

Case C-242/09

Albron Catering BV

v

FNV Bondgenoten and John Roest

(Reference for a preliminary ruling
from the Gerechtshof te Amsterdam)

(Social policy — Transfers of undertakings — Directive 2001/23/EC — Safeguarding of employees' rights — Group of companies in which staff are employed by an 'employer' company and assigned on a permanent basis to an 'operating' company — Transfer of an operating company)

Opinion of Advocate General Bot delivered on 3 June 2010 I - 10312

Judgment of the Court (Third Chamber), 21 October 2010 I - 10324

Summary of the Judgment

1. *Social policy — Approximation of laws — Transfers of undertakings — Safeguarding of employees' rights — Directive 2001/23 — Transferor — Meaning*
(Council Directive 2001/23, Art. 2(1)(a))
2. *Preliminary rulings — Interpretation — Temporal effects of judgments by way of interpretation — Retroactive effect — Limits — Legal certainty — Discretion of the Court*
(Art. 267 TFEU)

1. In the event of a transfer, within the meaning of Directive 2001/23 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 undertakings or businesses, of an undertaking belonging to a group to an undertaking outside that group, it is also possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment.

the legal or natural person who is responsible for the economic activity of the entity transferred and who, in that capacity, establishes working relations as employer with the staff of that entity, in some cases despite the absence of contractual relations with those employees, the position of a contractual employer, who is not responsible for the economic activity of the economic entity transferred, cannot systematically take precedence, for the purposes of determining the identity of the transferor, over the position of a non-contractual employer who is responsible for that activity.

(see paras 24-25, 28-29, 32, operative part)

The requirement under Article 3(1) of Directive 2001/23 that there be either an employment contract, or, in the alternative and thus as an equivalent, an employment relationship at the date of the transfer suggests that, in the mind of the Union legislature, a contractual link with the transferor is not required in all circumstances for employees to be eligible for the protection conferred by Directive 2001/23. On the other hand, it is not apparent from Directive 2001/23 that the relationship between the employment contract and the employment relationship is one of subsidiarity and that, therefore, where there is a plurality of employers, the contractual employer must systematically be given greater weight. Since the transfer of an undertaking, within the meaning of Directive 2001/23, presupposes, in particular, a change in

2. In exercising its jurisdiction under Article 267 TFEU, it is only exceptionally that the Court of Justice may, in application of the general principle of legal certainty inherent in the legal order of the Union, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely, that those concerned should have acted in good faith and that there should be a risk of serious difficulties. In that regard, when no concrete evidence has been submitted to the Court

of Justice of a risk of serious difficulties in connection with massive litigation which might be brought, following a judgment of the Court of Justice on the interpretation of Directive 2001/23, against undertakings which have carried out a transfer falling within that directive, there is no cause to limit the temporal effects of such a judgment. Moreover, the fact that

the undertaking making such a transfer has already made a severance payment to employees who have entered into the service of the transferee undertaking is in any event irrelevant.

(see paras 36, 38, 40)