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Remote control of workers' activities under the "JobsAct" (art. 23 D.Lgs. 151/2015): ideas to a debate.

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1. The balance between the employer's technical and productive interest and the worker's interest for the protection of dignity in the original version of art. 4 of the Workers' Statute.

The purpose of the present issue of the review is to offer the reader a reflection on the new art. 4 of the Workers' Statute ("Statuto dei lavoratori", hereinafter referred as St.lav.), as amended by art. 23, Legislative Decree 151/2015 (1)

As it is known, the statutory provision, in its original formulation, represented for the first time, in an explicit way (2), the ground for the employer's power to control from remote the activity carried out by employees, insofar as such power is functional to assure the satisfaction of the employer's technical and organizational interest. However, art. 4 St.lav. also provided for some limitations (3) to the aforementioned employers' power, in

(1) Art. 4 St.lav., as amended by Legislative Decree 151/2015, applies to all labour relationships – both employment relationships and some kinds of autonomous work relationships (i.e. the so called "hetero-organised" work relationships referred to in art. 2, Legislative Decree 151/2015) – differently from the new discipline of dismissals introduced by Legislative Decree 23/2015, which is applicable only to "new-hired" employees (i.e. workers hired after the 7th of March 2015).

(2) No Civil Code provision, in fact, makes reference to the power of control, even though it is evident that only after having exercised his control power, the employer can obtain sufficient information to exercise his disciplinary power.

(3) The provision – as we will see – set up both an internal and an external limitation to the employer's power to control: the general prohibition of remote control marked an

order to protect the opposite interest of the employee for the protection of his own personal dignity.

In particular, the original version of art. 4 St.lav. sets forth, first of all, a general prohibition to control from remote (4) employees' activities – working activities, but also activities carried out during breaks (lunch break or coffee break) – by means of specific instruments (audio-visual equipment and "other machineries"). Such prohibition was based on the consideration that an hidden and impersonal control, as the control realized through the technological instruments available at the time (closed circuit cameras, telephone switchboards), would be excessively stressing and thus detrimental for the dignity of the worker.

However, the disposition provided that such prohibition could be delimited and attenuated – under a collective agreement or an administrative authorisation – in the case of the so-called "accidental" or "indirect" controls (5), i.e. those controls justified by organisational or productive aims or by occupational health and safety reasons, even though such controls could entail also a surveillance on the worker's activity.

Furthermore, a breach of art. 4 St.lav. would constitute a criminal offence under art. 38 St.lav. (6).

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unsurmountable limitation to his power, as long as it has not been removed by collective agreement or administrative authorisation (external limitation); once the employer had obtained the authorisation the power to control was to be exercised according to the technical, productive and safety reasons defined in the authorization itself (internal limitation). In these terms see P. Lambertucci*, Potere di controllo del datore di lavoro e tutela della riservatezza del lavoratore: i controlli a "distanza" tra attualità della disciplina statutaria, promozione della contrattazione di prossimità e legge delega del 2014 (cd. Jobs Act)*, in *Working papers Massimo D'Antona*, 255/2015.

(4) According to case law (since Cass. 18 February 1983, n. 1236, in *Giust. civ.*, 1983, I, 1755) the term "remote" referred both to a spatial distance (e.g. control operated through closed circuit cameras) and to a temporal distance (e.g. control operated through devices recording phone calls). In literature see A. Bellavista, *Il controllo sui lavoratori*, Giappichelli, Torino, 1995, 73; B. Veneziani, *Sub art. 4,* in Lo Statuto dei lavoratori, *Commentario diretto da Giugni,* Milano, 1979, 21 e 23.

(5) Therefore, not the subjective intention of the employer, but only the objective aim justifying the control could be relevant. U. Romagnoli, *sub* art. 4, in G. Ghezzi, F. Mancini. L. Montuschi, U. Romagnoli*, Statuto dei diritti dei lavoratori*, Zanichelli, 1979, 28 ss. 29.

(6) Breach of art. 4 St.lav. entailed the criminal sanctions set forth by art. 38 St.lav. Later, however, art. 179, paragraph 2, of the Privacy Code removed from art. 38 St.lav. the references to art. 4 St.lav.

The amendment did not produce any substantial modification. In fact, art. 171 of the Privacy Code continued providing for the applicability of criminal sanctions provided for

As a logical consequence of the aforementioned balance operated by the provision, information collected through the so-called "indirect" controls would not be available – first of all for disciplinary purposes (7) – against the employee.

Nevertheless, the statutory provision did not address this point.

However, on the other hand, it is not plausible to believe that the employer who collected information regarding the employee's behaviours by any means would refrain from using such information. Should the direct use of information be precluded, the employer would presumably not hesitate to follow other ways to get rid of a worker who is not considered as trustworthy anymore.

Employers' demands for a wider acknowledgement of the possibility to use information, by any means collected, was supported by that part of case law that developed the category of the so-called "defensive controls" (i.e. controls aiming to ascertain the worker's unlawful misconducts) (8). According to this case law, since defensive controls were not expressly regulated by the statutory rule, limitations provided by art. 4 St.lav. were not applicable.

Some of the following contributions analyse the positions assumed by Italian courts on the issues regarding defensive controls and question whether they fall within the scope of the new version of art. 4 St.lav. I therefore refer to these contributions.

Although, it is necessary to underline that case law on "defensive controls" – as well as the numerous doubts regarding the applicable rules – signalled the state of clear sufferance of art. 4 St.lav. (9).

Moreover, the outbreak of new technologies overwhelmed the distinction – on the contrary assumed by the statutory provision – between control devices and working devices: in the present productive contest

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by art. 38 St.lav. in case of violation of art. 114 of the Privacy Code itself, which kept safe art. 4 St.lav. Due to this complex framework of references from one article to another, sanctions set forth by art. 38 St.lav. still applied to violations of art. 4 St.lav.

(7) But also for the purpose of promotions or production awards.

(8) Cass. 3 April 2002, n. 4746, in *NGL*, 2002, 642; Cass. 17 July 2007, n. 15892, in *RGL*, 2008, II, 358; Cass. 23 February 2010, n. 4375, in *RIDL*, 2010, II, 564; Cass. 23 February 2012, n. 2722, in *FI*, 2012, I, 1421; Cass. 1 October 2012, n. 16622, in *FI*, 2012, I, 3328; lastly, Cass. 27 May 2015, in *FI*, 2015, I, 2316, which deemed lawful the behaviour of an HR manager who created a fake facebook profile in order to discover the employee's breach of the contract.

(9) P. Ichino, *I controlli a distanza: tanto rumore per nulla*, in http://www.pietroichino.it

computers, smartphones, tablets, internet and emails (10) almost always constitute both instruments used to render the working performance and devices which allow a capillary, continuous and pervasive control on the worker's activity, also due to the possibility of memorising and crossing data.

Was it then necessary to consider the abovementioned instruments as falling within the scope of art. 4 St.lav. in its precedent version?

It is evident that no productive organisation can anymore avoid providing employees with computers or mobile phones. In the light of above, to admit the need for an authorisation would have meant, firstly, an undeniable organisational cost for the employer. However, it would also and especially have exposed the employer, rather to the risk of a denial of the authorisation, than to the possibility of being addressed by limitations regarding the utilisation of certain devices (consider the example of an authorisation admitting the use of smartphones, but excluding the utilisation of gps in order to localise the position of the worker). In fact, the authorisations, especially those released by administrative authorities, often contained this kind of prescriptions.

Therefore – on the ground that art. 4 St.lav., in the original version, submitted to limitations only control instruments, but not working devices entailing some control possibilities – employers in practise often avoided requiring any authorisations concerning instruments used by employees to render their performance, with the consequence of being able to control the workers … without any control.

It is evident that the outbreak of new technologies deeply "undermined" the statutory provision.

Lastly, it is not to be omitted the lack of coordination between the labour law rules protecting the worker's dignity – represented indeed by art. 4 St.lav. – and the general provisions governing personal data protection, derived from European Law and currently set forth in the so-called Privacy Code (Legislative Decree 196/2003), which aims to protect the privacy rights of all citizens (11).

(10)Sometimes also social networks such as Facebook, Instagram and others can be considered as "devices to render the working performance": consider the case of employees whose tasks are to promote a certain image of the company.

(11) M.P. Aimo, *Privacy, libertà di espressione e rapporto di lavoro,* Jovene, 2003; P. Chieco, *Privacy e lavoro*, Cacucci, 2000.

Different logics permeated these two different disciplines: art. 4 St.lav. focused on the installation and utilisation of control devices, the Privacy Code on data treatment.

Nobody ever doubted, actually, that the acquisition and utilisation of data collected by the employer when exercising his own power of control fell within the concept of "treatment", which is the cornerstone of the Privacy Code (12). Therefore, these two disciplines appeared to be complementary.

However, as art. 114 of Legislative Decree 196/2003 did not affect the provision set forth by art. 4 St.lav., it has clarified that was this last provision to provide the limitations to the employer's power of control; nevertheless, this also contributed to maintain obscure the general restrictions to data treatment contained in the Privacy Code. As at today, there are no significant judicial precedents applying the Privacy Code rules to ascertain the impossibility of using collected data, as provided for expressly by art. 11.

Things thus standing, the idea of amending art. 4 St.lav. in order to adequate it to the deep changes occurred in the current productive and technological context is clearly appreciable.

That being said, the issue is to evaluate which balance of interests the provision realises and therefore what is the real aim of the recent amendment. Only an accurate investigation of its contents will allow to understand whether the new discipline widens the power to control from remote the activity of the worker up to the point that the employer's technical and organisational interest prevails in any case – also when the purpose is an increase in productivity – or it still individuates some effective limitations to such power, which are suitable to preserve adequately workers' dignity and privacy.

(12) Data treatment is defined as "any operation or set of operations … entailing collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction" of personal data (art. 4, paragraph 1, let. a), Privacy Code).