

Case C-314/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

16 April 2019

Referring court:

Tribunal Superior de Justicia de Castilla-La Mancha (Spain)

Date of the decision to refer:

12 March 2019

Appellant:

R.C.C.

Respondent:

M.O.L.

Subject-matter of the main proceedings

Action brought by an employee of a Notary challenging her dismissal.

Subject-matter and legal basis of the request

To determine whether 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 applies to an employee of a Notary.

The legal basis is Article 267 TFEU.

Question referred for a preliminary ruling

Does Article 1(1)(a) 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, and therefore the content of the directive, apply to a case in which a Notary, a public official who, in turn, is the private employer of the staff working for him, that relationship as employer being governed by general employment law and by the sectoral collective agreement, who replaces the previous departing Notary, taking over his Protocol, and who continues to provide that service at the same workplace, with the same material facilities, and who takes on the staff who worked for the previous Notary who ran that practice?

Provisions of European Union law relied on

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. Article 1(1)(a).

Provisions of national law relied on

-Law of 28 May 1862, Organic Law on Notaries

Article 1: 'A notary is a public official authorised to authenticate, in accordance with the laws, contracts and other extrajudicial documents.'

Throughout the Kingdom [of Spain] there shall be a single class of those officials.'

-Decree of 2 June 1944 approving definitively the regulation of the organisation and conditions of employment of Notaries, in its version amended by Royal Decree 457/2007 of 19 January, and by Royal Decree 140/2015 of 6 March on notarial demarcation.

Article 69: "“Public office” shall mean the specific staffing and material resources required to carry out that purpose [of notarial public service].'

Article 272: 'The notarial protocol shall include the public instruments and other documents incorporated into the same each year [...].'

Workers' Statute

Article 44

'1. The transfer of an undertaking, workplace or independent production unit of a business shall not in itself terminate the employment relationship; the new employer shall take over the former employer's employment and social-security rights and obligations, including commitments in respect of pensions, in accordance with the conditions laid down in the relevant specific legislation, and, generally, all obligations in relation to additional social protection which the transferor has undertaken.

2. For the purposes of this article, there shall be a transfer of undertaking 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, be this a central or ancillary activity.'

Article 51(1): 'For the purposes of this law, 'collective redundancy' shall mean 'the termination of employment contracts on economic, technical, organisational or production grounds [...].'

Article 52(c): 'An employment contract may be terminated where any of the grounds provided for in Article 51(1) are established and where the termination affects fewer employees than the relevant number of employees referred to in that provision'.

Article 53

'1. 'The adoption of a decision terminating an employment contract under the preceding article must meet the following requirements:

- a) the employee must be notified in writing of the reason for termination;
- b) the employer must make available to the worker, at the same time as it gives written notification of termination, compensation equal to 20 days' remuneration per year of service, periods shorter than a year being calculated *pro rata* on a monthly basis up to a maximum of 12 monthly payments.'

Article 56

'1. Where a dismissal is declared to be unfair, the employer, within 5 days of notice of the judgment being served, may choose between reinstating the employee or paying compensation equal to 33 days' remuneration per year of service, periods shorter than a year being calculated *pro rata* on a monthly basis up to a maximum of 24 monthly payments. If the employer opts to pay compensation, the employment contract shall be terminated, which will be regarded as having occurred on the date of effective cessation of work.

-Collective Agreement for employees of Notaries of the Notarial College of Albacete (repealed in 2010).

Article 16: 'An employment contract shall be suspended and terminated on the grounds referred to in Articles 45 and 49 of the Workers' Statute.

However, the Notary, on taking over a Notary's office, shall take over responsibility for the employment relationships of his predecessor, if permitted by the legislation in force, or shall be required to compensate, as established for each case by the substantive law in force, the employee or employees whom he does not employ.

[...].’

-State Collective Agreement on notaries and staff employed (BOE of 23.8.2010)

Article 55: ‘The termination of the employment relationship due to the transfer or resignation of the Notary shall entitle the employee to receive compensation as provided for at any moment in the legislation in force in relation to the transfer or termination on objective grounds (currently set at 20 days’ remuneration per year of service, periods shorter than a year being calculated pro rata on a monthly basis up to a maximum of 12 monthly payments, in accordance with Articles 40(1) and 52(c) of the Workers’ Statute, based on the actual length time spent working for that departing Notary. There shall be no right to said compensation should any of the following situations occur:

In the event of agreement between Notaries, if the employee continues with the other Notaries.

If before, or at the same time as the transfer, the employee reaches an agreement with another Notary to continue working.

If the employee joins the Notary at his new workplace.

[...].’

- State Collective Agreement on notaries and staff employed (BOE of 16.9.2017)

Article 50: ‘The termination of the employment relationship due to transfer (requiring a change in residence) or resignation of the Notary shall entitle the employee to receive compensation as provided for at any moment in the legislation in force in relation to the transfer or termination on objective grounds (currently set at 20 days’ remuneration per year of service, periods shorter than a year being calculated pro rata on a monthly basis up to a maximum of 12 monthly payments, in accordance with Articles 40(1) and 52(c) of the Workers’ Statute, based on the actual length time spent working for that departing Notary. There shall be no right to that compensation should any of the following situations occur:

1. In the event of agreement between Notaries, if the employee continues with the other Notaries.

2. If before or at the same time as the transfer, and at the employee’s initiative, he reaches an agreement with another Notary to continue working, provided that the Notary who employs him formally acknowledges his length of service for compensation purposes.

3. If the employee joins the Notary at his new workplace.

[...].’

-Judgments of the Tribunal Supremo (Supreme Court) of 15 December 2004 and 23 July 2010.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Mrs R.C.C, the applicant in the main proceedings, was employed in the Notary office of Piedrabuena from 7 February 1979 to 16 June 2017, working for the various Notaries in that practice during that period.
- 2 On 13 January 2016, Mrs M.O.L, the defendant in the main proceedings, took over that practice. On 16 June 2017, Mrs R.C.C received a letter of dismissal from Mrs M.O.L, in which it was stated that the dismissal was on economic grounds, that it was acknowledged as being unfair and consequently a calculation was made for redundancy pay.
- 3 Mrs R.C.C brought an action before the Juzgado de lo Social No 2 de Ciudad Real (Social Court No 2, Ciudad Real) challenging her dismissal, by which she sought the annulment of that dismissal or, in the alternative, that it be declared an unfair dismissal. She argued, inter alia, that, for the calculation of the appropriate compensation, the reference point to be taken was the date upon which she began to work in the Notary office, and not the date upon which she began to work for Mrs M.O.L.
- 4 By judgment of 7 March 2018, the Juzgado de lo Social No 2 de Ciudad Real (Social Court No 2, Ciudad Real) dismissed the claim. Although in that judgment it was acknowledged that the dismissal was unfair, it was held that, in accordance with the Collective Agreement in force, the date to be taken as a reference point for the purposes of calculating the compensation is 13 January 2016.
- 5 Mrs R.C.C. brought an appeal against that judgment before the Tribunal Superior de Justicia de Castilla La-Mancha (High Court of Justice, Castilla La-Mancha). This court harbours doubts as to whether Directive 2001/23/EC applies to the present case, which is the decisive factor in order to determine the length of service which is to be taken into account for the purposes of calculating the compensation, therefore it has decided to make the present request for a preliminary ruling to the Court of Justice.

The essential arguments of the parties in the main proceedings

- 6 Amongst other grounds, the appellant takes the view that the date which is to be taken as the reference point for the purposes of calculating the compensation is 7 February 1979, whereas the defendant submits that the relevant date for those purposes is 13 January 2016.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 7 The referring court explains that, in Spain, a Notary is a public official who receives work referred to him, but who at the same time has the status of an employer of workers for whom he is responsible, bound to them by contracts of employment subject to all general employment legislation and EU legislation, and is required to register with the Special Social Security Scheme for Self-Employed Workers (RETA). Notaries also negotiate with their employees, through their respective representatives, collective agreements, until 2010 at territorial level and since this year at national level.
- 8 When a Notary leaves his practice, due to transfer or retirement, his successor, who may decide whether or not to continue in the same premises, must retain for 25 years the archive ('protocol') of the previous Notary, issuing copies and certifications of work carried out by the former Notary when requested by clients, it being usual practice (although not legally compulsory) for the new Notary to retain the staff and the facilities, the so-called 'public office'. There is no express special rule, nor provision of a collective agreement regarding the situation of the staff in the event of dismissal, except in the event of the Notary's transfer or resignation.
- 9 The referring court takes the view that, in the present case, this is an objective dismissal on economic grounds – not, therefore, resulting from a transfer of the Notary to another practice – to which the general rules relating to such a dismissal are unquestionably applicable, and in respect of which it is essential to establish the length of service which is to be taken into account, irrespective of whether that dismissal is fair or unfair, given that, in both cases, there is a right to compensation, calculated according to the employee's actual salary and length of service, up to certain limits depending on whether the dismissal is fair or unfair.
- 10 The referring court takes the view that, given that the employee worked uninterrupted from 7 February 1979 for various Notaries who in turn ran the Notary practice in Piedrabuena, bound to those Notaries by an ordinary employment relationship, working in the same business and having had her length of service acknowledged by the previous Notaries, with Mrs M.O.L, the new Notary, becoming her employer from 13 January 2016 and taking on the employees who had worked for the previous Notary running that practice, in the same business where the protocol is kept, and with the same material elements, without acknowledging Mrs R.C.C's length of service, and subsequently deciding to dismiss her on economic grounds, there are doubts as to whether such a situation falls within the scope of Article 1(1)(a) 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, which provides that it is to 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'.

- 11 The referring court notes that, should the claim for unfair dismissal be upheld and should it be held that Directive 2001/23/EC does apply to the present case, the relevant date of length of service for the purposes of calculating compensation would be 7 February 1979, in accordance with the provisions of that directive. The referring court also notes that national general employment legislation does not exclude employment legislation from applying to those staff, and that in the collective agreements (which, in any case, could not be contrary to legislation, nor to EU law) only the situation arising from the termination of the contract as a result of the transfer of the Notary to another practice has been governed.
- 12 Lastly, the referring court refers to the limited national case-law on employment relationships between Notaries and their employees. It cites, on the one hand, the judgment of the Tribunal Supremo (Supreme Court) of 15 December 2004, in which, referring to an article of the Notarial Regulations of 1956, it was noted that such a provision had to be understood as being ‘compulsorily repealed, at least, from the promulgation of the Workers’ Statute, whose derogating provision rendered ineffective any provisions which went against the Workers’ Statute. And, amongst the employment relationships of a special nature referred to in Article 2, that relating to employees of Notaries is not mentioned, and amongst the grounds for termination listed in Article 49, the transfer of employer is not mentioned, except in the event of retirement or death and those which give rise to termination on objective grounds in the cases referred to in Articles 51 and 52 of the Workers’ Statute. That means that from the Notarial Regulations, the only rules which continue in existence are those which are compatible with the regulation exercised by the Workers’ Statute over an employment relationship, and those relating to the termination of the contract are not present in this case’. On the other hand, it refers to the judgment of the Tribunal Supremo (Supreme Court) of 23 July 2010, in which it was indicated that the legal nature of the public service carried out by the Notary ‘does not remove his status as an employer when the requirements under Article 1(2) of the Workers’ Statute are met, which provides that obligations imposed on an employer by employment legislation must be fulfilled [...]’, but in which, nevertheless, it is stated further on that ‘A notary is not responsible for an organisation of staffing and material facilities which, when the corresponding office in which he provided the public service is transferred, creates a transfer of employer, because their successive appointments and resulting transfers depend on the Government, and nor does the Notary become, due to his appointment to a specific Notary office, responsible for a group of organisations characterising the same, but becomes merely the depositary of its protocol, and the head and director of the public service – which is not public service in the strict sense – carried out in that office.