

JUDGMENT OF THE COURT

11 March 1997

In Case C-13/95,

REFERENCE to the Court under [Article 267 TFEU] by the Arbeitsgericht, Bonn, for a preliminary ruling in the proceedings pending before that court between

Ayşe Süzen

and

Zehnacker Gebäudereinigung GmbH Krankenhausservice,

Lefarth GmbH, party joined

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),

THE COURT,

composed of: G. C. Rodriguez Iglesias, President, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), P.J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet (Rapporteur), G. Hirsch, P.Jann and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Zehnacker Gebäudereinigung GmbH Krankenhausservice, by Christof BroBke, Rechtsanwalt, Villingen,
- the German Government, by Ernst Roder, Ministerialrat in the Federal Ministry of the Economy, and Gereon Thiele, Assessor in the same ministry, acting as Agents,
- the Belgian Government, by Jan Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Edwige Belliard, Assistant Director, Directorate of Legal Affairs in the Ministry of Foreign Affairs, and Anne de Bourgoing, Charge de Mission in the same directorate, acting as Agents,
- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt QC,

— the Commission of the European [Union], by Christopher Docksey, of its Legal Service, and Horstpeter Kreppel, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Süzen, represented by Christoph Kramer, Rechtsanwalt, Bonn; Zehnacker Gebäudereinigung GmbH Krankenhausservice, represented by Christof Broßke; Lefarth GmbH, represented by Nikolaus Christ, Rechtsanwalt, Rosrath; the German Government, represented by Ernst Roder; the French Government, represented by Anne de Bourgoing; the United Kingdom Government, represented by Derrick Wyatt; and the Commission of the European [Union], represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, at the hearing on 18 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 15 October 1996,

gives the following

Judgment

- 1 By order of 30 November 1994, received at the Court Registry on 18 January 1995, the Arbeitsgericht (Labour Court), Bonn, referred to the Court for a preliminary ruling under [Article 267 TFEU] 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 brought by Mrs Süzen against Zehnacker Gebäudereinigung GmbH Krankenhausservice (hereinafter 'Zehnacker').
- 3 Mrs Süzen was employed by Zehnacker, which assigned her to cleaning operations in the premises of the Aloisiuskolleg, a secondary school in Bonn-Bad-Godesberg, Germany, under a cleaning contract concluded between that school and Zehnacker. Zehnacker dismissed Mrs Süzen, together with seven other employees who, like her, worked as cleaners at the school, by reason of the fact that the Aloisiuskolleg terminated the contract between it and Zehnacker with effect from 30 June 1994.
- 4 The Aloisiuskolleg then contracted the cleaning of its premises to Lefarth GmbH (hereinafter 'Lefarth'), the party joined in the main proceedings, with effect from 1 August 1994. The order for reference does not state whether Lefarth offered to re-engage the employees dismissed by Zehnacker.
- 5 Mrs Süzen instituted proceedings before the Arbeitsgericht, Bonn, for a declaration that the notice of dismissal served on her by Zehnacker had not brought to an end her employment relationship with the latter.
- 6 Considering that the decision to be given depended on an interpretation of the directive, the Arbeitsgericht stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

1. On the basis of the judgments of the Court of Justice of 14 April 1994 in Case C-392/92 *Schmidt* [1994] ECR I-1311 and of 19 May 1992 in Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, is

Directive 77/187/EEC applicable if an undertaking terminates a contract with an outside undertaking in order then to transfer it to another outside undertaking?

2. Is there a legal transfer within the meaning of the directive in the case of the operation described in Question 1 even if no tangible or intangible business assets are transferred?
- 7 Article 1(1) of the directive provides: 'This directive shall 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'.
- 8 In *Schmidt*, cited above, the Court held that that provision must be interpreted as covering a situation, such as that outlined in the order for reference, in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee. Earlier, in *Redmond Stichting* cited above, the Court took the view in particular that the term 'legal transfer' covers a situation in which a public authority decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim.
- 9 By its two questions, which it is appropriate to consider together, the national court asks whether the directive also applies to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking without any concomitant transfer of tangible or intangible business assets from one undertaking to the other.
- 10 The aim of the directive is to ensure continuity of employment

relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed (Case 24/85 *Spijkers* (1986] ECR 1119, paragraphs 11 and 12, and, most recently, Joined Cases C-171/94 and C-172/94 *Merck & Neuhaus* [1996] ECR I-1253, paragraph 16; see also the advisory opinion of the Court of the European Free Trade Association of 19 December 1996 in Case E-2/96 *Ulstein and Reiseng*, not yet reported, paragraph 27).

- 11 Whilst the lack of any contractual link between the transferor and the transferee or, as in this case, between the two undertakings successively entrusted with the cleaning of a school, may point to the absence of a transfer within the meaning of the directive, it is certainly not conclusive.
- 12 As has been held -most recently in *Merck & Neuhaus* (paragraph 28) - the directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking. Thus, there is no need, in order for the directive to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may also take place in two stages, through the intermediary of a third party such as the owner or the person putting up the capital.
- 13 For the directive to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term entity thus refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.
- 14 In order to determine whether the conditions for the transfer of an

entity are met, it is necessary to consider all the facts characterizing the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, *Spijkers* and *Redmond Stichting*, paragraphs 13 and 24 respectively).

- 15 As observed by most of the parties who commented on this point, the mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it.
- 16 The mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.
- 17 It must also be noted that, although the transfer of assets is one of the criteria to be taken into account by the national court in deciding whether an undertaking has in fact been transferred, the absence of such assets does not necessarily preclude the existence of such a transfer (*Schmidt and Merck* *et al.*, cited above, paragraphs 16 and 21 respectively).

- 18 As pointed out in paragraph 14 of this judgment, the national court, in assessing the facts characterizing the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets.
- 19 The United Kingdom Government and the Commission have argued that, for the entity previously entrusted with a service contract to have been the subject of a transfer within the meaning of the directive, it may be sufficient in certain circumstances for the new awardee of the contract to have voluntarily taken over the majority of the employees specially assigned by his predecessor to the performance of the contract.
- 20 In that regard, it should be borne in mind that the factual circumstances to be taken into account in determining whether the conditions for a transfer are met include in particular, in addition to the degree of similarity of the activity carried on before and after the transfer and the type of undertaking or business concerned, the question whether or not the majority of the employees were taken over by the new employer (*Spijkers*, cited above, paragraph 13).
- 21 Since in certain labour-intensive sectors a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognized that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, as stated in paragraph 21 of *Rygaard*, cited above, the new employer takes over a

body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis.

- 22 It is for the national court to establish, in the light of the foregoing interpretative guidance, whether a transfer has occurred in this case.
- 23 The answer to the questions from the national court must therefore be that Article 1(1) of the directive is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.

Costs

- 24 The costs incurred by the Belgian, French, German and United Kingdom Governments and the Commission of the European [Union], 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 questions referred to it by the Arbeitsgericht, Bonn, by order of 30 November 1994, hereby rules:

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 is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.

Rodriguez Iglesias

Moitinho de Almeida Murray Sevon

Kapteyn

Gulmann

Edward

Puissochet

Hirsch Jann

Ragnernalm

Delivered in open court in Luxembourg on 11 March 1997.

R. Grass

G. C. Rodriguez Iglesias

Registrar

President