SUMMARY

2021/9 AGET Iraklis: another belated victory for the employer (GR)

|he Supreme Court of Greece has clarified that the validity of terminations is not affected by the lack of consultation with the employees' representatives, as per Directive 2002/14/EC on a general framework for informing and consulting employees. In case of non-compliance with such obligation, alternative administrative or judicial measures can be provided by the Member States. It further reiterated that the expediency and necessity of the company's business decision to suddenly interrupt its plant operation cannot be subject to judicial control.

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Facts

Twenty-two employees were hired to work at the defendant's cement plant in Halkida under an indefinite term employment agreement. On 26 March 2013, after information and consultation procedures in the Fall of 2012 leading to alternative work arrangements, the company quite unexpectedly, following its board of directors' decision on the previous day, informed the employees that it had discontinued the operation of its plant and that their

services would no longer be required. The reasons invoked by the company were the fall in production and client numbers. It invited the employees' representatives to inform and consult on the reasons for such a decision and the planned dismissal of 229 employees. The employees' representatives refused to attend such meeting. Further invitations followed without success. Consequently, on 16 April 2013, once the 20-day legal deadline had expired, the company, as per the collective dismissals procedure, submitted to the Ministry of Labour a request for authorization of the collective dismissals of the 229 employees. On 26 April 2013, the Ministry of Labour, following the legal opinion of the Supreme Employment Committee and a relevant meeting with the company and the employees' representatives, issued a negative decision, i.e. it did not approve such collective dismissals.

The company then, in compliance with the monthly quotas allowed for by law in case the authorities do not approve the collective dismissals, proceeded to monthly successive terminations starting in April 2013 up until July 2014 dismissing all 229 employees.

At the same time, in June 2013, the company proceeded to file a recourse before the Conseil d'Etat to annul the negative decision of the Ministry of Labour, which subsequently resulted in the issue of the Conseil d'Etat's decision no. 1254/2015, by which a preliminary ruling was submitted to the ECJ. Such preliminary ruling led to the now well-known ECJ (Grand Chamber) case of AGET Iraklis (C-201/15).

In such a context, the company dismissed the first 11 employees on 29 April 2013 and the next 11 employees on 5 May 2013.

Proceedings

The employees claimed that their terminations were invalid since (1) they had taken place in violation of Greek Law 1387/1983 on collective dismissals (Law implementing Directive 98/59/EC), (2) they had taken place in violation of the company's obligation to inform and consult with the employees as per Presidential Decree 240/2006 (implementing Directive 2002/14/EC), (3) the terminations were abusive since the company's decision was sudden and unjustified – given the plant's sustainability – and disproportionately severe to the employees' interests, given that more lenient measures were available instead of terminations, and finally (4) the severance pay due was not correctly calculated and therefore not the appropriate amount.

The Halkida First Instance Court of Justice accepted such lawsuit, i.e. it found the claim admissible for proceedings (decision no. 11/2015).

The company filed an appeal against the decision and the Evia Court of Appeals by its decision no. 183/2017 accepted the same, held the case for ruling and rejected the main claim of the lawsuit on the invalidity of the termination of the employment agreements, but accepted the ancillary claim on the severance ordering the company to pay the difference, i.e. the correct amount of severance due.

Subsequently the employees filed a recourse before the Supreme Court of Greece on several grounds.

Judgment

The Supreme Court, by its decision no. 512/2020, rejected all grounds of appeal except one which concerned the invalidity of the terminations due to the inappropriate amount of the severance payable. [Under Greek law, in case the correct amount of severance is not paid by the employer on the termination date, then the termination is considered as null (however terminations can be upheld if the employer pays the difference of the severance due).]

It ruled that Presidential Decree 240/2006 transposing into Greek law Directive 2002/14/EC on a general framework for informing and consulting employees, which imposes administrative fines in case of violation of the obligation on information and consultation with the employees' representatives, is in accordance with Article 8 of the Directive namely that:

Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the employer or the employees' representatives. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

Therefore, the Supreme Court concluded that consultation had not been set as a prerequisite of the validity of the company's business decisions and therefore Greek legal provisions on abusive terminations could be applied. It mentioned that if the legislator intended as a consequence that terminations due to a violation of the law are to be invalid, it specifically would have provided so.

It also rejected the employees' claim that terminations were abusive since the expediency and necessity of the business decision to interrupt the plant's operation could not be subject to judicial control.

|t finally ruled that there was no case of conflict between the national and the community law

on the implementation of the relevant provisions of the Directive in the Greek legal order.

Consequently, it rejected the employees' request for submission of a preliminary ruling to the ECJ since it considered there was no need for interpretation of the European Union primary or secondary law and its relevant implementation into Greek law.

Commentary

The interest of this decision lies in the fact that such a case has been for many years a hot topic for the unions and the press, given not only the acquisition by Lafarge of an important old Greek cement company and the particularly high number of dismissed employees (229) but also the successful effort of the company to attack before the Greek Conseil d'Etat the negative decision of the Minister of Labour to authorize the collective dismissals, so as to declare the same null and void – which subsequently led to the noted AGET Iraklis case.

Four years after the ECJ decision in AGET Iraklis, the Conseil d'Etat by its decision no. 1786/2019 and in conformity with the reasonings of the ECJ decision, declared the nullity of the Minister of Labour's negative decision on the authorization of the collective dismissals – 'lettre morte'. Since then new Law 4472/2017 has removed completely the competency of the Ministry of Labour to prohibit collective dismissals and so such dismissals are deregulated and subject only to the information and consultation obligations and to the notification of the relevant minutes to the Labour High Council.

One could say – as is stated in the Recital of Law 4472/2017 – that the ECJ by such a decision has shown the way for the Greek legislator to align Greek labour law with the EU's Directive – even though the legal theory supports the view that this was a prerequisite set by the European Stability Mechanism in the context of the Third Economic Adjustment Programme for Greece (the third Memorandum).

Comment from other jurisdiction

Germany (Andre Schüttauf and Chantal Käthner, Luther Rechtsanwaltsgesellschaft mbH): Even before the release of Directive 2002/14/EC, employee representatives (in the following this refers to the works council) in Germany were granted extensive rights of participation. The German legislator has differentiated between the right to be heard, the right to information and instruction and the right to objection. A violation of these participation rights by the employer has consequences of varying significance.

The participation of the works council in the case of termination is structured in such a way that a consultation is a prerequisite for validity. At the time of the implementation of the law for employee representatives (Betriebsverfassungsgesetz, 'BetrVG'), the effects of a lack of consultation were controversial. As a result, the Federal Labour Court (Bundesarbeitsgericht, 'BAG') developed a solution according to which the employer could not rely on the fact that the termination was socially justified in the case of a lawsuit about the validity of the termination, unless the consultation with the works council had taken place. Through an amendment to the law, it has later been expressly implied that a termination without the consultation of the works council is invalid. This change had already taken place before Directive 2002/14/EC was released.

The employer must (also and additionally) involve the works council in connection with mass dismissals. The employer may only issue a termination after the conclusion of the consultations with the works council and, moreover, after notification of the mass dismissal to the employment agency.

Participation rights of other employee representatives arise, for example, in connection with the termination of severely disabled employees.

Subject: Information & Consultation, Collective Redundancies

Parties: AGET Heracles S.A. v. ..... (22 employees - no names)

Court: Areios Pagos (Supreme Court of Greece – B1 Labour Law Section)

Date: May 12, 2020

Case number: 512/2020

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