JUDGMENT NO. 59 YEAR 2021

In this case, the Court heard a referral order from the Court of Ravenna questioning the constitutionality of Article 18 of the Workers' Statute insofar as it provides that when a court finds that the circumstances adduced in support of a dismissal made on grounds of good cause do not exist it must order reinstatement whereas a similar finding in a case of a dismissal on business grounds does not trigger reinstatement, which is for the court to decide as an option to mere compensation and then only when non-existence of the adduced circumstances is clear and when, according to case law, reinstatement would not be excessively onerous for the employer. The referring court did not contest the power of the legislator to rule out reinstatement as a remedy for dismissal but argued that once it has chosen to provide protection in that form under certain circumstances it could not treat identical situations differently thereby infringing *inter alia* Article 3 of the Constitution on equality.

The Court ruled that the question was well founded in that there was no plausible justification for distinguishing between what were essentially comparable situations and that the criteria developed by case law to support courts in their decision as to whether to opt for reinstatement or compensation were unreasonable, echoing the referring court's concerns on that issue. Accordingly, it declared that the challenged provision of the Workers' Statute providing that a court "may" rather than "shall" order reinstatement was unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of the second sentence of Article 18(7) 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), as amended by Article 1(42)(*b*) of Law No. 92 of 28 June 2012 (Provisions on the reform of the labour market for the purpose of promoting growth), initiated by the Ordinary Court of Ravenna, acting as a labour court, in proceedings brought by CFS Europe S.r.l. against M. P., with referral order of 7 February 2020, registered as No. 101 in the Register of Referral Orders 2020 and published in the Official Journal of the Republic No. 26, first special series 2020.

Having regard to the intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Silvana Sciarra in chambers on 24 February 2021;

after deliberation in chambers on 24 February 2021.

[omitted]

Conclusions on points of law

1.- By means of the referral order referred to in the headnote (Referral Order No. 101 of 2020), the Ordinary Court of Ravenna, acting as a labour court, has raised questions concerning the constitutionality of the second sentence of Article 18(7) 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), insofar as it provides that when a court finds that the circumstances adduced

in support of a dismissal made on grounds of an objective justification manifestly do not exist, it may – rather than must – order reinstatement of the worker.

1.1.- The referring court alleges, first and foremost, a conflict with Article 3 of the Constitution in the light of the "unreasonably discriminatory treatment" that the legislator supposedly affords to "identical situations". Reinstatement is mandatory in the case of a dismissal on grounds of good cause if the circumstances adduced in support of the said dismissal do not exist, but is merely optional and subject to an assessment in terms of not being excessively onerous in the case of a dismissal on grounds of an objective justification, which latter case moreover requires that the non-existence of the invoked circumstances be manifest and assumes that the employer's actions are "totally pretextual".

The employer's incontestable choice to classify the dismissal as being one made on grounds of good cause or an objective justification is said, by the referring court, to give rise to "an extremely important distinction in terms of the protection for the worker". It is claimed that not even the differences between good cause and objective justification can explain that distinction because, in the event of the circumstances never having existed, there is nonetheless an unlawful dismissal, irrespective of the reasons given, whether relating to good cause or an objective justification.

The referring court observes that, in the present case, it is not the "lack of constitutional protection for reinstatement" that is at issue but rather the arbitrary unequal treatment of situations that are identical as regards their constituent elements. Once the legislator has chosen to provide protection in the form of reinstatement under certain circumstances, it cannot introduce "unjustified different treatment of identical situations".

In the referring court's view, the fact that the worker can opt – as was the case in the main proceedings and as often happens in practice – for compensation in lieu of reinstatement demonstrates "the unreasonableness of the system adopted as a whole": in those circumstances, any reference to excessive onerousness would be irrelevant, and accordingly that criterion is unsuited to shaping a court's decision.

1.2.- The referring court argues that a court's discretionary power to order or deny reinstatement, "in the absolute absence of normative criteria on the basis of which to guide the interpreter", is treated as one "essentially comparable to the conduct of business activity". In so doing, it is claimed that the legislator is sacrificing the freedom of private-sector economic initiative, protected by Article 41 of the Constitution, and placing "constraints precisely on the limits of private-sector economic initiative" that the Constitution itself sets as respect for safety, liberty and human dignity.

In denying protection in the form of reinstatement when it is excessively onerous, it is asserted that the court is effectively making "a further and new dismissal on grounds of an objective justification" and engaging in "organisational decisions assigned to the entrepreneur".

1.3.- The referring court challenges the second sentence of Article 18(7) of the Workers' Statute also on the basis that it infringes Article 24 of the Constitution.

The argument is that by giving the courts the power to make a new dismissal, the provision in question prejudices the right of defence of the parties, who are not placed in a position to discuss the compatibility of reinstatement with the undertaking's organisational requirements "in the midst of proceedings serving a different purpose".

Article 24 of the Constitution, in conjunction with Article 3 of the Constitution, is also

alleged to be infringed in two further respects.

Firstly, it is argued that the worker's right of action is "unjustly sacrificed and hindered by the choice, made by ordinary-level legislation, to make the worker's protection dependent on the mere incontestable (not even *ex post*) decision of the employer as to how to classify [the dismissal]".

Secondly, it is argued that the dismissal that the court makes when it denies protection in the form of reinstatement is treated "unjustifiably differently and less favourably [...] than any other normal dismissal made by the employer" and also than dismissals on grounds of an objective justification, made on the basis of the very same organisational change that precluded the application of protection in the form of reinstatement. Dismissal *ope iudicis*, in fact, does not comply with the safeguards provided for in Article 7 of Law No. 604 of 15 July 1966 (Provisions on individual dismissals) and can be challenged only in an appeal against the decision of the court that ordered it, with the consequent loss of one level of judicial proceedings.

1.4.- Lastly, the referring court alleges a conflict with Article 111(2) of the Constitution and with the principles of due process.

The argument is that the challenged provision requires the court to play the role of a party to the proceedings, in particular, the entrepreneur, without even indicating "the criteria to be followed by the court", thereby meaning that the latter's neutrality is compromised.

2.- Preliminarily, it is necessary to examine the objections as to inadmissibility raised by the intervenor.

2.1.- According to the President of the Council of Ministers, which intervened in the proceedings, represented and defended by the State Counsel's Office, the question is inadmissible for shortcomings in the referring court's reasoning regarding the requirement of relevance.

2.1.1.- It is argued that the referring court has not shown that it is necessary to apply the challenged provision in order to decide one or more of the claims made in the main proceedings and has not provided any information about the impact, on the outcome of the dispute, of a ruling granting its application. It is also alleged that the referring court has failed to highlight the indispensable relationship between the resolution of the doubt as to constitutionality and adjudication of the main proceedings.

The description of the actual case is also said to be wanting.

Finally, it is contended that the referring court did not raise any issue concerning the unlawfulness of the dismissal, the manifest non-existence of the circumstances adduced in support of the dismissal itself, and the need to apply the provision that excludes the remedy of reinstatement and dictates an award of compensation only.

2.1.2.- The referring court's reasoning on relevance is not such that the objection as to inadmissibility raised by State Counsel can be sustained.

This Court has stated that "[a]lso with a view to a more widespread access to a review of constitutionality (Judgment No. 77 of 2018, point 8 of the *Conclusions on points of law*) and a more effective guarantee of the conformity of legislation with the Constitution, the requirement of relevance is not to be equated with the actual utility for the litigants (Judgment No. 20 of 2018, point 2 of the *Conclusions on points of law*)" (Judgment No. 174 of 2019, point 2.1 of the *Conclusions on points of law*).

Relevance presupposes "the need to apply the challenged provision in the reasoning

process leading to the decision and is tied to the impact of this Court's ruling on any stage of that process" (Judgment No. 254 of 2020, point 4.2 of the *Conclusions on points of law*). The applicability of the challenged provision is therefore sufficient to establish the relevance of the question raised (amongst others, Judgment No. 174 of 2016, point 2.1 of the *Conclusions on points of law*).

In the matter now submitted for this Court's scrutiny, the referring court described the actual case in a manner capable of meeting the requirement of the relevance of the doubt as to constitutionality.

The referring court states that the main proceedings relate exclusively to a case of dismissal on grounds of an objective justification. The employer has not pursued its objections to the two dismissals made on grounds of good cause that were annulled by the court at the summary stage, resulting in the reinstatement of the worker.

At the summary stage, it was established that the circumstances relied on by the employer in support of the dismissal on grounds of an objective justification manifestly did not exist and – on this disputed issue – the arguments of the parties will be developed in the full-length proceedings instituted by the employer.

The referring court adds that the parties do not dispute the need to apply the provision complained of, also in the light of the date of the applicant's hiring (2001) and the size of the undertaking, which employs approximately fifty employees.

According to the referring court, the relevance of the question of constitutionality is not affected either by the worker's choice to receive compensation in lieu of reinstatement.

The referring court's assessment, which is supported by a number of arguments, is not implausible and therefore passes the "external" check that this Court is required to carry out with regard to the requirement of relevance (most recently, Judgment No. 32 of 2021, point 2.1.1 of the *Conclusions on points of law*).

The competing claims of the parties – that of the employer seeking repayment of the compensation paid and that of the worker concerning the precise quantification of the amount due – presuppose that the merits of the claim for reinstatement will be assessed in the context of the appeal against dismissal brought under Article 1(51) of Law No. 92 of 28 June 2012 (Provisions on the reform of the labour market for the purpose of promoting growth).

For the purposes of deciding the dispute, it is thus imperative to apply the challenged provision, which lays down the conditions for reinstatement in the case of a dismissal on grounds of an objective justification such as that alleged – by admission of both parties – in the main proceedings. That is sufficient to establish the relevance of the question.

2.2.- State Counsel contends that the referring court did not attempt to interpret the challenged provision in a way that it would conform to the Constitution.

2.2.1.- It is asserted that the referring court confined itself to identifying the literal meaning of the second sentence of Article 18(7) of the Workers' Statute, without engaging in a systemic construction thereof using a "reasonable and balanced power of interpretation". For that reason, it is claimed that the question is therefore inadmissible.

2.2.2.- This objection is not well founded either.

In order for the question of constitutionality to be admissible, it is necessary and sufficient that the referring court have explored the feasibility of an interpretation conforming to the Constitution and have consciously ruled it out (most recently, Judgment No. 32 of

2021, point 2.3.1 of the *Conclusions on points of law*), in the light of a careful examination of the alternatives thrown up by the debate on interpretation (Judgment No. 123 of 2020, point 3.3.1 of the *Conclusions on points of law*).

Whether the interpretation chosen by the referring court is the only persuasive one is not an aspect that has a bearing on admissibility but rather on the merits of the question of constitutionality and – in the examination of the merits – must be considered (Judgment No. 95 of 2016, point 2.2 of the *Conclusions on points of law*).

The referring court starts from the premise that the challenged provision has an unambiguous literal meaning, and any interpretation conforming to the Constitution gives rise to "an interpretation that clearly abrogates a clear legislative precept", contrary to the centralised review of constitutionality.

The referring court shows that it accepts the interpretation endorsed by the "prevailing Supreme Court case law", which recognises the lawfulness of the discretionary power to deny reinstatement "if protection in the form of reinstatement is, at the time of the adoption of the judicial measure, substantially incompatible with the organisational structure adopted in the meantime by the undertaking" (Supreme Court of Cassation, Labour Division, Judgment No. 10435 of 2 May 2018).

The Court of Ravenna does not agree with the different approach, which is "numerically a minority view" and which considers reinstatement to be compulsory in cases where the circumstances adduced in support of the dismissal manifestly do not exist (Supreme Court of Cassation, Labour Division, Judgments No. 7167 of 13 March 2019 and 17528 of 14 July 2017) and leads to an "an essentially abrogative interpretation of legislative wording".

After a detailed examination of the various interpretations put forward, the referring court ruled out the feasibility of an interpretation conforming to the Constitution and thus adequately fulfilled its duty to give the provision a meaning in accordance with constitutional principles.

Therefore, likewise from that angle, there is no obstacle to an examination of the merits.

2.3.- State Counsel further contends that the question is inadmissible also because it is formulated in such a way as to obtain "an additive or manipulative ruling that is not constitutionally obligatory" in an area in which the legislator enjoys wide discretion.

2.3.1.- It is argued that the choice of the protection to be afforded to an unlawfully dismissed worker is left to the discretion of the legislator. Granting of reinstatement thus represents "only one of the many alternatives available".

2.3.2.- This objection is also unfounded.

The referring court calls for precise corrective action – in indicating a clear term of comparison – by this Court that would restore, with regard to the mandatory nature of reinstatement, equal treatment between dismissal on grounds of good cause or a subjective justification, on the one hand, and dismissal on grounds of an objective justification, on the other. Equally, in the latter case, reinstatement should be compulsory when it is established that the circumstances adduced in support of the dismissal manifestly do not exist.

The multiplicity of possible remedies against unlawful dismissal and the absence of constitutionally mandated solutions do not mean that differences between the systems of protection need not be underpinned by rational justification and do not exempt the choices

adopted by the legislator from review by this Court.

3.- On the merits, the question is well founded.

4.- The doubts as to constitutionality focus on the second sentence of Article 18(7) of the Workers' Statute, as amended by Article 1(42)(*b*) of Law No. 92 of 2012, within the framework of a wide-ranging reform of protection against unlawful dismissal.

The legislator sought to redistribute "employment protections in a more equitable way" including through adapting the law on dismissals "to the needs of the changed context of reference" and making provision for "a specific judicial procedure to speed up the resolution of the associated disputes" (Article 1(1)(*c*) of the said law).

The original model, which focused on protection in the form of reinstatement for all cases of nullity, voidability and ineffectiveness of dismissal, covers four regimes applicable to permanent employment relationships established up to 7 March 2015. From that date onwards, one must apply the rules introduced by 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 are characterised by a different rationale and a different set of protections.

It should be noted that protection in the form of full reinstatement, regardless of the number of employees in the workforce, applies in the event of dismissals that are discriminatory, null and void for reasons of marriage, maternity or paternity, based on a determining unlawful motive or declared ineffective because communicated orally. The court reinstates the worker and awards him or her compensation commensurate with the last *de facto* total [monthly] remuneration accrued from the day of dismissal until that of actual reinstatement, less what was received, during the period of dismissal, for the performance of other work activities (*aliunde perceptum*). The minimum amount, without exception, is five months' salary.

The worker, in lieu of reinstatement, may request the employer for compensation amounting to fifteen times the last *de facto* total [monthly] remuneration, without waiving damages for the harm suffered in the period between dismissal and the request for compensation in lieu, which operates to terminate the employment relationship.

Article 18 of the Workers' Statute, as amended in 2012, also provides for protection in the form of attenuated reinstatement and protection in the form of compensation, in both full and reduced forms, applicable to employers that employ more than fifteen employees (five in the case of agricultural undertakings) in the production unit where the dismissal took place or within the same municipality or that employ a total of more than sixty employees, even if in different production units.

Attenuated reinstatement, relied on in the present case, provides for reinstatement in the job, like full reinstatement, but limits to 12 months' salary the amount of compensation that the employer must pay from the date of dismissal until the date of actual reinstatement. From that amount, however, one must deduct not only what the worker has earned by virtue of other work (*aliunde perceptum*), but also what he or she could have earned by exercising ordinary diligence in seeking other work (*aliunde percipiendum*). In this case too, the worker has the option – actually exercised in the main proceedings – to opt for compensation in lieu of reinstatement.

This protection applies to dismissals on disciplinary grounds and those made for good cause or a subjective justification when the court finds that the circumstances adduced in support of the dismissal either do not exist or pertain to conduct punishable by a sanction

that entails keeping one's job on the basis of the provisions of collective bargaining agreements or disciplinary codes.

Attenuated reinstatement also covers dismissals made without justification "for an objective reason consisting in the physical or mental unfitness of the worker" or made in breach of the rules that, within the context of dismissals for illness, govern protected periods (Article 2110 of the Civil Code).

In the case of dismissals on economic grounds, protection in the form of attenuated reinstatement may be applied in cases of "manifest non-existence of the circumstances adduced in support of the dismissal made on grounds of an objective justification".

5.- With regard to dismissal on grounds of an objective justification in connection with economic, production and organisational reasons, which is at the heart of today's question of constitutionality, the new system of sanctions provided for in Article 18 of Law No. 300 of 1970, as amended by Law No. 92 of 2012, prescribes as a rule the payment of compensation, ranging from a minimum of 12 to a maximum of 24 months' salary.

Restoration of the employment relationship, with compensation up to a maximum of 12 months' salary, is limited to the cases of manifest non-existence of the circumstances adduced in support of the dismissal, which postulates a clear absence of the prerequisites for lawfulness of that dismissal and hence its pretextual nature (Supreme Court of Cassation, Labour Division, Order No. 7471 of 19 March 2020).

That requirement, which the referring court does not criticise, is closely linked to the conditions for the lawfulness of a dismissal on grounds of an objective justification, which is for the employer to prove. These are understood to be reasons inherent in production activities, the organisation of work and its proper functioning, the causal link between the termination and the employer's organisational choices and, finally, the impossibility of placing the worker elsewhere (Supreme Court of Cassation, Labour Division, Judgment No. 29102 of 11 November 2019). In order for the remedy of reinstatement to apply, it is sufficient that the manifest non-existence concern one of the aforementioned circumstances (Supreme Court of Cassation, Labour Division, Judgment No. 32159 of 12 December 2018).

Those prerequisites, albeit in their separate sphere of application, are all linked to the authenticity of the employer's organisational decision, which the court is called upon to assess without overstepping the mark and reviewing what is appropriate and best. The examination of the genuineness of the business decision ensures that dismissal is always a last resort and not the result of incontestable arbitrariness.

6.- The referring court starts from the assumption, also endorsed by the most recent case law of the Supreme Court of Cassation (Labour Division, Judgment No. 2366 of 3 February 2020), that reinstatement is not compulsory, not even when the non-existence of the circumstances adduced in support of the dismissal is manifest.

The wording confirms that premise as to interpretation. In the context of Article 18(7) of the Workers' Statute, the peremptory "shall apply" of the first sentence contrasts with the "may apply" of the second sentence and implies, according to the meaning of the words, a discretionary power for the court.

The literal wording is corroborated by the *ratio legis*, as can be seen from the parliamentary history. The current wording is the result of a compromise between opposing views, following a heated parliamentary debate. The criticism of the "inconsistency" of the challenged provision, which emerged during the approval of the

parliamentary bill presented by the Minister of Labour and Social Policies, did not lead to the reintroduction of compulsory reinstatement, although proposed on several occasions.

In an attempt to avoid uncertainty in the application of the law engendered by its wording, the Supreme Court of Cassation (Labour Division, Judgment No. 14021 of 8 July 2016) has attempted to set the criteria governing the exercise of the court's discretionary power and has emphasised, in particular, the general principles on specific redress (Article 2058 of the Civil Code), which preclude *restitutio in integrum* when it is excessively onerous; a rule that is also applicable to contractual liability.

In the Supreme Court of Cassation's reconstruction, which constitutes "living law", the reference to the law governing specific redress offers "a reference point for the exercise of the court's discretion", which requires an assessment of whether the reinstatement is "at the time of the adoption of the judicial measure, substantially incompatible with the organisational structure adopted by the undertaking in the meantime" (Supreme Court of Cassation, Labour Division, Judgment No. 10435 of 2 May 2018).

The court, therefore, will be able to order reinstatement of the worker "subject to the further discretionary assessment of whether the remedy would be excessively onerous" (Supreme Court of Cassation, Labour Division, Judgment No. 2930 of 31 January 2019).

7.- The challenged provision, in sanctioning a discretionary power to grant or deny reinstatement, is contrary to Article 3 of the Constitution as regards the aspects and for the reasons set out below.

8.- The right to work (Article 4(1) of the Constitution) and the protection of work in all its forms and practices (Article 35 of the Constitution) have long been the cornerstone of this Court's recognition of the need to provide "necessary guarantees" and "appropriate safeguards" for cases of dismissal (Judgment No. 45 of 1965, point 4 of the *Conclusions on points of law*).

The implementation of the right "not to be unjustly or unreasonably ousted from work" (Judgment No. 60 of 1991, point 9 of the *Conclusions on points of law*) has been brought, including recently, within the scope of the legislator's margin of discretion as regards the choice as to the timing and methods of protection (Judgment No. 194 of 2018, point 9.2 of the *Conclusions on points of law*), also due to the varying degrees of seriousness of the defects and other objectively appreciable elements such as, for example, the size of the undertaking. It has also been pointed out that reinstatement is not "the only possible implementation paradigm" of the constitutional principles (Judgment No. 46 of 2000, point 5 of the *Conclusions on points of law*).

In an integrated system of protections, in which the Constitution is supported by supranational sources (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) and EU sources (Article 30 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007), "many remedies may be suited to ensuring adequate compensation for the arbitrarily dismissed worker" (recently, Judgment No. 254 of 2020, point 5.2 of the *Conclusions on points of law*).

In providing the guarantees necessary to protect the person of the worker, the legislator, albeit with the wide margin of appreciation that it enjoys, is duty-bound to respect the principles of equality and reasonableness.

9.- The challenged provision conflicts with these principles.

The merely optional nature of reinstatement reveals, first of all, an internal inconsistency in the particular system laid down by Law No. 92 of 2012 and violates the principle of equality.

For dismissals on disciplinary grounds, the legislator has provided for reinstatement of the worker when it is established in court that the circumstances adduced in support of the dismissal do not exist. In the case of dismissals on economic grounds, the non-existence of those circumstances may lead to reinstatement if it is manifest. The non-existence of the circumstances, albeit demonstrated to a different extent, thus becomes a precondition for the granting of the most incisive of the remedies for protecting the worker.

Further to what the legislator has decided in the exercise of its discretion, the non-existence of the circumstances – whether it relates to conduct attributed to the worker attracting disciplinary action or to an organisational decision of the employer, and is of a manifest nature – affords room for the same response in terms of sanctioning the employer, in the form of the most stringent one entailing restoration of the employment relationship.

In a system which, by a conscious choice of the legislator, attaches importance to the common denominator of non-existence of the circumstances and links the application of protection in the form of reinstatement to this factor, the optional nature of the remedy of reinstatement solely for dismissals on economic grounds is inconsistent with and prejudicial to the principle of equality, in the face of the *manifest* non-existence of the justification put forward and the occurrence of a more serious defect than the *mere* non-existence of the circumstances.

The special features of cases of dismissal, which as regards those made on grounds of good cause or a subjective justification entail the breach of contractual obligations by the worker and, as regards those made on grounds of an objective justification, entail technical and organisational choices by the employer, do not warrant a difference between the compulsory or optional nature of reinstatement once it is held that the circumstances for dismissal do not exist, thereby meriting the remedy of reinstatement, and where for dismissal on economic grounds the even more stringent condition of manifest non-existence is required.

The arbitrary exercise of the power of dismissal, both when based on the pretext of a non-existent disciplinary ground and when based on a business reason not borne out by the facts, harms the worker's interest in the continuity of the contractual relationship and results in a traumatic event that involves the worker directly. The non-existence of the circumstances, albeit with the different degrees that may occur in the single cases of dismissal, gives rise to a very sharp contrast with the principle of necessary justification of the employer's termination, which this Court has espoused on the basis of Articles 4 and 35 of the Constitution (Judgment No. 41 of 2003, point 2.1 of the *Conclusions on points of law*).

These elements common to the cases of dismissal compared by the referring court, which were emphasised by the legislator itself in the provision of identical protection in the form of reinstatement, mean that there is no plausible justification for making a remedy merely optional solely for dismissals on economic grounds.

There is also no rational basis for the case law which makes reinstatement subject to an

assessment in terms of excessive onerousness solely for dismissals on economic grounds, which affect the organisation of the business in the same way as dismissals on disciplinary grounds and equally involve the person and dignity of the worker.

10.- In addition to the breach of the principle of equality and the internal inconsistency in a system of protection already characterised by numerous distinctions, there is the intrinsic unreasonableness of the distinguishing criterion adopted, which leads to further unwarranted unequal treatment.

The referring court sees the challenged provision as a "blank" one and stigmatises the unreasonableness of a law "completely lacking in application criteria" capable of guiding the discretionary power to order or not to order reinstatement.

10.1.- These observations, which support the reasoning of the referral order, are also well founded.

In the case of dismissals on economic grounds, the legislator not only requires that the defect be obvious, which is not always easy to distinguish from a case of non-existence not otherwise specified, but also makes reinstatement optional without offering the interpreter a clear guiding criterion.

The choice between two profoundly different forms of protection – reinstatement, albeit in its attenuated form, and mere compensation – is thus left to the court's own evaluation detached from any precise indications.

The reference to excessive onerousness, which Supreme Court case law has indicated in order to give the provision a less evanescent preceptive content, does not remedy the indeterminateness of the provision.

The notion of excessive onerousness, which serves to draw a dividing line between two forms of protection based on reparation (specific redress or equivalent damages), fits into a context of comparable economic magnitudes. In the law governing reinstatement, on the other hand, which has gradually been constructed as a separate method of protection compared to the paradigm of Article 2058 of the Civil Code, that notion ends up proving inadequate.

In the reconstruction made by the case law referred to above, the measure of compensation cannot be said to be "equivalent", as is by contrast the case with the compensation in lieu of reinstatement provided for in Article 18(3) of the Workers' Statute. Rather, it has a reduced content, like that provided for in the fifth paragraph of that same article.

Excessive onerousness, understood in terms of incompatibility with the organisational structure adopted in the meantime by the undertaking, presupposes non-linear comparative assessments in the dialectic between the worker's right not to be arbitrarily ousted from their job and the freedom of private-sector economic initiative. Nor does it serve to identify definite parameters for the court's evaluation of which of two dissimilar remedies – reinstatement or compensation – should be granted.

In a balanced system of protections, the court's discretion plays a crucial role, as this Court has recently acknowledged in striking down the automatism that governed the determination of the compensation for dismissals that were flawed on substantive grounds (Judgment No. 194 of 2018) or formal grounds (Judgment No. 150 of 2020), which was initially based solely on length of service. The courts have been given back an essential power to assess the specifics of the actual case before them, on the basis of precise and

multiple criteria that can be deduced from the legal system, the result of a long-standing legislative development and proven practice.

In the present case, the different protection applicable – which has considerable implications – is based on a case-law criterion which, on the one hand, is indefinite and inappropriate and, on the other hand, has no connection with the wrongfulness of the dismissal.

The change in the organisational structure of the undertaking which precludes the application of protection in the form of reinstatement can be traced back to the very same employer that made the unlawful dismissal in the first place, and can therefore lend itself to being used for the purposes of elusion. Such a change, moreover, can occur a long time after the termination and is still a fortuitous element, which has no connection with the seriousness of the individual case of dismissal.

It is therefore manifestly unreasonable to attribute to contingent factors, and in any case ones determined by the choices made by the person responsible for the wrongdoing, consequences of considerable magnitude, which have repercussions on the alternative between a more incisive protection in the form of reinstatement or mere compensation.

According to the settled case law of this Court (among many, Judgment No. 2 of 1986, point 8 of the *Conclusions on points of law*), the legislator may well delimit the scope of application of reinstatement.

However, a distinguishing criterion, which relies on a changeable case-by-case assessment and on a factor totally divorced from the wrongdoing to be countered, is not based on objective or rationally justifiable elements and amplifies the uncertainties of the system.

11.- Furthermore, by leaving the choice between protection in the form of reinstatement and protection in the form of compensation to an evaluation by the courts that lacks any guiding criteria and is therefore highly contestable, the challenged legislation contradicts the aim of a fair redistribution of "employment protections" set out in Article 1(1)(*c*) of Law No. 92 of 2012. The intention to circumscribe within certain and predictable boundaries the application of the more incisive remedy of reinstatement and to offer precise parameters for the exercise of a court's discretion risks being thwarted by the need to engage in a complex assessment of compatibility with the organisational needs of the undertaking.

From that point of view, too, the unreasonableness criticised by the referring court is apparent.

12.- It must therefore be declared that the second sentence of Article 18(7) of Law No. 300 of 1970, as amended by Article 1(42)(*b*) of Law No. 92 of 2012, is unconstitutional insofar as it provides that when a court finds that the circumstances adduced in support of a dismissal made on grounds of an objective justification manifestly do not exist, it "may also apply" – rather than "shall also apply" – the provisions of Article 18(4).

The other aspects of the referring court's challenge are absorbed.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

declares that the second sentence of Article 18(7) 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), as amended

by Article 1(42)(*b*) of Law No. 92 of 28 June 2012 (Provisions on the reform of the labour market for the purpose of promoting growth), is unconstitutional insofar as it provides that when a court finds that the circumstances adduced in support of a dismissal made on grounds of an objective justification manifestly do not exist, it "may also apply" – rather than "shall also apply" – the provisions of Article 18(4).

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 24 February 2021.

Signed by: Giancarlo CORAGGIO, President

Silvana SCIARRA, Author of the Judgment