



E-3/2001

## JUDGMENT OF THE COURT

22 March 2002\*

*(Council Directive 77/187/EEC - Transfer of a State administrative entity to a State-owned limited liability company)*

In Case E-3/01

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Héraðsdómur Reykjavíkur (Reykjavík District Court) for an Advisory Opinion in the case pending before it between

**Alda Viggósdóttir**

and

**Íslandspóstur hf. (Iceland Post Ltd)**

on the interpretation of the Agreement on the European Economic Area (hereinafter the “EEA Agreement”), with particular reference to 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 (hereinafter the “Directive”), in particular Articles 1 and 3 thereof,

THE COURT,

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\* Language of the request: Icelandic.

composed of: Thór Vilhjálmsson, President, Carl Baudenbacher (Judge-Rapporteur) and Per Tresselt, Judges,

Registrar: Lucien Dedichen,

having considered the written observations submitted on behalf of:

- Alda Viggósdóttir, represented by Stefán Geir Þórisson, Supreme Court Advocate;
- Íslandspóstur hf., represented by Andri Árnason, Supreme Court Advocate;
- the Government of Iceland, represented by Anna Jóhannsdóttir, Legal Officer, External Trade Department, Ministry for Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority, represented by Dóra Sif Tynes, Legal Officer, Department of Legal & Executive Affairs, acting as Agent;
- the Commission of the European Communities, represented by John Forman and Jörn Sack, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard the oral observations of Alda Viggósdóttir, represented by Stefán Geir Þórisson; Íslandspóstur hf., represented by Jón Sigurðsson, District Court Advocate; the Government of Iceland, represented by Anna Jóhannsdóttir; the EFTA Surveillance Authority, represented by Dóra Sif Tynes, and the Commission of the European Communities, represented by Jörn Sack, at the hearing on 15 November 2001,

gives the following

## **Judgment**

### **I Facts and procedure**

- 1 By a reference dated 15 March 2001, registered at the Court 22 March 2001, Héraðsdómur Reykjavíkur (Reykjavík District Court) made a Request for an Advisory Opinion in a case pending before it between Alda Viggósdóttir (hereinafter, the “Plaintiff”) against Íslandspóstur hf. (Iceland Post Ltd, hereinafter, the “Defendant”).

- 2 In 1963, the Plaintiff began working for the General Directorate for Post and Telecommunication (*Póst og símamálastjórnin - Póstur og sími*), which later became the Post and Telecommunications Administration (*Póst- og símamálastofnunin*). On 1 January 1997, the Administration was, by Act No. 103/1996, converted into a wholly State-owned limited liability company, operating under the name “Post and Telecom Iceland Ltd. ” In connection with the assumption of operations by this company, an employment contract was concluded with the Plaintiff, covering her work for the new company. Subsequently, on 1 January 1998, the Defendant, Íslandspóstur hf., came into being as a result of the break-up of Post and Telecom Iceland Ltd. into two limited liability companies, and the Plaintiff became an employee of the Defendant.
- 3 The Defendant gave the Plaintiff, who was working as manager of a post office, notice of temporary suspension of employment on 5 October 1999. The Defendant offered the Plaintiff a termination of employment agreement. Under the terms of that proposal, the Plaintiff would have received 12 months salary plus vacation pay and a December bonus. The Plaintiff rejected the offer. By a letter of dismissal dated 28 December 1999, the Defendant gave the Plaintiff notice of final termination of employment, with the contractual three-month notice period. The reason stated for the dismissal was that the Plaintiff’s dealings with the Defendant’s employees and customers had not been satisfactory. The Plaintiff was asked not to work during the notice period. In addition to salary during the notice period, the Plaintiff received a further one month’s salary.
- 4 In the main proceedings, the Plaintiff requested that the Defendant be ordered to pay damages and compensation for non-financial loss totalling ISK 6 896 120, plus accrued interest as specified in further detail. In addition, the Plaintiff requested that the Defendant be ordered to pay costs, plus value-added tax. The Defendant requested that the Court reject all claims of the Plaintiff; or, in the alternative, that the Plaintiff’s claims be substantially reduced. In addition, the Defendant requested that costs be awarded in favour of the Defendant, or, in the alternative, that each party be ordered to bear its own costs in the case.
- 5 Héraðsdómur Reykjavíkur decided to submit a Request for an Advisory Opinion to the EFTA Court on the following questions:
  1. *Is Article 1(1) of Council Directive 77/187/EEC to be interpreted to the effect that the conversion of a State-owned entity into a wholly State-owned limited company constitutes a transfer within the meaning of that provision?*
  2. *Is Article 3(1) of Council Directive 77/187/EEC to be interpreted as prohibiting the provision, in an employment contract which is concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer?*

- 6 Reference is made to the Report for the Hearing for an account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

## II Legal background

### EEA Law

- 7 The Directive states *inter alia*:

“SECTION 1 Scope and definitions

Article 1

1. This Directive shall apply to the transfer of an undertaking, business or of part of a business to another employer as a result of a legal transfer or merger.
2. This Directive shall apply where and in so far as the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty.
3. This Directive shall not apply to sea-going vessels.

(...)

SECTION II Safeguarding of employees' rights

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 transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer with the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship.

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 provision that it shall not be less than one year.

3. Paragraphs 1 and 2 shall not cover employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer within the meaning of Article 1(1) in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary schemes referred to in the first subparagraph."

## **National law**

- 8 The principal statutory provisions under examination in the main proceedings are set out below. Reference is made to Icelandic Act No. 77/1993 on the Legal Status of Employees in the Event of the Transfer of Undertakings (*Lög um réttarstöðu starfsmanna við aðilaskipti að fyrirtækjum*), in particular Sections 1 and 2. The first paragraph of Section 2 reads as follows:

"As of the date of transfer within the meaning of the first paragraph of section 1, the transferee shall acquire the rights and obligations of the transferor as specified in the employment contract and respect the wage terms and terms of service that have been approved in general collective agreements, subject to the same conditions as applied to the transferor until such time as the contract is terminated or expires, or until another collective agreement takes effect or is applied."

- 9 Further, reference is made to Icelandic Act No. 103/1996 Establishing a Limited Company to Operate the Post and Telecommunications Administration (*Lög um stofnun hlutafélags um rekstur Póst- og símamálastofnunar*), particularly Sections 1, 7 and 8. The first paragraph of Section 8 reads as follows:

"Permanent employees of the Post and Telecommunications Administration shall have the right of employment with the new company, and shall be offered positions therein which are comparable to those in which they were employed in the Administration, provided that they retain in the company the rights that they have already earned in the Administration. Their right to severance pay, however, shall be subject to the Civil Servants' Rights and Obligations Act in force at the time of commencement of this Act."

- 10 Reference is also made to Section 4 of the former Act No. 38/1954 on Civil Servants' Rights and Obligations (*Lög um réttindi og skyldur starfsmanna ríkisins*), which reads as follows:

"If a person is appointed to a position, the view shall then be taken that he will work in that position until one of the following occurs:

1. he commits an offence while at work, with the result that he has to be dismissed from the position;
2. he does not meet the conditions of section 3 of this Act;
3. he is released from the position at his own request;
4. he attains the maximum age limit (cf. section 13);
5. he is transferred to another position with the State;

6. his period of appointment according to a letter of temporary appointment expires;
  7. the position is abolished (cf. Section 14).”
- 11 Lastly, reference is made to the current Act No. 70/1996 on Civil Servants’ Rights and Obligations (*Lög um réttindi og skyldur starfsmanna ríkisins*), in particular Section 25, the content of which is the same as Section 4 of Act No. 38/1954 (cited in the previous paragraph).

### **III Findings of the Court**

#### **The first question**

- 12 By the first question, the national court seeks to ascertain whether Article 1(1) of the Directive is to be interpreted to the effect that a conversion of a State administrative entity into a wholly State-owned limited liability company constitutes a transfer within the meaning of that provision.
- 13 The Plaintiff argues that the conditions for the application of the Directive appear to be clear. In particular, she argues that there is no requirement that there be a new owner of the undertaking or part thereof. Thus, the Directive is intended to cover all cases in which there is a change in the party operating the undertaking, regardless of whether a private or a public party is involved.
- 14 The Defendant submits that the Directive does not unequivocally cover the transfer of the rights and obligations of a State-owned entity to a limited liability company, unless some transfer of proprietary rights accompanies it. In the present case, the change consisted solely of a change in operational form, while the holder of proprietary rights, i.e. the Icelandic State, has remained unchanged.
- 15 In addition, the Defendant argues that, as a servant of the Post and Telecommunications Administration, the Plaintiff was a civil servant and therefore subject to public law, in particular Act No. 70/1996 on Civil Servants’ Rights and Obligations. In the opinion of the Defendant, it follows from the judgment of the Court of Justice of the European Communities in case C-343/98 *Collino and Chiappero* [2000] ECR I-6659 that the Directive does not apply to civil servants enjoying the benefits of public law at the time of the alleged transfer.
- 16 The Government of Iceland submits that the Defendant, Íslandspóstur hf., operates a public postal service for a fee. Consequently, the Directive may apply to the circumstances in the main proceedings even though the Defendant is a State-owned entity, because a unilateral decision by a public authority to transfer

a public entity to another legal person falls within the material scope of the Directive. However, the Government of Iceland argues that the Plaintiff's legal situation at the time of the transfer was governed by public law, and therefore the Directive is not applicable in the present case.

- 17 The EFTA Surveillance Authority argues that it constitutes a transfer of undertakings within the meaning of Article 1(1) of Directive when an entity that provides postal services for the public and is a part of the public administration, is transferred to a wholly State-owned limited company which carries out the same task as the administrative entity, and has for those purposes assumed its tangible and intangible assets. The persons affected by such a transfer must, however, have been protected under national employment law prior to the transfer.
- 18 The Commission of the European Communities states that the conversion of a State-owned economic entity into a wholly State-owned limited liability company constitutes a transfer within the meaning of the Directive.
- 19 The Court has in several judgments considered the concept of transfer within the meaning of Article 1 of the Directive (see Case E-2/95 *Eidesund v Stavanger Catering* [1995-1996] EFTA Court Report 3; Case E-2/96 *Ulstein and Røiseng v Møller* [1995-1996] EFTA Court Report 65; and Case E-3/96 *Ask and Others v ABB Offshore Technology and Aker Offshore Partner* [1997] EFTA Court Report 3).
- 20 In these judgments, the Court has set out criteria for determining whether there is a transfer within the meaning of Article 1(1) of the Directive. According to that case law, it is necessary to consider all the facts characterising the transaction in question, including the type of undertaking or business concerned, whether or not tangible assets, such as buildings and moveable property, or intangible assets, such as patents or know-how, are transferred, the value of the assets at the time of the transfer, whether or not most of the personnel is kept on by the new employer, whether or not customers are transferred, the degree of similarity between the activities carried out before and after the transfer and the period of any suspension of those activities. All those circumstances are, however, only individual factors in the overall assessment to be made and cannot therefore be considered in isolation (see, for example, *Eidesund*, cited above, at paragraph 32; see also, Case C-24/85 *Spijkers v Benedik* [1986] ECR 1119, at paragraph 13).
- 21 The Defendant does not appear to dispute that the requirements described in the previous paragraph are, to a sufficient degree, fulfilled in the case at hand, and that the conditions for the applicability of the Directive are thereby fulfilled. However, it is for the national court to make the necessary factual appraisal in order to establish whether these conditions are sufficiently met in the case before it.
- 22 The Defendant has submitted that the Directive does not unequivocally cover the transfer of the rights and obligations of a State entity to a limited liability

company owned by the State, unless some transfer of proprietary rights accompanies it. The Defendant argues that no such transfer has taken place.

- 23 This argument must be rejected. The Icelandic State has, through the enactment of a statute, transferred its postal services from a State entity to a limited liability company wholly owned by the State. The fact that the transfer has been effected by statute rather than agreement, does not prevent the Directive from being applicable (see Case C-29/91 *Redmond Stichting v Hendrikus Bartol* [1992] ECR I-3189, at paragraphs 15 to 17). Nor does the fact that the limited liability company is also wholly owned by the State prevent the Directive from being applicable. It is sufficient that there is a change in the natural or legal person responsible for carrying out the business and assuming the position of an employer towards the employees of the undertaking (see case C-13/95 *Süzen v Zehnacker Gebäudereinigung* [1997] ECR I-1259, at paragraph 12; Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1267, at paragraph 28). Furthermore, the Court of Justice of the European Communities has found that the Directive may apply to a situation in which an entity operating telecommunications services for public use and managed by a public body within the State administration is, following decisions of the public authorities, the subject of a transfer for value to a private company established by another public body that holds its entire capital (see C-343/98 *Collino and Chiappero*, cited above, at paragraph 41).
- 24 On the basis of the foregoing, and assuming that the criteria set out above have been fulfilled, the answer to the first question must be that the conversion of a State-owned entity into a wholly State-owned limited liability company may constitute a transfer within the meaning of Article 1(1) of the Directive. Whether the transfer was for value or not is immaterial in that regard.
- 25 The Defendant has further argued that, as a servant of the Post and Telecommunications Administration, the Plaintiff was a civil servant at the time of the alleged transfer, and therefore subject to public law rather than national employment law. Since the Plaintiff was a civil servant, enjoying the benefits of public law at the time of transfer, it must follow from the judgment of the Court of Justice of the European Communities in C-343/98 *Collino and Chiappero*, cited above, that the Directive does not apply in the present case.
- 26 The Court notes that the Directive is intended to achieve partial harmonisation in the area of employment law, mainly by ensuring that the transferee maintains the protection guaranteed to employees under national employment law. Its aim is therefore to ensure, as far as possible, that the acquired rights protected by national employment law remain unchanged with the transferee, so that the persons affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria (see Case 105/84 *Foreningen for Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639, at paragraph 26; *Redmond Stichting v Hendrikus Bartol*, cited above, at paragraph 18; and Joined Cases C-173/96 and



C-247/96 *Sánchez Hidalgo and Others* [1998] ECR I-8179, at paragraph 24; and *Collino and Chiappero*, cited above, at paragraph 37).

- 27 From this, the Court of Justice of the European Communities has drawn the conclusion that the Directive does not apply to employees who are not protected under the national employment law, regardless of the nature of their tasks (see *Collino and Chiappero*, cited above, at paragraph 38).
- 28 This understanding has been confirmed by Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC 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 1998 L 201, p. 88). 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) is a consolidated version of the various directives. Here it is specifically stated that for the purpose of the Directive, an "employee" shall mean "any person who, in the Member State concerned, is protected as an employee under national employment law." This more specific language confirms that the Directive does not apply in respect of functionaries whose protection from dismissal is stronger than that which may be afforded by national employment law. This Directive is referred to in point 32d of Annex XVIII to the EEA Agreement (see Decision of the EEA Joint Committee No 159/2001 of 11 December 2001).
- 29 On the basis of the foregoing, the Court finds that the Directive is only applicable in the present case if the Plaintiff was at the time of the transfer protected under national employment law. It also follows that the Directive is not applicable to the situation in the main proceedings if the Plaintiff enjoyed, at the relevant point in time, the special protection against dismissal granted only to civil servants for reasons associated with the public law function or the character of their employment. This must apply regardless of the specific nature of the Plaintiff's tasks as a servant of the Post and Telecommunications Administration.
- 30 The national court must therefore examine whether at the time of the transfer the Plaintiff in the present case enjoyed this special protection, or whether her protection from dismissal was governed by national employment law.
- 31 The national court's examination must be based on all legal instruments that may be relevant to the Plaintiff's situation, i.e. statutes, collective agreements and any contractual relationship between the Plaintiff and the Post and Telecommunications Administration. It cannot be ruled out that the status of the Plaintiff must be regarded as being partly governed by public law and partly by national employment law. In that event, a situation may arise where different sets of rules may apply to different aspects of her legal situation. It is for the national court to undertake this examination, on the basis of national law, with regard to the distinction between public law and national general employment law. If the national court finds that issues relating to protection against dismissal in the

Plaintiff's case are primarily subject to rules of public law, it will proceed on the basis that the Directive does not apply. If, however, the national court finds that those issues are primarily subject to the rules of Icelandic general employment law, it is bound to proceed on the basis that the Directive applies.

- 32 The answer to the first question must therefore be that the conversion of a State entity into a wholly State-owned limited liability company may constitute a transfer within the meaning 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. Further, that Directive may apply when an employee, at the time of the transfer, was protected as an employee under national employment law. It is for the national court to assess whether that was the case or whether the employee enjoyed protection from dismissal under public law.

### **The second question**

- 33 By its second question the national courts seeks to ascertain whether Article 3(1) of the Directive is to be interpreted as prohibiting the provision, in an employment contract concluded in connection with a transfer within the meaning of Article 1(1) of the Directive, of less advantageous terms regarding termination of employment as compared with those enjoyed by the employee prior to the date of the transfer.
- 34 The Court notes that the answer to this question is only relevant if the national court comes to the conclusion that the Plaintiff in this case was, at the time of the transfer, an employee protected under national employment law and thus by the Directive.
- 35 The Defendant has argued that the Plaintiff, in her contract of employment with the new limited liability company, had renounced her rights with regard to more favourable rules concerning dismissal.
- 36 The Court has previously held that the transfer of the employee's rights cannot be restricted, even with the employee's consent (Case E-3/95 *Langeland v Norske Fabricom* [1995-1996] EFTA Court Report 36, at paragraph 43; see also Case 324/86 *Tellerup v Daddy's Dance Hall* [1988] ECR 739, at paragraph 15).
- 37 This case law is mainly based on the objective of the Directive, which is not to improve the situation of an employee following a transfer, but merely to preserve his acquired rights. The new employer may, therefore, agree with the employee to change the terms of the latter's employment to the same extent as could have been done during the contractual relationship with the previous employer. However, the transfer of the undertaking may not in itself constitute the reason

for the change in the terms of employment. Otherwise, the mandatory provisions of the Directive could be easily circumvented.

- 38 It is not disputed that the contract at issue in the main proceedings, which was the basis of the Plaintiff's legal situation after the conversion of the State entity into a limited liability company, was made in connection with the transfer.
- 39 The answer to the second question must therefore be that an employee cannot waive the rights conferred upon him by the mandatory provisions of Directive 77/187/EEC. The Directive does not, however, preclude an agreement with the new employer to modify the employment relationship to the extent that such modification is permitted by the applicable national law in situations other than those involving the transfer of an undertaking.

#### IV Costs

- 40 The costs incurred by the Government of Iceland, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. In so far as the parties to the main proceedings are concerned, these proceedings are a step in the proceedings pending before the national court. The decision on costs is therefore a matter for that court.

On those grounds,

#### THE COURT,

in answer to the question referred to it by Héraðsdómur Reykjavíkur by the reference of 15 March 2001, hereby gives the following Advisory Opinion:

**The conversion of a State entity into a wholly State-owned limited liability company may constitute a transfer within the meaning 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. That Directive may apply when an employee, at the time of the transfer, was protected as an employee under national employment law. It is for the national court to assess whether that was the case or whether the employee enjoyed protection from dismissal under public law.**

**An employee cannot waive the rights conferred upon him by the mandatory provisions of Directive 77/187/EEC. The Directive does not, however, preclude an agreement with the new employer to modify the employment relationship to the extent that such**

**modification is permitted by the applicable national law in situations other than those involving the transfer of an undertaking.**

Thór Vilhjálmsson

Carl Baudenbacher

Per Tresselt

Delivered in open court in Luxembourg on 22 March 2002.

Lucien Dedichen  
Registrar

Thór Vilhjálmsson  
President