

Dismissal due to illness and disability discrimination between case law and collective bargaining

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1. Introduction. 2. Case law trends regarding the “*periodo di comporta*” for workers with disabilities. 3. An open issue: what is meant by “*disability status*”? 4. Some solutions adopted by collective bargaining: great is the confusion under the heavens. 6. Final remarks.

Abstract

The contribution examines the tension between the discipline of the *periodo di comporta* (the job-retention period during illness) under Article 2110 of the Italian Civil Code and the prohibition of indirect disability discrimination introduced by EU Directive 2000/78/EC. Following the landmark judgment no. 9095/2023 of the Italian Supreme Court, which ruled that applying an identical job-retention period to both disabled and non-disabled workers constitutes indirect discrimination, the Author analyses the subsequent evolution of both case law and collective bargaining. The Author concludes that while collective bargaining and judicial balancing are valuable, an organic legislative intervention is urgently required to achieve a sustainable equilibrium between the protection of vulnerable workers and the operational certainty of employers, suggesting intermediate cooperative solutions such as the strategic use of digital sick leave certificates.

Keywords: Sick leave; Disability; Illness; Dismissal; Discrimination; NCBA.

1. Introduction.

Paragraph 2 of art. 2110 of the Italian Civil Code establishes that the sick or injured worker has the right to be absent and keep his/her job for a period (the so-called “*periodo di comporta*”, hereinafter I will refer to it as such), determined by other sources, identified in special laws, collective agreements, customs and equity. During this *periodo di comporta*, the employer may not dismiss the worker, not only for reasons related to illness, but also for any other reason, except in cases that can be qualified as just cause for dismissal both for very serious breach of duty by the worker¹ and for the cessation of the company’s activity.²

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¹ In doctrine, in the sense of the validity of the dismissal for just cause during the protected period, see Dell’Olio M., *Sospensione del rapporto di lavoro*, in *Digesto delle Discipline Privatistiche. Sezione Commerciale*, XV, 1988, 26; Del Punta R., *La sospensione del rapporto di lavoro*, Giuffrè, Milan, 1992, 370.

² Del Punta R., *ibid*, 371.

Dismissal adopted during the *periodo di comporta* and determined by the state of illness is null and void for violation of mandatory rule.³

On the other hand, the dismissal ordered during the *periodo di comporta*, but for reasons unrelated to the state of illness (and not qualifying as just cause for termination) is only temporarily ineffective until the end of the illness.⁴

Once the *periodo di comporta* has ended, however, if the employee remains absent, the employer can notify him/her of a specific type of termination, the so-called dismissal for exceeding the *periodo di comporta*.

According to the doctrine,⁵ the issue of dismissal for exceeding the *periodo di comporta* has always been a test of the ability of the labour law system to balance, in a coherent manner, opposing interests: on the one hand, the worker's need to keep his/her job in the face of morbid events that make him/her temporarily unfit to perform the service; on the other hand, the employer's interest in maintaining the continuity and efficiency of the production organization. Art. 2110 of the Italian Civil Code, in sanctioning the right to keep the post for a specific period, offers a regulatory solution based on a rigid chronological criterion, which identifies the passage of time as the resolving element of the tension between the two poles of interest.

Well, this balance of opposing interests has shown obvious limits when applied to disabled workers. The latter, as a result of their condition, are more exposed to frequent and prolonged absences, with the consequence that the formal and indiscriminate application of the *periodo di comporta* translates into a substantial compression of the right to work and, more generally, into indirect discrimination. Merely formal equality, in such cases, is converted into substantial inequality, because the apparent neutrality of the rule results in a concrete prejudice for a category of vulnerable workers. The disabled worker, in fact, could accumulate a greater number of absences due to illness and therefore be more exposed to the risk of being dismissed for exceeding the protected period.

This question involves principles of the constitutional and multilevel order: art. 3 of the Constitution – in its dual declination aimed at protecting both *formal* equality (first paragraph) and *substantive* equality (second paragraph) – requires the legislator and the interpreter to remove the obstacles that in fact prevent the full participation of disabled people in working life; art. 4 of Constitution enshrines the right to work as the foundation of personal dignity; art. 32 of the Constitution protects health as a fundamental right and collective interest.

At the European level, Directive 2000/78/EC introduces the prohibition of discrimination on the grounds of disability and the obligation for the employer to provide reasonable accommodation; the Charter of Fundamental Rights of the European Union, in art. 26, and the UN Convention on the Rights of Persons with Disabilities further strengthen this obligation, recognising the right of disabled people to appropriate measures to ensure their autonomy and social and work inclusion.

³ In case law: Cass. no. 24525/2014; Cass. no. 15604/2024. In doctrine: Del Punta R., *ibid*, 366.

⁴ In case law: Cass. no. 23063/2013; Cass. no. 9037/2001; Cass. no. 1657/1993; in doctrine Dell'Olio M., nt. (1), 26; Del Punta R., *ibid*, 367.

⁵ Sigillò Massara G., *Il licenziamento del lavoratore disabile per superamento del periodo di comporta*, in *Lavoro Diritti Europa*, 2, 2025, 2.

The Italian legal system has transposed the Directive through Legislative Decree no. 216/2003, but this has not produced direct effects on the regulation of the *periodo di comporta*. Art. 2110, paragraph 2, of the Italian Civil Code has remained unchanged and makes no mention of disability. The collective agreements, called upon to concretely regulate the functioning of the protected period, in most cases, have not introduced differentiated rules for the disabled. The result was a heated jurisprudential and doctrinal debate, characterized by sometimes conflicting rulings by the Courts and the Supreme Court, as well as by interventions by the Constitutional Court and the Court of Justice of the European Union. The Court of Cassation entered this debate with judgment no. 9095 of 31 March 2023,⁶ according to which the clause of the collective agreement that provides for the same period of protection also for the disabled employees constitutes indirect discrimination on the basis of disability and therefore renders the consequent dismissal null and void. This decision, confirmed by numerous subsequent rulings, urged the parties stipulating the collective agreements to modify the contractual clauses regarding the protected period.

More than three years after the ruling, it is therefore certainly of interest to verify whether collective bargaining has received the solicitation of the Supreme Court and, if so, with what contractual solutions.

2. Case law trends regarding the “*periodo di comporta*” for workers with disabilities.

Before reviewing the solutions adopted by collective bargaining, it is useful to briefly report on the jurisprudential guidelines on the *periodo di comporta* of disabled workers that have developed within the courts and the Supreme Court.

The aforementioned decision of the Supreme Court of 2023 consolidated the interpretative approach⁷ according to which the application of the ordinary *periodo di comporta* to the worker with a disability constitutes a form of indirect discrimination, which was then reiterated by numerous rulings.⁸ According to this orientation, it constitutes indirect

⁶ Cass. 31 March 2023, no. 9095, with note by Filì V., *Superamento del comporta di malattia e rischio di discriminazione indiretta per disabilità*, in *Giurisprudenza Italiana*, 10, 2023, 2143-2150; with note by Donini A., *L'applicazione indistinta del comporta è discriminatoria se la malattia è riconducibile a disabilità*, in *Rivista Italiana di Diritto del Lavoro*, 2, II, 2023, 238-261; with note by Molè M., *Un binomio che discrimina: la morbosità del lavoratore disabile e l'applicazione del periodo di comporta breve. Parola alla contrattazione collettiva?*, in *Diritto delle Relazioni Industriali*, 3, 2023, 819-825.

⁷ Address inaugurated by Trib. Verona, 21 March 2021 and consolidated with the judgments App. Genoa, 21 July 2021, no. 211; Trib. Mantua, 22 September 2021, no. 126; App. Florence, 26 October 2021; Trib. Milan, 2 May 2022; App. Milan, 1 December 2022; App. Naples, 17 January 2023, no. 168.

⁸ Cass. 7 January 2025, no. 170 and Court of Rome, 3 December 2024, no. 12377, with note by Della Rocca G., *Ancora sul periodo di comporta dei lavoratori con disabilità: questioni aperte in attesa di una contrattazione collettiva specifica*, in *Labor*, 15 February 2025; Cass. 21 November 2024, no. 30095; Cass. 6 September 2024, no. 24052; Cass. 5 June 2024, no. 15723, with a note by Ferrara M.D., *Disabilità e comporta, dalla conservazione alla protezione del posto di lavoro: spunti per un ragionevole bilanciamento*, in *Rivista Giuridica del Lavoro*, 4, 2024, 397; Cass. 31 May 2024, no. 15282; Cass. 23 May 2024, no. 14402; Cass. 22 May 2024, no. 14316; Cass. 2 May 2024, no. 1742; Cass. 21 December 2023, no. 35747, with note by Salvagni M., *Corte di Cassazione 21 dicembre 2023 n. 35747: malattia collegata all'handicap, discriminazione indiretta e nullità del licenziamento del disabile per superamento del comporta*, in *Labor*, 22 February 2024; Cass. 31 March 2023, no. 566, with note by Diana M., *Il superamento del periodo di comporta e la discriminazione indiretta del lavoratore disabile: spunti interpretativi ed ipotesi alternative*, in *Lavoro e Previdenza Oggi*, 22 January 2024.

discrimination, pursuant to art. 2, paragraph 2, letter b) of Directive 2000/78/EC, apply the same protected *periodo di comporta* as non-disabled workers to disabled workers, as the latter would be statistically more exposed to the risk of greater morbidity, not to mention that a large part of their absences could be due to diseases related to the state of disability. This transmutes the apparently neutral criterion of the same behaviour into a discriminatory practice against subjects in a particularly disadvantaged position.⁹

This orientation incorporates the indications of the EU Court of Justice¹⁰ (hereinafter, CJEU), according to which, the disabled worker, compared to the non-disabled worker, “*is exposed to the additional risk of an illness related to his disability*”, which results in a greater risk of having to be absent from work and being dismissed for having exceeded the protected period. Failure to take this risk into account “*could put disabled workers at a particular disadvantage, creating indirect discrimination, pursuant to art. 2, par. 2, letter b), Directive 2000/78/EC*”.

A second approach stated that discrimination could be avoided by applying to disabled workers the provisions of collective agreements that provide for a prolonged period of protection for serious and chronic illnesses. In this way, the protection would not derive from the condition of disability as such, but from the nature of the pathology, with the result of automatically including workers with disabilities within an already protected category due to the greater risk of prolonged absences.¹¹

Finally, a third approach argued that the extension of the protected period, even beyond the provisions of collective agreements, can be configured as a real reasonable accommodation. In this perspective, the judge should examine whether it is possible for the employer to extend the protected period for the disabled worker without this constituting a disproportionate measure.¹²

Finally, a fourth orientation has fundamentally denied the problem, believing that there are no reasons to treat disabled workers differently from others with regard to the protected period since the disabled person is not necessarily a sick worker *per se*, i.e. suffering from a pathology that requires absences “due to illness” being illness and disability different concepts.¹³

⁹ For an examination of the different jurisprudential orientations, see: Salvagni M., *Il “prisma” delle soluzioni giurisprudenziali in tema di licenziamento del disabile per superamento del comporta: discriminazione indiretta, clausole contrattuali nulle, onere della prova e accomodamenti ragionevoli*, in *Lavoro e Previdenza Oggi*, 3-4, 2023, 215-242; Ravelli F., *Licenziamento di lavoratori disabili per superamento del periodo di comporta e diritto antidiscriminatorio*, in *Labor*, 3, 2023, 312 ff.; Dagnino E., *Comporta, disabilità e disclosure: note a margine di una querelle giurisprudenziale*, in *Argomenti di Diritto del Lavoro*, 1, II, 2023, 241-254.

¹⁰ See CJEU, case C-270/16, *Conejero*, 18 January 2018, with note by Guaglianone L., *Licenziamento per assenteismo e indiretta discriminazione per motivi di disabilità. A proposito della sentenza Conejero (C-270/16)*, in *Rivista Giuridica del Lavoro*, 3, II, 2018, 271 ff. See also CJEU, Joined cases C-335/11 and C-337/11, *HK Danmark*, 11 April 2013.

¹¹ See Court of Appeal of Turin, 26 October 2021 and 3 November 2021; Court of Lodi, 12 September 2022, no. 19; Court of Milan, 5 February 2023.

¹² See Court of Naples, 29 May 2025, no. 4247.

¹³ Thus, Court of Lodi, 12 September 2022, no. 19, available at https://www.bollettinoadapt.it/wp-content/uploads/2022/10/20220912_Trib-Lodi.pdf.

3. An open issue: what is meant by “disability status”?

Before examining the solutions adopted by collective agreements, it is essential to ask what is meant by “disability status” when we talk about the *periodo di comporta* for disabled workers. Answering this question is essential to understand whether collective agreements have correctly defined what a disabled worker means.

The Supreme Court, with decision no. 9095 of 2023, transposed the euro-unitary notion of disability¹⁴ as a limitation resulting from lasting physical, mental or psychic impairments which, in interaction with barriers of various kinds, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. The Supreme Court has, therefore, adopted the evolutionary path of the CJEU jurisprudence that has passed from the so-called biomedical model of disability to the so-called bio-psycho-social one.¹⁵ The Supreme Court also referred to the UN Convention on the Rights of Persons with Disabilities, ratified by Italy with Law no. 18/2009, recalling in particular the passage in which it recognizes that “*disability is an evolving concept and that disability is the result of the interaction between people with impairments and behavioural and environmental barriers, that prevent their full and effective participation in society on an equal basis with others*”.

The notion of disability adopted by the Supreme Court does not necessarily coincide with the disability certified under current legislation (e.g. Law no. 104/1992) since even a worker without such certification issued by the competent bodies can find himself in the condition of so-called bio-psycho-social disability described above and therefore be protected from indirect discrimination determined by the application of a *periodo di comporta* equal to that applied to others non-disabled workers.

For the same reasons, the employer cannot consider disabled, for the purposes of the application of the *periodo di comporta*, only workers hired within the so-called protected categories referred to in Law no. 68/1999,¹⁶ since the notion of disability underlying this

¹⁴ See: CJEU, Joined Cases C-335/11 and C-337/11, *HK Danmark*, 11 April 2013; CJEU, Case C-270/16, *Ruiz Conejero v. Ferroservicios Auxiliares SA*, 18 January 2018. For some considerations on the evolution of the notion of disability in the case law of the European Union, see Chiaromonte W., *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, in *Variazioni su temi di diritto del lavoro*, 4, 2020, 897-921. On the repercussions that the evolution of the notion has caused in the domestic legal system, especially with reference to the termination of the employment relationship, see Garofalo D., *La risoluzione del rapporto di lavoro per malattia*, in *Diritto delle Relazioni Industriali*, 2, 2023, 375-385.

¹⁵ Over time, the CJEU has changed its position on the concept of illness and disability starting from the *Chacon Navas* judgment (11 July 2006, case C-13/05) which, based on a so-called biomedical model, excluded the possibility of assimilating the two concepts, up to the *HK Danmark* judgments (11 April 2013, cases C-335/11 and C-337/11), *Kaltoft* (18 December 2014, case C-354/13), *Daouidi* (1 December 2016, case C-395/2015), and *Ruiz Conejero* (18 January 2018, case C-270/16) in which, using a so-called bio-psycho-social model, they tend to equate diseases with long-term limitations with disability. For a systematic reconstruction of the legal concept of disability through the positions of the CJEU, see Della Rocca G., *La malattia del lavoratore subordinato tra vecchie e nuove tutele*, Giappichelli, Turin, 2024, 14.

¹⁶ This is the legislation that requires employers, based on their employee headcount, to hire a specific quota of workers with disabilities.

discipline is narrower than the so-called bio-psycho-social one transposed by European Union and national jurisprudence.¹⁷

The solution adopted by the Supreme Court, although understandable from the point of view of maximum protection of fragile subjects, risks leading to a situation of absolute application uncertainty and, ultimately, placing the burden on the employer to verify the worker's state of disability.

The Supreme Court affirms, in fact, that the necessary consideration of the protected interest of disabled workers, in balance with the legitimate purpose of employment policy, postulates the application of the principle of identifying reasonable accommodations to ensure the principle of equal treatment of disabled people, guaranteed by art. 5 of Directive 2000/78/EC (i.e. the reasonable accommodations referred to in the UN Convention on the Rights of Persons with Disabilities, in the light of which the EU anti-discrimination legislative directives must be interpreted). However, in order to be able to adopt reasonable solutions regarding the protected period for disabled workers, it is necessary, first of all, to know the state of disability of the worker and, in the Italian legal system, thanks to the protection of the worker's privacy, the employer may well be unaware of the subjective condition of the employee, except in cases in which the same has been hired precisely because he is disabled in the context of the abovementioned protected categories.

It is in this context that the debate on the *knowledge* or *knowability* of the status of disability by the employer is inserted.

According to a first orientation that emerged in the case law, the employer's knowledge of the condition of disability (and its connection with absence due to illness) would not be relevant, as the prohibition of discrimination "*operates objectively, i.e. by reason of the mere importance of the deteriorating treatment reserved for the worker*".¹⁸ It was, however, objected that "*it is one thing to exempt the worker from the difficult proof of the intention of others to discriminate against him, it is another to impute to the employer the responsibility for the unlawfulness of an act deriving from a fact that he does not know*",¹⁹ also considering that, where there is no knowledge, the obligation relating to "reasonable accommodations" is legally unenforceable.²⁰

More recently, the Supreme Court, in order to protect the position of the disabled worker, has equated the employer's "knowability" of the condition of disability with "knowledge", and has consequently stated that "*it cannot be denied that the knowledge or knowability of a*

¹⁷ See, in this regard, Della Rocca G., *Determinazione del periodo di comporto del disabile "di fatto": contrattazione collettiva carente e giurisprudenza allo sbaraglio*, in *Rivista Italiana di Diritto del Lavoro*, 1, 2024, 127-155, Proia L., *Comporto del lavoratore disabile, accomodamenti ragionevoli, conoscenza o conoscibilità della disabilità*, in *Lavoro Diritti Europa*, 2, 2025, 8.

¹⁸ Thus, Cass. 31 March 2023, no. 9095. See also Cass. 5 April 2016, no. 6575, and, in the case law on the merits, Court of Verona, 21 March 2021; Court of Mantua, 21 September 2021; Court of appeal of Milan, 9 December 2022; Court of appeal of Naples, 17 January 2023.

¹⁹ Thus, Franza G., *Quando l'effettività genera paradossi. Sull'esclusione del periodo di comporto della malattia imputabile a disabilità*, in *Il Lavoro nella giurisprudenza*, 1, 2022, 65.

²⁰ Bono R., *Disabilità e licenziamento discriminatorio per superamento del periodo di comporto*, in *Italian Equality Network*, 10 February 2022, available at <https://italianequalitynetwork.it/disabilita-e-licenziamento-discriminatorio-per-superamento-del-periodo-di-comporto/>; Dagnino E., nt. (9), 252; Garofalo D., nt. (14), 357 ff. and 383; Fili V., *Superamento del comporto*, nt. (6), 2150.

*discriminatory factor may be relevant, for the purpose of ascertaining the existence of an exemption for the employer in order to make reasonable accommodations practicable”.*²¹

But when would the condition of disability be known by the employer? According to some rulings, it would be so when it can be deduced, using ordinary diligence, from the length of the worker’s absences that led to the exceeding of the *periodo di comporta*.²²

According to a recent decision of the Supreme Court,²³ an employer should have inferred the condition of disability, concealed by the employee, from the fact that she had been declared by the company doctor unfit for night work on a continuous basis; that she had been admitted to a nursing home for nervous diseases and had then been judged, always by the company doctor, unfit for the duties. In the opinion of the judges, these data, known to the company, represented an alarm bell that should have led it to investigate the reasons for the absences and to inform the employee of the rights recognized by the anti-discrimination legislation.

Well, the knowledge of the worker’s state of disability (or the possibility of knowing it according to ordinary diligence) gives rise to the employer’s burden – to which the worker cannot oppose obstructive behaviour – to acquire, before proceeding with the dismissal, information about the possible relation between the employee’s absences due to illness and the state of disability, in order to adopt possible reasonable accommodations, after dialogue with the interested party.²⁴

From the above, it emerges that the case law, with the understandable intention of protecting the disabled worker, has not yet reached an acceptable point of balance between that protection and the position of the employer who, in good faith, has exercised the dismissal for exceeding the protected period having not been informed of the condition of disability and having no objective possibility to presume the existence of such a condition.²⁵

It therefore seems desirable that the case law, with a view to a more balanced balance between the position of the worker and that of the employer, gives greater value to the necessary “cooperation” on the part of the disabled worker,²⁶ also considering that the employer can identify a reasonable, targeted and specific solution or accommodation in favour of the worker only if he knows the specific “impairment” that afflicts him.

²¹ Thus, Cass. 23 May 2024, no. 14402. See also Cass, 22 May 2024, no. 14316.

²² See Voza R., *Eguaglianza e discriminazioni nel diritto del lavoro. Un profilo teorico*, Report for AIDLaSS – XXI National congress, Messina, 23-25 May 2024, 2024, 55, according to which the fact that it can be «justifiably presumed that a long-term illness is already in itself a revealing symptom of the existence of a lasting pathology, such as to justify, according to the canons of fairness and good faith, the employer’s activation in order to verify whether the conditions in relation to which the obligation of reasonable accommodation arises exist (...)» is a mere presumption «given that not all workers who exceed the protected period are disabled».

²³ Cass. 2 March 2026, no. 4623.

²⁴ Cass. no. 14316 of 2024.

²⁵ See Fili V., nt. (6), 2150, according to which it is «impossible to postpone a legislative or social partner intervention in identifying the point of balance between the protection of the worker’s privacy and the protection of the company’s reasons, both reinterpreted in the prism of the general clauses of fairness and good faith».

²⁶ The Supreme Court itself recognizes the need for “interlocution” and “confrontation” between the parties, see Cass. 31 May 2014, no. 15282 and Cass. 23 May 2024, no. 14402.

4. Some solutions adopted by collective bargaining: great is the confusion under the heavens.

How can the collective bargaining rules about the protected period avoid the risk of being considered null and void for indirect discrimination against disabled workers?

This is the question that the social partners have to deal with in the renewals of collective agreements subsequent to the decision no. 9095 of 2023 of the Court of Cassation. On this, the Supreme Court itself²⁷ has offered some ideas, underlining that collective bargaining, in order to avoid the risk of discriminatory treatment towards workers with disabilities, must “explicitly” regulate the disadvantaged position of the disabled person, since it is not sufficient to eliminate this risk a discipline that takes into account only the objective profile of the abstract seriousness or particularity of the pathologies, without also valuing the subjective aspect of disability.

The most direct solution consists in the introduction of a longer *periodo di comporta* for disabled workers, or in any case for those suffering from specific pathologies that lead to more frequent and prolonged absences.²⁸

A second solution – alternative or cumulative to the previous one – consists in contractually providing for the exclusion from the calculation of the *periodo di comporta* of absences due to illness that are causally linked to the worker’s disability. There is no shortage of decisions according to which the employer could have evaluated, among the reasonable accommodations, “the removal from the compulsion of periods of illness related to the state of disability”.²⁹ Such exclusion would be based on the conceptual distinction – reiterated by the CJEU – between the notion of “illness” and that of “disability”: the taking into consideration of absences due to pathology related to disability in the single cauldron of the generic protection ends up assimilating a pathology linked to a disability to the general notion of illness, an assimilation that the CJEU has expressly excluded.

The Supreme Court and the case law of courts of merit converge in holding that, even where collective bargaining does not yet provide for a differentiated protection, the employer – and, *a fortiori*, collective discipline – must guarantee a mandatory confrontation phase with the disabled worker before proceeding with the dismissal for exceeding the protected period.³⁰

Having identified the (few and uncertain) coordinates that the jurisprudence has provided to the social partners for the regulation of the protected period for the disabled, let’s now

²⁷ Cass. 6 September 2024, no. 24052; Cass. 7 January 2025, no. 170.

²⁸ According to Court of Milan, 18 January 2024, no. 263: «the motivation looks at the principle of equality understood in a substantial sense, which requires the equal treatment of comparable situations and the differential treatment of different situations: diversified treatment that many collective agreements begin to expressly provide, establishing a different calculation of the protected period for workers suffering from particular pathologies that have a more typical relapse, inherent in the condition, precisely that of determining the need for the worker both to be absent more often due to illness and to resort (permanently or for a prolonged period of time) to periodic treatments».

²⁹ Court of Cosenza, 4 November 2024, n.1936.

³⁰ According to Cass. no. 31464/2023, the preventive confrontation phase constitutes a “*necessary moment in the dismissal procedure*”, having the function of both ascertaining the possibility of keeping the employee in service with different tasks, and identifying reasonable organizational adjustments.

analyse the provisions adopted on the subject by the some of the main Italian national collective bargaining agreements (hereinafter, NCBA or NCBA's).

The NCBA of Metalworking Industry³¹ intervened on the issue with the renewal agreement of 22 November 2025, according to which, for workers with a certified disability resulting from the documentation delivered to the employer pursuant to Legislative Decree no. 62/2024, Law no. 104/1992 and Law no. 68/1999 at the time of exceeding the protected period, whether short or extended, the following will be granted: (i) an additional 30 days of job retention for workers with up to 3 years of service; (ii) an additional 45 days of job retention for workers with more than 3 years of service and up to 6 years; (iii) an additional 60 days of job retention for workers with more than 6 years of service; for these periods, a supplement will be paid by the company up to 80% of the normal salary that he would have received if he had worked.

With the renewal of 15 April 2025, the NCBA of Chemical Industry³² has provided that, for workers with a certified disability pursuant to Law no. 68/1999, the terms of retention of the job are extended by a further 30% compared to the durations already indicated for the generality of employees.

The NCBA of Food Industry³³ pursues the declared objective of dictating a differentiated discipline of the sick leave valid for workers with certified disabilities pursuant to Law no. 68/1999, on the ground that they are more exposed to the risk of illness due to this condition, and this regardless of whether the absence due to illness can be traced back to the disabling pathology. In light of this, this NCBA provides that the terms of retention of the job during illness are increased by 90 days for the worker with a certified disability pursuant to Law no. 68/1999.

The NCBA of Trade Sector³⁴ and the NCBA of Logistics Sector³⁵ have not yet implemented the indications of the jurisprudence on the protected period for disabled workers.

³¹ NCBA for employees of the private metalworking and plant installation industries (Contract code: C011), signed by the Italian Metalworking Industry employer Federation (Federmeccanica), the National Association of Plant Installers (ASSISTAL) and trade unions FIM-CISL, FIOM CGIL, UILM-UIL, FISMIC, UGL mechanics.

³² NCBA for workers in the chemical, chemical-pharmaceutical, chemical fibres and abrasive, lubricant and LPG sectors (Contract code: B011), stipulated by the National Federation of the Chemical Industry (Federchimica), the Association of Pharmaceutical Companies (Farmindustria), the Association of Italian Cerai and trade unions FILCTEM-CGIL, FEMCA-CISL, UILTEC-UIL.

³³ NCBA for employees of companies operating in the food industries (Contract code: E012), signed by Ancit, Anicav, Assica, Assitol, Assobibe, Assobirra, Assolatte, Federvini, Mineracqua, Unaitalia, Unionfood, Unionzucchero and trade unions FAI-CISL, FLAI-CGIL, UILA-UIL.

³⁴ NCBA for employees of Trade Sector, distribution and services (Contract code: H011), signed by CONFCOMMERCIO – Imprese per l'Italia and trade unions FILCAMS-CGIL, FISASCAT-CISL, UILTUCS-UIL.

³⁵ NCBA for employees of freight forwarding, road haulage and logistics companies (Contract code: I100), signed by AITI, Assoespressi, Assologistica, Fedespedi, Fedit, Fisi, Confetra, Aite, Fai, Federtraslochi, Federlogistica, Fiap/L, Unitai, Conftrasporti, Agci Servizi, Anita, Clai, Confartigianato Trasporti, Federlavoro E Servizi – Concooperative, Sna-Casartigiani, Fita-Cna, Legacoop Servizi, Trasporto Unito – FIAP, Assotir and trade unions FILT-CGIL, FIT-CISL, UILTRASPORTI.

5. Final remarks.

The examination of some of the main Italian NCBAAs shows, as already noted by the doctrine, that the contractual provisions that have tried to incorporate the indications of the jurisprudence are rather heterogeneous in terms of the protection techniques used and, in most cases, result in simple maintenance of the pre-existing disciplines on differentiated protection for workers suffering from serious pathologies, while, only in a few cases, do they express a real desire of the contracting parties to offer a different treatment to disabled employees, as required by the new orientation that has emerged from the jurisprudence.³⁶

The NCBAAs that have regulated the matter in an advanced manner (such as the NCBAAs Metalworking, Chemical and Food Industry) have included workers with certified disabilities pursuant to Law no. 68/1999, Law no. 104/1992 or both laws in the group of beneficiaries of differentiated treatment.

Paradoxically, even the provisions of these NCBAAs could be considered null and void for indirect discrimination, insofar as they exclude from differentiated protection any workers who are to all intents and purposes disabled, in the bio-psycho-social sense implemented by the CJEU and the Supreme Court, but have not obtained a certification of this status under the abovementioned legislations.

This brings out, as noted by authoritative doctrine,³⁷ the need for legislative intervention on the subject since, in the current structure deriving from the aforementioned rulings of the Supreme Court and the CJEU, it is in fact impossible for the social partners to identify a regulation of the matter free from the risk of being considered null and void. And this undermines legal certainty and the protection of the company's reasons, which must certainly be balanced with the protection of the worker's disability and privacy, but within the framework of a proportionate balance and not excessively and unreasonably afflictive for one of the parties.

In my view, case law should afford more effective protection to the employer's position; an employer cannot be expected to possess near-magical powers to know something – such as disability status – that is inherently unknowable and protected by privacy legislation.

Moreover, it does not seem overly burdensome to place a certain disclosure obligation on those who wish to benefit from preferential treatment. This is already the case in many instances: an employee wishing to take the marriage leave provided by NCBAAs must inform the employer of the marriage; a female employee who wants to exercise rights related to new-mother status must submit appropriate supporting documentation, etc. I see no reason, then, why an employee wishing to access a more favourable regime regarding the *periodo di comporta* should not be required to disclose his/her disability status to the employer – perhaps without providing excessive detail, in compliance with the data minimization principle.³⁸

³⁶ Alifano F., *Discriminazione per disabilità, comporta e contrattazione collettiva*, Working Paper no. 7/2024, Adapt, 2024, 7.

³⁷ Fili V., nt. (6).

³⁸ Art. 5, Regulation (EU) no. 679/2016.

In fact, it would be enough for case law to give weight to a mechanism that already exists under current regulations: the Ministerial Decree of April 18, 2012,³⁹ provides the option, on the employer's copy of the sick leave certificate, to check the box for an "*underlying pathological condition or condition connected to a recognized disability status*". If employees were mindful of this when their doctor issues the medical certificate, the employer would instantly know that the absence is linked to a disability. Consequently, the employer could no longer claim ignorance of the disability status.

Ultimately, whether this is achieved through legislation or via a more balanced case law that weighs the protection of disabled individuals against the safeguard of the employer's position, a more balanced framework for this matter is imperative.

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³⁹ Reference is made to the Interministerial Decree of April 18, 2012, which defines the technical procedures for the preparation and electronic transmission of sick leave certificate data. On this point see Della Rocca G., *La questione della conoscenza o conoscibilità dello status di disabilità*, in *Lavoro Diritti Europa*, 2, 2025, 6.

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