Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

6 April 2017*

(Reference for a preliminary ruling — Social policy — Directive 2001/23/EC — Article 3 — Safeguarding of employees' rights in the event of transfers of undertakings — Collective agreements applicable to the transferee and the transferor — Additional periods of notice granted to dismissed workers — Account to be taken of the length of service with the transferor)

In Case C-336/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbetsdomstolen (Labour Court, Sweden), made by decision of 1 July 2015, received at the Court on 6 July 2015, in the proceedings

Unionen

v

Almega Tjänsteförbunden,

ISS Facility Services AB,

THE COURT (Tenth Chamber),

composed of A. Borg Barthet, acting as President of the Tenth Chamber, E. Levits (Rapporteur) and F. Biltgen, Judges,

Advocate General: E. Tanchev,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2016,

after considering the observations submitted on behalf of:

— Unionen, by U. Dalén, S. Forssman, M. Wulkan and D. Hellman,

— Almega Tjänsteförbunden and ISS Facility Services AB, by J. Stenmo and J. Hettne,

— the French Government, by G. de Bergues, D. Colas and R. Coesme, acting as Agents,

— the European Commission, by M. Kellerbauer and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 February 2017,

* Language of the case: Swedish.

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Council Directive 2001/23/EC of 12 March 2001 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 (OJ 2001 L 82, p. 16).

2 The request has been made in proceedings between, on the one hand, Unionen, a trade union, and, on the other hand, Almega Tjänsteförbunden, an employers' association ('Almega'), and ISS Facility Services AB, a company incorporated under Swedish law ('ISS'), concerning the failure to take into account, following a transfer of undertakings, the length of service acquired by four employees with transferors.

Legal context

EU law

3 Article 1(1)(a) of Directive 2001/23 provides:

'This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.'

4 Article 3 of that directive provides:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

…

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

…'

Swedish law

5 Under Paragraph 6b of the lagen (1982:80) om anställningsskydd (Law (1982:80) on employment protection), when an undertaking, a business or part of a business is transferred from one employer to another, the rights and obligations arising from the contracts of employment and the conditions of employment which apply at the time of the transfer are transferred to the new employer.

6 Paragraph 28 of the lagen (1976:580) om medbestämmande i arbetslivet (Law (1976:580) on the participation of employees in negotiated decisions) transposes Article 3(3) of Directive 2001/23 into Swedish law in the following way:

'When an undertaking, a business or part of a business is transferred from one employer who is bound by a collective agreement to another employer by virtue of a transfer, as provided for by Paragraph 6b of Law [1982:80], the new employer shall be bound by the relevant parts of that agreement unless the new employer is already bound by a separate collective agreement applicable to transferred employees.

…

When the contracts of employment and the working conditions of the employees are transferred to a new employer in accordance with Paragraph 6b of Law [1982:80], that new employer shall be bound to apply, for a period of one year from the date of the transfer, the terms and conditions as laid down in the collective agreement by which the previous employer was bound. Those terms and conditions must be applied in the same way as they had been applied by the previous employer. Those provisions shall no longer be applicable once the collective agreement has expired or a new collective agreement has begun to apply to the transferred employees.'

The dispute in the main proceedings and the question referred for a preliminary ruling

7 The employees BSA, JAH, JH and BL are members of Unionen. BSA was employed by Apoteket AB, and JAH, JH and BL were employed by AstraZeneca AB, before ISS became their employer following a transfer of undertakings.

8 On 27 July 2011, ISS dismissed BSA on economic grounds, on the expiry of a six-month period of notice. At the time of her dismissal, BSA was over 55 years of age. Her length of service with Apoteket and ISS exceeded 10 years.

9 On 31 October 2011, ISS dismissed the other three employees, JAH, JH and BL, also on economic grounds and with six months' notice, later extended by an additional five months. Those employees were also 55 years of age or older at the time of their dismissal and each had a length of service of over 10 years through their employment with AstraZeneca AB and subsequently with ISS.

10 When the posts of the four employees were transferred to ISS, the transferors, in the present case Apoteket and AstraZeneca, were bound by collective agreements. Under those agreements, where an employee who is dismissed on economic grounds is, at the time of his or her dismissal, aged between 55 and 64 years inclusive and has a continuous period of service of 10 years, the period of notice in the event of dismissal is to be extended by six months.

11 ISS was also bound by a collective agreement, in the present case that entered into between the employers' association Almega and the trade union Unionen. Pursuant to that agreement, an employee who is dismissed on economic grounds is entitled to a period of notice identical to that provided for, under the same conditions, by the collective agreements binding on the transferors.

12 When they were dismissed, ISS did not grant the employees BSA, JAH, JH and BL a period of notice extended by six months. According to ISS, the employees in question did not have a continuous period of service of 10 years with the transferee and, for that reason, did not satisfy the conditions to which the grant of an extension of that notice was subject.

13 Unionen takes the view that that approach infringes the rights of its members. ISS, it submits, ought to have taken into account the length of service of BSA, JAH, JH and BL with the transferors.

14 The referring court, before which the trade union has brought its action claiming that ISS should be ordered to provide compensation for the loss suffered by the employees whom it had dismissed without extending their periods of notice, takes the view that the case in the main proceedings raises questions concerning the interpretation of EU law which leave room for doubt. In that regard, the referring court points out, in particular, that, in its view, the present case is distinguishable from those giving rise to the case-law of the Court relating to employees whose rights were affected immediately after the transfer of their post and not, more than one year after the transfer, following the expiry of a transitional protection period.

15 In those circumstances, the Arbetsdomstolen (Labour Court, Sweden) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it compatible with [Directive 2001/23], after a year has elapsed following the transfer of an undertaking, on application of a provision in the transferee's collective agreement which means that, where a certain continuous length of service with a single employer is a condition for an extended period of notice to be granted, not to take account of the length of service with the transferor, when the employees, under an identical provision in the collective agreement which applied to the transferor, had the right to have that length of service taken into account?'

Consideration of the question referred

16 By its question, the referring court asks, in essence, whether Article 3 of Directive 2001/23 must be interpreted as meaning that the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for the determination of the period of notice to which that employee is entitled, that employee's length of service with the transferor.

17 In this regard, it should be recalled, first of all, that Directive 2001/23, according to its second and third recitals, seeks to protect employees in the event of transfers of undertakings, particularly in order to ensure that their rights are safeguarded.

18 As the Court has consistently held, that directive is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor (see, for example, judgment of 27 November 2008, *Juuri*, C-396/07, EU:C:2008:656, paragraph 28 and the case-law cited). The purpose of that directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer (see judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 75 and the case-law cited).

19 With regard to Article 3 of Directive 2001/23, the Court has stated that the objective of that directive is also to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other. It follows from this, inter alia, that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, judgment of 11 September 2014, *Österreichischer Gewerkschaftsbund*, C-328/13, EU:C:2014:2197, paragraph 29 and the case-law cited).

20 More specifically, the Court has previously ruled on questions of the recognition of length of service in the case of a transfer of an undertaking for the purposes of calculating financial rights of transferred employees within the meaning of that directive (see judgments of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, and of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542).

21 In those judgments, the Court held that, while length of service with the transferors is not in itself a right that the transferred employees may assert against the transferee, the fact nonetheless remains that, in certain cases, it is used to determine certain financial rights of employees, and that those rights must then, in principle, continue to be observed by the transferee in the same way as they were observed by the transferor (see judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 69 and the case-law cited).

22 Thus, while recalling that the transferee may, on a ground other than the transfer of undertakings and in so far as national law so allows, alter the conditions of remuneration in a manner unfavourable to employees, the Court has held that the first subparagraph of Article 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 (OJ 1977 L 61, p. 26), the wording of which is essentially identical to that of the first subparagraph of Article 3(1) of Directive 2001/23, must be interpreted as meaning that, in calculating rights of a financial nature, the transferee must take into account the entire length of service of the employees transferred, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship (see, to that effect, judgment of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, paragraphs 51 and 52).

23 In the case in the main proceedings, it is common ground that the extended period of notice of six months claimed by Unionen confers entitlement to six months of wages. It follows that that right to an extended period of notice, determined by the conditions laid down in the collective agreements applicable to the transferor's employees during the transfer of undertakings, is to be classified as a right of a financial nature.

24 That finding is also confirmed by the case-law of the Court, noted above, from which it is expressly clear that it is necessary to take into account the length of service of an employee with the transferor of an undertaking not only when calculating the employee's remuneration (see judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 81) but also when calculating that employee's termination payment (see judgment of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, paragraph 53).

25 As the Advocate General noted in point 25 of his Opinion, the right to such a termination payment is comparable to the right to an extension of the notice period which is to be granted to an employee when his employment relationship is terminated.

26 While it follows from the foregoing that the first subparagraph of Article 3(1) of Directive 2001/23 must be interpreted as meaning that, following the transfer of an undertaking, the transferee must, when dismissing an employee, include, in the calculation of that employee's length of service, which is relevant for the determination of the period of notice to which that worker is entitled, that employee's length of service with the transferor, it is nonetheless necessary to examine whether that interpretation is confirmed, in circumstances such as those in the main proceedings, in the light of the second subparagraph of Article 3(3) of that directive.

27 As was pointed out in paragraph 19 above, in order to ensure a fair balance between, on the one hand, the employees' interests and, on the other, those of the transferee, the transferee may, on a ground other than the transfer of undertakings and in so far as national law so allows, make the adjustment and changes necessary to carry on its operations.

28 With regard to the case in the main proceedings, it is apparent from the file submitted to the Court that the Swedish legislature, when transposing Article 3(3) of Directive 2001/23 into national law, made use of the option set out in the second subparagraph of that provision. Thus, when the transferee is, at the time of the transfer, already bound by another collective agreement, which will therefore

apply to the transferred employees, its obligation to continue to observe the terms and conditions set out in to the collective agreement which bound the transferor, from which the transferred employees benefit, is limited to a period of one year from the date of the transfer of undertakings.

29 However, although ISS, bound at the dates of the transfers of undertakings by a separate collective agreement, was entitled, after the expiry of the one-year period, for economic reasons and thus on a ground other than the transfer of undertakings, to no longer continue to observe the terms and conditions set out in the collective agreement applicable to the transferred employees, it is not, however, apparent from the file available to the Court that the transferee made any adjustment to those terms and conditions in a manner unfavourable to the transferred employees.

30 According to the information available to the Court, which it is for the national court to verify, the collective agreement applicable to the transferred employees from the date of their transfer had been neither terminated nor renegotiated. Furthermore, that collective agreement had neither expired nor been replaced by any other collective agreement.

31 Consequently, where, after the one-year period has elapsed, no adjustment to the terms and conditions has been carried out by the transferee and the terms of the collective agreement by which the transferor was bound are worded identically to the collective agreement by which the transferee is bound, the employees cannot be made subject to less favourable working conditions than those which were applicable prior to the transfer.

32 In those circumstances, the transferee's argument that the second subparagraph of Article 3(3) of Directive 2001/23 must be interpreted as meaning that it is not necessary to take account of the lengths of service of the transferred employees prior to their transfer cannot be accepted.

33 In light of the foregoing, the answer to the question referred is that Article 3 of Directive 2001/23 must be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for determining the period of notice to which that employee is entitled, the length of service which that employee acquired with the transferor.

Costs

34 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 3 of Council Directive 2001/23/EC of 12 March 2001 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 must be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for determining the period of notice to which that employee is entitled, the length of service which that employee acquired with the transferor.

[Signatures]