



Corte costituzionale



JUDGMENT NO. 351 OF 2008

GIOVANNI MARIA FLICK, President
SABINO CASSESE, Author of the Judgment



JUDGMENT NO. 351 YEAR 2008

In this case the Court considered an administrative law reference from the Council of State. A director general of a Lazio health authority had been dismissed from his post under the terms of regional legislation which removed certain senior officials from their posts in the aftermath of regional elections, operating a so-called political spoils system. That legislation was ruled unconstitutional by the Court (judgment No. 104 of 2007). In order to avoid reinstatement, the Regional Council enacted legislation providing that the director could be compensated. The Court struck down the legislation on the grounds that the private law principle of compensation for unfair dismissal could not be extended to the public sector, in which the dismissal of civil servants was detrimental also to the public interest on various grounds.

THE CONSTITUTIONAL COURT

Composed of: President: Giovanni Maria FLICK; Judges: Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(1) and (2) of Lazio Region law No. 8 of 13 June 2007 (Provisions governing appointments to the executive organs of regionally controlled public bodies terminated pursuant to regional legislative provisions declared unconstitutional by the Constitutional Court), commenced pursuant to the referral order of 16 October 2007 by the Council of State on an appeal filed by Franco Condò against Lazio Region and others, registered as No. 88 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 15, first special series 2008.

Considering the entries of appearance by Franco Condò and Pietro Grasso;
having heard the Judge Rapporteur Sabino Cassese in the public hearing of 21 October 2008;

having heard the Francesco Castiello and Guido De Santis, barristers, for Franco Condò and Rosaria Russo Valentini, barrister, for Pietro Grasso.

The facts of the case

1. - The Council of State raised the question of the constitutionality of Article 1(1) and (2) of Lazio Region law No. 8 of 13 June 2007 (Provisions governing appointments to the executive organs of regionally controlled public bodies terminated pursuant to regional legislative provisions declared unconstitutional by the Constitutional Court), due to violation of Articles 3, 24, 97, 101, 103, 113 and 117(2)(1) of the Constitution.

1.1. - The contested provisions stipulate that: “1. With regard to the members of the executive organs of regionally controlled public bodies who were dismissed from their posts pursuant to regional legislative provisions declared unconstitutional by judgment of the Constitutional Court, with the resulting termination of the private law contracts governing the related employment relationships, the Regional Council is authorised to choose between: a) the reinstatement in their posts and the restoration of the relative employment relationships; b) the offer of fair compensation. 2. The solution mentioned under sub-section 1(b) shall in any case be adopted where the employment relationship has in actual fact been interrupted for more than six months”.

1.2. - The referring court gives the following statement of the facts at issue in the main proceedings. The appellant was dismissed from his post as director general of the Local Health Board Rome/E under the terms of the regional legislation according to which the senior members of the executive organs were removed following the formation of the new Regional Cabinet (so-called spoils system). He appealed against this decision to the Regional Administrative Tribunal for Lazio, filing a cross application for an interim injunction, which was rejected by the trial court. The appellant subsequently filed an

interlocutory appeal requesting the annulment and reformulation of the regional administrative tribunal's order rejecting his application. Having been called upon to rule on this interlocutory appeal, the Council of State raised the question of the constitutionality of the regional legislative provisions establishing the aforementioned spoils system. This legislation (Article 71(1), (3) and (4)(a) of Lazio Region law No. 9 of 17 February 2005, containing the “Regional finance law for the financial year 2005” and Article 55(4) of Lazio Region law No. 1 of 11 November 2004, containing “New Statute of Lazio Region”) was declared unconstitutional by this Court in judgment No. 104 of 2007. Before the Council of State ruled on the interlocutory appeal however, the contested regional provisions entered into force, under the terms of which, since Lazio Region was not able to order the reinstatement as in actual fact the relationship had been interrupted for longer than six months (Article 1(1)(b) of law No. 8 of 2007), it “agreed upon” an indemnity equal to 15 months' salary, even though no agreement – the referring court clarifies – had been reached with the appellant, who by contrast had insisted on the adoption of all interim measures necessary in order to implement Constitutional Court judgment No. 104 of 2007. In the hearing in chambers scheduled for the recommencement of the interim stage, the Council of State therefore stayed proceedings for a second time, referring to the Court a question concerning the constitutionality of the new regional legislative provisions introduced, pending the outcome of proceedings, in order to regulate the position of the individuals who had been removed from their posts under the terms of the legislation already declared unconstitutional in judgment No. 104 of 2007.

1.3. - As regards the question of relevance, the lower court notes that the contested legislation precludes the adoption of interim measures in specific form which, in the absence of such legislation, would by contrast have been granted to the appellant, as moreover have been granted to other directors general removed from their posts under the terms of the legislation declared unconstitutional in the same judgment No. 104 of 2007. On the one hand in fact, the removal *ab initio* of the legislative basis for the contested measures was claimed to make the prognosis on the outcome of the appeal, pursuant to Article 21 of law No. 1034 of 6 December 1971 (Establishment of the Regional

Administrative Tribunals) a foregone conclusion. On the other hand however, the nature of the detriment suffered by the appellant, which calls into question his very professional standing, would justify the application of interim measures in specific form. However, interim relief is precluded under the contested provision which stipulates, in cases involving the actual interruption of the relationship for more than six months, that an offer of fair compensation must be made, excluding the possibility, which however is only in appearance an alternative, of reinstatement in the post.

1.4. - As regards the question of non manifest groundlessness, the referring court considers that the contested regional legislation violates a range of constitutional principles.

First, in providing for the possibility (and in certain circumstances the requirement) of compensation rather than reinstatement it reintroduces, albeit in an “onerous form”, the very same spoils system mechanism which the Constitutional Court has already found to breach the Constitution, thus committing the same violation of Article 97 of the Constitution as that identified in judgment No. 104 of 2007.

Secondly, the contested regional legislative provisions violate Articles 3, 24, 103 and 113 of the Constitution on two grounds. On the one hand, they violate the principle of effective judicial protection against the acts of the public administration, limiting this protection only to compensation. On the other hand, this restriction is applied unreasonably only to directors dismissed pursuant to regional legislation declared unconstitutional by the Constitutional Court and not also to directors dismissed from their posts by measures ruled unlawful by other courts. This amounts to a violation of Article 3 of the Constitution “due to the [lack of] reasonableness of the legislative classification”.

Thirdly, according to the referring court, the procedures and time-scale for the approval of the contested legislation (whilst the proceedings which had given rise to judgment No. 104 of 2007 of the Constitutional Court were pending and immediately after the Council of State had granted specific interim relief in one of these cases) suggest that it was introduced not in order to regulate the matters in general terms, but to affect the outcome of court proceedings in progress, thus constituting an *ultra vires* legislative act and violating Article 101 of the Constitution.

Finally, the regional legislation, the constitutionality of which is questioned by the Council of State, concerns issues (“limits on the effects of judgments of the Constitutional Court and the range of interim measures in administrative proceedings”) which fall under the matters reserved pursuant to Article 117(2)(1) of the Constitution to the exclusive competence of the state: “judicial matters and procedural rules; private and criminal law; administrative justice”.

2. - The appellant in the main proceedings entered an appearance, fully endorsing the arguments contained in the referral order of the Council of State, and asserting that the question of constitutionality is well founded in the terms stated by the referring court.

3. - The other interested party in the main proceedings entered an appearance, requesting that the Court reject the question of constitutionality raised.

4. - Shortly before the public hearing, the other interested party applied for a deferral of the hearing, for the following reasons: “Lazio Region has presented a draft bill (No. 408 of 7.10.2008), placed on the agenda for approval by the plenary sitting of the Council for 20 October and this law will replace regional law No. 8 of 2007 under the cognisance of this Court, the hearing for which is scheduled for 21 October”.

5. - During the course of the hearing, the representative of the other party restated the request that proceedings be adjourned and submitted a copy of the draft bill in question, approved on 20 October 2008 by the Council of Lazio Region, requesting that the case file be remitted to the lower court in order that it reassess the relevance of the question in the light of the changed reference legislative framework.

Conclusions on points of law

1. - The Council of State has raised the question of the constitutionality of Article 1(1) and (2) of Lazio Region law No. 8 of 13 June 2007 (Provisions governing appointments to the executive organs of regionally controlled public bodies terminated pursuant to regional legislative provisions declared unconstitutional by the Constitutional Court), due to violation of Articles 3, 24, 97, 101, 103, 113 and 117(2)(1) of the Constitution.

In particular, according to the referring court, the contested provisions violate Article 97 of the Constitution because they preclude the requirement for the reinstatement of directors who have been automatically dismissed from their posts under the terms of a provision declared unconstitutional by the Constitutional Court. In providing the Regional Council with powers to offer the director compensation instead of reinstatement and, above all, in stipulating that the Council is obliged to offer compensation where the actual interruption of the relationship was longer than six months, these provisions have the effect – according to the referring court – of “reintroducing the possibility of creating the very same spoils system mechanism which the Constitutional Court has already found to breach the Constitution” since, “all things considered, regional law No. 8 of 2007 is nothing other than an onerous form of spoils system”.

1.2. - As a preliminary matter, the Court finds that, for the purposes of this decision, the draft regional bill amending the contested provisions, already approved but not yet published, to which the representative of the private party (the other interested party in the proceedings before the lower court) refers in his request, which was not accepted, to adjourn the hearing for discussion, is irrelevant. Indeed, the Court finds that the contents of this draft bill – which contemplates the replacement of the original alternative provision for the offer of fair compensation (pursuant to Article 1(1)(b) of Lazio region law No. 8 of 2007) with the payment of damages, as well as a change to the period of time during which the Regional Council may pass a resolution adopting the alternative solution (pursuant to Article 1(2)) – leaves unchanged, for the purposes of the question before this Court, the legislative arrangements challenged as unconstitutional by the lower court and, taking into account the grounds for unconstitutionality raised, would not impinge upon the decision which the referring court has been called upon to take.

1.3. - The Court also rejects the challenges of inadmissibility raised during the course of the hearing by the representative of the other interested party in the main proceedings that the question referred by the referring court was irrelevant, first due to the fact that the original duration of the appointment had expired whilst proceedings were pending, and secondly on account of the subsequent approval of Article 1(79) of regional law No. 14 of

11 August 2008 (Arrangements governing the annual and long-term budget of Lazio Region 2008-2010), according to which “the contracts for the directors general of the local health authorities and the hospital trusts currently in post shall be extended until 30 June 2010”.

With reference to the first challenge to the admissibility of the question, the referring court argues, not unreasonably, that its power to grant interim relief is unaltered by the fact that the period of time originally fixed for the appointment had expired, since “the period of time necessary in order to obtain relief through the courts [...] can never operate to the detriment of the party seeking relief”.

As regards the second challenge to the admissibility of the question, it should be pointed out that a law which extends the duration of the appointments of directors general in post cannot have the effect of remedying, where applicable, the unlawful status of the acts by which they were appointed.

2. - The question is well founded with reference to Article 97 of the Constitution.

In contrast to the situation in the private sector, in which the employer's powers of dismissal are limited in order to protect the employee, in the public sector the powers of the administration to remove a director from his post and to terminate the related employment relationship are accompanied by guarantees and limits which are imposed not only, and not so much, in the interest of the individual to be removed, but also, and above all, in order to protect more general collective interests. The interests concerned are recognised under constitutional law, as this Court recently clarified in judgment No. 103 of 2007 and, with particular reference to the position of the directors general of local health authorities, in judgment No. 104 of 2007. More specifically, in this last judgment the Court held that “the principles of impartiality and the proper functioning [of the public administration] require that the post of director general be accompanied by guarantees”. The guarantees not only aim to protect the director general as an employee, but also flow from constitutional principles put in place in order to protect the public interest: administrative impartiality which, as asserted by this Court, is incompatible with arrangements providing for the automatic termination of the appointment which does not respect the principle of the

fairness of administrative procedures, or that of the proper functioning of the public administration which is undermined, again according to the case law of this Court, by a system which provides for the automatic replacement of directors irrespective of any assessment of the results obtained.

It follows from the above, with regard to the forms of protection available, that financial compensation such as, for example, the payment of damages or indemnities recognised under private law in favour of the employee unfairly dismissed, cannot within the public sector constitute effective instruments for the protection of collective interests infringed by unlawful decisions to remove administrative directors. In particular, the fact that the director general of a local health authority, after having been removed automatically and without any opportunity to make representations, should receive financial redress, under the terms of the contested regional legislation, does not in any way alleviate the detriment caused by the dismissal to the collective interest in the impartiality and proper functioning of the public administration. In fact, this detriment appears to some extent to be aggravated since, as is correctly pointed out by the referring court which alluded to a “onerous form of spoils system”, the collectivity also suffers an additional financial cost: the duty to remunerate the new health directors, appointed as replacements for those automatically dismissed, is in fact accompanied by the requirement to pay financial redress to the latter.

The other grounds for challenge are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 1(1) and (2) of Lazio Region law No. 8 of 13 June 2007 (Provisions governing appointments to the executive organs of regionally controlled public bodies terminated pursuant to regional legislative provisions declared unconstitutional by the Constitutional Court) are unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 22 October 2008.

Signed:

Giovanni Maria FLICK, President

Sabino CASSESE, Author of the Judgment

Maria Rosaria FRUSCELLA, Registrar

Filed in the Court Registry on 24 October 2008.

The Director of the Registry

Signed: FRUSCELLA