STUDIES

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PENALTIES FOR UNLAWFUL DISMISSAL IN FRANCE AND IN ITALY

RÉSUMÉ

Cette contribution a pour objet d'étudier les récentes législations françaises et italiennes portant sur les licenciements, leur contrôle, et leur sanction en cas de motif illégitime. Les deux droits ont, entre 2012 et 2017, fait l'objet de profondes réformes qui commencent à produire leurs effets. Dans les deux droits, les législateurs ont justifié le changement par l'exigence d'une « sécurisation » des licenciements. L'étude prouve, outre le caractère ambivalent de ce terme, que l'objectif de sécurisation n'est pas atteint, pour aucune des parties.

MOTS CLÉS : Licenciement, régime de sanction, sécurisation.

ABSTRACT

This contribution sets out to study recent French and Italian legislation on redundancies, their monitoring and sanctions in the event of an improper motive. Between 2012 and 2017, these two legal systems were subject to major reforms which are now beginning to show their effects. In both systems, the justification for this change made by legislators was that it would make redundancies more "secure". This study proves, besides the ambivalent nature of this term, that the goal of security has not been achieved for either party.

KEY WORDS : Redundancies, Sanction System, Security.

Both French and Italian employment laws underwent profound reform between 2012 and 2017[1], causing what some authors see as a «paradigm shift»[2] in their purpose, with both now aimed at securing[3] work relations. This objective is sometimes presented as neutral, that is to say benefiting both employers and employees[4], and consensual, since no-one wishes to live in insecurity, and even less in legal uncertainty.

In this study, we propose to examine a particular - crucial - point in the French and Italian reforms, in which the objective of security has been invoked on both sides of the Alps. This point is the reparation of unlawful dismissal.

Consequently, the aim is to try and determine the trends expressed in the two systems of employment law. In times of economic depression such as we are currently experiencing, the legal institutions, laws and standards in general, constructed for more socially tranquil times, are called into question or threatened by the transformations of economies in crisis[5].

From the end of the 1960s onwards, France and Italy, like virtually all the European countries, set up a regulatory framework for dismissals and redundancies. The main aim

1 In France, Law no. 2016-1088 of 8 August 2016 (*Loi Travail*, Labour Law) and especially the «Macron Orders» of 2017. In Italy, the «Fornero» Law no. 92/2012, Delegation Law no. 183/2014 and the Legislative Decrees 2105.

2 A. Perulli, «L'idea di diritto del lavoro, oggi», in A. Perulli (dir.), *L'idea di diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi*, Kluwer-Cedam, Milano, 2018, p. XLI.; A. Perulli, «Un nouveau paradigme pour le droit du travail, entre néolibéralisme et néolabourisme», *Revue de droit du travail*, 2015, p. 732; A. Perulli, «Les ordonnances Macron et le Jobs Act: valeurs et fonctions dans le nouveau paradigme du droit du travail», *Droit social*, 2018 p. 86; T. Sachs, C. Wolmark, «Les réformes de 2017, quels principes de composition?», *Revue de droit comparé du travail et de la sécurité sociale*, 2017-2, p. 1008.

3 On this notion, see T. Sachs, «Quand la sécurité juridique se perd dans l'analyse économique», *Droit social*, 2015, p. 1019. The theme of legal certainty, however, is an older one. See, for example, the special issue *Droit Social*, July-August 2006: B. Teyssié, «Sur la sécurité juridique en droit du travail», p. 703; A. Mazeaud, «Le principe de sécurité juridique: l'antidote au poison de l'insécurité juridique? », p. 707; F. Favennec-Hery, «Sécurité juridique et actes des partenaires sociaux», p. 766.

4 Concerning the Macron Orders, see: http://travail-emploi.gouv.fr/IMG/pdf/dossier_de_presse_-_conference_de_presse_31082017.pdf

5 B. Veneziani, *Stato e autonomia collettiva. Diritto sindacale italiano e comparato*, Cacucci, Bari, 1992. For an analysis of the changes in dismissal law even in the countries most affected by the 2008 crisis, see B. Palli, «Les reformes nationales de la justification du licenciement au prisme des standards européens et internationaux», *Revue Droit Travail*, 2018, p. 618.

of this legislation was to make this choice by an employer a last resort (*extrema ratio*)[6], after all other possible solutions had been considered. Although French and Italian laws on dismissal have ever sought to prohibit terminations (contrary to the fundamental principle of freedom of work), the Italian laws passed in 1966[7] and 1970[8] and the French law of 1973[9] imposed a relatively strict procedural framework on employers.

The French and Italian orientations of these founding years were very different however, even though the intentions were the same. In France, the Law of 1973 introduced a real pre-dismissal procedure (consisting, briefly, of a summons to a meeting, an oral interview and a written letter of dismissal) and prioritised monetary compensation in the event of a dismissal without «real and serious cause».

In Italy, Article 18 of the Workers' Statute placed the emphasis on penalties, with a dual regime, in the event of unlawful dismissal, of reinstatement (for medium-sized and large companies) or compensation (for smaller organisations). In spite of these differences, the objective was identical: to make the employer think twice before breaking off contractual relations with the employee, whatever the grounds (economic or personal).

The French and Italian reforms in the 2010s rowed back from these compensation regimes for unlawful dismissal or, to use the French terminology, dismissals without real and serious cause. In both countries, these changes constitute an event per se. In Italy, Art. 18 of Law no. 300/1970 was considered as a bastion of workers' dignity, freedom and security, a product of that great step forward that was the Workers' Statute (the result of an intense period of collective negotiations at the end of the 1960s), numerous governments having failed in the 2000s in their attempts to amend it[10]. In France, the government also failed in 2015 and 2016, before finally managing to impose a substantial change to the method of compensating for dismissals.

As the laws that were passed are fundamentally different, it is important not to fall into the trap of likening the French and Italian laws to each other too quickly. Even though the economic and political background is the same, the legal transposition is not identical[11], which makes a comparison rich in useful lessons, but also in pitfalls[12].

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6 A. Lyon-Caen, *Dalloz,* 1997, p. 171: «The Court of Cassation (…) also suggests that it be remembered that the meaning of a rule - redundancies on economic grounds are the final measure possible - is marked above all in the force of the sanction for violating it». In Italy, see M. Napoli, *La stabilità reale del rapporto di lavoro*, Milan, 1980, based on Article 2103 of the Italian Civil Code to justify the idea of dismissal as an *extrema ratio*.

7 Law no. 604/1966 of 15 July 1966.

8 Law no. 300/1970 of 20 May 1970 («Workers' Statute»).

9 Law no. 73-680 of 13 July 1973.

10 See the Berlusconi government's draft Delegation Law no. 848-bis of 2002, Art. 3, which provided for the abolition of mandatory reinstatement in the event of unfair dismissal for employees with an open-ended contract due to the conversion of a limited term contract.

11 R. Dalmasso, «Flexibiliser par la procédure», *Travail et Emploi,* 2015, no. 142, p. 55.

12 B. Veneziani, «Stato e autonomia collettiva. Diritto sindacale italiano e comparato», *op. cit.*; O. Khan Freund, «Sull'uso ed abuso del diritto comparator», *Rivista trimestrale di diritto della procedura civile*, 1975, no. 2, p. 796.

We can therefore say that the French and Italian reforms are two test laboratories trying out changes to employment law by adopting different protocols and solutions, although they are designed to achieve the same objective, assigned by a certain form of economics[13]: to secure the termination of employment.

Contrasts will be drawn from the differences and similarities, paying more attention to Italian law **(I)**, as the French reader is assumed to be familiar with French law. These attempts to achieve secure termination, however, are being legally challenged. It is claimed that they are contrary to higher, constitutional laws, and even international labour law **(II)**.

I – ATTEMPTS TO SECURE THE TERMINATION OF EMPLOYMENT

To get a clear understanding of the significance of the recent changes **(B)**, it is necessary to come back to the original standards providing for the compensation of unlawful dismissals in France and in Italy **(A)**.

A - The emergence of deterrents to dismissal

In France as in Italy, the law on dismissals in the 1960s and 70s was constructed to deter the termination of employment. The law before that was considered too permissive, as regards both the grounds and the procedure. However, the procedural choices made by the two countries were different.

1 - The 1970 Italian Workers' Statute: protections against unlawful dismissal

In Italy, from the outset, the procedures intended to limit dismissals were not the same for all companies. A distinction was made according to the number of workers employed in the company, which therefore generated different rights, and the issue at stake was whether or not the penalty imposed on the employer was to reinstate the unlawfully dismissed worker.

Art. 2118 of the Italian Civil Code, provides for an *ad nutum* right of termination of open-ended contracts. The 1966 reform - in conjunction with Articles 4 and 35 of the Constitution - lays down the principle of the need to justify a dismissal. This principle was asserted by Law no. 604/66[14], confirmed by Law no. 300/70 (and by Law no. 108/90 which amended the previous two).

13 Reference to the *Labour law & economics* school of thought on firing costs, which must be certain.

14 Article 3 provides that, in the case of an open-ended contract, the worker can only be dismissed for «just cause» (*giusta causa*) as defined by art. 2119 of the Civil Code or on «justified grounds» (*giustificato motivo*), subjective or objective.

It is materialised in two forms of protection:
- «obligatory protection» (*tutela obbligatoria*) provided for by Art. 8 of Law no. 604 requires, in the event of a dismissal - by a small employer[15] - with no just cause, subjective justified ground or objective justified ground, that the worker be reinstated or be paid compensation of at least 2.5 months' salary and at most six months' salary.
- «real protection» (*tutela reale*), concerning larger employers[16]. This protection was provided for by Art. 18 of Law no. 300/70[17], the version preceding Law no. 92/2012.

In all cases of dismissal that were unjustified, ineffective (because, for example, they were affected by procedural errors) or null and void because they were discriminatory, it obliged the employer to reinstate the worker and pay them compensation corresponding to the damage incurred (corresponding to the wages not paid during the period from the day of termination to reinstatement, minus any other income received during that period, with an upper limit of five months' pay), and gave the worker the possibility of refusing reinstatement and obtaining further compensation equivalent to fifteen months' wages instead.

The normative choice of a «parallel protection» (with reinstatement in the system of «real stability»[18] and reparation by damages in that of «obligatory stability») did not fail to be seen as a possible violation of the principles of equality. The constitutional judges, however, have always held that the disparity of regime induced between the workers in large and small companies is reasonable, basing their arguments on two aspects: a) the need to avoid burdening small companies with excessive costs[19]; b) the high level of trust in working relations in companies, which renders reinstatement impossible[20].

The alternatives of «real» stability and «obligatory» stability have therefore always had, in the eyes of the Constitutional Court, a justification based (somewhat paternalistically) on a necessary compatibility with the companies' environment[21]. This regime was substantially changed, as we will see below, by Legislative Decree no. 23/2015.

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15 The mandatory protection applied in all the cases where the real protection was not applicable, that is to say (within the meaning of art. 2, Law no. 108/90) to employers employing up to 15 workers in a production unit (or up to five for agricultural undertakings), as well as to employers who in any case employed up to sixty workers; under art. 3 of Law no. 108/90, in the event of discriminatory dismissal, reinstatement applied regardless of the size of the workforce. There were also specific provisions relating to certain employers (those with political, trade union activities, etc.) who were excluded from the scope of real protection. Certain employees (domestic workers, directors, workers completing a trial period) remained subject to the *ad nutum* dismissal rule.

16 Within the meaning of the old para. 1 of art. 18 of the Workers' Statute, real protection applied to employers (whether entrepreneurs or not) employing more than 15 workers in a production unit (or 5 for agricultural undertakings), and, in all cases, those employing more than 60 workers. This provision has now been replaced by paras 8 and 9 of art. 18, whose content is identical.

17 M. D'Antona, «Tutela reale del posto di lavoro», *Enciclopedia Giur. Treccani*, XXXI, Rome, 1994.

18 M. Napoli, «La stabilità reale del rapporto di lavoro», *op. cit.*, p. 41.

19 Const. Court, 6 March 1974, no. 55; Const. Court, 14 April 1969, no. 81; and on the legitimacy of the distinction made between industrial and agricultural undertakings, Const. Court, 19 June 1975, no. 152.

20 Const. Court, 8 January 1986, no. 2; plus, in general, Const. Court, 23 February 1996, no. 44.

21 Concerning the managers and directors category, the exclusion from real protection was justified by referring to the particular characteristics of the mode of execution of the employment relationship; Const. Court, 26 October 1992, no. 404; Const. Court, 7 May 1975, no. 101; Const. Court, 6 July 1972, no. 121.

2 - The French law of 1973: the choice of compensation rather than reinstatement

From the end of the 1960s onwards, and even more so from the beginning of the 1970s[22], the French government and the social partners, unions and employers, began to realise that employment law, and more precisely the law on termination of employment, had to provide some legal responses in the face of economic crisis. This would translate, to use the vocabulary of the time, into the notion of job security[23]. But behind this expression that is always on everyone's lip, there is a real controversy: should we design legal systems that really protect jobs or content ourselves with standards that provide a framework for the termination of employment? In spite of strong legal opinion in favour of real and binding protection of jobs, in 1973 the government opted for «simple» financial penalties.

The French law on dismissals in the early 1970s was in fact essentially jurisprudential, not very precise and left the worker with a considerable burden of proof if the grounds for the termination were challenged. A legislative reform was therefore clearly necessary. Very quickly, two opposing options would battle it out: on the one hand, the argument more favourable to employees, urged by most of the trade unions[24], considering that in the event of unlawful dismissal the employee should be reinstated; on the other hand, a more liberal, or more moderate, doctrine, in favour just of introducing compensation, without seeking to overturn the dismissal itself.

In an article written in 1973, F. Naudé, setting out the position of the CFDT union, strongly defended, before the vote on the reform of the law on dismissals, the introduction of real protection in the event of unfair dismissal, with the reinstatement of the employee as a penalty: «While the principle of the nullity of the dismissal in breach of the legal provisions is no longer a matter of discussion in a certain number of countries (Germany, Italy), along with the principle of reinstatement that follows on from it, the draft law only provides for reinstatement if the boss and the worker accept it. The dominant idea therefore remains that reinstatement is not possible against the employer's will. Reinstatement would be the only measure that could repair the prejudice for the employee as a result of being deprived of his job and recognise his right to work»[25].

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22 When unemployment rose from 439,000 in March 1974 to 755,000 in March 1975.

23 See the national inter-professional agreement of 10 February 1969 on «security of employment»; G. Battu, «Analyse de l'accord national interprofessionnel du 10 février 1969, modifié par l'avenant du 21 novembre 1974», *Droit social,* June 1975, special issue, p. 27.

24 The main trade unions CGT, CFDT, CGT-FO, and the judiciary union were in agreement on this fight. See E. Maire (General Secretary of the CFDT), *Le Monde,* 22 August 1972, p. 14: «The Law will have to intervene. It will have to take account of the following principles: (…) need for the employer to provide proof of justified grounds; in the absence of such proof, impossibility or nullity of the dismissal, with the worker being able to choose between reinstatement or genuine compensation».

25 F. Naudé, «Réflexion à propos du projet de loi modifiant le droit du licenciement», *Droit social*, 1973, p. 148; J.-J. Dupeyroux, *Le Monde,* 4 July 1972, p. 12.

The Law of 13 July 1973 obliged the employer to give grounds for the dismissal[26], and the judge to examine the «real and serious» nature[27] of said grounds[28]. In this Law, the choice made was nevertheless that of compensating the employee dismissed without real and serious grounds, the principle today contained in Article L.1235-3 of the Labour Code[29], to the detriment of the logic of reinstatement.

G. Lyon-Caen and M.-C. Bonnetête criticised this choice at the time: «The Law of 13 July 1973 allows the unilateral and prior right to dismiss a worker to subsist. It could probably not, in the situation in which it occurred, do anything else. A modest law, a capitulation before the facts, rather than a reform. The same goes for the reinstatement of the worker in the event of unlawful dismissal (…). Whereas several courts ruling in summary proceedings in cases where dismissal was not only wrongful, but in direct breach of the Law, were no longer hesitating to order reinstatement, the Law has gone into reverse and made reinstatement optional for the employer. The Law is therefore one of closure, not openness»[30].

Lawmakers in 1973 were certainly sensitive to the arguments of a doctrine that was already raising the risk of a perverse effect of overprotecting employees on hiring decisions. A. Sauvy stated, in remarks that are surprisingly apt today: «The LIP affair and many others have shown how sensitive workers have become to the fear of redundancy, especially managers, and how much they would like to have security on that front. Let's suppose that, under pressure from the unions and also public opinion, the public authorities decide to ban dismissals or make them very difficult. Companies will now only hire very prudently, an attitude that will once again hit the young»[31].

This being the case, rather than a law to protect jobs, the Law of 1973 on the real and serious nature of dismissals, is more in line with a logic of providing a (rather strict) framework for terminations, in return for the monetary compensation of employees, where appropriate.

The French and Italian laws of the late 1960s and early 1970s therefore opted for different choices in terms of reparation of unlawful dismissal. However, although this expression had not yet been used at the time, the two regimes shared the common objective of dissuading employers from dismissing a worker, by means of requiring good grounds, but, above, all by penalising the employer in the absence of good grounds. Reinstatement or compensation, the goal was the same: as well as compensating the employee fully for the damage incurred, it was a question of encouraging the employer to use dismissal only as a last resort (*extrema ratio)*. Italy, where real protection imposed reinstatement, however, went further in the idea of the need to fully repair the damage suffered by the employee.

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26 Art. L.1232-6, Labour Code (old Art. L.122-14-2, para. 1).

27 Art. L.1232-1, Labour Code (old Art. L.122-14-3, para. 1, first sentence). See also Art. L.1235-1, Labour Code (old Art. L.122-14-3, para. 1, first sentence et al. 2).

28 Art. 24*q* of the Law of 13 July 1973 expressly specified, however, that it did not apply to «collective redundancies on economic grounds». Legislators considered that the inter-professional agreement on security of employment of 10 February 1969 provided workers with sufficient protection.

29 Today this article still says that in the event of unfair dismissal (without due cause) «the judge may propose reinstatement», but the employer may oppose it.

30 G. Lyon-Caen and M.-C. Bonnetete, «La réforme du licenciement à travers la loi du 13 juillet 1973», *Droit social,* 1973, p. 495.

31 A. Sauvy, «Dérive et accident», *Droit social*, 1973, p. 490.

B - The wish to limit and anticipate the scale of the reparation

One criticism was to be made against both French and Italian laws concerning the reparation of dismissal at the dawn of the 2000s. The excessively severe and, above all, uncertain penalties deterring employers from hiring. The reforms brought in in Italy and France between 2012 and 2017 were therefore justified, from a legal point of view, essentially by a desire to secure the termination of employment. Of course, starting out as they did from different laws, the French and Italian changes were different. Here we will concentrate once again on Italian law, as French law is assumed to be known to the reader.

1 - Italian reforms since 2012

Two series of reforms have been passed in Italy: the first in 2012, known as the «Fornero» Law **(a)** and the second in 2014-2015 known as the «Renzi» Law **(b)**.

a - The Fornero Law: confining the possibilities of reinstatement and promoting a compensation scale

Italian Law no. 92 of 2012 (so-called «Fornero» Law) innovated concerning the penalty for illegal dismissal, by amending the substance and title of Art. 18 of Law no. 300/70, replaced by the following wording: «Protection of the worker in the event of unlawful dismissal» (Art. 1, paragraph 42, point a).

In application of the three first paragraphs of the «new» Art. 18 (which continues to apply only to workers hired on open-ended contracts at 7 March 2015, date when Legislative Decree no. 23/2015 came into force), real protection applies generally, regardless of the size of the employer's workforce, for any discriminatory dismissal or «attributable to other cases of nullity provided for by law or determined by a decisive unlawful ground» within the meaning of Art. 1345 of the Civil Code, independently of the formal ground given by the employer; this sanction also applies to a dismissal that is ineffective as pronounced verbally.

For employers employing more than 15 employees in the production unit or more than 60 workers in total, the penalty of reinstatement (although «moderated» by the fact that the corresponding compensation may not exceed twelve months' wages) also applies in the case of dismissal on objective justified grounds, when the reason or «fact» put forward by the employer is manifestly unfounded (*manifesta insussistenza del fatto,* ex Art. 18, paragraph 7), and in the event of violation of the criteria for selecting workers to be made collectively redundant (Art. 5, paragraph 3, third sentence, Law no. 223/92); the same penalty also applies in the event of a disciplinary dismissal unjustified due to «non-existence of the contentious fact» (Art. 18, paragraph 4) (see below).

In view of the foregoing, those that are mentioned in paragraph 1 of Art. 18 (first of all discriminatory dismissal) represent the main cases of unlawful dismissal sanctioned by reinstatement.

Since 2012 we have therefore seen a trend to claim the aforementioned nullity of the dismissal in advance before the courts - in spite of the difficulties of the burden of proof borne by the worker - in order to bring the large majority of disputes relating to the unlawful nature of dismissals for disciplinary or economic reasons within the framework of reinstatement.

The most recurrent case and the most difficult to prove is not that of discrimination in the strict sense (political, trade union, racial or religious), but that of retaliation dismissal, in particular in the case of reprisals for the exercising of a right, either constitutional or even simply inherent in the employment contract[32].

Law no. 92/2012 does not ignore this problem: it provides for the declaration of nullity/reinstatement (also) of dismissals determined by a decisive unlawful ground within the meaning of Art. 1345 of the Civil Code, even if this text remains quite generic, and with the fault of leaving room for a restrictive interpretation according to which the ground, to really be decisive, must also be «unique»[33].

Dismissal on subjective justified grounds is governed by paragraphs 4 and 5 of Art.18. The legislation is based on a distinction between the «different defects» that can render a disciplinary dismissal unlawful: a distinction is made between certain defects that can give rise to the cancellation of the dismissal and reinstatement (dismissal unjustified for «non-existence of the contentious fact» under Art. 18, paragraph 4)[34] and all the «others» which allow the dismissal to stand but give rise to compensation.

In particular, according to paragraph 5 of Art. 18, in the «other eventualities» where the judge finds that the conditions required for subjective justified grounds or just cause are not met, he will declare the employment contract terminated with effect from the date of the dismissal and order the employer to pay compensation of between a minimum of twelve and a maximum of 24 months of the last salary, calculated according to a certain number of criteria (length of service, number of employees, economic activity, behaviour of the parties)[35].

Finally, that of objective justified grounds was the issue most debated at the time the Fornero Law was passed, as the initial intention of the Monti government was to provide only for damages and not reinstatement, in cases of unlawful dismissal.

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32 For example, the employee dismissed for bringing legal action to recover unpaid hours (Trib. Parma, 1 February 2018, *Rivista giuridica del lavoro,* 2018, II, p. 385), or for having given evidence in court that was unfavourable to the employer (Trib. Prato, 14 November 2017, *Rivista giuridica del lavoro,* 2018, II, p. 416), or for having reported serious violations of the Code of Conduct by a superior (Trib. Florence, 13 September 2018, unpublished).

33 See Cass. 5 April 2016, no. 6575, *Rivista italiana di diritto del lavoro*, 2016, II, p. 714, which explained the link between discriminatory dismissal and dismissal on unlawful grounds.

34 The Italian Court of Cassation has clarified the notion of the non-existent fact. It can be understood as a materially existent fact, but one which does not characterise a breach of contract and is therefore devoid of unlawfulness. In this case, real protection with reinstatement must be applied. In this sense, Cass. 10 May 2018, no. 11322; Cass. 26 May 2017, no. 13383; Cass. 25 May 2017, no. 13178; Cass. 20 September 2016, no. 18418; Cass. 13 October 2015, no. 20540. The theory of the «legally relevant fact» is now accepted in the majority of Italian case law, see Cass. 3 September 2018, no. 21569, *Rivista giuridica del lavoro*, no. 1/2019.

35 The Italian Court of Cassation (Combined Sections, ruling no. 30985 of 27 December 2017) brought cases of breach of the principle of the opportuneness of the disciplinary dispute (which is only one of the most common procedural errors under Art. 7 of Law no. 300/70) into line with the «other eventualities» of unlawfulness of dismissal (therefore making it a substantial error). In this case, the employee is entitled to compensation (art. 18, para. 5).

In the wording of paragraph 7 of Art. 18, the possibility of reinstatement («moderated» version of Art. 18, paragraph 4) was reintroduced. Within the meaning of this rule, the judge can grant the employee real protection (with reinstatement) in the event of manifest non-existence of the fact forming the basis of the dismissal on objective justified grounds (second sentence); in the «other eventualities, where he finds that the conditions of objective justified grounds are not met», the judge will apply obligatory protection.

Consequently, clarifying the meaning of certain expressions - in particular the concept of «fact forming the basis of the dismissal» and the notion of «manifest non-existence» - amounts to drawing a line between reinstatement and compensation where there is no objective ground for dismissal.

The Italian Court of Cassation has taken a stance to clarify these points. In particular, the Italian judges first identified the «fact» with a legal concept and precisely with the «objective justified ground of the economic type» defined by Art. 3 of Law no. 604/66, this ground consisting of three elements: effective reorganisation (whatever the type: job cuts, technological innovation, etc.), a causal link between this reorganisation and the position of the employee dismissed and the obligation to redeploy the worker[36].

Once the «fact» had been identified with the concept of the objective justified ground of the economic type, the judges indicated that the failure of the employer to provide proof of just one of these elements determines the «manifest non-existence of the fact» in reference to Art. 18, paragraph 7, Law no. 300/70[37].

b - The Renzi Law

The 2012 reform was not deemed sufficient by the Renzi Italian government, which judged it too rigid and likely to harm employment. The element of rigidity was identified both in the fact that the law leaves reinstatement in place in the event of dismissal on objective justified grounds and in the fact that it does not guarantee the employer any certainty or foreseeability of the cost of dismissal, leaving it up to the judge to determine the amount of the compensation to be paid to the employee.

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36 For the inclusion of the obligation to redeploy the employee in the notion of «fact», see Cass. 22 October 2018, no. 26675.

37 In this sense, see among other things, Cass. 2 May 2018, no. 10435, *Rivista giuridica del lavoro*, 2018, II, p. 459. In addition the judges ruled that the expression «manifest non-existence» of the fact has meaning with regard to the proof. Accordingly, the trial judge «must check whether the very non-existence of even one of the facts constituting the dismissal is manifest or evident»; legislators «wanted to limit the right to reinstatement to some residual hypotheses» and therefore the concept of «manifest non-existence» must refer to an «obvious and easily verifiable (…) lack of the eventualities justifying the dismissal allowing it to be judged that the termination is clearly a pretext». According to this interpretation, Art. 18, para. 7, would have graduated the consequences in terms of sanction for an unlawful dismissal; only a dismissal «totally» devoid of an objective just cause (dismissal on a pretext) can be the subject of a reinstatement; conversely, a dismissal that is «simply» devoid of an objective just cause implies the mandatory protection of Art. 18, para. 5 (compensation equivalent to between 12 and 24 months of the last salary). For a critique of this position, see M.T. Carinci, «Licenziamento per gmo e *repechage*», *Rivista giuridica del lavoro,* 2018, II, p. 466.

With Legislative Decree no. 23/2015 (amended by Art. 3, paragraph 1 of Decree-Law 87/2018, converted into Law no. 96/2018), the Renzi government sought to overcome this problem:

- firstly, by reducing the number of cases where it is possible to obtain reinstatement;

- secondly by lowering the amount of compensation for unfair dismissal and, above all, by eliminating the uncertainty concerning the quantification of compensation (and by limiting the possibilities the judge has for modulating the penalty according to the prejudice actually incurred).

In application of the criterion of delegation fixed by Law no. 183 of 2014[38], Legislative Decree no. 23/2015 on the open-ended employment contract with «increasing protection» (*a tutele crescenti*) first of all defines its scope with reference to «employees who have the status of blue or white-collar workers or managers hired on an open-ended contract as of the date of the entry into force» of the Decree (7 March 2015) (Art. 1, paragraph 1), including, in accordance with Art. 9, paragraph 2 - those employed by employers who are not entrepreneurs «who exercise activities of a non-profit political, trade union, cultural or religious nature»; it therefore seems clear that there is a dual limit: the express exclusion of workers already employed on a permanent contract (before 7 March 2015) and directors/managers; the implicit exclusion of privatised public employees.

Secondly, Legislative Decree no. 23/2015, again in application of Law no. 183/2014, establishes in Art. 3, paragraph 1, for newly hired workers, in the event of dismissal considered unlawful because the conditions of validity of the objective justified reason or the just cause are not met - which accounts for most of the cases that come to court - a general model of protection of the compensation type, certain in its amount, progressively increasing on the exclusive basis of the employee's length of service and subject to an upper limit on the maximum amount (thereby meeting the criterion provided for in Art. 1, paragraph 7, point c): «certain compensation increasing with length of service»).

The general protection model mentioned in Art. 3, paragraph 1, is distinguished - by its fixed, progressive amount - according to the size of the company's workforce.

It now provides, since the reforms of the Conte government (Decree-Law no. 87/2018), a minimum amount of compensation, respectively, of six months' wages[39] for employers with more than 15 employees in the individual production unit and two months' wages for other employers - plus, with a limit of two months of the last salary (reference salary used to calculate severance pay) for each year of service, in the first case, and one month's salary for each year of service in the second case.

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38 By Art. 1, para. 7, point c) of this Law, the government had a mandate to publish a reform of the rules governing dismissals based on the following principles: «provide, for new recruits, an open-ended contract with increasing guarantees in terms of length of service, excluding for economic redundancies, the possibility of reinstating the employee, providing a certain level of economic compensation that increases with length of service and limiting the right to reinstatement to dismissal that are null and void and discriminatory as well as to specific cases of unjustified disciplinary dismissal and providing precise deadlines for appealing against a dismissal».

39 Decree-Law no. 87/2018 amended the penalties regime of art. 3, para. 1, increasing the amount of compensation in the event of an unlawful dismissal: now with a minimum of six months (instead of four) and a maximum of 36 months (instead of 24).

The maximum amount of the compensation is now 36 months for the employees of employers with more than 15 employees in the individual production unit and 6 months or the others[40].

B - The French reform of 2017: a scale and an upper limit in the name of security

In France, after several aborted attempts[41], the Macron Orders[42] finally imposed a form of scale and a ceiling on the compensation for dismissal without real and serious grounds. It does not seem necessary to return here to these provisions which have been largely studied in French legal journals[43].

They are contained in Articles L.1235-3 et seq of the Labour Code, which define minimum and of course maximum amounts of compensation, based on the employee's length of service and the size of the company.

However, we will mention the fact that the title of Section II of Order no. 2017-1387 shows the government's intentions: it now talks about «repairing» the dismissal and not about paying damages to the employee for the prejudice incurred.

According to F. Batard and M. Grévy[44], the civil penalty is dissolved more than ever in a «charge» whose aim is to deter the employee from going to court, or, at the very least, to enable the employer to anticipate and provision exactly the amount it will be ordered to pay, if found guilty.

The link to the Renzi reform of 2015 is therefore close: in both systems, the government has sought to limit the compensation for unlawful dismissal and make it more predictable for the employer.

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40 There are a few rare exceptions. Reinstatement remains the rule in the cases provided for by Art. 2 of Legislative Decree no. 23/2015 (dismissal invalid) and the case provided for in art. 3 para. 2 of the same Decree, in the event of dismissal for a subjective just cause where the judge finds that the alleged material fact is non-existent, aside from any assessment of the proportionality of the dismissal.

41 See in particular the first attempt to introduce a scale, in the «Macron» law no. 2015-990, censured by a Constitutional Council ruling no. 2015-715 of 5 August 2015 (*AJDA* 2015, 1570). See D. Baugard, «Le plafonnement de l'indemnisation des licenciements injustifiés ne peut pas varier selon les effectifs des entreprises», *Droit social*, 2015, p. 803; T. Sachs, «Quand la sécurité juridique se perd dans l'analyse économique», *Droit social*, 2015, p. 1019. V. J. Mouly, «Le plafonnement des indemnités de licenciement injustifié devant le Comité européen des droits sociaux», *Droit social*, 2017, p. 745.

42 Orders nos. 1385, 1386, 1387, 1388 and 1389 of 22 September 2017 and no. 1718 of 20 December 2017, adopted following enabling act no. 2017-1340 of 15 September 2017 and ratified by Law no. 2018-217 of 29 March 2018.

43 See October 2017 special issue of *Revue de droit du travail*, and in particular P. Adam, «Libertés fondamentales et barémisation: la grande évasion», p. 643; F. Batard, M. Grévy, «Securitas omnia corrumpit», p. 663; C. Percher, «Le plafonnement des indemnités de licenciement injustifié à l'aune de l'art. 24 de la Charte sociale européenne révisée», p. 726.

44 F. Batard and M. Grévy, «Securitas omnia corrumpit», *op. cit*.

On the servicepublic.fr website, there is now even an online simulator available to calculate, according to the employee's length of service and the company's workforce, the possible minimum and maximum amounts of compensation that may be awarded[45]. It should be noted that maximum amounts in France are lower than those fixed by the Italian government.

As in Italy, a few rare exceptions can escape the ceiling. By way of exemption, the amount of the compensation awarded by the industrial tribunal (*prud'hommes*) may not be less than the wages of the last six months when the judge finds that the dismissal is null and void because it occurred, in particular: in violation of a fundamental freedom, in connection with psychological or sexual harassment, in application of a discriminatory measure[46] or following legal action brought by employee on the basis of the provisions against discrimination[47].

II - PROBLEMATIC COMPATIBILITY OF FRENCH AND ITALIAN LEGISLATION WITH HIGHER STANDARDS

These «new» rights, which set upper limits on compensation, are intended to secure the termination of employment. However, by doing so, the risk run by the legislation in both countries is that it will not be a sufficient deterrent to dismissal. The Italian Constitutional Court has recently challenged the entire relevance of the Renzi reform **(A)**, whilst the compatibility of the legislations with international standards is in question **(B)**. However, a particular challenge remains, that of the legal control of economic grounds **(C)**.

A - The Italian Constitutional Court and the unconstitutionality of the Jobs Act

A little more than four months after Decree-Law no. 87/2018 came into force, Italian Constitutional Court judgment no. 194 of 2018 was published[48], ruling on a question of constitutionality raised by the Court of Rome concerning Art. 3, paragraph 1, of Decree no. 23/2015.

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45 https://www.service-public.fr/simulateur/calcul/bareme-indemnites-prudhomales

46 Cass soc. (Court of Cassation, Employment Division) 15.11.2017, no. 16-14.281. For M. Mercat-Bruns, «The principle of non-discrimination due to age does not constitute a basic freedom», *Revue de droit du travail*, 2018, p. 132.

47 See complete list, Art. L. 1235-3-1 Labour Code.

48 Const. Court, 8 November 2018, no. 194, *Dejure*, p. 1; V. Speziale, «La sentenza no. 194 del 2018 della Corte costituzionale sul contratto a tutele crescenti», *Rivista giuridica del lavoro*, no.1/2019; S. Giubboni, «Il licenziamento del lavoratore con contratto "a tutele crescenti" dopo l'intervento della Corte costituzionale», *Foro Italiano*, no. 1/2019; A. Perulli, «Il valore del lavoro e la disciplina del licenziamento illegittimo», *Libro dell'anno del diritto Treccani*, Rome, 2018, p. 339; M. T. Carinci, «La Corte costituzionale no. 194/2018 ridisegna le tutele economiche per il licenziamento individuale ingiustificato nel "Jobs Act", e oltre», *WP Massimo D'Antona*, no. 378/2018; R. De Luca Tamajo, «La sentenza costituzionale 194 del 2018 sulla quantificazione dell'indennizzo per licenziamento illegittimo», *Diritti Lavori Mercati*, 2018, p. 633; P. Saracini, «Licenziamento ingiustificato: risarcimento e contenuto essenziale della tutela», *ivi*, p. 643.

The Constitutional Court declared unlawful the part - not amended by Decree-Law no. 87/2018 - of Art. 3, paragraph 1, aforementioned which provides for an automatic method of calculation based on the employee's length of service, of the damages for unjustified termination of employment.

The first ground for referral to the Constitutional Court concerned the breach of Article 3 of the Italian Constitution (principle of equality). According to the plaintiffs, and the Court of Rome, the law breaches the principle of equality as it introduces two different legal systems according to the date when employees were hired. The disparity in the treatment of old and newly hired employees was considered as devoid of justification.

The Court of Rome thus claimed that the «date of hiring appears to be a random fact» and that there were no factors that could justify such a difference in treatment.

However, the Constitutional Court rejected this argument. According to the Court, the criterion for the determination of the application in time of Legislative Decree no. 23/2015 «does not go against the principle of what is "reasonable" [*ragionevolezza*]».

The Court considered that the goal [*scopo*] pursued by the government of strengthening opportunities for entering the world of work can justify a difference in the dismissal rights between old and newly hired workers.

The Court limited itself here to examining the apparently reasonable nature or not on the merits. It therefore pointed out that «it is not up to this Court to enter into an appreciation of the results that the employment policy conducted by the government is seeking to obtain».

The judgment of constitutional illegitimacy was therefore focused on Art. 3, paragraph 1 of Legislative Decree no. 23/2015 (either the original wording or the wording amended by Art. 3, paragraph 1 of Decree-Law no. 87/2018).

In the main proceedings before the Court of Rome, the dismissal inflicted on the plaintiff - a few months after she was hired on an «increasing protection» contract - was based on the following grounds: «following increasing problems of an economic and production-related nature preventing the regular continuation of the employment relationship, her professional activity can no longer be fruitful for the company».

The employer also mentioned the lack of any possibility of redeployment and dismissed the employee on objective legal grounds.

The judges at the Court of Rome considered that the grounds were extremely generic and could be adapted to any situation, and were therefore inappropriate to achieve the goal that the burden of motivation must achieve; «faced with the nature of the grounds adopted, which could not be more general (…) this defect is the most serious of those indicated, namely the absence of the «conditions required for dismissal on objective justified grounds».

They added that if the employee had been hired before 7 March 2015, she would have been entitled to be reinstated and to compensation of twelve months' wages (under Art. 18, paragraph 7, L. no. 300/70) or - in application of paragraph 5 of Art. 18 - compensation of between 12 and 24 months' wages, and that in this case, she was only entitled to 4 months' wages.

In the end, the Court considered that there subsisted a defect in the grounds so serious that there was «non-existence of the fact». But the protection system described in Art. 3 of Legislative Decree no. 23/2015 did not allow the plaintiff to be awarded compensatory protection for the prejudice actually incurred.

On the contrary, the acceptance of the question of constitutionality would - according to the Court - enable the plaintiff to be awarded compensatory protection for the prejudice actually incurred, which, in this case, would be constituted by the specific protection provided for by Art. 18, paragraphs 4 and 7 of Law no. 300/70 (and, in the alternative, minor protection under paragraph 5).

Finally, the judge at the Court of Rome stated that the employer «had obviously wanted to take advantage of the reductions in social contributions available by hiring a worker, whom he then got rid of by dismissing her on pseudo-grounds».

The Court opted, after a relatively long reasoning, to declare the dismissal unlawful under the part of Art. 3, paragraph 1 which fixes the compensation for unjustified dismissal at an «amount equivalent to two months of the reference salary used to calculate the *trattamento di fine rapporto (t.f.r.)* for each year of service».

The foreseeing of compensation increasing *only* due to length of service is, according to the Court, contrary to the principle of equality and in breach of Articles 4 (right to work) and 35 (protection of work in all its forms and applications) of the Italian Constitution, as well as Articles 76 and 117 (in connection with Art. 24 of the revised European Social Charter).

The judgment is «ablative and not additive» in the sense that it does not add the criteria that the judge must respect, eliminating just the mathematical formula, considering it as insufficient. This being the case, it is not known, at the current time, how to apply this decision to future disputes. However, the judgment does give some indications.

he elimination of the words «amount equivalent to two months of the last salary (…) for each year of service» is accompanied, in the reasoning for the judgment, by some useful clarifications.

It is indicated that the judge must, whilst respecting the minimum and maximum limits provided for by Art. 3, par. 1 of Decree no. 23/2015, to calculate the damages to compensate for the unlawful dismissal (*indennità risarcitoria*), take account, above all, of the employee's length of service (in application of Art, 1. par. 7 of Law no. 184/2014), but also of other criteria provided for by Art. 8 of Law no. 604/66 (provided for the calculation of the compensation in companies with fewer than 16 employees), i.e. «the number of employees, the size of the business or the behaviour and condition of each party».

The choice made by the Italian Constitutional Court to eliminate from the wording of Art. 3, par. 1, the mention of the employee's length of service and to add this parameter to other criteria in its reasoning, could enable the judge to evaluate freely which criteria to adopt to assess the damages and what financial value to allocate to each of them.

The *seriousness of the offence* could also be evaluated by the judge, as it can of course be deduced from the «behaviour (…) of the parties», up to the maximum limit of 36 moths' wages.

B - The risks of conflict with international law

There is also a risk that the French and Italian law will be contrary to certain provisions of international law. In France, currently, certain industrial tribunals (*conseils de prud'hommes*) have refused to apply the scale, and especially the ceiling on the compensation for dismissal without real and serious grounds as this is considered to be contrary to ILO Convention no. 158 and Article 24 of the revised European Social Charter (rESC)[49]. Concerning the latter, a number of collective complaints have been filed by French[50] and Italian[51] trade unions with the European Committee of Social Rights (ECSR) so that the latter may rule on whether it has been breached following the decision on the merits given by the ECSR concerning the complaint submitted by the *Finnish Society of Social Rights* against Finland (complaint 106/2014)[52].

An examination of this dispute would require an entire article on its own. However, we will note, by way of a conclusion, that the securing of termination of employment sought by the French and Italian governments of 2014-2015 and 2017 has been called into serious question, and that the coming months will be of great legal uncertainty. By seeking to limit and put a ceiling on compensation for unlawful dismissal, the governments have perhaps created standards that are no longer a deterrent, but rather an incentive to dismissal and which risk being on a collision course with constitutional standards or international labour law. To put it another way, by trying too hard to give the employer security, it has been plunged into total insecurity.

C - The specific issue of the control of the economic grounds for redundancy

Finally, addressing the logic of securing termination of employment only from the point of view of the penalties and not the control of the grounds, would be incomplete. The notion of securing must be able to be evaluated from the point of view of the *justification* of dismissal (in particular economic redundancies) and its appreciation by judges.

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49 See CPH Lyon of 7 January 2019; CPH Lyon of 21 December 2018; CPH Amiens of 19 December 2018; CPH Troyes of 13 December 2018.

50 Complaint no. 160/2018 *CGT-FO v. France*; complaint no. 171/2018 *CGT v France*; complaint no. 174/2019 *CGT YTO France c. France*.

51 Italian Constitutional Court ruling no. 194/2018 was published while the collective complaint filed on 26 October 2017 by the Italian General Confederation of Labour (CGIL) v. Italy before the ECSR was still pending (complaint no. 158/2017). The latter is due to give a ruling soon on the same issue. In particular in its complaint the CGIL emphasises the fact that the Italian dismissal regulations contained in Decree no. 23/2015 go against Art. 24 of the ESC (revised). It should be pointed out that the French government intervened in these proceedings (act 31 May 2018).

52 J. Mouly, «Le plafonnement des indemnités de licenciement injustifié devant le Comité européen des droits sociaux», *op. cit.*, p. 745 ; J. Mouly, «L'indemnisation du licenciement injustifié à l'épreuve des norme supra-légales», *Droit ouvrier*, July 2018, p. 435.

In France, in the 1990s the Court of Cassation recognised the principle of in-depth control of the economic grounds[53], although there was a partial reversal in 2000 with the SAT judgment[54].

In Italy, the courts were also traditionally supposed to control economic grounds. However, since 2016, a new precedent has applied[55], indicating that the elimination of a post and therefore management and organisational choices constitute an objective justified ground for dismissal.

This precedent excludes the inclusion in the concept of objective justified grounds laid down by Art. 3 of Law no. 604/66 (reasons inherent in the production activity, the organisation of the work and its regular operation) of the reasons behind the organisational decision[56], as well as substantial evaluations relating to profitability, opportuneness, efficacy, etc., in the employer's choice to reorganise its own structure.

This precedent therefore confirms the principle, in Italian economic redundancies, of the employer having strong powers to reorganise its company as it sees fit. There is therefore some doubt as to whether the Italian Court of Cassation has reasonably weighed the balance between a fundamental social right (that of stability in work, which is integrated into employment law - and fixed by Art. 4 of the Italian Constitution) and an economic law subject to limits (that of free use of the entrepreneur's power of organisation and management, based on Art. 41, paragraph 1 of the Constitution).

Here it would be necessary to go back on the original case law that said that dismissal on the objective justified ground of the economic type is management choice of last resort (*extrema ratio*) in the presence of an economic crisis or serious organisational reasons.

Conclusion

What conclusion can we draw from our comparison of these French and Italian attempts to secure employment termination? Both from the perspective of the employer and the employee, in both countries, the outcomes are negative.

Concerning employers, the security is a delusion: in Italy, the ceilings on compensation are unconstitutional, which is generating uncertainty as to disputes to come. In France, although the ceilings are, for the moment, still valid, real control by the courts, in particular

53 The Brinon judgment (Cass. Soc., 31 May 1956, *Bull. Civ. Div.* V. 1956 no. 499) said that the employer was sole judge in the choice to dismiss an employee. In the 1990s the Court of Cassation overturned case law, in favour of exhaustively controlling the economic grounds. See for example, Cass. Soc. (Court of Cassation, Employment Division) 2 April 1997, no. 94-43165. See, for an explanation and justification of this jurisprudential orientation, P. Waquet, «Le juge et l'entreprise», *Droit social*, 1996, p. 472.

54 Cass. Ass. Plen. (full court), 8 December 2000, *Bull. Ass. Plen*. (full court) no. 11. See G. Couturier, «Licenciement économique: le choix de l'employeur et rôle du juge», *Liaisons Soc. Mag*, February 2001, p. 58. The Court of Cassation ruled that although the trial judges had to check the real and serious nature of the economic grounds, they should not consider the choice made by the employer between the different possible solutions. In the case in point, the employer initially envisaged several types of restructuring, with varying degrees of impact on jobs.

55 See Cass. no. 25201 of 7 December 2016. In the same sense, Cass. 15 February 2017, no. 4015; Cass. 20 October 2017, no. 24882; Cass. no. 10435/2018; Cass. no. 16702/2018.

56 Cass. 7.12.2016, no. 25201; Cass. 15.2.2017, no. 4015; Cass. 20.10.2017, no. 24882.

of economic redundancies, remains. However, still in France, the risk of the ceilings being in conflict with international law remains very high at the present time, meaning that the employer who dismisses workers is running substantial financial risks.

From the employees' point of view, in both countries, the situation is even worse. In Italy, the employer can very easily give economic grounds for a dismissal, making all compensation illusory for employees (the penalty of reinstatement having disappeared for workers hired after 7 March 2015).

In France, for all types of dismissal, the upper limits are low and provide very insufficient compensation to employees unlawfully dismissed. Insecurity is, at the present time, rife in both countries, for all parties.

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