Employment & Labour Law

2019

Seventh Edition

Contributing Editor:
Charles Wynn-Evans

glg global legal group

CONTENTS

Italy

Vittorio De Luca, Roberta Padula & Claudia Cerbone
De Luca & Partners

General labour market and litigation trends

The last statistics published on 12 June 2018 by ISTAT (the Italian National Institute of Statistics), the main supplier of official statistical information in Italy, revealed that the first quarter of 2018 was characterised by stationary employment compared to the last three months of 2017, in an overall panorama of increasing unemployment and decreasing inactivity.

In particular, based on ISTAT research, in the first quarter of 2018, employment remained substantially stable compared to the previous quarter, due to the further increase in fixed-term employees (+69,000, +2.4%) and the corresponding decrease in both permanent employees (-23,000, -0.2%) and self-employed (-37,000, -0.7%). The employment rate remained broadly unchanged at 58.2%, too. According to the most recent monthly data (May 2018), without considering seasonal workers, the number of employees continued to grow compared to April 2018. In particular, employment rose to 23.382 million, +0.5% compared to April. Unemployment stood at 2.793 million, -2.9% compared to the previous month.

The employment rate was 58.8%, +0.2 percentage points compared to the previous month, the unemployment rate was 10.7%, -0.3 percentage points compared to April 2018 and the inactivity rate was 34.0%, steady with the previous month.

From an employment law standpoint, a few deep reforms have been implemented over the current decade. The most significant reforms were:

- Law 183/2010, which introduced very strict limitation periods for – *inter alia* – objection to dismissals, thus substantially limiting uncertainty for employers and the duration of court proceedings;
- Decree Law 138/2011, which introduced the possibility for trade union agreements to derogate *in pejus* to National Collective Agreements, thus allowing general industry provisions to adapt to specific exigencies of companies;
- Law 92/2012 (so-called "*Riforma Fornero*"), which dramatically reduced the number of cases in which reinstatement applies to unfair dismissals, and introduced deflationary tools of litigation; and
- Law 183/2014 (the so-called "Jobs Act"), a wide reform including eight decree laws implemented in 2015 concerning most areas of employment law (Decree Laws 22, 23, 80, 81, 148, 149, 150 and 151).

In addition to the above, a new labour law reform has recently taken place in Italy. Indeed, on 13 July 2018, the Law Decree 87/2018 has been converted into law (Conversion Law 96/2018 of 9 August 2018) and was published in the Official Journal on 11 August 2018.

Among other things, Law Decree 87/2018 sets several provisions regarding labour law, amending – *inter alia* – Law Decree 81/2015. In particular, the most important changes made by the decree concern the amendment of the fixed-term employment contracts regulation and an increase of the indemnity due in case of unlawful dismissal provided by Law Decree 23/2015.

As far as litigation is concerned, thanks to the reforms mentioned above, court cases concerning dismissals and short-term contracts dropped by 70% in 2012–2018.

Protection against unfair dismissals

Under Italian labour law, any dismissed employee who deems his/her termination not to have proper grounds is entitled to bring an action before the Labour Court in order to challenge it.

The terms to challenge the dismissal are that it must be: (i) within 60 days from its communication; and (ii) within 180 days following such challenge to bring action before the competent Labour Court.

The Jobs Act reform – in particular, Legislative Decree 23/2015 – has introduced a new regime for individual and collective unfair dismissal, aimed at reducing the circumstances of reinstatement and making more certain and assessable the consequences in cases of unfair dismissal. The said Decree introduced the open-ended employment contract to the Italian labour market, with protection increasing based on seniority (the so-called "Increasing Protection Contract").

The Jobs Act provision is applicable to:

- employees hired under an open-ended employment contract starting from 7 March 2015;
- employees hired before 7 March 2015 under a fixed-term employment contract converted into an open-ended contract after 7 March 2015; and
- apprentices hired before 7 March 2015 with an apprenticeship contract converted into an open-ended contract after 7 March 2015.

Moreover, the dismissal of employees who are already in employment on 7 March 2015 will be subject to the new rules if the employer's workforce exceeds the legal threshold set out under Art. 18 Law 300/1970 (i.e., more than 15 employees in the business unit or in the same municipality, or more than 60 in the entire company) as a consequence of any new employee hires.

Finally, the Jobs Act has definitively abolished the protections stemming from Article 18 of Law 300/1970, removing reinstatement for employees enrolled from the entry into force of the Jobs Act onward, unless the lay-off is served in some residual circumstances described below.

Consequences for the employer in case of unfair dismissal

In the event of void, oral and discriminatory termination, the employer would have to perform the following:

(i) reinstatement of the dismissed employee to his/her previous job position. In this case, the employee may waive the right to reinstatement, electing to receive (*in lieu* of reinstatement) additional compensation equal to 15 months' salary; and

(ii) payment of the salary that would have been accrued from the time of dismissal to the reinstatement (plus social security due thereon) to an extent; however, this cannot be less than five months' salary.

In addition to the cases described above, according to the Jobs Act, reinstatement (which may also be replaced by compensation *in lieu* equal to 15 months' salary, at the request of the employee) will be applicable for dismissal for subjective reasons or for just cause, where it has been proven that "the complained material fact is inexistent". In this case, the employee, along with the reinstatement, is entitled to the payment of an indemnity which cannot exceed 12 months' pay, plus the relevant social security contribution due for the entire period.

In any other case of unlawful dismissal, employees' protection only consists in the entitlement to an indemnity.

In particular, when the dismissal – whether for subjective or for objective reasons – is declared unlawful by the court, according to Article 3 of Law Decree 23/2015, the employees are entitled to an indemnity equal to two months' salary for each year of service, with a minimum of four months' and a maximum of 24 months' salary. The law specifies that the said indemnity is not subject to social security contributions.

The indemnity payable for unfair dismissal for employees hired as of 7 March 2015 was increased by Law Decree 87/2018. The minimum indemnity was raised from four to six months' salary, while the maximum indemnity increased from 24 to 36 months' salary. The calculation method remains unchanged (i.e. two months' salary for each year of service). Moreover, when dismissals have been notified in breach of the procedure provided by the law, the employee is entitled to an indemnity amounting to one month's salary for each year of service, with a minimum of two months' and a maximum of 12 months' salary. Also in this case, the mentioned indemnity is not subject to social security contributions.

For companies with up to 15 employees, the amount of the indemnity is halved, and, in any case, it cannot exceed six months' salary. Reinstatement is foreseen only for discriminatory or void dismissals.

Termination settlement offer

For employees hired as of 7 March 2015, a special termination settlement procedure introduced by the Jobs Act is applicable, with the purpose of settling any possible dispute arising from the dismissal.

Based on this procedure, the employer may opt to offer, within 60 days from the day on which the dismissal is served (for any reason), a settlement to the employee equal to one months' salary per each year of service, with a minimum of two and a maximum of 18 months. This amount is halved – and it cannot exceed six months' salary – for employers staffed with up to 15 employees.

The settlement compensation has been increased by Law Decree 87/2018 from two to three months' salary and from 18 to 27 months' salary.

It is worth noting that settlement compensation is exempted from income tax (so-called "IRPEF" in Italian tax law) and social security contributions and shall be immediately paid to the employee by cashier's check within one of the so-called "protected offices" set out under law (i.e. union associations, the local public labour office, agencies provided for under collective bargaining agreements, etc.).

The acceptance of the offer entails the termination of the employment relationship and the waiver of whatever claim related to the dismissal.

Additional compensation paid as part of the settlement deal (i.e. for the employee to waive all rights in relation to the former employment such as, for example, non-paid overtime and alleged demotions) will be subject to the ordinary tax treatment.

Collective dismissal

As well as for individual dismissal, by means of the Jobs Act reform, reinstatement is also no longer a remedy for unlawful collective dismissal – except for collective dismissal served in oral form – and the employer is subject to pay only an economic indemnity, depending on the employee's length of service.

Pursuant to Article 24 of Law 223/1991, the dismissal of five or more employees in the same business unit, within a period of 120 days, due to a reduction/reorganisation/shutdown of the company's business, amounts to a collective dismissal.

The collective dismissal can be lawfully implemented only once a mandatory procedure has been properly fulfilled in accordance with Articles 4 and 24 of Law 223/1991. The procedure begins with the employer submitting a written notice to the works councils (if any) or to the trade union to inform it of its intention to carry out a collective dismissal.

The Jobs Act reform provided, for the first time, that executives must be included in the calculation that triggers a collective dismissal, and that employers will need to set up a separate negotiation with the trade union with regard to executives.

Unless a termination agreement is reached, dismissed employees can individually or collectively challenge the dismissals given within 60 days from receipt. Failing a settlement after such challenge, the employees can trigger a court procedure within 180 days following such challenge.

As anticipated, as with individual dismissals, in the case of a collective dismissal, should the dismissal be deemed unfair by the court, the consequences for the employer depend on the date of hiring (before or after the enforcement of Jobs Act).

Therefore, after the enforcement of the Jobs Act (i.e. for employees hired after 7 March 2015), pursuant to Article 5, Par. 3, Law 223/1991, in case of breach of the mandatory procedure and/or non-compliance with the selection criteria, the only consequence for the employer is the payment of an indemnity equal to two months' salary per each year of service, with a minimum of four and a maximum of 24 months.

As for individual dismissals, reinstatement (or payment equal to 15 months' salary) is always granted in case of a discriminatory dismissal or if the dismissal is not notified in writing. In such case, the Labour Court nullifies the unfair dismissal and the employer is also obliged to pay compensation for the damage suffered from the employee's unfair loss of job, in any case not less than five months' salary, and to pay the social contribution and compulsory insurance.

Fixed-term employment contracts

Fixed-term contracts are regulated by Legislative Decree 81/2015, implementing the Jobs Act, and the Dignity Decree.

Fixed-term contracts can last up to 36 months, including any extension. It is worth noting that periods of work concerning duties of the same level and legal category, performed by the same parties, within a fixed-term staff supply contract, are considered in the calculation of the maximum duration of 36 months.

Fixed-term contracts are not allowed in the following circumstances:

(a) to replace employees exercising the right to strike;
(b) to replace employees affected by a collective dismissal in the past few months;
(c) to replace employees suspended from work (or subject to a working time reduction) due to temporary lay-offs; and

(d) for employers who are not compliant with the work safety obligations set under Law Decree 81/2008.

Quantitative limits are normally set by national collective agreements; otherwise, failing such provision in the national collective agreements, the law states that the overall number of fixed-term contracts may not exceed 20% of the workforce hired on the basis of an open-ended employment contract at 1 January of the year of hiring (of the fixed-term employee).

Fixed-term contracts are exempted from quantitative limits in specific cases provided by the law (e.g. in the start-up phase of new activities or performance of seasonal activities).

Extension of the contract is possible for employment relationships not exceeding 36 months, up to a maximum of five times over a 36-month period. If the number of extensions exceeds five times, the contract is deemed to be an open-ended contract from the date on which the sixth extension commences.

Renewal of a fixed-term contract between the same parties is allowed, but a timeframe between the old contract and the new one must be observed; in particular: (a) 10 days for employment contracts up to six months; and (b) 20 days for employment contracts of over six months. In case of violation of the above-mentioned terms, the law states that the new contract shall be considered an open-ended contract.

The new rule confirms that the employment can continue beyond the period originally established between the parties: (a) for 30 days for employment contracts up to six months; and (b) for 50 days for employment contracts of over six months.

In this case, the employee is entitled to a supplementary wage.

In case the above-mentioned terms are exceeded, the contract is deemed to be an open-ended contract starting from the expiration of the terms above.

Finally, for 12 months after termination of a fixed-term contract, individuals employed for at least six months have preferential rights to re-employment under an open-ended contract with reference to the same duties performed during the fixed-term employment relationship.

Law Decree 87/2018 will be applicable to employees hired from 14 July 2018 as well as to fixed-term contracts renewed or extended after 31 October 2018 (in accordance with the so-called transition clause).

The new Decree changes the fixed-term contracts regulation, introducing the following provisions:

- the length of a fixed-term contract may not exceed 24 months;
- a fixed-term contract not exceeding 12 months may be entered into without the need to provide specific reasons;
- a fixed-term contract exceeding 12 months may be entered into only if at least one specific reason is given;
- a fixed-term contract may be renewed only if at least one specific reason is met;
- the extension of a fixed-term contract is allowed up to a maximum of four times within a period of 24 months;
- a fixed-term contract entered into for seasonal activities may be renewed or extended without the need to give a specific reason; and
- a 0.5% increase of the additional contribution for each fixed-term contract renewal is provided.

Furthermore, Law Decree 87/2018 changes the time limit for challenging a fixed-term employment contract. According to the new regulation, an employee can challenge it within 180 days from the termination of the contract (instead of the 120 days provided in the Jobs Act).

Law Decree 87/2018 also changes the fixed-term supply agreement regulation, extending to fixed-term supply agreements most of the rules governing fixed-term contracts.

Therefore, the rules mentioned above concerning the (i) application of the specific reasons, (ii) maximum length of contract, and (iii) maximum number of extensions, shall apply to supply contracts.

On the contrary, Articles 21, Par. 2 ("Stop and go"), 23 ("Maximum number of fixed-term contracts") and 24 ("Preferential rights to be re-employed") of Law Decree 81/2015 shall not be applicable to supply agreements.

Moreover, unless otherwise provided in the collective agreements applied by the user company, the number of fixed-term or temporary workers may not exceed 30% of the number of open-ended contract workers employed by the user company as at 1 January of the year in which the fixed-term or supply contracts were entered into.

Finally, so-called fraudulent staff leasing (repealed by Law Decree 81/2015) has been re-introduced – which takes place whenever the use of supply agreements has the purpose of avoiding mandatory laws or collective agreements – which provides for a fine of EUR 20 for each temporary worker involved and for each day of work.

Vittorio De Luca
Tel: +39 02 3655 6532 / Email: vittorio.deluca@delucapartners.it

Managing Partner, Vittorio De Luca advises corporations and private equity funds, in conjunction with law firms within the framework of international transactions involving multiple jurisdictions both in restructurings and in M&A transactions. Thanks to his degree in Jurisprudence and Economics, he is highly skilled in understanding business needs.

He is regularly involved in primary reorganisations, M&A, restructuring and private equity transactions. He collaborates regularly with "Il Sole 24 Ore" and he has authored articles in the specialist press. He is interviewed in mass media journals and is a regular contributor to conventions. He is member of the AGI, the EELA, the ABA and the IBA. He was shortlisted for Lawyer of the year for Industrial Relations by the Legalcommunity Labour Awards 2017 and was recognised among Leaders in their Field by *Chambers and Partners 2018*.

Roberta Padula
Tel: +39 02 3655 6528 / Email: roberta.padula@delucapartners.it

Associate, Roberta Padula graduated *magna cum laude* in Law from the University of Palermo in 2009 and was admitted to the Palermo Bar in 2013. She joined De Luca & Partners law firm in 2016, after having gained experience working in an important law firm specialised in Labour and Employment Law and, subsequently, in an important international law firm.

Roberta specialises in all the most important matters dealing with Employment Law and Industrial Relations, supporting Italian and foreign companies on day-to-day advice, and on both contentious and pre-contentious matters. She has authored articles on employment law published in legal magazines. She speaks English fluently.

Claudia Cerbone
Tel: +39 02 3655 6526 / Email: claudia.cerbone@delucapartners.it

Associate, Claudia Cerbone graduated from the Cattolica University in Milan in 2013 and she has been a member of the Bar Association of Milan since 2017. Claudia began her professional career at Pavesio & Associati in association with Allen & Overy, in the labour law department, before joining De Luca & Partners.

Over the years, Claudia has gained experience in all the most important matters dealing with employment law, by providing advice and assistance to Italian and foreign clients both in extrajudicial and judicial legal activities, specifically on assistance before court and on farm advisory, preparing individual employment contracts (employment and self-employment agreements) and providing advice on individual or collective dismissals and on consensual resolution of employment relationships. She has authored articles on employment law published in legal magazines. She speaks English fluently.

De Luca & Partners

Largo A. Toscanini, 1 Milan, Italy
Tel: +39 02 3655 651 / Fax: +39 02 3655 6505 / URL: www.delucapartners.it

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Blockchain & Cryptocurrency Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Energy**
- **Fintech**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**

Strategic partner