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Case No: 75359

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ORIGINAL

ORIGINAL

EFTA SURVEILLANCE
AUTHORITY

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

THE EFTA SURVEILLANCE AUTHORITY

represented by

Maria Moustakali, Officer, and Janne Tysnes Kaasin, Temporary Officer,

Department of Legal & Executive Affairs,

acting as Agents,

IN CASE E-10/14

Enes Deveci and Others

v

Scandinavian Airlines System Denmark-Norway-Sweden

in which Eidsivating Court of Appeal of Norway has requested the EFTA Court to give an advisory opinion concerning the interpretation of Article 3(1) and (3) 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 (hereinafter "the Transfer of Undertakings Directive" or "the Directive"), regarding the obligations for the transferee to observe the pay level that applied in the transferor undertaking.

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1 INTRODUCTION

1. Eidsivating Court of Appeal of Norway refers a request for an advisory opinion to the Court concerning the interpretation of Article 3(1) and (3) of the Transfer of Undertakings Directive¹.
2. The matter pending before the national court concerns a dispute between 129 former employees of Spirit Air Cargo Norway AS (Spirit) and Scandinavian Airlines System Denmark-Norway-Sweden ("the SAS consortium") regarding a reduction in pay after the transfer of the employees to the SAS consortium. The plaintiffs are represented by the Norwegian Confederation of Trade Unions (LO) and the Confederation of Vocational Unions (YS). The defendant is represented by the Confederation of Norwegian Enterprise (NHO).
3. The former employees of Spirit claim that the SAS consortium should continue to observe the pay level that was applied in Spirit. Nedre Romerike District Court pronounced a judgment on 18 November 2013 in which it found in favour of the SAS consortium. The 129 plaintiffs have appealed the case to Eidsivating Court of Appeal.

2 EEA LAW

4. Article 3(1) and (3) of the Transfer of Undertakings Directive² reads as follows:
 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.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of

¹ Act referred to in point 32d of Annex XVIII to the EEA Agreement.

² Its predecessor, Directive 77/187, has provisions that are equal in substance to the relevant provisions of the current Directive in Articles 3(1) and (2), 4(2) and 7.

employment or an employment relationship existing on the date of the transfer.

[...]

3. Following the transfer, 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.

5. Article 4(2) of the Transfer of Undertakings Directive reads as follows:

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 termination of the contract of employment or of the employment relationship

6. Article 8 of the Transfer of Undertakings Directive reads as follows:

This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.

3 NATIONAL LAW

7. The relevant provisions of the Transfer of Undertakings Directive are reflected in Section 16-2 of the Act relating to working environment, working hours and employment protection (the Working Environment Act).³ Section 16-2, subsection (1) and (2) reads as follows:

(1) The rights and obligations of the former employer ensuing from the contract of employment or employment relationship in force on the date of

³ Act of 17 June 2005 No 62 relation to working environment, working hours and employment protection etc. (*Arbeidsmiljøloven*).

transfer shall be transferred to the new employer. Claims pursuant to the first sentence may still be raised against the former employer.

(2) The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer at the latest within three weeks after the date of transfer declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.

8. The first sentence of subsection (1) reflects Article 3(1), first subsection, of the Transfer of Undertakings Directive. Subsection (2) of Section 16-2 reflects Article 3(3), first subsection, of the Directive, albeit with additional language clarifying the applicability of a collective agreement in force in the transferor undertaking to the transferee.
9. The main rule in Norwegian law is that the transferee is bound by any collective pay agreement that was binding upon the transferor undertaking. The possibility for the transferee not to be bound by the collective agreement in force in the transferor undertaking is provided for due to the formal and practical challenges an automatic transfer of collective agreements would pose in the current system of collective agreements in Norway. An automatic transfer of the collective agreement in force in the transferor undertaking, may e.g. create difficulties if the transferee is member of another employer's association than the transferor undertaking.⁴ Thus, this solution has been chosen, where the transferee may declare that he does not wish to be bound by the collective agreement in force with the transferor undertaking. This however does *not* affect the obligation of the transferee to ensure the working conditions laid down in the collective agreement in force in the transferor undertaking.

⁴ See the preparatory works of the Working Environment Act, Ot.prp.nr. 49 (2004-2005), Chapter 21.5 (available in Norwegian only).

10. The wording of the final sentence in subsection (2) of Section 16-2 of the Working Environment Act differs somewhat from the wording of the last part of Article 3(3), first subsection, of the Directive. Both provisions make it clear that the terms and conditions applicable in the collective agreement of the transferor undertaking applies until this agreement expires. However, on the alternative measures that may end this obligation, the Working Environment Act states that the conditions of the transferor undertaking shall apply until *“a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees”*, whereas the Transfer of Undertakings Directive states that they shall apply until *“the entry into force or application of another collective agreement”*.
11. Finally, it should be mentioned that Norway has not availed itself of the possibility of limiting the period for observing the terms and conditions applicable to the transferor as provided for in Article 3(3) second subparagraph.

4 THE QUESTIONS REFERRED

12. The following questions have been referred by Eidsivating Court of Appeal to the Court:
1. Is it consistent with Article 3(1), cf. Article 3(3), of Council Directive 2001/23/EC that the transferee undertaking assigns the individual employees covered by the transfer a place in a pay table set out in a collective agreement that applies in the transferee undertaking, with effect from a date after the collective agreement that applied in the transferor undertaking has expired, even if this results in a pay reduction for the individual employees?
 2. Does the answer to Question 1 depend on whether the collective agreement that applied to the employees of the transferor was still in force when the transferee's collective agreement was made applicable to the employees covered by the transfer of the undertaking?
 3. Does the answer to Question 1 depend on whether the reduction in pay is significant or not?

5 LEGAL ANALYSIS

5.1 Introduction

13. In accordance with Article 3(1) of the Transfer of Undertakings Directive, the transferor's rights and obligations arising from a contract of employment or from an employment relationship that exists on the date of a transfer shall be transferred to the transferee. This entails that the transferee is put in the same situation as that of the transferor undertaking. Accordingly, the transferee will have the same rights and obligations vis-a-vis the transferred employees as the transferor undertaking had. Equally, the transferred workers will have the same rights and obligations vis-a-vis the transferee as they had towards the transferor undertaking at the date of the transfer. The Transfer of Undertakings Directive thus seeks to ensure a fair balance between the interests of transferred employees and those of the transferee.⁵
14. Article 8 of the Directive makes it clear that the Directive shall not affect the right of EEA States to introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees. At the same time, case law clearly shows that the freedom to conduct a business does limit the freedom of the States in this respect.⁶ For instance, the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.⁷ Accordingly, Article 3, read in conjunction with Article 8, cannot be interpreted as entitling the EEA States to take measures which are liable to adversely affect the very essence of the transferee's freedom to conduct a business.⁸
15. The Directive is intended to achieve only partial harmonisation and is not intended to establish a uniform level of protection throughout the EEA.⁹ As previously stated

⁵ Judgment in *Alemo-Herron*, C-426/11, EU:C:2013:521, paragraph 25.

⁶ Judgment in *Alemo-Herron* EU:C:2013:521 paragraphs 25-36.

⁷ Judgment in *Alemo-Herron* EU:C:2013:521 paragraph 25.

⁸ Judgment in *Alemo-Herron* EU:C:2013:521 paragraph 36.

⁹ Judgment in *Juuri*, C-396/07, EU:C:2008:656, paragraph 23, Judgment in *Delahaye*, EU:C:2004:706, paragraph 32.

by the Court of Justice ("CoJ"), the Directive can be relied on only to ensure that the transferred employee is protected in his relations with the transferee to the same extent as he was in his relations with the transferor undertaking under the legal rules of the EEA State concerned.¹⁰

5.2 Question 1

16. By its first question, the referring court asks whether the conditions of the collective agreement in the transferee undertaking may be applied to the transferred workers after the expiry of the collective agreement in the transferor undertaking, even if this results in a reduction of pay.
17. First, the Directive does not harmonise the conditions under which an existing collective agreement expires, nor does it harmonise how another collective agreement enters into force or is made applicable. It is for national law to determine the conditions under which another collective agreement may enter into force or be applicable after the expiration of the collective agreement in the transferor undertaking.
18. Second, the wording of Article 3(3) of the Transfer of Undertakings Directive quite clearly states that the obligation to apply the terms and conditions of the collective agreement in force with the transferor undertaking ends when the agreement expires. This has been confirmed by the case law of the CoJ.¹¹
19. However, even if the collective agreement of the transferor undertaking has expired, this does not fully answer the question of the referring court, namely whether the transferee may adjust the pay to the detriment of the transferred workers. This question has been touched upon by the CoJ in several cases which, although not fully identical with the case at hand, may give relevant guidance.

¹⁰ Judgment in *Juuri* EU:C:2008:656, paragraph 23, judgment in *Martin*, C-4/01, EU:C:2003:594, paragraph 40, judgment in *Daddy's Dance Hall*, C-324/86, EU:C:1988:72, paragraph 16.

¹¹ Judgment in *Juuri* EU:C:2008:656, paragraphs 33 and 34.

20. In this respect, the Authority recalls that the CoJ has found that the wording of the Directive does not in any way indicate that the transferee should be bound by collective agreements other than the one in force at the time of the transfer.¹² This finding is consistent with the objective of the Directive, which is “*merely to safeguard the rights and obligations of employees in force on the day of the transfer [...] the Directive is not intended to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements*”.¹³
21. Furthermore, in *Delahaye*, Mrs. Boor, who was not a part of a collective agreement in her private sector employment at Foprogest, was transferred to the Luxembourg State when the State took over its activities. In this case, the CoJ clarified that the Directive does not in principle preclude that the transferee may reduce the amount of remuneration of the transferred workers - in *Delahaye* for the purpose of complying with national rules in force for public employees.¹⁴ Still, the relevant rules must be interpreted in light of the purpose of the Directive and taking account of the length of service, in so far as this is taken into consideration when calculating the remuneration.¹⁵
22. In *Scattolon*, Ms. Scattolon was employed by a municipality and covered by the collective agreement in force there. Then, pursuant to a new law, she was transferred onto the list of State employees and the collective agreement was replaced with that of the State. In this case, the CoJ further addressed the question of whether the transferee may adjust the pay to the detriment of the transferred workers by confirming that it is lawful for the transferee to apply, from the date of the transfer, the working conditions laid down by the collective agreement in force with him, including those concerning remuneration.¹⁶ In this respect, the court again

¹² Judgment in *Werhof*, EU:C:2006:168, paragraph 29.

¹³ Judgment in *Werhof*, EU:C:2006:168, paragraph 29. See also the AG Opinion in *Österreichischer Gewerkschaftsbund*, C-328/13, EU:C:2014:876, paragraph 51.

¹⁴ Judgment in *Delahaye*, EU:C:2004:706, paragraph 35.

¹⁵ Judgment in *Delahaye*, EU:C:2004:706, paragraph 35.

¹⁶ Judgment in *Scattolon*, C-108/10, EU:C:2011:542, paragraph 74.

emphasised that the arrangements chosen by the transferee must be in conformity with the aim of the Directive.¹⁷ This includes taking into account factors that are relevant for determining the level of remuneration in the collective agreement applicable in the transferee undertaking, or other rules on the calculation of remuneration.¹⁸

23. In the *Scattolon* case, the salary position and progression depended to a large degree on the length of service and, accordingly, the CoJ found that it would be contrary to the objective of the Directive not to take account of the length of service in so far as is necessary approximately to maintain the level of remuneration that the transferred workers received with the transferor undertaking.¹⁹
24. The obligation to take into account factors that affect the calculation of remuneration, such as the length of service, seems to reflect aspects of fairness that must be taken into account in order to determine remuneration in line with the aim of the Directive. Different collective agreements or national rules may have differing methods of determining remuneration and other terms and conditions of work. Thus, it is not only the length of service that may be important to calculate remuneration: other elements such as education and type of experience may be of importance.
25. The Authority submits that the first question must be answered in the affirmative: the conditions of the collective agreement in the transferee undertaking may be applied to the transferred workers after the expiry of the collective agreement in the transferor undertaking, even if this results in a reduction of pay, provided that the relevant rules are interpreted in light of the purpose of the Directive and account is taken of the length of service with the transferor undertaking and other equivalent factors when calculating the remuneration in the transferee undertaking.

¹⁷ Judgment in *Scattolon*, EU:C:2011:542, paragraph 75.

5.3 Question 2

26. By its second question, the referring court asks if the answer to the first question depends on whether the collective agreement in the transferor undertaking was still in force when the transferee's collective agreement was made applicable to the transferred workers. This question is twofold, as it touches both on the conditions for the application of another collective agreement and of the content of the agreement.
27. In the case that the collective agreement that applied in the transferor undertaking is still in force, it follows from the wording of Article 3(3) that the conditions therein would apply, and must be respected by the transferee,²⁰ until it expires or another collective agreement enters into force or is applicable. These alternative conditions will, when fulfilled, end the obligation of the transferee to observe the terms and conditions of collective agreement that applied in the transferor undertaking. The Directive does not rank the alternatives, but rather presents them equal in value and effect.
28. If the collective agreement in the transferor undertaking is still in force on the date of the transfer, one of the two other alternatives must be fulfilled in order to end the obligation of the transferee to apply the terms and conditions of the collective agreement in the transferor undertaking. Therefore, the question of what is needed to end the application of the collective agreement in force with the transferor and replace it with another agreement, be it a new agreement or an existing agreement, arises.
29. The wording of the Directive is wide in this respect and takes consideration of the fact that the EEA States have structured their collective labour law in different ways. In the interpretation of Article 3(3) one should take into account that the Directive is

¹⁸ Judgment in *Scattolon*, EU:C:2011:542, paragraphs 79-81, judgment in *Delahaye*, EU:C:2004:706, paragraph 34.

¹⁹ Judgment in *Scattolon*, EU:C:2011:542, especially paragraphs 79 and 81.

²⁰ Judgment in *Werhof*, C-499/04, EU:C:2006:168, paragraph 27.

not intended to achieve full harmonisation of EEA law and that it can be relied on only to ensure that the protection of the transferred workers vis-a-vis the transferee is equal to the protection enjoyed with the transferor under the law of the EEA State concerned.²¹ Moreover, Article 8 of the Directive explicitly allows for national legislation that is more favourable to employees.

30. As mentioned above, the Directive does not harmonise the conditions under which an existing collective agreement expires, nor how another collective agreement enters into force or is made applicable. Accordingly, it is left for national law to regulate those situations.
31. The Authority submits that each case has to be assessed according to its specific circumstances and the relevant arrangements of national law. Thus, the conditions of the collective agreement in the transferee undertaking may be applied to the transferred workers even when the collective agreement with the transferor is still in force, provided that the conditions pursuant to the national law for replacing the collective agreement applicable with the transferor undertaking by the agreement applicable with the transferee are fulfilled. In such a situation, the collective agreement applicable with the transferee would apply and a reduction in pay would be possible.²² In the Authority's view, this option is provided for by the last option in Article 3, first subparagraph (*"until the [...] application of another collective agreement"*).
32. Another option provided for in the Directive is to have a new collective agreement (*"the entry into force [...] of another collective agreement"*). The replacement of the existing collective agreement in the transferor undertaking by a new agreement would also be subject to the conditions of national law.

²¹ Judgment in *Juuri* EU:C:2008:656, paragraph 23, judgment in *Martin*, C-4/01, EU:C:2003:594, paragraph 40, judgment in *Daddy's Dance Hall*, C-324/86, EU:C:1988:72, paragraph 16.

²² Provided that the reduction in pay is made in accordance with the Directive, see especially paragraphs 24 and 25 above.

33. If however the conditions of national law on the entry into force or application of another collective agreement are not fulfilled, the terms and conditions of the collective agreement applicable with the transferor will continue to apply after the transfer. In that case, the transferee undertaking would be obliged to apply the terms and conditions of the collective agreement applicable with the transferor undertaking and a reduction of pay would not be possible. In this respect, the EEA States may however limit the period for observing the terms and conditions of the collective agreement in the transferor undertaking, in accordance with Article 3, second subparagraph of the Transfer of Undertakings Directive.
34. Thus, the Authority submits that the collective agreement applied by the transferor undertaking and still in force on the date of the transfer will continue to apply until it is lawfully replaced by another collective agreement. It is for national law to lay down the conditions for the entry into force or application of another collective agreement. However, the national law governing the conditions for the entry into force or application of another collective agreement should be in line with the purpose of the Directive and take into account the protection it affords to the transferred employees (see answer to question one above).
35. Accordingly, the second question must be answered in the affirmative: the answer to the first question *may* depend on whether the collective agreement in the transferor undertaking was still in force when the transferee's collective agreement was made applicable to the transferred workers. However, if and to what extent this may affect the entry into force or application of another collective agreement, will depend on the regulation of collective labour law in the respective EEA State.

5.4 Question 3

36. By its third question, the referring court asks if the answer to the first question depends on whether the reduction in pay is significant or not. This question touches on the limits, if any, applicable to the discretion of the employer to determine the terms and conditions of work for the transferred workers after the expiry of the

collective agreement that applied in the transferor undertaking. This has already been partly dealt with in relation to the first question, *inter alia* that the transferee must interpret the relevant rules in line with the aim of the Directive and take account of factors that influence the calculation of the remuneration. Additionally, Article 4(2) of the Transfer of Undertakings Directive provides further restrictions in this regard.

37. Article 4(2) states that if an employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, then the employer shall be regarded as responsible for the termination. Thus, the Directive does not preclude the possibility that a transfer may entail substantially worse working conditions. Also, although the transfer itself shall not constitute grounds for dismissal, dismissals may take place for other reasons.²³
38. To safeguard the rights of the transferred workers in such situations, the employer is deemed to be responsible for the termination of the employment relationship, with the consequences it may entail. The Directive does not however regulate the consequences of such a termination of the employment relationship. Rather, the consequences have to be derived from national law.²⁴ Accordingly, by deeming the employer to be responsible for a termination of contract, Article 4(2) in effect further limits the discretion to adjust the working conditions to the detriment of the transferred workers.
39. To the third question, the Authority submits that the amount of the reduction in pay will be of significance in so far as it may entail a substantial change in working conditions within the meaning of Article 4(2).
40. Given the connexity between the first and the third question, the Authority proposes to answer them together.

²³ Article 4(1). Judgment in *Mayeur*, C-175/99, EU:C:2000:505, paragraph 56.

²⁴ Judgment in *Juuri*, EU:C:2008:656, paragraph 22 et seq.

6 CONCLUSION

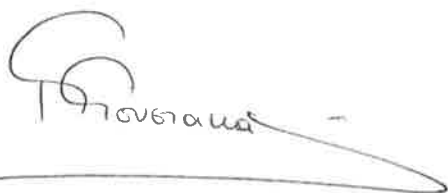
Accordingly, the Authority requests the Court to answer the questions referred by Eidsivating Court of Appeal as follows:

1. Answer to questions one and three:

"The conditions of the collective agreement in the transferee undertaking may be applied to the transferred workers after the expiry of the collective agreement in the transferor undertaking, even if this results in a reduction of pay, provided that the relevant rules are interpreted in light of the purpose of the Directive and account is taken of the length of service with the transferor undertaking and other equivalent factors when calculating the remuneration in the transferee undertaking. The amount of the reduction in pay will be of significance in so far as it may entail a substantial change in working conditions within the meaning of Article 4(2)."

2. Answer to question two:

"If the collective agreement in the transferor undertaking is in force on the date of the transfer, this may affect the application of the collective agreement of the transferee, depending on the regulation of collective labour law in the respective State."



Maria Moustakali



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