

JUDGMENT OF THE COURT (Third Chamber)
10 February 1988 *

In Case 324/86

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

Foreningen af Arbejdsledere i Danmark (Danish Association of Supervisory Staff),
acting on behalf of Mr Kim Erik Tellerup,

and

Daddy's Dance Hall A/S

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 (Third Chamber),

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

Advocate General: M. Darmon

Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

- (i) the United Kingdom by H. R. L. Purse, of the Treasury Solicitor's Department,

* Language of the Case: Danish.

(ii) the Commission of the European Communities by J. F. Bühl, Legal Adviser, and E. Traversa, a member of its Legal Department,

having regard to the Report for the Hearing and further to the hearing on 28 October 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 9 December 1987

gives the following

Judgment

- 1 By order of 18 December 1986 which was received at the Court Registry on 22 December, Højesteret (the Supreme Court of Denmark) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning 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 1977, L 61, p. 26).
- 2 These questions were raised in proceedings brought by Foreningen af Arbejdsledere i Danmark (Danish Association of Supervisory Staff), acting on behalf of Mr Kim Erik Tellerup, against Daddy's Dance Hall A/S.
- 3 Mr Tellerup was employed as a restaurant manager by Irma Catering A/S, which had taken a non-transferable lease of restaurants and bars belonging to A/S Palads Teatret. The lease was subsequently terminated, and on 28 January 1983 Irma Catering dismissed its staff, including Mr Tellerup, with the statutory notice, which in the case of Mr Tellerup expired on 30 April 1983. Irma Catering continued to run the businesses in question with the same staff until 25 February 1983.

- 4 With effect from that date a new lease was concluded between A/S Palads Teatret and Daddy's Dance Hall A/S. Daddy's Dance Hall immediately re-employed the employees of the former lessee, including Mr Tellerup, to do the same jobs as before. The new management contract concluded with Mr Tellerup stipulated, however, that his remuneration, which had previously been in the form of commission, would henceforth take the form of a fixed salary. Furthermore, at Mr Tellerup's request the parties agreed on a trial period of three months during which either side could give 14 days' notice. On that basis Mr Tellerup was dismissed on 26 April 1983 with 14 days' notice. The main proceedings concern in essence the period of notice to which the plaintiff was entitled.

- 5 Højesteret considered that its decision in the case depended on the interpretation of the provisions of the abovementioned Directive 77/187/EEC. It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:
 - '(1) Must 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 be interpreted as meaning that the directive applies where a non-transferable lease of a business is terminated and as a result, without there being any interruption in the running of the business, the owner leases the business to a new lessee, who re-employs the staff, who had been given notice but had not left their employment, and buys the former lessee's stock?'

If Question 1 is answered in the affirmative:

- '(2) Can an employee who enters into an agreement with the purchaser of a business waive rights under the directive where by so doing he obtains certain advantages so that his conditions of employment, taken as a whole, are not altered in such a way as to leave him in a worse position?'

- 6 Reference is made to the Report for the Hearing for a more complete account of the facts, the provisions of Community law in question, the course of the procedure 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 In the first question the national court seeks in substance to determine whether Article 1 (1) of Council Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff, who had been given notice on the expiry of the initial lease.
- 8 The United Kingdom and the Commission are agreed that that question should be answered in the affirmative. In their view, once it is accepted that the directive is applicable to the transfer of an undertaking from one lessee to another when the obligations with respect to employees are incurred by the lessee, it must also be accepted that it is applicable in the event that this operation is carried out in two stages, where the undertaking is first transferred from the original lessee to the owner and the latter then transfers it to the new lessee. In such a case the employees are in the same situation as that resulting from a direct transfer and they are therefore entitled to equivalent protection.
- 9 As the Court has already held, most recently in the judgment of 17 December 1987 (Case 287/86 *Ny Mølle Kro* [1987] ECR 5465), that the purpose of Directive 77/187/EEC is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor. The directive is therefore applicable where, following a legal transfer or merger, there is a change in the natural or legal 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* employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.

- 10 It follows that where, upon the expiry of the lease, the lessee ceases to be the employer and a third party becomes the employer under a new lease concluded with the owner the resulting operation can fall within the scope of the directive as defined in Article 1 (1). The fact that in such a case the transfer is effected in two stages, in that the undertaking is first retransferred from the original lessee to the owner and the latter then transfers it to the new lessee, does not prevent the directive from applying, provided that the economic unit in question retains its identity; that is so in particular when, as in this case, the business is carried on without interruption by the new lessee with the same staff as were employed in the business before the transfer.
- 11 For those reasons the answer to the first question must be that Article 1 (1) of Council Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff, who had been given notice on the expiry of the initial lease.

The second question

- 12 In its second question the national court seeks in substance to determine whether an employee may waive rights conferred on him by Directive 77/187/EEC if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position.
- 13 Both the United Kingdom and the Commission argue that this question should be answered in the negative; that is to say, an employee may not, in relation to his new employer, waive rights conferred on him by the mandatory provisions of the directive. The United Kingdom states, however, that the employee should be able to do so if that possibility existed with regard to the transferor. The transferee, it says, stands in the shoes of the transferor: an employer may therefore agree on an amendment to his contract of employment with the transferee within the limits which would have been applicable *vis-à-vis* the transferor. This argument must be upheld.

14. As was stressed above, the purpose of Directive 77/187/EEC is to ensure that the rights resulting from a contract of employment or employment relationship of employees affected by the transfer of an undertaking are safeguarded. Since this protection is a matter of public policy, and therefore independent of the will of the parties to the contract of employment, the rules of the directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees.
15. It follows that employees are not entitled to waive the rights conferred on them by the directive and that those rights cannot be restricted even with their consent. This interpretation is not affected by the fact that, as in this case, the employee obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before.
16. However, as the Court held in its judgment of 11 July 1985 in Case 105/84 *Foreningen af Arbejdsledere i Danmark v. Danmols Inventar* [1985] ECR 2639, Directive 77/187/EEC is intended to achieve only partial harmonization, essentially by extending the protection guaranteed to workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. It is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria. Thus the directive can be relied on only to ensure that the employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned.
17. Consequently, in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer. Since by virtue of Article 3 (1) of the directive the transferee is subrogated to the transferor's rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the

transfer of the undertaking itself may never constitute the reason for that amendment.

- 18 For the above reasons the answer to the second question must be that an employee cannot waive the rights conferred on him by the mandatory provisions of Directive 77/187/EEC even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as such an alteration is permitted by the applicable national law in situations other than the transfer of an undertaking.

Costs

- 19 The costs incurred by the United Kingdom and 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 action pending 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 questions referred to it by Højesteret by order of 18 December 1986, hereby rules:

- (1) Article 1 (1) of Council Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff, who had been given notice on the expiry of the initial lease;

- (2) An employee cannot waive the rights conferred upon him by the mandatory provisions of Directive 77/187/EEC even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as an alteration is permitted by the applicable national law in cases other than the transfer of an undertaking.

Moitinho de Almeida

Everling

Galmot

Delivered in open court in Luxembourg on 10 February 1988.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Third Chamber