JUDGMENT OF THE COURT (First Chamber)

26 May 2005 *

In Case C-478/03,

REFERENCE under Article 234 EC for a preliminary ruling from the House of Lords (United Kingdom), made by decision of 10 November 2003, received at the Court on 17 November 2003, in the proceedings

Celtec Ltd

v

John Astley and Others,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), N. Colneric, E. Juhász and E. Levits, Judges,

* Language of the case: English.

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 December 2004,

after considering the observations submitted on behalf of:

— Celtec Ltd, by J. Bowers QC, P. Watson and A. Sendall, Barristers, and J. Lewis, Barrister,

— Mr Astley and Others, by G. Millar QC and T. Linden, Barrister,

— the Commission of the European Communities, by G. Rozet and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 3(1) 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 (OJ 1977 L 61, p. 26).

2 That reference was made in proceedings between Celtec Ltd ('Celtec') on the one hand and Mr Astley, Ms Owens and Ms Hawkes on the other hand regarding determination of the length of the period of continuous employment on which the latter may rely as former civil servants affected by the privatisation of vocational training programmes in the United Kingdom.

Relevant provisions

Community legislation

3 Pursuant to Article 1(1), Directive 77/187 is applicable to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

4 Under Article 2 of Directive 77/187, 'transferor' is to be understood to 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 business' and 'transferee' is to be understood to 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 business'.

5 Article 3(1) of Directive 77/187 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 within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.'

National legislation

6 Directive 77/187 was transposed into law in the United Kingdom by the Transfer of Undertakings (Protection of Employment) Regulations 1981.

7 Pursuant to section 155 of the Employment Rights Act 1996, an employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date. Under section 162 of the Act, the amount of that payment depends on the number of years of continuous employment, with an upper limit of 20 years.

8 Pursuant to section 218(1) of the Act, the concept of continuous employment refers to employment with the same employer. However, section 218(2) makes special provision for the case of a transfer of an undertaking, under which 'if a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another ... the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and the transfer does not break the continuity of the period of employment'.

Facts of the dispute and the questions referred for a preliminary ruling

The reform of vocational training in the United Kingdom

9 Until 1989, the Department of Employment ('the DoE') managed, through about 60 local Area Offices, programmes for the training of young people and unemployed adults in England and Wales.

10 In 1989, the United Kingdom Government decided to transfer part of its vocational training responsibilities to private bodies managed by employers, the Training and Enterprise Councils ('the TECs'). 82 TECs were created in that manner by different groups of employers. The TECs took over the activities of the DoE's local Area Offices, as well as their related resources. By November 1991 all the TECs were operational.

11 Under that privatisation process, the civil servants employed by the DoE's local Area Offices were invited to put themselves forward, on a voluntary basis, for temporary secondment to the newly created TECs for a period of three years. During their secondments those concerned retained their status as civil servants.

12 In December 1991 the Government called upon the TECs to make the change to becoming employers in respect of all their staff before the end of their fifth year of operation at the latest.

13 To meet concerns expressed by the TECs, in 1992 the DoE entered into an agreement with the TECs dealing with their reciprocal obligations upon a seconded civil servant electing to join a TEC permanently. That agreement laid down, inter alia, measures concerning the accrued rights of seconded civil servants, by which the United Kingdom Government undertook to reimburse a TEC should a court or tribunal decide, in the case of dismissal of a former civil servant, that his or her period of employment with the Civil Service followed by the period of employment with the TEC must be deemed to be continuous for the purpose of calculating that person's rights.

The situation of the respondents in the main proceedings

14 In Wales, the activities, premises, information systems and databases of the Wrexham local Area Office were taken over by the North East Wales TEC ('Newtec'). Newtec commenced operations in September 1990. Another TEC, called Targed, took over the activities and premises of the Bangor local Area Office. On 1 April 1997, Newtec and Targed merged to form Celtec.

15 When Newtec was created 43 civil servants were seconded to it from the Wrexham and Bangor local Area Offices for a period of three years. By the end of their period of secondment, 18 of those civil servants had resigned from the Civil Service and had taken up employment with Newtec.

16 Mr Astley, Ms Hawkes and Ms Owens, the respondents in the main proceedings, entered the Civil Service on 31 August 1973, 4 November 1985 and 21 April 1986 respectively. Responsible for vocational training in North Wales, they were seconded to Newtec. Towards the end of their three-year secondments, they elected to resign from the Civil Service and to take up employment with Newtec. There was no gap in time between their resignations and their recruitment by Newtec. The employment contract of Ms Hawkes and Ms Owens with Newtec commenced on 1 July 1993 and that of Mr Astley on 1 September 1993.

17 In 1998, Ms Hawkes was dismissed by Celtec, which refused to recognise continuity of employment since the date on which she joined the Civil Service. The other two respondents in the main proceedings feared they would be dismissed shortly as well. All three therefore sought a determination by the Abergele Employment Tribunal as to the length of the period of continuous employment on which they are able to rely, arguing that that should include their periods of service with the Civil Service as well as those with Newtec and Celtec.

Procedure before the United Kingdom courts

18 By a decision of 22 December 1999, the Abergele Employment Tribunal held that the dispute between Celtec and the respondents in the main proceedings was defined by the occurrence of a transfer of an undertaking within the meaning of Directive 77/187. In paragraph 11 of the extended reasons for its decision, it defined the undertaking transferred as follows: 'the management of the government-funded post-16 vocational training and enterprise activities in England and Wales together

with the information systems and database, some staff and some premises'. Emphasising the importance of human resources in carrying out the activities of the undertaking in question, the Tribunal took the view that the secondment of civil servants from the DoE to the TECs was an important part of the undertaking and its transfer.

19 The Abergele Employment Tribunal ruled that, in those circumstances, the respondents in the main proceedings could rely on a continuous period of employment, running from the date of the commencement of their employment with the Civil Service.

20 By judgment of 5 October 2001, the Employment Appeal Tribunal allowed the appeal brought by Celtec against the decision of the Abergele Employment Tribunal. It took the view that the transfer of the undertaking in question was completed in September 1990, that is, long before the respondents in the main proceedings became employees of Newtec.

21 By judgment of 19 July 2002, the Court of Appeal (England and Wales) quashed that decision. It held, first, that Article 3(1) of Directive 77/187 covered a transfer of an undertaking which takes place over several years and, secondly, that the Abergele Employment Tribunal was entitled to take the view that the professional skills of the civil servants seconded from the DoE to Celtec formed part of the undertaking which was being transferred.

22 Celtec appealed against that judgment to the House of Lords, which considered it necessary to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the words "the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a

transfer" in Article 3(1) of ... Directive 77/187 ... to be interpreted as meaning that there is a particular point in time at which the transfer of the undertaking or part thereof is deemed to have been completed and the transfer of rights and obligations pursuant to Article 3(1) is effected?

2. If the answer to Question 1 is "yes", how is that particular point in time to be identified?

3. If the answer to Question 1 is "no", how are the words "on the date of a transfer" in Article 3(1) to be interpreted?'

The questions referred for a preliminary ruling

23 First of all, it should be stated that the decision making the reference is based on the finding made by the Abergele Employment Tribunal in its decision of 22 December 1999 that the transfer in question between the DoE and Newtec in the case in the main proceedings falls within the scope of Directive 77/187.

24 That having been made clear, it is necessary to examine together the first two questions, by which the national court asks, essentially, whether in the light of Article 3(1) of Directive 77/187 it must be considered that there is a particular point in time at which the transfer of the undertaking concerned and that of the rights and obligations of the transferor arising from employment relationships linking the latter with the workers it employs is deemed to take place and, if the answer is in the affirmative, the manner in which that particular point in time can be identified.

25 In order to give a proper reply to those two questions, it is important to take into account the purpose of Directive 77/187 and in particular Article 3(1) thereof.

26 As the Court has repeatedly held (see, inter alia, Case C-362/89 *D'Urso and Others* [1991] ECR I-4105, paragraph 9, and Case C-399/96 *Europièces* [1998] ECR I-6965, paragraph 37), Directive 77/187 is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer on the same conditions as those agreed with the transferor. 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 Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, paragraph 25).

27 The rules applicable in the event of a transfer of an undertaking or a business to another employer are thus intended to safeguard, in the interests of the employees and to the greatest possible extent, the existing employment relationships which form part of the economic entity transferred (Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 21).

28 Accordingly, Article 3(1) of Directive 77/187 covers the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, in order to carry out their duties, were assigned to the undertaking transferred or to the part of the undertaking or business transferred (see *D'Urso*, cited above, paragraph 10).

29 Against that background, the reference to 'date of a transfer' in Article 3(1) of Directive 77/187 is designed to identify the workers who may rely on the protection established by that provision. That protection therefore covers workers assigned to

the unit affected by the transfer whose contract of employment or employment relationship is in force on the 'date of a transfer' and not those who have ceased to be employed by the transferor on that date (see Case 19/83 *Wendelboe and Others* [1985] ECR 457, paragraphs 13 and 15) or those who were engaged by the transferee after that date (see *Ny Mølle Kro*, cited above, paragraphs 24 to 26).

30 Both the choice of the word 'date' and reasons of legal certainty indicate that, in the mind of the Community legislature, the workers entitled to benefit from the protection established by Article 3(1) of Directive 77/187 must be identified at a particular point in the transfer process and not in relation to the length of time over which that process extends.

31 As is apparent from the actual wording of Article 3(1) of Directive 77/187, the term transfer in the expression 'date of a transfer' in that provision is to be understood 'within the meaning of Article 1(1) [of that directive]'.

32 It is apparent from the latter provision that Directive 77/187 applies to transfers of an undertaking, business or part of a business 'to another employer'. In the words of the second recital in the preamble to the directive, the directive is intended to protect employees 'in the event of a change of employer'. In Article 2 of the directive, the terms 'transferor' and 'transferee' are defined by reference to, respectively, ceasing to be or becoming 'the employer in respect of the undertaking, business or part of the business'.

33 It has been held on several occasions that Directive 77/187 applies where there is a change in the legal or natural person who is responsible for carrying on the business, regardless of whether or not ownership of the undertaking is transferred (see *Ny Mølle Kro*, cited above, paragraph 12, Case 324/86 *Daddy's Dance Hall* [1988] ECR 739, paragraph 9, and Joined Cases 144/87 and 145/87 *Berg and Busschers* [1988] ECR 2559, paragraph 17).

34 To establish whether there is a transfer within the meaning of Directive 77/187, it is necessary to assess whether the unit in question retains its identity, which follows in particular from the fact that its operation is actually continued or resumed by the new employer, with the same or similar economic activities (see Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11, 12 and 15, and Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraphs 15 and 16).

35 It follows that the decisive criterion for establishing whether there is a transfer for the purposes of Article 1(1) of Directive 77/187 is whether a new employer continues or resumes the operation of the unit in question, retaining its identity.

36 In those circumstances, the term 'date of a transfer' in Article 3(1) of Directive 77/187 must be understood as referring to the date on which responsibility as employer for carrying on the business of the unit in question moves from the transferor to the transferee.

37 As the Court has already held, implementation of the rights conferred on employees by Article 3(1) of Directive 77/187 may not be made subject to the consent of either the transferor or the transferee nor to the consent of the employees' representatives or the employees themselves, with the sole reservation, as regards the workers themselves, that, following a decision freely taken by them, they are at liberty, after the transfer, not to continue the employment relationship with the new employer (see Case 105/84 *Danmols Inventar* [1985] ECR 2639, paragraph 16, and *D'Urso*, cited above, paragraph 11).

38 It follows that, with that sole reservation, contracts of employment or employment relationships existing on the date of the transfer referred to in Article 3(1) of Directive 77/187 between the transferor and the workers assigned to the

undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking (see *D'Urso*, cited above, paragraph 20, and Case C-305/94 *Rotsart de Hertaing* [1996] ECR I-5927, paragraph 18).

39 In addition, in paragraph 26 of the judgment in *Rotsart de Hertaing* the Court held that the transfer of the contracts of employment and employment relationships pursuant to Article 3(1) of Directive 77/187 necessarily takes place on the same date as that of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee.

40 In support of that interpretation, the Court observed, first, that the second subparagraph of Article 3(1) of Directive 77/187 gives the Member States the option of providing that, after the date of transfer, the transferor is to be liable, alongside the transferee, for the obligations arising from a contract of employment or employment relationship. Such a rule implies that in any event those obligations are transferred to the transferee on the date of the transfer (*Rotsart de Hertaing*, paragraph 23).

41 Secondly, referring to paragraph 14 of its judgment in *Berg and Busschers*, cited above, in which Article 3(1) of Directive 77/187 was interpreted as meaning that after the date of transfer of the undertaking the transferor is in principle discharged, by virtue of the transfer alone, from its obligations arising under the contract of employment or the employment relationship, the Court found that, given the directive's objective of protecting workers, that can only be done if the obligations in question are transferred to the transferee as from the date of transfer (*Rotsart de Hertaing*, paragraph 24).

42 Finally, the Court considered that to allow the transferor or transferee the possibility of choosing the date from which the contract of employment or employment relationship is transferred would amount to allowing employers to derogate, at least

temporarily, from the provisions of Directive 77/187, whereas those provisions are mandatory, and it is thus not possible to derogate from them in a manner unfavourable to employees (*Rotsart de Hertaing*, paragraphs 17 and 25).

43 For the same reasons as those stated in paragraphs 40 to 42 of this judgment, it must be held that, for the purposes of applying Article 3(1) of Directive 77/187, contracts of employment or employment relationships existing on the date of the transfer referred to by that provision between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties to the transfer process in that respect.

44 In the light of the foregoing, the answer to the first two questions referred must be as follows:

— Article 3(1) of Directive 77/187 must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.

— For the purposes of applying that provision, contracts of employment or employment relationships existing on the date of the transfer within the meaning stated above between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect.

45 In view of the answers given to the first two questions, it is unnecessary to reply to the third question.

Costs

46 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 (First Chamber) hereby rules:

1. **Article 3(1) 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 must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee. That date is a particular point in time which cannot be postponed to another date at the will of the transferor or transferee.**

2. **For the purposes of applying that provision, contracts of employment or employment relationships existing on the date of the transfer within the meaning stated in paragraph 1 of the operative part between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect.**

[Signatures]