COMPARATIVE LABOR LAW DOSSIER
MODIFICATION OF WORKING CONDITIONS IN ITALY

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1. Is it possible in Italy for the employer to unilaterally modify the worker's functions? If the answer is yes or if it is only allowed in cases of agreement with workers' representatives, public authority or a third party (for example, Labor Administration or arbitrator), what are the causes that allow this modification? What are the formal or procedural limits that must be followed?

Yes, in the Italian legal system it is possible for the employer to unilaterally modify employees' functions, however according to the very strict rules contained in article 2103 of the Civil Code. The provision, which was completely changed by article 13 of the Workers' Statute (Act 21 May 1970, n. 300), distinguishes between horizontal mobility and vertical mobility, though leaving (at least apparently) no room to downgrade employees.

So may the employers change the job of their employees provided that they grant them the same level of remuneration (principle of irreducibility of the salary) and the new tasks are "equivalent" to those performed before the modification. The law does not clarify which kind of equivalence is required between the old and the new tasks: however, since the previous level of remuneration is already separately guaranteed, legal scholars and judges agree that the old and new jobs must have a similar professional content. Nonetheless, "professional equivalence" is a very controversial juridical concept: whereas amongst the legal scholars a broader interpretation tends to prevail, with the aim of granting the employer sufficient functional flexibility, a high number of judicial decisions, even in recent times, require that the employee by performing the new job use almost the same skills and knowledge as in the previous position. It should be noted that in principle these rules may not be derogated by collective agreements. There are, however, two exceptions. Firstly, in the public sector collective bargaining is allowed to decide which professional profiles are equivalent, so determining the degree of functional flexibility granted to the employer. Secondly, since 2011 collective agreements concluded at plant and territorial levels by comparatively more representative trade unions and by their bodies in the firms enjoying the support of the workforce majority may derogate, *inter alia*, from article 2103 of the Civil Code,

provided that some (quite general) objectives are pursued and international conventions, EU law and Constitutional principles are respected (article 8, Decree Law n. 138/2011). Under article 2103 of the Civil Code there are no particular restrictions to vertical mobility: moreover, special rules are provided in order to protect employees who are given a new (and more important) job. More precisely, if an employee is moved to a job corresponding to a higher classification in the job scale, he is entitled to the higher pay corresponding to the new position and, after the period set by collective agreements (but in any case not longer than three months) the assignment becomes definitive (principle of the so called "automatic promotion"). However, if the employee is moved to the higher position to substitute for another employee who is absent with the right to keep his/her post (for example, because he/she is off for illness or pregnancy), the rule of the automatic promotion does not apply. More stringent provisions are laid down for employees in the public sector: in particular, the automatic promotion never takes place, in order to safeguard the constitutional principle of the access through public selection (article 97, par. 4 of the Italian Constitution).

Article 2103 of the Civil Code states that any agreement contrary to the aforementioned rules is null and void: so, not only the possibility for the employers of unilaterally modifying the job content is severely limited; they are also prevented from obtaining the same result with the consent of the employees! However, over the years the judges have increasingly been accepting individual agreements whereby employees are moved to lower positions in order to take into account interests that are more important than the protection of their professional capacities: this happens, for example, if the downgrading is the only means to avoid individual dismissals for economic reasons. Moreover, employers are obliged to assign employees to an equivalent job or, if this is not available, even to a lower position when they become partially unable to accomplish their tasks because of illness or industrial injury (article 4, par. 4, Act n. 68/1999; article 42, par. 1, Legislative Decree n. 81/2008). Employers have a similar obligation towards pregnant women and women until the seventh month after the birth of the child, if the tasks performed are dangerous for their health or the health of the baby (article 6-7, legislative decree n. 151/2001). In both cases employees are entitled to receive the same remuneration as before the job change. In case of collective redundancies the employer can be empowered by collective agreements to modify job assignments by derogating from article 2103 of the Civil Code (article 4, par. 11, Act. n. 223/1991).

The amendment to article 2103 of the Civil Code was introduced in the Workers' Statute of 1970 to better protect the professional capacities of employees by limiting the functional flexibility of the enterprises: in times of global competition and economic and financial crisis it comes as no surprise that the calls for changing this provision are growing ever louder. In fact, a new bill now under discussion in Parliament (the so

called *Jobs Act* bill) aims at modifying article 2103 of the Civil Code to give the employers more room for manoeuvre when changes in the job contents are needed in case of reorganization, restructuration or change in production; other possibilities to derogate from article 2103 will be conferred upon collective agreements signed at industry-wide or plant level with trade unions comparatively more representative at multi-industry or industry-wide level. Since the *Jobs Act* is a delegation law, it is by no means clear how the Government will struck the balance between the increased functional flexibility granted to the employers and the protection of the employees' professional capacities.

2. Is it possible for the employer to unilaterally modify the employee's workplace? If applicable, what are the causes that allow this modification? What are the formal or procedural limits that must be followed?

Yes, in the Italian legal system it is possible for the employer to unilaterally modify the employee's workplace. Three hypotheses can be distinguished.

1. The change is purely temporary in nature (*trasferta*). This case is not regulated by the law: the legal scholars and the judges consider the employer's power to temporarily send the employee to another place of work as part of the directive power, so that it has almost no limits. However, it should be noted that some rules are contained in the collective agreements: in particular, they often provide a specific indemnity for employees temporarily sent to another workplace, with the aim of refunding the expenses incurred by them. When employees agree in their individual contracts that they will work in different places on a regular basis (so called *trasfertismo*), the mentioned indemnity becomes usually a fixed component of their pay aimed to compensate not only for the incurred expenses, but also for the troubles connected to such a performance.

2. The change of the workplace is permanent in nature (*trasferimento*): this case is regulated in article 2103 of the Civil Code, at the end of the first paragraph. The employer may transfer the employee from a place of work to another provided that the transfer is justified by organizational, technical or productive reasons. The judicial interpretation of this provision gives considerable freedom to the employers: they have to demonstrate the existence of the reason, but the judge will normally neither question the merit nor balance the interest of the employers with that of the employees. The employers are obliged to communicate in writing their decision and the related reasons only if the employees ask for them. When the transfer is communicated in writing, the employee must oppose it within 60 days by means of a written declaration. After that, he has to apply to the employment tribunal within 180

days; alternatively, he may resort to conciliation or to informal arbitration. If he remains inactive, the transfer is considered automatically lawful. It should be noted that trade union representatives enjoy a particular protection against transfers: they may be transferred from the productive unit where they work (in fact, their constituency) only with the consent of their trade union (article 22, par. 1 of the Workers' Statute).

3. The change of the workplace is temporary in nature, but it involves also the temporary change of the actual employer (*distacco*). In fact, when employees are on "secondment" or "detachment", they are ordered by their employer to work for another employer, who has with them no contractual relationship: by doing that, the employees work in a new workplace and obey the directive power of another employer. Article 30 of the Legislative Decree n. 276/2003 (so called *Legge Biagi*) states that the detachment is lawful if it is temporary in nature and the original employer has a vested interest in sending the employees to work for another employer (this happens, for example, if the employees during the detachment acquire new skills which can be useful once returned to the original employer). The existence of this interest is presumed when the two employers are linked by a particular kind of partnership called *contratto di rete* (net contract). Moreover, if the detachment implies moving to a new workplace which is located at a distance of more than 50 km. from the old one, organisational, productive, technical and substitutive reasons are also required. If the job performed during the detachment entails a modification of the previous tasks, the employer must secure the consent of the employees.

3. Is it possible for the employer to unilaterally decide a permanent or temporary transnational geographic mobility? In that case, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

Yes and no. Judicial decisions have traditionally denied the application of article 2103 of the Civil Code to the transnational transfer of employees, so that in this case employers should always seek the consent of employees to send them to work abroad. However, some other decisions, also of the Supreme Labour Court (the *Corte di cassazione, sezione lavoro*), have disagreed with the traditional orientation, arguing that article 2103 makes no distinction between internal and international transfer of employees. Also the opinion of legal scholars is strongly divided.

Anyway, two points are quite clear amongst both the scholars and the judges: a) the consent of the employees concerned is always required for the transfer to a country not

belonging to the European Union; b) according to the overwhelming opinion, no limits are set for the temporary sending of employees abroad (the *trasferta*).

In particular, the permanent transfer of employees to non-EU countries requires the registration of the concerned employees on a special list administered by the regional offices of the Labour Department; moreover, the law obliges the employer to agree with the employees a special separate indemnity (*indennità estero*), which is added to the pay to which they are entitled according to collective agreements (article 1, par. 4, and 2, par. 4, litt. c), Decree Law n. 31 July 1987, n. 317).

4. Is it possible for the employer to unilaterally modify the regulation established in collective bargaining agreements regarding working conditions (working hours, salary, holidays…)? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

No, it is not possible for the employer to unilaterally modify the working conditions established by collective agreements. In Italy collective agreements do not enjoy general binding effects (the so called *erga omnes* effect): so in principle industry-wide collective agreement applies either to employers who are members of the employers' association which signed the agreement or to employers who made a reference to that collective agreement in the individual employment contracts. In fact, employers can choose to adhere to the collective regulation of working conditions by either way: however, if they are bound by collective agreements, they are not allowed to unilaterally deviate from them. The same applies *a fortiori* if the collective agreement is signed at plant level directly by the employer.

5. Is it possible for the employer to unilaterally modify the regulation of working conditions (working hours, salary, holidays…) not established in collective bargaining agreements? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

No, any unilateral modification of working conditions is forbidden. The employment contract, like any other contract in civil law, hinges on the main principle of the consent of the parties for every modification of its content: if the working conditions which the employer whishes to change are enshrined in the individual employment contract, the consent of the employee must be sought.

On the other hand, even working conditions not expressly stated in the written employment contract tend over time to become binding upon the parties if they are

constantly observed. So, for instance, if a given sum of money not provided by the employment contract has been nonetheless paid for years to an employee, it becomes part of his/her contract and the employer can no longer take it away in a unilateral way. Moreover, as far as the pay is concerned, there exist some judicial decisions that apply the principle of irreducibility of the salary contained in article 2103 of the Civil Code (see above the answer to question 1) irrespective of any change in the job content: the practical effect is the freezing of the level of wage provided in the individual contract, which could not be lowered even with the consent of the employee! This judicial orientation is not convincing: leaving aside the fact that the principle of irreducibility of the salary appears to be tightly connected to the rules on the modification of job content, it makes it very difficult to adapt the employment relationship to the changing environment, and can lead at the end of the day to more economic dismissals.

It goes without saying that the consent of the employee is not necessary for the modifications in the job tasks and the place of work mentioned in the answer to Q1-3.

6. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there a different treatment depending on the size of the company? If applicable, what is the different regulation?

No, in the Italian legal system there is no different treatment depending on the size of the firm with regard to the modification of working conditions.

7. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there a different treatment in the event of business transfers (when the modification of working conditions is needed to cause the transfer)?

Yes, as a consequence of the transposition of the Directive 2001/23/EC.

In general, when a transfer of enterprise takes place the rules already seen apply fully. Even better, under article 2112, par. 1, of the Civil Code the employment relationship continues with the transferee and all the rights of the employee are fully protected: in other word, the transfer of the enterprise cannot be the occasion to dilute or waive the employees' rights, nor to dismiss them.

The only exception concerns the working conditions provided in collective agreements. In fact, the collective agreement applied by the transferee replaces the collective agreement in force in the transferred business, provided that both of them belong to the

same level: in other words, the substitution effect takes place only if both collective agreements are either of industry-wide or of plant level (article 2112, par. 3 of the Civil Code). If this substitution actually happens, it is clear that the working conditions of the employees working in the transferred business can improve as well as worsen. This is the reason why article 2112, par. 4 of the Civil Code provides employees with the possibility of resigning for just cause if their working conditions undergo a substantive modification within the first three months after the transfer of the enterprise. Finally, if the transferee applies no collective agreement or a collective agreement of a different level, the collective agreement applied in the transferred business will remain in force until its expiration (article 2112, par. 3 of the Civil Code).

8. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there any specialty when the modification of working conditions is intended in an insolvent/bankrupt company?

Yes, but only if a transfer of the insolvent/bankrupt company takes place. In fact, when a company is in a situation of certified crisis or involved in different procedures that are contingent upon a state of insolvency, article 2112 of the Civil Code on the continuity of working conditions may be derogated by means of a collective agreement which ensures at least the partial re-employment of the employees of the transferred business (article 47, par. 4-bis and 5, Act n. 428/1990). If the activity of the enterprise has stopped, the law lays down a complete derogation, unless the collective agreement provides for something different; in the other cases, article 2112 of the Civil Code will apply within the boundaries set by the collective agreement.

9. The worker affected by a modification of his or her working conditions (functions, geographic mobility, working hours, salary, holidays…), does he or she have the right to terminate the employment relationship with right to compensation?

Yes, according to the general principles on the termination of the employment contract. If the employer modifies the job content or the place of work in breach of article 2103 of the Civil Code, or unilaterally reduces the employee's salary or unilaterally changes any other clause of the employment contract, the employee is entitled to resign for just cause under article 2119, par. 1 of the Civil Code. The employment contract is terminated immediately, and the employer must pay the employee an indemnity equal to the period of notice.

The employee can very often claim for damages as well. For example, if he/she has been downgraded in breach of article 2103 of the Civil Code and assigned to a job

which is not professionally equivalent, he/she can firstly ask for damages which correspond to the difference between the previous salary and the actual one, if the latter is lower; if the employee had even good possibilities for being promoted by continuing to do the previous job, he can also ask for a compensation for the loss of this opportunity.

Moreover, the tribunal may award the employee a compensation for immaterial damages connected with the downgrading, like health-related damages (if the employee, for instance, suffered from depression and/or anxiety as a consequence of the downgrading) and damages connected with the diminution of the employee's professional capacities and skills.

10. Is there a special judicial procedure to substantiate claims regarding modification of working conditions?

No, the Italian legal system provides no special judicial procedure to substantiate claims regarding the modification of working conditions.

However, to contest downgrading and transfer to another place of work employees use frequently the urgent procedure provided by article 700 of the Code of Civil Procedure. The main requirements to issue an urgent measure, which is in fact a temporary anticipation of the definitive decision, are: a) the appearance at first sight that the right of the claimant is well-founded (*fumus boni iuris*); b) the imminent and irreparable prejudice threatening the right during the time required to assert it through the ordinary procedure (*periculum in mora*). The urgent measure has the aim to secure the usefulness of the definitive decision. Therefore, in case of unlawful downgrading the urgent measure issued by the employment tribunal is the order to reassign the claimant the previous tasks; with regard to the unlawful transfer of the employee to another workplace the employment tribunal orders the employer to reinstate him/her in the previous workplace.