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Sanctionatory consequences deriving from the violation of the obligation of reasonable accommodations in Italian labour law

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1. Supervention of unsuitability, disability and dismissal for a justified objective reason. 2. The limits to the employer's power of dismissal. 3. The influence of anti-discriminatory law. 4. Sanctionatory consequences of the violation of the obligation of reasonable accommodations in light of anti-discriminatory protection. 5. Dismissal and reasonable accommodation in jurisprudential evolution.

Abstract

After having revisited the limits that preside over the exercise of an employer's power of dismissal, in light of the definition of 'disability' and 'reasonable accommodations', this paper focuses on the need to reassess this specialized discipline in an anti-discriminatory key, also in order to determine the sanctionatory consequences deriving from the violation of the obligations that rest on the employer.

Keywords: Supervention of unsuitability for duties; Disability; Obligation of repechage; Obligation of reasonable accommodations; Dismissal.

1. Supervention of unsuitability, disability and dismissal for a justified objective reason.

The need to terminate employment for reasons linked to one's organization, as a consequence of a legitimate business choice to modify one's assets (art. 41 Cost.), is provided for in art. 3 of law n. 604 of 1966, which requires that the employer respect the limits outlined by the law, such as the effectiveness of the reasons adopted in support of the dismissal, the link of causality with respect to the position to be suppressed and the fulfilment of the duty of *repechage*.[1]

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[1] Gragnoli E., *Il licenziamento, la giusta causa e il giustificato motivo*, in Gragnoli E. (ed.), *L'estinzione del rapporto di lavoro subordinato*, in Persiani M., Carinci F. (dir.), *Trattato di diritto del lavoro*, Wolters Kluwer-Cedam, Milano-

In the past, the notion of justified objective reason permitted the inclusion within limits of dismissal for supervention of unsuitability for the fulfilment of one's duties, as a reason for dismissal justified by the need to protect the interests of the employer and his business, in cases where there was no attributable worker behaviour. [2]

This solution was outlined in absence of a specific legal discipline and has the merit of abandoning the previous orientation, which led the particular case to the supervened impossibility of civil origin.

Nonetheless, with Law n. 68 of 1999, and then with art. 42 of Legislative Decree n. 81 in 2008 dismissal for supervened unsuitability and/or disability obtained its own specific regulation.

Despite the traditional reference to the notion of justified objective reason in art. 3 Law n. 604 of 1966,[3] no special normative regulation contains such reference.

The laws which preside over the dismissal of an unsuitable and/or disable employee are qualitatively and quantitatively different, and demand the respect of greater limits than those which preside over dismissal for "other" objective reasons, for example so called "economic" reasons, (only) sharing with the latter the consideration of dismissal as *extrema ratio*.

To prove the fact that we are in the presence of a case of its own, were it not sufficient to consider the specific discipline, even the reforms of the sanctionatory regimes following Law n. 92 of 2012 and Legislative Decree n. 23 of 2015 determined in detail the consequences linked to this case of dismissal by deconstructing protection depending on the reason for dismissal and the "weight" of the employer's violation, although making different choices. [4]

Therefore, the limits to the power of dismissal and the sanctionatory consequences of their violation must be determined by looking at the entire discipline of the right to/of labour of people with an unsuitability and/or disability.

It is not an easy task since we are before a fragmented regulation, embedded in many sources, each with its own field of application depending on whether the dismissal concerns an employee who is declared unsuitable and/or disable. This concerns norms which were issued in different times and with different aims, which graded the intensity of the procedures and the obligations resting on the employer in proportion to the seriousness of the disadvantages caused to the employee. Nonetheless, the principles of supranational derivation, which are now fully part of our regulations, act as a link for a unified interpretation of the normative context in an anti-discriminatory sense.

Padova, 2017, 288, 348 ff.; Perulli A. (ed.), *Il licenziamento per giustificato motivo oggettivo*, Giappichelli, Torino, 2017.

[2] Cass. S.U. 7 August 1998, n. 7755, in *Giustizia civile - Massimario annotato dalla Cassazione*, 1998, 1668.

[3] *See* Cass. 24 May 2005, no. 10914, in *Diritto delle relazioni industriali*, 2007, 1, 199; Cass. 6 March 2007, no. 5112, in *D&L: Rivista critica di diritto del lavoro*, 2007, 2, 504; Trib. Ravenna 29 October 2007, ord.; Cass. 23 April 2010 no. 9700; Cass. 12 January 2017 no. 618, *Diritto & Giustizia*, 2017, 13 January.
See, Ferraresi M., *L'obbligo di repêchage tra riforme della disciplina dei licenziamenti e recenti pronunce di legittimità*, in *Variazioni su Temi di Diritto del Lavoro*, 2016, no. 4, 833 ff., 835.

[4] Cester C., *Le tutele*, in Gragnoli E. (ed.), nt. (1), 726 ff., 977 ff.

2. Limits to the employer's power of dismissal.

The regulation foresees four cases for protection, two of which are regulated by general norms and two by a sectorial norm.

Law n. 68 of 1999, named "Norms for the right to employment of the disabled" (the first to be issued) foresees two situations in regulating the system of so called targeted employment: that of a worker employed via ordinary procedures, whose supervened unsuitability leads to exceeding the limits outlined in art. 1 comma 1 (regulated by art. 4 comma 4); and that of an already disable employee, employed via targeted employment, whose health worsens during his or her employment or who is no longer suitable for the fulfilment of his or her duties due to significant changes made by the employer to the organization of the work (art. 10 comma 3). Subsequently, art. 42 of Legislative Decree n. 81/2008 extended the same protection to another category, that of employees employed via ordinary procedures who become unable to fulfil their original duties, but who do not have a disability. Nonetheless, following Legislative Decree n. 216 of 2003, it is necessary to distinguish within this category workers who were employed via ordinary procedures who have become unable to complete their duties due to a disability, according to the definition of international derivation, and who, in addition to being protected by the aforementioned art. 42 cit., also benefit from anti-discriminatory protection.[5]

In fact, in addition to the limits to the employer's power of dismissal standardized by the above regulations, we must include limits derived from European Directive n. 78/2000 by means of Legislative Decree n. 216 of 2003,[6] which are applied in all cases where the unsuitability derives from a condition of disability in a bio-psycho-social sense, according to the notion in UN Convention of 2006 (adopted by Law n. 18 of 2009).[7]

Such further limits consist in forbidding direct and indirect discrimination due to disability (this factor of discrimination is included in art. 15 St. lav.) and in the so-called obligation of reasonable accommodations (in actual fact, inserted in comma 3-*bis* of art. 3 of Legislative Decree n. 216/2003 successively with Law Decree no. 76 of 2013).[8]

Starting with the duty of *repechage*, in this special discipline, the weight and intensity are different from the limit which presides over justified objective reason *ex* art. 3 of Law n. 604 of 1966, in that its absolution does not depend solely on the existence of other available duties, but also on the compatibility of these duties with the capabilities of the employee, so that, to start with, the characteristics of the impairment which caused the

[5] Voza R., *Sopravvenuta inidoneità psicofisica e licenziamento del lavoratore nel puzzle normativo delle ultime riforme*, in *Argomenti di Diritto del lavoro*, 2015, 4-5, 771 ff.

[6] Dir. 2000/78/CE.

[7] *See*: CJEU 11 July 2006, C-13/05, *Chacon Navas*, in *Rivista Italiana di Diritto del Lavoro*, 2007, 4, 758 ff., with note by Giappichelli G., *La Corte di giustizia si pronuncia sulla nozione di handicap: un freno alla vis expansiva del diritto antidiscriminatorio?,* in *Rivista italiana di diritto del lavoro,* 2007; Mégret F., *The Disabilities Convention: towards a Holistic Concept of Rights,* in *The International Journal of Human Rights*, 2008, 261; Lawson A., *Reasonable accommodation in the Convention on the Rights of Persons with Disabilities and non-discrimination in employment: Rising to the challenges?* , in O'Mahony C., Quinn G. (Eds.), *Disability law and policy*, *An analysis of the UN Convention*, Clarus Press, London, 2017.

[8] Issued following the sentence that condemned Italy for failing to comply with the obligation of reasonable agreements, *see* CJEU – Case C-312/11, European Commission vs. Italy, ECLI:EU:C:2013:446.

unsuitability impact on the "space" within which an another position of employment can be reasonably found. [9]

Another question pertains the breadth of the *repechage,* in light of the modifications following Legislative Decree n. 81 of 2015 in art. 2103 Civil Code, that is to say the fact that the new discipline of the duties determines the margins of the extension of the obligation of *repechage* also with reference to cases of dismissal for supervened inability. [10]

Art. 4 co. 4 of Law n. 68/1999, and later also art. 42 of Legislative Decree n. 81/2008 establish that the employee must be assigned, where possible, "equivalent duties or, where this is not possible, inferior duties thus guaranteeing compensation which corresponds to the original duties". [11]

These are special norms which do not refer to the general discipline of art. 2103 Civil Code, but rather are exceptions to the codified regulation. [12]

In fact, with the first reform of 2015,[13] when art. 2103 Civil Code forbade the assignment of non- equivalent duties, let alone inferior duties, in case of supervened unsuitability, the employer had to find an equivalent position first of all, or, in the absence of such a position, an inferior position.[14]

In the same way, according to the current formulation of the codified norm, the limits of *jus variandi* should not be applied in cases of supervened unsuitability.

In fact, the codified norm distinguishes the modes and limits of the removal of duties according to whether this is determined by an exclusive need of the employer or if there is a concurrent interest of the employee. In the first case, a unilateral removal of duties is admissible (within an inferior level albeit without modifying the legal category, and with the right to preserving the financial compensation) only "in the case of modification of the business' organizational assets which impacts on the employee's position" and in other cases provided for in collective contracts; in the second case, an agreed removal of duties is permissible within a protected place (without limitations or guarantee of maintaining compensation) "in the interest of the employee for the preservation of employment, the acquisition of a different profession or the improvement of living conditions."

Instead, the aim of the special discipline is to ensure the employer does everything possible before terminating the employee who finds him or herself in a disadvantageous position, thus favouring *repechage* even when the type and degree of inability limit the

[9] As regards internal "space" within which the employer must fulfill the obligation of repechage, *see* Cass. 15 July 2010, n. 16579, *D&L: Rivista critica di diritto del lavoro*, 2010, 3, 857, and Cass. 31 March 2016, n. 6254, which highlight all productive units, including those abroad, and also all firms belonging to the same business group; also *see* Cass. 16 November 2015, n. 23698 and Cass. 23 April 2010, n. 9700, according to which the employer does not need to modify his or her organization in order to create new positions in the interest of safeguarding the relationship.

[10] Lai M., *Recenti sviluppi in tema di inidoneità sopravvenuta*, in *Rivista Italiana di Diritto del Lavoro*, 2018, III, 37.

[11] Giubboni S., *Sopravvenuta inidoneità alla mansione e licenziamento. Note per una interpretazione "adeguatrice"*, in *Rivista Italiana di Diritto del Lavoro*, 2012, 1, 291 ff., 300.

[12] Garofalo D., *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli*, in *Argomenti di Diritto del Lavoro*, 2019, 6, 1222, 1238.

[13] *See* Spinelli C., *La sfida degli "accomodamenti ragionevoli" per i lavoratori disabili dopo il Jobs Act*, in *Diritti Lavori Mercati*, 2017, 1, 39 ff.

[14] Cass. 5 August 2000, no. 10339, *Giustizia civile - Massimario annotato dalla Cassazione*, 2000, 1730; Cass. 25 November 2010, no. 23926, *Diritto & Giustizia online*, 2010.

employee's capabilities, thus forcing the employer to assess all possible solutions which are compatible with the employee's personal conditions, in order to reach a reasonable accommodation.[15] And, in order to offer adequate protection, the law gives the employer the actual right (and not a mere interest) to the preservation of the position, and, furthermore, the right to maintaining the retribution corresponding to the original duties is also provided for. [16]

In as much as the legal waivers, which already existed before the reform of art. 2103 Civil Code, remain valid and unprejudiced, an influence of the codified norm does exist regarding the concept of equivalency, since the new formulation no longer refers to the profession and allows horizontal *jus variandi* among all the duties found within the same contractual level thus extending the chances of horizontal mobility, impacting on the meaning that the term "equivalent duties" takes on nowadays.

Therefore, for the *repechage* of the employee unsuitable and/or with disabilities, firstly it will be necessary to evaluate available duties within the same contractual level of those of the original position and, in the absence of such duties, it will be necessary to evaluate available duties in inferior levels, and to propose the assignment of duties which, in any case, are compatible with the employee's health.

While art. 2103 Civil Code is relevant, in its entirety, to define the limit of invariability *in pejus* of the employment of employees, where the modification of their duties becomes necessary in order to fulfil the duty of so-called reasonable accommodations.[17]

The regulation assigns another obligation to the employer, which exists before or at the same time as the *repechage*.

In the face of supervened unsuitability for duties, art. 42 Legislative Decree n. 81/2008 states that "the employer…takes the measures indicated by the competent doctor".

Given art. 41 comma 6, the literal interpretation of the norm could indicate that, in giving his or her expert opinion, the competent doctor must indicate the prescriptions or limits that he or she considers useful and which the employer must take into consideration, only in cases of partial, temporary or permanent unsuitability, and which, in the case of total unsuitability, if temporary, is sufficient to specify the validity of time limits.

Nevertheless, an extensive interpretation of the norm seems more convincing, according to which even in case of total and permanent unsuitability for duty, the qualified physician must prescribe the measures to be adopted, since, were there no specific indication of what the employee can or cannot do in his or her current state of health, the employer would not be able to assess the compatibility of other available duties.

In any event, the aforementioned "measures indicated by the competent doctor" fall within the concept of reasonable accommodation of super-national derivation, but do not coincide with it.[18]

[15] C. App. Venezia, 5 April 2022.
[16] *Contra*, Trib. Roma, 24 July 2017.
[17] Considering n. 20 in Dir. 2000/78/EC gives sharing of tasks as an example of reasonable agreement. It refers to the position of the workplace, adjustment of the equipment, of the work hours, the distribution of tasks, training, and in general to finding suitable solutions within the workplace.
[18] For example, these can consist in not requiring the employee to lift objects over a certain weight, or not having him or her stand for a certain amount of time, or not having him or her work in a damp place, and so

The same can be said regarding the reference in art. 10 comma 3 of law no. 68/1999, which presides over the supervened unsuitability for a specific duty of the disabled employee hired via targeted employment due to a worsening of his or her health (in addition to significant variations of the work assigned). The norm states that "dismissal can take place if the aforementioned commission has verified the definitive impossibility of reinserting the disabled employee within the company, despite all possible changes to the work assigned".

Despite the fact that the expression "possible changes to the work assigned" seems to recall the concept of "reasonable accommodation", the term can be exclusively referred to the measures indicated by the Commission which determines the suitability,[19] and where such measures do not exhaust the super-national concept of reasonable accommodation.

The obligation of "reasonable accommodation", which already distinguishes itself in that it must be respected in all phases of the working relationship (not only at the time of dismissal), is wide and general, and encompasses all the concrete measures which can be taken by (and on the initiative of) the employer, in relation to his or her own company and his or her own financial resources (therefore following medical prescriptions and the duty of *repechage),* thus requiring an organizational and economic effort linked to the consolidated principle of the intangibility of the business choices which until now had absolved the employer from having to change company assets in order to find other positions or modify existing ones.[20]

European Directive n. 78/2000 and the UN Convention of 2006 give examples of the possible content,[21] but all possible solutions must be assessed according to each specific case.

The obligation of reasonable accommodation redefines the limits to the power of dismissal which weigh on the employer when the unsuitability for the duties is caused by a disability according to the notion of international derivation based on the bio-psycho-social model, which takes into account even temporary impairment provided it is lasting and the limits which might also derive from the surrounding environment, and which concludes by also including employees who are not considered disabled according to the law presiding over targeted employment. [22]

on. *See* Giubboni S., nt. (11), 303, according to whom these measures (art. 42 of Decreto Legislativo 09 Aprile 2008, n. 81 and art. 10, comma 3, Legge 12 Marzo 1999 n. 68) translate the internal regulations as the level is specifically prescribed in art. 5 in Dir. 2000/78/EC (obligation of reasonable agreements).

[19] Cass. 28 April 2017, no. 10576, *Giustizia Civile Massimario*, 2017.

[20] De Mozzi B., *Sopravvenuta inidoneità alle mansioni, disabilità, licenziamento*, in *Lavoro Diritti Europa*, 2020, 2, 1 ff.

[21] *See* Considering n. 20, Dir. 2000/78/EC.

[22] Regarding the notion of disabled person in the jurisprudence of the Court of Justice *see:* CJEU - Case C-13/05, Sonia Chacón Navas v Eurest Colectividades SA, ECLI:EU:C:2006:456; CJEU – Case C-303/06, S. Coleman v Attridge Law and Steve Law, ECLI:EU:C:2008:415; CJEU – Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11), ECLI:EU:C:2013:222; CJEU – Case C-354/13, Fag og Arbejde (FOA) v Kommunernes Landsforening (KL), ECLI:EU:C:2014:2463.
On the definition of disabled people in national jurisprudence *see* Cass. 4 February 2016, no. 2210, *Rivista Italiana di Diritto del Lavoro*, 2016, 3, II, 553; Cass. 3 November 2015, no. 22421, *Rivista Italiana di Diritto del Lavoro*, 2016, 3, II, 480; Trib. Ivrea 24 February 2016; Cass. 19 March 2018, n. 6798, *Rivista Italiana di Diritto*

3. The Influence of anti-discriminatory law.

The questions of interpretation which are brought to our attention nowadays with regard to the consequences of the violation of the duty of reasonable accommodations stem from the fact that the (varied) panorama of norms, composed of art. 4 and art. 10 of Law no. 68 of 1999, as well as art. 42 of Legislative Decree n. 81/2008, was issued and consolidated prior to the confirmation of disability as a forbidden discriminatory factor, totally forbidding autonomous dismissal for supervened disability over justified objective reason as per art. 3 in Law no. 604 of 1966, and within an anti-discriminatory context.

The same reforms of the factionary regimes presided over (and diversified "strictly speaking" the illegitimacy of dismissal for justified objective reason) the consequences of the violation of the limits to the power of dismissal with specific reference to the violation of art. 4 comma 4 and 10 comma 3 of Law no. 68 of 1999, and did not wholly encompass the principles deriving from supranational sources.

Their implementation has represented a fundamental passage in the evolution of the right to employment for the disabled, but the process of adjustment lasted a decade.[23]

Therefore, the limits to the power of dismissal and the consequences of their violation must be reassessed in light of the normative evolution described,[24] which has determined a real paradigm shift, thanks to which the right to employment for the disabled must be guaranteed by the principle of equality and parity of compensation.[25]

With the exclusion of no. 17 of European Directive no. 78/2000,[26] the implementation of the principles of supranational derivation is determined by the necessary collaboration of the employer, who must consider the possibility of resorting to every reasonable organizational and technical solution in order to allow access to and maintaining employment.

Legislative Decree n. 216/2003 has a clear anti-discriminatory aim. From the moment it was issued, disabled people who enter (or who wish to enter) the world of work,[27] with or without targeted employment, have the right not to be subject to discriminatory treatment due to their personal situation, and have the right to the employer's collaboration who, in compliance with the obligation to adopt reasonable accommodations where possible and

del Lavoro, 2019, 2, II, 145; Cass. 26 October 2018, no. 27243, *Rivista Italiana di Diritto del Lavoro,* 2019, 2, II, 146; Cass. 21 May 2019, no. 13649, *Giustizia Civile Massimario*, 2019; Cass. 28 October 2019, no. 27502, *Giustizia Civile Massimario,* 2019; Trib. Milano 24 December 2019. On this point, *see* Favalli S., Ferri D., *Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints*, in *European Public Law*, 2016, 3, 1 ff. ; Barnes C., *The Social Model of Disability: Valuable or Irrelevant?*, in Watson N., Roulstone A., Thomas C. (eds), *The Routledge Handbook of Disability Studies*, Routledge, 2012.

[23] Consider the changes which Decreto Legislativo 09 Settembre 2015 n. 151 to the Legge 12 Marzo 1999 n. 68, in order to improve the regulation of targeted employment (*see* Garofalo D., *Jobs act e disabili*, in *Rivista di Diritto della Sicurezza Sociale*, 2016, 1, 108 ff.), and the Legge 22 Dicembre 2021 no. 227, reforming Legge 5 Febbraio 1992 n. 104 (*see* Bonardi O., *Luci e ombre della nuova legge delega sulla disabilità,* in www.italianequalitynetwork.it).

[24] Giubboni S., nt. (11), 291.

[25] Ferrara M.D. (ed.), *Disabilità e lavoro tra tutela antidiscriminatoria e inclusione reale*, in *Variazioni su Temi di Diritto del Lavoro*, 2020, 4.

[26] *See* the Considering n. 17 of Dir. 2000/78/CE.

[27] Garofalo D., *Disabili e insider/outsider theory*, in *Giurisprudenza Italiana*, 2020, 2, 375 ff.

within the fixed limits, actively contributes to create the desired condition of equality, even with additional expenses, provided they are reasonable (useful to guarantee the right to employment and not financial support) and not disproportionate (not excessively taxing, in relation to the concrete situation). [28]

All employers, public and private, must comply for the entire duration of the work relationship, from employment to dismissal.[29] Non-compliance affects the validity of dismissal if the employer does not demonstrate that he or she is not obliged or was unable to comply. In the first case, the employer must prove that the employee does not correspond to the profile of "disabled person" sanctioned by UN Convention of 2006; while, in the second case, the employer must demonstrate that there are no measures which allow the continuation of employment, or that the introduction thereof would result in a sacrifice for the other employees, or that the compensation would require unsustainable economic costs for the employer's financial means, and not mitigated by the possibility of receiving *ad hoc* public resources. [30]

4. Sanctionatory consequences of the violation of the obligation of reasonable accommodations in light of anti-discriminatory protection.

The question regarding the consequences of the violation of the obligation (and therefore refusal) of implementing changes where possible has not been fully resolved to date.

Legislative Decree n. 216 of 2003 does not address the issue, and, similarly, Law n. 92 of 2012 (which came into effect before the introduction of the obligation of reasonable accommodations) and Legislative Decree n. 23 of 2015, which changed the sanctions applied in case of dismissal which violates special norms regarding supervened unsuitability and/or disability, contain no reference to Legislative Decree n. 216 of 2003, but rather to arts. 4 comma 4 and 10 comma 3 of Law n. 68/1999.

It would seem that Law n. 92/2012 and, in part, Legislative Decree n. 23/2015, remained anchored to the qualification of the particular case in terms of justified objective reason *ex* art. 3 of Law n. 604/1966, without giving due consideration to how the normative evolution has veered substantially from that notion.

An example is the fact that art. 18 comma 7 St. lav. refers to "lack of justification of dismissal…for objective reason consisting in the physical or psychic unsuitability of the employee", just as art. 2 comma 4 of Legislative Decree n. 23/2015 refers to "lack of

[28] Regarding the notion of "reasonable agreements", *see* Lawson A., Ferri D., *Reasonable accommodation for disabled people in Employment*, European Union, 2016; Ferri D., *Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg*, in *Social Inclusion*, 2018, 1, 1 ff. In national jurisprudence *see* Cass. 23 February 2021, no. 4896, *Diritto & Giustizia*, 2021, 24 febbraio; Cass. 9 March 2021, no. 6497, *Rivista Italiana di Diritto del Lavoro*, 2021, 4, II, 597.
[29] Barbera M., *Le discriminazioni basate sulla disabilità*, in Barbera M. (ed.), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, Milano, 2007, 77 ff.
[30] *See* art. 13, Legge 12 Marzo 1999 n. 68.

justification" of dismissal "for reasons consisting in the physical or psychic disability of the employee".

In truth, despite a proposed constitutional interpretation according to which the terms "unsuitability" and "disability" are used by the legislator as synonyms,[31] from a literal point of view, the two norms are different.[32]

Art. 18 comma 7 St. lav. (issued before the obligation to adopt reasonable accommodations was made official) confirmed the traditional view of supervened unsuitability for duties as a justified reason, against those who violate the special protective discipline which safeguards fragile employees, foreseeing the application of the so called lessened re-integratory protection.[33] Such protection is applied in all cases where the special discipline is violated, both when the unsuitability derives from a disability and in the contrary case, recalling the concept of "unsuitability" and the regulations of law no. 68 of 1999.[34]

On the other hand, art. 2 comma 4 of legislative decree no. 23/2015 recalls the concept of "disability" (not "unsuitability") and, despite increasing the level of protection with the application of full re-integration as per comma 1, does not actually include dismissal for supervened disability in the category of discriminatory dismissal; this case is distinct from discrimination for other factors, and in fact it does not refer to discrimination but a "lack of justification for reasons consisting in disability", considered apart, in comma 4, instead of comma 1, which is recalled only to extend strong protection. [35]

Given the lack of reference to "unsuitability", the increase of protection for the disabled contrasts with a decrease of protection for the non-disabled person who has become unsuitable for his or duties, and to whom, in the absence of guidelines, one applies the protection in art. 3 comma 1 which provides for all cases of illegitimate dismissal for justified objective reason. [36]

Nonetheless, the *ratio* of supranational sources highlights the need to requalify in discriminatory terms of dismissal for supervened unsuitability where this is caused by a disability.

The notion of reason accommodations has absorbed the specific limits to the power of dismissal (it also includes the limits to the power of dismissal already provided for by the

[31] Unsuitability v. Disability *see* Cass. 28 October 2019, n. 27502, *Giustizia Civile Massimario*, 2019. Giubboni S., *Disabilità, sopravvenuta inidoneità, licenziamento*, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2016, 621.
[32] Voza R., nt. (5), 772.
[33] Casale D., *Malattia, inidoneità psicofisica e handicap nella novella del 2012 sui licenziamenti*, in *Argomenti di Diritto del Lavoro*, 2014, 2, 401 ff.
[34] In fact, the norm containing the term "also" alludes to the fact that there are other cases of dismissal for justified objective reason which benefit from enforced safeguarding; the doctrine immediately singled out the case in art. 42, Decreto Legislativo 9 Aprile 2008 n. 81, *see* Maresca A., *Il nuovo regime sanzionatorio del licenziamento illegittimo: le modifiche all'art. 18 Statuto dei lavoratori*, in *Rivista Italiana di Diritto del Lavoro*, 2012, 415 ff.
[35] Lambertucci P., *Il lavoratore disabile tra disciplina dell'avviamento al lavoro e tutela contro i licenziamenti. Brevi note a margine dei provvedimenti attuativi del c.d. Jobs Act alla "prova" della disciplina antidiscriminatoria*, in *Argomenti di Diritto del Lav*oro, 2016, 6, I, 1147 ff.
[36] Voza R., nt. (5), 786, highlighted how dismissal for supervened unsuitability is not automatically equal to discriminatory dismissal, as in the case of people with disability. Regarding the violation of art. 42 of legislative decree n. 81/2008 and the case of invalidity for contrast of imperative norms (art. 32 Cost.) in order to apply full re-integration, *see* Lai M., nt. (10), 46.

special discipline), in addition to increasing the number and type of behaviour required of the employer.

Therefore, the violation of the limits to the power of dismissal equals the refusal to implement reasonable accommodations, which is a discriminatory behaviour in itself. [37]

In fact, comma 3-*bis* of art. 3 of Legislative Decree n. 216/2003, which regulates the obligation of reasonable accommodations, expressly recalls the definition supplied by the UN Convention on the rights of people with disabilities of 2006 (ratified by Italy with law n. 18 of 2009), which states what is intended by "discrimination based on disability" in art. 2, that is to say it "includes every form of discrimination, including the refusal of reasonable accommodations. [38]

A reasonable accommodation is a tool which removes disparity, and, therefore, the refusal to adopt possible solutions constitutes a form of discrimination which is forbidden by our regulations.

We are no longer looking at a lack of a substantial premise of the notion of justified objective reason, but rather the lack of foundation for dismissals.

The incongruence of the sanctionatory system derives from regulating the various protection regimes of dismissal for disability (in a bio-psycho-social sense) which occurred, as it was not always applied in other discriminatory dismissals; instead, depending on the dimensions of the employer and the date of commencement of employment, the constant illegitimate dismissal for lack of objective reason entails the application of various sanctions, also in cases of pure compensation (art. 8 of Law n. 604/1966).

It is true that Directive 78/2000/CE (and not even the UN Convention) does not oblige States to provide for the reintegration and complete compensation for damages in favour of the employee who has been discriminated against, although the sanctions could also include financial compensation, provided they are "effective, proportionate and dissuasive". [39]

The fact remains that our regulations for discriminatory dismissal provide for a strong and single protection (which does not differentiate between big and small cases), and it is incomprehensible why all employees who are discriminated against for one of the other forbidden factors (age, political orientation, union, religion, etc.) should resort to it, but not disabled employees, for whom the refusal to implement reasonable accommodations (according to the law) constitutes a discriminatory behaviour, since disability is included in art. 15 of Workers Statute.

Nonetheless, art. 18 comma 1 recalls the causes for discrimination in art. 3 Law n. 108 of 1990, which recalls art. 4 Law n. 604 of 1966 and art. 15 St. lav., as modified by art. 13

[37] Peruzzi M., *La protezione dei lavoratori disabili nel contratto di lavoro*, in *Variazioni su Temi di Diritto del Lavoro*, 2020, 945; Simoncini G.R., *I limiti al licenziamento del lavoratore disabile. Una proposta interpretativa alla luce del diritto antidiscriminatorio*, in *Labor*, 2021, 2, 207 ff. In national jurisprudence *see*, Trib. Pisa, 16 April 2015; Trib. Asti, 23 July 2018 and Trib. Roma, 8 May 2018.

[38] The Court of Justice itself has always clarified that Dir. 2000/78/CE must be interpreted according to the ONU Convention, *see* CJEU – Case C-824/19, TC, UB v Komisia za zashtita ot diskriminatsia, VA, point 59; CJEU – Case C-485/20, XXXX v HR Rail SA. The Court of Cassation holds the same view, *see* Cass. 12 November 2019, no. 29289, *Giustizia Civile Massimario* 2019.

[39] Art. 17, Dir. 78/2000/CE.

Law n. 903 of 1977, which was not updated with further discriminatory factors introduced by Legislative Decree n. 216 of 2003, the need for coordination between the various norms forces us to consider the notion of discriminatory dismissal in light of all forbidden reasons.

According to legal interpretation "the invalidity of discriminatory dismissal is a direct consequence of the violation of specific norms of internal law, as art. 4 of Law n. 604/1966, art. 15 of the Statute of employees, and art. 3 of Law n. 108/1990 (as well as European law…), so that, differently from the case of retaliatory dismissal, the subsistence of an illegitimate reason is not necessary as per art. 1345 Civil Code, nor can discriminatory nature be excluded from the concurrence of another end, albeit legitimate, such as economic reasons". [40]

If we then consider that art. 4 of Legislative Decree n. 216/2003 states that the employee who has been a victim of discrimination can press charges with a summary legal proceeding of cognition regulated by art. 28 from Legislative Decree n. 150/2011, which establishes that if the judge finds a discriminatory behaviour (such as the violation of the obligation of reasonable accommodations), he or she orders that such behaviour must cease, as well as the prejudiced behaviour or act and all other suitable measures to remove the effects must be adopted,[41] it would appear unreasonable that an employee is protected *in toto* in another phase of the relationship, but even less so in the case of dismissal, where different degrees and intensity of protection are possible.

Therefore, the omissions of the employer, notwithstanding subjective discrimination on his or her part, should entail the dismissal to be declared invalid as well as the application of the sanction provided for discriminatory dismissal.[42] And while Legislative Decree n. 23/2015, despite all the interpretative doubts raised, recalls the violation of the discipline of supervened disability and the sanctionatory consequences provided for discriminatory dismissal, art. 18 comma 7 St. lav. poses the problem of constitutional legitimacy in relation to art. 3 Cost. where, recalling art. 4 comma 4 and 10 comma 3 of Law n. 68 of 1999, an inferior protection (even if re-integratory) recalls discrimination deriving from disability with respect to that found in comma 1 for discrimination deriving from other forbidden factors.[43]

[40] Cass. 5 April 2016, n. 6575, *IUS Lavoro* 2016, 27 maggio; Cass. 9 June 2017, no. 14456, *Rivista Italiana di Diritto del Lavoro*, 2017, 4, II, 708; Cass. 19 December 2019, n. 34132, *IUS Lavoro*, 6 APRILE 2020.
[41] Garofalo D., nt. (12), 1246.
[42] De Mozzi B., nt. (20); Malzani F., *Inidoneità alla mansione e soluzioni ragionevoli: oltre il repechage*, in *Argomenti di Diritto del Lavoro*, 2020, 4, 965, 973; Bonardi O., *L'inidoneità sopravvenuta al lavoro e l'obbligo di adottare soluzioni ragionevoli in una innovativa decisione della Cassazione,* in *Questione Giustizia*, 2018, 3.
[43] Lambertucci P., nt. (35), 1167.

5. Dismissal and reasonable accommodation in jurisprudential evolution.

Thus far, the reconstruction proposed does not appear to have been followed by the legal system.

As regards cases provided for by the application of art. 18 St. lav. modified by law no. 92/2012, apart from a few sentences which enforced the protection outlined in art. 18 comma 1 in the face of violation of the obligation of reasonable accommodations,[44] the Court of Cassation appears to confirm the application of the sanctionatory regime in art. 18 comma 4.[45]

The main question regards the relationship/connection between the obligation of reasonable accommodation and other existing obligations, in particular *repechage*, which has always represented the element qualifying the supervened unsuitability and /or disability *ex* arts. 4 comma 4 of Law n. 68/1999 and 42 of Legislative Decree n. 81/2008.

According to an initial reconstruction, the obligation of reasonable accommodations integrated the notion of justified objective reason for the disabled, adding to the obligation of *repechage* intensifying it. [46]

Given this framework, the obligation of reasonable accommodation configures a further element of the notion of justified objective reason and concurs with the specific discipline to outline the limits to the employer's power of dismissal; therefore, if the employer does not demonstrate that he or she concretely assessed, even with a negative outcome, the possibility of implementing reasonable solutions which could be applied in the workplace, the dismissal is illegitimate and the judge sentences the employer applying the sanctions provided for the violation of the special discipline regarding supervened unsuitability or inability, that is the sanctions determined by the violation of art. 4 comma 4 and 10 comma 3 of l. n. 68 of 1999 (which, according to art. 8 l. 604/1966, require compulsory protection, according to art. 18 St. lav. require reduced re-integration and according to Legislative Decree n. 23/2015 require full re-integration). [47]

On the other hand, because of another implementation of reasonable accommodation, it remains outside of the notion of justified objective reason, which is unchanged, maintaining the obligation of *repechage* as a qualifying element.[48]

Such implementation considers the obligation of reasonable accommodation as autonomous with respect to the obligation of *repechage*. So that, the violation of the first

[44] Trib. Pisa, 16 April 2015; Trib. Asti, 23 July 2018 e Trib. Roma, 8 May 2018.
[45] Cass., ord., 21 March 2022, n. 9158, *IUS Lavoro*, 13 APRILE 2022, where the Court states that the violation of the obligation to assign the employee possible alternative duties constitutes possible sanctions with re-integration «when it is clear that there is no basis for dismissal»; Cass. 9 March 2021, n. 6497, *Rivista Italiana di Diritto del Lavoro,* 2021, 4, II, 597. On the other hand, where service is no longer possible, totally and definitely, where it is not possible for the employee to carry out alternative duties, the law states a just cause *ex* art. 2119 c.c. for the impossibility to continue the professional relationship, with the exclusion of notice, see Cass. 9 May 2019, n. 12373, *Diritto delle Relazioni Industriali,* 2020, 2, 540.
[46] Giubboni S., *Il licenziamento per sopravvenuta inidoneità alla mansione dopo la legge Fornero e il Jobs Act.*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, n. 261/2015, where the Author refers to a "stengthened" notion of justified objective reason.
[47] Giubboni S., nt. (46).
[48] Bonardi O., nt. (42).

entails the declaration of the invalidity of the dismissal as discriminatory, while non-observance of the second entails the application of the protection provided for, according to the applicable regimes, the violation of the special discipline.[49]

Both orientations appear to be based on the premise of different content between the obligation of *repechage* and the obligation of reasonable accommodation.

Nonetheless, in light of the supranational notion of "reasonable accommodation", as reconstructed in the previous paragraphs, the two concepts overlap in that the obligation of *repechage* configures a measure of reasonable accommodation, with the re-employment of the employee with duties which are suitable for his or her health among the measures which the employer must adopt to avoid dismissal.

A recent sentence by the Court of Justice has supported this view, as it established that

> "*art. 5 of directive 2000/78/CE…must be interpreted in the sense that the notion of «reasonable solutions for the disabled»…implies that employees, including those on apprenticeship after employment, who are declared unsuitable to carry out the essential functions of their position because of disability, are assigned to another position for which they have the required competencies, capabilities and availability, unless such measures impose a disproportionate encumbrance on the employer*". [50]

Therefore, according to the Court of Justice, the obligation of *repechage* is a reasonable solution. In fact, n. 20 of the European Directive, lists possible adjustments required of the employer, refers to the "adjustment of the workplace" and, in upholding the sentence, states that this can also consist in "transfer to another workplace"; furthermore, such a solution must be assessed as a priority with respect to other measures of adjustment of the workplace,[51] but the possibility of assigning the employee with disabilities to another workplace "exists only in the presence of at least one vacancy which the employee can fill".[52]

There are two consequences to consider.

The first is that assigning other duties to the employee can (legitimately) be "refused" by the employer if this entails, not only organizational burdens, but also disproportionate and excessive encumbrances. The organizational connotation that characterizes the correct exercise of the power of dismissal is stronger than that required by the notion of justified objective reason in art. 3 of Law n. 604/1966, which does not require the employer to make the structure compatible with the needs of the employee.

The second is that if the search for other available duties is a reasonable accommodation, then also the violation of the obligation of *repechage* is a discrimination,[53] with sanctionatory consequences.

[49] Voza R., nt. (5), 782; Casale D., nt. (33), 410; Lambertucci P., nt. (35), 1160, according to which failure to adopt reasonable agreements is direct discrimination.
[50] CJEU – Case C-485/20, XXXX v HR Rail SA, ECLI:EU:C:2022:85.
[51] *Ibidem*.
[52] *Ibidem*.
[53] Peruzzi M., nt. (37), 945.

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