

SCHMIDT

JUDGMENT OF THE COURT (Fifth Chamber)

14 April 1994 <sup>\*</sup>

In Case C-392/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landesarbeitsgericht Schleswig-Holstein (Germany) for a preliminary ruling in the proceedings pending before that court between

Christel Schmidt

and

Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen

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 (Official Journal 1977 L 61, p. 26),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse (Rapporteur) and M. Zuleeg, Judges,

<sup>\*</sup> Language of the case: German.

Advocate General: W. Van Gerven,  
Registrar: D. Loutherman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Spar-und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen, the defendant and respondent in the main proceedings, by Wolfgang Jordan, Rechtsanwalt, Bordesholm,
- the Government of the Federal Republic of Germany, by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, acting as Agent,
- the United Kingdom, by Sue Cochrane, of the Treasury Solicitor's Department, and Derrick Wyatt, Barrister, acting as Agents,
- the Commission of the European Communities, by Karen Banks and Jürgen Grunwald, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, and Derrick Wyatt, acting as Agents, and the Commission, at the hearing on 20 January 1994,

after hearing the Opinion of the Advocate General delivered at the sitting on 23 February 1994,

gives the following

### Judgment

1 By order of 27 October 1992, received at the Court on 9 November 1992, the Landesarbeitsgericht (Higher Labour Court) Schleswig-Holstein referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty 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 ('the directive').

2 Those questions were raised in a dispute between Christel Schmidt and the Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen (Savings and Lending Bank of the former Bordesholm, Kiel and Cronshagen Districts) ('the Savings Bank').

3 It appears from the order of reference that the plaintiff and appellant in the main proceedings, who was employed by the Savings Bank to clean the premises of its branch office in Wacken, was dismissed in February 1992 on account of the refurbishment of that branch office, in which the Savings Bank wished to entrust the cleaning to Spiegelblank, the firm which was already responsible for the cleaning of most of the Savings Bank's other premises.

4 Spiegelblank offered to employ Mrs Schmidt for a monthly wage which was higher than that which she had previously been receiving. Mrs Schmidt, however, was not

prepared to work on those terms, as she calculated that her hourly wage would in fact be lower as a result of the increase in the surface area to be cleaned.

- 5 Mrs Schmidt brought an action challenging her dismissal, in which she was unsuccessful at first instance. She thereupon appealed to the Landesarbeitsgericht Schleswig-Holstein.
  
- 6 Taking the view that the outcome of the dispute depended on the interpretation of Directive 77/187, the national court accordingly referred the following questions to the Court of Justice for a preliminary ruling:
  - ‘1. May an undertaking’s cleaning operations, if they are transferred by contract to a different firm, be treated as part of a business within the meaning of Directive 77/187/EEC?
  
  2. If the answer to Question 1 is in principle in the affirmative, does that also apply if prior to the transfer the cleaning operations were undertaken by a single employee?’
  
- 7 Those two questions may be dealt with together for the purposes of a reply.
  
- 8 Article 1(1) provides that ‘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.’
  
- 9 In its two questions, the national court seeks to ascertain whether the cleaning operations of a branch of an undertaking can be treated as part of a business within the meaning of the directive and whether it is possible to do so where the work was performed by a single employee before being transferred by contract to an outside firm.

10 The Savings Bank, the Federal Republic of Germany and the United Kingdom argue that those questions should be answered in the negative. In essence, the Savings Bank contends that the performance of cleaning operations is neither the main function nor an ancillary function of the undertaking, while the Government of the Federal Republic of Germany and the United Kingdom submit that the decision by the Savings Bank to entrust those operations to a different firm did not involve either the transfer of an economic unit or the transfer of premises or tangible assets.

11 The Commission takes the view, in particular, that if the cleaning is carried out by the staff of the undertaking, it is a service which the latter performs itself and the fact that such work is merely an ancillary activity not necessarily connected with the objects of the undertaking cannot have the effect of excluding the transfer from the scope of the directive.

12 According to the case-law of the Court (judgment in Case C-209/91 *Watson Rask and Christensen v ISS Kantineservice* [1992] ECR I-5755, at paragraph 15), the directive 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.

13 The protection provided by the directive applies in particular, by virtue of Article 1(1), where the transfer relates only to a business or part of a business, that is to say, a part of an undertaking. In those circumstances the transfer relates to employees assigned to that part of the undertaking since, as the Court held in its judgment in Case 186/83 *Botzen and Others v Rotterdamsche Droogdok Maatschappij* [1985] ECR 519, at paragraph 15, an employment relationship is essentially characterized by the link between the employee and the part of the undertaking or business to which he is assigned to carry out his duties.

14 Thus, when an undertaking entrusts by contract the responsibility for operating one of its services, such as cleaning, to another undertaking which thereby assumes the obligations of an employer towards employees assigned to those duties, that operation may come within the scope of the directive. As the Court held at paragraph 17 of its judgment in *Watson Rask and Christensen*, cited above, the fact that

in such a case the activity transferred is for the transferor merely an ancillary activity not necessarily connected with its objects cannot have the effect of excluding that operation from the scope of the directive.

15 Nor is the fact that the activity in question was performed, prior to the transfer, by a single employee sufficient to preclude the application of the directive since its application does not depend on the number of employees assigned to the part of the undertaking which is the subject of the transfer. It should be noted that one of the objectives of the directive, as clearly stated in the second recital in the preamble thereto, is to protect employees in the event of a change of employer, in particular to ensure that their rights are safeguarded. That protection extends to all staff and must therefore be guaranteed even where only one employee is affected by the transfer.

16 The arguments of the Government of the Federal Republic of Germany and of the United Kingdom based on the absence of any transfer of tangible assets cannot be accepted either. The fact that in its case-law the Court includes the transfer of such assets among the various factors to be taken into account by a national court to enable it, when assessing a complex transaction as a whole, to decide whether an undertaking has in fact been transferred does not support the conclusion that the absence of these factors precludes the existence of a transfer. The safeguarding of employees' rights, which constitutes the subject-matter of the directive, as is clear from its actual title, cannot depend exclusively on consideration of a factor which the Court has in any event already held not to be decisive on its own (judgment in Case 24/85 *Spijkers v Benedik* [1986] ECR 1119, at paragraph 12).

17 According to the case-law of the Court (see the judgment in *Spijkers*, cited above, at paragraph 11, and the judgment in Case C-29/91 *Dr Sophie Redmond Stichting v Bartol and Others* [1992] ECR I-3189, at paragraph 23), 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. According to that case-law, the retention of that identity is indicated *inter alia* by the actual continuation or resumption by the new employer of the same or similar activities. Thus, in this case, where all the relevant information is contained in the order for reference, the similarity in the cleaning work performed before and after the transfer, which is reflected, moreover, in the offer to re-engage the employee in question, is typical of an oper-

ation which comes within the scope of the directive and which gives the employee whose activity has been transferred the protection afforded to him by that directive.

18 It may, however, be noted that while Article 4(1) of the directive provides that the transfer of an undertaking or part of an undertaking cannot in itself constitute grounds for dismissal by the transferor or the transferee, that provision does not stand in the way of dismissals for economic, technical or organizational reasons entailing changes in the workforce.

19 Finally, it should also be borne in mind that the directive does not preclude an amendment to the employment relationship with the new employer, in so far as national law allows such an amendment otherwise than through a transfer of the undertaking (see, most recently, the judgment in *Watson Rask and Christensen*, cited above, at paragraph 31).

20 The answer to the questions submitted must therefore be that 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 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.

## Costs

21 The costs incurred by the German Government, the United Kingdom and 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 (Fifth Chamber),

in answer to the questions referred to it by the Landesarbeitsgericht Schleswig-Holstein, by order of 27 October 1992, 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 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.**

Moitinho de Almeida

Joliet

Rodríguez Iglesias

Grévisse

Zuleeg

Delivered in open court in Luxembourg on 14 April 1994.

R. Grass

J. C. Moitinho de Almeida

Registrar

President of the Fifth Chamber