

1. Italy: Court Reverses itself and Re-affirms the Exclusion of Managers from COVID-19 Dismissal Ban

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Court of Rome judgment rendered on 19 April 2021, regarding the dismissal ban for objective reasons (economic and reorganisational reasons), originally introduced by Article 46 of Legislative Decree n. 18/2020, does not apply to the individual dismissals of managers; decision overrules the judgment rendered by this same Court on 26 February 2021.

This past March, we reported that the Court of Rome, by its judgment issued on 26 February 2021, established that the dismissal ban for objective reasons, aimed at facing the economic consequences of COVID-19 spreading across the population, as introduced by Article 46 of Legislative Decree n. 18/2020, also applies to the individual dismissals of managers.

We also pointed out that since Article 46 of Legislative Decree 18/2020 was expressly referring to Article 3 of Law No. 604 of 15 July 1966, which governs the dismissal of workers and employees for objective reasons, the case law and doctrine had always considered – before the above judgment – that managers were specifically excluded from the mentioned ban.

After the judgment issued on 26 February 2021 however, and more recently on 19 April 2021, the Court of Rome, with judgment number 3605/2021, overruled its own decision and re-affirmed the exclusion of managers from the dismissal ban in comment.

In particular, the Court excluded, with precise and consistent reasons, the extension of the emergency ban to managers, thus dissenting from the position previously expressed; as a result, the Court regarded as legitimate, the termination communicated by a company to one of its managers on 6 May 2020.

The main arguments used by the Court in the last case were as follows: i) first, the literal wording of Article 46 of Decree-Law No. 18/2020, which provides that an employer, irrespective of the number of employees, may not terminate, while the ban is in force, a contract for objective reasons pursuant to Article 3 of Law No. 604/1966. On this point, the Court pointed out that the latter provision does not apply to managers either by express legislative provision or by established principle of jurisprudence; ii) second, the Court pointed out that the exclusion is coherent with a further fundamental element, meaning that the system of protection adopted in the emergency phase is based on the symmetry between the freeze on dismissals and the use of social shock absorbers, through which the cost of labour is borne by the community and not by the employer. In case of a manager's dismissal, said symmetry would not exist, because such category of workers are not entitled to receive any social assistance, so that, through a dismissal ban, the employer, on one side, cannot dismiss and, on the other side, must bear all costs relating to the maintenance in force of the manager, so even determining a constitutional inconsistency with the principle of freedom of economic initiative, pursuant to Article 41 of the Italian Constitution; iii) it is reasonable to differentiate between managers dismissed in the context of a collective dismissal, who for sure are covered by the dismissal block (according to the law, collective procedures may not start or continue), and managers who are dismissed individually. In fact, in the first case, the manager is involved in a collective procedure, together with other protected employees, and for this very reason such protection is extended to him. Alternatively, the second case involves the manager in a single redundancy whose status is ruled autonomously, based on provisions that properly apply to him and which are consistent with the Italian legal system.

Therefore, our evaluation of the judgment rendered on 26 February 2021 by the Court of Rome seems to be validated by the more recent judgment of the same Court. Indeed, it was unclear: (i) how the textual reference contained in Article 46 of Legislative Decree n. 18/2020 regarding a dismissal prohibition pursuant to Article 3 of Law number 604/1966, could be extended to categories of employees not within the scope of such law; (ii) how limits to constitutional rights such as those arising from Article 41 could be introduced by limiting employers' choices in the management of the company and leaving them to deal with all the economic burdens deriving from a duty to maintain a manager within the workforce, provided that social absorbers specifically do not apply to executives; and (iii) how the constitutionally oriented interpretation proposed by the Court with reference to Article 3 of the Constitution could be upheld, since executives and other workers are in completely different positions under Italian law, so that excluding them from the application of the dismissal ban would not be considered as a disparity in the treatment of equal situations, but rather as a dissimilar treatment in situations that are substantially different.