

## SNACKS: DIGESTIBLE WEEKLY LABOUR NEWS – ISSUE 44

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### WEEKLY ITALIAN LABOUR UPDATES

"With collective company agreements it is possible to attribute the employees the chance to substitute their variable remuneration in pay slip with welfare benefit services of the same economic amount."

#### **Transferring TFR**

The INPS has provided clarifications on the transfer of severance pay (TFR) when an employment contract is transferred from a public administration to a private employer. In particular, the INPS clarified that such transfers involve transferring the TFR accrued by an employee from the existing relevant INPS structure to the transferee employer. This transfer of TFR takes place even if private business is required to set aside the same TFR in the INPS Treasury Fund.

*INPS, Message 22/02/2022 No. 851*

#### **Health and safety responsibilities lie with qualified individuals only**

In terms of health and safety in the workplace, prevention, insurance and supervision obligations can be transferred from an employer to another person – pursuant to Article 16 of Legislative Decree No. 81/2008 – if the following provisions are met:

1. the transfer of responsibility affects specified areas/departments rather than the entire business;
2. the delegated person is fully qualified and has relevant experience; and
3. the delegated person has existing managerial authorities.

*Supreme Court 16/02/2022 No. 5415*

## **Maximum monthly payments for unlawful dismissal**

The maximum limit of twelve months' salary (based on the last overall gross monthly salary) under Art. 18, paragraph 4 of Law 300.1970, which is the compensation remedy (in addition to reinstatement) for those who have been unlawfully dismissed, does not affect the calculation of any damages owed to the employee. The maximum limit is, instead, taken into account after calculating damages. The months' wages lost by the employee between the day of dismissal and that of reinstatement have to be counted in advance, then the *aliunde perceptum* (how much the employee has gained through other employment) and/or the *aliunde percipiendum* (how much they could have gained if it had diligently sought alternative employment) are deducted. Only then is the ceiling of twelve months' salary applied.

*Supreme Court 07/02/2022 No. 3824*

## **Collective redundancies and trade union procedures**

Sometimes collective labour agreements (both company-specific and national) contain obligations to inform and consult on the same matters covered by specific trade union procedures provided for by law, resulting in an overlap. This may also occur with respect to collective procedures for reducing staff numbers pursuant to Articles 4 and 24 of Law No. 223/1991. In a recent case, the Tribunal of Ancona found verification was needed to check whether the omission of prior trade union information provided for by collective bargaining could jeopardise a collective dismissal procedure. According to the Tribunal of Ancona, such an omission would only affect the validity of a collective redundancy procedure if the collective labour agreement clearly states that the start of the redundancy procedure is subject to the prior conclusion of a contractual information and consultation.

*Tribunal of Ancona 22/02/2022 No. 22*

## **Directors can be dismissed following merger**

According to the Supreme Court, if the merger of two companies (in this specific case, banking institutions) leads to an overlap in the same role, the dismissal of an executive holding a position assigned to another executive is lawful. The availability of executive roles following a merger does not need to be verified in advance because there is no "repêchage" burden on the employer with respect to executives.

*Supreme Court 11/01/2022 No. 569*

## **Defining a subordinate employee**

The main criterion for assessing whether a relationship formally classified as a coordinated and continuous collaboration falls under the definition of a subordinate employment relationship lies in the subordination of the employee to an employer's power of direction and control. However, if a hierarchy of management direction is not clear due to the technical or specialist nature of the tasks carried out by an employee (that their superiors cannot do themselves), subordination may be inferred via other criteria, such as continuity of work, observance of a pre-established timetable, payment at regular intervals of a fixed salary and the absence of even a minimal entrepreneurial activity on the part of the employee.

*Supreme Court 27/01/2022 No. 2537*

## **Trade union representatives of business unit transferred to new company retain positions until replacement take office**

On the transfer of a business unit to another company, any change in collective agreements regarding employment relationships does not result in the automatic and immediate dismissal of pre-existing trade union representatives. It is not relevant that any pre-existing trade union representatives were appointed by the trade union organisations which were signatories to the previous (and no longer applicable) collective agreement. To protect the employees of the transferred branch, any remaining trade union representatives retain their mandate until new employee representatives are appointed according to the mechanisms provided for in the Workers' Statute.

*Tribunal of Milan 21/12/2021*

## **Transfer of business can also be proved by witnesses**

An employee can prove, through a witness interview, the transfer of the company they were employed by. The first paragraph of Article 2556 of the Civil Code provides that agreements regarding the transfer of ownership or use of a business need to be in writing “*ad probationem*” with respect to the contracting parties. For third parties, such as employees, the proof of the transfer of a business is not subject to any limitation and the burden can also be discharged by means of witnesses.

*Supreme Court 18/02/2022 No. 5320*

## **Dismissal of managers who appropriating company know-how lawful**

Dismissing managers who appropriate documentation belonging to their employer without their consent is lawful. The importance of said documentation is irrelevant with respect to the seriousness of the conduct engaged in by said manager. In fact, taking any documents relating to a company's production process constitutes the misappropriation of corporate 'know-how' and justifies dismissal.

*Supreme Court 27/01/2022 No. 2402*

## **A heart attack during a business trip is an accident at work**

The Supreme Court ruled that a heart attack suffered by an executive as a result of the physical and psychological stress during a business trip constitutes an accident at work, since it was linked to their employment. The risk faced by the employee who, in order to reach his meeting's location, had to stay awake for 24 hours straight cannot be considered unrelated to his work activity. Consequently, an INAIL pension must be awarded to his surviving family members.

*Supreme Court 22/02/2022 No. 5814*

## **Company's majority shareholder can also be its employee**

The majority shareholder of a company may also be an employee of said company if he is not the sole holder of all management authority. An employment relationship with a company cannot be established where, in practice, the shareholder has assumed, within that company, effective and exclusive ownership of management authority.

*Tribunal of Brescia 25/01/2022*

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