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Group of Companies: Recent Supreme Court Decision

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Recent case

In Decision 25270, which was issued on November 29 2011, the Labour Section of the Supreme Court ruled on the status of parent companies in the employment relationships of their subsidiaries' employees. The court stated that if a parent company effectively interferes itself in the management of such relationships, it is deemed to be the true employer, as it is the effective beneficiary of the employees' performance and the owner of the productive business in which the activities are carried out.

The court ruled that effective interference on the part of the parent company arises when it goes beyond general direction and coordination of its subsidiaries' overall activities and manages employment relationships from an organisational, hierarchical and economic perspective.

The court identified two analyses of a parent company's interference in its subsidiaries' activities and employment relationships. In particular, it specified that:

- "physiological interference" occurs where a parent company determines the subsidiary's general strategic objectives, but does not exercise influence over the effective management of employees; and

- "pathological interference" occurs where a parent company significantly interferes itself in the activities of its subsidiaries, limiting their organisational autonomy in managing their employees' working relationships. In such cases, a "fictitious interposition" occurs: an employee is formally employed by his or her employer, but effectively carries out his or her duties for the benefit of another entity.

In the case in question, the court ruled on a claim brought by an individual who was employed by the Australian subsidiary of a leading Italian-based multinational company. The claimant sought to establish the existence of an employment relationship with the parent company. The claim was based on the alleged existence of a fictitious interposition. The claimant argued that:

- the parent company determined the salary paid to the subsidiary's employees;
- the parent company took responsibility for the social security contributions in respect of the employees;
- the parent company set the employees' performance targets; and
- the employees' activities differed from the subsidiary's core business.

Similar judgments

The November 2011 decision follows two precedential decisions from the Labour Section of the Supreme Court.

In Decision 19931, issued on September 21 2010, the court held that in the case of a parent company that is not formally involved in an employment relationship, a fictitious interposition arises when the parent company manages the relationship as the real, de facto employer. In the case at issue, the parent company had taken a decision in respect of an employee's secondment and on the date of the employee's dismissal for objective reasons.

In Decision 11107, issued on May 15 2006, the court considered that the existence of a number of different entities in a group of companies was irrelevant in view of the fact that:

- the companies had a single organisational and productive structure;
- the various group companies performed integrated activities and accordingly shared a common interest;
- a single management entity coordinated the various activities of the individual companies from a technical, administrative and financial point of view, so that these activities converged for a common purpose; and

- the contemporaneous use of employees' services by the owners of various group companies meant that such services were performed for various entities, on a simultaneous and undifferentiated basis.

Main consequences for employment issues

Where a parent company is deemed to be the true employer of a subsidiary's employee, this has practical consequences for the performance of the employment relationship and the dismissal of such individuals.

If an employee is dismissed for an objective justified reason (i.e., a reason relating to the company's activity, the organisation of its human resources and the regular operation thereof), the employer has a duty of repechage – that is, before terminating the employee, the employer must consider whether he or she could be employed within the company in another capacity. In cases where the criteria identified by the Supreme Court in the abovementioned decisions are met, and if the parent company could therefore be deemed the true employer, a question arises – in the event of an employee being dismissed for an objective justified reason – of whether he or she could be employed within the parent company, not only elsewhere within the subsidiary.

Under Italian law, a dismissal of an employee in breach of the law will trigger different consequences, depending on whether the employer employs (i) more than 15 employees (including managers) in the same office, or (ii) more than 60 employees (including managers) throughout Italy. If the employer exceeds these headcount thresholds, the principle of 'continuance of employment' applies. In cases where the criteria identified by the Supreme Court in the abovementioned decisions are met, and if the parent company could therefore be deemed the true employer, the employees to be included in the headcount are not limited to those in the subsidiary. Rather, such an assessment must also take account of the employees in the parent company, even if they are located outside Italian territory.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.