

EMPLOYEES MUST BE REINSTATED IN THE EVENT THE FACTS UNDERLYING DISCIPLINARY DISMISSAL DO NOT HAVE DISCIPLINARY VALUE

Employees hired with the so-called "contract with graduated safeguards" must be reinstated in the workplace if the facts underlying the disciplinary dismissal existed, but they did not have any disciplinary value. This has been stated by the Italian Supreme Court with the decision No. 12174 of 8 May 2019.

Pursuant to the law, in the event of disciplinary dismissal, employees hired before 7 March 2015 have the right to be reinstated in the event that "the facts underlying the dismissal do not exist" while employees hired after such date with a so-called "contract with graduated safeguards" would have the right to be reinstated only when "it is directly proven in the proceeding that the material facts underlying the dismissal do not exist".

Despite the different wording of the provisions above, the Italian Supreme Court stated that an existing fact must be considered as not having happened in the event it cannot be subject to any disciplinary sanction. Essentially, the Italian Supreme Court confirmed for employees hired after 7 March 2015 the concept of "facts underlying the dismissal" affirmed with reference to employees hired before such date. This concept includes not only the cases in which the facts do not exist but also other cases in which the existing facts underlying the dismissal do not have disciplinary value and therefore do not have a negative value from a legal standpoint. This decision appears to overcome the wording of the new provision governing the so-called "contract with graduated safeguards".

The flexibility introduced on 7 March 2015 by the so-called "Jobs Act" has been further reduced after the decision by which the Italian Constitutional Court granted discretion to judges in awarding an indemnity of up to 36 months to unfairly dismissed employees, without determining the indemnity only by taking into account their length of service as originally established by the Jobs Act and without prejudice to the cases in which the employee has the right to be reinstated (Decision No. 194/2018).

Key issues

- An existing fact must be considered as not having happened in the event it has no disciplinary value.
- The above is applicable also to employees hired after 7 March 2015 with the so-called "contract with graduated safeguards".
- Despite the different wording of the provisions governing dismissal of employees hired (i) before 7 March 2015 or (ii) after such date, the Italian Supreme Court confirmed the concept of "facts underlying the dismissal" affirmed with reference to the employees hired before 7 March 2015.

C L I F F O R D

C H A N C E

As a result of these decisions, employers must pay particular attention when deciding whether to dismiss an employee in order to mitigate the risk of reinstating the employee or the risk of paying compensation of up to 36 months of their salary.

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