

TRANSFER OF UNDERTAKING: EXCLUDED EMPLOYEES HAVE 60 DAYS TO FILE A CLAIM IN RELATION TO THEIR (NON-)TRANSFER

The Court of Appeal of Palermo, in its Ruling No. 993 of 28 December 2016, held that the limitation period of 60 days is to be deemed applicable to claims from employees who, having been excluded from a transferred undertaking, seek to obtain the transfer of their employment relationship, as part of the undertaking, to the transferee.

This ruling means that the transferee will be protected from the uncertainty caused by claims commenced years after the transfer.

The limitation period runs from the date of transfer of the undertaking: there is also a practical need to make the workers excluded from the transfer aware of this date .

An appropriate solution here could be to notify those employees who are excluded from the transfer of the transfer date, especially in (potentially) controversial cases or where the scope of the transfer is difficult to identify.

THE LIMITATION PERIOD

Ruling No. 993 of 28 December 2016 of the Court of Appeal of Palermo has deemed that the limitation period under Article 6 of Law 604/1966 and Article 32 of Law 183/2010 also applies to claims raised by workers whose employment relationship is excluded from transfer in the context of a transfer of undertaking.

The above legislation provides that:

- Dismissals must be challenged within 60 days following receipt of written notice (then, within the 180 days then following, the judicial claim or administrative request for conciliation or arbitration must be filed);
- The same limitation period also applies to the transfer of the employment relationship pursuant to Article 2112 of the Italian Civil Code (transfer of undertakings or of a part of undertaking), with the period commencing as from the date of the transfer of the undertaking, and to any other case where a worker seeks the creation or recognition of an employment

Key issues

- According to the ruling under review, employee claims in relation to their non-transfer, in the context of to the sale of an undertaking, can also be subject to the limitation period
- The limitation period is 60 days from the date of the transfer of the undertaking
- Companies should also notify the date of the transfer to any workers who have been excluded from the transfer.

relationship with an entity other than the holder of the employment contract.

Until now the limitation period clearly applied only to transferred workers.

An academic interpretation would view the limitation period as not applying in the converse case where the worker – still employed by the transferor, alleged that he or she was an integral part of the undertaking transferred.

Ruling No. 993 significantly altered the interpretative framework, recognising that the limitation period also applies in claims against the transferee. The Court of Appeal of Palermo observed that this conclusion is consistent with the rationale of the rule, which is to confine within a short and reasonable time workers' rights to act against the employer, for the purpose of ensuring certainty in relations between the parties. Non-application in these circumstances would lead to an unreasonable difference in treatment: the transferee would be open to judicial actions by non-transferred employees of the transferor for the full statute of limitations, while the transferor would be protected by the 60-day limitation.

PRACTICAL CONSEQUENCES FOR EMPLOYERS

From a practical point of view, this innovative ruling makes it advisable for companies to notify the non-transferred workers of the transfer of the undertaking and its effective date.

In fact, the law provides that the limitation period begins to run as from the date of the transfer, but does not specify whether such date must be made known to the employees. It is possible for workers who are excluded from the transfer not to be aware of the date of the transfer, given that usually they do not receive any communication in relation to such a transfer. The law does not require that written notice be given to the non-transferred employees, while written notice must be given to the transferred employees of their transfer pursuant to Article 2112 of the Civil Code, in accordance with Legislative Decree 152/1997.

To prevent uncertainty, the most appropriate solution seems to be that of also providing written notice of the transfer of the undertaking to the non-transferred employees. The notice to the non-transferred workers should confirm that the addressees will remain employed by the transferor (as the transfer does not affect them) and will have the effect of crystallising these employees' knowledge as to the date of the transfer of the undertaking.

This notice will be very useful where the perimeters of the undertaking being transferred are particularly difficult to identify. Naturally, the notice must be given via an appropriate method, to allow legal certainty as to the fact that it has been received; for example, via registered mail with acknowledgement of receipt.

The Supreme Court of Cassation might still reverse the instant ruling; similarly, other lower Courts could rule differently on the matter, given that precedent judicial decisions in Italy are not binding. Nevertheless, given the new vision provided by the instant ruling, which aims to give certainty to the legal relationships in the complex environment of business transfers, it is advisable to inform, with a specific notice, those employees who are excluded from the transfer of the business, especially in the more controversial cases, so as to add a procedural defence to all of the defences on the merits should a claim be made.

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