THE REASONABLENESS AND PROPORTIONALITY PRINCIPLE IN LABOUR LAW

Piera Loi

Law Department, University of Cagliari, Italy

The reasonableness and proportionality principle in labour law

Piera Loi
Law Department, University of Cagliari, Italy
Loip@unica.it

Draft- not to be quoted

Introduction

The reasonableness and proportionality principle seems to have a growing importance in labour law.

One of the first questions we should ask is what are the relations between these concepts. In the Italian constitutional tradition proportionality and reasonableness are strictly related, since the proportionality principle has always been considered as instrumental to the reasonableness principle- and the proportionality test is seen as part of the reasonableness test- whereas in the other EU legal systems and also in European case law the reasonableness principle is autonomous.

The proportionality principle is in use in different areas of law, especially in constitutional and administrative law, and it's aiming at controlling the exercise of public powers towards individuals.

This unwritten constitutional principle developed by the German Constitutional Courts, finds its origins in the tradition of German public law. It was precisely the Prussian Supreme Court that established the principle in the field of police law[1] and Georg Jellinek's comment was that "the police may not kill a swallow with a cannon". The principle requires that any restriction of individual freedom must be appropriate to the attainment of the objectives to be achieved.

Any restrictive measures should not impose excessive limits on the freedom of the individual and must therefore be based on the principle of

[1] Decision 9 of 14 June 1882, PROVG 353

reasonableness. Following this principle every legislative and administrative act is subject to the control of the Constitutional Court.

The expansion of the proportionality principle to other areas of law and especially to contract law could be explained through the changing role of the law in establishing an Economic public order that, traditionally, has been realised via the imperative law, aiming at combating inequalities in the name of social justice.

The employment relationship is a typical example of what Mac Neil calls a relational contract[2] in which not all the possible circumstances can be regulated by the parties in advance and for this reason it is necessary to have recourse to external criteria to regulate these unpredictable circumstances. In contract law an extensive use of general clauses, is made in order to fill this contractual regulatory gap and the most important is surely the principle of good faith, which is also used in the employment relationship. We should not forget that the employment relationship is characterised by a different distribution of contractual powers and one of the most important function of labour law is precisely to re-balance this unequal power distribution in the contract and to avoid that in every contractual arrangement, behind the veil of the free definition of the terms of the contract hides an abusive exercise of powers on the employers' side. This labour law function can be implemented through a variety of instruments: first of all using imperative norms that the parties of the contract of employment can't derogate, with a range of different sanctions applied to every individual arrangement contrary to the legal norm (from economic sanctions up to the declaration of being null and void). Examples of this kind of intervention can be drawn in the area of discrimination law, or in the regulation of working time as far as the minimum of four week paid annual leave, recognised by art. 7 of the European Directive 2003/88/EC.

In other cases the rebalancing of powers is attained trough the intervention of collective agreements to which the law delegates the regulation of certain aspects of the employment relationship.

---

[2] Macneil I. , *Relational Contract: What We Do and Do Not Know*, Wisconsin Law Review, 1985., pp.483 ff.

I would like to argue that the use of the reasonableness principle can be justified precisely as a technique to fill the regulatory gap in the contract of employment, through a judiciary control over the exercise of the employer's prerogatives, that, as in the public and administrative law, should not go beyond the legitimate aims recognised by the law.

In this paper we would also like to argue that relevant hints can be found both at national and European level the reasonableness principle should be interpreted

I will first give a short description of the principle, how it's used by the legislator and most of all how it is used as a legal argument by judges, underlying its complexity and vagueness.

I will then give some examples of the use of reasonableness drawn from Italian labour law in the area of dismissals for economic reasons.

One of the arguments I would like to discuss is that the expansion of the reasonableness principle ca be seen as a sign of a regulatory crisis by the law, in situations where the high degree of complexity of the situations to be regulated and the variety of reasons and values to be taken into account, suggest to abandon the traditional regulatory setting through general and abstract norms and to refer to an open-endedness criterion like reasonableness in order to complete the content of the norm. Nonetheless this technique leaves more space to the judiciary interpretation and risks to alter the labour law tradition of leaving to the social partners and to the collective agreement the regulatory tasks, in order to balance the different and often colliding interests of the parties.

1. Vagueness of the reasonableness concept

The reasonableness is a principle or a criterion with a variety of meanings and of uses in different areas of law. It 's surely a normative concept

since it is used for the assessment of actions, decisions, rules and institutions and also judgments [3].

It's meaning is rather complex and is often confused with rationality, whereas the last one is included but it cannot be reduced to it, since reasonableness cannot be reduced to the correctness of reasoning, but it draws also on moral considerations[4] and it comprises a series of practical and normative requisites for judging decisions and actions which have a legal relevance.

2. Reasonableness as balancing

According to Mac Cormick the essence of reasonableness is "balancing." The reason for resort to the requirements of reasonableness is the existence of a plurality of factors requiring evaluation in respect of their relevance to a common focus of concern[5]. The reasonableness principle requires that when a plurality of factors or a plurality of values that represent contrasting reasons and imply incompatible answers to practical problems, all reasons and values should be considered and that should be balanced according to their relative weight and importance

An important question to be discussed is then how relative weight and importance of different reasons should be assigned and if this balancing operation is entirely subjective.

Alexy's opinion on this is that the reproach of subjectivity raised against balancing[6] could be counterbalanced if we admit first of all that balancing implies a procedural dimension of deliberation about the relative weights of interests, that should give voice to those who are concerned. Secondly reasonableness as balancing implies that law cannot be balanced in its entirety, it should incorporate human rights either as constitutional rights or in

---

[3] Alexy R., *Reasonableness of the Law* in Bongiovanni G., Sartor C., Valentini G.(ed.), *Reasonableness and Law*, Dordrecht Heidelberg London New York: Springer , 2009, p. 7

[4] Rawls J., *Political Liberalism*, New York, Comubia University Press, 1993

[5] Mac Cormick, *Rethoric and the rule of law*, Oxford, OUP, 2005, 173

[6] Habermas J., *Between Facts and norms*, Trans. William Rehg, Cambridge, MIt Press 1996, p. 259

some other forms that guarantee their priority. The incorporation of human rights into a legal system enhances the role of balancing since the application of constitutional human right requires proportionality analysis, which is a an expression of reasonableness reasoning[7].

3. The relevance of reasonableness in different areas of law

Reasonableness' relevance in different areas of law, is becoming more and more important in two different ways:

In civil law systems reasonableness traditionally has been used in public law as a criterion to judge the legitimacy of exercising public office powers and rule making powers. In judicial review especially in constitutional adjudication, it serves as a criterion to evaluate the legitimacy of laws in respect to constitutional norms and especially in ascertaining violation of the constitutional equality principle by statutes.

Reasonableness is also frequently used in private law in order to evaluate the behaviour and choices of private citizens. In contract law and tort law reference is often made to the reasonable person, also in labour law reference is made to the reasonable person in particular to the reasonable employer. The question is how subjective is the definition of reasonable person or in the case of labour law of the reasonable employer? The normative reasonable person acts as a surrogate for society, whose mandate is not the discovery of what the parties reasonably intended, but the discovery of what society believes they should have intended[8].

The open-endedness and flexibility of reasonableness highlight it's risks and it's advantages. The advantages are the fact that the legal reasoning aimed at finding reasonable interpretation and application of the law, is striving at adapting the abstract form of law to the concrete circumstances, taking into account, through balancing, all the different reasons ad all the

---

[7] Alexy, R., "The Construction of Constitutional Rights", in Law & Ethics of Human Rights, Vol. 4 , Iss. 1, Art. 2, 2010

[8] DiMatteo, Larry A., *The Counterpoise of Contracts: The Reasonable Person Standard and The Subjectivity of Judgment*, 48 SOUTH CAROLINA LAW REVIEW, 1997, p. 293 ff.

demands that emerge in the concrete case. The risks are the lack of objectivity and the reduction of certainty, as predictability and coherence.

Some scholars argue that the proportionality principle can be used in consumer protection law, where the aims is to eliminate the inefficient contractual clause, in order to achieve consumer protection and market safeguards. Contractual terms can takes the form of an undue restriction of

competition by the seller or supplier and of depriving the consumer of freedom of choice.

The term clause should be performed in the light of a detailed appreciation of the proportionality of the parties' rights and obligations. If we apply the proportionality test we should say that the clause is lawful on three conditions: that it is adequate for the attainment of the entrepreneur's interest in that it could be pursued only by recourse to that term; that it is necessary, in other words that no other measure exists that would pursue the interest of the seller or supplier but would be less restrictive of the consumer's interest; that it is proportional in the strict sense of the word, in other words it is such that there must be an adequate proportion between the choice of limiting the consumer's interest and the gravity of the reasons justifying that choice[9].

4. The reasonableness principle in the equality judgement

The concept of reasonableness is used by lawyers and philosophers in very different ways and, like the concept of rationality to which it's strictly connected (Alexy, 2009, 5), it involves various consequences depending on the theoretical background to which is made reference. Since a short description of the different theories on reasonableness would exceed the aim of this paper, we will emphasize balancing as the prevailing feature of the reasonableness principle[10]. The idea of reasonableness as balancing is particularly useful when

[9] Bortoluzzi A. *The Principle of Proportionality in Comparative Law*, in Vinay Kumar P., Proportionality and Federalism, Hyderabad , ICFAI University Press, 2009

[10] Alexy R., *Reasonableness of the Law, cit., p. 8;* Mac Cormick, *Rethoric and the rule of law*,cit. p. 173

a plurality of values is at stake and they give incompatible answers to practical questions[11].

One of the most frequent uses of reasonableness as balancing is in the equality judgement. As we all know the equality principle in the Aristotelian formula means that "likes should be treated alike" 12 and this is commonly described as the formal concept of equality, transposed in many Constitutions as the principle "everyone is equal before the law" . We all know that the other expression of the equality principle, typical of the Welfare State, is the substantive equality principle, which acknowledge that individuals starts from different points of departure (ranging from social, cultural situation and economic resources) and affirm the necessity to guarantee to everyone same chances and equality of opportunities. This concept admits or better requires differentiation of treatment, that should be justified in order to guarantee access to resources, welfare or well-being, or capabilities, depending on the theory of justice behind the principle13.

The equality principle imposes that all different treatments by the law should be justified on the basis of the reasonableness of the distinction that has been used. In other words if we affirm that two situations are not similar and that they deserve a different treatment (that is a consequence of the equality principle) we should demonstrate that the different treatment is reasonable. This means first of all to demonstrate that the factor on the grounds of which we require the different treatment is not a suspect factor. The suspect factors are criteria that cannot be taken into account by the law in order to justify different treatment and are established by the antidiscrimination law. Suspect factors are sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and they change in relation to the evolution of the legal systems. Discriminations are different treatment that the law consider as not reasonable, unless the law itself introduces possible justifications which would render the differentiation reasonable and, in other

---

[11] Alexy R., *Reasonableness of the Law, cit., p. 9*

[12] Aristotle, *Nicomachean Ethics*, 1130b-1132b

[13] See Gosepath, S, "Equality", The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2008/entries/equality/>

words, would reconsider the suspect factor as a legitimate differentiating factor.

We must admit that the reasonableness principle is a vague and indeterminate concept that nonetheless is frequently used by the constitutional Courts to ascertain if the law has treated differently situations that are analogous or if it has treated alike situations that are different. As a result the law can be judged as unreasonable when it has treated differently situations that are analogous or when it has treated alike situations that are different. If the different treatment is not considered reasonable we are before a discrimination, since not all different treatment fall into the category of discrimination, but on the contrary to differentiate treatments could be a declination of the equality principle when situations are different. From this point of view the reasonableness principle has the function of admitting or excluding the discriminatory nature of a different treatment. Antidiscrimination laws' function, in identifying grounds of discrimination that are forbidden, is then to inhibit the legislator , if the antidiscrimination law is at constitutional level, or the individuals to justify a different treatment on grounds that are forbidden, since they represents suspect factors.

The reasonableness principle plays a fundamental role in the equality judgement14 before the Constitutional Courts and also before the European Court of Justice. The structure of the judicial review change if it's involved a question of equality or of discrimination. In the first one the control technique is minimal[15] because there is a presumption of legitimacy about the different treatment introduced by the law. In the second one the control is strict, and it starts from the suspect nature of the factor on the ground of which the different treatment has been introduced, and it follows a procedure and a structure of legal argumentation that rejects all justifications that are not considered reasonable, that is a reason capable of limiting a fundamental right.

---

[14] A. CERRI, voce "*ragionevolezza delle leggi*", in *EG, .XXV*, Roma, 1991, p. 1 e ss.; G. SCACCIA, *Gli "strumenti" della ragionevolezza nel giudizio costituzionale*, Luiss-Collana di Studi Giuridici, Giuffrè, Milano, 2000, p. 3

[15] In the Spanish Constitutional Court this kind of control is called "*juicio de minimo*", see J. Mercader Uguin, M. Nogueira Guastavino, *El fin de la validez de las cláusulas convencionales de jubilación forzosa: Comentario a la SSTS 9 marzo 2004 [RJ 2004, 841 y RJ 2004, 873]*, *Aranzadi Social,* num. 12/2004, Editorial Aranzadi, Pamplona, 2004, p. 8

Following the Spanish constitutional theory when in the difference of treatment you adopt one of the criteria described as discriminatory by the law (sex, race, age and so on) the author of the norm must show that it's aiming at pursuing a goal like the ones justifying limitations of fundamental rights. In this case the principle of equality it's transformed into the fundamental right not to suffer any discrimination[16].

The reasonableness principle's use in equality judgement is not standardised, but we can nonetheless trace some common elements that frequently appear in Constitutional Courts. We can identify different steps17. In the first step of the judgement, in order to establish if two situations are treated by the law equally or differently, it's necessary to ascertain if the situation regulated buy the law are alike or different. This is not a mere factual operation but it is precisely a normative operation that contains an irreducible dose of arbitrariness18,: when a law assumes that two situations are alike simply makes an abstraction of their different features and qualifies as relevant the feature that they have in common. The Constitutional judge will ascertain if the legislator choice of qualifying as similar or different two situations is reasonable, will make reference to the *ratio legis*, that is the objective goal of the law., which represent the so called *tertium comparationis.* The second step is aimed at verifying the coherence of the *ratio legis*, which justify different treatments, with the constitutional norms through the control of proportionality. This principle is strictly linked to that of reasonableness and it 's the principal criterion to judge State intervention through legislation in order to ensures that any restriction of individual freedom aiming at attaining a specific goal is not manifestly excessive and does not go beyond what is necessary in order to attain it19.

---

[16] See see J. Mercader Uguin, M. Nogueira Guastavino, *El fin de la validez de las cláusulas convencionales de jubilación forzosa: Comentario a la SSTS 9 marzo 2004 [RJ 2004, 841 y RJ 2004, 873*] and the Spanish Constitutional Court case law cited.

[17] V. B. CAROVITA DI TORITTO, *Le quattro fasi del giudizio di eguaglianza ragionevolezza*, in AAVV, *Il principio di ragionevolezza nella giurisprudenza della Corte Costituzionale. Riferimenti comparatistici,* cit., p. 258 e ss.

[18] A. SUPIOT, *Principi di eguaglianza e limiti della razionalità giuridica*,in *Lavoro e Diritto*, 1992, p.212

[19] *Idem*

The principle of proportionality, following the German tradition[20], is composed by three sub-principles: suitability, which means that the restrictive measure is appropriate to achieve the aim that has to be achieved; necessity, which means that the adopted measure should not exceed what is necessary to achieve the objective and that a less restrictive measure does not exist; and, finally, *stricto sensu* proportionality, which means that the disadvantages caused by the measure do not outweigh the advantages that would justify the measure21 and the more they affect fundamental rights the more in the balancing, should weigh the reasons justifying the intervention22.

In the words of the German Constitutional Court "The intervention must be suitable and necessary for the achievement of its objective. It may not impose excessive burdens on the individual concerned and must consequently be reasonable on its effect on him"[23].

The third step of the proportionality *strictu sensu* principle implies a balancing between interests and rights, between the sacrifices suffered by the individuals, touched by the measure, and the society as a whole or identifiable groups.

At this point we should ask if the reasonableness test have different function in an equality judgment and in a discrimination judgment, since in the first one the reasonableness principle is aimed at checking the reasonableness of the different treatment. We said that a norm defining a non discrimination principle plays an instrumental function towards the principle of equality, excluding, in the choice of the legislation or of the individuals, from the range of all the reasons that could justify any different treatment, those that are suspect. This traditional scheme is altered when the law forbidding a discrimination at the same time admits derogations, when the reasons are

---

[20] See R. Alexy, *Rights, Legal Reasoning and Rational Discourse, Ratio Juris*, 1992, p.149 ff.
[21] N. Emiliou, *The principle of proportionality in the European Law: A comparative study*, Kluwer Law International, London The Hague Boston, 1996, p. 27 ff. and W. Van Gerven, *The effects of proportionality on the Actions of Member States. National Viewpoint from Continental Europe*, in E.Ellis (ed. by), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford and Portland,Oregon, 1999, p, 37 ff.
[22] Cfr. R. ALEXY, *Collisione e bilanciamento quale problema di base della dogmatica*, in M. LA TORRE e A. SPADARO, *La ragionevolezza nel diritto*, Giappichelli, 2002, p.42
[23] BVerfGE 63 at 144, quoted by W. Van Gerven, *The effects of proportionality on the Actions of Member States. National Viewpoint from Continental Europe* cit. p, 45

objective and the aim is legitimate and proportionate, in a word when the different treatment is reasonable.

In this case the judicial review and the reasonableness control has the function of replacing to the judiciary power the legitimacy of the legislator's choice of excluding a particular discriminating factor. In other words in the equality judgement the judge will ascertain if the different treatment is reasonable, whereas if there is a discrimination prohibited by the law admitting derogations, the judge will verify if it's reasonable to reconsider the suspect factor which would qualify the different treatment as a discrimination and turn it into a reasonable different treatment. We could say that in the in this latter case what is judged is the reasonableness of the equal treatment.

5. Some uses of the reasonableness principle in Italian labour law

We can see how the reasonableness principle can be used in the area of economic dismissals.

The Italian legislation (art. 3 , Law no. 604 of 1966) provides that an employer can dismiss his employees for reasons inherent to the production activity, the organisation of work and the regular functioning of it. If the employee considers the dismissal illegitimate, the judge cannot pronounce directly on the opportunity of the employer's choice, since this could be a violation of art. 41 of the Italian Constitution, protecting the liberty of any private economic initiative.

Following the Corte di Cassazione (Cass. 2435 of 30 November 2010) the judge can only ascertain the existence of the facts underpinning the economic reason, the relation between the economic reason alleged by the employer and the employee dismissed and that the employee dismissed could not be assigned to perform other tasks without any loss of his/her professional skill and salary.

In reality what judges do is to apply a reasonableness test since they ascertain first of all the existence of the economic reason alleged which in

many cases consists in a mere subjective evaluation of the needs of the enterprises' organization in order to face the market fluctuations. We could say that this phase correspond to the first step of the reasonableness test, answering to the question if there is a legitimate aim. After that the judge should ascertain if there is a link between the economic reason alleged and the dismissal of the employee, and this represent the test of appropriateness, answering to the question: was it appropriate for the employer to dismiss the employee in order to attain the specific economic aim? The last step of the reasonableness test is represented by the necessity test, answering to the question: the dismissal of the employee was the ultimate and only way to attain the economic aim or there was another way of doing it? This is the theory of the dismissal for economic reasons as an "*extrema ratio"* which is clarified by the duty of "r*epechage*" charged on the employer. The employer must give evidence that there was no possibility to assign the employee to other tasks without any loss of his/her professional skill and salary, and the evidence could be given by the fact that after the dismissal no employee has been hired to perform the same tasks of the employee dismissed.

The recent Fornero MOnti Labour Law reform (Law no. 92 of June 2012) has deeply modified art. 18 of Law no. 300 of 1970 introducing different sanctions in case of illegitimate dismissal. There are two kinds of dismissals for economic reasons: the first one is the dismissal with no economic reason grounding the dismissal. If the dismissal is invalid because no "justified objective reason" supports the dismissal, the employee can only receive an indemnity assessed between 12 and 24 months (plus the social security contributions), taking into account factors such as the total number of the workforce of the employer, the seniority of the employee, the behaviour and conditions of the parties, the initiatives taken by the employee to look for another job and the behaviour of the parties during the compulsory conciliatory procedure, that should be initiated by the employer in front of the local Labour Office, before notifying an individual dismissal for economic reasons.

The other type of dismissal for economic reason is the dismissal with the economic reason manifestly non-existent. If the judge ascertain it the employee will be reinstated and will receive an indemnity at a maximum of 12 months. Many commentators have underlined the difficulties to differentiate this form of dismissal from the previous one. This specific economic dismissal cause is aimed at avoiding that employers allege an economic reason whereas it is motivated by disciplinary or discriminatory reasons. This double hypothesis enhances judges' role in deciding whether the economic reason alleged by the employer is simply "non existent" or "manifestly non existent" risks to generate a higher level of judicial controversies and, as a consequence, greater uncertainty. Besides that the new discipline far from resolving the previous debate on the limits of judicial intervention in the area of the freedom of the enterprise recognised by art. 41 of the Italian constitution, seems to exacerbate it, giving to judges a more sophisticated tool to control managerial prerogatives with a view to guarantee an equilibrium between economic freedoms and employment security[24].

As we have seen in the first phase of the reasonableness test the judge, in order to ascertain if the economic reason is or not manifestly non-existent, will have to make a judgement which is based on factual arguments and on an evaluation of all the circumstances linked to the functioning of the market. The first phase should be the declaration of the legitimacy of the aims. The declaration of the legitimacy of the employer's goals by the judge is in itself a judgement on the reasonableness of the reason alleged. The second phase should ascertain if there is a link between the economic reason alleged and the dismissal of the employee, and this represent the test of appropriateness, answering to the question: was it appropriate for the employer to dismiss the employee in order to attain the specific economic aim? The last step of the reasonableness test is the necessity test ascertaining if the dismissal of the employee was the only way to attain the economic aim. Through this last step of the test the judge is called to balance between the economic freedom and

[24] Brun S. Il licenziamento economico tra esigenze dell'impresa e interesse alla stabilità, Cedam, Padova, 2012

the employment security, which can be questioned if in each legal system is constructed as a right.

6. Seniority and choosing criteria in collective redundancies and Age discrimination

We must admit that the reasonableness principle is a vague and indeterminate concept that nonetheless is frequently used by the constitutional Courts in the equality judgements. Constitutional Courts use it to ascertain if the law has treated differently situations that are analogous or if it has treated alike situations that are different. As a result the law can be judged as unreasonable when it has treated differently situations that are analogous or when it has treated alike situations that are different. If the different treatment is not considered reasonable we face a discrimination, since not all different treatments fall into the category of discrimination, but on the contrary to differentiate treatments could be a declination of the equality principle when situations are different. From this point of view the reasonableness principle has the function of admitting or excluding the discriminatory nature of a different treatment. Antidiscrimination laws' function, in identifying grounds of discrimination that are forbidden, is then to inhibit the legislator or the individuals to justify a different treatment on grounds that are forbidden, since they represents suspect factors.

The Court of Justice of EU uses the reasonableness test in discrimination cases[25] and the structure of the judicial review changes if it's involved a question of equality or of discrimination. In the first one the control technique is minimal because there is a presumption of legitimacy about the different treatment introduced by the law. In the second one the control is strict, and it starts from the suspect nature of the factor on the ground of which the different treatment has been introduced, and it follows a procedure and a

[25] Loi P. , *The Reasonableness Principle in the EU Court of Justice Age Discrimination Cases*, in Moreau M.A. (ed) *Before and after the economic crisis : what implications for the 'European Social Model'*?, Cheltenham, Ed. Elgar, 2011, p. 141 ff.

structure of legal argumentation that rejects all justifications that are not considered reasonable, that is capable of limiting a fundamental right.

As we know “Age” has become a suspect factor qualified as such by Directive 2000/78/EC. We would like to argue, through the analysis of some relevant ECJ rulings on discrimination on ground of age, that through the reasonableness judgment set up by art. 6 of the Directive, admitting justifications of direct discriminations on ground of age, the ECJ has significantly enlarged EU competencies, especially in employment policies. This is a step perfectly admissible since the justification principles set by the Directive 2000/78/CE excludes any discrimination on the grounds of age when differences in treatment are justified by legitimate employment policy, labour market and vocational training objectives, if the means of achieving these aims are appropriate and necessary.

The Law no.223/1991, that regulates collective redundancies, provides that in case of collective redundancies seniority- together with family charges and reasons linked to organization and production-is one of the criteria that the employer could use in order to choose the workers to dismiss. None of these criteria could prevail and in principle they should be combined, but the employer could actually choose to make one of them (for example reasons linked to organization and production) prevail over the others. The law doesn’t specify if the seniority criterion is referred to the length of service in the enterprise or to seniority in general, but it’s clear its strict relation with age. It’s worth specifying the fact that these legal criteria constitute a second best, because they operate only if the employer and worker’s representatives have not signed any collective agreement after the procedure of information and consultation, during a collective dismissal procedure. These collective agreements could establish the prevalence of a criterion over another so, in some cases, the rule would be to dismiss first the older workers on the basis of proximity to the retirement age, but in other cases the criterion of organization and production could prevail, with the necessity to safeguard the capacity of innovation guaranteed by younger workers who would be the last ones to be

dismissed. The legitimacy of these collective agreements and their derogatory powers, have always been discussed but it's only recently that the question of the legitimacy of these agreements as far as their respect of the principle of non-discrimination on grounds of age has become pressing.

The Italian legislation on collective dismissals admitted, especially in the past, the reference to the age criterion, just think about all the social security system provisions that guarantee to the workers collectively dismissed who are about to be retired, to get special unemployment benefits until the age of retirement. The Judges, in the past, have always considered legitimate and reasonable the use of the "proximity to retirement" criterion, mostly because of the reduced social impact and social costs, that could be higher in case of dismissal of younger workers. Also the Constitutional Court (Corte Cost. no. 268/1994) held that both the principle of non discrimination and of reasonableness should be taken into account when evaluating the legitimacy of collective agreements choosing as a first criterion the proximity to retirement. The Constitutional Court went on saying that the collective agreement can abandon the legal criterion of proximity to retirement, which imply an advantage for older people, in a labour market situation whereby if younger worker were dismissed first, it would be very hard for them to find a new job in a short period of time. It would also be considered reasonable and justified to abandon the criterion of proximity to retirement, when the redundancy procedure is due to a restructuring process that would require high levels of technological innovation that, in principle, would advantage younger workers.

The Constitutional Court has considered reasonable this less favourable treatment, taking into account the general conditions of the labour market, characterised by particular difficulties of young people in search of employment. Also the Corte di Cassazione (Cass., no. 9866, of 24 April 2007) in some cases ruled that it is legitimate for employers to make workers redundant on grounds of a criterion of retirement age or impending retirement.

More recently the judges, especially the ones of first instance, cast doubts on the legitimacy of the proximity to retirement criterion in the light of the principle of prohibition of discrimination on the grounds of age deriving

from the Directive 2000/78/EC and from Legislative Decree no. 216/2003 complying with the Directive.

A Court of First instance (Tribunal of Milan, 7 January 2005) held that a collective agreement adopting the proximity to retirement criterion in case of redundancy was contrary to the provisions of Legislative Decree no. 216/2003 and the adoption of such a criterion represents indirect age discrimination resulting in a disadvantage for older people, because any employee entitled to a retirement pension should have the same rights and legal protection in terms of stability of employment as other employees. Moreover, Law no. 223/1991, provides benefits also in the case of younger unemployed people. As a result, the collective agreement clause adopting the criterion of proximity to retirement was considered null and void and the dismissal was held to be unlawful.

The thesis adopted by this judge and by other judges of first instance (Court of Appeal of Florence, 27 march 2006) has been appreciated by some authors[26] and criticized by others because it seems that the proximity to pension criterion is rational and do not violate the principles of the Directive 2000/78/EC, since it can be one of the justifications admitted in case a difference of treatment is introduced .

Nonetheless it seems that this recent case law starts correctly from the new perspective adopted by the Directive 2000/78/EC: first of all because it doesn't consider sufficient the justifications based on generic labour market arguments such as the difficulties for younger workers to find a new job or any reference to the higher capacity of younger people to face technological challenges due to enterprise restructuring. Secondly because the differences of treatment on the grounds of age cease to be discrimination and are considered legitimate once is demonstrated that a balancing between different interests has been made, once it's demonstrated that the aim is legitimate because it's a legitimate employment policy or labour market and vocational training objectives and, finally, once it's demonstrated that the means of achieving these aims are appropriate and necessary.

---

[26] Bonardi O., Le discriminazioni basate sull'età, in Barbera M. (ed.) Il nuovo diritto antidiscriminatorio, Giuffrè, Milano, 2007, 125, ff.

Another topic that should be considered is related to the legitimacy of the sources in applying the principle of reasonableness through which a difference of treatment can be justified or can be declared a discrimination[27]. In this case, law delegates to a collective agreement the competence to decide the criteria to choose the workers to be dismissed, criteria that could be discriminatory unless they are justified. It's the collective agreement the source that makes a balance between different interests and rights and finally it's the collective agreements that justify or declare as discriminatory a difference of treatment. The exercise of normative powers by collective agreements is nothing but new in many legal systems, what seems quite new is the amplitude of powers in balancing different interests. By this way the reasonableness procedure judgment, through which a differentiation of treatment is declared or not a discrimination, made by the collective agreement, become clearly an instrument of re-establishing the normative powers between legal sources in the regulation of labour market.

[27] Loi P. , *La ragionevolezza come predicato delle differenze di trattamento, in Rivista Giuridica del lavoro e della previdenza sociale*, 2008, p. 481 ff.