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The dual dimension of the European Social Charter and its effects on the rules on the protection against unlawful dismissals

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1. Origins, evolution and perspectives of the European Social Charter. A discontinuous line. 2. Art. 24 of the European Social Charter and the "The right to protection in cases of termination of employment": the attempt of the Italian legislator to dismantle the reinstatement protection and the necessary orderly limits. 3. The persistent centrality of judicial discretion. Some reflections.

Abstract

This contribution deals with the influence of the European Social Charter on the legal penalty regime of unlawful dismissals. In particular, the dialogue between the system of the Social Charter and constitutional case-law appears to be of particular interest and seems to increase the space of discretion of the judicial activity.

Keyword: European Social Charter; unlawful dismissal; Constitutional Court; judicial activity; discretion.

1. Origins, evolution and perspectives of the European Social Charter. A discontinuous line.

The European Social Charter, emblematically approved in 1961 (the year of erection of the Berlin Wall) and significantly flanked – at Community level – by the Community Charter of the Fundamental Social Rights of Workers in 1989 (the year of the fall of the Berlin Wall), follows a line of sinusoidal evolution, which makes it move between the rank of fundamental principles and rules, with a superordinate nature to ordinary law, but without the power to order states to comply with the relevant decisions.[1]

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[1] On the European Social Charter *see*, among others, Barile G., *La Carta Sociale Europea e il diritto internazionale*, Giuffrè, Milano, 1961; Benvenuti L., *Le finalità sociali e politiche della Carta Sociale Europea*, in Ministero del Lavoro e della Previdenza Sociale, *La Rassegna del Lavoro*, 1961, 13; Purpura R., *La Carta Sociale Europea*, in *Lavoro e sicurezza sociale*, 5, 1965, 709; Busacea G., *La sicurezza sociale in Italia, in Francia e nelle prospettive internazionali: la Carta Sociale Europea*, Borgia, Roma, 1965; D'Amico M., Guiglia G., Liberali B. (eds.), *La Carta sociale europea e la tutela dei diritti sociali: atti del Convegno del 18 gennaio 2013*, Edizioni Scientifiche Italiane, Napoli, 2013; Panzera C.

In other words, the European Social Charter lives a sort of eternal double dimension between a natural development towards the identification of national rules violating the Charter and the impossibility for the European Committee of Social Rights of the Council of Europe to have a binding influence on internal systems.

On the other hand, the European Social Charter is complementary to the ECHR implementing it from the point of view of economic and social rights, so that the list of rights in the Social Charter has then found an autonomous codification within the Charter of Fundamental Rights of the European Union.

While it is true that this continuity between the two Charters may provide a valid basis for the Court of Justice of the European Union for the progressive consolidation of the rights provided for therein, the embedded risk in the system is that the Social Charter may remain a mere declaration of principles and intentions, which are the prerequisites for mere non-binding recommendations towards the signatory States.

In fact, it cannot escape the fact that the need to reach this "weakened" landing place arises essentially at the time when in Europe the line of demarcation, even physical, between the capitalist West and the socialist East is consolidated, with the related need to avoid possible drifts with respect to the social claims of the working classes.

In that historical passage the καιρὸς (the right moment) is realized in which (Western) Europe must necessarily satisfy at least in part the demands coming from the world of work, in order to contain in its own systems even potentially revolutionary social pressures.[2]

On the other hand, the confirmation of the theorem is visible in the circumstance that the countries once belonging to the Eastern bloc, concluded the experiences of the so-called real socialism, were progressively absorbed into the system of the Social Charter, long before they entered the European Community.

If, therefore, this is the context in which the Social Charter originates, it can only encompass the critical issues of an essentially contradictory legal construction: on the one hand, the need to proclaim and encourage the spread of social rights and to guarantee work and, on the other, to avoid the creation of overlaps with state legislative powers.

The unresolved issue of the scope and limits of action of the Social Charter is on the other hand evident if one compares the relative legal system with the Community one. In the latter, the legal construction immediately appeared firmly established, in outlining mechanisms for the progressive stripping of national regulatory powers in favor of the supranational entity constituted first by the Communities, then by the Union.[3]

The Community legal order first and the euro-unitary then proceeded, albeit with a troubled and not always linear path, towards the construction of a dimension on the one hand unifying (the Communities first, the Union later) and on the other progressively ablative of national prerogatives, so as to make Community law and European Union a binding

(ed.), *La Carta sociale europea tra universalità dei diritti ed effettività delle tutele: atti del Convegno di studi, Reggio Calabria, 26 febbraio 2016*, Editoriale Scientifica, Napoli, 2016.

[2] Di Stasi A., *Diritto d'impresa e diritto del lavoro. Spunti critici nell'era della globalizzazione*, Futura, Roma, 2005, 1.

[3] On the accession of the European Union to the ECHR *see*, among others, Parodi M., *L'adesione dell'Unione Europea alla Cedu: dinamiche sostanziali e prospettive formali*, Edizioni Scientifiche Italiane, Napoli, 2020; Anrò I., *L'adesione dell'Unione europea alla CEDU. L'evoluzione dei sistemi di tutela dei diritti fondamentali in Europa*, Giuffrè, Milano, 2015.

source of law in internal legal systems. Vice versa, in the system of the Social Charter this has not happened, since the process has stopped at a plan of a statement of principle, without any consideration regarding the cogency and effectiveness of what has been declared and agreed in the supranational assembly.[4]

The different outcome of the two levels (Social Charter system and Community law) can be explained by the implications of the two regulatory levels in terms of structure and superstructure.

In other words, since the euro-unitary system is originally and necessarily aimed at facilitating the functioning of the common market and, therefore, to the progressive integration of the economic system, it immediately offered the legal instruments, endowed with cogency and effectiveness, suitable for pursuing the result of the progressive harmonization of national laws.

On the other hand, the Social Charter system relates rather to the superstructure plan, as it is functional to recommend principles and rules guaranteeing compliance with values still permeated by a meta-legal and abstract dimension, functional to the creation of an ideal heritage and shared cultural identity, in order to promote social cohesion within the acceding States.[5]

There is, moreover, evidence of the different outcome of the two paths in terms of the cogency of the recognition of fundamental rights in the fact that, with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union was given the same legal value as the Treaties, within the meaning of Article 6 of the Treaty on European Union.[6]

If this is true, however, the ability of the social order outlined by the Charter to influence, albeit indirectly and as an interpretive canon, the other Charters of Rights, first and foremost the Charter of Fundamental Rights, must not be overlooked and, on the other, it is crucial to generate a virtuous dialogue with the case law, primarily constitutional, of the individual states.

It is in fact the tendency of national constitutional charters to be porous and open to the incorporation of principles and rules deriving from international law that can constitute

[4] On the role of the ECHR in relation to the scope of intervention of the various national courts, *see* Sciarabba V., *Il ruolo della Cedu tra Corte costituzionale, giudici comuni e Corte europea*, Key Editore, Milano, 2019; Di Stasi A. (ed.), *CEDU e ordinamento italiano la giurisprudenza della Corte Europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2016-2020)*, Cedam, Padova, 2020.

[5] For an analysis of the multilevel system with reference to the right to work *see* Alaimo A.M., *Il diritto al lavoro fra Costituzione nazionale e Carte europee dei diritti: un diritto "aperto" e "multilivello"*, in Aa. Vv., *Studi in onore di Luigi Arcidiacono*, Giappichelli, Torino, 2010, 3; Torsello L., *Persona e lavoro nel sistema Cedu. Diritti fondamentali e tutela sociale nell'ordinamento multilivello*, Cacucci, Bari, 2019, 179.

[6] For an in-depth discussion *see* Menegatti E., Montanari A., *Un nuovo ruolo per il modello sociale europeo nel rapporto tra globalizzazione e tutela del lavoro*, in Stefanelli M.A. (eds.), *Dopo la globalizzazione: sfide alla società e al diritto*, Torino, Giappichelli, 2017, 37; Ales E., *Lo sviluppo della dimensione sociale comunitaria: un'analisi genealogica*, in Carinci F., Pizzoferrato A. (eds.), *Diritto del lavoro dell'Unione Europea*, UTET Giuridica, Torino, 2010, 131; Pizzoferrato A., *Libertà di concorrenza e diritti sociali nell'ordinamento Ue*, in *Rivista Italiana di Diritto del Lavoro*, 3, 2010, 523; Casale D., *Mercato unico dei servizi e tutela del lavoro nell'Unione Europea: convergenze e interferenze*, in Aa. Vv., *Novas Tecnologias, Processo e Relações de Trabalho III*, Editora Magister, Porto Alegre, 2019, 13.

fertile ground for a virtuous dialectic for the purpose of implementing levels of protection in social and labour matters.

In this sense, there seems to be no doubt that the Italian constitutional case-law, with the judgments n. 348 and 349 of 2007,[7] has sanctioned an important "quantum leap" when it recognized that through the entrance door constituted by the "*respect of the constraints deriving from international obligations*" provided for by art. 117, first paragraph, Cost., principles and rules of international law, including those agreed in the European Social Charter, constitute so called "interposed rules", i.e. parameters of constitutionality external to the national legal system but which in this way acquire the dignity of para-constitutional sources.[8]

In other words, as a result of the tendency to open up the national legal systems to the international community and to the relative normative production, even sectors that were originally and tend to be weak in terms of their binding force and effectiveness, such as that of the European Social Charter, have the possibility of becoming part of the higher-ranking sources, so as to guide, already from a hermeneutic point of view, the activity of exegesis and application of the national disciplines, bringing them into line with the indications coming from the supranational level.

However, this path is not without its limits and criticalities, if we consider that these are still legal systems essentially built around the concept of recommendation and soft *law,* without, moreover, courts entitled to issue binding measures.

In this perspective, it is interesting to see the effective capacity of the European Committee of Social Rights of the Council of Europe to influence national legislations, although this is an action that does not have a direct effect on them, but can on the other hand constitute an active player in the interpretative dialogue between the high courts. This is also because the Committee has the power to decide on complaints of a collective nature, so that specific cases submitted to it can give rise to guidelines useful both to the legislature and to the case-law of the States parties to the Charter.

2. Art. 24 of the European Social Charter and the "*the right to protection in cases of termination of employment*": the attempt of the Italian legislator to dismantle the reinstatement protection and the necessary orderly limits.

The case of the filing of the collective complaint against Articles 3, 4, 9 and 10 of Legislative Decree No. 23/2015 by the CGIL trade union organization appears emblematic of a potentially virtuous dialogue between the international and constitutional dimensions.[9]

[7] For a monographic treatment of the topic, *see* Salazar C., Spadaro A., *Riflessioni sulle sentenze 348-349/2007 della Corte costituzionale*, Giuffrè, Milano, 2009.

[8] Majorana G., *La Corte costituzionale e la Corte Edu (forse) ad un punto di svolta?*, in Bin R., Brunelli G., Pugiotto A., Veronesi P. (eds.), *All'incrocio tra Costituzione e CEDU*, Giappichelli, Torino, 2007, 153.

[9] For a comment on the legislative decree n. 23 of 2015 *see* among others Fiorillo L., Perulli A. (eds.), *Contratto a tutele crescenti e Naspi. Decreti legislativi 4 marzo 2015, n. 22 e n. 23*, Giappichelli, Torino, 2015; Carinci F., Cester C. (eds.), *Il licenziamento all'indomani del d.lgs. n. 23/2015 (contratto di lavoro a tempo indeterminato a tutele crescenti)*, in *Adapt Labour Studies e-book series*, 46, 2015; Carinci M.T., Tursi A. (eds.), *Jobs act: il contratto a tutele crescenti*, Giappichelli, Torino, 2015; Dalfino D., *L'incostituzionalità del contratto a tutele crescenti: gli effetti sui processi pendenti*,

In particular, the question was raised as to the compatibility of the above provisions on purely economic protection against unlawful dismissal with Article 24 of the European Social Charter as amended and supplemented in Strasbourg on 3 May 1996, ratified and made enforceable in Italy by Law No 30 of 9 February 1999.

That provision, in addition to providing for the commitment of the Contracting States to recognize the right of workers not to be dismissed without valid reason, also provides for the right of workers dismissed without such a motive to appropriate compensation or to *"other appropriate relief",* together with the guarantee of the right to appeal against such a measure before an "*impartial body*".

Therefore, it follows from that article of the European Social Charter that the national legislation placed to protect workers against the unlawful nature of dismissals should conform to standards of an appropriate justified withdrawal and adequacy of compensation or adequacy of restorative protection.

In the decision of 11 September 2019, the European Committee of Social Rights of the Council of Europe, citing EACR General Survey on Convention (No 158) and Recommendation (No 166) on Termination of Employment, 1982, International Labour Conference, 82nd Session 1995, Report III (Part 4B), Geneva 1995, therefore stated "*compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. In order to do this, the impartial bodies should have all the necessary powers to decide quickly, completely and in full independence, and in particular to decide on the most appropriate form of redress in the light of the circumstances, including the possibility of reinstatement. When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination*".

In substance, it is a matter of a series of affirmations that essentially place reinstatement at the center of the system of protection against dismissal, following a path that improves on that followed by Italian constitutional case-law. The latter, in fact, starting with judgment no. 81 of 1961 (and subsequently, no. 45 of 1965;[10] no. 81 of 1969;[11] no. 55 of 1974;[12] no. 152 of

in *Argomenti di Diritto del Lavoro*, 2, 2019, 15; Ferraro G. (ed.), *I licenziamenti nel «contratto a tutele crescenti»*, in *Quaderni di Argomenti di di Diritto del Lavoro*, Cedam, Padova, 2015; Gamberini G., Pelusi L.M., Tiraboschi M., *Contratto a tutele crescenti e nuova disciplina dei licenziamenti*, in Tiraboschi M. (ed.), *Le nuove regole del lavoro dopo il Jobs Act*, Giuffrè, Milano, 2016, 21; Marazza M., *Il regime sanzionatorio dei licenziamenti nel Jobs Act*, in *Argomenti di Diritto del Lavoro*, 2, 2015, 310; Zoppoli A., *Rilevanza costituzionale della tutela reale e tecnica del bilanciamento nel contratto a tutele crescenti*, in *diritti lavori mer*cati, 2, 2015, 91; Fiorillo L., *Licenziamento individuale per giusta causa o giustificato motivo e tecniche di tutela dopo il Jobs Act*, in Calcaterra L. (eds.), *Tutele del lavoro ed esigenze della produzione. Le riforme del quinquennio 2011-2015. Studi in onore di Raffaele De Luca Tamajo*, Editoriale Scientifica, Napoli, I, 2018.

[10] For a comment on this judgment *see* Crisafulli V., *Diritto al lavoro e recesso* ad nutum, in *Giurisprudenza Costituzionale*, 1965, 661.

[11] The judgment is published in *Giurisprudenza Costituzionale*, I, 1969, 1153.

[12] For a comment on this judgment *see* Sandulli P. *La Corte costituzionale di fronte ai problemi del campo di applicazione dell'art. 18 dello Statuto dei lavoratori*, in *Massimario di Giurisprudenza del Lavoro*, 1974, 466.

1975;[13] no. 178 of 1975;[14] no. 189 of 1975;[15] ord. no. 256 of 1976; no. 194 of 1970;[16] no. 2 of 1986[17]), noted that Article 4 of the Constitution establishes principles expressing the need to limit the freedom of withdrawal of the employer and the extension of the protection of the worker as regards the preservation of his job. While it noted that the principles that express the need to limit the employer's freedom to terminate employment and to extend the protection of the worker with regard to the preservation of his job, it also stated that the implementation of these principles is entrusted to the discretion of the ordinary legislator as regards the choice of times and methods in relation to the general economic situation.

On the other hand, it should be noted that the Constitutional Court, in its judgment No 45 of 1965, stated that the obligation to state reasons and the adversarial rule can be traced back to a general principle of protection of work codified in Articles 4 and 35 of the Constitution, which requires the legislature to dictate "*due guarantees*" and "*appropriate balances"* with respect to the power of dismissal.[18]

In particular, given the discretion and graduality with which the legislature could apply the constitutional principles relating to the guarantee of the preservation of employment, it was stated that the purely economic protection established by Article 8, Law No. 604/66 was an initial implementation of those principles. Subsequently, the real protection provided for by Articles 18 and 35 of Law No. 300 of 1970 (Workers' Statute) to workers dependent on undertakings with certain size requirements, both fall within the discretion of the legislature which is entitled to delimit the scope of application of reinstatement.

In addition, the choice of a model of economic protection or of reinstatement protection has important implications also with reference to the identification of the starting point of the prescriptive period for employment claims. This would be placed at the time of termination of the relationship rather than at the time of accrual of the right, depending on whether the employment relationship is not or is assisted by the regime of real stability against dismissals, as constantly affirmed by Constitutional Court since sentence No. 63 of 1966.[19]

Although, according to a well-established approach to constitutional jurisprudence, it would be legitimate and reasonable for competences and powers to be attributed to the legislator in order to identify the tendentially reasonable balance of principles and interests, since in this respect there are also solid formal arguments, it is also clear that on this point the Italian Constitutional Court appeared to be backtracking from its role as judge of the constitutional legitimacy of the laws, in fact emptying the preceptive scope of the constitutional rules which not only ensure the right and duty to work, but also the protection

[13] The judgment is published in *Massimario di Giurisprudenza del Lavoro*,, 1975, 725.

[14] The judgment is published in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, II, 1975, 642.

[15] The judgment is published in *Diritto del Lavoro*, II, 1975, 231.

[16] *See* Prosperetti U., *Riflessi della questione di legittimità costituzionale dell'art. 8, legge 1966 n. 604*, in *Massimario di Giurisprudenza del Lavoro*, 1970, 522.

[17] The judgment is published in *Foro Italiano*, I, 1986.

[18] The reflection on reintegration protection by D'Antona M., *La reintegrazione nel posto di lavoro. Art. 18 dello Statuto dei lavoratori*, Cedam, Padova, 1979, is still fundamental.

[19] For a comment on this judgment *see*, among others, Chiola C., *Il nuovo "*dies a quo*" nella prescrizione dei crediti di lavoro,* in *Giurisprudenza Costituzionale*, 3, 1966, 945.

of the same in all its forms and applications. This is also in consideration of the centrality of work in the broader legal construct of constitutional democracy, in which work activity is at the same time an instrument of realization of the person as well as an element that should contribute to the removal of social inequalities, so that the same could not reasonably be removed illegitimately by providing for a mere economic protection in case of ascertained illegitimacy.

However, also as a result of the progressive – although still not entirely univocal – entry into our system of the rules of the Social Charter, the Constitutional Court began to provide a first line of review on the merits of the constitutionality of the protection provided by the legislator. And in fact, Judgment No. 194 of 2018 declared the constitutional unlawfulness of Article 3(1) of Legislative Decree No. 23 of 4 March 2015 (Provisions on open-ended employment contracts with increasing protections, implementing Law No. 183 of 10 December 2014), both in its original text and in the text amended by Art. 3, paragraph 1, of Decree-Law No 87 of 12 July 2018 (Urgent provisions for the dignity of workers and enterprises), converted, with amendments, into Law No 96 of 9 August 2018 limited to the words "*of an amount equal to two months' salary of the last reference salary for the calculation of the severance pay for each year of service*".[20]

This declaration of unconstitutionality was based on the use of the interposed rule referred to in Article 24 of the European Social Charter, through which both Article 76 – in the reference made by the delegation law to respect international conventions – and Article 117, first paragraph, Cost.[21]

Therefore, in partial acceptance of the issues raised by the *national* court with regard to Article 3 (in relation both to the principle of equality, from the point of view of the unjustified approval of different situations, and to the principle of reasonableness), the first paragraph of Article 4, the first paragraph of Article 35 and, by Article 24 of the European Social Charter, Articles 76 and 117, first paragraph, of the Constitution, Article 3 of Legislative Decree No 23 of 2015, limited to the words *"of an amount equal to two months of the last reference salary for calculating the severance pay for each year of service",* has been declared constitutionally unlawful.

Consequently, the "monthly payments" to which art. 3, paragraph 1, of Legislative Decree no. 23 of 2015 must refer to the last reference remuneration for the calculation of severance

[20] *See* Bellavista A., *Discutendo con Carlo Cester su alcuni profili delle tutele contro i licenziamenti illegittimi dopo la sentenza n. 194 del 2018 della Corte costituzionale*, in Tremolada M., Topo A. (a cura di), *Le tutele del lavoro nelle trasformazioni dell'impresa: liber amicorum Carlo Cester*, Cacucci, Bari, 2019, 957; Ghera F., *La tutela contro il licenziamento secondo la sentenza n. 194/2018 della Corte costituzionale*, in *www.dirittifondamentali.it*, 2019, 1; Giubboni S., *Il licenziamento nel contratto di lavoro a tutele crescenti dopo la sentenza n. 194 del 2018 della Corte costituzionale*, in *Foro Italiano.*, 1, I, 2019, 92; Perulli A., *La disciplina del licenziamento illegittimo di cui all'art. 3, comma 1, d.lgs. n. 23/2015 alla luce del c.d. "Decreto Dignità" e della sentenza della Corte costituzionale n. 194/2018*, in Fiorillo L., Perulli A. (eds.), *"Decreto Dignità" e Corte costituzionale n. 194 del 2018. Come cambia il Jobs Act*, Giappichelli, Torino, 2019, 59; Romboli R., *Nota a Corte cost., sent. n. 194/2018*, in *Foro Italiano*, 1, 2019, 89.

[21] On the subject of interposed rules *see* Giocoli Nacci P., *Norme interposte e giudizio di costituzionalità*, in *Scritti su la Giustizia Costituzionale in onore di Vezio Crisafulli*, I, 1982, 359; Siclari M., *Le norme interposte nel giudizio di costituzionalità*, Cedam, Padova, 1992; Cicconetti S.M., *Lezioni di giustizia costituzionale*, Quinta Edizione, Giappichelli, Torino, 2014; Alberti A., *La delegazione legislativa tra inquadramenti dogmatici e svolgimenti della prassi*, Giappichelli, Torino, 2015, 43.

indemnity, as can be seen from Legislative Decree no. 23 of 2015 as a whole, with regard to the commensuration of compensation.

On the other hand, in compliance with the limits, minimum and maximum, of the range within which the allowance due to the unlawfully dismissed worker must be quantified, the judge will be required to take into account first of all the seniority – this criterion being prescribed by art. 1, paragraph 7, letter c) of delegated law no. 184 of 2014 – but also the other criteria that can be inferred in a systematic key from the evolution of the discipline of dismissals (number of employees employed, size of economic activity, behavior and conditions of the parties).

In the same vein, the Constitutional Court, in its judgment no. 150 of 2020, once again called upon to rule on the constitutionality of the system of protection against unlawful dismissal laid down by Legislative Decree no. 23 of 2015, found that, with reference to dismissals that are formally flawed, in the face of the weakening of the reinstatement protection of the dismissed worker, there is "*a progressive weakening of the indemnity protection, which is not enough to implement a balanced balancing of conflicting interests. In the overall plan proposed by the legislator, a criterion anchored exclusively to seniority of service only accentuates the marginality of formal and procedural defects and devalues even more the function of guaranteeing fundamental values of juridical civilization, oriented to the protection of the dignity of the person of the worker*".

In particular, the incongruity and the unreasonableness of a rigidly predetermined measure are even more accentuated and in cases of reduced length of service, in which both the compensatory function and the deterrent effect of indemnity protection appear to be completely ineffective, even if we consider that the inadequacy of the refreshment recognized by law cannot be remedied by the minimum measure of the allowance, set at two months.

In the present case, the Constitutional Court did not have recourse to the interposed rule referred to in Article 24 of the European Social Charter, but nevertheless considered the remedies provided for by the contested provision to be inadequate and therefore also detrimental to the protection of work in all its forms and applications as provided for in the first paragraph of Article 4 and Article 35, first paragraph, of the Constitution.

Although there is no express reference to this provision of the Social Charter, it cannot escape the fact that this omission could paradoxically constitute an element that further strengthens the pervasiveness of the Charter system, since the exclusive reference to the constitutional principles referred to in Articles 4 and 35 of the Constitution together with the reference to the judgment no. 194 of 2018 of the Constitutional Court (which instead had referred to the interposed rule of Article 24 of the Social Charter), appears to confirm once again the transposition of the latter within the horizon of the reasoning and legal discourse of the judge of the laws, with a view to the full protection of the *"dignity of the person of the worker"*. [22]

On the basis of these hermeneutical interactions, the constitutional illegitimacy of art. 4 of legislative decree. n. 23 of 2015, limited to the words *"of an amount equal to one month of the last reference salary for the calculation of the severability treatment for each year of service"*. [23]

[22] Fiorillo L., Perulli A. (eds.), nt. (20).

[23] For an in-depth and careful discussion of the various profiles connected to the topic *see*, among others, Carinci F., Tiraboschi M. (eds.), *I decreti attuativi del Jobs Act: prima lettura e interpretazioni*,in *ADAPT Labour Studies*

It follows from this that in compliance with the minimum and maximum limits set by the legislator, the judge, in determining the allowance, will be obliged to take into account first of all the length of service, which is the starting point of the assessment but, *"then corrective key, with an appropriately motivated assessment, the judge will also be able to weigh other criteria that can be deduced from the system, which contribute to making the determination of the allowance adhering to the particularities of the concrete case*".

This means that the seriousness of the violations, enucleated by art. 18, sixth paragraph, of Law No. 300 of 1970, as amended by Law No. 92 of 2012,[24] as well as the number of employees, the size of the undertaking, the conduct and conditions of the parties, which are referred to in Article 8 of Law No. 604 of 1966, a provision which applies to formal defects in the context of purely economic protection redefined by Law No. 92 of 2012.[25]

However, the pervasive effectiveness of the aforementioned fruitful combination of the interpretative activity of the Constitutional Court and the principles of the Social Charter finds a limit in the need for the legislator ultimately, also in the light of the indications enunciated on several occasions by the Constitutional Court, *"to recompose according to coherent lines a legislation of essential importance, which sees heterogeneous disciplines competing, the result of the succession of fragmentary interventions"*.

Also subsequently, the Constitutional Court with sentence no. 59 of 2021[26] reiterated the integrated nature of the system of protection against unlawful dismissals provided for by

e-Book series, 37, 2015; Carinci F., Cester C. (eds.), nt. (9); Basenghi F., Levi A. (eds.), *Il contratto a tutele crescenti*, Giuffrè, Milano, 2016; Zilio Grandi G., Biasi M. (eds.), *Commentario breve alla Riforma "Jobs Act"*, Cedam, Padova, 2016.

[24] Examine the first judicial applications of art. 18 of the law n. 300 of 1970 as amended by law no. 92 of 2012 Brusati S., Gragnoli E. (eds.), *Una prima esperienza sulla nuova disciplina dei licenziamenti. Seminario in onore di Michele De Luca*, in *Quaderni di Argomenti di di Diritto del Lavoro*, Cedam, Padova, 2014.

[25] Tiraboschi M., *Italian Labour Law after the so-called Monti-Fornero Reform (Law No. 92/2012)*, in *E-journal of International and Comparative Labour Studies*, 1, 3-4, 2012, 47; Cinelli M., Ferraro G., Mazzotta O. (eds.), *Il nuovo mercato del lavoro dalla riforma Fornero alla legge di stabilità 2013*, Giappichelli, Torino, 2013; Chieco P. (ed.), *Flessibilità e tutele nel lavoro. Commentario della legge 28 giugno 2012 n. 92*, Cacucci, Bari, 2013, 257; Carinci F., Miscione M. (eds.), *Commentario alla riforma Fornero (Legge n. 92/2012 e Legge n. 134/2012)*, in *Supplemento a Diritto & Pratica de Lavoro*, IPSOA, 33, 2012, 82, investigate in depth, among others, the effects of this law on Italian labor law. Among the first comments on the new art. 18 Stat. Lav., as resulting from the changes made by law no. 92 of 2012, please refer to Marazza M., *L'art. 18, nuovo testo, dello Statuto dei lavoratori*, in *Argomenti di Diritto del Lavoro*, 3, 2012, 612; Cester C. (ed.), *I licenziamenti dopo la legge n. 92 del 2012*, Cedam, Padova, 2013; Speziale V., *La riforma del licenziamento individuale tra diritto ed economia*, in *Rivista Italiana di Diritto del Lavoro*, I, 2012, 549.

[26] The judgment is published in *Foro Italiano*, 5, I, 2021, 1518. For an in-depth analysis *see* Tiraboschi M., *La Corte costituzionale "censura" la disarmonica tecnica (e valoriale) del legislatore*, in *Argomenti di Diritto del Lavoro*, 4, 2021, 968; Speziale V., *Il licenziamento per giustificato motivo oggettivo dopo la sentenza della Corte costituzionale n. 59 del 2021*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2, I, 2021, 247; Romeo C., *Il condivisibile giudizio della Consulta sull'applicazione dell'art. 18 dello Statuto per il licenziamento per g.m.o.*, in *Il Lavoro nella Giurisprudenza*, 6, 2021; Pisani C., *La riforma dei regimi sanzionatori del licenziamento per mano della Consulta*, in *Diritto delle Relazioni Industriali*, 2, 2021, 522; Perulli A., *La disciplina del licenziamento per GMO dopo Corte costituzionale n. 59/2021*, in *Rivista Italiana di Diritto del Lavoro*, 2, I, 2021, 187; Magnani M., *Il terribile diritto. Riflessioni sull'attuale regime del licenziamento tra giurisprudenza e legislatore*, in *Rivista Italiana di Diritto del Lavoro*, 2, I, 2021, 169; Giorgi F.M., *L'interpretazione dell'art. 18, comma 4, Stat. lav. da parte del giudice di legittimità deve essere rimeditata*, in *Il Lavoro nella Giurisprudenza*, 8-9, 2021, 827; Ferrante V., *Non c'è alternativa alla reintegra, in caso di manifesta insussistenza del giustificato motivo oggettivo*, in *Diritto delle Relazioni Industriali*, 2, 2021, 509; Cester C., *La Corte costituzionale sul licenziamento per g.m.o.: più spazio per la tutela reale in caso di illegittimità*, in *Il Lavoro nella Giurisprudenza*, 6, 2021; Bellomo S., Preteroti A., *La sentenza della Corte costituzionale n. 59/2021 sull'art. 18 St. lav.: una questione di (inaccettabile) discrezionalità*, in *www.federalismi.it*, 13, 2021; Aiello F., *La Corte costituzionale e la differenza di tutele nel licenziamento collettivo dopo il 'Jobs Act': quale significato per il 'non liquet'?*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale,* 2, II, 2021, 205.

the European Social Charter, so much so as to explicitly state that *"the Constitution is flanked by supranational sources (art. 24 of the European Social Charter, revised, with annex, made in Strasbourg on 3 May 1996, ratified and made enforceable by Law No. 30 of 9 February 1999) and of the European Union (Article 30 of the Charter of Fundamental Rights of the European Union – CDFUE – proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007)*". However, having said that, the Court points out that in its judgment no. 254 of 2020, which limited itself to declaring the inadmissibility of the questions of constitutionality raised therein, it was stated that "*there may be many remedies capable of guaranteeing adequate compensation for the worker who has been arbitrarily dismissed*". Nevertheless, in providing the guarantees necessary to protect the person of the worker, the legislator, albeit within the wide margin of appreciation that falls to him, is bound to respect the principles of equality and reasonableness. Starting from this premise, it was first of all stated that the merely optional nature of reinstatement on the one hand appears inconsistent with the peculiar system outlined by Law No 92 of 2012 and, on the other hand, violates the principle of equality.

While for disciplinary dismissals the reinstatement of the employee has been foreseen, if it is established in court that the fact underlying the employer's dismissal does not exist, on the other hand, for economic dismissals, the non-existence of the fact may lead to reinstatement if it is manifest, so that in this case the non-existence of the fact, although differently graduated, is a diriment element for the purposes of the recognition of the reintegration protection. Therefore, once again, the precise indication of both the Committee and the Social Charter is echoed, regarding the tendential centrality of reintegration protection in the system of protection against illegitimate dismissal.

On the basis of the choice made by the Italian legislator, the non-existence of the fact, whether it is a matter of disciplinary conduct charged to the employee, or whether it concerns an organizational decision of the employer, or whether it is of a manifest nature, constitutes the logical and legal premise of a homogeneous sanctioning response, consisting in the re-establishment of the employment relationship.

However, the absence of the fact constituting the objective reason for dismissal leads to the application of reinstatement protection only on an optional basis, thus infringing the principle of equality with regard to economic dismissals, even though it is still a question of the manifest inconsistency of the justification put forward and there is a more serious defect than the mere absence of the fact.

Nor, much less, the peculiarities of the cases of dismissal, which in the just cause and in the justified subjective reason are substantiated in the violation of contractual obligations by the worker while in the justified objective reason in the technical and organizational choices of the entrepreneur, can justify a diversification regarding the obligatory or optional nature of the reintegration, once the legislator has considered the non-existence of the fact worthy of the remedy of reintegration. This is also because, in the integrated system of protections indicated above, reinstatement is not just any choice, but the preferable option as the most suitable one to constitute a truly dissuasive solution with respect to the adoption of dismissals without legal and factual bases.

It is in fact clear that the arbitrary exercise of the power of dismissal, regardless of whether it is a disciplinary or economic case "*harms the worker's interest in the continuity of the negotiating*

bond and results in a traumatic affair, which directly involves the person of the worker. The non-existence of the fact, despite the different gradations it presents in the individual cases of dismissal, denotes the most striking contrast with the principle of necessary justification for the withdrawal of the employer, which that Court has enunciated on the basis of articles. 4 and 35 Cost. ", with judgment no. 41 of 2003. This is because, as stated since the beginning of republican labor law by Prof. Francesco Santoro Passarelli,[27] the ontology of the discipline placed to protect the worker, namely "the spirit of labor law", consists in the fact that for the work provider the latter implies first of all the being, even before having, unlike the employer, for whom instead the employment relationship constitutes first of all an element of a patrimonial nature. In fact, it is enough to consider that the performance of work implies for the worker the delicate issue of freedom and personality.

As is clear from a reading of Article 24 of the Social Charter, there is no valid justification for the optional nature of the reinstatement remedy for economic dismissals alone, since economic dismissals involve the person and dignity of the worker as much as disciplinary dismissals.

On the other hand, the unreasonableness of the legislative choice is clear in the fact that it is not always easy to distinguish between manifest and non-manifest non-existence, thus making the reinstatement easier without the interpreter's indication of a clear directive criterion and leaving the crucial choice of the form of protection (reinstated, albeit in the attenuated form, and merely indemnity) to an assessment of the judge detached by precise points of reference.

Nor is the reference to the "excessive onerousness" made by the jurisprudence of legitimacy in order to give the provision a stronger preceptive content, suitable to remedy the indefiniteness of the case, since the measure of compensatory protection can be considered "equivalent", as is the indemnity in lieu of reinstatement provided for by the third paragraph of Article 18 of Law no. 300 of 1970, having a reduced content, such as that provided for by the fifth paragraph of the same article.

In that regard, it is sufficient to consider that mere indemnity protection constitutes a well-defined economic sanction, which derives from the assessment and declaration of the illegality but effectiveness of the dismissal. Otherwise, the compensation in lieu of reinstatement presupposes that the dismissal has been declared unlawful and also ineffective, so that it does not produce effects in terms of the accrual of the right to remuneration from dismissal to reinstatement, with the related contribution consequences,[28] but gives the employee the choice of converting the reconstituted job into a sum quantified by the legislature as 15 months' salary.

And in fact, according to the reasoning of the Constitutional Court, the excessive burden understood as *"incompatibility with the organizational structure in the meantime assumed by the company, presupposes non-linear comparative assessments in the dialectic between the right of the worker not to be arbitrarily ousted from the workplace and the freedom of private economic initiative. Nor does it serve to*

[27] Santoro Passarelli F., *Spirito del diritto del lavoro*, in *Rivista Italiana di Diritto del Lavoro*, 1948, 1.
[28] On this topic, *see* Zampini G., *Reintegra del lavoratore licenziato e versamenti contributivi*, in *Il Lavoro nella Giurisprudenza,* 2015.

identify certain parameters for the judge's assessment in the recognition of two remedies – reinstatement or indemnity – characterized by a heterogeneous statute".

3. The persistent centrality of judicial discretion. Some reflections.

Therefore, the centrality of the judge's discretion returns to the center of reflection and legal reasoning, which following the judgment n. 194 of 2018 and n. 150 of 2020 is now endowed with an essential power to evaluate the particularities of the concrete case, on the basis of punctual and multiple criteria that can be deduced from the legal system, the result of a dating regulatory evolution and a proven practice. If in fact the mechanism of real protection referred to in Article 18 of Law no. 300 of 1970 codified in a certain and non-discretionary manner the legal consequences of the declaration of illegality of dismissal in cases where the reinstate remedy applies, otherwise, in the amending discipline dictated by Law no. 92 of 2012 and in the legislation introduced for workers hired from 7 March 2015 with the so-called contract with increasing protections, this possibility of providing and predetermining with certainty the consequences of an unlawful dismissal are significantly reduced.[29] On the contrary, since the system of protection varies considerably depending on the size of the employer, the defect in the dismissal and the date of the employee's employment, it is very difficult to predict the outcome of the case with a good degree of certainty, since a considerable part of the consequences are left to the uncertainties of the law and therefore, in the final analysis, to the discretion of the judge.

And in fact, in the case subject to scrutiny by the Court in judgment no. 59 of 2021, the diversity of the applicable protection is based on a criterion, I.E. the excessive burden of reintegration, deriving from the jurisprudential elaboration which, on the one hand, appears indeterminate and improper and, on the other, lacks any relevance to the disvalue of the dismissal.

This is because the change in the organizational structure of the undertaking which should justify the application of reintegration protection is an element which depends on the choices of the same entrepreneur who ordered the unlawful dismissal and can therefore be adopted for elusive purposes, also in view of the fact that such a change could take place a long time after the withdrawal, even though it is an accidental element with no connection with the seriousness of the dismissal.

Hence, according to the reasoning followed by the Constitutional Court, that it is manifestly unreasonable to link the choice between reintegration protection and merely indemnity protection to contingent factors and in any case attributable to the determinations of the person responsible for the offense, all the more so if we consider the implications that the application of one type of protection rather than another has on the freedom and dignity of the worker.

[29] Corti M., *Flessibilità e sicurezza dopo il Jobs Act. La flexicurity italiana nell'ordinamento multilivello*, Giappichelli, Torino, 2018.

If it is true that the Constitutional Court's constant case law has recognized as legitimate the legislator's delimitation of the scope of application of reinstatement, it should not be underestimated that a distinguishing criterion that relies on a changeable case-by-case assessment without an objective connection with the offence to be punished is not based on objective or rationally justifiable elements, but rather amplifies the uncertainties of the system.

And in fact, the reference to a judicial assessment provided with any directive criterion of the choice between reintegration protection and indemnity protection contradicts the purpose of a fair redistribution of the "protections of employment", enunciated by art. 1, paragraph 1, letter c), of Law no. 92 of 2012, so that the objective of circumscribing within certain and predictable boundaries the application of the most incisive remedy of reintegration and to offer precise parameters to the discretion of the judge risks being frustrated by the need to proceed with the complex assessment of compatibility with the organizational needs of the company.

On the basis of this articulated reasoning, although the preceptive scope of the European Social Charter on protection against unlawful dismissals is not directly mentioned, it nevertheless emerges that this principle is now a real prerequisite that conditions any reflection, the assumption that must then be filled with concrete content in identifying the protection applicable against unlawful dismissal. According to these logical and legal assumptions, it has therefore been declared unconstitutional that Article 18, paragraph 7, second sentence, of Law no. 300 of 1970, as amended by Article 1, paragraph 42, letter b), of Law no. 92 of 2012, insofar as it provides that the judge, if he finds that the fact underlying the dismissal for justified objective reason is manifestly unfounded, "*may also apply*" - instead of "*also apply*" - the rules set out in paragraph 4 of Article 18. It is therefore an intervention that re-expands, at least in part, the scope of application of the real protection, thus implementing the recommendation of the European Committee of Social Rights, which expressly stated that the reinstatement protection is "*the best solution*".

In conclusion, it seems correct to say that there is still a double dimension in the action of the European Social Charter. The latter, while constituting the basis of acts of *soft law,* nevertheless constitutes on the one hand a hermeneutical canon and on the other parameter of a rank equivalent to the constitutional source, so as to be able to conduct the jurisprudential activity of the Constitutional Court to identify necessarily implementing solutions of the levels of social and labor protection, which in this way are enriched with new contents, with a view to ensuring the most effective possible protection of the rights of those who work, first of all with regard to protection against unlawful dismissal.

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