JUDGMENT OF THE COURT (Third Chamber)

21 October 2010*

In Case C-242/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te Amsterdam (Netherlands), made by decision of 30 June 2009, received at the Court on 3 July 2009, in the proceedings

Albron Catering BV

v

FNV Bondgenoten,

John Roest,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 May 2010,

after considering the observations submitted on behalf of:

— Albron Catering BV, by P. Kuypers and P.M. Klinckhamers, advocaten,

— FNV Bondgenoten and Mr Roest, by E. Unger, advocaat, and P. Kruijff, legal adviser,

— the Netherlands Government, by C. Wissels, M. Noort and Y. de Vries, acting as Agents,

— the European Commission, by J. Enegren and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2010,

gives the following

Judgment

1 This reference 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 reference was made in the context of a dispute between Albron Catering BV ('Albron'), of the one part, and FNV Bondgenoten ('FNV') and Mr Roest, of the other part, in order to determine whether, in the context of a group of companies one of whose legal entities performs the function of central employer and detaches its employees amongst various companies which constitute that group, the transfer of the activities of one company in the said group to a company outside the group, namely Albron, must be regarded as falling within the rules for the protection of employees instituted by Directive 2001/23.

Legal context

European Union legislation

3 Directive 2001/23 was a consolidation 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

4 Recital 3 of the preamble to Directive 2001/23 states that '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'.

5 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 … that activity is central or ancillary.'

6 Article 2 of Directive 2001/23 provides:

'1. For the purposes of this Directive:

(a) "transferor" shall 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 undertaking or business;

(b) "transferee" shall 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 undertaking or business;

…

(c) "employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

...'

7 According to Article 3(1) to (3) of Directive 2001/23:

'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 shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.'

National legislation

8 Article 610(1) of Book 7 of the Netherlands Civil Code (Burgerlijk Wetboek) defines a contract of employment for the purposes of Netherlands law as follows:

'An employment contract is a contract whereby one party, the employee, undertakes for a defined period and for a salary to work for the other party, the employer.'

9 Article 663 of Book 7 of the Netherlands Civil Code provides:

'By virtue of the transfer of an undertaking, the employer's rights and obligations, at the time of the transfer, under an employment contract concluded between the latter and an employee in that undertaking are automatically transferred to the transferee. For a period of one year after the transfer, that employer remains jointly and severally

liable with the transferee for compliance with the obligations under the employment contract which came into being before the transfer.'

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

10 Heineken International is a group of Netherlands beer producers. Within that group, all the staff are employed by Heineken Nederlands Beheer BV ('HNB'). HNB thus performs the function of central employer and detaches the staff to the various operating companies of the Heineken group in the Netherlands.

11 Mr Roest was employed by HNB from 17 July 1985 to 1 March 2005 as a staff member in the 'catering' department. He was assigned by HNB, along with about 70 other staff members in that department, to Heineken Nederland BV ('Heineken Nederland'), a company which, until 1 March 2005, supplied catering at various locations to employees of the Heineken group. In the context of that assignment, the collective agreement reached within HNB applied.

12 Mr Roest is a member of the FNV, a trade union the aims of which include defence of its members' interests in the area of working conditions and salaries, in particular by the conclusion of collective agreements.

13 The catering activities carried out by Heineken Nederland were transferred, by virtue of an agreement, to Albron on 1 March 2005.

14 Albron is involved throughout the Netherlands in, amongst other things, contract catering, namely the management and operation of catering services, particularly in staff restaurants in the private and public sectors on the basis of appropriate contracts with clients. Mr Roest entered the service of Albron as a member of the catering staff in a company restaurant as from 1 March 2005.

15 FNV and Mr Roest brought an action against Albron before the Kantonrechter (Cantonal Court) for a declaration that the transfer of the catering business which took place on 1 March 2005 between Heineken Nederland and Albron constituted the transfer of an undertaking within the meaning of Directive 2001/23 and that employees of HNB who were assigned to Heineken Nederland automatically became staff members of Albron as from that date.

16 The FNV and Mr Roest also sought an order against Albron that the latter be required to apply to the employment contract concluded by Albron with Mr Roest, with retrospective effect from 1 March 2005, the conditions which applied between HNB and Mr Roest before that date, and that, in so far as such application related to wage arrears from 1 March 2005, Albron be ordered to pay the statutory increase of 50 % pursuant to Article 625 of Book 7 of the Netherlands Civil Code together with statutory interest from the date of the indebtedness. The FNV and Mr Roest also applied for a costs order against Albron.

17 By a judgment of 15 March 2006, the Kantonrechter upheld the claims, save for the statutory increase of 50 %.

18 Albron appealed against that judgment before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam).

19 In those circumstances, the Gerechtshof te Amsterdam decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Should Directive 2001/23 … be interpreted as meaning that there is a transfer of rights and obligations to the transferee referred to in the first sentence of Article 3(1) only if the transferor of the undertaking to be transferred is also the formal employer of the employees concerned, or does the protection of employees envisaged by Directive [2001/23] imply that, upon transfer of an undertaking from an operating company belonging to a group, the rights and obligations pertaining to the employees working for that undertaking are transferred to the transferee if all the personnel working in the group are in the employ of a personnel company (which also belongs to that group) which functions as the central employer?

(2) What would be the answer to the second part of the first question if the employees referred to there who work for an undertaking belonging to a group are in the employ of another company which also belongs to that group, which is not a personnel company as described in the first question?'

The questions referred

Substance

20 By its two questions, which it will be convenient to examine together, the national court asks, in essence, whether, in the case of a transfer, within the meaning of

Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment ('the non-contractual employer'), given that there exists within that group a undertaking with which the employees concerned were linked by such a contract of employment ('the contractual employer').

21 First, it is apparent from the wording of Article 2(1)(a) of Directive 2001/23 that the transferor is the party which, by reason of a transfer, within the meaning of Article 1(1) of that directive, loses the capacity of employer.

22 It is clear from the facts at issue in the main proceedings that the non-contractual employer lost its capacity as non-contractual employer following the transfer of the business. Therefore, one cannot exclude the possibility that it might be regarded as a 'transferor', within the meaning of Article 2(1)(a) of Directive 2001/23.

23 Next, as is apparent from the very wording of Article 3(1) of Directive 2001/23, the protection conferred by that directive on employees in the event of a change of employer concerns the rights and obligations arising for the transferor from the existence, at the date of the transfer of the undertaking, of an employment contract or an employment relationship, the existence or otherwise of a contract or employment relationship being, according to Article 2(2) of that directive, a matter for assessment under national law.

24 The requirement under Article 3(1) of Directive 2001/23 that there be either an employment contract, or, in the alternative and thus as an equivalent, an employment

relationship at the date of the transfer suggests that, in the mind of the Union legislature, a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by Directive 2001/23.

25 On the other hand, it is not apparent from Directive 2001/23 that the relationship between the employment contract and the employment relationship is one of subsidiarity and that, therefore, where there is a plurality of employers, the contractual employer must systematically be given greater weight.

26 Thus, in a context such as that in the main proceedings, Directive 2001/23 does not prevent the non-contractual employer, to which employees are assigned on a permanent basis, from being likewise capable of being regarded as a 'transferor', within the meaning of Directive 2001/23.

27 Finally, it follows from the provisions of Article 1(1)(b) of Directive 2001/23 that 'there is a transfer within the meaning of the 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 … that activity is central or ancillary'.

28 Thus, the transfer of an undertaking, within the meaning of Directive 2001/23, presupposes, in particular, a change in the legal or natural person who is responsible for the economic activity of the entity transferred and who, in that capacity, establishes working relations as employer with the staff of that entity, in some cases despite the absence of contractual relations with those employees.

29 It follows that the position of a contractual employer, who is not responsible for the economic activity of the economic entity transferred, cannot systematically take precedence, for the purposes of determining the identity of the transferor, over the position of a non-contractual employer who is responsible for that activity.

30 That analysis is supported by recital 3 of Directive 2001/23, which emphasises the need to protect employees in the event of a change of 'employer'. That concept may, in a context such as that in the main proceedings, designate the non-contractual employer, responsible for the running of the business transferred.

31 In those circumstances, if, within a group of companies, there are two employers, one having contractual relations with the employees of that group and the other non-contractual relations with them, it is also possible to regard as a 'transferor', within the meaning of Directive 2001/23, the employer responsible for the economic activity of the entity transferred which, in that capacity, establishes working relations with the staff of that entity, despite the absence of contractual relations with those staff.

32 The answer to the questions referred must therefore be that, in the event of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is also possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment.

The temporal effects of the present judgment

33 In its observations, Albron has raised the possibility, in the event of the Court finding that a situation such as that at issue in main proceedings falls under Directive 2001/23, of the Court limiting in time the effects of the present judgment to the cases which are pending before it.

34 In support of its claim, Albron argues, first, that the number of claims brought against HNB and other undertakings which have made a transfer will be 'considerable' and that HNB has already paid a severance payment to employees who have entered the service of Albron. It also argues that economic operators may have a legitimate expectation, having regard to the case-law of the Court of Justice, in the application of Directive 2001/23 being subject to the conclusion of an employment contract with the transferor.

35 According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of Union law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (see, inter alia, Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraph 27; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 141; and Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 50).

36 Accordingly, it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the legal order of the Union, be moved to

restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, inter alia, Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 56, and Case C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 91).

37 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Union legislation by reason of objective, significant uncertainty regarding the implications of Union provisions, to which the conduct of other Member States or the Commission may even have contributed (see, inter alia, Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 42, and *Brzeziński*, paragraph 57).

38 This Court finds that, in the main proceedings, Albron has not submitted to the Court any concrete evidence capable of establishing a risk of serious difficulties in connection with massive litigation which might be brought, following this judgment, against HNB and other undertakings which have carried out a transfer. Moreover, as the Advocate General has pointed out in point 59 of his Opinion, the fact that HNB has already made a severance payment to employees who have entered into the service of Albron is in any event irrelevant.

39 In those circumstances, it is not necessary to determine whether the criterion relating to the good faith of those concerned is fulfilled.

40 It is therefore not appropriate to limit in time the effects of the present judgment.

Costs

41 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 (Third Chamber) hereby rules:

In the event of a transfer within the meaning 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, of an undertaking belonging to a group to an undertaking outside that group, it is also possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment.

[Signatures]