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When is disciplinary code necessary?

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Legislation on disciplinary codes

An employer's power of direction over its employees is recognised in Article 2106 of the Civil Code and Article 7 of the Statue of Workers (Law 300/1970), providing substantial and procedural limits to the exercise of this power. In particular, Article 7(1) provides that the employer must draft a document (termed a 'disciplinary code') to indicate relevant breaches and consequent disciplinary measures in compliance with the law and with national collective agreements.

The code must refer to the relevant sections of the applicable national collective agreement (eg, provisions on the obligations and prohibitions applicable to employees, as well as disciplinary measures and the regulation thereof). The employer must make employees aware of the code by displaying it in all working areas.

The onus is on the employer to display the code. It is not required to do so, but if the code is not displayed before a potential breach occurs, the employer may not fairly apply impose measures on an employee in respect of the breach.

In addition, the employee's power of direction may be set out in an internal policy – normally referred to as an 'employee handbook' – containing provisions unilaterally determined by the

employer. Employee handbooks are not regulated under Italian law and are therefore not automatically enforceable against employees; thus, a breach of a stipulation in a handbook does not automatically trigger disciplinary action. Nevertheless, employers use handbooks for a number of reasons, including for their deterrent effect, and such handbooks sometimes incorporate the disciplinary code.

Case study: dismissal by employer without a disciplinary code

An employee was absent from work for 50 days. His employer considered the employee's leave unjustified and dismissed him. The employee argued that his breach was covered by a provision of the applicable national collective agreement, which provided that the penalty of dismissal should be applied in cases of arbitrary leave for a period exceeding 10 days. However, the employee contended that his dismissal was unfair because there was no disciplinary code in which a reference to the provision of the national collective agreement could be found.

The Labour Court agreed with the employee and found the dismissal unfair, as it was applied in the absence of a disciplinary code. This decision was confirmed by the Court of Appeal.

Supreme Court decision

In February 2012, Supreme Court Decision 3060 overturned the Labour Court decision, referring to the principle established by the Supreme Court that:

> "*the guarantee of advertisement of disciplinary code, by posting it in a place accessible to all the employees of the company, does not apply if the employee is dismissed for conduct in breach of the main duties related to the employment relationship or to the employee's integration within the company's structure and organisation."(*see, among others, Supreme Court Decisions 19770, September 14 2009; 20270, September 18 2009; and 16291, August 18 2004).

Furthermore, the court stated that:

> "*the guarantee of advertisement of disciplinary code applies when disciplinary dismissal is related to specific hypothesizes of cause or of justified reason, provided by national collective agreements or fairly provided by the employer, and not when disciplinary dismissal is related to hypothesizes provided by law or evidently contrary to the common professional ethics*."

Referring to the dismissal of the habitual absentee, the court stated that the performance of working activity is one of the main duties of an employment relationship (based, in particular, on Articles 2104 and 2105 of the Civil Code). As a consequence, the employer need not specify in the disciplinary code that an employee's failure to comply with the obligation to carry out his or her working activity may give rise to dismissal.

On this basis, the court found the dismissal of the employee to have been fair, even though the employer had not displayed a disciplinary code.

Practical suggestions

As the Supreme Court has confirmed, in some cases displaying a disciplinary code is not a necessary condition of fair dismissal of an employee.

It is possible to identify some scenarios in which an employer may dismiss an employee for cause or for justified reason, even in the absence of a disciplinary code, such as where the employee:

- is in breach of his or her main duties;
- breaches provisions, obligations or prohibitions in law; or
- is responsible for actions or behaviour that may be considered, on the basis of civic responsibility, as seriously detrimental to the fiduciary relationship between employer and employee (eg, the disclosure of confidential information, damage to the employer's tools or theft).

Express provisions are not required in order to specify such conduct as illegitimate. However, it is always advisable for an employer to draft a disciplinary code – and to ensure that all employees are made aware of it – in order to avoid possible claims. If a disciplinary code is not displayed, the employee has the right to challenge a possible disciplinary measure, which the Labour Court may find to be null and void.