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## Poor performance dismissals: a new frontier in Italy

The evolution of the Italian Labour Court's view of the **dismissal of employees for poor performance** is a useful point of reference to address a topic that is closely related to the interpretation of the changes currently underway in the workplace here on the peninsula.

di [Luca Failla](#) - Avvocato - Managing Partner studio boutique Failla & Partners

di [Paola Salazar](#) - Avvocato in Milano

The evolution of the Italian Labour Court's view of the dismissal of employees for poor performance is a useful point of reference to address a topic that is closely related to the interpretation of the changes currently underway in the workplace here on the peninsula. Perhaps the most obvious changes have occurred in our current post-pandemic era. In more detail, employers are now more closely assessing the traditional employment relationships in Italy – which are fundamentally based on a work performance being carried out for a defined period of time for a certain remuneration. Today this view is changing – and slowly Italian law is beginning to catch up by loosening certain rigidities built into historic labor regulations. This is especially true when one speaks of the termination of an employment relationship at the employer's.

One of the most notable differences of the Italian Civil Law legal system when compared to common law systems is that there is no particular need written in government labor regulations which establishes a strong connection between an employee's performance directly with their employment relationship. The only exception to this is when one speaks of self-employed workers.

**According to the traditional employer** – employee relationship in Italy - the employment contract allows an employer to 'buy' time from an employee by paying them a (monthly) salary for a certain amount of working hours (really in essence buying his / her / ze / their time without any guarantee as to the final result). In Italy remuneration is, in fact, strongly linked to a specific level of employment for each sector (often referred to as CCNL levels) and the amount of time devoted to the performance of work. In this respect, Italian employment law has never allowed for the termination of the employment relationship based solely on **the failure to achieve the 'objectives' planned** or expected by the employer. In short, you cannot technically fire an employee in Italy for doing a bad job.

Of particular note, in practice in Italy it is not possible to unilaterally introduce **'work performance' evaluation parameters** which are unrelated to working time and / or directly linked to 'poor performance' or 'low performance'. However, employers in Italy can instead legally address any non-performance connected to could be defined as 'negligent conduct' of an employee's work - but only within the framework of the obligations of diligence, loyalty and non-competition provided by law for in the employment relationship (Articles 2104 and 2105 of the Italian Civil Code). In this context, the employer must prove not only the failure to achieve a certain expected result - but is also required to provide evidence of a 'significant breach' by the employee of their contractual obligations (diligence, good faith and fairness), attributable to a series of conducts implemented over a certain period of time – which must be assessed as a whole and not in isolation.

It is really only in recent years that the Italian Supreme Court has begun to accept that "poor performance" may exist in cases where precise 'parameters' exist too - in order to ascertain that the work to be performed reached a low level of performance. This is done by utilizing the average diligence and professionalism typical of the tasks entrusted to the worker. When a 'deviation' from these 'parameters' occurs, an employee could find themselves faced with a provable case of inexact employment performance. Such a circumstance could lead, for example, to the revision of duties, the negotiation of a different contract and, in the most serious and extreme cases – it could precisely lead to the termination of the employment relationship.

Hence we can see that there no true autonomous legal category in Italy for dismissal due to poor performance. On this front, the majority of the Italian Supreme Court's guidelines frames this form of dismissal within the scope of dismissal for 'justified subjective reason'.

The most recent guidelines establishes that *"dismissals for so-called poor performance can constitute a case of termination by an employer if a considerable breach of contractual obligations has been made by an employee"*.

Here it can be viewed as a type of termination for breach of contract under Articles 1453 et seq. of the Italian Civil Code - without prejudice to the fact that the failure to achieve a pre-established result does not in itself constitute a breach of contract when parameters can be identified to ascertain whether the service was performed with average diligence and professionalism typical of the duties entrusted to the employee.

Any deviation from these may constitute a sign of 'inexact performance' on the basis of an overall assessment of the activity rendered for an appreciable period of time (Cass. civ. sez. lav. 6 April 2023, no. 9453; and also Cass. civ. sez. lav. 14 July 2023, no. 20284).

Behind the evolution of this case law one can also glimpse the same evolutionary line of the category of the employment relationship. Or rather, of the 'exchange' underlying the employment relationship (work performance for a defined time for remuneration).

This evolution is accentuated by the heightened awareness of the effectiveness of remote work - which in its very nature is "without a precise time or place of work constraints". There is really no better example which showcases the need to predefine precise work objectives between employers and their employees (art. 18, c. 1, Legge 81/2017).

Without the forced experimentation of **remote work** that has taken place over the last few years (sparked by the global pandemic) we would not have found ourselves today discussing in such depth 'terms of productivity' - in addition to the criteria for measuring aspects of an employee's poor performance.

We finally have had a true hands-on experience of what it really means to work in the sphere of subordinate work in an 'autonomous' way and with an 'objectives' manner - using the conscious and responsible management of working times and 'work places'. Without this experience we could not today be speaking concretely about '**expected performance**' and '**work by objectives**'.

This is now possible because, on the one hand, the employment contract has had to adapt by becoming more flexible - thanks also to the forced experimentation of remote work - and, on the other hand, because it is precisely down to this forced experimentation of work that a new focus on objectives and results emerges into the subordinate employment relationship. Previously objectives and results were predominantly observed in the realm of self-employment.

Ultimately, a new progressive conceptual rapprochement between autonomous and subordinate work in Italy is taking place. Here we must refer to Italian Law no. 81/2017 which approaches remote work in such a way that self-employment and subordinate working relationships are no longer distinguished through the traditional criteria of the constraints of working hours, but instead through a different assessment of the parameters of "employer-direction" which rethinks the traditional parameters for measuring the performance of subordinate work.

Here we see a clear sign of the new balance that is being built between the concepts of 'self-employment' and 'subordinate employment' on one hand where there is the opening up towards 'more responsible' (subordinate) work - and also 'remote work' which provides greater freedom from forms of space-time control... and more importantly a sort of 'self-determination' in the management of the results. On the other hand a more accentuated sensitivity on the part of the legislator towards greater protection of non-entrepreneurial self-employment.

In this scenario, the expected performance of work undertaken also becomes a tool for interpreting the evolution that is taking place within the Italian Civil Law legal system.

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