JUDGMENT OF THE COURT
7 February 1985 [1]

In Case 19/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Vestre Landsret [Western Division of the Danish High Court] for a preliminary ruling in the proceedings pending before that court between

(1) Knud Wendelboe,

(2) Foreningen af Arbejdsledere i Danmark [Association of Supervisory Staff, Denmark], acting on behalf of Ib Jensen,

(3) Handels- og Kontorfunktionærernes Forbund i Danmark [Union of Commercial and Clerical Employees, Denmark], acting on behalf of Jørn Holst Jeppesen,

and

L.J. Music ApS, in liquidation,

on the interpretation 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, business or parts of businesses (Official Journal 1977 L 61, p. 26),

1 — Language of the Case: Danish.

THE COURT

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

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

*

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 order of 3 February 1983, which was received at the Court on 7 February 1983, the Vestre Landsret [Western Division of the Danish High Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question as to the interpretation of certain provisions of Council Directive No 77/187 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).

2 That question was raised in proceedings instituted by Knud Wendelboe, by the Forening af Arbejdsledere i Danmark [Association of Supervisory Staff, Denmark], acting on behalf of Ib Jensen, and by the Handels- og Kontorfunktionærernes Forbund i Danmark [Union of Commercial and Clerical Employees, Denmark], acting on behalf of Jorn Holst Jeppesen, against L.J. Music ApS, a company in liquidation.

* after considering the observations submitted on behalf of
the plaintiff Wendelboe by Mr J. Glusted Madsen,
the plaintiffs Foreningen af Arbejdsledere i Danmark and Handels- og Kontorfunktionaerernes Forbund i Danmark by Mr L. Svenning Andersen,
the Danish Government by Mr L. Mikaelsen, acting as Agent,
the Netherlands Government by Mr I. Verkade, acting as Agent,
the French Government by Mr J.-P. Costes, in the written proceedings, and by Mr G. Boivineau, in the oral proceedings, both acting as Agents,
the United Kingdom by Mr R. N. Ricks, acting as Agent,
the Commission of the European Communities by Mr H. P. Hartvig, acting as Agent,
after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1984,

3 Messrs Wendelboe, Jensen and Jeppesen were employed by L.J. Music ApS, whose business consisted in making cassette recordings. On 28 February 1980, faced with impending insolvency, L.J. Music ApS ceased production and dismissed the majority of its work-force, including the plaintiffs in the main proceedings, who were informed that they would not be required to work out their notice.

4 By order of 4 March 1980, the Skifteret [Bankruptcy Court], Hjørring, declared L.J. Music ApS insolvent. On the same day, in the course of the hearing at which the company was declared insolvent, the Skifteret, having notice of an offer to buy the undertaking made by the company SPKR No 534 ApS, authorized that company to use the insolvent undertaking's premises and equipment as from 5 March 1980. The final agreement on the transfer was concluded on 27 March 1980, but in that agreement it was stated that the company's business was deemed to have been carried on on behalf, and at the risk, of the transferee as from 4 March 1980.

5 On 6 March, Messrs Wendelboe, Jensen and Jeppesen were engaged by the new company; they were paid a higher salary by the company but lost their seniority.

6 The plaintiffs in the main proceedings then brought an action against L.J. Music ApS before the Skifteret, Hjørring, for a declaration that they were entitled, as preferential creditors, to compensation for unlawful dismissal and holiday pay.

7 In judgments of 29 September 1980, the Skifteret, although upholding the claim relating to holiday pay, dismissed the claim for compensation for unlawful dismissal on the ground that the transferor of the undertaking was discharged, after the transfer, from his obligations towards his employees, since those obligations had been transferred to the transferee pursuant to Article 2 (1) of Danish Law No 111 of 21 March 1979 on the Rights of Employees on the Transfer of Undertakings. That Law had been adopted in order to implement Council Directive No 77/187 of 14 February 1977.

8 That directive, which was adopted on the basis, in particular, of Article 100 of the Treaty, is intended, according to its preamble, to provide for 'the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. For that purpose, Article 3 (1) thereof provides that 'the transferor's rights and obligations arising from the 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'. Article 4 (1) provides for protection of the employees concerned against dismissal by the transferor or the transferee, but does not stand in the way of 'dismissals that may take place for economic, technical or organizational reasons entailing changes in the work-force'. Moreover, Article 6 of the directive requires the transferor and the transferee to inform and consult the representatives of the employees affected by the transfer. Finally, Article 7 states that the directive is not to 'affect the right of Member States to apply or introduce . . . provisions which are more favourable to employees'.

9 The plaintiffs in the main proceedings appealed against the judgments of the Skifteret to the Vestre Landsret, which, considering that the decision to be given depended on the interpretation of Directive No 77/187, stayed the proceedings and submitted the following question to the Court for a preliminary ruling:

'Does the Council directive 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 require the Member States to enact provisions under which the transferee of an undertaking becomes liable in respect of obligations concerning holiday pay and compensation to employees who were not employed in the undertaking on the date of transfer?'

The applicability of Directive No 77/187 in cases of insolvency

10 Since the transfer of the undertaking in question took place in liquidation proceedings, it must be noted in the first place that, as the Court held in its judgment delivered today in Case 135/83 (*Abels*):

'Article 1 (1) of Council Directive No 77/187/EEC of 14 February 1977 does not apply to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor, although the Member States are at liberty to apply the principles of the directive to such a transfer on their own initiative. The directive does, however, apply where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a "surséance van betaling" (judicial leave to suspend payment of debts).'

11 In this case, it is apparent from the grounds of the order for reference that the Vestre Landsret seeks an interpretation of Directive No 77/187 so that it will be in a position to interpret and apply its national law in conformity with the principles laid down in that directive. It is therefore appropriate, in pursuance of the cooperation between national courts and this Court provided for in Article 177, to reply to the question submitted in such a manner as to enable the national court to apply the principles of that directive where national legislation has made them applicable to cases of insolvency.

The question submitted for a preliminary ruling

12 It should be noted in the first place that Article 3 (1) of Directive No 77/187 provides that: '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'.

13 It follows from a textual interpretation of that provision in the various language versions that it refers only to the rights and obligations of workers whose contract of employment or employment relationship is in force on the date of the transfer and not to those who have ceased to be employed by the undertaking in question at the time of the transfer. This is apparent from the fact that in the Dutch, French, German, Greek and Italian versions the phrase 'existing on the date of the transfer' relates unequivocally to the expression 'contract of employment or . . . employment relationship' and that, in the English and Danish language versions, the same interpretation is in any event possible.

14 That interpretation is confirmed by comparison of Article 3 (1) with Article 3 (3); the latter provision, which relates to certain old-age, invalidity and survivors' benefits, makes an express distinction between 'employees' and 'persons no longer employed in the transferor's business at the time of the transfer'. The fact that no such distinction is drawn in Article 3 (1) indicates that former employees are excluded therefrom.

15 That interpretation of the scope of Article 3 (1) is also in conformity with the scheme and the purposes of the directive, which is intended to ensure, as far as

possible, that the employment relationship continues unchanged with the transferee, in particular by obliging the transferee to continue to observe the terms and conditions of any collective agreement (Article 3 (2)) and by protecting workers against dismissals motivated solely by the fact of the transfer (Article 4 (1)). Those provisions relate only to employees in the service of the undertaking on the date of the transfer, to the exclusion of those who have already left the undertaking on that date.

16 The existence or otherwise of a contract of employment or an employment relationship on the date of the transfer within the meaning of Article 3 (1) of the directive must be established on the basis of the rules of national law, subject however to observance of the mandatory provisions of the directive and, more particularly, Article 4 (1) thereof, concerning the protection of employees against dismissal by the transferor or the transferee by reason of the transfer. It is for the national court to decide, on the basis of those factors, whether or not, on the date of the transfer, the employees in question were linked to the undertaking by virtue of a contract of employment or employment relationship.

17 For all those reasons, it is necessary to state in reply to the question submitted that Council Directive No 77/187 of 14 February 1977 does not require the Member States to enact provisions under which the transferee of an undertaking becomes liable in respect of obligations concerning holiday pay and compensation to employees who were not employed in the undertaking on the date of the transfer.

Costs

18 The costs incurred by the Danish, United Kingdom, French and Netherlands Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Vestre Landsret, by order of 3 February 1983, hereby rules:

Council Directive No 77/187/EEC of 14 February 1977 does not require the Member States to enact provisions under which the transferee of an undertaking becomes liable in respect of obligations concerning holiday pay and compensation to employees who were not employed in the undertaking on the date of the transfer.

Mackenzie Stuart Bosco Due Kakouris

Koopmans Everling Bahlmann Galmot Joliet

Delivered in open court in Luxembourg on 7 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President