| Role number : 4691 |
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| Judgment n° 18/2010<br>25 February 2010 |

# JUDGMENT

*Concerning:* the preliminary question relative to article 1017, paragraph 2, of the Judicial Code, raised by the Anvers Court of Appeal.

The Constitutional Court,

Composed of the Presidents M. Bossuyt and P. Martens, and of the judges M. Melchior, R. Henneuse, E. De Groot, L. Lavrysen, A. Alen, J.-P. Snappe, J.-P. Moerman, E. Derycke, J. Spreutels and T. Merckx-Van Goey, assisted by the court clerk P.-Y. Dutilleux, presided by the President M. Bossuyt,

After having deliberated, renders the following judgment:

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I. *Subject of the preliminary question and procedure*

By the judgment delivered on 21 April 2009 concerning Jozef Verstreepen against the public sector Pensions Services and the federal public Financial Services, for which the court clerk received the expedition on 28 April 2009, the Anvers Court of Appeal asked the following preliminary question:

"Does article 1017, paragraph 2, of the Judicial Code violate the articles 10 and 11 of the Constitution such as it limits its enforcement to the authority or organization required to apply the laws and regulations provided for in articles (579, 6°,) 580, 581 and 582, 1° and 2°, and as such as it does not extend its enforcement to the authority or the organizations responsible for applying the analogous laws and regulations on social security for the public sector employees?"

The Council of Ministers lodged a statement.

During the public hearing of 12 January 2010:

- Appeared before the Court J. Mosselmans, with P. Peeters, attorneys at the Brussels Bar, for the Council of Ministers;
- The reporting judges E. De Groot and J. Spreutels provided a report;
- The aforementioned lawyer was heard;
- The case was deliberated.

The provisions of the special law of 6 January 1989 concerning the procedure and the use of languages have been applied.

II. *The facts and the previous procedure*

On 1 November 1988, Jozef Verstreepen was pensioned in his capacity as a first class postman due to physical incapacity. Due to his wedding on 22 May 2004, the amount of his pension was reduced as of 1 October 2005. Since he considers that this measure discriminates him from the non-married cohabitants who benefit from a public sector pension, he summoned the public sector Pension Services and the federal public Financial Services before the Tumhout Court of First Instance. Following the decision of the Court to declare its action unfounded, he filed an appeal before the Anvers Court of Appeal.

The Court of Appeal also considers this action unfounded. As concerns the expenses, Jozef Verstreepen argued that the article 1017, paragraph 2, of the Judicial Code creates a difference in treatment, for which does not exist a reasonable justification, between the socially insured, as to whether they are employees or civil servants.The *a quo* judge considers that it is necessary, before ruling on the costs, to ask the Court a preliminary question on this topic.

III. *As concerns the Law*

- *A* –

A.1.The Council of Ministers outlines that the law of 21 April 2007 relating to the repeatability of attorneys' fees and expenses attributed a new content to the procedural indemnity provided for in article 1022 of the Judicial Code, in the sense that it must now be understood to mean the global intervention for the fees and expenses of the lawyer of the successful litigant. The provision in question includes an exception to the general rule, which provides that as concerns actions initiated by or against the socially insured person, the public authority of the organization responsible for applying the law and regulations provided by articles 579, 6°, 580, 581 and 582, 1° and 2° of the Judicial Code are in theory mandated to the expenses.

A.2. The Council of Ministers outlines that even though the question asked is formulated in a broad manner, the pending claim before the *a quo* judge is about an alleged unequal treatment of employees and civil servants as concerns claims of pensions. It considers that therefore, the examination of the preliminary question can be limited to these claims.

A.3. The Council of Ministers outlines that the provision called into question constitutes an exception to the general rule and that it must, therefore, be interpreted in a restrictive manner.

By linking the enforcement of this provision to the claims for which the Labour Court is exclusively competent *ratione materiae*, the legislator considered desirable to limit the exception to the general rule to specific claims related to social security, which can only be heard by Labour Courts.

Pursuant to article 580 of Judicial Code, the Labour Court is competent to hear the claims relating to the rights and obligations of employees and apprentices as concerns the retirement pension and the survival pension. According to a constant case law, including from the Court of Cassation, the Labour Court is not competent to hear claims relating to the retirement and survival pension of civil servants. These claims fall within the jurisdiction of the Court of First Instance, because the pensions at issue were instituted by a specific law or regulation or in accordance with them, and because they are considered as a deferred wage. This has for effect that the provision in question does not apply to the claims relating to pensions opposing a retired civil servant to the public sector Pension Services. Indeed, the applicability of this provision is related to the subject matter jurisdiction of the Labour Court.

A.4.1. According to the Council of Ministers, the civil servants cannot be compared to employees as concerns pension plans, in so much as the plans applicable to them are different than the plan applicable to employees, in terms of the objective, the financing mode and the grant conditions. The categories in question not being comparable, the equality and non-discrimination principle would not be violated.

A.4.2. Notwithstanding this observation, there is no unequal treatment, according to the Council of Ministers, since the pension plans applicable to the civil servants are financed by the public authority. For this reason, this plan is not under social security, which is based on social security contributions paid for by employees, employers and self-employed workers. Furthermore, the public sector pension is qualified by the “deferred wages” doctrine.

It is therefore reasonably justified, according to the Council of Ministers, that a claim relating to pensions opposing public authority and a civil servant is not included in the scope of the provision in question, since this provision applies exclusively to claims relating to social security, of which public sector pensions are not a part of.

A.4.3. According to the Council of Ministers, a claim relating to the pension of a civil servant could eventually be compared to a claim concerning the salary of an employee. Indeed, in the case of a civil servant, a claim concerning a pension is a claim relating to a differed wage. Pursuant to article 578 of the Judicial Code, the Labour Court hears claims relating to the salary of employees. If the employee loses his case, he must pay the expenses, considering that within this claim he cannot avail himself of the provision in question. This is also the case for the civil servant as concerns the claims relating to his pension, which must be considered as a differed wage. There is thus no difference in treatment.

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B.1. Article 1017 of the Judicial Code, modified lastly by article 128 of the programme law (1) of 27 December 2006, provides:

“Every definitive judgment pronounces, automatically, the imposition of the expenses against the losing party, unless specific laws provide otherwise and without prejudice to the agreement of the parties that, the case being, the case stipulates.

The imposition of the expenses is, however, always delivered, except in cases of frivolous or vexatious requests, to be borne by the authority or the organization responsible for applying the laws and regulations provided in articles 579, 6°, 580, 581 and 582, 1° and 2°, as concerns the requests introduced by or against the socially insured.

By socially insured, must be understood as: the socially insured as provided by article 2, 7°, of the Law of 11 April 1995 aimed at instituting the socially insured's “Charter”.

The expenses can be compensated within the margin decided by the judge, either if the parties lose respectively on any charge, either between spouses, ascendant relatives, brothers and sisters or allied to the same degree.

Every hearing for a judgment reserves the costs.”

B.2. On the facts of the case, the motivation of the decision to refer and of the phrasing of the entirety of the provisions referred to in article 1017, paragraph 2, of the Judicial Code and the

fact that the Court is invited to rule on the compatibility of this legislative provision with articles 10 and 11 of the Constitution, insofar as, by referring to article 580, 2°, of the Judicial Code, this provision instils a difference in treatment between two categories of socially insured persons: on the one hand, the employee which has filed a judicial complaint against the authority or organization responsible for enforcing the laws and regulations referred to in article 580, 2°, of the Judicial Code, and, on the other hand, the member of the civil service statutory personnel who files a complaint against the authority or organization responsible for enforcing the analogous laws and regulations relating to the social security relevant to this type of personnel.

Only the first is assured that, except in cases of frivolous or vexatious requests, he will not be mandated to pay the expenses.

B.3.1. Article 1017, paragraph 1, of the Judicial Code provided at first in general terms that any definitive judgment mandating payment of the expenses to the losing party, without prejudice to the agreement between parties.

The exception, included in the provision in question, was introduced by article 15 of the law of 24 June 1970 modifying the law of 10 October 1967 including the Judicial Code and provisions relating to the competence of courts and tribunals and to civil procedures. During the preparatory work for this provision, was declared on this topic:

“Article 14 [currently 15] fulfills a gap which had eluded the authors of the Code and the legislator.

Under article 1017 of the Judicial Code the losing party is mandated to pay the expenses. This rule has a general scope.

It however suffers from exceptions in the cases where specific laws depart expressly from it. This is the case for work accidents and professional illnesses (the law of 20 March 1948, completing as concerns the procedural fees, the laws coordinated on work accidents).

However, there exists, in the current state of the law, cases where the procedure is guaranteed to be free of charge for the beneficiaries of indemnities, namely in cases of mandatory health and disability insurance. Medical examinations to which the insured can be subjected to do not incur fees for the interested parties.

There is no reason to modify this rule at the moment of establishment of labour jurisdictions.

Also, the project tends to only maintain what, in terms of social security, has been historically allowed” (*Doc. parl.*, Senate, 1969-1970, n° 11, p. 8).

B.3.2. It appears that, with the provision in question, the legislator wished to avoid, originally, that parties which benefited from a free procedure before the transfer of the disputes

relating to social security to the labour jurisdictions could, following this transfer of competence, be mandated to pay the expenses when they lose.

B.4. Before the transfer of the claims relating to social security to the labour jurisdictions, the victims of work accidents, namely, benefited from a free procedure as provided by the law of 20 March 1948 completing, as concerns the procedure fees, the coordinated laws on work accidents.

It can be deducted from the preparatory work for this law that the legislator wished to avoid that the victims of work accidents be brought to "accept an insufficient [indemnity] offer by fear of having to pay the judicial fees" (*Doc. parl.*, Senate, 1946- 1947, n° 153, p. 2).

B.5. The fact that the legislator, through the provision in question, wished, in a more general manner, to facilitate access to justice for the socially insured for which the social rights are contested is expressly confirmed in the preparatory work of article 129 of the law of 13 December 2006 establishing different provisions concerning health, which replaced paragraph 2 of article 1017 of the Judicial Code, in order to specify, namely, that only the socially insured as provided by article 2, paragraph 1, 7°, of the law of 11 April 1995 aimed at instituting "the charter" of the socially insured can avail themselves of this provision. The following was declared on this subject during the preparatory work sessions:

"Pursuant to article 1017, paragraphs 2, of the Judicial Code, the social security organizations are required to pay the expenses, except in cases of frivolous or vexatious requests, as concerns the requests introduced by or against the beneficiaries. The legislator thus initially wished to make access to justice the easiest possible for the socially insured.

The fields within which disputes might arise relating to health and disability insurance have extended greatly in the past years and concern more and more problems that are foreign to the insured *stricto sensu*. Other parties try by all means available to widen the beneficiary notion in order to benefit as well from the free procedure. The case law has accepted that the notion of beneficiary must be interpreted in a strict manner but it is not unanimous.

The suggested modification's objective is to put an end to the discussion concerning whether the care establishments and providers can be considered as beneficiaries within the meaning of article 1017, paragraph 2, of the Judicial Code. The use of the social insured notion answers the initial intent of the legislator to guarantee a free procedure for the socially insured for which the social rights are contested" (*Doc. parl.*, Chamber, 2005- 2006, DOC 51-2594/001, pp. 62-63).

B.6.1. Pursuant to article 2, paragraph 1, 7°, of the law of 11 April 1995, must be understood by "socially insured":

"The individuals that are entitled to social benefits, who are eligible or could be eligible, their legal representatives and their authorized representatives".

B.6.2. The social security benefits must be understood as social benefits, as listed by article 2, paragraph 1, 1°, of the law of 11 April 1995.

This article provides:

"For the execution and application of the present law and its execution measures, this is what is meant by:

1° 'social security':

a) all the areas repeated in article 21 of the law of 29 June 1981 establishing the general principals of social security for employees, including those for the social security of marines from the merchant navy and the miners;

b) all the areas provided by a), for which the application is extended to people employed in the public sector, and the areas of the public sector that fulfill an equivalent function to the areas provided by a);

[…]".

B.6.3. It follows from the above that the public sector plans that fulfill an analogous function to those of social security plans applicable to employees (article 21 of the law of 29 June 1981) must be considered as falling under social security and the persons entitled to these social security benefits must be considered as "socially insured" within the meaning of article 2, paragraph 1, 7°, of the law of 11 April 1995.

B.7. In so far as it is applicable to claims between the socially insured and the authority of the organization responsible for applying the laws and regulations relating to social security, provided by article 580, 2° of the Judicial Code, but not applicable to the claims between the socially insured and the authority or organization responsible for applying the analogous laws and regulations relating to social security for the civil service statutory personnel, the provision in question creates a difference in treatment between two categories of socially insured persons which is not reasonably justified, in regard to the objective pursued by the provision in question, which is the simplification of the access to justice for the socially insured for which the rights are contested. Indeed, the risk of being mandated to pay the expenses constitutes a restriction on access to justice for the civil service statutory personnel members for which the social rights are contested, as well as for the employees.

B.8. In so far as it does not provide for the mandate to pay the expenses to be always required, except in cases of frivolous or vexatious requests, to be paid by the authority of the organization responsible for applying the laws and regulations relating to social security of civil service statutory personnel analogous to the laws and regulations relating to social security of employees, as provided by article 580, 2° of the Judicial Code, as concerns the requests introduced by the socially insured, the provision in question is not compatible with articles 10 and 11 of the Constitution.

B.9. Considering this shortcoming is located in the text submitted to the Court, the *a quo* judge is responsible for ending the unconstitutionality found to exist by this Court, because this acknowledgment is expressed in terms sufficiently precise and complete to allow for the provision in question to be applied in respect of articles 10 and 11 of the Constitution.

B.10. The preliminary question calls for an affirmative answer.

On these grounds,

the Court

rules that :

Article 1017, paragraph 2, of the Judicial Code violates articles 10 and 11 of the Constitution, in so far as it does not provide for the mandate to pay the expenses to be always required, except in cases of frivolous or vexatious requests, to be paid by the authority or the organization responsible for applying the laws and regulations relating to social security of civil service statutory personnel analogous to the laws and regulations relating to social security of employees, as provided by article 580, 2° of the Judicial Code, as concerns the requests introduced by the socially insured.

Hereby delivered in Dutch and in French, in accordance with article 65 of the special law of 6 January 1989, at the public hearing of 25 February 2010.

The court clerk, The President,

P.-Y. Dutilleux M. Bossuyt