

JUDGMENT OF THE COURT (Third Chamber)

15 December 2005 ^{*}

In Joined Cases C-232/04 and C-233/04,

REFERENCES for a preliminary ruling under Article 234 EC from the Arbeitsgericht Düsseldorf (Germany), made by decisions of 5 May 2004, received at the Court on 3 June 2004, in the proceedings

Nurten Güney-Görres (C-232/04),

Gül Demir (C-233/04)

v

Securicor Aviation (Germany) Ltd,

Kötter Aviation Security GmbH & Co. KG,

^{*} Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet, S. von Bahr, A. Borg Barthet (Rapporteur) and U. Löhmus, Judges,

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 20 April 2005,

after considering the observations submitted on behalf of:

- Kötter Aviation Security GmbH & Co. KG, by F. Kasper, T. Wegmann and L. Kolks, Rechtsanwälte,
- Securicor Aviation (Germany) Ltd, by C. Berger, Rechtsanwalt,
- the Federal Republic of Germany, by C.-D. Quassowski, A. Tiemann and M. Lumma and U. Forsthoff, acting as Agents,

— the Commission of the European Communities, by G. Rozet, H. Kreppel and F. Erlbacher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2005,

gives the following

Judgment

- 1 The references for a preliminary ruling concern the interpretation of Article 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 Those references were submitted in the course of proceedings brought by Ms Güney-Görres and Ms Demir against Kötter Aviation Security GmbH & Co. KG ('Kötter'), the company tasked, by contract, to carry out security checks on passengers and baggage at Düsseldorf airport, and their former employer, Securicor Aviation (Germany) Ltd ('Securicor'), the company tasked previously with the same services under a contract which had been terminated. Those employees brought an action against Kötter before the Arbeitsgericht Düsseldorf (employment tribunal), for a declaration that the employment relationship existing between them and Securicor continued with Kötter on the basis of Paragraph 613a of the German Civil Code (Bürgerliches Gesetzbuch, hereinafter the 'BGB') which implemented Directive 2001/23 in German law.

Legal context

Community legislation

- 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 businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).
- ⁴ The scope of Directive 2001/23 is established in Article 1 thereof, which provides:
- '1. (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.'

- 5 The wording of Article 1 of Directive 2001/23 is identical to that of Article 1 of Directive 77/187, as amended by Directive 98/50 where the fourth recital in the preamble reads as follows:

‘... considerations of legal security and transparency require that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice; ... such clarification does not alter the scope of Directive 77/187/EEC as interpreted by the Court of Justice’.

- 6 Articles 3 and 4 of Directive 2001/23 contain the following provisions:

‘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 shall, by reason of such transfer, be transferred to the transferee.

...

Article 4

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.

...

National law

- 7 Provision is made for the transfer of employment relationships by reason of a transfer of a business and for the associated prohibition against dismissal in Paragraph 613a of the BGB, entitled 'Rights and obligations in the event of transfers of businesses', which reads:

'(1) Where a business or part of a business is transferred to another owner by a legal transaction, the rights and obligations arising from the employment relationships existing on the date of the transfer shall pass to that owner. Where those rights and obligations are subject to the provisions of a collective agreement or works agreement, they shall be incorporated into the employment relationship between the new owner and the employee and may not be amended in a manner unfavourable to the employee for at least one year following the date of the transfer. The second sentence shall not apply where the rights and obligations under the new owner are subject to the provisions of a different collective agreement or different works agreement. The rights and obligations may be amended before expiry of the period prescribed in the second sentence if the collective agreement or works agreement ceases to apply or if either party to a different collective agreement, which the new owner and the employee agree is applicable, is not bound by its provisions.

- (2) The former employer and the new owner shall be jointly and severally liable in respect of obligations under subparagraph 1 if such obligations arose before the transfer date and fall to be met within one year of that date. However, if such obligations fall to be met after the transfer date, the former employer shall be liable only in respect of the period prior to the transfer date.
- (3) Subparagraph 2 shall not apply where a legal person or a commercial partnership is dissolved by means of a reorganisation.
- (4) Termination of an employee's employment relationship by the former employer or new owner by reason of the transfer of a business or part of a business shall be without effect. This shall be without prejudice to the right to give notice on other grounds.
- (5) The former employer or new owner shall be required to give written notification, prior to a transfer, to employees affected by that transfer of:
 - 1. the date or proposed date of the transfer;
 - 2. the reasons for the transfer;
 - 3. the legal, economic and social implications of the transfer for the employees, and

4. any measures envisaged in relation to the employees.

(6) Employees may object in writing to the transfer of their employment relationships within one month of receipt of the notification under subparagraph 5. Objections may lie against the former employer or the new owner.'

Facts

8 Ms Güney-Görres and Ms Demir were employed by Securicor, for an indefinite duration, as security attendants assigned to carry out security checks on passengers and their baggage at Düsseldorf airport.

9 Under the terms of a contract of 5 April 2000, concluded between the German State, represented by the Bundesministerium des Inneren (Federal Minister of the Interior, hereinafter the 'BMI'), and Aviation Defence International Germany Ltd, the latter was tasked with carrying out checks on passengers and their baggage at Düsseldorf airport in accordance with the terms of the third sentence of Paragraph 29c(1) of the Law on Aviation (Luftverkehrsgesetz), in the version of 27 March 1999 (BGBl. 1999 I, p. 550). Securicor took over responsibility for implementing the contract, which expired on 31 December 2003.

10 As stipulated in the contract, the German State made available to Securicor the aviation security equipment necessary to carry out the security checks on passengers, that equipment consisting of, inter alia, walk-through metal detectors, a baggage conveyor belt with automatic X-ray screening (baggage checking system and screening devices), hand-held metal detectors and explosives detectors.

- 11 Securicor had 306 employees, 295 of whom were working exclusively in aviation security. The attendants engaged to carry out such operations had received training for that purpose on a special course of a minimum four-week duration and had to have passed an examination to qualify as an aviation security assistant and have obtained the national accreditation required to perform the checks. When carrying out the airport security checks, the employees were under the authority of the competent office of the Bundesgrenzschutz (Federal Border Guard).
- 12 By letter of 5 June 2003, the BMI notified Securicor that the contract awarded for airport security checks at Düsseldorf airport would not be extended after the following 31 December. On 16 September 2003, the BMI notified Securicor that the contract in question had been awarded to Kötter.
- 13 In response to an enquiry made by Securicor, the director of Kötter stated that it was not interested in a transfer of the business. By letter of 17 November 2003, Kötter also notified Securicor that it proposed to take over only a small proportion of the latter's employees.
- 14 By letters of 26 November 2003, Securicor gave notice to Ms Güney-Görres and Ms Demir that their employment relationships would be terminated with effect from 31 December 2003. Securicor also terminated the employment relationships of all other employees employed under the contract concluded with the German State.
- 15 On 31 December 2003 Securicor ceased to carry out, at Düsseldorf airport, the security tasks entrusted to it by that State.

- 16 From 1 January 2004, under a contract concluded with the German State, Kötter carried out the security checks on the passengers in that airport and their baggage. The subject-matter of the contract was essentially the same as that of the contract concluded with Securicor. Kötter also used the aviation security equipment owned by that State.
- 17 On the same date, Kötter took on 167 employees previously employed by Securicor. Ms Güney-Görres and Ms Demir were not, however, included in that number. The employees taken on by Kötter and engaged to carry out airport security checks likewise came under the authority of the competent office of the Bundesgrenzschutz.

The main proceedings and the questions referred for a preliminary ruling

- 18 The issue in the main proceedings is whether the notice given by Securicor to terminate the employment relationships in question as from 31 December 2003 ended the employment relationships between the claimants in the main proceedings and Securicor and/or between them and Kötter or whether, rather, that termination falls within the scope of a transfer of a business, the employment relationships having been transferred to Kötter by way of a transfer of a business within the meaning of Article 1 of Directive 2001/23.
- 19 According to the Arbeitsgericht Düsseldorf, the proceedings turn on the interpretation given to the term 'transfer of a business' within the meaning of Article 1 of Directive 2001/23.
- 20 The referring court points out that, under the Court's case-law, a transfer of assets to the contractor is one of the criteria characterising a transfer of a business. That court is uncertain whether the condition that a transfer of assets exists only if the assets

are used on an independent commercial basis, a criterion inserted by the case-law of the Bundesarbeitsgericht (the Federal Employment Tribunal), is permitted by Community law.

- 21 The Arbeitsgericht Düsseldorf considers that a significant issue as far as the decision in the main proceedings is concerned is whether there was a transfer of the assets, composed of the aviation security equipment, such as walk-through metal detectors, a baggage conveyor belt with automatic X-ray screening (baggage checking system), hand-held metal detectors and explosives detectors, from Securicor to Kötter.
- 22 The referring court takes the view that the equipment in question was not used in an independent commercial manner, in so far as its maintenance was the responsibility of the German State, the contracting authority, which also had to bear the cost. There was absolutely no scope for the relevant contractors to use the equipment for their own purposes. They could neither obtain any additional economic benefit from it, nor determine the manner and extent of its use. Furthermore, under the contractual specifications, the contractor was obliged to use that equipment.
- 23 In those circumstances, the Arbeitsgericht Düsseldorf decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
- ‘(1) In examining whether there is — irrespective of the question of ownership — a transfer of a business within the meaning of Article 1 of Directive 2001/23/EC in the context of a fresh award of a contract, does the transfer of the assets from

the original contractor to the new contractor — having regard to all the facts — presuppose their transfer for independent commercial use by the transferee? By extension, is conferment on the contractor of a right to determine the manner in which the assets are to be used in its own commercial interest the essential criterion for a transfer of assets? On that basis, is it necessary to determine the operational significance of the contracting authority's assets for the service provided by the contractor?

(2) If the Court answers Question 1 in the affirmative:

- (a) Is it precluded to classify assets as being for independent commercial use if they are made available to the contractor by the contracting authority solely for their use and responsibility for maintaining those assets, including the associated costs, is borne by the contracting authority?

- (b) Is there independent commercial use by the contractor when, for the purpose of conducting airport security checks, it uses the walk-through metal detectors, hand-held metal detectors and X-ray equipment supplied by the contracting authority?

²⁴ By order of the President of the Court of 9 July 2004, Cases C-232/04 and C-233/04 were joined for the purposes of the written and oral procedures and of the judgment.

Questions referred for a preliminary ruling

- 25 By its first question, the referring court asks whether, in the context of an assessment whether there is a transfer of a business within the meaning of Article 1 of Directive 2001/23, a finding that there was a transfer of the assets from the original contractor to the new contractor presupposes their transfer for independent commercial use by the transferee. By a second question, which the referring court asks in the event of its first question being answered in the affirmative, the Court is asked to define, in outline, that legal concept of independent commercial use.
- 26 Securicor submits that, according to the Court's case-law, the criterion of transfer of the main tangible assets is met if the new operator uses them. It is irrelevant whether that use is under its own power of disposal or the contracting authority's instructions. Therefore, Securicor submits that the criterion of independent commercial use cannot be upheld.
- 27 The German Government and Kötter submit that the decisive criterion indicating a transfer of the assets from the original contractor to the new contractor is whether those assets were transferred to the latter for the purpose of independent commercial use. They argue that that criterion is consistent with the Court's case-law. According to that Government, the legal concept in question must be understood as meaning that the new contractor uses the assets under its own power of disposal and its own calculation of costs with a view to obtaining an additional economic benefit. On the other hand, the German Government takes the view that determining whether the assets made available by the contracting authority constitute the 'end' or the 'means' of the service provided by the contractor is not sufficient, in itself, to clearly define that concept.

- 28 The Commission of the European Communities submits that the first question should be answered in the negative. It considers that the matter of the interpretation of the term ‘transfer of assets’ may not be dealt with separately from the other criteria which must be considered when examining whether there has been a transfer of an undertaking or business. Concerning the criterion of the transfer of material assets, the Commission states that there is no doubt that, from 1 January 2004, Kötter’s employees used, just as Securicor’s employees did, the material assets, such as the walk-through metal detectors, baggage checking system, hand-held metal detectors and explosives detectors. It draws attention to the Court’s case-law, under which it is irrelevant whether those assets belong to the contractor or not. The Commission is of the opinion that the Bundesarbeitsgericht’s case-law, which restricts the assignment of assets to a contractor’s business by imposing the condition that ‘assets are only made available [to someone] with the right to make independent commercial use of them’, is not consistent with Directive 2001/23.

Findings of the Court

- 29 As set out in Article 1(1)(a) Directive 2001/23, that ‘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’.
- 30 As provided in Article 1(1)(b), ‘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’. The fourth recital in the preamble to Directive 98/50 indicates that that information was inserted in order to clarify the legal concept of transfer in the light of the Court’s case-law.

- 31 According to that case-law, the aim of Directive 2001/23 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of that directive is, therefore, whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed (see, *inter alia*, Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12; Case C-13/95 *Süzen* [1997] ECR I-1259, paragraph 10 and Case C-340/01 *Abler and Others* [2003] ECR I-14023, paragraph 29).
- 32 For Directive 2001/23 to be applicable the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (see *inter alia* Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term 'entity' thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective (see *inter alia* *Süzen*, cited above, paragraph 13 and *Abler and Others*, cited above, paragraph 30).
- 33 In order to determine whether the conditions for the transfer of an organised economic entity are met, 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 (see, *inter alia*, Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, paragraph 24, and the cases cited above *Spijkers*, paragraph 13, *Süzen*, paragraph 14, and *Abler and Others*, paragraph 33).
- 34 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* *Spijkers*, paragraph 13; *Süzen*, paragraph 14, and *Abler and Others*, paragraph 34).

35 The national court, in assessing the facts characterising the transaction in question, must take into account the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion indicating a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business (see *Süzen*, paragraph 18; Joined Cases C-173/96 and C-247/96 *Hidalgo and Others* [1998] ECR I-8237, paragraph 31, and *Abler and Others*, paragraph 35).

36 The aim of the questions referred by the Arbeitsgericht Düsseldorf is to define the conditions under which it may be considered that one of the circumstances to be taken into consideration, namely, that relating to the transfer of assets, is met. The referring court asks whether a finding that there was transfer of assets presupposes their transfer for independent commercial use.

37 In this connection, it must be noted that it is clear from the wording of Article 1 of Directive 2001/23 that it is applicable whenever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the undertaking or business and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking or business, regardless of whether or not ownership of the tangible assets is transferred (*Abler and Others*, paragraph 41, and the case-law cited).

38 In paragraph 42 of the judgment in *Abler and Others*, the Court held that the fact that the tangible assets taken over by the new contractor did not belong to its predecessor but were provided by the contracting authority cannot preclude the existence of a transfer of an undertaking or business within the meaning of Directive 77/187.

- 39 It does not appear that the fact that independent commercial use was made of the assets taken over by a contractor is decisive in establishing whether or not there has been a transfer of assets.
- 40 That criterion is derived neither from the wording of Directive 2001/23 nor from its objectives, which are to ensure the protection of workers where there is a change of undertaking or business and to allow the completion of the internal market.
- 41 Thus, the fact that the tangible assets are taken over by the new contractor without those assets having been transferred to him for independent commercial use does not preclude there being either a transfer of assets, or a transfer of an undertaking or business within the meaning of Directive 2001/23.
- 42 The answer to the first question asked by the referring court is thus that Article 1 of Directive 2001/23 must be interpreted as meaning that, in examining whether there is a transfer of an undertaking or business within the meaning of that article, in the context of a fresh award of a contract and having regard to all the facts, the transfer of the assets for independent commercial use is not an essential criterion for the transfer of those assets from the original contractor to the new contractor.
- 43 Given that the Court answered the first question in the negative, there is no need to reply to the second question.

44 It is for the national court to establish, in light of all of the foregoing factors and in the course of a global assessment, whether there has been a transfer of an undertaking or business in the case in the main proceedings. It must be noted, in this connection, that the transfer of assets is only a single factor in the overall assessment which must be made by the national court when examining whether or not there is a transfer of an undertaking or business within the meaning of Article 1 of Directive 2001/23.

Costs

45 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 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 in examining whether there is a transfer of an undertaking or business within the meaning of that article, in the context of a fresh award of a contract and having regard to all the facts, the transfer of the assets for independent commercial use is not an essential criterion for a finding that there was a transfer of those assets from the original contractor to the new contractor.

[Signatures]