Corte costituzionale

JUDGMENT NO. 341 OF 2006

Franco Bile, President

Gaetano SILVESTRI, Author of the Judgment

JUDGMENT No. 341 YEAR 2006

In this case the Court considered a referral from a supervisory board in a dispute commenced by a prison inmate against a private company for which he worked whilst in prison. Jurisdiction was declined by the ordinary courts in favour of the supervisory board, which questioned the constitutionality of the relevant rule on the grounds that "are not compatible with the requirements of fair representation and *audi alteram partem* typical of employment law disputes". The state authorities contested this view, arguing that the special arrangements were justified by the special nature of prison work, as well as the unreasonably high costs of proceedings before the ordinary courts. The Court held that, although "choice in favour of the hearing in chambers is not illegitimate in itself" and that "Parliament has a broad power of discretion in the design of procedural forms", the contested provision "dictates procedural rules which within the context of employment law disputes are not suitable for ensuring the minimum adherence to the principle of *audi alteram partem* and fair representation to which all citizens are entitled in court proceedings", and was therefore unconstitutional.

THE CONSTITUTIONAL COURT

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

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 69(6)(c) of law No. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom), commenced pursuant to the referral order of 17 November 2005 of the Supervisory Board [*Magistrato di Sorveglianza*]* for Pisa,

---

* Translator's note: The "*Magistrato di Sorveglianza*" has general powers of oversight over criminal sentences. Whilst a significant aspect of its activities mirrors that of the common law parole board (i.e. conditional release, release under house arrest, release on parole, etc.), its ambit extends to much broader decision-making, its remit being to balance the rights of prisoners with the requirements of

pursuant to an appeal lodged by V.A.M., registered as No. 7 in the Register of Orders 2006 and published in the *Official Journal of the Republic* No. 3, first special series 2006.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Gaetano Silvestri in chambers on 5 July 2006.

The facts of the case

1. - By order of 17 November 2005, the Supervisory Board [*Magistrato di Sorveglianza*] for Pisa raised, with reference to Articles 3, 24(1) and (2), 27(1) and (3), 81(4), 97 and 111 of the Constitution, the question of the constitutionality of Article 69(6)(a) of law No. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom), insofar as it provides that the Supervisory Board [*Magistrato di Sorveglianza*] shall have jurisdiction "over complaints by prisoners and detainees concerning adherence to the provisions governing their status as workers, pay and remuneration, as well as the performance of employment and training activities and social security".

The referring board became seized of a dispute, in accordance with the procedure required under the combined provisions of Articles 14-*ter* and 69(6) of law No. 354 of 1975, previously commenced by a prisoner before the Employment Law Courts pursuant to Article 409 of the Code of Civil Procedure. The case concerned an application to obtain a declaration that the appellant had worked as an employee under the employment relationship formerly in existence between the appellant and a private company (with services performed inside the prison), as well as a declaration that the dismissal was unfair, and a resulting order that the employer pay certain sums. By judgment of 27 April 2005, the court seized declared that it had no jurisdiction, holding that the Supervisory Board [*Magistrato di Sorveglianza*] for Pisa had jurisdiction pursuant to Article 69 of the aforementioned law No. 354 of 1975.

1.1. - The referring board, arguing that the principle applied by the employment law courts has been confirmed in repeated judgments of the Court of Cassation and already

---

society. Its tasks include, *inter alia*, control over prison organisation, the approval of individual programmes for rehabilitation including the authorisation for external work, overseeing the treatment of prisoners with psychiatric disorders, the granting of permits, the imposition of security measures and disciplinary matters.

forms part of the "living law", considers that the characteristics of the supervisory procedure – insofar as this procedure has acquired the status of proper court proceedings through the introduction of Article 14-*ter* into the law on incarceration by Article 2 of law No. 663 of 10 October 1986 (Amendments to the law on incarceration and the implementation of measures which deprive or limit freedom) – are not compatible with the requirements of fair representation and *audi alteram partem* typical of employment law disputes.

The lower court finds in particular that the procedure regulated by the aforementioned Article 14-*ter* does not provide for the direct involvement of the prisoner, who participates through a representative and may only submit written statements, whilst the other party, i.e. the prison authorities, does not participate in the hearing even through a representative, as the public prosecutor cannot be considered as fulfilling this role, given that he is in fact a necessary party to proceedings. The upshot for both subjects involved in the disputed relationship is that these rules violate the principles laid out in Article 24(1) and (2) of the Constitution. The right to fair representation of the party which is not an employee is also argued to have been unlawfully breached in that, according to the referring board, only the employee may challenge the ruling of the Supervisory Board [*Magistrato di Sorveglianza*] concluding proceedings by appeal to the Court of Cassation. This rule is claimed to amount to a further breach of the Constitution, namely of the principle of equality between the parties enshrined in Article 111(2) of the Constitution.

1.2. - The lower court also finds that the regulation of territorial jurisdiction for supervisory procedures (Article 677 of the Code of Criminal Procedure) stands in the way of the establishment of the facts relevant for the solution of the employment law dispute in cases where the prisoner is transferred, since the relevant place is that where the interested party is in custody at the time of the appeal, and not at the time when the services were provided. This above all means that a subject different from that involved in the relationship is a party to proceedings (that is the governor of the prison in which the claimant is in custody at the time when proceedings are instigated and not of the institute where the interested party was incarcerated when he provided the services). In these circumstances, according to the lower court, the principle of the proper conduct of administration is breached, also as regards the organisation of the courts (Article 97 of

the Constitution). The same principle is also argued to have been breached through the attribution of jurisdiction over specialist questions to a court, the professional preparation of which covers completely different matters.

1.3. - The referring board goes on to argue that Article 3 of the Constitution outlaws discrimination between workers in custody and those not subject to restrictions on their personal freedom. The difference in treatment, already found to be reasonable in the case law of the Court of Cassation on the basis of the particular features of prison work, is now claimed to be incompatible with the current equivalence between incarcerated workers and ordinary workers which this court is said to have declared when considering the rights to paid leave in judgment No. 158 of 2001. Such equivalence is particularly significant, in the opinion of the lower court, when the employment relationship is entered into, as in the case before the court, with a private company outside the prison administration, concluding an ordinary contract with an express reference to the corresponding provisions of the Civil Code and national collective bargaining agreements. There is therefore no reason to guarantee to incarcerated workers a weaker protection than that recognised to every other worker, such as for example occurs through the rule of the immediate enforceability of the judgment at first instance under employment law procedures (a rule, according to the referring board, not applicable to orders of the Supervisory Board). Moreover, the lower court notes, there is no general principle that the Supervisory Board [*Magistrato di Sorveglianza*] must have jurisdiction over the protection of the individual rights of prisoners, not even when the other party is the prison administration, as is shown by the jurisdiction vested in the civil courts for actions which give rise to liability to pay compensation to prisoners.

1.4. - There is also – the referring board continues – a serious lack of protection as far as the position of the employer involved in the dispute is concerned, since it generally remains completely extraneous to the procedure in chambers celebrated by the Supervisory Board. The question could not be resolved (as at times has been proposed in case law) by assuming that the administration is always and in any case the opposing party to the prison worker. If this were the case, all duties flowing from the employment relationship, including those pertaining to salary and social security contributions, would be placed on the administration, attributing to it an inappropriate intermediary and guarantor role, and forcing it to undertake expensive remedial action with an

uncertain outcome (and without any legislative provision for the necessary financial coverage for the corresponding duties, as required under Article 81(4) of the Constitution). Moreover, this surrogate liability would extend to accidents and professional illnesses including, where applicable, criminal liability, and according to the referring board the effects of this would be incompatible with the principle of individual criminal law responsibility (Article 27(1) of the Constitution).

If therefore the employment relationship of a prisoner may involve a party outside the prison administration, which remains excluded from the procedure mentioned in Articles 14-*ter* and 69 of the law on incarceration, it is in the opinion of the lower court clear that the contested provision is incompatible with the principles contained in Article 24(1) and (2) of the Constitution.

1.5. - The referring board considers finally that the duties as a whole imposed on prison governors (duties which would even include those of the employer, should the view expressed in case law of their surrogate liability for duties taken on by external companies be accepted) would act as a disincentive on institutional actions which aim to rehabilitate prisoners through work, thereby frustrating the principle of the necessary re-educative goal of sentences (Article 27(3) of the Constitution).

2. - The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, intervened in proceedings by writ submitted on 7 February 2006, requesting that the question be declared inadmissible and in any case unfounded.

The referring board is argued in the first place to have failed to carry out the necessary search for an interpretative solution capable of avoiding the breach of the relevant constitutionally protected interests. Indeed, even though the Joint Sections of the Supreme Court have on various occasions applied a traditional formula, finding the Supervisory Board [*Magistrato di Sorveglianza*] to have jurisdiction also over disputes involving employers other than the prison administration, there is no lack of assertions in case law of the opposite, albeit less frequent, principle, i.e. that in the cases in question jurisdiction is conferred according to the rules of civil procedure.

In any case, again in the opinion of the government representative, the question is unfounded. The derogation from the general principle of jurisdiction is claimed to be justified (under Article 3 of the Constitution) by the special nature of prison work,

which is decisive in the rehabilitation of the prisoner and at any event the manner in which it is carried out is strongly influenced by the worker's status as a prisoner. Even when the work is performed for employers outside the prison administration, the relationship is characterised by special regulations, which also derive from special sources (for example the regulation through general agreements between the prison administration and third parties). On the other hand, the procedure regulated by the combined provisions of Articles 69 and 14-*ter* of law No. 354 of 1975 should now be recognised as a proper court procedure, thus capable of guaranteeing the rights of the parties, albeit according to special procedures which reflect the particular nature of the underlying relationship.

The complaints concerning Article 97 of the Constitution are not only inadmissible in that they concern a provision which was not contested (that establishing the territorial jurisdiction of the Supervisory Board) and due to their generic formulation, but are also unfounded. In fact, the celebration of the proceedings by the board in which jurisdiction is vested in the place of actual incarceration of the worker is intended to avoid complex and costly transfers to a different jurisdiction, which is in any case outside the prison.

As far as the requirement of *audi alteram partem* and right to representation of the employer involved in the dispute are concerned, the *Avvocatura dello Stato* points out that even in relations involving private businesses the prison administration adopts the role of the contractual partner of the employee, which may participate in proceedings through the submission of written statements. Indeed, if this were not the case, the non-participant employer could make his own claims in additional proceedings, to which he would be entitled not having participated in the proceedings before the Supervisory Board.

In either case, the referring board has not proven any eventual “reflex” costs incurred by the prison administration, which means that the further question concerning Article 81 of the Constitution is also unfounded.

Conclusions of points of law

1. - The Supervisory Board [*Magistrato di Sorveglianza*] for Pisa questions the constitutionality of Article 69(6)(a) of law No. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom) – insofar as it provides that the Supervisory Board [*Magistrato di*

Sorveglianza] shall have jurisdiction in accordance with the procedure mentioned in Article 14-*ter* of the same law over complaints by prisoners and detainees regarding adherence to the provisions governing their status as workers, pay and remuneration, as well as the performance of employment and training activities and social security – in relation to Articles 3, 24(1) and (2), 27(1) and (3), 81(4), 97 and 111 of the Constitution.

2. - The question is well-founded.

2.1. - The performance of employment activities by prisoners contributes to ensuring that the manner in which the sentence is served complies with the principle set out in Article 27(3) of the Constitution, which provides that sentences shall pursue the goal of the rehabilitation of the convicted person. This court has held that prison work, far featuring as a factor of increased punishment, "is a tool for the rehabilitation of the person, a core value within our prison system not only with reference to the principle of individual dignity but also that of the drawing of benefit from the aptitudes and specific employment capacities of the individual" (judgment No. 158 of 2001).

Parliament has clearly enunciated the same principle, specifying on the one hand that "prison work is not punitive in nature and shall be remunerated" and on the other hand that "the organisation and methods of prison work shall reflect those of employment in the world outside in order to provide individuals with an adequate professional preparation for normal employment conditions thereby facilitating their reintegration into society" (Article 20(2) and (4) of law No. 354 of 1975).

The employment of prisoners, whether by the prison administration of whether – as occurs with increasing frequency – by third parties, implies a series of rights and duties on the parties, regulated on the basis of contracts governing the individual relationships. This court has already held that it necessarily follows from the primacy accorded to the person under the present constitutional order that fundamental rights "may be subject to limitations inherent in the condition of those who are subject to restrictions on personal freedom, and which are related to the goals pursued by such restrictions, through they are by no means denied in such situations". Given the inextricable link between the recognition of rights and the possibility of enforcing them before a court according to a standard court procedure, the respect for the "minimal procedural guarantees required under the constitution, such as the requirement of *audi alteram partem*, the stable status

of the decision and the possibility of appeal to the Court of Cassation" must always be ensured (judgment No. 26 of 1999).

2.2. - According to the principles mentioned above, it is possible to establish three core principles in the area of law which forms the backdrop to the question of constitutionality raised by the referring board.

The first is the necessary protection through the courts of the rights created by employment relationships entered into within the context of the prison administration. These rights include not only those of prisoners, but also those of other parties to the relationship, i.e. employers, which may not indirectly suffer limitations on their own legal position due to the sole fact of having concluded contracts with persons subject to restrictions on personal freedom.

The second principle concerns Parliament's ability to place limits on the rights in question, with reference to the restrictions on personal freedom to which the prisoner worker is subject. The substantive nature and the protection through the courts of the rights created by employment relationships involving prisoners cannot therefore coincide with those which characterise the employment of free individuals, where this is necessary in order to maintain intact the essential manner in which the sentence is implemented, and in order to ensure, through the provision of specific procedures for court proceedings, the corresponding organisational requirements of the prison administration. In other words, the rights of prisoners must be reasonably balanced with society's right to the proper enforcement of criminal sentences.

The third principle, which flows from the first two, is the illegitimacy of any "unjustified irrational discrimination" between prisoners and other citizens with reference to the rights associated with employment (judgment No. 49 of 1992).

3. - The question of constitutionality raised by the referring board must be examined in the light of the core principles within constitutional case law cited above.

3.1. - There is no doubt that prisoners have the right to enforce before the courts claims arising from the provision of employment services. It is equally certain that both the prisoner and the other party have the right to court proceedings based on the principle of *audi alteram partem*, as required by Articles 24(2) and 111(2) of the Constitution, which confer on all parties a minimum core of guarantees.

If the contested provision is assessed against the background of the above constitutional guarantees, it must in the first place be pointed out that the procedure in chambers provided for therein, which is typical of proceedings before the Supervisory Board, does not guarantee the prisoner a representation essentially equivalent in its general features to that guaranteed by the legal order to all employees, in that it allows for an exchange of opinions purely in written form, precluding the direct participation of the employee-prisoner in the trial. On the other hand, the provision does not guarantee adequate protection to the employer, since the prison administration is only allowed to submit written statements, and any third party contractual partner of the employee (such as in the principle proceedings) is even excluded from the hearing, even through it may in any case be held liable for the breach of the rights of the prisoner employee, should the Supervisory Board [*Magistrato di Sorveglianza*] make such a finding.

The procedure set out in Article 14-*ter* of law No. 354 of 1975, which pursuant to Article 69(6)(a) applies to all civil disputes arising from the employment of prisoners, thus considerably infringes the essential judicial guarantees recognised to all citizens. The irrationality of such a restriction is also accentuated by the absence of any specific need for limitations related to the proper enforcement of the sentence. Eventual organisational problems created by more robust guarantees of *audi alteram partem* and representation in proceedings may be tackled and resolved in a rational manner by the prison administration, without any need for the law to require the sacrifice of fundamental rights guaranteed under the Constitution. Parliament may within the limits of its discretion put in place procedures for the celebration of civil proceedings concerning the employment of prisoners that are compatible with the requirements of the prison organisation, whilst at the same time maintaining intact the essential core of the parties' right to a fair hearing.

3.2. - The contested provision cannot be interpreted in accordance with the Constitution due to the categorical clarity of its formulation, which inextricably links the jurisdiction of the Supervisory Board [*Magistrato di Sorveglianza*] with the procedure in chambers mentioned in Article 14-*ter* of law No. 354 of 1975, a procedure which is typical of this board in line with Parliament's wishes. This exclusive jurisdiction, with the resulting necessary application of the above procedural rules, has been upheld in a line of unequivocal judgments of the Court of Cassation since 1999 (Joined Civil Sections,

judgment No. 490 of 1999). The court has in particular rejected any anomalous right of the prisoner, in accordance with previous case law, to choose between the procedure in chambers, provided for by the contested provision as a direct consequence of the jurisdiction of the Supervisory Board, and the standard procedure provided for by legislation governing individual employment law disputes.

This court has found that Parliament's choice in favour of the hearing in chambers is not illegitimate in itself, but only in the event that the purpose and function of the proceedings – and hence in the first place the requirement of *audi alteram partem* – are not guaranteed (*inter alia*, judgment No. 543 of 1989 and order No. 121 of 1994).

4. - The Constitution does not impose a binding procedural model (see *inter alia* the recent orders No. 389 of 2005 and No. 386 of 2004). It is therefore necessary to "recognise that Parliament has a broad power of discretion in the design of procedural forms, subject to the limit that the instruments set in place for protection may not be irrational, even through they may differ between themselves" (judgment No. 180 of 2004). Parliament enjoys the same discretion in the regulation of jurisdiction (judgment No. 206 of 2004). However, the contested provision does simply identify a specific jurisdiction of a particular court but rather, in consequence thereof, dictates procedural rules which within the context of employment law disputes are not suitable for ensuring the minimum adherence to the principle of *audi alteram partem* and fair representation to which all citizens are entitled in court proceedings. The court therefore finds that Articles 24(2), 111(2) and 3(1) of the Constitution have been breached by Article 69(6)(a) of law No. 354 of 1975.

5. - The other arguments of constitutional illegitimacy concerning the same provision contained in the referral order are moot.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 69(6)(c) of law no. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom) is unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 October 2006.

Signed:

Franco BILE, President

Gaetano SILVESTRI, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the Court Registry on 27 October 2006.

The Director of the Registry

Signed: DI PAOLA