ECLI:EU:C:2018:646

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

7 August 2018 (*)

(Reference for a preliminary ruling — Directive 2001/23/EC — Scope — Article 1(1) — Transfers of undertakings — Safeguarding of employees' rights –Service contract for the management of a municipal Academy of Music — Cessation of the activity of the first contractor before the end of the current school year and designation of a new contractor at the beginning of the following school year — Article 4(1) — Prohibition of dismissal by reason of transfer — Exception — Dismissal for economic, technical or organisational reasons entailing changes in the workforce — Charter of Fundamental Rights of the European Union — Article 47)

In Case C-472/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castilla y León, Spain), made by decision of 12 May 2016, received at the Court on 24 August 2016, in the proceedings

Jorge Luís Colino Sigüenza

v

Ayuntamiento de Valladolid,

In-pulso Musical SC,

Miguel del Real Llorente, Administrador Concursal Músicos y Escuela SL,

Músicos y Escuela SL,

Fondo de Garantía Salarial (Fogasa)

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits, A. Borg Barthet (Rapporteur), M. Berger and F. Biltgen, Judges,

Advocate General: E. Tanchev,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 27 September 2017,

after considering the observations submitted on behalf of:

– Mr Colino Sigüenza, by J.M. Blanco Martín, abogado,

– In-Pulso Musical SC, by J. Lozano Blanco, abogado,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the European Commission, by J. Rius and M. Kellerbauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 4(1) of Council Directive 2001/23/EC 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) and of Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Mr Jorge Luís Colino Sigüenza and the Ayuntamiento de Valladolid (municipal administration of Valladolid, Spain), In-pulso Musical SC, Mr Miguel del Real Llorente, Administrador Concursal de Músicos y Escuela SL, (in his capacity as liquidator in the insolvency of Músicos y Escuela, Músicos y Escuela and Fondo de Garantía Salarial (Fogasa) (Wages Guarantee Fund (Fogasa), Spain), concerning the lawfulness of Mr Colino Sigüenza's dismissal under a collective dismissal procedure.

Legal context

EU law

3 Directive 2001/23 codifies Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 1977 L 61, p. 26), as amended by Council Directive 98/50/EC of 29 June 1998 (OJ 1998 L 201, p. 88).

4 Article 1(1) of Directive 2001/23 provides:

'(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.'

5 The first subparagraph of Article 3(1) of that directive states:

'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.'

6 Under the first subparagraph of Article 4(1) of Directive 2001/23:

'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.'

Spanish law

7 The rules applicable to employees in the event of transfers of economic entities are defined by Real Decreto Legislativo 1/1995 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 1/1995 approving the consolidated text of the Law on the Workers' Statute) of 24 March 1995 (BOE No 75, of 29 March 1995, p. 9654), in the version resulting from Law 12/2001 of 9 July 2001 (BOE No 164, of 10 July 2001, p. 24890; 'the Workers' Statute').

8 Article 44(1) and (2) of the Workers' Statute provides:

'1. The transfer of an undertaking, business or independent production unit of an undertaking shall not in itself terminate the employment relationship; the new employer shall take over the former employer's rights and obligations in respect of employment and social security, including commitments as regards pensions, on the conditions laid down by the specific applicable legislation, and, in general, all obligations in the sphere of additional social protection that were borne by the transferor.

2. For the purposes of this article, there shall be a transfer of undertaking 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.'

9 Article 51 of that statute, entitled 'Collective dismissal' provides:

'For the purposes of this Law, "collective redundancy" shall mean the termination of employment contracts based on economic, technical, organisational or production grounds, where, over a period of 90 days, the termination affects at least:

(a) 10 workers, in undertakings employing fewer than 100 workers;

(b) 10% of the number of workers in undertakings employing between 100 and 300 workers;

(c) 30 workers in undertakings employing more than 300 workers.

Economic grounds shall be deemed to have been established where a negative economic situation is apparent from the financial performance of the undertaking, in cases where losses are actually sustained or forecast or where there is a persistent reduction in the level of ordinary revenue or sales. In any event, a reduction shall be deemed to be persistent if, for three consecutive quarters, the level of ordinary revenue or sales in each quarter is lower than that recorded in the same quarter of the preceding year.

...

Collective redundancy shall also mean a termination of employment contracts affecting the entire workforce of an undertaking, provided that the number of workers affected is greater than five, where the termination occurs as a result of the total cessation of the business activity of the undertaking on the same grounds referred to above.

...

2. Collective redundancy must be preceded by a period of consultation with the workers' legal representatives for a maximum period of 30 calendar days or 15 days in the case of undertakings with fewer than 50 workers.

...

The employment authority shall ensure the effectiveness of the consultation period. Where appropriate, it may send warnings and recommendations to the parties, which warnings or recommendations may not in any event interrupt or suspend the procedure. Moreover, without prejudice to the preceding paragraph, during the consultation period, the supervisory authority may, at the joint request of the parties, take mediation measures appropriate to a search for solutions to the problems to which the collective dismissals give rise. To the same ends, it may also lend its assistance, at the request of a party or upon its own initiative.

Once the consultation period has ended, the employer shall inform the employment authority of the outcome. If an agreement has been reached, the employer shall forward a complete copy [of the agreement to the authority]. If no agreement has been reached, the employer shall provide the workers' representatives and the employment authority with the final decision on collective redundancy adopted by it, and the conditions of those redundancies.

...

4. Once the decision has been communicated to the employees' representatives, the employer may notify the individual workers concerned of the terminations under the conditions set out in Article 53(1) of this Law. In any event, at least thirty days must elapse between communication of the date of the opening of the consultation period to the employment authority and the date on which the termination takes effect.

...

6. The employer's decision may be subject to appeals provided for in respect of such dismissal. The lodging of an appeal by the workers' representatives shall suspend the processing of individual actions until such time as a ruling has been given on the appeal.'

10 Collective dismissal is governed by Article 124 of the Ley 36/2011 reguladora de la jurisdicción social (Law 36/2011 on the organisation of labour courts) of 10 October 2011 (BOE No 245 of 11 October 2011, p. 106584). In the version in force as from 15 July 2012, that article, entitled 'Collective dismissals for economic, technical or organisational reasons or reasons of production or force majeure', provides:

'1. The employer's decision may be challenged by the employees' statutory representatives by means of the procedure set out in the following paragraphs. Where the action is brought by trade-union delegates, they must be sufficiently involved in the collective dismissal procedure.

2. The action can be based on the following pleas in law:

(a) the legal ground stated in the written notice is not present;

(b) the consultation period has not taken place, the documents referred to in Article 51(2) of the Workers' Statute have not been supplied or the procedure provided for in Article 51(7) of the Staff Regulations was not followed;

(c) the dismissal decision was adopted by fraud, deception, coercion or abuse of law;

(d) the dismissal decision was adopted in breach of fundamental rights and public freedoms.

Applications concerning the failure to apply the priority rules on safeguarding employment provided for in legislation, collective agreements or an agreement adopted during the consultation period cannot in any event be subject to that procedure. Those applications must be made under the individual procedure referred to in paragraph 11 of this article.

...

6. The action must be brought within 20 days from the date of the agreement concluded during the consultation period or of the date on which the workers' representatives were notified of the collective dismissal decision adopted by the employer.

...

9. Once the action has been declared admissible, the Registry shall notify the defendant employer and order him to submit, within five days and preferably by digital means, the documents and minutes of the consultation period and the communication of the result thereof to the Employment Authority.

In the same order, the Registry shall set a time limit of five days within which the employer must bring the existence of the action brought by the employees' representatives to the employees affected by the collective dismissal so that they may, within 15 days, provide the court with an address for service of the judgment.

...

11. The judgment shall be rendered within 5 days of the hearing and may be subject to appeal.

The decision terminating the employment relationship shall be declared valid where, in accordance with Article 51(2) or (7) of the Workers' Statute, the employer confirms the existence of the legal ground on which he relies.

The judgment shall declare the decision terminating the employment relationship invalid where the employer does not confirm the existence of the legal ground stated in the letter of dismissal.

...

12. Once it becomes definitive, the judgment shall be served upon the parties and notified to the employees affected by the collective dismissals who have provided the court with an address for service, for the purposes of paragraph 13(b) of this article.

The definitive judgment shall be notified, for information, to the Employment Authority, the unemployment fund and social security administration, where they have not been parties to the proceedings.

13. When the proceedings concern an action brought by an individual before the Juzgado de lo Social (Social Court, Spain) against a dismissal, Articles 120 to 123 of this Law shall apply, subject to the following special provisions:

(a) where the dispute relates to the priority given to certain workers, the action must also be brought against them.

The action must also be brought against the employees' representatives where the measure has been taken with their consent, provided that those who have not signed the agreement have not challenged the dismissal decision in accordance with the preceding paragraphs;

(b) if, pursuant to the preceding paragraphs, the employees' representatives bring an action against the employer's decision after the commencement of proceedings brought by an individual, those proceedings shall be suspended until a decision has been taken in the action brought by the employees' representatives, which, once it is final, shall have the force of *res judicata* with regard to the individual proceedings, in accordance with Article 160(5) of this Law;

(c) in addition to the grounds referred to in Article 122(2) of this Law, the dismissal shall be void where the employer has not opened the consultation period, provided the documents referred to in Article 51(2) of the Workers' Statute, complied with the procedure laid down in Article 51(7) of that Statute or obtained judicial authorisation from the insolvency court where that is required by law.

The termination of the contract decided upon by the employer without observance of the priorities safeguarding posts, which may flow from laws, collective agreements or the agreement reached in the consultation period, shall also be void. That nullity does not extend to terminations of contracts made in the same collective dismissal in compliance with the post-safeguarding priorities.'

11 Article 160(5) of that Law provides as follows:

'A final judgment shall have the force of *res judicata* with regard to individual actions which are pending, or which may be brought, and which concern the same subject matter or are directly related thereto, whether the actions have been brought before the social or the administrative courts.

Those actions shall therefore be suspended for the duration of the collective action. An order for suspension shall be made even if judgment has been given at first instance and an appeal or an appeal in cassation is pending, the competent court being bound by the final judgment given in the collective action, even though the inconsistent or contradictory nature of that final judgment has not been invoked in appeal proceedings brought before the Tribunal Supremo [(Suprement Court)] the purpose of which is to ensure consistency in the case-law.'

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

12 Mr Colino Sigüenza was employed as a music teacher at the Municipal Music School of Valladolid (Spain) ('the School') from 11 November 1996. Originally, that school was directly managed by the municipal administration of Valladolid and Mr Colino Sigüenza was initially employed by the administration.

13 From 1997, the municipal administration of Valladolid stopped managing the School directly and put out a series of calls for tenders for its management. The contractor designated after those successive procedures was, without interruption from that time until 31 August 2013, Músicos y Escuela, which carried on the business of the School, managing the premises, facilities and instruments necessary to the provision of that service. Músicos y Escuela also took over some of the workers who had been employed by the municipal administration, including Mr Colino Sigüenza. That activity continued to be regarded as a service offered to citizens by the municipal administration of Valladolid as the Municipal School of Music.

14 Due to a reduction in the number of students of the Valladolid Municipal Academy of Music in the 2012-2013 school year, the sums paid by students for that service were no longer commensurate with the amounts to be paid by the municipal administration of Valladolid under the contract concluded with Músicos y Escuela, which led the latter to claim the sum of EUR 58 403.73 in respect of the first term of that school year and EUR 48 592.74 in respect of the second term thereof from the administration.

15 Since the municipal administration of Valladolid refused to pay those sums, on 19 February 2013 Músicos y Escuela requested the termination of the service contract on the ground of the administration's non-performance and claimed corresponding damages. In response, in August 2013, the municipal administration terminated the contract, alleging wrongful conduct by Músicos y Escuela as it had ceased its activities before the contractual end-date. The case was brought before the Sala de lo Contencioso-Administrativo of the Tribunal Superior de Justicia de Castilla y León (Administrative Chamber of the High Court of Justice, Castilla y León, Spain), which, by a number of final judgments delivered during 2014 and 2015, decided, firstly, that the municipal administration of Valladolid had breached the contract concluded with Músicos y Escuela, in so far as it provided for a guaranteed income irrespective of the number of students enrolled and that, by failing to comply therewith, the municipal administration had itself prevented Músicos y Escuela from continuing its activities, thus justifying the termination of that contract on the grounds of the wrongful conduct of the municipal administration. Secondly, since Músicos y Escuela has not fulfilled its obligations by having decided unilaterally to cease its activities on 31 March 2013, the damages which it sought were refused.

16 In the meantime, on 4 March 2013, Músicos y Escuela had commenced the negotiation and consultation period necessary to the collective dismissal of its entire staff due to the economic situation resulting from the conflict with the municipal administration of Valladolid. On 27 March 2013, in the absence of any agreement with the employees' representatives, Músicos y Escuela took the decision collectively to dismiss all the staff.

17 On 31 March 2013, that is to say a few months before the end of the current academic year, Músicos y Escuela ceased its activity and, on 1 April, returned the premises, instruments and facilities for the operation of the Municipal School of Music, the management of which had been entrusted to it, to the municipal administration of Valladolid. On 4 April 2013, Músicos y Escuela sent a letter of dismissal to all its staff, including Mr Colino Sigüenza, with effect from 8 April 2013. That company was declared insolvent on 30 July 2013.

18 Since the representatives of the Músicos y Escuela workers are alone permitted, under the Law on the organisation of labour and social courts, to bring an action in respect of a collective dismissal, they appealed against the collective dismissal decision before the Sala de lo Social de Valladolid of the Tribunal Superior de Justicia de Castilla y León in Valladolid (Valladolid Social Chamber of the High Court of Justice, Castilla y León, Spain) which, by decision of 19 June 2013, dismissed the appeal.

19 The workers' representatives appealed against that decision before the Tribunal Supremo (Supreme Court), which, by a judgment of 17 November 2014, also dismissed their appeal. That judgment has become final.

20 In the meantime, in August 2013, the municipal administration of Valladolid assigned the management of the Municipal Music School to In-pulso Musical and gave it, as it had done with Músicos y Escuela, the use of the premises, instruments and equipment necessary to that end. In-pulso Musical started its activities in September 2013 for the 2013-2014 school year. Following a new tendering procedure, the municipal administration of Valladolid again awarded that contract to In-pulso Musical for the 2014-2015 and 2015-2016 academic years. That company has not hired any of the employees who previously worked in the Municipal School of Music and who were collectively dismissed by Músicos y Escuela.

21 Mr Colino Sigüenza has brought an individual action before the Juzgado de lo Social No 4 de Valladolid (Social Court No 4, Valladolid, Spain) against Músicos y Escuela, the municipal administration of Valladolid and In-pulso Musical to challenge his dismissal.

22 By a judgment of 30 September 2015, that court dismissed the action brought by Mr Colino Sigüenza on the ground that the authority of *res judicata* attaching to the judgment of the Tribunal Supremo (Supreme Court) of 17 November 2014, which dismissed the action against the collective dismissal brought by the workers' representatives, binds it as regards the individual action brought by the person concerned against his dismissal, despite the fact that he was not, as an individual, a party to the proceedings which gave rise to that judgment. In addition, the Juzgado de lo Social No 4 de Valladolid (Social Court No 4, Valladolid) considered that In-pulso Musical had not succeeded Músicos y Escuela as Mr Colino Sigüenza's employer, since nearly five months had elapsed between his dismissal and In-pulso Musical's taking over the management of the Municipal School of Music.

23 Mr Colino Sigüenza appealed against that decision before the referring court, the Tribunal Superior de Justicia de Castilla y León (High Court of Justice of Castile-Leon).

24 In support of his action, he argues, in essence, firstly, that the authority of *res judicata* attaching to the judgment of the Tribunal Supremo (Supreme Court) of 17 November 2014, which dismissed the action brought against the collective dismissal, cannot affect him, in so far as he was not a party to those proceedings, so that such an extension of the authority of *res judicata* infringes his right to an effective remedy, guaranteed by Article 47 of the Charter. Secondly, he claims that

there was, in the present case, a transfer of undertaking to In-pulso Musical, so that that operation cannot justify the termination of his employment contract.

25 That court is therefore doubtful, in essence, firstly, as to whether the temporary interruption, by Músicos y Escuela, of its services between 1 April 2013 and early September 2013, the date at which the management of the Municipal School of Music was taken over by In-pulso Musical, precludes the establishment of a 'transfer' of undertaking or business within the meaning of Article 1 of Directive 2001/23 and, secondly, whether, in a situation such as that before it, the application of the national legislation on the force of *res judicata* has the effect of infringing Mr Colino Sigüenza's right to an effective remedy.

26 In those circumstances, the Tribunal Superior de Justicia de Castilla y León (High Court of Justice of Castile-Leon) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Should it be considered that there is a transfer for the purposes of Directive 2001/23/EC where the holder of a concession of a Municipal Music School, which receives all the material resources from that Municipality (premises, instruments, classrooms, furniture), has engaged its own staff and provides its services during the academic year, ceases that activity on 1 April 2013, two months before the end of the academic year, returning all the material resources to the Council, which does not resume the activity for the remainder of the academic year 2012/13, but awards a new concession to a new contractor, which resumes the activity in September 2013, at the beginning of the new academic year 2013/14, transferring to the new contractor for that purpose the necessary material resources previously made available to the former contractor by the Municipality (premises, instruments, classrooms, furniture)?

2. If the answer to the first question is in the affirmative, is it to be understood for the purposes of Article 4(1) of Directive 2001/23/EC that, in the circumstances described, — in which the failure of the main undertaking (the Municipality) to fulfil its obligations obliges the first contractor to cease its activity and to dismiss all its staff and immediately afterwards that main undertaking transfers the material resources to a second contractor, which continues with the same activity –, the dismissal of the first contractor's employees has occurred for 'economic, technical or organisational reasons entailing changes in the workforce' or has it been caused by 'the transfer of the undertaking, business or part of the undertaking or business', a cause prohibited by that article?

3. If the reply to the second question is that the dismissal has been caused by the transfer and is therefore contrary to Directive 2001/23/EC, is Article 47 of the Charter of the Fundamental Rights of the European Union to be interpreted as meaning that it precludes national legislation prohibiting a court from ruling on the substance of the claims of an employee who challenges his dismissal in an individual action, as part of a collective dismissal, in order to defend the rights deriving from Directive 2001/23/EC and Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, owing to the fact that final judgment has already been given on the collective dismissal in proceedings to which the worker was unable to be a party, although the unions established in the undertaking and all the collective statutory representatives of the employees were able or could have been to be parties?'

Consideration of the questions referred

The first question

27 By its first question, the referring court asks, in essence, whether Article 1(1) of Directive 2001/23 must be interpreted as meaning that a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a Municipal School of Music, to which the municipal administration had supplied all the resources necessary for the exercise of that activity, ceased that activity two months before the end of the current academic year, dismissing staff and returning those material resources to that municipal administration, which proceeds with a new award solely for the following school year and provides the new contractor with the same material resources, is capable of coming within the scope of that directive.

28 As a preliminary point, it must be borne in mind that the Court has held that that Directive 2001/23 is applicable wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the undertaking and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred (judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraph 28 and the case-law cited).

29 In accordance with the settled case-law of the Court, the aim of Directive 2001/23 is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of that directive is, therefore, the fact that the entity in question retains its identity, as indicated by the fact, inter alia, that its operation is actually continued or resumed (judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 25 and the case-law cited).

30 In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned, including in particular the type of undertaking or business concerned, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 25 and the case-law cited).

31 In particular, the Court has pointed out that the degree of importance to be attached to each criterion will necessarily vary according to the activity carried on and the production or operating methods employed in the undertaking, business or part of a business (judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 27 and the case-law cited).

32 In that regard, the Court has held that, in a sector where the activity is based essentially on manpower, the identity of an economic entity cannot be retained if the majority of its employees are not taken on by the alleged transferee (judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraph 35 and the case-law cited).

33 However, in a sector where the activity is based essentially on equipment, the failure of the new contractor to take over the staff which its predecessor employed to perform the same activity is not sufficient to preclude the existence of a transfer of an entity which retains its identity within the

meaning of Directive 2001/23 (see, to that effect, judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraph 41).

34 The question referred should be examined particularly in the light of that case-law, while account should be taken of the principal matters of fact set out by the national court in the order for reference.

35 It should be noted, first of all, that in a situation such as that at issue in the main proceedings, the material resources, such as musical instruments, facilities and premises, appear to be essential to the conduct of the economic activity in question, relating to the management of a School of Music. In the present case, it is common ground that the municipal administration of Valladolid has made available to the new contractor all the material resources which it had assigned to the former contractor.

36 Moreover, since the economic activity at issue in the main proceedings does not appear able to be regarded as an activity based essentially on manpower, since it requires a significant amount of equipment, the mere fact that In-pulso Musical did not take over the workers from Músicos y Escuela does not preclude the existence of a transfer of undertaking within the meaning of Directive 2001/23.

37 As regards, next, the fact that the tangible assets essential to the performance of the activity at issue in the main proceedings belonged at all times to the municipal administration of Valladolid, it must be recalled that, in accordance with the case-law cited in paragraph 28 of this judgment, whether ownership of tangible assets is transferred is not relevant for the purposes of the application of Directive 2001/23.

38 In that regard, the Court has held, in particular, that the fact that the tangible assets taken over by the new contractor did not belong to its predecessor but were merely provided by the contracting authority cannot preclude the existence of a transfer of an undertaking within the meaning of that directive (judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraph 39 and the case-law cited).

39 In that respect, an interpretation of Article 1(1)(b) of Directive 2001/23 which excludes from the scope of that directive a situation in which the tangible assets essential to the performance of the activity in question have always been owned by the transferee (the local authority of Valladolid) would deprive that directive of part of its effectiveness (see judgment of 26 November 2015, *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14, EU:C:2015:781, paragraph 40).

40 Finally, other factors submitted to the Court give a strong indication, in view of the criteria set out in paragraph 30 of this judgment, that the case in the main proceedings involved a ‘transfer of a business’ within the meaning of Article 1(1) of Directive 2001/23. Thus, In-pulso Musical took over the students of Músicos y Escuela and, from September 2013, the services provided by Músicos y Escuela until 1 April 2013.

41 Furthermore, it is clear from the case-law of the Court that a temporary suspension, of only a few months, of the undertaking’s activities cannot preclude the possibility that the economic entity at issue in the main proceedings retained its identity and that there was therefore a transfer of undertaking within the meaning of that directive (see, to that effect, judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, EU:C:2015:565, paragraph 31).

42 In that regard, the Court has held, in particular, that the fact that the undertaking was, at the time of the transfer, temporarily closed and had no employees in its service is admittedly one factor to be taken into account when assessing whether an existing economic entity was transferred. However, the temporary closure of an undertaking and the resulting absence of staff at the time of the transfer do not of themselves preclude the possibility that there has been a transfer of an undertaking within the meaning of Article 1(1) of Directive 2001/23 (judgment of 15 June 1988, *Bork International and Others*, 101/87, EU:C:1988:308, paragraph 16 and the case-law cited).

43 That conclusion applies in particular in a situation such as that at issue in the main proceedings, where, although the undertaking's activities ceased for five months, that period included three months of school holidays.

44 Consequently, the temporary suspension of the undertaking's activities and In-pulso Musical's failure to take over Músicos y Escuela's employees cannot preclude the possibility that the economic entity at issue in the main proceedings retained its identity and that there was therefore a transfer of undertaking within the meaning of that directive.

45 Ultimately, it is for the referring court to establish, in the light of the foregoing considerations and taking into account all of the factual circumstances of the operation at issue, whether or not there was a transfer of undertaking in the main proceedings.

46 In those circumstances, the answer to the first question is that Article 1(1) of Directive 2001/23 must be interpreted as meaning that a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music, to which the municipal administration had supplied all the means necessary for the exercise of that activity, ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff and returning those material resources to that municipal administration, which conducts a new tendering procedure solely for the following academic year and provides the new contractor with the same material resources, is capable of coming within the scope of that directive.

The second question

47 By its second question, the referring court asks, in essence, whether Article 4(1) of Directive 2001/23 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, the dismissal of the employees must be regarded as having been made for 'economic, technical or organisational reasons entailing changes in the workforce' or that the reason for that dismissal was 'the transfer of an undertaking, business, or part of an undertaking or business'.

48 As a preliminary point, it must be borne in mind that, as the Court has repeatedly held, Directive 2001/23 is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the new employer in the same conditions as those agreed with the transferor (judgment of 27 November 2008, *Juuri*, C-396/07, EU:C:2008:656, paragraph 28 and the case-law cited). The purpose of the 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 (judgments of 17 December 1987, *Ny Mølle Kro*, 287/86,

EU:C:1987:573, paragraph 25, and of 26 May 2005, *Celtec*, C-478/03, EU:C:2005:321, paragraph 26).

49 That being so, as is clear from the very wording of the first subparagraph of Article 3(1) of Directive 2001/23, the protection that the directive is intended to provide only concerns workers who have an employment contract or employment relationship existing at the date of the transfer.

50 In that regard, it must be recalled that, according to the case-law of the Court, unless otherwise expressly provided, Directive 2001/23 may be relied on solely by workers whose contract of employment or employment relationship is in existence at the time of the transfer. Whether such a contract or relationship existed at that time must be assessed on the basis of national law, subject, however, to compliance with the mandatory provisions of the directive concerning protection of employees from dismissal as a result of the transfer (judgment of 15 June 1988, *Bork International and Others*, 101/87, EU:C:1988:308, paragraph 17).

51 On this point, it must be observed that, under Article 4(1) of Directive 2001/23, the transfer of an undertaking, business or part of an undertaking or business must not in itself constitute grounds for dismissal by the transferor or the transferee.

52 Consequently, the employees whose contract of employment or employment relationship comes to an end with effect from a date prior to that of the transfer, contrary to Article 4(1), must be regarded as still employed by the undertaking on the date of the transfer, with the result, in particular, that the employer's obligations towards them are automatically transferred from the transferor to the transferee (judgment of 12 March 1998, *Dethier Équipement*, C-319/94, EU:C:1998:99, paragraph 35 and the case-law cited).

53 In order to determine if the reason for the dismissal was solely the transfer, contrary to Article 4(1) of Directive 2001/23, it is necessary to take into consideration the objective circumstances in which the dismissal occurred (judgment of 15 June 1988, *Bork International and Others*, 101/87, EU:C:1988:308, paragraph 18).

54 In that regard, it is stated in the order for reference that Mr Colino Sigüenza's dismissal took place well before the date of the transfer of the activity to In-pulso Musical and that the reason for that termination of the employment relationship was the fact that it was impossible for Músicos y Escuela to pay its staff, a situation resulting from a breach by the municipal administration of Valladolid of the provisions of its contract with Músicos y Escuela. Thus, those circumstances would appear to militate in favour of a classification of the dismissal of the staff of Músicos y Escuela for 'economic, technical or organisational reasons', within the meaning of Article 4(1) of Directive 2001/23, provided, however, that the circumstances which gave rise to the dismissal of all the staff and the delayed appointment of a new service provider are not a deliberate measure intended to deprive the employees concerned of the rights conferred on them by Directive 2001/23, which it will be for the referring court to ascertain.

55 In the light of the foregoing considerations, the answer to the second question is that Article 4(1) of Directive 2001/23 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, it appears that the dismissal of the employees was made for 'economic, technical or organisational reasons entailing changes in the workforce', within the meaning of that provision, provided that the circumstances which gave rise to the dismissal of all

the employees and the delayed appointment of a new service provider are not a deliberate measure intended to deprive those employees of the rights conferred on them by Directive 2001/23, which it will be for the referring court to ascertain.

The third question

56 By its third question, the referring court asks, in essence, whether Directive 2001/23 and the right to an effective remedy, enshrined in Article 47 of the Charter, must be interpreted as meaning that they preclude national rules on the force of *res judicata*, such as those at issue in the main proceedings, which prohibit national courts from ruling on challenges, based on Directive 2001/23, to the individual dismissal of a worker in the context of a collective dismissal, where a judicial decision in proceedings relating to the collective dismissal, in respect of which only the workers' representatives may bring a challenge, has already been made.

57 It should be recalled that, according to the established case-law of the Court, the procedure provided for in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the former provides the latter with the points of interpretation of EU law which they require in order to decide the disputes before them (see, inter alia, judgments of 16 July 1992, *Meilicke*, C-83/91, EU:C:1992:332, paragraph 22, and of 24 March 2009, *Danske Slagterier*, C-445/06, EU:C:2009:178, paragraph 65).

58 In the context of that cooperation, it is for the national court before which the dispute has been brought, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, inter alia, judgments of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 38; of 6 December 2001, *Clean Car Autoservice*, C-472/99, EU:C:2001:663, paragraph 13; and of 5 February 2004, *Schneider*, C-380/01, EU:C:2004:73, paragraph 21).

59 Nonetheless, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, judgment of 26 January 1993, *Telemarsicabruzzo and Others*, C-320/90 to C-322/90, EU:C:1993:26, paragraph 6; order of 13 July 2006, *Eurodomus*, C-166/06, not published, EU:C:2006:485, paragraph 9).

60 It must be noted that the order for reference does not contain sufficient information regarding the relevant national law. The referring court does not provide any information as regards the application of the principle of *res judicata*, within the meaning of Article 124(13)(b) of Law 36/2011 on the organisation of labour and social courts.

61 In addition, Article 160(5) of that Law, to which Article 124(13)(b) thereof refers, provides that the force of *res judicata* is to be limited to the subject matter of the proceedings. Firstly, the order for reference does not contain any information as to Article 160(5) of that Law and, secondly, as the Spanish Government observed at the hearing, to examine whether the subject matter of the procedure is identical, in the present case, given the collective nature of both the dismissal and the transfer concerning all the staff, it would be necessary also to take into consideration other provisions of Spanish procedural law.

62 In those circumstances, as the Court does not have the necessary information to enable it to give a useful answer to the third question, that question must be declared inadmissible.

Costs

63 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 (Fifth Chamber) hereby rules:

1. **Article 1(1) of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music, to which the municipal administration had supplied all the means necessary for the exercise of that activity, ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff and returning those material resources to that municipal administration, which conducts a new tendering procedure solely for the following academic year and provides the new contractor with the same material resources, is capable of coming within the scope of that directive.**

2. **Article 4(1) of Directive 2001/23 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, it appears that the dismissal of the employees was made for 'economic, technical or organisational reasons entailing changes in the workforce', within the meaning of that provision, provided that the circumstances which gave rise to the dismissal of all the employees and the delayed appointment of a new service provider are not a deliberate measure intended to deprive those employees of the rights conferred on them by Directive 2001/23, which it will be for the referring court to ascertain.**

[Signatures]

* Language of the case: Spanish.