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Presentación del número extra

«Los diferentes tipos de despido en Europa»

Belén García Romero y Elisa Cuadros Garrido

(Codirectoras Revista Justicia & Trabajo y coordinadoras del número extra 2024)

Con gran orgullo vemos salir este número extra de 2024, dedicado al análisis de la institución del despido en diferentes países de Europa, en que la que, por primera vez, contamos con participación internacional gracias a la colaboración de la European Labour Law Young Scholars (ELLYS) representada por su presidente Fabrizio Ferraro, Profesor que es, a su vez, jefe del Departamento de Dirección Estratégica del IESE Business School de Italia.

Es de justicia, agradecer al profesor Antonio Sempere Navarro el consejo que nos proporcionó sobre la temática a abordar en un número monográfico de derecho comparado, cuando acudimos a consultarle, dada su dilatada experiencia en el mundo editorial.

También hemos de mostrar nuestro agradecimiento a Yolanda Sánchez-Urán Azaña, catedrática de Derecho del Trabajo y de la Seguridad Social a la hora de reclutar autores para la aportación portuguesa.

Anticipándonos a un evento de futuro, damos las gracias, también, a Dario Calderara el enlace con la Università di Roma La Sapienza donde, anunciamos que se va presentar este número extra, no es otra que la Universidad más grande de Europa y una de las más prestigiosas, es un honor para todos acudir a tan insigne institución a mostrar los resultados de esta investigación.

Ahora procedemos a presentarles el número por orden de intervención:

- Con el artículo *El devenir del despido disciplinario en el Derecho español* se inaugura el número extra en el que, cabe anticipar, supone un magistral estudio a cargo del profesor Jaime Cabeza Pereiro, catedrático de Derecho del Trabajo y de la Seguridad Social la Universidad de Vigo.
- El segundo artículo *El modelo español de Despido Colectivo. Entre adecuación al Derecho de la UE y respuesta a la realidad socioeconómica*, que pone el colofón a la aportación

española, a nivel académico es excelente y lo firman los profesores de la Universidad Complutense de Madrid, Yolanda Sánchez-Urán Azaña, catedrática de Derecho del Trabajo y de la Seguridad Social y Emilio De Castro Marín, recientemente acreditado a profesor titular.

- A continuación, el artículo número 3, versa sobre *El despido en Italia*, firmado por profesionales de la Università di Roma La Sapienza, el despido colectivo a cargo de Luisa Rocchi, el despido objetivo individual firmado por el profesor de Dario Calderara y el abogado y doctorando Angelo Casu y por último el despido disciplinario escrito por Giulia Perri.
- El artículo 4 sobre *El despido en Portugal*, está cargo de la abogada y profesora de la Universidade do Porto, Maria Regina Redinha, de la abogada y doctoranda de la Universidade de Lisboa, Mariana Pinto Ramos y de Diana Cunha Silva asistente invitada en la Universidade do Porto. Comienza con una delimitación general realizada por Maria Regina Redinha, para luego continuar con las diversas modalidades de despido escrito por Mariana Pinto Ramos, luego se proceden a analizar los orígenes y el recorrido histórico del despido colectivo por Diana Cunha Silva, el despido objetivo individual se describe por Maria Regina Redinha para finalmente concluir con el despido disciplinario suscrito también por Maria Regina.
- El artículo 5 sobre *Las modalidades de despido en Serbia*, es firmado por Mila Petrović profesora de la Union University Law School Belgrade, y versa sobre variadas cuestiones de esta institución que vertebra en tres ejes principales, por un lado, las causas del despido que guardan relación con la capacidad de trabajo del empleado y su conducta, por otro lado, las causas del despido que están relacionadas con una infracción culposa de los deberes laborales del empleado o incumplimiento de la disciplina laboral por parte del empleado y por último las causas del despido relacionados con las necesidades del empleador.
- El artículo 6 se dedica a la regulación de la *Terminación de la relación laboral en Eslovaquia*, es escrito por Martin Bulla profesor de la University of Groningen de Países Bajos, realiza una análisis global de la figura de la extinción contractual para luego centrarse en el despido y sus diferentes facetas, por razones organizativas, por causas médicas, despido disciplinario, y despido colectivo.
- El último artículo, el 7 sobre *El despido en Croacia* lo firma la abogada Ivana Meštrović examina las modalidades de despido en la República de este país que son los despidos objetivos, subjetivos y colectivos, destacando las reformas legislativas clave.

En definitiva, el número es de sumo interés porque una perspectiva de derecho comparado sobre una institución con tanta conflictividad judicial como el despido, seguro, que aporta prismas y distintos enfoques que se salen del molde habitual del que estamos acostumbrados. ¡Les deseamos buena lectura!

Belén García Romero y Elisa Cuadros Garrido
Codirectoras Justicia & Trabajo.

Presentation of the extra number «The different types of dismissal in Europe»

It is with great pride that we see the release of this extra issue of 2024, dedicated to the analysis of the institution of dismissal in different European countries, in which, for the first time, we have international participation thanks to the collaboration of the European Labor Law Young Scholars (ELLYS) represented by its president Fabrizio Ferraro, Professor and head of the Department of Strategic Management at the IESE Business School in Italy.

It is only fair to thank Professor Antonio Sempere Navarro for the advice he gave to us, the co-directors, on the topic to be addressed in a monographic issue of comparative law when we went to consult him given his extensive experience in the publishing world.

With the article *The future of disciplinary dismissal in Spanish Law*, the extra issue is inaugurated in which, it should be anticipated, represents a masterful study by Professor Jaime Cabeza Pereiro, professor of Labor and Social Security Law at the University of Vigo.

The second article *The Spanish model of collective dismissal. Between adaptation to EU law and response to socio-economic reality*, which puts the culmination of the Spanish contribution, at an academic level is excellent and is signed by the professors of the Complutense University of Madrid, Yolanda Sánchez-Urán Azaña, professor of Labor and Security Law Social and Emilio De Castro Marín, recently accredited full professor.

Next article, number 3, deals with the *Dismissal in Italy*, signed by professionals from the Università di Roma La Sapienza, the collective dismissal by Luisa Rocchi, the individual objective dismissal signed by the professor of Dario Calderara and the lawyer and doctoral student Angelo Casu and finally the disciplinary dismissal written by Giulia Perri.

The article 4 on *Dismissal in Portugal* is written by the lawyer and professor at the University of Porto Maria Regina Redinha, the lawyer and doctoral student at the University of Lisbon Mariana Pinto Ramos and Diana Cunha Silva, guest assistant at the University of Porto. It begins with a general delimitation made by Maria Regina Redinha, and then continues with the various modalities of dismissal written by Mariana Pinto Ramos, then proceeds to analyze the origins and historical trajectory of the collective dismissal by Diana Cunha Silva, the individual objective dismissal is described by Maria Regina Redinha to finally conclude with the disciplinary dismissal signed by Maria Regina Redinha.

The article 5 on *Dismissal modalities in Serbia*, is signed by Mila Petrović, professor at the Union University Law School Belgrade, Serbia and deals with various issues of this institution

that is structured around three main axes, on the one hand, the causes of dismissal that are related to the employee's work capacity and his conduct, on the other hand, the causes of dismissal that are related to a culpable violation of the employee's labor duties or failure to comply with labor discipline by the employee and finally the causes of dismissal related to the needs of the employer.

The article 6 is dedicated to covering the regulation of the *Termination of the employment relationship in Slovakia*, it is written by Martin Bulla, assistant professor at the University of Groningen in the Netherlands, it carries out a global analysis of the figure of contractual termination and then focuses on dismissal and its different facets, for organizational reasons, for medical reasons, disciplinary dismissal, and collective dismissal.

The last article, 7 on *Dismissal in Croatia*, is signed by the lawyer Ivana Meštrović examines the modalities of dismissal in the Republic of this country, which are objective, subjective and collective dismissals, highlighting key legislative reforms.

In short, the number is of great interest because a comparative law perspective on an institution with as much judicial conflict as safe dismissal that provides bonuses and different approaches that go beyond the usual mold that we are used to. ¡We wish you good reading!

Belén García Romero & Elisa Cuadros Garrido.
Codirectors Justicia & Trabajo.

Modalities of dismissal in Italy

Modalidades de despido en Italia

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Summary: I. Collective dismissals 1.1. Collective dismissals due to staff reduction and mobility 1.2. Procedural obligations: the union information and consultation phase 1.3. The selection criteria 1.4. The penalty regime 1.5. Dismissals due to cessation of business. II. Objective dismissals. 2.1. Origin. 2.2. Historical evolution. 2.3. Current regulation. The concept of dismissal for objective justified reasons. 2.4. The procedure for intimation of dismissal for objective justified reasons. 2.5. The sanctions regime. Employers hired before. March 2015. 2.6. Employers hired since 7 March 2015. III. Disciplinary dismissals. 3.1. Origin. 3.2. Historical evolution. 3.3. Current regulation.

Sumario: I. Despidos colectivos 1.1. Despidos colectivos por reducción y movilidad de plantilla. 1.2. Obligaciones procesales: la fase de información y consulta sindical 1.3. Los criterios de selección. 1.4. El régimen sancionador. 1.5. Los despidos por cese de actividad. II. Despidos objetivos 2.1. Origen. 2.2. Evolución histórica. 2.3. Regulación actual. El concepto de despido por causas objetivas justificadas. 2.4. El procedimiento de intimación de despido por causas objetivas justificadas. 2.5. El régimen de sanciones. 2.6. Empleadores contratados antes. 2.7. Marzo de 2015. 2.8. Empresarios contratados desde el 7 de marzo de 2015. III. Despidos disciplinarios. 3.1 Origen. 3.2. Evolución histórica. 3.3. Regulación actual

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

Luisa Rocchi

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 repercussions¹.

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.

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' salary⁵⁵.

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 cause⁵⁶. 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 ease⁵⁷, 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 dismissal⁵⁸, 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 withdrawal⁵⁹, 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 recurrence⁶⁰, 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 companies⁶², 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 needs⁶³.

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 powers⁶⁴, confining the *ad nutum* withdrawal to narrow areas⁶⁵ 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 withdrawal⁶⁶.

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 worker⁶⁷. 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 employer⁶⁸, 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 dismissal⁷⁰.

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 determination⁷¹. 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 reason⁷².

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 dismissal⁷³. 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 form⁷⁵.

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 obligations⁷⁷.

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 procedures⁷⁸. 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 dismissal⁷⁹.

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 conduct⁸¹.

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 sufficient⁸². In fact, it will be up to the employer to prove the psychological element⁸³, 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 reasons⁸⁴. 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 dismissal⁸⁵.

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 company⁸⁶. 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 temporarily⁸⁷.

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 cause⁸⁸. 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 employee⁸⁹. 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 trust⁹⁰.

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 reason⁹¹.

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 dismissal⁹², however placing himself in line with the *modus operandi* of the Fornero Law⁹³.

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 companies⁹⁴.

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 company⁹⁵. 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 dismissal⁹⁶.

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 contribute⁹⁸.

The reference to the notion of “disputed material fact”⁹⁹ has raised many interpretative doubts¹⁰⁰. 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 doctrine¹⁰¹, 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 proportion¹⁰², 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 applied¹⁰³. 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 measures¹⁰⁴, 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 allowances¹⁰⁵ 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 it¹⁰⁶.

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.

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.

