JUDGMENT NO. 254 YEAR 2020

In this case, the Court heard a referral order from the Court of Appeal of Naples questioning the constitutionality of legislation setting out the sanctions for breaching statutory selection criteria establishing which workers to dismiss in a collective redundancy and that drew a distinction between workers hired before and after a certain date.

In essence, the referring court maintained that treating identical breaches occurring within the same selection procedure differently based merely on the date of hiring of the worker gave rise to unreasonable disparity in treatment thereby infringing *inter alia* Article 3 of the Constitution on equality and Articles 10 and 117(1) of the Constitution on Italy's international and EU obligations having specific regard to the Charter of Fundamental Rights of the European Union (CFREU) and the European Social Charter. On that basis the referring court both sought a preliminary ruling from the Court of Justice of the European Union (CJEU) and initiated constitutional review proceedings before the Constitutional Court.

The CJEU held that it manifestly lacked jurisdiction to reply to the questions referred given the absence of a link between an act of Union law and the national measure in question, which is by contrast required by Article 51(1) CFREU.

For its part the Constitutional Court found that the reasons given by the referring court as to the relevance of the questions raised were insufficient and furthermore the remedy sought was unclear. Accordingly, it ruled that the questions as to constitutionality were inadmissible, thereby precluding their examination on the merits.

The Court took the opportunity to reiterate that there is an indissoluble link between the role of the CJEU charged with ensuring that in the interpretation and application of the Treaties the law is observed and the role of all of the national courts tasked with ensuring effective legal protection in the fields covered by Union law. In an integrated system of protection, loyal and constructive cooperation between the different courts involved plays a crucial role in safeguarding fundamental rights, with a view to providing systemic and unfragmented protection.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(7) of Law No. 183 of 10 December 2014 (Delegation of legislative powers to the Government concerning the reform of social welfare payments, employment services and active policies, and on the reorganisation of the legislation on employment relations, on inspections and on the protection and reconciliation of the needs of care, life and work) and Articles 1, 3 and 10 of Legislative Decree No. 23 of 4 March 2015 (Provisions on permanent employment contracts with increasing protection over time, implementing Law No. 183 of 10 December 2014), initiated by the Court of Appeal of Naples, in proceedings brought by C.R. against B. S.r.l., with referral order of 18 September 2019, registered as No. 39 in

the Register of Referral Orders 2020 and published in the Official Journal of the Republic No. 20, first special series 2020.

Having regard to the entry of appearance filed by C.R.;

after hearing Judge Rapporteur Silvana Sciarra at the public hearing of 3 November 2020;

after hearing Counsel Maria Matilde Bidetti and Arcangelo Zampella for C.R.;

after deliberation in chambers on 4 November 2020.

[omitted]

Conclusions on points of law

1.- By means of the referral order referred to in the headnote (Referral Order No. 39 of 2020), the Court of Appeal of Naples has raised questions concerning the constitutionality of Article 1(7) of Law No. 183 of 10 December 2014 (Delegation of legislative powers to the Government concerning the reform of social welfare payments, employment services and active policies, and on the reorganisation of the legislation on employment relations, on inspections and on the protection and reconciliation of the needs of care, life and work) and Articles 1, 3 and 10 of Legislative Decree No. 23 of 4 March 2015 (Provisions on permanent employment contracts with increasing protection over time, implementing Law No. 183 of 10 December 2014), on grounds of infringement of Articles 3, 4, 24, 35, 38, 41, 111, 10 and 117(1) of the Constitution, the latter two in relation to Articles 20, 21, 30 and 47 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007, and Article 24 of the European Social Charter, revised, with appendix, done in Strasbourg on 3 May 1996, ratified and implemented by Law No. 30 of 9 February 1999.

The questions have arisen in appeal proceedings concerning a challenge to a collective redundancy.

The referring court maintains that it has to apply the second sentence of Article 10 of Legislative Decree No. 23 of 2015. This provision, as regards a failure to comply with the selection criteria [to establish which workers to dismiss] that the referring court considers has occurred in the present case, refers in turn to what Article 3(1) of that same Legislative Decree establishes for dismissals made without good cause or -lacking an objective or subjective justification therefor.

The aforementioned Article 3(1) states that the court "shall declare the employment relationship terminated on the date of dismissal and order the employer to pay compensation, free from social security contributions, of an amount equal to two months' remuneration, based on the last qualifying [monthly] remuneration for the purposes of calculating the end-of-service allowance, for each year of service", for an amount that originally ranged from a minimum of four to a maximum of twenty-four months' remuneration.

With reasoning that passes the test of non-implausibility, the referring court argues that the increased compensation ranging from a minimum of six months' remuneration to a maximum of thirty-six months' remuneration subsequently provided for by Article 3(1) of Decree-Law No. 87 of 12 July 2018 (Urgent provisions for the dignity of workers and undertakings), converted, with amendments, into Law No. 96 of 9 August 2018, does not apply to a dismissal made on 1 July 2016.

Article 1 of Legislative Decree No. 23 of 2015 provides that the hiring date marks the dividing line *ratione temporis* between the old and the new rules, applicable to workers hired as from 7 March 2015 or for whom, as from 7 March 2015, the original fixed-term contract has been transformed into a permanent one.

With regard to the rules that apply to workers hired up to 7 March 2015, the consequences of breach of the selection criteria are regulated by the third sentence of Article 5(3) of Law No. 223 of 23 July 1991 (Rules on the wages guarantee fund, redundancy allowance, unemployment benefits, transposition of European directives, job placement, and other labour market provisions), as amended by Article 1(46) of Law No. 92 of 28 June 2012 (Provisions on the reform of the labour market for the purpose of promoting growth).

The aforementioned provision states that the court shall annul the dismissal and order the employer to reinstate the worker and pay compensation, not exceeding twelve months' remuneration, "commensurate with the last overall de facto [monthly] remuneration from the date of dismissal until the day of actual reinstatement, deducting what the worker has received, during the period of dismissal, for the performance of other work as well as what he could have received by diligently dedicating himself to finding a new job".

The referring court's challenges focus on the supposed overall inadequacy of the protection, exclusively in the form of compensation, now provided for in the case of collective redundancies made in breach of the selection criteria. The issues come down to a number of essential points, in the terms set out below.

1.1.- [It is the remitting court's view that] the challenged provisions conflict, first of all, with Article 3 of the Constitution, since, in the context of the same collective redundancies procedure, they introduce "an unjustified different system of sanctions" in the event of breach of the selection criteria.

Even in the event of "identical breaches relating to completely homogeneous cases occurring simultaneously within the same selection procedure", two different sets of sanctions would apply that are "completely uneven in terms of levels of protection", with a consequent "unreasonable disparity in treatment".

The passing of time would not justify that lack of homogeneity in the context of the same case of collective redundancies, nor could one rely on the aim of "facilitating the employment of new hires through rendering dismissals more flexible", an aim which in itself contrasts with the law on collective redundancies.

The referring court further claims that there is a conflict with Article 3 of the Constitution, under a distinct aspect related to Articles 4 and 35 of the Constitution.

The legislator is said to have struck an unreasonable balance between the constitutionally important interests at stake in regulating collective redundancies. Workers hired from 7 March 2015 suffer a severe impairment of their constitutionally protected right to remain in employment, while great flexibility is afforded to the employer in making layoffs.

The system thus devised, "totally divorced from actual harm" and tied to the remuneration to be taken into account for the purposes of calculating the end-of-service allowance (*trattamento di fine rapporto*, TFR), which collective bargaining could even eliminate, is claimed to lack any deterrent effect and not to contribute to encouraging the employer to responsibly exercise the power of dismissal.

The same considerations lead the remitting court to believe that Article 41 of the Constitution has also been infringed: the rules in question allegedly sacrifice the "values

of human dignity and social utility", which the employer cannot ignore, even when exercising a decision to reduce the workforce.

[According to the remitting court,] the inadequacy of the protection can also be grasped by examining both social security and procedural aspects.

As far as the social security aspect is concerned, the referring court argues that only reinstatement ensures "the restoration of the effective social security position". Protection through compensation implies the "loss of one's social security position", which would not be offset by the social welfare system. There would thus be a conflict with Article 38 of the Constitution.

In considering the procedural aspect, the remitting court focuses on the legislator's decision to eliminate the special and speedier "Fornero procedure" (Articles 1(47) - 1(68) of Law No. 92 of 2012), applicable "to disputes concerning challenges to dismissals in the cases governed by Article 18 of Law No. 300 of 20 May 1970 as amended, including when questions relating to the classification of the employment relationship must be resolved".

Those disputes are now dealt with in accordance with the less expeditious ordinary court proceedings, such that [in the remitting court's view] the legislator has infringed Articles 24 and 111 of the Constitution by making the judicial remedy "less effective because it lacks immediacy".

1.2.- [It is the remitting court's view that] the ensuing ineffective system of sanctions breaches the "obligations arising from accession to the Union Treaties" and "interposed provisions", in particular the European Social Charter, which provide for effective sanctions "as a necessary protection of a fundamental social right".

The Court of Appeal of Naples assumes that, as a result of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, this field of law is "by now 'caught' by the competences effectively implemented by the European Union" and that this is enough to bring it within the scope of application of the CFREU.

It is argued that the challenged provisions would undermine the right to effective, adequate and dissuasive protection against unjustified dismissals, in violation of Articles 10 and 117(1) of the Constitution, in relation to Article 30 CFREU and Article 24 of the European Social Charter.

According to the referring court, Article 30 CFREU is not "a merely programmatic provision without its own actionable specific core of precepts" but imposes "a constraint on the national legislator", since, interpreted in the light of Article 24 of the European Social Charter, it necessarily requires adequate compensation or other appropriate measures in the case of unjustified dismissal.

The referring court asserts that there is a contrast with Articles 10 and 117(1) of the Constitution, in relation to Articles 20 and 21 CFREU, because "a system of sanctions, likely for comparable breaches to generate a substantial difference in the rules as regards the measures applicable to the person liable for the wrongdoing" risks penalising "younger workers" and introducing unequal treatment.

It is further contended that Articles 10 and 117(1) of the Constitution are also infringed through Article 47 CFREU, which enshrines the right to an effective remedy, since the legislator has not guaranteed "an effective remedy, efficacious and with the capacity to

inhibit the infringement of a fundamental right".

1.3.- [It is the remitting court's view that] the decision by the government in the exercise of its delegated authority to extend the new rules on sanctions also to collective redundancies infringes Article 76 of the Constitution.

The Court of Appeal of Naples asserts a contrast with the object, principles and guiding criteria of the act of Parliament delegating legislative powers to the government, which, in citing dismissals made on economic grounds, refers only to "cases of individual dismissal for objective reasons".

It is argued that the inadequate model of protection outlined by the legislator conflicts with Article 76 of the Constitution and Article 117(1) of the Constitution for infringement of the guiding principles set out in Article 1(7) of Law No. 183 of 2014, which bind the legislator in the exercise of its delegated authority to "precise compliance with the principles and rights enshrined" in European Union law and international conventions.

2.- It is necessary at the outset to highlight some of the distinctive features of the events submitted for scrutiny by this Court and to give an account of new developments since the referral order was made.

With regard to the infringement of the provisions of the Nice Charter, the referring court decided to simultaneously refer the matter to the Court of Justice of the European Union for a preliminary ruling and initiate constitutional review proceedings. The question referred for a preliminary ruling aims, from the point of view of the double referral that the referring court makes, to clarify the "content of the Charter of Fundamental Rights", to then assume "direct relevance in the constitutional proceedings".

2.1.- As this Court recently reaffirmed (Judgments No. 63 and No. 20 of 2019 and Orders No. 182 of 2020 and No. 117 of 2019), the implementation of an integrated system of protection has as its cornerstone loyal and constructive cooperation between the different jurisdictions involved, each called upon – within their respective spheres of competence – to safeguard fundamental rights, with a view to providing systemic and unfragmented protection.

In this respect, it is no coincidence that Article 19(1) of the Treaty on European Union (TEU), signed in Maastricht on 7 February 1992, which entered into force on 1 November 1993, considers in a similar vein the role of the Court of Justice, charged with ensuring that "in the interpretation and application of the Treaties the law is observed" (paragraph 1), and the role of all of national courts, tasked with ensuring "effective legal protection in the fields covered by Union law" (paragraph 2), thereby highlighting the indissoluble link between them.

2.2.- Following the reference for a preliminary ruling made by the referring court, the Court of Justice of the European Union was the first to rule in the matter. In its order of 4 June 2020 (Case C-32/20, *TJ v Balga S.r.l.*) it held that it manifestly lacked jurisdiction to reply to the questions referred.

This decision focuses on the absence "of a link between an act of Union law and the national measure in question", a link required by Article 51(1) of the Nice Charter and that does not consist of a mere affinity between the matters under consideration and the indirect influence that one matter has on the other (paragraph 26).

In keeping with those indications, this Court also rigorously surveys the field of application of European Union law and has consistently stated that the CFREU can be

invoked, as an interposed provision, in constitutional review proceedings solely when the matter that is the subject of domestic legislation is governed by European law (Judgment No. 194 of 2018, point 8 of the *Conclusions on points of law* and, previously, Judgment No. 80 of 2011, point 5.5 of the *Conclusions on points of law*).

Directive 98/59/EC establishes a procedure for consulting workers' representatives and informing the competent public authorities in order to limit recourse to layoffs and mitigate their consequences through "accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant" (Court of Justice, Order of 4 June 2020, cited above, paragraph 30). This source of secondary legislation has given rise, due to the procedural nature of the provisions now cited, to "partial harmonisation", which, however, "does not seek to establish a general economic compensation mechanism at Union level in the event of loss of employment or harmonise the arrangements for the definitive cessation of a company's activities" (paragraph 31).

The breach of the criteria for the selection of workers to be made redundant, as well as the arrangements adopted by the employer in carrying out the redundancies, are matters which, in the reconstruction provided by the Court of Luxembourg, are unrelated to the notification and consultation obligations arising from Directive 98/59/EC and remain, as such, within the competence of the Member States (paragraph 32).

It follows from these observations that the legal situation of the applicant in the main proceedings "does not fall within the scope of EU law" and that the interpretation of the provisions of the Charter therefore "bears no relation to the subject matter of the main proceedings" (paragraph 23).

3.- This Court has no reason to express an opinion on the events now referred to. There are, in fact, multiple grounds for inadmissibility that can be examined by this Court of its own motion.

4.- The first of these grounds concerns the description of the actual case and the reasoning as regards the requirement of relevance.

4.1.- The applicant in the main proceedings challenged the collective redundancy, made on 1 July 2016, "for breach of the selection criteria of Law No. 223/91 and, in any case, for breach of the procedure" (point 4), as also confirmed by the arguments put forward in that party's entry of appearance here.

The referring court states that it must decide on the appeal filed against the first instance judgment, which rejected the challenge to the collective redundancy "as the grounds were general and unfounded" (point 3).

With regard to relevance, the referring court merely points out that an employment relationship established after 7 March 2015 is subject to the provisions of Article 3 of Legislative Decree No. 23 of 2015, which regulates the "consequences in terms of sanctions if the claim is upheld" (point 8).

A declaration of unconstitutionality would imply "a change in the legal framework assumed by the referring court" and from that perspective would confirm the relevance of the questions raised, which the referring court would be called upon to illustrate with "non-implausible reasoning" (point 7).

4.2.- The relevance of the question as to constitutionality is not to be equated with the actual utility for the litigants (Judgment No. 174 of 2019, point 2.1 of the *Conclusions on points of law*). Relevance presupposes the need to apply the challenged provision in the

reasoning process leading to the decision and is tied to the impact of this Court's ruling on any stage of that process.

4.3.- In the face of a challenge based on breach of the selection criteria and, in the alternative, on breach of the procedure, the Court of Appeal of Naples does not explain at all why it favours classifying the dispute as one falling under the first ground in the appeal and hence impugning the associated rules on sanctions, comparing them to the previous set of rules, as far as deterrence is concerned.

It is precisely with regard to the breach of the selection criteria, in fact, that there appears to be a clean break between protection in the form of reinstatement provided for by the third sentence of Article 5(3) of Law No. 223 of 1991 and the protection in the form of mere compensation introduced by Article 10 of Legislative Decree No. 23 of 2015. On the contrary, as regards breach of the procedure, there is no appreciable discontinuity in the law since the previous legislation (second sentence of Article 5(3) of Law No. 223 of 1991) also contemplates protection in the form of mere compensation, even if configured differently.

The burden of [adducing sufficient] reasoning is moreover even heavier in an appeal case, which is called upon to review, on the basis of specific grounds of appeal, the correctness of a first-instance decision that rejected the action in its entirety.

The referring court does not offer any insight into the reasons supporting the unlawfulness of the collective redundancy for breach of the selection criteria and why the assessment made by the court of first instance to the contrary should be overturned.

With regard to the rules governing sanctions for individual dismissals flawed on substantive grounds (Judgment No. 194 of 2018) or on formal or procedural grounds (Judgment No. 150 of 2020), this Court has been able to examine the merits of the complaints also in the light of the exhaustive argumentation made by the referring court on the issue of relevance, which from time to time discloses the occurrence of a case of unlawfulness, on substantive or formal grounds, of the contested dismissals and the need to apply the corresponding rules on protection.

Although aware of the fact that the question as to constitutionality concerns the consequences in terms of sanctions envisaged solely in the event of upholding the claim (point 8 cited above), the referring court neglects to describe the actual case and to adduce elements apt to corroborate upholding the challenge on grounds of a breach of the selection criteria, already ruled out by the court of first instance.

The application of the rules on sanctions, which the referring court suspects to be unconstitutional, requires prior identification of the defects affecting the collective redundancy. This assumption is of crucial importance in the light of both the alternative that the party to the case outlines between breach of the selection criteria and breach of the procedure, and of the existence of a first-instance judgment that ruled out any defects in the contested collective redundancy.

The referring court does not dwell on this inescapable logical antecedent and omits, even relying on just non-implausible reasoning, arguments to support the relevance of the alleged doubts as to constitutionality.

These gaps in the description of the specific case therefore prevent this Court from assessing the relevance of the issues raised.

5.- The inadmissibility of the questions is also determined by the uncertainty as to the

corrective intervention sought from this Court.

5.1.- From the wording of the challenges, it is not clear whether the remedy that the remitting court is seeking calls for the complete invalidation of Article 10 of Legislative Decree No. 23 of 2015, in the part in which it punishes breach of the selection criteria, or a substitute ruling aligning the preceptive content of that provision with the solutions laid down by the third sentence of Article 5(3) of Law No. 223 of 1991, as redefined by Article 1(46) of Law No. 92 of 2012.

It is the very applicant in the main proceedings who calls, in the explanatory brief filed in the run up to the hearing, for "an ablative or manipulative ruling", with a perplexing indication that in itself reveals the ambiguity of the prayer for relief.

Nor is it for this Court to resolve the alternative described, in the absence of unambiguous indications from the referring court.

5.2.- Equally unresolved is the alternative, which in any case has to do with the eminently discretionary power enjoyed by the legislator, between the pure and simple restoration of protection in the form of reinstatement or the reconfiguration of protection in the form of compensation, with an eye more on deterrence.

The Court's own case law (Judgments Nos. 150 of 2020, point 9 of the *Conclusions on points of law*, No. 194 of 2018, point 9.2 of the *Conclusions on points of law*, and No. 46 of 2000, point 5 of the *Conclusions on points of law*) and the international law cited by the referring court (Article 24 of the European Social Charter) show that many remedies may be suited to ensuring adequate compensation for the arbitrarily dismissed worker.

Both reinstatement and compensation as forms of protection can be modulated differently and the legislator has a wide margin of appreciation in implementing the rights enshrined in Articles 4 and 35 of the Constitution and, in a convergent perspective, in Article 24 of the European Social Charter.

In the face of a wide range of solutions, the referring court does not state in clear terms the appropriate relief that would remedy the many alleged inequalities, based on precise points of reference already present in the regulatory framework.

For these additional reasons, the questions as to constitutionality must be declared inadmissible.

6.- Those aspects absorb any further grounds of inadmissibility.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

declares inadmissible the questions as to the constitutionality of Article 1(7) of Law No. 183 of 10 December 2014 (Delegation of legislative powers to the Government concerning the reform of social welfare payments, employment services and active policies, and on the reorganisation of the legislation on employment relations, on inspections and on the protection and reconciliation of the needs of care, life and work) and Articles 1, 3 and 10 of Legislative Decree No. 23 of 4 March 2015 (Provisions on permanent employment contracts with increasing protection over time, implementing Law No. 183 of 10 December 2014), as per the version precedent to the amendments made by Article 3(1) of Decree-Law No. 87 of 12 July 2018 (Urgent provisions for the dignity of workers and undertakings), converted, with amendments, into Law No. 96 of 9 August 2018, raised by the Court of Appeal of Naples, with the referral order referred to in the headnote, with reference to Articles 3, 4, 24, 35, 38, 41, 76, 111, 10 and 117(1)

of the Constitution, the latter two in relation to Articles 20, 21, 30 and 47 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007, and Article 24 of the European Social Charter, revised, with appendix, done in Strasbourg on 3 May 1996, ratified and implemented by Law No. 30 of 9 February 1999.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 November 2020.

Signed by: Mario Rosario MORELLI, President

Silvana SCIARRA, Author of the Judgment