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Just cause to terminate: recent rulings by the Supreme Court and lower courts

This Briefing Note focuses on conduct in breach of the obligations of loyalty and good faith, in cases involving fraudulent use of sick leave and improper use of social networks

The Courts have deemed that a serious breach of the procedural rules requiring promptness and completeness of the employer's objections to the conduct underlying termination and granting the employee's right to be heard could lead to reinstatement of the employee.

Just cause and fake illness

- Where Court-appointed technical experts had declared that the medical certificates submitted by the employees were an incorrect reflection of the truth, the Supreme Court found there was just cause for dismissing the employee, who had deceived the attending physician by representing to be in a medical condition of depression, which was not true. To aggravate the matter, the employee breached the duty). of loyal cooperation, by being absent from home without being justified for doing so (Supreme Court Ruling no. 10154 of 21 April 2017).
- The Supreme Court affirmed that just caused existed to dismiss an employee who, while absent from work for a condition of low back pain, was filmed by an investigator while performing actions and physical movements wholly incompatible with such medical condition (Supreme Court Ruling no. 17113 of 16 August 2016).
- When truly in a condition of illness, the employee has the duty not to aggravate his or her medical condition. The Supreme Court's Ruling no. 10647 of 2 May 2017 found that the employer had just cause to dismiss an employee who had injured his ankle in a workplace accident and later participated in a soccer game.

Just cause and social network

Using social networks can lead to termination, not only in case of excessive use during work hours but also because of the contents of one's posts.

- The Court of Brescia, with Ruling no. 782 of 13 June 2016, held that just cause existed for terminating an employee who had made approximately 6,000 accesses over the prior 18 months, of which approximately 4,500 to Facebook alone, equal to approximately 16 accesses for each day of work, with an average work time of 3 hours per day. The Court deemed that the employee's conduct was suitable to harm the relationship of trust with the employee, given that over a long period the employee had failed to work during working hours, and used work equipment improperly, taking advantage of the fact that the employer's was not strict.
- The above ruling is consistent with several rulings of the lower courts after a ruling by Supreme Court on 27 May 2015 (Ruling no. 10955). That ruling stated that just cause existed to fire an employee who used his personal smartphone during working hours, neglecting his duty to oversee certain machinery. The Supreme Court held that the conduct was suitable to harm the company's assets, in terms of the machinery's operations and safety.

- The Court of Ivrea addressed the issue of posted contents with a ruling on 28 January 2015, whereby the Court found that just cause existed for termination not only because of the slanderous statements made against the employer, supervisors and female colleagues, but also because of the specific intent to harm their reputation, as attested to by the delay in removing the posts, ultimately removed two weeks later and only after the employer's formal demand that they be removed.
- Similarly, the Court of Milan, with a ruling on 1 August 2015, found that just cause existed to fire an employee whose posts on Facebook included insults implicitly against the employer and photographs taken in the work place during office hours.
- If, however, the Court deems that the employee's post is not defamatory to the employer, then the lack of unlawfulness of the contested conduct leads to the reinstatement of the employee (Supreme Court Ruling no. 13799 of 31 May 2017).

Just cause and lawful "hidden" monitoring

- With a ruling on 4 May 2017, the Court of Arezzo found there was just cause to fire a store manager who had failed to issue sales receipts, as proven by external investigators who pretended to be customers. The Court held that the employee's conduct was particularly serious, taking into account his role and the financial and tax consequences of his actions. The Court rejected the employee's justification for his actions, which included statements that the employee felt pressured because of the several customers in line to pay, the fact that the products were of small monetary value, and the absence of any evidence that the amounts missing from the cash register were attributable to the employee. The "hidden" monitoring by way of investigators was deemed lawful because aiming to safeguard the company's assets, by monitoring solely cash register activity.
- The Supreme Court too has recently addressed the issue of hidden monitoring, in Ruling no. 10636 of 2 May 2017. The Court held that the installation of video cameras in areas other than where employees perform their work duties is beyond the scope of Article 4 of the Workers' Statute and therefore does not require a prior agreement with the labour unions or administrative authorisation. Thus, the Supreme Court deemed lawful the termination of an employment relationship where bakery products off a shelf in a warehouse that was staffed exclusively by workers external to the employer.
- On the contrary, the prior agreement with the labour unions or administrative authorisation is required when the video cameras are placed so as to make it possible, even if only indirectly, to remote monitoring of work activities. In absence of such agreement or authorisation, the installation of the video cameras is unlawful even if all employees have given their consent, so as to protect the collective interest (represented by the labour unions) granted by Article 4 of the Workers' Statute. This was held by the Supreme Court, Third Criminal Division, in Ruling no. 22148 of 8 May 2017; a ruling that reverses the Court's precedent position.

Just cause and plea bargains

- The employer can terminate an employee who has entered a plea bargain in connection with criminal charges unrelated to the employment relationship, as held by Supreme Court Ruling no. 8132 of 29 March 2017. The Supreme Court found that the Labour Court can independently evaluate any element suitable to be evidence, and therefore also any evidence brought forth in any stage of criminal proceedings, even if not during trial or adversarial proceedings. In this case, the charges were unrelated to the employment relationship, but were such as to harm the necessary element of trust in the employer-employee relationship.

Objections to be contested promptly

- The employer's failure to object to the employee's conduct in a timely manner is fined with an indemnity payment of up to 12 months' salary, but in case of unreasonably long delays (e.g. one-two years), it can even imply the de-classification of the termination as one for justified subjective reason with related payment of an indemnity in lieu of notice (Supreme Court Ruling no. 10642 on 2 May 2017) or the reinstatement of the employee because the misconduct is deemed not to

have occurred (Supreme Court Ruling no. 2513 on 31 January 2017).

Objections to be precise and specific

- An employer who had not identified his wife, who had been appointed as a consultant by the firm, as his relative in the appropriate company disclosure form, was reinstated because of a finding that there was no misconduct. In the case, the employee's defence argued that a wife is not a relative, and the Supreme Court agreed, finding that a husband-wife relationship and a relative relationship are legally different and the company form only asked for relatives (Supreme Court Ruling no. 10831 of 4 May 2017).
- Also reinstated was an employee who had accused his superior to be "waging a war" against him personally. Such accusation was included in the letter of justification submitted by the employee in the context of the disciplinary procedure, which he also sent to the company's Supervisory Board and top management. The Supreme Court found that the employee's conduct was lawful in the context of his right to a defence (Supreme Court Ruling no. 13383 of 26 May 2017).
- Insults aimed at a superior outside of working hours do not constitute insubordination; according to the Supreme Court, hierarchical obligations between individuals do not extend outside of working hours. The event at issue was classified by the Supreme Court as an argument, not involving physical acts, sanctioned under the collective bargaining agreement with the mere suspension from service, rather than termination of employment, and therefore the termination was deemed to be unlawful (Supreme Court Ruling no. 11027 of 5 May 2017).
- The performance of unlawful transactions, using the employee's password, was found not to be a serious and precise presumption of the employee's liability, because of the other contrasting elements: the failures of protection of the company computer system, the transactions having occurred during lunchtime and admission by a colleague of having performed part of the transactions. The company, if it wished to impute negligence, should have better defined the employee's responsibilities in the context of password secrecy. The Court therefore found that dismissal was unlawful (Supreme Court Ruling no. 13373 of 26 May 2017).
- The non-issuance of a written objection, or an objection that is overly broad is not only a procedural flaw, sanctioned by requiring the employer to pay indemnity of up to 12 months of salary, but gives rise to a finding that the underlying misconduct did not take place, and consequently the employee is to be reinstated (Supreme Court Ruling no. 25745 of 14 December 2016, and Court of Brindisi a on 3 January 2017).
- Pursuant to Art. 18 of the Workers' Statute, as amended by the Fornero Law, a dismissal that is non-proportional to the conduct implies reinstatement of the terminated employee only if the collective bargaining agreement or company policy expressly provides for another, lesser sanction for the conduct. Otherwise, the Court cannot order reinstatement but can only order compensation for the employee ranging from 12 to 24 months' salary (Supreme Court Ruling no. 13178 of 25 May 2017.)

The right of the employee to be heard

- During disciplinary proceedings the employer must grant the employee a hearing, for oral presentation, if the employee so requests expressly. Thus, the employer does not have discretion to decide whether such a hearing would be useful or effective for the employee's defence further to the defences already submitted in writing by the employees (Supreme Court Ruling no. 11895 of 12 May 2017).
- The employee, however, cannot demand to be heard exclusively during working hours and in the work place, (Supreme Court Ruling no. 1350 of 26 January 2016) or only in the presence, and with the assistance, of legal counsel. Article 7 of the Workers' Statute only grants the employee the right to be assisted by a labour union representative, and does not mention the right to legal counsel. Similarly, it is irrelevant whether the employee is subject to a criminal trial in relation to the same set of facts object of the disciplinary procedure, because there are different interests at play in the two procedures, private and public (Supreme Court Ruling no. 9305 of 11 April 2017).

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