



HIGHLIGHTS FOR 2023

2023

A NEW

FOCUS ON

KNOWN

CHALLENGES

BY STEFANO TRIFIRÒ AND FEDERICO MANFREDI

The events that have affected the human capital of companies over the past year have been identified under many names. Although these dynamics have always existed in business organisation, they have now become so frequent as to attract media attention. In an attempt to urgently define these events, in recent months human resources specialists have at first spoken of great resignation, then of quiet quitting, while, in recent weeks, the expression quiet firing has been attracting attention.

It is widely acknowledged that people are strategic to the competitive success of companies; however, events have made it impossible to ignore the changing needs of the workforce underlying the massive increase in the number of resignations recorded during 2022.

The attention is justified both by the quarterly publications of data by the Ministry of Labour on the number of resignations recorded during the year - as of September 2022 there were already 1,500,000 resignations, representing an increase of around 22% compared to the previous year - and, perhaps even more significantly, if one considers the data on the average duration of a worker's employment in a company, which decreases dramatically the lower the age group considered - from 7 years for Gen X to 2 years for Gen Z. In short, the motto is always the same: put people at the centre, to relaunch companies.

This is nothing new for Trifirò & Partners. Our Firm has always been convinced that human contribution is of central importance in every aspect of business and that each person's participation in the company's challenges and successes is vital, with obstacles being tackled together, and successes at work being always celebrated together.

The vision of prioritising people in the world of work is fully reflected in T&P's "style" for which the individual is strategic and indispensable. Human-to-human communication is a fundamental component for the success of the services offered to companies, making the legal implications of the strategies adopted tangible and predictable for management.

The many legal and communication initiatives that 2023 holds in store for the Firm are united by the motto "humans first". Just consider - to give an example - the laborious and daily production of scientific papers and regulatory updating in which the unanimous and transversal contribution of all the Firm's Colleagues, without exception, plays a leading role. Similarly, the challenge that T&P has successfully taken up of integrating predictive algorithmic forecasting and AI systems within its processes cannot be ignored, thus enabling solutions that are increasingly integrated and adherent to the needs of each client.

We are also very proud of the attention paid to mentoring, aimed at encouraging the creation of value with the contribution of different generations of Colleagues, where diversity is valued as a real asset, in order to develop an innovative and stimulating working environment for T&P's Professionals and Stakeholders. All this and much more draws the complex picture of human culture that makes the T&P brand unique. A culture that does not stop at these pages, but that every day contributes to defining the daily operations and the "technical dimension" of each T&P Professional, ensuring the quality and promptness of the legal assistance provided by our Firm.

REFORMS





THE NEW DISMISSAL PROCEDURE

BY MARINA OLGATI

Legislative Decree No. 149/2022 (“Legislative Decree”) was published on 17 October 2022 in the Official Gazette (Ordinary Supplement No. 243) within the framework of the Justice Reform and to implement Delegated Law No. 206 of 26 November 2021. The Legislative Decree aims to simplify, rationalise and speed up the civil process, in accordance with the objectives set out in the National Recovery and Resilience Plan (“NRRP”). The purpose of the Justice Reform is the formal and substantive reorganisation of the civil process. Law No. 206/2021 envisaged a delegation of authority to the Government “for the efficiency of the civil process and the revision of alternative dispute resolution mechanisms and the adoption of urgent measures to rationalise proceedings concerning personal and family rights, as well as in matters regarding enforcement”. In exercising the delegated power, the Legislative Decree has, in fact,

in a general way and among other measures, introduced rules that strengthen and extend the scope of application of institutions such as arbitration, assisted negotiation and mediation, as means of alternative dispute resolution; it has also envisaged provisions that tend to concentrate the preparatory and introductory phase of the trial as much as possible, to eliminate superfluous hearings and unify procedures, with a view to improving efficiency.

In this context, the Reform also intervened on the procedural rules that govern dismissal disputes, by inserting Chapter I-bis and articles 441bis - 441quater in Book II, Title IV of the Italian Code of Civil Procedure. The new provisions will enter into force on 1 March 2023.

From this date, therefore, the labour process will continue to be governed by article 409 and following articles of the Italian Code of Civil Procedure, but a special discipline will



be implemented for dismissal disputes, which will definitively replace the so-called Fornero procedure (article 1, paragraphs 47 to 69 of Law No. 92/2012). The procedure regarding dismissals will be unified, with a view to simplifying the process, thus overcoming the different procedural regime currently applicable depending on the date of employment of the dismissed employee.

The recent provisions establish, first of all, a preferential (“priority”) track for dismissal appeals in which an application for reinstatement in the workplace is lodged, even when issues concerning the qualification of the relationship have to be resolved (art. 441bis). The new procedure is then characterised by the principles of rapidity (pursued through the possibility of reducing the time limits by up to one-half, provided that the twenty-day term between the date of notification to the defendant or to the third party joi-

ned in the action and the date of the hearing is respected, and through the joint treatment, or separation, of any connected claims and counterclaims) and concentration (in particular, the concentration of the preliminary investigation phase and the decisional phase is implemented by reserving specific days, even close together, in the calendar of the hearings; the latter measure, moreover, was already envisaged by the Fornero Law). The same requirements of rapidity and concentration must also characterise any subsequent appeal phases.

Articles 441ter and 441quater then refer, respectively, to the dismissal of members of cooperatives (it is established that appeals against such dismissal are governed by article 409 and following articles of the Italian Code of Civil Procedure and that the labour court also decides on matters relating to the member relationship, including termination of the lat-



ter, if termination of the employment relationship results from it) and to discriminatory dismissal, with respect to which a multiplicity of procedures will continue to coexist. In fact, the possibility of choosing the special procedures, as an alternative to the ordinary procedure is maintained, where the requirements are met (article 38 of Legislative Decree No. 198/2006 and article 28 of Legislative Decree No. 150/2011), precluding, however, the possibility of subsequently taking legal action under a different procedure for the same claim.

An examination of the rules shows that the Legislative Decree has not clarified whether proceedings introduced under the Fornero procedure and pending at the date of entry into force of the new rules should continue under that procedure in subsequent stages. Article 35 (“Transitory Provisions”) establishes that the new rules “... shall apply to proceedings brought after” 28 February 2020, while “the provisions previously in force shall apply to proceedings pending as at 28 February 2023”. The rule is not precise: perhaps it would have been better to refer to “appeals against dismissals” brought after or before the aforementioned date. In any case, the current prevailing view taken is that the cases commenced under the Fornero procedure should continue with the same procedure also for the stages subsequent to the first stage.

Therefore, pending clarifications, depending on the solution that will be adopted, it may be possible that two types of dismissal procedures will continue to coexist for a significant period of time.

At an initial assessment and considering the purpose of the new provision, some doubts may be expressed as to whether the new dismissal procedure simplifies the process and makes it more rapid. Indeed, it can be agreed that the application of a single procedure

(whatever the substantive discipline applicable to the dismissal challenged) and the elimination of the two-phase judgment typical of the Fornero procedure does simplify the procedure; nevertheless, the new procedure could prove to be no simpler than the one currently in force, due to the power granted to the Court to separate claims (one claim challenging the dismissal and other claims of a different nature, e.g. for salary differences). In this case, there would be a duplication of litigation pertaining to the same employment relationship, in the same way as occurs now when the Court orders the separation of the claims filed in addition to the claim originally lodged against the dismissal, and which do not fall within the scope of the Fornero procedure. Ultimately, a “double track” is still conceivable: on the one hand, there will be appeals against dismissal accompanied by ancillary claims, all of which will be decided according to the “fast track” because the Court will have deemed it necessary to deal with them jointly; on the other hand, instead, dismissal cases which - as a result of the separation measure - will be decided separately from other claims lodged at the same time, the decision of which will probably take longer.

The possibility granted to the Court to shorten the time limits following a summary recognition of the content of the appeal (“taking into account the circumstances set out in the appeal”) in order to accelerate the proceedings, without allowing the defendant, at this stage, any kind of intervention, has also given rise to some criticism. It should be also noted that the defendant’s defence pleadings could also have a positive impact on speeding up the proceedings: just consider cases where, for example, the defendant offers documentary evidence to justify the dismissal, thus enabling the Court to decide the dispute immediately. In any case, since the entry into force of the new procedure is not imminent, it is to be expected that

a number of clarifications will be forthcoming, required to settle the various interpretative doubts and to provide appropriate guidance on the implementation aspects.

The hope is that the need for simplification and acceleration of the process will actually materialise. The observation is not rhetorical, considering that also the Fornero procedure, in the legislator’s intentions, was aimed at ensuring a rapid settlement of dismissal disputes, at least in the interim phase; unfortunately, after a promising start, the system soon began to operate at two speeds, i.e. with decision times in the interim phase varying from a few weeks in the most virtuous Courts to many months (if not even years!) in other Courts.

This time, however, there are the preconditions for an actual implementation of the objectives envisaged, considering that the law amendment intervenes not only on the rules of the trial, but also on the organisation of the judicial structures (by expanding the workforce and ensuring the trial office is fully operational) and that, at present, the reduction of trial times is not merely an intention, but represents one of the objectives of the National Recovery and Resilience Plan (NRRP), the achievement of which is a requirement and conditions the disbursement of the Recovery plan’s considerable funds.

ASSISTED NEGOTIATION IN LABOUR DISPUTES

BY GIORGIO MOLTENI

Assisted negotiation was introduced into our legal system by Decree-Law No. 132 of 12 September 2014, converted into Law No. 162 of 10 November 2014. As established in that law, assisted negotiation is an agreement by which the parties agree to cooperate in good faith and with loyalty to resolve the dispute amicably through the assistance of qualified and registered professional lawyers; the agreement must specify the time limit (not less than one month and not more than three months) established by the parties to complete the procedure. If the procedure is successful, the agreement thus concluded - and certified by the lawyers as to its compliance with mandatory rules and public order, as well as the authenticity of

the parties' signatures - constitutes an enforceable order. Article 7 of Ministerial Decree No. 132/2014 provided for the possibility of resorting to assisted negotiation also for labour disputes, expressly specifying that any agreement reached at the end of the procedure was exempt from the appeal regime envisaged by article 2113 of the Italian Civil Code. The law converting the decree, however, repealed the aforementioned provision, explicitly excluding the use of assisted negotiation in labour matters.

This U-turn is the result of the opposition expressed by trade unions to assisted negotiation in labour matters, as well as the negative opinion expressed, on this point, by the Supreme Judicial Council (Consiglio Superiore della

Magistratura), according to which, in the case of a disproportion of power between the parties, regulations governing the rights arising out of the employment relationship cannot be entrusted to the free individual award of the parties involved, even if assisted by a lawyer, since the presence of an impartial third party capable of overseeing the fairness of the agreed solution is required, as would be the case in conciliations, pursuant to articles 411 and 412-ter of the Italian Code of Civil Procedure. This critical remark, indeed, did not appear at all acceptable, because - to put it mildly - also trade union conciliations have a purely negotiating structure without the intervention of any impartial third party, since the representatives of the organisations which the Parties are registered with or to whom they have granted a mandate cannot be considered to be an impartial third party, as they provide them with technical assistance in the concluding stage of the agreement, as is the case in assisted negotiation.

In the years that followed, the Italian Labour Lawyers Association (Associazione Giuslavoristi Italiani), with the unanimous support of the legal profession's bodies (the National Lawyers Council-CNF and the National Lawyers Congress-OCF), fought against the exclusion of labour disputes from assisted negotiation, which appeared to be the result of an ill-concealed and unjustified distrust in the legal profession; in support of this claim, it was correctly emphasised that equal conditions between the parties are re-established through the presence of the worker's lawyer, thereby ensuring the worker receives assistance that is certainly not less effective than the assistance the worker is offered in the case of trade unions conciliations (it is well known, moreover, that case law has - on several occasions - deemed invalid the conciliations concluded before trade unions precisely because, in the cases examined, it had been found that there was a lack of effective assistance to the worker, i.e. such as to enable the worker in question to identify exactly which rights were being waived and to what extent, thus failing to provide the support function that the law assigns to the trade union at the conciliatory stage). The legal profession's reiterated requests were finally granted by Law No. 206/2022 (delegating the government to ensure efficiency in the civil process and to review the regulation governing the alternative dispute resolution tools), which - at the end of a complex and troubled legislative process - also indicated, among the



guiding criteria given to the delegated legislator to amend the current provisions on assisted negotiation, the extension of this institution to labour disputes.

When implementing the delegated power, Legislative Decree No. 149/2022 inserted in Decree-Law No. 132/2014 the new article 2-ter, pursuant to which the parties may resort to assisted negotiation for disputes referred to in article 409 of the Italian Code of Civil Procedure, provided that each party is assisted by at least one lawyer and also by a labour consultant, where deemed appropriate; the provision in question expressly maintains the possibility that such disputes be conciliated also at the venues and in the manner envisaged by the collective bargaining agreements signed by the most representative trade unions, pursuant to article 412-ter of the Italian Code of Civil Procedure. This ensures that assisted negotiation does not replace trade union conciliation, but is in addition to it, offering the parties a further way to conclude settlement agreements that are not subject to appeal, pursuant to article 2113 of the Italian Civil Code.

The new rule, in fact, expressly provides that the fourth paragraph of article 2113 of the Italian Civil Code applies to the agreement reached at the end of the assisted negotiation procedure, so that the agreement - like the agreements signed before a judge, the Territorial Labour

Inspectorate, the certification commissions or before trade unions - is not subject to the appeal regime under the first three paragraphs of article 2113. On the other hand, the possibility of challenging the agreement - on the basis of general principles - remains of course unaffected, if the agreement is null and void (insofar as it relates to absolutely inalienable rights, or because it is contrary to mandatory provisions of law) or is voidable due to a vice of consent (error, duress, or fraud). Recourse to assisted negotiation in labour disputes is not compulsory, but merely optional, since it is not a condition for proceeding with a court action.

Accepting the proposals of the Justice Committee of the Senate and Chamber of Deputies set out in the opinions expressed, pursuant to article 1, paragraph 2 of Law No. 206/2022, the delegated decree has finally provided that the agreement reached at the end of the assisted negotiation must be transmitted, within ten days, to one of the bodies entrusted with the certification of employment contracts, pursuant to Article 76 of Legislative Decree No. 276/2003. To tell the truth, the meaning of this further fulfilment is not clear, nor does the illustrative report to the delegated decree provide any further clarification in this regard. In my opinion, it certainly cannot be considered that the agreement is subject to certification, pursuant to article 82 of Legislative Decree No. 276/2003, because this would be in clear conflict with the delegated law, which ensures that the agreement reached between the parties with the assistance of their respective lawyers cannot be challenged, thus excluding the intervention of third parties for the purposes of its validity, as well as of its stability, pursuant to the last paragraph of article 2113 of the Italian Civil Code.

Pending desirable ministerial clarifications on this point, it may be assumed that the transmission of the agreement to a certification body serves to allocate a certain date to the agreement and to ensure that the competent authorities can verify the correct fulfilment of the contribution and tax obligations deriving from this agreement, a verification that would be impossible if the agreement remained solely at the disposal of the parties and/or their respective lawyers. The provisions of Legislative Decree No. 149/2022 are expected to come into force as of 30 June 2023; however, a government amendment to the



Budget Law, which is being discussed in Parliament in these very days, envisages that the effective date of the new rules to be brought forward to 28 February 2023.

The provisions of Legislative Decree No. 149/2022 were supposed to come into force as of 30 June 2023, but the Budget Law recently passed by Parliament brought their effectiveness forward to 28 February 2023.

In conclusion, the novelty introduced by the reform, which recognises the role not infrequently played by lawyers in the settlement of labour disputes, must be viewed positively, as it removes from the system of appealability envisaged by the first three paragraphs of article 2113 of the Italian Civil Code the agreements reached by the parties with the assistance of their respective lawyers, thereby

relieving the parties (companies and workers) of the time and costs required for the subsequent formalisation in a protected location, which represents, in fact, a useless ritual that unjustifiably debases the function of persons (lawyers) with specific professional qualifications who are obliged to comply with duties of diligence and competence (from an ethical point of view, in fact, lawyers cannot accept assignments on matters in which they are not adequately trained and experienced) and to exercise their legal profession faithfully and independently.



HR





HR CHALLENGES IN 2023

BY ALICE TESTA AND ILARIA PITINGOLO

In recent times and especially in the last three years, the world of work has been faced with new challenges, having to adapt to a new and heterogeneous socio-cultural context. A need for change accelerated by the pandemic that has led companies, in an attempt to cope with it, to experiment with new ways of working that are today difficult to give up.

Reference is being made first and foremost to hybrid work (or remote work), which has now become an (almost) established reality that enables employees to benefit from a better work-life balance, as well as greater flexibility in work performance, no longer rigidly anchored to a physical location. It is precisely from 2023 that employers will be obliged to enter into a hybrid work agreement with their employees, leaving behind the pandemic-related emergency regulations. In this context, it will be vitally im-

portant to set up new organisational models designed to ensure the combination of different ways of working within the company and, at the same time, to identify initiatives capable of creating a climate of cohesion and collaboration between employees, despite the physical distance. The advantages of remote working in terms of increased productivity, cost savings and environmental impact have been experienced by most companies, and today more than ever the savings generated by resorting to remote working are a useful tool to cope with the impact of the financial crisis.

However, there are still unresolved aspects that HR departments will probably have to come to terms with. Just consider, for example, the difficult management of health and safety obligations of the remote worker or issues such as the right to disconnect, which can and must be

ensured by resorting, for example, to drafting policies aimed at regulating the so-called work-life balance. When speaking of work-life balance, the recent international spread of proposals aimed at introducing the so-called “short week” by reducing the actual number of working days (to 3 or 4 in the week), and at the same time, implementing daily working hours, also merits reflection. And the foregoing has the declared aim of guaranteeing employees greater flexibility and an anxiety-free approach in the management of their working hours.

The current situation and interest aroused by these initiatives are (perhaps) the result of the legacy left by the Covid-19 pandemic and the massive use of remote working, which have, in some cases, led to episodes of work-related stress and burn-out among employees. It is no coincidence that in recent years the phenomenon of the so-called Great Resignation (a significant increase in voluntary resignations recorded particularly among workers

under 40) and, even more recently, the so-called quiet quitting (a broad spectrum of behaviour revealing the employee’s apathy and general lack of interest in work and taking the form of doing the so-called bare-minimum) has hit the headlines.

These situations require consideration regarding the opportunity for companies to invest in tools and resources directed at increasing employee welfare, thus making the company more competitive and attractive to the workforce. Space is therefore given to the development of corporate welfare policies, the granting of benefits, and the review of remuneration policies, also through the introduction of customised solutions based on the needs of the individual employee. In a constantly evolving world, the use of employee training activities will also play an increasingly important role with a view, on the one hand, to implementing skills and specialisations, and on the other, to increasing the employee’s feeling of belonging, where





the employee sees his or her role valued and recognised. The company will also benefit in terms of reducing excess turnover. Another aspect on which energies should be focused is related to the now increasing attention of employees and potential candidates to the issues of sustainability, gender gap and D&I (Diversity and Inclusion). In order to be attractive on the labour market, a company cannot therefore disregard initiatives related to economic and environmental sustainability and the implementation of programmes aimed at ensuring gender equality (also in terms of pay), inclusion and interculturalism. On the other hand, a push in this direction also comes from the recent

European Directives on minimum wages and gender balance (“Women on Boards”). In this context, the adoption or improvement of policies that identify and regulate systems and tools to combat disrespectful or discriminatory behaviour in the workplace, protecting those who report irregularities, violations of the law or criminal offences committed in the workplace (so-called “Whistleblowing”), will be equally important.

As part of the processes of automation and digitalisation of HR functions, companies will then be able to take advantage of the opportunities offered by the most advanced technologies, both in the phase of recruiting and management of employment relationships, but they will have to address the challenges related to the compliance of these tools with the Data Protection and other regulations. In fact, in 2022, new disclosure obligations for the employer were introduced by Legislative Decree No. 104/2022 (the so-called “Transparency Decree”). These stringent obligations also concern the adoption of automated decision-making or monitoring systems.

Although there is as yet no certainty as to the types of tools covered by the legislative definition, these could be, for example, systems that, in the recruiting phase, perform automated profiling of candidates, screening of CVs, or software for emotional recognition and psycho-aptitude tests, as well as the automated assignment or revocation of tasks or shifts, etc. Similarly, information obligations are envisaged in the case of the use of automated systems that provide information on the monitoring, assessment, performance and fulfilment of contractual obligations of the workers, such as tablets, digital devices, Global Positioning Systems (GPS) and geolocalisers, facial recognition systems, rating and ranking systems, etc.

With legal compliance obligations and the need for continuous innovation, 2023 also lends itself to being a year of challenging goals for HR departments whose function is increasingly central with a view to ensuring the growth and future of companies through workforce management.







T&P

Trifirò & Partners
avvocati

MILANO | ROMA | PADOVA | TORINO | TRENTO | PARMA | BERGAMO

CORRESPONDING STUDIES IN THE COUNTRIES OF THE EUROPEAN UNION, UNITED KINGDOM, UNITED STATES, CHINA AND ARAB EMIRATES

www.trifiro.it |   