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THE STRANGE CASE OF THE REINSTATED EXECUTIVE

Comment on the order of the Court of Rome 26.02.2021



So, as feared by many, hoped by others, here is the first pronouncement by an Italian Court that freezes companies and adds further uncertainty in law, at a time when everybody is looking for certainty. One of the few certainties that we could afford until now was that Executives ("Dirigenti") constituted one of the few categories dismissable *ad nutum* and excluded from the protections provided by the Italian Law n. 604/66.

This certainty was also betrayed by a recent order of the Court of Rome, labor section, published on February 26, 2021, which held that the prohibition of dismissal established (almost a year ago) by art. 46 of the Italian Law Decree n. 18/2020, which has been extended several times, was also applicable to Executives. Consequently, the Court ordered the reinstatement of an Executive dismissed in July 2020 pursuant to art. 18 of the Labor Code. The order has been issued at the end of the special procedure for wrongful dismissals implemented by the so called "Fornero labor reform". Basically the Court has:

- **considered** that the "ratio of the freeze" on dismissals must be found in the need to avoid "provisionally" (!) the immediate suppression of jobs and that the category of Executives is the "most exposed to this risk";
- **considered** that it would not be "reasonable" to exclude Executives from such a freeze, also in view of the principle of equality (art. 3 of the Italian Constitution) and the fact that Executives are protected by the rules on collective redundancies; instead
- **affirmed** that the reference made by the Law Decree 18/2020 to art. 3 of the Law n. 604/66 should not be interpreted in the literal sense, but that a constitutionally oriented reading of the provision should be carried out.

With the same brevity used by the Judge to demolish our certainties, it is sufficient to point out that:

- 1) The Law Decree 18/2020 has clearly indicated that the only dismissals to be prohibited are those based on objective justified reason pursuant to art. 3 of the Law n. 604/66 " (see art. 46); and therefore:
 - i) since the Law n. 604/66 (see art. 10) does not apply to Executives, and
 - ii) since it does not make sense to speak about objective justified for dismissal of an Executive, to assert, as the judge in Rome did, that art. 46 of the Law Decree 18/2020 is also applicable to Executives is merely an interpretation *contra legem*.
- 2) Executives are not just any workers, in fact they may be dismissed *ad nutum*, but at the same time they have solid contractual guarantees provided by their respective National Collective Labor Agreements and, moreover, they also benefit from unemployment allowance ("NASPI"); they are not recipients of the Wages Guarantee Fund, which is the only "counterpart" that has allowed companies not to fail so far. That's why the Executives are excluded from the prohibition of dismissal: they cannot benefit from the Wages Guarantee Fund; and that's why there is no violation of art. 3 of the Italian Constitution.
- 3) Executives earn from the double to hundred times more than an employee: if the enterprise cannot cut not even this cost, it will be forced to close or to opt for redundancy at zero hours also for those employees or workers that until now have partially worked.

Also from the social point of view, the order in examination could have disruptive effects, as one may save an Executive and condemn 10 other workers could to the hunger.

In conclusion, while abroad some Courts (i.e. Court of Barcelona, Spain) begin to declare illegitimate the normative on the block of the dismissals since it is in contrast with the freedom of entrepreneurial initiative and with the EU Law, here in Italy even it is attempted to extend a legislative dictate also to categories pacifically excluded from such application. In this respect the entire productive field is frozen and many of those (moreover little) enterprises, that until now have survived to the disaster, are condemned to certain doom.

With good peace of our (former) certainties, also constitutionally guaranteed!