

JUDGMENT OF THE COURT
7 February 1985 ¹

In Case 186/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kantonnrechtcr [Cantonal Court], Rotterdam, for a preliminary ruling in the proceedings pending before that court between

Arie Botzen and Others

and

Rotterdamsche Droogdok Maatschappij BV

on the interpretation of Council Directive No 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

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn

Registrar: H.A. Rühl, Principal Administrator

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¹ — Language of the Case: Dutch.

* after considering the observations submitted on behalf of the plaintiffs A. Botzen and Others by Mr S. de Laat, the defendant Rotterdamsche Droogdok Maatschappij by Mr A. F. de Savornin Lohan and Mr A. J. Braakman, in the written proceedings, and by Mr E. W. J. H. de Liagre Böhl and Mr A. J. Braakman, in the oral proceedings, the Netherlands Government by Mr I. Verkade, in the written proceedings, and by Mr A. Bos, acting as Agent, in the oral proceedings, the latter being assisted by Mr L. A. D. Keus, the Danish Government by Mr L. Mikaelsen, acting as Agent, the French Government by Mr G. Boivineau, acting as Agent, the Commission of the European Communities by Mr M. Beschel, acting as Agent, assisted by Mr F. Herbert, after hearing the Opinion of the Advocate General delivered at the sitting on 16 January 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By judgment of 25 August 1983, which was received at the Court on 1 September 1983, the Kantonrechter, Rotterdam, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions as to the interpretation of certain provisions of Council Directive No 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, business or parts of businesses (Official Journal 1977 L 61, p. 26).
- 2 Those questions were raised in proceedings instituted by Arie Botzen and Others against Rotterdamsche Droogdok Maatschappij BV.
- 3 The plaintiffs in the main proceedings were employees of Rotterdamsche Droogdok Maatschappij Heijplaat BV (hereinafter referred to as 'the old RDM'), which was declared insolvent by judgment of 6 April 1983. In order to avoid total liquidation of that undertaking and with a view to safeguarding as large a proportion as possible of the jobs, a new company, Rotterdamsche Droogdok Maatschappij BV (hereinafter referred to as 'the new RDM') was constituted on 30 March 1983.
- 4 On 7 April 1983, an agreement was concluded between the old RDM and the new RDM. Under that agreement, the new RDM took over certain departments of the old RDM and all the staff assigned thereto, and in addition took over a number of employees of the departments not transferred to it, namely the general and administrative departments. However, the other workers, including the plaintiffs in the main proceedings, were dismissed by the liquidators of the old RDM.

- 5 Considering their dismissal to be invalid on the ground that they had *ipso jure* entered the service of the new RDM on the date of the transfer, the plaintiffs in the main proceedings brought an action against the new RDM before the Kantonrechter, Rotterdam, seeking payment of the salary due from 7 April 1983 until such time as their employment relationship might be terminated. They also requested, as an interim measure, that the new RDM should be ordered to pay them, as from 7 April 1983, or, in the alternative, as from the date of the decision to be given, a monthly amount equivalent to their salary and to allow them to carry out their usual work. In support of their action, they claimed that the transaction at issue was to be regarded as a transfer of a business or part of a business within the meaning of Articles 1639 aa and 1639 bb of the Netherlands Civil Code, introduced by the Law of 15 May 1981 for the purpose of implementing Council Directive No 77/187 of 14 February 1977.
- 6 Directive No 77/187, which was adopted by the Council on the basis of, in particular, Article 100 of the Treaty, is intended, in the terms of its preamble, 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. For that purpose, Article 3 (1) thereof provides that: '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.' Article 4 (1) provides for the protection of the workers concerned against dismissal by the transferor or the transferee, but does not stand in the way of 'dismissals that may take place for economic, technical or organizational reasons entailing changes in the work-force'. In addition, Article 6 of the directive requires the transferor and the transferee to inform and consult the representatives of the workers affected by the transfer. Finally, Article 7 provides that the directive is not to 'affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.
- 7 Considering that the decision to be given depended on the interpretation of Directive No 77/187, the Kantonrechter, Rotterdam, stayed the proceedings and submitted the following questions to the Court for a preliminary ruling:
- '(1) Does the scope of Article 1 (1) of Directive No 77/187/EEC extend to a situation in which the transferor of an undertaking is adjudged insolvent or is granted a "surséance van betaling" [judicial leave to suspend payment of debts]?

- (2) Does the scope of the directive extend to the rights conferred upon and the obligations imposed upon the transferor by contracts of employment which exist at the date of transfer and which are made with employees whose duties are not performed exclusively with the aid of assets which belong to the transferred part of the undertaking?
- (3) Does the scope of the directive extend to the rights conferred upon and the obligations imposed upon the transferor by contracts of employment which exist at the time of transfer and which are made with employees who are employed in an administrative department of the undertaking (for example, general management services, personnel matters, etc.), where that administrative department carried out duties for the benefit of the transferred part of the undertaking but has not itself been transferred?

The first question

8 The first question is identical to a question submitted in Case 135/83 (*Abels*), in which judgment has today been delivered.

9 In that judgment, the Court ruled, with respect to that question, that:

‘Article 1 (1) of Council Directive No 77/187/EEC of 14 February 1977 does not apply to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor, although the Member States are at liberty to apply the principles of the directive to such a transfer on their own initiative. The directive does, however, apply where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a “surséance van betaling” (judicial leave to suspend payment of debts).’

10 For the grounds of that ruling, reference should be made to the judgment in that case, the text of which is annexed to this judgment.

The second and third questions

11 The second and third questions are essentially intended to ascertain whether Article 3 (1) of Directive No 77/187 must be interpreted as extending to a transferor’s rights and obligations arising from a contract of employment or employment relationship existing on the date of the transfer and entered into with

employees who, although not belonging to the part of the undertaking which was transferred, carry on certain activities using the assets assigned to the transferred part, or who, being assigned to an administrative department of the undertaking which was not itself transferred, carried out certain duties for the benefit of the transferred part of the undertaking.

- 12 Article 3 (1) provides that: 'The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee'.
- 13 In that connection, Rotterdamsche Droogdok Maatschappij claims that only employees working full-time or substantially full-time in the transferred part of the undertaking are covered by the transfer of employment relationships, to the exclusion of those engaged in partial tasks in various businesses or parts of businesses and those who, although working for several businesses or parts of businesses, form part of the remaining staff.
- 14 On the other hand, the Commission considers that the only decisive criterion regarding the transfer of employees' rights and obligations is whether or not a transfer takes place of the department to which they were assigned and which formed the organizational framework within which their employment relationship took effect.
- 15 The Commission's view must be upheld. An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive No 77/187 by reason of a transfer within the meaning of Article 1 (1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.
- 16 The answer to the second and third questions must therefore be that Article 3 (1) of Directive No 77/187 must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred.

Costs

- 17 The costs incurred by the Netherlands and Danish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Kantonrechter, Rotterdam, by judgment of 25 August 1983, hereby rules:

- (1) Article 1 (1) of Council Directive No 77/187/EEC of 14 February 1977 does not apply to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor, although the Member States are at liberty to apply the principles of the directive to such a transfer on their own initiative. The directive does, however, apply where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a 'surséance van betaling' (judicial leave to suspend payment of debts).
- (2) Article 3 (1) of Directive No 77/187/EEC must be interpreted as not covering the transferor's rights and obligations arising from a contract of employment or an employment relationship existing on the date of the transfer and entered into with employees who, although not employed in the transferred part of the undertaking, performed certain duties which involved the use of assets assigned to the part transferred or who, whilst being employed in an administrative department of the undertaking which has not itself been transferred, carried out certain duties for the benefit of the part transferred.

Mackenzie Stuart	Bosco	Due	Kakouris
Koopmans	Everling	Bahlmann	Galmot
			Joliet

Delivered in open court in Luxembourg on 7 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President