

JUDGMENT OF THE COURT (Sixth Chamber)
20 November 2003 *

In Case C-340/01,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Carlito Abler and Others

and

Sodexho MM Catering Gesellschaft mbH,

intervener

Sanrest Großküchen Betriebsgesellschaft mbH,

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: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, acting as President of the Sixth Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Sodexho MM Catering Gesellschaft mbH, by G. Schneider and G. Loibner, Rechtsanwälte,
- the United Kingdom Government, by J. Collins, acting as Agent, and K. Smith, barrister,
- the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Sodexho MM Catering Gesellschaft mbH, represented by G. Loibner, of Sanrest Großküchen Betriebsgesellschaft mbH, represented by A. Walchshofer, Rechtsanwalt, and of the Commission, represented by J. Sack, at the hearing on 15 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 19 June 2003,

gives the following

Judgment

- ¹ By order of 25 June 2001, received at the Court on 10 September 2001, the Oberster Gerichtshof (Supreme Court) (Austria) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 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).
- ² That question was raised in proceedings between Sodexho MM Catering Gesellschaft mbH ('Sodexho'), a catering company, which held the contract for management of the catering service in a hospital, and Mr Abler, a kitchen help, and 21 other catering sector workers ('Mr Abler and Others'), supported by their former employer, Sanrest Großküchen Betriebsgesellschaft mbH, ('Sanrest'), the catering company which, immediately beforehand, supplied the same services under a previous contract which was terminated. Those employees brought an action against Sodexho before the Arbeits- und Sozialgericht Wien (Labour and

Social Court, Vienna) (Austria) seeking a declaration that their employment relationship continued with Sodexho on the basis of the Arbeitsvertragsrechts-Anpassungsgesetz (law to adapt employment contract legislation), BGBl. 459/1993, as amended ('AVRAG'), which implemented Directive 77/187 in Austrian law.

Legal background

Community law

- ³ Under Article 1(1), Directive 77/187 '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'.
- ⁴ The first subparagraph of Article 3(1) of Directive 77/187 provides:

'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.'

- ⁵ Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187 (OJ 1998 L 201, p. 88), for which the period prescribed for implementation ended on 17 July 2001, was implemented in Austrian law in 2001, after the events at issue in the main proceedings, and is therefore not applicable.

National law

- 6 Paragraph 3 of the AVRAG, entitled ‘Transfers of undertakings, businesses or parts of businesses to another employer’, provides in subparagraph 1:

‘Where an undertaking, a business or part of a business is transferred to another employer (transfer of undertaking), the latter takes over, in the capacity of employer, all the rights and obligations deriving from the employment relationships existing on the date of the transfer.’

The main proceedings

- 7 On 2 November 1990 the management authority of the Wien-Speising orthopaedic hospital (‘the management authority’) concluded an agreement with Sanrest under which the latter took over the management of catering services within the hospital, providing patients and staff with meals and drinks. Special services were to be paid for separately.
- 8 Meals were to be prepared on the hospital premises. The obligations of Sanrest included, in particular, drawing up menus, purchasing, storing, producing, portioning and transporting the portioned meals to the various departments of the hospital (but not serving them to the patients), serving meals in the staff dining room, washing the crockery and cleaning the premises used.

- 9 The premises themselves, as well as water, energy and the necessary small and large equipment were provided for Sanrest by the management authority. Sanrest bore the cost of wear and tear of that equipment.
- 10 In addition, Sanrest took over the running of the cafeteria, which was also located in the hospital.
- 11 Further, until the summer of 1998, Sanrest supplied outside customers, inter alia, the Kindergarten St. Josef, a day nursery located near the hospital, with meals prepared in the hospital kitchen.
- 12 In the middle of 1998, disagreements arose between the management authority and Sanrest leading Sanrest to refuse to provide the contracted services for two months. During that time, Sodexho provided the catering services in the hospital from its other business premises.
- 13 By letter of 26 April 1999, the management authority terminated its contract with Sanrest, giving the six months' notice required under the contract.
- 14 By letter of 25 October 1999, the management authority informed Sanrest, which had submitted a bid in response to a new call for tenders, that the contract would not be awarded to it and the contract was awarded to Sodexho from 16 November 1999.

- 15 Sanrest then contended that this constituted a transfer of the undertaking. However, as Sodexho had refused to take over Sanrest's materials, stock and employees, the latter reduced stocks so that there was nothing left after 15 November 1999. According to the order for reference, Sodexho received no accounting data, menu plans, diet plans, recipe collections or general records from Sanrest.
- 16 Of the other activities of Sanrest, in addition to the catering service for the hospital, Sodexho took over some 6 to 10 menus for the Kindergarten St. Josef.
- 17 By letter of 5 November 1999 Sanrest terminated the employment contracts of its employees, with effect from 19 November 1999.
- 18 Mr Abler and Others then brought an action against Sodexho before the Arbeits- und Sozialgericht Wien seeking a declaration that their employment relationship continued with Sodexho on the basis of the provisions of the AVRAG on transfers of undertakings.
- 19 Sodexho contended that there had been no transfer of an undertaking as it had refused to take over even one of Sanrest's employees. It also stated that there was no contractual relationship between the two companies.
- 20 At first instance, the Arbeits- und Sozialgericht dismissed the action of Mr Abler and Others. It held that, although the absence of a contractual relationship between Sanrest and Sodexho was not of prime importance and the only decisive factor was the change, in contractual terms, in the person responsible for the business, there was, in this case, no transfer of a stable economic entity in the

sense of an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective, which is the defining characteristic of a transfer within the meaning of the AVRAG. It held that the fact that the services supplied by Sanrest and Sodexho were similar was not sufficient.

- 21 The Arbeits- und Sozialgericht held that Sodexho only took over Sanrest's catering activity for the hospital in the premises provided for it. It held that the requirements of a transfer of an undertaking were not met as no transfer of management staff, work organisation, recipe collections, diet directions, or even of customers, had taken place.
- 22 On appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria) took the opposite view. It held that it was not the type of transfer of undertaking which was decisive but the fact that the person responsible for the fate of the undertaking changed.
- 23 The Oberlandesgericht held, in the light of the case-law of the Court of Justice, that a transfer of an undertaking had taken place since in essence an economic entity which retained its identity and was characterised by the exercise of the activity and by the existing assets and business premises provided had been transferred. The transfer of the workforce was a consequence of, and not a prerequisite for, the transfer of a business.
- 24 Sodexho then brought an appeal on a point of law before the Oberster Gerichtshof submitting that it did not take over from Sanrest any tangible or intangible assets such as stock, menu plans, diet plans, recipe collections, accounting data or general records, or even any part of the latter's workforce.

- 25 According to Sodexho, the taking over by a new contractor of premises and equipment only does not amount to the taking over of a work organisation unit for the purposes of a transfer of a business.
- 26 It is against that background that the Oberster Gerichtshof decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is there a transfer of part of a business within the meaning of Article 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 where a hospital authority, which has previously employed a catering undertaking to supply meals and beverages to patients and hospital staff at a price based on a day of catering per person, and to that end has made available to that undertaking water and energy as well as its service premises (hospital kitchen) together with the necessary equipment, transfers, after giving notice of termination of that contract, those operations and the assets previously made available to that first catering undertaking to a second catering undertaking which does not take over the assets (staff, stock, accounting material and menu, diet, recipe or general records) brought in by the first catering undertaking itself?'

The question referred

- 27 By its question, the referring court is essentially asking whether Article 1 of Directive 77/187 must be interpreted as applying to a situation in which a contracting authority which had awarded the contract for the management of the

catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor, on the one hand, uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority and, on the other hand, refuses to take on the employees of the first contractor.

- ²⁸ Article 1(1) of Directive 77/187 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.
- ²⁹ The aim of Directive 77/187 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, therefore, 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 Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 10).
- ³⁰ For Directive 77/187 to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (see inter alia Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term 'entity' thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (see inter alia *Süzen*, cited above, paragraph 13).

- 31 Sodexho contends, first of all, that the failure to take on any of the staff of Sanrest in itself precludes any transfer of an economic entity which maintains its identity within the meaning of Directive 77/187.
- 32 It bases its argument on the judgments in which the Court of Justice has held that in certain sectors in which activities are based essentially on manpower a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity. According to that case-law, such an entity is thus 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 (see *inter alia Süzen*, paragraph 21, and Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 32).
- 33 In order to determine whether the conditions for the transfer of an organised economic entity are met, it is necessary to consider all the facts characterising 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 (see *Spijkers*, cited above, paragraph 13, and *Süzen*, paragraph 14).
- 34 However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see *inter alia Spijkers*, paragraph 13, and *Süzen*, paragraph 14).

- 35 The national court, in assessing the facts characterising the transaction in question, must take into account 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 Directive 77/187 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 (*Süzen*, paragraph 18, and *Hidalgo*, cited above, paragraph 31).
- 36 Catering cannot be regarded as an activity based essentially on manpower since it requires a significant amount of equipment. In the main proceedings, as the Commission points out, the tangible assets needed for the activity in question — namely, the premises, water and energy and small and large equipment (*inter alia* the appliances needed for preparing the meals and the dishwashers) — were taken over by Sodexho. Moreover, a defining feature of the situation at issue in the main proceedings is the express and fundamental obligation to prepare the meals in the hospital kitchen and thus to take over those tangible assets. The transfer of the premises and the equipment provided by the hospital, which is indispensable for the preparation and distribution of meals to the hospital patients and staff is sufficient, in the circumstances, to make this a transfer of an economic entity. It is moreover clear that, given their captive status, the new contractor necessarily took on most of the customers of its predecessor.
- 37 It follows that the failure of the new contractor to take over, in terms of numbers and skills, an essential part of the staff which its predecessor employed to perform the same activity is not sufficient to preclude the existence of a transfer of an entity which retains its identity within the meaning of Directive 77/187 in a sector such as catering, where the activity is based essentially on equipment. As the United Kingdom and the Commission rightly point out, any other conclusion would run counter to the principal objective of Directive 77/187, which is to ensure the continuity, even against the wishes of the transferee, of the employment contracts of the employees of the transferor.

- 38 Sodexho submits, then, that it has no contractual relationship with Sanrest.
- 39 However, as has been held on several occasions, Directive 77/187 is applicable whenever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the business and entering into the obligations of an employer towards employees of the undertaking. Thus there is no need, in order for Directive 77/187 to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may take place through the intermediary of a third party such as the owner or the person putting up the capital (see, *inter alia*, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraphs 28 to 30, *Süzen*, paragraph 12, and Case C-51/00 *Temco* [2002] ECR I-969, paragraph 31).
- 40 Finally, Sodexho contends that the fact that the management authority remains the owner of the premises and equipment necessary for the performance of the activity precludes a mere change in the contractor from being regarded as a transfer of an economic entity.
- 41 However, it is clear from the wording of Article 1 of Directive 77/187 that it is applicable whenever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer *vis-à-vis* the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred (Case 287/86 *Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro* [1987] ECR 5465, paragraph 12, and Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 15).

- 42 The fact that the tangible assets taken over by the new contractor did not belong to its predecessor but were provided by the contracting authority cannot therefore preclude the existence of a transfer within the meaning of Directive 77/187.
- 43 The answer to the question of the referring court must therefore be that Article 1 of Directive 77/187 must be interpreted as applying to a situation in which a contracting authority which had awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, even where the second contractor has expressed the intention not to take on the employees of the first contractor.

Costs

- 44 The costs incurred by the United Kingdom Government and by the Commission, 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 (Sixth Chamber),

in answer to the question referred to it by the Oberster Gerichtshof by order of 25 June 2001, hereby rules:

Article 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 must be interpreted as applying to a situation in which a contracting authority which had awarded the contract for the management of the catering services in a hospital to one contractor terminates that contract and concludes a contract for the supply of the same services with a second contractor, where the second contractor uses substantial parts of the tangible assets previously used by the first contractor and subsequently made available to it by the contracting authority, even where the second contractor has expressed the intention not to take on the employees of the first contractor.

Gulmann

Cunha Rodrigues

Puissochet

Macken

Colneric

Delivered in open court in Luxembourg on 20 November 2003.

R. Grass

Registrar

I - 14060

V. Skouris

President