

JUDGMENT OF THE COURT (Fifth Chamber)
5 May 1988 *

In Joined Cases 144 and 145/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Harry Berg

and

Ivo Martin Besselsen (Case 144/87)

and

Johannes Theodorus Maria Busschers

and

Ivo Martin Besselsen (Case 145/87)

on the interpretation of Articles 1 (1) and 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 (Official Journal 1977, L 61, p. 26),

THE COURT (Fifth Chamber)

composed of: G. Bosco, President of Chamber, U. Everling, Y. Galmot, R. Joliet and F. Schockweiler, Judges,

Advocate General: G. F. Mancini

Registrar: D. Louterman, Administrator

* Language of the Case: Dutch.

after considering the observations submitted on behalf of:

Harry Berg and Johannes Theodorus Maria Busschers by A. H. P. M. van Tielraden, advocaat,

Ivo Martin Besselsen by E. Grabandt, advocaat,

the Netherlands Government, by E. F. Jacobs,

the United Kingdom Government by H. R. L. Purse,

the Portuguese Government by Luís Inêz Fernandes and Lénia Maria de Deabra Real,

the Commission of the European Communities by H. Lima and F. Herbert, avocat,

having regard to the Report for the Hearing and further to the hearing on 9 February 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on the same day,

gives the following

Judgment

- 1 By judgments of 1 May 1987, which were received at the Court on 11 May 1987, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions, which were identical in the two joined cases, on the interpretation of Articles 1 (1) and 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 (Official Journal 1977, L 61, p. 26).

- 2 These questions were raised in the course of two sets of proceedings instituted, on the one hand, by Harry Berg (Case 144/87) and, on the other, by Johannes Theodorus Maria Busschers (Case 145/87), against their former employer, Ivo Martin Besselsen, who operated a bar-discothèque known as 'Besi Mill'.
- 3 On 15 February 1983 a commercial partnership owned by a Mr Manshanden and a Mr Tweehuijzen took over the operation of the establishment under a lease-purchase agreement within the meaning of Article 1576 of the Netherlands Civil Code. According to this provision 'lease-purchase is a purchase and sale on deferred payment, by which the parties agree that the object sold shall not become the property of the purchaser by mere transfer'. Mr Berg and Mr Busschers continued to work in the establishment following the transfer. By decision of 25 November 1983, on an application by Mr Besselsen, the Kantonrechter, Harderwijk, made a ruling terminating the lease-purchase agreement on the ground of the purchasers' non-performance and ordered that the establishment be restored to Mr Besselsen.
- 4 By their actions, which came before the Hoge Raad der Nederlanden on appeal, Mr Berg and Mr Busschers seek in substance an order requiring Mr Besselsen to pay them their arrears of salary for the period in which the establishment was managed by Mr Manshanden and Mr Tweehuijzen. In support of these claims, they argue *inter alia* that the transfer of an undertaking cannot have the effect of extinguishing the transferor's liability regarding the obligations deriving from a contract of employment, without the consent of the employees concerned.
- 5 The Hoge Raad der Nederlanden stayed the proceedings and requested the Court for a preliminary ruling on the following questions:
 - '1. (a) Must Article 3 (1) of the abovementioned directive be interpreted as meaning that, in so far as it is not otherwise provided in the directive or by the Member States, after the date of transfer the transferor is no longer liable for the obligations arising from the employment contract?
 - (b) If the answer to that question is in the affirmative: Must that provision therefore be interpreted as meaning that the consent of the employee is required for that legal consequence (that is to say, that the transferor is no longer liable) to take effect?

- (c) If not, must that provision be understood as meaning that that legal consequence does not occur where the employee lodges an objection, with the result that he remains in the employ of the transferor?
2. (a) Can a lease-purchase agreement as described above... result in the transfer of an undertaking for the purposes of Article 1 (1) of the directive?
- (b) Can the termination of a lease-purchase agreement as described above, result in a transfer as referred to above, with the legal consequence that the obligations of the purchaser by lease-purchase arising from the contract of employment existing at the time of the termination are transferred by that transfer to the vendor by way of lease-purchase.'
- 6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case in the main proceedings, the provisions of Community law in question, the course of the proceedings and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 7 The first question seeks in substance to ascertain whether Article 3 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that, after the date of the transfer, the transferor is released from his obligations under the contract of employment or the employment relationship solely by reason of the transfer, even where the employees of the undertaking do not consent to that effect or oppose it.
- 8 According to Mr Berg and Mr Busschers, that question must be answered in the negative because the transferor can be discharged of his liability *vis-à-vis* his employees only with their consent. In their view, this follows, first, from the aim of Directive 77/187/EEC which seeks to ensure that the transfer of undertakings is not effected at the expense of their employees, and, secondly, from the principle of the law of obligations according to which no one may assume the debt of a third party without the creditor's consent.

- 9 On the other hand, Mr Besselen, the Netherlands and Portuguese Governments, the United Kingdom and the Commission stress that the transfer of an undertaking entails the automatic transfer of the rights and obligations deriving from the contract of employment. Consequently, the effect which the transfer has of releasing the transferor from liability cannot depend on the will of the employees concerned and the fact that they object to the transfer does not mean that they remain in the transferor's employ.
- 10 It should be observed that according to the first subparagraph of Article 3 (1) of Directive 77/187/EEC 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer . . . shall, by reason of such transfer, be transferred to the transferee.' The second subparagraph of this provision states however that: 'Member States may provide that, after the date of the transfer . . . and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship'.
- 11 An analysis of Article 3 (1) and, more particularly, the relationship between the first and second subparagraphs of this paragraph show that the transfer of an undertaking entails the automatic transfer from the transferor to the transferee of the employer's obligations arising from a contract of employment or an employment relationship, subject however to the right of Member States to provide for joint liability of the transferor and transferee following the transfer. It follows that, unless the Member States avail themselves of this possibility, the transferor is released from his obligations as an employer solely by reason of the transfer and that this legal consequence is not conditional on the consent of the employees concerned.
- 12 Mr Berg and Mr Busschers are mistaken in arguing that this interpretation is not consistent with the aim pursued by Directive 77/187/EEC. As the Court has consistently held, most recently in its judgment of 10 February 1988 in Case 324/86 (*Daddy's Dance Hall* [1981] ECR 739), this 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 transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ.
- 13 Similarly, the argument based on a principle of the law of obligations which, it is claimed, is generally recognized in the legal systems of the Member States, namely

that a debt may be transferred only with the creditor's consent, cannot be accepted. Without there being any need to assess the effect of that principle, it is sufficient to observe that the rules applicable in the event of a transfer of an undertaking or a business to another employer are intended to safeguard, in the interests of the employees, the existing employment relationships which are part of the economic entity transferred. That is why the directive provides for the automatic transfer of obligations arising from employment contracts to the transferee, thereby overriding the principle relied on by the plaintiff in the main proceedings. Moreover, by giving the Member States the power to provide for joint liability of the transferor and the transferee following the transfer, the second subparagraph of Article 3 (1) of Directive 77/187 enables them to reconcile the rule of automatic transfer with the principles of their domestic legal systems.

- 14 Accordingly, the reply to the first question must be that Article 3 (1) of Directive 77/187 of 14 February 1977 must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking did not consent or if they object, subject however to the power of the Member States to provide for joint liability of the transferor and the transferee after the date of transfer.

The second question

- 15 The second question seeks in substance to ascertain whether Article 1 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies, on the one hand, to the transfer of an undertaking under a lease-purchase agreement such as that provided for in Netherlands law and, on the other, to the retransfer of that undertaking following the termination of the lease-purchase agreement by judicial decision.
- 16 It is common ground between all the parties in these proceedings who have submitted observations on this point that the directive applies to the transfer of an undertaking under a lease-purchase agreement. However, they differ with regard to the applicability of the directive to the retransfer of the undertaking following the termination of a lease-purchase agreement by judicial decision. Mr Berg and Mr Busschers, the Netherlands Government, and the United Kingdom, and also the Commission, in its observations at the hearing, consider that the termination,

even by judicial decision, of a contract is so bound to the very existence of the contract that the transfer of an undertaking resulting therefrom must be regarded as equivalent to a transfer resulting from a contract. On the other hand, Mr Besselsen argues that the directive does not cover a transfer resulting from a judicial decision, since such a decision does not constitute an agreement.

- 17 As the Court has already held, in its judgment of 17 December 1987 in Case 287/86 (*Ny Mølle Kro* [1987] ECR 5465), Directive 77/187 is applicable where, following a legal transfer or merger, 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 undertaking is transferred.
- 18 It follows that, in so far as the purchaser of an undertaking becomes, by virtue of a lease-purchase agreement, the employer in the sense set out above, the transfer must be regarded as a transfer of an undertaking as a result of a legal transfer within the meaning of Article 1 (1) of the directive, notwithstanding the fact that such a purchaser acquires the ownership of the undertaking only when the totality of the purchase price has been paid.
- 19 Similar considerations apply where the undertaking transferred in this way is restored to the former employer, following the termination of the lease-purchase agreement, regardless of whether the termination results from an agreement between the contracting parties or a unilateral declaration by one of them or indeed a judicial decision. In all these cases, the transfer of the undertaking occurs on the basis of a contract. Consequently, in so far as the retransfer of the undertaking deprives the purchaser of the status of employer, a status which reverts to the vendor, it must be regarded as a transfer of an undertaking to another employer as a result of a legal transfer within the meaning of Article 1 (1) of the directive.
- 20 For those reasons the reply to the second question must be that Article 1 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies both to the transfer of an undertaking pursuant to a lease-purchase agreement of the kind available under Netherlands law and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision.

Costs

- 21 The costs incurred by the Netherlands and Portuguese Governments and by the United Kingdom and those incurred by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds

THE COURT (Fifth Chamber),

in answer to the questions referred to by the judgments of the Hoge Raad der Nederlanden of 1 May 1987, hereby rules:

- (1) Article 3 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking do not consent or if they object, subject however to the power of the Member States to provide for joint liability of the transferor and the transferee after the date of transfer.
- (2) Article 1 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies both to the transfer of an undertaking pursuant to a lease-purchase agreement of the kind available under Netherlands law and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision.

Bosco

Everling

Galmot

Joliet

Schockweiler

Delivered in open court in Luxembourg on 5 May 1988.

J.-G. Giraud

G. Bosco

Registrar

President of the Fifth Chamber