Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

16 May 2019*

(Reference for a preliminary ruling — Transfers of undertakings — Directive 2001/23/EC — Articles 3 to 5 — Safeguarding of employees' rights — Exceptions — Insolvency proceedings — Proceedings for judicial restructuring by transfer under judicial supervision — Total or partial safeguard of the undertaking — National legislation authorising the transferee, after the transfer, to choose which employees to keep on)

In Case C-509/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the arbeidshof te Antwerpen, afdeling Hasselt (Antwerp Labour Court, Hasselt Section, Belgium), made by decision of 14 August 2017, received at the Court on 21 August 2017, in the proceedings

Christa Plessers

v

Prefaco NV,

Belgische Staat,

THE COURT (Third Chamber),

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

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 October 2018,

after considering the observations submitted on behalf of

– Ms Plessers, by J. Nulens and M. Liesens, advocaten,

– Prefaco NV, by J. Van Acker and S. Sonck, advocaten,

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and by C. Raymaekers, advocaat,

– the European Commission, by M. van Beek and M. Van Hoof, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 23 January 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3 to 5 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 Ms Christa Plessers on the one hand, and Prefaco NV and the Belgische Staat (Belgian State) on the other, concerning the lawfulness of her dismissal.

Legal context

European Union law

3 The first subparagraph of Article 3(1) of Directive 2001/23 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.'

4 Under Article 4 of that directive:

'1. 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.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for terminating the contract of employment or the employment relationship.'

5 In accordance with Article 5(1) of the directive:

'Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority).'

Belgian law

6 Article 22 of the wet betreffende de continuïteit van de ondernemingen (Law on the continuity of undertakings) of 31 January 2009 (*Belgisch Staatsblad*, 9 February 2009, p. 8436), in the version applicable to the dispute in the main proceedings ('the LCU'), provides:

'As long as the court has not given a ruling on the application for judicial restructuring, regardless of whether the action was brought or the means of enforcement commenced before or after the filing of the application:

– the debtor cannot be declared bankrupt or, in the case of a company, be wound up by court order;

– no sale of the debtor's movable or immovable property may take place as a result of the exercise of a means of enforcement.'

7 The first paragraph of Article 60 of the LCU provides:

'The judgment ordering the transfer shall designate a legal representative responsible for organising and carrying out the transfer in the name and on behalf of the debtor. It shall determine the subject matter of the transfer or leave it to the assessment of the legal representative.'

8 Under Article 61(4) of the LCU:

'It is for the transferee to choose the employees it wishes to keep on. That choice must be dictated by technical, economic and organisational reasons and be carried out without unlawful distinction, in particular on account of activities carried out as a staff representative in the undertaking or the part of the undertaking transferred.

The lack of any distinction in that regard shall be deemed to be established if the proportion of employees and staff representatives who were active in the undertaking or the part of the undertaking transferred and who are kept on by the transferee is complied with in the total number of employees kept on.'

9 According to Article 62 of the LCU:

'The appointed legal representative shall organise and carry out the transfer ordered by the court by selling or transferring movable or immovable assets which are necessary or useful for the maintenance of all or part of the undertaking's economic activity.

It shall seek offers while ensuring that priority is given to maintaining all or part of the undertaking's activity, while having regard to the rights of creditors. …

…'

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

10 Ms Plessers was employed by Echo NV on the Houthalen-Helchteren (Belgium) site from 17 August 1992 to April 2013.

11 On 23 April 2012, the rechtbank van koophandel te Hasselt (Commercial Court, Hasselt, Belgium) instituted, at Echo's request, proceedings for judicial restructuring with a view to obtaining the agreement of the creditors, pursuant to Articles 44 to 58 of the LCU. That undertaking was granted a stay until 23 October 2012, and then until 22 April 2013.

12 On 19 February 2013, that is to say before the expiry of the stay, the rechtbank van koophandel te Hasselt (Commercial Court, Hasselt) granted Echo's application to amend the transfer with agreement to a transfer under judicial supervision.

13 On 22 April 2013, that court authorised the legal representatives to transfer the movable and immovable property to Prefaco, one of two companies which submitted a proposal for the acquisition of Echo. In its proposal, Prefaco had offered to keep on 164 employees, which is approximately two thirds of all Echo's staff.

14 The transfer agreement was signed on the same date. The list of employees that were to be kept on was set out in Annex 9 to that convention. Ms Plessers's name did not appear on that list.

15 Moreover, that agreement provided that the transfer would take effect two working days after the date of the judgment of the rechtbank van koophandel te Hasselt (Commercial Court, Hasselt) granting authorisation.

16 On 23 April 2013, Prefaco contacted by telephone the employees kept on requesting them to be present the following day in order for them to carry out their duties. On 24 April 2013, Prefaco confirmed that transfer in writing. As regards the other employees, they were contacted by telephone and were informed by the legal representatives, by letter of 24 April 2013, that they had not been kept on by Prefaco.

17 The letter read as follows:

'This letter constitutes official notification in accordance with Article 64(2) of the [LCU]. [Echo's] activity shall cease on 22 April 2013. Since you have not been kept on by the abovementioned transferees, you must consider the present letter as terminating your contract with your employer, [Echo]. As a potential creditor [of Echo], you may lodge a claim with the undersigned legal representatives ...'

18 The legal representatives also provided Ms Plessers with a form stating the date of 23 April 2013 as being the date of termination of her contract.

19 By letter of 7 May 2013, Ms Plessers placed Prefaco on formal notice to continue her employment. According to the interested party, Prefaco had started to operate the establishment in Houthalen-Helchteren from 22 April 2013, the date on which the rechtbank van koophandel te Hasselt (Commercial Court, Hasselt) gave its judgment.

20 Prefaco rejected Ms Plessers's demand by letter of 16 May 2013, referring to Article 61(4) of the LCU, which entitles the transferee to choose the employees which it wishes to keep on, provided, on the one hand, that such a choice is dictated by technical, economic or organisational reasons and, secondly, that there is no unlawful distinction. Prefaco added that it was not bound by the obligation to renew Ms Plessers employment after the termination of her employment contract with Echo.

21 By application of 11 April 2014, Ms Plessers brought an action before the arbeidsrechtbank te Antwerpen (Labour Court, Antwerp, Belgium).

22 Ms Plessers further applied for the Belgian State to be joined as a party to the proceedings on 24 July 2015.

23 By judgment of 23 May 2016, the arbeidsrechtbank te Antwerpen (Labour Court, Antwerp) dismissed as unfounded all the claims made by Ms Plessers and ordered her to pay all the costs.

24 Ms Plessers appealed against that judgment to the arbeidshof te Antwerpen, afdeling Hasselt (Labour Court, Antwerp, Hasselt Section), which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the right of option for the transferee under Article 61(4) of the … [LCU], in so far as that "judicial reorganisation by transfer under judicial supervision" is applied with a view to maintaining all or part of the transferor or its activities, consistent with Directive [2001/23], in particular with Articles 3 and 5 of that directive?'

Admissibility of the request for a preliminary ruling

25 Prefaco doubts the admissibility of the request for a preliminary ruling, noting that, from its point of view, the question referred is not relevant for the resolution of the dispute in the main proceedings. Since the dispute concerns two private persons, Ms Plessers cannot rely on Directive 2001/23 in order to avoid the application of a clear national legislative provision.

26 In that regard, it should be recalled that it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the judicial decision to be made, to determine, in the light of the particular circumstances of the case, inter alia the relevance of the questions that it submits to the Court. Consequently, where those questions concern the interpretation of a rule of EU law, the Court is, in principle, bound to give a ruling (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 31).

27 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation or assessment of the validity of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25, and of 7 February 2018, *American Express*, C-304/16, EU:C:2018:66, paragraph 32).

28 Since the question referred by the national court concerns the interpretation of Directive 2001/23, it must be noted that, admittedly, in the case of a dispute between private persons, the Court has consistently held that a directive cannot of itself impose obligations on private persons and cannot therefore be relied upon as such against private persons. However, the Court has also repeatedly held that Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited).

29 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of national law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and, consequently, to comply with the third paragraph of Article 288 TFEU (judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 31 and the case-law cited).

30 In the light of the foregoing, it cannot be held that the question referred by the referring court bears no relation to the actual facts of the main action or that it relates to a hypothetical problem.

31 The reference for a preliminary ruling is therefore admissible.

Substance

32 It should be observed as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the question referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgments of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 16 and the case-law cited, and of 31 May 2018, *Zheng*, C-190/17, EU:C:2018:357, paragraph 27).

33 In the present case, by the question referred, the referring court asks the Court to rule on whether the rule of national law referred to is consistent with Articles 3 and 5 of Directive 2001/23.

34 On the one hand, worded in that manner, that question would lead the Court to rule, in the context of proceedings brought under Article 267 TFEU, on the compatibility with EU law of a provision of national law, which it is not for the Court to do (see, to that effect, judgment of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 29).

35 On the other hand, even though that question does not expressly refer to Article 4 of Directive 2001/23, that provision, in so far as it concerns the protection of employees against any dismissal carried out by the transferor or the transferee on the basis of the transfer, is relevant for the answer to be given to the referring court.

36 In those circumstances, the question must be reformulated as asking, in essence, whether Directive 2001/23, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on.

37 In that regard, it must be recalled at the outset that, under Article 5(1) of Directive 2001/23, unless the Member States provide otherwise, Articles 3 and 4 of that directive do not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority.

38 Moreover, the Court has held that in view of the fact that Article 5(1) of Directive 2001/23, in so far as it renders, in principle, inapplicable the system of protection of employees in relation to certain transfers of undertakings, and thus negates the main objective underlying that directive, must necessarily be interpreted strictly (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 41).

39 It is therefore necessary, in the first place, to determine whether the transfer of an undertaking such as that at issue in the main proceedings is covered by the exception laid down in Article 5(1) of Directive 2001/23.

40 In that regard, the Court has held that it is necessary to ensure that such a transfer satisfies the three cumulative conditions laid down by that provision, namely that the transferor is the subject of insolvency or similar proceedings, that those proceedings were initiated for the purposes of the liquidation of the transferor's assets and that they are under the control of a competent public authority (see, to that effect, judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 44).

41 As regards, first of all, the requirement that the transferor must be the subject of insolvency or similar proceedings, it should be noted that, under the national legislation at issue in the main proceedings, as long as the court has not given a ruling on the application for judicial restructuring, the debtor cannot be declared insolvent and, in the case of a company, it cannot be wound up by the courts.

42 As the Advocate General observed in point 55 of his Opinion, it is common ground between the parties that proceedings for judicial restructuring cannot be regarded as being insolvency proceedings.

43 Moreover, although judicial restructuring proceedings such as those at issue in the main proceedings may lead to the insolvency of the undertaking concerned, such an outcome is neither automatic nor certain.

44 As regards, next, the requirement that proceedings must have been instituted for the purposes of the liquidation of the transferor's assets, it is apparent from the case-law of the Court that it is not met in the case of proceedings aimed at ensuring the continuation of the activity of the undertaking concerned (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 47 and the case-law cited).

45 As is apparent from the very wording of the question referred, the competent national court ordered the proceedings for judicial restructuring by transfer under judicial supervision in order to maintain all or part of Echo or its activity.

46 Lastly, as regards the requirement that the proceedings in question must be conducted under the supervision of a competent public authority, it is apparent from the national legislation that the legal representative appointed by the judgment ordering the transfer is responsible for putting in place and carrying out that supervision in the name and on behalf of the debtor. Moreover, the legal representative is to seek offers while ensuring that priority is given to maintaining all or part of the undertaking's activity, and while having regard to the rights of creditors. Where there are several comparable offers, priority is given to the person who guarantees stability of employment by way of a social agreement.

47 As noted by the Advocate General in point 68 of his Opinion, the supervision thus exercised by the legal representative in the context of the proceedings for judicial restructuring by transfer under judicial supervision cannot satisfy that requirement, in so far as its scope is more restricted than that of the supervision exercised by the legal representative in the context of insolvency proceedings.

48 It follows from the foregoing that proceedings for judicial restructuring by transfer under judicial supervision, such as those at issue in the main proceedings, do not meet the requirements laid down in Article 5(1) of Directive 2001/23 and that, consequently, transfers carried out in such circumstances are not covered by the exception provided for in that provision.

49 Thus, Articles 3 and 4 of Directive 2001/23 remain applicable to a case such as that at issue in the main proceedings.

50 In those circumstances, it is necessary, secondly, to determine whether Articles 3 and 4 of that directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides the transferee with the option to choose the employees it wishes to keep on.

51 In that regard, first of all, it is apparent from Article 3(1) of Directive 2001/23 that the rights and obligations of the transferor arising from a contract of employment or from an employment relationship existing on the date of transfer of the undertaking are, by reason of such transfer, to be transferred to the transferee.

52 As the Court has repeatedly held, Directive 2001/23, Article 3 thereof included, is intended to safeguard the rights of employees in the event of a change of employer by making it possible for them to continue to work for the new employer on the same terms as those agreed with the transferor. The purpose of that directive is to ensure, as far as possible, that the contract of employment continues unchanged with the transferee, in order to prevent the employees concerned from being placed in a less favourable position solely as a result of the transfer (see, to that effect, order of 15 September 2010, *Briot*, C-386/09, EU:C:2010:526, paragraph 26 and the case-law cited).

53 Furthermore, under Article 4(1) of Directive 2001/23, the transfer of an undertaking does not in itself constitute grounds for dismissal by the transferor or the transferee. That being said, that provision does not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

54 It is clear from the wording of that provision that dismissals which occur in the context of the transfer of an undertaking must be justified by economic, technical or organisational reasons relating to employment which do not intrinsically relate to that transfer.

55 The Court has thus held that the absence of any agreement between the transferee and the lessors on a new lease, the lack of suitable alternative business premises or the impossibility of transferring staff to other sites may constitute economic, technical or organisational reasons within the meaning of Article 4(1) of Directive 2001/23 (see, to that effect, judgment of 16 October 2008, *Kirtruna and Vigano*, C-313/07, EU:C:2008:574, paragraph 46).

56 In the present case, it is apparent from the national legislation at issue in the main proceedings that the transferee is entitled to choose the employees whom it wishes to keep on, although that choice must be based on technical, economic and organisational reasons and be implemented without making any prohibited distinction.

57 It appears that the national legislation is aimed, contrary to the context of which Article 4(1) of Directive 2001/23 forms part, not at employees who are made redundant but to those whose contracts of employment are transferred, it being understood that the choice of those persons by the transferee is based on technical, economic and organisational reasons.

58 While it is true that employees who are not kept on by the relevant transferee, and, accordingly, made redundant, are implicitly but necessarily those for which no technical, economic or organisational reasons require, from the transferee's point of view, the transfer of the contract of employment, the fact remains that the transferee is not required to show that the redundancies arising from the transfer are due to technical, economic or organisational reasons.

59 It is therefore apparent that the application of national legislation such as that at issue in the main proceedings is liable seriously to compromise observance of the principal objective of Directive 2001/23, as set out in Article 4(1) thereof and referred to in paragraph 52 of the present judgment, namely the protection of employees against unjustified dismissal in the event of a transfer of an undertaking.

60 It should, however, be recalled, as has already been pointed out in paragraphs 28 and 29 of the present judgment, that a national court, hearing a dispute between private persons, which finds itself unable to interpret provisions of its national law which are consistent with a directive which has not been transposed or has been incorrectly transposed, is not required, solely on the basis of EU law, to disapply those national provisions which are contrary to the provisions of that directive. The party injured as a result of the domestic legislation's lack of compliance with the directive may nevertheless rely on the case-law stemming from the judgment of 19 November 1991, *Francovich and Others*

(C-6/90 and C-9/90, EU:C:1991:428), in order to obtain from the Member State, where appropriate, compensation for the damage suffered (see, to that effect, judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraphs 49 and 56).

61 In the light of the foregoing, the answer to the question referred for a preliminary ruling is that Directive 2001/23, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on.

Costs

62 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:

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, in particular Articles 3 to 5 thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the event of the transfer of an undertaking which has taken place in the context of proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep on.

[Signatures]