

JUDGMENT OF THE COURT (Sixth Chamber)

7 March 1996 ^{*}

In Joined Cases C-171/94 and C-172/94,

REFERENCES to the Court under Article 177 of the EC Treaty by the Cour du Travail, Brussels, for a preliminary ruling in the proceedings pending before that court between

Albert Merckx (C-171/94),

Patrick Neuhuys (C-172/94)

and

Ford Motors Company Belgium SA

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 (OJ 1977 L 61, p. 26),

^{*} Language of the case: French.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini (Rapporteur), F. A. Schockweiler, P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: C. O. Lenz,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Merckx and Mr Neuhuys, by Joan Dubaere, of the Brussels Bar,

— Ford Motors Company Belgium SA, by Carl Bevernage, Bernard van de Walle de Ghelcke and Luc Vanaverbecke, of the Brussels Bar,

— the United Kingdom, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Eleanor Sharpston, Barrister,

— the Commission of the European Communities, by Marie Wolfcarius and Christopher Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Merckx and Mr Neuhuys, Ford Motors Company Belgium SA, the United Kingdom and the Commission at the hearing on 15 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 6 July 1995,

gives the following

Judgment

- 1 By two judgments of 15 June 1994, received at the Court on 22 June 1994, the Cour du Travail (Higher Labour Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question 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 (OJ 1977 L 61, p. 26, hereinafter 'the Directive').

- 2 That question was raised in proceedings brought by Mr Merckx and Mr Neuhuys against Ford Motors Company Belgium SA ('Ford') concerning the effects on the contracts of employment concluded by Mr Merckx and Mr Neuhuys with Anfo Motors SA ('Anfo Motors') of the discontinuance of Anfo Motors' business and the assumption by Novarobel SA ('Novarobel') of the dealership held by Anfo Motors.

The relevant provisions and the facts

- 3 The Directive's aim, as the second recital in its preamble indicates, is 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) of the Directive provides for the transfer to the transferee of the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer. The first subparagraph of Article 4(1) adds that the transfer of an undertaking, business, or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee.

- 4 According to Article 1(1), the Directive applies to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.
- 5 The Directive was implemented in Belgian law by *Convention Collective* (Collective Agreement) *No 32 bis* of 7 June 1985 concerning the safeguarding of employees' rights in the event of a change of employer as a result of a legal transfer of an undertaking and governing employees' rights in the event of a transfer of assets after compulsory liquidation or composition with creditors by relinquishment of assets, as required by the Royal Decree of 25 July 1985 (*Moniteur Belge* of 9 August 1985, p. 11527).
- 6 At the material time Mr Merckx and Mr Neuhuys were salesmen with Anfo Motors. Anfo Motors sold motor vehicles as a Ford dealer, in a number of municipalities in the Brussels conurbation, Ford also being its main shareholder.
- 7 On 8 October 1987 Anfo Motors informed Mr Merckx and Mr Neuhuys that it would discontinue all its activities on 31 December 1987 and that with effect from 1 November 1987 Ford would be working with an independent dealer, Novarobel, in the municipalities covered by the Anfo Motors dealership. It stated that Novarobel would take on 14 of the 64 employees of Anfo Motors, who would retain their duties, seniority and all other contractual rights in accordance with the provisions of *Convention Collective No 32 bis*.
- 8 Anfo Motors also sent a letter to its customers in order to inform them of the discontinuance of its activities and to recommend to them the services of the new dealer.

- 9 By letters of 27 October 1987 Mr Merckx and Mr Neuhuys refused to accept the proposed transfer, claiming that Anfo Motors could not require them to work for another company, in another place and under different working conditions, without any guarantee as to whether the client base would be retained or a particular turnover achieved. They therefore considered that Anfo Motors' decision constituted a unilateral breach of the employment contract and claimed a redundancy payment and sums due under other heads.
- 10 By letters of 30 October and 2 November 1987 Anfo Motors informed Mr Merckx and Mr Neuhuys that their contracts were being transferred to Novarobel and claimed that, by a collective agreement of 30 October, the trade unions had recognized that *Convention Collective No 32 bis* applied and that the transfers were, therefore, valid. Anfo Motors requested Mr Merckx and Mr Neuhuys to present themselves without any further delay at Novarobel, failing which Anfo Motors would claim compensation for breach of contract.
- 11 Mr Merckx and Mr Neuhuys did not comply with that request and following another fruitless exchange of letters they brought an action before the Tribunal du Travail (Labour Court), Brussels, for an order that Anfo Motors and, subsequently, Ford, its successor in the proceedings, should pay them various sums by way of compensation for breach of contract, unlawful dismissal and redundancy as well as their pro rata entitlement to end-of-year bonus. Anfo Motors counter-claimed for payment by Mr Merckx and Mr Neuhuys of compensation for breach of contract. By judgments of 20 July 1990 the Tribunal du Travail held the main actions to be unfounded and the counter-claims to be inadmissible.
- 12 Mr Merckx and Mr Neuhuys brought an appeal against those judgments before the Cour du Travail, Brussels, while Ford brought cross-appeals. Mr Merckx and Mr Neuhuys claimed that the circumstances did not constitute a transfer of an undertaking for the purposes of *Convention Collective No 32 bis*, but rather the closure of an undertaking. Ford contended for the opposite point of view.

- 13 The national court found, first, that pursuant to an 'agreement and guarantee' concluded with Novarobel on 15 October 1987, Ford had decided to discontinue the activities of its subsidiary Anfo Motors and to entrust that company's dealership to Novarobel, which would take on certain duties performed by Anfo Motors in accordance with *Convention Collective No 32 bis* in return for guarantees from Ford. It then observed that, while it was true that Ford was the main shareholder of Anfo Motors, it had nevertheless been Anfo Motors which had decided to discontinue its activities. Finally, the national court stated that there was no agreement linking Anfo Motors to Novarobel, that Anfo Motors had dismissed more than three-quarters of its staff and paid them redundancy payments, that no tangible assets had passed from Anfo Motors to Novarobel, and that it had not been established that Anfo Motors had transferred its customer list to Novarobel.
- 14 Having regard to the foregoing, the Cour du Travail, Brussels, decided to stay the proceedings and to refer the following question, drafted in the same terms in both cases, to the Court of Justice for a preliminary ruling:

'Is there a transfer of an undertaking within the meaning of Directive 77/187 of 14 February 1977 if an undertaking which has decided to discontinue its activities on 31 December 1987 dismisses most of its staff, keeping only 14 out of a total of over 60, and decides that those 14 persons, while retaining their acquired rights, must work from 1 November 1987 for an undertaking with which that first undertaking has no formal agreement, but which has since 15 October 1987 held the dealership previously held by the first undertaking, and if the first undertaking has not transferred any of its assets to the second?'

- 15 That question seeks essentially to ascertain, first, whether Article 1(1) of the Directive must be interpreted as applying where an undertaking holding a motor vehicle dealership for a particular territory discontinues its business and the dealership is then transferred to another undertaking which takes on part of its staff and is recommended to customers, without any transfer of assets. Secondly, having regard to the facts in the main proceedings and in order to provide a helpful response to the national court, it is necessary to establish whether Article 3(1) of the Directive

precludes an employee of the transferor at the date of transfer of the undertaking from objecting to the transfer of his contract of employment or employment relationship to the transferee.

The existence of a transfer within the meaning of the directive

- 16 As regards the first part of the question as reformulated, it is settled case-law that the decisive criterion for establishing whether there is a transfer for the purposes of the Directive is whether the entity in question retains its economic identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed (see *inter alia* the judgment in Case C-29/91 *Redmond Stichting v Hendriekus Bartol* [1992] ECR I-3189, paragraph 23).
- 17 In order to determine whether that condition is met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees is taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (judgment in Case C-29/91 *Redmond Stichting*, cited above, paragraph 24).
- 18 In the light of those principles, the Court notes that in the situation with which the main proceedings are concerned Ford, the main shareholder in Anfo Motors, transferred to Novarobel the dealership for the sale of vehicles in the territory covered by Anfo Motors and so transferred the economic risk associated with that business to an undertaking outside its own group of companies, that Novarobel carried on the activity performed by Anfo Motors, without interruption, in the

same sector and subject to similar conditions, that it took on part of its staff and that it was recommended to customers in order to ensure continuity in the operation of the dealership.

- 19 All those factors, taken as a whole, support the view that the transfer of the dealership in the circumstances of the main proceedings is capable of falling within the scope of the Directive. It must be ascertained, however, whether certain factors relied on by Mr Merckx and Mr Neuhuys may rebut that finding.
- 20 First, Mr Merckx and Mr Neuhuys claimed that in the circumstances at issue in the main proceedings there had been neither a transfer of the company's tangible or intangible assets nor at least partial preservation of the undertaking's structure and organization. Moreover, the municipalities of the Brussels conurbation in which Novarobel has its principal place of business are different from those in which Anfo Motors carried on its business.
- 21 Those circumstances are not such as to prevent the application of the Directive, since, having regard to the nature of the activity pursued, the transfer of tangible assets is not conclusive of whether the entity in question retains its economic identity (see to that effect the judgment in Case C-392/92 *Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* [1994] ECR I-1311, paragraph 16). The purpose of an exclusive dealership for the sale of motor vehicles of a particular make in a certain sector remains the same even if it is carried on under a different name, from different premises and with different facilities. It is also irrelevant that the principal place of business is situated in a different area of the same conurbation, provided that the contract territory remains the same.
- 22 Secondly, Mr Merckx and Mr Neuhuys claimed that there could not be a transfer for the purposes of the Directive when an undertaking definitively ceased trading

and was put into liquidation, as was the case with Anfo Motors. In such circumstances, the economic entity had ceased to exist and could not retain its identity.

- 23 In that regard, if the Directive's aim of protecting workers is not to be undermined, its application cannot be excluded merely because the transferor discontinues its activities when the transfer is made and is then put into liquidation. If the business of that undertaking is carried on by another undertaking, those facts tend to confirm, rather, that there has been a transfer for the purposes of the Directive.
- 24 Thirdly, Mr Merckx and Mr Neuhuys claimed that the fact that the majority of the staff had been dismissed upon the transfer of the dealership indicated that the Directive did not apply.
- 25 Article 4(1) of the Directive provides that the transfer of an undertaking, business or part of the business does not in itself constitute grounds for dismissal. However, that provision is not to stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce.
- 26 Accordingly, the fact that the majority of the staff was dismissed when the transfer took place is not sufficient to preclude the application of the Directive. The dismissals might have taken place for economic, technical or organizational reasons, in compliance with Article 4(1), cited above. In any event, failure to comply with that provision could not affect the existence of a transfer for the purposes of the Directive.

27 Finally, Mr Merckx and Mr Neuhuys claimed that, even if there had in fact been a transfer for the purposes of the Directive, it was not the result of a legal transfer as required by Article 1 thereof. That concept necessarily required the existence of a contractual link between the transferor and the transferee. There was no such link in the present case.

28 On account of the differences between the language versions of the Directive and the divergences between the laws of the Member States with regard to the concept of legal transfer, the Court has given that concept a sufficiently flexible interpretation in keeping with the objective of the Directive, which is to safeguard employees in the event of a transfer of their undertaking, and has held that the Directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking (see, *inter alia*, the judgment in *Redmond Stichting*, cited above, at paragraphs 10 and 11).

29 The Court has therefore held that the Directive applies to the termination of a lease of a restaurant followed by the conclusion of a new management contract with another operator (Case 324/86 *Tellerup v Daddy's Dance Hall* [1988] ECR 739), the termination of a lease followed by a sale by the owner (Case 101/87 *Bork International v Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057), and also a situation in which a public authority ceases to grant subsidies to a legal person thereby bringing about the full and definitive termination of its activities in order to transfer them to another legal person with a similar aim (*Redmond Stichting*, cited above).

30 It is clear from that case-law that, for the Directive to apply, it is not necessary for there to be a direct contractual relationship between the transferor and the transferee. Consequently, where a motor vehicle dealership concluded with one undertaking is terminated and a new dealership is awarded to another undertaking pursuing the same activities, the transfer of undertaking is the result of a legal transfer for the purposes of the Directive, as interpreted by the Court.

- 31 Furthermore, it is clear from the documents before the Court that the circumstances of the actions brought before the national court are that Ford, the principal shareholder of Anfo Motors, concluded an 'agreement and guarantee' with Novarobel, by which it undertook, *inter alia*, to bear the expenses relating to certain payments for breach of contract, unlawful dismissal or redundancy which might be payable by Novarobel to members of the staff previously employed by Anfo Motors. That fact confirms that there was a legal transfer within the meaning of the Directive.
- 32 Consequently, the answer to the first part of the question as reformulated above must be that Article 1(1) of the Directive must be interpreted as applying where an undertaking holding a motor vehicle dealership for a particular territory discontinues its activities and the dealership is then transferred to another undertaking which takes on part of the staff and is recommended to customers, without any transfer of assets.

The employee's power to prevent the transfer of his contract or the employment relationship

- 33 As regards the second part of the question as reformulated above, the Court held in Case 105/84 *Foreningen af Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639, paragraph 16, that the protection which the Directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer.
- 34 It also follows from the judgment in Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others v Konstandinidis* [1992] ECR I-6577, paragraphs 31 and 32, that, whilst the Directive allows the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor, it cannot be interpreted as obliging the employee to continue his employment relationship with the transferee. Such an obligation would jeopardize the fundamental

rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.

- 35 It follows that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be. The Member States may provide, in particular, that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or employment relationship should be maintained with the transferor (judgment in *Katsikas and Others*, cited above, paragraphs 35 and 36).
- 36 Mr Merckx and Mr Neuhuys claimed, moreover, that in the case in point Novarobel refused to guarantee to maintain their level of remuneration, which was calculated by reference, in particular, to the turnover achieved.
- 37 In the light of that submission, it should be noted that Article 4(2) provides that if the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for termination.
- 38 A change in the level of remuneration awarded to an employee is a substantial change in working conditions within the meaning of that provision, even where the remuneration depends in particular on the turnover achieved. Where the contract of employment or the employment relationship is terminated because the transfer involves such a change, the employer must be regarded as having been responsible for the termination.

- 39 Consequently, the answer to the second part of the question as reformulated must be that Article 3(1) of the Directive does not preclude an employee employed by the transferor at the date of the transfer of an undertaking from objecting to the transfer to the transferee of the contract of employment or the employment relationship. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be. However, where the contract of employment or the employment relationship is terminated on account of a change in the level of remuneration awarded to the employee, Article 4(2) of the Directive requires the Member States to provide that the employer is to be regarded as having been responsible for the termination.

Costs

- 40 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the question referred to it by the Cour du Travail, Brussels, by judgments of 15 June 1994, hereby rules:

1. 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 must be interpreted as applying where an undertaking holding a motor vehicle dealership for a particular territory discontinues its activities and the dealership is then transferred to another undertaking which takes on part of the staff and is recommended to customers, without any transfer of assets.

2. Article 3(1) of Directive 77/187 does not preclude an employee employed by the transferor at the date of the transfer of an undertaking from objecting to the transfer to the transferee of the contract of employment or the employment relationship. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be. However, where the contract of employment or the employment relationship is terminated on account of a change in the level of remuneration awarded to the employee, Article 4(2) of the directive requires the Member States to provide that the employer is to be regarded as having been responsible for the termination.

Kakouris

Mancini

Schockweiler

Kapteyn

Ragnemalm

Delivered in open court in Luxembourg on 7 March 1996.

R. Grass

C. N. Kakouris

Registrar

President of the Sixth Chamber