

## SUPREME COURT OF JUSTICE

On 16 March 2010, the Supreme Court delivered judgement in

**HR-2010-00473-A, (case no. 2009/1618), civil appeal against judgment,**

Bardufoss Flyservice AS

Counsel Mr Kjell Heggvoll – under examination)

v.

Jostein Holmebukt

Erik Rognmo

Bjørn-Tore Fredriksen

Monarth Pedersen

Rune Lusi Holmebukt

Tore Henrik Strømseth

Pål Oredalen Tronstad

Ruth-Eva Lynghaug

Forde Bjørkestøl

Counsel Mr Christopher Hansteen – under examination)

### R E A S O N S:

- (1) Mr Justice **Matheson**: The issue in this case is whether a change of provider of ground handling services at Bardufoss Airport constitutes a transfer of undertaking pursuant to section 16-1 of the Working Environment Act.
- (2) The air route between Bardufoss and Oslo was formerly operated by SAS. Transport of military personnel accounts for almost 50 percent of operational traffic on the route. In 2007, the contract for this passenger transport was put out on competitive tender and SAS lost the contract, which was awarded to the airline Norwegian. On 1 May 2008, Norwegian started regular air passenger transport between Oslo and Bardufoss. SAS closed down its air route from 13 May the same year.
- (3) When SAS operated the air route, ground handling services at Bardufoss Airport were provided by an SAS subsidiary, Scandinavian Ground Services AS, to which I refer as SGS; that is to say that SGS was responsible for check-in, passenger and luggage handling, cleaning of planes etc.

- (4) In connection with Norwegian's takeover of the route, it put the provision of ground handling services out on competitive tender. SGS submitted a bid but was not successful and the contract was awarded to a company which is now called Røros Flyservice AS (literally: Røros Air Service AS).
- (5) Røros Flyservice AS formed a subsidiary, Bardufoss Flyservice AS, to deliver ground handling services at Bardufoss Airport. Bardufoss Flyservice AS started business on 1 May 2008. SGS closed down its business on 12 May the same year. The companies cooperated in the transition period and there was no disruption in ground handling services at the airport in connection with the change of operator.
- (6) Twelve of the people employed by Bardufoss Flyservice AS had previously been employed by SGS. On 9 June 2008, nine of these employees took out legal proceedings against their new employer, Bardufoss Flyservice AS, claiming that they must be employed with the same rights and obligations as in their contracts of employment with SGS.
- (7) The Senja District Court pronounced judgement on 2 January 2009 with the following conclusion:
- “1. Jostein Holmebukt, born on 24 October 1979, Erik Rognmo, born on 22 February 1968, Bjørn-Tore Fredriksen, born on 18 January 1969, Monarth Pedersen, born on 6 February 1959, Rune Luis Holmebukt, born on 26 June 1978, Tore Henrik Strømseth, born on 5 April 1963, Pål Oredalen Tronstad, born on 8 April 1977, Ruth-Eva Lynghaug, born on 9 July 1952 and Frode Bjørkestøl, born on 3 September 1971, are employed by Bardufoss Flyservice AS with the rights and obligations that are embodied in their contracts of employment with Scandinavian Ground Services AS.
  2. Bardufoss Flyservice AS shall pay to the claimants in item no. 1 above legal costs for the proceedings before the District Court in the amount of 66 791 – sixtysixthousandsevenhundredandninetyone – kroner within 2 – two – weeks of the date of service of this judgment.”
- (8) Bardufoss Flyservice AS appealed against the judgment to the Court of Appeal. The Hålogaland Court of Appeal pronounced judgment on 3 August 2009 with the following conclusion:
- “1. The appeal is dismissed.
  2. Bardufoss Flyservice AS shall pay to the appellants, represented by counsel Sigurd-Øyvind Kambestad, legal costs for the proceedings before the District

Court in the amount of 89 291 – eightyninethousandtwohundredandninetyone – kroner within 2 – two – weeks of the date of service of this judgment.

3. Bardufoss Flyservice AS shall pay to the appellants, represented by counsel Sigurd-Øyvind Kambestad, legal costs for the proceedings before the Court of Appeal in the amount of 77 068 – seventyseventhousandandsixtyeight – kroner within 2 – two – weeks from the date of service of this judgment.”
- (9) Bardufoss Flyservice AS has appealed against the judgment of the Court of Appeal to the Supreme Court on the grounds of the application of the law. Director of operations at Bardufoss Flyservice AS, Mr Stig Bjørnstad, and two of the respondents, Mr Bjørn-Tore Fredriksen and Mr Erik Rognmo, testified before the Supreme Court. Their testimony was given by judicial recording. All three testified at the hearing before the Court of Appeal. In all other respects, the case before the Supreme Court is materially the same as the case before the Court of Appeal.
- (10) In brief, the appellant, Bardufoss Flyservice AS, has argued as follows:
- (11) There has not been a transfer of undertaking pursuant to the Working Environment Act section 16-1.
- (12) Firstly, the condition that the undertaking must have been transferred to the new owner pursuant to a contract – as this criteria has been established in case law – is not satisfied.
- (13) SGS closed down its business at Bardufoss Airport when SAS lost the competitive bid for a frame agreement with the Norwegian Armed Forces. However, it would have been entirely possible for SAS to compete for other customers at Bardufoss Airport and to carry on SGS’ business at the airport. When, however, it was decided to close down the business, the situation is that one contract for services has merely superseded another contract for the same or similar services. There is no transfer of undertaking pursuant to contract.
- (14) Secondly, the requirement that the undertaking must have retained its identity after the transfer is not satisfied.
- (15) The services provided by Bardufoss Flyservice AS differ in appearance, and its methods and mode of operation are different, from those used by its predecessor SGS to serve SAS. This is primarily due to the fact that Bardufoss Flyservice AS’ services promote Norwegian and not SAS. In addition, the services provided by Bardufoss Flyservice AS

are adapted to Norwegian's low-budget concept and flight schedule, which has implications for how both the content and operation of the ground handling services are organized, which in turn means that the identity of the operation is different from before.

- (16) The fact that Bardufoss Flyservice AS operates its services from the same rented premises using the same infrastructure as its predecessor is irrelevant. This is simply a consequence of the nature of the business, and the situation would be the same for any provider of ground handling services at an airport.
- (17) Bardufoss Flyservice AS has not taken over from SGS any of the ground equipment that is necessary for its business, but rents this equipment for a not insignificant amount of money from its parent company. The replacement of ground equipment has contributed to changing the identity of the business.
- (18) The employees were recruited following an open recruitment process. None of them were taken over pursuant to an agreement with SGS. The explanation for why many of the employees at Bardufoss Flyservice AS are former employees of SGS is simply that it was natural to choose people with ground handling service experience, not that these possessed a special competence that was crucial to Bardufoss Flyservice AS.
- (19) In case of doubt as to whether a business has retained its identity, the interests of competition should weigh against giving the provisions on transfer of undertakings in the Working Environment Act application. This is particularly so when labour costs are such a significant factor for the competitiveness of the company, as is the case here. It must be pertinent to have regard to the interests of competition in view of the stated purpose of the EEA Agreement concerning establishment of common competition and other rules.
- (20) Bardufoss Flyservice AS entered the following plea:
  - 1. Bardufoss Flyservice AS shall be acquitted.
  - 2. Bardufoss Flyservice AS shall be awarded legal costs before all court instances.
- (21) In brief, the respondents, *Jostein Holmebukt et.al.*, have argued as follows:

- (22) The condition that the undertaking must have been transferred to a new owner pursuant to a contract is satisfied.
- (23) A direct contractual relationship between the former and the new owner of the business is not required. An indirect contractual relationship is sufficient. An indirect contractual relationship exists where there is a chain of contracts. This is also reinforced by the fact that Bardufoss Flyservice AS, like SGS, has an informal relationship with the Armed Forces. Among other things, the company performs de-icing services for the Armed Forces' military aircraft, and has access to the Armed Forces' jet aircraft starters.
- (24) In any event, according to case law, the requirements regarding transfer are small. There are strong indications that the transfer requirement has gradually become so diluted that it is no longer a separate requirement for a transfer of undertaking in the legal sense, see Barrett, Common Market Law Review 2005 page 1060 at page 1078.
- (25) The condition that the business must have retained its identity after the transfer is also satisfied.
- (26) When considering this requirement, regard must be had to the fact that there is room for only one provider of ground handling services at Bardufoss Airport. Regard must also be had to the fact that the change of provider did not disrupt the provision of ground handling services.
- (27) Ground handling services are provided pursuant to an industry-standard agreement. Both the nature and the content of the new business is the same as before.
- (28) Organizational changes by the new provider in the performance of the services do not change the identity of the business.
- (29) The ground handling services are performed for the benefit of the same category of airline passengers as before, namely members of the Armed Forces and civilian passengers. In this regard, it is irrelevant that the client that pays for the ground handling services – i.e. the airline – is different from before.
- (30) It is irrelevant that the employees were recruited following an open recruitment process and not pursuant to an agreement with SGS. If the way in which the employment process is carried out were to be conclusive, it would be too easy to circumvent the

employment protection provided by the rules on transfer of undertakings. The main issue when considering whether the identity of the business has been retained is that as many as 70 percent of the former employees of SGS were subsequently employed by Bardufoss Flyservice AS.

- (31) Bardufoss Flyservice AS performs its ground handling services from the same premises and uses the same infrastructure as SGS used. As a consequence, the services that are produced are substantially the same as before. The fact that Bardufoss Flyservice AS rents ground equipment from its parent company does not counteract this.
- (32) Competition considerations are altogether irrelevant in cases of doubt as to whether the condition concerning retention of identity is satisfied. The respondents referred, among other things, to the Working Environment Act section 16-1 subsection 2, which provides that the only circumstance in which the provisions on transfer of undertaking do not apply is where there is a transfer from a bankrupt estate.
- (33) Jostein Holmebukt et. al. have entered the following plea:
1. The appeal shall be dismissed.
  2. Bardufoss Flyservice AS shall be ordered to pay the respondents' legal costs for the proceedings before the Supreme Court.

(34) **My opinion on the case**

(35) I find that the appeal must be dismissed.

(36) Section 16-1 of the Working Environment provides as follows:

- “(1) This chapter shall apply on transfer of an undertaking or part of an undertaking to another employer. For the purposes of this Act, transfer shall mean transfer of an autonomous unit that retains its identity after the transfer.
- (2) Sections 16-2 and 16-4 shall not apply in connection with transfer from a bankrupt estate.”

(37) Chapter 16 of the Working Environment Act implements into Norwegian law the consolidated EU Directive 2001/23/EC on safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The preamble to the Directive states that the rules have a social purpose. Item 3 of the preamble states:

“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.”

- (38) In the case reported in Rt-2006-71 (the SAS-case) at paragraph 66 ff, the Supreme Court described the conditions for the application of the rules on transfers of undertakings laid down in the jurisprudence of the European Court of Justice. Section 16-1 of the Working Environment Act must be interpreted in accordance with this jurisprudence, as stated by the Supreme Court in the case reported in Rt-1997-1954 at page 1960, which refers to Article 6 of the EEA Agreement.
- (39) As stated in the SAS case, the first condition is that the transfer must concern an autonomous economic unit (see paragraph 72).
- (40) The second condition is that the business or undertaking must be transferred to a new owner pursuant to contract or by merger. Where the business is transferred pursuant to contract, there is no requirement that there is a direct contractual relationship between the former and the new owner of the undertaking (paragraph 73).
- (41) The third condition is that the business that is carried on by the new owner is essentially the same as the business that was run by the former owner (paragraph 74). In other words, the business must have retained its identity after the transfer.
- (42) There is consensus between the parties that the ground handling services performed by SGS at Bardufoss Airport constitute an autonomous economic unit in legal terms. The dispute in the case relates to whether the other conditions in section 16-1 of the Working Environment Act are satisfied, namely the condition that there must be a *transfer* of an undertaking pursuant to contract in the terms of the Act, and the condition that the undertaking must have retained its *identity* after the transfer.
- (43) I will deal first with the condition that there must be a transfer of an undertaking in the terms of the Act.
- (44) Bardufoss Flyservice AS has alleged that this is a case of mere succession as a consequence of SGS’ choice to close down its business after it lost the competitive bid for the contract for ground handling services. In these circumstances, there is no transfer of an undertaking. Bardufoss Flyservice attempts to find support for its argument in the advisory opinion of the EFTA Court of 19 December 1996 in Case E-2/96 (Ulstein) at

paragraph 27, where it is stated that a mere succession of two contracts for the provision of the same or similar services will not, as a rule, be sufficient for there to be a transfer of an undertaking, business or part of a business.

- (45) This will generally be the situation where a business closes down before it starts up again, see Proposition to the Odelsting (Ot.prp.) no.71 (1991-1992) at page 32. However, in my view this did not happen in the present case. In this connection, it is sufficient to refer to the fact that the change of provider did not disrupt the provision of ground handling services at Bardufoss Airport, and that the number of passengers that pass through the airport is not sufficient to justify more than one provider of ground handling services at the airport.
- (46) Moreover, I cannot see that the EFTA Court, in the Ulstein case, has said anything more than that a transfer of undertaking in the legal sense requires something more than a mere change of provider – referred to as “succession”.
- (47) The respondents, on the other hand, have argued that the transfer requirement in section 16-1 of the Working Environment Act is satisfied because there is an indirect contractual transfer of undertaking. I agree with this argument.
- (48) According to the jurisprudence of the European Court of Justice, a change of provider may fall within the material scope of the Directive and constitute a transfer of undertaking in legal terms even though there is no direct contractual relationship between the old and the new provider. This will be the case, for example, where there is a change of provider following a competitive tender procedure, see e.g. the judgement of the European Court of 25 January 2001 in Case C-172/99 (Liikenne).
- (49) I emphasize that the European Court’s interpretation of what constitutes “a contractual transfer” in the terms of Article 1(1)(a) of Council Directive 2001/23/EC need not necessarily coincide with the ordinary everyday understanding of the term. In section 16-1 of the Working Environment Act, the term “transfer” is defined as *transfer* of an autonomous unit, without any express requirement that this must be pursuant to contractual or similar arrangement.
- (50) In Proposition to the Odelsting (Ot.prp.) no.71 (1991-1992) at page 32, the Ministry of Local Government referred to a number of decisions of the European Court of Justice



and stated that a wide interpretation must be applied to the use of this particular term in the Directive.

- (51) In its jurisprudence, the European Court has applied an interpretation which is directed by the purpose of the Directive to safeguard employees rights, see for instance the Judgement of the European Court of 7 February 1985 in Case C-135/83 (Abels). At paragraph 13, the Court states that the scope of the provisions cannot be appraised solely on the basis of a textual interpretation. With regard to the wording, the Court states:

“Its meaning must therefore be clarified in the light of the scheme of the Directive, its place in the system of community law in relation to the rules on insolvency, and its purpose.”

- (52) This Court’s assessment of whether there has been a transfer of undertaking in the present case must therefore be made on the basis of these principles, which are very wide in scope.
- (53) The European Court considered whether there was a transfer of undertaking in the terms of the Directive in a case very similar to the present one in its Judgement of 24 January 2002 in Case C-51/00 (Temco).
- (54) The Temco case concerned a contract for cleaning services between Volkswagen and a cleaning company called BMV. BMV’s subsidiary, GMC, had performed the cleaning services as subcontractor of BMV. Volkswagen terminated the contract with BMV and entered into a new contract for cleaning services with Temco. Following the loss of the contract, GMC had no work. Four GMC employees claimed that there was a transfer of undertaking. At paragraph 32 of the Judgement, the European Court states:

“The fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect. In the case in the main proceedings, GMC’s relationship with Volkswagen appears to be of a contractual nature within the meaning of the directive, since BMV, having had the contract awarded to it by Volkswagen, by contract concluded by the undertaking, in turn entrusted the performance of the contract to GMC by subcontract. Moreover, such subcontracts create direct links between the contractor and the subcontractor, which may be legal, as in the case of direct payment, and which are in any event practical links, as in the case of the monitoring and daily supervision of the work done. Such links are particularly important in the dispute in

the main proceedings because GMC was set up, as a subsidiary, by BMV solely for the performance of the cleaning contract concluded by that company for the benefit of Volkswagen.”

- (55) In my view, the judgement in Temco must be understood to mean that a subcontract establishes an indirect contractual relationship between the underlying owner who commissions the services and the subcontractor who provides them. This indirect contractual relationship is sufficient to establish a transfer of the undertaking at the subcontractor level when the owner transfers its contract to a new service provider pursuant to contract.
- (56) In my view, this principle must also apply in a case like the present one where not all of the underlying contract is subcontracted, but where the subcontract comprises only a part of the total services. A frame contract for air transport of Armed Forces personnel requires the airline to provide or have access to necessary ground handling services at the airport. While SAS supplied air passenger transport to the Armed Forces, the provision of these services was subcontracted to SGS. When this frame contract was transferred to Norwegian, Bardufoss Flyservice AS was engaged to perform comparable services.
- (57) I should add here that the underlying contract with the Armed Forces accounts for only about 50 % of commercial traffic at the airport. There is no underlying contract for air transport of civilian passengers - who account for the other half of the commercial traffic at the airport. However, this is not decisive for the question whether the transfer in the present case has taken place pursuant to contract. In my view, and as already mentioned, the decisive issue is that the establishment of a competing business at the airport is unrealistic because the passenger basis is too small. A contract with the Armed Forces is therefore probably an essential prerequisite for a company to start regular air services at Bardufoss Airport.
- (58) At paragraph 32 of its judgment in Temco, the European Court referred to the way in which subcontracts can create direct links between the contractor and the subcontractor, which may be legal or practical, “as in the case of the monitoring and daily supervision of the work done”. I understand the judgment to mean that the presence of this kind of direct link can be a strong indication that there is an indirect contractual relationship which is capable of being transferred.

(59) Such direct links exist between the provider of ground handling services and the Armed Forces in the present case. The evidence submitted shows that the ground handling services which Bardufoss Flyservice AS will perform include de-icing of the Armed Forces' aircraft, provision of air start units and runway clearing. Ground handling services will also to some extent be performed from the Armed Forces' premises. There will be direct communication between Bardufoss Flyservice AS and the Armed Forces as users of ground handling services for its personnel. These factors further reinforce the suggestion that there is an indirect contractual relationship here.

(60) On the basis of the above, I conclude that there has been a transfer of an undertaking in legal terms. It is therefore unnecessary for me to consider the respondents' allegation that the law no longer requires that the undertaking is transferred pursuant to a contract and that the only relevant issue is whether one service provider has been replaced by a new service provider.

(61) I will now consider whether the second condition – the condition that the undertaking or business has retained its identity after the transfer – is satisfied.

(62) The principal legal case on interpretation of the identity requirement is the judgment of the European Court of Justice dated 18 March 1986 in case C-24/85 (Spijkers), where the European Court described the factors to be taken into account when determining whether the condition is satisfied. Paragraph 13 of the judgment states as follows:

“In order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's 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 and 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. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.”

(63) In the SAS case at paragraph 79 ff, the first-voting justice described the significance of the individual factors which, according to the jurisprudence of the European Court, are relevant in the total assessment. Paragraph 86 of the SAS judgment states as follows:

“My description of the jurisprudence of the European Court illustrates that in cases where the undertaking or business essentially is characterized by one input factor,

the Court has normally attached decisive weight to this factor. However, in my view, there is not one single factor that characterizes «ground handling» services at an airport. The question whether the identity of the business or undertaking has been retained after the transfer must therefore be determined following an assessment of all of the factors which are relevant according to the jurisprudence of the European Court.”

- (64) A total assessment of this kind must be undertaken in the present case.
- (65) There are several factors which indicate that the identity condition in section 15-1 of the Working Environment Act is satisfied.
- (66) The legal basis for the provision of services is an important factor in the total assessment. The ground handling services are performed pursuant to an industry-standard agreement. This fact – coupled with the fact that ground handling services by their very nature are relatively standard – indicates that the business that is now being carried out by Bardufoss Flyservice AS is essentially the same as before.
- (67) Moreover, the business is carried out from the same premises and with the same infrastructure used by its predecessor. In the total assessment in the SAS case, the Supreme Court attached considerable weight to the fact that the business continued under the same structural framework (see paragraph 90). This builds on the view adopted by the European Court in its judgment dated 20 November 2008 in case C-340/01 (Abler) at paragraph 36. As the Supreme Court pointed out in the SAS case at paragraph 90, it is in this connection irrelevant that the premises and infrastructure are rented from a third party – in this case Avinor.
- (68) I cannot see that it makes any notable difference in the total assessment that Bardufoss Flyservice AS has acquired some other ground services equipment that it needs to perform the services itself, such as passenger stairs, beltloaders, baggage carts and computer equipment. In this connection, I attach weight to the fact that the equipment that Bardufoss Flyservice has acquired itself constitutes a small proportion of the total physical facilities required for the provision of ground handling services.
- (69) Another argument in favour of the identity condition being satisfied is the large number of former SGS employees in the workforce at the airport. As many as 70 per cent of SGS employees were subsequently employed by Bardufoss Flyservice AS. In this connection, it is largely irrelevant that they were recruited following an open

recruitment process. If recruitment following an open recruitment process were to render the number of former employees engaged by the new employer irrelevant for the purposes of the identity condition, it would be simple to avoid the regulations and evade the social purpose of the rules on transfer of undertaking.

- (70) The core of the ground handling services for both SGS and Bardufoss Flyservice AS is the Armed Services' demand for air transport services. As in the *Spijkers* case at paragraph 13, the customers are largely the same as before, which also indicates that the activities carried on after the transfer are a continuation of the activities that were carried on before. In my view, the identity issue cannot in these circumstances be resolved solely by reference to the fact that the paying client is now Norwegian and not SAS.
- (71) However, in its judgement of 11 March 1997 in case C-13/95 (*Süzen*) at paragraph 15, the European Court stated that the identity of an entity may also depend on whether internal factors have changed after the transfer, such as "the way in which its work is organized, its operating methods".
- (72) Bardufoss Flyservice AS has alleged that its profile and work for Norwegian, as distinct from SAS, has resulted in a change of identity. Among other things, Bardufoss Flyservice AS alleges that Norwegian's low budget profile influences the way in which the ground handling services are now carried out and has thus changed the content of the business. Among other things, the competence level of the employees has been reduced due to the low budget concept, the work is now organized across the various disciplines and the need for local administration has been reduced. The data solution for passenger check-in has also been changed.
- (73) These arguments cannot succeed.
- (74) As already mentioned, it is clear from the nature of ground handling services and the industry-standard agreements that have been concluded that the services at the airport do not change in any material particular depending on who is the service provider. I cannot see that it makes any difference that the services have been given a new outward appearance and that personnel functions and data systems have been reorganized. A service provider will normally give the services a different outward appearance than the one given by his predecessor. If such a common change were to lead to a change in

identity of a business or undertaking in legal terms, there would rarely be a transfer of undertaking pursuant to section 16-1 of the Working Environment Act.

- (75) Nor can I see any evidence in the case that the reorganization of the ground handling services through an increased amount of cross-discipline work and new data solutions has changed the content of the service production significantly - be it how the services are produced internally within the company or how they outwardly appear to the passengers. For instance, there is no evidence that the differences between Norwegian's and SAS' flight schedule influence the ground handling services as such to any significant degree, except that check-in procedures and data solutions must be adapted to the different airlines.
- (76) By comparison, in the case reported in Rt-1997-1954 (Løten), the Supreme Court held that the identity condition was not satisfied when a local authority took over the provision of a before- and after-school care service from a private provider and organized the service itself. The decisive factor for the Supreme Court was that the local authority increased the qualification requirements of employees when it took over and the Supreme Court held that this changed the ambitions and the nature of the service that was offered to users. In the present case, however, I cannot see that there is evidence of a similar change in the nature of the ground handling services as a result of the alteration in the way they are organized or operated.
- (77) I add that in case E-2/04 (Total) at paragraph 48, the EFTA Court stated as follows with regard to the question whether the services had lost their identity because they were now provided by someone else:
- “Determinative, is whether the same functions will continue to be performed. A different result would make the application of the Directive subject to the transferee's organisation of its work.”
- (78) This statement is in my view equally relevant in the present case, because it has not been proven that the new way in which the services are organized and operated changes the fact that it is the same functions that are being performed.
- (79) Accordingly, I find that the ground handling services have retained their identity after the transfer.

- (80) Finally, I add that interests of competition are irrelevant in the assessment of whether the provisions on transfer of undertakings apply. The purpose of the rules is to provide for the protection of employees “in the event of a change of employer”, as I have already cited from the Directive. It is sufficient to refer to the European Court in the *Liikenne* case, which stated that competition “cannot justify not applying the social legislation”, see paragraph 24. Against this background, there can in my view be no doubt that where a contract is put out on a competitive tender, no exception to the rules in the Working Environment Act on transfer of undertakings can be made on the grounds that this will reduce the incentive of potential participants to compete in the tender. This would violate the clearly articulated social purpose behind the rules. Where a transaction falls within the scope of the rules, providers must compete on other parameters than employee rights.
- (81) I therefore conclude that the change of provider of ground handling services from SGS to Bardufoss Flyservice AS at Bardufoss Airport constitutes a transfer of undertaking pursuant to section 16-1 of the Working Environment Act. The respondents are employed by Bardufoss Flyservice AS with the rights and obligations embodied in their contracts of employment with SGS.
- (82) The decision is based on case law, particularly the case law of the European Court of Justice, where the rules on transfer of undertakings have been given a somewhat wider scope than a purely textual interpretation of the concept might merit. In my view, the particular circumstances of the present case fall within the scope of a transfer of undertaking, although possibly not within the core area.
- (83) The respondents have won the case, and are awarded costs pursuant to the general rule in the Disputes Act section 20-2 subsection 1. The respondents have claimed NOK 133 321 in costs before the Supreme Court, of which NOK 120 600 is counsel’s fees. The claim is accepted.
- (84) I vote for the following judgment:
1. The appeal is dismissed.
  2. Bardufoss Flyservice AS shall pay legal costs before the Supreme Court to Jostein Holmebukt, Erik Rognmo, Bjørn-Tore Fredriksen, Monarth Pedersen, Rune Luis Holmebukt, Tore Henrik Strømseth, Pål Oredalen Tronstad, Ruth-Eva Lynghaug and Frode Bjørkestøl jointly in the amount of 133 321 –

onehundredandthirtythreeousandthreehundredandtwentyone – kroner within  
2 – two – weeks of service of this judgment.

(85) Mrs Justice Webster: I agree on the whole and with the result of the first voting Justice..

(86) Mrs Justice Øie: Likewise.

(87) Mrs Justice Indreberg: Likewise.

(88) Mrs Justice Gjølstad: Likewise.

(89) After the passing of votes, the Supreme Court pronounced the following

*J u d g m e n t:*

1. *The appeal is dismissed.*
2. *Bardufoss Flyservice AS shall pay legal costs before the Supreme Court to Jostein Holmebukt, Erik Rognmo, Bjørn-Tore Fredriksen, Monarth Pedersen, Rune Luis Holmebukt, Tore Henrik Strømseth, Pål Oredalen Tronstad, Ruth-Eva Lynghaug and Frode Bjørkestøl jointly in the amount of 133 321 – onehundredandthirtythreeousandthreehundredandtwentyone – kroner within 2 – two – weeks of service of this judgment.*