

## DISMISSAL DUE TO BUSINESS REASONS IN ITALY

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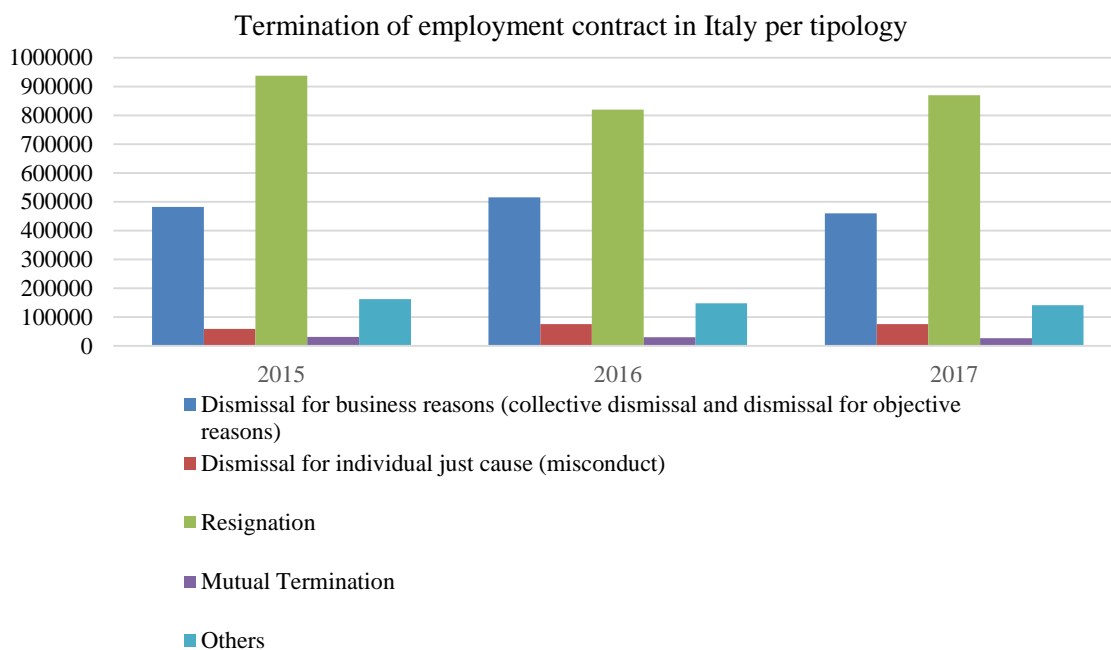
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### Introduction

Considering the latest statistics of the year of 2017 provided by INPS, dismissals for business reasons is the second most frequent type of termination of the employment contract in the Italian labour market, following the termination by will of the employee. It is worth mentioning that this type of dismissal has decreased since its peak in 2012. According to data provided by SISCO, in 2012 collective dismissals amounted to 96369 and the dismissals for objective reasons amounted to 830027. In 2017, they totalled 460530 (see the graph below).



Source: INPS, Osservatorio sul Precariato, Dati sui nuovi rapporti di lavoro, Report mensile Gennaio-Dicembre, 2017

A reflection on dismissals due to business reasons is not only important for its relevance in the labour market, but also because the Italian legislator has recently made some

important reforms on the legal framework for this kind of dismissal. To build a comprehensive framework of the dismissal due to business reasons in Italy, it is important to bear in mind two of the major labour market reforms in the Italian legal system, the first produced by Law number 92 of 28 June 2012 and the second by a series of legislative decrees promulgated during the year 2015 (so-called Jobs Act reform). Both these reforms redefined the sanctionatory framework for unlawful dismissals through a progressive reduction of workers' reinstatement and substitution for compensation schemes: currently the two different regimes coexist as the latter only applies to dismissals of workers hired after March 7th 2015. Moreover, the above-mentioned reforms had an impact on other aspects of the regulation of dismissals due to business reasons.

### **1. How are the causes that justify a redundancy or a dismissal due to business reasons defined?**

In the Italian legal system, "economic" dismissal refers to the dismissal for justified objective reasons, due to "*reasons inherent to the productive activity, the organization of work and the regular functioning of it*" (Article 3 of Law number 604, of 15 July 1966).

Therefore, the "economic" reasons do not refer to a misconduct by the worker, but to specific business reasons so that a certain job position is no longer needed. Two of the conditions required for this purpose are: a) the effectiveness of the business needs referred to in the motivation for dismissal; b) a causal nexus between these needs and the dismissal.

It must be specified, however, that the entrepreneurial management choices are not questioned by the judge, which must be limited to pronounce only on their realization consistency, by virtue of the principle of freedom of the private economic initiative laid down in article 41 of the Constitution. Furthermore, in the presence of general clauses, among which they are expressly understood also the rules on dismissal, "*judicial control is limited exclusively, in compliance with the general principles of the legal system, the establishment of the assumption of legitimacy and can not be extended to the merit side on evaluation, techniques, organizational and productive activities that belong to the employer*" (according to article 30, paragraph 1 of the Law number 183/2010). Law number 92/2012 also specified that failure to comply with the relevant provisions to the merit "*constitutes a ground of appeal for violation of the rules of right*" (article 1, paragraph 43).

On the other hand, it is possible to verify in Court the consistency of the dismissal with an organizational change in light of the technical rules of good organization: a dismissal would therefore be unjustified if, according to these 'rules', does not appear as an indefectible consequence of the unquestionable, technical-organizational choices or if it is not linked to the latter by a close causal link (for example dismissal of a worker not involved in a reorganization process).

**2. The business reasons that justifying the dismissal, must they concur in the entire company or only concur in the workplace where dismissal occurs?**

When the employer decides to order a dismissal for economic reasons, the technical, organizational and productive reason must affect the whole company and not only the workplace, where the dismissal occurs. The dismissal must be configured as an *extrema ratio* and, according to a consolidated jurisprudential orientation, the employer must demonstrate the non-existence of alternative positions not only in the employer's premises where the worker was used, but in all the offices of the company (also known as obligation of *repechage*, that will later on be explained in detail).

**3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in cases of redundancies (that is, when there is a collective dismissal)?**

The procedure to be followed is first and foremost different depending on whether the dismissal is individual or collective.

**3.1. Individual dismissal**

The dismissal must be communicated in writing indicating at the same time the reasons that determined it.

If the employer falls within the dimensional requirements of article 18 of the Statuto dei Lavoratori (Law number 300/1970), following the Reform of 2012, a further obligation of a procedural nature was established in the experiment of an attempt of conciliation before the administrative headquarters of the Territorial Labor Inspectorates (*Ispettorati Territoriali del Lavoro*, henceforth ITL). The employer must make a communication in which he declares his intention to proceed to the dismissal indicating the reasons, as well as any assistance measures for relocation of the interested employee.

The procedure is aimed at examining the existence of alternative solutions to the dismissal and must be completed within twenty days of the transmission of the

convocation by the ITL, unless the parties, of common notice, do not consider the reaching of an agreement.

For specific provision of the Legislative Decree number 23/2015 (article 3 paragraph 3), the above-mentioned procedure is not applied to the workers who fall under the application of the same regulation (in general, those hired after March 7th, 2015).

### 3.2. Collective dismissal

In the Italian legal system, there are two different kind of collective dismissal: collective dismissal resulting after a period of Extraordinary Wages Guarantee Fund (CIGS) (article 4, paragraph 1 of the Law number 223/1991) and collective dismissal due to a staff reduction (article 24 of the Law number 223/1991). As we will see in the next section, they have different requirements: however, they share the same collective dismissal procedure established by article 4, paragraph 2 and following.

Article 4, paragraph 2 and paragraph 3 of the Law number 223/1991 states that the procedure begins with the communication of the intention of the dismissal to the Unitary Workplace Union Structure (RSU) and to the associations belonging to the more representative confederations, the technical and organizational reasons that determine the need to reduce staff; the number, the company location and the professional profiles of the excess staff, as well as of the personnel normally employed; the implementation time of the staff reduction; any measures planned to deal with the consequences on the social plan of the implementation of the program: the method of calculation of all attributions other than those already provided for by current legislation and by contract.

The procedure, introduced by the first communication, can be divided into two phases: one, occasional and preliminary, and the other subject to the negative result of the first.

The first phase, so-called union phase, can take place at the initiative of the union within 7 days from the date of receipt of the communication and must, however, take place in a time frame not exceeding 45 days. This phase consists of a joint discussion between the employer and the union aimed at seeking an agreement that resolves in whole or in part the problem of surpluses (article 4, paragraph 5, Law number 223/1991). When this phase is over, two possible situations are set up: an agreement has been reached or the procedure was unsuccessful; in this second case the law provides for the opening of a further conciliation phase in the administrative area.

Once the whole procedure has been completed, which on the whole can not last longer than 75 days, if there is still a need to intimate all or only some of the redundancies initially provided for in the communication, the employer has the right to identify in concrete, the workers affected by the dismissal provision.

#### **4. How is the number of affected workers calculated in order to determine the individual or collective nature of the dismissal?**

In order to delimit individual dismissals due to objective reasons from the collective dismissal, the Italian legal system establishes a dimensional requisite for the collective dismissal (in harmony with article 1 of the Directive 98/59/EC of 20 July 1998). According to article 24, paragraph 1 of Law number 223/1991, for a collective dismissal due to a staff reduction there must be the intention to dismiss at least 5 workers in a timeframe of 120 days on a production unit or on distinct production units within the same province, as long as the enterprise has more than 15 employees. The cause of the dismissal must be unitary and due to a reduction or transformation of business activity (to be intended as the working and production factors used to fulfill business goals) or of the workload. This definition has a generally all-encompassing scope, so it must be considered to include also hypotheses in which the enterprise only reduces the workforce employed due to technological upgrades, without fulfilling a contraction of structures or activity (so-called technological dismissal), even just to reduce costs business.

However, if the dismissal results after the employer had access to Extraordinary Wages Guarantee Fund (CIGS), then article 4, paragraph 1 of Law number 223/1991 is applicable and the dimensional requirement no longer takes place: if the employer dismiss even only one employee, the dismissal is still qualified as a collective dismissal.

#### **5. Are there groups of workers who have priority in a dismissal for business reasons? Particularly, do workers' representatives have priority? And pregnant workers? Elder workers? Workers with family responsibilities?**

##### 5.1. Individual dismissal

Regarding the individual dismissal, there is no specific group of workers with protection against the dismissal. Nonetheless, the employer must respect the general rules regarding the principle of equal treatment, non-discrimination and other fundamental rights of workers in a protection period, such as pregnant workers, workers on paid leave, whether maternity leave, paternity leave, parental leave, marriage leave or sick leave.

## 5.2. Collective dismissal

In collective dismissal, the identification of workers to be fired must take place according to technical, productive and organizational requirements in compliance with the criteria set by collective agreements, according to article 5 of Law number 223/1991.

In lack of the latter, the choice must be made in compliance with the following concurring legal criteria: family loads; seniority; organizational and technical-productive needs. These criteria are not set in order of prevalence and they must be jointly evaluated with reference to each employee. With reference to the “family responsibilities” criterion, employees with family engagements should be given priority at the time of deciding whom should be kept in employment; in relation to seniority, priority to keep the job is given to employees who have higher seniority, but the nature of the criterion is still debated among scholars and courts.

The criteria covered by the collective agreement can be totally different from the purely supplementary ones identified by the law, but they must be equipped with the character of abstractness and cannot be, of course, discriminatory or violate some particular provisions dictated by law as mandatory (for example, the number of disabled persons’ subject to compulsory placement regulations cannot be less than percentages provided for by the Law number 68/1999).

The dismissal of a working mother is only possible in the case of termination of the activity of the enterprise, according to article 54 of the Legislative Decree number 151/2001. The company cannot also dismiss a percentage of female labor above the percentage of female labor occupied with regard to the tasks taken into consideration.

## **6. Are workers affected by a dismissal due to business reasons entitled to an economic compensation?**

In Italy in any case of legitimate termination of the employment relationship is recognized an indemnity called termination treatment (*Trattamento Fine Rapporto* or TFR), calculated by dividing by 13,5 of everything what the worker has received during the year on a non-occasional basis and with exclusion of the amount paid as reimbursement of expenses.

The amount obtained must be re-evaluated with the application of an annual increase composed of a fixed rate of 1.5% and more than 75% of the increase in the price index to the consumption recognized by the ISTAT (National Institute of Statistics). The

assumptions and the modalities for the payment of severance pay, before the termination of the relationship, are determined from the same article 2120 Civil Code and from Law number 53/2000. In some cases of insolvency or default, the employer is replaced in the payment of the TFR by a guarantee fund.

The worker will also be able to benefit from the unemployment benefits in order to ensure a gradual transition from the old to the new job position.

**7. What obligations does the company that carries out a dismissal due to business reasons have? In particular, is there the obligation to relocate affected workers within the company or the group of companies?**

As mentioned in the question 2, before proceeding to the dismissal the employer has to abide by the principle of *extrema ratio* of the dismissal, that is the employer must verify if the worker can be reallocated to an alternative position in the establishment where the worker was used, but in all the company premises.

Notwithstanding, a recent law change has brought a new relevance to this point, more concretely article 3 of the Legislative Decree number 81/2015 that modified the article 2013 of the Italian Civil Code. Under this new regulation, the employer can modify even if in a pejorative sense (in terms of category) the duties of the worker respecting certain conditions, something that is denominated as the *ius variandi in peius*. Following this modification, a doctrinal section question if the new provision entails an enlargement of the obligation of *repechage*, coherently to the enlargement of the power to change the tasks performed by the employee. Some interpreted the *ratio* of the Legislator with this attenuation of the principle of conservation of the workers' professionalism the intention of enlarging the principle of *extrema ratio* of the dismissal.

This discussion is far from over in the Italian doctrine and the jurisprudence will prove to be essential on the corroboration of this interpretation.

Obviously, in case the worker refuses the transfer to a different location, the obligation can be considered as respected, with consequent legitimacy of dismissal.

Whenever there occurs a termination of the employment contract not due to the worker, the employer has the obligation to pay a contribution to the social security that is defined yearly with the State Budget. As such, any employer that wants to dismiss either for objective reasons or collective dismissal has to pay the contribution. There is a possibility of aggravation in the case of collective dismissal when the employer

proceeds to the dismissal without an agreement with the trade union (mentioned in the question 3): in this case the contribution will be multiplied by three.

**8. What are the consequences that arise from breach or non-compliance with the legal procedure regarding dismissals due to business reasons? In which cases is the dismissal considered null (that is, that implies the worker's readmission)?**

8.1. Individual dismissal

As previously said, different regimes are applied depending on the date of hiring of the employee and on the size of the enterprise.

a) Employees hired before the 7<sup>th</sup> of March 2015:

- Independently of the size of the enterprise, the reinstatement is applied in the event that the objective dismissal is intimated in oral form and not in writing or if the dismissal is considered discriminatory or void for violation of other specific provisions (for example, those covering physical disability and dismissals in case of marriage). In these cases, the employee is also entitled to an economic compensation and can also decide to decline the reinstatement, which is substituted by the payment of 15 wages.
- If the employer has more than 15 employees in the productive unit or, in any case, more than 60 employees in the organization as a whole, if the reason behind the dismissal is deemed unjustified, the reinstatement protection is applied only if there is a "*manifest non-existence of the fact placed on the basis of dismissal for justified objective reason*" of the justification given by the employer for the dismissal due to business reasons. In these cases, the employee is also entitled to an economic compensation (lower than the one provided in the previous case) and can also decide to decline the reinstatement, which is substituted by the payment of 15 wages. In all the other cases of non-compliance with the regulation, the employee is only entitled to an economic compensation which varies according to type of violation.
- If the employer does not reach the threshold mentioned in the previous paragraph, according to article 8 of the Law 604/1966, when the dismissal due to business reasons is deemed unjustified, the employer can decide to re-hire *ex novo* the employee or to pay an economic compensation between 2,5 and 6 wages.

b) Employees hired after the 7<sup>th</sup> of March 2015:

- Independently of the size of the enterprise, the reinstatement is applied in the event that the objective dismissal is intimated in oral form and not in writing or if the



dismissal is considered discriminatory or void for violation of other specific provisions (such as, for example, those covering physical disability and dismissal in case of marriage). In these cases, the employee is also entitled to an economic compensation and can also decide to decline the reinstatement, which is substituted by the payment of 15 wages.

- If the employer has more than 15 employees in the productive unit or, in any case, more than 60 employees in the organization as a whole, when the dismissal due to business reasons is deemed unjustified, the employee is only entitled to an economic compensation that is determined according to the seniority of the employee (to the maximum of 24 wages). In all the other cases of non-compliance with the regulation, the employee is only entitled to an economic compensation which varies according to type of violation and the seniority.
- If the employer does not reach the threshold mentioned in the previous paragraph, when the dismissal due to business reasons is deemed unjustified, the employee is only entitled to an economic compensation that is determined according to the seniority of the employee (to the maximum of 6 wages).

## 8.2. Collective dismissal

### a) Employees hired before the 7<sup>th</sup> of March 2015:

The sanctions for non-compliance of the regulation are those provided by article 18 of the Law number 300/1970, according to the provisions of the article 5 of the Law number 223/1991.

The employee is entitled to reinstatement if there was a violation of the criteria established by law or collective agreement for the individuation of the employees to be dismissed and if the dismissal has not been communicated in writing. The employee is also entitled to an economic compensation that is higher in the latter case.

If there was a procedural violation, the employee is only entitled to an economic compensation.

### b) Employee hired after the 7<sup>th</sup> of March 2015:

The sanctions for non-compliance of the regulation are provided by article 10 of the Legislative Decree number 23/2015.

The employee is entitled to reinstatement only if the dismissal has not been notified in writing. In both the case of violation of the criteria established by law or collective

agreement for the individuation of the employees to be dismissed and of procedural violation, the employee is entitled to an indemnity determined according to the seniority of the employee (to the maximum of 24 wages).

**9. Are there specialties in the dismissal due to business reasons for microcompanies and/or small and medium enterprises?**

9.1. Individual dismissal

As explained responding to the previous question, different (that is, less onerous) regimes are applied for the non-compliance with the regulation of dismissal if the employer does not meet a certain threshold.

9.2. Collective dismissal

According to article 24, paragraph 1 of the Law number 223/1991, the collective dismissal can only be applied in enterprises with 15 or more employees, thus microcompanies and small enterprises that do not fulfill this requirement fall out of the scope of this dismissal.

**10. Is it possible to conduct a dismissal due to business reasons in a public administration? In this case, what specialties exist in regard to the definition of the business causes?**

It is possible to have the dismissal of the public employee due to business reasons. However, unlike what happens in private sector, the needs the employer's organizational arrangements give rise to the institution of the surplus of personnel and of the placement in availability. Consequently, the justified objective reason in the public employment refers exclusively to circumstances inherent to the worker himself: the interdiction from public offices, which may derive from a criminal conviction sentence; the physical incapacity, provided that it is not possible to frame the worker in equivalent levels or even lower ones.

Contrary to the private sector, in the public administration the judge can verify the merit of the dismissal and the criteria utilized, as they constitute administrative acts, being contestable for incompetency, violation of the law or misuse of power.

## 11. Other relevant aspects regarding dismissals due to business reasons

On the category of dismissal due to business reasons, there is an ongoing debate caused by a recent jurisprudence trend on the definition of its nature, that is the dismissal based on objective grounds does not limit itself to factual prerequisite like situations of crisis on the enterprise, thus not supporting a literal interpretation of article 3 of Law number 604/1966. In the decision number 25201 of December 2016 of the *Cassazione*, the Court stated that foundations related to greater managerial or productive efficiency (or even grounds of intended increase in company's profitability) may be considered to justify the dismissal, that determine an effective change in the organizational structure by deleting an identified working position, thus putting aside the thesis of the negative economic performance of the company as *sine qua non* condition for the dismissal.

The Court revolved around article 41 of the Italian Constitution, regarding the free economic initiative of the employer, concluding that the employer has the choice of the best combination of the productive unit functioning in order to increase production and the choice of setting the dimension of the occupational dimension of the enterprise, choices that cannot be questioned by third parties, like a judge. As such, the Court affirmed that the role of the judiciary will be limited to the control of the concrete consistency of the motive given by the employer.

The decision has raised different voices by the scholars and it is not possible to say if this interpretation will consolidate in Court in the future.