

Commentary

••

Retention in Service of Public Employees: Italian Constitutional Court on Elder Workers' Entitlement and Need for Intergenerational Turnover

By Vincenzo Pietrogiovanni, Senior Lecturer, Department of Business Law, Lund University, Sweden

Introduction

Italian public employment has traditionally meant lifelong employment, that is, to retirement age, but sometimes even beyond that. In the wake of the economic crisis, however, Italy—like many other countries—has reformed its labor legislation for both the private and the public sector, and many institutions have been affected. Among them is retention in public-sector service after retirement age, which this judgment of the Italian Constitutional Court concerns.¹

Article 1(1) of Decree-Law No. 90 of 24 June 2014 abolished this practice with the aim of encouraging replacement and rejuvenation of personnel in public administration, and making retirement mandatory or at the discretion of the public administration.² Article 1(2) defined a general transitional regulation.

¹ Constitutional Court of Italy, Judgment No. 133 of 2016, 10 June 2016, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S133_2016.pdf.

² Decree Law No. 90 of 2014 – Urgent measures concerning administrative simplification and transparency and to enhance the efficiency of judicial offices, converted with amendments into Article 1(1) of Law No. 114 of 11 August 2014. The resolution of the relationship is mandatory for those who have completed the requirements for the old-age pension or the right to early retirement, having reached the prescribed age limit. The resolution is discretionary

Article 1(3) established a special discipline for ordinary, administrative, and military judges.

Suppressing this practice and doing so the way it was done, according to four administrative courts, violated the Italian Constitution, *inter alia* the principles of equality, antidiscrimination on grounds of age, balanced budget, and proper conduct of public administration.³ The Constitutional Court rejected all allegations as unfounded, evaluating the legislation as not in breach of any legitimate expectation, not contradictory or unreasonable, and not discriminatory.⁴

Judgment No. 133 of 2016, which is complex, deals with certain peculiar aspects of Italian employment regulation in the public sector. Two aspects of the Court's argumentations, however, are worthy of attention even for non-Italians: that the allegations concerning the suppression of retention in service as violating the principle of antidiscrimination on grounds of age, especially in light of European Union law, are unfounded and that the measures affecting the welfare State need to be proportional.

Retention in Service and Intergenerational Balance

The Regional Administrative Court for Emilia-Romagna asserted violation of the proportionality principle and breach of legitimate employee expectations regarding the public administration given how the Court of Justice of the EU (CJEU) interpreted Articles 1, 2, and 6(1) of Directive 2000/78 in *Commission v Hungary*.⁵ Such an assertion is unfounded, according to the Constitutional Court, for two reasons, which are both related to an exercise of legal classification.

for those who have acquired the right to early retirement pension in accordance with the requirements set by special legislation.

- 3 The four courts are the Regional Administrative Court for Lombardia (referral order of 20 November 2014), the Regional Administrative Court for Emilia-Romagna (referral order of 27 November 2014), the Council of State (referral order of 29 April 2015) and the Regional Administrative Court for Lazio (referral order of 17 November 2015). On equality, Article 3; on age, Articles 1, 2 and 6(1) of Directive 2000/78/EC of 27 November 2000 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation) via Article 117(1); on conduct, Articles 81 and 97.
- 4 For a general comment on the Judgment No. 133 of 2016, see Giovanna Pistor, "Prosecuzione del rapporto di lavoro oltre l'età pensionabile: nodi irrisolti e spunti di riflessione," *Il Lavoro nella giurisprudenza* 8–9 (2016): 764–76.
- 5 Court of Justice of the European Union C-286/12 of 6 November 2012, *Commission v Hungary*.

First, the Court rejected the idea that retention in service can be tied to the right to retirement, as referred to in *Commission v Hungary*. Even though both practices affect the span of gainful employment in the public sector, retention in service is an opportunity to suspend pension benefits despite eligibility for them simply to continue employment “as an exception to the rule of compulsory retirement.”⁶ The Hungarian provisions—the source of contention in *Commission v Hungary*—“abruptly and significantly lowered the age-limit for compulsory retirement without introducing transitional measures” to protect the legitimate interests of those concerned. The CJEU considered them discriminatory because they were inappropriate and disproportionate to the goal of rejuvenating the sector. The Constitutional Court, however, did not consider the Italian provisions discriminatory because the goal of generational turnover appeared consistent. The Court therefore declared *Commission v Hungary* not relevant for the case in question, in line with the *Cilfit* doctrine.⁷

The Court also emphasized that retention in service, before it was suppressed, had been “entirely remodeled” to grant certain discretionary powers to the public administration.⁸ This argument bears directly on the second reason for the rejection.

Over the past eight years, the Italian legislature has permitted progressive degradation of the practice of retention in service, taking it from a substantive right to a mere legitimate interest. The Constitutional Court has held that this change is linked to the transformation of public administration to meet both budgetary and generational change needs. Clearly, retention in service is now conceived of as a measure that frustrates containment of public spending and youth unemployment, which in Italy is dramatic.⁹

In this context, the Court determined that legitimate interest can be sacrificed to the policy goals of generational change and efficient public spending. These have become fundamental objectives, not only within national law but

6 On the institution of retention in service, *inter alia*, Carmen Di Carluccio, “Focus – Il trattamento in servizio dei dipendenti pubblici (e dei professori universitari in particolare): l’applicazione giurisprudenziale dopo il dln 112/2008,” *Rivista Italiana di Diritto del Lavoro* 30, no. 1 (2011): 235; Constitutional Court of Italy, Judgment No. 133 of 2016, para. 4.2.1.

7 The reference is to the Court of Justice Case 283/81 of 6 October 1982 – *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.

8 The institution was revised by Article 72(7) of Decree-Law No. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilization of the public finances and tax equalization), converted with amendments into Article 1(1) of Law No. 135 of 6 August 2008. Constitutional Court of Italy, Judgment No. 133 of 2016, para. 4.2.1.

9 The last figure available is 39.4 percent of youth unemployment in November 2016 (ISTAT, 9 January 2017).

also at the EU level. In this regard, concerning the scope of Article 6 of Directive 2000/78, the Constitutional Court cited *Fuchs, Köhler*, and *VEMW and others*.¹⁰

The CJEU has made numerous judgments on age discrimination, and the literature is extensive on age discrimination and intergenerational balance, active aging, and youth employment policies.¹¹ Among the more interesting studies, some take into account the lump of labor fallacy, according to which the substitution effect of young people on the retirement of older workers is not well supported by evidence.¹² However, the same research points out that in some closed organizations, especially those in the public sector, substitution effects may in fact be present. In light of these findings, the Italian Constitutional Court's ruling on age discrimination appears coherent.

Budget Balance

The second important point in Judgment No. 133 relates to the scrutiny of scaling choices of the traditional welfare State in the wake of State budget cuts. In Italy as in other EU Member States, the crisis has brought about dramatic

¹⁰ Court of Justice of the European Union Judgment Nos. C-159/10 and C-159/10 of 21 July 2011 – *Gerhard Fuchs and Peter Köhler v Land Hessen*; Court of Justice of the European Union Judgment No. Case C-17/03 of 7 June 2005 – *VEMW and others v Directeur van de Dienst uitvoering en toezicht energiea*.

¹¹ The most famous age discrimination suits are *Mangold* (C-144/04 – Judgment of the Court (Grand Chamber) of 22 November 2005 – *Werner Mangold v Rüdiger Helm*) and *Küçükdeveci* (C-555/07 – Judgment of the Court (Grand Chamber) of 19 January 2010 – *Seda Küçükdeveci v Swedex GmbH & Co. KG*). On active aging, see Alycia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (London: Bloomsbury, 2016); Ann Numhauser-Henning and Mia Rönnmar, eds., *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, 2015); and Elaine Dewhurst, “The Development of EU Case-Law on Age Discrimination in Employment: ‘Will You Still Need Me? Will You Still Feed Me? When I’m Sixty-Four’,” *European Law Journal* 19, No. 4 (2013): 517–44. On youth employment policies, see Vincenzo Pietrogiovanni, “Reality Still Bites: A First Look on Labour Law and Jobless Youth in Nordic and Southern European Countries,” *European Journal of Social Law* 3 (2014): 141–62. For a feminist point of view, see Ania Zbyszewska, “Active aging through employment: A critical feminist perspective on Polish policy,” *International Journal of Comparative Labour Law and Industrial Relations* 32, No. 4 (2016): 449–72.

¹² Elaine Dewhurst, “Intergenerational balance, mandatory retirement and age discrimination in Europe: How can the ECJ better support national courts in finding a balance between the generations?,” *Common Market Law Review* 50, No. 5 (2013): 1333–62.

changes in public spending, which have in turn led to constitutionalizing the principles of a balanced budget and sustainable public debt—a process on which the new European Economic Governance has had a significant influence.¹³ Within this framework, what is left for the Constitutional Courts called upon to assess the constitutionality of measures that affect (more and more negatively) national welfare States and thus fundamental social rights to do?

In its budget rulings, the Italian Constitutional Court has held that related constitutional principles and rules both cover legislative obligations and introduce measures. New public administration arrangements based on suppression of retention in service will, according to supporting documents, create resources for recruitment of younger personnel.

The main tool for the judges, then, is again the proportionality test, but a financial one. Scrutiny of austerity measures is central in the Italian debate.¹⁴ Interest in it has risen especially since 2009, when EU institutions and Member States began introducing major transformations to what is defined as the EU “fiscal constitution.”¹⁵

The Portuguese Constitutional Court, to take one example, reviewed measures the Portuguese government had implemented in the framework of the Program of Financial and Economic Assistance negotiated with the EU Commission, the European Central Bank, and the International Monetary Fund to obtain financial aid. Of particular interest was Judgment No. 187 of 5 April 2013, on the reduction of stipends and the suspension of the thirteenth and fourteenth monthly salaries for public employees.

The common trend in such cases is that affirmation of the relevance of the budgetary rule at both supranational (EU) and national (constitutional) level is changing the DNA of European legal systems. The changes not only affect the level of protection of fundamental social rights, but also create tensions within the system of law, dramatically reshaping the traditional legal hierarchy, whether national, supranational, or international. The principle of a balanced

¹³ Constitution of the Republic of Italy, Articles No. 81 and No. 97. For an analysis of the events from the 2010 European Financial Stability Mechanism and the European Financial Stability Facility and Six Pack to the 2012 Fiscal Compact, see Christophe Degryse, *The New European Economic Governance* (Brussels: ETUI, 2012).

¹⁴ The debate has been fueled by a number of judgments from the Constitutional Court on provisions framed within austerity policies, such as Judgments No. 173 of 2016 and No. 178 of 2015. On the latter, see Giulia Frosecchi, “The Supremacy of the Right to Collective Bargaining: A Judgment of the Italian Constitutional Court on Austerity Measures,” *International Labor Rights Case Law* 2 (2016): 313–18.

¹⁵ Federico Fabbrini, “The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective,” *Berkeley Journal of International Law* 32 (2014): 64.

budget may end up overwhelming other fundamental principles of national constitutions, becoming a sort of “super-rule” that carries more weight than human rights and freedoms—implementation of which “has always a cost.”¹⁶

If the affirmation of proportionality—which is central in the scrutiny of high courts—is linked to the balanced budget rule, then today’s legal testing is more and more inspired by economic rationality and efficiency. This would confirm that courts are surrendering to *gouvernance par le nombres*.¹⁷

Conclusion

The judgment of the Italian Constitutional Court deals with a critical element of contemporary legal conflicts in Europe: the intergenerational balance between elder workers and young unemployed in the frame of budget cuts. This conflict raises myriad inner tensions that are reshaping the fundamentals of legal tradition.

Although national and supranational legislatures adopt measures justifying them with the need of improving the employment of young people, constitutional and high courts face formidable challenges in balancing various fundamental social rights. In this context, is the proportionality test still the better tool?

16 Guido Rivosecchi, “L’equilibrio di bilancio: Dalla riforma costituzionale alla giustiziabilità,” *Rivista dell’Associazione Italiana dei Costituzionalisti* 3 (2016): 22; Antonio Lo Faro, “Compatibilità economiche, diritti del lavoro e istanze di tutela dei diritti fondamentali: Qualche spunto di riflessione dal caso italiano,” *Giornale di diritto del lavoro e di relazioni industriali* 142 (2014): 279–301.

17 Alain Supiot, *La Gouvernance par les nombres* (Fayard, 2015), and Alain Desrosières, *Gouverner par les nombres: L’argument statistique II* (Paris: Presses des Mines via OpenEdition, 2013).