



[Pagina iniziale](#) > [Formulario di ricerca](#) > [Elenco dei risultati](#) > **Documenti**



[Avvia la stampa](#)

Lingua del documento :

ECLI:EU:C:2019:499

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

13 June 2019 (*)

(Reference for a preliminary ruling — Directive 2001/23/EC — Transfers of undertakings — Safeguarding of employees' rights — Concept of 'worker' — Substantial change in working conditions to the detriment of the employee)

In Case C-317/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal), made by decision of 23 April 2018, received at the Court on 14 May 2018, in the proceedings

Cátia Correia Moreira

v

Município de Portimão

THE COURT (Eighth Chamber),

composed of F. Biltgen, President of the Chamber, J. Malenovský (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Ms Correia Moreira, by M. Ramirez Fernandes, advogado,

- the Município de Portimão, by J. Abreu Rodrigues, advogado,
- the Portuguese Government, by L. Inez Fernandes, T. Paixão, A. Pimenta and T. Nunes, acting as Agents,
- the European Commission, by M. França and M. Kellerbauer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) TEU and Article 2(1)(d) 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 The request has been made in proceedings between Ms Cátia Correia Moreira and the Município de Portimão (Municipality of Portimão, Portugal) concerning the lawfulness of the termination of her contract of employment.

Legal context

EU law

3 Directive 2001/23 codified 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) ('Directive 77/187').

4 Recitals 3 and 8 of Directive 2001/23 state:

'(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

...

(8) Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not altered the scope of Directive [77/187] as interpreted by the Court of Justice.'

5 Article 1(1) of Directive 2001/23 states:

'(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.

(c) This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this directive.’

6 Article 2 of that directive provides:

‘1. For the purposes of this Directive:

...

(d) “employee” means any person who, in the Member State concerned, is protected as a worker under national employment law.

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

...’

7 The first subparagraph of Article 3(1) of that directive provides as follows:

‘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.’

8 Under Article 4 of that directive:

‘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.

Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.

2. 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.’

9 The wording of Article 1(1) of Directive 2001/23 is substantially the same as that of Article 1(1) of Directive 77/187.

Portuguese law

10 Article 8(4) of the Constitution provides:

‘The treaties of the European Union and the provisions adopted by its institutions within the confines of their powers shall apply in internal law in accordance with the law of the European Union, with due regard to the fundamental principles of a democratic state based on the rule of law.’

11 Article 47(2) of the Constitution provides:

‘Every citizen has the right to enter the civil service under equal and free conditions, as a general rule by means of a competitive selection process.’

12 According to Article 53 of the Constitution:

‘Workers shall be guaranteed security of employment. Dismissal without legitimate grounds or for political or ideological reasons is prohibited.’

13 Article 11 of the Código do Trabalho (Labour Code) provides:

‘A contract of employment is one on the basis of which a natural person, for remuneration, undertakes to provide services to another person or persons within an organisation and under its authority.’

14 Article 161 of the Labour Code provides:

‘In relation to a ‘position of trust’, a directorship or equivalent position, or a managerial or supervisory position, reporting directly to the management board or managing director or equivalent, it may be possible to exercise the duties of the personal secretariat for the holder of any of those positions or, provided the collective labour regulation instrument so permits, duties which also entail a special relationship of trust with the person who holds those positions or carries out those command duties.’

15 Article 162(1), (2) and (5) of the Labour Code provides as follows:

‘1. An employee of the undertaking or another person recruited to that end may hold a position of trust or exercise those duties.

2. Where a worker is recruited to perform duties as the holder of a position of trust, his contract may be made permanent at the end of the position of trust contract.

...

5. For the purposes of calculating the employee’s seniority, the period of service completed under the position of trust rules shall count as having been completed at the employee’s grade.’

16 Article 163(1) and (2) of the Labour Code provides:

‘1. Either party may terminate the position of trust by giving prior written notice of at least 30 or 60 days, depending, respectively, on whether the position lasted two years or longer.

2. Failure to give notice does not prevent the position from being terminated, since the party at fault shall be liable to indemnify the other party in accordance with Article 401.’

17 Article 285 of the Labour Code states:

- ‘1. In the event of a transfer, by whatever means, of ownership of an undertaking or business or part of an undertaking or business which is an economic entity, the rights and obligations of the employer under the employment contracts of the employees concerned shall be transferred to the transferee, together with the liability to pay any fines imposed in respect of employment law infringements.
2. The transferor shall be jointly and severally liable in respect of obligations falling due up to the date of the transfer for a period of one year following that transfer.
3. The provisions of the preceding paragraphs shall also apply to the transfer, assignment or resumption of control of the operation of an undertaking, business or economic entity and, in the event of assignment or resumption of control of the operation, the party carrying out that operation immediately before the assignment or resumption shall be jointly and severally liable.
4. The preceding paragraphs shall not apply to an employee who, before the transfer, has been transferred by the transferor to another business or economic unit, within the meaning of Article 194, while being retained in the transferor’s service, with the exception of matters concerning the liability of the transferee regarding payment of any fines imposed in respect of employment law infringements.
5. An organised grouping of resources which has the objective of pursuing an economic activity shall be considered to be an economic unit, whether that activity is central or ancillary.
6. A breach of the rules laid down in paragraph 1 of this Article, and of the first part of paragraph 3 thereof, shall constitute a very serious infringement.’

18 Article 62 of Lei n.º 50/2012 aprova o regime jurídico da actividade empresarial local e das participações locais e revoga as Leis n.ºs 53-F/2006, de 29 de dezembro, e 55/2011, de 15 de novembro (Law No 50/2012 approving the legal arrangements for local business activities and shareholdings held by local authorities, and repealing Law No 53-F/2006 of 29 December 2006 and Law No 55/2011 of 15 November 2011), of 31 August 2012 (*Diário da República*, 1st series, No 169, 31 August 2012), in the version applicable to the dispute in the main proceedings, which concerns the winding up of local undertakings, provides:

‘1. Without prejudice to Article 35 of the Companies Code, a winding-up order must be made within a period of six months in respect of a local undertaking where one of the following situations exists:

...

5. Members of staff performing duties in local undertakings which fall within one of the situations provided for in paragraph 1, who are not covered by the instruments of mobility provided for in Law No 12-A/2008 of 27 February 2008, are subject to the rules governing contracts of employment, without prejudice to paragraph 6 below.

6. Local undertakings which are being liquidated may transfer to public entities with shareholdings in those undertakings those employees who have been engaged in accordance with the rules governing contracts of employment, pursuant to Article 58 of Law No 12-A/2008 of

27 February 2008, provided those employees are assigned to, and are necessary for, the activities being integrated or in-sourced.

...

11. The provisions of paragraphs 6 to 10 shall apply only to employees with a permanent contract of employment concluded at least one year before the date of the order winding up the local undertaking, to whom, where a permanent legal relationship of public employment has been established, no compensation is payable for the abolition of the previous post.

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 19 April 2005, Ms Correia Moreira entered into a training contract with Expo Arade, Animação e Gestão do Parque de Feiras e Exposições de Portimão EM.

20 On 2 January 2006, Ms Correia Moreira entered into a fixed-term contract of employment with that company for one year to perform duties as a member of the human resources staff.

21 On 1 November 2008, Ms Correia Moreira and Portimão Urbis EM SA (‘Portimão Urbis’) entered into a contract for a position of trust to perform the duties of head of the administrative management and human resources unit. That contract lasted until 30 June 2010.

22 On 1 July 2010, Ms Correia Moreira entered into a new contract for a position of trust with Portimão Urbis to perform the same duties. The parties terminated that contract on 1 July 2013.

23 On the same date, she entered into a new contract for a position of trust with Portimão Urbis to perform the duties of manager of the administrative management and human resources unit, but with a reduction in her gross pay.

24 On 15 October 2014, the Municipality of Portimão approved the winding up and liquidation of Portimão Urbis as part of a plan to in-source some of the activities of that undertaking to the municipality and to outsource other activities to another municipal undertaking, that is to say, Empresa Municipal de Águas e Resíduos de Portimão EM SA (‘EMARP’).

25 The Municipality of Portimão and EMARP maintained in force all rights under the employment contracts concluded by Portimão Urbis.

26 Ms Correia Moreira was included on the list of ‘in-sourced’ employees of the Municipality of Portimão, who entered into a public-interest transfer agreement with Portimão Urbis, and she was assigned to administrative and human resources management services. Between 1 January 2015 and 20 April 2017, she performed the duties of a senior member of staff in human resources operations within the Municipality of Portimão.

27 In July 2015, the employees who came under the in-sourcing plan, which included Ms Correia Moreira, were informed by the Municipality of Portimão that their applications to the proposed competition would, assuming they were successful, result in their recruitment to the first rung of the civil service, where they would be required to remain for at least 10 years. The employees who were ‘outsourced’ to EMARP were not subject to such a competitive selection procedure.

28 A competition was initiated to which Ms Correia Moreira applied. At the conclusion of the competition, and even though she had been ranked in first place on the list, she was informed that her remuneration would be lower than what she received at Portimão Urbis, which she did not accept.

29 On 26 April 2017, Portimão Urbis gave Ms Correia Moreira notice of the termination of her contract of employment due to the closure of the undertaking.

30 On 2 January 2018, the conclusion of the liquidation procedure for Portimão Urbis was registered in the commercial registry.

31 Ms Correia Moreira applied to the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal) for a declaration that her contract of employment with Portimão Urbis was transferred to the Municipality of Portimão from 1 January 2015, as a result of the transfer of the establishment where she worked. In view of the transfer of Portimão Urbis, she is asking the referring court to declare that the subsequent termination of the contract of employment is unlawful and that she must be brought into the workforce of the Municipality of Portimão under the same conditions as those applied to her by Portimão Urbis since 1 January 2015.

32 In addition, she is seeking an order that the Municipality of Portimão pay her the differences in salary between the salary which the municipality was required to pay her after that transfer and the salary which was actually paid to her. Finally, she is seeking an order that the Municipality of Portimão pay her compensation for non-material harm.

33 The Municipality of Portimão disputes the claims of Ms Correia Moreira arguing, first, that there was no transfer of an establishment, since the municipal undertaking was wound up in accordance with the law and the municipality merely took back the responsibilities with which it was originally entrusted, secondly, that Ms Correia Moreira performed her duties in connection with a position of trust and therefore she was not an employee of Portimão Urbis and, thirdly, that the Municipality of Portimão merely complied with the legal rules arising from Article 62 of Law No 50/2012 of 31 August 2012 in the version applicable to the main proceedings, according to which all municipal officials are recruited following specific rules and are subject to the principle of equal treatment with regard to access to the civil service laid down in Article 47(2) of the Constitution.

34 In those circumstances, the Tribunal Judicial da Comarca de Faro (District Court, Faro, Portugal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) On the premiss that “worker” must be taken to mean any person who, in the Member State concerned, is protected as an employee under national employment law, can a person who has a contract for a position of trust with the transferor be regarded as an “employee” within the meaning of Article 2(1)(d) of Council Directive 2001/23 and can that person, accordingly, enjoy the protection which that legislation confers?’

(2) Does EU legislation, in particular Directive 2001/23, in conjunction with Article 4(2) TEU, preclude a national rule which, even in the case of a transfer falling within the scope of that directive, requires that workers in all cases undergo a public competitive selection procedure and become bound by a new relationship with the transferee where that transferee is a municipality?’

Consideration of the questions referred

The first question

35 By its first question, the referring court asks, in essence, whether Directive 2001/23, in particular Article 2(1)(d), must be interpreted as meaning that a person who has entered into a contract for a position of trust, within the meaning of the national legislation at issue in the main proceedings, with the transferor may be regarded as an ‘employee’ and thus benefit from the protection which that directive affords.

36 It should, first of all, be stated that the national court, in its order for reference, expressly refers to the judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16, EU:C:2017:574, paragraph 46), in which the Court of Justice held, in essence, that Article 1(1) of Directive 2001/23 must be interpreted as meaning that a situation in which the activities of a municipal undertaking are transferred to a municipality falls within the scope of that directive, provided that the identity of that undertaking is preserved after the transfer, which is a matter for the national court to determine.

37 The present request for a preliminary ruling was brought by the same court which made the reference to the Court of Justice in the case which gave rise to the judgment cited in the preceding paragraph and concerns a transaction of the same type as the one considered in that judgment.

38 In the main proceedings, as regards the preservation of the identity of the transferred undertaking, the referring court does not see any particular problem, since it starts from the premiss that the transaction at issue in the main proceedings may fall within the scope of Directive 2001/23.

39 That being so, the referring court is unsure whether, in the context of a transfer such as the one at issue in the main proceedings, a person, such as the applicant in the main proceedings, may be regarded as an ‘employee’ within the meaning of Article 2(1)(d) of Directive 2001/23, given the specific nature of her contract with the transferor.

40 It should be noted in that respect that, under Article 2(1)(d) of Directive 2001/23, any person who, in the Member State concerned, is protected as an employee under national employment law is considered to be an ‘employee’.

41 In addition, the first subparagraph of Article 2(2) of that directive provides that the directive will be without prejudice to national law as regards the definition of the contract of employment or the employment relationship.

42 It follows from both those provisions that if Directive 2001/23 is intended to protect employees, it is for the Member States to provide a definition of an employee and his contract or employment relationship in their respective legislation.

43 Although the Court does not have jurisdiction to interpret national law (order of 21 October 2015, *Kovozber*, C-120/15, not published, EU:C:2015:730, paragraph 32 and the case-law cited), as that is a matter for the referring court, it should be observed that, in the present case, that court notes, in the order for reference, that the contract for a position of trust concluded with a person who is already an employee or who has no other previous employment relationship is classified as a contract of employment.

44 Thus, it appears that a person such as the applicant in the main proceedings may be regarded as an ‘employee’ within the meaning of Article 2(1)(d) of Directive 2001/23 and her contract for a position of trust may be regarded as a contract of employment, for the purposes of the first subparagraph of Article 2(2) of that directive.

45 That being so, it is apparent from the order for reference that the protection afforded to that type of employee differs from that afforded to other employees in so far as the national legislation concerned makes it possible to terminate a contract for a position of trust merely by giving notice in writing within a relatively short period and without the requirement for a legitimate reason.

46 In that regard, Article 2(1)(d) of Directive 2001/23 merely requires a person to be protected as an employee under the national legislation concerned, without, however, insisting on the protection having a particular content or a particular quality.

47 Indeed, making differences between employees relevant, depending on the content or quality of their protection under national legislation, would deprive Directive 2001/23 of part of its effectiveness.

48 Moreover, it should be pointed out that Directive 2001/23, as is apparent from recital 3, is intended to safeguard the rights of employees when there is a change of ownership of the undertaking and not, as the case may be, to extend their rights. Thus, that directive merely ensures that the protection which a person enjoys under the national legislation concerned is not diminished solely because of the transfer.

49 The purpose of that directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer (see judgment of 6 April 2017, *Unionen*, C-336/15, EU:C:2017:276, paragraph 18 and the case-law cited).

50 It follows that Directive 2001/23 ensures that the specific protection provided for by national legislation will be preserved without its content or quality being affected.

51 In the light of the foregoing considerations, the answer to the first question is that Directive 2001/23, in particular Article 2(1)(d), must be interpreted as meaning that a person who has entered into a contract for a position of trust, within the meaning of the national legislation at issue in the main proceedings, with the transferor may be regarded as an ‘employee’ and thus benefit from the protection which that directive affords, provided, however, that that person is protected as an employee by that legislation and has a contract of employment at the date of transfer, which is a matter for the referring court to determine.

The second question

52 By its second question, the referring court asks, in essence, whether Directive 2001/23, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that it precludes national legislation which provides that, in the event of a transfer within the meaning of that directive and where the transferee is a municipality, the employees concerned must, first, undergo a public competitive selection procedure and, secondly, have a new relationship with the transferee.

53 First of all, it must be observed that, according to settled case-law, the fact that the transferee is a legal person governed by public law is not such as to exclude the existence of a transfer coming within the scope of Directive 2001/23, whether that legal person is a public undertaking responsible for a public service or a municipal authority. Thus, the Court has acknowledged that the fact that the transferee is a municipality does not, as such, preclude that directive from applying to a transfer of the activities of an undertaking to a municipality (see, to that effect, judgement of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraphs 30 to 32 and the case-law cited).

54 However, the Court has pointed out, in that respect, that it is clear from the wording of Article 1(1)(c) of Directive 2001/23 that, in order for the directive to apply, the transfer must concern an entity engaged in economic activities, whether or not for gain, and that, in principle, activities which fall within the exercise of public powers are excluded in that respect (judgment of 20 July 2017, *Piscarreta Ricardo*, C-416/16, EU:C:2017:574, paragraphs 33 and 34 and the case-law cited).

55 It follows from a reading of the second question that the referring court appears to consider that the transfer at issue in the main proceedings is covered by Directive 2001/23 and therefore that the activities being transferred do not fall within the exercise of public powers.

56 Therefore, relying solely on that assumption, which is for the referring court to verify, the Court will provide an answer to the second question.

57 In that regard, pursuant to the first subparagraph of Article 3(1) of Directive 2001/23, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer will, by reason of such transfer, be transferred to the transferee.

58 As was observed in paragraph 49 above, the purpose of Directive 2001/23 is to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer.

59 In the present case, it is apparent from the order for reference that, under the applicable national legislation, a person such as the applicant in the main proceedings is, as a result of the transfer, required, first, to undergo a competitive selection procedure and, secondly, to have a new relationship with the transferee. Furthermore, if, following such a public competitive selection procedure, the applicant in the main proceedings were brought into the civil service, it would be on the basis of a reduction in her salary for a period of at least 10 years.

60 It must be held that such requirements which, first, alter the terms and conditions of employment, agreed with the transferor, of a person such as the applicant in the main proceedings and, secondly, risk placing that employee in a position less favourable to the one which she was in prior to that transfer are contrary to both the first subparagraph of Article 3(1) of Directive 2001/23 and the purpose of that directive.

61 With regard to the national court's reference to Article 4(2) TEU, it should be observed that that provision stipulates that the Union must respect, inter alia, the national identities inherent in the fundamental structures, political and constitutional, of the Member States.

62 In that regard, it should be pointed out that, in an area where Member States have transferred competence to the Union, such as the matter of safeguarding employees' rights in the event of transfers of undertakings, that provision cannot be interpreted so as to deprive a worker of the protection granted to her by the Union law in force in that area.

63 In the light of the foregoing considerations, the answer to the second question is that Directive 2001/23, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that it precludes national legislation which provides that, in the event of a transfer within the meaning of that directive and where the transferee is a municipality, the employees concerned must, first, undergo a public competitive selection procedure and, secondly, have a new relationship with the transferee.

Costs

64 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 (Eighth Chamber) hereby rules:

- 1. 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, in particular Article 2(1)(d), must be interpreted as meaning that a person who has entered into a contract for a position of trust, within the meaning of the national legislation at issue in the main proceedings, with the transferor may be regarded as an 'employee' and thus benefit from the protection which that directive affords, provided, however, that that person is protected as an employee by that legislation and has a contract of employment at the date of transfer, which is a matter for the referring court to determine.**
- 2. Directive 2001/23, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that it precludes national legislation which provides that, in the event of a transfer within the meaning of that directive and where the transferee is a municipality, the employees concerned must, first, undergo a public competitive selection procedure and, secondly, have a new relationship with the transferee.**

[Signatures]

* Language of the case: Portuguese.
