

1. Article 1 (1) of Council Directive 77/187 on the safeguarding of employees' rights in the event of transfers of undertakings must be interpreted as meaning that the directive applies where, upon the termination of a non-transferable lease, the owner of an undertaking leases it to a new lessee who carries on the business without interruption with the same staff, who had been given notice on the expiry of the initial lease.
2. An employee cannot waive the rights conferred on him by the mandatory provisions of Directive 77/187 even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the directive does not preclude an agreement with the new employer to alter the employment relationship, in so far as an alteration is permitted by the applicable national law in cases other than the transfer of an undertaking.

REPORT FOR THE HEARING
delivered in Case 324/86 *

I — Facts and written procedure

1. The purpose 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 (Official Journal 1977, L 61, p. 26) 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' (second recital in the preamble).

Article 1 (1) of the directive provides that it is to apply to 'the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

Under Article 3 (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 within the meaning of Article 1 (1) shall, by reason of such transfer, be transferred to the transferee'. Article 3 (2) ensures that the transferee continues to observe the conditions of work agreed in any collective agreement on the same terms applicable to the transferor under that agreement.

Article 4 (1) of the directive also provides that the transfer may not in itself constitute grounds for dismissal by the transferor or the transferee without prejudice to dismissals that may take place for economic, technical or organizational reasons entailing changes in the work force.

* Language of the Case: Danish.

Article 7 states that the directive 'shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.

2. The provisions of Directive 77/187 were implemented in Denmark by Law No 111 of 21 March 1979 on the rights of employees on the transfer of undertakings (Lovt. 1979, p. 326). That law is applicable to 'the transfer of an undertaking or a part thereof situated within the geographical area of application of the Treaty establishing the European Economic Community' (Article 1 (1)).

Article 2 (1) of Law No 111 is worded as follows:

'Where an undertaking or a part thereof is transferred, the transferee shall immediately succeed to the rights and obligations existing on the date of the transfer by virtue of:

- (1) collective agreements;
- (2) provisions concerning the terms and conditions of pay and work which are laid down or approved by the public authorities; and
- (3) individual agreements concerning the terms and conditions of pay and work.'

3. Kim Erik Tellerup was employed with effect from 1 October 1982 by Irma Catering A/S as a restaurant manager at Palads Teatret (the Palace Theatre). Irma

Catering had taken a lease of the restaurants and bars in that theatre from the same date pursuant to a contract concluded with the owner, A/S Palads Teatret. Under that contract the lessee was not entitled to transfer its rights under the lease to third parties.

As regards the recruitment of personnel it was agreed, *inter alia*, that the first three months were to be considered as a trial period during which either side could terminate the employment on 14 days' notice.

The lease was conditional on Irma Catering's obtaining a licence to sell alcoholic beverages. The company failed to obtain the necessary licence and was therefore obliged to give up the lease; consequently, on 28 January 1983 it dismissed its staff, including Mr Tellerup, who, in accordance with the applicable Danish law, was dismissed with three months' notice expiring on 30 April 1983. However, Irma Catering continued to run the restaurants and bars until they were taken over by the new lessee.

On 4 February 1983, without any intervention on the part of Irma Catering, Palads Teatret concluded a new lease with Daddy's Dance Hall A/S for the lease of the restaurants and bars in question.

On 7 February 1983 Daddy's Dance Hall concluded a management contract with Mr Tellerup pursuant to which Mr Tellerup was once again engaged as restaurant manager with effect from the date of the transfer of the lease, that is to say 25 February 1983. The contract stipulated a trial period of three months during which either party could give 14 days notice. The clause concerning the trial period was inserted in the contract at Mr Tellerup's request.

On the basis of that contract Mr Tellerup was dismissed on 26 April 1983 with 14 days' notice.

The principal issue in the main proceedings is the period of notice to which Mr Tellerup was entitled when on 26 April 1983 he was dismissed from his post as manager of the Daddy's Dance Hall restaurant.

In this respect, Sø- og Handelsretten (the Maritime and Commercial Court), Copenhagen, which heard the case at first instance, held on 20 December 1984 that Mr Tellerup's employment did not fall within the abovementioned Law No 111 of 21 March 1979 on the rights of employees on the transfer of undertakings and that consequently Mr Tellerup was only entitled to 14 days' notice. Sø- og Handelsretten found as a fact, *inter alia*, that as the new lessee Daddy's Dance Hall took over only the stock from Irma Catering and left it to Mr Tellerup, as restaurant manager, to recruit new staff. It is also stated in the judgment that, with the exception of one person, all Irma Catering's former employees who had been dismissed on 28 January 1983 but had not yet left continued to work at Daddy's Dance Hall under the same conditions as before under new contracts which were identical to those which they had signed with Irma Catering.

The plaintiff appealed to Højesteret (the Supreme Court), which considered that the case involved questions of interpretation of Directive 77/187 which might have a bearing on the interpretation of the applicable Danish legislation. Højesteret consequently stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Must 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 be interpreted as meaning that the directive applies where a non-transferable lease of a business is terminated and as a result, without there being any interruption in the running of the business, the lessor leases the business to a new lessee, who re-employs the staff, who had been given notice but had not left their employment, and buys the former lessee's stock?'

If Question 1 is answered in the affirmative:

'(2) Can an employee who enters into an agreement with the purchaser of a business waive rights under the directive where by so doing he obtains certain advantages so that his conditions of employment, taken as a whole, are not altered in such a way as to leave him in a worse position?'

4. The decision making the reference was entered in the Court Registry on 22 December 1986.

In accordance with Article 20 of the Statute of the Court of Justice of the EEC, written observations were submitted by the United Kingdom, represented by H. R. L. Purse of the Treasury Solicitor's Department, and by the Commission of the European Communities, represented by its Legal Adviser Føns Buhl and by Enrico Traversa, a member of its Legal Department.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to assign the case to the Third Chamber and to open the oral procedure without any preparatory inquiry.

That does not, however, mean that there can be no transfer to which the directive applies. Where there is a surrender of a lease and a grant of a new lease to a third party and the business activity continues throughout, one must consider the way in which the business has changed hands.

II — Written observations

1. *The first question*

Both the United Kingdom and the Commission argue that Directive 77/187 is applicable in a case such as that before the national court.

At the end of the lease, the lessor becomes in effect the owner of the business, even if only for a moment. Upon his granting possession of the premises under a new lease to a third party, the business is then transferred to the new lessee. There is thus a chain of ownership which links the first lessee to the new lessee and one must consider each transfer in that chain in accordance with the directive. In the United Kingdom, double transfers of this nature have arisen in particular in relation to petrol stations.

(a) The United Kingdom takes the view that the first question raises the problem of the applicability of the directive in relation to businesses which are situated in and tied to leased property. Where, as in this case, the lease is not transferable the lessee will be unable to transfer his business directly to a third party. It is likely that he can transfer to such a person his stock-in-trade but he will only be able to transfer most attributes of the business to the lessor on surrender of the lease.

In the light of the foregoing, the United Kingdom considers that in this case the directive is capable of applying if it is found that the business in question was first transferred, if only notionally, to the lessor, Palads Teatret, and was then transferred by Palads Teatret to Daddy's Dance Hall so that the latter was put in possession of the same business as a going concern.

Consequently, in the case of a non-transferable lease there can in general be no direct transfer from one lessee to another even though, by reason of the arrangements made on the surrender of the lease, the business activity continues throughout the transfer.

(b) The Commission explains that Directive 77/187/EEC relates to the transfer by agreement of an undertaking in whole or in part. In the case of most categories of undertakings the concept of transfer covers transfer by purchase, where there is a real change of owner, and transfer by gift, for example the transfer of an undertaking to a foundation. However, it often happens that certain types of undertakings are leased. In such a case, it is the lessee and not the owner who undertakes obligations to the

employees. The employees are therefore not affected by any change of owner so long as the lease is in force. On the other hand, the workers need the protection conferred by the directive when the lease is transferred.

Since the directive uses the expression 'transfer . . . to another employer' and is thus not necessarily limited to transfers to another owner, it is evident that it is applicable to a case where a lessee takes over a business as a going concern and the question of transferring existing employment contracts arises.

The critical factor in deciding whether or not the directive is applicable is whether the lessee takes over a business as a going concern and continues the same, or at least similar, activities (see the judgment of 18 March 1986 in Case 24/85 *Spijkers v Benedict*, [1986] ECR 1119).

However, the present case has the special feature that the transfer of the undertaking took place in two stages, inasmuch as the undertaking was first transferred by the original lessee to the owner who then retransferred the lease to the new lessee. Both transfers were by agreement. The operation of the undertaking was not interrupted by the transactions and was not taken over at any point by the owner. The original lessee's obligations, in particular regarding the workers' claims to wages and paid holidays, therefore continued in principle until the three-month period of notice had elapsed. The employment relationships were therefore still in existence at the time when the new lessee took over the undertaking.

Consequently, the fact that the undertaking was transferred in two stages does not of itself prevent the undertaking from retaining its identity as an economic unit. This conclusion is buttressed by the fact that the procedure used may not permit evasion of the directive. If the undertaking continues its business activities without interruption the employees are in the same situation as if there had been a direct transfer from owner to owner and they are therefore entitled to equivalent protection.

2. *The second question*

Both the United Kingdom and the Commission consider that, with certain provisos, the second question must be answered in the negative.

(a) The United Kingdom assumes that the problem raised by this question is whether, following the transfer, Daddy's Dance Hall is obliged, by reason of Mr Tellerup's period of employment, to give him three months' notice of termination rather than 14 days' notice.

The purpose of the directive is to protect employees in the event of a change of employer. It is not therefore a voluntary code but imposes a transfer of the rights and obligations arising from the contract of employment. Once he enters the employment of the transferee, the employee can insist on the performance of those obligations. Furthermore, under Article 8, Member States are required to adopt the provisions necessary to comply with the directive.

However, this does not mean that there can be no change in the terms of the contracts of employment. Article 3 (1) provides that the transferee is put in the position of the transferor in respect of contracts of employment. Nothing prevents him from seeking an alteration in the terms of the contract of employment of the employees but, in doing this, he is in the same position as the transferor would have been. It is therefore open to an employee to agree with the purchaser an amendment to his contract of employment to the same extent as he could have agreed an amendment with the transferor.

In this case Mr Tellerup would be able to agree that the three-month period of notice to which he would normally be entitled should be replaced by a 14-day period of notice if and only if he could have reached the same agreement with Irma Catering.

(b) The Commission states that it may be justified for an employee to attempt to obtain special entitlements when the ownership of the undertaking changes, such as a trial period allowing him to take stock of working conditions under the new employer. In return the employee may perhaps give up certain rights. In this case Mr Tellerup's remuneration, which was originally to have taken the form of a commission, was replaced by a fixed salary. This constituted an amendment to his conditions of employment which might turn out favourable or unfavourable to the employee according to whether the undertaking's turnover increased or decreased.

In fact the problem is who must assess, at the time when the contract is concluded, whether the conditions of employment as a whole place the employee in a less favourable situation. The directive is silent on the point. Although Article 7, taken in conjunction with the purpose of the directive, suggests that the directive must be interpreted restrictively and favourably to the employee, there is no provision in the directive which precludes a general assessment of the employees' conditions of work.

More particularly, Article 3 (1) may be understood as meaning that contracts of employment or employment relationships must be maintained as they stood at the date of the transfer, which would mean that the worker may not give up some rights in order to obtain others in return. However, that provision may equally refer to the level of rights which the employee initially obtained, which would mean that the conditions may be amended provided that the worker is never placed in a less favourable situation, viewed as a whole, than that which was originally agreed.

In conclusion, the Commission suggests that the answer to the second question should be that a worker who enters into a contract with the transferee of an undertaking may not waive rights derived from the provisions of Directive 77/187/EEC, in particular Article 3 (1), which, having regard to the scope and purpose of the directive, appear to be of a mandatory nature.

U. Everling
Judge-Rapporteur