TRIFIRO' & PARTNERS AVVOCATI

N° 21

April 2018

T&P Magazine

"Brothers, knives": the bond of subordination "enters" into the family

Followed by Enrico Vella

Constant respect of work hours that coincide with the opening to the public of a commercial activity and the payment of a monthly fee at regular intervals are the two conditions which, when proved, allow the performance rendered by a sister to be classified as a payroll worker activity owned by the brother. This is the rule of law expressed by the Supreme Court in decree n. 4535 of 27 February 2018.

At first instance, the subsidiary was referred to the Court of Turin to claim against her own brother, owner of an individual firm operating in the flower and plant trade, the subordinate nature of the relationship and the payment of the related differences in remuneration. The Court of First Instance, having recognized the existence of the bond, fully accepted the applicant's claims. The sentence was confirmed on appeal.

The Court of Cassation highlighted the existence of clear elements that made it possible to bring the employment relationship back into the context of payroll work. In fact, during the investigation, the constant presence in the sister's shop emerged, the observance of a time coinciding with the opening to the public of the commercial activity and the payment, at fixed intervals, of a fee.

These elements suggested that the collaboration given by the sister had entailed a steady contribution to the organization of the commercial activity and not a mere participation in the activity, dictated by reasons of family assistance. The fixed remuneration qualifies as payment for the benefit and not as an economic contribution to cover contingents and, therefore, variable life requirements.

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With the judgment in question, the Court seems to confirm the well-known principle that the bond of subordination, where subsistent and proven, prevails over mere collaboration within the family business. It excludes subordination in family work when the parties have given, expressly or tacitly, a different configuration to their relationship or, more generally, when it is intended to attribute legal importance to work performed in the family that can not be classified in typical cases.

The company email does not nail the worker for lawful dismissal because the server is in the hands of the employer

Excluding the probative value of the messages acquired from the employee's account: this is correspondence that required certain guarantees or abstract documents that could be altered by the company. There is no dismissal for just cause of the worker if the dispute is on the company's email account. The Cassation confirms this with the sentence 6425/18, published on March 15 by the employment section in the context of the same sequence of events in 5523/18.

Identity and identifiability

The Supreme Court provides further clarification: the evaluation is confirmed according to the insufficient value of the evidential emails acquired by the employer in relation to the employee's company account. And this is for two reasons: it is about correspondence of which the acquisition required certain guarantees and the intervention of the judicial authority or of documents coming from the data that have full availability on the company server and, therefore, the abstract possibility to intervene on the content; in fact it is not a certified email or signed with a digital signature that can guarantee the identifiability of the author and the identity of the document.

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Employee is an "on call" worker if he falls within the company organization and is paid by the hour

The cash-desk operator in the betting center may be considered as payroll worker, where he is part of the company organization and is still paid in proportion to the hours worked. Thus, the subordinate relationship between the betting center and the employee who collects the installments is set up and pays the winnings where it is not paid on the basis of net cash receipts.

And this even if from time to time has the right to join or not the call of the company and in the course of the relationship has refused the stabilization. This is what emerged from sentence 3457/18, published on February 13 by the sections of the Cassation. It does not matter that the worker has the right to join or not to call the employer to cover the shift: in case of impossibility occurred, in fact, the person must still notify the company or take action to find a substitute in the pool of cashiers available; the fact does not undermine the personality of the service where the remuneration is in any case paid to the person who actually provides the service: the possibility of part time work at flexible time can be recalled in this regard. And given the nature of the duties, the violation of the fidelity obligation must be excluded if more than one part-time relationship is established at different times in different betting agencies. In this case, the service provided by the person in charge of the cash desk is in any case provided according to methods and functions predetermined by the company. Lastly, the possible refusal to regularize during a relationship is irrelevant: the rights triggered in question, in fact, concern a mandatory and unsusceptible protection of valid ex-ante waiver agreements.

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The manager is entitled to compensation for loss of chance if the company does not assign him objectives to be achieved

The pecuniary damage is linked to the possibility of obtaining an economic advantage according to an evaluation to be carried out ex ante. The manager is entitled to compensation for loss of chance if the company has not assigned him the objectives to be achieved. The damage, of a patrimonial nature, does not consist of the loss of an economic advantage but in the mere possibility of achieving it according to an evaluation to be carried out ex ante. This was reiterated by the work section of the Supreme Court with sentence 2293 of January 30 which rejected the appeal of a company under extraordinary administration. The court had admitted to the liabilities various receivables claimed by a manager and a sum by way of compensation for the damage awarded to him for the non-assignment of the objectives over a two-year period.

Furthermore, the Court of Cassation continued, the loss of chance financial damages are non-current, but future damage, consisting of the loss not of an economic advantage, but the mere possibility of achieving it, according to an assessment to be brought back to the moment in which the wrongdoing behaviour affected this possibility in terms of its harmful potential.

The Court of Cassation concluded, as established in the present case, it consists of a concrete and effective lost opportunity to achieve a particular asset, not in mere factual expectation, but in a separate equity entity, legally and economically, which is subject to independent assessment, which must take into account the projection on the subject's sphere of assets.

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The unjustified absentee worker can not be dismissed because of the need to assist the depressed daughter

A serious family reason, supplemented by the serious postpartum syndrome of the daughter, should be considered in assessing the missing employee who does not submit the forms requesting leave. Assisting the daughter affected by severe postpartum depression justifies the failure to send the permit to take leave: it can not, therefore, trigger the dismissal for just cause of the employee who is unjustifiably absent.

The Supreme Court ratified this with sentence 1922/18, filed January 25. The conduct alleged against the woman and which cost her the withdrawal related to the failure to send the employer permission to take leave for serious family reasons, namely assistance to the daughter struggling with heavy postpartum depression. According to the Court of Cassation, the conviction regarding the existence of the just cause of dismissal attributes exclusive importance to the non-observance of the forms envisaged for obtaining permission to use leave, regardless of the consideration of the effectiveness and urgency of the reasons for the absence (which certainly can not be exhausted in the relief about the ordinariness of the delivery event, when instead the need invoked was given by the assistance to the daughter affected by a severe postpartum depression). On the contrary, this serious family motive affects the evaluation of the "objective consistency and the subjective qualification of the wrongful conduct".