EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/4 The Italian Jobs Act (Legislative Decree no. 23 of 2015) reforming the protection against unfair dismissal contrasts with the European Social Charter 1996 (IT)

On 8 November 2018 the Italian Constitutional Court prohibited the reform of the protection against unfair dismissal introduced by the so-called Jobs Act (Legislative Decree no. 23 of 4 March 2015), insofar as it imposed a requirement on the judge to quantify the compensation due for unfair dismissal based on an employee's seniority only. According to the Court, such a requirement violated not just internal constitutional norms, but also Article 24 of the (Revised) European Social Charter of 1996. This contribution focuses particularly on the EU law questions deriving from such an important judgment.

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Legal background

Article 1(7)(c) of Law no. 183 of 10 December 2014 authorised the Government to adopt a legislative decree or several legislative decrees, "in line with European Union law and international conventions", in accordance with the principles and criteria on the "provision, in respect of newly hired employees, of permanent contracts with increasing protection based on length of service, subject to the exclusion of any right to reinstatement of the worker in his or her job in the event of dismissal on financial grounds, providing for fixed financial compensation that increases in line with length of service and limiting the right to reinstatement to dismissals that are declared void and discriminatory and to specific forms of unjustified dismissal on disciplinary grounds, and establishing certain time limits for any challenges to dismissal".

Article 3 of Legislative Decree no. 23 of 2015 – implementing Law no. 183 of 2014 – set out the regime on the protection of employees against unfair dismissal that are "based on justified reasons and with good cause" where it is established that the relevant factual prerequisites do not occur. More precisely, Article 3(1) of that Legislative Decree provided that: "where it is established that the prerequisites for dismissal on objectively justified grounds, on justified subjective reasons pertaining to the worker, or for good cause do not occur, the court shall terminate the employment relationship as of the date of dismissal and order the employer to pay compensation, exempt from social security contributions, amounting to two times the last monthly salary (calculated for the purposes of the end-of-service allowance) for each year of service, and in any case equal to no less than four and no more than twenty-four months' salary".

Article 3(1) of Decree-Law no. 87 of 12 July 2018, converted with amendments into Law no. 96 of 9 August 2018, increased those limits, respectively, from four to six times (minimum limit) and from twenty-four to thirty-six times (maximum limit) the last monthly salary for the purposes of calculating the end-of-service allowance.

Legislative Decree no. 23 of 2015 applies to permanent employment relationships that started on or after 7 March 2015.

Facts

The employer concerned had dismissed the employee on the basis of "increasing economic and productive problems" at the company. The employee claimed that the dismissal was unfair and lacked sufficient ground. The first instance tribunal held that in fact the economic reason put forward as the basis of the dismissal did not occur.

As the employee had been hired after 6 March 2015, the applicable protective regime was that provided for under Article 3(1) of Legislative Decree no. 23 of 2015, as originally enacted, equal to four months' salary according to her seniority.

However, for the employment tribunal of Rome, Article 3 of Legislative Decree no. 23 of 2015 violated, among others, Articles 76[1] and 117(1)[2] of the Italian Constitution.

In particular, the referring court objected that the new regime (Article 3(1)) introduced an inflexible and automatic criterion, based on length of service, which is such as to preclude any "discretionary assessment by the courts", in breach of the principles of equality and reasonableness, as it contrasts with the requirement to guarantee adequate redress for the specific detriment suffered by the worker, as well as failing to provide an adequate deterrent for the employer against unjustified dismissal.

Concerning Articles 76 and 117(1) of the Constitution, the referring court asserted that the contested provisions did not respect, as regards Article 76 of the Constitution, the principles laid down by Article 1(7) of Law no. 183 of 2014 (consistency "with EU law and international conventions") and, as regards Article 117(1) of the Constitution, the "constraints resulting from Community law and international obligations" as they were at odds with the provisions of EU and international law that enshrine the rights of the worker "to effective protection against unfair [...] dismissal". The above-mentioned constitutional parameters were claimed to have been violated, in particular, with reference to three interposed rules: Article 30 of the Charter of Fundamental Rights of the European Union, Article 10 of ILO Convention no. 158 (on Termination of Employment at the Initiative of the Employer, and not ratified by Italy), and Article 24 of the (Revised) European Social Charter (1996) which stipulates that: "[w]ith a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: ... b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief" (first paragraph).

The referring court therefore raised questions concerning the constitutionality of Article 1(7)(c) of Law no. 183 of 2014 and Article 3 of Legislative Decree no. 23 of 2015.

Judgment

The Constitutional Court held that Article 3(1) of Legislative Decree no. 23 of 2015 – both in the original wording and as amended by Article 3(1) of Decree-Law no. 87 of 2018, converted with amendments into Law no. 96 of 2018 – was unconstitutional with regard only to the

phrase "in an amount equal to two times the last qualifying monthly salary for the purposes of calculating the end-of-service allowance for each year of service".

According to the Constitutional Court, that Article "also violates Articles 76 and 117(1) of the Constitution in relation to Article 24, first paragraph, letter b), of the European Social Charter". The Constitutional Court in fact recalled that "in the decision given in relation to collective complaint no. 106/2014, filed by the Finnish Society of Social Rights against Finland, the European Committee of Social Rights clarified that compensation is adequate if it is capable of ensuring adequate redress for the actual harm suffered by the worker dismissed without a valid reason and of dissuading the employer from the unjustified termination of contracts".

The Constitutional Court also stated that it "has already held that the European Social Charter is capable of supplementing Article 117(1) of the Constitution and has also acknowledged that the decisions of the Committee have authoritative status, although are not binding on national courts" (Judgment no. 120 of 2018). In actual fact, Article 24 of the European Social Charter – which is inspired by ILO Convention no. 158 of 1982 – "lays down an obligation on the international level to guarantee adequate specific compensation for unfair dismissal, in line with Article 35(3) of the Constitution, which is in keeping with the finding made by this Court based on the internal constitutional parameter of Article 3 of the Constitution. There is thus an overlap between various sources and – more importantly – a collection of the guarantees provided by them (Judgment no. 317 of 2009, section 7. of the Conclusions on points of law). Accordingly, both Article 76 … and Article 117(1) of the Constitution have been violated through Article 24 of the European Social Charter".

Commentary

The judgment of the Constitutional Court is of paramount importance. First, for the effect on the overall discipline provided for by Legislative Decree no. 23 of 2015: "subject to the minimum and maximum limits within which the compensation due to a worker who has been unfairly dismissed must be quantified, the [Italian] courts will take account first and foremost of length of service – a criterion required under Article 1(7)(c) of Law no. 184 of 2013 and which inspired the reformist spirit of Legislative Decree no. 23 of 2015 – along with the other criteria …, which may be inferred on a systematic basis from the development of the legislation imposing limits on dismissals (number of employees, scale of the business activity, conduct and circumstances of the parties)". Such criteria are in fact already provided for by Article 8, Law no. 604 of 15 July 1966 and by Article 18(5) of the Workers' Statute (Law no. 300 of 1970).

The case is interesting also from an EU law perspective. In a previous judgment (no. 120/2018)

on the right to associate within a trade union for members of the armed forces, the Constitutional Court held that: "within the context of the relations … between the European Social Charter and the signatory States, the decisions of the Committee, whilst being authoritative, are not binding on the national courts when interpreting the Charter, especially if – as in the case at issue here – the expansive interpretation proposed is not confirmed by our principles of constitutional law". In the more recent judgment commented on here, the Court has shown that the decisions of the European Committee of Social Rights must be taken into account and are indispensable.

Comments from other jurisdiction

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): It is interesting to observe that the Italian Constitutional Court attributes an authoritative status to the decisions of the European Committee of Social Rights. The European Court of Human Rights has stated this before in e.g. the *RMT – v – UK* Case (31045/10 - Chamber Judgment 366, April 2014): "…the interpretative value of the ECSR appears to be generally accepted by States and by the Committee of Ministers. It is certainly accepted by the Court, which has repeatedly had regard to the ECSR's interpretation of the Charter and its assessment of State compliance with its various provisions." However, authoritative is not the same as legally binding, and many national jurisdictions do somewhat disregard the importance of the ECSR or even of the European Social Charter. In Belgium, the ESC is mostly used in connection to Article. 6.4 regarding the right to take collective action (as Belgium has no explicit legal basis for this right in its constitution or legislation).

With regards to unfair dismissals the compensation calculation in Belgium is different than the Italian one. Based on the national collective bargaining agreement ('CBA') no. 109 of 2014, workers can demand on top of the indemnity in lieu of notice to which they are entitled by law compensation going from 3 weeks up to 17 weeks of wages in case of a manifestly unreasonable dismissal. However, CBA no. 109 does not provide any guidelines or criteria which the worker or the courts can use in order to determine the extent of the compensation. In practice there seems to be a wide variation in the amount of compensation granted by the Belgian labour courts. Often the dismissed workers request the maximum of 17 weeks without establishing any reason or proof why they would be entitled to the highest compensation, so that this request is refused and a lower compensation is granted. It seems logical that the awarded compensation should be proportional to the unreasonable character of the dismissal, but it is not easy to determine this objectively, especially seen the lack of settled jurisprudence.

Subject: Dismissal, Unfair dismissal

Parties: Francesca Santoro – v – CGIL (Confederazione generale italiana del lavoro, Italian General Confederation of Labour) (Intervenor) – v – President of the Council of Ministers (Intervenor)

Court: Italian Constitutional Court

Date: 8 November 2018

Case Number: ECLI:IT:COST:2018:194

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[1] According to this Article, "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes".

[2] According to the first paragraph of this Article, "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations".

Creator: Corte Costituzionale (Constitutional Court)
Verdict at: 2018-11-08
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