European Working Group on Labour Law

Dismissal effected by an employer for one or more reasons related to the individual workers concerned

Italian Report

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Questions for National Reports

1. **Definition**. Does your country have a system that defines the grounds on which a worker can be dismissed? If so, mention the grounds. If not, explain when it is possible to dismiss a worker.
2. **Relevant factors for allowing dismissals**: is the number of workers employed relevant or the type of contract, or the duration of the employment relation, or whether the employer is a public or private legal person, or any other factors.
3. **Sources of law**: specify the sources of the regulation of dismissal (Constitution, Acts, case-law, collective labour agreements, impact of international and European law).
4. **Criteria for allowing the dismissals**: is there a need for a valid reason for termination? How is the reason defined and what criteria apply? Can dismissal be considered as an ordinary tool of company management or is it an instrument that can be used only if there is no other real alternative?
5. **Formal and procedural requirements:** is there a specific form of communication/notification and period of notice required? What are the consequences of infringement of these rules?
6. **The role of the labour authority, workers' representatives and/or collective agreements in dismissals.**
7. **Judicial control of dismissal:** what is the scope of control of courts? Do they check existence of valid reasons, proportionality, adequacy and necessity of the employer's decision in the termination of the contract, dismissal as *extrema ratio*, causal link, etc.? What is the qualification of the unfair dismissal – justified, unjustified, etc.? Are there limits and prescription periods of legal action, burden of proof, extrajudicial resolution of conflicts, enforcement of the judgement, interim measures, etc.?
8. **What are the consequences and effects of a (lawful and unlawful) dismissal:** amount of compensation, legal guarantees of the enforcement of the sentence, procedural problems on legal qualification and enforcement of the judicial decision, etc.
9. **Special categories of workers:** is there a special protection against dismissal in case of maternity, paternity, women who are victims of gender violence, trade union representatives, discrimination, persons who participated in a strike, etc. In other words: are fundamental rights protected during a dismissal procedure and its consequences?
10. **Developments in dismissal law in the past 10 years:** has the test by courts increased, is there an impact by the economic crisis, have employers been imposed more obligations to keep workers employable in order to avoid dismissals?

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1. INDIVIDUAL DISMISSAL IN ITALY: THE BASIC PRINCIPLES

1.1 The basic rule governing individual dismissal: existence of a valid reason as condition for (lawful) dismissal

Individual dismissal represents, as is well known, the termination of the employment relationship effected by the employer through a unilateral act.

In the Italian legal system, a basic rule applies according to which, in the context of an open-ended employment contract, the employer can dismiss a worker only in case of existence of a valid reason for termination.

1.2 Grounds for dismissal

In particular, the grounds on which a worker can be dismissed are the following:

- For just cause (without notice), in case of serious misconduct by the worker - not necessarily linked to a breach of the obligations deriving from the employment contract - whose gravity is such as to compromise the bond of trust that must inform the contractual relationship between employee and employer (Article 2119 of the Civil Code).

- For justified subjective reasons (with notice), in case of notable failure in performing contractual duties (Article 3 of Act. No. 604 of 1966).

- For justified objective reasons (with notice), *id est* corporate/economic reasons or, in any case, reasons not related to the employee's conduct (Art. 3 of Act. No. 604 of 1966).

- For exceeding maximum sick leave period -so called "*period of grace*"- (with notice)

Dismissal for exceeding maximum sick leave period (so called "*period of grace*") is regulated by Article 2110 of the Civil Code. The period of grace is the maximum time for which a post may be preserved following an illness of the employee protected under the legal system. According to case law (see, among others, Supreme Court ruling No. 284 of 2017) dismissal for exceeding the period of grace falls within the category of the above mentioned dismissal for justified objective reasons and, consequently, follows its rules regarding the required procedure and the notice (see better *infra*).

- For permanent physical or psychic unsuitability of the employee in performing her or his duties (with notice)

According to case law (see, among others, Supreme Court ruling No. 29250 of 2017) also dismissal for occurred (permanent) physical or psychic unsuitability of the employee to perform her or his duties (Article 4, par. 4, and Article 10, par. 3, of Act No. 68 of 1999) falls within the category of the above mentioned dismissal for justified objective reasons and, consequently, follows its rules regarding the required procedure and the notice (see *infra*)

1.3 Exceptions to the basic rule: free dismissal

As an exception to the aforementioned basic rule, free dismissal (*id est* dismissal that can be effected by the employer without providing a motivation, also called dismissal "*at will*" or "*ad nutum*"), applies only in the following cases.

1.3.1 "*Dirigenti*" (executives/managers)

Due to their role as *alter ego* of the employer, in Italy executives are subject to different and less protective statutory rules compared to regular employees. In fact, while Italian statutory law generally provides, as we have seen, that, in order to dismiss an employee, the employers must prove that they have fair reason to dismiss them, when it comes to executives the employer is not obliged to provide proof of a valid motivation. This means that, as a rule, executives can be dismissed freely (Article 10, par. 1, Act No. 604 of 1966). Moreover, if the dismissal is based on a just cause (a very serious reason which is able to break the "*bond of trust*" between the employer and the executive) then the employer is exempt from giving the executive a period of notice and is also exempt with paying the executive a sum in lieu of notice. In these types of cases the executive will lose any contractually agreed sums for the notice period. While executives remain rather unprotected under Italian statutory law, national collective agreements for executives partially fill the gap. In fact, national collective agreements provide that the dismissal of executives shall be at least justified. The concept of justification has been elaborated upon by case law and, broadly speaking, it means that the dismissal shall not be completely arbitrary. For instance, it will be considered justified the dismissal of the executive whose performance is not as high as expected. If the dismissal will be deemed "*not justified*" by the Labour Court, then the executive will be compensated, according to the rules laid down in the national collective agreements, with a sum called "*supplementary indemnity*" which can be equal to as much as 18 months of wages for an executive operating in the industrial sector. For executives operating in the commercial sector this sum can be up to 22 months of wages. It is worth noting that executives that have been unfairly dismissed will never be reinstated in employment by a court order. There are only two instances where the dismissal of an executive is regulated by the same Italian statutory laws which govern all employees: 1) If the dismissal is given orally 2) If the dismissal is based on discrimination grounds, for example race, nationality or national origins, sex, age, sexual orientation, disability, religion and belief/non belief. In the two cases above the sanction will always be reinstatement into the previous position of employment in addition to a financial compensation for wages lost since the day of dismissal until the day of reinstatement (see better *infra*). Finally, it is worth adding that female executives are protected by the rule that prohibits dismissal in case of marriage and in case of pregnancy (see *infra*).

1.3.2 Employees on trial

Other categories of employees who can be freely dismissed are employees on trial, but only in the first six months after hiring. After this period, the dismissal must be justified as for any other employee (Article 10 of Act No. 604 of 1966). During the trial period the dismissal can be communicated, and not necessarily in written form, at any time, and for no reason at all, unless the worker is disabled and compulsorily employed, in which case employer must prove that the reason for dismissal is not linked to employee's disability.

The trial period agreement is governed by Article 2096 of the Civil Code under which "…*the hiring of an employee for a trial period must be specified in writing. The enterprise and employee are respectively required to permit and accept the duties that are the subject of the trial period. During the trial period, either party may terminate the contract, without being obliged to provide notice or compensation. If, however, the trial period is established for the minimum time required, the right of withdrawal may not be exercised before expiry of the term. Once the trial period has been completed, the appointment becomes definitive, and services already rendered count towards the employee's length of service*". According to case law, the trial period "*…has the function of allowing the contracting parties, when entering into an employment contract, to make a definitive appointment subject to the positive outcome of a trial period, aimed at assessing the mutual benefit of continuing with the employment relationship. The reason for the trial period agree ment is in fact the common interest of the Contracting Parties in ascertaining whether they are interested in continuing with the contract, by means of a trial period that allows the employer to verify the professional abilities of the worker and the latter to assess the conditions of the working relationship*". (See, for example, Supreme Court ruling No. 10440 of 22 June 2012).

1.3.3 Domestic workers

Domestic workers are another group to whom the principle of free dismissal applies (Act No. 339 of 1958; Article 4, par. 1, of Act No. 108 of 1990), with the exception of dismissal on the basis of discrimination. When a domestic worker is dismissed on a discriminatory basis he or she has the right to be compensated for damages.

1.3.4 Employees who have achieved pension requirements

Employees over the age of 60 who have achieved pension requirements can also be freely dismissed (Article 4, par. 2, of Act No. 108 of 1990).

1.3.5 Professional sport workers

Under Article 4, par. 8, of Act No. 91 of 1981, professional sport workers can be freely dismissed.

2. RELEVANT FACTORS FOR ALLOWING DISMISSALS

2.1 Dismissal in the context of a fixed-term contract

The rules described in the previous section 1.1 apply, as we already have underlined, to the open-ended employment contracts. As far as the fixed-term employment contracts are concerned, before the expiry of the deadline only the dismissal for just cause is admitted (Article 2119 of the Civil Code).

2.2 Differences between private and public sector

The rules examined in the previous section 1.1, regarding the principle of necessary justification and the grounds for dismissal, apply both in the private and in the public sector.

On the contrary, the system of protection of the workers in case of unfair dismissal is different in the two sectors (see *infra* section n. 9.3.4). Also the disciplinary proceedings, that have to be followed in case of dismissal for subjective reasons, are partially different in the public sector (see *infra* section n. 5.3).

2.3 Relevance of the dimensions of the employer

The rules examined in the previous section 1.1, concerning the necessary justification and the grounds for dismissal, apply regardless of the dimensions of the employer (number of workers employed).

The number of workers employed plays, anyway, a crucial role within the system of protection of the employees in case of unfair dismissal (see *infra* section n. 9).

3. SOURCES OF LAW

3.1 Constitution

In the Italian Constitution there is no provision directly regarding dismissals. However, some Articles of the fundamental Charter, dedicated to the protection both of work and of workers, constitute the foundations on which the statutory provisions governing dismissals are built.

- Art. 1 *Italy is a Democratic Republic, **founded on work**. Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution*.

- Art. 2 *The Republic recognises and guarantees **the inviolable rights of the person**, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled*.

- Art. 4 *The Republic recognises **the right of all citizens to work** and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society.*

Art. 35 *The Republic* ***protects work in all its forms and practices****. It provides for the training and professional advancement of workers. It promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights. It recognises the freedom to emigrate, subject to the obligations set out by law in the general interest, and protects Italian workers abroad.*

Art. 41 *Private-sector economic initiative is freely exercised.* ***It cannot be conducted in conflict with social usefulness*** *or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.*

3.2 Statutory provisions

Statutory provisions are the main source regulating dismissals. In fact, the rules governing both the substantive and the procedural aspects of dismissal are contained in the Civil Code (Article 2118 -dismissal with notice- and Article 2119 -dismissal for just cause without notice-) and in several Acts adopted by the Italian legislator in this field. Among other laws, which we will examine in this report, it is worth here mentioning:

- Act No. 604 of 1966 (principle of necessary justification; grounds of dismissal; oldest system of protection against unjustified dismissal, still applicable to the workers hired before 7 March of 2015 in case of employers of small dimensions);
- Act No. 300 of 1970 -Workers' Statute- (Article 18, as modified by Act No. 92 of 2012, provides for the system of protection against invalid or unfair dismissal applicable to the workers hired before 7 March of 2015 in case of large employers);
- Legislative Decree No. 23 of 2015 (new system of protection against invalid or unfair dismissal applicable to the workers hired on or after 7 March of 2015).

3.3. Collective agreements

The law delegates the regulation of important aspects of the dismissal system to collective agreements. As we will see in detail in the sections below, collective agreements govern, among other, the length of the notice period, the length of the probation period, the maximum length of the sick leave period. Moreover, collective agreements play an important role in defining concrete hypotheses of justified dismissal for subjective reasons (see *infra* sections 4.1 and 4.2), hypotheses that Judge has to take in account while assessing the legitimacy of dismissals for just cause or for justified subjective reason.

3.4. Case law

Case law has played and keeps on playing a crucial role in interpreting the statutory provisions governing dismissals. For instance, as we will see below, the notion of "*just cause*" (provided for

by Article 2119 of the Civil Code) has been defined, in its concrete meaning, by the rulings of the Supreme Court.

4. CRITERIA FOR ALLOWING INDIVIDUAL DISMISSALS

4.1 Dismissal for just cause

Art. 2119 of the Italian Civil Code provides for the termination of the relationship for just cause, establishing that each of the contracting parties may withdraw without notice from an open-ended contract if a cause that does not allow the working relationship to continue (even on a provisional basis) occurs.

In order to better understand the legal definition, we should point out that we may talk of "just cause" for dismissal in all those types of conduct by the worker – not necessarily linked to a serious breach of contract – whose gravity is such as to compromise the bond of trust that must inform the contractual relationship between employee and employer.

In fact, just cause includes serious cases of breach of contract but also other issues which, despite laying outside the employment relationship, can reflect on it because they mine trust or expectation of performance, thus cancelling the employer's interest in collaborating with the employee.

Having clarified the definition of the abstract notion of dismissal for just cause, we should now specify the cases that may lead to the immediate termination of the contract, *id est* without notice.

First of all, it is necessary to assess the harm to the bond of trust in relation to the quality and nature of the relationship, to the position that the worker holds within the enterprise and to the duties he or she performs, to the circumstances of time and place in which the fact disputed took place and, lastly, any other aspect correlated to the specific connotation of the relationship that may negatively influence it (Supreme Court ruling No. 3270 of 1998).

In the light of these characteristics, it seems evident that the assessment of whether or not a just cause occurs must involve a concrete evaluation of the facts (Supreme Court ruling No. 1087 of 26 January 2012; Supreme Court ruling No. 35 of 3 January 2011; Supreme Court no. 20385 of 5 October 2011) which takes into account the aforementioned parameters of assessment.

In other words, just cause should be evaluated by taking into consideration objective, but also subjective circumstances. It is necessary to verify if, in relation to the qualities and characteristics of the individual relationship between the parties, the specific "lack" or infringement of the obligations deriving from the contractual relationship, considered and assessed not only objectively but also subjectively, is such as to harm the bond of trust so seriously that the relation

between employer and employee is compromised, thus determining the application of a sanction not less serious than dismissal.

In order to better understand the principle just mentioned, we should take into consideration, by way of example and in the scope of the extensive case law on the topic, some positions taken in relation to individual, specific cases.

The employee's exercise of the right to criticise constitutes just cause when it exceeds the limits of objective truth and is translated into conduct which is harmful to the employer's image, such as to also cause damage of an economic nature (Supreme Court 14 June 2004, No. 11220).

Just cause for dismissal has been found to exist in the case of criminal coercion exercised by an employee against a colleague, consisting in having forced a shop assistant to purchase goods approaching their sell-by date (Supreme Court, Civil Division, No. 17315 of 15 July 2013).

With reference to the harm done to the bond of trust in the case of the misappropriation of corporate assets, some case law has considered that even if the economic damage is slight, this is irrelevant, since priority should be given to the symptomatic value of the act, which compromises the trust that a company may place in the employee (Court of Appeal of Milan, in ruling No. 645 of 22 May 2013, has considered as legitimate a dismissal in the event of a theft of small value).

On the other hand, some case law has taken the opposite approach. In fact, the Supreme Court has stated that "*the dismissal of a cashier who steals a few coins from the cash till is illegitimate because the measure is disproportionate compared to the damage undergone by the employer*" (Supreme Court no. 17739 of 29 August 2011).

Another instance which, especially in recent years, has been taken into consideration by case law, is that linked to the misuse of the employer's technological instruments. In particular, the misuse of the internet in the workplace, during the time assigned for work and paid as such, constitutes, according to case law, a reason that legitimises withdrawal on the part of the employer. The same conclusions were reached in relation to the use of the company mobile phone for personal purposes.

As observed previously, conduct unrelated to the employment relationship – normally irrelevant for the purposes of dismissal – become significant when, due to their seriousness and nature, they are such as to consider the worker unsuitable to continue in the employment relationship (Supreme Court No. 3379 of 6 March 2003. Along the same lines, see Supreme Court No. 21437 of 17 October 2011).

By way of example, if a bank clerk has had a bill of exchange protested, has issued uncovered checks and has used a credit card in such a way as to withdraw sums from an ATM and pay by credit card sums exceeding authorised limits, this may lead to immediate dismissal. Case law has

ruled out the legitimacy of dismissing a bank employee who was already a drug addict, considering the need to rehabilitate the worker as prevalent over protection of the bank's image.
Nor is addiction to alcohol considered in itself sufficient reason to compromise the trust of the employer, since it is necessary to ascertain from time to time the conduct of the employees, in the concrete performance of their duties and according to the ordinary criteria established by law and collective agreements, in order to assess the legitimacy of the dismissal.

Lastly, it is important to keep in mind the value of the examples contained in collective agreements regarding the hypotheses that constitute just cause for dismissal.
In these cases, case law has constantly found that the hypotheses provided for in collective agreements have an exclusively exemplary value and do not cover all the types of conduct that may be significant for the purposes of terminating employment for just cause.
Furthermore, if one of the hypotheses provided for by the collective agreements occurs, the judge is not exempted from the need to ascertain if the dismissal is, in conformity with the general principle contained in Article 2126 of the Civil Code, a proportionated sanction in the concrete case.
Labour Court's discretion is, however, limited when collective agreements exclude that a certain conduct would be considered as just cause since Article 12 of Act No. 604/1966 expressly allow collective agreements to provide employees for more favourable treatments.

4.2. Dismissal for justified subjective reasons

Dismissal for a justified reason (with notice) is provided for by Article 3 of Act No. 604 of 1966, which identifies two types of justified reason: subjective and objective.
Dismissal for a "*subjective*" justified reason occurs when a worker is accused of having committed a significant breach of contractual obligations qualified, from a psychological point of view, as involving her or his responsibility.
What distinguishes the justified reason from the just cause is that in the former the breach is not so serious as to render impossible the continuation, albeit temporary, of the working relationship.
Case law has stated that the difference between the two types of dismissals for subjective reasons is of a qualitative nature, in the sense that dismissal for just cause is based on facts of greater seriousness compared to those at the basis of dismissal for justified reason (Supreme Court No. 1475 of 27 January 2004; Supreme Court No. 6889 of 13 may 2002 and Supreme Court no. 14551 of 9 November 2000)
The mention – in collective agreements – of specific breaches by the worker, which are such as to legitimise dismissal, does not exempt the judge from the need to ascertain the entity and

seriousness of the infractions with which the employee is charged and, in particular, the proportionality between the conduct and the penalty inflicted (Article 2126 of the Civil Code).
Therefore, the Court is not bound by special terms in collective agreement unless these are more favourable to employees.
But way of example, case law has stated that a subjective justified reason for dismissal exists in the following cases:

- insubordination;
- abandonment of the workplace;
- violation of the obligation of loyalty and non competition;
- simulation of illness in order to perform another work.

It has been ruled out that poor performance may count as a subjective justified reason, unless the employer can prove negligence on the part of the worker (Supreme Court No. 7398 of 26 March 2010 and Supreme Court No. 14605 of 10 November 2000).
If the Court finds that the alleged fact does not constitute just cause, the dismissal is still valid when the Judge rules that the fact is nevertheless relevant as justified subjective reason. In this case, the employee has the right to receive compensation for lack of notice.
Justified subjective reason, like just cause, must be promptly notified to the employee since tolerating employee's failure means acceptance of the behavior (see *infra* the procedure in section 5.3).

4.3 Dismissal for justified objective reason

The notion of dismissal for justified objective reason is provided for by Article 3 of Act No. 604 of 1966 under which this type of dismissal with notice is determined by reasons regarding the productive activity, the organisation of work and its regular functioning.
Dismissal for an objective reason is thus linked to facts and/or events which affect the corporate reality and in relation to which the employer has the effective need (of an organizational or economic nature) to put an end to the employment relationship. In this case, dismissal may be performed with notice pursuant to Article 2118 of the Civil Code.
Therefore, all the cases and situations that regard the employer and make the termination of employment inevitable fall within the notion of dismissal for objective justified reason. It follows that within its scope we may, for example, include:
–reorganisation for the more economically viable management of the enterprise;
–the reorganisation of working methods with the introduction of new machinery;
–the computerisation of services;

–the termination of production activity or part of it;

–the completion of work on a construction site;

–the closure of a branch of a store or of a single department.

As far as the issue of reorganisation is concerned, it should be pointed out that this may also be dictated by the need to achieve greater productive efficiency through the redistribution of activities, not being necessary, for the purposes of constituting a justified reason, that all the duties previously attributed to the dismissed worker are discontinued. In these terms, we can imagine the following hypotheses: 1) total elimination of the post; 2) partial elimination of the post with redistribution of the remaining duties; 3) total elimination of the post with total redistribution of the duties.

In this context we should further remember that in the extent to which the reason is linked to entrepreneurial choices this may not be subject to judgements on the merits by the Court, also in the light of the fundamental principle of "*free economic initiative*" contained in Article 41 of the Italian Constitution.

Without prejudice to the discretionary power of the company, the issue that is crucial in distinguishing between the legitimacy and illegitimacy of a dismissal is that of the effectiveness of what is stated in the motivation for dismissal.

On this point, we find two different approaches in case law.

The first, particularly sensitive to the principle of the employer's freedom of organisation, as envisaged under Art. 41 of the Constitution, establishes that "*in the event of reorganisation or restructuring of the company, without prejudice to the need to prove the effectiveness of the relative process, any reason, in an economic sense, which has determined it is legitimate, not excluding market needs or the pursuit of an increase in profits through organisational changes, while the judge has the task of checking that at the basis of the entrepreneur's decision there is a serious economic reason and not a pretext. Nor is it possible to distinguish between reasons determined by factors outside the enterprise or related to the market, and those regarding management of the enterprise, or aimed at a more suitable organisation for an increase in profits*" (Supreme Court No. 5777 of 11 April 2003; Supreme Court No. 9310 of 9 July 2001; Supreme Court No. 6222 of 23 June 1998; Supreme Court No. 24502 of 21 November 2011; Court of Bari, 26 April 2012).

According to the other approach, the motivation of reorganisation sees the dismissal for an objective reason as justified only if it is made on the basis of an unfavourable economic situation. In fact, "*in the notion of objective justified reason for dismissal we can also find the hypothesis of company reorganisation performed for the purpose of a more economic management of the*

company and decided by the entrepreneur not simply to increase profits but to deal with unfavourable situations, not merely of a contingent nature, which have a decisive influence on normal productive activity". (Supreme Court No. 11646 of 18 November 1998; Supreme Court No. 3030 of 29 March 1999; Supreme Court No. 6067 of 24 June 1994).

This means, in definitive terms, that the entrepreneur remains free to assume all the most important decisions for the management of the enterprise, provided that these choices can be verified in their effectiveness by the Court for the purposes of the real existence of a causal link between organisational needs and the measure of dismissal.

In this context we should take into account the peculiar case of multiple individual objective dismissal for a justified reason, namely the case of dismissal involving a number of workers which does not however constitute a case of collective dismissal as envisaged under Act No. 223 of 1991.

With respect to this particular hypothesis of dismissal, case law (Cass. 21 December 2001, n. 16144; Cass. 11 June 2004, n. 11124) requires that the employer who has decided to dismiss only one or some (but not all) of the employees performing the same task(s) has to prove that the choice has been made in accordance to the principles of fairness and good faith (Articles 1175 and 1375 of the Civil Code) which means applying, by analogy, the same criteria of choice provided for by Article 5 of Act No. 223 of 1991 i.e. seniority within the company (last in, first out) and family burdens.

Apart from the situations strictly linked to the activity of the enterprise, **there are cases which, although regarding the worker, fall within the scope of objective justified reasons**.

In this respect, according to the prevailing case law, the following cases fall within the category of dismissal for an objective reason:

– termination of the contract due to completion of the period of grace (see *infra* section 4.4);

– the occurrence of a situation rendering the worker definitively unable to perform her or his duties (see *infra* section 4.5);

– the preventive custody of the worker for events unrelated to the performance of her or his working activity. This case falls within the scope of objective reasons since it causes a temporary impossibility for the worker to perform his duties. In this case, the legitimacy of dismissal will be assessed by taking into account the needs of the company, its size, the foreseeable duration of custody and, in general, any other circumstance linked to the tolerability of the absence;

– the suspension of licences or authorisations necessary to the employee for performing of a given working activity.

For the purposes of legitimacy of dismissal for an objective justified reason, it will be necessary, according to case law, to check that the dismissed employee could not be assigned to another post (so called duty of "*repechage*"). From this point of view, it is also necessary to demonstrate that dismissal is seen to be inevitable due to the specific situation of the company and its organisation. In this sense, checking the possibility of reassigning the employee will be made with reference to the entire company and not only to the office or department in which the worker was posted, while respecting, on one hand, the professional qualities of the worker and, on the other, the corporate organisation.

This check must be made with reference to the corporate organisation existing at the time of dismissal, but may also take into account the circumstance that, after the withdrawal, there have not been any new appointments for the same role as was held by the dismissed worker.

4.3 Dismissal for exceeding maximum sick leave period (so called "*period of grace*")

Dismissal for exceeding maximum sick leave period (so called "*period of grace*") is regulated by Article 2110 of the Civil Code. The period of grace is the maximum time for which a post may be preserved following an illness of the employee protected under the legal system. The law on private employment (Art. 6 of Royal Decree Law No. 1825 of 13 November 1924) establishes that, in the events of suspension of work due to illness, the employer has to preserve the post for the employee for a period of: a) three months, if the worker's length of service does not exceed 10 years; b) six months, if the length of service is over 10 years. The period of grace is also regulated, in a way more favorable to the worker, by collective agreements in a variety of ways and may be classified as follows:

"Simple" or "uninterrupted" period of grace	Maximum period for which the working post is preserved, with reference to a single, uninterrupted period of illness, without taking into account previous periods of illness, except for in the case of a relapse of the same illness, in which case, moreover, an extension of the period of grace is envisaged.
"Subdivided" or "accumulated" period of grace	Maximum period for which the working post is preserved within a wider assessment period, taking into account all the previous periods of illness within this wider period. For example, if 180 days in the last 12 months of employment, or 180 days in one solar year.

Once the period of grace has run, the employer is free to withdraw (with notice) from the employment contract.

According to case law (see, among others, Supreme Court ruling No. 284 of 2017) dismissal for exceeding the period of grace falls within the category of the above mentioned dismissal for justified objective reasons and, consequently, follows its rules regarding the required procedure and, as we have seen, the notice (see *infra*).

4.5 Dismissal for permanent physical or psychic unsuitability of the employee in performing her or his duties (with notice)

As we have underlined in section 4.3, according to case law (see, among others, Supreme Court ruling No. 29250 of 2017) dismissal for occurred (permanent) physical or psychic unsuitability of the employee in performing his or her duties (Article 4, par. 4, and Article 10, par. 3, of Act No. 68 of 1999) falls within the category of the above mentioned dismissal for justified objective reasons and, consequently, follows its rules regarding the required procedure and the notice (see *infra*).

5. FORMAL AND PROCEDURAL REQUIREMENTS

5.1 Written form of the communication of dismissal with indication of the reason for termination

Dismissal is acted by the employer or by an employer's representative and, under Article 2 of Act No. 604 of 1966, must necessarily be communicated in writing. The termination takes effect when the worker receives the written communication of the dismissal unless employee can prove that the knowledge of the document was impossible and she or he is not to blame for it (Article 1335 of the Civil Code).

Moreover, Article 2 of Act No. 604 of 1966, as amended by Act No. 92 of 2012, provides that the written communication of dismissal must indicate and clarify the reasons for the termination.

The explanation of the reasons for dismissal must not be injurious - that is, offensive to the employee's honour and decorum - and those reasons cannot be changed in the course of an eventual lawsuit. Only details that do not alter the substance of reasons given for termination can be integrated by the employer before the Court.

5.2 Period of notice

The notice defers the dismissal effect so that the employee has time to look for a new job before the employment relationship ends.

As we have underlined above, in the Italian legal system the notice is due in all cases of dismissal with the sole exception of dismissal for just cause.

The length of the period of notice is provided for by collective agreements and usually depends on seniority and professional level of the employee.

Violation of notice results in the typical sanction of the payment of compensation for lack (or *in lieu*) of notice, due independently of proof of harm. This compensation coincides with the salary that the worker would have received during the period of notice.

The lack of notice compensation is calculated according to the rules provided for by Article 2121 of the Civil Code stating that every permanent payment must be considered, including food and lodgings and excluding compensation for non-permanent expenses, calculated on an average of the last three years.

Dismissal of a sick worker does not take immediate effect, unless it is founded on a just cause, which is why it is thought that the notice period does not run during the employee's illness.

5.3 Disciplinary proceedings (dismissal for just cause and for justified subjective reason)

When a dismissal is founded on subjective reasons (just cause or justified subjective motive), the employer has the duty not only to communicate it in writing and to give a reason for the termination but to also implement, prior to the dismissal, the procedure provided for by Article 7 of Act No. 300 of 1970 (Workers' Statute) regarding the application of disciplinary sanctions. In such cases, the employer must previously state the charge in writing clearly specifying the facts being complained of in such a way that the employee is put in a position to be able to exercise his right to defend herself or himself.

Moreover, the employer must state the charge promptly, especially in the case of dismissal for just cause, since in such a case the fact complained is particularly serious. Case law has, however, clarified that the concept of "promptly" is to be interpreted in relative terms, since it is important to take into account the moment when the employer achieves full knowledge of the facts being complained of, also considering the size of the corporate organisation and the time necessary to verify the facts.

If the conduct engaged in by the employee is particularly serious, it will be possible to provide, in the letter of complaint, also a "precautionary" suspension of work until the completion of disciplinary proceedings, on full pay.

In the five days subsequent to receiving the complaint, the employee may provide her or his own justifications verbally, if he so desires also asking to be accompanied by a trade union representative, or in writing. After this term has run, the employer may proceed with dismissal, qualifying it, in relation to the characteristics of the concrete events, as dismissal for just cause or

for subjective justified reasons. In the case in which the worker has fully exercised his full right of defence, submitting her or his justifications to the employer, the employer may legitimately issue the disciplinary measure even before the running of the five days (Supreme Court, Joint Divisions, No. 6900 of 7 May 2003).

In the communication of dismissal subsequent to the disciplinary procedure employer does not have to repeat reasons but can simply refer to those indicated in the statement of disciplinary charge.

From a formal point of view, without prejudice to the obligation of the written form, the letter with which the employer communicates dismissal must acknowledge that the employee's justifications have been taken into consideration. The employer is not however obliged to respond to them, it being sufficient to specify the reasons for dismissal, referring to the complaint and specifying that the justifications made by the employee have been deemed unfounded.

It should also be remembered that dismissal, ordered after the outcome of the proceedings as envisaged under Art. 7 of Act No. 300/1970, produces effect from the date of the communication with which the proceedings were initiated.

Disciplinary proceedings in the public sector are inspired by the same principles described above (for example, immediacy of the letter of complaint and respect for the worker's right to defense) but there are slightly different rules regarding the terms and some other formal aspects.

5.4 Preventive conciliation procedure (dismissal for objective reason)

In relation only to employees hired before 7 March 2015 - the date when Legislative Decree No. 23 of 2015 came into force - dismissal for justified objective reason by an employer falling under Article 18, par. 8, of Act No. 300/1970, that defines the undertaking size for purposes of circumscribing standard of protection (see *infra* section 9), must be preceded by an administrative compulsory conciliation procedure (Art 1, par. 40, of Act No. 92/2012).

In fact, Article 7 of Act No. 604/1966, as emended by Act. No. 92 of 2012, establishes that an employer who wishes to proceed with dismissal for objective reasons and falls within the scope of Article 18 of the Workers' Statute is obliged to state, in a written communication to the Local Employment Department – sent in copy to the worker –, his intention to proceed with dismissal. This communication describes reasons for the dismissal and possible measures for relocating the employee. The Local Employment Department, within the term of seven days from receiving the aforementioned communication, shall provide for convening the parties, who may be assisted by trade union organisations or by their own lawyers or employment consultants, to attempt conciliation. The procedure must be completed within 20 days from the moment when the Local

Employment Department has transmitted the convocation for the meeting, save the case in which the parties agree not to continue with the discussion with a view to reaching an agreement.

If the attempt at conciliation fails and, in any case, once the time-limit envisaged for the convening of the parties by the Local Employment Department has run, the employer may proceed with dismissal.

The regulation also envisages that a failure on the part of one or both parties to make an application for an attempt at conciliation may be assessed by the judge, in the event of legal proceedings, for the purposes of the court's decision.

As in the case of the procedure envisaged for disciplinary dismissals, the effectiveness thereof runs from the date on which the procedure begins.

The procedure specified above **must not be followed** in the following cases:

– **in the event of dismissal for completion of the period of grace pursuant to Art. 2110 of the Italian Civil Code**;

- in the event of dismissals performed as a consequence of changes in the contract followed by appointments with other employers by virtue of company clauses;

–in the event of interruptions of an open-ended employment contract in the sector of construction work, due to the completion of activities and closure of the construction site.

It is important to underline that the administrative procedure has to be followed in case of dismissal for permanent physical or psychic unsuitability of the employee in performing her or his duties.

6. THE ROLE OF THE LABOUR AUTHORITY, WORKERS' REPRESENTATIVES AND/OR COLLECTIVE AGREEMENTS IN DISMISSALS

6.1 Labour Authorities

The only role played by Labour Authorities in the individual dismissal system is the one described in the previous section regarding the preventive conciliation procedure in case of dismissal for objective reason. In particular, during this procedure, the Local Employment Department has the task of helping the parties in finding alternative solutions to dismissal or, in case the dismissal is inevitable, of helping them to find an agreement that contains protective measures in favour of the worker.

6.2 Trade Unions and collective agreements

As we have seen above, collective agreements play a very important role within the system of individual dismissal since they regulate, among other, the length of the notice period, the length of the probation period, the maximum length of the sick leave period. Moreover, as we have

underlined above, the hypotheses of justified dismissal for subjective reasons, frequently contained in collective agreements, have to be taken in great account by the Judge while assessing the legitimacy of dismissals for just cause or for justified subjective reason.

7. ACTIONS AGAINST DISMISSAL AND JUDICIAL CONTROL

7.1 Actions against dismissal (limits)

Under Article 6 of Act No. 604 of 1966, as amended by Article 32 of Act No. 183 of 2010, the employee must challenge the dismissal **within 60 days** of receiving its written communication. The challenge has to be made by an extrajudicial written act that is apt to clearly express the employee's intention to appeal against the dismissal. This extrajudicial act does not necessarily have to contain the reasons for the claim.

The employee must, then, present the appeal to the specialized Labour Court **in the 180 days** after the first extrajudicial claim.

If the worker does not respect the terms indicated above, she or he definitively loses the right to take legal action against the employer as far as the legitimacy of dismissal is concerned.

7.2 Burden of proof

Article 5 of Act No. 604 of 1966 states that the burden of proof in relation to just cause and justified reason (both subjective and objective) of dismissal lies on the employer. The employee has simply to adduce and demonstrate the dismissal, while the employer has to prove its legality. As seen above, in case of dismissal for objective reasons, the employer, besides having to prove the existence of the reasons, also has to demonstrate the impossibility to make use of the worker elsewhere in the company.

As far as discriminatory dismissal is concerned, see *infra* section 10.

7.3 Judicial control

As we have seen above, during a lawsuit the Judge verifies, on the basis of the grounds of appeal proposed by the worker, if the employer, in adopting the dismissal, has complied with all the substantive and procedural rules established by law.

Therefore, among other, the Labour Court checks the existence of the dismissal reasons given by the employer, the proportionality of the dismissal with respect to the conduct of the worker and the observance, by the employer, of the formal requirements and compulsory procedures provided for by law.

7.4 Types of illegitimacy of the dismissal

When declaring the dismissal unlawful, the Judge may ascertain the following types of illegitimacy:

1) Lack of written form (ineffective dismissal).

2) Lack of just cause or of justified (subjective or objective) reason (unjustified dismissal).

3) Violation of procedural rules, such as the disciplinary proceedings or the compulsory conciliation procedure both provided for by Art. 7 of Act No. 300 of 1970 (dismissal unlawful for procedural defects).

4) Nullity (the most serious kind of illegitimacy).

The law considers dismissal to be null when, regardless of the formal motivation adopted, it is ascertained as being:

– discriminatory, *id est* caused by reasons related to political or religious beliefs, race, gender or nationality, or to the membership of a trade union or participation in trade union activities (see better infra section 10).

- performed by way of reprisal, in other words following conduct disagreeable, such as a claim, to the employer (so called retaliatory dismissal).

–ordered for an illicit reason pursuant to Article 1345 of the Civil Code.

–ordered during the period of protection envisaged by the law on maternity and paternity (Article 54 of Legislative Decree No. 151 of 2001 - see better *infra* section 10).

–ordered for reason of marriage (Article 35 of Legislative Decree No. 198 of 2006 - see better *infra* section 10).

8. CONSEQUENCES AND EFFECTS OF A LAWFUL DISMISSAL

8.1 Severance indemnity (so called TFR -Trattamento di fine rapporto-)

Dismissed employees, whatever the motivation, are entitled to receive the so called TFR - Trattamento di fine rapporto (severance indemnity).

Severance indemnity is regulated by Article 2120 of the Civil Code as follows:

1. Whenever employment is terminated, the employee is entitled to severance pay. The amount of the indemnity is calculated by adding for each year of service an amount equal to and in any case not exceeding the annual remuneration owed for the year, divided by 13.5. The amount is proportionally reduced for fractions of a year, calculating as an entire month any fractions of a month equal to or exceeding fifteen days.

2. Unless otherwise envisaged by collective labour agreements, annual remuneration, for the purposes of the previous paragraph, includes all sums, including the equivalent of services in

kind, paid in function of the employment relationship, of a non-temporary nature and excluding any sums paid by way of reimbursement of expenses.

3. In the event of suspension of service during the year for one of the causes envisaged under Article 2110 of the Italian Civil Code, and in the event of total or partial suspension for which the topping-up of the salary is envisaged, the equivalent of the remuneration to which the worker would have been entitled in the event of the normal performance of work must be calculated as part of the remuneration referred to in paragraph 1.

4. The indemnity referred to in paragraph 1 above, excluding the amount accrued over the year, is increased, on a compound basis, on 31 December each year, by applying a rate com posed of a fixed rate of 1.5% plus 75% of the increase in the consumer price index for families of blue collar workers and clerical staff, as ascertained by ISTAT, compared to December of the previous year.

5. For the purposes of applying the rate of revaluation under the previous paragraph for fractions of a year, the increase in the ISTAT index is that recorded in the month of the termination of employment compared to that of December of the previous year. The fractions of a month equal to or exceeding fifteen days are calculated as an entire month.

In short, TFR is a sum calculated by dividing the annual wage for 13,5 and multiplying the obtained result obtained for the years of service performed by the employee within the company. The sums paid in this way are excluded from the formation of the taxable base for the calculation of welfare and social security contributions (Act No. 153 of 1969). Fiscally, it contributes to the formation of income from employment (Articles 17 and 51 of Presidential Decree No. 917 of 22 December 1986).

As regards the taxation, it should be determined on the basis of an average rate (about 23%), according to the more favourable methods of the "*separate taxation*" (Article 19 of Presidential Decree No. 917 of 22 December 1986).

In case of employer's insolvency, the TFR due to the employee is paid by a special fund instituted by INPS (National Institute of Social Security).

8.2 Treatment of income protection - NASPI

In the event of termination of an open-ended employment relationship at the employer's initiative, the worker is entitled, if the access requirements described below are met, to receive by INPS an unemployment benefit called NASPI (New Social Insurance Provision for Employment), introduced by Legislative Decree No. 22 of 2015.

The access requirements are the following: 13 weeks of social contributions in the four years before termination of employment, and at least 30 working days in the 12 months preceding the termination of employment.

The duration of the treatment is equal to a half of the number of weeks for which social contributions were paid in the four years before the start of unemployment. The weeks which already gave rise to the payment of the benefit are excluded from the computation of its duration. However, the maximum duration is 18 months.

The amount of the allowance is 75% of the wage received by the worker during the employment relationship, with a maximum limit of €1.300. The amount, however, decreases by 3% each month starting from the fourth month.

9. CONSEQUENCES AND EFFECTS OF AN UNLAWFUL DISMISSAL

9.1 Sanctions for unlawful dismissal: a brief introduction

The current system of sanctions for unlawful dismissal is very articulated and differs in relation to various criteria. These include:

1) the date on which the worker was hired (before or on 7 March 2015/after 7 March 2015) since Legislative Decree No. 23 of 2015, entered in force on 7 March 2015, has introduced, only for workers hired after 7 March 2015, a brand new system of protection against unlawful dismissal. To the workers hired before 7 March 2015 the old system, provided for by Act No. 604 of 1966 and by Article 18 of the Workers' Statute (as amended by Act No. 92 of 2012), continues to apply.

2) the size of undertaking from which the employee was dismissed (numbers of workers employed);

3) the type of illegitimacy of the dismissal that the Judge ascertains. In fact, a dismissal can be ascertained by the Labour Court, as we have seen above, as discriminatory, null, ineffective, unjustified, unlawful because effected in violation of procedural rules.

9.1 Sanctions for discriminatory, null and oral dismissal

When a dismissal is ascertained as discriminatory, null or ineffective because communicated orally, the employee enjoys, **regardless of the size of the employer and of the date of hiring**, a full protection.

In fact, in these cases, the Judge: 1) order the reinstatement of the employee; 2) order the employer to pay compensation, in the amount of salary due from the day of dismissal until the day of actual reinstatement; 3) order the employer to pay social welfare and health contributions from the time of dismissal until the time of actual reinstatement. The employee has a unilateral and absolute

power to choose, *in lieu* of reinstatement, the payment of an amount equal to fifteen months of full wages (Art. 18 of Act. No. 300 of 1970 and Art. 2 of Legislative Decree No. 23 of 2015).

It is worth noting that the order for reinstatement is not subject to physical enforcement, so the law provides an indirect form of coercion by obliging the employer to pay the employee's salary until the actual time of her or his reinstatement.

9.2 Sanctions for unlawful dismissal in case of employees hired before 7 March 2015

9.2.1 The weak protection provided for employees working for small employers (Act No. 604 of 1966)

The expression "weak protection" synthetically describes the sanctions provided, in case of unlawful dismissal, in favour of all employees occupied in the smaller working organizations that is to say employers which employ up to fifteen workers in the same production unit or in a number of production units in the same municipal district (Article 35 of Act No. 300 of 1970). Therefore, fifteen employees in sectors other than agriculture is the threshold: in agriculture, in fact, the basic protection operates below the threshold of six employees.

Under the rules governing the basic protection (Act No. 604 of 1966), the employer is required either to re-employ the worker, within three days of the Court's ruling ascertaining the unlawfulness of the dismissal, or to pay him a compensatory sum.

The amount of the compensatory sum is determined by the Court on the basis of detailed rules which are drawn by Act No. 604 of 1966, and which are different from those detailed in the Civil Code generally regarding compensation for damages.

The amount of compensation **goes from a minimum of two and a half months to a maximum of six months of wage**. In determining the exact amount the Court takes into account the number of employees, the size of the undertaking, the worker's length of service and the behaviour and condition of the parties involved (Article 8 of Act No. 604/1966).

This system of protection applies both in case of unjustified dismissal and in case of dismissal effected violating procedural rules (for instance, as far as dismissals for just cause or for subjective reasons are concerned, violating the disciplinary proceedings provided for by Art. 7 of Act No. 300 of 1970).

9.2.2 The strong protection provided for employees working for large employers (Art. 18 of Act No. 300 of 1970)

The strong protection, provided for by Article 18 of Act No. 300 of 1970 as amended by Act No. 92 of 2012, applies to employees working for employers whose size is greater than that envisaged under Act No. 604 of 1966.

To this end, Article 18 of the Workers' Statute applies to employers (entrepreneurs and non-entrepreneurs) who employ over 15 employees (or 5 in the case of agricultural enterprises) in the same production unit or in a number of production units in the same municipal district. This article in any case applies to employers who, regardless of the aforementioned limits, employ over 60 employees throughout the national territory.

For the purposes of calculating the employment requirement, it is important to keep in mind the so-called "*normal occupation*", taking as a reference parameter the last six months (Circular No. 3 of the Labour Ministry of 16 January 2013). Always for the purposes of calculating the number of workers, the following must be excluded: 1) temporary agency workers, 2) workers performing community service 3) apprentices. Workers hired with a part-time contract will be counted in proportion to their working time.

In its current form, Art.18 of Act No. 300 of 1970 provides for a modulation of the system of penalties in function of the reason determining the illegitimacy of the dismissal.

From this point of view, if the Judge has ascertained the lack of just cause or subjective justified reason due to inexistence of the facts complained of, or because the facts, although ascertained, fall within the types of conduct punishable with a conservative penalty on the basis of the provisions of collective agreements or disciplinary codes, the employer shall reinstate the employee (unless the worker opts for a compensation of 15 months' salary) and will be ordered to pay damages in proportion to the months running from the date of dismissal to reinstatement (in any case no more than 12 months' salary). The compensation shall take into account any sum which may have been received by the worker in the performance of other activities and also his efforts to find new employment (so called *aliunde perceptum* and *aliunde percipiendum*).

The Judge may apply the same system of sanctions when dismissal is ordered for an objective justified reason and in legal proceedings it has been ascertained that the facts on which dismissal is based are clearly inexistent.

The system described above also applies:

- when a dismissal, effected for permanent physical or psychic unsuitability of the employee in performing her or his duties, is ascertained as unjustified;
- when a dismissal, effected for exceeding maximum sick leave period ("period of grace"), is ascertained as unjustified.

In the other cases, in which the Court only ascertains the lack of a subjective or objective reason or of a just cause (unjustified dismissal), the working relationship is terminated and the employer is ordered to pay an all-inclusive compensation that goes from a minimum of 12 to a maximum of 24 months' salary on the basis of the last de facto overall salary received. The assessment

regarding the amounts of compensation shall be made by the Court, taking into consideration the length of service of the worker, the size of the enterprise, and the conduct or conditions of the parties.

Article 18 of the Workers' Statute also envisages a third system of sanctions based on compensation.

The third system applies when dismissal is ascertained as justified but has been declared ineffective:

–due to an infringement of the requirement of motivation as established under Art. 2 of Act No. 604 of 1966;

–due to an infringement of the disciplinary proceedings set forth under Art. 7 of Act No. 300 of 1970 (dismissal for subjective reasons);

–due to an infringement of the compulsory conciliation procedure set forth under Art. 7 of Act No. 604 of 1966 (dismissal for objective reasons).

In these cases, the working relationship will in any case be terminated and the employer will be ordered to pay a compensation that goes from a minimum of 6 and a maximum of 12 months' salary on the basis of the last salary received.

9.3 Sanctions for unlawful dismissal in case of employees hired on or after 7 March 2015

9.3.1 Brief introduction

Although referring in its heading to the so-called "*contract with increasing levels of protection*", the Legislative Decree n. 23 of 2015, implementing Enabling Act No. 183 of 2014 (so called *Jobs Act*), focuses on a new legal framework on individual and collective dismissal.

As far as individual dismissals are concerned, the new legal framework leaves untouched the grounds of dismissal as provided for, as we have seen above, by Article 2019 of the Civil Code and by Act No. 604 of 1966. Changes provided by the new legal framework mainly refer to the consequences of unlawful dismissal.

In such a perspective, the expression "*tutele crescenti*" ("*increasing levels of protection*") means that the amount of the indemnity that the employer shall pay in case of unlawful dismissal grows according to workers' seniority within the company.

9.3.2 System of protection for employees working for large employers

First, we will examine the rules applicable to employees working for employers (entrepreneurs and non-entrepreneurs) who employ over 15 employees (or 5 in the case of agricultural enterprises) in the same production unit or in a number of production units in the same municipal district. The same rules also apply to employers who, regardless of the aforementioned limits, employ over 60 employees throughout the national territory.

When a dismissal, effected for permanent physical or psychic unsuitability of the employee in performing her or his duties, is ascertained as unjustified, the same rules (full protection) described in the previous section 9.1 (regarding the sanctions provided in case of discriminatory, null and oral dismissal) apply.

If the just cause or the subjective or objective reasons alleged by the employer in order to dismiss the worker is assessed as ungrounded, the judge declares the termination of the employment relationship from the day of the dismissal and condemns the employer to the payment of an indemnity amounting to 2 months of the last wage, occasional grants and reimbursements excluded, for each year of work.

The total amount of the indemnity shall not be lower than 4 and cannot exceed 24 months of wage.

In this case, no social security contribution is due.

Only in case of lack of the material facts on which the employer has grounded a dismissal for subjective reasons (just cause included), the Judge declares the dismissal unlawful and condemns the employer to reinstate the worker. The employer is also condemned to pay to the worker an indemnity (in lieu of damage compensation). Benchmark of the indemnity is the last wage perceived by the worker (occasional grants and reimbursements excluded). The amount of the indemnity depends upon the length of the period starting from the date of dismissal and ending on the date of reinstatement.

Any wage earned by the worker during that period (so called *aliunde peceptum*), as well as any wage that the worker could have earned by accepting a suitable job offer coming from the Employment Services (so called *aliunde percipiendum*), shall be deducted from the calculation of the indemnity.

The amount of the indemnity cannot, anyway, exceed 12 months of wage.

In this case, the employer is also condemned to the payment of social security contribution from the date of dismissal until the date of reinstatement. Sanctions due because of the delayed payment of social security contribution do not apply.

The assessment on the lack of the material fact on which the employer has grounded the dismissal, does not allow the Judge to test the proportionality between the infraction and the sanction.

In cases in which the worker has been dismissed without the respect of the procedure provided for by Art. 7 of Act No. 300 of 1970 (disciplinary procedure), the Judge declares the termination of the employment relationship from the day of the dismissal and condemns the employer to the payment of an indemnity amounting to 1 month of the wage, occasional grants and reimbursements excluded, for each year of work.

The total amount of the indemnity shall not be lower than 2 and cannot exceed 12 months of wage calculated as referred in the above. In this case, no social security contribution is due.

The preventive administrative conciliation procedure provided for by Art. 7 Act 604 of 1966 in case of economic dismissal, does not apply to employment relationships falling under the scope of application of the new regulation.

In case the employer repeals the dismissal within 15 days from the communication that the worker has lodged a claim against it, the employment relationship shall be regarded as not having being interrupted and the worker has the right to the wages that should have earned in the meantime. No sanction applies to the employer.

In case of dismissal of workers falling under the scope of application of the new regulation, in order to avoid the judicial review and left open the possibility to follow any other conciliation and arbitration procedure provided by the law or by the collective agreement, the employer, within 60 days from the dismissal, may offer to the worker a sum amounting to 1 month of the wage, as calculated in the above, for each year of work.

In any case, that sum shall not be lower than 2 and cannot exceed 18 months of wage calculated as referred in the above. The sum is social security contribution and tax free.

The sum shall be paid by bank draft to be given to the worker during the conciliation procedure that shall take place either in court or by a trade union or by the Local Labour Office or by a Certification Commission.

The acceptance of the bank draft terminates the employment relationship. By accepting the bank draft, the worker renounces to the claim eventually lodged against the dismissal. Any other sum agreed within the conciliation procedure is taxed.

In case of succession of companies in the same contract, for the purpose of determining the amount of the indemnity or of the sum due in the above mentioned cases, the seniority of the worker who keeps on working for the companies that succeed into the contract, is calculated taking into account the periods worked by the other companies that have operated within the same contract.

In case the employer repeals the dismissal within 15 days from the communication that the worker has lodged a claim against it, the employment relationship shall be regarded as not having being interrupted and the worker has the right to the wages that should have earned in the meantime. No sanction applies to the employer.

9.3.3 System of protection for employees working for small employers

We will now examine the rules applicable to employees working for employers which employ up to fifteen workers in the same production unit or in a number of production units in the same municipal district.

When a dismissal, effected for permanent physical or psychic unsuitability of the employee in performing her or his duties, is ascertained as unjustified, the same rules (full protection) described in the previous section 9.1 (regarding the sanctions provided in case of discriminatory, null and oral dismissal) apply.

If the just cause or the subjective or objective reasons alleged by the employer in order to dismiss the worker is assessed as ungrounded, the judge declares the termination of the employment relationship from the day of the dismissal and condemns the employer to the payment of an indemnity amounting to 1 months of the last wage, occasional grants and reimbursements excluded, for each year of work.

The total amount of the indemnity shall not be lower than 2 and cannot exceed 6 months of wage. In this case, no social security contribution is due.

The same rules apply, and reinstatement is not provided, also in case of lack of the material facts on which the employer has grounded a dismissal for subjective reasons.

In cases in which the worker has been dismissed without the respect of the procedure provided for by Art. 7 of Act No. 300 of 1970 (disciplinary procedure), the Judge declares the termination of the employment relationship from the day of the dismissal and condemns the employer to the payment of an indemnity amounting to 0,5 month of the wage, occasional grants and reimbursements excluded, for each year of work.

The total amount of the indemnity shall not be lower than 1 and cannot exceed 6 months of wage calculated as referred in the above. In this case, no social security contribution is due.

The employer, within 60 days from the dismissal, may offer to the worker a sum amounting to 1 month of the wage, as calculated in the above, for each year of work.

In any case, that sum shall not be lower than 1 and cannot exceed 6 months of wage calculated as referred in the above. The sum is social security contribution and tax free.

The sum shall be paid by bank draft to be given to the worker during the conciliation procedure that shall take place either in court or by a trade union or by the Local Labour Office or by a Certification Commission. The acceptance of the bank draft terminates the employment relationship. By accepting the bank draft, the worker renounces to the claim eventually lodged against the dismissal. Any other sum agreed within the conciliation procedure is taxed.

In case the employer repeals the dismissal within 15 days from the communication that the worker has lodged a claim against it, the employment relationship shall be regarded as not having being interrupted and the worker has the right to the wages that should have earned in the meantime. No sanction applies to the employer.

9.3.4 System of protection in the public sector

Legislative Decree No. 75 of 2017 contains a special (and more favorable) rule for public servants (including public executives - "*dirigenti*") according to which, in every case of invalid dismissal (discriminatory, null, ineffective, unjustified, unlawful because effected in violation of procedural rules) and regardless of the size of the public body concerned, the Judge: 1) order the reinstatement of the employee; 2) order the Public Administration to pay compensation, in the amount of salary due from the day of dismissal until the day of actual reinstatement, within a maximum limit of 24 months; 3) order the Public Administration to pay social welfare and health contributions from the time of dismissal until the time of actual reinstatement.

10. SPECIAL CATEGORIES OF WORKERS

In the Italian legal system, a dismissal adopted for unionism, political, religious, racial or ethnic reasons or whose ground is linked to nationality, language, gender, personal beliefs, age and sexuality is considered a discriminatory act and is, consequently, null and void (Article 3 of Act No. 108 of 1990; Art. 4 of Act No. 604 of 1966; Art. 15 of Act No. 300 of 1970).

The concept of unionism covers not only the activity performed on behalf of the trade union by one of its members, but also that conduct which – although engaged in outside trade union initiatives – is in any case aimed at supporting positions and claims made by employees.

However, in these cases, the burden to prove that the reason for the dismissal is discriminatory lies on the employee. Purely in relation to discrimination on the basis of gender, the burden of proof passes on the employer if the employee makes it likely that discrimination has happened through evidence of facts, also of a statistic nature, that are clue of a discriminatory behavior (Article 40 of Legislative Decree No. 198 of 2006 - National Code of Equal Opportunities between Women and Men, implementing EU Directives on equal opportunities and equal treatment in matters of employment).

Other special cases of null dismissal, which are broadly referable to anti-discrimination policy, are those related to maternity or paternity and to marriage.

In particular, under Art. 54 of Legislative Decree No. 151 of 2001, women workers may not be dismissed from the beginning of the period of pregnancy until the end of the periods of obligatory maternity leave provided for under law, nor before the infant's first birthday.

The prohibition of dismissal, from the beginning of abstention until one year of age of the child, also applies to the father who abstains from work in the first three months after the birth of the child in the absence of the mother (serious illness, death, abandonment, exclusive custody of the father).

The same system applies in the event of adoption and foster care until a year after the minor's entrance into the family. In the case of international adoption, the period of prohibition begins to run from the moment of the communication of the proposal to meet the minor to be adopted or of delivering the invitation to go abroad to receive the adoption proposal. However, there is no prohibition in the cases in which dismissal is ordered for just cause, for failure to pass the trial period, due to termination of the corporate activity.

Moreover, Article 35 of Legislative Decree No. 198/2006 prohibits the dismissal adopted for reason of marriage. From this point of view, the law presumes that dismissal of a worker woman in the period between the day of the request for publication of the banns, up to one year after the wedding, has been ordered due to marriage. The employer is entitled to prove that dismissal taking place in the above period has been ordered not due to marriage, but for one of the following reasons: 1) termination of the employment relationship for just cause; 2) termination of the activities of the company for which the employee works; 3) completion of the works for which the worker was appointed.

11. DEVELOPMENTS IN DISMISSAL LAW IN THE PAST 10 YEARS

In the past ten years, the Italian legal system has undergone profound changes regarding the protection system of the workers in case of unlawful dismissal.

The reinstatement of the worker, which, as far as the larger employers are concerned, was guaranteed to the worker, under the original text of Article 18 of the Workers' Statute, in any case of unlawful dismissal has nowadays become an exception.

In fact, first the Government led by Mario Monti (Act No. 92 of 2012) and then the Government led by Matteo Renzi (Legislative Decree No. 23 of 2015) have progressively reduced both the cases in which reinstatement is envisaged and the amount of compensation in the cases where reinstatement is not provided.

This policy was clearly aimed at making the labour market more flexible, in the belief that this flexibility would have made companies more competitive and, consequently, encouraged an increase in employment.

It is certainly too early to assess whether such political action is suitable for achieving the desired objectives.

In the meantime, a part of the trade unions and political parties has strongly contested the aforementioned reforms, complaining of a progressive and unacceptable reduction of the workers' rights.