Italy

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RECENT RULINGS OF THE ITALIAN CONSTITUTIONAL COURT ON THE REGULATION OF DISMISSALS: AN OVERVIEW

The aim of this report is to review the main provisions of the Italian Constitutional Court adopted not only in the past six months but in recent years. To fully understand the changes that have taken place, it is necessary to consider a broad timeframe, even for the purposes of a short report.

The issue of dismissals has been at the center of attention of Italian labour law for many years, with numerous regulatory amendments enacted in recent years. This report analyses in chronological order the main amendments resulting from the Constitutional Court rulings in recent years concerning Legislative Decree 23/2015 and Article 18 of the Workers' Statute[1]. The innovations brought about by these reforms, in particular the system of protections introduced in the case of unlawful dismissals, have on several occasions led the courts of first instance to refer questions concerning the constitutionality of these reforms to the higher courts. Starting with the labour market reform adopted by the Monti Government in 2012, followed by the Jobs Act of the Renzi Government in 2015, Italian labour law has undergone profound changes in the regulation of dismissals. The Constitutional Court has intervened in relation to certain aspects of the provisions of Article 18 of Act no. 300/1970 (the Workers' Statute), amended by the Monti Government, and by Legislative Decree 23/2015, enacted by the Renzi Government. Act no. 92/2012 amended Article 18 of the Workers' Statute, concerning the protections relating to unlawful dismissals. In particular, the legislation provided for reinstatement in the workplace as a residual hypothesis, in the case of both disciplinary and economic dismissals. In a more incisive manner, Legislative Decree 23/2015 was intended to move beyond the provisions of Article 18 of the Workers' Statute, to introduce a new system of incremental protections based on the length of service of the dismissed employee, while reducing the role of reinstatement in the workplace.

In Judgment no. 194/2018 the Constitutional Court struck down as unconstitutional the calculation of the compensation payable in the event of unjustified dismissal. The Jobs Act 2015 provided for the compensation to be based on the length of service (adopting the principle of the employment contract with incremental protections), but the Court ruled that other factors should also be considered. The ruling concerned a key element of the Jobs Act: allowing the parties to evaluate the risk of taking action in the courts. In fact, the Jobs Act introduced the mechanism of incremental protections with the calculation of compensation for unjustified dismissals based on a fixed formula of two monthly payments for each

1 On the chronological order of the judgments which are cited see P. Stern, *Jobs Act: come la Corte Costituzionale ha riscritto le norme sui licenziamenti, Quotidiano Più - Giuffrè Francis Lefebvre*, July 31 2024.

year of service, with a minimum of four and a maximum of 24 monthly payments. The minimum and maximum limits were modified by the so-called Dignity Decree enacted by the Conte I Government in 2018 (Law Decree no. 87/2018). The Court ruled that such a rigid mechanism of determining the calculation of the compensation did not take into account the different personal and professional situations of workers, treating in the same way cases that might be very different from each other. The « court shall take into account first of all the seniority (…) as well as the other criteria (…), which can be deduced in a systematic way from the evolution of the discipline limiting dismissals (number of employees employed, size of the economic activity, conduct and conditions of the parties) »[2]. The calculation of the compensation was therefore a matter for the courts.

Three years later, in Judgment no. 59/2021, the Constitutional Court examined the provisions on unlawful dismissal in the Workers' Statute as amended by the Monti Government in 2011. The discretion of the courts to reinstate employees in the case of economic dismissals with a manifest lack of evidence was found to be illegitimate. The Constitutional Court considered unreasonable the totally discretionary power of the courts to reinstate the dismissed employees when the manifest lack of evidence was established. The Court censured the measure in so far as it provided that the court, having ascertained that the fact underlying the dismissal was manifestly unfounded « may also apply », instead of court « also apply » what it referred to as an « attenuated reinstatement »[3].

In Judgment no. 125/2022 the Court returned to the same point. On this occasion the requirement of the « manifest lack of existence » of the fact justifying the dismissal for economic reasons was declared unreasonable. The term « manifest » preceding the expression 'unfoundedness of the fact' underlying a dismissal for economic reasons was discussed. The Court found that the requirement of « manifest groundlessness » was vague thus giving rise to uncertainty in its application, leading to unequal treatment. In the same year, the Court examined the general limit of 15 employees (n. 183), in particular the limit for the application of various protections against illegitimate dismissal in Italian labour law. The Court stated that « the number of employees (...) does not in itself reflect the actual economic strength of the employer, nor the severity of the dismissal » and concluded by highlighting « the need for the system to equip itself with adequate remedies for illegitimate dismissals determined by employers with the same number of employees »[4]. In the ruling handed down in 2024 (no. 22) the Court deleted the adverb « expressly » from the text of the Jobs Act which limited the nullity of dismissals. As a result, reinstatement in the workplace is required after the dismissal of the worker during the « protected period » of pregnancy and up to one year from the birth of the child. Such dismissals are to be considered null and void, and therefore the sanction of reinstatement is envisaged for unjustified dismissals in cases of: expiration of the protected period; dismissal for unlawful reasons; retaliatory dismissal of a whistleblower; and dismissal of workers who claims their rights to information regarding the employment relationship.

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2 Judgment no. 194/2018, point 15.

3 Judgment no. 59/2021, point 12.

4 Judgment no. 183/2022, points 5.2 and 6.

In 2024, the Court re-examined the regulation of dismissals for economic reasons, in particular the case of attenuated reintegration. The constitutional illegitimacy of the provision of the Jobs Act eliminating reintegration also applies in the case of dismissal for economic reasons, in cases in which the material fact does not exist. However, the Constitutional Court upheld the sanction of compensation rather than reinstatement in the case of failure to provide outplacement (*repêchage*). In other words, the failure to provide *repêchage* gives rise to indemnity protection (Judgment no. 128). In a different manner, another judgment of the Constitutional Court ruled that in the case of dismissal for just cause or justified subjective reasons, where the facts contested are relevant but attract sanctions from the point of view of disciplinary conduct pursuant to the national collective agreement, the sanction must be that of reinstatement in the workplace (Judgment no. 129). As noted in the first comments, reinstatement does not apply in all other cases, particularly the frequent cases of sanctions relating to disciplinary offences. Most cases of sanctions relating to offences concerning the employee's disciplinary conduct are identified on the basis of general expressions[5].

In concluding this report, it appears to be necessary to provide at legislative level an organic regulation of protection against unlawful dismissals. It is not a simply a matter of redrafting the regulations on dismissals, but rather the fragmentation of the sources needs to be overcome and the guiding principles laid down by the Constitutional Court need to be adopted in a systematic and harmonious manner.

5 A. Maresca and E. M. D'Onofrio, « Sanzioni più incerte per i licenziamenti ingiustificati », *Il Sole 24 Ore*, July/19/2024.