

PREMISE

This short piece deals with causes of termination of the employment relationship in the Italian legal system.

It does not deal with any of the causes of termination of relationships of collaboration not having the nature of employment.

In that regard, it is necessary to specify that employment (“*subordinazione*”) means the placing of the employee’s psycho-physical energies at the disposition of the employer and, according to the notion elaborated by the caselaw, consists of the employee being subjected to both the employer’s managerial power – which consists in the giving of specific orders rather than simple directions – and the employer’s disciplinary power, with the resultant limitations on the employee’s contractual autonomy and his establishment within the organization of the firm. The case-law has identified other characteristics of the employment relationship, such as the absence of risk, the continuity of provision of service, observance of fixed hours, and the payment of a regular salary, specifying however that these are mere circumstantial evidence and have a merely subsidiary nature, while what remains decisive is the existence of the relationship of *subordinazione* between employer-employee, as seen above.

TERMINATION OF EMPLOYMENT “ORDINARY” CAUSES

Death of the Employee

The relationship of employment, as with any other relation having as its object the provision of a personal service, can be extinguished, first of all, because of the employee’s death.

The death of the employer does not give rise to the same issue, because in this case the relation passes to his successors.

Art. 2118 c.c. establishes that in case of employee’s death, the relatives identified by Art.2122 c.c., (spouse, sons, and, if living with the employee, relatives in the third degree of kinship and persons related by affinity in the second degree) or, otherwise, his successors, are entitled to an indemnity equal to the employee’s salary during the notice period in case of rescission of contract (the so-called “*indennità sostitutiva del preavviso*” (indemnity in lieu of notice)). In this case the indemnity functions substantially as social aid.

Effluxion of time

Where the labour relation is subject to a deadline (whether negotiated or fixed by law), it ends because of the expiry of the term specified.

The preconditions and mechanisms for the early termination of a fixed time employment relationship will be analysed later in this paper.

Consent of the parties

As with any other contractual relationship, the labour relation ends in accordance with the mutual consent of the parties, as foreseen generally by Art. 1372 c.c.

EMPLOYEE'S TERMINATION – RESIGNATION

Premise

The rescission is undoubtedly the most important cause of termination of employment. It is a legal transaction by which one contracting party decides, unilaterally, the resolution of the contract. It is unilateral because comes from only one party to a contract, and is *recettizia* as it gives rise to legal effects from the moment in which the other party becomes aware of it.

Termination by the employee is called *dimissioni* (resignation), while the termination by the employer is called *licenziamento* (dismissal).

Il recesso (rescission) is the primary means by which one party can disengage himself from a contractual relationship and the obligations deriving from it, even against the will of the other party, and is generally attributed to the parties in a contractual relationship of continuous or periodic performance for which no fixed term is foreseen (that is for an undetermined time, given that the legal system is adverse to perpetual contractual liabilities).

From a series of specific provisions applicable to typical contracts, there emerges a general tendency of the Italian legal system to attribute to both the parties in a continuing contractual relation without a fixed term the power to rescind the contractual relationship, unilaterally at any time (see, for example, Art. 1750 c.c. Agency; Art. 1569 c.c. Supply; Art. 1810 c.c. Gratuitous loan for use; Art. 1833 c.c. Banking account; Art. 2285 c.c. Partnership).

Similarly, apart from certain limitations placed on the ability of the employer, discussed below, the Civil Code acknowledges that either of the parties can withdraw from a contract of employment not subject to a fixed term (which is the normal situation) at any time and without any justification, subject only to the giving of a term of notice.

Within labour law, the institute of rescission represents the instrument used for functional relationship pathologies, taking the place of the generally applicable rules for resolving similar cases.

When there is non-performance of a contract, the law relating to contracts of employment gives to the performing party a power of rescission, making the otherwise

applicable rules relating to rescission for breach inapplicable. Those rules regulate an undoubtedly more complicated mechanism; which requires a judgment of a court, while rescission in relation to a contract of employment is an out-of-court remedy.

Rescission is applicable also when the contract performance cannot exist because of unforeseeable events which are not attributable to the parties, taking the place of the judicial remedy of rescission for supervening impossibility of performance.

Rescission, in fact, is expressly foreseen by the law for a series of situations which may be qualified as supervening impossibility of performance, whether total or partial (sickness of the employee for example) and it can be used in other analogous situations which are not expressly regulated (preventive detention, or supervening unfitness of the employee, commandeering or destruction of industrial plant, etc).

The general jurisprudence shows a tendency to reduce all these different situations to the existence of a justified objective motive, which legitimates the termination of employment.

Resignation with notice in an unfixed-time employment relationship.

The 1942 Civil Code, observing the general principle of formal equality between the parties, deals with rescission in the same way for employee and employer in an employment relationship of unlimited duration, giving them the option to rescind any time and without any justification (*ad nutum*).

As will be seen shortly, subsequent special legislation has set many limits to the employer's power of rescission, with the aim of guaranteeing employees' stability in the workplace

Today the right of rescission foreseen by the code in an unfixed time contract is only applicable to the employee, while in relation to the employer, it is only applicable in a few residual cases.

By Art. 2118 c.c., the employee can rescind an unfixed time labour relation, giving to the employer due notice in the way and terms established by the "corporative norms" (following the abrogation of the corporative legal system, this should be read as referring to collective labour agreements) or according to usage or in accordance with equity.

Collective bargaining usually fixes the amount of notice required, fixing it in proportion to the seniority of service of the employee and the employee's professional qualification.

This kind of legal transaction has no requirements as to form, so that resignation communicated orally or by conclusive acts are held to be valid and effective.

On the basis of Art.2118 c.c., in addition, if the employee does not give notice, he has to pay to his employer an indemnity equal to the salary for the notice period.

Art. 2121 c.c provides that the indemnity is to be calculated including commissions, productivity premiums, profit or goods sharing and any other continuous reward, except for refund of charges. Reward elements are variable and Art. 2121 c.c. provides that allowance is fixed as the mean of the emoluments in the last three years of service or on the shorter period of service.

As previously noted, the power of rescission is not subject to any limits so far as the employee's condition is concerned; he has just to give his notice.

This situation, quite apart from being conditioned by an economic context characterised by unemployment, is also expressive of a principle of personal freedom which, taking into consideration the personal nature of the contract, inhibits the use of coercive forms of employment.

Therefore, even if the imposition of limits on the faculty of the employee to rescind are theoretically possible, any other limits could only be of economic nature, through specific damages forms.

The many limits of the power to terminate employment and the corresponding absence of any charge to the employee for resigning, make it necessary to closely enquire that the employee's will has been freely expressed.

In some cases of great vulnerability, the law provides for specific forms of protection to ensure the employee's freedom of choice, subordinating the validity of the resignation to special conditions which are the involvement or assistance of public organs or their consent.

For example, the resignation by a female employee upon the occasion of her wedding has to be confirmed before the local Labour District, while a resignation during pregnancy or during the baby's first year of life are subordinated to confirmation by that organ.

For all other cases, there exists the ordinary contractual protections for vices of consent (an action for annulment of the contract for mistake, duress or deceit). In these cases, nevertheless, it is the employee that must provide the proof to obtain the annulment of the unilateral legal transaction of resignation.

Resignation for just cause

In addition to termination upon notice (the so-called *recesso ad nutum*, i.e. without the need for cause) Art. 2119 c.c. regulates resignation for just cause, establishing that, when there is a cause which does not permit continuation of the employment

relationship, even if temporary, either party can withdraw from a contract of employment for an unfixed time without any kind of notice.

The difference between the two forms of rescission is based upon the requirement or not of providing notice. In the Civil Code just cause permits the rescinding party to not give notice.

As we shall see, on the ground of specific legislation, the existence of a just cause produces the same legal effect (possibility of rescission without notice) also with regard to the employer.

Collective labour agreements usually identify examples of just cause, with the possibility that rescission for just cause will also extend to similar or analogous situations.

Art. 2119 c.c. specifies that an employee employed for an undetermined period who rescinds for just cause without notice must receive a payment in lieu of notice. The rationale for the rule in such a case consists in the fact that in such cases, the discharge of the contract is a consequence of a fact attributable to the employer, or in any case not chargeable to the employee.

Resignation in a fixed time employment relationship

Contrary to the situation in relation to an employment contract for an indeterminate time, a contract for a fixed period cannot be resolved freely (*ad nutum*) prior to the expiry of the period specified.

Under Art. 2119 c.c. a just cause allows either party to discharge the relationship before expiry of the period, also in the case of a contract of employment for a fixed period.

The regime of the Civil Code is applicable both to the employee and the employer, as the special law relating to dismissal, as seen before, applies only to contracts of employment for indeterminate periods.

Normally, collective agreements provide for an employee's power of rescission, establishing the period of notice also for fixed time contracts.

TERMINATION OF EMPLOYMENT - DISMISSAL

Premise

As seen above the employer's power of rescission (dismissal) is heavily circumscribed by the law.

The different treatment as a matter of law derives from the inequality between the contractual parties and the juridical and economic subordination of the employee, in addition to prevalence of unemployment in the wider economic context.

The many special laws on the subject, have, in the course of time, resulted in a system in which:

- dismissal *ad nutum* (that is independent of any kind of limitation) is a residual institution subsisting solely in situations excluded from regulation by those special laws;
- dismissal may only be justified on grounds specified by the legal order (just cause or good reason (*giusta causa* or *giustificato motivo*)), of which the employee must be informed, and the existence of those grounds must be proved by the employer in the case of judicial challenge to the dismissal (shifting of the burden of proof);
- if dismissal takes place where the conditions foreseen by the law are not fulfilled, the law establishes different sanctions, either of a compensatory nature (indemnity) or consisting of reinstatement according to the size of the employer;
- dismissal is void and without legal effect if motivated by unlawful reasons (e.g. so-called discriminatory dismissal);
- there are many cases of absolute prohibition of dismissal.

The very general framework outlined above is somewhat approximate and will be expanded in the light of the considerations which follow.

Substantial limits to power of dismiss: a) just cause

By law n. 604/1966 the power of dismissal without justification (*ad nutum*) of an employee under a contract for an unfixed term becomes an exception to the normal rule and the employer's power to terminate employment is subject to formal and substantial strict limits.

This law - modified by law n. 300/1970 (Workers' Statute) and by law n. 108/1990 - establishes that to be lawful the employee's dismissal must be supported by a **just cause** (*giusta causa*) (Art.2119 c.c.) or **good reason** (*giustificato motivo*) (Art.1).

The two cases in issue are very different as regards the requirement of notice. Art.3 of law n. 604/1966 provides for a duty to give notice for dismissal for good reason, while on the ground of Art. 2119 c.c. the existence of just cause permits the summary termination of the relationship of employment.

As concerns the legal concept of just cause, the above-mentioned rule refers to Art. 2119 c.c. which, as mentioned above, refers to a **cause which does not permit continuation, even if only temporarily, of the employment relationship.**

The extreme generality of this legal definition has given rise to two contrasting strands of jurisprudence.

It is common opinion that at the root of the power to rescind without notice is the fiduciary nature of the employment relationship which can not continue during the notice period, in the presence of serious facts damaging the relationship of trust.

However, on the one hand, some maintain that, exactly because of the fiduciary implications of the employment relationship, other facts unrelated to contractual obligations are just cause for recission, if they produce negative effects in the working environment and damage, irreparably, the relationship of trust between the parties (objective theory).

On the ground of another legal argument, others argue the employee's behaviour outside of employment could be important only if it affected the performance of the contractual obligations.

In this perspective, just cause would still derive from a non-performance by the employee and it would be distinguished from subjective "good reason" (*giustificato motivo soggettivo*) only because of its particular seriousness (contractual theory).

The contrast might only be apparent if considering an ampler understanding of the employee's contractual obligation, which comprises also duties in relation to behaviour and obligations preparatory for contractual performance. From this point of view, some kind of employee's behaviour outside of his work could be of contractual relevance, because connected to those interests of the employer that the contractual performance was intended to fulfil.

The Court of Cassation, has not taken a position on the doctrinal debate, but explains that the employee's behaviour has to be "chargeable" (*imputabile*) to him, and points to the existence of an employee's non-performance (*mancaza*) which has to be considered from an objective and subjective point of view, as bearing upon the fiduciary relationship with the employer.

As seen before, collective labour agreements give examples of just cause; however, these are not binding for the judge, who can give weight to facts which were not envisaged by the parties to the collective agreement, or he can refuse to give weight to facts which were foreseen.

b) subjective good reason (giustificato motivo soggettivo)

Law n. 604/1966 gives a clearer legal definition of good reason, establishing that it can consist either of a serious breach of the employee's contractual duties or of reasons concerning commercial activity, the organization of work and its good functioning (Art.3).

Subjective good reason consists of a relatively serious non-performance of the obligations arising from a contract of employment, and is distinguished from just cause

only from a quantitative point of view. As noted above, it does not exempt the employer from the obligation to give notice.

While just cause is a behaviour distinguished by fraud or very gross negligence, subjective good reason is characterized by gross negligence.

On the basis of the objective theory (see above) all facts and behaviours extrinsic to the contractual obligations would be included within the just cause notion.

It is generally accepted that dismissal for just cause may be transformed, also ex officio, into a subjective good reason for dismissal by the judge, assigning to the fact a lesser seriousness.

c) objective good reason

Art. 3 of law n. 604/1966 foresees this hypothesis in reasons inherent in commercial activity, the organization of work and its good functioning.

Dismissal is not justified by an employee's breach, but by demands of the business enterprise which prevail over the interests of the employee in the preservation of his job.

Such reasons may consist in the employer's decisions as to organization of the company or its manufacturing process, or facts relating to the employee but having repercussions on the company.

In the first group we can see commercial activity reorganization and termination (total or partial), which entails the suppression of jobs.

Many cases of reorganization of commercial activity are consequential on market crises or other outside events, of the substitution of employees with machinery to reduce costs and to restore competitiveness.

There are different opinions in the jurisprudence regarding the possibility that reorganisation may be motivated by purely economic reasons such as profit increase cost-saving or as to whether such measures have to be justified by the need to respond to the unfavourable situation of the company.

Several rulings have considered as legitimate any reason giving rise to a reorganization, including maximisation of profits through organizational change, on the ground that any business entrepreneur has the right to obtain elements of production as cheaply as possible and to choose the most profitable modality of organization.

According to a different current of thought, reorganization may be carried out for cheaper management of the company, provided that it is not merely aimed at maximizing profits, but rather is aimed at confronting unfavourable non-contingent situations, which are decisive for the commercial activity of the company.

It is however, commonly agreed that for a dismissal to be considered legitimate, the intent of cost reduction and maximisation of profit – although in principle capable of

justifying the suppression of jobs – must be accompanied by some form reorganization of the company having as its goal better management. Dismissals should therefore be held to be unjustified if their purpose is solely that of substituting expensive staff with a cheaper alternative, without any organizational change.

Similarly, it is generally recognised by the jurisprudence that the control by the judge over the choices made by the entrepreneur must be limited solely to a verification of the legality of the choice taken.

According to the case-law, the judge must verify the implementation of the economic choice made (i.e. existence of a reorganization) and verify the causal nexus between that choice and the suppression of the job of the dismissed employee. The judge, however, cannot audit the merits and rationality of the entrepreneur's determination.

It is also commonly recognised that the employer has the burden of proving that there was no possibility of making use of the employee elsewhere within the company for employment similar to that practised before the reorganization.

Factors relating to the situation of the employee are clearly not qualifiable as a subjective good reason, because they do not constitute a breach of contract by the employee.

Amongst the most common cases considered by the jurisprudence are the dismissal of an employee for intervening unfitness to undertake the work required of him and the imprisonment of the employee for events not related to his contractual obligations to the employer.

As will be discussed in more detail below, the dismissal of an employee suffering from disease due to the expiry of the prescribed period within which the post is to be preserved does not constitute a dismissal for a objective good reason; rather, it is considered an autonomous form of rescission of contracts of employment.

Discriminatory dismissal

A discriminatory dismissal constitutes a specific instance of illegal dismissal, under Art. 4 of law n. 604/1966 which is characterized by the illegitimate motive for the termination of employment.

The provision mentioned above refers to “dismissal due to political creed or religious faith, by trade union membership or participation in trade union action”, but the definition is expanded by Art. 3 of law n. 108/1990 to cover instances of political, religious, racial, linguistic and sexual discrimination. The same provision provides for the right to reinstatement, as a sanction for discriminatory dismissal.

Despite this expansion, the regime remains founded on certain prohibited instances of discrimination. However, the jurisprudence extends the protections against

discriminatory dismissal to other cases of dismissal characterized by illegitimate reasons.

While the employer has to prove the existence of just cause or good reason (the so-called reversal of the burden of proof), it remains for the employee to prove a discriminatory motive.

A discriminatory dismissal is void and the employee has to be reinstated to his employment, independently of the size of the company.

Prohibition of Dismissal

The limits on dismissal examined up to this point were introduced by laws passed subsequent to the adoption of the Civil Code.

Already, the Civil Code considered that during periods in which the employee was unable to work due to a situation not chargeable to him, his employer could terminate the contract only in case of just cause.

Under Art. 2110 c.c. in the case of industrial accident suffered by the employee, disease or pregnancy the employer cannot terminate employment prior to the expiry of the period time established by law, collective labour agreement, usage or equity.

During such a period, in the face of such a temporary impossibility of performance, the law suspends the contractual relationship and gives to the employee the right to preservation of his post, regular income and service seniority.

A similar regime has been introduced in the case of military service and recall to army and in the case of the wedding of a female worker.

An employee called up to army, who has worked for the employer for at least three months, and an employee recalled to the army, have the right to preservation of his post until the 30 days after his release from military duty, and for three months after resumption of employment.

A female worker cannot be dismissed from the day of publication of the bans up to one year after the celebration of the wedding.

The prohibition of dismissal and right to preservation of the post have also been recognized in the Constitution in relation to workers who perform public functions (Art.51).

A special law regulating the prohibition of dismissal during pregnancy and the post-natal period, specifies that the protection applies from the first days of pregnancy until the child's first birthday.

In all these cases, the employee can be dismissed only for just cause or, with regard to working mothers, the special law establishes that dismissal can only occur in very serious cases of gross professional negligence by the worker, as well as in the case of termination of commercial activity of the company, or employees on trial.

As regards working mothers, since the prohibition of dismissal is applicable to the objective situation of pregnancy and the post-natal period, dismissal is unlawful and inoperative even if the employer was unaware of the pregnancy.

The periods of suspension of the employment relationship and the prohibition of dismissal during disease and following industrial accident (so-called '*periodi di comporro*', roughly equivalent to 'leave of absence') are fixed by collective labour agreements and their length depends on the employee's seniority and qualifications.

After the expiry of the leave of absence period, the employer can freely (*ad nutum*) terminate the employment relationship, giving due notice to the employee. This is an independent cause of rescission, not submitted to the restrictions of the law on dismissals, as the impossibility of performance by the employee removes the employer's interest in the obligation.

There has been much discussion in relation to cases where the employee is discontinuously absent because of disease, but does not surpass the prescribed period of leave of absence. Such cases appear to be regulated by Art. 2110 c.c., so, when a collective labour agreement does not regulate the period of the leave of absence by totalling days of absence, the judge has to apply the subsidiary sources of law (usages and equity). However, nowadays almost all contracts include both fixed and "cumulative" leave of absence periods.

Dismissal form

The law also submits dismissal to strict formal limits.

Under Art. 2 of law n. 604/1966, dismissal has to be communicated in written form and reasons have to be provided.

The communication of the dismissal must be in writing upon pain of nullity; as for reasons, while they do not have to be given at the same time as the dismissal, the employee can ask for them within fifteen days from the notice of dismissal. In that case, the employer has to provide the reasons, in written form, within seven days.

Given that the written form is required upon pain of nullity, the employer is not permitted to prove that the employee in any case knew of his decision to terminate the contract and his reasons.

On the other hand the giving of reasons fixes the grounds for the rescission and the employer is not able to subsequently adduce other reasons before the court.

The formal restrictions discussed do not apply to situations which arising under a power to freely rescind even if the requirement of use of the written form has been extended also to managers, who are not otherwise subject to the restrictive rules on dismissal.

Disciplinary dismissal

The formal requirements relating to disciplinary dismissal merit separate discussion.

Art.7 of the Workers' Statute (*Statuto dei Lavoratori*) (law n. 300/ 1970) introduced a protective limits on the exercise of the employer's disciplinary power, fixing the following procedural requirements:

- a) predetermination of the disciplinary breaches, the applicable penalties and the making public of the same;
- b) the right to challenge the disciplinary charges prior to imposition of a sanction and the right to be heard;
- c) restrictions on types of sanctions permissible, in particular the prohibition of sanctions involving changes to the employment relationship;
- d) a required period of five days between the hearing of the disciplinary charge and levying of a sanction;
- e) the possibility to invoke arbitral proceedings in order to contest the validity of the sanction;
- f) limits on the relevance of recidivism to the period of two years following the levying of a sanction.

It was long a matter of debate whether these procedural restrictions should also be applied to disciplinary dismissal, or whether they applied only to preventive sanctions and if they do so apply to dismissals, whether they applied to any dismissal due to an employee's non-performance, or only those included in the collective labour agreements as numbering among disciplinary sanctions.

Following a ruling on the constitutionality of Art. 7, it is now clear that the rule applies also to disciplinary dismissal, independently of whether its application is required by law, a contract or under provisions (internal regulations) of the employer.

As for the notion of disciplinary dismissal, the case-law of the Court of Cassation is now settled to the effect that every dismissal founded by the non-performance of the employee is to be considered disciplinary and therefore subject to the protections contained in Art. 7, independently of its express inclusion among disciplinary sanctions.

Accordingly, any dismissal is to be considered disciplinary, and is therefore subject to the procedural limits, whether based on just cause or subjective good reason. The only exceptions are those grounds for rescission for just cause which are based on facts extraneous to the employee, or on factors causing non-performance which are not attributable to the employee.

The Court of Cassation has affirmed that, in addition, that part of Art. 7 which provides for the expiry of a minimum five day period prior to the levying of a sanction (paragraph V) has to be implemented to disciplinary dismissals, notwithstanding the

fact that it was not affected by the declaration of unconstitutionality. It follows that disciplinary dismissal without notice is not possible, even if the charge contains the basis for a dismissal on the basis of just cause.

As for the requirements of predetermination and publicity (paragraph I), it is also now generally accepted that they apply only when the employer wants to fix specific cases of non-performance amounting just cause or good reason in relation to particular interests of the company, but not to those infractions which are commonly accepted to constitute grave breaches of those of the employee's obligations imposed by law.

It is also now generally accepted that Art. 7 is also applicable to the residual freedom of rescission.

Also in the cases examined below where employer can freely withdraw from the relationship of employment, the procedural restrictions contained in Art. 7 are applicable, even if dismissal is based on the employee's non-performance of his obligations.

At least in relation to high-level managers, the issue of applicability of disciplinary provisions to managers remains unresolved..

Challenges

In accordance with Art. 6 of law n. 604, the employee, upon pain of being time-barred, must challenge the dismissal within sixty days of receiving notice or of receipt of a successive communication of reasons.

The challenge – the rule continues – may be made by any written act which is apt to express the employee's intention.

There has been much discussion in relation to the entitlement of legal persons other than employee to challenge a dismissal. In relation to trade unions, such a right is expressly conferred by law.

With reference to legal representatives, the united sections of the Court of Cassation established that the power of challenge can be exercised by a legal representative, provided that the relevant power of attorney is written and, that is to say, in the same form required for the act to be carried out.

It is also admissible if the employee successively gives a written ratification, as long as such ratification is brought to the knowledge of the employer prior to the expiration of the term.

A challenge is also a unilateral legal act having *effetto recettizio*, that is to say that it produces its effects only when it is received by the addressee.

Consequently, when interruption of limitation period occurs through the commencement of legal proceedings, it is not sufficient that the action is filed with the court, but it must be notified to the adverse party within the period of sixty days.

There is no duty to challenge a dismissal when it has only been communicated orally as an oral act is deprived of any effect and therefore cannot become definitive.

The acceptance of severance pay by an employee following purported termination of employment is not considered to be acquiescence in the dismissal.

Legal proceedings must be preceded by a compulsory attempt at conciliation, to be carried out as provided in the collective labour agreement or before the Provincial Office for Labour (*Direzione Provinciale del Lavoro*).

The attempt at conciliation constitutes a legal condition for continuation of the action and if the judge becomes aware that it has not been attempted, he must suspend the case, ordering a sixty-day peremptory time limit for conciliation. The action has to be reinstated within 180 days following the cessation of the cause for the suspension.

A successful conciliation is registered in the records of the court, and that registration cannot be challenged in accordance with Art.2113 c.c., last paragraph.

Burden of proof

Art. 5 of law n. 604/1966 states that the burden of proof in relation to just cause or good reason is on the employer.

The employee has simply to adduce and demonstrate the dismissal, while the employer has to prove the legality of the dismissal.

The situation can become more complicated when the employee challenges an oral dismissal, challenging its legal enforceability, and the employer adduces evidence that labour relationship terminated due to resignation (which can be communicated orally or through conclusive behaviour).

In these cases, the employee has to supply proof of the dismissal, while it is up to the employer to prove that the relationship terminated because of the employee's oral resignation.

As seen above, in case of dismissal for objective good reasons, the employer, besides having to prove the reasons for suppression of the employee's post, also has to demonstrate the impossibility to make use of him elsewhere in the company.

In relation to discriminatory dismissal, the employee is required to prove the existence of the unlawful reason.

Sanctions for illegal dismissal:

a) tutela obbligatoria

After have examined the requirements for a valid dismissal, it is necessary to describe the consequences of an invalid dismissal.

The consequences deriving from the various situations of invalidity are the following:

- a) lack of effects of a dismissal which is defective on the grounds of form, because ordered without written form or without description of reasons (Art.2, law n. 604/1966)
- b) voidness of a discriminatory dismissal or a dismissal on the basis of another illegal reason (Art. 6, law n. 604/1966)
- c) voidability of a dismissal ordered without just cause or good reason (Art. 3, law 604/1966 and Art. 18, law n. 300/1970)
- d) voidness of a dismissal of a working mother or dismissal ordered because of marriage
- e) lack of effects of a dismissal of an employee suffering from a disease ordered before the expiry of the prescribed leave of absence period.

As will be seen, these cases do not coincide with the common law rules.

The protection that the law recognises to illegally dismissed employees consists of either the preservation of employment or requiring compensation by payment of damages, depending on the dimensions of the company and nature of the invalidity of the dismissal.

The law, in general, recognises protection through specific performance (*tutela di tipo reale*), that is the right to reinstatement to the post, as well as compensation for damage, if the employer (whether or not an *imprenditore*) employs more than fifteen employees (five in the case of a farmer (an *imprenditore agricolo*)) in the branch in which there has been the dismissal, or in the same municipal area, even if any one branch, considered independently, does not achieve those limits.

The same regime is applied to employers who, regardless of the limits described above, employ in total more than sixty employees.

In relation to employers falling under those limits, the law recognises to the employee protection requiring the employer either to re-employ or to pay him a compensatory sum (*tutela obbligatoria*)

In these cases, dismissal without just cause or good reason is voidable and, by Art. 8 of law n. 604/1966 the employer is required to re-employ the employee within three days, or to compensate him, paying a redundancy payment of between 2.5 and a maximum of 6 months of salary, depending on the number of employees, the size of the company, seniority, and the behaviour and condition of the parties. The level of redundancy payment can increase up to ten months of salary for an employee who has been employed for more than ten years and up to fourteen months of salary for an employee who has been employed for more than twenty years.

Under this regime of protection (*tutela obbligatoria*), a dismissal without appropriate justification, even if illegal, can produce effects by terminating the relationship, so when

employer chooses re-employment, a new employment relationship is created, with effect *ex nunc*. The law talks about re-employment and not about reinstatement, as is the case with companies above the limits specified above.

It sometimes occurs that, even if the choice between re-employment and compensation is up to the employer, an employee who refuses re-employment is in any case entitled to compensation.

These are the general lines of the *tutela obbligatoria*, but there are differentiations dependent on the nature of the invalidity of the dismissal.

Dismissal affected by formal defects is judged unenforceable and subject to a regime similar to voidness.

In small firms oral dismissal or dismissal without subsequent notice of reasons does not produce effects, and the employee has the right to readmission in service and to receive accrued salary up to the restoration of the employment relationship.

According to the prevailing trend in the jurisprudence, within the limits of the regime, a disciplinary dismissal affected with procedural defects produces, on the contrary, the same effects as unjustified dismissal, giving the employer the choice between reemployment and the payment of compensation.

This solution, which is in truth not based normative considerations, is based on the consideration that it is illogical to attribute to a procedural defect a sanction more serious than is provided for for a defect of substance.

Discriminatory dismissal is void by Art. 4 of law n. 604/1966 and it always involves the stability regime foreseen by Art. 18 of the Workers' Statute, independently of the size of the company and whether or not the relationship is one from which it is possible to freely withdraw.

Whether companies are subject to the regime of *tutela obbligatoria*, or even are not subject to any limits on dismissals, the discriminatory nature of the dismissal requires the reinstatement of the employee and the payment of damages.

b) tutela reale

When firms exceed the limits on the number of employees mentioned above, Art. 18 of the Workers' Statute provides for a regime of stability of employment, recognising to the employee the right to reinstatement. The rule unifies the effects of the three kinds of invalidity under law n. 604/1966 (lack of effect (*inefficacia*), voidability and voidness), and establishes identical consequences when a judge declares a dismissal without effect in the sense of Art. 2 of law n. 604/1966, annuls a dismissal ordered without just cause or good reason or declares its voidness.

The rule in question provides in particular that in these cases the judge: 1) must order the reinstatement of the employee; 2) order the employer to pay compensation,, in the

amount of salary due from the day of dismissal until the day of actual reinstatement, in any case, not less than five months' wages; 3) order the employer to pay social welfare and health contributions from the time of dismissal until the time of actual reinstatement.

The employee has a unilateral and absolute power to choose, in lieu of reinstatement, the payment of an amount equal to fifteen months of full wages.

The jurisprudence qualifies this situation as an obligation subject to an option on the part of the employee.

The final initiative for reinstatement is entrusted to the employer, who must invite the employee to return to work. The latter must return to work within 30 days from the invitation, or request within 30 days of the communication of the judgment the payment of the payment of the substitute compensation.

If the term has expired without the employee restarting work or giving notice of his election in favour of the substitute payment, the employment relationship is considered to be terminated.

The majority opinion is that the order for reinstatement is not subject to physical enforcement, so the law provides a indirect form of coercion, ordering the employer to pay the employee's salary until the actual time of his reinstatement.

The case-law considers that the employee is entitled to the entire remuneration which accrues after an illegal dismissal; however, employer is permitted to prove that the employee found another job while the case was pending, so as to reduce the damages due in equal measure to the earnings of the employee from the other job (the so-called *aliunde perceptum*).

As to the much-debated question of whether illegal dismissal has the effect of terminating employment relationship, under the regime of *tutela reale* it is nowadays commonly recognized that given that the dismissal is void and unenforceable, the employment relationship continues.

The continuation of the employment relationship is confirmed by the fact that the employee has the right to compensation equivalent to the remuneration accrued from the day of dismissal until the day of reinstatement (or the date of termination of the relationship due the employee's election for the alternative compensation) and that the employer must pay social welfare and health contributions for the same period.

The fact that the law defines the employer's performance as compensation depends solely on the fact that the sums paid to the employee have the double nature of performance of the pre-existent contractual obligation and compensation for damage suffered. The payment of the sum, apart from being the consequence of the continuance of the contractual obligation to make payment, also functions as a

sanction, given that the law determines the minimum measure of compensation to be five months remuneration, even when the salary lost due to the illegal dismissal are inferior in number.

The law specifies that, for the purposes of application of the regime of the *tutela reale*, the number of employees is calculated including workers undertaking a vocational training contract and part-time workers, on the basis of pro-rating the actual hours worked.

On the other hand, the spouse and relatives of the employer to the second degree of kinship, both direct and collateral, do not have to be computed.

The case-law considers that employee who claims the protection of the regime of *tutela reale* has the burden of proving the actual number of employees of the firm.

The *organizzazioni di tendenza*, i.e. those employers which carry out political, trade union, cultural, educational, religious or spiritual activities on a not-for-profit basis, are excluded from the regime of *tutela reale*.

Excluded legal categories

As mentioned above, there remains an area to which the limitations of the protective regimes in relation to dismissal do not apply. These exclusions are based essentially upon categories of employees to which the rules do not apply.

First, the regime limiting dismissal is not applied with respect to managerial staff, who are excluded from the application of law n. 604/1966.

The dismissal of managerial staff, however, is not entirely free as there exist contractual compensatory forms of protection provided in collective labour agreements.

Such collective labour agreements generally provide for the employee's right to obtain an additional sum by way of penalty (the so-called *indennità supplementare*) in case of unjustified dismissal, varying between a minimum and a maximum (usually from one to two years of remuneration).

The law, moreover, adopting provisions frequently used in collective labour agreements, now also requires that the dismissal of managerial staff must be in written form.

Finally, the regime of *tutela reale* in cases of discriminatory dismissal is also applicable to managerial staff.

Also excluded from the protective regimes in relation to dismissal are workers engaged on probation. The law provides that the parties can include in a contract a probation period, during which either can withdraw freely and without notice.

Such a stipulation must be written and the probation period cannot exceed the length provided in the relevant collective labour agreement and, in any case cannot exceed six months.

However, it is unanimously recognized that employees engaged on probation nevertheless are protected against discriminatory dismissal.

In addition, the jurisprudence considers that termination of probationary employment by the employer can be challenged if it is based on illegitimate reasons, or when, due to the circumstances in which it has been ordered, it appears to be motivated by reasons different from unsatisfactory performance during the probation period.

Following an intervention by the Constitutional Court, the regime limiting dismissals is now applicable to apprentices in relation to the employer's rescission during the apprenticeship contract, even if employer is still able to choose to not convert the apprenticeship contract into a contract of employment at its expiry.

The regime limiting dismissals does not apply to workers over sixty years old who, are entitled to retire, unless they have chosen in accordance with law n. 54/1982, due to not having reached the maximum pension entitlement, to continue the employment relationship until they have obtained full entitlement or until they have reached the age of sixty five.

In these cases, however, the employment relationship does not automatically terminate upon the occurrence of the required triggering events, so the employer has to give notice of termination for retirement and to grant due notice, which is only possible once the requirements have been fulfilled (attainment of the relevant age and fulfilment of pension requirements).

Older workers enjoy the protection of the regime of *tutela reale* against discriminatory dismissals, and accordingly in that regard have a right to reinstatement.

The regime limiting dismissals does not apply to domestic employment.

Even if the law expressly excludes only domestic employment under law n. 239/1958 (i.e. domestic employment consisting of more than four hours of work per day for the same employer), the jurisprudence considers that the legislator intended to refer to the whole field of domestic employment.

In this case the law asserts the prohibition of discriminatory dismissal and its protection under the regime of *tutela reale*.

Public employment

Following the privatization of public employment, the whole subject-area is regulated by the Civil Code and other specific legislation regulating private employment.

The requirements for validity of dismissal are the same .

As for the effects of illegitimate dismissal, Art. 55, par.II, of decreto legislativo 165/2001 extends the protection of the regime of *tutela reale* as provided for in the Workers' Statute, regardless of the number of employees.

Fixed time employment

This category is excluded from the regime of protection against dismissal, because law n. 604/1966 applies only to employment relationships of undeterminate duration (Art.1).

As seen before, nevertheless, the limits of the Civil Code relating to the possibility of rescission of contracts before expiry of the term, is applied to both parties of contract.

Art. 2119 c.c. provides that either party can withdraw before expiry of the contractual term only where there exists just cause.

However, generally collective labour agreements provide for a power of rescission on the part of the employee and the giving of the relevant notice.

Collective dismissal

Collective dismissal can be roughly defined as the dismissal consequential upon the cutback of the workforce or the reorganization of a company.

Historically, the notion of collective dismissal derives from the need to exclude dismissals motivated by reorganizational necessities or commercial activity from the protective regime relating to termination of employment, and to assign a specific discipline to that case at the same time.

The regime is intended on the one hand to protect the independence of choice of the company, and on the other to guarantee adequate protection of the rights of employees.

The present regulation of the subject is contained in law n. 223/1991 which applies solely to companies having more than 15 employees.

The regime provides that when a company is involved in restructuring or reconversion of a temporary nature, it can activate, if certain conditions are met, an extraordinary redundancy fund (*cassa integrazione guadagni straordinaria*), which constitutes a public instrument to soothe social strain deriving from the company's crisis, consisting of the total or partial suspension of the obligation to work and of the obligation to pay salaries, with the costs of wages being charged to the State.

Where difficulties arise during the reorganization programme which the company considers itself unable to overcome without resorting to a reduction of the workforce, it can initiate specified procedures in concert with the trade unions to ascertain the level of overstaffing. After that, the company may proceed to terminate the contracts of those employees who have been found to be redundant, and to place workers on the mobility list.

If, on the contrary, the company considers itself unable to get over the crisis without permanent structural down-sizing of its workforce, the law provides that it can proceed to the collective dismissal of the redundant employees, placing them on the mobility

list. Also in this case, there is a requirement to go through various processes in collaboration with the trade unions to ascertain the extent of over-staffing.

Workers placed on mobility lists have the right to receive an allowance (the so-called *indennità di mobilità*, which acts as a surrogate for unemployment benefit) and they are helped in the search for new employment by tax incentives for companies that engage workers registered in the lists.

The regime in question provides that the affected company contributes to the costs of wages of workers in the *cassa integrazione* and the payment of the *indennità di mobilità*, and establishes that the company's contribution is reduced by half if the company is able to reach agreement with the trade union on the number of employees to be made redundant.

According to law n. 223/1991, collective dismissal is characterized by the following traits: 1) it must result from reduction or reorganization of the activity or work of the company; 2) it must affect at least five workers; 3) it has to be completed within 120 days, in each productive branch or in more than one productive branch within the same province.

In the past, lively debates arose in relation to the notion of reduction or reorganization of the activity or work of the company, in an attempt to distinguish collective dismissal from multiple individual dismissal caused by objective good reason.

At one time, it was thought that collective dismissal was “ontologically” different from multiple individual dismissal, as the former was a consequence of a choice to reduce staffing (distinguished by irrelevance of position or of particular characteristics of the individual workers affected), while the latter was characterized by a “qualitative” reorganization of the company (not necessarily involving staffing cuts), from which could flow the suppression of particular posts.

Only in the first case would the workers' individual positions be weighed comparatively, to solve conflicts of interests extant among them, while only in the case of multiple individual dismissal, was the employer required to prove to have been unable to engage, in any other duty, workers with employment positions that had been suppressed.

Following the entry into force of law n. 223/1991, nevertheless, this position has been definitively by-passed and the largely prevailing opinion holds that the notion of reduction or reorganization of the activity or work of the company, as provided in that law, is a kind of objective good reason, with particular regard to reasons relating to productivity and efficiency..

Accordingly, the difference between individual dismissal for objective good reason and collective dismissal is merely a numerical and temporal one, in addition to subjective requirements as to its applicability (the requirement of at least fifteen employees).

Dismissals deriving from a reorganization decision, which fall below the numerical threshold, are covered by the regime applicable to dismissals for objective good reason.

Given that the numerical requirements for the application of the regime under discussion may be attained progressively (over the course of 120 days) in order to determine if a situation constitutes collective dismissal or multiple individual dismissals, the law makes reference to the employer's intention, specifying that the procedure required for collective dismissal must be followed whenever the employer foresees that the programme of reorganization is likely to require at least five dismissals.

It is not necessary to conduct a psychological enquiry into the employer's intention, but only to establish whether the programme of reorganization objectively involved at least five dismissals, taking account of the employer's ability to forecast.

According to this doctrine, when the number of employees to be made redundant falls below the threshold, following notices and the involvement of the trade unions required by law, the nature of the dismissals as collective does not change.

Another debated question is whether, to attain the minimum threshold of five dismissals, it is possible to aggregate to terminations of employment by the employer resignations (whether incentivized or not) and rescissions by agreement, referable to the same programme of reorganization.

As the regime in question is applicable only to companies employing more than fifteen people, the problem arises as to how to regulate what are objectively collective dismissals in companies having less than fifteen employees.

The non-applicability of the legislation restricting dismissals and, in particular, of law n. 604/1966 appears self-evident in relation to cutbacks or reorganization which involve the dismissal of fewer than five workers. This is clear when one considers that, as mentioned above, below that threshold, even collective dismissal in large companies fall under the regime of individual dismissals.

Greater doubts arise with respect to decisions to reorganize which involve the suppression of five or more posts; in this case, some suggest that the procedures envisaged for collective dismissals should be adopted whilst others take the view that the employer's choice is absolutely free from any kind of restriction. Even if there is still no clear trend, it seems correct to say that dismissals of this type cannot entirely escape all forms of judicial control.

Procedural laws

Law n. 223/1991 provides for a complicated procedural system that starts with a written notice to be sent by the employer to the trade union representatives within the company and to the respective associations, and also to the *Direzione Provinciale del Lavoro*. The notice must include:

- 1) the reasons which determine the situation causing redundancies.
- 2) the technical, organizational, and productive reasons as to why it is not possible to adopt measures other than redundancies.
- 3) Indications of the number, job description, and professional profile of the excess personnel.

The case-law considers that incompleteness or indefiniteness of the notice renders the procedure illegal and is reflected in the enforceability of any dismissals.

The notice has to be accompanied by a receipt showing payment to the INPS of a portion of what is owed as mobility contributions.

Following the notice, there opens a phase of meetings with the trade unions, during which the parties proceed to a joint examination of the situation and possible solutions.

This stage has to be settled in 45 days. Once that period has expired without any agreement being reached, the parties are summoned to the *Direzione Provinciale del Lavoro* to proceed to a further examination of the issues mentioned above, which should be concluded within 30 days.

If an agreement is reached or the procedures and examination have been exhausted without any agreement being reached, the company can dismiss the redundant workers, communicating in written form to all of them the termination of their employment, while observing the applicable term of notice.

At the same time, the list of workers to be placed on the mobility lists, together with indications of the criteria used to select them, must be sent to *Direzione Provinciale del Lavoro* and the trade unions.

As seen before, the company has to pay to the social security agency a sum equal to six times the monthly sum in respect of mobility in respect of each worker.

That sum, nevertheless, is reduced to half if the level of redundancies has been the object of agreement with the trade unions.

The enterprise is exempt from the payment of the residual instalments if it obtains for the workers on the mobility list offers of work of undetermined duration having certain characteristics.

Criteria for selection of workers

The employer has to select the workers to be placed on mobility on the grounds of criteria provided in collective labour agreements or, failing that, of the following concurrent criteria:

- a) Number of dependants,
- b) Length of service,
- c) technical, productive and organization demands.

According to part of the case-law, the specification that the above criteria are concurrent implies that it is not possible to give precedence to one of them, but that they all have to be considered together.

There are, nevertheless, different opinions. According to another trend, technical and productive demands have priority, while a yet further trend sustains that the criteria have to be applied by precedence in the list order.

These criteria provided by the law are supplementary to those provided by collective labour agreements. Contractual criteria for selection must be characterized by their abstractness, impersonal nature, and lack of discrimination; their legality is subject control by a judge.

Consequences of illegal dismissal

Law n. 223/1991 punishes through unenforceability collective dismissals which are not communicated in writing or are made in violation of the procedures established.

Collective dismissals ordered infringing the criteria for selection provided in collective labour agreements or by law are voidable.

Unenforceable or voidable dismissals must be challenged in writing within sixty days after receipt, except for dismissals which are not made in writing.

When dismissal is declared unenforceable or void, the employee has the right to be reinstated and to damages in a sum equal to the wages accrued since the dismissal (so-called *tutela reale*).

The law provides that where the illegality of the dismissal derives from the fact that the rescission has not been made in writing or from violation of the criteria for selection (but not when it derives from lack of observance of proscribed procedures), the company can proceed to rescind the employment relationship of a number of workers equal to the number of reinstated workers without having to carry out a new procedure, in accordance with the applicable selection criteria.

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