

SOME BRIEF NOTES ON DECISION N° 3220/2017 OF PIRAEUS' SINGLE-MEMBER COURT OF FIRST INSTANCE

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Artículo recibido el 11 de abril de 2018
Artículo aceptado el 18 de abril de 2018

ABSTRACT

Decision n° 3220/2017 of Piraeus' Single-member Court of First Instance is of historical significance for two converging reasons. First, because it is the only known case since the ratification of the Revised European Social Charter by Greece in which a Greek court applies article 24 of the Charter on a dismissal case. The second reason is linked to the fact that, in its basic premise, the Court of Piraeus takes the view, for the first time in the history of the Greek labour jurisprudence, that, pursuant to article 24, in order for a dismissal to be lawful, it has to be grounded on a valid reason, which must be invoked before the court and then be proven by the employer. Provided that the Greek Supreme Court espouses this viewpoint, Piraeus' ruling has the potential to radically alter the physiognomy of the Greek dismissal law by introducing an objective system of protection against arbitrary dismissals.

KEY WORDS: Revised European Social Charter; Article 24; Protection against arbitrary dismissals; Abusive dismissals; Burden of proof; Severance allowance.

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RESUME

L'arrêt n° 3220/2017 du Tribunal de Première Instance de Pirée est d'une importance marquante pour deux raisons convergentes. Premièrement, parce qu'il est le premier cas de la jurisprudence hellénique, rendue après la ratification par la Grèce de la Charte sociale européenne révisée, qui a appliqué l'article 24 de la Charte dans une affaire de licenciement. Et, deuxièmement, parce que dans cet arrêt le Tribunal de Première Instance de Pirée a estimé pour la première fois en Grèce que, conformément à l'article 24 de la Charte, pour qu'un licenciement soit qualifié licite, il doit être fondé sur une cause valable qui, une fois invoquée devant le tribunal, elle doit être prouvée par l'employeur. Si la Cour de Cassation hellénique adopte la solution précitée, l'arrêt n° 3220/2017 du Tribunal de Première Instance de Pirée contribuera de façon décisive à la modification du droit grec des licenciements car il introduira dans l'ordre juridique hellénique un système objectif de protection contre tout licenciement arbitraire.

MOTS-CLES : Charte sociale européenne révisée ; article 24; protection contre les licenciements abusifs, licenciement abusif, le fardeau de la preuve, indemnité de licenciement.

1. Decision n° 3220/2017 of Piraeus' Single-member Court of First Instance is undoubtedly of historical significance. And this is so for two converging reasons: To start with, this is the first time since the ratification of the Revised European Social Charter by Greece (20.1.2016) that a Greek court applies article 24 of the Charter on a dismissal case; and it does so both directly and horizontally, in a case between two private parties. The second, contiguous reason which attaches tremendous importance to this ruling is that, in its basic premise, the Court of Piraeus takes the view —for the first time in the history of the Greek labour jurisprudence— that in order for a dismissal to be lawful, it has to be grounded on a valid reason, which, on top of that, must be invoked before the court and then be proven by the employer².

As it will be schematically shown in the following few pages, the ratification of the Revised European Social Charter, along with the *ratio decidendi* of the said Court's ruling, has a strong potential to stimulate a major shift in the Greek law and jurisprudence regulating employees' protection against arbitrary termination of their employment contract.

² For an analysis of this court Decision see C. Tsimpanikis, 'End of Story for the Non-causal Dismissal? Piraeus' Court of First Instance Applies Article 24 of the Revised European Social Charter and Inaugurates a New Era for the Greek Labour Law' [Αρχή του τέλους για την «αναιτιώδη» εργοδοτική καταγγελία; Το Πρωτοδικείο Πειραιώς εφαρμόζει το άρθρο 24 του Αναθεωρημένου Ε.Κ.Χ. και εγκαινιάζει μια νέα εποχή για το ελληνικό δίκαιο των απολύσεων], *Labour Law Review* 76 (2017) [ΕΕργΔ 2017], p. 1395 *et seq.*, wherein extensive citation of the Greek legal theory and case law.

2. Since its very early days, Greek labour law has never enshrined any *ad hoc* substantial legislative protection against the termination of an open-ended employment contract on the employer's initiative. Instead, what the Greek labour legislation has always been familiar with is procedural rules that, establishing some standards of minimum justice³, stipulate certain formalities upon which the validity of a dismissal depends.

In particular, under Greek legislation, for a termination of an open-ended employment contract to be lawful, four preconditions should be met: **i)** the termination of the contract must be handed to the employee in writing; **ii)** a period of notice before the termination of the employment must be kept; **iii)** the employee being dismissed must be granted a severance allowance, the sum of which doubles in case the employer omits to keep the aforementioned notice period (in this case, the severance allowance also embeds a compensation in lieu of notice)⁴; and **iv)** the employee who is being dismissed must have been insured, or at least registered, at the Unified Social Security Institution (EFKA).

If even one of these formal preconditions is not met, the termination of the employment contract is null and void. And reversely: the dismissal is, in principle, valid provided that the above mentioned preconditions are met.

3. Leaving aside certain legislative provisions appertaining to limited categories of employees who are in need of enhanced protection (e.g. legislation regarding trade union officials or female employees under maternity protection, or forbidding discriminatory dismissals), a general substantive protection of *every* employee against arbitrary dismissals is only being achieved through article 281 of the Greek Civil Code, which forbids the *abusive exercise of rights*. Putting it into the frame of labour law, this legislative provision has the meaning that an employer is not allowed to exercise his/her⁵ right to terminate an employment contract in an abusive manner.

The first ruling of the Greek Supreme Court (Areios Pagos) applying article 281 C.C. on a dismissal case dates back to 1947⁶, namely the year that followed the entry into force of the Greek Civil Code. However, in the decades that followed the Civil Code's enactment, Greece, by stark contrast to what happened in most European countries during the post-War period, never adopted a legislation explicitly making the dismissal's validity conditional on the existence of a real and just cause, linked to the conduct or competence of the employee, or to the operational needs of the enterprise. As

³ See *D. Vassiliou*, 'The Impact of Article 24 of the Revised European Social Charter on the Greek Dismissal Law' [Το άρθρο 24 του Αναθεωρημένου Ευρωπαϊκού Κοινωνικού Χάρτη και η επίδρασή του στο ελληνικό δίκαιο της καταγγελίας], *Labour law Review* 76 (2017) [ΕΕργΔ 2017], p. 881.

⁴ The sum of the severance allowance owed depends, cumulatively, on the employee's years of previous service and on the amount of his/her salary at the last month of employment.

⁵ Henceforth, any reference to a person of the male sex should also be read as a reference to a person of the female sex.

⁶ Decision n° 34/1947 of the Greek Supreme Court (Areios Pagos), *Labour Law Review* 6 (1947) [ΕΕργΔ 1947], p. 246.

a result, Greek civil courts⁷, finding themselves in such a legislative void, have always leaned heavily on article 281 C.C. when dealing with dismissal cases, thus building an almost entirely judge made law for a universal yet inefficient protection against arbitrary dismissals.

4. Under this jurisprudential regime of *abusive dismissal*, an employer is in principle free to terminate an employment contract at will. No valid reason justifying the dismissal is needed. However, the dismissal is deemed abusive, and thus null and void, if the employer reaches his decision to terminate the employment contract motivated by reprehensible or vindictive incentives, or by his hatred towards the employee, stemming from a lawful yet distasteful to the employer act or behaviour on the part of the employee. Typical examples of abusive/vengeful dismissals are those taking place as a response to the employee's standing for his statutory or contractual rights: e.g. an employee is fired because he asked to be paid the overtime work he has provided, or asked for his annual paid leave, or reported a violation of the labour legislation to the Labour Inspectorate, etc.

What is noteworthy here is that, according to Areios Pagos' well-established case law⁸, a dismissal that is not grounded on a just cause and cannot be objectively justified is not deemed abusive by default. Contrariwise, in order for a dismissal to be regarded as abusive, it has to be the result of the employer's hatred, or to stem from his reprehensible and vindictive incentives. If those incentives are not invoked in the law suit and then proven by the dismissed employee before the court, the termination of the employment contract will be deemed valid. And this is so even if the employer, facing the plaintiff's allegations, refuses to invoke any cause for the effectuated dismissal, or even invokes a reason that is obviously untrue or deceitful.

Indeed, according to the procedural law rules concerning the application of article 281 C.C. in unfair dismissal trials, the burden of proof rests completely with the employee, who bears the onus not only to invoke the reason rendering the dismissal abusive, but also to prove the abuse before the court — or see his law suit being rejected. Thus, although in most cases the employer, not wishing to negatively bias the court, will usually allege a credible reason for his decision to terminate the employment contract, in principle he may as well merely deny the plaintiff's allegations without presenting a single reason for the dismissal at issue.

⁷ The Greek legal system knows no special labour courts. All employment disputes are thus resolved by common civil courts, staffed by judges who only exceptionally and fortuitously have an expertise in the field of labour law. This lack of both labour courts and specialised judges is one of the factors greatly responsible for the current misfortune of the Greek labour law.

⁸ See purely indicatively Areios Pagos n° 769/2016, Labour Law Review 2017 (EErgD 2017), p. 389; Areios Pagos n° 1422/2015 EErgD 2016, p. 595; Areios Pagos n° 460/2013 EErgD 2013, p. 744; Areios Pagos n° 512/2012 EErgD 2013, p. 692; Areios Pagos n° 50/2011 EErgD 2011, p. 943; Areios Pagos n° 283/2009 EErgD 2010, p. 47; Areios Pagos n° 625/2008 EErgD 2009, p. 508; Areios Pagos n° 851/2005; Areios Pagos n° 326/2001 EErgD 2002, p. 917.

5. Besides the above, according to the Greek case law, there are two more occasions on which a termination of an employment contract may be deemed abusive pursuant to article 281 C.C. Both of them concern, more or less, dismissals effectuated on economic grounds.

In the first occasion, which arises strictly in cases of economic dismissals, an employer shall be found to have terminated the employment contract abusively if he fails to properly apply the pertinent social and economic criteria when deciding which of his redundant employees to fire⁹.

The second occasion is related to the employer's omission to apply the principle of *ultima ratio*. According to this principle, before proceeding to the termination of an employment contract, which is regarded to be employer's last resort, the employer must first seek for alternative, less onerous to the employee measures, which, if adopted, could result to the avoidance of the dismissal. Although Greek legal theory suggests that the *ultima ratio* principle should be applicable in all kinds of dismissals¹⁰, Greek case law has only very rarely and wholly inconsistently applied this principle in cases of dismissals connected with the employee's conduct or capacity. Therefore, in practice, an abusive termination of the employment contract due to violation of the *ultima ratio* principle will arise merely in cases of economic dismissals.

6. According to the vast majority of Greek labour law scholars, the aforementioned judicial interpretation of article 281 C.C. in unfair dismissal cases is unduly and absurdly narrow. In their view, interpreting the notion of abusive dismissal in such a restrictive manner is incompatible with the Greek Constitution, whose article 22 para. 1 explicitly guarantees the right to work. Since both the protection against arbitrary dismissals and the job protection *per se* derive from the right to work, the majority view in the Greek legal theory espouses the standpoint that courts should deem abusive any dismissal that is not grounded on a true, serious and valid reason related to the employee's conduct or capacity, or to the operational needs of the undertaking¹¹.

However, this perspective, no matter how deep and persuasive in its analysis, has not been able to influence the jurisprudence of the Greek Supreme Court (Areios Pagos). On the contrary, over the last two decades Areios Pagos has been persistently interpreting the concept of abusive dismissal in an increasingly narrow manner, thus

⁹ This was the case in the aforementioned ruling of the year 1947 (see above, footnote n^o 5) in which Areios Pagos applied article 281 C.C. on a dismissal case.

¹⁰ See among others *D. Zerdelis*, *The Dismissal as Ultima Ratio* [Η απόλυση ως ultima ratio], 1991, *passim*.

¹¹ See among many *D. Zerdelis*, *The Dismissal as Ultima Ratio* [Η απόλυση ως ultima ratio], 1991, *passim*; *idem*, *Employment Law* [Εργατικό Δίκαιο], 2015, p. 989-990; *I. Koukiadis*, *Employment Law* [Ατομικό Εργατικό Δίκαιο], 2017, p. 39, *F. Dermizaki*, 'The Judicial Scrutiny of Dismissals' [Ο δικαστικός έλεγχος της καταγγελίας της σύμβασης εργασίας αορίστου χρόνου], *Labour Law Review* 70 (2011) [ΕΕργΔ 2011], p. 881 *et seq.* For an opposite opinion see *I. Lixouriotis*, *Employment Law* [Ατομικές Εργασιακές Σχέσεις], 2017, p. 770-771, 781-783, *K. Bakopoulos*, *The Termination of the Employment Contract* [Η καταγγελία της σύμβασης εργασίας], 2012, p. 87-92.

making the protection of employees against arbitrary dismissals even weaker than it already was¹².

7. It is true though that the high sums of severance allowance to which the (lawfully) dismissed employees had been entitled until 2010 could in some cases practically blunt the absence of a legal provision directly protecting the employment position. But even when this protection was achieved, it was so only indirectly, in the sense that employers, especially those running small businesses, would think twice before deciding to terminate an employment contract. In other words, because of the high severance allowances that applied until 2010, small and medium employers were at some extent deterred from proceeding to completely unreflective dismissals¹³. However, even this oblique protection of the work position was drastically diminished in 2010, and then more severely in 2012, when, due to the MoU emergency legislation, the severance allowance payable to the employees in case of a *lawful* dismissal was dramatically shrunk in the lowest ranks since its enactment in 1920¹⁴. But, either way, the *ratio* of the severance allowance is neither to deter the employer from effectuating dismissals nor to be a sanction imposed upon the employer in case of an arbitrary dismissal. Severance allowance is due only in cases of a *lawful* dismissal, constituting a deferred wage offered to the employee at the end of the employment contract. Supplementarily, it also serves as a means of relieving the dismissed employee from the consequences of his unemployment, in parallel with the unemployment benefit provided by the State¹⁵.

8. Within the above described legislative and judicial frame, people working in post-crisis Greece found themselves in the worst position ever as regards their protection against dismissals. With no explicit legislative provision directly shielding the job position, with a far too restrictive judicial interpretation of the notion of abusive dismissal, with the severance allowance in case of a lawful dismissal at record low levels, with the collective labour law amputated and the coverage from collective agreements in a historical nadir, a serious protection of the job position was unfeasible even in an indirect way. As a result, the core aim of dismissal law was practically eradicated — that is if one accepts that its aim is to raise collective wages and to not allow the perpetual swapping of employees in the same job position by preventing them from becoming the lowest bidders for a constantly contestable job position¹⁶.

9. And then came the Revised European Social Charter, whose article 24 reads:

¹² See above, footnote n° 7.

¹³ *D. Vassiliou, op.cit.*, p. 883.

¹⁴ *F. Dermizaki, op.cit.*, p. 891.

¹⁵ On the legislative purpose of severance allowance in the Greek labour law see *C. Tsimpanis, op.cit.*, p. 1414-1418, wherein further citation.

¹⁶ *Cf. D. Zerdelis, 'Abusive Dismissal in the Light of the Recent Areios Pagos' case law' [Η καταχρηστική απόλυση υπό το φως της πρόσφατης νομολογίας του Αρείου Πάγου]*, in: *The 'New' Labour Law [Το «νέο» Εργατικό Δίκαιο] - Essays in Honour of Professor Ioannis Koukiadis*, p. 325 *et seq.*; *D. Vassiliou, EErgD 2017*, p. 548.

«With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body»¹⁷.

Given that the Greek Constitution, following the monistic model of incorporating international treaties into the national legal order, establishes the supremacy of international law over national legislation, the Charter prevails over ordinary statutory legislation (as is article 281 of the Civil Code). The Charter's supremacy, along with the fact that its article 24a is unconditional and sufficiently precise, led part of the Greek legal theory to support that, upon the Charter's ratification, the physiognomy of the Greek dismissal law was automatically and utterly transformed¹⁸. In other words, according to this viewpoint, the judicial interpretation of article 281 C.C. as regards the concept of abusive dismissal holds no validity any more. And this is so because article 24a of the Revised Charter, being a self-executing provision, has already introduced an objective system of protection against arbitrary dismissals, without the immediate need of taking any further legislative measures.

According to this new dismissal system, the termination of an employment contract on the employer's initiative may only be deemed valid if it is grounded on a

¹⁷ For a detailed analysis of article 24 of the Revised E.S.C. see *M. Schmitt*, 'Article 24: The Right to Protection in Cases of Termination of Employment', in: N. Bruun / K. Lörcher / I. Schömann / S. Clauwaert (eds), *The European Social Charter and the Employment Relation*, 2017, p. 412 *et seq.*

¹⁸ *N. Gavalas*, 'What Changes in the Greek Labour Law after the Ratification of the Revised European Social Charter' [Τι αλλάζει στο εργατικό δίκαιο μετά την κύρωση του Αναθεωρημένου Ευρωπαϊκού Κοινωνικού Χάρτη], *Labour Law Review* 75 (2016) [ΕΕργΔ 2016], p. 129 (150-157); *idem*, 'The Protection against Unjustified Dismissal as a Fundamental Human Right' [Η προστασία από την αδικαιολόγητη απόλυση ως θεμελιώδες δικαίωμα του ανθρώπου], *Labour Law Review* 76 (2017) [ΕΕργΔ 2017], p. 503 *et seq.*; *D. Vassiliou*, 'Limitations on the Arbitrary Termination of Employment Contract on the Employer's Initiative and Protection Against Arbitrary Dismissals' [Περιορισμοί της αθέμιτης εργοδοτικής καταγγελίας και προστασία από την αθέμιτη απόλυση], *Labour Law Review* 76 (2017) [ΕΕργΔ 2017], p. 535 *et seq.*; *idem*, 'The Impact of Article 24 of the Revised European Social Charter on the Greek Dismissal Law' [Το άρθρο 24 του Αναθεωρημένου Ευρωπαϊκού Κοινωνικού Χάρτη και η επίδρασή του στο ελληνικό δίκαιο της καταγγελίας], *Labour Law Review* 76 (2017) [ΕΕργΔ 2017], p. 881 *et seq.* For an opposite view see *I. Lixouriotis*, *Employment Law*, 5th edition, 2017, p. 761-762; *G. Theodossis*, 'The Justified Termination of the Open-ended Employment Contract' [Η αιτιολογημένη καταγγελία της σύμβασης εξαρτημένης εργασίας αορίστου χρόνου], *Labour law Review* 76 (2017) [ΕΕργΔ 2017], p. 527 *et seq.*

just cause associated with the employee's capacity or conduct, or based on the operational requirements of the undertaking, establishment or service.

Moreover, since under this new scheme the existence of a valid reason constitutes a prerequisite for the dismissal's lawfulness, the burden of proof is now reversed. Accordingly, the employer is now the one burdened with the onus to prove that the dismissal was effectuated on a valid reason, whereas the employee need only allege in his law suit that the dismissal was ungrounded.

10. This viewpoint was fully endorsed by the Single-Member First Instance Court of Piraeus in its Decision n^o 3220/2017, which can potentially signify a new era for the Greek dismissal law system. And this is so despite that fact that the Court of Piraeus failed to complete the breakthrough it commenced in its basic premise, since its final judgment on what consists a valid reason is open to criticism and further contemplation. What is important though is that the first step for the application of article 24 of the Revised European Social Charter in the Greek legal order has been made. Now it is up to Areios Pagos to pick up the baton and finally alter its obsolete jurisprudence.