BUSINESS CORNER

New Italian Supreme Court Guidelines on Dismissals for Objective Justified Reasons –Will It Now Be Easier to Terminate an Employment Contract?

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Introduction

In Judgment No. 25201, of December 7, 2016, the Italian Court of Cassation has perhaps definitively ruled on the issue regarding dismissals for objective justified reasons and, more particularly, on the interpretation of Article 3 Law 604/1966. Article 3 states that ''dismissal for objective justified reasons ... is determined … by reasons pertaining to the productive activity, work organization and its regular functioning."

Over the past years, this topic has been subject to an intense jurisprudential and doctrinal debate over the specification of criteria for dismissal in terms that are objective and justified, and in particular, for the specification of legitimate reasons for the abolishment of work positions. This debate was carried out in consideration of the strict requirement in Article 41 of the Constitution regarding freedom of economic initiative that may clash with social utility or the endangerment of human dignity, security, and freedom.

In Judgment No. 25201, the Supreme Court decided to establish a series of guidelines with which the court having jurisdiction on the merit must comply. In doing so, the ruling of the Supreme Court stated an important – and according to many people – innovative principle of law, that caused an uproar in the Italian national press.

The Case

The case examined by the Court of Cassation concerns a dismissal ordered by a company that abolished the position of Operating Director in order to curtail the chain of command.

In particular, the company, which at that time operated tourist resorts in Tuscany and Campania, decided to conduct an audit regarding the functionality of the company's organization and structure. According to the audit, it appeared that there was an overlap of tasks between the General Manager and the Operations Director of the resort in Tuscany. This overlap caused hierarchical and organizational confusion within the company's organization, in particular in dealing with the underlying hierarchical structure.

The company decided to reorganize and this led to the abolishment of the position of Chief Operating Manager in the Tuscan resort. The Chief Operating Manager was offered a position with the same salary in the resort in Campania, but he rejected the proposal. He was then dismissed, following an unsuccessful attempt of a conciliation procedure before the Territorial Labor Conciliation Court.

The employee appealed his dismissal, disputing the effectiveness of the reorganization and complaining about the discriminatory nature of the dismissal.

The court of first instance, after a lengthy investigation, recognized the effectiveness of the restructuring and the elimination of the work position; more specifically, it considered that the dismissal was indeed motivated by technical requirements to achieve a leaner chain of

command and more streamlined business operations. The court rejected the worker's application and declared the dismissal to be legitimate.

Following the appeal against the decision before the Florence Court of Appeal, the judges acknowledged the effectiveness of the reorganization and the elimination of the working position, but still considered the dismissal unlawful. The reason for this was the absence of any economic necessity, as the action by the company was not imposed by turnover losses or increased production costs. In particular, the Court of Appeal held that in the absence of the employer's evidence proving the need to cope with adverse situations or bear considerable expenses of extraordinary character, any restructuring of the business was justified only by cost reduction and, thus, by an impact on profits.

The company appealed to the Supreme Court against this ruling for two main interconnected reasons, based on an infringement of Articles 3 and 5 of the Law of July 15, 1966 No. 604 in relation to Article 41 of the Constitution. In particular, the company argued that:

> the Court of Appeal, while recognizing the good faith of the suppression of the Operating Director's workplace and its effectiveness, in the sense of the technical need to achieve a leaner chain of command and a leaner company structure, deemed necessary an additional element to justify the dismissal, that is to say the need to cope with adverse and not merely contingent situations which have a decisive impact on normal production activities or to bear considerable extraordinary expenses, pointing out, however, that the organizational restructuring had not the mere purpose of making a greater profit, but rather rendering more efficient and functional the company's management...

The argument continued that even if the suppression of the working position had been dictated by a mere choice in favor of a more economical management of the company, such a decision would nonetheless have been legitimate, under Article 41 of the Constitution, which grants the freedom of' the private economic activity.

The extremely complex ruling of the Court draws inspiration from the critical analysis of the reasoning set forth by the judges of the Florence Court of Appeal, taking into account previous rulings of the Supreme Court itself.

The contested judgment has its fundamental *ratio decidendi* in the principle according to which the dismissal for objective justified reasons includes the assumption that the organizational restructuring of the company implemented not only increases the profit, but also copes with adverse—and not merely contingent—situations that have a decisive impact on normal production activities or that force the company to bear considerable extraordinary expenses.

And indeed, as recognized by the judges of the Court of Cassation, this principle was affirmed in a number of rulings of the Court. Some of the decisions are recent.[1] The judges of the Florence Court of Appeal stated that the Court of Cassation had simply applied, in a strict manner, the principle according to which the factual assumption of an adverse economic situation of the company, regardless of the reasons raised by the entrepreneur and of their effectiveness, becomes a requirement of legitimacy intrinsic to the concept of dismissal for

[1] *See* Cass. 4146/1991, Cass. 21282/2006; Cass. 24307/2013, Cass. 5173/2015, Cass. 13116/2015.

objective, justified reasons. These reasons must be proved by the employer and verified by the judge.

Moreover, another guideline exists within the Court, under which the reasons pertaining to the productive activity, set out in Article 3 of Law 604/66, may derive also from "reorganizations or restructuring, irrespective of their purposes and so include reorganizations and restructuring to save costs or increase profits…."[2] Moreover,

> the assumption according to which the employer should prove the need to save costs by demonstrating the existence of adverse market conditions, since his independent choice is not enough, proves to be wrong… deeming differently … its legitimacy should be accepted only when it aims to avoid the bankruptcy of the company and not also to increase its profitability. This conclusion would be constitutionally impracticable and illogical. In micro-economic terms, in the long term and in a system of competition, the company that has the higher unit cost of production is destined to be expelled from the market.[3]

The Court of Cassation decided in favor of continuity, in order to consolidate the second guideline, according to which

> it is sufficient that the dismissal is determined by reasons pertaining to the productive activity, the work organization and the regular functioning of the company, including a greater management or production efficiency or reasons aimed at increasing the company profitability. Therefore, it is not necessary to face a negative economic trend or extraordinary expenses, as it is a worthwhile corporate purpose to safeguard competitiveness in the sector in which the activity of the company is carried out through the means, and thus the combination of the factors of production, considered most appropriate by the subject who assumes responsibilities even in terms of risk and negative financial consequences.

To arrive at such a conclusion, the judges of the Court of Cassation analyzed the case law of the Constitutional Court, without finding any precedent imposing a different interpretation of the rule in employment protection and, first of all, limiting the freedom of the entrepreneur (without prejudice to the insurmountable constraint under which the private economic initiative cannot be conducted in conflict with the social utility or in a manner that can endanger human dignity, security, and freedom).

Furthermore, even under the guidance of the European Union, the judges have not found any inconsistency. In fact, neither the Treaty on the Functioning of the European Union (Articles 151 and 153) nor the European Social Charter[4] require any other condition for the termination of the employment agreement apart from the right of the worker not to be dismissed without valid reasons, including the need for a better functioning of the company and a modification of the organizational structure.

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[2] *See* Cass. 10672/2007.
[3] *See* Cass. 13516/2016; Cass. 15082/2016
[4] Ratified by n. 30/1999

In this respect, the Court cited as an example and on the basis of precedents already examined, “the suppression of the working position of the worker made redundant, to the so-called outsourcing of its activity to third parties, to the distribution of the tasks of the worker made redundant to other workers of the company, to the technological innovation that makes its work superfluous.”

Despite a wide range of case examples, this does not mean that there is not or there should not be judicial control on terminations, but that this control is limited only to establish the respect of the legitimate requirements. Furthermore, the judicial control should not be extended to include the examination of the merit of the technical, organizational and productive assessments pertaining to the employer.

It is therefore undeniably an important position of the Court which, by this ruling, has not made a "Copernican Revolution" by creating a new case of dismissal for objective justified reason—the so-called “dismissal for profit"—but has now firmly clarified and confirmed that the reasons linked to the productive activity referred to in article 3 L. 604/66 (which can therefore serve as basis of a dismissal for objective justified reason) may simply result from the need for reorganization or restructuring, even in the absence of a business’ negative trend.

The shifting from a less social to a more liberal application of the law on dismissals by the Supreme Court has given grounds to enthusiastic comments in the media which considered such a judgment to be an open door to better competitiveness of the “System Italy.”

We partially share such a view, since we should not fail to remember that it is still up to judges to evaluate the effectiveness and the lack of good faith regarding the reason concretely offered as grounds for dismissal and the necessity of a causal link between the grounds claimed and the effective dismissal of the employee.

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