EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/36 Is de facto prohibition of collective dismissal compatible with EU law? (GR)

<p>The Greek Council of State has asked the ECJ to determine whether Greek law prohibiting collective dismissals in the absence of governmental authorisation is compatible with Directive 98/59 and the TFEU.</p>

Summary

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Facts

The applicant in this case is Heracles General Cement Company, a subsidiary of the French Lafarge Group. Since the start of the financial crisis in 2008, construction activity in the Attica region of Greece has declined by up to 80%, with the result that the demand for cement has gone down dramatically. The situation became so bad that in 2011, the Company's plant in Halkida went almost entirely out of production, its remaining work having been taken over by the Company's plants in Volos and Milaki. In 2012, the Company reduced its non-staffing costs, but this measure yielded insufficient financial relief, so in 2013, management decided to close down the Halkida plant and make the 236 employees redundant. It invited the unions for a consultation meeting to discuss the proposed measures, as required by Greek Law 1387/1983.

Law 1387/1983 transposes (the predecessor of) Directive 98/59. Article 2 of this directive provides as follows:

"1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences [...]

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations: a. supply them with all relevant information [...]"

Article 3 (1) of the directive states:

"Employers shall notify the competent public authority in writing of any projected collective redundancies [...]"

In Greece, the competent public authority referenced in the directive is the Ministry of Labour.

Law 1387/1983 goes beyond merely transposing Directive 98/59. It also prohibits employers from implementing a collective redundancy in the absence of authorisation by the Ministry of Labour. Requests for authorisation are judged according to the following criteria: (a) the labour market conditions, (b) the employer's financial situation and (c) the interests of the national economy.

As already mentioned, the Company invited the unions for a meeting. The plan was to provide the unions with written details of the number of redundancies, the timing of those redundancies and all the other information required by law. However, the unions did not show up. They were invited a second time but again they did not appear.

The Company then filed an application for authorisation with the Ministry of Labour. In a decision dated 26 April 2014, the Ministry turned down the application. The reason it gave was that the Company's arguments for wanting to close down the plant and make the workforce redundant were vague and insufficiently substantiated.

The Company filed a petition with the Council of State asking it to annul the ministerial decision and to grant the authorisation. The Company argued that the refusal to authorise the collective redundancy was contrary to Articles 49 and 63 TFEU (regarding, respectively, freedom of establishment and freedom to move capital between states), in combination with Article 16 of the Charter of Fundamental Rights of the EU, which recognises: *"the freedom to conduct a business in accordance with Community law and national laws"*.

Judgment

The Council of State, taking into consideration ECJ case law, had serious second thoughts about whether the Greek prohibition on collective redundancies in the absence of governmental authorisation is compatible with EU law or whether, given the economic crisis and high level of employment, it constitutes an acceptable national measure in favour of employees, justifying a limitation on the right to establishment, the right to free movement of capital and the right to conduct business freely. The Council referred the following questions to the ECJ:

Are the provisions of Greek legislation such as those of Article 5(3) of Law 1387/1983, setting as a prerequisite for collective redundancies the Ministry of Labour's authorisation, compatible with the provisions of Directive 98/59 or Article 49 and 63 TFEU?
If not, are those national provisions compatible with said provisions of EU law, given the existence of serious reasons such as the severe economic crisis and the exceptionally high rate of unemployment?

Commentary

The Ministry of Labour has almost never granted authorisation for a collective redundancy. The effect of this is that in practice, collective redundancy is not possible in Greece. Employers faced with the need to reduce their workforce can only do so gradually, by dismissing staff on a non-collective basis (essentially, by dismissing up to six employees per month in most small companies or up to 5% of the workforce per month in companies with over 150 employees) or by declaring insolvency.

Needless to say, this issue may soon appear to be moot, given the rapid developments resulting from the "almost Grexit". The amendments to labour law on collective dismissals have not been voted on yet. This is a hot potato issue.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): I have difficulty seeing what would make the *de facto* impossibility of achieving a collective redundancy incompatible with freedom of establishment (Article 49 TFEU) or freedom to move capital from one Member State to another (Article 63 TFEU). The freedom to conduct a business (Article 16 Charter) came to the notice of Dutch employment lawyers when the ECJ applied it, rather surprisingly, in its judgment of 18 July 2013 in the *Alemo-Heron - v -Parkwood* case (C-426/11). The ECJ held that "Article 3 of Directive 2001/23, read in conjunction with Article 8 of that directive, cannot be

interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business".

It will be interesting to see whether the ECJ applies Article 16 of the Charter in this Greek case and, if so, how. The most far-reaching outcome, which I find difficult to imagine and which could potentially impact Dutch dismissal law, would be that the Greek requirement of an authorisation as such is declared incompatible with EU law. A less farreaching outcome could perhaps be that that a policy of almost never granting authorisation is incompatible with EU law.

Subject: collective redundancies

Parties: Heracles General Cement Company - v - Ministry of Labour

Court: Symvoulio Epikratias (Council of State)

Date: 25 June 2015

Case number: 1254/2015

Publication: www.dsanet.gr and https://lawdb.intrasoftnet.com (both not publicly accessible)

Creator: European Court of Justice (ECJ)
Verdict at: 2015-06-25
Case number: 1254/2015