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Modalities of dismissal in Italy

Modalidades de despido en Italia

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Abstract: In Italy the general principle is that the dismissal must be causal. This article analyzes the dismissal reform in Italy, introduced by Legislative Decree no. 23/2015, 7 March.In collective dismissal there is a specific procedure in the case of company relocations apart from the classic collective dismissal due to staff reduction. In the

other hand, the reinstatement protection, in a context of dismissal for objective justified reasons, is provided only for the case in which the judge ascertains the lack of justification for the reason consisting in the employee's physical or psychic disability, assimilating it to the hypothesis of nullity of dismissal. Regarding disciplinary dismissal, a distinction is made between the "giusta causa" and the "giustificato soggettivo motive".

Resumen: *En Italia el principio general es que el despido ha de ser causal. Este artículo analiza la reforma del despido en Italia, introducida por el Decreto Legislativo núm. 23/2015, de 7 de marzo. En el despido colectivo existe un procedimiento específico en el caso de traslados de empresa, al margen del clásico despido colectivo por reducción de plantilla. Por otro lado, la protección de readmisión, en un contexto de despido por causas objetivas justificadas, se prevé únicamente para el caso en que el magistrado compruebe la falta de justificación del motivo consistente en la incapacidad física o psíquica del trabajador, asimilándolo a la hipótesis de nulidad del despido. En cuanto al despido disciplinario, se distingue entre la «giusta causa» y el «motivo giustificato soggettivo».*

Keywords: Dismissal causal in Italy, collective dismissal, dismissal for objective justified reasons, disciplinary dismissal.

Palabras clave: *Despido causal en Italia, despido colectivo, despido por causas objetivas justificadas, despido disciplinario.*

I. Collective dismissals

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1.1. Collective dismissals due to staff reduction and mobility

The discipline of collective dismissals was initially regulated by interconfederal agreements.

Only with law n. 223/1991, following the transposition of Directives n. 75/129/EEC and n. 92/56/EEC, the national legal system provided for specific rules dictated to mitigate the employment repercussions[1].

The Italian regulations provide for two hypotheses for collective dismissals: dismissal due to mobility and dismissal due to staff reduction.

1 M. D'Antona, *Riduzioni di personale e licenziamenti: la rivoluzione copernicana della l. 223/91*, in *Foro it.*, 1993, 2031; G. Santoro-Passarelli, Diritto dei lavori e dell'occupazione, 2022, Torino, Giappichelli, 444 ff.

a) The first hypothesis, governed by Art. 4 of Law No. 223/1991, is closely related to cases in which the company resorts to wage supplementation tools and, therefore, to the hypotheses of extraordinary redundancy fund under Art. 19 of Legislative Decree No. 148/2015 deputed to intervene when the company is in a state of crisis. It is no coincidence that the Extraordinary Wage Supplement Fund is commonly referred to as "the antechamber of dismissal".

b) Dismissal due to staff reduction, on the other hand, disregards the use of the layoff fund. In this case, the dismissal is defined as such if it concerns five workers within one hundred and twenty days[2] in each production unit or several production units in the same province in case of "reduction or transformation of activities or work" (Art. 24). The broad formula is apt to encompass a wide range of hypotheses and, in essence, only allows for the exclusion of reasons pertaining to worker behavior.

In addition, the numerical threshold provided by art. 24 also makes it possible to distinguish collective dismissal from dismissal for multiple objective reasons. In other words, if the dismissal involves up to 4 workers, Law n. 223/1991 will not apply, but the different rules set forth in Law n. 604/1966 will apply[3].

Such dismissals may depend, for example, on a reduction or transformation of activity or finally when the activity ceases (on this hypothesis *infra*...art. 24, paragraph 2).

The two hypotheses of collective dismissals are autonomous from each other — although they retain an "idem ratio" — with the consequence that the requirements provided for the latter and determined by art. 24, paragraph 1, do not apply to the hypothesis of placement in mobility referred to in art. 4[4].

As for how it is calculated, the requirement is to be determined by taking into consideration the average employment in the six-month period prior to the start of the procedure, but excluded, according to art. 24, paragraph 4, Law n. 223/1991 are cases of expiration of fixed-term contracts, end of work in construction and in cases of seasonal activities. Instead, apprentices are included.

Initially, executives were also excluded from the scope of the discipline, not only because they were protected by collective bargaining and considered "stronger" than other workers, but also because art. 4, paragraph 9, originally referred only to the categories of middle managers, clerical workers and blue-collar workers.

Only as a result of the intervention of the Court of Justice — which condemned Italy for its failure to implement Directive n. 59/1998 — the national legislature with Law n. 161 of 2014 amended paragraph one of art. 24 of Law n. 223/1991 by adding a paragraph 1-*quinquies*,

2 The period of 120 days, according to art. 8, paragraph 4, runs from the conclusion of the union procedure, specifically from the day on which the first dismissal was made.

3 Terminations occurring at the initiative of the employer for reasons not related to the employee's person shall be equated with dismissals, and resignation and consensual termination shall not be equated with it, s. Cass. 29.3.2010, n. 7519, Cass. 16.7.2019, n. 19022.

4 Cass. 17.10.2018, n. 26028.

thus including managers in the scope of application of the discipline, including the procedure of union information and consultation.

1.2. Procedural obligations: the union information and consultation phase

Both hypotheses described above require the conduct of a phase of union information and consultation (art. 4, paragraph 2).

In fact, the company must inform in advance the company trade union representatives (r.s.a. and r.s.u.) and, failing that, the communication must be made only to the trade associations belonging to the most representative confederations at the national level. In addition, according to art. 4, paragraph 2, the notice must also be sent to administrative authorities if the surplus concerns production units located in more than one region.

The information will have to cover a detailed set of elements[5] and, in particular, the number of workers involved, with the aim of reaching an agreement with the workers' representatives, according to a mechanism already known in the field of company transfers[6] and, recently, also enhanced by the Euro-Union system.

The purpose of the communication is not only to make the trade unions participate in the business decision, but also to identify workers potentially to be ousted from the enterprise in a transparent and objective way[7].

It is important to point out that any flaws in the initiation notice (lack of specificity of the notice, receipt and completeness) can be remedied in the concluded union agreement, as provided for in art. 4, paragraph 12, l. n. 223/1991[8].

The proceduralization of the exercise of employer power elaborated by Law n. 223 of 1991, realizes, according to case law, the transition from judicial control exercised "ex post" to a control of the entrepreneurial initiative concerning the downsizing of the company devolved "ex ante" to the trade unions, recipients of incisive powers of information and consultation.

5 In particular, the reasons that determine the surplus situation; the technical, organizational or productive reasons for which it is considered that it is not possible to adopt suitable measures to remedy the aforementioned situation and avoid, in whole or in part, collective redundancies; the number, company location and professional profiles of the surplus staff, as well as the staff usually employed the timing of the implementation of the staff reduction program; any measures planned to deal with the social consequences of the implementation of the program of the method of calculating all asset allocations other than those already provided for by current legislation and collective bargaining (art. 4, paragraph 3, Law n. 223/1991).

6 Art. 47, l. n. 428 del 1990.

7 Cass. 18.07.2023, n. 20863.

8 Inserted by art. 1, paragraph 45, l. n. 92/2012.

The spaces of control devolved to the court, in fact, concern the procedural correctness of the operation[9] and not the business decision, which remains incontestable[10].

Thereafter, the joint examination stage will be opened if the union representatives, within 7 days from the date of receipt of the notice, have requested it. The purpose is to examine the causes that contributed to the overstaffing and to explore other hypotheses for different utilization of the personnel deemed to be overstaffed.

It is important to emphasize that there is no obligation on the entrepreneur to identify alternative solutions to layoffs, even if proposed by trade unions during the joint examination, since imposing such an obligation would mean violating the prerogatives recognized by Article 41 of the Constitution, which protects freedom of economic initiative.

Once this phase has also been completed, which must be concluded within 45 days from the date of receipt of the notice of opening of the mobility (a non-peremptory deadline), the employer must send the administrative office written notice of the result of the union consultation and the reasons for any negative outcome.

In the latter case, a further and possible phase of consultation may open, this time in the administrative office. Only at the end of this phase, even in the absence of agreement, it will be possible to proceed with dismissals[11].

1.3. The selection criteria

Particularly relevant to the regulation of collective redundancies is the identification of workers to be dismissed[12].

In this sense, art. 5 of Law n. 223 of 1991, in order to avoid the discretionary nature of the employer's choice, entrusts the identification of surplus personnel to the agreement with

9 Such as the existence of causal link, s. Cass. 26.10.2021 n. 30137.

10 Cass. 13.03.2018 n. 5950. Recently, Cass. 11 aprile 2023, n. 9650 in *Foro it.* 2023, 5, I, 1447, which affirmed that "the provision, in collective dismissals for staff reduction, of Law n. 223 of 1991, art. 4 and 5, of punctual, complete and cadenced procedimentalization of the employer's measure of placing in mobility, has introduced a significant innovative element consisting in the transition from judicial control, exercised ex post in the previous legal system, to a control of the entrepreneurial initiative on the downsizing of the company, devolved ex ante to the trade unions, recipients of incisive powers of information and consultation according to a method already tested in the field of business transfers: with the consequence that the residual spaces of control devolved to the judge in litigation no longer concern the specific reasons for staff reduction, unlike what happens in relation to dismissals for justified objective reasons.".

11 Pursuant to art. 4, paragraph 9, the final notice must be sent to the unions and the government within seven days of the notice of withdrawals. The deadline is peremptory and failure to meet it results in the invalidity of the withdrawal, s. Cass. 14.10.2019 n. 25807.

12 R. Del Punta, *L'ambito di applicazione dei criteri di scelta nel licenziamento collettivo, in Mass.giur. lav., 2002, 567 ff.; C. Pisani, Licenziamento collettivo e criteri di scelta*, in *Mass.giur.lav.*, 2014, 3, 122; M.T. Salimbeni, *La procedura e i criteri di scelta, in I licenziamenti individuali e collettivi nella giurisprudenza della Cassazione*, a cura di R. De Luca Tamajo - F. Bianchi D'Urso, Giuffrè, 2006, 13.

the workers' representatives, taking into account the technical-productive and organizational needs of the company as a whole.

Debated is whether such criteria should be identified a priori, or can be predetermined ex post, at the time of dismissal, as is usually the case in practice.

Moreover, the criteria bind all workers involved regardless of whether or not they are members of the stipulating union with the consequence that they will not be able to subsequently challenge any dismissal imposed for such an eventuality, but only in the case of violation of the criteria of surplus staff. Such agreements, in fact, are managerial in nature[13], "proceduralizing" a power of the employer.

In the absence of a pactual determination of criteria, however, those identified by law apply: family loads, seniority, and technical-productive and organizational needs, also providing special attention to the protection of disabled workers and female labor.

As for the concrete identification of the workers to be laid off, as a general rule, the choice must take into account all workers employed in the entire production complex who perform tasks that are homogeneous among themselves[14].

Exceptionally, however, jurisprudence holds that in cases where the restructuring of the company affects a specific production unit or sector[15], the identification of those to be initiated to mobility can be limited to the personnel assigned to that unit or sector[16] as long as the reasons for limiting to that location already emerge from the communication referred to in Article 4, paragraph 3, l. 223/1991 together with the reason why it does not consider to proceed with the transfer of the employees involved to nearby production units[17].

Therefore, the employer must indicate, in addition to the identification of the professional profiles of the surplus personnel and those habitually employed, the reasons that preclude the transfer, to other operating units distinct from the one (or those) being divested or downsized, of the individual surplus workers.

For the purposes of this inquiry, moreover, case law values the wealth of knowledge and practical skills incardinated not only in the duties performed, at the time of dismissal, but also in those pertaining to the experience gained in the enterprise. It is because of the latter that it must be determined whether workers, employed in the part of the company affected by the reorganization and/or suppression, can be compared with colleagues in other departments or sectors, even following the rewriting of art. 2103 c.c.

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13 Corte cost. 30.8.1994, n. 268, in *Foro it.*, 1994, 1, 2307

14 Cass. 26.9.2016, n. 18847, FI, 2016.

15 L. Tebano, *Il licenziamento collettivo a bacino ristretto nell'evoluzione giurisprudenziale*, in *Riv. it.dir.lav.*., 2022, 4, 543 ff.

16 Cass. 3.2.2023 n. 3437; Cass. 6.2.2023, n. 3511, in *Riv.it.dir.lav.* nt. di G.G. Crudeli, *Licenziamento collettivo a bacino ristretto e controllo sindacale; L. Tebano, Il licenziamento collettivo a bacino ristretto nell'evoluzione giurisprudenziale*, in *Riv.it.dir.lav.*, 2022, 4, 543 ff.

17 Cass. 20.2.2023, n. 5202, in *Mass. Giur. lav.*, 2021, 1, 196, which is in line with established guidance, including Cass. 3.2.2023, n. 3395; Cass. 27.1.2022, n. 2390.

1.4. The penalty regime

Turning to the level of protections, the penalty regime in case of unlawful collective dismissals is regulated by art. 10 of Legislative Decree n. 23 of 2015 for workers hired on or after March 7, 2015.

However, it is necessary to distinguish the different hypotheses that can be envisaged[18]:

a) if the dismissal was announced without the written form, the regime of reinstatement with the right to compensation for damages in an amount not less than five months of the last reference salary for the calculation of severance pay shall apply, similar to the provisions for null dismissals referred to in art. 2, paragraph 1, Legislative Decree n. 23 of 2015;

b) if the dismissal is announced in violation of the criteria for the selection of workers, the protection exclusively compensatory protection operates according to the same provisions provided if the extremes of dismissal for objective justified reason do not exist (art. 3, paragraph 1, Legislative Decree n. 23 of 2015);

c) if the dismissal is vitiated by a violation of the procedure provided for in art. 4, Law n. 223 of 1991, likewise, the protection exclusively compensatory protection operates as provided for in art. 3, paragraph 1, Legislative Decree n. 23 of 2015.

It should be clarified that the aforementioned discipline diverges from the provisions for workers hired before March 7, 2025 (i.e., until March 6). In these cases, art. 18 St.lav., as referred to in Article 5, paragraph 3, Law n. 223 of 1991, still applies.

Therefore, in case of lack of written form, there will be full reintegration protection (art. 18, paragraph one, Stat. Lav.); while in case of violation of procedural rules (art. 18, paragraph seven, third period) an indemnity protection, between a minimum of 12 and a maximum of 24 monthly salaries; in case of violation of the selection criteria, the attenuated reintegration as per paragraph four of art. 18 Stat. Lav.

Notwithstanding the doubts expressed, the Court of Justice[19] and the Constitutional Court, when hearing the question, did not consider the coexistence of a dual sanctioning regime of collective dismissal depending on the date of the employee's employment (*pre* or *post* Jobs Act) to be incompatible with European law and, by extension, with art. 117 of the Constitution.

In fact, in the view of the remittent judges, the penalty regime would not guarantee adequate, effective and dissuasive protection, thus violating art. 30 of the Charter of Fundamental Rights of the European Union, to be interpreted in light of art. 24 of the European Social Charter.

18 G. Ferraro, *I licenziamenti collettivi nel Jobs Act*, in *Riv.it.dir.lav*, 2015, 2, 202 ff.

19 C. giust. ord. 4 giugno 2020, C-32/20, TJ c. Balga Srl in *Arg. dir.lav.*, 2021, 1, II, with note by B. De Mozzi, *Jobs act e licenziamenti collettivi: la Corte di Giustizia è manifestamente incompetente a giudicare della disciplina sanzionatoria italiana in materia di violazione dei criteri di scelta.*

And yet, the Court of Justice clarified, that Directive No. 98/59 does not aim to guarantee a general economic compensation mechanism at the Union level in case of job loss, but only to provide a uniform system in case of collective redundancies from the procedural point of view, disregarding the penalty regime.

As a result, the Constitutional Court, in an initial ruling, also declared the issue inadmissible.

Notwithstanding this, a new issue of constitutional legitimacy was raised, and yet, even on this last occasion, in Judgment n. 7 of January 22, 2024, the Constitutional Court declared the questions of legitimacy on the sanction regime of collective dismissals in the case of violation of the selection criteria to be unfounded, reiterating that the difference in treatment falls within the legitimate exercise of the prerogatives of the legislature. In addition, it found the indemnity protection provided by the legislature for the worker unlawfully dismissed at the outcome of a collective dismissal procedure to be quantitatively adequate, consistent with the orientation affirmed since 2018 in Judgment n. 194.

1.5. Dismissals due to cessation of business

Lastly, it should be pointed out that Law n. 234 of 2021, in article 1, paragraphs 224 ff[20], as part of the so-called anti-delocalization regulations[21], provided additional procedural constraints for dismissals for objective or collective justified reasons announced by employers who employed an average of 250 employees in the previous year[22].

This procedure anticipates that of collective dismissal and must be initiated 90 days prior to the same, with the aim of safeguarding the employment and production fabric, in the event of the closure of a location/establishment/branch/office or autonomous department located in the national territory, with definitive cessation of the related activity and with the dismissal of at least 50 employees.

The purpose of the new procedure is to present a plan aimed at limiting the employment and economic impact of the closure, in return for a number of economic/regulatory benefits.

Specifically, the employer must initiate the procedure by communicating— to be done within 180 days of the start of the layoffs-its intention to a wide range of parties. In addition

20 Modified by d.l. n. 144 del 2022, "Decreto Aiuti-*ter*".

21 Although originally the text did not include such wording referring generally to the closure of the business. D. Mezzacapo, *I licenziamenti "per delocalizzazione" dopo il cd. Decreto Aiuti Ter*, in *Riv. it. dir. lav.*, 4, 2022, 495 ff., 499.

22 According to the following paragraph 226: "Excluded from the scope of paragraphs 224 to 238 are employers who are in conditions of asset or economic-financial imbalance that make their crisis or insolvency likely and who can access the negotiated settlement procedure for the resolution of the enterprise crisis (...)," thus suggesting that the procedure is only available to "healthy" enterprises, but the issue is still controversial, s. R. Romei, *La nuova procedura in caso di cessazione di una attività produttiva,* in *Riv. it. dir. lav.,* 2022, 1, 29, I. Alvino, *Cessazione dell'attività d'impresa, crisi e ruolo del sindacato*, in *Riv. it. dir. lav.,* 2022, I, 469; V. Nuzzo, *Delocalizzazioni e chiusure di stabilimenti: i nuovi limiti all'iniziativa economica privata tra scelte legislative e prospettive possibili,* in *Riv. it. dir. lav.*, 2022, I, 517.

to the r.s.a. or r.s.u., and the territorial branches of the comparatively most representative trade union associations at the national level, it must inform, at the same time, the regions of the affected territories, the Ministry of Labor and Social Policy, the Ministry of Economic Development and the national agency for active labor policies.

The notice must contain, in addition to the employer's intention to proceed with the closure, a number of other elements, such as the economic, financial, technical, or organizational reasons for the closure, the number and professional profiles of the staff employed, and the timeframe within which the closure is planned.

Subsequently, but in any case within 60 days of the communication, a plan drawn up by the entrepreneur to limit the employment and economic fallout resulting from the closure must be submitted, which may be approved with the consequent recognition of benefits both to the company, of an economic nature, and to the workers, who may have access to a series of wage supplementation treatments, or, in the event of failure to reach an agreement, the subsequent collective dismissal procedure will be opened, which will be carried out without the joint examination, given that the parties have, in effect, already examined the situation.

It should be pointed out that the union agreement does not avert the possibility of collective dismissals: the employer is still entitled to open the relevant procedure at the end of the plan itself. And yet, before the conclusion of the examination of the plan and its eventual signing, the employer cannot proceed with collective dismissals or intimate dismissals for objective justifications. As for the sanction profile, the law specifies that individual dismissals for objective justifications and collective dismissals announced in the absence of the notice of the opening of the procedure aimed at the presentation of the plan or before the expiration of the term of one hundred and eighty days, or the shorter term within which the plan is signed, are null and void, with consequent recognition of the reintegration protection provided for in art. 2, Legislative Decree n. 23 of 2015[23].

2. Objective dismissal in Italy

Dario Calderara and Angelo Casu[24]

2.1. Origin

The employer's freedom of dismissal, besides being expressly provided for in Article 2118 of the Civil Code of 1942, finds its constitutional coverage in Article 41 of the Constitution. Indeed, as evidenced by commentators, the freedom of private economic initiative recognized under Article 41 of the Constitution implies the freedom to dismiss the employee for

23 Following the intervention of the Constitutional Court in the sentence n. 22/2024, the adverb "expressly" was removed from the provision. However, even prior to this ruling there was no doubt about the expressly null and void character of the aforementioned dismissal.

24 The chapter is a joint reflection of the Authors. That said, §§ 1, 2, 3 are to be attributed to Dario Calderara, §§ 4, 5, 5.1 are to be attributed to Angelo Casu.

organisational reasons[25]. Freedom of enterprise, however, in the taxonomy of constitutional values is limited, on the one hand, by paragraph 2 of the same article, which states that private economic initiatives cannot take place «in contrast with social utility», and, above all, requires a balancing act with the right to work and employment established by Article 4 of the Constitution.

Over the last few decades, lawmakers weighed this balancing act differently, adjusting it under the democratic majority principle[26], in accordance with the changed economic context.

2.2. Historical evolution

The reference to the justified reason for dismissal, which contains the «misleading»[27] distinction between subjective and objective reasons, is included in Law No. 604/1966.

This legislative act overcomes the codified framework, which referred to the employer's withdrawal, as set out by Article 2118 of the Civil Code, i.e. the free withdrawal sc. *ad nutum*. The only obligation for the employer, according to the previous approach, was notice, the duration of which was established by custom, in equity or, more commonly, by collective bargaining applicable to the employment relationship.

If, on the one hand, Article 3 of Law No. 604/1966 has been unaffected by legislative amendments, being subject only to the evolution of case law, which has specified the scope of the rule over the time, on the other, the legislation on protection against unlawful dismissal has been subject to numerous amendments.

Law No. 604/1966 itself provided for an initial mandatory protection, requiring the employer to reinstate the employee unlawfully dismissed or, failing that, to pay him compensation.

With the introduction of Article 18 of Law No. 300/1970 there was a radical[28] change in the effects of unjustified dismissal. The invalidity of the dismissal has been sanctioned, for production units employing more than 15 employees, with the annulment of the dismissal and the consequent "real" reinstatement protection. The legislator, in this sense, strengthens the position of the employee with respect to the company's freedom of dismissal.

The change in the labour market and the context of the economic crisis prompted the 2012 legislator to amend Article 18 of Law No. 300/1970[29] allowing greater flexibility in dismissal, reducing the scope of reinstatement, in addition to cases of nullity of the dismissal and cases of «insubstantiality of the fact».

25 E. Gragnoli, *L'insopprimibile libertà di cessare l'impresa e l'illiceità del divieto di licenziamento*, in *Mass. giur. lav.*, 3, 2020, 609.

26 G. Santoro-Passarelli, *Le "ragioni" dell'impresa e la tutela dei diritti del lavoro nell'orizzonte della normativa europea*, in *Eur. dir. priv.*, 1, 2005, 65.

27 M.V. Ballestrero, entry *Licenziamento* individuale, in *Enc. dir., Annali,* V, 2012, 806.

28 G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, IX ed., 2022, 426.

29 A. Maresca, *Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche dell'art. 18 statuto dei lavoratori*, in *Riv. it. dir. lav.*, 2, 2012, I, 415 ss.; M. Marazza, *L'art. 18, nuovo testo, dello Statuto dei lavoratori*, in *Arg. dir. lav.*, 3, 2012, I, 612 ss.

The definitive paradigm shift, in favour of compensation protection, occurs with Legislative Decree No. 23/2015, which further reduces the cases under which unlawful dismissal is sanctioned with real protection. In fact, the economic protection becomes a common protection with respect to unjustified dismissal. The provision also provided for the system of the so-called increasing protection, to allow greater predictability to the employer of the costs to be incurred in the event of unlawful dismissal, linked only to the length of service[30]. This "mechanism" for quantifying the compensation was declared unconstitutional by the Constitutional Court through judgments No. 194/2018 and No. 150/2020. In particular, the Constitutional Court noted the unreasonableness of the parameter of seniority of service alone. Indeed, this would lead to an undue homologation of situations that may be different, regardless of the peculiarities and diversity of the events of the dismissals announced by the employer[31].

2.3. Current regulation. The concept of dismissal for objective justified reasons

The objective justification for dismissal, as mentioned above, is identified by Article 3 of Law No. 604/1966, in the «reasons inherent to productive activities, the organisation of work and the regular operation thereof». In other words, the provision defines the limits to dismissals that are not caused by the employee's breach of contract or breach of trust, pursuant to Article 2119 of the Civil Code. The "broad" wording includes cases where the employer decides to change the structure of the company organisation. The person of the employee is therefore relevant to the extent that his performance is deemed no longer useful by the employer[32], subject to the reasons set out in Article 3.

The judge's review of the legitimacy of the dismissal, therefore, must assess the existence of the reasons underlying the dismissal, as well as the causal link between the entrepreneurial choice and the dismissal. Case law subsequently introduced an additional obligation for the employer to verify the possibility of employing the employee within the company organisation, even by assigning him to different tasks (the so-called obligation of repechage)[33]. The impossibility of employing the employee in other company positions constitutes by "living law" a requirement for the legitimacy of dismissal for objective justified reasons.

The lack of only one of the above elements results in the illegitimacy of the dismissal. Pursuant to Article 5 of Law No. 604/1966, the burden of proof of the objective justified reasons is upon the employer.

30 The original text of Article 3(1) of Legislative Decree 23/2015 provided that: «[...] in cases where it is established that the grounds for dismissal for objective justified reason [...] do not apply, the judge shall declare the employment relationship extinct at the date of dismissal and order the employer to pay an indemnity not subject to social security contributions in an amount equal to two months' salary of the last reference salary for the calculation of severance pay for each year of service, in an amount in any case not less than four and not more than twenty-four months' salary».

31 C. Const. 194/2018, para. 11.

32 Among all M. Persiani, *Contratto di lavoro e organizzazione*, Cedam, 1966, 265, who observes that the employee's performance can satisfy the employer's interest if it produces a utility.

33 G. Santoro-Passarelli, *Il licenziamento per giustificato motivo oggettivo "organizzativo": la fattispecie*, in *WP CSDLE "Massimo D'Antona".IT*, 317, 2016, 2.

A first limitation placed by the legislator on the power of dismissal is, therefore, the necessary integration of reasons inherent in the productive activities, the work organisation, and the regular operation thereof. In this regard, the question arose as to whether a court could review the merits of the entrepreneur's business choices, or the economic and social adequacy of those choices, even requiring decisive proof of an unfavourable trend in the company's productive activity[34]. Such an interpretation, which was followed by the case law minority[35], would in fact risk conflicting with the employer's freedom to carry out business under Article 41, par. 1 of the Constitution. Moreover, Article 30, par. 1 of Law No. 183/2010 has specified, in this regard, that for the provisions on employment relations containing «general clauses», judicial examination cannot extend «to the review of the merits of the technical, organisational and production assessments which are the responsibility of the employer». The violation of this prohibition constitutes, following the amendment introduced by Law No. 92/2012, a ground for challenging the judicial decision for «violation of a rule of law».

In the exercise of its nomofilactic function, the Court of Cassation intervened with the well-known judgment No. 25201 of 7 December 2016, confirmed by further subsequent judgments[36]. This decision clarifies that, for the purposes of the integration of the case referred to in Article 3 of Law No. 604/1966, it is not necessary to ascertain the «factual ground» identifiable in the unfavourable conditions of the undertaking. In this sense, the Court of Cassation does not exclude that the dismissal may also be imposed for a «better management or production efficiency», as well as for the purpose of increasing the «profitability of the business», adopted according to the legitimate and unquestionable choice of the employer. In other words, the Court of Cassation adheres to the orientation following the letter of the law «it is sufficient that the dismissal is determined by reasons inherent to the productive activities, the organisation of work and the regular operation thereof» and that is verified «the causal link between the reason established as inherent to the productive activities and the organisation of work as declared by the entrepreneur and the dismissal in terms of traceability and consistency with the restructuring operated». It has been authoritatively observed how this judgment, on the one hand, enhances the elements of the case in order to avoid that the objective justified reason «can be assimilated to an *ad nutum* dismissal resulting from self-sufficient and unquestionable choices of the entrepreneur», while, on the other hand, no objective criteria are identified to guide the court on the merits, thus running the risk of rendering judicial review a «mere notarial ratification of the employer's decision to suppress the job»[37].

A further requirement of the justified reason is, therefore, the causal link that must exist between the suppression of the job and the dismissal. In other words, it is required that the justified reason for the employer's dismissal necessarily affects the position of the dismissed employee. It follows that the reason justifying the dismissal and the suppression of the employee's position constitute two distinct moments of assessment, rejecting the hypothesis that the dismissal could be motivated only by the suppression of the job[38]. Verification of the

34 R. Del Punta, *Diritto del lavoro*, XIV ed., Giuffrè, 2022, 692.

35 Cass., 24th June 2015, no. 13116; Cass. 16th March, no. 5173, Cass. 17th January 2014, no. 902; Cass., 23rd October 2013, no. 24037. See also V. Speziale, *Il giustificato motivo oggettivo: extrema ratio o "normale" licenziamento economico?*, in A. Perulli (a cura di) *Il licenziamento per giustificato motivo oggettivo*, Giappichelli, 2017, 119 ss.

36 Recently Cass., 30th January 2024, no. 2831; Cass., 12nd January 2023, no. 752.

37 G. Santoro-Passarelli, *Il licenziamento per giustificato motivo oggettivo "organizzativo"* cit., 7.

38 R. Del Punta, *Disciplina del licenziamento e modelli organizzativi delle imprese*, in *Dir. lav. rel. ind.*,

existence of the causal link, therefore, is an assessment that must be carried out at the level of the logical consistency between the dismissal and the justified reason for it, without this leading to judicial interference in the merits of the entrepreneurial choice[39], thus making it possible to verify the non-pretextuality of the dismissal[40].

As mentioned, the case law on the subject of dismissal, starting from the well-known decision of the Court of Cassation, Unified Section, No. 7755 of 7 August 1998, has deduced from the general principles of the legal system the obligation for the employer to investigate the «possibility of another activity attributable [...] to the tasks currently assigned or to equivalent tasks or, if this is impossible, to inferior tasks, provided that this activity can be used in the undertaking, according to the organisational structure unquestionably established by the employer». This would be an expression of the principle whereby dismissal must constitute the ultima *ratio* (extreme remedy) for the employer[41]. It should be borne in mind that the entrepreneurial organisational structure constitutes the limit of the extension of the obligation to dismissal[42] and therefore requires a joint reading with Article 2103 of the Civil Code, which delineates the boundaries of the employer's power to assign the employee to different tasks. It should also be borne in mind that according to a recent ruling of the Court of Cassation, the employer, in fulfilling the obligation of repechage, must «also take into consideration those job positions which, purely yet unfilled, will become available in a time span quite close to the date on which the notice of dismissal is given. When [...] that circumstance is well known to the employer»[43]. With reference to the limits of the obligation of *repêchage*, it should be noted that case law holds that in the presence of a group of undertakings, the obligation must extend to the other undertakings only where a single centre of imputation of legal relations can be identified, or in the case of joint employership[44].

Regarding the burden of proof, the *regula iuris*, pursuant to Article 5 of Law No. 604/1966, according to which the employer bears the burden of proving the impossibility of relocating the employee to other tasks, must be confirmed. However, part of the case law[45] has developed an orientation tempering the burden of proof on the employer about the obligation to reallocate, which, especially in large companies, could be particularly onerous. According to those judgments, the worker would be required to provide evidence of the possibility of being reinstated, according to a principle of cooperation[46] of the worker himself. However, according to more recent case law, the burden of proof would be interpreted strictly. The

80, 1998, 707.

39 On this matter see F. De Giuli, *Il nesso causale nel licenziamento per giustificato motivo oggettivo*, in *Lav. dir. eur.*, 3, 2022, 2 ss.

40 Cass., 28th March 2019, no. 8661.

41 E. Ghera — A. Garilli — D. Garofalo, *Diritto del lavoro,* Giappichelli, 2020, 267; R. Del Punta, *Diritto del lavoro* cit., 694. In problematic terms on the relationship between *extrema ratio* and "repechage obligation" see M. T. Carinci, *L'obbligo di «ripescaggio» nel licenziamento per giustificato motivo oggettivo di tipo economico alla luce del* jobs act, in *Riv. it. dir. lav.*, 2, 2017, I, 203 ss.

42 Cass., 19th November 2015, no. 23698; Cass., 23rd April 2010, no. 9700.

43 Cass., 8th May 2023, no. 12123.

44 Cass., 9th May 2018, no. 11166.

45 Cass., 6th July 2012, no. 11402; Cass., 15th May 2012, no. 7512; Cass., 6th July 2011, no. 14872; Cass., 8th February 2011, no. 3040; Cass., 18th March 2010, n. 6559; Cass., 12nd December 2007, n. 26084.

46 Cass., 12nd August 2016, no. 17091.

employee would not bear «the burden of alleging the positions that can be filled, since it would be contrary to ordinary procedural principles to differentiate between those burdens»[47].

Now, it should be noted that dismissal for objective justified reasons also includes hypotheses attributable to the person of the employee, but which do not constitute non-performance. In this sense, we are referring to the cases referred to in Article 2110 of the Civil Code, in addition to cases of objective impossibility of performance, pursuant to Article 1256 of the Civil Code, such as the supervening unfitness for the worker's job, *pursuant to* Law No. 68/1999[48].

2.4. Procedure for intimation of dismissal for objective justified reasons

For workers to whom Article 18 of Law No. 300/1070[49] applies, i.e. hired before 7 March 2015, employed in offices or establishments employing more than 15 employees, there is a procedure for the exercise of the power of dismissal by the employer, aimed at mitigating the social consequences of dismissal.

Article 7 of Law No. 604/1966, in fact, provides that dismissal for objective justified reasons must be preceded by a communication, made by the employer, to the Labour Inspectorate of the place where the employee works, transmitted for information to the employee himself. The content of the notice must indicate the intention to dismiss, the reasons for the dismissal and any measures to assist the outplacement of the worker concerned.

The employer and employee must be summoned by the Labour Inspectorate within seven days of receiving the request, at the Provincial Conciliation Commission, where the employee may be assisted by a trade union representative, a lawyer, or an employment consultant.

The procedure must be concluded within 20 days — with the possibility of suspension for a maximum of 15 days for justified impediment on the part of the worker — and alternatives to dismissal must be examined.

2.5. The sanctions regime. Employers hired before 7 March 2015

As mentioned, the system of protections against unlawful dismissal in the Italian legal system is different for workers hired before 7 March 2015, to whom Law No. 300/1970 and the sanctions system of Law No. 604/1966 apply, and after 7 March 2015, to whom Legislative Decree No. 23/2015 applies.

47 Recently Cass. 30th January 2024, no. 2739; Cass., 13rd November 2023, no. 31512; Cass., 11st November 2022, no. 33341; recalling Cass., 22nd March 2016, no. 5592, annotated by M. Persiani, *Licenziamento per giustificato motivo oggettivo e obbligo di repêchage*, in *Giur. it*, 5, 2016, 1167, who nevertheless observes that the provision of a burden on the worker to indicate which positions in the company where he could be redeployed would be a «reasonable compromise».

48 S. Cairoli, *Il licenziamento per giustificato motivo oggettivo per i lavoratori assunti prima del 7 marzo 2015*, in G. Santoro-Passarelli (a cura di), *Diritto e processo del lavoro e della previdenza sociale*, Utet, 2020, 1511.

49 See Article 3 (4) of Legislative Decree No. 23/2015.

The legislation of privatised public employment essentially does not distinguish between dismissal for justified subjective and objective reasons, in relation to the sanction's regime[50]. It is worth noting that in that legislative framework, real stability still constitutes a general character, pursuant to Article 63 of Legislative Decree No. 165/2001[51].

In private employment, workers hired before 7 March 2015 and employed in a location or establishment employing more than 15 employees are covered by the protections of Article 18 of Law No. 300/1970, while, below that threshold, the protection is the mandatory protection of Article 8 of Law No. 604/1966.

Therefore, for systematic purposes, with specific reference to cases of illegality of dismissal for objective justified reasons, it is necessary to distinguish between: "attenuated" reinstatement protection, "strong" economic protection, and "weak" economic protection[52].

The first refers to the sanction of the reinstatement of the worker unlawfully dismissed, accompanied by compensation for damages equal to an indemnity commensurate to «the last full salary from the day of dismissal until the day of actual reinstatement»[53] up to a maximum of twelve months' salary, in addition to the payment of the relevant social security and welfare contributions. From the compensation must be deducted what the employee has received, during the period of dismissal, for the performance of other work activities (so-called *aliunde perceptum*), as well as what he could have received by diligently seeking new employment (so-called *aliunde percipiendum*).

Insofar as it is of interest herein, this sanction concerns cases where the lack of justification relates to the employee's psycho-physical unfitness, pursuant to Articles 4, par. 4 and 10, par. 3 of Law No. 68/1999 or for breach of the rules on the Art. 2110 of the Civil Code, as well as to the finding that the fact underlying the dismissal for objective justified reason does not exist.

This assumption follows the intervention of the judgments No. 59 and 125, respectively issued by the Constitutional Court on 1 April 2021[54] and 22 May 2022, which "equalised" the penalty regime for the absence of the fact in the case of dismissal for justified subjective and objective reasons as well as for just cause.

Indeed, Law No. 92/2012 provided that in case of absence of objective justification, the judge could discretionally choose between reinstatement protection and economic protection. Otherwise, if there was no subjective justification or just cause, the judge was

50 A. Veltri, *Gli altri casi di estinzione del rapporto di lavoro pubblico* cit., 3634 ss.

51 Pursuant to Article 63, Legislative Decree No. 165/2001, which is similar to the original text of Article 18, L. no. 300/1970 «The judge, with the sentence annulling or declaring the dismissal null and void, shall order the administration to reinstate the employee in the workplace and to pay an indemnity commensurate with the last salary used to calculate the severance pay corresponding to the period from the date of dismissal until the date of actual reinstatement, and in any case not exceeding 24 months' salary, less any sums received by the employee for other work activities. The employer is also ordered to pay social security and welfare contributions for the same period».

52 See the systematisation in R. Del Punta, *Diritto del lavoro* cit., 700 ss.

53 Art. 18, para. 4. L. No. 300/1970.

54 S. Bellomo — A. Preteroti, *La sentenza della Corte n. 59/2021 sull'art. 18 St. lav.: una questione di (inaccettabile) discrezionalità*, in *federalismi.it*, 13, 2021, 1 ss.

required to annul the dismissal and reinstate the worker. According to the Constitutional Court, judgement No. 59/2021, the «merely» optional nature of reinstatement would conflict with the principle of equality under Art. 3 Const. and reveal an internal disharmony in the peculiar system of protections outlined by Law. No. 92/2012. In support of its decision, the Court also invokes Art. 4 and 35 of the Constitution, respectively, the right to work and the protection of labour in all its forms and applications, reiterates that the non-existence of the fact in each case denotes the «most strident contrast» with the principle of necessary justification for termination.

Similar arguments underlie judgement No. 125/2022. Indeed, the letter of the Law No. 92/2012 provided that the absence of the fact in objective dismissals had to be «manifest». This unequal treatment was found by the Constitutional Court to be unreasonable and therefore unconstitutional. This requisite was found to be indeterminate. The unreasonableness of the requisite is also examined from a procedural standpoint. Indeed, in disputes involving dismissals for objective justifications, the evidentiary framework is often articulated, so much so that it is not compatible with an immediate verification of the non-existence of the fact, which the law requires for the purposes of reinstatement. The unreasonable character, therefore, would occur in the «imbalance between the ends enunciated and the means concretely chosen» by the rule.

In the further hypotheses in which the judge considers that the grounds for the objective justification do not exist, he orders the employer to pay an indemnity «all-inclusive determined between a minimum of twelve and a maximum of twenty-four months' salary of the last global *de facto* remuneration, in relation to the worker's seniority and taking into account the number of employees employed, the size of the economic activity, the behaviour and conditions of the parties, with the burden of specific motivation in this regard» ("strong" economic protection).

The "weak" economic protection, applicable, as mentioned above, to workers, hired before 7 March 2015, employed in offices or establishments where less than 15 employees are employed, provides that the unlawfulness of dismissal for objective justified reasons shall be subject to 'an indemnity of an amount between a minimum of 2.5 and a maximum of 6 months of the last de facto global remuneration'. The provision also identifies the criteria for determining the compensation, i.e. the number of employees employed, the size of the undertaking, the length of service of the employee, the conduct and conditions of the parties. This allowance may be increased up to ten months' salary for employees with a seniority of more than ten years. For workers with a seniority of more than twenty years, the allowance may be increased up to fourteen months' salary.

2.6. Employers hired since 7 March 2015

For workers hired since 7 March 2015, as mentioned above, the rules set forth in Legislative Decree No. 23/2015 apply, which is characterised by the residual role attributed to reinstatement protection, favouring economic protection.

In fact, the provision provides that in any case in which it is found that the grounds for dismissal for objective justified reasons do not exist, even if the fact does not exist, the employer is required to pay the employee only economic compensation, corresponding to

the payment of an indemnity commensurate with the last salary used as a reference for the calculation of severance pay, not subject to social security contributions, in an amount not less than six and not more than thirty-six months' salary[55].

With reference to workers employed in offices or establishments with less than 15 employees, pursuant to Article 9 of Legislative Decree No. 23/2015, which expressly recalls Article 18, paras. 8-9 of Law No. 300/1970, the amount of the indemnity is halved and, in any case, cannot exceed six months' salary.

The reinstatement protection, in a context of dismissal for objective justified reasons, is provided only for the case in which the judge ascertains the lack of justification for the reason consisting in the employee's physical or psychic disability, assimilating it to the hypothesis of nullity of dismissal.

3. Disciplinary dismissal

Giulia Perri

3.1. Origin

Disciplinary dismissal is a type of withdrawal that includes both dismissal for justified subjective reason and dismissal for just cause[56]. Those types of dismissal constitute sanctions to punish the breach of contract of the employee.

The evolution of the discipline of the termination of the employment relationship originates in the Civil Code of 1942. The Code contains Article 2118 characterized by an approach focused on the symmetrical freedom of withdrawal from the permanent employment contract. Article 2118 of the Civil Code regulated the two unilateral legal actions capable of producing the extinguishing effect of the relationship: that of the employer (dismissal) and the one of the employee (resignation).

In the employment relationship, however, the interests of the opposing parties do not coincide and are not substantially equivalent. While the employer, on one hand, has an interest in easily adapting his workforce (and therefore the number of workers) based on the needs of his company, being able as he is to dissolve his contractual obligations with a certain ease[57], the worker is interested in the stability of his job. This conflict of interests between that of

55 Art. 3, Legislative Decree No 23/2015.

56 Disciplinary dismissal has been expressly classified as such in the public sector by Legislative Decree no. 165/2001, while in the private sector the explicit reference to it was contained in Article 1, paragraph 7, letter. c) of enabling law no. 183/2014, A. Boscati, *Il licenziamento disciplinare nel contratto a tutele crescenti*, in *Dir. rel. ind.*, 4, XXV, 2015, 1034.

57 Similarly G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 419.

the worker to remain within the company and that of the entrepreneur who often opts for dismissal[58], exists concretely in the real world and therefore had to be reflected in a discipline that took these aspects into consideration.

The so called "ad nutum" dismissal brought together, in an initial phase, the two types of withdrawal[59], avoiding the indefinite continuation of the employment relationship.

This form of dismissal ad nutum, therefore without motivation, was the only one originally envisaged by the Civil Code and subjected the withdrawal solely to the obligation of notice which, despite its social value and its function of allowing a suitable period of time in which the worker could reorganize his working life, could however be monetised, therefore replaced by an indemnity equivalent in cash to the days or monthly payments due for the aforementioned period, with consequent immediate termination of the employment relationship.

In the original system of the Civil Code, however, there was another case of dismissal, provided for by the subsequent Article 2119 of the Civil Code, the so-called dismissal for just cause, or "in tronco", therefore without notice.

The article did not contain a real definition of just cause and limited itself to determining the effects of its recurrence[60], i.e. the impossibility of continuing the relationship.

The Civil Code system, therefore, was as linear as it was unreasonable, due to what some authors define as its "lack of social sensitivity"[61]. The original idea of the Code, in fact, was then shattered by the effects of the economic developments of the 1950s and 1960s and the frequent abuses of the withdrawal power of large industrial companies[62], which highlighted the disvalue of the 1942 Code mechanism.

This structure - and therefore the substantial advantage of the employer - was maintained until 1966, year in which the Law no. 604 was issued on July 15. Article 3 of the aforementioned law which will be discussed, actually, was the result of all the changes undergone by Italian society in the post-war period, with international exchanges becoming more and more frequent and the construction of large industrial plants in which thousands of employees coexisted with as many voices, bearers of individual needs[63].

58 P. Alleva, *Intervento* su *Il lavoro e il mercato*, in *Riv. it. dir. lav.*, I, 1997, 248 ss.

59 See S. Mainardi, *L'estinzione del rapporto nella sistematica del Codice civile. Dimissioni e risoluzione consensuale*, in Aa.Vv. Coordinati da S. Mainardi, *Il lavoro subordinato. Il rapporto individuale di lavoro: estinzione e garanzie dei diritti*, Giappichelli, Torino, 2007, 7 ss.

60 See G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 420.

61 E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani e F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 295.

62 *Ibidem*.

63 *Ibidem*.

Furthermore, that Article opens the way to control over the legally relevant reasons for the exercise of the employer's powers[64], confining the *ad nutum* withdrawal to narrow areas[65] and imposing not only a comparison between the employer and the provider, but a close dialogue with the judge, in searching of the legitimate reasons for the withdrawal[66].

It was precisely this law that introduced for the first time the obligation to state reasons on the part of the employer and the burden of proving the justified reason, establishing the principle according to which, to be legitimate, individual dismissal had to be not only preceded by notice, but supported by a justified reason, the non-existence of which could be asserted in Court by the worker[67]. The minimum requirement of legitimacy of the dismissal therefore becomes the justified reason, which requires notice, and a particular subspecies of it, the just cause, which takes the form of a justified but "aggravated" reason, so serious as to exonerate the employer from the obligation to give notice. Despite being born with an implicit reference to corporate logic, Article 3 actually concerns any employer[68], regardless of its nature. The introduction of the rule said above has also aligned the Italian legal system with supranational principles: such as those contained in the Articles 24 of the European Social Charter (which recognizes the right of workers dismissed without valid reason to adequate compensation) and 20 of the Nice Charter (which provides for the right of every worker to protection against unjustified dismissal in compliance with community law and national legislation and practices)[69], which therefore ensure the right to protection against any unjustified dismissal[70].

Dismissal, therefore, remains an expression of individual authority and autonomy, since it has the effect of terminating the employment relationship by virtue of a unilateral determination[71]. Article 3, therefore, only partially attenuates this power, limiting it to specific cases.

64 Similarly F. Carinci, *Diritto privato e diritto del lavoro: uno sguardo dal ponte*, in Aa. Vv., *Il lavoro subordinato*, F. Carinci (a cura di), I, *Il diritto sindacale*, G. Proia (coordinato da), Giappichelli, Torino, 2007, LXXXV ss.

65 See A. Boscati, *I regimi di tutela contro il licenziamento illegittimo*, in S. Mainardi (a cura di), *Il rapporto individuale di lavoro: estinzione e garanzie dei diritti,* Giappichelli, Torino, 2007, 266 ss.

66 E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani, F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 289.

67 Similarly, R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 686.

68 See E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani, F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 290.

69 A. Boscati, *Il licenziamento disciplinare nel contratto a tutele crescenti*, in *Dir. rel. ind.*, 4, XXV, 2015, 1038.

70 Similarly R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 687.

71 E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani, F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 296.

3.2. Historical evolution

The historical development concerned, in particular, the consequences of the illegitimate dismissal for justified subjective reason and just cause.

With Article 18 of law no. 300/1970, the legislator initially clearly favored the interests of the worker, establishing the invalidity and unfitness of unjustified dismissal to terminate the employment relationship. This regulation, however, until 1990, could only be applied to companies with more than 15 employees, while law no. 604/1966 was still applied in other cases.

In 1990, in fact, law n. 108 introduced the obligation to justify the dismissal also for small businesses, therefore for all the entrepreneurs who have less than 15 employees. However, in such cases, the dismissal will still be valid, and will only entail compensation protection similar to that provided by Law no. 604 for dismissal without just cause or justified reason[72].

In order for this rule to have real confirmation in the behavior of employers, it was necessary, however, that unjustified dismissal must be heavily sanctioned by the law, through strong protection such as reinstatement in the workplace provided for by the Article 18 of the Law. 300/1970. Despite that, in 2012, following a rewriting of the Article 18 of the Workers' Statute by Law. 92/2012 (so-called Fornero reform) the protection of reinstatement has been limited only to some situations and replaced in others by compensation protection. The reform, in fact, aimed to create an inclusive labor market, more equitably redistributing employment protections.

The reformed text of Article 18 does not modify the meaning of just cause and justified subjective reason contained respectively within the Articles 2119 c.c. and 3 of the '66 Law. What has changed, however, is the sanctioning regime in the event of illegitimate dismissal[73]. While initially there was a single sanction, consisting of real protection, it later moved to a graduated regime which introduced four decreasing sanctions.

For null dismissals, the real protection remains valid. The so-called "attenuated" or "weakened one"[74] is aimed at the cases envisaged by paragraph 4 (two cases, as regards the justified subjective reason: non-existence of the disputed fact and conduct punishable with a conservative sanction on the basis of the provisions of the collective agreements or of the applicable disciplinary codes), the full indemnity protection is the sanction foreseen for all other cases of justified reason, while the reduced indemnity protection remains valid for illegitimate dismissals for formal or procedural violations. Finally, three years later, the Jobs Act (Legislative Decree of 4 March 2015) established a still new regime for illegitimate dismissal, aimed at relaunching the permanent contract as the dominant contractual form[75].

72 See G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 427.

73 For further explanations see C. Pisani, *Il licenziamento disciplinare: novità legislative e giurisprudenziali sul regime sanzionatorio*, in *Arg. dir. lav.*, 1, 2015, 97 ss.

74 See M. T. Carinci, *Il lavoro al tempo della crisi*, Relazione XXVII Congresso AIDLASS (Pisa 7 – 9 giugno 2012) e A. Maresca, *Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche all'art. 18 Statuto dei Lavoratori*, in *Riv. it. dir. lav.*, 2012, 1, 436 e ss.

75 R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 689.

3.3. Current regulation

The justified reason, governed by Article 3 of the aforementioned law of 1966 includes within it two classes of facts: the first one is related to "reprehensible" behaviors of the worker (justified subjective reason), while the second refers to facts resulting from company decisions regarding a reorganization of the company itself (justified objective reason)[76]. Dismissal for justified subjective reason, relating to the first of these classes, consists of a significant failure to fulfill contractual obligations[77].

Disciplinary withdrawal originates from disciplinary power, which has its basis in the contract and, more specifically, in subordination. In this form of withdrawal, the employer's power of personal and direct reaction emerges, with the provision of consequent specific procedures[78]. Whenever the employer intends to fire a worker for a non-fulfilment of the same, he will have to carry out the procedure provided for by the Article 7 of the Workers' Statute (L. 300/1970). Failure to carry out this procedure will constitute an incurable defect which will therefore lead to the illegitimacy of the requested dismissal[79].

The contractual obligations mentioned in Article 3 can derive from rules of various kinds: from those contained in the Civil Code to those present within collective and individual contracts. Such behavior very often takes the form of prolonged unjustified absence from work, violation of company safety measures, or damage to company machinery, or even serious insubordination towards superiors.

As specified in the text of the Article, in addition to a breach occurring, it must also be "considerable", there must be, therefore, an objective gravity of the act committed, which cannot be punished with a classic conservative sanction, such as a fine or suspension.

The difficult evaluation and verification of the seriousness of this breach is left to the judge, who will have to take into account the types of justified reason that are contained in the collective labor agreements stipulated by the comparatively more representative unions and the individual contracts if stipulated with the assistance of the commissions of certification, as stated in the Article 3 co. 3 of Law no. 183/2010 (which implemented a traditional direction of jurisprudence)[80], as well as any code of ethics present in the company. The judge, obviously, will not be bound by these typologies. Indeed, he can recognize a justified reason even when a fact is not foreseen by the CCNL, as well as deeming a less serious sanction than that contemplated by the CCNL (but not a more serious one), also considering the subjective state in which the behavior was implemented and the practices adopted in some company contexts, which may have always been particularly tolerant towards certain behaviors, so as to act as a mitigating factor with respect to the worker's conduct[81].

76 See *Ivi*, 693.

77 Article 3, Law 15 july 1966, No. 604.

78 Similarly E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani, F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 303.

79 Cass. 23/10/00, n. 13959; Cass. S.U. 1/6/87 n. 4823; Cass. 7/7/04 n. 12526; Cass. 7/9/93 n. 9390; Cass. 4/3/93 n. 2596.

80 R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 694.

81 *Ivi*, 695.

To establish whether this notable breach occurs in the specific case, it was noted that the most valued aspect is precisely the subjective element, therefore the degree of intensity [...] of the fraud or fault, the objective irregularity not being considered sufficient[82]. In fact, it will be up to the employer to prove the psychological element[83], and therefore the existence of a serious denial of the essential elements of the relationship, also with reference to the concrete aspects of the same, the extent of the fact, the reasons[84]. He, therefore, will not only have to demonstrate the non-compliance, but will have to prove that this is significant and likely to lead to dismissal[85].

Article 2119 of the Civil Code completes the category of dismissals for subjective reasons by providing for dismissal for just cause, i.e. dismissal without notice and determined by a behavior of the employee which breaches his/her disciplinary obligations and it, so serious as to not allow the continuation of the employment relationship.

This rule, as already mentioned, does not contain a notion of just cause, but only regulates the effects of "in tronco" dismissal: therefore the immediate termination of the employment relationship and the absence of notice. The characteristics that primarily identify it are the seriousness of the fact that determines it and the immediacy of the termination of the employment relationship. As reiterated by the Supreme Court, in fact (Cass. 10 September 2003 n. 13284) these would be cases in which any other sanction would be insufficient to protect the employer's interest. What constitutes the extremes of just cause, therefore, is a very notable failure to fulfill the worker's contractual obligations, so serious as to irreparably damage the bond of trust between employer and provider, and so as to justify immediate expulsion from the company[86]. Just cause, therefore, has often been described as a breach similar to that which integrates the extremes of the justified subjective reason, but identified by a greater gravity, capable of instantly breaking the fiduciary relationship. In other words, a justified reason characterized by its extent and severity makes the relationship impossible to continue even temporarily[87] .

The determination of the seriousness of the behavior is left to the judge's discretion, who can, also in this case, as in the justified subjective reason, make use of the indications of the CCNL to be able to classify a specific case in one or the other category and evaluate even more carefully the intensity of the intent or fault that motivated the conduct.

Doctrine and jurisprudence, however, have actually developed two theses relating to what is meant by just cause[88]. According to the first, in fact, only the very serious breach of duty by the employee (such as failure to comply with the smoking ban in a room containing highly flammable materials) is relevant. The second thesis, on the other hand, which is also prevalent, gives rise to a notion of just cause (sometimes called "objective just cause") that can be found in any other fact or act that cannot be included in contractual obligations, and therefore do not pertain to the performance of work but to the employee's individual sphere and thus to his

82 See C. Pisani, *I licenziamenti individuali: le fattispecie: giusta causa e giustificato motivo di licenziamento*, in M. Bessone (a cura di), *Trattato di diritto privato*, Torino, Giappichelli, 2007, 113 ss.

83 Cass. 9/9/2003, n. 13188, in *Gius*, 2004, 671; Cass. 14/1/2003, n. 444, in *Arch. Civ*. 2003, 1237.

84 Cass. 14/7/2001, n. 9590, in *Orient. Giur. lav*., 2001, I, 822.

85 E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani, F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 335.

86 R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 695.

87 G. Pera, *La cessazione del rapporto di lavoro*, Cedam, Padova, 1980, 70 ss.

88 G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 421.

private life, and which are nevertheless attributable to reprehensible conduct of such gravity as to irreparably damage the trust that the employer should place in his employee[89]. In short, just cause would not only coincide with the failure to fulfill the obligations of the contract, it would also include events or behaviors outside the sphere of the contract and perhaps objectively lawful, but such as to undermine the relationship of trust[90].

An example of such conduct is that of a bus driver who is discovered to be habitually consuming drugs. Precisely this type of just cause can give rise to controversies, finding ourselves faced with behavior that does not relate to performance, but falls within the sphere of the worker's private life.

As regards public workers, with Legislative Decree 116/2016 (adopted in implementation of article 17, paragraph 1, letter s of law 124/2015 on the reform of the P.A.) rules on the matter have been introduced of disciplinary responsibility of public employees. In particular, the provision modifies article 55-quater of Legislative Decree 165/2001. Subsequently, Legislative Decree 75/2017 also intervened on the matter, introducing further changes to the article and introducing some specific cases of disciplinary dismissal, for example that in the case of serious and repeated violations of the codes of conduct, inefficiency or poor performance in a period of no less than two years, due to repeated absenteeism of the public employee from work or repeated negative performance evaluation over the last three years.

Thus, disciplinary dismissal occurs whenever the dismissal is motivated by behavior attributable to the worker's fault, with the consequent application of Article 7 of the Workers' Statute in its first 3 paragraphs.

This entails the fact that every time the employer intends to dismiss a worker following his non-compliance, he must, within the terms prescribed by the aforementioned Article 7, first of all, dispute the charge and guarantee the worker's right of defence, and only subsequently, dismiss him for the disputed disciplinary reason[91].

Among the legitimacy requirements for disciplinary dismissal, therefore, the non-compliance stands out, which can be notable or very serious, integrating the cases of justified subjective reason or just cause, the timely notification of the charge and the immediate imposition of the sanction, the lack of which corresponds, on the contrary, to a renunciation of the exercise of disciplinary power.

In case of unjustified dismissal, Law no. 604 of 1966 had provided in Article 8 the condemnation of the employer to rehire the worker, or to pay him compensation which ranged from a minimum to a maximum monthly salary based on the number of employees hired in the company, the length of service of the worker and the behavior of the parties.

With Legislative Decree no. 23 of 2015, entitled "Provisions regarding fixed-term employment contracts with increasing protections", the legislator actually limited himself to

89 As also the commission of criminal acts, if they are of such a nature as to affect credit expectations, Cass. 17/2/2015, n. 3136.

90 G. F. Mancini, *Il recesso unilaterale e i rapporti di lavoro. II. Il recesso straordinario – Il negozio di recesso*, Giuffrè, Milano, 1962-1965, 45 ss

91 See G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 426.

redefining the protections in the event of illegitimate dismissal[92], however placing himself in line with the modus operandi of the Fornero Law[93].

The Legislative Decree recognized financial protection as the common sanction in the event of unjustified dismissal, leaving reinstatement as an exceptional case.

In the so-called contract with increasing protections, in fact, economic compensation now plays a central role (calculated automatically and in proportion to the increase in the length of service of the worker, hence the name), while the restorative protection is confined to residual hypotheses. Protection is in fact only "mandatory" for the so-called smaller companies, and, in the presence of certain conditions, also "real" for the larger companies[94].

In the event of a dismissal without just cause or justified subjective reason, the judge declares the relationship terminated and condemns the employer to pay an indemnity, thus maintaining the function of expelling the worker from the company[95]. This regime was declared applicable only to workers hired on a permanent basis starting from 7 March 2015 (the date on which the law came into force), while for the others, the regime was based on Article 18 of the Statute and 8 of the 1966 law.

Precisely for these reasons, in the Italian legal system there is currently a double regime regarding the consequences of illegal dismissal[96].

This decree was subsequently modified by the so-called "Decreto Dignità" (Legislative Decree no. 87 of 2018, converted into Law 96 of 2018) which raised the protection thresholds against unjustified dismissal in large companies, bringing them from the original 4 at the minimum, to 6, and from 24 to 36 in the maximum.

Currently, therefore, there are two distinct parallel disciplines depending on whether the dismissal concerns a worker hired before or after 7 March 2015.

In detail, for workers hired with a permanent contract before 7 March 2015, protection in the event of dismissal for justified subjective reason or for just cause communicated by an employer who exceeds the size thresholds established by Article 18 of the statute (i.e. having a production unit with more than 15 employees, or more than 5 in the case of an agricultural entrepreneur, or more than 60 employees in total) will be that provided for by the same Article 18, which contemplates the possibility of the reinstatement of the worker in the event of non-existence of the disputed fact or dismissal ordered for a fact which falls within the sanctions punishable with a conservative sanction. For dismissal ordered by the employer who is below these thresholds, however, the protection regime provided by Article 8 of the '66 law is applied, as amended by Article 2 of law 108/1990, which therefore only recognizes financial compensation for the illegitimately dismissed worker.

92 A. Boscati, *Il licenziamento disciplinare nel contratto a tutele crescenti,* in *Dir. rel. ind*., 4, XXV, 2015, 1032.

93 *Ivi*, 1033.

94 *Ivi*, 1036.

95 G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 433.

96 R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 690.

For workers hired starting from 7 March 2015 with a permanent contract, however, the illegitimacy of disciplinary dismissal due to lack of justified subjective reason or just cause will be protected under the Legislative Decree no. 23/2015. The new regulation maintains the distinction between employers above the threshold and those below.

However, the 2015 Decree provides, in its article 3 entitled "Dismissal for justified reason and just cause" that in the event that it is ascertained that the conditions for dismissal for justified subjective reason or just cause do not apply, the judge declares the employment relationship on the date of dismissal and orders the employer to pay an indemnity not subject to social security contributions of an amount equal to two months' salary of the last reference salary for the calculation of severance pay for each year of service, in any case not less than six and not more than thirty-six monthly payments. In this first part of the article the so-called "increasing protection" is therefore substantiated. That Article then maintains (in paragraph 2) the residual cases of the worker's reinstatement exclusively in the cases [...] in which the non-existence of the material fact alleged against the worker is directly demonstrated in court, with respect to which any evaluation remains extraneous relative to the disproportionality of the dismissal". Only in such cases, therefore, the judge cancels the dismissal and orders the employer to reinstate the worker in the workplace and to pay a compensation commensurate with the final reference salary for the calculation of severance pay, corresponding to the period from the day of dismissal to the day of actual reinstatement adding that both *l'aliunde perceptum sia l'aliunde percipiendum*[97] must be deducted from the amount of compensation therefore deducting how much the worker received for carrying out other work activities, as well as how much he could have received by accepting a suitable job offer pursuant to Article 4, paragraph 1, letter c), of the legislative decree of 21 April 2000, no. 181, and subsequent amendments.

Finally, the article specifies that in any case the amount of the compensation relating to the period prior to the reinstatement cannot be greater than twelve months' salary of the final reference salary for the calculation of the severance pay. The employer will also be condemned to pay social security and welfare contributions from the day of dismissal until the day of actual reinstatement, without applying sanctions for failure to contribute[98].

The reference to the notion of "disputed material fact"[99] has raised many interpretative doubts[100]. The doctrine, in fact, has sometimes understood this fact as a fact as described in the dispute regardless of its legal qualification, other times - as confirmed by the Corte di Cassazione (8 May 2019 n. 12174) – with the conduct integrating the notable or very serious breach alleged against the worker, a fact which therefore has disciplinary relevance. Furthermore, according to authoritative doctrine[101], the very literal clarification according to

97 A. Boscati, *Il licenziamento disciplinare nel contratto a tutele crescenti*, in *Dir. rel. ind.*, 4, XXV, 2015, 1044.

98 Article 1 comma 3 of the Decree, further states that in the event that the employer, as a result of open-ended recruitments occurring after the entry into force of the present decree, fulfils the employment requirement set forth in Article 18, paragraphs 8 and 9, of Law No. 300 of 20 May 1970, as amended, the dismissal of workers, even if they were hired prior to that date, is governed by the provisions of the present decree.

99 See also A. Boscati, *Il licenziamento disciplinare nel contratto a tutele crescenti*, in *Dir. rel. ind.*, 4, XXV, 2015, 1046.

100 G. Santoro-Passarelli, *Diritto dei lavori e dell'occupazione*, Giappichelli, Torino, 2022, 435.

101 *Ibidem.*

which the fact must be "disputed" implies that it was committed by the worker and thus can, at the very least, be attributed to him. Otherwise, in fact, an expulsion act based on the truth of a fact that is not relevant under the disciplinarity aspect could be considered abstractly valid. Article 3 paragraph 2, therefore, simply punishes more harshly the employer who is incapable of proving the existence of the disputed breach by reinstating the worker.

In the case of violation of timeliness, unlike the non-existence of the disputed material fact, the violation will be of purely procedural nature, except in the case in which the delay is so excessive as to constitute unjustified dismissal.

Finally, it must be noted that the same Article 3 paragraph 2, itself, mentioned above specifies that any assessment relating to the disproportionality of the dismissal remains irrelevant. The legitimacy of the measures presupposes, in fact, in theory, their proportion[102], with a direct review by the judge. In fact, he will have to ask himself whether there is proportion in the connection between the behavior of the lender and the measure that was applied[103]. This statement implies, despite this, that a disproportionate dismissal will remain illegal, and will not be sanctioned with reinstatement, but only with the payment of an indemnity for those workers who were hired after 7 March 2015.

Furthermore, it is noted that dismissal is not prevented for behavior for which the code imposes a conservative sanction, if there is a serious reiteration of that behavior and the consequent punitive measures[104], given that otherwise the same would be of no relevance if they could never lead to the employer's withdrawal.

The regulation of the Jobs Act, as mentioned, has also undergone changes, first through Legislative Decree 87/2018 through the increase in the minimum and maximum compensation allowances[105] and then by judgement no. 194/2018 of the Constitutional Court, which deemed the automatic calculation of allowances illegitimate, entrusting the judge with the task of determining it[106].

Lastly, it should be noted that the Corte di Cassazione, in judgment no. 11665 of 11 April 2022, established that reinstatement is also applicable for conduct not typified by the CCNL, but provided for by general or elastic clauses. Therefore, in order to select the applicable protection among those provided for by Article 18, paragraphs 4 and 5 of Law no. 300/1970, it established that the judge is allowed to subsume the conduct in the contractual provision that punishes the offence with a conservative sanction. This is so even when such provision is expressed by general or elastic clauses.

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102 E. Gragnoli (a cura di), *L'estinzione del rapporto di lavoro subordinato*, in M. Persiani, F. Carinci (diretto da) *Trattato di diritto del lavoro*, v. V, Cedam, Padova, 2017, 337.

103 *Ibidem.*

104 S. Mainardi, *Il potere disciplinare nel lavoro privato e pubblico. Art. 2106*, Giuffrè, Milano, 2002, 337; For the opposit thesis, E. D'Avossa, *Il potere disciplinare nel rapporto di lavoro*, Giuffrè, Milano, 1983, 112 ss.

105 These allowances, as mentioned, were increased from 4 to 6 months' salary in the minimum, and from 24 to 36 months' salary in the maximum.

106 R. Del Punta, *Diritto del lavoro*, Giuffrè, Milano, 2023, 690.