COVID19

Smart working from "Covid19" is not smart working by Ciro Cafiero Paola Pezzali

Smart working, introduced in our country by law no. 81 of 22 May 2017, has proven to be the tool capable of reconciling, more than any other, the production needs of companies with those of protecting workers' health in the midst of the health emergency triggered by "Covid19". They promoted the appeal: both the Prime Minister's Decrees of 23 and 25 February 2020 for the first red areas, as much as the subsequent ones of 1, 4 and 8 March for the entire national territory, as well as the Protocol on Safety in the workplace between Government and Social Partners of 14 March 2020, as, finally, the decree law n. 18 of 17 March 2020. And then, it is necessary to ask whether the "emergency" discipline on smart working, or "emergency work", if you like, is equivalent to the one designed by the "mother" discipline, to draw some considerations on the possible measures that should be taken where this equivalence is lacking, and question, in conclusion, about future prospects. Going in order, the law n. 81 of 2017 assigns to agile work the aim of increasing competitiveness and reconciling life and work times (art.18). Vice versa, the purpose assigned to it by the "emergency" discipline is exclusively to protect the health of workers and therefore to contain the infection through home isolation. From here, a first notable difference. And again, the use of agile work is possible through the agreement between the parties, in order to "forms of organization by phases, cycles and objectives and without specific time or place of work constraints" and "to forms of exercise the managerial power of the employer "(ibidem, art. 18 and subsequent art. 21). However, Article 4 of the Prime Minister's Decree of 1 March 2020, in order to facilitate its use, has canceled the need for this agreement. Consequently, the forms of work organization and the choice of working time are left to the employer only or to the worker, as the case may be.

It is evident, however, that the joint choice guarantees the balancing of the aims of increasing the company's competitiveness and reconciling the life and work times of the worker. While the exercise of disciplinary power is left only to the employer and the workplace always coincides with the home of the worker, as the slogan "stay home" reminds us. On the subject of disciplinary power, it is therefore necessary to ask what happens in all those cases generally regulated by the agreement that the "emergency" discipline does not contemplate. For example, if the worker is in default due to damage to the IT tools, due to a drop in electrical voltage, or because he is deserting a call conference for an unexpected domestic event? Or if you visit websites outside of the company, or if you do not observe some pauses or if you fail to log out when the maximum working hours limit is reached (art.19 of law n.81 of 2017)? Will the employer have free hands in disciplining the worker, or vice versa? On the ground of the uniqueness of the workplace, it is interesting to ask whether "emergency" smart working does not really correspond to an evolved form of "home working" and therefore teleworking. The consequences vary, and greatly, in terms of safety in the workplace. And in fact, teleworking is applied peacefully, in its entirety, by Legislative Decree no. 81 of 2008 (in this sense, its art.3, paragraph 10), c.d. consolidated text on

job security. Instead, law no. 81 of 2017 does not present equally peacefully in this regard. Article 22, in fact, expressly burdens the employer only with the delivery to the worker and to the workers' representative for the safety, at least on an annual basis, of "written information in which the general and specific risks are identified". Furthermore, what is the significance of protection against accidents occurring "in itinere", or in reaching one of the most working places that smart working contemplates (ibidem, art. 22), in the light of circular INAIL no. 48 of November 2, 2017?

That said, we must also ask ourselves about the consequences of the use by workers of their own technological tools instead of the company, as happened in this emergency period. In fact, many companies that had never experienced agile work have not been able to equip their staff with PCs, tablets, and devices of various kinds. How, in particular, the employer's responsibility for safety and for the proper functioning "of the technological tools assigned to the worker for carrying out the work activity" is declined (ibidem, art. 22) if the latter has not provided it and therefore you don't know it? How, moreover, could the worker be informed and trained about it? Finally, this scenario nullifies, on the one hand, the obligation to give notice for the purpose of withdrawing from agile work (ibidem, art. 19), which will cease when the emergency ceases; on the other, that "to an economic and regulatory treatment not lower than that applied in general ... towards workers who perform the same tasks exclusively within the company" (art. 20 of law no. 81 of 2017). In fact, smart workers are denied the bonus of 100 euros net introduced by art. 63 of the law decree n. 18 of 2020 in favor of workers who carry out activities within the company. It is natural to ask, however, what happens for those placed in smart working before the spread of "Covid19". In light of these uncertainties, to answer the question concerning the measures useful to face them, it is first of all reasonable to build an ad hoc discipline through company regulations and circulars or second-level union agreements. In the absence, the risk of future litigation is high. Furthermore, from the legislative point of view, it is the right time to take up the challenge of tax exemption and the decontribution of agile work remuneration, as the nature of the welfare instrument already suggested. This would, in fact, reward the companies which, in resorting to them, choose to keep the staff in force "at their own expense" rather than burden the funds, not yet sufficiently large, of the layoffs. In conclusion, once the emergency has ceased, the success of agile work will depend, as it has shown to depend on it, on individual and collective agreements between the parties, of which it will have to go back to doing without it. What better opportunity, after all, for the participation of workers in the management of the company in the sign of Article 46 of the Constitution?