JUDGMENT NO. 159 YEAR 2019

In this case, the Court heard a referral order concerning legislation providing for the deferred payment, by instalments, of end-of-service allowances for public sector employees on the grounds – *inter alia* – that it breached the principle of equality (equivalent rules not being applicable to private sector employees). The Court rejected the questions, holding that the rules were proportional and adequate, and moreover struck a reasonable balance between the various constitutional interests in play, having regard to the fact that the legislator was required to make a discretionary assessment that took account also of public finance considerations. However, the Court declined to rule on the constitutionality of "legislation requiring the deferred payment by instalment of end-of-service allowances also in situations in which the age or contribution history limits have been met or involving compulsory retirement as a result of reaching the maximum length of service", and invited parliament to take action to rectify the shortcomings within the legislation.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 3(2) of Decree-Law no. 79 of 28 March 1997 (Urgent measures to rebalance the public finances), converted with amendments into Law no. 140 of 28 May 1997, and Article 12(7) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted with amendments into Law no. 122 of 30 July 2010, initiated by the *Tribunale di Roma*, sitting as an employment court, within the proceedings launched by Amelia Capilli against the National Institute for Social Security (*Istituto nazionale della previdenza sociale*, hereafter INPS) by the referral order of 12 April 2018, registered as no. 136 in the Register of Referral Orders 2018 and published in the Official Journal of the Republic no. 40, first special series 2018.

Considering the entries of appearance by Amelia Capilli and the INPS, and the interventions by the President of the Council of Ministers and the Confsal-Unsa Federation;

having heard Judge Rapporteur Silvana Sciarra at the public hearing of 17 April 2019;

having heard Counsel Antonio Mirra for Amelia Capilli, Counsel Flavia Incletolli for the INPS and the State Counsel [*Avvocato dello Stato*] Gianfranco Pignatone for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– By the referral order of 12 April 2018 (Register of Referral Orders no. 136 of 2018), the *Tribunale di Roma*, sitting as an employment court, has questioned the constitutionality of Article 3(2) of Decree-Law no. 79 of 28 March 1997 (Urgent measures to rebalance the public finances), converted with amendments into Law no. 140 of 28 May 1997, and Article 12(7) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted with amendments into Law no. 122 of 30 July 2010, with reference to Articles 3 and 36 of the Constitution.

The referring court states that, in providing for the deferred payment by instalment of the end-of-service allowances due to public sector employees, irrespective of how those allowances are designated, the contested provisions violate the principle of equality (Article 3 of the Constitution). Public sector workers are argued to be subject to a less favourable regime than private-sector workers, to whom the end-of-service allowance is paid without any delay. It is asserted that the special nature of the employment relationship with the public administrations cannot constitute reasonable justification for the difference in treatment objected to.

The "deferred payment by instalment" of end-of-service allowances, which is provided for "in general terms and on a permanent and definitive basis" is moreover claimed to violate the principle of reasonableness (Article 3 of the Constitution) as well as the right to receive remuneration that is proportionate with the quantity and quality of the work performed (Article 36 of the Constitution).

The "particular seriousness of the current economic and financial situation" could justify – so it is argued – exclusively "a temporary targeted initiative in relation to end-of-service allowances" applicable "throughout the public sector" in accordance with "a comprehensive plan featuring a programmatic dimension" projected over the multi-year duration of budgetary policies. Nevertheless, such an initiative must not result in a "permanent irrational continuation of the deferred payment by instalment" of end-of-service allowances.

A scheme structured in these terms, which defers the payment of end-of-service allowances, is asserted to violate the principle that remuneration must be proportionate with the quantity and quality of the work performed, and would undermine its adequacy, in breach of Article 36 of the Constitution. It is argued that these payments, which may be classified as deferred remuneration, are paid upon the termination of employment for the purpose of satisfying "core life necessities (for example, buying a home, paying for a child's wedding, medical expenses […])", in relation also to the need to honour other financial commitments taken on.

[omitted]

3.– In order to define the *thema decidendum* referred to this Court for examination, it is necessary to set out the salient features of the law governing the payment of end-of-service allowances and the special circumstances of the specific case that resulted in the doubt as to the constitutionality of the legislation.

3.1.– Article 3(2) of Decree-Law no. 79 of 1997 sets the time limits for the payment of "end-of-service allowances, irrespective of how those allowances are designated", payable to employees of the public administrations, now defined under Article 1(2) of Legislative Decree no. 165 of 30 March 2001 (General provisions on the regulation of employment in the public administrations), as well as to staff governed by public law pursuant to Article 3(1) and (2) of Legislative Decree no. 165 of 2001.

The disbursing body is required to make payment "upon expiry of a period of twenty-four months after the cessation of employment relations or, in the event that employment ceased as a result of reaching the age or contribution history limits provided for under the regulations applicable to the body of origin, due to compulsory retirement as a result of reaching the maximum length of service provided for under the law or regulations applicable to the administration, upon expiry of a period of twelve months after the cessation of employment relations". Payment must be made "within the following three months, upon expiry of which interest shall be due".

In addition to the deferred payment of end-of-service allowances, provision has also been made for their payment by instalment by Article 12(7) of Decree-Law no. 78 of 2010 with the aim of contributing "to the consolidation of the public accounts by containing current spending, in accordance with the public finance objectives laid down in the updated stability and growth programme".

The original payment schedule, which distinguished between one annual instalment for end-of-service allowances of up to 90,000.00 euros, two annual instalments for allowances between 90,000.00 and 150,000.00 euros, and three annual instalments for allowances of 150,000.00 euros or more, in all instances before tax, was altered by Article 1(484)(a) of Law no. 147 of 27 December 2013 laying down "Provisions on the formation of the annual and multi-year budget of the state (Stability Law 2014)".

For employees of the public administrations, "as identified by the National Institute for Statistics (*Istituto nazionale di statistica*, ISTAT) pursuant to Article 1(3) of Law no. 196 of 31 December 2009", the departure allowance, the service bonus allowance, the end-of-service-allowance and "any other equivalent non-recurring allowance, irrespective of how it is designated, payable following the cessation of employment on various grounds" are now to be paid "in one single annual instalment if the overall amount of the benefit, before the relevant tax is deducted, is equal or lower in total than 50,000 euros" (letter a), "in two annual instalments if the overall amount of the benefit, before the relevant tax is deducted, is greater than 50,000 euros in total but is lower than 100,000 euros" (letter b) and "in three annual instalments if the overall amount of the benefit, before the relevant tax is deducted, is equal to or greater than 100,000 euros in total" (letter c).

[omitted]

3.2.– The referring court states that it has been called upon to rule on an action brought by an employee of the Ministry of Justice "who has been retired on the grounds of old age since 1 September 2016", and who receives the end-of-service allowance "by instalment and on a deferred basis, with the final instalment being payable in September 2020".

In the statement of claim, the claimant in the main proceedings has specified that the payment arrangements governed by Article 12(7)(c) of Decree-Law no. 78 of 2010 apply, "consisting in three successive annual instalments".

The National Institute for Social Security (INPS) and the President of the Council of Ministers have not made any challenges to the facts stated by the referring courts as regards the retirement on the grounds of old age on 1 September 2016 and the four-year time frame for the payment of the full amount of the end-of-service allowance.

3.3.– According to the position stated by the referring court, which moreover has not been disputed, it may be unequivocally inferred that the claimant is receiving the end-of-service allowance "in three annual instalments". The first annual instalment can only be paid by the disbursing body "upon expiry of a period of twenty-four months after the cessation of employment relations" (Article 3(2) of Decree-Law no. 79 of 1997). In fact, the claimant is "in receipt of an old-age pension" and does not benefit from the application of the more favourable one-year time frame that the legislator has established for the payment of end-of-service allowances in the various scenarios involving the cessation of employment "as a result of reaching the age or contribution history limits provided for under the regulations applicable to the body of origin, due to compulsory retirement as a result of reaching the maximum length of service provided for under the law or regulations applicable to the administration".

The need – stated by the referring court – to wait for four years until the "payment" of the end-of-service allowance therefore results from the combined provisions of Article 12(7)(c) of Decree-Law no. 78 of 2010 and Article 3(2) of Decree-Law no. 79 of 1997, which provide, respectively, for the payment in three annual instalments and for the payment of the first annual instalment no sooner than twenty-four months after the cessation of employment relations.

4.– In the light of these clarifications, the questions concerning the constitutionality of Article 3(2) of Decree-Law no. 79 of 1997, insofar as it imposes a time limit of twelve months for the payment of end-of-service allowances in the event of the cessation of employment relations as a result of reaching the age or contribution history limits or upon compulsory retirement as a result of reaching the maximum length of service, must consequently be ruled inadmissible on the grounds that they are not relevant. That provision is not applicable within the main proceedings, which are by contrast covered by separate legislation providing for payment within twenty-four months of the cessation of employment relations.

As regards Article 12(7) of Decree-Law no. 78 of 2010, whilst the provision is general in scope and lays down interlinked rules associated with increasing thresholds, it is only possible to examine the specific aspect at issue within the main proceedings.

Therefore, also the questions concerning the constitutionality of the legislation governing the payment by instalment of the allowances due following the cessation of employment, insofar as applicable to situations – which are not at issue before the referring court – involving the cessation of employment relations as a result of reaching the age or contribution history limits or upon compulsory retirement as a result of reaching the maximum length of service, must therefore be ruled inadmissible on the grounds that they are not relevant.

Constitutional review is therefore limited to the provisions of Article 3(2) of Decree-Law no. 79 of 1997 on the twenty-four month time limit for payment, along with the corresponding provisions on the payment by instalment of end-of-service allowances (Article 12(7) of Decree-Law no. 78 of 2010), which are applicable in that specific scenario.

5.– The questions, delineated in this manner, are unfounded in relation to all aspects raised by the referring court.

6.– The referring court objects in the first place to an arbitrary difference in treatment between the public and private sectors in terms of the time limits for the payment of end-of-service allowances.

The objection is unfounded.

According to the settled case law of this Court – mentioned by the referring court itself – public sector work and private sector work "cannot be treated as equivalent to each other in all respects (see Judgments no. 120 of 2012 and no. 146 of 2008) and the differences, albeit moderate, remain also following the extension of collective bargaining to a vast area of work performed by employees of the public administrations" (Judgment no. 178 of 2015, section 9.2. of the Conclusions on points of law).

Public sector work accounts for a significant share of current expenditure which, precisely for this reason, impinges upon the general equilibrium between income and expenditure within the state budget (Article 81 of the Constitution). The requirement for a prudent control of spending, which is inherent throughout the legislation on public

sector employment and is entirely absent from the rules applicable to the private sector, precludes the comparison proposed by the referring court.
As regards the payment of the amounts due, in accepting the objections of unconstitutionality formulated by the claimant, subject to the limits mentioned above, the referring court itself does not propose that there should be complete equivalence between end-of-service allowances applicable within the public and private sectors, but calls for the restoration of the time limit of ninety days applicable to the payment of the departure allowance pursuant to Article 26(3) of Decree of the President of the Republic no. 1032 of 29 December 1973 (Approval of the consolidated text of provisions on pension benefits for the civilian and military employees of the state), as amended by Article 7 of Law no. 75 of 20 March 1980 (Extension of the time limit laid down by Article 1 of Law no. 610 of 6 December 1979 on payments to civilian and military state employees in service and retired; provisions on the calculation of thirteenth monthly salary payments and the payment of the departure allowance and provisions on the interpretation and implementation of Article 6 of Law no. 177 of 29 April 1976 on the transfer of lifetime annuities to the Social Fund and reopening of the time limits for exercising that option).
Therefore, in invoking the previously applicable legislation on the time limits for the payment of departure allowances, the referring court demonstrates its awareness of the special rules applicable to the public sector in that area, in consideration of the overriding need for the orderly and transparent planning of the allocation of the limited resources available. This is sufficient to justify the differences contested and to preclude the violation objected to of Article 3 of the Constitution on the grounds of the unequal treatment alleged.
7.– The second group of objections, which have been formulated with reference to Articles 3 and 36 of the Constitution, assert that the provisions on payment are inherently unreasonable insofar as they infringe the right of public sector employees to receive deferred remuneration that is proportionate with the quantity and quality of the work performed.
In consideration of the unitary goal that inspires the contested provisions, as well as the inseparable link between the objections alleging unreasonableness and those that assert that deferred remuneration violates the requirements of proportionality and adequacy, they must be examined together. These objections are unfounded.
7.1.– Despite their differing configuration over the years, end-of-service allowances constitute "a unitary category having an identical nature and function, which is applicable in general terms to any type of employment relationship in the event of its termination due to any reason" (Judgment no. 243 of 1993, section 5 of the Conclusions on points of law).
The evolution in the law, "which has been stimulated by constitutional case law" (Judgment no. 243 of 1993, section 4 of the Conclusions on points of law), has ended up classifying end-of-service allowances paid within the public sector under the common paradigm of deferred remuneration, with a parallel function of pension provision, as part of a process involving the gradual approximation with the rules laid down for the private sector by Article 2120 of the Civil Code (Decree of the President of the Council of Ministers of 20 December 1999 on "End-of-services allowances and the creation of pension funds for public sector employees").
This process of harmonisation, which also features a significant role for collective autonomy (Judgment no. 213 of 2018), reflects the unitary goals of the end-of-service

allowance, which is intended to assist the worker during the delicate period following departure from active employment.
Within the public sector, the allowances in question are remunerative in nature, a position which is justified by the fact that the level of the payment is based on the length of service as well as the ongoing remuneration received throughout the employment relationship. The allowance therefore constitutes the fruit of employment activity (Judgment no. 106 of 1996, section 2.1 of the Conclusions on points of law) and is an integral part of the assets of the beneficiary, which is payable to his or her survivors "in the event of the death of an employee in service) (Judgment no. 243 of 1997, section 2.3 of the Conclusions on points of law).
The allowances are paid upon the termination of employment with the specific purpose of "making it easier to deal with the financial difficulties that may arise when salary payments stop being made" (Judgment no. 106 of 1996, section 2.1 of the Conclusions on points of law). This encapsulates the pension-related function, which coexists along with the remunerative function and represents the true *raison d'être* for the payment of the allowances following the cessation of employment relations.
7.2.– The status as deferred remuneration, which is shared by those allowances, draws them within the scope of Article 36 of the Constitution, which requires that all forms of remuneration must be proportionate with the quantity and quality of the work performed and must under all circumstances be capable of guaranteeing a free and dignified existence.
Precisely because the constitutional guarantee of fair remuneration transcends the purely reciprocal logic that is inherent within contracts providing for reciprocal performance, and pertains to the very fundamental values of human existence, it manifests itself not only in the requirement that the amount actually paid must be appropriate, but also in the requirement of timely payment. It is this timely payment that guarantees "to the worker and to his or her family a free and dignified existence by satisfying everyday life requirements" (Judgment no. 82 of 2003, section 2 of the Conclusions on points of law; see also Judgment no. 459 of 2000, section 7 of the Conclusions on points of law).
The constitutional guarantee is fully applicable, along with all of its implications, also to end-of-service allowances, which are associated with a special and more vulnerable period of human existence. The pension-related function of such payments, which attend to the multiple needs of the worker and of his or her family and close associates, would risk being thwarted by its payment over an unreasonably extended period.
In line with the principles referred to above, it is therefore necessary to verify whether the rules governing the time-scale for payment enacted by the legislator are consistent with the requirements of proportionality and adequacy pursuant to Article 36 of the Constitution and strike a reasonable balance between the countervailing interests in play.
The review which this Court is required to perform is premised on an assessment of remuneration considered in global terms (Judgment no. 213 of 2018, section 8.1 of the Conclusions on points of law) as well as the overall legislation with reference to which it is payable (Judgment no. 366 of 2006, section 3 of the Conclusions on points of law) and must inevitably consider the range of variables that come into play within the discretionary assessment of the legislator, which is required to "take account also of public finance requirements" (Judgment no. 91 of 2004, section 4 of the Conclusions on points of law) as well as the need for rational planning of the use of limited resources.

8.– The legislation governing the deferred payment by instalment of the end-of-service allowance, within the limits currently brought before this Court, applies to workers who have not reached the age or contribution history limits provided for under the relevant legislation.

According to the settled case law of this Court (most recently, Judgment no. 104 of 2018, section 6.1 of the Conclusions on points of law), the legislator may indeed "provide for incentives against early retirement (*inter alia*, Judgment no. 416 of 1999, section 4.1 of the Conclusions on points of law), whilst at the same time promoting the continuation of employment through adequate incentives to those who stay at work and continue to draw benefit from their professionalism built up over time, as this Court has held in relation to the assessment of the particular services provided by civilian and military state employees (Judgment no. 39 of 2018, section 4.4 of the Conclusions on points of law) and also in relation to the coefficient for the transformation of contributions paid, which is greater for persons who have worked for longer (Judgment no. 23 of 2017, section 4.1 of the Conclusions on points of law)".

The discretionary choices made in this regard by the legislator, also from a perspective of safeguarding the sustainability of the pension system, cannot however sacrifice in an unreasonable and disproportionate manner the rights protected under Articles 36 and 38 of the Constitution.

8.1.– In this case, the limits imposed by the principle of reasonableness and the proportionality principle have not been breached.

The twenty-four month time limit for the payment of end-of-service allowances in situations other than those in which the age or contribution history limits have been reached was first introduced by Article 1(22)(a) of Decree-Law no. 138 of 13 August 2011 (Further urgent measures for financial stabilisation and development), converted with amendments into Law no. 148 of 14 September 2011.

The legislation enacted extends beyond the contingent objective of achieving immediate and considerable savings, which were estimated in detail by the technical report annexed to the draft legislation on the conversion of Decree-Law no. 138 of 2011 and, within a broader perspective, draw on a consolidated line of legislation, the aim of which is to discourage the cessation of employment before reaching the age or contribution history limits. The restrictive measure in question was thus enacted during a serious economic and financial emergency, which saw a considerable number of retirements by workers who had not yet reached the age or contribution history limits.

In the case that has now been brought before this Court, the deferred payment of end-of-service allowances applies in relation to the cessation of employment relations, which may occur also when the right to a pension has not yet accrued. The stricter treatment is applicable having regard to the special nature of an employment relationship, which may come to an end for the most disparate reasons (moreover, in many cases, due to a voluntary choice by the interested party), even a long time before the age or contribution history limits are met.

The legislation is applicable in a nuanced manner, having regard to that distinctive feature, on the assumption that it is precisely at the time the limits in question are reached when the needs that the end-of-service allowances seek to satisfy, and that require more expeditious payment schedules, are most keenly felt.

The framework set out by the legislator is not only based on a non-arbitrary prerequisite, but is also mitigated by a number of exceptions applicable in situations that deserve particular protection, such as the "end of service on the grounds of unfitness for

work, whether or not caused by the employment, as well as due to the death of the employee", in which case the competent administration is required to forward the relevant documentation to the pension body within fifteen days of the cessation of employment, which is obliged to pay the allowance "within three months of receipt of the documentation" (Article 3(5) of Decree-Law no. 79 of 1997).

Therefore, when analysed within the specific reference context, in accordance with the goals and the overall body of rules comprising the legislation in question, the deferred payment regime is not unfair, therefore, as a whole.

8.2.– The same considerations may be made in relation to the payment by instalment of end-of-service allowances, which are governed by Article 12(7) of Decree-Law no. 78 of 2010, as subsequently tightened up by Article 1(484)(a) of Law no. 147 of 2013.

In this case, the further sacrifice imposed on employees of the public administrations again results from the early termination of employment, and its justification is rooted in the particular circumstances of such a scenario, in the manner described above.

In addition, the mechanism introduced by the legislator provides for the staggered extension of deferrals, which gradually become longer as the allowance increases, and is therefore tailored in such a manner as to favour the recipients of more modest payments, and must be considered also for this reason to have struck a balance that is not unreasonable.

8.3.– When examined overall and with reference to the early termination of employment relations, as things currently stand, the contested legislation strikes a balance between the various interests of constitutional significance that is not unreasonable, having particular regard to situations requiring more enhanced protection.

9.– These proceedings do not make any ruling on the questions concerning the constitutionality of the legislation requiring the deferred payment by instalment of end-of-service allowances also in situations in which the age or contribution history limits have been met or involving compulsory retirement as a result of reaching the maximum length of service.

Although this issue is not covered by the current review, this Court cannot refrain from recalling Parliament of the urgent need to overhaul the legislation, which is not lacking in problematic aspects, as part of a wholesale review of the entire area of the law, which has moreover been branded as urgent within recent parliamentary debates.

The legislation, which has gradually extended the time limits for the payment of amounts due upon the cessation of employment relations, has lost track of a defined time-frame and the initial linkage with the consolidation of the public accounts that justified it. With particular reference to cases in which age and contribution history limits have been reached, the twofold remunerative and pension-related function of end-of-service payments, which was achieved "through the performance of employment and as a result thereof" (Judgment no. 106 of 1996, section 2.1 of the Conclusions on points of law), risks being compromised in a manner at odds with the constitutional principles that protect the dignity of the individual by guaranteeing fair remuneration, including deferred remuneration.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *rules* inadmissible the intervention by Federazione Confsal-Unsa;

2) *rules* inadmissible the questions concerning the constitutionality of Article 3(2) of Decree-Law no. 79 of 28 March 1997 (Urgent measures to rebalance the public finances), converted with amendments into Law no. 140 of 28 May 1997, insofar as it

provides that end-of-service allowances, irrespective of how those allowances are designated, are to be paid by the disbursing body "in the event that employment ceased as a result of reaching the age or contribution history limits provided for under the regulations applicable to the body of origin, due to compulsory retirement as a result of reaching the maximum length of service provided for under the law or regulations applicable to the administration, upon expiry of a period of twelve months after the cessation of employment relations", raised by the *Tribunale di Roma*, sitting as an employment court, with reference to Articles 3 and 36 of the Constitution, by the referral order mentioned in the headnote;

3) *rules* inadmissible the questions concerning the constitutionality of Article 12(7) of Decree-Law no. 78 of 31 May 2010 (Urgent measures on financial stabilisation and economic competitiveness), converted with amendments into Law no. 122 of 30 July 2010 insofar as it provides for the payment by instalment of the allowances due following the cessation of employment relations "in the event that employment ceased as a result of reaching the age or contribution history limits provided for under the regulations applicable to the body of origin, due to compulsory retirement as a result of reaching the maximum length of service provided for under the law or regulations applicable to the administration", raised by the *Tribunale di Roma*, sitting as an employment court, with reference to Articles 3 and 36 of the Constitution, by the referral order mentioned in the headnote;

4) *rules* unfounded the questions concerning the constitutionality of Article 3(2) of Decree-Law no. 79 of 1997, as converted into Law no. 140 of 1997, insofar as it provides that end-of-service allowances, irrespective of how those allowances are designated, are to be paid by the disbursing body "upon expiry of a period of twenty-four months after the cessation of employment relations", and of Article 12(7) of Decree-Law no. 78 of 2010, as converted into Law no. 122 of 2010, insofar as it provides for the payment by instalment of the allowances due following the cessation of employment relations due to reasons other than "reaching the age or contribution history limits provided for under the regulations applicable to the body of origin, due to compulsory retirement as a result of reaching the maximum length of service provided for under the law or regulations applicable to the administration", raised by the *Tribunale di Roma*, sitting as an employment court, with reference to Articles 3 and 36 of the Constitution, by the referral order mentioned in the headnote.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 17 April 2019.