

JUDGMENT OF THE COURT (Second Chamber)

11 November 2004 \*

In Case C-425/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour administrative (Luxembourg), made by decision of 21 November 2002, received at the Court on 25 November 2002, in the proceedings

**Johanna Maria Boor, née Delahaye,**

v

**Ministre de la Fonction publique et de la Réforme administrative,**

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann and N. Colneric (Rapporteur), Judges,

\* Language of the case: French.

Advocate General: P. Léger,

Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 May 2004,

after considering the observations submitted on behalf of:

- Johanna Maria Boor, née Delahaye, by R. Assa and N. Prüm-Carré, avocats,
  
- the Luxembourg Government, by S. Schreiner, acting as Agent, and A. Rukavina, avocat,
  
- the Italian Government, by I.M. Braguglia and D. Del Gaizo, acting as Agents, and A. Gingolo, avvocato dello Stato,
  
- the Portuguese Government, by L. Inez Fernandes and A. Seiça Neves, acting as Agents,

— the Commission of the European Communities, by A. Aresu and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 June 2004,

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns essentially the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26).
  
- 2 The reference was made in the course of proceedings between Mrs Boor, née Delahaye, and the Minister for Public Service and Administrative Reform concerning the minister's refusal to maintain the remuneration under the contract of employment originally concluded between Mrs Boor and Foprogest ASBL (association sans but lucratif, non-profit-making association) ('Foprogest'), a legal person governed by private law, after the latter's undertaking had been transferred to the Luxembourg State.

## Legal background

### *Community legislation*

3 Article 1(1) of Directive 77/187 provides:

‘This Directive shall 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.’

4 Article 2 of that directive provides:

‘For the purposes of this Directive:

...

(b) “transferee” means any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the business;

...’

5 Article 3(1) and (2) of the directive states:

‘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.

...

2. Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the proviso that it shall not be less than one year.’

6 Article 4 of the directive reads as follows:

‘1. The transfer of an undertaking, business or part of a business shall not in itself constitute grounds for dismissal by the transferor or the transferee. 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.

...

2. If the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.'

7 Directive 77/187 was amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88), which, under Article 2 of that directive, was to be transposed by 17 July 2001.

8 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) codified Directive 77/187, taking into account the amendments made to it by Directive 98/50.

*National legislation*

9 Article 36 of the Loi du 24 mai 1989 sur le contrat de travail (Law of 24 May 1989 on contracts of employment, *Mémorial A* 1989, p. 611, ‘the Law of 24 May 1989’) prescribes:

- ‘1. If any change arises in the legal situation of the employer, in particular by reason of succession, sale, merger, transformation of business assets or incorporation, all contracts of employment in force on the date of that change shall continue to exist between the new employer and the employees of the undertaking.
  
2. A transfer of the undertaking as a result inter alia of a legal transfer or merger shall not in itself constitute grounds for dismissal by the transferor or the transferee.

If the contract of employment 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 termination of the contract of employment.

...’

10 Article 37 of that law provides:

‘Any change to the detriment of the employee relating to an essential term of the contract of employment must, in order not to be void, be notified to the employees in the forms and within the time-limits referred to in Article 19 and 20 and must state the date from which it takes effect. In such a case the employee may ask the employer for the reasons for the change and the employer is obliged to state those reasons in the forms and within the time-limits laid down in Article 22.

...

A termination of the contract of employment following from the employee’s refusal to accept the change notified to him shall constitute a dismissal against which the legal proceedings referred to in Article 28 may be brought.’

11 The conditions and amounts of the remuneration of employees of the Luxembourg State are fixed by Grand-Ducal regulation.

### **The main proceedings**

12 Mrs Boor, née Delahaye, was an employee of Foprogest. There was no collective agreement governing her remuneration.

- 13 Foprogest's objects consisted in particular of promoting and implementing training activities intended to improve the social and occupational position of persons seeking work and unemployed persons in order to enable them to be integrated or reintegrated into the workforce. Its resources consisted essentially of grants, donations and legacies.
- 14 Foprogest's activity was transferred to the Luxembourg State, namely the Minister for National Education, Vocational Training and Sport. The activity thus taken over is now carried on in the form of an administrative public service.
- 15 With effect from 1 January 2000, Mrs Boor was taken on as an employee of the Luxembourg State. Other workers who had previously been employed by Foprogest were also taken on by the State. That operation gave rise to the conclusion of new contracts of employment between the State and the employees concerned. It was in those circumstances that Mrs Boor on 22 December 1999 concluded a contract for an indefinite period with the minister concerned.
- 16 By virtue of the Grand-Ducal regulation on the remuneration of State employees, Mrs Boor was then allocated a lower remuneration than that she had received under the contract originally concluded with Foprogest.
- 17 She submitted at the hearing, without being contradicted by the Luxembourg Government, that she had been classified by the Luxembourg State, with no

allowance for length of service, in the first grade, last step, of the salary scale, which meant that she lost 37% of her monthly salary.

- 18 The parties to the main proceedings disagree essentially on whether the State is obliged, after the transfer in question, to maintain all the rights of the employees, including in particular the right to remuneration, deriving from the contract of employment concluded between them and the transferor association.

### **The questions referred for a preliminary ruling**

- 19 The national court states that the parties agree that there was a transfer of an undertaking within the meaning of Article 36 of the Law of 24 May 1989, a view which that court also shares.
- 20 The national court expressly rejects the argument put forward by the defendant in the main proceedings that the classification of the activity in question as economic could legitimately be contested, since it is an activity for countering unemployment which may fall within the exercise of public power. In this respect the national court refers to the judgments of the Court in *Case C-29/91 Redmond Stichting* [1992] ECR I-3189 (concerning assistance to drug addicts), *Joined Cases C-173/96 and C-247/96 Hidalgo and Others* [1998] ECR I-8237 (concerning home help) and *Case C-175/99 Mayeur* [2000] ECR I-7755.
- 21 On the basis of that case-law, the national court accepts that in the case at issue in the main proceedings there was a transfer of an undertaking within the meaning of the Community legislation.

- 22 According to that court, having regard to the subject-matter of the case as it now stands on appeal, the question should first be examined whether Article 36 of the Law of 24 May 1989, which must be applied in the light of the Community provisions and in particular Directives 77/187 and 98/50 taken over in Directive 2001/23, allows the transfer of the rights and obligations of the employees to take place, in the case of a transfer to the public sector, only 'subject to compatibility with existing rules of public law', as the judgment under appeal put it. In other words, it must be determined whether the State as transferee may substitute the rules on compensation applicable to its own employees for the terms laid down by the previous contract of employment.
- 23 The national court observes, first, that the Community legislation provides, in principle, that in the event of a transfer of an undertaking the rights and obligations of the transferor — in this case Foprogest — are transferred to the transferee — in this case the Luxembourg State — by reason of the transfer. Moreover, Article 36 of the Law of 24 May 1989 provides that in such cases all contracts of employment in force continue to exist between the new employer and the employees of the undertaking.
- 24 It notes, second, that Article 4(2) of Directive 77/187, reproduced word for word in the second subparagraph of Article 36(2) of the Law of 24 May 1989, provides that, 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 is to be regarded as having been responsible for termination of the contract of employment.
- 25 It considers that, although their context is the termination of the employment relationship, the provisions of Article 4(2) of that directive none the less necessarily imply that there is a possibility of changing the employees' situation by reason of the transfer.

26 It says that the question therefore remains whether the transferee, the Luxembourg State, may, to comply with its own domestic rules of public law, impose on employees taken over on a transfer a restructuring of their remuneration situation which could, in certain cases, lead to a procedure for termination of the employment relationship at the employee's initiative on the conditions laid down in Article 4(2) of Directive 77/187, or whether, on the contrary, the principle that the contract continues to exist requires the State to maintain, disregarding its own legislation, the remuneration under the original contract.

27 Those were the circumstances in which the Cour administrative decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Having regard to the provisions of Directives 77/187/EEC, 98/50/EC and 2001/23/EC identified herein, in the event of the transfer of an undertaking from a non-profit-making association, which is a legal person under private law, to the State as transferee, is it permissible for the transferor's rights and obligations to be taken over only in so far as they are compatible with the State's own rules of public law, in particular in the field of remuneration, where the detailed provisions and amounts of compensation are laid down by Grand-Ducal regulation, bearing in mind that the status of public sector employee confers legal benefits in the fields of, inter alia, career development and job stability on the employees concerned, and that, in the event of disagreement as regards "substantial changes" to the employment relationship within the meaning of Article 4(2) of those directives, the employees concerned retain the right to request termination of that relationship according to the detailed rules in the relevant provisions?'

### **The question referred for a preliminary ruling**

28 For the reasons set out by the Advocate General in point 27 of his Opinion, Directives 98/50 and 2001/23 do not apply to the dispute in the main proceedings. Consequently, only Directive 77/187 needs to be interpreted.

- 29 By its question the national court essentially seeks to know whether that directive precludes, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees.
- 30 It should be recalled that, according to the Court's case-law, the transfer of an economic activity from a legal person governed by private law to a legal person governed by public law is in principle within the scope of Directive 77/187. Only the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities is excluded from that scope (Case C-298/94 *Henke* [1996] ECR I-4989, paragraph 14, and *Mayeur*, paragraphs 29 to 34).
- 31 Under Article 3(1) of Directive 77/187, the transferor's rights and obligations under the contract of employment or employment relationship are transferred to the transferee by reason of that transfer.
- 32 Since Directive 77/187 is intended to achieve only partial harmonisation of the field in question (see, inter alia, Case 324/86 *Tellerup* [1988] ECR 739 ('*Daddy's Dance Hall*'), paragraph 16, and Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraph 41), it does not preclude, in the event of a transfer of an activity to a legal person governed by public law, the application of national law which prescribes the termination of contracts of employment governed by private law (see, to that effect, *Mayeur*, paragraph 56). However, such a termination constitutes, in accordance with Article 4(2) of Directive 77/187, a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, so that the termination of those contracts of employment must, in such circumstances, be regarded as resulting from the action of the employer (see *Mayeur*, paragraph 56).

- 33 The same must apply where, as in the case at issue in the main proceedings, application of the national rules governing the position of State employees entails a reduction in the remuneration of the employees concerned by the transfer. Such a reduction must, if it is substantial, be regarded as a substantial change in working conditions to the detriment of the employees in question, within the meaning of Article 4(2) of the directive.
- 34 Moreover, the competent authorities responsible for applying and interpreting the national law relating to public employees are obliged to do so as far as possible in the light of the purpose of Directive 77/187. It would be contrary to the spirit of that directive to treat an employee taken over from the transferor without taking length of service into account, in so far as the national rules governing the position of State employees take a State employee's length of service into consideration for calculating his remuneration.
- 35 Consequently, the answer to the national court's question must be that Directive 77/187 must be interpreted as not precluding in principle, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees. However, the competent authorities responsible for applying and interpreting those rules are obliged to do so as far as possible in the light of the purpose of that directive, taking into account in particular the employee's length of service, in so far as the national rules governing the position of State employees take a State employee's length of service into consideration for calculating his remuneration. If such a calculation leads to a substantial reduction in the employee's remuneration, such a reduction constitutes a substantial change in working conditions to the detriment of the employees concerned by the transfer, so that the termination of their contracts of employment for that reason must be regarded as resulting from the action of the employer, in accordance with Article 4(2) of Directive 77/187.

## Costs

- <sup>36</sup> 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 (Second Chamber) rules as follows:

**Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as not precluding in principle, in the event of a transfer of an undertaking from a legal person governed by private law to the State, the latter, as new employer, from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules in force for public employees. However, the competent authorities responsible for applying and interpreting those rules are obliged to do so as far as possible in the light of the purpose of that directive, taking into account in particular the employee's length of service, in so far as the national rules governing the position of State employees take a State employee's length of service into consideration for calculating his remuneration. If such a calculation leads to a substantial reduction in the employee's remuneration, such a reduction constitutes a substantial change in working conditions to the detriment of the employees concerned by the transfer, so that the termination of their contracts of employment for that reason must be regarded as resulting from the action of the employer, in accordance with Article 4(2) of Directive 77/187.**

Signatures.