JUDGMENT NO 183 YEAR 2022

In this case the Court heard a referral order from a lower court questioning the constitutionality of Article 9(1) of Legislative Decree No 23/2015 regulating the compensation payable in the event of unlawful dismissal by small businesses and limiting the amount payable to between three and six months' remuneration. The referring court argued that the inflexibility in quantifying the compensation, tied as it was mainly if not exclusively to the size of the workforce, infringed the principles of reasonableness and equality enshrined in Article 3 of the Constitution and the right to work protected by Articles 4 and 35 of the Constitution. In essence, it was alleged that the criterion failed to tailor the compensation to the specific circumstances of each case, contrary to what the Court had held in its previous judgments Nos 194/2018 and 150/2020 striking down a compensation calculation mechanism anchored to the rigid and uniform criterion of length of service.

The Court found that there was indeed a violation of the Constitution, but it was not one that it could redress. This was because the solutions were so many and varied as to require action on the part of the legislator insofar as it was up to the latter to choose the most appropriate solutions to ensure adequate protection. Accordingly, the Court ruled that the question was inadmissible as any likely solution would encroach on the legislator's legislative discretion. That said, the Court stated that prolonged legislative inertia would not be tolerable and that should the question come before it again, it would intervene directly in relation to the challenged provision despite the aforementioned difficulties in doing so.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 9(1) of Legislative Decree No 23 of 4 March 2015 (Provisions on permanent employment contracts with increasing protection over time, implementing Law No 183 of 10 December 2014), initiated by the Ordinary Court of Rome, acting as labour court, in the proceedings brought by F. M. H. against Così per Gioco 2 srls, with referral order of 26 February 2021, registered as No 84 in the Register of Referral Orders 2021 and published in the Official Journal of the Republic, No 24 first special series 2021.

[omitted]

Conclusions on points of law

1. – By means of Referral Order No 84/2021, the Ordinary Court of Rome, acting as a labour court, has raised questions concerning the constitutionality of Article 9(1) of Legislative Decree No 23 of 4 March 2015 (Provisions on permanent employment contracts with increasing protection over time, implementing Law No 183 of 10 December 2014), which regulates the compensation payable in the event of unlawful dismissal by employers who do not meet the size requirements set out in Articles 18(8) and 18(9) of Law No 300 of 20 May 1970 (Provisions on the protection of the freedom and dignity of workers, trade union freedom and trade union activity within the workplace, and provisions on placement).

The referring court maintains that the challenged provision infringes Articles 3(1), 4, 35(1) and 117(1) of the Constitution, the latter in relation to Article 24 of the European Social Charter, revised, with appendix, done in Strasbourg on 3 May 1996, ratified and implemented by Law No 30 of 9 February 1999.

1.1. – Article 18(8) of the Workers' Statute refers to "employers, entrepreneurs or non-entrepreneurs, who in each location, establishment, branch, office or separate

department where the dismissal takes place, employ more than fifteen workers or more than five in the case of agricultural entrepreneurs, as well as to employers, entrepreneurs or non-entrepreneurs who within the same municipality, employ more than fifteen workers and agricultural undertakings that, within the same territory, employ more than five workers, even if each production unit, considered individually, does not reach these limits, and in any case employers, entrepreneurs and non-entrepreneurs who employ more than sixty workers".

Article 18(9) of Law No 300/1970 specifies that, for the purposes of calculating the number of employees, "account shall be taken of workers employed on permanent part-time contracts for the portion of hours actually worked, taking into account, in this regard, that the calculation of workers shall refer to the hours laid down by collective bargaining in the sector". The spouse and relatives of the employer up to the second degree in the direct and collateral line are not counted.

For employers who do not fulfil the said workforce size requirements, Article 9(1) of Legislative Decree No 23/2015 provides for compensation in an amount halved compared to that established by Article 3(1) of Legislative Decree No 23/2015 and in any event set "in the narrow range of three to six months' remuneration".

1.2. – The amount of compensation is at issue in the present proceedings.

In endorsing the claims of unconstitutionality raised by the applicant in the main proceedings, the referring court argues that the provision for compensation of no more than six months' remuneration, without even the alternative of rehiring, does not strike a reasonable balance between the competing interests.

In particular, it is alleged that the challenged provision, "insofar as it sets a maximum limit that is wholly inadequate and not at all dissuasive", does not ensure "balanced compensation" and "adequate redress" for the injury and does not achieve the necessary deterrent function.

The referring court maintains that compensation devised in this way constitutes "an almost uniform form of protection" and attributes importance solely to the "number of employees", an element that is "negligible in the context of the current economy", and fails to value the multiple criteria that this Court has identified in Judgments Nos 194/2018 and 150/2020 with a view to tailoring compensation to the specific circumstances of each case.

The general reference to Article 44 of the Constitution has not been followed up by separate arguments on that ground and has been omitted from the operative part of the referral order, which shapes the identification of the matter for decision by this Court.

[omitted]

4. – State Counsel, secondly, claims that the referring court has asked this Court to redetermine what would be appropriate compensation and consequently to choose "between several regulatory options, all equally compliant with the Constitution" in the absence of "alternative regulatory parameters". It is argued that this angle betrays an encroachment of the legislator's margin of appreciation.

4.1. – The objection is well founded, in the terms and for the reasons set out below.

4.2. – As far back as Judgment No 45/1965, this Court traced the protection against unlawful dismissal back to Articles 4 and 35 of the Constitution, interpreted as a whole. On that occasion it was held that although the right to work does not entail a guarantee of stability of employment, it is for the legislator, "within the framework of the policy prescribed by the constitutional provision", to adjust the protections in the event of unlawful dismissal (point 4 of the *Conclusions on points of law*).

In harmony with these principles, the protection accorded to work by the Constitution, also reaffirmed by Article 24 of the European Social Charter, fits within a

framework distinguished by a cumulation of guarantees and their maximum scope of application (Judgment No 194/2018, point 14 of the *Conclusions on points of law*).

The referring court corroborates its assertions of unconstitutionality by citing Judgments Nos 194/2018 and 150/2020, cases that, with regard to compensation for dismissals flawed respectively from a substantive and formal point of view, struck down a compensation calculation mechanism anchored to the rigid and uniform criterion of length of service.

In the aforementioned judgments, this Court reiterated that the modulation of protection against unlawful dismissal is left to the discretion of the legislator, which must however respect the principle of equality, which prohibits treating different situations identically and disregarding the specific circumstances of each case.

In a case that sees the worker as a person directly involved, the court's assessment is of primary importance since it is called upon, within the framework of the criteria set by law, to "personalise the harm suffered by the worker, which is also dictated by the principle of equality" (Judgment No 194/2018, point 11 of the *Conclusions on points of law* and, in the same vein, Judgment No 150/2020, point 9 of the *Conclusions on points of law*).

Among these criteria, of importance are the number of employees, the size of the undertaking, the behaviour and conditions of the parties, typified by Article 8 of Law No 604/1966, confirmed by Law No 108 of 11 May 1990 (Rules on individual dismissals) and widely tested in actual practice.

In addition, a comprehensive system of protections hinges on the principle of reasonableness, "which this Court, in the context of the law governing dismissals, views as requiring that remedies be appropriate in terms of striking an adequate balance between the various interests at stake and taking account of the special nature of the safeguards provided for by labour law" (Judgment No 150/2020, point 13 of the *Conclusions on points of law*).

An adequate remedy, which assures serious compensation for the harm caused by the unlawful dismissal and dissuades the employer from repeating the wrongful act, is required by virtue of the "special protection accorded to work in all its forms and applications, as the foundation of the republican order (Article 1 of the Constitution)" (Judgment No 125/2022, point 6 of the *Conclusions on points of law*).

4.3. – These requirements that protection be effective and adequate also apply to dismissals by smaller employers (referred to in the aforementioned eighth and ninth paragraphs of Article 18 of the Workers' Statute).

In ruling out the unconstitutionality of legislation that excluded reinstatement for such employers, this Court emphasised the fiduciary nature of the employment relationship within the context of the organisational realities described, the advisability of not burdening them with excessive burdens and, finally, the tensions that enforcement of an order of reinstatement could generate (Judgments Nos 2/1986, 189/1975 and 152/1975).

Moreover, the "size that the employer has adopted for its business organisation" is a "matter pertaining to the economic reality of common experience" (Judgment No 55 of 1974, point 4 of the *Conclusions on points of law*). From this perspective, "the size of the workforce has an influence on the way in which the organised employment relationship exists and operates", especially because of the "economic criterion suggested to regulate the interests of undertakings with a smaller number of employees, without however neglecting the interests of the workers" (Judgment No 81 of 1969, point 4 of the *Conclusions on points of law*).

4.4. – The framework laid down by Legislative Decree No 23/2015 has profoundly changed from that analysed by the oldest decisions of this Court. Reinstatement is now limited to an exhaustive list of situations for all employers and the size of the undertaking

does not become a discretionary criterion between the application of the more incisive remedy of reinstatement and the awarding of pecuniary compensation only.

In a system hinging on the tendentially general scope of protection in the form of monetary compensation, the specificity of small organisational realities, which nevertheless remains in the current economic system, cannot justify a disproportionate sacrifice of the employee's right to obtain an adequate remedy for the harm suffered.

5. – The referring court, citing this Court's case law, points out the inconsistencies inherent in the predetermination of the compensation payable by employers whose workforce is smaller than the threshold set by Article 18 of Law No 300/1970.

These inconsistencies originate, firstly, from the narrow interval between the minimum and maximum compensation payable and, secondly, from the distinguishing criterion laid down by the legislator and tied to the number of employees.

5.1. – With regard to the first aspect, it must be noted that compensation confined within the narrow range of a minimum of three and a maximum of six months' remuneration frustrates the need to adjust the amount to the specific circumstances of each individual case, with a view to ensuring adequate compensation and creating an effective deterrence, which considers all the relevant criteria set out by the rulings of this Court and sees dismissal as a last resort.

5.2. – With regard to the second aspect, it must be highlighted that the narrow interval between the minimum and the maximum set by law gives preeminent, if not exclusive, importance to the number of employees, which, on closer examination, does not in itself reflect the actual economic strength of the employer, nor the gravity of the arbitrary dismissal. And nor does it furnish plausible parameters for an assessment of damages reflecting the specific circumstances of the given case.

Indeed, in a framework dominated by the incessant evolution of technology and the transformation of production processes, a small number of employees can correspond to large capital investments and a substantial volume of business. Therefore, the criterion centred solely on the number of employees does not meet the need to avoid burdening with disproportionate costs undertakings that are actually unable to bear them.

The uniform and insurmountable limit of six months' remuneration, which applies to entrepreneurs and non-entrepreneurs alike, operates in relation to a wide range of businesses whose only common denominator is the size of the workforce, an element that in and of itself has no meaningful significance.

5.3. – In conclusion, such a system does not strike a balance between competing interests, which is the primary function of an effective system of protection against unlawful dismissal based on compensation.

6. – It must therefore be acknowledged that the violation complained of by the referring court actually exists. And it is necessary that the legal system be equipped with appropriate remedies for unlawful dismissals by employers whose common denominator is that they have the same number of employees.

The violation so found cannot however be remedied by this Court.

In fact, there is no constitutionally adequate solution that could guide corrective action and fit it within a defined perimeter, relying on quantitative elements already present in the regulatory system and on unambiguous points of reference.

6.1. – It should be noted, first of all, that the situation scrutinised by this Court in the case at issue cannot be compared to that examined in Judgments Nos 194/2018 and 150/2020.

In those proceedings the referring courts asked this Court to strike down a compensation calculation criterion based solely on length of service. However, once the

mechanism identified by the legislator had been removed, it was possible to find in the system tried and tested criteria capable of guiding the court's assessment and making up for the removal of a fixed and immutable parameter.

In the present case, the referring court is not asking this Court to strike down a calculation mechanism, which is an integral part of a system that is in any event coherent in itself. Rather, the request concerns the redetermination – to the advantage of the unlawfully dismissed worker – of the maximum compensation limit itself, in the absence of predefined solutions that could demarcate the 'manipulative' ruling sought. A redetermination that covers a range of several possible solutions, also on account of the different characteristics exhibited by small employers.

6.2. – The arguments put forward by the referring court in support of its doubts as to constitutionality thus presage a vast range of alternatives, and multiple solutions exist to overcome the inconsistencies complained of.

The arguments adduced by the applicant in the main proceedings are similar and disclose a multiplicity of remedial options.

6.2.1. – The legislator could well sketch out more ductile and complex distinguishing criteria, not tied only to the size of the workforce but taking into account differences between the various business realities and the diversified economic contexts in which the undertakings operate.

It is thus not for this Court to choose, among the many criteria that can be envisaged, those that are most appropriate.

6.2.2. – As an appropriate solution the referring court also proposes the elimination of the special regime for small employers.

Again that solution could only be left to the discretion of the legislator, due to its considerable systemic implications.

6.2.3. – Taking into account the principles enunciated by the case law of this Court and in light of new legislative developments in the meantime (Article 3 of Law-Decree No 87 of 12 July 2018 on "Urgent provisions for the dignity of workers and enterprises", converted with amendments by parliament into Law No 96 of 9 August 2018), the thresholds for the compensation payable could be remodelled relying on any number of criteria.

In this respect too, the broad spectrum of solutions that could be devised by the legislator in the exercise of its discretion is evident.

7. – In fact, different legislative policy options correspond to each of the conceivable choices. There are thus inescapable discretionary assessments to be made, which, precisely because they concern the relationship between means and end, do not fall within this Court's remit.

Indeed, it falls to the legislator as part of its overriding assessment to choose the most appropriate means to achieve a constitutionally necessary end, in the context of "a legal framework of fundamental importance" (Judgment No 150/2020). This is because of its connection with the rights that affect the person of the worker, a choice that projects its effects on the economic system as a whole.

As this Court has already pointed out (Judgment No 150 of 2020, point 17 of the *Conclusions on points of law*), the matter, which is the product of a patchwork of provisions stemming from piecemeal intervention, can only be reviewed in overall terms, taking account of both the distinguishing criteria between the regimes applicable to several employers and the deterrent function of the remedies provided for in the various cases.

In declaring the questions to be inadmissible, this Court cannot conclude without pointing out that prolonged legislative inaction would not be tolerable and would induce it,

if the matter comes before it again, to act directly despite the difficulties described here (Judgment No 180/2022, point 7 of the *Conclusions on points of law*).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares inadmissible the questions as to the constitutionality of Article 9(1) of Legislative Decree No 23 of 4 March 2015 (Provisions on permanent employment contracts with increasing protection over time, implementing Law No 183 of 10 December 2014), raised, with reference to Articles 3(1), 4, 35(1) and 117(1) of the Constitution, the latter in relation to Article 24 of the European Social Charter, revised, with appendix, done in Strasbourg on 3 May 1996, ratified and implemented by Law No 30 of 9 February 1999, by the Ordinary Court of Rome, acting as employment judge, with the referral order referred to in the caption.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 June 2022.

Signed by: Giuliano Amato, President

Silvana Sciarra, Author of the Judgment