JUDGMENT NO. 260 YEAR 2015

[omitted]

In this case the Court considered a referral order concerning a decree-law which purported to interpret a previous decree-law which prohibited "the conversion of fixed-term employment contracts concluded by operatic and symphonic foundations into permanent contracts as a consequence of violations of the provisions governing the conclusion of contracts, extensions and renewals". The case law had construed the legislation narrowly by limiting its applicability only to renewals, which was objected to by the interpretative legislation which it asserted was more generally "intended to avoid the stabilisation of employment relations", and thus extended the exclusion beyond renewals only. The Court ruled the legislation unconstitutional on the grounds that "the contested provision does not establish a plausible variant to the meaning" of the previous legislation in that it vested it with a meaning that was "at odds with the meaning of the term "renewals", according to its settled interpretation within the case law of the Court of Cassation".

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 40(1-bis) of Decree-Law no. 69 of 21 June 2013 (Urgent provisions to relaunch the economy), converted with amendments into Article 1(1) of Law no. 98 of 9 August 2013, initiated by the Florence Court of Appeal in the proceedings pending between the Fondazione Teatro Maggio Musicale Fiorentino and M.M.G. by the referral order of 18 September 2014, registered as no. 234 in the Register of Orders 2014 and published in the Official Journal of the Republic no. 53, first special series 2014.

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

having heard the Judge Rapporteur Silvana Sciarra in chambers on 10 June 2015.

[omitted]

Conclusions on points of law

1.– The Florence Court of Appeal questions the constitutionality of Article 40(1-bis) of Decree-Law no. 69 of 21 June 2013 (Urgent provisions to relaunch the economy), converted with amendments by Article 1(1) of Law no. 98 of 9 August 2013, objecting that the contested provision violates Articles 3(1) and 117(1) of the Constitution, the last provision in relation to Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955.

The contested provision, which purports to interpret Article 3(6), first sentence of Decree-Law no. 64 of 30 April 2010 (Urgent provisions concerning the performing arts and cultural activities), converted with amendments into Article 1(1) of Law no. 100 of 29 June 2010, prohibits the conversion of fixed-term employment contracts concluded by operatic and symphonic foundations into permanent contracts as violations would arise of the provisions governing the conclusion of contracts, extensions and renewals.

With particular regard to the unlawful inclusion of a term of duration in the first contract, the referring court considers the legislation to have retroactive effect, behind the curtain of the asserted interpretative purpose, and considers that this retroactivity violates the principles of equality and reasonableness (*ragionevolezza*) (Article 3(1) of the Constitution) whilst also infringing the right to a fair trial, enshrined also in the ECHR.

The contested legislation, which is not justified by compelling reasons of general interest, is claimed to frustrate the legitimate expectation of the public and to result in an arbitrary interference in the exercise of the judicial function, discriminating without any justification against persons working for operatic and symphonic foundations compared to other private sector workers.

2.– These proceedings are not affected by the legislation on fixed-term contracts concluded by musical production foundations introduced by Legislative Decree no. 81 of 15 June 2015 (Basic legislation on employment contracts and review of the

legislation governing employment duties, issued pursuant to Article 1(7) of Law no. 183 of 10 December 2014).

According to Article 57, that legislation (Articles 23(3) and 29(3)) is to apply only from 25 June 2015, the day after publication of the decree in the Official Journal of the Republic of Italy, and thus does not affect the rights arising under the previous legislation.

The legislative changes do not have any influence on the proceedings in progress and do not alter the terms of the question. The referring court thus need not carry out a new assessment of its relevance (see Judgment no. 205 of 2015, with regard to the changes introduced, by a transitory provision with identical content, by Legislative Decree no. 80, also adopted on 15 June 2015, laying down "Measures to reconcile the requirements of care, private life and work, issued pursuant to Article 1(8) and (9) of Law no. 183 of 10 December 2014").

3.– The question is well founded.

4.– The contested provision must be examined from a diachronic perspective due to the multiple legislative changes adopted at various points in time.

4.1.– The examination must start with Article 3(6) of Decree-Law no. 64 of 2010, as converted into law, the first sentence of which provides as follows: "With effect from their transformation into private law bodies, operatic and symphonic foundations shall remain subject to Article 3(4) and (5) of Law no. 426 of 22 July 1977, as amended, including with regard to employment relations established after their transformation into private law bodies and to the period falling prior to the date of entry into force of Legislative Decree no. 368 of 6 September 2001".

Article 3 of Law no. 426 of 22 July 1977 (Extraordinary provisions to support musical activity), to which Decree-Law no. 64 of 2010 refers, prohibited "the renewal of employment relations which, according to legislative or contractual provisions, would entail the transformation of fixed-term contracts into permanent contracts" (paragraph three), whilst providing for the automatic invalidity of contracts of employment concluded in breach of that prohibition (paragraph four).

The background to Law no. 426 of 1977 included the legislative framework which granted legal personality under public law to bodies of priority national interest called

upon to operate in the musical sector (Article 5(1) of Law no. 800 of 14 August 1967 laying down "New arrangements governing operatic bodies and musical activities").

This different arrangement takes account of the exceptions from the general provisions laid down by Law no. 230 of 18 April 1962 (Provisions governing permanent employment contracts) as amended, including in particular the choice to exempt operatic bodies from the application of Article 2 of Law no. 230 of 1962 on extensions and renewals (Council of State, sixth division, decision no. 352 of 23 March 1998).

In 2010 the legislator was operating within profoundly changed circumstances.

Legislative Decree no. 367 of 29 June 1996 (Provisions on the transformation of bodies operating within the musical sector into private law foundations) provided for the transformation of bodies of priority national interest operating in the musical sector into private law foundations (Article 1) and vested such foundations with "legal personality under private law" (Article 4). The choice to subject the employment relations of employees of foundations to the provisions of the Civil Code and to regulation of a contractual nature (Article 22(1)) is consistent with the new provisions, which took effect on 23 March 1998 (Article 1 of Decree-Law no. 345 of 24 November 2000, no. 345 laying down "Urgent provisions on operatic and symphonic foundations", converted with amendments into Article 1(1) of Law no. 6 of 26 January 2001).

As part of an overall framework based on the need to rationalise spending, Decree-Law no. 64 of 2010 laid down on the one hand provisions of a general nature, amending the legislation governing fixed-term contracts concluded by foundations, and on the other hand provisions concerning the contingent situation and controversial issues arising during the transition from the public law regime to the strictly private law arrangement.

With regard to the first issue, whilst confirming the need for a tangible reference within artistic composition contracts to specific expressly programmed artistic activities (Article 3(6), second sentence), the legislator set out exceptional arrangements for fixed-term contracts concluded by operatic and symphonic foundations, which it exempted from the requirement to comply with the provisions of Article 1(01) and (2) of Legislative Decree no. 368 of 6 September 2001 (Implementation of Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by

ETUC, UNICE and CEEP), which establish permanent employment contracts as the common form of employment relationship and impose the requirement of writing in the event that a term of duration is specified, failing which such term of duration will not have any effect (Article 3(6), second sentence).

As regards the second aspect that emerges in these proceedings, the legislator seeks to dispel the doubts that had arisen with the inclusion of foundations into the private law regime.

These doubts were moreover limited to a period starting from the time the operatic bodies were transformed into entities governed by private law (23 May 1998) until the entry into force of the new rules governing fixed-term contracts introduced by Legislative Decree no. 368 of 2001 which sought to avoid their abuse, in accordance with the Community directive.

The provision applies for a limited period of time, as may be inferred from its literal wording, which specifically refers to employment relations established after the transformation of foundations into entities governed by private law and "to the period falling prior to the date on which Legislative Decree no. 368 of 6 September 2001 entered into force".

For that period, during which the transition of the foundations to the private law regime was completed, but before the new legislation on fixed-term contracts (Legislative Decree no. 368 of 2001) had come into force, the legislator reiterated the continuing applicability of the provisions on renewals laid down by Law no. 426 of 1977 constituting a means of public law regulation which, without that express provision, would otherwise have been set aside by the application of the rules contained in the Civil Code.

4.2.– Article 40(1-*bis*) of Decree-Law no. 69 of 2013, which has been challenged in these proceedings, was introduced during the conversion and is the result of an amendment by the joint committees during the report stage (amendment no. 40.3).

The provision, which reflects that previously introduced into Article 11(19), last sentence, of Decree-Law no. 91 of 8 August 2013 (Urgent provisions on the protection, exploitation and relaunch of cultural heritage and activities and tourism), as in force prior to conversion, with amendments, into Article 1(1) of Law no. 112 of 7 October

2013, provides an authentic interpretation of Article 3(6), first sentence of Decree-Law no. 64 of 2010.

The legislator has imposed an absolute prohibition for operatic and symphonic foundations on the stabilisation of employment relations "as a consequence of the violation of the provisions governing the conclusion of fixed-term employment contracts, or the extension or renewal of such contracts".

As is clear from the preparatory works in Parliament, including in particular the explanatory report on the conversion bill (Senate no. 1014, XVII Legislature) for Decree-Law no. 91 of 2013, Article 11(19), last sentence of which was a precursor to the provision contested in these proceedings, the requirement to introduce an interpretative provision results from "case law extended throughout the national territory", which had construed narrowly the prohibition on stabilisation enshrined in 2010, limiting it solely to renewals. The legislator considered that the courts had misinterpreted the meaning of Decree-Law no. 64 of 2010, "which was intended to avoid the stabilisation of employment relations".

Thus, the narrow interpretation, which had been confirmed by the Court of Cassation prior to the adoption of the interpretative provision (Court of Cassation, employment division, judgments no. 18263 of 30 July 2013 and no. 11573 of 26 May 2011, establishing common position in relation to the provision interpreted, which was expressed in many judgments also after the entry into force of the interpretative provision by the Court of Cassation, employment division, in judgments no. 10924 of 19 May 2014, no. 10217 of 12 May 2014, no. 7243 of 27 March 2014, no. 6547 of 20 March 2014 and no. 5748 of 12 March 2014) was deemed to conflict with that *ratio legis*.

5.– In stipulating that the prohibition on the conversion of fixed-term contracts into permanent contracts is not limited to renewals and extensions, but relates to any situation involving the "violation of the provisions governing the conclusion of fixed-term employment contracts", the contested provision does not establish a plausible variant to the meaning of Article 3(6), first sentence of Decree-Law no. 64 of 2010 and Article 3(4) and (5) of Law no. 426 of 1977.

The provision interpreted contains a specific reference to renewals of fixed-term contracts. According to the inherent meaning of the text, which is an essential canon of

interpretation (Article 12 of the provisions on the law in general), the term “renewal” evokes a different concept from that of the unlawful nature of the inclusion of a term of duration in the first contract.

Whilst renewal relates to the succession of contracts and the dynamic aspect of the bargaining relationship, the question under scrutiny in the main proceedings concerns a congenital defect, which affects the contract from the outset.

Not by chance, the legislator precludes equal treatment between renewals and the original unlawfulness of the inclusion of a term of duration, within the legislation governing fixed-term contracts. “Renewal” is a technical term, which may be found throughout all legislation on fixed-term contracts, and has remained unchanged right through to the most recent developments.

The conceptual autonomy of renewals results from a multifaceted yet coherent tapestry of provisions, the essential strands of which tie Law no. 230 of 1962, which regulates the matters to Article 2 of Legislative Decree no. 368 of 2001, Articles 4 and 5 of which are dedicated to the issue of renewals and successive contracts, and, finally, relate to Legislative Decree no. 81 of 2015, which mentions extensions and renewals in Article 21.

An examination of sectoral legislation also confirms that conceptual autonomy and demonstrates that the particular circumstances of fixed-term contracts within operatic and symphonic foundations lie precisely in the regulation of extensions and renewals.

The entire legislative framework is permeated by these principles, which have characterised the course of its overall development and find significant confirmation first in Article 3(4) and (5) of Law no. 426 of 1977, conceived as a part of the public law regulation of symphonic bodies, in Article 22(22) of Legislative Decree no. 367 of 1996, which exempts the foundations (which had by this time been privatised) from the requirement to comply with the provisions of Article 2 of Law no. 230 of 1962 on extensions and renewals, and subsequently in Article 11(4) of Legislative Decree no. 368 of 2001 which, pursuant to the Community directive, reiterates that exception within the modified legislation applicable to fixed-term contracts.

Also Article 29(3) of Legislative Decree no. 81 of 2015 restates the exceptions applicable to fixed-term contracts within operatic and symphonic foundations with regard to extensions and successive contracts.

It may thus be asserted that the contested legislation vests the provision contained in Decree-Law no. 64 of 2010 with a substantive content that is at odds with the meaning of the term "renewals", according to its settled interpretation within the case law of the Court of Cassation.

Therefore, it cannot be concluded that the interpretative provision was required by the legislator in order to correct an imperfection within the original text, thereby restoring the authentic meaning of the provision thus interpreted, or that it resolved interpretative contrasts that had given rise to significant uncertainties.

6.– The contested provision, which does not interfere with the prohibition on stabilisation in the event of unlawful extensions or renewals, is circumscribed in scope and applies solely in situations in which the provisions concerning the unlawful inclusion of a term of duration have been violated.

At the same time, the contested provision violates the legitimate expectation of the public in legal certainty and the constitutional powers of the judiciary (see Judgment no. 209 of 2010 concerning the indissoluble bond uniting these values with the rule of law, which was highlighted also in the referral order of the Florence Court of Appeal).

In this case the expectation was corroborated by a long-standing legislative framework grounded on the distinction between renewals and the original unlawfulness of fixed-term contracts, and also by case law mentioned in the parliamentary preparatory works themselves, which the interpretative law intentionally overturned, having repercussions on proceedings in progress and situations that had not yet been legally resolved.

The contested legislation, which does not have any semantic link with the provision interpreted, also violates the autonomous exercise of the judicial function as it is likely to have an effect on pending proceedings, overturning the effects of judgments that have already been issued.

The provision is unconstitutional not only on the grounds that it is retroactive but also on separate and no less crucial grounds.

In extending the prohibition on the conversion of fixed-term contracts beyond the bounds originally specified to include also situations involving congenital defects within fixed-term contracts, the provision undermines a fundamental aspect of the

protection of employment under Italian law, within a context already characterised by significant exceptions from the ordinary legislation.

Moreover, the European Court of Justice has assessed the role of "objective grounds" for entertainment arts workers as a suitable means for preventing abuses in the conclusion of fixed-term contracts and for striking a balance between the rights of the workers to stability of employment and the unyielding special circumstances of the sector (see the judgment of 26 February 2015 in Case C-238/14, *Commission v. Grand Duchy of Luxembourg*, which repeats the assertions made in the judgment of the Court of Justice of 26 November 2014 in Joined Cases C-22/13, C-61/13 to C-63/13 and C-418/13, *Mascolo and others*).

7.– The objections alleging a violation of Article 3 of the Constitution due to the alleged difference in treatment between workers at operatic and symphonic foundations and private sector workers are moot.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 40(1-bis) of Decree-Law no. 69 of 21 June 2013 (Urgent provisions to relaunch the economy), converted with amendments into Article 1(1) of Law no. 98 of 9 August 2013, is unconstitutional insofar as it provides that Article 3(6), first sentence of Decree-Law no. 64 of 30 April 2010, converted with amendments into Article 1(1) of Law no. 100 of 29 June 2010, should be interpreted to the effect that, following their transformation into private law bodies, operatic and symphonic foundations shall not be subject to the statutory provisions governing the stabilisation of employment relations as a consequence of the violation of provisions governing the conclusion of fixed-term employment contracts.