



Reports of Cases

ASKLEPIOS KLINIKEN JUDGMENT OF THE COURT (Third Chamber)

27 April 2017*

(References for a preliminary ruling — Transfer of undertakings — Safeguarding of employees' rights — Directive 2001/23/EC — Article 3 — Contract of employment — Legislation of a Member State authorising the incorporation of clauses referring to collective labour agreements after the date of the transfer — Effects with regard to the transferee)

In Joined Cases C-680/15 and C-681/15,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decisions of 17 June 2015, received at the Court on 17 December 2015, in the proceedings

Asklepios Kliniken Langen-Seligenstadt GmbH

v

Ivan Felja (C-680/15)

and

Asklepios Dienstleistungsgesellschaft mbH

v

Vittoria Graf (C-681/15),

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský (Rapporteur), M. Safjan and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2016,

after considering the observations submitted on behalf of:

— Asklepios Kliniken Langen-Seligenstadt GmbH and Asklepios Dienstleistungsgesellschaft mbH, by A. Dziuba and W. Lipinski, Rechtsanwälte,

* Language of the cases: German.

— Ivan Felja and Vittoria Graf, by R. Buschmann, legal representative,
 — the Kingdom of Norway, by C. Anker, C. Rydning and P. Wennerås, acting as Agents,
 — the European Commission, by T. Maxian Rusche and M. Kellerbauer, acting as Agents,
 after hearing the Opinion of the Advocate General at the sitting on 19 January 2017,
 gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 3 of Council Directive 2001/23/EC 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) and Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 Those requests have been made in proceedings between Mr Ivan Felja and Ms Vittoria Graf ('the workers'), on the one hand, and Asklepios Kliniken Langen-Seligenstadt GmbH and Asklepios Dienstleistungsgesellschaft mbH ('Asklepios'), on the other hand, concerning the application of a collective labour agreement.

Legal context

EU law

- 3 Directive 2001/23 codified 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), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88) ('Directive 77/187').
- 4 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.'
- 5 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.

...'

German law

- 6 In Germany, the rights and obligations applicable in the event of a transfer of a business are governed by Paragraph 613a of the Bürgerliches Gesetzbuch (Civil Code, 'BGB'), subparagraph 1 of which reads as follows:

'Where a business or part of a business is transferred to another owner by a legal transaction, the rights and obligations arising from the employment relationships existing on the date of the transfer shall pass to that owner. Where those rights and obligations are subject to the provisions of a collective agreement or works agreement, they shall be incorporated into the employment relationship between the new owner and the employee and may not be amended in a manner unfavourable to the employee for at least one year following the date of the transfer. The second sentence shall not apply where the rights and obligations under the new owner are subject to the provisions of a different collective agreement or different works agreement. The rights and obligations may be amended before expiry of the period prescribed in the second sentence if the collective agreement or works agreement ceases to apply or if either party to a different collective agreement, which the new owner and the employee agree is applicable, is not bound by its provisions.'

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

- 7 The workers were employed at the hospital in Dreieich-Langen (Germany), which was then owned by a local authority. Mr Felja was a caretaker/gardener from 1978, while Ms Graf was employed as a care assistant from 1986. In 1995, the local authority transferred the hospital to a limited liability company (GmbH), then, in 1997, the part of the hospital business where the workers were employed was transferred to KLS Facility Management GmbH ('KLS FM').
- 8 The contracts of employment concluded between the workers and KLS FM, which did not belong to any employers' association which had negotiated and participated in the adoption of a collective labour agreement, contained a 'dynamic' referral clause providing that their employment relationship would be governed, as was the case before the transfer, by the Bundesmanteltarifvertrag für Arbeiter gemeindlicher Verwaltungen und Betriebe (Federal framework collective agreement for employees of municipal authorities and businesses, 'BMT-G II'), and also, in the future, by the collective agreements supplementing, amending and replacing it.
- 9 Subsequently, KLS FM became affiliated to a group of undertakings in the hospital sector.
- 10 On 1 July 2008, the part of the business where the workers were employed was transferred from KLS FM to another company in the group, namely Asklepios. Like KLS FM, Asklepios is not bound, as a member of an employers' association, either to the BMT-G II or the Tarifvertrag für den öffentlichen Dienst (collective agreement for the public service, 'TVöD'), which replaced it from 1 October 2005, or to the Tarifvertrag zur Überleitung der Beschäftigten der kommunalen Arbeitgeber in den TVöD und zur Regelung des Übergangsrechts (collective agreement on the transition of staff employed by municipal employers to the TVöD and the regulation of the transitional law).
- 11 The workers brought legal proceedings seeking a declaration, in accordance with the 'dynamic' referral clause to the BMT-G II in their respective contracts of employment, that the provisions of the TVöD and the collective agreements supplementing it and the provisions of the collective agreement on the

transition of staff employed by municipal employers to the TVöD and the regulation of the transitional law apply to their employment relationship in the version of those provisions in force at the date of their application.

- 12 Asklepios contends that Directive 2001/23 and Article 16 of the Charter preclude the legal consequence, provided for in national law, whereby the rules of the public service collective agreements to which the contract of employment refers apply dynamically. It argues that, after the transfer of the workers concerned to another employer, those agreements should be applied as they originally stood (statically), meaning that only the terms of employment agreed in the contract of employment concluded with the transferor employer, based on the collective agreements referred to by that contract may be relied on against the transferee employer.
- 13 The lower courts upheld the actions brought by the workers and Asklepios appealed to the referring court on a point of law.
- 14 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) (a) Does Article 3 of Directive [2001/23] preclude a provision of national law which provides that, in the event of a transfer of an undertaking or business, all conditions of employment agreed between the transferor and the employee, individually and in the exercise of their freedom of contract, in the contract of employment transfer to the transferee unaltered, as if he had himself agreed them in an individual contract with the employee, where national law provides for both consensual and unilateral adjustments by the transferee?
- (b) If Question 1(a) is answered in the affirmative, either generally or for a defined group of individually agreed conditions of employment in the employment contract between the transferor and employee:

does the application of Article 3 of Directive 2001/23 have the effect that certain terms of the contract of employment between the transferor and the employee which have been agreed in the exercise of freedom of contract are to be excluded from being transferred unaltered to the transferee, and are to be adjusted simply by reason of the transfer of the undertaking or business?

- (c) If, according to the Court of Justice’s answers to [Question 1(a) and (b)], an individual provision which has been agreed in an individual contract, under which certain provisions in a collective agreement are, dynamically and in the exercise of freedom of contract, incorporated into the employment contract, is not transferred unaltered to the transferee:
- (i) does this apply also where neither the transferor nor the transferee is party to a collective agreement or is affiliated to such a party, that is, where, even prior to the transfer of the undertaking or business, the provisions in the collective agreement would not have been applicable to the employment relationship with the transferor in the absence of the term referring to them in the agreement made, in the exercise of freedom of contract, in the contract of employment?
- (ii) if [Question 1(c)(i)] is to be answered in the affirmative:

does this apply also if the transferor and the transferee are undertakings within the same group?

- (2) Does Article 16 of [the Charter] preclude a national provision enacted to implement Directive [77/187] or Directive [2001/23] which provides that, in the event of a transfer of an undertaking or a business, the transferee is bound by the conditions of employment agreed individually and in the exercise of their freedom of contract by the transferor with the employee as if he had agreed them himself, even if these conditions incorporate certain provisions of a collective agreement,

which would not otherwise apply to the employment contract, into the employment contract dynamically, in so far as national law provides for both consensual and unilateral adjustments by the transferee?’

Consideration of the questions referred

- 15 By its questions, which it is appropriate to answer together, the referring court asks essentially whether Article 3 of Directive 2001/23, read together with Article 16 of the Charter, must be interpreted as meaning that, in the case of a transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment, extends to the clause which the transferor and the worker agreed pursuant to the principle of freedom of contract, pursuant to which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by collective agreements subsequent to the transfer supplementing it, modifying it or replacing it, if national law provides for the possibility for the transferee to make adjustments, which are both consensual and unilateral.
- 16 From the outset, it must be observed that, by means of contractual clauses, a contract of employment may refer to other legal instruments, in particular, collective labour agreements. Such clauses may, like ‘static’ referral clauses, make reference solely to rights and obligations laid down by the text of the collective agreement in force on the date of the transfer of the business, or, like the ‘dynamic’ referral clauses at issue in the main proceedings, may also refer to future modifications to the agreements, which involve changes to those rights and obligations.
- 17 In that connection, the Court has held, in the case of a ‘static’ contractual clause and in the context of Directive 77/187, that the latter does not in any way indicate that the EU legislature intended the transferee to be bound by collective labour agreements other than the one in force at the time of the transfer and, consequently, that the terms and conditions be subsequently amended through the application of a new collective labour agreement concluded after the transfer (see, to that effect, judgment of 9 March 2006, *Werhof*, C-499/04, EU:C:2006:168, paragraph 29).
- 18 The objective of Directive 77/187 was merely to safeguard the rights and obligations of employees in force on the day of the transfer. On the other hand, the Directive was not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements (see, to that effect, judgment of 9 March 2006, *Werhof*, C-499/04, EU:C:2006:168, paragraph 29).
- 19 While it follows from the case-law of the Court, referred to in the preceding paragraph of the present judgment, that Article 3 of Directive 2001/23 must be interpreted as meaning that it does not require a ‘static’ clause to be treated as ‘dynamic’, the Court also observed that a contract is characterised by the principle of freedom of the parties to arrange their own affairs, according to which, in particular, parties are free to enter into obligations with each other (judgment of 9 March 2006, *Werhof*, C-499/04, EU:C:2006:168, paragraph 23).
- 20 Nothing in the wording of Directive 2001/23 and, in particular, Article 3 thereof, indicates that the EU legislature intended to derogate from that principle. It follows that Directive 2001/23 and, in particular Article 3 thereof, should not be read as intended to prevent, a ‘dynamic’ clause from producing its effects under all circumstances.
- 21 Therefore, if the transferor and the employees have freely consented to a ‘dynamic’ contractual clause and if it is in force on the date of transfer, Directive 2001/23 and in particular Article 3 thereof, must be interpreted as providing, in principle, that that obligation arising from an employment contract is transferred to the transferee.

- 22 However, the Court has stated, in the case of a ‘dynamic’ contractual clause, that Directive 2001/23 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, judgments of 18 July 2013, *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 25 and of 11 September 2014, *Österreichischer Gewerkschaftsbund*, C-328/13, EU:C:2014:2197, paragraph 29).
- 23 More specifically, Article 3 of Directive 2001/23, read in the light of the freedom to conduct a business, requires that the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity (see, to that effect, judgment of 18 July 2013, *Alemo-Herron and Others*, C-426/11, EU:C:2013:521, paragraph 33).
- 24 In the present case, it is clear from the decision to refer and, in particular, from the wording of the questions referred for a preliminary ruling that the national legislation at issue in the main proceedings provides for the possibility, after the transfer, for the transferee to adjust the working conditions existing at the date of the transfer, either consensually or unilaterally.
- 25 Thus, it must be held that the national legislation at issue in the main proceedings satisfies the requirements deriving from the case-law mentioned in paragraph 23 of the present judgment.
- 26 Given that that case-law takes into consideration Article 16 of the Charter, there is no longer any need to examine further the compatibility of the national legislation at issue in the main proceedings with that provision.
- 27 While Asklepios appears to challenge the existence or effectiveness of the possibilities to make adjustment concerned. However, it suffices to state, in that regard, that it is not for the Court of Justice to give a ruling on that point.
- 28 It is the referring court alone which has jurisdiction to assess the facts and interpret the national legislation (see, to that effect, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 88).
- 29 Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 3 of Directive 2001/23, read together with Article 16 of the Charter, must be interpreted as meaning that, in the case of a transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment, extends to the clause which the transferor and the worker agreed pursuant to the principle of freedom of contract, pursuant to which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by agreements subsequent to the transfer and which supplement it, amend it or replace it, if the national law provides for the possibility for the transferee to make adjustments both consensually and unilaterally.

Costs

- 30 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 (Third Chamber) hereby rules:

Article 3 of Council Directive 2001/23/EC 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 and Article 16 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the case of a transfer of a business, the continued observance of the rights and obligations of the transferor arising from a contract of employment, extends to the clause which the transferor and the worker agreed pursuant to the principle of freedom of contract, pursuant to which their employment relationship is governed not only by the collective agreement in force on the date of the transfer, but also by agreements subsequent to the transfer and which supplement it, amend it or replace it, if the national law provides for the possibility for the transferee to make adjustments both consensually and unilaterally.

[Signatures]