JUDGMENT OF THE COURT (Second Chamber)
14 November 1996 *

In Case C-305/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal du Travail, Brussels, for a preliminary ruling in the proceedings pending before that court between

Claude Rotsart de Hertaing

and

J. Benoidt SA, in liquidation,

and

IGC Housing Service SA

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 (OJ 1977 L 61, p. 26),

* Language of the case: French.

THE COURT (Second Chamber),

composed of: G. F. Mancini, President of the Chamber (Rapporteur), J. L. Murray and G. Hirsch, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

after considering the written observations submitted on behalf of the Commission of the European Communities, by Marie Wolfcarius, of its Legal Service, and Horstpeter Krepper, a national civil servant seconded to that service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 July 1996,

gives the following

Judgment

1 By judgment of 7 November 1994, received at the Court on 18 November 1994, the Tribunal du Travail (Labour Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions 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 (OJ 1977 L 61, p. 26, hereinafter 'the Directive').

2 Those questions were raised in proceedings between Mrs Rotsart de Hertaing and J. Benoidt SA, in liquidation, and IGC Housing Service SA concerning the payment of damages for wrongful dismissal and other compensation.

3 As the second recital in the preamble shows, the Directive aims to 'provide for the protection of workers in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

4 To that end, the first subparagraph of Article 3(1) of the Directive provides that the transferor's rights and obligations arising from a contract of employment existing on the date of a transfer are to be transferred to the transferee. Under the second subparagraph, Member States may provide that, after the date of the transfer and in addition to the transferee, the transferor is also to remain liable in respect of obligations which have arisen from a contract of employment or employment relationship. The first subparagraph of Article 3(2) then provides that, following the transfer, the transferee is to 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.

5 Under the first subparagraph of Article 4(1) of the Directive, the transfer of an undertaking, business or part of a business is not in itself to constitute grounds for dismissal by the transferor or the transferee. That provision is not to stand in the

way of dismissals for economic, technical or organizational reasons entailing changes in the workforce.

6 The Directive was implemented in Belgian law by Collective Agreement No 32 *bis* 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 taken over in the event of a takeover of assets following liquidation or judicial composition with transfer of assets, made mandatory by Royal Decree of 25 July 1985 (*Moniteur Belge*, 9 August 1985, p. 11527), as amended, in particular, by Collective Agreement No 32 *quater*.

7 Mrs Rotsart de Hertaing was employed by Housing Service SA from 1987 and at the material time carried out reception duties for that company.

8 On 19 November 1993 Housing Service SA changed its name to J. Benoidt SA (hereinafter 'Benoidt') and went into liquidation. Its business was carried on by a newly formed company, IGC Housing Service SA (hereinafter 'IGC Housing Service'), operating from the same premises.

9 By registered letter of 23 November 1993 Benoidt terminated Mrs Rotsart de Hertaing's contract of employment with six months' notice to run from 1 December 1993, and informed her that until further notice she was not required to serve out her notice period. By letter of 29 November 1993 Benoidt informed Mrs Rotsart

de Hertaing that she had to work through her notice and that during that period she was to work on preparations for the company's relocation.

10 Mrs Rotsart de Hertaing, through her trade union, protested against that unilateral alteration of her contract, and requested Benoidt to reinstate her in her previous functions by 17 December 1993 at the latest. By registered letter of 22 December 1993, Mrs Rotsart de Hertaing was informed that the liquidator was terminating her contract on that day on the ground of serious fault. By letter of 27 December 1993, Benoidt informed Mrs Rotsart de Hertaing of the facts alleged to constitute serious fault justifying dismissal. According to the national court, 22 December 1993 was the date of Mrs Rotsart de Hertaing's dismissal by Benoidt.

11 On 21 January 1994 Mrs Rotsart de Hertaing brought proceedings in the Tribunal du Travail, Brussels, seeking an order against Benoidt and IGC Housing Service jointly and severally to pay various sums as compensation in lieu of notice, damages for wrongful dismissal, the 13th month's salary for 1993, the balance of her holiday pay and sums wrongly deducted, with statutory interest thereon. Benoidt counterclaimed for damages against Mrs Rotsart de Hertaing. The counterclaim was not pursued in the supplementary pleadings and was not argued at the hearing.

12 The national court declared Mrs Rotsart de Hertaing's action against Benoidt admissible and well founded, on the ground that Benoidt had not established that the actions complained of within the statutory time-limit as constituting serious fault had been done with a dishonest intention or that those actions made it impossible for employment relations to continue between the parties. It therefore

ordered Benoidt to pay Mrs Rotsart de Hertaing BFR 535 378 as compensation in lieu of notice and BFR 64 412 in respect of the 13th month's salary, with statutory interest thereon.

13 As regards the claim for IGC Housing Service to be found jointly and severally liable, the national court considered, on the one hand, that there had been a legal transfer of an undertaking within the meaning of the Directive and Collective Agreement No 32 *bis* and, on the other hand, that Mrs Rotsart de Hertaing's contract of employment had not been transferred. IGC Housing Service conceded that it had never been her employer, whereas Benoidt claimed that it had been her only employer up to the date of termination of the contract.

14 Having regard to the foregoing, the Tribunal du Travail, Brussels, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is Article 3 of Directive 77/187 to be interpreted as meaning that all employment contracts existing on the date of the transfer and concerning staff employed in the undertaking transferred are, by virtue of the transfer, transferred from the transferor to the transferee without any option on the part of the transferor or the transferee?

2. If so,

— are the staff automatically transferred regardless of the refusal by the transferee to comply with his obligation?

— are the staff transferred on the date of the transfer, or may either the transferor or the transferee fix a later date?'

Transfer of the contracts existing on the date of the transfer

15 By its first question and the first part of its second question the national court asks essentially whether Article 3(1) of the Directive is to be interpreted as meaning that the contracts of employment and employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking, despite the contrary intention of the transferor or transferee and despite the latter's refusal to fulfil his obligations.

16 As the Court has repeatedly held (see, *inter alia*, Joined Cases 144/87 and 145/87 *Berg and Busschers* v *Besselsen* [1988] ECR 2559, paragraph 12), the Directive 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 under the same conditions as those agreed with the transferor.

17 It is likewise settled case-law (see Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739, paragraph 14) that the rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.

18 It follows that in the event of the transfer of an undertaking the contract of employment or employment relationship between the staff employed by the undertaking transferred may not be maintained with the transferor and is

automatically continued with the transferee (Case C-362/89 *d'Urso and Others* v *Ercole Marelli Elettromecanica Generale and Others* [1991] ECR I-4105, paragraph 12). The Court concluded that the contracts of employment and employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred to the transferee by the mere fact of the transfer (*d'Urso*, paragraph 20).

19 It must, however, be stated that, according to the second subparagraph of Article 3(1), the automatic transfer of employment relationships to the transferee does not prevent the Member States from providing for joint liability of the transferor and transferee (see, on this point, *Berg and Busschers*, paragraphs 11 and 13).

20 In view of the doubts expressed by the national court, it should be added that, by reason of the mandatory nature of the protection afforded by the Directive, and in order not to deprive workers of that protection in practice, the transfer of the contracts of employment may not be made subject to the intention of the transferor or the transferee, and more particularly that the transferee may not obstruct the transfer by refusing to fulfil his obligations.

21 The answer to the first question and the first part of the second question must therefore be that Article 3(1) of the Directive is to be interpreted as meaning that the contracts of employment and employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking, despite the contrary intention of the transferor or transferee and despite the latter's refusal to fulfil his obligations.

Date of transfer of the contracts of employment and employment relationships

22 By the second part of its second question the national court asks whether the transfer of the contracts of employment and employment relationships pursuant to

Article 3(1) of the Directive necessarily takes place on the date of the transfer of the undertaking, or whether it may be postponed to another date at the will of the transferor or the transferee.

23 On this point, it must be observed firstly that it follows from the actual wording of the Directive that the transfer of the contracts of employment and employment relationships takes place on the date of the transfer of the undertaking. The second subparagraph of Article 3(1) does in fact give 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.

24 Secondly, the Court held in paragraph 14 of its judgment in *Berg and Busschers* that Article 3(1) is to be interpreted as meaning that after the date of transfer the transferor is in principle discharged, by virtue of the transfer alone, from all obligations arising under the contract of employment or in the employment relationship. 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.

25 Thirdly, 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 the Directive. However, according to the settled case-law referred to in paragraph 16, those provisions are mandatory.

26 The answer to the second part of the second question must therefore be that the transfer of the contracts of employment and employment relationships pursuant to Article 3(1) of the Directive necessarily takes place on the date of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee.

Costs

27 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Tribunal du Travail, Brussels, by judgment of 7 November 1994, 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 is to be interpreted as meaning that the contracts of employment and employment relationships existing on the date of the transfer of an undertaking between the transferor and the workers employed in the undertaking transferred are automatically transferred from the transferor to the transferee by the mere fact of the transfer of the undertaking, despite the contrary intention of the transferor or transferee and despite the latter's refusal to fulfil his obligations.

2. The transfer of the contracts of employment and employment relationships pursuant to Article 3(1) of Directive 77/187 necessarily takes place on the date of the transfer of the undertaking and cannot be postponed to another date at the will of the transferor or transferee.

Mancini Murray Hirsch

Delivered in open court in Luxembourg on 14 November 1996.

R. Grass G. F. Mancini

Registrar President of the Second Chamber