JUDGMENT OF THE COURT

19 September 1995 *

In Case C-48/94,

REFERENCE to the Court under Article 177 of the EC Treaty by Sø-og Handelsretten, Copenhagen, for a preliminary ruling in the proceedings pending before that court between

Ledernes Hovedorganisation, acting on behalf of Ole Rygaard

and

Dansk Arbejdsgiverforening, acting on behalf of Strø Mølle Akustik A/S

on the interpretation of Article 1(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),

* Language of the case: Danish.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler, P. J. G. Kapteyn and P. Jann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida (Rapporteur), J. L. Murray, G. Hirsch, H. Ragnemalm and L. Sevón, Judges,

Advocate General: G. Cosmas,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ledernes Hovedorganisation, the applicant in the main proceedings, by Karen-Margrethe Schebye, of the Copenhagen Bar,

— Dansk Arbejdsgiverforening, the defendant in the main proceedings, by Henrik Uldal, of the Copenhagen Bar,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, acting as Agent,

— the Commission of the European Communities, by Anders Christian Jessen, of its Legal Service, and by José Juste Ruiz, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral observations of the applicant, the defendant and the Commission at the hearing on 7 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 10 May 1995,

gives the following

Judgment

1 By order of 2 February 1994, received at the Court on 7 February 1994, Sø-og Handelsretten (Maritime and Commercial Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty 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 (OJ 1977 L 61, p. 26, hereafter 'the Directive').

2 That question was raised in proceedings between Mr Rygaard and the company Strø Mølle Akustik A/S (hereafter 'Strø Mølle').

3 As stated in the second recital of its preamble the aim of the Directive is 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 for the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer to be transferred to the transferee. Article 4(1) prohibits both the transferor and the transferee from dismissing the employees concerned on the ground of the transfer.

4 Article 1(1) provides that the Directive is to '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'.

5 Mr Rygaard was employed by the firm of carpenters, Svend Pedersen A/S.

6 On 27 January 1992 that firm, which had been entrusted by the company SAS Service Partner A/S with the construction of a canteen, informed that company that it wished part of the work, on the ceilings and the joinery work, to be completed by Strø Mølle.

7 On 29 January 1992 Strø Mølle submitted a tender to SAS Service Partner A/S.

8 On 30 January 1992 SAS Service Partner A/S and Strø Mølle entered into a contract which contained the following terms:

'Wage costs already incurred in respect of the first tranche of the tender concerning the ceilings and doors (room and first floor) shall be refunded to Svend Pedersen A/S by Strø Mølle Akustik A/S. Strø Mølle Akustik A/S shall not be liable for any other claims made against Svend Pedersen A/S.

Materials supplied and paid for by Svend Pedersen A/S to be used on the said work are to be refunded by Strø Mølle Akustik A/S to Svend Pedersen A/S directly.

The difference in the price of fender beams, amounting to DKR 188 000 excluding VAT, shall be paid by Svend Pedersen A/S to Strø Mølle Akustik A/S.

Strø Mølle shall take on two apprentices for the period from 1 February 1992 to (about) 1 May 1992. The above is subject to the works planner drawing up a revised timetable acceptable to Strø Mølle Akustik A/S.'

9 On 31 January 1992 Svend Pedersen A/S sent Mr Rygaard a letter giving him notice that he would be dismissed on 30 April 1992. In the letter of dismissal the employer gave notice of its intention to wind up the firm and informed him that the abovementioned works would be taken over by Strø Mølle. It went on to state that, with effect from 1 February 1992, Mr Rygaard would be transferred to the subcontracting firm which would continue to pay him until the end of the employment relationship.

10 On 10 February 1992 SAS Service Partner A/S accepted Strø Mølle's offer and Strø Mølle then took over the works. Mr Rygaard continued to work for Strø Mølle until 26 May 1992 when he was given notice taking effect on 30 June 1992.

11 Svend Pedersen A/S was declared bankrupt in March 1992.

12 Mr Rygaard is claiming damages for wrongful dismissal before the Sø- og Handelsretten.

13 Considering that interpretation of the Directive was necessary in order to decide the case, the Sø- og Handelsretten referred the following question to the Court of Justice:

'Is Council Directive 77/187/EEC applicable when Contractor B, pursuant to an agreement with Contractor A, continues part of building works begun by Contractor A, and

(i) an agreement is made between Contractor A and Contractor B under which some of Contractor A's workers are to continue working for Contractor B and Contractor B is to take over materials on the building site in order to complete the contracted work; and

(ii) after the taking over, there is a period in which Contractor A and Contractor B are both working on the building works at the same time?

Does it make any difference that the agreement on the completion of the works is entered into between the awarder of the main building contract and Contractor B with Contractor A's consent?'

14 By its question the national court is essentially asking whether the taking over, with a view to completing, with the consent of the awarder of the main building contract, works started by another undertaking, of two apprentices and an employee, together with the materials assigned to those works, constitutes a transfer of an undertaking, business or part of a business, within the meaning of Article 1(1) of the Directive.

15 According to the Court's case-law, it is clear from the scheme of the Directive and from the terms of Article 1(1) thereof that the Directive is intended to ensure

continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the business in question retains its identity (see, in particular, the judgment in Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, paragraph 11).

16 According to that same judgment, in order to ascertain whether that criterion is satisfied, it is necessary to consider whether the operation of the entity in question is actually continued or resumed by the new employer, with the same or similar economic activities (*Spijkers* v *Benedik*, paragraph 12).

17 It is then necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and movable property, are transferred, the value of the intangible assets at the time of the transfer, whether or not most of the personnel are taken over by the new employer, whether or not customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period of any suspension of those activities. All those circumstances are, however, only individual factors in the overall assessment to be made and they cannot therefore be considered in isolation (*Spijkers* v *Benedik*, paragraph 13).

18 Mr Rygaard considers that those conditions are satisfied in the present case. He observes that the works taken over by Strø Mølle are the same as those which had been entrusted to Svend Pedersen A/S and that the duration of the works cannot be decisive in determining whether a transfer of an undertaking, within the meaning of the Directive, has taken place, just as the scale of the activity transferred was not held to be decisive in Case C-392/92 *Schmidt* [1994] ECR I-1311.

19 That argument cannot be accepted.

20 The authorities cited above presuppose that the transfer relates to a stable economic entity whose activity is not limited to performing one specific works contract.

21 That is not the case of an undertaking which transfers to another undertaking one of its building works with a view to the completion of that work. Such a transfer could come within the terms of the directive only if it included the transfer of a body of assets enabling the activities or certain activities of the transferor undertaking to be carried on in a stable way.

22 That is not so where, as in the case now referred, the transferor undertaking merely makes available to the new contractor certain workers and material for carrying out the works in question.

23 The reply to the question submitted must therefore be that the taking over, with a view to completing, with the consent of the awarder of the main building contract, works started by another undertaking, of two apprentices and an employee, together with the materials assigned to those works, does not constitute a transfer of an undertaking, business or part of a business, within the meaning of Article 1(1) of the Directive.

Costs

24 The costs incurred by the German Government and by the Commission of the European Communities, which have 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,

in answer to the question submitted to it by Sø- og Handelsretten, hereby rules:

The taking over, with a view to completing, with the consent of the awarder of the main building contract, works started by another undertaking, of two apprentices and an employee, together with the materials assigned to those works, does not constitute a transfer of an undertaking, business or part of a business within the meaning of Article 1(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.

Rodríguez Iglesias Schockweiler Kapteyn

Jann Mancini Kakouris Moitinho de Almeida

Murray Hirsch Ragnemalm Sevón

Delivered in open court in Luxembourg on 19 September 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President