EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

<p>2015/18 The “Jobs Act”: changes to rules for termination, executives and mandatory severance pay</p>

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Facts

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yet been completed.

The main rules (so far) are as follows:

1. Termination

By Legislative Decree no. 23 of 4 March 2015, instances of reinstatement of employees in their previous positions will significantly reduce and will be substituted by an indemnity based on length of service. This rule will apply to those hired after 7 March 2015 and this will mean that for some time, existing employees will enjoy a greater degree of protection in cases of unlawful termination than new employees.

Although the change might not appear significant in other EU countries, where monetary sanctions rather than reinstatement have been normal practice, this change is a major shift in Italian employment law, which has relied on reinstatement ever since the Workers' Statute ('Statuto dei lavoratori') of 1970. Even after 2012, when Minister Fornero of the Monti Government introduced some very controversial changes to the rules on termination and pensions, reinstatement continued to be the principal sanction for unlawful dismissal in organisations with over 15 employees. But now it is the Renzi Government's intention to make it easier to terminate newly hired staff and to this end, it is starting to move in a distinctly employer-friendly direction.

With the exception of executives (who can be reinstated only in very limited circumstances), cases of discrimination and some other specific cases, reinstatement has always been the sanction of choice for unlawful dismissal in organisations with over 15 employees, while a mere indemnity, ranging from between two and a half and six months was imposed on organisations below that threshold.

Now reinstatement is no longer an option in relation to any employer: if a termination, whether for redundancy or for reasons to do with the individual, is not lawful, the sanction will in almost all cases be an indemnity equal to two months' remuneration for each year of employment. A minimum of four months and a maximum of 24 is provided, either for very short or very long employment relationships.

Unlike in Spain, which has had a similar system to Italy for many years, the indemnity is not payable in every case of termination, but is only owed if the termination was unlawful. A lawful termination attracts no indemnity at all. But similarly to Spain, the Italian Government has now given some financial backing to indemnities, by providing that if an offer of one month's remuneration per year of service is made and accepted before a Commission appointed under section 2113 of the Civil Code, the indemnity will be tax free, while any

additional amount will be subject to the ordinary tax rules. (Note that if the employer does this it may only offer an extra month's pay per year of service, capped at 18 months' pay, and it may only do so before terminating the contract and where the termination is not subject to court proceedings).

An indemnity is also provided where employees are terminated without written reasons and where the allegation is of negligence by the employee but no disciplinary procedure was conducted before the dismissal took place. In these cases, the indemnities are reduced to one month per year, with a minimum of two months and a maximum of 12, unless the court deems higher indemnities should apply.

Reinstatement is therefore now possible only in the following scenarios:

discrimination;
retaliation;
termination during maternity;
oral termination;
disciplinary terminations (where there is evidence that the employee was dismissed based on facts that never happened)

Reinstatement will apply to collective dismissals only where the terminations were not communicated in writing. By contrast, for breaches of the mandatory information and consultation requirements with the trade unions and where the selection criteria have not been respected, the usual rule of two months' pay per year of service will apply.

Note that the trade unions will retain the special remedy that applies in cases where a collective redundancy is found to have an anti-union aim. This is known as "section 28 proceedings" (based on s28 of the Workers Statute) and the remedy is reinstatement.

2. Changes for executives

Further to the ECJ decision in case C-596/12 where the Court remarked that Italy had not provided any legal protection for executives in cases of mass redundancy, the Italian State decided to extend the duties of information and consultation to the executives' trade unions. These are different from the unions that represent non-executive staff. For breach of any of these rules, executives could be awarded an indemnity ranging from between 12 and 24 months' pay. The selection criteria rules have also been changed and breaches are subject to the same sanctions.

In addition, the law allows collective agreements for executives to provide for different indemnities. Note that in 1995, executives in the manufacturing sector were granted (by means of a specific agreement) an indemnity equal to and in addition to their notice period, plus an age-related increase to this in the case of restructuring, reorganisation or collective dismissal.

Shortly before the new law came in, however, the agreement granting these rights, together with the collective agreement for executives in the manufacturing sector was terminated and the new one provides only for indemnities for individual terminations – and these have been reduced significantly, as have notice periods.

No other executive CBA currently provides rules for collective dismissals and it is likely that the services sector CBA will also reduce its indemnities on next renewal.

3. Mandatory severance ('TFR')

A change to mandatory severance (trattamento di fine rapporto, or 'TFR') pursuant to Law no. 190 of 23 December 2014 and effective from 1 January 2015 seems at first sight to be favourable to employees.

TFR is paid in any case of termination (just cause included) and to any employee, including executives, and is roughly equal to 7.5% of salary and bonuses. Thus, every year, the employer pays approximately 7.5% of annual salary into a separate fund. This was only payable to employees before the end of the employment in cases specified in law, and was limited to a certain percentage of employees belonging to the same company.

The cases specified by law included, for example, where the employee bought his or her first house or underwent serious and expensive surgery. The fact that the exceptions were limited helped to guarantee the stability of the fund for other employees in the organisation.

About 15 years ago, employees were also given the chance to pay their TFR accruals into additional pension funds, which were favourable for tax. In addition, on final payment at end of employment, TFR was taxed separately, since it had been accrued over a number of years and might otherwise serve to increase the tax payable in the year it was taken.

Under the new law it is now possible for employees to opt to receive accrued TFR in addition to their monthly salary. (Note that this covers amounts newly accrued each month, but not pre-existing accruals). But what might seem to be as advantageous because employees are no longer obliged to save in a particular way, is in reality favourable only for employees on the lowest tax rate. All other employees will be now subject to normal taxation and will therefore

be fully taxed if they decide to take immediate payments. And the same law has also introduced an increase in tax for payments to TFR that go directly into pension funds - even though in the past the law had encouraged saving of this kind by making it favourable to tax.

The TFR changes may appear on the face of it to be advantageous to employees, but, for example, although families on very low incomes might receive a temporary increase to their monthly salary, they will lose the larger payment that they would have received upon termination for enforced saving. If they had previously decided to pay their TFR into additional pension funds, they will also now incur higher tax.

Commentary

The changes to the termination rules have been well received both by the European Commission and by a number of EU Member States, though from an Italian perspective, they increase job-insecurity compared to the old rules and are likely to produce some unbalanced outcomes for some time. For example, in a collective dismissal in which the employer breaches the selection criteria, those already employed on 7 March 2015 will be reinstated, whereas those employed afterwards will only receive an indemnity.

Similarly, although at first sight, the rules for executives increase their protection, this is coupled with a downward trend in financial compensation on termination and so the picture is mixed.

The stated political aim of the changes as a whole is to find ways to reduce the high rate of unemployment in Italy, yet it is hard to predict whether they will have that effect in practice. It may turn out that other obstacles, including the economic crisis, corruption and inefficiency conspire to keep unemployment rates as high as before.

Creator:
Verdict at:
Case number: