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“Ban on dismissals”

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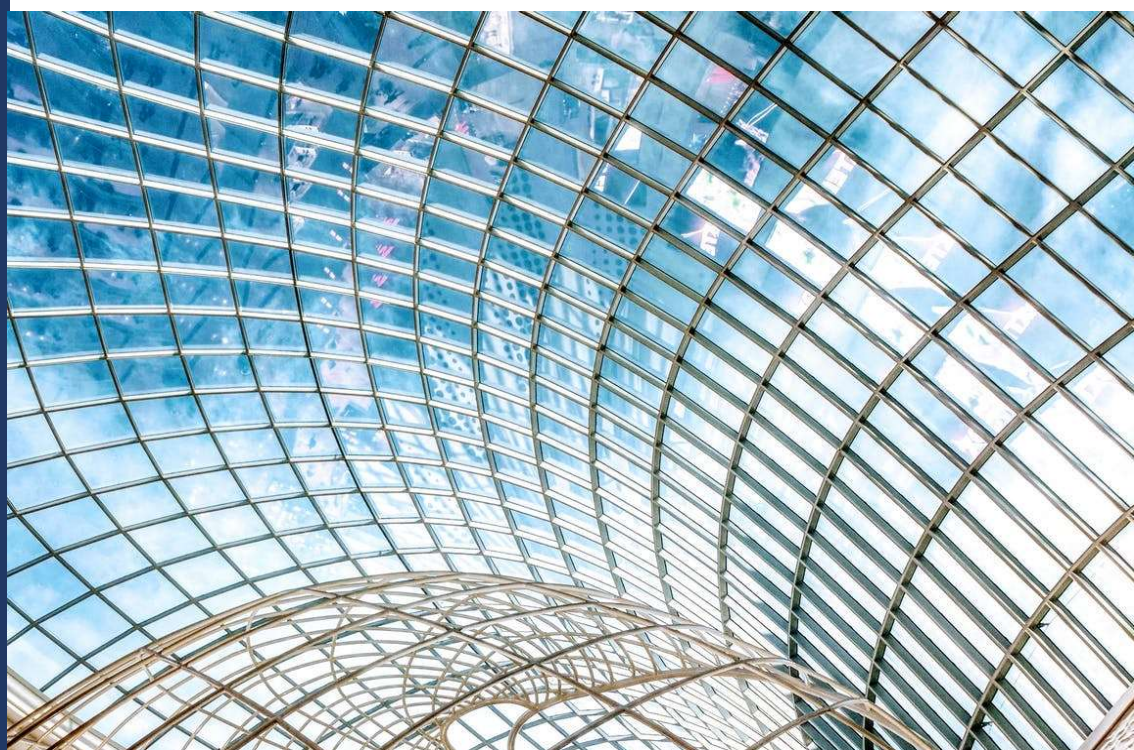

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This series is edited by **F. Rotondi, A. Paone, M. Bani e P. Speziale**

Our colleagues **Marco Pati Clausi**, **Antonella Mauro and Francesca Rotondi**, contributed to the drafting of this paper.

1. Covid-19 emergency and ban on dismissals.

Introduction

This brief paper aims to provide an overview of the limitations related to the exercise of the right to dismiss for objective reasons considering the succession of emergency provisions and the new final deadline for the "ban", 31 December 2021. Firstly, it reconstructs the different formulations contained in the emergency decrees aimed at preventing dismissals and secondly it provides a precise and analytical description of the current regulatory framework.

Within this framework, this paper deals with some critical issues relating to the field of application of the ban.

In other terms, it deals with the issues relating to the extension of the ban on dismissals and, therefore, what redundancies are included and what are excluded, also making some brief considerations aimed at examining potential strategies and opportunities to be seized in this new regulatory context as well as that one will be after the end of the ban.

Ban on dismissals: regulatory framework

To face the economic and health emergency, the Law Decree no. 18/2020 (the so-called "*Decreto Cura Italia*"), which entered into force on 17 March 2020, introduced the "ban" on dismissals, which imposed certain limitations on the employer's power to dismiss.

Article 46 of Law by Decree no. 18/2020

Particularly, art. 46 of Law Decree no. 18/2020[1] introduced a ban on dismissals having a generalized effect, for approximately 60 days from the date of the entry into force of this regulation, precluding employers from:

- proceeding with individual dismissal for objective reasons (art. 3 Law no. 604/1966), regardless of the number of employees and the size of the company;
- initiating new collective redundancy procedures (art. 4, 5 and 24 Law no. 223/1991);
- continuing collective redundancy procedures, already initiated since 23.02.2020, to be considered therefore suspended.

The aim of this provision was to safeguard jobs following the paralysis of the market due to the health emergency as well as to ensure business continuity and worker protection.

Similarly, the same disposal should be read as part of a more complex set of rules that has seen the generalized and acausal expansion (COVID Cause -19) of the existing tools for income protection, moreover, all financially facilitated through the acausal concession of direct dispensing of the sums to workers by the social security office.

[1] «*1. As of the date of entry into force of this Decree, the commencement of the procedures referred to in Articles 4, 5 and 24 of Law No. 223 of 23 July 1991 shall be prohibited for 60 days and during the same period pending procedures commenced after 23 February 2020 shall be suspended. Until the expiry of this period, the employer, regardless of the number of employees, may not withdraw from the contract for justified objective reasons within the meaning of Article 3 of Law No. 604 of 15 July 1966*».

In other terms, the maintenance of employment relationships was funded through forms of income support in the face of the limitation on the employer's power to dismiss.

Upon conversion of the "*Decreto Cura Italia*", Law no. 27/2020 confirmed the original structure of the regulation in question and the final deadline of the ban, restricting, however, the field of application of the same, i.e., introducing an additional hypothesis of exclusion from the ban on dismissals.

More specifically, the ban on dismissals for objective reasons (individual and collective) continued to be applied for 60 days, except in the event of a change of contract.

Law by Decree no. 34/2020 (Relaunch Decree)

Art. 46 was then amended by Law by Decree no. 34/2020 (the so-called "Relaunch Decree"), which extended the duration of the ban on collective and individual redundancies, as well as the suspension of collective redundancy procedures, from the previous 60 days to 5 months, *i.e.* until August 15, 2020.

By means of Law by Decree no. 104/2020 (the so-called "August Decree"), as converted into law by Law no. 126/2020, the legislator partially changed its approach to the issue of the dismissal ban, by tacitly repealing art. 46 of Law by Decree no. 18/2020.

In addition, the same Decree, which did not provide for an explicit deadline for the end of the ban, has further extended the term of the ban by making it subject to the use of social shock absorbers and therefore it extended it until December 31, 2020.

Article 14 of August Decree

After the "August Decree" the dismissal ban went from being a generalized instrument with a fixed term, to being a ban which was, in the light of subsequent interpretations, also generalized, but formally subject to a condition which was not *de facto* effective as well as to a "mobile" term.

The text of article 14 read as follows "*1. Employers who have not benefited in full of the social shock absorbers related to the epidemiological emergency from COVID-19 as per article 1, or of the exemption from the payment of social security contributions as per article 3 of this decree, are precluded from initiating the procedures set forth under articles 4, 5 and 24 of law no. 223 of July 23, 1991. The pending procedures initiated after the date of February 23, 2020 are also suspended, except in cases where the terminated personnel, already employed in a service contract, are rehired following the takeover of a new contractor by virtue of law, national collective bargaining agreement, or clause of the service contract.*

2. Under the conditions referred to in paragraph 1, the employer is also precluded, regardless of the number of employees, from terminating an employee for objective reasons pursuant to article 3 of Law no. 604 of July 15, 1966. Undergoing procedures pursuant to article 7 of the same law are also suspended.

3. The preclusions and suspensions referred to under paragraphs 1 and 2 do not apply (i) in cases of dismissals motivated by the definitive cessation of the company's activity, following the liquidation of the company without the continuation, even partial, of the business activity, provided that in the course of the liquidation there is no transfer of a group of assets or activities that may constitute a transfer of the company or a branch of it pursuant to article 2112 of the Civil Code, or (ii) in the hypotheses of a company collective agreement, stipulated by the trade unions that are comparatively more representative at a national level, providing an incentive to terminate the employment relationship, limited to workers who adhere to the aforementioned agreement; said

workers are in any case granted the benefit set forth under Article 1 of Legislative Decree No. 22 of March 4, 2015. Dismissals announced in the event of bankruptcy are also excluded from the ban, when the provisional exercise of the business is not envisaged, or its termination is ordered. In the event that the provisional exercise is ordered for a specific branch of the company, layoffs concerning sectors not included in the same are excluded from the ban".

It is quite clear that the paradigm has changed in the sense that, while in the previous formulation the ban was generalized, with the August Decree, the ban was not limited to the employers who benefitted from shock absorbers for the 18 weeks referred to in Article 1 of the same decree or from the contribution exemption of 4 months usable by December 31, 2020 "*within the limits of double the hours of social shoch absorbers already used in the aforementioned months of May and June 2020"*.

In other words, although in the absence of an explicit term of the dismissal ban, the prohibition was conditional on the use by employers of the aforementioned instruments and, in any case, until December 31, 2020.

This time limit was the indirect result of a combined reading of the provisions regarding wage subsidies and exemption from social security contributions, the use of which was, in any event, limited within the above date. Although, formally, the duration of the ban was conditioned by the use of social shock absorbers, the prevailing interpretation in this regard was the one that foresaw the permanence of a *de facto* general ban and, therefore, until December 31, 2020.[2]

Further emergency decrees

Subsequently, two further pieces of legislation were added to the text of the August Decree, without altering its structure:

- Legislative Decree no. 137/2020 (so-called "Easement Decree") which extended the effectiveness of the regulations set out in the previous measure until January 31, 2021;

- Law no. 178/2020 (the so-called "Budget Law 2021"), which in turn extended the ban to March 31, 2021.

Below is a **diagram summarizing** the evolution of the legislation on ban.

[2] *See* F. Scarpelli "*proroga del blocco dei licenziamenti per favore diamone interpretazioni ragionevoli*" Linkedin August 19, 2020; adherents to the interpretation for which the dismissal ban remains in force among others: M. Marazza D. Defeo "*DL n. 104/2020 (cd DL Agosto) profili giuslavoristici*" in www.studiomarazza.it; Note National Labor Inspectorate no. 713 of September 16, 2020.

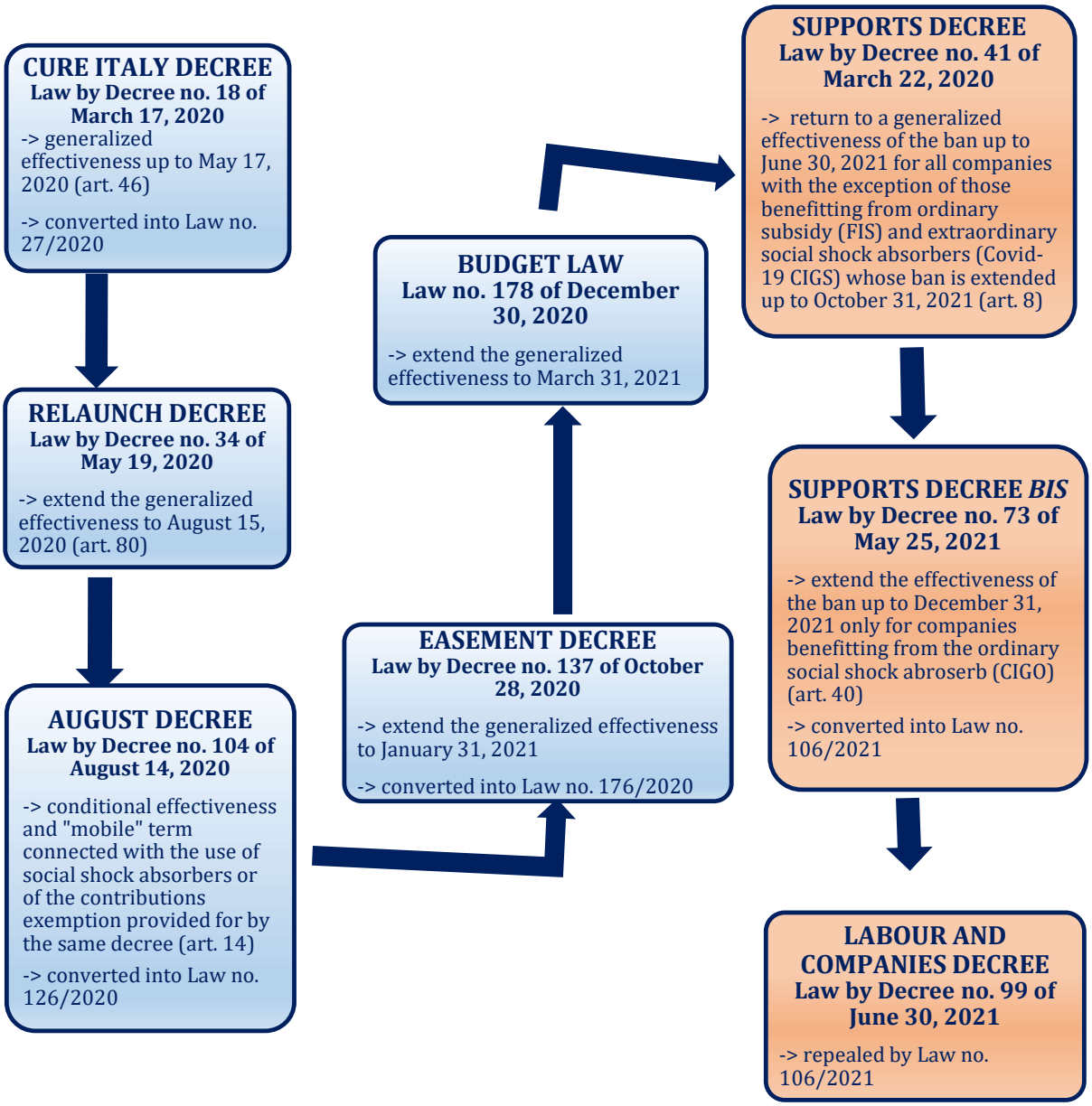

Chart 1 Sequence of emergency decrees

2. Ban on dismissals in the different formulations. Current legislation.

Supports Decree (*Decreto Sostegni*)

After a long period in which the dismissal ban was configured as a *de facto* generalized and unconditional prohibition, with interpretative stops that were sometimes difficult to reconcile with the textual data of the regulations, by means of article 8 of Law by Decree no. 41/2021 (the so-called "Supports Decree"), a "mixed" system was introduced.

Such decree of March 22, 2021 marks a return to the legislative approach set out in the first emergency decree, the "Cure Italy Decree", by reintroducing an explicit final term for the dismissal ban.

More specifically, a bipartite system of the final term of the dismissal ban was introduced, namely:

- June 30, 2021 for companies falling within the scope of the ordinary social shock absorber (CIGO);
- October 31, 2021 for those companies falling within the scope of application of ordinary subsidy (FIS), of the extraordinary social shock absorbers (CIGS), of alternative bilateral funds, of CISOA or of the agricultural workers' social shock absorber.

With respect to this second category of employers, given the lack of clarity of the regulatory text accompanied by many ambiguous interpretations by government sources, the issue of the scope of the prohibition has arisen, in the sense of whether this should refer to employers who fall within the scope of application of the aforementioned social shock absorbers or whether the ban should refer to companies that actually benefit from them. From this point of view, an initial prudential reading of all the indications offered suggests that the first hypothesis should be adopted, namely, that the ban should be extended to October 31 notwithstanding the actual use of social shock absorbers. This approach is confirmed by the Italian Labor Inspectorate Note no. 5186 of July 16, 2021, as well as by the second version of the explanatory note to the Decree, which provides clarifications and operational indications regarding the reactivation of conciliation procedures for individual dismissals for objective reasons, as well as clarifications regarding the extension of the scope of application of the still dismissal ban.

Supports Decree Bis (*Decreto Sostegni Bis*)

The subsequent Legislative Decree no. 73/2021 (the so-called " Supports Decree Bis", converted into Law no. 106 of July 23, 2021), under article 40, confirmed the cessation of the dismissal ban as provided by the "Supports Decree", *i.e.* up to June 30, 2021, for those who do not benefit from Covid-related ordinary social shock absorber (CIGO Covid). Such decree also provided that employers who can benefit from the CIGO Covid, and benefit from the ordinary CIGO or the extraordinary social shock absorber (CIGS) with exemption from payment of the additional contribution, may not dismiss for the entire duration of the benefit in the period between July 1 and December 31, 2021.

Similarly, although not expressly provided for, the ban must be considered to be in force, for the entire duration of the measure, for employers who benefit from the defensive solidarity contract provided for in favor of companies that in the first half of 2021 have suffered a drop in turnover of 50% compared to the first half of 2019 (so-called mini-solidarity), since these are agreements aimed at maintaining employment levels; as well as, until December 31, 2021, for companies in the tourism, thermal and commerce sectors that benefit from the contribution exemption provided for by the same Decree.

Labor and Companies Decree (*Decreto Lavoro e Imprese*)

Finally, Law by Decree no. 99/2021 (the so-called "Labor and Companies Decree"), in addition to confirming the terms of the "Supports Decree" relating to the end of the dismissal ban, introduced a number of important innovations, specifically:

- the extension of the COVID CIGO only to companies in the textile, clothing and leather sectors (identified by ATECO business codes 13, 14 and 15), extending the ban until October 31, 2021, regardless of the use of shock absorbers;
- the possibility to benefit from a further 13 weeks of social shock absorbers, until December 31, 2021, for companies in economic difficulty, with an application to be submitted to the Ministry for Economic Development. In such cases, redundancies are blocked for a period equal to the period in which the company benefits from such social shock absorbers.

The latter Law by Decree was repealed by article 1, paragraph 3 of Law no. 106/2021, without prejudice to the acts and measures adopted, the effects produced and the legal relations that arose on the basis of the same.

The current regulatory framework is structured as follows:

Dismissal Ban				
Law	**Beneficiary**	**Social shock absorber**	**Benefitting term**	**Dismissal ban**
Law by Decree no. 41/2021 Art. 8, par. 1	Companies that can request ordinary social shock absorber (CIGO)	13 weeks of Covid-CIGO	By June 30, 2021	Up to June 30, notwithstanding the request of the social shock absorber
Law by Decree no. 41/2021 Art. 8, par. 2	Companies that can request ordinary subsidy (FIS) or the derogation social shock absorber (CIGD)	28 weeks of CIGD or Covid ordinary subsidy	By December 31, 2021	Up to October 31, notwithstanding the request of the social shock absorber
Law by Decree no. 41/2021 Art. 8, par. 8	Companies that can request CISOA	120 days of CISOA	By December 31, 2021	Up to October 31, notwithstanding the request of the social shock absorber
Law by Decree no. 73/2021 Art. 40, par. 3	Companies that can request the ordinary social	Ordinary CIGO and CIGS without additional contribution, for	By December 31, 2021	For the period in which the company benefits from the social shock

	shock absorber (CIGO)	the duration provided according to the cap set forth under Legislative Decree no. 148/2015		absorber and up to December 31
Law by Decree no. 73/2021 Art. 40	Employer in the tourism, thermal and commerce sectors	Contribution exemption for employers in the tourism, thermal and commerce sectors	By December 31, 2021	Up to December 31, if they benefit from the contribution exemption (on the contrary, up to October 31)
Law by Decree no. 99/2021[3] Art. 4, par. 2	Companies that cannot request the ordinary social shock absorber (CIGO) with ATECO2007 business code no. 13, 14 and 15	17 weeks of Textile CIGO	By October 31, 2021	Up to October 31, notwithstanding the use of CIGO
Law by Decree no. 73/2021 Art. 40 bis [4](introduced by Law by Decree no. 99/2021 Art. 4, par. 8)	Companies that cannot apply for social shock absorbers pursuant to Legislative Decree no. 148/2015	13 weeks of CIGS	By December 31, 2021	Up to December 31, 2021, for the period in which the company benefits from the social shock absorber

Solidarity contract				
Law	**Beneficiary**	**Social shock absorber**	**Benefitting term**	**Dismissal ban**
Law by Decree no. 73/2021 Art 40, par. 1	Companies that can apply for the social shock absorbers provided under Legislative Decree no. 148/2015	26 weeks of solidarity contract	By December 31, 2021	This measure is not linked to the dismissal ban but it is aimed at maintaining the employment levels

Chart 2 Dismissal ban (chart from the Labor Inspectorate note no. 5186 of July 16, 2021)

[3] Such Law by Decree was repealed by article 1, par. 3 of Law no. 106/2021, without prejudice to the acts and measures adopted, the effects produced and the legal relations that arose on the basis of the same.
[4] Article inserted by article 4, paragraph 8, of Law by Decree no. 99 of June 30, 2021, and subsequently replaced by article 1, paragraph 1, of Law no. 106 of July 23, 2021, at the time of conversion, which repealed the abovementioned Law by Decree no. 99/2021.

Nullity of the dismissal

With regard to the consequences of any violation of the dismissal ban, no explicit indication is given by the legislator on the sanctions to be applied in such a case.

After about a year and a half from the entry into force of the first emergency decree, and therefore from the legislative imposition of the dismissal ban, jurisprudence appears unanimous in considering null and void the termination carried out in violation of the regulations in force on the subject.

In particular, the thesis of the nullity of the dismissal carried out during the dismissal ban has found an initial confirmation in the judgment of November 11, 2020 of the Court of Mantua, according to which "*from the mandatory nature and public order of the discipline of the dismissal ban, follows the nullity of dismissals adopted in contrast to the rule, with the consequent sanction of reinstatement as provided under article 18, 1st paragraph of Law no. 300/1970 and article 2 of Legislative Decree no. 23/2015, deriving the nullity from article 1418 of the Italian Civil Code*".

This was confirmed also by the tribunals that, with reference to cases of termination of managers due to economic reasons, have confirmed the nullity of the termination carried out in violation of the legislation on the dismissal ban, in accordance with the general principles of contractual matters (article 1418 of Italian Civil Code)[5]. However, we are aware of the fact that the hypothesis in question represents a debated case history, as it will be better explained in the next chapter.

Suspended procedures

A further aspect of interest is that relating to the management, once the ban period has passed, of any procedures that may still be suspended. In this respect, the first operational interventions of the inspection authority regarding the reactivation of the conciliation procedures for individual dismissals for objective reasons should be mentioned.[6]

It is clear that many of the economic reasons underlying the procedures initiated and suspended may no longer be "current", just as the economic context resulting from the emergency period will certainly not be the one described by initiating procedures at the beginning of 2020.

3. Dismissal ban exceptions.

Exceptions explicitly provided

Once analyzed the relevant legislation, it is necessary to assess which cases are excluded from the “ban”.

First of all, there are several cases of dismissals which are explicitly excluded from the objective scope of the ban:

- change in a service contract with consequent re-employment of the personnel by the new contractor;
- company shut-down;

[5] Court of Rome, February 26, 2021; Court of Milan, January 28, 2021; Court of Milan, January 21, 2021; Court of Ravenna, January 7, 2021.
[6] Note of the Italian Labour Inspectorate no. 5186 of July 16, 2021.

- company liquidation without continuation, even partial, of the activity, in cases when during the liquidation there is no transfer of a group of assets or activities that may constitute a transfer of undertaking or of a branch of it pursuant to article 2112 of the Italian Civil Code;
- in the event of the bankruptcy of the company, when the provisional exercise of the company's business activity is not envisaged, or when its closure has been ordered. In the event that the provisional exercise is arranged for a specific branch of the company, redundancies regarding sectors not included in the same branch are excluded from the ban;
- company collective agreements providing incentives to terminate the employment relationship.

Terminations for subjective reasons

Dismissals for just cause and justified subjective reasons are also excluded from the ban since they are related to personal reasons inherent to the person of the worker and, therefore, have nothing to do with the technical and organizational which ground the termination for objective reasons.

Termination for exceeding the maximum period of leave from work

Dismissal for exceeding the period of job preservation pursuant to article 2110 of the Italian Civil Code, in accordance with the terms provided for by the applicable National Collective Bargaining Agreements (the so-called "*comport"*) is more critical.

According to the most recent comments and case law, which distinguish only two cases of termination - for subjective reasons (just cause and for justified subjective reasons) and for justified objective reasons - such termination had always been considered governed by the rules of dismissal for justified objective reasons, since it does not depend on a subjective conduct of the worker[7].

However, due to the reforms that have taken place in recent years, in terms of dismissals ("*Fornero Law*"; "*Jobs Act*"), the courts have revised their position, leaving the previous rigid schemes (dismissal for just cause or justified objective reasons) and recognizing that this form of termination of employment is different and independent from objective reasons. In fact, the dismissal for exceeding the maximum period of leave from work (*comporto)*, although having in common with the termination for justified objective reasons the absence of conduct attributable to the worker, is a case that maintains significant ontological differences from the latter, given that the exceeding the maximum period of leave from work (article 2110 of Italian Civil Code) is a sufficient condition to legitimate the termination, regardless of the existence of a justified objective reason, nor is required to verify whether it is possible to assign the worker to different tasks as in case of termination for justified objective reasons[8].

Therefore, for this kind of dismissal, it must be considered that the ban does not apply, also because the continuation of the employment relationship after the expiry of the limit set by the NCBA, could otherwise be symptomatic of the will to renounce to the dismissal and could generate a corresponding reliance in good faith of the employee on the continuation of the relationship, thus requiring the employer, obviously, an excessive and unjustifiable sacrifice.[9]

Termination during the trial period and domestic workers

The ban is also excluded for domestic workers and in case of dismissal for failure to pass the trial period; as they are regulated by different rules.

[7] Court of Cassation no. 3571 of March 21, 1992.
[8] Court of Cassation no. 21377 of October 24, 2016.
[9] Court of Cassation no. 24739 of October 19, 2017.

Termination for reaching the maximum age limit

Moreover, dismissals due to reaching the maximum retirement age (including access to the so-called "*amount 100*") must be considered excluded from the ban, given that this kind of termination, on the one hand, relates to the personal sphere of the employee (although not constituting a just cause for dismissal); on the other hand, it allows the employer to withdraw from the relationship with no notice period[10]. In addition, it should be remembered that the continuation of the employment relationship beyond the retirement age is, in any case, subject to a specific agreement between the parties[11].

Dismissals at the end of the apprenticeship period

The same applies to dismissals at the end of the apprenticeship period, which is possible, but is subject to different rules than for open-ended contracts. In fact, at the end of the apprenticeship period, both the employer and the apprentice have the right to withdraw freely: the withdrawal, therefore, does not have to be motivated and justified by particular reasons and in this case the rules of the normal subordinate employment contract do not apply, as the withdrawal does not require the presence of a just cause or a justified reason.

For this reason, also such kind of dismissal is it not included in the scope of the ban.

Fixed-term contracts

With regard to fixed-term employment contracts, also impacted by the emergency regulations, the expiration of the final term is excluded from the ban, especially taking into account that the current legislation provides the option to continue a fixed-term with no need of specifying the reason at least until December 31, 2021, notwithstanding the limit of 24 months of duration.

Moreover, in case of fixed-term contracts, the right to terminate the contract before its expiry is only allowed in the event of the occurrence of a just cause, and not also in the event of justified subjective or objective reasons.

Termination of managers (*Dirigenti*)

In addition, doubts have arisen with regard to the discipline of the individual dismissal of managers.

Although the law does not regulate such hypothesis, this termination is excluded from the "ban", in the light of what has been said over time by the case law that considers such dismissals not ruled by art. 3 of Law no. 604/1966. In case of a manager's dismissals, in fact, the justified reason (subjective and/or objective) does not apply, while it shall be considered the so called "*justifiability*", governed by collective bargaining and not by the law. Moreover, it is well known that any dismissal of an executive may concern strategic and economic aspects that are different from those relevant to the dismissal of an employee.

More specifically, the Court of Cassation ruled that the notion of "*justifiability*" for the dismissal of managers differs, both subjectively and objectively, from that provided under Law no. 604/1966[12].

Therefore, even the simple inadequacy of the executive with respect to prior expectations, or a major deviation of the executive from the line marked by the general directives of the employer, or even a different reorganization of business structures may constitute legitimate reasons for dismissal of the executive, provided they fall within the concept of " *justifiability*"[13].

[10] Court of Cassation no. 6157 of March 14, 2018.
[11] Court of Cassation no. 17589 of September 4, 2015.
[12] Court of Cassation no. 17086 of October 8, 2012.
[13] Court of Bergamo of July 25, 2006.

This being said, the regulations regarding the ban, in their various formulations, making specific reference to article 3 of Law no. 604/1966, must be considered inapplicable to managers, who enjoy specific contractual protections and not those provided for by the law.

Moreover, it must be remembered that case law has repeatedly distinguished between two different types of managerial work: that carried out by the so-called top executives, who act as the *alter ego* of the entrepreneur; that carried out by the so-called "pseudo-managers", for whom the prohibition laid down under art. 46 is deemed to be applicable, since, as recalled by consolidated case law, their dismissal is subject to the application of Law no. 604/1966 (Court of Cassation no. 7295 of March 23, 2018; Court of Cassation no. 20763 of November 23, 2012).

Another evidence for deeming well-founded the exclusion from the application of the dismissal ban is the one that goes back to the underlying rationale of the ban, namely, "*I forbid the possibility of firing you because, on the other hand, I extend in an almost generalized manner the social shock absorbers*".

In the specific case of the manager, however, there is no "counterweight" to the limitation, and this is because managers do not fall within the scope of application of the social shock absorbers. Therefore, the right to free economic initiative would be limited without, on the other hand, providing a counter-performance that limits the economic and organizational effects of the prohibition. From this point of view, the risks that the provision might be declared as contrary to the Italian Constitution are even more evident if the provision is interpreted as including managers in the ban.

Notwithstanding the reasons in favor of the exclusion of the executives from the "ban", it is necessary to take into account a different position that tends to include the executives under the scope of the ban.

Briefly, according to such different interpretation, the inclusion is justified on fact that Law no. 223/91 regarding collective redundancies applies also to the managers. On the other hand, from the point of view of individual dismissal - although it is true that the discipline of Law no. 604/66 is not applicable to managers - it is believed that the concept of “justifiability" for dismissal of managers is in a relationship of continuity with respect to the less extensive objective reasons[14] .

Even more generally, the thesis of inclusion moves from the assumption that the ban is intended to include typologically the dismissal for objective reasons and this regardless of the concrete scope of application of Law no. 604/66 with respect to blue-collars, white-collars employees and high-level white collars employees. It should also be noted, in this regard, the message of the Italian Social Security Authority (INPS) of November 26, 2020 no. 4464 that includes among those affected by the collective agreements to incentive terminations, provided for by the August Decree, also managers. In fact, such message states that: "*it should be noted that even the managerial staff, possibly adhering to the agreements in question, where the other conditions of the law apply, can access the unemployment benefit (NASpI)*". In this heterogeneous interpretative framework, the first judgments of the courts of merit are still ambiguous.

From this point of view, it is worth noting that even the same Court has made opposing statements on the subject.

[14] Court of Cassation no. 9665 of April 5, 2019.

In fact, with the order of February 26, 2021, the Labor Court of Rome has deemed illegitimate the dismissal of the manager because carried out in violation of the dismissal ban applicable at the time.

According to the judge, since the *ratio* of the emergency legislation is to "*temporarily avoid that the almost generalized economic consequences of the pandemic translate into the immediate suppression of jobs*", managers should also be included in the scope of application of the legislation, as not only they have in common with the other categories of workers the same needs of employment protection in the context of the current contingencies, but they are also more exposed to the risk of suffering the consequences due to the "*greater flexibility of their contractual-collective regime of protection from arbitrary dismissal*".[15]

The same Court, with a subsequent ruling has instead decided that the manager does not fall within the scope of application of the legislation at issue, on the basis of the functional link between the use of social shock absorbers and the ban on dismissal. The Court stated that "*with regard to managers, this combination cannot stand, since the latter is not allowed [...] to access social safety nets. Consequently, in the hypothesis in which the ban on dismissals was extended to managers, the employer would find itself in the condition of not being able to find a substitute solution [...] that would allow them to guarantee income and employment protection without additional costs"*[16].

The Court of Milan also expressed the same opinion in the rejection order issued on June 17, 2021.

Dismissals for poor performance

Another hypothesis of dismissal, on which the case law has recently focused, not without contrasting interpretations, is that of poor performance, due in particular to the excessive morbidity of the employee (sick leave).

Well, it is well known that the poor performance has always been recognized in doctrine and jurisprudence as a hypothesis of dismissal attributable to the employee, due to a significant failure in the performance of their services, to the point of making their performance unnecessary within the company.

Until the summer of 2014, Italian Courts did not allow the dismissal for poor performance of the worker due to excessive absences from work due to illness ("excessive morbidity") if they did not exceed the maximum period of leave from work.

However, the Supreme Court, by means of the judgment of September 4, 2014 (no. 18678) stated that the absences of the worker, even if blameless and even if not such as to exceed maximum period of leave from work, can still ground the dismissal for justified objective reason, if, by the manner in which they are realized, are such as to adversely affect the production activity, the organization of work and the regular operation of the company.

This is, therefore, a real dismissal for objective reasons for which the discipline of art. 3 of Law no. 604/1966 is applicable.

Subsequent arrests of the Supreme Court, then endorsed by the case law, have moved in the opposite direction to the aforementioned judgment of 2014 and the contrast was then resolved by the United Sections of the Court of Cassation which ruled that

[15] Court of Rome of March 26, 2021.
[16] Court of Rome no. 3605 of April 19, 2021.

"*The dismissal announced for the continuation of absences due to illness or injury of the worker, but before the maximum period of compensation set by collective bargaining or, failing that, by the uses or according to equity, is void for violation of the mandatory rule in article 2110, paragraph 2, Civil Code*"[17].

And therefore, if on the one hand the dismissal for poor performance due to excessive morbidity is not allowed if you do not exceed the maximum period of leave from work ("*comporto*"), on the other hand the poor performance has been considered as attributable to the employee who could be terminated only for subjective reason.

In light of the latter orientation, the termination for poor performance shall be excluded from the dismissal ban and it will be possible only by means of the procedure under article. 7 of Law no. 300/1970.

Dismissals of the member of a production and work cooperative.

Another particular hypothesis is that of the dismissal of the member of a production and work cooperative. According to the Court of Cassation (Judgment No. 3836 of February 26, 2016), the termination of the worker who is a member of the cooperative and who does not oppose the resolution to exclude them, is legitimate and final, even if intimated without prior procedure of law: article 18 of Law No. 300/1970 is in fact inapplicable to the worker/member after the exclusion from the cooperative, which automatically determines the extinction of the employment relationship.

The legislator (in amending, with article 9 of Law no. 30/2003 the paragraph 2 of article 5 of Law no. 142/2001) stated the centrality of the cooperative relationship and its prevalence with respect to the working one. According to the Supreme Court, in cooperatives, "*in which the mutual relationship has as its object the performance of working activities by the member, the latter, at the time of joining or after the establishment of the associative relationship, establishes a further working relationship, in subordinate or autonomous form or in any other form with which he/she contributes in any case to the achievement of social purposes*". If this further relationship is of a subordinate nature, Law no. 300 of May 20, 1970 is applied, with the exclusion of article 18, every time the associative relationship ceases, along with the working relationship. Therefore: "*the employment relationship is extinguished with the withdrawal or exclusion of the member deliberated in compliance with the statutory provisions and in conformity with articles 2526 and 2527 of the Civil Code*".

In the light, therefore, of what has been stated by the Court of Cassation, it is possible to consider the cases of termination of a member of a production and work cooperative as excluded from the scope of application of article 46.

[17] Court of Cassation, Unified Sections, no. 12568 of May 22, 2018.

Exceptions to the ban
Exceptions explicitly provided
• change in a service contract • company shut-down • company liquidation without continuation, even partial, of the business activity • execution of a company collective agreements providing incentives to terminate the employment relationship • Bankruptcy
Other exceptions
• Just cause and justified subjective reasons • Exceeding of the maximum period of leave from work (*comporto*) • Dismissal during trial period and domestic workers • Termination for reaching the maximum age limit • Dismissal at the end of the apprenticeship period • Expiration of fixed-term contracts • Executives • Poor performance • Termination of the relationship with the former member of a production and work cooperative, in case of previous termination of the associative relationship

Chart 3 Hypothesis of ban exceptions

4. Conclusions.

Until now, the focus has been on the scope of the dismissal ban and the consequences of its breach.

Probably, however, it is arrived the time to carry out some evaluations on the end of the ban.

Firstly, it will be necessary to ask whether the deadlines of June 30 and October 31 really represent the end of the season of the dismissal ban.

The answer to this question is contained in the regulatory framework, and in particular, in conjunction with those relating to access to social shock absorbers.

From this point of view, the possibility of accessing to social shock absorbers without an entry contribution is, in fact, the way for a "soft" exit from the ban which, if from a social point of view, may appear an appreciable choice, however, will lead the labor market to an anomalous situation at least until December 31, 2021.

In other words, the free access to income support tools exchanged with the continuation of the ban will lead to a differentiated regime at least until the end of the year in which there will be only some realities subject to the dismissal ban, according to choices that do not always have a business character but could only be a way of procrastinating inevitable choices.

All this takes place in the total absence of an articulated reform of active policies, which evidently compromises the possibility of alleviating the social effects of redundancies.

This leads to the further question of the real effect of the dismissal ban in terms of effective employment protection.

In this sense, the European Commission has been extremely critical, highlighting the potential fallacies of this measure in terms of its impact on employment, since it "hinders the necessary adaptation of the workforce to business needs".

The data in this regard, in fact, are not positive. First of all, it is pointed out that, despite the general prohibition of dismissal, Italy has not obtained better results from the point of view of employment protection than other European countries that have adopted less restrictive measures[18].

Moreover, the generalized "Italian-style" ban dismissal had deleterious effects on youth and female employment, favoring the so-called insiders, *i.e.*, those subjects who are already included in the labor market on a permanent basis and who, therefore, compared to other categories on the margins of the same, already enjoy a system of protection. Another crucial point is that of planning the entrepreneurial choices to be adopted at the end of the period of inhibition; an aspect that is perhaps not at the center of the debate. The companies will also be called upon to conduct an evaluation that will have to focus on the ability of the entrepreneur himself to foresee his new

[18] M. Casamonti – G. Galli, Is the dismissal ban useful to sustain employment? Osservatorio sui Conti Pubblici Italiani, February 26, 2021, for a comprehensive synthesis of OECD data.

post-pandemic size. In other words, the next few months will have to be devoted to understanding whether or not the trend in its market is upward from the time when the shock absorbers will no longer support the maintenance of the workforce.

Sede di Milano

Largo Augusto, 8
20122 Milano
Tel: +39 02 30 31 11
Fax: +39 02 30 31 12

Sede di Napoli

Via Dei Mille, 16
80122 Napoli
Tel: +39 081 25 12 3546
Fax: +39 081 40 90 22

Sede Triveneto

Via Stella, 2
35031 Abano Terme, Padova
Tel: +39 049 7968508

Sede di Messina

Via Luciano Manara, 22
98123 Messina
Tel. +39 090.941.40.62
Fax. +39 090.941.40.96

Sede di Genova

Via Fiasella, 3 Int. 17
16121 Genova
Tel. +39 010 58 72 78
Fax. +39 010 59 45 08

Sede di Torino

Corso Vittorio Emanuele II, n. 64
10121 Torino
Tel: +39 (0)11 197 42 501
Fax: +39 (0)11 197 42 523

Sede di Bologna

Via Santa Margherita 2
40123 Bologna
Tel. +39 051 234 883
Fax. +39 051 234 883

Sede di Roma

Via Ennio Quirino Visconti, 20
00193 Roma
Tel: +39 06 3220229
Fax: +39 06 3221351

Sede di Bari

Via San Francesco D'Assisi 40
70122 Bari
Tel: +39 080 5213 874
Fax: +39 080 52 44 282

Sede di Bolzano

Via Museo, 31
39100 Bolzano
Tel: + 39 0471
324932

Segui LabLaw

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www.lablaw.com