EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

# 2014/54 Government abolishes national broadcasting company, dismisses all staff and establishes new company. No transfer of undertaking: collective dismissal rules not applicable (GR)

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<p>This case report describes the approach adopted by the ‘Conseil d’ Etat’ (the Council of State, i.e. the Greek Supreme Administrative Court) (Plenary Session), in the leading case to rule on the legality of the Ministerial Decree. Reference is also made to claims brought before the Greek civil courts by several groups of redundant employees. One of these cases, described below, has reached the Court of Appeal.</p>
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**Facts**

On 11 June 2013 the government, without warning and with immediate effect, abolished the national broadcasting organisation ERT (i.e. Greek Radio and Television). Screens went black, programs stopped and all 2,560 employees were terminated pending a planned re-organisation. The government based its decision1 on Law 4002, enacted in 2011, that provided for the abolition, merger and restructuring of private law entities carrying out a public function, one of which was ERT. The reason for the decision was to reduce civil servants' costs. This was more or less imposed by the "troika" (i.e. the IMF, the European Commission and the European Central Bank).

ERT was a société anonyme. Its share capital was wholly owned by the State.

The Ministerial Decree abolishing ERT provided that all of its assets (buildings, equipment, archives, etc.) and all rights and liabilities transferred to the State, all employment contracts were to be terminated and a new body was to be established to resume broadcasting services in the near future. Accordingly, the 2,560 employees were dismissed, with payment of statutory severance. This was done without the prior information and/or consultation required by Greek Law 1387/1983, transposing Directive 98/59 on collective dismissals. The government went ahead under pressure from the troika. Its decision sparked violent demonstrations, the occupation of ERT's premises by redundant workers and a large number of legal actions.

One month later, on 10 July 2013, Greek State TV (GSTV) started broadcasting using the same frequencies as ERT. GSTV, which was never established as a legal entity, operated in the context of the special administration of the former ERT's assets, which had been transferred to the State. The creation of GSTV was deemed necessary to enable the country to continue having state TV until the establishment of a new entity, known as 'NERIT'.

Six weeks after the abolition of ERT, in July 2013, the government established NERIT as a new *société anonyme*, also wholly owned by the State. It resumed ERT's activities, using the same buildings, equipment, frequencies, reporters and other resources. It hired back approximately one third of ERT's staff.

This case report deals with two of the many legal procedures that were brought in connection with the sudden abolition of ERT and its effects. The main one was an application for annulment of the Ministerial Decree, brought by a federation of unions2 against the State. It was brought before the Conseil d' Etat. The federation demanded the annulment of the government's decision to abolish ERT, arguing that the decision violated:

| the Greek Constitution;

| the European Convention on Human Rights;

| Greek Law 1387/1983 transposing (the predecessor3 of) Directive 98/59 on collective dismissals.

In September 2013, while the Conseil d' Etat procedure was pending, several groups of dismissed employees brought civil proceedings before the First Instance Court of Athens and before the First Instance Court of Heraklion (Crete). The defendants were ERT, the State and NERIT. The plaintiffs claimed that their dismissals were void, arguing, amongst other reasons: (i) that they were based on an unconstitutional act (the Ministerial Decree); (ii) that the rules on collective dismissals were violated; and (iii) that the replacement of ERT by NERIT constituted the transfer of an undertaking, as a result of which they had transferred into the employment of NERIT, which continued to be their employer on their former terms.

**Conseil d' Etat judgment**

The State based its defence on the provision of Greek law transposing Article 1(2)(b) of Directive 98/59, which provides that the directive does not apply to workers employed by "public administrative bodies or by establishments governed by public law". The *Conseil d' Etat a*ccepted that the Greek legislator had not intended to enlarge the scope of Law 1387/1983 beyond that of the Directive.

Citing the ECJ's rulings in USA – v – Nolan (C-583/10)4 (paragraph 41) and Scattolon5 (C-108/10) (paragraph 44), on the notion of undertakings

2Greek Federation of ERT's Personnel Associations (POSP-ERT). Un- der Greek law, a federation is defined as a second level association of two or more unions of employees employed in the same undertaking or in the same or similar sector or in the same or similar

type of job. Unions are first level employee representations.

3The original Directive 95/129 was amended by Directive 92/56 and re- placed in 1998 by the present Directive 98/59.

4Nolan at § 41: “Whilst the size and functioning of the armed forces does have an influence on the employment situation in a given Member State, considerations concerning the internal market or competition between un- dertakings do not apply to them. As the Court of Justice has already held, activities which, like national defence, fall within the exercise of public pow- ers are in principle excluded from classification as economic activity.”

5Scattolon at § 44: “Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers (see, exercising public power and serving a public purpose, the *Conseil d' Etat* found that, although ERT was a private law company, it belonged to the public sector, was controlled and supervised by the State, its share capital was owned by the State, it had economic and administrative independence and was under the social control of the State. Under these circumstances, ERT did not constitute an undertaking exercising a ordinary economic activity operating according to the principles of the private economy. Consequently, ERT was excluded from the application of both the Directive on collective dismissals and Law 1387/1983. The plaintiff's action was dismissed.

**Heraklion Court of First Instance judgment**

In the case brought by former employees in relation to their dismissal, the Court of First Instance rejected their claim against ERT on the grounds that a legal entity that no longer exists cannot be a party to legal proceedings. However, the plaintiffs were successful in their claims against the State and NERIT.

As regards the breach of the collective dismissals rules, the court found that the national judge and national legislator do not have the power to overrule the provisions of EU Directives, because by doing so they would be violating EU law, which takes precedence over national law. Law 1387/1983, which implemented EU Directive 75/129, refers to collective dismissals (i.e. dismissals for reasons which do not relate to any personal characteristics of the individuals being dismissed and which, within any calendar month, do not exceed specific thresholds). According to the Greek implementing legislation, there are three main obligations the employer must respect regarding collective dismissals:

a) to consult with employees representatives; b) to provide written information to employee representatives; and c) to notify the competent authorities. There is only one exception to this, relating to dismissals that take place because the company is closing down, following a court

judgment. However, ERT had not been closed down following a court judgment and so this exception did not apply.

The defendants argued that the closing down of ERT was a situation analogous to where an employer (natural person) dies. The Court rejected this claim, concluding that the dismissals constituted collective dismissals as defined by law and the parties had failed to follow the applicable procedure. The dismissals were therefore invalid. As regards the issue of whether the transfer of an undertaking had taken place, the Court considered that it had been sufficiently proven that the State became the universal successor of ERT and should be ordered to pay salary due to the dismissed employees. However, it considered that NERIT was not a universal or special successor of ERT. This ruling was based on the legislator's intention, as expressed in Law 4173/2013, which provided that NERIT did not constitute a successor of the abolished ERT, but a new legal entity. Therefore, there had been a transfer from ERT to the State but there had not been a transfer from the ERT to NERIT.

in particular, Case C 49/07 MOTOE [2008] ECR I 4863, paragraph 24 and case-law cited, and, concerning Directive 77/187, Case C 298/94 Henke [1996] ECR I 4989, paragraph 17). By contrast, services which, without fall- ing within the exercise of public powers, are carried out in the public inter- est and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic activi- ties (see, in that respect, Case C 41/90 Höfner and Elser [1991] ECR I 1979, paragraph 22; Aéroports de Paris v Commission, paragraph 82; Cassa di Risparmio di Firenze and Others, paragraphs 122 and 123)."

**East Crete Court of Appeal judgment**

On an appeal filed by the Greek State against this judgment, the East Crete Court of Appeal fully adopted the State's reasons for appeal and annulled the judgment that had favoured the employees. The Court of Appeal reasoned that the employees' claim should not have been heard, on the basis that it was not within the jurisdiction of the civil courts to consider. This aligned with the Conseil d' Etat judgment, which had ruled that the abolition of ERT was constitutional and that its "*res judicata*" was binding on the civil courts as well.

Further, the Court of Appeal stressed that while ERT was a private law legal entity, its characteristics and the scope of control exercised over it by the Greek State, along with the way it was funded, were similar to a statutory body and for that reason it considered that the dismissals did not fall within the application of the Directive on collective dismissals and of Law 1387/1983. This judgment has not yet been published.

The East Crete Court of Appeal judgment fully aligns with several other judgments issued by

the Athens First Instance Court immediately after the Conseil d' Etat judgment (e.g. cases 2292/2014, 3128/2014, 3134/2014, 3558/2014 and 3564/2014). They all take the same line as the Crete Court of Appeal and reject all employees' claims on the grounds that the civil courts lacked jurisdiction. The claims related to the Ministerial Decree abolishing ERT, which meant that they were administrative disputes - and the 'res judicata' (autorité de chose jugée) of the Conseil d' Etat binds the civil courts.

It is worth noting that the Heraklion First Instance Court's judgment, which contrasts with those of the Athens First Instance Court, made its ruling in the absence of a ruling from the Conseil d' Etat, stating that there was no reason to suspend its judgment until the Conseil d'Etat came to a decision.

**Commentary**

According to Greek law, collective dismissals are triggered when companies employing more than 20 employees, for reasons which do not relate to personal characteristics of the individuals being dismissed, exceed the following thresholds within any calendar month: | a) For companies with workforce from 20 to 150 employees, up to 6

dismissals per month;

| b) For companies with over 150 employees 5% and up to 30 employees per month.

The procedure for collective dismissals does not apply in cases where the closure of the business follows a court judgment.

The Court ruled that in the case at hand the company was closed down by means of Joint Ministerial Decision no 2/11.6.2013 of the Minister of Economy and the Deputy Minister to the Prime Minister. This abolished ERT and interrupted its programming and all of its other activities. The Court ruled that the closing down of the company by Joint Ministerial Decree could not be considered as a closure following a court judgment and therefore the dismissals procedure was not exempt from the procedure applicable to collective dismissals.

Contrary to the Conseil d' Etat judgment, the present Court correctly ruled that Directive 98/59 should have applied to the collective dismissals and the information and consultation procedures provided by Article 1 and 2 of Directive 98/59 EC and article 6 paragraph 1 of Law 1387/1983 should have been carried out. Therefore the approximately 3,000 terminations that took place on the same day were invalid.

Further, in terms of the transfer of undertaking, PD 178/2002 which implemented the Acquired Rights Directive in Greece, provides that there is a transfer if the business

function/service/section to be transferred is an organised economic unit with tangible and intangible assets, capable of being transferred and retaining its identity after the transfer. In the case under examination, the Court ruled that there was no transfer from ERT to NERIT, since the legislator's will and supporting memorandum to Law 4173/2013 under which NERIT was established, provide that NERIT does not constitute a successor of ERT. The Court relied on the supporting memorandum to Law 4173/2013 and did not proceed to further examine whether on the facts there could be considered to have been a transfer of undertaking under PD 178/2002.

This approach has been criticised, as it is debatable whether the Court should have kept to the letter of the law and not examined the facts in depth. By accepting that a legal definition inserted in a memorandum to a law can serve to set aside Directive 2001/23/EC, the First Instance Court effectively superseded the Directive.

It is interesting to note the Court of Appeal's approach, which annulled the judgment without entering into the substance of the case at all. As mentioned in the media, the employees were right to be shocked by the judgment.

**Subject**: (i) Transfer of undertaking; collective redundancies

CASE I

**Parties:** Greek Federation of ERT's Personnels Associations (POSPERT) - v - Minister of Finance and Deputy Minster to the Prime Minister.

**Court**: Conseil d' Etat - Plenary Session of the Council of State

**Date**: 23 May 2014

**Case number**: 1901/2014

**Publication**: NOMOS, APM 2014/1202, EERGD 2014/801

CASE II

**Parties**: 20 ex-employees of the Greek Radio and Television (ERT) -v - ERT, the Greek State

and the New Greek Radio Internet and Television (NERIT)

**Court**: First Instance Court of Heraklion (Crete)

**Date**: 13 May 2014.

**Case number**: 305/2014

**Publication**: NOMOS, EERGD 2014/831

**Court**: East Crete Court of Appeals

**Date**: December 2014

**Case number**: 181/2014

**Publication**: Not yet published

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**Creator**: Council of State
**Verdict at**: 2014-05-23
**Case number**: 1901/2014 and 181/2014