SUMMARY

2013/40 New law suspending older civil servants unenforceable (GR)

<p>In 2011, under pressure from the EU and the IMF, Greece enacted a law aimed at reducing the number of civil servants in certain areas. It provides that civil servants who are eligible to retire no later than 31 December 2013 face automatic suspension at 60% of salary on 1 January 2012 and automatic termination of their employment on 31 December 2013. Two civil servants challenged the law in interlocutory proceedings and although their application was rejected for lack of urgency, the legal basis of their claim was accepted. The court in its reasoning established that the law is age discriminatory and unenforceable.</p>

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Background

In October 2011, Parliament enacted Law 4024/2011 in the context of the economic crisis and following the measures imposed on Greece by the "Troika" (the European Commission, European Central Bank and International Monetary Fund). Article 34(3) provides that the employment agreements of certain categories of civil servants with permanent status will

terminate automatically following 35 years of full pensionable service (the period required under Greek law to accrue full retirement benefits), provided the 35 years have been completed no later than 31 December 2013. Moreover, employees to whom this applies were automatically suspended from active duty ("placed in labour reserve") on 1 January 2012, from which date they ceased to work and were paid 60% of their last-earned base salary. However, the employer continued to pay social benefits on the basis of 100% of last- earned salary. The 60% was off-set against the statutory severance pay to which employees were entitled upon termination. For the employees concerned, being placed in labour reserve is even worse than being dismissed, because the duration of the labour reserve status is equivalent to the notice period for termination, but with the difference that during the notice period employees receive full salary, whereas employees on labour reserve receive only 60%. Article 34(9) of the Law provides that Article 34(3) supersedes any law, collective agreement, arbitration award or provision in individual employment contracts.

Facts

Ellinika Amyntika Systimata A.E. is a company owned almost entirely (99.78%) by the Greek state, which also appoints the members of its Board and exercises full control and supervision over the company. On 24 April 2012, two of its employees were placed in labour reserve. One of them was scheduled to have fulfilled 35 years of pensionable service on 18 February 2013, the other on 13 May 2013.

On 30 November 2012, these two employees filed an application for injunctive relief demanding to be given work and paid full salary rather than 60%, on pain of a penalty of € 200 for each day of non-compliance.

Judgment

The Court began by observing that the decisive criterion determining whether an employee is placed in labour reserve is whether or not his or her normal retirement date is no later than 31 December 2013. Thus, the criterion is linked to the employee's age. This means that the law treats employees differently based on their age, which is prohibited under Directive 2000/78 and Greek Law 3304/2005 transposing that directive, unless it is objectively justified.

Given that the employer in question was almost wholly state-owned, the court regarded it as an emanation of the State. Therefore, Directive 2000/78 had direct (vertical) effect.

Article 6(1) of Directive 2000/78 and the equivalent Article 11(1) of Law 3304/2005 provide that different treatment on the grounds of age is justified and does not constitute prohibited discrimination "*as long as it is objectively and reasonably justified in the context of national law*

by a legitimate aim, and in particular by legitimate policy in the field of employment, labour market and vocational training, and as long as the means of achievement of such aims are appropriate and necessary". It should be noted that the Greek article has omitted the words "*and in particular*" and therefore a legitimate aim can only be an aim based on a policy in the field of employment, labour market or professional training.

The Court considered that in this case the different treatment introduced towards older employees does not serve a (objective and reasonable) legitimate aim as provided by Directive 2000/78/EC. The provisions on labour reserve do not serve the general interest, in the sense of removing older employees who are no longer capable of efficiently performing their duties. Nor do they serve the aim of shrinking the public sector in a rational manner. Termination is effected solely on the grounds of the characteristics of those having the relevant positions – in other words, it is effected on the grounds of the accidental fact that the employee is close to retirement. The aim of the labour reserve is purely to save resources from the state budget. However, according to the ECJ's 2011 decisions in *Fuchs* (C-159/10) and *Köhler* (C-160/10) (at § 74):

"while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature of extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78".

The Court went one step further by elaborating that, even if such an aim of reducing the resources of the state budget could be considered to be legitimate as per the Directive, the measures should respect the principle of proportionality and the prerequisite of necessity, since saving money from the state budget does not necessarily require different treatment on the grounds of age.

The Court concluded that Article 34 of Law 4024/2011 will not apply as far as it contradicts Articles 1 and 2 of Directive 2000/78/EC and Articles 1, 2 and 7 of Law 3304/2205.

Finally the Court examined whether the need for injunctive relief was sufficiently urgent to justify a provisional judgment. The two plaintiffs had tolerated the interruption of their employment for over seven months (April to November 2012) and during that time had received their salaries at 60% without taking any action or otherwise reacting to their situation. This meant that there was a lack of urgency to the request for injunctive relief. As such, their request was rejected.

Commentary

This judgment was merely a provisional one, based on indications and probabilities. The main claim must still be considered by the same court before a final judgment will be pronounced.

It is worth noting that the court could have rejected the plaintiffs' applications on the grounds that they had failed to satisfy not one, but two conditions for injunctive relief: urgency and imminent risk. Instead, it gave lengthy reasoning on the legality of the claim, which resulted in rejection of it for lack of urgency. At the same time, it elaborated on the illegality of the labour reserve.

This is the first time that the notion of the labour reserve has featured in the reasoning of a court decision and found to be contrary to Community law. The judgment is also interesting because in various places the judge verges on political commentary about governmental actions. The idea that the judiciary can discuss legislation enacted under the pressure of the Troika or express opposition to it, is bound to raise a few eyebrows, especially when it has been passed in an effort to reduce the excessive numbers of civil servants in Greece.

Subject: Age discrimination

Parties: Employees – v - Company "EAS (ex EVO PYRKAL)"

Court: Monomeles Protodikio Egiou (First Instance Court of Egion, Procedure for Provisional Measures)

Date: 16 April 2013

Case number: 67/2013

Hard Copy publication: Not yet available, but can be found in EED 12 (1725) page 733

Internet publication: NOMOS (passwords are required)

Creator: Monomeles Protodikio Egiou (First Instance Court of Egion)
Verdict at: 2013-04-16
Case number: 67/2013