

SUMMARY

## **2012/45 Employee who refuses to go across to transferee loses job (GR)**

***&lt;p&gt;Greek law has no provision entitling employees to refuse automatic transfer into the employment of the transferee in the event of a transfer of undertaking.&lt;/p&gt;***

### **Summary**

Greek law has no provision entitling employees to refuse automatic transfer into the employment of the transferee in the event of a transfer of undertaking.

### **Facts**

The defendant in this case was the Greek company 'C S.A.', a subsidiary of the American company 'C Ltd', a business in the field of medical products and supplies. The plaintiff was employed by C S.A. in 2006 as a sales representative in the surgical material sales department. In June 2010 the defendant decided to cease operations in Greece due to unpaid debts of millions of Euros owed by its Greek customers. The defendant informed its employees, including the plaintiff, of this decision. It did, however, manage to find another Greek company, 'St M. Prod.', that was willing to take over its surgical material sales department. On 12 July 2010 the defendant informed the employees that they would transfer into the employment of St M. Prod. and that their existing employment terms and conditions would remain unaffected. On the day of the transfer, new employment contracts were drafted and signed by the transferred employees (with the exception of the plaintiff). Besides retaining the employees' existing terms of employment, St M. Prod. agreed that if any dismissal took place during the 12 months following the date of the transfer, it would pay the affected employees statutory severance compensation plus an amount equal to seven months' salary.

The plaintiff refused to sign a contract with St M. Prod., claiming that her job was not secure. She also said her excellent previous service and high level of qualifications meant that her professional future was at stake, given that the managing director of St M. Prod. had been

recently convicted in connection with fraudulent commission-taking. The plaintiff sent the defendant a letter to this effect on 20 July 2010, though the transfer had been completed on 15 July. The defendant replied that it had fulfilled all its obligations for the safeguarding of her employment terms and that it could not continue to employ her given that, as of 15 July, it was no longer her employer.

The employee responded on 26 July that she considered this reply to be a termination of her employment agreement. She claimed payment of (i) statutory severance compensation; (ii) unpaid allowances;

(iii) compensation for unused paid leave; (iv) compensation for non-compliance with the obligation to inform and consult personnel in respect of a transfer of undertaking; and (v) compensation for moral damages based on the insult to her personally.

### **Judgment**

The Court found in favour of the defendant. It emphasized that Greek legislation transposed Directive 2001/23 (and its predecessors) through Presidential Decrees 572/1988 and 178/2002. According to these decrees, in the case of transfer of an undertaking (provided that the conditions for transfer are met), the transfer of the employment agreement is compulsory both for the employer and the employee.

The Court referred expressly to ECJ case law, which has accepted that an employee can refuse to transfer into the employment of the transferee, but in such a case (where the employee decides freely not to maintain the employment relationship with the transferor) it rests with the Member States to define the consequences. Member States can provide that in such a case the employment relationship may be terminated, either on the initiative of the employer or on the initiative of the employee, or that it is maintained by the transferee (ECJ, C-171/94 and C-172/94 *Merckx and Neuhuys*, at § 39).

Greek law does not provide employees, as a more favourable treatment, with the right to refuse transfer of their employment agreements in the event of a transfer of undertaking. The Court cites the ECJ's 1991 decision in the *D'Urso* case (C-362/89 at § 20) on the nature of automatic (*ipso jure*) assignment to the transferee of the rights and obligations of the transferor. The Court also notes that the non-recognition of a right for employees to refuse to transfer does not violate any constitutional right, nor does it violate any of the rights protected by the European Convention on Human Rights, regarding freedom to work, free development of personality and protection of dignity.

The Court took into account the fact that the defendant twice (on 20 and 22 July 2010) asked

the employee to present herself at the offices of St M. Prod. and that she failed to appear, as well as the fact that St M. Prod. informed the employee that if she did not appear in its office on 22 July, that would be construed as voluntary resignation, leading to the end of their employment relationship. The employee never turned up, and St M. Prod. informed the labour authorities of her resignation on 28 July, a fact that was not contested by the plaintiff.

Accordingly, the Court concluded that the plaintiff was not entitled to oppose the transfer of her employment agreement, which had taken place automatically by operation of law on 15 July 2010.

### **Commentary**

What makes this case interesting from a Greek perspective is that it is the first time a court has interpreted in detail the refusal of an employee to transfer in the case of the transfer of an undertaking. It makes clear that Greek law does not only not provide employees with the right to oppose a transfer, but also that the transferee succeeds automatically to the rights and obligations of the original transferor, as far as the terms and conditions of the employment agreement are concerned. The refusal of the transferee to accept the employee's offer of work after the transfer has taken place, does not constitute a termination by the transferor, but rather a resignation by the employee.

Finally, it is worth noting that the Court made reference not only to the Greek Constitution but to the European Convention on Human Rights, saying that the lack of provision to enable employees to oppose transfers is not contrary to either.

### **Comments from other jurisdictions**

*Czech Republic (Nataša Randlová)*: Pursuant to Directive 2001/23/EC the transfer of rights and duties is automatic, affects all of the relevant employees and cannot be excluded by agreement or by objections by the employees involved. The employees retain their existing terms of employment. In the past, the only legal recourse open to employees whose existing terms of employment were not respected by the transferee was to bring a claim for damages. Now, however, employees may demand continuation of their terms of employment. Since 2012, an employee may, alternatively, give notice within two months of the transfer or terminate their employment relationships by mutual agreement, on grounds of significant deterioration in working conditions. In such a case, the employee can apply to the court for a redundancy payment. However, he or she is only entitled to a payment if the court finds that there has been a significant deterioration in the working conditions.

*Finland (Johanna Ellonen)*: It is unlikely that a similar case would have been brought in

Finland since, unlike in Greece, under Finnish law employees are entitled to object to transfer by terminating their employment contracts within a special notice period. If the employees do not terminate their employment contracts, the rights and obligations relating to the employment relationships belonging to the entity to be transferred, transfer automatically to the transferee by operation of law. Employees are not entitled to unilaterally elect to remain in the service of the transferor.

As regards the special notice period, employees may terminate their employment contracts to expire, as a rule, on the date of transfer. However, if the employees have been informed of the transfer less than one month prior to the transfer (as in the case at hand), they are entitled to terminate their employment contract to expire on the date of transfer or on a date not later than one month after having been informed of the transfer.

The practice of the Finnish Court of Appeal is to consider the actions of employees when evaluating whether the employee has resigned or not, and, for example, an undisputed refusal to transfer can be interpreted as a resignation. Further, under Finnish law the employment may be considered terminated where the employee is absent from work for at least seven days without justified grounds.

*The Netherlands (Peter Vas Nunes):* Where an employee declines to follow the business in which he works, there are two relevant issues:

(i) does his contract with the transferor terminate automatically? and

(ii) does he become an employee of the transferee? Although in the case reported above, in which only the transferor was the defendant, only issue (i) was litigated, the judgment indicates that the plaintiff not only ceased to be an employee of the transferor but also never became an employee of the transferee, except perhaps for the brief period between 15 and 28 July 2010.

The plaintiff in this case claimed, inter alia, statutory severance pay, alleging that the transferee's Managing Director had recently been convicted of fraud. Is this not a situation covered by Article 4(2) of the Acquired Rights Directive: "If the contract of employment [...] is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment [...]?"

The author comments as follows: The Court ruled that no such substantial change took place in the employee's working conditions. However, we agree that this could be seen as a rather strict interpretation, and that by a broader interpretation one may say that the conviction of the

MD (as representative of the legal entity) influences the reputation of the company itself, which could in the long term harm the employee.

**Subject:** Employees who transfer/refuse to transfer

**Parties:** Employee - v - C.S.A.

**Court:** ΑΠΟΚΡΑΤΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΠΡΩΤΗΣ ΚΑΤΑΣΤΑΣΗΣ (First Instance Court of Volos)

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**Verdict at:**

**Case number:** 60/2012