

JUDGMENT OF THE COURT (Third Chamber)

20 January 2011 *

In Case C-463/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Superior de Justicia de Castilla-La Mancha (Spain), made by decision of 20 October 2009, received at the Court on 25 November 2009, in the proceedings

CLECE SA

v

María Socorro Martín Valor,

Ayuntamiento de Cobisa,

* Language of the case: Spanish.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the European Commission, by J. Enegren and R. Vidal Puig, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2010,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 1(1) 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 question has arisen in the course of legal proceedings brought by CLECE SA ('CLECE') against Mrs Martín Valor and the Ayuntamiento de Cobisa (municipal authority of Cobisa) concerning Mrs Martín Valor's dismissal.

Legal context

European Union law

- ³ Directive 2001/23 codifies 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 undertakings or businesses (OJ 2001 L 61, p. 26) as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

- 4 According to recital 3 in the preamble to Directive 2001/23, 'it is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.'

- 5 Article 1(1) of the Directive states:

'(a) 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.

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.'

6 The first subparagraph of Article 3(1) of the Directive provides:

‘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.’

7 The first subparagraph of Article 4(1) of Directive 2001/23 states:

‘The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.’

National law

8 Directive 2001/23 was transposed into Spanish law by Article 44 of Royal Legislative Decree No 1/1995 of 24 March 1995 approving the amended text of the Workers’ Statute (Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores) (BOE No 75 of 29 March 1995, p. 9654, ‘the Workers’ Statute’).

9 Article 44(1) and (2) of the Workers' Statute provides:

'1. The transfer of an undertaking, business or independent production unit of a business shall not in itself terminate the employment relationship; the new employer shall take over the former employer's rights and obligations with respect to the employment contract and social security, including all commitments in respect of pensions, in the circumstances provided for by the relevant specific legislation and, generally, all obligations in relation to additional social protection which the transferor has undertaken.

2. For the purposes of this article, there shall be a transfer of undertaking where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

10 Article 14 of the Collective Agreement concerning workers employed in the cleaning of buildings and premises in Toledo provides:

'When an undertaking whose cleaning services have been supplied by a contractor takes over those services itself, it is not obliged to keep on the staff who provided the services on behalf of the contractor if it employs its own staff to carry out the cleaning. It must, however, do so if it wishes to employ new staff to carry out the cleaning.'

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

- ¹¹ On 27 May 2003, CLECE, a company that supplies cleaning services, entered into a contract with the Ayuntamiento de Cobisa for the cleaning of schools and premises belonging to the council. It was not established that any ‘special equipment’ was required for the provision of services in question.
- ¹² Pursuant to that contract, Mrs Martín Valor was employed by CLECE as a cleaner from 25 March 2004.
- ¹³ On 9 November 2007, the Ayuntamiento de Cobisa informed CLECE that it was terminating its contract with that company with effect from 31 December 2007.
- ¹⁴ On 2 January 2008, CLECE informed Mrs Martín Valor that, as of 1 January 2008, she would become a member of the staff of the Ayuntamiento de Cobisa, since that body would henceforth carry out the cleaning of the premises in question. According to CLECE, pursuant to Article 14 of the Collective Agreement concerning workers employed in the cleaning of buildings and premises in Toledo, the Ayuntamiento de Cobisa had taken over from that company all the rights and obligations relating to the employment relationship forming the subject of the dispute in the main proceedings.
- ¹⁵ On the same day, Mrs Martín Valor presented herself for work at the premises of the Ayuntamiento de Cobisa, but was not permitted to carry out her work there. CLECE, for its part, did not offer her an alternative job.

- 16 On 10 January 2008, the Ayuntamiento de Cobisa hired five workers to clean its premises, through an employment agency.
- 17 Mrs Martín Valor then brought an action before the Juzgado de lo Social No 2 de Toledo against CLECE and the Ayuntamiento de Cobisa, seeking a finding of unlawful dismissal.
- 18 By a judgment of 13 May 2008, the Juzgado de lo Social No 2 de Toledo held that Article 14 of the Collective Agreement concerning workers employed in the cleaning of buildings and premises in Toledo did not apply and that, therefore, the Ayuntamiento de Cobisa could not be sued. That court also found that CLECE had unlawfully dismissed Mrs Martín Valor and ordered CLECE either to reinstate Mrs Martín Valor on the terms she enjoyed prior to her dismissal or to compensate her in the amount of EUR 6 507,10. In either case, CLECE had also to pay Mrs Martín Valor the ordinary earnings that she had not received.
- 19 On 26 December 2008, CLECE brought an appeal against that judgment before the Tribunal Superior de Justicia de Castilla-La Mancha. In that appeal, CLECE claims, in particular, that the Ayuntamiento de Cobisa is subrogated in the employment relationship with Mrs Martín Valor, pursuant to Article 14 of the Collective Agreement concerning workers employed in the cleaning of buildings and premises in Toledo in conjunction with Article 44 of the Workers' Statute and with the case-law which it cites.
- 20 The referring court points out that it is clear, in essence, from case-law consolidated by a judgment of the Tribunal Supremo (Supreme Court) of 10 December 2008, that the provisions of a collective agreement in the sector for the cleaning of buildings and premises do not apply to a main undertaking, performing a different activity, which

terminates a contract with a cleaning company and decides to carry out the cleaning of its premises itself, since the main undertaking cannot be regarded as falling within the scope of that collective agreement.

- 21 In those circumstances, the referring court asks whether a situation in which a municipal authority takes over the cleaning of its premises, using its own staff, in circumstances where that work was previously carried out by a cleaning company under a contract which has been terminated, the main undertaking has hired new staff to carry out the cleaning work, and the Collective Agreement on the cleaning of buildings and premises, which creates a subrogation obligation in such situations, does not apply to it, falls within the scope of Article 1(1)(a) and (b) of Directive 2001/23.
- 22 In particular, the referring court asks whether, in the dispute in the main proceedings, it is necessary to draw the appropriate conclusions from the application of Article 1(1)(a) and (b) of Directive 2001/23, even though the Collective Agreement in question does not apply to the Ayuntamiento de Cobisa and that body is a public employer, which means that its employment relations are coloured by special features, in accordance with Article 103(3) of the Spanish Constitution.
- 23 In those circumstances, the Tribunal Superior de Justicia de Castilla-La Mancha decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

‘Does a situation in which a municipal authority resumes or takes over the activity of cleaning its premises, which was previously carried out by a contractor, and for

which new staff are hired, fall within the scope of Directive 2001/23, as defined in Article 1(1)(a) and (b) thereof?

The question referred for a preliminary ruling

- ²⁴ By its question, the referring court asks, in essence, if Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as meaning that that directive applies to a situation in which a municipal authority which has contracted out the cleaning of its premises to a private company decides to terminate its contract with that company and to undertake those cleaning services itself, by hiring new staff for that purpose.
- ²⁵ It must be noted that, pursuant to Article 1(1)(c) of Directive 2001/23, that directive applies to public undertakings engaged in economic activities whether or not they are operating for gain.
- ²⁶ The Court has therefore held that the mere fact that the person to whom the activity is transferred is a public-law body, in this case a municipal authority, cannot be a ground for excluding the existence of a transfer within the scope of that directive (see Case C-175/99 *Mayeur* [2000] ECR I-7755, paragraphs 29, 33 and 34, and Case C-151/09 *UGT-FSP* [2010] ECR I-7591, paragraph 23).

- 27 Therefore, the fact that, as in the dispute in the main proceedings, one of the parties is a municipal authority does not, of itself, prevent Directive 2001/23 from applying.
- 28 Pursuant to Article 1(1)(a) of Directive 2001/23, that directive applies 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.
- 29 It is clear from the settled case-law that the scope of that provision cannot be determined solely on the basis of a textual interpretation. On account of the differences between the language versions of that 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 that directive, which is, as stated in recital 3 of the preamble, to safeguard employees in the event of a transfer of their undertaking (see, to that effect, Case C-458/05 *Jouini and Others* [2007] ECR I-7301, paragraph 24 and case-law cited).
- 30 The Court has therefore held that Directive 77/187, codified by Directive 2001/23, is applicable wherever, in the context of contractual relations, there is a change in the legal or moral person who is responsible for carrying on the undertaking and who incurs the obligations of an employer towards employees of the undertaking (see Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 28, and Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraph 23).
- 31 Similarly, the Court has held that Directive 77/187 is capable of applying to a situation in which an undertaking, which used to have recourse to another undertaking for the cleaning of its premises or part of them, decides to terminate its contract with that

other undertaking and in future to carry out that work itself (see *Hernández Vidal and Others*, paragraph 25).

- ³² Accordingly, it cannot automatically be excluded that Directive 2001/23 might apply in circumstances such as those of the dispute in the main proceedings, where a municipal authority unilaterally decides to terminate a contract with a private undertaking and to carry out itself the cleaning work it used to contract out to that undertaking.
- ³³ Nonetheless, according to Article 1(1)(b) of Directive 2001/23, a condition for the application of that directive is that the transfer must concern an economic entity which retains its identity after the change of employer.
- ³⁴ In order to determine whether such an entity retains its identity, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business concerned, whether or not its 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 are taken over by the new employer, whether or not its customers are transferred, 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. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, *inter alia*, Case 24/85 *Spijkers* [1986] ECR 1119, paragraph 13; Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 24; Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 14; and Case C-340/01 *Abler and Others* [2003] ECR I-14023, paragraph 33).

- 35 The Court has previously stated that an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, and therefore the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets (see *Süzen*, paragraph 18; *Hernández Vidal and Others*, paragraph 31; and *UGT-FSP*, paragraph 28).
- 36 The Court has accordingly held that inasmuch as, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis (see *Süzen*, paragraph 21; *Hernández Vidal and Others*, paragraph 32; Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 32; Case C-51/00 *Temco* [2002] ECR I-969, paragraph 33; and *UGT-FSP*, paragraph 29).
- 37 It is of no consequence, as is clear from paragraph 31 of this judgment, whether the majority of employees are taken on following a legal transfer negotiated between the transferor and the transferee, or whether it is the result of a unilateral decision made by the former employer to terminate the employment contracts of the transferred employees, followed by a unilateral decision made by the new employer to take on the majority of the same employees to carry out the same work.
- 38 If, in circumstances where the majority of employees are taken on, it was a condition for the existence of a transfer within the meaning of Directive 2001/23 that the taking on of staff must be pursuant to a contract, the protection of workers, which is the aim of that directive, would be left to the discretion of employers, for whom it would be

open, by not agreeing a contract, to avoid application of the Directive, which would be detrimental to the maintenance of transferred employees' rights that is required by Article 3(1) of Directive 2001/23.

³⁹ It is true that, according to the Court's case-law, cleaning services, such as those at issue in the dispute in the main proceedings, can be regarded as an activity essentially based on manpower (see, to that effect, *Hernández Vidal and Others*, paragraph 27; *Hidalgo and Others*, paragraph 26; and *Jouini and Others*, paragraph 32) and, consequently, a group of employees who are permanently assigned to the common task of cleaning may, in the absence of other factors of production, amount to an economic entity (see, to that effect, *Hernández Vidal and Others*, paragraph 27). That entity's identity must nonetheless be retained after the transfer in question.

⁴⁰ According to the order for reference, the Ayuntamiento de Cobisa, in order to carry out itself the cleaning of its schools and premises previously undertaken by CLECE, employed new staff, and did not take on the employees who previously carried out that work for CLECE, nor, moreover, did it take over any tangible or intangible assets of that undertaking. In those circumstances, the only factor creating a link between the activities carried out by CLECE and the Ayuntamiento de Cobisa is the activity in question, namely the cleaning of premises.

⁴¹ However, the mere fact that the activity carried out by CLECE and that carried out by the Ayuntamiento de Cobisa are similar, even identical, does not lead to the conclusion that an economic entity has retained its identity. An entity cannot be reduced to the activity entrusted to it. Its identity emerges from several indissociable factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it (see, to that effect, *Süzen*, paragraph 15; *Hernández Vidal and Others*, paragraph 30; and *Hidalgo and Others*, paragraph 30). In particular, the identity of an economic entity, such as that forming the subject of the dispute in the main proceedings,

which is essentially based on manpower, cannot be retained if the majority of its employees are not taken on by the alleged transferee.

⁴² It follows that, notwithstanding any national protection rules, the mere taking over by the Ayuntamiento de Cobisa, in the dispute in the main proceedings, of the cleaning work that was previously carried out by CLECE, cannot, of itself, indicate the existence of a transfer pursuant to Directive 2001/23.

⁴³ Therefore, the answer to the question referred is that Article 1(1)(a) and (b) of Directive 2001/23 must be interpreted as meaning that that directive does not apply to a situation in which a municipal authority which has contracted out the cleaning of its premises to a private company decides to terminate its contract with that company and to undertake the cleaning of those premises itself, by hiring new staff for that purpose.

Costs

⁴⁴ 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 1(1)(a) and (b) 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 the directive does not apply to a situation in which a municipal authority which has contracted out the cleaning of its premises to a private company decides to terminate its contract with that company and to undertake the cleaning of those premises itself by hiring new staff for that purpose.

[Signatures]