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Briefing note July 2017

Individual dismissal for redundancy: recent interpretation by the courts

Focus on recent decisions of the Supreme Court and of lower courts on dismissal for economic-technical, production and organisational reasons.

The trend for the Supreme Court has been of greater openness towards business reorganisations aimed at improving productivity and new criteria for choosing among employees having the same tasks.

Stricter, instead, is the obligation to offer alternative job positions, after changes made by the Jobs Act to the regulations applicable in case of change of duties.

Lawful dismissal even when the company has profits

- Dismissals for redundancy may be lawful even when the company has profits and has just invested millions of euro. The Supreme Court reiterated this with Judgment of 24 May 2017, No. 13015, in line with its latest position (Supreme Court, 7 December 2016, No. 25201; Supreme Court, 28 September 2016, No. 19185; Supreme Court, 1 July 2016, No. 13516). The Court has recognised that a dismissal may be justified even in the context of changes leading to the sharing of certain tasks by the existing staff, implemented with a view to more efficient and productive management.

  It is not necessary, therefore, for the employer to prove unfavourable market conditions (as formerly required by other judicial decisions).

  The dismissal must be allowed not only to avoid operating deficits - and thus to prevent the risk of bankruptcy - but also to improve productivity, since the undertaking with the highest production costs will be forced out of the competitive market in the long run.

  What the employer must prove is the existence of a genuine reorganisation, i.e., an actual change in the technical-productive organisation, so that the different way the tasks are distributed is at the origin of dismissal rather than being one of its effects.

- In the context of a genuine organisational restructuring, the dismissal is lawful also when it is the outcome of a re-allocation of tasks among third parties responsible for production segments pursuant to contract and other employees (Supreme Court, 15 June 2017, No. 14871).
- In any case, the reason for the dismissal cannot be a non-specific justification that does not explain why the reorganisation affects the specific job position at issue, especially in a complex enterprise of significant size. A justification that the company is subject to cyclical crisis, for example, which could used in relation to any employee, in any department, would not, therefore, suffice to justify dismissal (Court of Milan, 24 February 2017).

Selection criteria among employees having the same tasks

- When the employer needs to reduce the number of interchangeable staff members, it must select the employees to dismiss with good faith and fairness. The selection criteria established by the law in case of collective redundancy (length of service and family dependents, in addition to production needs), traditionally required by courts decisions, constitute a good standard; however, the employer may use different criteria.

  The Supreme Court so decided, in its Judgment of 7 December 2016, No. 25192. The Court found that tailored criteria - to be assessed on a case-by-case basis - can be used provided they are based on rationality and rank the workers concerned.

  The Court, in this case, has considered reasonable to select employees based on who received a higher salary, had worse job performance and had better overall economic conditions than other workers. The Court considered these criteria reasonable because they were objectively identifiable by common experience, as well as suitable to make comparisons among employees.

Obligation to redeploy the employee

- A dismissal is lawful only if the employer also proves that it is impossible to assign to the employee other tasks within the company, or offers them to the employee prior to termination. This obligation primarily concerns the equivalent job position/s. The employer cannot fail to make such offer by arguing that the two positions or business units locations are different in prestige: all that is needed is that the tasks be at the same pay level and category under the law / collective agreement, and require the same level of professionalism (Supreme Court 30 May 2017, No. 13606).
- The labour reform so called Jobs Act has radically transformed the norms applicable to changes in duties. The notion of equivalence of tasks has broadened, it being sufficient that the tasks relate to the same ranking level and category, thus making it harder for the employer to satisfy its burden of proof on redeployment (Court of Milan, 16 December 2016).
- The obligation to redeploy may also include an obligation to make an offer for a position with lesser tasks requiring the employee's consent. Acceptance by the employee can be imputed in the mere fact that the employee has already performed lesser tasks during the course of employment, even if only as a small part of the employee's mix of duties. This is enough to trigger the obligation for the employer to offer to the employee lower job positions/s existing in the company. The obligation extends to the other companies of the group if the group is managed as a single centre of imputed interest, in breach of the law (Supreme Court 26 May 2017, No. 13379).

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