JOB SECURITY
AND THE VALUE OF EQUALITY

a tentative *law & economics* approach
to the prevailing jurisprudence
about dismissal for economic reasons

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THE CASE

The chambermaids of a large hotel are normally able to tidy up 30 rooms each, every day; one of them, through no fault of her own, for some time has been able to tidy up only 15 rooms.

- Is this sufficient to justify her dismissal?

- Would a lower loss be sufficient?

- Or would even a higher loss not be sufficient?

What does exactly the principle of justification of dismissals established by European national laws (and by the new EU Constitution as well) mean?

THE CURRENT COURTS' MAXIMS

A. the dismissal is *justified* if it is necessary in order to reduce a business loss of the company as a whole; *not justified* if it is aimed at increasing profit

B. the dismissal is *by all means justified*, because the employer cannot be obliged to maintain a loss-making relationship; also the "opportunity cost" (*) constitutes a loss

(*) OPPORTUNITY COST: the productivity difference between the chambermaid considered and the best one available and willing to replace her

C. the dismissal is *by all means justified*, because the worker's output is lower than the normal one, which is the performance by contract due to the employer

D. the dismissal is *by no means justified*, because the risk of output reductions without fault is born by the employer

E. the dismissal is *justified* if the employer eliminates the job, inside the organization; *not justified* if he replaces the worker with another

WHAT DOES THE ITALIAN LAW (AND DO OTHER EUROPEAN LAWS) SAY

"*Dismissal with notice can be caused*

→ "*by an important breach of the worker's contractual duties...*" as well as for

→ "*... reasons concerning the productive activity, the work organization and its regular functioning*"

the most frequent maxims

D - *it is unfair to dismiss*
the inefficient worker without fault

E - *it is unfair to dismiss*
the worker in order to replace her

appear inconsistent, in their absoluteness, with the above legal rule

WHY, THEN, DO MAXIMS “D” AND “E” PREVAIL IN THE COURTS’ DECISIONS?

one of the main *effective* functions
of labour law, since its origins, is the

GUARANTEE OF EQUALITY AMONG WORKERS

we can see the labour law as a whole as aimed at

- assuring that the initial determination of the worker’s treatment ignores as far as possible his/her effective productivity

- later protecting those who turn out to be the weakest ones against treatment reductions

THE WORK CONTRACT AS A SORT OF INSURANCE POLICY

the employer is made responsible for the risk
of the future worker’s inefficiency
(not caused by observable fault)

this vision of labour law shows a remarkable analogy with

THE IDEA OF THE
"*A PRIORI* PREFERENCE FOR EQUALITY"
PROPOSED BY J. RAWLS:

under the veil of ignorance about the results of natural and social lottery, the fear of bad luck induces us to chose a social organization ruled by the principles of
- equality in the fundamental rights
- highest possible degree of welfare
for the most disadvantaged

THE BALANCE
BETWEEN THREE PRINCIPLES

in fact, even the most egalitarian court
never decides the case
applying *equalization* as an absolute principle

the equalization principle is always, in some way,
balanced with two other principles:

- the principle of ***equal treatment for work of comparable worth***
- the principle of ***freedom of enterprise***

EQUAL TREATMENT
FOR EQUIVALENT WORK

the principle of ***equal treatment for work of comparable worth*** generates inequalities

this can be necessary
as an *incentive* to individual effort

all the national labour law systems postulate a balance between *equal treatment* and *equalization*

each law system combines them in a different way, favouring in different measures one or the other

FREEDOM OF ENTERPRISE

a principle from which the labour jurisprudence
firmly deduces the rule of the exemption
from judicial control of management's choices

it is not incompatible with the equalization principle

but the latter enters into tension
with the freedom of enterprise principle
if and when it activates
a *judicial control over the expected loss* deriving
from the continuation of the work relationship

AN ELEMENTARY FORMALIZATION

let's call

$\boldsymbol{\theta_i}$ the number of rooms daily tidied up by the *inefficient* chambermaid

$\boldsymbol{\theta_n}$ the number of rooms normally tidied up by hotel chambermaids (*normal* output)

$\boldsymbol{\theta_g}$ the minimum number of rooms that must be tidied up under which the court justifies dismissal

∗ when $\boldsymbol{\theta_i < \theta_n}$ a minority of decisions say that this is sufficient to *justify* dismissal... (*i. e.*: $\boldsymbol{\theta_g = \theta_n}$)

... if *the company as a whole* is working at a loss (max. **A**)

... always, because *the w. relationship* is at a loss (max. **B**)

... always, because θ_n is the due performance (max. **C**)

IN A COMPETITIVE MARKET

MAXIM “A” MAKES NO SENSE

AND CLASHES WITH EACH ONE OF THE THREE PRINCIPLES

the company has a balanced or credit budget only if
the entrepreneur constantly acts in order to eliminate
the sources of losses inside the firm *at the right time*
that is before the debit balance becoming apparent

MAXIM “B” IS INCONSISTENT WITH THE LIMITATION
OF THE DISMISSAL FOR ECONOMIC REASONS

IT CLASHES WITH THE EQUALIZATION PRINCIPLE

if dismissal were justified by *whatever* expected loss,
this would remove all practical meaning from the rule
the employer never dismisses a worker
if not in order to avoid an expected loss
(except the case of disciplinary or discriminatory dismissal)

MAXIM “C” IS A PARTICULAR CASE OF “B”

IT CLASHES TOO WITH THE EQUALIZATION PRINCIPLE

if dismissal were justified
by *whatever* drop in performance (opportunity cost),
this would wipe out
the insurance content implicit in the work contract

∗ following the prevailing jurisprudence (max **D** and **E**):

$\theta_i < \theta_n$ by itself *doesn't justify* dismissal
(*i. e.*: $\theta_g < \theta_n$)

but

- in fact courts never consider irrelevant
the size of the difference $\theta_n - \theta_i$

- *i.e.* they never apply max. **D** or **E** *as the sole rule*

- *i.e.* there is always **a threshold** $\theta_g > 0$

- *i.e.* there must be a limit to the expected loss $\theta_n - \theta_i$

THE THRESHOLD
AND THE BALANCE OF THE 3 PRINCIPLES

θ_i θ_n

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41

equalization (insurance) maxims D and E <---------- θ_g ----------> commensuration freedom of enterprise maxims B and C

the higher θ_g is, the higher the equalization guarantee

and thus:

- the higher the insurance content of the w. relationship
- the more serious the sacrifice of the commensuration pr.
- the more serious the sacrifice of the freedom of enterpr.

SOME EVIDENT DEFECTS OF THE OLD EGALITARIAN MECHANISM FROM THE EQUALITY POINT OF VIEW

* the mechanism operates in different ways (θ_g varies) from one zone to another

* even the most egalitarian court holds that $\theta_g > \mathbf{0}$; thus:
  - the threshold may be exceeded
  - for one more or one less completed room, the chambermaid can save everything or lose everything
  - her cost (loss of the job) is not internalized in the company finances

SOME LESS EVIDENT DEFECTS OF THE OLD EGALITARIAN MECHANISM FROM THE EQUALITY POINT OF VIEW

* the steadier employment is, the more difficult it is for the unemployed, the irregular or the temporary worker to leave his/her position

* ***risk of exclusion***: if the minimum treatment standard is set in function of the normal output θ_n the chambermaid whose lower output θ_i is already known will meet great difficulty in finding a new regular job

* ***the flight from the protected work***: the most efficient workers

  - tend to avoid the egalitarian mechanism, that so reduces itself to a solidarity mechanism inside the poorest workers' segment

  otherwise

  - they tend to go abroad (unless we build walls in order to prevent them to do so)

  (AKERLOF's *market for lemons*)

the old work protection pattern,
in a market system, risks to yield
effects that clash with the egalitarian ideal

THE DECLINE
OF THE OLD EGALITARIAN MECHANISM

in the most developed countries
in the last fifteen years
we have observed a general tendency
towards the weakening
of most egalitarian labour law institutions...

....but not towards the softening
of the dismissal discipline

the labour market’s dual character
may be enhanced

IN CONCLUSION

under the “veil of ignorance”
about his/her own endowments and position
what protection system can be preferred
by the Western XXIst century worker,
who fears to turn out a loser?

THE VERY HIGH STABILITY MODEL

would be preferable only if

- the most fortunate ones couldn’t escape
- the least fortunate ones didn’t risk unemployment

such conditions recall the *soviet model*

but such a model leaves unsolved
among others
the problem of incentive to individual effort

THE MEDITERRANEAN MODEL
(HIGH STABILITY WITH RISK OF EXCLUSION)

the Rawlsian worker cannot prefer a system that

offers the majority of workers high stability,
but is not able to prevent
a large unemployment
and irregular work area

exposes the weakest worker
to the risk of losing the protected job
without any indemnification

WHAT THE RAWLSIAN PARADIGM SUGGESTS IF HIGH STABILITY WITHOUT EXCLUSION CAN'T BE GUARANTEED

the most unfortunate ones are in a better position:

- if the filter of dismissals for economic reasons consists in an adequate compensation due *in any case* and not in a judicial evaluation of the dismissal ground (O.BLANCHARD and J.TIROLE, 2004)
- if the mandatory insurance mechanism offered by the law has a rigorously universal character, bringing together weak and strong workers (even at the cost of forgoing a part of the insurance coverage)

but the best guarantee for the most unfortunate
in the labour market
cannot be granted by a legal rule

THE NORTHERN EUROPE MODEL

where the least fortunate are better off

the best guarantee for the losers
is given by a system capable of eliminating
their deficit of initial endowment
by means of good labour market services

this is the best way of reconciling
the freedom of enterprise
with the value of equality