# THE EMPLOYEE'S RIGHT TO BE TRAINED: AN ATTEMPT TO ASSESS A LEGAL REASONING

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# INTRODUCTION AND CONTEXT

- Adjusting employees' skills to new technologies and innovation is nowadays considered to be essential
- During their working lives, employees face deep and even radical changes in the nature of the working activity that they are required to undertake to stay active on the labour market
- The working activity of employees and their skills and competences are at the core of the employment relationship

→ the exchange formalized in the employment contract can be described not as a simple exchange between a general working activity and a salary but rather as an exchange between a specific activity to be carried out with the proper competencies and the proportionate salary

# THE EMPLOYEE'S TRAINING

- ***Training*** as an essential component of the employment relationship deserves specific attention from labour lawyers

HOWEVER

the main approach adopted by labour lawyers to address the topic traditionally focuses on the side of the employer and involves two levels of investigation:

1) Focus on the prerogative of the employer to unilaterally amend the content of the contract to adjust it to the organizational and business needs (*jus variandi*)
2) Focus on possible redundancy of the employee → the duty of *repêchage* involves an investigation into the possible positions to be considered

# RESEARCH QUESTION

*Has an employee the right to be trained and retrained during her working relationship with her employer?*

*Has the employer a positive obligation to sustain the costs of the employee's training?*

*Can we rely on rigorous juridical arguments to sustain the existence of this right or does it fall outside the synallagma of the employment contract?*

The answer is not easy to find and might largely change not only from common law to civil law legal systems but also within the two families of systems, in which the interpretation of the notion of a contract can be very different.

# THE LEGAL CONTEXT: THE ITALIAN REGULATION OF JUS VARIANDI

- The employer can legitimately assign the employee to all the tasks included in the same level of classification of the applicable collective bargaining agreement
- potential great extension of the tasks to be performed by the employee

→ against the legitimate exercising of *jus variandi* within the limits laid down by the collective agreement, the employee may not refuse to perform the new tasks on pain of breach of the obligation to work

# THE LEGAL CONTEXT: THE ITALIAN REGULATION OF JUS VARIANDI

- How can this possibility, made lawful by Article 2103 of the Italian Civil Code, be reconciled with the interest, both patrimonial and non-patrimonial, of the employee in fulfilling exactly her obligation?
- What is the importance of the **professionality** of the employee, constantly recognized in the light of the previous provision as an asset subject to the protection provided by the discipline of *jus variandi*?

# THE TRAINING OBLIGATION

- Part of the provision must be taken into account → Article 2103 of the Civil Code, as modified by the 2015 reform, states that the '*change of duties is accompanied, when necessary, by the fulfilment of the training obligation*'
- The lawmaker contemplates the need to train the employee assigned to new tasks when necessary ...?

# THE TRAINING OBLIGATION

To establish the cases in which training is necessary, two hypotheses can be identified:

1) the collective agreement itself requires the employer to comply with certain training obligations in the face of changes in the task that require new skills and knowledge → training as an obligation, the non-fulfilment of which may lead to consequences in terms of compensation for damage to the person suffered by the employee
2) Can similar considerations also apply in the silence of the collective agreement?

# THE TRAINING OBLIGATION

Doctrinal debate before the latest reform:

1) *Mayority:* there cannot be a real obligation on the employer to take care of the training of the employee so that she is able to perform the work assigned
2) *Minority*: the employer is the recipient of a real obligation of professional elevation of the employee, under Article 35, paragraph two, of the Constitution, which, read in relation to Articles 2094 and 2103 of the Civil Code, is the regulatory vehicle for the translation into employment of the right to training, in the light of the importance of the good of professionality as an expression of the employee's person but also in the light of the importance assumed, in post-Fordist production organizations, by the adaptability of the employee – and therefore by her training – to the changing needs of the company (M. NAPOLI; C. ALESSI; G. LOY; A. LOFFREDO).

# THE TRAINING OBLIGATION

→ The thesis was part of a broader reflection on the professionality of the employee, according to which professionality represents the object of the contract of employment (M. Napoli)

→ The exchange, in consideration of which the employee receives a salary does not have as an object the agreed tasks but the professionality of the employee *tout court* (M. Napoli)

# THE TRAINING OBLIGATION

With the entry into force of the new Article 2103, the debate on training, regarding its purpose but mainly its legal role, has reopened

# MAIN THESIS

Under the Italian legal system, the employee's 'right to be trained' may be deemed to exist whenever the change of duties unilaterally decided by the employer is such as to require the employee to have a professional qualification that she does not possess

→ Strict link with the exercise of the employer's *jus variandi*

# MAIN THESIS - ARGUMENTS

1) The burden of placing the employee within a productive organization that allows the employee to carry out her obligation falls on the employer → duty of cooperation (GHEZZI)
2) Considering the extension of the possible tasks that can be demanded by the employer, the importance of that burden of cooperation of the employer can only be symmetrically extended. In fact, the employer has the burden of ensuring that the employee is able to perform within the production organization.
3) In consideration of the enlargement of the spectrum of duties, it can be argued that the employer's burden of cooperation materializes today, even more than yesterday, *in the duty to train the employee*.
4) The doctrinal and jurisprudential elaboration on the notion of professionality should not be lost → it is no longer to be understood as a limit to the exercise of *jus variandi*, the legitimacy of which is anchored exclusively to the collective bargaining agreement, but it should be considered as a parameter to verify the employer's fulfilment of her duty of cooperation with the object of training the employee when requested to perform tasks that are completely outside the scope of her professionality.

# MAIN THESIS - ARGUMENTS

The parameter of professionality, far from having disappeared with the 2015 reform, would therefore be valid in identifying the hypotheses in which the change of duties is resolved in the request for services for which the employee does not have the necessary competences.

It would be useful, consequently, to identify the cases in which there is concretely a duty to train on the part of the employer, who will not be able to limit herself to varying the tasks without activating the means to make this possible.

# CONCLUSIONS

1) Rapid technological development, the aging population, the mechanization of working activities through new technologies and the increased level of skills required of employees in the labour market: all these factors seem to have caused a crisis regarding the traditional legal parameters of labour.
2) However, the legal problems caused by the technological and economic changes have often been viewed exclusively from an external perspective: issues related to the need to move beyond the subordinate employment relationship, to enlarge its scope of application and to identify new contractual forms to regulate non-standard work, have been addressed from different perspectives, and various solutions have been offered.
3) Nevertheless, the same factors are influencing the employment relationship itself. Even "inside" the most regular and clearly subordinate employment contract, such factors are profoundly changing the ways in which employers and employees execute their relationship.
4) Pursuant to this view, reconsidering the employment contract and its relationship with the concepts of organization and of performance might be one of the keys to examining the new forms of work as well.

# CONCLUSIONS

The great flexibility granted to the employer by the latest reforms shall be counterbalanced by the recognition of the value of the employee's professionality.

Recovering the reflections already elaborated under the previous discipline, it is possible to sustain that the duty of inserting the employee into a productive organization that allows her to fulfil her obligation fully falls on the employer.

This being said, in consideration of the extension of the duties that an employee might be asked to performed, the importance of training can be extended to preserve professionality not only as a set of competencies **but also as an extension of the employee's personal identity, reputation and self-realization**

# Q&A

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