THE MANAGERIAL PREROGATIVE AND THE RIGHT AND DUTY TO COLLECTIVE BARGAINING IN GREECE

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I. THE MANAGERIAL PREROGATIVE

The managerial prerogative constitutes the most characteristic expression of the employer's powers being intrinsic with the notion of dependent work, and constitutes its distinctive feature relative to other forms of labor (independent services, etc).

The managerial prerogative signifies the power of the employer to regulate the issues pertaining to the organization and function of the undertaking aiming to attain its goals, and more precisely, to determine the kind, the place, the manner, and the time of labor provision by the worker specifying in this way his labor performance.[1] It constitutes an important source of duties for the worker permitting the unilateral determination of every detail not specified by the labor contract or other source of law.

The managerial prerogative is not provided nor specified by any particular legislative provision. It has been suggested that it is derived from the employer's power onto the means of production, from the business risk regarding the operation of the undertaking or from the integration of the worker in the "labor society of the undertaking."[2] It is widely believed that on its foundation lies the labor contract, namely that on the basis of this contract the worker assumes the duty to follow the employer's instructions regarding the fulfillment of his tasks.[3]

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1. Areios Pagos [AP] [Supreme Court] 435/1992 (Greece); Deltio Ergatikes Nomothesias (Bulletin of Labor Law) [DEN] 1289 (1992) (Greece); AP 406/1989 (Greece); EErgD 1990, p 302 (Greece); AP 351/1990 (Greece); DEN 1991, 221.

2. *See* A. KARAKATSANIS, THE LEGAL ORDER OF THE INDERTAKING 124, 241 (1969) (in Greek).

3. I. KOUKIADIS, LABOUR LAW 370 (2005) (in Greek); G. LEVENTIS, THE CHANGE OF TERMS OF THE CONTRACT OF DEPENDENT WORK 83 (1990) (in Greek).

The managerial prerogative lies in the lower rank of the sources forming the labor relationship. Its limits are derived not only from the labor contract, but also from the remaining sources of labor law, as the law, the internal labor codes, the collective agreement, the practice of the undertaking, the company practice, etc. The limits provided in the internal labor codes are of special practical importance as they contain the rules regulating the labor relationship during its execution. Similarly important limits are posed by the joint decisions of the employer and the workers' council, which provide for the issues described in article 12 par. 4 Act 1767/1988 (way of controlling the presence and conduct of workers in the undertaking, schedule of the vocational training programs, continuous personnel training, annual holidays, etc.).

Moreover, the uniform exercise of the managerial prerogative for a long time period (e.g., long presence at the same workplace or durable assignment of the same task) may be regarded as a tacit transformation of the individual labor contract content, and thus result in restricting the managerial prerogative itself.[4] However, the length of time is not sufficient, as it must be also accompanied by special conditions (expression of reservations, ethical and material interests of the worker) that combined to the length of time should transcend to the conclusion that a reasonable conviction has been formed and that the managerial prerogative will remain unaltered.[5]

Moreover, the managerial prerogative must not be exercised abusively. Its exercise, having a functional nature, should serve the objective interest of the undertaking and not the selfish interest of the employer, nor should it correspond to reprehensible incentives. Exercising this prerogative in good judgment (371 CC) and according to the good faith principle (281 CC), the employer must consider, along with the interest of the undertaking, the interests of the workers, and also should respect the equal treatment principle. Finally, the limits posed the principle of respect of the personality of the worker within the undertaking are particularly significant.

The employer often wishes to readjust the terms of the worker's labor contract for various reasons, something that can be achieved by exercising his managerial prerogative. The exercise of this prerogative is restricted, however, as it is aforementioned, by the contractual terms and the imposition to the worker of a unilateral

4. LEVENTIS, *supra* note 3, at 85.

5. D. ZERDELIS, INDIVIDUAL LABOUR RELATIONSHIPS 583 (2007) (in Greek); AP 1248/93 (Greece); DEN 1994, 405.

harmful change of contract is not possible. The terms of the labor relationship cannot be modified unilaterally, without considering the law, the collective agreement, the internal labor codes, or the individual labor contract. This unilateral change is regarded as harmful when the worker suffers not only material damage but also ethical injury.

According to the case law unilateral change of labor terms are:

a) The change in the nature of the agreed work causing the worker material or ethical injury.[6] The transfer to another department that has a different nature of labor compared to the initial kind of labor.[7] The assignment of inferior duties.[8]
b) The decrease of the agreed salary by the employer.[9] The harmful change of the way of calculating the worker's salary.[10] The change of the agreed time period of the employment with a respective decrease in remuneration.[11]
c) The unilateral increase of the working hours,[12] and especially in case of contractual part-time work.[13]
d) The transfer of the employee to another place from the one that has originally been specified[14] or to another sector implying a different nature of work.[15]

According to the case law harmful change does not occur when:

a) The provided by the labor contract reduction of the remuneration (under the condition that it is not less than the minimum wage) or the abolishment of an allowance granted because of liberality but not with the intent to constitute an exchange for the work performance, especially if there was reserved the right of its withdrawal.[16]

6. AP 1702/1998 (Greece); DEN 1999, 701; AP 15/1999 (Greece); ElDik 1999, 568.
7. AP 990/1996 (Greece); ElDik 1998, 836.
8. Court of Appeal of Athens 5797/1999, ElDik 2000, 651.
9. AP 1937/1988 (Greece); EErgD 1989, 606; AP 53/1994 (Greece); EErgD 1995, 612.
10. AP 446/1982 (Greece); DEN 1982, 845
11. AP 995/1982 (Greece); DEN 1982,1059; AP 1447/1982 (Greece); EErgD 1983, 469;. AP 1684/1990 (Greece); EErgD 1991, 936. *See* Act 1892/1990 art. 40, ¶ 6, prohibiting the termination of labour contract due to non acceptance of the worker of the employer's proposal regarding part time employment.
12. Regarding the increase in the working hour after the succession of the employer, see AP 521/1984 (Greece); DEN 1985, 322; AP 974/72 (Greece); DEN 1972, 81; AP 732/71 (Greece); EErgD 1972, 219.
13. AP 162/1993 (Greece); DEN 1993, 649.
14. *Id.*
15. AP 1338/1984 (Greece); EErgD 1985, 618.
16. AP 699/2002 (Greece); XrID 2002, 641; AP 1937/1988 (Greece); EErgD 1989, 606; AP 2001/2002 (Greece); ElDik 2002, 733.

b) The reduction of overtime work, of night work, and of the work on Sundays and holidays, unless the employer has contractually assumed such an obligation.[17]
c) The removal of supervising tasks, if the worker ceased to be trustful and if this removal does not result in ethical disgrace and reduction in wages.
d) The transfer to a different sector with the assignment of different tasks if it serves functional purposes and under the condition that the new tasks are not inferior and do not entail reduction of the remuneration.
e) The change of the workplace as long as the business activity is extended in more places, under the condition that the right is not restricted by a specific legal provision or by the terms of labor contract or by the internal labor codes and it is not abusive.[18]
f) The change of the working hours of the worker that serves specific functional needs, as long as there is not a contrary contractual engagement and it is not abusive.[19]

The unilateral harmful change of the terms of labor contract by of the employer does not involve by itself the termination of the labor relationship. However the worker has different choices in order to protect his interests and he is entitled to select:

a) To deny the change by claiming the fulfilling of the terms of contract and the continuation of employment under the same conditions before the change. If the employer does not accept this kind of work, the worker can deny to provide service under new conditions and ask for the payment of the remuneration.[20]
b) To consider this change as termination of the contract by the employer then he can claim the payment of the legal compensation, if the contract is of indeterminate duration.[21]
c) To accept the change. In this, the employee accepts the conclusion of a new labor contract, which amends the old one. The acceptance of this change can be both verbal and

17. AP 995/1982 (Greece); DEN 1982, 105; AP 842/1985 (Greece); DEN 1986, 797; AP 677/1974 (Greece); DEN 1974, 793.
18. AP 927/1998 (Greece); DEN 1999, 1587; AP 1182/1999 (Greece); DEN 1999, 1588.
19. AP 266/1990 (Greece); DEN 199, 216.
20. AP 82/2001 (Greece); ElDik 2001, 921; AP 384/2001 (Greece); ElDik 2002, 130; AP 695/2001 (Greece); ElDik 2002, 733.
21. AP 94/1995 (Greece); ElDik 1997, 587; AP 211/2002 (Greece); XrID 2002, 462; AP 559/2001 (Greece); ElDik 2002, 1048; AP 1792/2001 (Greece); ElDik 2002, 1657.

tacit, if he does not oppose the change within a reasonable period.

The employer who wishes to ensure the variation of terms in the labor relation has the possibility to provide some clauses in the labor contract from the beginning. Consequently, when it is agreed *a priori* that the employer is entitled to change the terms of the contract, this change is not regarded as unilateral, but agreed and thus it is permitted. However, the limits of the change must be precisely defined and the employer must act within these limits.[22] It is correctly noted that the conventional right of the employer to amend unilaterally the terms of labor should not refer to the substantial terms of labor (arbitrary variation of remuneration, etc.), because then the rules of labor law regulating the termination of labor contract would be violated.[23] This change is legal, so long as it does not violate a special rule of protection of employees or another rule of public order, as, for example, the minimum protection limits of workers. The exercise of this employer's right is submitted in every case to the limitations posed by article 281 CC, in other words when it does not service the functional aims of the undertaking, but it is due to prejudice or revenge.[24]

Finally, if the employer wishes to amend the terms of labor contract, he can exercise a termination for the variation of the contract. This termination is exercised if the employee rejects the amendment of labor terms. In this way pressure is exercised upon the employee to accept the suggested variation.[25] In the case of acceptance on the part of the employee, the labor contract is changed on new conditions. If on the other hand, he does not accept it, then the contract is terminated and he is entitled to compensation.

II. THE RIGHT AND THE DUTY TO COLLECTIVE BARGAINING

The establishment of the right and duty to bargain constitutes one of the most important innovations of the Act 1876/90.[26] In this way, Greece transcends from the freedom to the right to negotiate. The option for negotiation is not laid on the discretionary power of

22. AP 1212/1990 (Greece); DEN 1992, 482; AP 1227/1994 (Greece); DEN 1994, 403.
23. LEVENTIS, *supra* note 3, at 69.
24. Court of Appeal of Athens 455/1992, EErgD 1992, 500.
25. D. ZERDELIS, ABUSIVE TERMS OF LABOUR CONTRACT 163 (2005).
26. For the right and duty to collective bargaining, see G. LEVENTIS, COLLECTIVE LABOUR LAW 535 (2007); I. Koukiadis, *Labour law*, 2 COLL. LAB. RELATION.170 (1999); A. KAZAKOS, THE ARBITRATION OF COLLECTIVE LABOUR DISPUTES 161 (1998).

collective bargaining agents. The refusal to negotiate is proclaimed an illegal conduct.

We should, however, make clear that the obligation for bargaining does not mean in any way the restriction of freedom to conclude or not a collective agreement and constitutes a regulation regarding only the conduct of agents and the bargaining procedure.

A. The Purpose of the Duty to Bargain

The recognition of the duty to bargain is initially pursued in order to protect the seriousness of the debate. Both sides, by adapting their conduct according to the rules of good faith bargaining, ensure the seriousness of the dialogue, and each side reasonably waits and claims an equivalent measure of good conduct from the other. The difference among employers' and employees' interests can be reconciliated by the dialogue procedure. Thus, the duty to bargain serves a normative regulative function, claiming the beginning and continuation of the dialogue.

Furthermore, the duty to bargain is characterized by an important "educative" mission. The dialogue is proclaimed to be the method that should be adopted by the social partners in order to settle their differences.

B. The Subjects of the Right and the Duty to Bargain

Paragraph 1 of article 4 Act 1876/90 prescribes that both workers and employers organizations and individual employers shall have the right and the duty to bargain with a view to drawing up collective agreements. Taking into account that the right and the duty to bargain serve the conclusion of a collective agreement, only the agents (employers' or workers' organization) enjoying the power to conclude a collective agreement are subject to this duty and possess the relative right.

For the same reason, the duty to bargain is related only to the issues that can constitute the context of the collective agreement according to article 2 Act 1876/90, whose content can be exceptionally extended. According to this article, the collective agreement can cover:

1. matters concerning the establishment, terms of application, and duration of such individual employment contracts as come within its field of application;
2. matters concerning the exercise of trade union rights in the undertaking, the provision of facilities to union officials,

procedures for the deduction at source of trade union dues, and the transfer of the latter to the appropriate organizations;

3. matters arising in respect of social security, excluding those relating to pensions, insofar as the provisions of the agreement on such matters do not contravene constitutional provisions or the policy laid down by the state social insurance institutions;
4. matters relating to the implementation of enterprise management policy, insofar as such policy directly affects labor relations;
5. matters concerning the interpretation of the clauses contained in the collective agreement;
6. matters concerning the provisions of article 12 of Law 1767/1988, without prejudice, however, to the powers vested in the workers' councils;
7. matters relating to the rights and obligations of the contracting parties;
8. matters relating to the procedure for, and terms of, collective bargaining, mediation, and arbitration; and,
9. matters designed to promote social peace in the areas within its scope.

Moreover we must highly underline the employer's duty to jointly decide with the personnel representatives for some issues. Thus under the par 4 of article 12 Act 1767/1988 the councils of the workers or the representatives of the trade unions decide jointly with the employer for the following issues: a. The internal rules of the undertaking b. The health and safety rules of the undertaking; c. Information courses on the modern business organisation methods and the use of new technologies; d. Planning the training, continuous and advanced education of the personnel, especially when technology changes; e. Attendance and conduct control method as part of the protection of the employees personality, mainly in connection with audiovisual means; f. Planning the annual leaves; g. Reintegration of people who became disabled as a result of an accident in the undertaking, in suitable job positions; h. Planning and control of cultural, entertainment and social events. The agreement is published on the notice board of the Workers Council. In the event of a dispute between the employer and the Workers Council pertaining to the regulation of the above issues, the dispute is solved by mediation and arbitration, under articles 15 and 16 of the Act 1876/1990. The above competences are exercised by the Workers Council, as long as there is not a trade union in the undertaking, and these issues are not regulated by a Collective Agreement.

C. The Bargaining Procedure

The procedure of collective bargaining starts with the notification from one party to the other by a document describing the place where the dialogue will take place and the list of the issues that are going to be discussed, (article 4, par. 2, Act 1876/90). This document is directed to the competent Labour Inspection.

D. The Content of the Duty to Bargain

The Greek legislature has established the duty to bargain in an extended content. It included, in other words, not only the duty to meet the other party, but also the duty to bargain in good faith (article 4, par. 3, sub. 1 Act 1876/90).

Consequently the legislation does not regard the fulfillment of the duty of the parties as a simple-typical participation in the dialogue procedure. Furthermore, such a duty cannot be fulfilled by the sterile bargaining behavior of a party, which cannot objectively participate in an agreement. It demands the seriousness of efforts in order to settle the dispute, the compliance to the procedural rules that lead to the creation of a constructive climate and generally the positive and active attitude in order to conclude an agreement.

The legislation defines some elements that can be included in the sense of good faith bargaining, for example, that the parties must explain the grounds of their proposals and counter-proposal (article 4, par. 3, sub. 2 Act 1476/90).

E. Sanctions in Case of Violation of the Duty to Bargain

The legislation does not provide expressively for sanctions pertaining to the violation of the duty to bargain. However, someone could propose the possibility of compensation for the damages imposed on the trade union or some other indirect sanctions (impossibility of recourse to mediation). In reality, the duty to bargain has mainly an educative character, which seems to have exercised an influence on Greek collective labor relations.

F. Information Duty

Finally, in order to ensure the seriousness of the bargaining for the conclusion of a collective agreement, it is expressively provided that the labor side is entitled to claim comprehensive and precise information from the employers, as well as any other information

likely to facilitate negotiations such as information on the financial situation, economic policy and personnel policy of the company.

> Similarly, the employer must, under the article 13, Act 1767/1988 to inform the workers' councils of the following issues before he applies his relative decisions: a) change in the legal status of the undertaking, b) total or partial transfer, extension or restriction of its istallations, c) introduction of new technology, d) change in the personnel, reduction or increase of the number of workers, e) the annual programming of the investments for health and safety measures of the undertaking, f) provision to the workers councils of every element which will be asked and refers to the issues of article 12 of this Act, g) the programming of the overtime employment. The workers councils are also entitled to information for: a) the general tendencies of the undertaking in the financial field and the programming of production, b) the balance sheet and the final report of the undertaking, c) the functional account of the undertaking. The above information must be provided clearly in sufficient time at least once a year. However the employer must not inform the workers councils about subjects which are classified "secret" pursuant to the legislation in force, as the banking or lawyer secrecy, important national issues, patents.