



HIGHLIGHTS 2024

EDITORIAL

Over the past year, multiple names have been assigned to events impacting the human capital of companies. We are talking about a dynamic that has always been present in the organisation of companies, but which has now taken on such a quantitative importance that it deserves the attention of the media.

To give a quick definition, in recent months HR professionals have been talking about great resignation, subsequently of quiet quitting and in recent weeks quiet firing. The strategic importance of people for a company's competitive success is widely recognised, but events have led to the conclusion that it is no longer possible to ignore the changing staffing needs that underlie the quantitative increase in resignations recorded during 2022. The reason for this attention can be found in the quarterly data published by the Ministry of Labour regarding the number of resignations recorded during the year - in September 2022, there were already 1,500,000 resignations, an increase of around 22% compared to the previous year - and, perhaps even more significant, in the data on the average length of time employees stay in a company, which decreases dramatically depending on the age group considered - from 7 years for Gen X to 2 years for Gen Z. In short, the motto is always the same: put people at the centre to relaunch companies. This is nothing new for Trifirò & Partners, a firm that has always been convinced of the centrality of the human contribution in every aspect of economic activity and of the importance of each person's participation in the challenges and successes of the company, overcoming obstacles and celebrating successes together.

The primacy of the human being in the world of work is fully reflected in T&P's approach, where the human being is strategic and invaluable. People-to-people communication is fundamental to the success of the services we provide to companies, making the complex legal implications of their strategies tangible and understandable to management. The many legal and communication activities that 2024 has in store for the firm are united by the motto "people first". To give just a few examples, we can think of the patient daily scientific production and constant updating of new regulations, in which the collective and transversal contribution of all the Firm's colleagues, without exception, plays a leading role. Nor can we ignore the challenge that T&P has successfully taken up in integrating predictive algorithmic and AI systems within its processes, thus enabling solutions that are increasingly integrated and adapted to the needs of each client. We are also very proud of the attention given to mentoring, aimed at promoting the creation of value with the contribution of different generations of colleagues, in the knowledge that diversity is a real asset in creating an innovative and stimulating working environment for T&P's professionals and stakeholders. All this and much more makes up the complex framework of the human culture that makes the T&P brand unique. A culture that is not confined to these pages, but which every day helps to define the daily work and "technical dimension" of each T&P professional, thus ensuring the quality and timeliness of the legal assistance provided.

CHANGES AND BUSINESS RESTRUCTURING: USER MANUAL

BY MARINA OLGIATI

Redundancies are always a hot topic in employment law. Companies report that it is increasingly difficult to proceed with dismissals when only a single sector or department needs to be reorganised, and the reorganisation results in the need to suppress job positions. Can you explain why?

The reasons for this are related to recent court rulings which, in the case of individual dismissals, have extended the so-called “obligation of re-employment”, i.e. the obligation of the employer who decides to eliminate jobs to prove that the employee whose job is being abolished cannot be placed elsewhere within the company, in order to avoid the risk of the dismissal of this employee being declared unlawful in the event of litigation.

While it is true that the employer is free to determine the size of his business according to his needs, it is also true that the courts have felt the need to temper this freedom in order to protect workers and their interest in keeping their jobs, by introducing the obligation to consider whether there are alternative employment opportunities within the production context before proceeding with the dismissal. An employer who fails to do so may face serious consequences, including the obligation to reinstate the dismissed employee, depending on the employment protection regime applicable to the specific case.

Given these decisions, how should a company behave in order to avoid such risks?



With regard to an employee whose position is being suppressed, the employer must first check whether there are any positions of the same level and category to which the employee can be transferred. According to recent case law, the employer must also check whether there are any positions at a level even immediately below the employee's, even though they are outside the employee's job description. Furthermore, other court rulings have even required that before dismissing an employee, the employer should not only consider the situation at the time of the reorganisation, but also the foreseeable employment environment in the near future. The situation must therefore be carefully examined and assessed.

And in cases where companies intend to reorganise or restructure with collective layoffs, what is the “current state of affairs”?

Just a few days ago, the Constitutional Court issued a ruling (ruling no. 7/2024) on the constitutionality of a provision of the Jobs Act concerning an open-ended contract with increasing protection; this provision states that if the employer - in the context of a collective redundancy - violates the so-called selection criteria, the consequences are only of a compensatory nature. As a result of this regulation, after the Jobs Act, a double situation has arisen in the event of non compliance by the employer with the selection criteria when resorting to collective layoffs: the situation of the workers whose relationship is governed by Article 18 of the Workers' Statute, who are entitled to reinstatement, and the situation of those hired under the Jobs Act, who are only entitled to compensation.



The Constitutional Court's decision was based on several technical and legal aspects. The most important, however, is the fact that the judges ruled that the double regulation described above does not contradict the principle of equality, and therefore, in the case at hand, if the company makes a mistake in the selection of the employees to be dismissed, it does not risk having to reinstate them if the unfairly dismissed employee was hired after 7 March 2015.

Dismissal for exceeding the so-called “periodo di comporto”, i.e. the protected period, also no longer seems to be easily applicable. Can you confirm this?

It is true. The courts have also become more rigorous in this type of dismissal, in order to protect the disabled and “fragile” individuals.

Some decisions have gone so far as to consider the dismissal of a disabled person to be null and void, even if it was notified in accordance to the rules established in collective agreements. In fact, it has been considered that it is not possible to apply to disabled workers the same period of protection as that provided by the collective agreement for sickness in general; according to these decisions, a collective agreement that does not provide for this difference amounts to indirect discrimination. As we can see, there are few certainties on this subject and it is therefore advisable for a company to seek legal advice in order to reduce any margin of risk.

In this context, how do you see the role of the employment lawyer in dealing with companies in a labour market that is changing significantly?

The labour market is undergoing profound changes that require companies to meet unprecedented demands: just think of remote working, the need for continuous training of workers to cope with technological innovation, the end of the idea of a permanent position.

Data shows that more than 50 per cent of managers are pursuing strategies for employee well-being. The themes are well known: social policies that help to balance life and work, inclusion policies that aim to bridge the gender gap in the workplace, social sustainability policies, and remuneration policies based on participation in the company's results. Achieving these objectives is mostly left to collective bargaining. In this context, the role of the employment lawyer is crucial to provide the appropriate support in identifying and implementing objectives in compliance with regulations. Finally, in our sector, a lawyer must have the appropriate technical expertise to assist companies not only in the “pathological” phase of the issues to be dealt with, but also to support them thoroughly in the pursuit of their projects. In this regard, we have assisted our clients on a wide range of issues, from the management of complex reorganisation processes to the drafting of company agreements (including welfare agreements), from the sale of businesses to contracts for the performance of non-core activities, to name but a few.







PREVENTION IS FAR BETTER THAN CURE

BY VITTORIO PROVERA

Why is it so important to get preliminary legal advice?

Thanks to the experience gained during the plague in the Republic of Venice at the beginning of the 18th century, Bernardino Ramazzini, a social medicine practitioner and visionary, was the first to assert that “prevention is far better than cure”, but he went unheeded for a long time.

Why is this reference relevant today?

In today's ever-changing, increasingly complex and regulated productive economic environment, the provision of legal advice to companies in the areas of employment, corporate and commercial law is essential to enable them to operate in compliance with laws and regulations, including EU legislation, and seize all opportunities and access financial contribution.

Why should companies consider legal advice to be a priority?

With the assistance of specialist corporate advisory firms, companies can adopt the most effective policies and strategies to protect their interests and avoid litigation. This will also allow them to face any disputes from a position of strength, having prepared and adopted effective contractual models or made production, commercial or organisational decisions in line with the regulatory requirements and the needs of the company, thus limiting the risks of their conduct infringing the applicable legal provisions.

What has been the evolution of your consultancy work?

In recent years, the Firm has significantly developed its structure, which is dedicated to providing companies with tailor-made advice in the areas I have mentioned, which are of vital importance. In particular, during the year under review, a number of transactions involving the sale and acquisition of companies or businesses were accompanied, in which the firm handled all the relevant stages, from due diligence, information and discussions with the trade unions, to the drafting of preliminary and final sale and purchase agreements, with the support of accountants and financial advisors. During these transactions, we have also tried to provide the necessary assistance to improve certain aspects from a legal point of view, in relation to contracts, corporate governance, the adoption

of welfare systems and tools, etc.

In what other sectors has business consultancy developed?

We have seen a significant increase in our advisory services, for example on the redefinition of governance in family-owned businesses. These companies represent around 90% of Italian businesses and generate 80% of GDP.

The assistance provided by the Firm is aimed at identifying the appropriate governance policies as well as suitable corporate structures to reconcile the dynamics of the company (characterised by meritocracy and efficiency) with those of the family, in view of generational change. All this in order to preserve the key success factors of these companies, i.e. agile governance, competent leadership and the preservation of the corporate culture.





LEGISLATIVE UPDATES AND NEW BUSINESS REQUIREMENTS

BY MARINA TONA

What are the most common topics that companies bring to an employment lawyer?

As a rule, an employment law advisor will assist in the overall management of the employment relationship, from its inception, through the many issues that may arise during its course, to the final phase of the relationship. Requests therefore range from the drafting of employment contracts, especially for senior positions, in which special clauses such as non-competition or stability pacts, golden parachutes, etc. need to be included, to the drafting of letters of dismissal, which require an in-depth analysis of the specific situation and careful preparation of the relevant documentation, whether motivated by organizational reasons or disciplinary infractions.

Other topics in which we are often called upon to inter-

vene are those relating to corporate changes (mergers, spin-offs, transfers of companies or branches), which have a significant implications for the management of labour relations, collective dismissal procedures, contract management, etc. In short, the assistance of a labour and employment lawyer has a wide scope of action.

What is one of the issues you have been asked to deal with most frequently in the past year?

One of the issues that has often been brought to my attention is the possibility of investigating employees suspected of unlawful conduct.

Court rulings on this issue are not consistent, but the prevailing view is that it is legitimate for investigative bodies to carry out so-called “defensive” checks, i.e. checks aimed



at verifying whether the employee is engaging in illegal conduct, even if not criminally relevant, as long as there is suspicion that such behaviour is ongoing. However, the Court of Cassation recently ruled that the dismissal of an employee on the basis of the results of defensive controls carried out by the company was unlawful, citing a violation of an article of the Code of Ethics relating to the processing of personal data in the course of defensive investigations.

According to this code the appointed investigator may only rely on delegates named specifically in the investigative mandate. Consequently, the Court of Cassation declared the results of the investigation inadmissible, stating that the fact at issue in the disciplinary proceedings did not exist from the outset.

What other topics were of interest?

Another topic that has given rise to questions and requests for in-depth analysis, also in the light of judicial initiatives that have received considerable media coverage before the summer of 2023, relates to the management of tenders, in particular the so-called “in-house” tenders, i.e. those relating to activities that are closely linked to the client’s overall production cycle, which are frequently used by companies for flexibility and organisational advantages. Contracts are often a source of controversy for trade unions and employees, who complain about the application of economic and regulatory treatments that are less favourable than those that should be applied, which is the reason for the client’s solidarity obligation under Article 29 of Legislative Decree 276/03, or even the fictitious nature

of the contract, with the consequent claim that the employment relationship should be established directly by the client.

As prescribed by the aforementioned article 29 and as taught by the case law, a genuine contract is one in which, in short, the contractor is entrusted with the pursuit of a result that is autonomous in itself, to be achieved through an effective and autonomous organisation of work, with the contractor effectively exercising its managerial power and control over its employees, using its own resources and assuming business risk. An unlawful interposition of labour is one in which the managerial and organisational power is entirely entrusted to the principal.

It is precisely with regard to this last aspect that a number of recent judgments on the merits have derived the proof of the hetero-direction by the principal of the contractor's employees from the use, in the performance of the works contracted, of automated systems or computer applications provided by the client, through which - the courts have argued - the principal himself exercised a power of

control over the performance of the contractor's employees by giving instructions for the planning and organisation of the activities.

In your opinion, what has been the most significant legislative intervention in labour law?

In terms of its impact, one cannot help but recall the so-called Labour Decree, which came into force in July 2023 and once again amended the discipline of fixed-term contracts dictated by Legislative Decree No. 81/2015, previously amended by Decree-Law No. 87/2018, and by the so-called Support Decree bis.

The Labour Decree amended the grounds for the use of fixed-term contracts - which can be freely used for the first 12 months without any justification - beyond the first 12 months and within 24 months, in order to allow for a more flexible use of this type of contract (it can now be used in the cases provided for in national, regional or company collective agreements concluded by relatively more representative trade union confederations at national level and in company collective agreements, in the absence of specific provisions in the collective agreements applied in the company, and in any case until 30 April 2024); in the absence of specific provisions in the collective agreements applied in the company, and in any case until 30 April 2024, for technical, organisational or productive needs identified by the parties; to replace other workers) and provided that the contract can be freely extended and renewed during the first twelve months and thereafter only under the above conditions. The decree then specifies that, for the purpose of calculating the 12-month period, only contracts entered into on the date of entry into force of the decree itself, i.e. 5 May 2023, will be taken into account. These are significant changes that may actually facilitate the use of this type of contract, which is still particularly frowned upon, despite being one of the main instruments of flexibility for companies, although in my opinion the risk of litigation remains high for contracts lasting more than 12 months, especially in the absence of collective agreement provisions.





And what do you see as a missed opportunity?

The Labour Decree was also supposed to include a provision stating that if an employee's unjustified absence exceeds the period specified in the collective agreement applicable to the employment relationship or, in the absence of a contractual provision, longer than five days, the unjustified absence would be treated as a voluntary resignation, with the consequent loss of the employee's right to the NASpl allowance and the employer's exemption from paying the dismissal notice. Unfortunately, this provision did not make it through the parliamentary process and was not implemented at the conversion stage. This is a

missed opportunity, as unjustified absence as a means of obtaining dismissal and hence the right to NASpl is unfortunately widespread in all sectors, so much so that the provision has been re-proposed in a new bill now before Parliament.

However, while awaiting legislative intervention, it is worth noting that some judges have ruled that absenteeism without any justification, in order to induce the employer to resort to dismissal for unjustified absence, constitutes reprehensible behaviour that, under certain conditions, constitutes the case of resignation by conclusive act, even without complying with the telematic procedure required by law.







2023 DEVELOPMENTS AND CONSIDERATIONS, FORECAST FOR 2024

BY STEFANO TRIFIRO

What are your expectations for 2024?

It's fair to say that 2023 ended on a high note, and early 2024 looks set to follow suit.

What are the hot topics?

Issues that arose during and after the Covid-19 pandemic, such as remote work arrangements, occupational health and safety, and productivity, continue to be hot topics.

Is corporate welfare a driver for change?

It certainly is. Companies are increasingly putting people, their human capital, at the centre of their production processes, and are aware that sustainable working conditions and quality of life lead to better results.

What can labour lawyers like your Firm do to stop climate change?

The introduction of new models and working methods, without the need to work from the office on a fixed schedule, and above all the study of new forms of "tailor-made" remuneration for the service provider, will all contribute to limiting the phenomenon of global warming, in the sense that new rules and behaviours aimed more at saving energy will undoubtedly lead to a slowdown in CO² emissions.

LEGAL ATLAS 2024

EMPLOYMENT AND SOCIAL ISSUES 2024

A photograph of three people in a library or law office. On the left, a man in a suit is looking at a laptop. In the center, a woman with long blonde hair is smiling and looking at a document. On the right, another man in a suit is looking at the same document. They are surrounded by bookshelves filled with books. The entire image has a red tint.

LAST YEAR'S JURISPRUDENCE
IN THE FIELD OF LABOUR LAW

When assessing the employee's redeployment options before dismissing him, the employer must also take into account positions that are still occupied but will become vacant within a very close timeframe to the date of the notice of dismissal. (Court of Cassation, Labour Section, 8 May 2023, no. 12132).

The Court of Cassation stated that, in accordance with the principle that the employer's conduct must be characterised by good faith and fairness, when making a concrete assessment of the existence of vacant positions in the company to which the employee whose employment has been terminated can be transferred, the employer must take into account those positions which, although occupied, will become vacant in the near future in the period close to the notice of dismissal to be given (in the case in question, the vacant positions in the near future were those of two employees who had resigned and were serving their notice period).

Harassment within the meaning of Article 26 of Legislative Decree no. 198/2006 is an unwanted conduct based on sex, which has the purpose or effect of violating the dignity of a female or male worker and of creating an intimidating, hostile, degrading, humiliating or offensive environment, even if it does not result in actual physical aggression of a sexual nature. (Court of Cassation, Labour Section, 31 July 2023, no. 23295).

The Court of Cassation held that in order for the employee's conduct to constitute "sexual harassment" within the meaning of Article 26 of Legislative Decree no. 198/2006, and thus to justify disciplinary dismissal, it is irrelevant both that there is no offensive intent towards the colleague who is the victim of the sexual innuendo (uttered in a generally joking company context and based on reciprocal jokes) and that the recipient of the joke could not have feared a physical attack, since harassment occurs even if the employee uttered phrases that "have the effect of violating the dignity of a female or male worker and of creating an intimidating, hostile, degrading, humiliating or offensive



environment". (In the case in question, the Court held that the dismissal of an employee who had made verbal and physical allusions of a sexual nature to a colleague was lawful, even though this behaviour had not been followed by actual physical aggression of a sexual nature).

An employee who is absent due to illness is entitled to request the use of accrued and unused leave in order to suspend the running of the protected period, since there is no absolute incompatibility between illness and leave, without this entitlement being accompanied by an obligation on the part of the employer to grant the request if there are organisational reasons of an obstructive nature (Court of Cassation, Labour Section, 21 September 2023, no. 26997).

In the case referred to the Court of Cassation, the Supreme Court, faced with an employee's request to convert sick leave into vacation days, confirmed that the employer - who is entitled to decide on the time of the holiday with a view to balancing the various interests at stake and in compliance with the general principles of fairness and good faith - may refuse the employee's request, but only if such refusal is motivated by "concrete and actual" reasons, which cannot consist of mere general references to "organisational needs".

Straining is different from mobbing because it lacks continuity, but it is still covered by Article 2087 of the Civil Code, so that if straining is established and not mobbing, the claim for damages must be granted in any case. (Court of Cassation, Labour Section, 19 October 2023, no. 29101).

In the specific case, the Court of Appeal had refused to award the manager damages for harassment, despite finding that there were "stress-generating relationships" within the company, on the grounds that there was no evidence that the harassing behaviour had been repeated "as it was an isolated episode". The Supreme Court, on the other hand, ruled that "beyond the taxonomy and

qualification of bullying and harassment", what matters is that "the act committed, even if it is a single case, is unlawful under article 2087 of the Italian Civil Code, which has led to the violation of the protected interests of the worker (her psychophysical integrity, dignity, personal identity, participation in social and political life)".

The limitation period for claims for remuneration by employees in the public service under contract, both in permanent and fixed-term employment and in successive fixed-term contracts, runs from the day on which they arise, for claims arising during employment, and from the date of termination of employment for claims arising after that date. (Court of Cassation, joint sections, 28 December 2023, no. 36197).

The United Sections of the Supreme Court of Cassation have intervened in this matter, definitively denying that there is full parity between contractual relationships in the private and public sectors, and confirming that the limitation period for workers' claims for remuneration under a public sector employment contract, both permanent and fixed-term, runs from the date of its inception (even if the employment relationship is ongoing). This is because, in the case of permanent contracts, the stability of the relationship does not give rise to a claim against the public administration for non-renewal of the contract. In fixed-term contracts instead, the non-renewal of the contract does not constitute a "fear", but rather an apprehension, which cannot be considered a protectable subjective right, but rather a mere factual expectation, which cannot be invoked in court because it is legally irrelevant.











Trifirò & Partners
avvocati

MILANO | ROMA | PADOVA | TORINO | TRENTO | PARMA | BERGAMO

CORRESPONDING STUDIES IN THE COUNTRIES OF THE EUROPEAN UNION, UNITED KINGDOM, UNITED STATES, CHINA AND ARAB EMIRATES

www.trifiro.it |   