for reference, that, in order to resolve the dispute brought before it, the national court is essentially interested in the question whether the transfer of the undertaking which took place in 1978 gives rise to rights in favour of the employees which fall within the scope of the Directive, that is to say whether the Directive applies to that transfer.

24. As the Spanish Government states, and is not disputed, the Kingdom of Spain acceded to the Communities on 1 January 1986 [7] and thereafter was, in principle, bound by Community law, including the Directive. It also points out that the date on which the transfer at issue took place (19 May 1978) precedes not only the accession by the Kingdom of Spain but also the expiry of the two-year time-limit laid down for implementation of the Directive by the existing Member States. According to the Spanish Government, therefore, the Directive may not be relied on in relation to a transfer of an undertaking which took place before those dates. [8]

25. That view is correct. Since the Kingdom of Spain acceded to the Communities on 1 January 1986 and was, thereafter, bound in principle by Community law, including the Directive, Community rules formed part of the legal order in Spain and began to produce legal effects for the Kingdom of Spain and for individuals from that date onwards. Employees may thus seek the protection

7 — The Treaty and the Act of Accession to the European Economic Community and the European Atomic Energy Community were signed on 12 June 1985 (OJ 1985 L 302); Spain's accession to the Communities took effect on 1 January 1986.

8 — 1 February 1986 and 14 February 1979 respectively.

which the Directive confers upon them only in the case of transfers of undertakings which took place after the Directive had taken effect in the abovementioned Member State.

26. Accordingly, since the question referred for a preliminary ruling relates to a time at which the Kingdom of Spain was not bound by the Directive, protection of employees' rights is governed by national law as regards the transfer at issue (which took place in 1978). For that reason, it also serves no purpose to examine the point raised by the Commission as to whether the purpose or the effect of the national law governing the Fondo de Garantía Salarial is to nullify or to restrict the rights of employees referred to above, because the answer given would be to a general question and would not help to resolve the dispute pending before the national court. [9]

V — Conclusion

27. In view of the above analysis, I propose that the Court reply as follows to the question referred for a preliminary ruling:

An employee may not rely on the protection provided for by 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 where the transfer took place at a time when the directive had not begun to have full effect in the internal legal order of the Member State in question.

9 — The Court has repeatedly made it clear that the task assigned to it is not that of delivering advisory opinions on general or hypothetical questions unrelated to resolution of the dispute before it but of assisting in the administration of justice in the Member States; see, for example, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18, Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171, paragraph 19, and Joined Cases C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* v *Instituto Nacional de Empleo* [1995] ECR I-1567, paragraph 29).