

JUDGMENT OF THE COURT (Third Chamber)
15 June 1988 *

In Case 101/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Danish Højesteret (Supreme Court) for a preliminary ruling in the proceedings pending before that court between

P. Bork International A/S, in liquidation,

appellant,

supported by

Lønmodtagernes Garantifond (Wage Earners' Guarantee Fund),

intervener,

and

Foreningen af Arbejdsledere i Danmark (Danish Association of Supervisory Staff), acting on behalf of Birger E. Petersen, respondent,

and between

Jens E. Olsen,

appellant,

supported by

Lønmodtagernes Garantifond,

intervener,

and

Junckers Industrier A/S, respondent,

and between

* Language of the Case: Danish.

Karl Hansen and Others,

appellants,

supported by

Lønmodtagernes Garantifond,

intervener,

and

Junckers Industrier A/S, respondent,

and between

Handels -og Kontorfunktionærenes Forbund i Danmark (Danish Union of Commercial and Clerical Staff), acting on behalf of Anna Birthe Trabjerg and Mona Bring Mortensen,

appellant,

supported by

Lønmodtagernes Garantifond,

intervener,

and

Junckers Industrier A/S, respondent,

on the interpretation of certain provisions 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 L 61, p. 26),

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida, President of Chamber, U. Everling and Y. Galmot, Judges,

Advocate General: M. Darmon

Registrar: H. A. Rühl, Administrator

after considering the observations submitted on behalf of

Lønmodtagernes Garantifond by Ulf Andersen, of the Copenhagen Bar,

Junckers Industrier A/S by Troels Helmer Nielsen, of the Copenhagen Bar,

the Commission of the European Communities by its Legal Adviser, Dimitrios Gouloussis, and by Ida Langermann, a member of its Legal Department,

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

after hearing the Opinion of the Advocate General delivered at the sitting on 4 May 1988,

gives the following

Judgment

- 1 By an order of 4 December 1985, which was received at the Court on 3 April 1987, the Danish Højesteret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 1 (1) of Council Directive 77/187 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 L 61, p. 26).
- 2 The question arose in proceedings between the Foreningen af Arbejdsledere i Danmark and P. Bork International A/S (hereinafter referred to as 'PBI'), in liquidation, and between a number of employees and the Handels- og Kontorfunktionærernes Forbund i Danmark, acting on their behalf, on the one hand, and Junckers Industrier A/S (hereinafter referred to as 'JI'), on the other.

- 3 In April 1980 PBI leased a beechwood veneer factory from Orehoved Trae- og Finérindustri A/S (hereinafter referred to as 'OTF'), taking over the factory staff at the same time. In the autumn of 1981 PBI gave notice terminating the lease with effect from 22 December 1981 and dismissed during that month all the factory's employees, giving them the appropriate period of notice.

- 4 On 30 December 1981 JI purchased the factory in question from OTF and effectively took possession of it on 4 January 1982. The factory, which had ceased to operate since the lease was terminated on 22 December 1981, was brought back into operation on 4 January 1982 by the new owner, who took on more than half of the staff previously employed by PBI but did not engage any new staff.

- 5 The four actions relate in substance to the question whether or not PBI's obligations towards the factory's employees, particularly as regards wages and holiday pay, were transferred to JI in its capacity as the new employer.

- 6 In one of those cases, the Foreningen af Arbejdsledere i Danmark, acting on behalf of one of the employees dismissed by PBI and taken on again by JI, claims outstanding wages and holiday pay from PBI, which has in the meantime been wound up. That claim was upheld at first instance by the Sø- og Handelstrettens Skifteret (Bankruptcy Division of the Maritime and Commercial Court), Copenhagen, on the ground that the purchase of the factory by JI did not constitute a transfer of an undertaking covered by the Danish law adopted for the implementation of Directive 77/187 and that, consequently, the claims in question had to be met out of PBI's assets.

- 7 In the other three cases, however, employees dismissed by PBI and taken on again by JI are claiming their outstanding wages and holiday pay from JI. Their claims were dismissed at first instance by the Sø- og Handelsret (Maritime and Commercial Court), Copenhagen, on the ground that, in the absence of a transfer of an undertaking within the meaning of the Danish legislation, JI was not bound by the obligations entered into by PBI.

8 Hearing the cases on appeal, the Højesteret decided that an interpretation of Directive 77/187 was necessary in order to resolve the disputes; it therefore stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Does Council Directive 77/187/EEC of 14 February 1977 apply where the lessor of the buildings, plant and machinery used for the operation of an undertaking, after giving notice bringing the lease to an end or upon termination thereof and the undertaking's cessation of operations, retakes possession of the leased property and thereafter transfers it to a third party who shortly afterwards resumes the operation of the undertaking without engaging new staff, inasmuch as the transferee takes on again, without there being an agreement on the subject either with the former lessee or with the transferor or between those two parties, just over half of the employees who were employed in the undertaking by the former lessee?'

9 Reference is made to the Report for the Hearing for a more detailed account of the facts of the case, the relevant provisions of Community law as well as the course of the procedure and the observations submitted to the Court, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

10 The question submitted for a preliminary ruling seeks in substance to ascertain whether Article 1 (1) of Council Directive 77/187 of 14 February 1977 is to be interpreted as meaning that the directive applies where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party who shortly afterwards brings it back into operation, which had ceased upon termination of the lease, with just over half of the staff that was employed in the undertaking by the former lessee.

11 JI suggests that that question should be answered in the negative on the grounds that, first, the applicability of the directive presupposes the conclusion of a transfer agreement between the previous employer and the new employer and, secondly, it is impossible to speak of a going concern where the undertaking ceased to operate before the transfer.

- 12 However, the Lønmodtagernes Garantifond, the intervener in the main proceedings, and the Commission consider that transactions of the kind which took place for the takeover of the undertaking in question constitute a transfer falling within the scope of the directive, notwithstanding the fact that the operation was carried out in two stages. Furthermore, the Commission points out that, if the directive is applicable, Article 4 (1) thereof requires employees who have been dismissed contrary to that provision to be regarded as still in the employ of the undertaking. That is so particularly in the case of employees taken on again by the new employer after being dismissed shortly before the transfer. As a general rule, the very fact that they are taken on again by the transferee rules out the possibility that their dismissal may have taken place for economic, technical or organizational reasons entailing changes in the workforce.
- 13 In that regard, it must be borne in mind that, according to the established case-law of the Court, as most recently confirmed by the judgment of 5 May 1988 in Joined Cases 144 and 145/87 *Berg and Busschers* [1988] ECR 2559, the purpose of Directive 77/187 is to ensure that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor. The directive is therefore applicable wherever, 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 incurs the obligations of an employer towards employees of the undertaking.
- 14 It follows that where, upon the expiry of the lease, the lessee ceases to be the employer and a third party becomes the employer thereafter under a contract of sale concluded with the owner, the resulting operation may fall within the scope of the directive as defined in Article 1 (1) thereof. The fact that in such a case the transfer is effected in two stages, inasmuch as the undertaking is first re-transferred from the lessee to the owner and the latter then transfers it to the new owner, does not prevent the directive from applying, provided that the undertaking in question retains its identity, as it does if it is a going concern whose operation is actually continued or resumed by the new employer, with the same or similar activities.
- 15 In order to determine whether those conditions are met, it is necessary to consider all the circumstances surrounding the transaction in question, including, in

particular, whether or not the undertaking's tangible and intangible assets and the majority of its employees are taken over, the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities ceased in connection with the transfer.

- 16 As regards more specifically the last criterion, it must be pointed out, as the Court has already held in its judgment of 17 December 1987 in Case 287/86 *Ny Mølle Kro* [1987] ECR 5465, that the fact that the undertaking in question was temporarily closed at the time of the transfer and therefore had no employees certainly constitutes one factor to be taken into account in determining whether a business was transferred as a going concern. However, the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking within the meaning of Article 1 (1) of the directive. That is true, in particular, in circumstances such as those of this case, where the undertaking ceased to operate only for a short period which coincided, moreover, with the Christmas and New Year holidays.
- 17 It must also be borne in mind in that connection that, as the Court has consistently held (see the aforesaid judgment in *Ny Mølle Kro*), unless otherwise expressly provided, Directive 77/187 may be relied upon solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer. Whether or not such a contract or relationship exists at that time must be assessed on the basis of national law subject, however, to compliance with the mandatory provisions of the directive concerning protection of employees from dismissal as a result of the transfer.
- 18 Accordingly, the employees of the undertaking whose contract of employment or employment relationship was terminated with effect from a date prior to that of the transfer, contrary to Article 4 (1) of the directive, must be regarded as still in the employ of the undertaking on the date of the transfer, with the result, in particular, that the employer's obligations towards them are automatically transferred from the transferor to the transferee in accordance with Article 3 (1) of the directive. In order to determine whether the employees were dismissed solely as a result of the transfer, contrary to Article 4 (1), it is necessary to take into consideration the objective circumstances in which the dismissal took place and, in

particular, in a case such as this, the fact that it took effect on a date close to that of the transfer and that the employees in question were taken on again by the transferee.

- 19 It is for the national court to make the necessary appraisal of the facts, in the light of the interpretative criteria laid down by the Court, in order to establish whether or not the directive is applicable.
- 20 For those reasons, the answer to the question submitted must be that Article 1 (1) of Council Directive 77/187 of 14 February 1977 is to be interpreted as meaning that the directive applies where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party who shortly afterwards brings it back into operation, which had ceased upon termination of the lease, with just over half of the staff that was employed in the undertaking by the former lessee, provided that the undertaking in question retains its identity.

Costs

- 21 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings brought before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Danish Højesteret, by order of 4 December 1985, hereby rules:

Article 1 (1) of Council Directive 77/187/EEC of 14 February 1977 is to be interpreted as meaning that the directive applies where, after giving notice bringing the lease to an end or upon termination thereof, the owner of an undertaking retakes possession of it and thereafter sells it to a third party who shortly afterwards brings it back into operation, which had ceased upon termination of the lease, with just over half of the staff that was employed in the undertaking by the former lessee, provided that the undertaking in question retains its identity.

Moitinho de Almeida

Everling

Galmot

Delivered in open court in Luxembourg on 15 June 1988.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber