

The Dismissal by Way of Redundancy in the United Kingdom as a Possible Legal Concept to be transplanted in Italy?: A Meditation on the “Odyssey” of an Impossible Dismissal (the Economic Dismissal in Italy) and a Possible Inspirational Muse (the British Legislation in the matter of the Redundancy)

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Abstract

The dismissal by way of redundancy in Britain is analysed in this contribution with regard to both its legislative pillars and the most recent judicial stances. However, the discussion goes beyond the mere revision of secondary sources, as the Authors propose to contrast the British jurisprudence with the Italian one, a jurisdiction that has just recently ushered into its legislative body, under the pressure of the European Union and against the backdrop of an increasingly deteriorated economic scenario, an up-dated, albeit partly flawed, form of redundancy (the redundancy for economic reasons or *giustificato motivo oggettivo*).

The results of the discussion (a pure comparative analysis in law, within the area of the employment law) are quintessentially groundbreaking, as a theory is corroborated that the British legislation in the matter of the redundancy should be used as a decidedly apt yardstick to which its Italian counterpart should work towards, particularly in respect of the possibility (*rectius* the necessity) to extend this legislative tool, just recently made tenuously applicable to private sector workers, to the public arena also.

1. Foreword

On November of 2011, among the economic measures – usually referred to in media circles in a rather perfunctory manner as “austerity measures” – that the European Central Bank and the European Commission have asked Italy to adopt in order, on the one hand, to stimulate the economy and, on the other, to address its considerable public debt, there was an undeniable need for the country to render its job market more flexible.¹ Such a need was felt particularly in its “exit” (termi-

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¹ European Commission, European Employment Strategy, 20/06/2012, in <http://ec.europa.eu/social/main.jsp?catId=101&langId=en>. More in detail, the search for flexibility is perceived as vital in order to enhance the economic growth in Europe. In this respect, although it is argued doctrinally (S Comi and C Lucifora, *Giovani e senza Formazione*, 16/01/2012, in <http://www.lavoce.info/articoli/pagina1002793>).

nation) prerequisites, in cases where the dismissal of the employee constitutes not merely a “disciplinary” breach (as the contractual obligations levied on the employee have not been fulfilled), but rather an economic necessity.²

In reality, the legislative provision that the Italian jurisdiction should implement in this specific matter³ – “historically” rejected and ostracised by political forces of different nature, figured out in “bashful” *interim* proposals and eventually, as clarified in this work, made effective just recently albeit in a very soft way – is far from being “massimalistic”, as the same has been included for years in other jurisdictions of EU member states.

Against the background of this socio-legislative climate (namely, the initial process Italy is now undergoing in respect to the modernisation and internationalisation of its job market), the aim of this work is to analyse how both Britain and Italy legislate in this matter and how the concept, specifically the redundancy, impacts upon the interaction between employer (either private or public) and workforce in each of the two countries.

Ultimately, and from a British perspective, it will be demonstrated that not only is the British redundancy a valid concept, but also it could be, albeit subject to cautious qualifications, exported to ‘foreign’ jurisdictions, such as the Italian one. As regards the latter jurisdiction, the paper shall seek to demonstrate and corroborate the view that its recent enactment of a form of redundancy, exclusive solely to employees working in the private sector (although a positive preliminary towards an international dimension of the job) does not represent a culmination of the process, but rather a “stepping stone” undertaken in pursuit of the overarching extension of redundancy to all employees, public and private alike, in the same fashion as that implemented by British legislation.

html; A Ricci, M Damiani and F Pompei, *Troppo Flessibilita' non aiuta la Crescita*, 29/09/2011, in <http://www.lavoce.info/articoli/pagina1002558.html>) that flexibility alone may both erode the human capital and endanger the job skills and training, it is also affirmed that the combination of flexibility and employment protection may purport to prevent any form of exploitation of workers.

² It is emphasised (P Ichino, *Inchiesta sul Lavoro. Perché non dobbiamo avere paura di una Grande Riforma* (Mondadori Editrice 2011) *passim*) that stringent employment protections in the job market may enhance the dualism and segmentation within the labour market, with employers inclined to hire people on atypical contracts on the one hand (with lower protection), and reluctant to hire workers on a permanent basis contract (because over-protected).

³ In the meantime actually amended, in a very soft way, as a result of Law no. 92/2012, the latter being recently followed up by Law Decree no. 76/2013. See later comments under Chapter 2.B, particularly footnotes 31 and 32 therein.

2. Redundancy in Britain and Italy: The Main Law Provisions

2A. Britain

It is common knowledge that the UK is privy to a piece of legislation that can be properly regarded, *mutatis mutandis*, as the “*magna charta*” of the rights of employees (the *Employment Rights Act 1996*⁴), where the concept of economic dismissal (or rather, the dismissal of the employee for reasons other than those of a disciplinary nature) is accepted and clearly set forth under s 139 of that legislative framework.

In detail, it is common and undisputed law in Britain that the worker, who has entered into a contract conducive to the characterisation of the worker as an employee⁵ and who has been working under an employer for no less than two years,⁶ may be made redundant (and therefore dismissed) in two scenarios summarised as follows: the first makes reference to an employer who has ceased, or intends to cease, carrying on the business for which the entire workforce was hired and where the workforce is still allocated⁷ or where the employer intends to cease it exclusively at the premises

⁴ The ERA 1996.

⁵ Therefore, it must be not simply a worker, rather an employee who has entered into contract of service with the employer according to the “ultimate test”, the economic reality.

At common law, the economic reality test is traditionally traced back to the decision *Market Investigations v. Minister of Social Security* [1969] 2 Q.B. 173, but also to *Ready Mixed Concrete v. Minister for Pensions and National Insurance* [1968] 2 QB 497. More recently, on the specific point of the control factor, see *Cormie v. Robert Rodger t/a Dalneigh Post Office & Stores* S/0036/11/BI (EAT).

See also on this aspect, generically: T Emir, *Selwyn's Law of Employment*, 47,55 (17th edn, OUP 2012); M Sargeant and D Lewis, *Employment Law*, 10,49 (6th edn, Pearson 2012); S Honeyball, *Honeyball & Bowers' Textbook on Employment Law*, 22,31 (12 edn, OUP 2012); N Selwyn, *Selwyn's Law of Employment*, 47,56 (16th edn, OUP 2011); G Pitt, *Employment Law*, 85,104 (8th edn, Sweet & Maxwell 2011); B Willey, *Employment Law in Context*, 30,70 (3rd edn, Pearson 2009); D Lewis and M Sargeant (with B Schwab), *Employment Law: the Essentials*, 15,17 (11th edn, Chartered Institute of Personnel and Development 2011). For a more in-depth analysis and discussion, see A C L Davies, *Perspective on Labour Law*, Chapter 5 (77,86) (2nd edn, Cambridge University Press 2009).

From a non-British point of observation of this matter, see P de Gioia-Carabellese, *Analisi del Quadro Normativo del Licenziamento Economico (Economic Dismissal) nel Regno Unito; un Possibile Modello di Riferimento per l'Italia* 4 Diritto delle Relazioni Industriali 1079,1107 (2012).

⁶ S 155 of the ERA 1996. The provision reconnects the requisite of the two years to the “*relevant date*”, therefore approximately the effective date of termination pursuant to s 97(1) of the ERA 1996. See S Deakin and GS Morris, *Labour Law*, 487 (5th edn, Hart Publishing 2009).

⁷ This would be basically the global cessation of the business, and this is certainly the least problematic circumstance; it is obvious that, if the business activity stops, all the employees hired and working in connection with it, will end up losing their jobs. G Pitt, *Employment Law* (n 5) at 305.

In these circumstances, the competent judicial authority will accept these factual circumstances and shall not be able to dispute the merit of the decisions adopted by the employer, as ruled in *Moon v. Homeworthy Furniture (Northern) Ltd* [1977] ICR 117, 121, where it was held in a clear-cut way that, also in the light of the company law principle according to which the business belongs to its owner, not to the judge, there was no reason for investigating the merit and, therefore, the legitimacy of both the foreclosure of that business and the redundancy of the relevant workers.

where the employee discharges his duties;⁸⁻⁹ the second scenario dictates, in a more peculiar case, that when the activity performed by a specific employee (therefore, not the business of the entrepreneur generally but the job performed by that employee specifically) is no longer required, either in absolute terms (because the business does not require the job discharged across the spectrum of its branches or factories) or it is no longer required in the place where that job is performed.¹⁰ Either of these two scenarios will see the employer instigate negotiations either with the entire work-force (in the case of the former scenario) or with the specific employee whose job has been rendered redundant according to the previously agreed terms (in accordance with the latter scenario).

Additionally, it is generally accepted that the British legislation, for such a dismissal of economic nature, a remuneration-compensation “mechanism” shall arise, hinged upon the mechanism of the redundancy pay; to elaborate, this shall be the right of the dismissed employee to obtain a “remuneration”, which is levied on the respective employer,¹¹ unless the latter is insolvent, in which case the cost of the “payment” results in being allocated among the tax-payers.¹²

⁸ S 39, para. 1, of the ERA 1996.

⁹ It is well known that in Britain the approach mainly advocated by the courts is the contractual one, as early as *O'Brien v. Associated Fire Alarms* [1968] 1 W.L.R. 1916.

In actual terms, based on this court decision, of formalistic flavour, the existence within the contract of employment of a mobility clause is so that the employee, in case of unexpected foreclosure of the business unit where he works, shall not be able to call upon the redundancy payment.

See *contra*, *High Table Ltd v. Horst* [1998] I.C.R. 409, where the approach has been more factual than contractual.

However, also in the light of the more recent case *Home Office v. Evans* [2008] EWCA Civ 1089, where the contractual approach is reconfirmed, nowadays, in the UK, the prevailing criterion is the contractual one.

See G Pitt, *Cases and Materials on Employment Law*, 190,192 (3rd edn, Pearson 2008); *Id.*, *Employment Law* (n 5) at 307, where harsh criticism is not spared, where it is noted that the result of this is “a one-sided situation, with all the flexibility on the side of the employer”.

Indirectly, the “contractual” approach is confirmed, subject to the peculiarities of the case, by *United Bank v. Akhtar* (1989) IRLR 507 (EAT).

¹⁰ Also in this specific case, s 39 of the ERA 1996, particularly the combined reading of para. 1, first part, and the second part of the same paragraph, whose interpolated reading is summarised as follows:

“For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

- (a) The fact that the requirements of that business –
- (i) For employees to carry out work of a particular kind, or
- (ii) For employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.”

¹¹ N Selwyn (n 5) 425. It is stated as follows:

“The claim, if admitted or successful, must be met by the employer. The amount will be determined by the length of time, the employee has been employed, his normal week’s pay, and his age.”

¹² In the light of the ERA 1996, particularly s 166. See, without pretence of exhaustiveness of the relevant secondary sources, G Pitt, *Employment Law* (n 5) at 316.

Amongst Scholars,¹³ the conclusion tends to be that the redundancy payment is calculated according to parameters, of a legislative source, related to age, pay and the maturity of the employee involved. To further clarify the concept in terms of its empirical implication, it should be noted that the payment at stake is not of remarkable proportions, yielding as it does the equal of one week's pay for each year of service completed by the employee, subject to a cap of £400, a monetary threshold which is updated from time to time.¹⁴ From an economic perspective then, the exit of the employee is not especially burdensome for the employer, particularly in light of the additional fact that, in calculating the redundancy payment, all years of service discharged in service to the employer are taken into account, albeit subject to a threshold of 20 years.¹⁵⁻¹⁶

Having put the British redundancy model into perspective within the confines of its legislative pillars, it is worth noting that the redundancy pay so far discussed has been of the mandatory or statutory variety, as set forth at legislative level (therefore, the "minimum" mandatory payment required by law). However, it is quite common, particularly amongst major organisations and companies, for the employer – either public or private – to dangle the proverbial carrot of more generous and persuasive economic packages¹⁷ as a "sweetener" in expediting a smooth "exit" of the worker.

As a final point on the British legislative framework with regard to this specific topic, the redundancy payment is a right forfeited by the employee in cases where a suitable alternative employment position offered by the employer is declined.¹⁸ In other words, the employee shall continue to be gainfully employed on acceptance of a job offer at any other place where the employer carries out business¹⁹ and where the alternative job does not entail a demotion (therefore a demotion of the employee²⁰ or

¹³ S Deakin and GS Morris (n 5) at 487. It is affirmed in an eloquent way: "*The statutory redundancy payment is calculated as a function of the age, weekly pay and seniority of the employee.*"

¹⁴ Accordingly, if the employee benefits from a weekly pay of £ 500, £ 100 (ie the gap between the statutory threshold and the actual weekly salary) shall not count towards the calculation of the pay; if the employee had to receive a weekly pay of £ 350, the latter figure shall be the base of calculation as the amount is below the legislative "cap".

¹⁵ See s 162 of the ERA 1996, more specifically para. 2.

¹⁶ For a simulation of the different scenarios which may arise through the combination of service and age, see P de Gioia-Carabellese, *Analisi del Quadro Normativo dell'Economic Dismissal nel Regno Unito. Un Possibile Riferimento per l'Italia* (2012) at 125 (15 March 2012) Working Paper Adapt 2 <http://www.bollettinoadapt.it/acm-on-line/Home/Pubblicazioni/docCatWorkingPaperAdapt.1796.1.15.3.html>> accessed 5 June 2010; P de Gioia-Carabellese (n 5) (Diritto delle Relazioni Industriali) at 1079,1107.

¹⁷ Within British textbooks (on this specific point, see B Willey, *Employment Law in Context* (n 5) at 88,89), it is pointed out that, in 2002, according to the statistics of the CIPD, 73% of the employers have awarded employees with redundancy pays exceeding the minimum statutory "floor".

¹⁸ This is connected to s 141 of the ERA 1996.

¹⁹ Obviously the alternative suitable offer is a legal tool which may operate exclusively in cases of contraction of the workforce. By contrast, if the foreclosure had to relate to the entire business, the relevant conditions for the pay-out of the redundancy payment would not be met.

²⁰ Under common law, a precedent could be *Spencer v. Gloucestershire County Council* [1985] IRLR 393 (CA).

a loss of status²¹) and so long as the job is acceptable from a geographic point of view.²² Notwithstanding this, the common law has decreed the offer of an alternative job incorporating a reduction in salary to be, by definition, unsuitable; a scenario where the employee concerned shall be entitled to refuse it and to ask for the redundancy payment in its stead.²³

2B. Italy

“Redundancy” in Italy lies extraneous to its statute, in a fundamental departure from the British system. The two countries are members of the European Union but, as the matter is not harmonised, the differences in the legislation are both noteworthy and significant.

First and foremost, as a result of the Law no. 223/1991, Italian legislation recognises dismissals of a collective nature, the *licenziamento collettivo*. In technical terms, it hypothesises that a chain of events, where multiple dismissals occurring within the same period of time and under the same employer, may originate from the selfsame source, either the “decrease or transformation of the business” or, even better, the “decrease and/or transformation of the work activity”, of that employer.

In the immediate aftermath of either of the aforementioned scenarios, the Italian legislative framework traditionally provides for employees, in case of job losses, by drawing on a form of “social absorber”, the *cassa integrazione guadagni*, or remuneration compensatory award. This appears to be a legislative tool “of a collective nature” (*licenziamento economico di natura collettiva*) as it is connected to the fact that the entire workforce of a business cannot be employed any longer, because that business either underperforms or can no longer sustain its own activity.²⁴

The conditions that must be satisfied in order that the employees gain entitlement to the award, arise either from the restructuring, reorganisation or business reconver-

The *ratio decidendi* entailed to this case is that, if the new job offered to avoid the redundancy is totally outwith the previous duties and skills of the employee, the refusal would be legitimate and the employee shall be entitled to receive the *redundancy payment*.

²¹ The case that can be recalled is *Taylor v. Kent CC* [1969] 2 Q.B. 560.

²² The precedents on this specific point are two: *Jones v. Associated Tunnelling* [1981] IRLR 477; *O'Brien v. Associated Fire Alarms* [1969] 1 All ER 93.

In general terms, the rationale behind these rulings is that the suitable alternative job, if to be discharged in a different city, must be at a distance so that a daily commuting is feasible. See in this respect also what clarified under the previous footnote 8 above.

²³ The “milestone” case is *Marriott v. Oxford & District Co-operative Society* (No 2) 1969 3 All ER 1126. Among the Authors (G Pitt, *Employment Law* (n 5) 311), this principle is spelled out quite clearly: “Pay is a major factor to be considered, and it would be unusual for a contract on less pay to be regarded as suitable.”

²⁴ M Grandi e G Pera, *Commentario alle Leggi sul Lavoro* (Cedam 1996). More recently, G Zilio Grandi, *La Nozione di Licenziamento Collettivo* in F Carinci (ed), *Commentario alle Leggi sul Lavoro*, vol. 3, 469,493 (Utet 2007).

sion of the employer,²⁵ or the onset of a financial crisis²⁶⁻²⁷. A *caveat* woven into this right restricts the allowance at stake to recognition exclusively within the industrial and agricultural sectors (the tertiary sector seems to be excluded) and so long as the employer concerned oversees a workforce comprised of 15 employees or more.

The mechanism of the *cassa integrazione guadagni* is quite inefficient if taken solely from a legislative perspective, and thus irrespective of sociological considerations. To elaborate, it is funded exclusively via public finances, as it is the state (the tax-payer) that bears the financial brunt of the award. The amount seems very generous, capped as it is at a hefty 80% of the employee's salary, per annum, with a working week not in excess of 40 hours. Furthermore, the duration of the allowance is unduly taxing, from a tax-payer's perspective, as the "ordinary" CIG may run for an initial three months²⁸, extendable to up to 12 months, whereas the extraordinary CIG, if the crisis of the business is unrecoverable,²⁹ may last for two years with a maximum of 2 renewals, each of a further two year duration. In the course of receiving the award, meanwhile, the employee could theoretically work for other companies or for himself as this would not cause the forfeiture of the entitlement.

Secondly, in respect to economic dismissal of an individual nature (*licenziamento economico di natura individuale*), ontologically it should not stray far from the dismissal of a collective nature, particularly the dismissal connected to the "decrease and/or reduction of the activity and/or the work", already clarified *supra*. However, the two typologies can, set in juxtaposition, be distinguished in Italy by the fact that the economic dismissal of a collective nature shall "step up to the plate" and take precedence over the other (the individual one) if the number of dismissals occurring under the same employer within a timeframe of 120 days exceeded five. It is obvious that, in this case, the employees will benefit from the most favourable assistance as a result of the "social absorbers".³⁰

Having placed the two variants of economic dismissals in Italy within a conceptual parameter, it is worth noting that the matter has been recently re-legislated, namely in the form of a prospective piece of legislation³¹ poised on the verge of being granted parliamentary approval³². The text, in addition to introducing novelties such as the

²⁵ According to Law no. 164/1975.

²⁶ Pursuant to Law no. 223/1991.

²⁷ According to Scholars (M Biagi, with M Tiraboschi, *Istituzioni di Diritto del Lavoro*, 265 (5th edn, Giuffrè Editore 2012), in both cases, there will arise a need for an integration of the salary to be awarded to the employees whose work relationship results in being suspended as a result of the decrease or interruption of the business.

²⁸ The ordinary CIG shall be connected to events such as the suspension (total or partial) of the business due to temporary events that do not affect the recovery of the business in a longer perspective.

²⁹ Basically, it will coincide with bankruptcy procedures, such as *mutatis mutandis* the administration, the compulsory voluntary liquidation *et similia*. See M Biagi, with M Tiraboschi (n 27) at 265.

³⁰ Art. 24 of Law no. 223/1991.

³¹ See footnote 3 above.

See also footnote 2 above.

³² See Law no. 92/2012 and, more recently, Law Decree 28 June 2013, no 76. The latter, which places emphasis on the promotion of the permanent basis contract of employment, occurs after less than

aforementioned “social absorbers”, takes great pain in rationalising the multifarious typologies of contract of employment, either “of service” or “for services”, in their respective divergence from the “classic” contract of service on a permanent basis (*contratto di lavoro subordinato a tempo pieno e indeterminato*). Of greater pertinence, the prospective Act shall amend a law provision, which has been traditionally perceived in Italy as a stronghold of the law and bastion of civilisation within the country³³: the provision referred to is art. 18 of the main piece of Italian legislation aimed at protecting the statutory rights of workers, namely the “*Statuto dei lavoratori*” or Law no. 300 of 1970.³⁴

In reality, as already emphasised by some commentators,³⁵ the law provision at stake does not appear so ground-breaking in terms of its content: it merely states that, in cases where the economic dismissal (of either individual or collective nature) is adjudicated to be unfair by the judge and the employee concerned is a constituent of a workforce in excess of fifteen employees, the dismissed employee must be re-engaged and re-instated in the same job as previously occupied. It is obvious that, if deprived of a right unfairly, that right must be “returned” to him, on a mandatory basis, through the binding intervention of the State. However – and this reflects the nuts and bolts underpinning the ultimate Italian statute on the subject – what the Italian legislator adds, in endorsing the novelty, is to confer on the judge the option (not the obligation), in cases of economic dismissal,³⁶ to bestow upon the employee a compensatory award of monetary nature,³⁷ rather than ordering a re-engagement in his favour. In other words, as a result of the decisive Italian legislation, the “firing cost” of the employee shall be pre-assessed, in advance, by the legislator and thereupon left to the discretion of the judge, who is ultimately charged with ruling on the merits of opting in favour of the alternative choice (“money” rather than

a year in a matter already governed by Law no “92/2012” already cited: in reality, in looking better at the ultimate stances put forward by Law Decree no. 76/2013 (promotion of the permanent basis contract of employment), the new scenario cannot help but put off foreign investments in Italy. As regards the matter of the intervention of the government in business insolvency through mechanisms of assistance and support of the salary (in Italy, for instance, *cig* and *cigs*, etcetera, see G Zilio Grandi and M Sferazza, *La Tutela del Lavoratore nei confronti dell'Insolvenza del Lavoratore* 4 Rivista Italiana di Diritto del Lavoro *passim* (2013)).

³³ More recently, on this aspect, see A Perulli, *Introduzione alla Presentazione del Volume “Il nichilismo giuridico” di V Possenti*, (Venice, 31 maggio 2012) and, *amplius* A Perulli and V Speciale, *L'Articolo 8 della Legge 14 settembre 2011, n. 148 e la “Rivoluzione di Agosto” del Diritto del Lavoro* 132 Working Paper Centro Studi di Diritto del Lavoro Europeo ‘M D’Antona’(2011).

³⁴ Henceforth also Law no. 300/1970.

³⁵ G Zilio-Grandi, *La Riforma dei Licenziamenti: Opportunità Perse e Risultati Ottenibili ... la Parola al Giudice* 12 Bollettino Speciale Adapt 3,4 (2012)<<http://www.bollettinoadapt.it>> accessed 5 June 2012.

³⁶ In Italy this would be defined more technically as the dismissal for *giustificato motivo oggettivo*. More recently, see what clarified by Legislative Decree no. 76/2013 on the mandatory procedure of settlement set forth only and exclusively for the “economic dismissal” (or *giustificato motivo oggettivo*), at art. 7(4), amended by art. 7(6) of Law 604/1966.

³⁷ This shall vary, according to the ultimate statute, according to elements and factors basically left to the discretionary power of the judge; nevertheless, it shall not exceed 24 months.

“engagement”)³⁸, albeit subject to a threshold of twenty-four months. A possible light for the employer at the end of this rather onerous tunnel might come in the form of an advanced awareness of the potential cost of effecting a dismissal, although such a tenuous benefit could be unceremoniously snuffed out by the risk that the competent employment tribunal may order the re-engagement of the employee.

Some commentaries³⁹ have alluded to a theoretical stimulation of foreign investments in Italy engendered as a result of the new statute. In addition to this, Italian businesses, particularly SMEs, should be equipped with the tools to reduce their workforce in more flexible circumstances or, at any rate, make decisions, unhindered by uncertainty and external constraints, on a legally viable and economically more efficient size and scope of their organisation. Of equal resonance with employers, the Italian legislator, thanks to the new (prospective) piece of legislation, has succeeded in clarifying circumstances⁴⁰ that, in the past, might have left room for serious misunderstandings, particularly at judicial level. Prior to the statute’s inception, the subject of economic dismissals (or the Italian dismissal for “*giustificato motivo oggettivo*”) was shrouded in controversy and uncertainty, as it literally gave rise to a *vexata quaestio*⁴¹, leading some Scholars to coin the rather eloquent, but undeniably appropriate expression, the “impossible dismissals”⁴². To elaborate, stranded between the “rock” of the onus on a causational link tying the reorganisation of the business to the dismissal (for economic reasons) of the employee, and the “hard place” of an established judicial practice inclined to consider the economic dismissal of an individual nature an *extrema ratio*, the employer was rendered *de facto* hamstrung despite a legal tool being in place, and despite the entitlement being conferred *expressis verbis* on the employer according to the black letter of Law n. 604 of 1966. To further clarify the magnitude of the latest Italian statute, regarding the matter of the economic dismissal, reference must be made to para. 7 of art. 18 enshrined within Law no. 300/1970 in terms of the ensuing amendments wrought by the new addition. To that end, in enforcing this provision, the judge is entitled to apply the provisions laid out by para. 4 of the same article – thereby declaring the dismissal to be “unfair”, rendering it void and ruling in favour of the re-instatement of the employee, in cases where it was ascertained that the reasons for the economic dismissal of an individual nature are entirely without merit.

To draw together the strands of the Italian legislation in a matter that, *ceteris paribus*, should be consistent with the economic dismissal by way of redundancy in

³⁸ G Zilio-Grandi, *La Riforma dei Licenziamenti* (n 35).

³⁹ See G Zilio-Grandi, *La Riforma dei Licenziamenti* (n 35).

⁴⁰ Such as the physical and psychological inability of the employee (*inidoneità psico-fisica del lavoratore*), because of the violation of art. 2110 of the Italian Civil Code.

⁴¹ As regards the general topic of the *reintegrazione* (re-engagement/re-instatement) in Italy, reference must be made to M D’Antona, *La Reintegrazione e il Risarcimento del Danno* 5 Foro Italiano 360,361(1990); on the “impossible dismissal”, see L Mariucci, *I Licenziamenti “Impossibili”: Crisi Aziendali e Mobilità del Lavoro* Rivista Trimestrale di Diritto e Procedura Civile 1360,1433 (1979).

⁴² See G Zilio-Grandi, *Il Licenziamento per Inidoneità Fisica* 1 Rassegna Giuridica del Lavoro del Veneto 24,35 (2009).

Britain, some peculiar aspects are notable and worthy of discussion for the purposes of the analysis of this paper.

- a. Quite arguably, the Italian legislation leans on a categorisation of the “economic dismissal” which diverges into two main branches, the collective avenue and the individual one: the former being more or less akin to the British redundancy due to a cessation of the entire business of the employer, the second conversely relating to all the other circumstances.
- b. In respect to the former (principally linked to the crisis of the industrial business of major proportions, causing the closure of the business), “social absorbers” are traditionally and historically provided in Italy; allowances which are very – perhaps overly – generous to the employees and which are levied on the tax-payer. Remarkably, the social absorbers do not exist in the public sector, not because employees in this area lack protection, but simply because they cannot be dismissed at all, including for redundancy.⁴³
- c. As far as the latter is concerned, a form of economic dismissal already existed in Italy in the form of “*licenziamento per giustificato motivo oggettivo*”, although its applicability has been ostracised or even “sabotaged” for decades due to its narrow interpretation and, *de facto*, its abstention at the hands of the Italian judiciary system. In response to such intransigence, it had been ironically re-named by Scholars as the “impossible dismissal”. More recently, a long-awaited amendment to the Italian labour law system has surfaced and this novelty should allow the Italian economic dismissal to be revamped, as the essence of the reform is to henceforth solely allot, in cases of unfairness of the economic dismissal of an employee (therefore for *giustificato motivo oggettivo*), a mere compensatory award, as opposed to the additional caveat of re-instatement which had hitherto prevailed, with the decision of which to administer (award *versus* re-instatement) resting on the tenuous predilection of the relevant judge.
- d. More remarkably, and not without a considerable degree of criticism surrounding the recent “reform”, the economic dismissal in Italy, as recently “modernised”, inexplicably fails to account for those employed in the public sector,⁴⁴ whose status is thus rendered impregnable regardless of the direction (or height) of the economic tide, as individuals who *de facto* cannot be dismissed for any reason.

⁴³ Therefore, also if the public employer did not exist any longer (because that authority has been suppressed, for example), given the status of the Italian public employee as “untouchable” (irremovable from his post), the latter will keep on receiving his “untouchable” salary, and will be somehow allocated in a different area, within the variegated and unfettered “brands” making up the Italian public sector (central authorities, local authorities or other, multifarious authorities). See *infra* Chapter 7 (Conclusions).

⁴⁴ In terms of numbers, we are dealing with a workforce of approximately 3,500,000 employees, tied to the public employer through a “relationship” of public nature, not a private contract of service. See L. Cifoni, *Gli Statali? In Italia sono meno che altrove* (*Il Messaggero*, 7 April 2012).

http://www.ilmessaggero.it/blog/luca_cifoni/gli_statali_in_italia_sono_meno_che_altrove/0-14-1405.shtml, accessed 3 September 2012).

3. The Underpinning Philosophy of the Redundancy Payment in the British Job Market

Introduced for the first time in 1965, as a result of the Redundancy Payments Act 1965, the redundancy payment⁴⁵ was simply concerned with compensating an employee, who had worked for a prolonged period of time under the same employer (therefore a long-serving employee), for the loss of his own job. The underlying philosophy, which at that time had inspired the Westminster legislator and which nowadays still basically informs the redundancy, in its updated “legislative source” enshrined under the ERA 1996, focuses predominantly on the advantages and benefits which may be achieved in terms of mobility, reassessment of the competences and support of the rationalisation process in the utilisation of the human resources.⁴⁶ The right to be “recompensed” is inexorably tied to the loss of the job, and is perceived to extend, so long as the conditions are met, to cases where the employee in actual terms had not yet found alternative gainful employment.⁴⁷

Furthermore, the amount of redundancy pay connected to the job “exit”, described at length in the chapter above, it is not weighted unfairly if viewed from an employee’s perspective, for the reason that, in an Anglo-Saxon system such as that prevailing in Britain and characterised by accentuated sociological dynamic forces, the dismissed employee shall be equipped with a multitude of opportunities to invest part of the redundancy pay in order to (re)qualify himself⁴⁸, *exempli gratia*, through participation in a variety of customised training courses offered by academic institutions. Such an array of options facilitate the dismissed employee’s ability to “react” punctually to the new formative needs demanded by society, particularly as the academic institutions in Britain operate and act according to principles of business and entrepreneurship. This allows the learners (in other words, redundant workers now seeking fresh employment opportunities) to benefit from the best possible results in terms of access to the teaching of new competences, expediting improved future job opportunities.

Needless to say, the present piece of work does not subscribe to a view – which, if held, would render it naive at best and speculative at worst – that the dismissal, including that remunerated through redundancy pay, does not in itself represent a serious social issue; indeed, it is an event that may have profound and enduring effects on the individual lives swept up in the ruthless process of redundancy. As alluded to by academics speculating on areas adjacent to law such as job psychology and

⁴⁵ Or *pagamento di un indennizzo per perdita “oggettiva” del lavoro*, to use an Italian legal terminology defining the same concept.

⁴⁶ N Selwyn (n 5) 506, who places emphasis on the following concept:

“[T]here may be other benefits or advantages, such as the need to encourage mobility of labour, redistribute economic skills, and assist in the process of rationalization of resources [...]”

⁴⁷ N Selwyn (n 5) at 506.

⁴⁸ It is well known that in the UK several training programmes are organised and offered by academic institutions and colleges.

employability,⁴⁹ unemployment is indicative of a valid social problem, not simply actualised by the job loss itself, but accentuated by a subsequent lack of access to the job market. In this respect, it is clearly emphasised that “*unemployment negatively [affects] mental health*” and that the “*[unemployed are] socially excluded*”. This pattern seems to be sadly replicated across continental Europe where, in countries such as Italy, the young and old alike have endured years of frustration in their attempts to enter the job market due to the “legislative rigidity” with which it is shackled. These “never-employed” or, more cynically, “never-to-be-employed” workers could conceivably bypass the normal cycle of the “work life” and, therefore, undergo the progression from the status of “youngsters” to that of “pensioners”, without having ever worked!

4. Logic and Strength of the Redundancy in Britain as Compared to Italy: The Case of the Public Sector

In order to better understand the reasonableness (a noun that, for sake of clarity, is preferred in this context to flexibility which is imbued with myriad misinterpretations and misunderstandings) of the British job market in this area, it should be stressed that the job relationships which, in the UK, can be theoretically affected by this special typology of dismissal – the economic dismissal by way of redundancy – are not simply and exclusively those of a private nature, but also those played out within the public sector. This is a direct consequence of the fact that, in the UK, the employee (either public or private), save for specific and rare exceptions⁵⁰, is employed in force of similar, if not identical, juristic relations, which is based on a contract, namely a contract of service; the latter bestowing upon the employee the special status as an employee.⁵¹ More specifically, an employee who

⁴⁹ H Kahn and CL Cooper, *Stress among Financial Dealers in the City Of London* in J Langan-Fox and C L Cooper (eds), in *Handbook of Stress in the Occupations* 339,357 (Edward Elgar Publishing, 2011); H Kahn, *Unemployment and Mental Health*, in C L Cooper and A S G Antoniou (eds), *The Psychology of the Recession on the Workplace* (Edward Elgar Publishing, forthcoming). In the latest, the Author underlines the following:

‘The unemployed, according to many researchers, are “socially excluded”. Social exclusion can be understood not only by focusing on what it means to be excluded versus included, but also on how each of these circumstances either enlarge or diminish the vulnerability of the individual.’

⁵⁰ For instance, the crown officers, few units across the country, for which the contract relationship shall be able to be terminated just upon previous notice, although more recently, as a result of s 191 of the ERA 1996, some statutory protections have been extended to them as well. Similarly, the police officers are hired in force of a contract of employment of private nature, differently from other Continental jurisdictions such as the Italian one. See G Pitt, *Employment Law* (n 5) at 114.

⁵¹ For those reading these notes from a non-British perspective, it is worth remembering that, notwithstanding what is already specified under the previous footnote 5, in Great Britain the worker shall enjoy merely the status as a *lavoratore autonomo* (self-employed), to utilise an Italian legal categorisation and, therefore, shall be linked to his own employer through a contract for services (a *contratto di servizi*, in Italian), but he will not be an employee, as this status originates exclusively from a contract

is hired either in the public sector (public sector employee) or in the private (private sector employee) shall have a bilateral working relationship based on a contract of a private nature, irrespective of factors such as rank, job description and remuneration.

Not only this, the economic dismissal – or, *rectius*, the economic dismissal by way of redundancy – is a possible tool of legislative nature, clearly applicable to all those who, in the UK, wind up being employees (either public or private) at some point during their professional lives, so long as the relevant conditions are met and, therefore, the specific requisites laid out in s 139 of the ERA 1996. For the sake of clarity then, a reference can be empirically made to a lecturer discharging his duties within a university in Britain where the academic will have the bilateral relationship with his employer almost certainly “governed” by a contract of service, possibly on permanent basis.⁵² Let us imagine that the academic in question has been hired by virtue of prominent research and publications undertaken and submitted within a specific sector which, at that point in time, were perceived to be of particular importance and the catalyst which heralded an influx of new student converts to the discipline on the wave of increasing interest in that area of teaching. However, as our hypothetical scenario unfurls with the passing of time (e.g. years), the hitherto demand for that area of teaching, initially enthusiastically high, gradually declines (perpetuated, for example, by the aging of the subject and/or poor attendance of the courses on the part of the students). A climate change of such nature would, as it would with any other employee, render the academic at stake surplus to requirements and thus a legitimate candidate for redundancy⁵³ where, thanks to the redundancy payment, he shall be equipped with the financial means to re-align himself to contemporary interests through training (for instance, the training might facilitate his understanding of evolving areas of teaching that may be of present, or indeed future, interest to the students, thus replacing the now relatively obsolete area of teaching he had previously discharged). Obviously, the variant of redundancy in the example just explained is the *extrema ratio*; indeed, a much more likely sequence of events would see advice filter through the relevant levels within the hierarchy of the university, and intimated by his superior from a hierarchical point of view, that, due to a growing lack of interest in the area of teaching or research with which that academic was initially involved, an enlargement or diversification of his courses may be necessary so as to safeguard his continued employment as an academic and establish a *raison d’être* with regard to student needs. Needless to say, an intervention of this nature would, if heeded by the academic, nullify the threat of *redundancy*. Conversely, the persistence of the academic in an activity which, objectively, is no longer required will see him inexo-

of service. See more recently P de Gioia-Carabellese (n 16) Working Paper Adapt 5; P de Gioia-Carabellese (n 5) (Diritto delle Relazioni Industriali) at 1079,1107.

⁵² See again, more recently, within the Italian literature, P de Gioia-Carabellese (n 16) Working Paper Adapt 6; P de Gioia-Carabellese (n 5) (Diritto delle Relazioni Industriali) at 1079,1107.

⁵³ Although it is likely that, in these circumstances, the redundancy pay would not be the statutory one, rather the voluntary one, therefore a more generous package by the employer to incentivise the employee.

rably fulfil the criteria necessary to effect redundancy proceedings, with the redundancy justified by economic reasons.⁵⁴

In other cases, in Britain, the employee is made redundant not because his specific job has become obsolete, but in light of the fact that there is a legitimate contraction of the business. Amongst an array of relevant examples could be a retailer which, having sustained substantial losses in carrying out its business is consequently compelled to implement the closure of specific units such as a branches, offices or shops. It is obvious that in these circumstances all those who work for that unit shall be made redundant as, in accordance with s 139 of the ERA 1996, the employer has ceased, or intends to cease, not the entire business but exclusively the activity where workers now at the mercy of dismissal, and therefore redundancy, are employed.⁵⁵

In Britain, the above scenario is applicable to major companies and small businesses alike, to both private employers and public (for example councils), and also to those employed by a judicial body, including a magistrate or a judge. This occurs as a result of two principal reasons: firstly, the redundancy relates to a worker holding a contract of service with an employer, irrespective of the nature – public or private – of that employer; secondly, the contract of service of a private nature in Britain constitutes the fulcrum of the employer-employee relationship. In a country such as Italy, conversely, the nature of the working relationship within the public sector is atypical, meaning that the public employee will be sheltered from any consequences affecting his job.

In light of the analysis and contemplation regarding the British legislation, alluded to above, it is reasonable to query whether the demands recently levied upon Italy by the European Union, in terms of economic dismissal, must be viewed as a “massimalistic” measure or, conversely, a reasonable goal legitimately conferred to Italy and to its depressed job market.

At least from a “legal” perspective, the answer alluded to in this work is that a reform of the job market in Italy, as suggested by the European Union (through robust and decisive implementation of the economic dismissal), is a more than legitimate course of action given the fact that redundancy is already embraced within the legislative framework of other countries across the European Union, decidedly so in the UK, as a means of assuaging any stagnation of the Italian economy and stoking the embers to reignite the flames of competitiveness.

⁵⁴ As dissected *supra*, in Italy, in the same scenario, as the concept of redundancy is unknown, particularly in the public sector, the Italian academic would keep on receiving his salary, without *de facto* performing any job. He will be an untouchable employee, with the right to receive a salary but without an obligation to discharge specific duties.

⁵⁵ The example of the retailer seems to fit better the case of the redundancy in the private sector; in reality, the contraction of the work force due to the foreclosure of offices could be replicated also in the public sector. As dissected below, in the public sector in Italy the contraction of the work-force in the public sector means that, in lack of a legal tool such as redundancy, the employee continues receiving his salary, although the employer does not “exist” any longer, without any possibility for the employer to terminate the relationship.

5. The Redundancy: Negotiation and Judicial Protection

Some observers may feel compelled to advocate the view that the system at stake, in its British form, is characterised by aspects of weakness, open to exploitation and manipulations of a varying nature on the part of the employer. For instance, they argue, the employer could single out, among some particularly hostile employees, a few “sacrificial lambs” and lead them to the slaughter where the legal tool (axe) of redundancy will fall with unerring aim and merciless indifference. However, such theoretical criticism proves to be unfounded for two main reasons with are worthy of detailed deliberation.

First and foremost, the British Trade Unions, which are unanimous in their acceptance of the concept of redundancy, actively invigilate on the negotiations, therefore on the process conducive to the redundancy dismissal, once the necessity has been announced by the employer. The redundancy therefore does not arise *ex abrupto* and its itinerary is not bereft of supervision during the phase of activation, given the fact that the process is overtly communicated to the trade unions which, for their part, once informed of both the reasons for, and the mechanisms of, selection intervene if necessary in order to tackle any possible abuse.⁵⁶ In this respect, the ERA 1996 hermeneutically merges with a further cardinal framework, namely the *Trade Union and Labour Relations (Consolidation) Act 1992*⁵⁷. As is common knowledge in British employment law, the latter statute prescribes that an employer who, for economic reasons, is set to propose dismissals accounting for twenty employees or more working within the same unit, must consult, prior to giving written notice of thirty days or (in a minority of cases) ninety days dependent upon the circumstances,⁵⁸ the representatives of the employees that may be directly affected by the dismissals.⁵⁹ Such representation, as previously stated, will be provided by representatives of the trade unions, or rather will be available to those employees under threat of redundancy who have valid union membership. The nature of these consultations (particularly those of a collective nature) are not specified within the *TULR(C)A 1992*; however, there is recognition, and indeed adherence, to a set of standards which are as consolidated as they are entrenched. For instance, as far as redundancy relating to those working

⁵⁶ This, on the other hand, is aligned to the *Collective Redundancies Directive 1998*, which – as well known – is based on the three pillars: (a) communication or information to the interested parties; (b) consultation of collective nature; (c) consultation of individual nature. As regards commentaries on this specific directive, see, within the literature in English, B Willey, *Employment Law in Context* 86,89 (n 5).

⁵⁷ Henceforth also the *TULRCA 1992*.

⁵⁸ The period at stake is of at least 30 days, if the employees to be made redundant are in between 20 and 99; it must at least of 90 days, if the employees to be affected by the redundancy are 100 or more. See s 188(1) of the *TULRCA 1992*. It is well known that said legislation is under review in the UK, as prospective reforms might reduce the time of the consultations, in order to facilitate the businesses.

⁵⁹ Therefore, employees may nonetheless be affected, indirectly, by measures connected to the redundancy.

in the coal business is concerned, it has been ruled⁶⁰ that fair consultations must be put in place and permission granted (by the employer) to any body consulted to such an end (the trade union, by definition) to have a proper opportunity, on the one hand, to fully understand the matter set for deliberation, and, on the other hand, to form and express its own sentiments on the consultation agenda. As a final point on the subject, the employer initiating negotiations should pay due attention to the point of view conveyed by the body consulted, so imbuing the interaction with a sincere tone, rather than a mere *pro forma*.

To reinforce the “mandatory character” of the consultations conducive to the redundancy, British case law⁶¹ is quite prone to holding that employees who have suffered any detriment, for example by way of a total or partial flaw and/or defect affecting the consultations, shall be entitled to receive compensation in accordance with fair and equitable criteria which must be set forth by the judge, and reliant on the severity of the violation committed by the employer.

Secondly, the Employment Tribunals in Britain, in dealing with controversies pertaining to contracts of employment, have a history of ruling along quite deep-rooted standards⁶²; that is to say that the choice over which employees to render redundant (therefore the selection criteria to which the candidates for dismissal are subjected) shall adhere to principles of reasonableness. This applies particularly in cases where there was a mere contraction of the workforce rather than the cessation of the entire business, as in the former case a *redde rationem* shall ensue – in other words, a mandatory decision on who should remain employed and who should not. This criterion, as emphasised under case law, shall be subjected to a ‘test’ of reasonableness.

In addition, and this aspect is not of common law origin, the choice of which workers to render redundant shall not violate some overarching statutory principles, particularly those enshrined within the Equality Act 2010 where it is prohibited to discriminate against workers in their workplace for reasons related to a list of characteristics afforded specific protection (the “protected characteristics”).⁶³ For exam-

⁶⁰ *R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price* [1994] IRLR 72 (CA).

⁶¹ *Susie Radin Ltd v. GMB and Others* [2004] IRLR 400. In some cases where specific circumstances occur, the employer is authorised not to stage consultations (“*special circumstances*”, according to the terminology of the TULRCA 1992); it is worth noting that the concept of *special circumstances* is not defined at legislative level (B Willey, *Employment Law in Context* (n 5) at 87).

⁶² The case study is *Polkey v. A.E. Dayton Services Ltd* [1987] IRLR 503 (HL). Among commentaries relating to this ruling, see: S Bailey, *Procedural Fairness and the British Labour Pump Principle Reassessed* 9(1) Comparative Law 29,30 (1988). Judicially and more recently, *Capita Hartshead Ltd v. Byard* 20 February 2012 (EAT).

See also *Williams v. Compair Maxam Ltd* [1982] IRLR 83), where it was held that a reasonable employer cannot use criteria which are exclusively dependent on those in charge of the organisation; rather, the employer shall use principles which may be objectively assessed, on the basis of elements such as presence and efficiency at work, experience and seniority in the role.

⁶³ Among the “*protected characteristics*”, it is worth highlighting, according to s 4 of the Equality Act 2010, the sex, the sexual orientation, the religious belief.

ple, the selection, for the purposes of the redundancy, of mature (*rectius*: old) employees rather than young employees would be judicially dismissed, contravening as it would the protected characteristic of age. Therefore, any selection for the purposes of the redundancy which infringed one of the protected characteristics would render the dismissal by way of redundancy automatically unfair.⁶⁴

In other words, a thorough analysis of the concept of economic dismissal, particularly the economic dismissal by way of redundancy, yields a straightforward acknowledgement that, in an advanced country conforming to values of liberal democracy such as the United Kingdom, redundancy is a deeply entrenched and veritably compact aspect of the working environment, roundly accepted by the Trade Unions and ultimately stimulus for a nimble and agile job market, which is literally in a flux of re-invention as newly trained professional figures tailored to modern economic needs keep pace with a socio-economic reality in constant evolution. The practicality of the economic dismissal is, to a certain extent, valued by the employee, as, if planned and conducted with the utmost reasonableness and free from discrimination, it is a catalyst capable of rendering a national workforce competitive within a global context. The employee, to this end, is blessed with a degree of foresight in his ability to anticipate a “sea change” on the horizon before the waves crash over his doorstep, and so can precipitate the, soon to be necessary, change by conceding that his typology of work will soon become obsolete. It is altogether conceivable then that, faced with such dire consequences of failing to act, he will be motivated and encouraged to re-qualify himself in order that his ‘toolbox’ of competences is furnished with a fresh set of “regenerated” and “modernised” tools with which to exploit the market, in accordance with the ever changing *desiderata* of society.

Furthermore, economic dismissal by way of redundancy, as already pointed out⁶⁵, is effectuated in both the private and public sectors in Britain, with an employee in the public sector not deemed to differ from a “peer” working within the private sector, irrespective of whether he discharges his duties amongst the rank and file or amidst the higher echelons of the sector.⁶⁶ On this point, a further significant perspective could be inferred, although not without a paradoxical connotation: in a country such as the United Kingdom – bereft of a formal Constitution – no fundamental difference exists distinguishing a public employee from a private employee (and, on the other hand, both conceptually and legally, there is no room whatsoever for thinking

⁶⁴ For the purposes of an examination and analysis of the Equality Act 2010 within the United Kingdom, see: G Pitt, *Employment Law* 27,84 (n 5); N Selwyn (n 5) at 126,185; R Painter and A E M Holmes, *Cases & Materials on Employment Law* 264,397 (8th edn, Oxford University Press 2010); D Lewis and M Sargeant (with B Schwab), *Employment Law: The Essentials* 84,109 (n 5).

As regards journal contributions, see among the others: A Lawson, *Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated* 40(4) *Industrial Law Journal* 359, 383 (2011); S Gilzean, *Third Party Harassment* 101(2) *Employment Law Bulletin* 4, 6 (2011).

⁶⁵ See *supra* Chapter 4.

⁶⁶ See P de Gioia-Carabellese (n 16) Working Paper Adapt 6; P de Gioia-Carabellese (n 5) (*Diritto delle Relazioni Industriali*) at 1079,1107, specifically the example of a person working in Britain as a judge in any judicial body.

of any inequality between the two “genres”). Conversely, in a country such as Italy which, at its legislative pinnacle, promises to uphold the Constitution – the principle of equality among citizens, private employees are legally discriminated against, being, as they are, entitled to a more limited set of rights than their public counterparts. Moreover, the same Italian Constitution acknowledges a cardinal principle (the right to work), with no distinction made between private and public jobs.⁶⁷ Taking this apparent divergence from the Constitution into account coupled with the legal ambiguities manifested in this comparative analysis, the constitutional principle from which the privileged status of the public employee originates is difficult (or, rather, impossible) to determine. Simple logical reasoning, based on a clear exegesis of the Italian constitution (for the constitution is undeniably transparent in its intentions), leaves no room for doubt that the work (*recte*: the right to work) is indeed recognised and protected in that piece of legislation, regardless of whether that work is discharged under a public or private employer.

The natural consequence of juxtaposing the British legislative system with that in Italy is the striking contrast which arises between the numerous constraints and limitations (annexed to the right to dismiss employees by way of redundancy) permeating the latter, and the “uncluttered” sequence of events in the UK where, as detailed above, if a public institution ceases to exist or finds it necessary to contract its business, the relevant employees will see their contract terminated legitimately by way of redundancy, to which is attached the right of that employee to receive a redundancy payment, in the same fashion as any private sector employee⁶⁸.

6. The Concept of the British Redundancy and Its Legislative Transplant in the Italian Legislation

In drawing a conclusion to the analysis of the British concept of redundancy, credence can be added to the theory that the demand which the European Union and the markets have placed on the Italian legislator are not particularly innovative, especially so when taking into account the burdens and rigidities objectively existing in Italian employment legislation. The demand, if implemented, would bring

⁶⁷ Without any pretence to get into adjacent fields of law (constitutional law) and, therefore, usurp the role of those experts in these areas, in the different articles where job or work is mentioned in the Italian constitution, (namely Art. 1, Art. 35, Art. 37, Art. 40, Art. 46), there is no such thing as a differentiation between public job and private job.

⁶⁸ In striking contrast to Britain, in Italy there is still strong resistance and infuriated debate as regards the proposal – also in this case of European Union nature – of elimination of the provinces (*province*), in the light of both the vituperated consequences of occupational nature and the mobility of the work-force which will certainly originate from the possible implementation of the proposal. If the elimination of an institution such as the *Councils* (*mutatis mutandis*, the council is to Britain as the *provincia* (province) is to Italy) was figured out in the UK, so long as this complies with an objective economic necessity, there would not be any obstacle to proceed, save for the certification and assessment that the *redundancy* is applied with a principle of reasonableness.

Italy in line with what various European nations (Great Britain being a prominent paradigm of this) have already achieved in the past, in forms and ways even more accentuated (in the UK, it has been applied also to the public sector workers), within their own legislative system, with results that are also positive.

From a comparative analysis standpoint, theoretically and notwithstanding the dangers attached to any form of evaluation of different jurisdictions,⁶⁹ the economic dismissal by way of redundancy could be, *mutatis mutandis*, a concept to be introduced within the context of the Italian legislative system, an apparatus with characteristics not so dissimilar from those under s 138 ff of the ERA 1996. Clearly, the general *caveat* in nurturing the successful undertaking of this transplant would be the fact that, from a sociological and geopolitical point of view, the two nations inevitably display incompatibilities, in some cases acute.⁷⁰

Taken from a “radical” stance underpinned by theoretical tendencies of a legal-academic flavour, one could advocate, in general terms, within the context of a profound and radical reform of the job market in Italy, the introduction of economic dismissal in both the private and public sectors. As a result of this reform, one could conceive, particularly in respect to the public sector in Italy⁷¹, of a mandatory conversion of all work relationships between the state (or the local authorities or different authorities) and their employees in contracts of service of private nature, without exception.⁷² The need for such draconian measures appear to be prompted by some significant reasons: firstly, the theoretical consideration that there are no apparent constitutional norms in Italy which may justify the supremacy of a work relationship of public nature (*rapporto di pubblico impiego*) over one in the private sector; secondly, the fact that, as empirically subjected to a thorough examination in this work, one of the world’s founding democracies – the UK – is home to a *public sector* which, prestigious centenarian institutions included, prefers to subsume its employees under

⁶⁹ The caution in the transplant of legal concepts, particularly from a common law to a civil law system, is correctly recalled by authoritative Scholars; see *inter alia* P Legrand, *European Legal Systems are not Converging* 45(1) *International Comparative Law Quarterly* 52, 81 (2006). However, in simply meditating on the dramatic magnitude of the matter at stake, an exception to the rule seems to be permitted and, therefore, to think about a transplant in this case, from the UK to a continental European jurisdiction like Italy, a “do” rather than a “don’t”.

⁷⁰ To our knowledge, at international level, a similar proposal has not been advocated yet by any specific commentator, apart from an Author (P de Gioia-Carabellese (n 16) *passim*), hence the necessary caution. Despite this, from an economic point of view, what the international bodies (in particular the European Union) are demanding Italy to implement in the matter of the job market may suggest that these ideas cannot be dismissed superficially. Secondly, the criticism of an Author in the Italian literature (P Ichino (n 2) *passim*) towards the too accentuated fragmentation of the Italian job market, could be consistent with the stances of a conversion of the employment relationship in the public sector in private contracts of employment.

⁷¹ Notoriously, the vast and huge public sector in Italy is one of the most significant contributory factors to the public debt; the level of the public debt in Italy is one of the worst ones among the industrialised countries in the world. In this respect, see *ultra* the Chapter “Conclusions”.

⁷² As clearly emphasised, in the British scenario, also judges at the highest rank, high officers of the army and academics are “tied” to their “employer” via a “private” contract of service, and, therefore, they are theoretically under the Damocles’ sword of the economic dismissal by way of redundancy.

work relationships of a private nature (*employer/employee*), even in cases where the typology of work the employee is required to discharge is potentially critical.⁷³ Furthermore, in light of the persistent requests to “squeeze” public expenditure in Italy, which is home to one of the most exorbitant public debts anywhere in the world – public debts undeniably reflecting the burden of an Italian public sector which is notoriously enlarged and inefficient,⁷⁴ so as to re-characterize all work relationships in the public sector merely as a “private contract matter” would leave the door ajar to apply the economic dismissal by way of redundancy also to those employed by the State and ancillary authorities. As an inherent consequence, there would be an opportunity for the State-employer, on one hand, to increase the degree of flexibility with which it can utilise available human resources while, on the other, it will be unshackled to pursue and achieve higher levels of efficiency and efficacy, in keeping with what is expected of any modern public “apparatus” striving to compete with the economic powerhouses of the European Union.

7. Conclusions

Based on the comparative analysis hitherto undertaken, it has been possible to ascertain that legislation governing over the job market in the UK – to which the economic dismissal is far from being extraneous and, *de facto*, is one of its fundamental pillars – yields a degree of efficiency. Explored in greater depth, such legislation appears perfectly tailored to the current needs of society as it targets the highest occupational levels set against a socio-economic backdrop that requires, on the one hand, mobility of the workforce and, on the other, the employee’s full awareness of the personal implication of such mobility, namely his foresight and ability to (re)train himself in keeping abreast with new typologies of work from time to time as required by the market. To this end, the employee knows that, if push comes to shove, he can rely, if dismissed by his employer, on a redundancy payment awarded by his own employer which will allow him to retrain.

Conversely, as manifested in this work, employment law jurisprudence in Italy continues to “loiter” around a “graveyard” of obsolete legal concepts, far removed from the rational organisation required to cater for the increasing demand for more

⁷³ For instance, as hinted above, in Britain, any worker of any rank, also the highest one, deployed in the army, signs a private contract of employment, albeit tainted with statutory provisions, necessary because of the nature of the job, aimed to limit some rights *eg*, the right to strike; however, in any case, these provisions in Britain, for some categories of public employees, do not purport to create, nor to give rise to, a privileged status.

⁷⁴ Just to briefly and superficially compare Italy to Britain, the two levels of public authorities existing in Britain (the Councils and the central power in London, more recently devolved to the regional assemblies/parliaments of Scotland, Northern Ireland, Wales) correspond to four different layers of authorities existing in Italy (*comuni* or municipalities; *province* or provinces, roughly correspondent to what in Britain is a council, at least in term of extension; *regioni* or regions; central authorities, such as ministries).

modern and efficient models and parameters of enterprise, both in the public and private sectors.⁷⁵

Aside from the very peculiar Italian distinction between an economic dismissal of a collective nature and that of an individual one, it is undeniable that a “pure” economic dismissal of international flavour, akin to the British system, has never been fully implemented in Italy despite a corresponding legislative concept (the *licenziamento per giustificato motivo oggettivo*) being in place, for reasons that are both political and as a direct casualty of the “war” declared on it by the judicial power in that country. However, of more recent pertinence, the “reform” of the job market and the principle that in cases of unfair economic dismissal the judge could rule in favour of a compensatory award, rather than being solely restricted to re-engagement, could represent a step towards a more contemporary form of legislation in Italy, consistent with the demands of both the financial markets and the International bodies (among them, the European Union).⁷⁶ Yet, as exposed by the comparison with Britain, the economic dismissal recently “resuscitated” in Italy is far from being a revolutionary concept, as on the one hand it shall not be extended to cover public sector workers while, on the other, incumbent judges continue to exercise strong discretionary power in the practical handling of them.

With regard to British jurisprudence, the analysis has illustrated the redundancy existing in Britain to be a very effective “legislative tool” hinged, as it is, upon the redundancy payment, therefore on an indemnity owed by the employer to the employee who is on the verge of being rendered redundant. This indemnity seems to be the best suited and most efficient means of generating a “social absorber” (the Italian “*ammortizzatore sociale*”), as it is not levied on the tax-payer.⁷⁷ Accordingly, it will not further burden the public debt while the employee shall be in a position to

⁷⁵ It is not the case that Italy has been “scolded” for so long by the European Union, particularly in respect of the labour legislation. See previous footnotes 2 and 3.

Italy and the UK display a very different level of employment protection. According to the OCSE figure, the UK has the third lowest level of employment protection (after US and Canada), namely 1.1 on a 0-6 scale 0-6, whereas Italy is at 2.6, well above the OECD average. In this scenario, in Italy the practise of hiring people on atypical employment relationships is encouraged by the possibility to avoid stringent protection on “regular” employment relationships. This, in turn, increases labour market segmentation. (D Venn, *Legislation, Collective Bargaining and Enforcement: Updating the OECD Employment Protection Indicators*, 23 (Paris, OECD 2012) 23, www.oecd.org/els/workingpapers, accessed on 17 August 2012).

In light of this, the Italian labour market reform of 2012, strongly requested by Brussels, aims at enhancing flexibility as well as reducing segmentation, through lower constraints over dismissal procedures. See Governo Italiano, *Towards a Flexible and Fair Labour Market in Italy* (28 June 2012) <http://www.governo.it/Presidenza/Comunicati/dettaglio.asp?d=685702012m> accessed 16 August 2012). As critically pointed out in this work, though, this reform has left the Italian public sector job market still untouched.

⁷⁶ See above footnotes 1, and more in general Chapter 1.

⁷⁷ Save for the hypothesis of insolvency of the employer.

make this indemnity profitable through his own training including, for example, equipping himself with the necessary tools to start his own business activity.⁷⁸

Not only is the British legislative system in the matter of redundancy deemed to be efficient and balanced in these notes, it is also suggested that it could be a decidedly apt “yardstick” which the Italian legislation could conceivably work towards, in a sort of attempt to transplant the concept. In this respect, and notwithstanding any cautious approach, a broad application of economic dismissal in the Italian job market could theoretically take place so as to account for all work relationships, within both the private and public sector, in the same fashion as that practiced in Britain. In regard to this last point, this paper has highlighted the ambiguities plaguing the Italian legislation which, against any (obvious) constitutional justification, has, for decades, been conferring on the public work relationship a privileged *status*.⁷⁹ As a means to addressing this legislative impediment to redundancy in Italy, an assimilation of other socio-political contexts such as Britain would pave the way for the Italian system to be “infused” by a contractual “aroma”, allowing for applicability of the legal concept of economic dismissal. Thus, there would be an introduction, in the Italian public sector, of a legal concept more adept at managing the need for modernisation and rationalisation within the public sector, a need which Italy has long witnessed calls for, particularly at international level.⁸⁰

⁷⁸ In this perspective, the traditional tools, conceived in the past by the Italian legislator and still utilised, the so-called “social absorbers” (*ammortizzatori sociali*), hinged upon the *cassa integrazione guadagni*, *contratti di solidarietà*, *indennità di disoccupazione* etc, reflect a past era and are totally ineffective, also because they seemingly reward laziness and encourage fraudulent behaviours.

Appropriate reference may be made to my university lectures in Edinburgh, both in *Employment Law* (P de Gioia-Carabellese, *Employment Law*, Heriot-Watt University, Academic Year 2011/2012, Lecture 7) and, particularly, in *Law of HR Management* (P de Gioia-Carabellese, *Law of HR Management*, Heriot-Watt University, Academic Year 2011/2012, Lecture 10).

⁷⁹ The Italian employee working in the public sector (or “*dipendente pubblico*” to use the language of that country) is an “*untouchable*”. Not only this: if Italy is a democratic Republic established on the work (*verbatim* and in paraphrasing the Italian constitution “*Repubblica democratica fondata sul lavoro*”) and the work protected by the constitution of that country is both private and public, it is nebulous how the constitution results in being totally re-written, for years, in the sense that Italy has nowadays become a “democratic republic established mainly on the public sector work, which enjoys a privileged status, and residually on the private sector work, which enjoys limited privileges.”

⁸⁰ See P de Gioia-Carabellese (n 16) Working Paper Adapt 12; P de Gioia-Carabellese (n 5) (*Diritto delle Relazioni Industriali*) at 1079,1107.

An example of the usefulness and the urgent need for this U-turn in Italy is given by some recent events both in Italy and in the UK in 2011 and 2012, greatly commented on and analysed by the media. More specifically, in both countries, an over-supply of workforce in the army has recently emerged. However, *on the one hand*, in the UK, thanks to the redundancy, legislated also for those working for the army, irrespective of the rank, it is now possible to proceed to the “trim” of entire battalions through the economic dismissal; the result of this is to allow the tax-payer, through the payment of the way-out – the *redundancy payment* – to save money connected to personnel not required any longer (see S Rayment, ‘Army Redundancies to roll on for Many Years’ (*The Telegraph*, 15 January 2012) <http://www.telegraph.co.uk/news/politics/9015064/Army-redundancies-to-roll-on-for-many-years.html>, accessed 15 March 2012).

On the other hand, in Italy, by contrast, it must be acknowledged that there is no mechanism of “sent-off” or “expulsion” of the work-force. Therefore, these will remain on the “books” of the taxpayer,

In other words, as far as Italy is concerned, the current work has succeeded in drawing attention to the recent reform of its job market, and particularly to art. 18 of the *Statuto dei Lavoratori*. The amended statute appears flawed as it continues to demand only partial implementation; in fact, taking into account the constitutional provisions, which regard both public and private sector work in Italy to be a cardinal feature and, of equal importance, considering the outcome of the comparative analysis with a country (the United Kingdom) whose economy may, to a certain extent, be likened to the Italian one, draconian legislative measures in the matter of the economic dismissal can no longer sit on the sidelines. However, the introduction of these law provisions should be concerned with, and applicable to, all employees, private and public alike. If indeed implemented, the latter (public sector employees or *lavoratori del pubblico impiego*) should be categorised, irrespective of what position they may hold, within a legal framework of the British contract of service. Accordingly, the “privatised” contractual relationship between the Italian public employer and its employees should be conducive, from an extra-legal perspective, to significant benefits: a dynamic and modern public sector, with international standards of efficiency; a fair job market, logically subject across its spectrum – private and public alike – to the principle of economic dismissal and the adjacent disciplinary dismissal⁸¹; and finally, an economy equipped with the tools, like Britain, to attract new investors and encourage prosperity.

If both the law jurists and law economists in Italy were to unite in a show of strength in favour of the realisation of these goals, and if they gave their backing to the need for internal liberal reforms, it is possible that Italy could, in the generations to come, reap the benefits sown by the seeds of constitutional values advocating enterprise and work (practical work as opposed to work as a status!) and fuelled by an ability to attract new investments from abroad. If this need was to continue to be unheeded, it is likely that such reforms will be unilaterally imposed on Italy directly by international bodies (European Union, the International Monetary Fund),⁸² unquenched by the respite of derogations and compromises, and at the mercy of repercussions on a socio-economic context not dissimilar to those which notoriously befell Greece.

with further hikes in the Italian public debt. Not only that: the “privileged” will pretend to work for different public bodies, to which they will be transferred in the meantime through unconvincing mechanisms of mobility, where it is quite clear that the job delivered shall not be a proper job, but merely a farce aimed at allowing them to symbolically “earn” their salary. See V Nigro, *Meno Armamenti e Generali. Le Spese Militari colpite dai Tagli* (*La Repubblica*, 15 February 2012) at <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2012/02/15/la-difesa-meno-armamenti-general-i-le-spese.html>, accessed 15 March 2012).

Obviously, in a Triple-A country (or therearound) such as the UK, these stratagems and legal tricks would not have existed; the army employee – either officers or non-officers – would have been made redundant and would have swiftly employed his time to maximise the redundancy payment in the meantime received.

⁸¹ The disciplinary dismissal set forth in the UK under s 94 ff of the ERA 1996.

⁸² Similarly to what happens in Greece, in respect of which the bail-out of the European Union and the International Monetary Fund is dependent on the cut of public employees and the reduction of the salary of those who manage to keep it.

