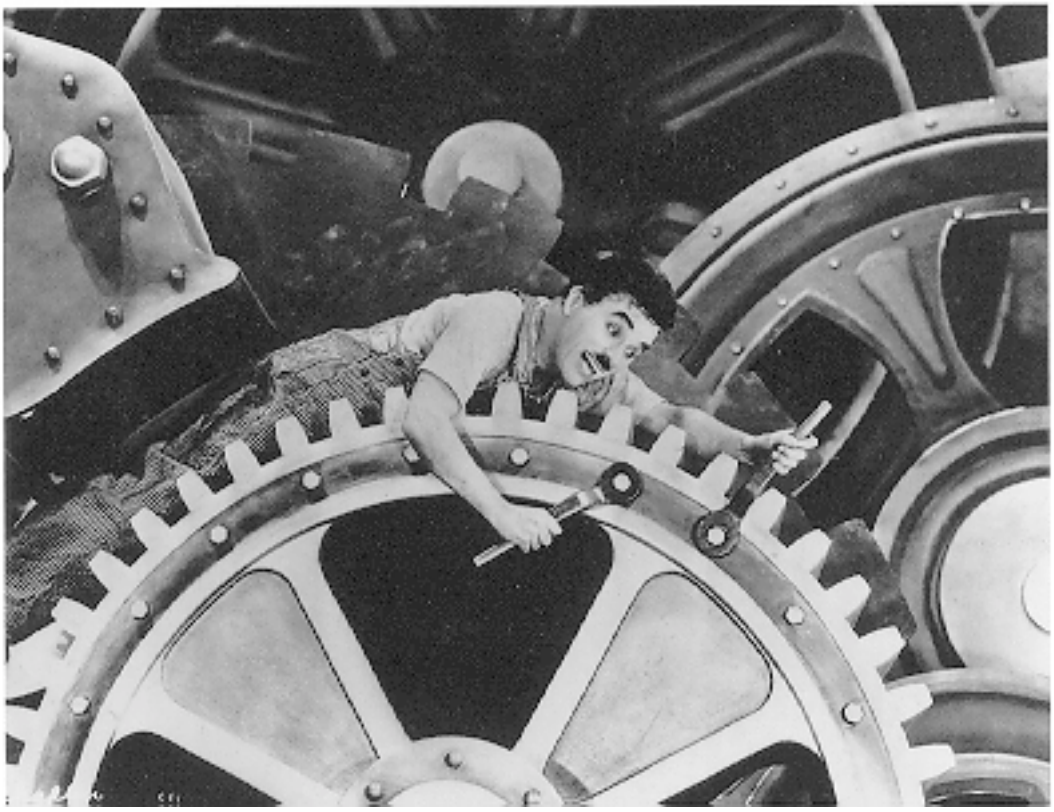
European Working Group on Labour Law

Wage setting in a comparative perspective

Italian Report:

University of Cassino



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Questions for National Reports

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1) The concept of pay

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A) The Constitutional principles related to wage.

Wage has to be considered in Italian labour law the main and essential obligation of the employer. It constitutes, according to art. 2094 c.c., the remuneration for work performances of the employee.

Furthermore, wage doesn't conclude its function in the contractual exchange of money for work, but has a social and fundamental function, according to the provisions of the article 36 of the Constitution, according to which: *"the employee has the right to a pay proportionate to the quality and quantity of work and, in any case, sufficient to guarantee him and its family a life free and dignified"*.

In such a perspective, wage constitutes the expression of a fundamental social right, which assumes a constitutional relevance according to the role that it has in the same life of the employee, as the result of its work and, normally, as the only source of livelihood for him and his family.

Therefore, wage represents one of the fundamental means to achieve the equality of all citizens, which is expressed in the article 3 of the Constitution.

According to rulings of the Court of Cassation, the provisions of the article 36 of the Constitution are immediately preceptive and, therefore, they have a general applicability to all the subordinate employment relations (See Cass. Lab. Sect., 21.2.1952, n. 461; Cass. Lab. Sect., 23.11.1992, n. 12490; Cass. Lab. Sect., 26.1.1993, n. 928).

As a result of the direct enforceability of the article 36, para. 1, of the Constitution, Labour Courts recognise a complete and direct application to the principle of proportionality and sufficiency of the wage, even in absence of a legislative provision about the recognition of a legal minimum wage.

According to the principle of proportionality, the Constitution imposes that wage has to be commensurate to the quantity and quality of work.

The parameter to identify the quantity refers to the circumstance that the remuneration must be determined according to the number of hours of work carried out or to the quantity of the goods products, as we will see after, in case of piecework wage.

Otherwise, the parameter to evaluate the quality of work derives from the principle according to whom: at higher qualified work have to amount higher wage.

On the other side, the principle of sufficiency of wage means that the pay must not fall under a certain minimum level, so that the employee and his family are effectively free and able to satisfy their existential needs.

In absence of minimum wage legislation, the principles of proportionality and sufficiency have found a specification, in accordance with drafting of case law.

Through case law on pay, therefore, has been reached an erga omnes indirect application of collective agreements, even if restricted to wage regulations provided for therein, to correct wages fixed in the individual contracts in a way abnormally low.

B) The definition of pay.

As we have seen before, according to article 2094 c.c., pay is the specific object of the principal obligation of the employer to compensate the work activities of the employees.

Nevertheless, Law does not provide an explicit definition of wage.

The total remuneration paid to an employee is usually divided into direct components and indirect or deferred components.

Direct components are those due on every pay day. They typically include the minimum hourly wage tariff fixed by the Collective or individual agreements, cost of living allowance, automatic seniority increases and other allowances of various kind, established by collective agreement.

Indirect and/or deferred components of wage take their name from the circumstance that they are paid without any immediate or direct connection with the performance of work, or are related to the continuity of the employment relationship, i.e. extra month's pay and end of services allowance (Trattamento di fine rapporto).

Rulings of the court of Cassation, over the years, trying to define a common concept of wage, have established that pay consists in all the economic treatment that the employee receives from the employer in exchange for his work (See Cass. United Sections 13/2/1984, n. 1069).

From this notion derive the following principles that cannot be derogated nor by collective bargaining or by the parties:

- Equivalence: which means that the employer pays the wage to employee in exchange for his effective work performances, principle that is derogated in some specific cases of absence from work as illness, vacation, maternity, accidents at work, holidays, marriage and parental leave and permissions;
- Mandatory: which means that pay is represented only by the amount that the employer is required to pay under the contract of employment and not those paid by way of liberality;
- Continuity, which means that fall within the concept of pay only those elements that are paid with a certain frequency and continuity;
- Irreducibility, which means that in case of a modification of the his tasks the employee has, generally, the right to maintain the wage provided in the originary individual contract of employment.

C) The obligation of pay.

According to mentioned art. 2094 of Civil Code, the payment of wage is an obligation of the employer which is part of the employment contract.
In specific hypotheses, however, law provides a joint liability of two subjects in order to give a more intense protection to employees' fundamental right to receive the wages:
1) In temporary-agency work, where the agency (which is the formal employer) and the user undertaking are jointly responsible both for remuneration and for social contribution of the workers (art. 23 of Act n. 276 of 2003);
2) In case of contracting of work or services, where contracting and contractor are jointly liable both for remuneration and for social contribution of the workers for a period of two years from the date of termination of the agreement (art. 29 of Act n. 276 of 2003);
3) In case of transfer of an undertaking or part of an undertaking to another employer as a result of a legal transfer or merger, the transferor and the transferee are jointly liable in respect of obligations, included the payment of wages, which arose before the date of transfer from an employment relationship existing on the date of the transfer (art. 2112 of Civil Code).

D) The obligation of pay in absence of work.

Generally speaking, according to the principle of equivalence, wage has to be paid only in case of effective work performance of the employee, nevertheless, it should be noted that this rule knows many exceptions provided by the law.

In some specific cases of suspension of work, in fact, the employee, maintains the right to receive wage.

We refer to the cases of illness, vacation, maternity, accidents at work, holidays, marriage and parental leave, for which legislation provides the right to remuneration also in case of absence from work.

In such hypothesis, wage assumes, next to the equivalence principle, a social function to support employees' income in situations of need, which deserve legal protection.

For example, in case of illness and accidents at work, the good protected is the fundamental right of health of the employee, according to article 32 of the constitution. In such a perspective, the article 2110, par. 1, c.c. provides that the employee has the right to receive his pay, in the percentage measures established via collective agreements. The same collective agreements can, moreover, establish hypothesis of not payment of the wage in the initial days of illness.

In others very important hypotheses of suspension of work, i.e. maternity and, in a limited way, paternity, the good protected is the constitutional familiar function of the parents, as established according to articles 31, par. 2, and 37 of the Constitution. In such a perspective, the wage of the employees involved is paid, in form of indemnity and in different percentage according by the provisions of the legislation, by the INPS (Italian National Social Security Institution) with the contribution of the employer.

Besides to these provisions the legislator recognises others relevant hypotheses of suspension of work with the right to the wage, for instance in cases of exercise of political and trade union functions or for the formation of the involved employee. In such provisions the employee maintains the right to the wage only if the suspension from work is limited to a brief period and the function covered by the employee is not remunerated by public authorities or trade union.

2) Mechanisms for determining pay.

Summary: A) The role of the Law; B) The role of the Collective Agreements; C) The role of the individual employment contract; D) Case Law.

A) The role of the Law.

Generally speaking, statutory provisions represent a limited source of regulation of the wage. In such a perspective, the article 2099 of the civil code specifies that the main sources of regulation can be identified in collective agreements and, secondly, in the individual contracts that cover the most important aspects related to pay, as the determination of the characteristics and the quantitative aspects of wage.

The civil code simply identifies the key aspects of pay, as the forms and terms of payment, leaving to collective agreement to define the others most significant aspects.

In this regards, the civil code identifies the different typologies and the several elements of the wage (forms of pay, base salary and emoluments direct or indirect).

First of all, the civil code, according to article 2099 c.c., identifies the two macro typologies of wage, as the hourly wage and the piecework pay, also identifying other special typologies, as the participation in profits or products about which we will talk further.

On this perspective, the art. 2099, para. 1, c.c., specifies the ordinary forms to calculate paycheck are:

- hourly wage, which represents the classic and most widespread system of pay, and consists in the payment of a sum of money determined in relation to working time, so it is important to know the time of work performed, which is the basis for the determination of pay regardless of the result achieved. It is customary to distinguish between the monthly salary, which competes for executives, managers and employees and the hourly wage, which competes for workers.

- piecework pay, which takes into account not only the time of work, but also the result, the productivity of labor and thus the performance provided by the worker. As a rule, the piecework combines with hourly wage and in this case we could talk about piecework mixed.

The residual forms of pay can be identified, according to article 2099, para. 3, Civil Code, in payment in nature (or in kind), that is a form of non – financial payment used in cases of marginal importance. In fact, apart of the agricultural sector, forms of payment in kind are found in domestic work and in some collective agreements, where, for instance, provisions are made for the employees of the distribution companies that can have, next to economic wage, the right to be supplied with free services.

B) The role of the Collective Agreements;

As we have seen above, according to the article 2099 of Civil Code, collective agreements play a crucial role in identifying the system of source of regulation of the wage in Italy.

To such end, the Civil Code specifies that the identification of the economic treatment is assigned to Collective Agreements that cover the most important aspects related to wage, as the determination of the characteristics and the quantitative aspects of the same.

The legislative delegation to Collective Agreements represents, therefore, a key element of the Italian regulation of wage.

In such a perspective, we have to distinguish the role played by the different levels of Collective Agreements in the determination of the measure of wage, as follows between: a) Intersectorial Collective Agreements; b) National Collective Agreements; c) Decentralised Collective Agreements.

a) Intersectorial Collective Agreements

They establish the common rules and the guidelines applicable, in all the productive sectors, in relation to the wage dynamics.

In the past, they provided and governed the automatical adjustment system of wage to the cost of life, via the so-called "scala mobile", then removed in the 1992.

Scala mobile was a mechanism automatically linked to the rise in the retail price index, which governs the raising of the cost of living and, consequently, the operation of the system of pay index-linking.

Afterwards, they had individuated the general criteria applicable to the category collective contract renewals. This occurred both with the Intersectorial Collective Agreement of the 1993, then with the Intersectorial Collective Agreement of the 2009.

The last one, in particular periodically identifies a certain number of consumer goods as a parameter (that is calculated by a public authority) in identifying the need for wage increases, via national collective agreements.

b) National Collective Agreements

National Collective Agreements, every three years, according to the criteria identified by the Intersectorial Collective Agreement, define the common minimum wage treatments applicable to all employees, anywhere in the national territory, belonging to the productive sector regulated by the agreement.

They may provide, in addition that in case of delay in the renewal can be ensured to employees involved a retroactive economical coverage with the new wage treatment for the period of contractual vacation.

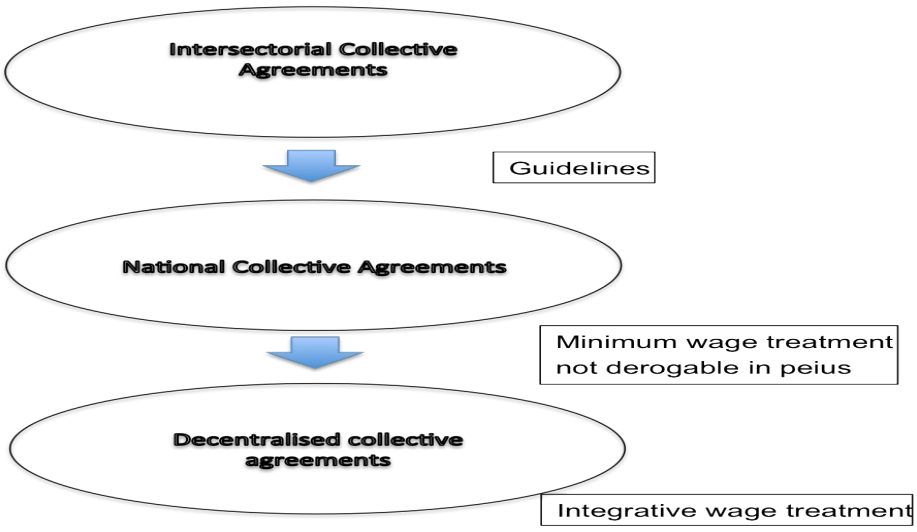
National collective agreements may, also, provide automatic machinery of wage implementation connected to the seniority of work or to the achievement of specific goals.

c) Decentralised collective agreements.

Decentralised collective agreements, at territorial and undertaking level, play a central role in the determination of wage treatments, often, establishing different typologies integrative of pay, in particular when the agreement is reached at company level.

Generally speaking, decentralised collective agreements cannot derogate *in peius* to the minimum wage treatments established by the national sectorial collective agreements. For this reason, the Intersectorial Collective Agreement of the 2009 encourages decentralised bargaining, especially at plant level, to provide, rather than general integrative wage treatment, instruments of variable wage, indexed on the results of the work.

Therefore, the role in wage determination played by the different levels of collective agreements can be resumed as follow:



C) The role of the individual employment contract

The individual contract of employment cannot derogate *in pieus* the provisions of the collective agreements, however, the parties are free to introduce in the employment contract integrative pay treatments that improve the minimum wage provided by the collective agreements.

The ameliorative economic provisions of the employment contract realise the so-called "superminimo" treatment that is a sum paid to an employee within a company over and above the minimum wage fixed by the national collective agreement. These payments may be the result of collective bargaining, individual negotiation or a unilateral decision of the employer.

D) Case Law

As we have seen above, in the Italian System a very important role in determination of pay, especially in the interpretation of the fundamental principles of wage, according to article 36 of Constitution, is played by case law.

The jurisprudence, in fact had a crucial impact in the identification of the complete and direct enforcement of the principles of proportionality and sufficiency of wage, stated by the art. 36 of Constitution, even in absence of a legislative recognition of legal minimum wage.

As we have seen, normally, the Jurisprudence of the Court of Cassation uses, as parameter to determine the proportionate and sufficient wages, the amount of pay established, in relation to the tasks performed by the worker, in the collective agreements in force, regardless of the inscription of the parties to trade unions signing the agreements.

At the same time, however, rulings of the Court of Cassation establish that, for the implementation of constitutional precept, the parameter offered by the collective agreements could not be considered binding nor it is the only element used for the quantification of just retribution, so the Court has the power to depart from these provisions, with adequate motivation (See Cass. Lab. Sect., 1.2.2006, n. 2245; Cass. Lab. Sect., 22.6.2004, n. 11624; Cass. Lab. Sect., 18.3.2004, n. 5519; Cass. Lab. Sect., 26.3.1998, n. 3218).

Both in the case in which the parties have not quantified the compensation for work performed and nothing is set in collective agreements or in customs and praxis, than in the case in which the adequacy of wage is disputed, therefore, it is allowed to the court to intervene to determine, in an equitable way, the pay, inspiring to the parameters specified via article 36 Constitution, or via the previsions set in the collective agreements applied in work relationships of the same nature (See Cass., United Sections, 26.3.1997, n. 2665; Cass. Lab. Sect., 5.5.2004, n. 8565; Cass. Lab. Sect., 22.8.2003, n. 12352; Cass. Lab. Sect., 23.6.2003, n. 9964).

a) Drafting and overcoming of the all-inclusive concept of pay.

As a result of the complexity to interpretate the nature of the different voices, direct or indirect, indicated in the paycheck, case law, initially had drafted a principle according to which all the various item payed by the employer (basic pay, bonuses, premium etc.) had to be included in the legal concept of pay.

Actually, the jurisprudence of the Court of Cassation denies the existence of an all-inclusive concept of pay and stated that, with the exception of expressed legal provisions, the collective agreements are free to establish which treatments have to be considered direct elements of wage base and which, instead, as an indirect form of wage.

3) The principle of equal treatment in terms of pay.

The constitutional rules on wage are completed by the warranty of the equal pay treatment that the Constitution, according to article 37, 1° and 3° paragraphs, recognise to women and minors respect the same work of the men.

The article 37, 1st paragraph establishes that woman has the same rights and, at same work, the same wage recognised to the man, while the 3rd paragraph recognises to minor, at equal work, the right to equal pay of men.

The constitutional principle for women is integrated by the legal provisions contained in the Code of equal opportunities between men and women, actually reformed by the legislative decree no 198/2006 in force form the 20th February 2010.

The code, ex article 1, par. 2, generally states that: "*Equality of treatment and opportunities between women and men must be ensured in all areas, including acccess to employment, working condition and pay*"

The general principle is integrated by the provisions of the article 28 of the Code, according to which: *"Is forbidden any discrimination, direct or indirect, relating to all aspects and conditions of wage, in respect to same work or for work which is attributed equal value"* and *"work classification systems adopted for determining wage are required to take common criteria for men and women in order to eliminate discrimination"*.

Same protection is afforded to minors by the Act no. 977/1966 and subsequent amendments.

Actually, in implementation of the European Directives 2000/43/EC and 2000/78/EC, the national legislator, respectively with the Legislative Decrees no. 215/2003 and 216/2003 gave a general equal wage protection in relation to other discriminatory factors as racial or ethnic origin, religion or belief, disability, age and sexual orientation.

According to the provisions of the Legislative Decrees no. 215/2003 and 216/2003 we can argue, therefore, a general extension of the principle of equal treatment in terms of pay, regarding the above mentioned discriminatory factors.

The legal provisions described, far from prefigure a general application of the principle of equal pay for all employees, in absence of the typical discriminatory factors, are faced also with the absence of a general statistical framework of the national employment situation in the topic of wage.

Italian national statistical system is not geared to studying the data on pay differentials and it is, therefore, very difficult to find useful data in this topic. Companies, in fact, consider this information confidential and the statistical institutions manage to provide only data on nominal increases in collectively agreed wages and, in most cases, without considering the discriminatory factors.

Despite on the described legal framework, from a more general point of view (legal discriminatory factors aside), according to the ruling of the Constitutional Court No° 103/1989, differential treatments in matters of job classifications and wages provided either by the employer or by collective agreements are considered lawful only in so far as they are "objectively justified".

Such a principles do not amount to an absolute principle of equal treatment; the employer is therefore enabled to treat differently the employees working in different position, only in so far as he is able to demonstrate that such a treatment is justified by business related reasons. It especially occurs when the activities are different and different collective agreements are applied. On the contrary whenever the collective agreement applied is the same, any differential treatment could be hardly justified.

Giving application to the Constitutional Court's ruling, Italian Courts could be able to scrutinise the criteria adopted by collective agreements in job classification and pay scales settlements.

Such an approach could lead the Courts to a cross-industry comparison, in order to evaluate whether the existing differential treatments between different branches are reasonable or not.

However, the constant orientation of the Court of Cassation (the first ruling on this point was Judgment no. 6030/1993) hold that Italian law does not provide a general principle of equal pay.

As a general rule, according to the Court of Cassation, differences in job classifications and pay provided either by the employer or by collective agreements are lawful, as long as a precise imperative rule does not prohibit to treat differently workers doing the same or comparable work.

The rule of equal pay would amount to a limit to the employers' freedom of initiative as well as to "collective autonomy", i.e. on the power of social partners to evaluate collective interests.

Hence, such a rule could be enacted only by the legislature, and not by a court.

Moreover, pay discrimination could be easily hidden both in additional wages bargained at local or enterprise level and in the so called superminimo individuale, but there are not recent and specific studies or case law on this matter.

4) Flexible pay systems

Summary: A) Flexible pay systems; B) Legal Incentive to flexible pay systems linked to the undertaking productivity.

A) Flexible pay systems:

a) Piecework

The Historical form of flexible wage system in the Italian legislation can be considered the piecework, that we have generally described before.

Piecework is a modality of payment based on the work output, for instance, related to the number of items produced.

It is a wage form that stimulates greater labor productivity: in fact, in the system of piecework, the quantity of performance and the relative wage, depend on the intensity of the commitment of the worker in the time unit. It must be noted that, when piecework can't be self-determined, but it is bound by the rhythms imposed by the machine where the worker is employed, the piecework responds above all to ensuring a standard yield.

As actually applied and regulated by collective bargaining, piecework is never pure (See Cass. Lab. Sect., 7.7.2004, n. 12512; Cass. Lab. Sect., 10.1.1994, n. 162; Cass. Lab. Sect., 27.1.1988, n. 692), with the exception of the homework and telework, so it does not mean that an employee's entire wage is correlated to the results of the work, but only a part of pay, which is consequently know as the variable part.

Piecework is know as “individual” if it is linked to an individual’s output fixed in the contract of employment of the employee, and “collective” if it is linked to the output of team or groups of employees, fixed in the collective agreement.

b) Commission

The commission is a pay proportionated to the values of affairs concluded by the workers for the employers. It is a type of pay diffused in the business relationship in the commercial sector, lawful on condition that is accompanied with a sufficient wage. With the commissions system is allowed pay the worker , in all or in part, with commissions without reference to the minimum schedules established by the collective bargaining. So the commissions has all the effects of a wage character, fixing the total amount, without that to its regard can find application, the normative system that regulates the piecework (See Cass. Lab. Sect., 14.2.1983, n. 1153).

The worker paid with commission has the obligation to prove the affairs concluded as an assumption for the commission (See Cass. Lab. Sect., 17.12.1982, n. 6988).

c) Profit-sharing

It is a wage form, established by the art. 2102 of Civil Code, *“on basis of net profits of the company and for the companies submitted to the publication of the balance, according to the net profits resulting by the balance approved and published regularly”*.

On the contrary, the shareholding of employees is not a wage form. It, also if prefigured by the Civil Code and stimulated fiscally by the legislator, is always been, and now stays a form of controversial economic democracy, criticized, because it allows a subaltern participation of the workers to the progress of the company, for this, it is not settled in our system.

B) Legal Incentive to flexible pay systems linked to the undertaking productivity.

To deal with the Italian economical crisis, the Government tried to introduce some fiscal incentives to increase the recourse, in the decentralised collective agreements, at undertaking and local level, to flexible pay treatments.

To such end, the Presidency of the Council of Ministers in the date 22nd January of 2013 adopted a decree that extends, for the period 1st January – 31st December 2013, a tax reduction for the flexible wage treatments linked to the productivity of the undertaking, for the employees with income not exceeding in 2012 to € 40.000,00 gross.

In the decree, productivity wage treatments have to be considered the employees payments, agreed in collective local or undertaking level agreements, explicitly linked to quantitative indexes of: productivity / profitability / quality / efficiency / innovation, or, alternatively, wage treatments that can be reconnected to one of the followings intervention plans:

a) Redefinition of working-time systems and their distribution with flexible models, aimed at a more efficient use of productive structures appropriate to achieve productivity goals, agreed through a monthly planning of the quantity and timing of work performances;

b) Introduction of a flexible distribution of the holiday through a business planning of the days of holiday in excess of two weeks;

c) Adoption of measures to make compatible the use of new technologies with the protection of fundamental rights of workers, to facilitate the activation of tools, essential for the performance of work activities;

d) Activation of interventions in the field of fungibility of tasks and integration of skills, even functional to technological innovation processes.

Finally, it is expected that, in order to monitor the development of tax relief and verification of compliance with the provisions of the agreements to the Decree, the Employers have to deposit the agreement at the competent territorial labour Directorate within 30 days from their subscription.

5) Variation of pay in time of crisis.

Summary: A) Individual amendments; B) Collective amendments.

One of the most complex issues on wage concerns the power of variation of pay in case of crisis of the undertaking.

We can divide the analysis of the topic in two macro-categories: A) Individual amendments and B) Collective amendments.

A) Individual amendments

Generally speaking, according to article 2103 of the civil code, the individual amendments *in peius* of tasks and wage originally agreed by the contractual parties are null (See, *ex multis,* Cass. Lab. Sect., 08-05-2008, n. 11362).

At a first reading, the rule seems to establish two simple principles:

- The prohibition of any unilateral reduction of wage agreed with the employee;

- The invalidity of any agreement in contravention of this prohibition.

Such principles, instead, find their derogation in case of economic crisis of the employer that can take to a dismissal of the employee for economic reasons.

In such hypothesis, the employer has the duty to check in advance, all the possible alternative solutions to the dismissal for objective justifiable reason, through the control of the respect of the "duty of *repechage*", *id est* demonstrating the impossibility to assign the employee to similar tasks (Cass. Lab. Sect., 16/05/2003, no. 7717).

The employer must do a preventive analysis of his enterprise, searching for a different task for the worker, also proposing an "alternative", which may consist, agreeing with the employee, in a lower task. So, in that case, employer and employees can agree a reduction of wage, linked to the lower tasks, to remove the risk of a dismissal connected to economic reasons of the employer. In case of refusal of the employee, the employer can go on with the individual dismissal.

It is very interesting to note, moreover, that, according to the rulings of the Court of Cassation, it integrates the crime of extortion, the threat of the employer to the employees, in a context of serious employment crisis, of the loss of job in the case where the employee does not accept a wage less than that resulting from the paycheck (See, *ex multis,* Cass. Lab. Sect., nn. 656/2009; 36642/2007; 16656/2010).

Different speech should be carried out in relation to the ameliorative provisions of the employment contract agreed between parties with the so-called "superminimo" treatment, as we have described above in the Paragraph 2, lett. C).

As we have seen, the Super-minimum is a sum paid to an employee within a company over and above the minimum wage fixed by the national collective agreement, that can be assigned to the employee, trough a direct agreement with the employer at the moment of signing of individual contract of employment or, indirectly, through the application of a disposition contained in the decentralised collective agreement, at plant or local level.

Therefore, to indicate the cases of lawful reduction of the treatments, we have to distinguish between the two described hypotheses.

In the first case, the economic treatment, for its ameliorative nature, that going beyond the scope of application of the paragraph 4 of the art. 2103, Civil Code, could be freely reduced,

agreeing by the contractual parties, but it can't be reduced unilaterally by the employer or through the application and the reference to new collective agreements applicable in the undertaking.

The only limitation is the respect of the minimum and sufficient wage, prescribed by the art. 36 of the Constitution.

In the second case, instead, the treatment doesn't constitute a direct disposition of the individual contract of employment, but it is a direct provision of the collective agreement applicable to the working relationship. Therefore, employer and employee cannot agree directly a reduction of the economic treatment (See Cass. Lab. Sect., 28/08/2004, no. 16691; Cass. Lab. Sect., 7/08/2004, n. 10762).

B) Collective amendments

The principal hypothesis that detects in terms of collective amendments to wage treatments is the case, regulated by the Act no. 223/1991, in order to avoid a collective dismissal.

In collective dismissal regulation, in fact, the employer is obliged to precede the dismissals of the employees by a joint examination with the trade union workers representatives that should result in a research for alternative measures of the dismissals, even worse than the previous employment situation.

So, the joint examination can allow the workers representatives, intervened in the procedure, to propose alternatives to dismissal.

To mitigate the negative consequences of the redundancies, the rule expressly provides in par. 5, of art. 4, Act n. 223/1991, the possibility to assign different tasks to the employees, in the same enterprise, including the use of social-plan agreement and part-time work, and, according to art. 4, 1° par., derogating art. 2103, 2° par. of the Civil Code, assigning the redundant employees to different tasks, even lower, and assign the redundant employees in another enterprise, trough detachment or temporary command.

In such a perspective, the alternative measures that have to be examined, concern even the possibility to use, in the same company, the employee in excess for equivalent tasks or in lower level tasks in the same plant, that is to say that employer in agreement with trade union representatives can reduce wage treatment to remove the risk of a collective dismissal for economic reasons of the employees.

Other hypothesis that detects is the case of the "proximity" collective bargaining, regulated by the Article 8, of the Act no. 148/2011.

Generally speaking, rulings of Labour Courts recognize that a new collective agreement may make worse the previous employment conditions, with the exception of the respect of the principle of the irreducibility of wage treatments. In other words, with a new collective agreement should not be possible a reduction of wage.

Nevertheless, with the introduction of Article 8, of Act no. 148/2011, the collective agreements stipulated at company and local level (described as 'proximity bargaining' by the new legislation) can derogate, even in peius, a broad range of employment terms and conditions prescribed by law or national collective agreements.

Agreements are valid and binding for all the relevant employees, provided that territorial or plant agreements are signed by the most representative trade unions at national, territorial or company level and provided that the signatories have the required majority in the relevant bargaining unit.

Article 8 of the new Act, however, allows proximity bargaining to opt out on several issues, providing the resulting agreement still conforms to the Italian Constitution, EU norms and international requirements. The issues include:

(a) working hours;

(b) worker tasks and job classification;

(c) fixed-term work contracts, part-time contracts, temporary agency work;

(d) audiovisual equipment and the introduction of new technologies;

(e) hiring procedures;

(f) the regulation of freelance work;

(g) the transformation and conversion of employment contracts;

(h) firing employees, with some exceptions (such as discriminatory firing, pregnant workers, mothers with babies under the age of one, firing during matrimonial leave, or firing those who have requested parental or adoption leave).

The most innovative aspect of the provisions of art. 8, of Act no. 148/2011, is constituted by the fact that the agreements can derogate even in worse legislation and national collective

agreement that, therefore, in relation to changes to working time and worker's tasks, may also have a direct impact on collective wage treatments previously paid to workers.

It seems an exception to the principle of irreducibility in peius of the wage treatments acquired, needed for extraordinary reasons, in the majority of cases linked to economic reasons of the company.

6) Consequences of non-payment of wages by the employer and remedies for the employees.

Summary: A) Reasons justifying the non-payment; B) Non payment as just cause for the employee's dismissal (constructive dismissal); C) Judicial remedies for the employees.

A) Reasons justifying the non-payment

As we have seen, according to the provisions of art. 2094 of Civil Code the contract of employment has to be considered as a reciprocal contract in which the employee's principal duty is to perform his work activities. Therefore, when the employee doesn't respect his main obligation, the employer is released from his duty to pay the remuneration.
The judge-made law has consequently stated that the strike is a valid reason for non payment of wages since it represents, although recognised as a fundamental employees' right by art. 40 of the Italian Constitution, a breach of the contract of employment (see Cass. Lab. Sect., 26.5.2001, n. 7196).
The case law has also stated that, as a general rule, the deduction of wage has to be commensurate to the last of the strike even if, concerning this matter, the Court of Cassation has specified that, in case of strikes that last less than a working-day (so called "*short strikes*"), the employer is allowed to deduct the whole daily remuneration when the residual work performance is technically unusable (Cass. Lab. Sect., 6.3.1986, n. 1492).
Other valid reasons for non-payment of wages are the cases of "*force majeure*" such as a natural event (Cass. Lab. Sect., 21.1.1986, n. 376) or a firm's occupation by striking workers (Cass. Lab. Sect., 2.12.1985, n. 6032).

B) Non payment as just cause for the employee's dismissal (constructive dismissal)

Art. 2119 of Civil Code states that, if a "*just cause*" occurs (*id est* a reason so much serious and urgent that it does not allow the continuation of the employment relationship even on a temporary basis), the employee:
a) is entitled to resign immediately without giving any advance notice to the employer;

b) is entitled to receive the indemnity *in lieu* of notice as if he had been fired, since the dismissal is due to the employer's conduct.
According to the case law of the Court of Cassation, the "*just cause*" provided by art. 2119 of Civil Code occurs in any case of gross misconduct by the employer and, in the first place, in case of non-payment of wages or in case of repeated delays in payment.
In case of constructive dismissal, the employee registered to the I.N.P.S. (acronym of the national institute for social security) since not less than two years and with at least 52 weeks of paid contributions for the unemployment benefit during the two-years period prior the end of the employment relationship, is entitled to receive the ordinary unemployment allowance that has 8 months duration or 12 months for employees older than 50.

The amount of this allowance is calculated as a percentage of the employee's wage in his last three months of service. It covers the 60% of the wage for the first 6 months, the 50% for the 7th and the 8th months and the 40 % for the further months. The unemployment benefit has a maximum threshold.

C) Judicial remedies for the employees

If the employer doesn't perform his obligation to pay the wages, the employee can bring the case to Labour Court.

Italian Labour Courts, composed by specialized judges, are integrated into the organisation of the general civil court system but follow the special procedural rules introduced by Act n. 533 of 1973 in order to reduce the amount of written material, to increase participation by the litigants and, above all, in order to speed up the labour trial.

In the first instance Labour Courts are composed by single judges, whatever the monetary amount of the case, whose decisions can be appealed before the Court of Appeal, composed by three judges, with a possible further appeal before the Court of Cassation.

Moreover, the labour trial is exempted from any kind of taxation when the employee's household annual income doesn't exceed 31.884,48 euro.

The employee has to introduce his claim before the Labour Court within five years but this prescription period, provided by art. 2948 of Civil Code, may be interrupted by an extrajudicial written request for payment.

The case law of the Constitutional Court has also stated that this prescription period of five years has to be calculated starting from the date of the end of the employment relationship

when the employee, not protected by the provisions of article 18 of Act n. 300 of 1970, is not entitled to be reinstated by Labour Court in case of unlawful dismissal: according to the Constitutional Court decisions, in fact, the fear of being fired could lead the employee not to bring the case to Labour Court during the employment relationship (see C. Cost., 10.06.1966, n. 63; C. Cost., 12.09.1972, n. 174).

Art. 429 of Civil Procedure Code provides that, when Labour Court ascertains the right of the employee to receive the claimed remuneration, it orders the employer to pay the owed sum increased by legal interests and currency revaluation.

Moreover, according to the provisions of articles 2751 *bis* and 2777 of the Civil Code, workers' wage claims are second in order of priority (after taxes and court fees) over the employer's estate. However, secured creditors are paid before workers in respect of the employer's assets that are affected by mortgage or liens.

Pursuant to art. 2 of Act n. 297 of 1982, a Guarantee Fund administered under the I.N.P.S. (National Social Security Institute) protects severance pay ("*Trattamento di fine rapporto*") in case it cannot be paid due to the insolvency of the employer.

The insolvency is defined as in the bankruptcy law, which calls for a formal declaration of insolvency being made by the competent judge.

Thereafter Act n. 80 of 1992 has implemented EU Directive 80/987 on the protection of employees' claims in case of insolvency of their employer.

Under this law the Guarantee Fund administered under the I.N.P.S. takes up also the payment of some specified workers' claims in the event that they have been left outstanding because of the insolvency of the employer. Workers' claims so protected are the salaries corresponding to the three final months of the employment relationship, within a time limit of one year before the declaration of insolvency.

Further readings

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