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COLLECTIVE REDUNDANCIES IN ITALY

Preface

While individual dismissal only produces its effect in the legal sphere of the recipient worker, collective dismissal for staff reduction has an additional impact on civil society resulting in an increase in unemployment levels.

The social consequences of restructuring are not forgotten by Italian laws which enhanced employee rights to counterbalance management's freedom to restructure.

In addition to the individual interest of the dismissed worker, the theme of collective dismissal affects "many interests": the interest of the "labor collective" which is not party to the employer's initiative and the interests of the unions which are institutionally concerned with the events of undertakings.

That is why the matter of downsizing has always been accompanied by a series of instruments. On one hand, these have tried to stem the number of redundancies and on the other to contain the consequences deriving from the same, always in compliance with the essential provisions of Article 41 of the Italian Constitution that prevents any assessment of the validity of business decisions.

One of the most effective instruments in this direction is certainly represented by the trade union preventive procedure which, by stimulating

the comparison between entrepreneurs and trade unions, may allow the taking of alternative solutions to dismissal.

In this context, the function of labour law is to lay down the legal rules that guarantee equitable restructuring processes, by minimizing as far as possible the negative effects of collective dismissals on individuals, enterprises and the community as a whole.

Legislative evolution of the collective dismissals

Law 23 July 1991, no. 223 (*Rules on the Wages Guarantee Fund, redundancies, unemployment benefits, enforcement of European directives, job placement, and other labour market provisions*) regulated the matter of redundancy for the first time, hitherto left to Inter-confederal agreements for the industrial sector in 1947, 1950 and in 1965 which provided a conciliation procedure between trade unions and employers' associations, and selection criteria for the employees to be made redundant.

Until the entry into force of Law 223/1991, collective dismissals for reasons of personnel reduction were excluded from the relevant legislation on dismissals (Article 11 Act 604/1966, as modified by Article 6 of Law 108/1990).

Law No. 223/1991 introduced the first organic framework for collective dismissal and was modified, *inter alia*, by Article 8 paragraph 4, Law 236/1993, Articles 1 and 4 Legislative Decree n. 151/1997, Legislative Decree n. 10/2004, Article 1, paragraphs 44,45,46 of Law 92/2012, Article 16 of law 161/2014 and Legislative Decree N. 23/2005.

The above mentioned law provides, *inter alia*: the qualitative/quantitative definition of collective dismissals, defines the procedure for consultation of workers' representatives and notification to the competent public authority, provides the obligation for the employer to consider other measures before termination of employment and the criteria for the selection of employees to be dismissed.

In other words, Law 223/1991 governs the procedure, formal tasks, preconditions and consultation with trade unions if a company decides to initiate collective dismissals.

The Community discipline

On 17 February 1975, the Council of the European Communities adopted Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, which was subsequently amended by Council Directive 92/56/EEC of 24 June 1992. Directive 75/129 was repealed by Directive 98/59.

According to the above Directive, collective redundancies means dismissals effected by an employer for one or more reasons that are not related to the individual workers concerned.

The above Directive provides that where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.

To enable workers' representatives to make constructive proposals, the employers shall, in good time during the course of the consultations, supply them with all relevant information and in any event notify them in

writing of, inter alia, the reasons for the planned redundancies, the number of categories of workers to be made redundant, the number and categories of workers normally employed, the period over which the planned redundancies are to be effected, and the criteria proposed for the selection of the workers to be made redundant.

The Italian Republic has been condemned twice (on June 8, 1982 and on November 6, 1985) by the European Court for not having adopted within the prescribed period the measures needed in order to comply with council directive 75/129/EEC of 17 February 1975.

The European Court of Justice (Third Chamber) in the case C-235/10 with Judgment dated 3rd March 2011 ruled that Articles 1 to 3 of Council Directive 98/59/EC of 20 July 1998 must be interpreted as applying to a termination of the activities of an employing establishment as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency, even though, in the event of such a termination, national legislation provides for the termination of employment contracts with immediate effect.

The European Court of Justice (Second Chamber) in the case C-385/05 with Judgment dated 18 January 2007 stated that Article 1(1)(a) of Council Directive 98/59/EC of 20 July 1998 must be interpreted as precluding national legislation which excludes, even temporarily, a specific category of workers from the calculation of staff numbers set out in that provision.

In Case C-44/08, the Court on 10 September 2009 stated that Article 2(1) of Directive 98/59, read in conjunction with the first subparagraph of Article

2(4) of that directive, must be interpreted to mean that, in the case of a group of undertakings consisting of a parent company and one or more subsidiaries, the obligation to hold consultations with the workers' representatives falls on the subsidiary which has the status of employer only once that subsidiary, within which collective redundancies may be made, has been identified and that in the case of a group of undertakings, the consultation procedure must be concluded by the subsidiary affected by the collective redundancies before that subsidiary, on the direct instructions of its parent company or otherwise, terminates the contracts of employees who are to be affected by those redundancies.

The above directive incorporates a number of exceptions relating to fixed-term contracts, contracts which are task related and where the tasks have been completed, public administrative bodies, establishments governed by public law and crews of sea-going vessels.

Collective dismissal and extraordinary redundancy fund

To alleviate the negative effects of collective dismissal, a body called the Wage Guarantee Fund (*Cassa Integrazione Guadagni*) was created to protect employees' wages in the event of a company experiencing a crisis or undergoing restructuring.

Law 223/1991 identifies two cases of collective dismissal. The first, governed by Article 4 *et seq* (mobility procedure), is called laid off workers' mobility scheme and refers to cases in which the employer, having already implemented layoffs with intervention of *Cassa integrazione guadagni Straordinaria* (Extraordinary Wages Guarantees Fund or Extraordinary

Redundancy Fund¹ resulting from restructuring needs or temporary crisis) believes that it cannot absorb all the workers admitted in such income guarantee scheme and that alternative measures to reabsorb redundant staff cannot be used (so-called mobility dismissal / dismissal in mobility²).

The second, governed by Article 24, is called collective dismissal for staff reduction which is used without a prior intervention of *Cassa integrazione guadagni Straordinaria*. It consists in “reduction or transformation of the activity or job” or “cessation of activity” (casual element). The two hypotheses – mobility procedure and collective dismissal for staff reduction - must be distinguished, being two separate features of the conduct of employers³.

The definition of collective dismissal

Collective redundancies have an objective numerical requirement, referring only to cases where the employer wishes to make at least 5 redundancies in the period of 120 days, due to the same reduction or transformation of the activity or job in each production unit, or several production units in the territory of the same province.

¹ The reform of such wage subsidies took place recently with Legislative Decree N. 148/2015 in implementation of Delegated Act no. 183/2014.

² The placement of surplus staff on the mobility scheme pursuant to Italian Law 223/91 is actually a dismissal with notice. The notice period to be granted to employees depends upon the employee’s level and seniority. The National Collective Agreement applied by the employer usually provides for specific terms. During the notice period, the employee must continue to perform his/her duties. It is possible, however, to exempt the employees from working during all or part of the notice period. In such a case the employee is entitled to an indemnity in lieu of notice; the sum the employee will receive is equal to the aggregate salary that the employee would have been entitled to receive had he/she been working during the notice period. The payment of the indemnity is subject to social security contributions.

³ In this sense, among others, see Court of Cassation June 27, 2000 n. 461; Court of Cassation December 2, 2009 n. 25553.

The specified requirement must exist at the time of activation of the collective dismissal procedure, it being possible that the outcome of the joint examination (employer/unions) allows the employer to distribute layoffs over a longer period of time.

The dismissals attributable to a restructuring choice but which are below the numerical threshold shall be considered for objective justifiable reasons.

The concept of “downsizing” can be considered as a stable and not transient reduction of productive activities which, without entailing either a transformation or elimination of organizational structures or materials, exclusively or predominantly concerns only one of the business factors, namely the so-called “personal” element, that is to say, the plurality of employees in the undertaking⁴.

The reference to the activity transformation requirement also makes clear the inclusion of “technological redundancies” in the legal provision. The law explicitly includes cases of complete cessation of business (Article 24 paragraph 2) under collective redundancy.

The concept of collective redundancy does not include: expiration of fixed-term employment relationships, the end/completion of work in the building sector, the end/completion of works, i.e., termination of tender contracts in the service, seasonal and occasional work sectors. Neither does it include activities in which the resizing of the workforce is physiological and predictable (Article 24 paragraph 4 Law 223/1991).

⁴ Among others, Court of Cassation N. 599 of 22.1.1994.

The difference between collective dismissal and individual dismissal for objective reasons as defined by Article 3 of Law no 604 (reasons concerning the production, the organisation of work and the regular functioning of the same), can be mainly seen in the *proceduralization* process of collective dismissal⁵.

As mentioned above, the discipline of Law no. 223 of 1991 is applicable in all situations in which the employer has planned a reorganization of its business, resulting in at least five redundancies over a period of one hundred and twenty days.

According to case law, in order to exceed the threshold of five units it is necessary to refer to the employer's program; indeed, it is of no relevance that the number of dismissals actually made is less than five.

Another question to ask is whether in reaching the above threshold, other than dismissal, there may also be added any retirements (with or without incentives) or consensual employment resolutions, that in some way are related to the reason for the company downsizing. As regards the application of general principles to the numerical threshold, any

⁵ A major controversy concerns the scope of judicial control when the employer justifies the dismissal – individual, but also collective – on grounds pertaining to the organisation of the enterprise or the functioning thereof. The traditional prevailing opinion is that the Courts can only judge as to whether the reasons advanced by the employer actually warrant the single (or collective) dismissal, and have no power to judge as to the merit of the employer's decisions, duly covered by the constitutional guarantee of free enterprise (Article 30, paragraph 1, Law no. 183/2010). The requisites that must be fulfilled are basically as follows: the technical or organizational reasons cited by the employer in support of management decisions actually exist; and that dismissal is the necessary consequence of these decisions. The key issue in distinguishing between the legitimacy and illegitimacy of any such dismissal is the effectiveness of that stated in the motivation for dismissal.

termination agreement made solely to avoid the activation of procedures is to be included.

As stated in some judgements, less certain is the cumulation also of resignation or consensual resolutions in the absence of any fraudulent or abusive intent.

Scope of applicability

Article 24 of the law 223/1991 states that the discipline of collective redundancies applies to undertakings employing more than fifteen employees or, with regard to the placement in mobility, which still have occupied more than fifteen workers in the six months preceding the request for access to *Cassa integrazione guadagni Straordinaria*.

The European Commission alleged that the Italian Republic had not correctly implemented Directive 98/59 in relation to the persons to whom it applies. Whereas the directive applies to collective redundancies effected by an employer, the provisions of Law No 223/91 referred exclusively to collective redundancies effected by undertakings or traders who may be categorised as entrepreneurs within the meaning of Article 2082 of the Italian Civil Code.

Following the Judgment of The Court (Second Chamber), dated 16 October 2003, Legislative Decree N. 110/2004 was issued. This modified Article 24 of Law 223/1991 in the sense that it includes in the sphere of application of the discipline, employers and/or non-entrepreneurs with more than fifteen employees for each production unit, including no profit oriented organisations (“*organisation of tendency*”) which perform political, trade-

union, cultural, religious activities. It should be noted that there is no explicit exclusion regarding public administration.

To such employers and/or non-entrepreneurs, there apply Articles 24 (specified conditions for legitimate collective redundancies), Article 4 (trade union consultation) and Article 5 paragraph 1 (criteria of selection of the personnel), but not Article 5 paragraph 3 on the system of sanctions, with the consequence that any eventual infringements of the rules on the selection criteria determines the application of a “weak protection” against unlawful dismissal (article 24 paragraph 1-quarter Law 223/1991).

By Article 8 paragraph 2 Law N. 263/1993, Articles 1, 4 and Article 24 of Law 223/1991 have been extended to worker members of producers’ and workers’ cooperative societies.

Therefore, the employers whether entrepreneurs or non-entrepreneurs with less than 16 employees are excluded from the discipline on collective dismissal.

Certainly, Law 223/1991 is applicable to blue-collar workers, employees and executive staff (*quadri*).

The European Court of Justice on February 13, 2014 (case C-596/12), sentenced Italy for excluding the category of managers (so-called “*dirigenti*”) from the scope of collective dismissal procedures.

Following this judgement, with Article 16 paragraph 1/b of Law October 30, no. 161/2014 there has been added paragraph 1-*quinques* to Article 24 Law 223/1991 which provides that when the envisaged redundancies include one or more managers, the steps of the collective dismissal

procedure shall apply also to this category of employees (without paying the financial contribution to INPS, Italian National Social Security Institution/National Agency of Social Insurance). The consultation with the trade unions shall have to be conducted through dedicated meetings aimed at examining specifically the situation of redundant managers.

Specific sanctions have been introduced for the case in which the dismissal of managers is ordered in breach of either the procedure or the selection criteria. In both cases the employer shall pay the manager an indemnity ranging from 12 to 24 monthly salaries, unless otherwise provided for by the national collective bargaining agreements.

Managers must be included in the calculation of both the 15-employee and the 5-redundancy thresholds.

Trade union procedure for collective dismissal

Collective dismissal must pass through a procedure of trade union consultation, described in detail by the Law 223/1991 which aims to provide unions – through joint examination with employers - a complete disclosure for the purposes of establishing the real existence of the prescribed requirements, the causal link and the inevitability of the redundancy procedure.

The lack of preventive consultation procedure with unions renders the dismissals unlawful and will be deemed as anti-union activity according to Article 28 Law N. 300/1970 (Workers' Statute). However, collective dismissals can be carried out without the consent of trade unions, since agreement with them is not necessary but a possible outcome.

Article 4 of Law no. 223/1991 provides for a procedural system which is commenced by the sending of a written notice by the employer to the trade union representatives within the company (or plant-level union structure, RSA) established under Article 19 of Law 20 May 1970, no. 300, and to the respective category associations. In the absence of the said representation, the communication must be made to the territorial trade associations which are members of the most representative confederations at national level.

Union representatives of workers (RSU), if constituted, takes place upon the prerogatives of RSA according to Article 5, 1° paragraph of the Inter-confederal Agreement dated December 20, 1993. In such a case the consultation/information procedure can be carried out by the employer with RSU.

The notice - in order to be considered valid - must include (Article 4, 3° paragraph):

- 1) the reasons for the situation giving rise to the redundancies;
- 2) the technical, organisational and productive reasons as to why it is not possible to adopt measures other than redundancies;
- 3) the precise indication of the number, work positions and professional profiles of the redundant staff;
- 4) timeframes for the implementation of the dismissal program;
- 5) the measures to deal with the social impact of the staff reduction;

6) the method for calculating any redundancy payments other than those arising by reason of law or collective agreements⁶.

The Notice must contain a copy of the receipt of the payment to the INPS of a contribution, the so called “*contributo di ingresso*” (Article 4, 3° paragraph Law 223/1991)⁷. A copy of the Notice and of the receipt shall be sent to the appropriate Provincial Labour Office.

Such detailed communication is aimed at tying the employer to the justifications relied upon for the dismissals. Therefore, in the case that an employee contests such dismissal, the employer shall not introduce any additional grounds for the same.

As far as the above is concerned, following the enabling act contained in Law no. 52/1996, the Italian Government issued Legislative Decree no. 151 dated May, 26 1997 for the implementation of Directive 92/56/EC.

According to such Decree, consultations between Employer and workers’ representatives will consider recourse to accompanying social measures aimed at aiding the redeployment or retraining of workers made

⁶ Article 2 Council Directive 98/59/EC of 20 July 1998 that ...“the employers shall in good time during the course of the consultations: (a) supply them with all relevant information and (b) in any event notify them in writing of: (i) the reasons for the projected redundancies; (ii) the number of categories of workers to be made redundant; (iii) the number and categories of workers normally employed; (iv) the period over which the projected redundancies are to be effected; (v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer; (vi) the method for calculating any redundancy payments other than those arising out of national legislation and/or practice...”

⁷ This sum is reduced in case agreement is reached with the trade unions.

redundant. In this context the workers' representatives may call upon the services of experts⁸.

Moreover, Article 4 paragraph 15-bis states that the obligations of information, consultation and notification shall apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer. In considering alleged breaches of the information, consultation and notification requirements laid down by the Law, account shall not be taken of any defence on the part of the employer on the ground that the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies⁹.

The notice must be notified also to the Public Service, the Territorial Labour Office (DTL).

The employer shall attach a copy of the payment to INPS equal to a portion of what each worker will receive as mobility treatment.

In providing information, the employer must observe the general principles of good faith and fair dealing; moreover, information must be concrete and a useful basis for discussion¹⁰.

⁸ The ECJ (Second Chamber) 27 January 2005 Case C-188/03, in the proceedings *Irmtraud Junk v Wolfgang Kühnel*, stated that "...Article 2 of the directive 98/59 imposes an obligation to negotiate".

⁹ In this sense see the above mentioned Judgment of ECJ (Fourth Chamber), 10 September 2009 in Case C-44/08, *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy*.

¹⁰ It is appropriate for the employer to provide the trade unions with all the information necessary to allow them a clear understanding of the company's

Article 4, paragraph 12, L. 223/1991 (as amended by Law no. 92/2012) provides that a dismissal adopted without respecting the information and consultation procedure is ineffective, but admits its validation by the agreement concluded by the social partners in the context of the dismissal procedure. Therefore, according to the above Law, such agreement between the social partners can have the effect of remedying any potential procedural irregularity.

Within 7 days from receipt of the communication, recipients are entitled to request a joint review procedure - which may take up to 45 days - with the employer in order to discuss the reasons justifying the redundancy and the possible alternative solutions to avoid dismissals (such as the detachment, the possibility of using the personnel for different tasks and positions *i.e.* demotion, solidarity contracts, accompanying social measures aimed at aid for redeploying or retraining workers made redundant etc..).

Where there is no set agreement, or where the joint examination has not been requested, it is compulsory to trigger an administrative procedure carrying out a joint examination with a maximum duration of 30 days before the Territorial Labour Office or directly to the Ministry of Labour if the redundancies concern production units located in various provinces of the same region, or in several regions. The above are non-mandatory time-limits.

position as well as the plan contemplated for each redundant employee. The absence of information could result in a declaration by a judge of illegitimacy in relation to procedure, with all consequences arising from an unfair dismissal.

In any case the employer's conduct has to be such that it satisfies the requirements of fair way and good faith in providing the requested information.

The result of the consultation procedure can be either a failure to agree - with the consequent right to dismiss personnel as per the program of staff reduction - or the signing of an union agreement in order to manage the collective redundancies leading to a reduction in the number of planned redundancies or the overcoming of the same through alternative measures (assignment of different tasks and/or to lesser duties, detachment, solidarity contracts, flexible forms of work organisation etc..).

Where no agreement is reached, or the agreement entails just a reduction in the number of planned redundancies, the employer shall communicate dismissal in writing - failure to do so will result in the dismissal being invalid - to the redundant workers, to administrative bodies (DTL) and unions with the transmission of the list of the redundant workers, indicating their addresses, their job classification level, their age, their family conditions, and the criteria applied in the selection of the dismissed workers (Article 4 paragraph 9 Law 223/1991).

At the end of the consultation procedure, the workers are placed in mobility. The placement of redundant staff on the mobility scheme has consequences for the worker. First, he is entitled to mobility allowance payment. In addition, the workers concerned are entitled to a privileged discipline to promote their position at work. They are recorded on '*mobility*

list' redeployment schemes thereby providing them with the formal requirement for re-placement at work (Article 6 Law 223/1991).

The cancellation of workers from the mobility list occurs, *inter alia*, at the end of the maximum period for which allowance is expected to be paid (see Article 13, 2°/a paragraph Law N. 80/2005).

As mentioned above, the Collective Agreements signed during the mobility procedure and/or collective dismissal involving the partial or total reabsorption of workers regarded as redundant, may determine the assignment of the latter also to lesser duties. Article 2103 of the civil code – as modified by Article 3, paragraph 1, of the Legislative Decree 2015, June 15 No 81 - authorizes the employer to assign the workers to lesser duties and downgrading within the limits of the same legal category (blue-collar workers, white-collar employees and executive staff).

Criteria for the selection of workers

The employer has to select the workers to be placed on mobility on the grounds of criteria provided in collective labour agreements or, failing that, of the following concurrent criteria:

- a) Number of dependants (family responsibilities and circumstances);
- b) Length of service;
- c) Technical, productive and organization needs of the Company.

The law opted for the principle of subsidiarity of the legal criteria in respect of the contractual criteria.

Court of Cassation, in its judgement no. 4666 of 11 May 1999, recalled that the Constitutional Court, in its judgement no. 268 of 30 June 1994, had ruled

that selection criteria envisaged in union agreements shall comply with the principle of non-discrimination (based on union, political, religious, racial, sexual, and language reasons) set out in Article 15 of Law 20 May 1970, no. 300 (the so-called 'Workers' Statute'), as well as with the rationality principle¹¹.

Therefore, Article 5 Law 223/1991 provides a *suppletive* criterion to determine which selection criteria of the redundant personnel shall apply.

The competent judicial authority is able to control the legality of the decision made on a contractual basis more than the substance of it. The selection criteria must be general and objective¹² and cannot breach either mandatory rules or the prohibition of discrimination (direct and indirect).

The comparison between the redundant workers must relate to the whole company.

Disabled workers, who have been compulsorily employed, may be considered redundant but in compliance with the quota system established by law for people with disabilities (Article 10, paragraphs 4,5, Law 68/1999)

According to part of the case-law, the specification that the legal criteria are concurrent implies that it is not possible to give precedence to any one criterion, but that they all have to be considered together. According to another trend, technical and productive demands have priority.

An "external limit" on the exercise of the employer's faculty to dismiss consists in the prohibition of discriminatory dismissals.

¹¹ See also Court of Cassation March 20, 2013 n. 6959

¹² Court of Cassation March 20, 2013 n. 6959.

As far as the above is concerned the prohibition of indirect discrimination¹³ on grounds of sex is contained in Article 5 of Law 223/1991 which provides that the employer cannot make redundant (placing in mobility) a percentage of female workers superior to the female labour force under consideration.

The above provision operates both in the pre-selection phase of redundant staff and the subsequent phase involving the selection of workers to be dismissed.

One of the legitimate criteria that may be adopted in a collective agreement is the attainment of retirement age. In such case, problems arise if the number of workers who have reached retirement age is greater than the number of workers that should be collectively dismissed. The Court of Cassation has clearly stated that the selection of employees, who have reached retirement age and that nevertheless will remain at work, must be founded on objective criteria in accordance with Article 4 paragraph 9 of the aforesaid Act. Furthermore, the employer must provide a clear indication of the way the sole criterion of the retirement age has been applied to the community of workers who have reached retirement age.

The burden of proof in relation to legitimacy of the dismissal is on the employer who has to motivate his unilateral choice to dismiss personnel.

Consequences of unlawful dismissal

¹³ Article 25 Legislative Decree n. 198/2006.

The dismissal must be contested - under penalty of expiration - within 60 days following the receipt of the communication of dismissal and the legal proceedings must be brought by the worker within 180 days.

According to Article 10 of “*Permanent Employment Contracts with Increasing Levels of Protection Decree*” (Legislative Decree n° 23 of March 4, 2015), relating to collective dismissals, if the dismissal is not communicated in writing, the employee is entitled to demand reinstatement.

In this case the Judge orders the employer, whether or not an entrepreneur, to reinstate the worker and to pay the employee an indemnity equal to the salary accrued in the period from the date of dismissal to the date of reinstatement and in any case not lower than a 5-month salary as calculated for leaving indemnity (TFR) purposes, less the so-called *aliunde perceptum* (any sum which may have been received by the worker in the performance of other activities) and social security contributions on the same amount (Article 2 paragraphs 1,2 of the Legislative Decree n. 23/2015). Pursuant to Article 2 paragraphs 3 of Legislative Decree n. 23/2015, reinstatement may be replaced by an additional indemnity equal to 15 month salary but only at the employee’s choice.

The above rule corresponds to the previous discipline on job reinstatement provided for by Article 18 paragraph 1/3 Law N. 300/19790 as amended by Law No. 92/2012.

Non-compliance with other procedural requirements (provided by Article 4 paragraph 12 Law 223/1991) or errors in the application of the selection criteria (Article 5 paragraph 1 Law 223/1991) will involve liability on the

part of the employer resulting in the payment of an indemnity equal to 2 months' salary for each year of service, with a minimum of 4 months and a maximum of 24 months), as per Article 3 paragraph 1 of the Decree 23/2015. In such cases the dismissal remains in force and effective to all intents and purposes.

The new rules provided by Legislative Decree n° 23 of March 4, 2015 only apply to those employees - qualified as "operai" (blue collar), "impiegati" (white collar) and "quadri" (middle management) - who have been hired on an open term basis after the date of the coming into force of the aforesaid Decree, i.e. March 7, 2015.

Legislative Decree No 23/2015 has been applied since 7 March 2015 both in cases involving newly hired employees and those involving the transformation of former temporary or apprenticeship contracts.

Moreover, the decree provides that the dismissal of employees who are already in post on 7th March 2015 will be subject to the new rules if the employer's workforce exceeds the legal threshold as set out under Article 18 paragraphs 8 and 9 of Law no. 300/1970 (i.e., more than 15 employees in the business unit or in the same municipality, or more than 60 in the entire company or more than 5 in an agricultural enterprise) as a consequence of any new employee hiring (Article 1 Legislative Decree n° 23/2015).

Employees under permanent contracts prior to the above Decree will continue to have their employment relationship governed by the previous rules: Article 18 Law 300/1970 as modified by Law 92/2012 and Article 8 Law 604/1966, as modified by Article 2 of Law 108/1990, depending on the

dimension of the enterprise. There will therefore be a dual system in place, also in terms of collective dismissals.

In the event of infringement of the procedure provided for in Article 4 paragraph 12 of Law 223/1991, the provisions contained in the law n. 92/2012 (which modified Article 18 paragraph 5 of Law n. 300/1970) states that the dismissal remains in force and is effective to all intents and purposes; however, it provides liability on the part of the employer which consists in the payment of an indemnity equal to a minimum of 12 months' salary and a maximum of 24 months' salary depending on the seniority of the worker, taking into account the number of employees, the size of the economic activity, the parties' behaviour and conditions.

In the case of mistakes in the application of the selection criteria the consequences provided for by Law no. 92/2012 (which amended Article 18 paragraph 4 of Law n. 300/1970) are job reinstatement and the payment of compensation amounting to a maximum of 12 months' salary.

If the workers in relation to which the selection criteria have been violated are reinstated, the employer, in compliance with the selection criteria set out in Article 5 paragraph 1 of Law 223/1991, can proceed to the termination of the employment contract for the same number of workers as those that have been reinstated without triggering a new procedure by giving prior notice to the above trade union representatives (Article 17 Law n. 223/1991 so called *repvechage*).

Overstaffing and redundancy in the public sector

The above matter is covered by Article 33 of Legislative Decree N. 165/2001 (as modified by L. n. 183/2011) which provides, *inter alia*, the following.

Public administrations which have situations of redundancies, in accordance with the functional requirements or financial situation, are required to observe the procedures provided for in the above Article and shall immediately inform the Public Services Department.

The failure to activate the procedures referred to in the above law by the manager responsible can be evaluated for the purposes of disciplinary responsibility.

In the event of redundancy, the responsible manager shall give prior information to the unitary representations of the personnel and to the signatory trade unions of the national collective agreement for the specific sector or area.

After ten days of giving such notification, the administration shall automatically retire the redundant workers subject to the requirements of law.

In the alternative, it sees to the total or partial relocation of the redundant personnel in the administration, including through the use of flexible forms of working time or solidarity contracts, or in other administrations, by agreement with the same.

After ninety days from the referred notification the administration places the remaining personnel on non-active status (in *disponibilità*).

From the non-active status there derives the suspension of all obligations relating to the employment relationship and the worker is entitled to

compensation equal to 80 percent of salary and to a special allowance, with the exclusion of any other compensation, for the maximum period of twenty-four months, after which the employment relationship is terminated.

Staff in on non-active status are registered in special lists (Article 34 of Legislative Decree N. 165/2001) and collective agreements can reserve special funds for the redeployment of such staff and foster incentives for redeploying redundant workers through voluntary mobility.

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Bibliography:

Mazzotta O. (2016) *Diritto del lavoro* (sesta edizione), Giuffrè Editore p. 742-780.

Ballestrero M.V. - De Simone G. (2015) *Diritto del lavoro*. Seconda edizione. P. 578-594.

Albi P. (2013) *I licenziamenti collettivi* in M. Cinelli, G. Ferraro, O. Mazzotta (a cura di) *Il nuovo mercato del lavoro dalla riforma Fornero alla legge di stabilità 2013*, Giappichelli Torino 2013.

Carabelli U, Giubboni S. (2013) *Il licenziamento collettivo* in P. Chieco (a cura di) *Flessibilità e tutele nel lavoro. Commentario della legge 28 giugno 2012 n. 92* Carucci, Bari.

Redundancy Law in Europe (2008) Edited by Maarten van Kempen, Lisa Patmore, Michael Ryley, Robert von Steinau-Steinruck, Wolters Kluwer.