Dispute settlement procedures and flexibilisation of employment relations: remedies against unfair dismissal under Italian law.

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SUMMARY: 1 - Dismissal Law and the principle of justification. 2 - The remedies against unfair dismissals under Italian law. 3 - Flexibility in the labour market and the reform of Dismissal Law. 4 - Arbitration as an alternative to judicial procedures

1. It is now thirty six years since the passage of Act n. 604, July 15, 1966, which expressly sets forth, inside clear limits of application, the procedural and substantial requisites to the legitimacy of dismissal of a worker, added a major piece to the edifice of Italian law. It is ten years (Act n. 108, May 11, 1990) since the principle of justification of dismissal was extended to all employers, regardless of the nature of activity pursued (profit/non-profit) and of the number of workers employed.

Within the ambit of supranationality, on the other hand, and leaving aside the debate over the binding power of the Charter of Fundamental Rights of the European Union adopted at Nice, the Italian Parliament has recently ratified the European Social Charter (revised), in the version amended in 1996 by the European Council, which, despite the extraneous position of the European Council vis-à-vis the institutional structure of the European Union, took effect in all Member States - except the United Kingdom - on September 1, 1999. Art 24 of said Charter commits all the signatory States to set forth tests to the legitimacy of dismissal and the possible remedies against unjustified dismissal. Such provision reflects the widespread recognition inside the European Legal Systems that only such dismissals as are clearly exclusive of merely arbitrary intent may claim to be justified.

1 Article 30 - “(Protection in the event of unjustified dismissal). Every worker has the right to protection against unjustified dismissal, in accordance with Community Law and practices”. On the specific issue of the legal nature of the principles entrenched in the Nice Charter see EU Commission Communication, comm. (2000) 644.

2 Article 24 - “(The right of workers to protection in cases of termination of employment). With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service, b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief”. 
Such notion is entrenched in the Italian legal system in the provision stating that individual dismissal is only valid on the ground of “just cause” (art 2119 of the Civil Code), that is, in case of a happening so grave as to justify immediate dismissal, or on the ground of “justified motive”, qualified as a “signal breach of contractual duties”, or on economic and/or organisational grounds (art 3 of Act n. 604/1966) which, instead, are subject to notice.

In case of redundancy dismissals, that is, under Italian law, where more than five workers are dismissed within the ambit of a restructuring plan of the business, the oversight of the requisites to the cutback, in accordance with a European Directive, is entrusted to an informative and consultative procedure with the Unions, where the justification of each individual dismissal is screened by the necessary application, by the employer, of such broad and abstract criteria as are set down in collective bargaining agreements or, in their absence, as are laid down by law.

Whereas the principle of submitting decision to dismiss workers to a set of procedural and substantial tests has come to be broadly accepted by all parties concerned, the issue of remedy in case of unfair dismissal, instead, has proved to be a much more sensitive - and still highly controversial - point.

It comes as no surprise, therefore, that the on-going debate in Italy, which came to a head recently in the wake of the proposal of the government, currently under discussion, now focuses exclusively on the reform of remedy in case of unfair dismissal as provided by art 18 of the Workers’ Rights Statute, although the fact that dismissal, in itself, should be subjected to oversight by an external and unbiased body was never challenged.

2. On that score, it should be noted that, under Italian law, remedies in case of unfair dismissal vary according to the number of workers employed.

In smaller enterprises - less than 15 workers in a plant or in several producing facilities located inside a single municipality or, at all events, not more than 60 workers nation-wide, provided each plant does not employ more than 15 workers - remedy provided for by law consists in the obligation to re-hire the worker, though the employer may be discharged from such obligation upon payment to the worker of such compensation as shall remedy the damage incurred from loss of employment. Such compensation is scaled by law within a preset minimum and maximum, according to specific parameters.

Put briefly, in smaller enterprises, dismissal without justification although unfair, it nonetheless terminates employment relation: hence, it is that very fact which causes the damage to be remedied.

In larger enterprises - which account, in Italy, for roughly one-fifth of all enterprises and for just over 25% of overall workforce in the private sector - unfair dismissal, instead, is held as voidable.

Voidability is affirmed by that very art 18, Act 300/1970, which sentences the employer to the reinstatement of the worker and to the payment of compensation for
the damage suffered from unfair - though temporary - loss of job. Under the law, the amount of such damage “may not be inferior to five months remuneration”.

Should the employer fail to fully and immediately reinstate the worker into his job, the latter has the right to “a compensation equal to full remuneration as from the date of dismissal and up to the date of effective reinstatement”

Discriminatory dismissal on the basis of race, sex, religion, political or union affiliation is null and void and remedy in similar cases, regardless of the number of workers employed - therefore, inclusive of enterprises with less than 15 workers - is reinstatement, as laid down under art 18.

With the application of the principle that dismissal must be justified increasingly prevailing in the examination of all such cases, and leaving aside the odd and more despicable cases of blatant discrimination, the number of workers employed stands out as basically the sole test that determines the type of sanction: merely compensatory, in cases involving smaller firms but substantially restitutive in cases involving larger firms, and with the clear scope of ensuring continuity of the employment relation, in absence of valid ground justifying its discontinuance.

More to the point, the specific scope, as under art 18 of the Workers Rights Statute, is to protect the interest - as of one of the contracting parties against the determination of the other - to permanence in time and in its operational vitality of the contractual bond, construed as being in itself a property right.

The set of sanctions that includes the injunction of reinstatement and the obligation to provide compensation which, as the law expressly lays down, carries the obligation to pay the worker the full remuneration accrued from the date of dismissal up to the date of reinstatement, compounded by the obligation to pay the social security contributions accrued over the same period of time, clearly shows that the intent is to reinstate what has been defined as the “de facto functionality” of the employment relation.\(^3\)

The scope pursued by the law in such case moves beyond the mere - though nonetheless fundamental - reinstating of the obligatory bond, in so far as the purpose of the injunction of reinstatement is nothing short of the operative resumption of cooperation between the parties, with a view to protecting the specific interest of the worker in his reintegration inside the corporate structure and in the performing of his tasks.

By such definition, effective and full satisfaction of the worker’s interest becomes the subject-matter of a property right true and proper.

On that point, it is worth underlining the fact that the adoption of reinstatement as a sanction for unfair dismissal is by no means peculiar to Italy and to a handful of other lesser countries inside the European Union. If anything, the peculiarity of art 18 lies rather in the hard-and-fast application of reinstatement as remedy to unfair dismissal and in the absence of other avenues which such inflexibility implies.

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An enduring passion for comparative labour law has not left me unaware of the dangers of establishing correspondences between features isolated from the broader respective contexts in which they are inserted, but it is worth mentioning the fact that in the Federal Republic of Germany the reinstating of the worker unfairly dismissed into his employment relation is the prevailing rule of law.

Admittedly, the law also authorises the employer to represent, even in case of unfair dismissal, the impossibility to return to the conditions before the fact as conducive to a “further and fruitful collaboration between the parties”. Where convincingly represented, such impossibility may induce the judge to opt for compensation as remedy.

In France, instead, the sanction applicable to firms employing more than 11 workers and in the case of a worker with more than two years’ continuous service is left to the discretion of the judge, who may opt between reinstatement or payment of compensation. Payment of the latter, however, is obligatory where either the employer or the worker refuse reinstatement.

In the United Kingdom reinstatement or re-hire to carry out tasks comparatively similar to those previously carried out by the worker are the main remedies to unfair dismissal, the decision between the two types of sanction being left to the determination of the judge. Should re-employment prove impracticable owing to the refusal of the employer to take back the worker, the latter is entitled, on top of the compensation for unfair dismissal, to an additional award for not being re-employed.

The prevailing intent of protection of a worker’s job, in Italy, however, is the protection of the worker as person.

This intent somehow relegates in second position the general intent to secure full employment, a scope which, typically, is entrusted to a class of instruments different from the strictly regulatory class, notoriously more adapted to enforce rights and duties determined by Courts of law than to shape up grand policies for economic growth.

From that standpoint, the complex system of sanctions hinging on the notion of job property stands out as probably the more relevant aspect of the implementation of the Constitution of 1948, where the provision of art 4 directing the State to ensure such conditions as shall make the right of all citizens to exercise an occupation effective is inextricably linked to the superior principle of the protection of human dignity (art 2).

In the debate over the rigidity of the job protection system, which is accused of preventing the development of new forms of occupation based on such trainings and flexible configurations as render them more adapted to fast-changing times, some scholar has gone so far as to foreshadow a conflict with the principle laid down under art 4 of the Constitution.

ICHINO, Il lavoro e il mercato, Milan, 1996.
On that point, it is interesting to note how studies and critical essays on the current system move into considerations on the degree of efficiency of our labour market.

Arguably, one can harbour doubts about the soundness of a system that forcibly keeps on the job workers who do not have - or no longer have - the qualifications needed by the market and, by so doing, prevents other workers, at times possibly even more meritorious, from finding work.

Another view, which lies more open to criticism because it is inspired by scenarios to a large extent already disproved by latest data on the increase in the rate of employment in Italy over the last year, claims that the mere reduction of checks to the power of employers to dismiss workers would set in motion an harmonious evolution of the labour market with positive *self-generated* effects on employment.

There is no evidence to back up such view and, from the theoretical angle, the notion that there could be a causal relation between the loosening of dismissal procedures and the lowering of unemployment rate rather stretches belief.

In Germany, the policy of lawmakers aimed at encouraging employment by loosening dismissal rules had so little impact on the market that it prompted them, in 1998, to go back to the previous system of protection against unfair dismissals.

In Italy, the introduction of new rules aimed at facilitating the laying off of workers is likely to fuel the creation of new jobs and to put back to work substantial numbers of jobless. But the overall result would amount to little more than a shift between employed and jobless.

As new hires would be offset by new layoffs, this piecemeal solution, in absence of a comprehensive reform of the labour market, would compare unfavourably, in terms of higher consistency of the reformed system, with the general constitutional framework.

3. It is inside this broad context, and in order to better grasp their import and shortcomings, that one should view the changes in the labour market proposed by the Italian government, inspired by the *White Paper on the Labour Market in Italy*, published in October 2001, by the Ministry of Welfare and containing the findings of a Commission of experts, among whom Marco Biagi stood out as the indefatigable and unrivalled animator.

In point of fact, the Bill submitted to Parliament only reflects in part the policy urged by the White Paper, and which purports to be in line with the guidelines and directives of the European Union.

In particular, the first steps taken by the government to overhaul dismissal rules and procedures seemed to show poor awareness of the fact that a policy of in-depth reform only has a chance of getting through if it is capable of building up broad consensus around it. Hence, the finding of a consensus requires an equidistant position between social forces and the involvement of unions in discussions and consultations over the project.
Initially, instead, the Italian Government - and the majority which supports it - moved aggressively to overhaul art 18, pretty much in a Thatcher-like way, wholly out of sync with the times and the context of Italy’s industrial relations and with a view to drive a wedge between unions and isolate the main trade union from the others.

Inevitably, the clash between diverging positions, considering the highly sensitive nature of the issue, led to radicalisation and threatened the social cohesion of the country, in sharp contrast with the modesty of the scaled-down project of reform which then came to be approved, at least standing by the official declarations of intent of the government.

The contents of the project is a watered-down version of the initial intent of the Government and is the result of a bargain struck with two of the principal trade unions, the CISL and the UIL, while the CGIL, which is by far the largest union in Italy - in terms of membership and votes totalled at elections for work councils - rejected the project.

According to the terms of the accord, application of art 18 shall be suspended for a three-year trial period for enterprises where the number of workers, in the course of said period, shall go above the ceiling of 15 as a result of new hires. Technically, all such new hires shall remain outside the range of application of remedies in case of unfair dismissal.

In reality, data available render such scheme rather improbable. According to a recent survey conducted by Confindustria (Confederation of Italian Industry), the vast majority of Italian enterprises either employ about 10 workers or well over 15, the floor number set by art 18 itself.

These findings are further confirmed by a recent research conducted by a pool of Italian economists which forecasts for the next three years an increase in employment rate fuelled by the experimental accord (estimated at 600,000 new permanent contract jobs) which shows little relevant variations in the current trend of employment now well into its second year.

However, since the number of workers employed in enterprises with more than 15 workers - that is, where art 18 is, and will remain, in force - stands at roughly below 6 million, more than 10% of that number shall fall, upon expiry of the three-year experiment, under a job protection system more differentiated - and weaker - than the one enjoyed by the other workers.

Arguably, such situation would be at odds with the respect of the constitutional principle of equality and, above all, would almost inevitably lead to legal wrangles over the fate of the workers hired during the three-year experiment should the old system be reintroduced upon expiry of the experiment.

In reality, the major flaw of the system, in relation to the absence of alternative to reinstatement, is the arbitrariness of the threshold - more or less than 15 workers - that determines eligibility to one rather than another protection scheme.

6 Data available on www.lavoce.info
For that reason, the taking into account of the overall situation of the enterprise and the inclusion of other parameters, and not only of the number of workers, would prove a more sensible and appropriate solution.

Such was the scope of a project of reform of art 18 presented by Tiziano Treu – former Minister of Labour in the past Government - in 2000, which aimed to differentiate remedies against unfair dismissal according to not only the number of workers and the economic and financial situation of the enterprise, but also according to the specific climate of the local labour market (inspired by such legislation in Austria), seniority, social standing of the worker and overall comportment of the parties prior to dismissal and during judicial proceedings.

4. It is easy to object to such proposal that the extension on a sliding scale of the range of remedies would increase the margin of uncertainty of dispute settlement and would thus undermine the certainty vested in the rule of law.

It is with a view to ensuring the latter that consensus-seeking instruments to dispute resolution - in particular, arbitration - have been put forward, as such schemes would vest the power to decide the type of remedy to be applied in an appointed body which, owing to its structure and composition, should safeguard the interests of both parties.

I, personally, share the opinion of those who believe that arbitration opens up new prospects to labour market legislation.

Although aware of a possible inconsistency with art 24\(^7\) and 25\(^8\) of the Constitution, I recently put forth the idea of a “binding” recourse to arbitration schemes as a means to dismissal dispute resolution, provided such avenue should be expressly directed by collective bargaining and, above all, should, naturally, not outreach its authority in case of violation of rights placed under the rule of law\(^9\).

On this point, it should be noted how arbitration procedures for labour dispute resolution have been undergoing sweeping changes for some time since and that the issue at hand offers a major ground to put them to the test.

The growing role played by out-of-court dispute resolution, which led to some substantial modifications to the *Code of civil procedure*, is part of a reform which makes access to arbitration subject to the condition that it be expressly provided for by collective bargain agreements and that the latter include specific rules of operation, in particular as regards composition of the board, mode and timeframe for reaching and issuing of award (art 412-ter).

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\(^7\) Article 24 - “(Right to be Heard in Court), (1) All may bring a case before a court of law in order to protect their rights under civil and administrative law. (2) Defence shall be an inviolable right at every stage and instance of legal proceedings. (3) The poor shall be entitled, through special provisions, to proper means for action or defence before all courts. (4) The law lays down the conditions and means for obtaining reparation for judicial errors”.

\(^8\) Article 25 - “(Defendant’s Rights). (1) No one’s case shall be removed from the court that must hear it, as pre-ordained by law. (2) No one shall be subjected to security measures save in such cases as are laid down by law”.

Such set rules being naturally intended to ensure the transparency and authoritativeness of the procedure and to safeguard further impartiality of decision.

The crucial and more controversial point of the question remains the absence of any specific provision at law regarding the possible invalidity of the award.

In particular, views diverge on whether, in case a decision should stand in violation of articles of law or of a collective bargain accord, there is valid ground to make recourse against the award.

Opinions on this range from those who hold that the award may be challenged for either breach of the law or of collective bargain accord, on the ground that the broad reference under art 412-quater of the Code of civil procedure with regards to “dispute over validity of contract” should authorise recourse to the Tribunal whatever the reason for which the award is held as invalid, to those who believe, instead, that the issuing of award is not subject to oversight to verify compatibility with rules at law, and who envision a form of arbitration inspired by the sole notions of equity.

Oddly enough, and despite their diverging opinions, each and everyone contends that his solution is the only one which, in conformity with the intent of lawmakers, is capable of furthering arbitration as the foremost avenue to out-of-court dispute resolution.

Some believe that an alternative system to judicial proceedings could only succeed if it ensured full discretion of a subsequent oversight of dispute settlement by the magistracy.

Others, instead, view the reform and, in particular, the abrogation of any such previous provisions setting forth specific grounds on which to challenge an issue of award as are extraneous to arbitration practices (as invalidity of award where it is inconsistent with collective bargain accord), as a means to entrench the authority of dispute settlement, which, to this day, remains uncertain owing to the too great number of possible causes of invalidation of awards.

Between these two extremes, still others think that dispute settlement may be challenged only in case of such breach as would invalidate, under the rule of law, any form of contractual act.

For the record, I must stress the fact that the original version of the Bill of the Government, in line with specific recommendations contained in the White Paper, seemed intent on considering arbitration as the linchpin to flexibilisation of the protection system.

The whole project was subsequently abandoned, on the motive that further studies were necessary. Provided parties move beyond the current climate of hostility and the Government recognises the fundamental role of consensus-building consultations with trade unions, such re-examination of the project might be an opportunity to place emphasis on alternative instruments to labour dispute resolution.

Such course would have a two-pronged result: on the one hand, it would relieve judiciary of some of its workload, a welcome step towards cutting down the notoriously overlong time of proceedings which plagues our system.
On the other hand, it would contribute to the flexibilisation of a system of protection against unfair dismissals capable of addressing diverse situations, adopting such remedies as best meet the cases and inside of a negotiation between parties firmly committed to conciliate corporate exigencies and respect of the rights of the worker.