

## Whistleblowing in Italy: rights and protections for employees\*

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1. The significance of whistleblowing in the Italian legal system	301
2. The legal grounds for the protection of whistleblowers.	301
3. The specific rules protecting civil servants.	301
4. The protection of employees within the private sector: main crucial points.	303
5. The balancing performed by case law between the employees' right to information and right of criticism, on one side, and the employer's right to secrecy and personality rights, on the other side: protected behaviours.	305
6. The receivers of the complaint and the procedures to be followed.	310
7. Internal reporting systems and problems deriving from the rules protecting the privacy of the person to whom the complaint relates. Need for a legislative amendment.	311
8. Protections for the whistleblower.	314
9. Protected parties beyond the employees?	317

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### 1. The significance of whistleblowing in the Italian legal system

Whistleblowing<sup>955</sup> is not significant at all in the Italian legal system.

There are only a few – about a few dozen – decisions published dealing with the issue and there is little literature on the subject-matter<sup>956</sup>.

The reason for the poor attention paid to whistleblowing mirrors the poor spread of the phenomenon throughout the social reality. This not only depends on the fact that there are no specific rules in Italy for the protection of whistleblowers but, above all, it is the consequence of the poor public spirit of the average Italian, who does not hesitate to pursue his/her own personal interest without abiding by the common good<sup>957</sup>.

Therefore, the marginality of whistleblowing first has cultural and then legal roots.

### 2. The legal grounds for the protection of whistleblowers.

Even though there is no law of general application whatsoever for the protection of whistleblowers, nonetheless, case law in any event finds effective protection instruments in the legal system, first, against dismissal, but also more in general against retaliatory and discriminatory acts, and mobbing (section 8) put in place by the employer or by the colleagues to whom the complaint relates.

Solely recently, within the framework of wider rules aimed at repressing corruption and illegality within the public sector<sup>958</sup>, has a specific rule for the protection of whistleblowers who are civil servants been introduced (section 3).

### 3. The specific rules protecting civil servants.

Art. 54 *bis* of Legislative Decree No. 165/2001<sup>959</sup> sets forth that the civil servant, who reports to

<sup>955</sup> Whistleblowing is taken into consideration herein from an employment law standpoint and, therefore, from the standpoint of the protection of employees towards the employer. For the sake of completeness, in the last section of this essay whistleblowing is taken into consideration from the self-employed standpoint.

<sup>956</sup> See, in so far as Italian literature is concerned, V.A. Belsito, *Il whistleblowing. Tutele e rischi per il soffiatore*, Cacucci Bari, 2013; R. Lattanzi, *Prime riflessioni sul cd. whistleblowing: un modello da replicare "ad occhi chiusi"?*, in *RIDL*, 2010, I, p. 335 *et seq.* and in G. Frascini, N. Parisi, D. Rinoldi (edited by), *Protezione delle vendette "civiche": il ruolo del whistleblowing in Italia*, Transparency International Italy. Association against corruption, [www.transparency.it](http://www.transparency.it), 2009, p. 107 *et seq.*; V. Ferrante, *Rapporti di lavoro e whistleblowing nell'ordinamento italiano. Diritto a "spifferare" e tutela del posto di lavoro nell'ordinamento italiano*, in G. Frascini, N. Parisi, D. Rinoldi (edited by), *Protezione delle vendette "civiche"*, cit., p. 101 *et seq.*; S.P. Emiliani, *La libertà del lavoratore di manifestare il proprio pensiero e il dovere di rispettare l'altrui onore e reputazione*, in *ADL*, 2007, II, p. 417 *et seq.*; P. Aimò, *Privacy, libertà di espressione e rapporto di lavoro*, Jovene Naples, 2003, p.226 *et seq.*; E. Gragnoli, *L'informazione nel rapporto di lavoro*, Giappichelli, Turin, 1996, p. 62.

<sup>957</sup> The poor public spirit of Italians is proven, in the negative, by the striking spread of corruption: from the EU Anti-Corruption Report from the Commission of 3 February 2014, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, Chapter on Italy*, Brussels, 3 February 2014, COM (2014) 38 Final, [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf), it emerges that corruption in Italy costs Euro 60 billion, half the total value of corruption within the European Union.

<sup>958</sup> See Law No. 190/2012 "*Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione*" (namely, '*Rules for the prevention and repression of corruption and illegality in the public sector*').

<sup>959</sup> Art. 54 *bis* of Legislative Decree No. 165/2001 – introduced by Law No. 190/2012 – sets forth that: 'Beyond the cases of liability by way of slander or defamation, or by any such way pursuant to section 2043 of the Civil Code, the civil servant who reports to the

the Courts or to the “Corte dei Conti”<sup>960</sup> or to his/her senior manager unlawful behaviours of which he/she has become aware in light of his/her employment, shall in no way be subject to disciplinary penalties, nor may he/she be dismissed, and in no way may he/she undergo any discriminatory measure, either direct or indirect, having an impact on the work conditions for reasons directly or indirectly linked with the complaint<sup>961</sup>. Should any such measures be adopted, the party concerned and the trade unions shall report the foregoing to the Public Service Department for all necessary measures.

The whistleblower who reports false facts or facts not committed by the person to whom the complaint relates shall not be subject to this type of protection, thus becoming criminally liable for the slander<sup>962</sup> or defamation<sup>963</sup> offences, or civilly liable by any such way for unfair damage<sup>964</sup>.

As we shall see in detail hereunder, the rule limits itself to expressly stating – for the specific public service sector – principles which may already be retrieved from the legal system as a whole and which are also valid for employees within the private sector. Indeed, the code of silence – that is the obligation to keep quiet about unlawful acts, which are significant from a criminal, administrative or disciplinary standpoint<sup>965</sup>, put in place by the employer or by senior managers and by colleagues, and attributable to the employer – does not fall within the scope of the obligations of employees (see section 5).

All things being like this, it is clear that the complaint made by the employee as to unlawful behaviours held in the company does not amount to any breach of the contractual obligations and, precisely for this reason, he/she is not liable to any repressive measure taken by the employer (disciplinary penalty, dismissal or any other unfavourable measure which, precisely in light of the aim connoting same, exactly takes the shape of a discriminatory measure).

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Courts or to the “Corte dei Conti”, or reports to his/her own senior manager unlawful behaviours of which he/she has become aware in light of his/her employment, shall in no way be punished, dismissed or undergo any discriminatory measure, either direct or indirect, having an impact on the work conditions for reasons directly or indirectly linked with the complaint.

Within the scope of the disciplinary procedure, the identity of the person bringing the complaint shall in no way be revealed without his/her consent, provided that the formal notice of the disciplinary charge is grounded on standalone and further checks with respect to the complaint. Should the formal notice be grounded, either totally or partially, on the complaint, the identity may be revealed if the respective knowledge is of the essence for defending the person accused.

The party concerned or the trade unions with greater representativeness within the public authority in which the discriminatory measures have been put in place, shall report to the Public Service Department the adoption of any such discriminatory measures for any and all steps falling within the respective scope of authority.

The complaint shall not be subject to the access provided for under art. 22 *et seq.* of Law No. 241 of 7 August 1990, as amended<sup>961</sup>.

<sup>960</sup> The “Corte dei Conti” is the administrative authority in charge of controlling the administrative and accounting compliance by the public authorities.

<sup>961</sup> Should a discriminatory measure be taken, the party concerned or the trade unions shall report the latter to the Public Service Department for the adoption of any and all measures falling within the respective scope of authority.

<sup>962</sup> Section 368 of the Criminal Code.

<sup>963</sup> Section 595 of the Criminal Code.

<sup>964</sup> Section 2043 of the Civil Code.

<sup>965</sup> Significant pursuant to specific rules. It is sufficient to think of the provisions of Legislative Decree No. 231/2001, which lay an obligation upon the employer, subject to the latter's liability, to prevent a series of criminal offences perpetrated within the company (see section 6); or of section 2087 of the Civil Code, which lays a general obligation upon the employer to protect the health and dignity of employees and, therefore, also to prevent, subject to the employer's liability, any and all mobbing behaviours put in place within the company by any employee.

Art. 54 *bis* of Legislative Decree No. 165/2001 adds to the general principle just mentioned above specific provisions for the protection of the secrecy of the whistleblower's identity, both throughout the disciplinary procedure and in accessing the relevant administrative records, such as not to expose him/her to the greatest possible extent to any retaliation whatsoever by the persons to whom the complaint relates.

From the former standpoint, the aforesaid art. 54 *bis* sets forth that – during the disciplinary procedure issued against who has committed the unlawful act –, in no way shall the whistleblower's identity be revealed without his/her consent. An exception to the above would be the case in which the formal disciplinary notice is totally or partially grounded on the whistleblower's complaint and the knowledge of the latter's identity is of the essence for exercising the right to defence.

From the latter standpoint, then, the whistleblower's complaint is not subject to the access foreseen in general for administrative records<sup>966</sup>. The provision thus overcomes the firm stance of administrative case law<sup>967</sup>, pursuant to which each single party needs to be able to precisely take cognisance of the contents and of the authors of complaints and reports<sup>968</sup>.

Art. 54 *bis* of Legislative Decree No. 165/2001 – despite having been greeted by law scholars, since it brings about the first protection specifically aimed at whistleblowers – has been deemed inadequate from different standpoints.

First of all, it has been pointed out that the rule does not specify the different ways and procedures in which employees may bring the relevant complaint.

It has then been stressed that the guarantee as to the secrecy of the whistleblower's identity is totally relative, since it is aimed at inevitably jeopardising when the reported behaviours have criminal significance and thus need be reported to the Public Prosecutor's Office<sup>969</sup>.

Finally, some have complained about the fact that the provision does not change – as it should have done in order to strengthen the protection of whistleblowers – the customary allocation of the burden of proof, especially, in so far as discriminatory dismissal is concerned<sup>970</sup> (see section 8).

#### 4. The protection of employees within the private sector: main crucial points.

As already stated, there are no specific provisions protecting whistleblowers who are employed

<sup>966</sup> Law No. 241/1990.

<sup>967</sup> See R. Lattanzi, *Prime riflessioni sul cd. whistleblowing: un modello da replicare "ad occhi chiusi" ?*, cit., p. 350 et seq.

<sup>968</sup> See Council of State, VI Division, 25 June 2007, No. 3601, in *Foro Amm.*, 2007, 6, 1929; Council of State, V Division, 19 May 2009, in *Arch. locazioni*, 2009, 6, p. 565 et seq.

<sup>969</sup> M. Palla, *Commento all'art. 54 bis. D.Lgs. 165/2001*, in R. De Luca Tamajo, O. Mazzotta, *Commentario breve alle leggi sul lavoro*, V ed., Cedam Padua, 2013, p. 1794.

<sup>970</sup> V.A. Belsito, *Il whistleblowing, tutele e rischi per il soffiatore*, Cacucci, Bari, 2013, p. 42.

Nonetheless please note that, in so far as dismissal is concerned, the issue is partially defused by the fact that, in general, the burden of proof as to whether there is a just cause or a justified reason, or not – and which is necessary for the lawfulness of the dismissal – always and in any event rests on the employer (art. 5, Law No. 604/1966).

by private employers. It is case law which – by arguing based on the principles and rules governing the employment relations – in any event ensures a protection for the employee bringing the complaint.

It needs be stressed that, up to now, case law has exclusively focused on whistleblowers who are employees. Therefore and first of all, we shall give an account of the problems and solutions formulated in this respect.

Nonetheless, similar problems may be raised for self-employed workers, in particular, for any self-employed worker carrying out a personal activity (section 9).

The first issue that case law has had to solve concerns the mutual boundaries between the right to information and the right of criticism<sup>971</sup>, on one side and, on the other side, the right to secrecy set forth by law in respect of business facts and information<sup>972</sup>, and the personality rights granted to the employer by the Constitution<sup>973</sup>.

Indeed, in interpreting case law, both the extent and the contents of the right to information and of the right of criticism – amounting to a variation of the principle of free expression of ideas, in general granted to all citizens by the Constitution<sup>974</sup> and confirmed by the law in favour of employees<sup>975</sup> – result from the balancing with the employer's right to the employees' loyalty<sup>976</sup>, inclusive of a right to the secrecy of all business information<sup>977</sup> and, moreover – as we shall see hereunder – with the employer's personality rights<sup>978</sup> – to dignity, reputation, image –, which penetrate the employment agreement either pursuant to the general obligations of fairness and good faith in the performance of the agreement<sup>979</sup>, or pursuant to the general principle of prohibition of any abuse of right.

The consequence is that, should the right to information and the right of criticism be exercised by exceeding the limits fixed by any such balancing, the employee shall be in default and shall expose himself/herself to the employer's lawful reactions (dismissal, disciplinary penalties).

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<sup>971</sup> The right to information concerns the disclosure of facts, whilst the right of criticism concerns the expression and disclosure of opinions.

<sup>972</sup> Section 2105 of the Civil Code.

<sup>973</sup> Art. 2 of the Constitution.

<sup>974</sup> Art. 21, paragraph 1, of the Constitution: 'Everybody has the right to freely express their ideas with words, writings or by any other means'.

<sup>975</sup> Art. 1 of the Workers' Statute (Law No. 300/1970): 'Workers, without any distinction as to the respective political, trade union and religious faith opinions, shall be entitled to freely express their thoughts in the workplace, in compliance with the principles set forth by the Constitution and with the rules provided for under this law'.

<sup>976</sup> Section 2105 of the Civil Code: 'Employees shall in no way deal with any business, either on their own behalf or on behalf of third parties, in competition with the entrepreneur, nor shall they disclose any information pertaining to the company's organisation and production methods, or use them in such a way as to be detrimental to the latter'.

<sup>977</sup> In addition to the obligation to secrecy, discussed herein, the rule also sets forth a non competition obligation and the prohibition to use business information in such a way as to cause damage to the company (see note above).

<sup>978</sup> Art. 2 of the Constitution.

Cass. 25 February 1986, No. 1173, in *FI*, 1986, I, c. 1884, states that personality rights are directly protected under art. 2 of the Constitution and, indirectly – given its reference to 'dignity' –, under art. 3 of the Constitution. Likewise, Cass. 22 October 1998, No. 10511, in *RGL*, 1999, II, p. 461.

<sup>979</sup> Sections 1175 and 1375 of the Civil Code. See Court of Rome, 26 October 2009, in *RIDL*, 2010, II, p. 799 *et seq.*

Besides such fundamental issue, it is worth mentioning other issues pertaining, more in particular, to the ways through which the complaint may be brought.

First of all, we need to ask ourselves whether the employer needs to identify internal procedures for allowing the employee's complaint and whether the employee then necessarily needs to use them.

In this respect, it is worth taking into consideration the provisions set forth by Legislative Decree No. 231/2001<sup>980</sup> – aimed at guaranteeing the legality and transparency of the public authorities, and at preventing and repressing corruption – which, in foreseeing the administrative liability of legal entities for the very first time, for a series of specifically indicated criminal offences, lays an obligation upon any entity willing to be exempted from any such liability to adopt organisational models aimed at preventing the perpetration thereof.

Secondly, we need to discuss the ways in which the employer may use the complaint received.

In this respect, there are problems arising from the relevant data protection rules (Legislative Decree No. 196/2003), which foresee that the employer may solely process the personal data provided that certain conditions are met.

We shall discuss these further aspects in section 7 hereunder.

Finally, there are issues arising in connection with the protection which may be called for by the whistleblower, which shall be dealt with in section 8 hereunder.

#### **5. The balancing performed by case law between the employees' right to information and right of criticism, on one side, and the employer's right to secrecy and personality rights, on the other side: protected behaviours.**

The Italian legal system lays a loyalty obligation upon employees<sup>981</sup>, which expressly includes the obligation to secrecy, that is the obligation not to 'disclose information concerning the company's organisation and production methods'. Should that obligation be breached, the employee shall be in default and shall thus be liable to disciplinary penalties up to reaching dismissal in the most serious cases (for justified subjective grounds or for just cause).

But which is exactly the content of the obligation to secrecy?

May it include a prohibition to disclose further information with respect to those specifically provided for under the law provision (information 'concerning the organisation and production') but, in any event, fit to cause damage to the company's reputation and image, thus damaging market competitiveness (it is sufficient, for instance, to think of any information concerning the company's financial trend)? And still: may said prohibition, should it be understood in the broad sense, go so far as to include any internal information of the company, including the irregularities and

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<sup>980</sup> Legislative Decree No. 231/2001 *"Disciplina della responsabilit  amministrativa delle persone giuridiche, delle societ  e delle associazioni anche prive di personalit  giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300"* ('Provisions governing the administrative liability of legal entities, companies and associations, even if lacking legal personality, pursuant to article 11 of Law No. 300 of 29 September 2000').

<sup>981</sup> Section 2105 of the Civil Code.

even the unlawful behaviours put in place within the company (such as the breach of safety at work rules, tax rules, anti-corruption rules, and anti-mafia rules)?

In so far as the extent of the loyalty obligation is concerned and, for the purposes hereof, as regards the boundaries of the obligation to secrecy, there is a conflict between law scholars and case law: law scholars deem that the obligation to secrecy needs be understood in a restrictive sense, since instrumental to protect the company's goodwill and, therefore, as provided for under the rule, solely with respect to the information 'concerning the organisation and production'<sup>982</sup> whilst case law, instead, tends to widen the content thereof, also including the disclosure of further information within the respective scope, in any event, provided that related to the running of the business and fit to damage the image and reputation, also on the market<sup>983</sup>.

In some cases, case law reaches the same result, that is of widening of the loyalty obligation (and of the obligation to secrecy) – thus understood as a general loyal behaviour obligation –, by enhancing the clauses of fairness and good faith in the performance of the agreement<sup>984</sup>.

In any event, also in case law, it is undisputed that the obligation to secrecy laying upon employees does not entail a general code of silence: the fiduciary relation linking employees with the respective employer – the expression of which is the loyalty obligation – 'concerns the employer's reliance on the employee's capacity to fulfil the work obligation and not on his/her capacity to share secrets which are not instrumental to the company's productive and/or commercial needs'<sup>985</sup>.

Indeed, the obligation to secrecy aims at solely protecting the entrepreneur's lawful activities, 'it being certainly not possible to request employees to fulfil any such obligations (...) even when [the entrepreneur] is willing to pursue unlawful interests'<sup>986</sup>.

Therefore, employees may certainly – and in some cases must (see section 6) – report the behaviours put in place in the company by the employer or ascribable thereto, which amount or may amount<sup>987</sup> to criminal unlawful acts (for instance, corruption), administrative unlawful facts (for

<sup>982</sup> Thus P. Ichino, *Trattato di diritto del lavoro*, Giuffrè Milano, vol. III, p. 284 *et seq.*; A. Boscati, *Obbligo di fedeltà e patto di non concorrenza*, in M. Martone (edited by), *Contratto di lavoro e organizzazione*, Volume I, in M. Persiani, F. Carinci (directed by), *Trattato di diritto del lavoro*, vol. IV, Cedam Padua 2012, p.1015.

Likewise, see Cass. 16 January 2001, No. 519, in *RIDL*, 2001, II, p. 453 *et seq.*

<sup>983</sup> See Court of Piacenza, 6 June 2007, in *Arg.Dir.Lav.*, 2008, I, p. 872. See also Cass. 6 May 1998, No. 4952, in *RIDL*, 1999, II, p. 346 *et seq.* and in *RGL*, 1999, II, p. 455 *et seq.*, in particular, p. 460.

<sup>984</sup> Sections 1175 and 1375 of the Civil Code.

In this respect, see Cass. 6 May 1998, No. 4952, in *RGL*, *cit.*, p. 460, pursuant to which employees 'shall not only refrain from the behaviours expressly prohibited under section 2105 of the Civil Code, but also from all those which, given the respective nature and consequences, result to be in conflict with the duties connected with the integration of the specific employee in the company's structure and organisation, or create situations of conflict with the aims and interests of the company itself, or are in any event fit to irretrievably damage the fiduciary prerequisite of the relationship'; Cass. 16 January 2001, No. 519, *cit.*, p. 458.

<sup>985</sup> Cass. 14 March 2013, No. 6501, in *FI*, 2013, 5, I, 1455.

<sup>986</sup> Thus Cass. 16 January 2001, No. 519, in *RIDL*, 2001, II, p. 453 *et seq.*, which faces a case in which the whistleblower had reported to the Court the behaviour of the employer, who had tried to evade the tax authorities by concealing the sales of the manufactured goods.

<sup>987</sup> See hereunder for the issue of the putative truth of the reported facts.

instance, breach of tax regulations), or civil unlawful acts (it is sufficient to think, for instance, of mobbing).

But case law goes beyond.

It is a shared opinion that the employee's complaint does not need to be solely limited to the specific unlawful acts, but may also have as purpose facts or behaviours which are just irregular or even perfectly lawful (such as, for instance, investment policies or any choices of manufacturing decentralisation or delocalisation), and may also include critical assessments and opinions of the whistleblower.

From a more in-depth view, it emerges – and this is the aspect of greatest interest – that the focal point of judicial control, regardless of the purpose of the complaint<sup>988</sup> and of the employee putting it in place<sup>989</sup>, is not the compliance with the obligation to secrecy<sup>990</sup> which, even if it is often cross-referenced, fades into the background.

Instead, the Judges directly balance the employee's right to information and right of criticism set forth by the Constitution, on one side<sup>991</sup> and, on the other side, the likewise constitutional personality rights of the employer<sup>992</sup> (dignity, reputation, image) to the respective ideal and economic extent<sup>993</sup>. In order to do so the Judges check, in particular, whether the right to information and the right of criticism have been exercised in compliance with certain limits<sup>994</sup>: limits of content (the principle of substantive restraint), formal or procedural limits (principle of formal restraint), and finalistic limits (principle of the pursued interest).

Only provided that these limits are complied with will the right to information and the right of criticism be lawfully exercised, thus a breach on the employee's side would not take shape<sup>995</sup>.

Therefore, let us analyse such limits separately.

In so far as the limits of content are concerned (principle of substantive restraint), firm case law requests that the complaint has as purpose true facts<sup>996</sup> or, at least, facts which the whistleblower deems true, without any wilful misconduct or gross negligence<sup>997</sup> (the so-called putative truth). Therefore, the employee must control, to the extent possible in light of the role held in the

<sup>988</sup> A criminal, administrative or civil unlawful act, a mere irregularity, a fully lawful entrepreneurial choice.

<sup>989</sup> A mere employee, an executive, a trade union representative, a workers' representative for safety. But see hereunder for the link between types of employees and interest pursued with the complaint.

<sup>990</sup> Set forth under section 2105 of the Civil Code.

<sup>991</sup> Art. 21 of the Constitution.

<sup>992</sup> Art. 2 of the Constitution.

<sup>993</sup> It lays stress on the financial damage resulting from the drop in the employer's image, Cass. 6 May 1998, No. 4952, in *RIDL*, 1999, II, p. 346 *et seq.* and in *RGL*, 1999, II, p. 455 *et seq.*

<sup>994</sup> Limits which follow those formulated for the freedom of press of journalists, see Cass., sitting as a Unified Criminal Division, 23 October 1984, in *GC*, 1984, III, c. 2941 *et seq.* For the transposition of the limits put forward for the freedom of press of journalists to the obligation to secrecy of employees, Cass. 25 February 1986, No. 1173, in *FI*, 1986, I, c. 1877 *et seq.*

<sup>995</sup> The breach may also arise in the event in which the features of the slander and defamation offences do not take shape, see Cass. 24 May 2001, No. 7091, *cit.*

<sup>996</sup> Cass. 6 May 1998, No. 4952, *cit.*; Cass. 22 October 1998, No. 10511, in *RGL*, 1999, II, p. 462.

<sup>997</sup> See Cass. 14 May 2012, No. 7471, in *RIDL*, 2012, II, p. 85.



company, the truthfulness of the reported facts, thus being under the obligation to refrain from falsely accusing someone of the facts that he/she knows are not true.

Nonetheless, the employee is entitled - as long as acting in good faith - to report facts to the Court in order to assess the criminal relevance thereof<sup>998</sup>.

Instead, when the complaint does not have as purpose facts, but opinions or judgments, there are no problems of truthfulness or untruthfulness whatsoever. The judgments (which are obviously relevant herein if negative) may always be expressed, even if they inevitably turn out to damage the public image of the person to whom the complaint relates<sup>999</sup>.

In so far as the formal or modal limits are concerned (principle of formal restraint), case law requests that all expressions and tones be proportionate and instrumental to the aims of the communication, and such as not to gratuitously damage the employer's image. Therefore, in no way will the communication go too far as to become an insult or indulge in rude or obnoxious approaches, or in expressions which are gratuitously aimed at causing contempt and disrepute<sup>1000</sup>. Quite the opposite, it shall be marked by fairness, civility and moderation of the expressions and by the balance of tones<sup>1001</sup>.

The line of reasoning followed by case law does not change in its baseline, regardless of the communication means chosen and the context in which it takes place. This does not mean that the Judges do not take into consideration the peculiarity of the communication instrument (newspaper article, television interview<sup>1002</sup>, leaflet, satirical cartoon) and, therefore, the expressive codes featuring same and the context in which the communication takes place (for instance, the complaint brought by a trade union representative in the context of a harsh collective confrontation<sup>1003</sup>).

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<sup>998</sup> See Cass. 23 March 2012, No. 4707, *cit.*, p. 837 *et seq.*

<sup>999</sup> Thus Court of Rome, 26 October 2009, in *RIDL*, 2010, II, p. 799 *et seq.*

<sup>1000</sup> Thus Court of Rome, 26 October 2009, *cit.*; see, more recently, Cass. 14 May 2012, No. 7471, in *RIDL*, 2013, II, p. 86.

<sup>1001</sup> See Cass. 6 May 1998, No. 4952, in *RGL*, *cit.*, p. 457, pursuant to which the communication will trample on a person's dignity when it is not marked by 'loyal clarity: this may be found when having recourse to the so-called 'underlying man of learning', to the persuading approaches, to the excessively scandalised and outraged tone, especially in titles of articles or publications or, in any event, to the contrived and systematic dramatisation with which neutral information is reported, as well as to real insinuating remarks'.

<sup>1002</sup> Court of Varese, 20 March 2007, in *D&L*, *RCDL*, 2007, I, 510, note by Cafiero.

<sup>1003</sup> See, for instance, Magistrates' Court of Palermo, 1 December 1990, in *D&L*, *RCDL*, 1992, p. 245 *et seq.*, which assesses the tones and expressions used by a trade unionist within the scope of a 'harsh, strong and inflexible report of behaviours detrimental to the collective interests of workers (...), whose tones do not exceed the boundaries of trade union dispute in the stricter sense, even if they show an obstinate opposition to the company' as compliant with the right of criticism. See also Magistrates' Court of Bergamo, 29 September 1997, in *MGL*, 1998, I, 24, note by Failla; Court of Rome, 26 October 2009, *cit.*; Cass. 17 December 2003, in *GCM*, 2003, 12.

See also Court of Rome 26 October 2009, *cit.*, with respect to the right to information and to the right of criticism exercised by a workers' representative for safety, pursuant to which 'the intrinsically dialectical nature of trade union relations [entailing], totally physiologically, the recourse to claiming and protest techniques, requests an adequate and reasonable tolerance criterion with respect to the phenomena, often determined by an excess of polemical strength, of relative (...) aggressiveness in expressing the respective opinions'.

With special respect to satire, the use of symbolic and paradoxical language<sup>1004</sup>, the recourse to strong and exaggerated images, aimed at making fun of facts and situations, are permitted<sup>1005</sup>.

Lastly, in so far as the finalistic limits are concerned (principle of the pursued interest), case law deems that, through the complaint, the whistleblower may lawfully pursue both an own individual interest (such as, for instance, the exercise of the right to defence pursuant to the Constitution<sup>1006</sup>, or the right to protect his/her own job<sup>1007</sup>), as well as a collective and trade union interest (for instance, the protection of employment levels within the company<sup>1008</sup>, or safety in the workplace), or a public and general interest (for instance, salubrity of the environment, transport safety<sup>1009</sup>, the repression of criminal phenomena such as mafia infiltration).

Nonetheless, it needs be stressed that, pursuant to the leading stance<sup>1010</sup>, the significance given under the legal system to the final interest pursued - be it a collective or general interest - leads to mitigate the strictness of the substantive and formal limits just discussed, thus reverberating on the balancing judgment between the employee's right to information and right of criticism, and the employer's personality rights. In short, the assessment of the final interest at which the complaint is aimed leads to read the employee's right to information and right of criticism in a broader way.

Case law gives special significance to this aspect with respect to the complaints brought by a trade union representative, by stressing that, in this case, the latter acts on equal terms and not on subordinate terms<sup>1011</sup> with respect to the employer, since his/her complaint is at the same time the free expression of ideas<sup>1012</sup> and the expression of trade union freedom<sup>1013</sup>.

Similar remarks may be raised for the workers' representative for safety, who is in charge of protecting the right to the health of workers in the workplace<sup>1014</sup>.

<sup>1004</sup> Cass. 24 May 2001, No. 7091, in *MGL*, 2001, p. 795.

<sup>1005</sup> See Magistrates' Court of Bergamo 29 September 1997, in *MGL*, 1998, p. 33.

<sup>1006</sup> Art. 24 of the Constitution.

See Cass. 16 February 2000, No. 1749, in *RGL*, 2000, II, 463, note by Villa, which deems the event in which the employee, after having brought the complaint before the Court for extortive behaviours towards any such employee, against the general manager who had informed his/her colleagues, a lawful exercise of the right to information and of the right of criticism.

<sup>1007</sup> See Cass. 16 January 2001, No. 519, *cit.*, concerning a complaint about tax irregularities by the employer, in order to prevent the latter, by concealing part of the company's income, from being able to establish in advance the conditions for reducing staff at a later stage.

<sup>1008</sup> See Cass. 24 May 2001, No. 7091, *cit.*; Magistrates' Court of Bergamo, 29 September 1997, *cit.*

<sup>1009</sup> See Court of Rome, 26 October 2009, *cit.*

<sup>1010</sup> See Cass. 25 February 1986, No. 1173, *cit.*, c. 1884 *et seq.*, pursuant to which 'the right to freely express own ideas in a critical way is not sufficient in itself to justify the damage to constitutionally guaranteed property, but this may be justified if – and provided that – the action putting it in place is reasonably and prudently aimed at satisfying significant interests (from a legal standpoint) at least equal to that of the damaged property'. Likewise, Cass. 16 January 2001, No. 519, *cit.*, p. 461; Cass. 6 May 1998, No. 10511, *cit.*, p. 461 *et seq.*; Court of Rome, 26 October 2009, *cit.*. However, see also Cass. 16 May 1998, No. 4952, in *RIDL*, 1999, II, p. 346 *et seq. cit.* which, according to some law scholars, determines a one-off adjustment in connection herewith.

<sup>1011</sup> See Cass. 24 May 2001, No. 7091, *cit.*, p. 794; see also, even if with more blurred tones, Cass. 14 May 2012, No. 7471, *cit.*, p. 86.

<sup>1012</sup> Art. 21 of the Constitution.

<sup>1013</sup> Art. 39 of the Constitution.

<sup>1014</sup> See Court of Rome, 26 October 2009, *cit.*

Instead, the event in which the whistleblower's complaint is merely aimed at damaging the employer goes beyond the scope of the right to information and of the right of criticism. In any such event, there would be abuse<sup>1015</sup>: the right is no longer exercised for spreading information and for forming a critical awareness by the public as to the company's operations, but solely in order to damage the personality and cause financial damage thereto.

## 6. The receivers of the complaint and the procedures to be followed.

The whistleblower may bring his/her own complaint by having recourse to different means of communication and by turning to different parties: the Courts through formal complaints<sup>1016</sup>, the media through interviews in the newspapers or by participating to television programmes, citizens and/or employees through leaflets, the employer through internal communications. Obviously, in the event of internal complaints addressed to the employer, that is to the employee's contractual counterparty, no breach whatsoever of the loyalty obligation may take shape at the root<sup>1017</sup>.

On the other hand, there are cases in which the law shapes a real obligation for certain employees to bring the complaint: it is the case of employees vested with special public duties, who have the burden of reporting criminal offences to the Courts<sup>1018</sup>. It is the case of employees with control duties who become aware of unlawful acts or irregularities, who have the obligation to report to the employer, in compliance with the relevant diligence<sup>1019</sup> and loyalty<sup>1020</sup> obligations in the performance of the agreement<sup>1021</sup>.

There is no law provision, in any event, laying an obligation upon the whistleblower to report what has happened in the company without first informing the respective senior managers or the employer, both in writing and orally<sup>1022</sup>.

Nonetheless, any such obligation may be introduced by the disciplinary code, in particular, when the employer foresees formal internal procedures for reporting unlawful acts and irregularities. The complaint brought by the employee amounts to compliance with and not to breach of the loyalty obligation, which is governed pactionally. In this case, the employee who fails to activate the internal communication channels first will be subject to disciplinary penalties.

Furthermore, it needs be stressed that Legislative Decree No. 231/2001 – which is aimed at boosting transparency and legality in the Italian legal system –, in introducing the administrative liability

<sup>1015</sup> U. Rescigno, *L'abuso del diritto*, in *Riv.dir.civ.*, 1965, I, p. 205 *et seq.*

<sup>1016</sup> See Cass. 23 March 2012, No. 4707. *cit.*

<sup>1017</sup> Thus rightly, see R. Lattanzi, *Prime riflessioni sul cd. whistleblowing: un modello da applicare "ad occhi chiusi"?*, *cit.*, p. 346 note 37.

<sup>1018</sup> See, for instance, the obligations to complain and to report foreseen under section 361 *et seq.* of the Criminal Code.

<sup>1019</sup> Section 2104 of the Civil Code.

<sup>1020</sup> Section 2105 of the Civil Code.

<sup>1021</sup> See Cass. 8 June 2001, No. 7819, in *ADL*, 2003, I, 285 *et seq.*, pursuant to which the employee, deputy director of a bank, is under the obligation – in compliance with the diligence (section 2104 of the Civil Code) and loyalty (section 2105 of the Civil Code) obligations – to report to top management the serious managerial irregularities put in place by his/her senior manager, that is the director.

<sup>1022</sup> See Cass. 14 March 2013, No. 6501, *cit.*

of entities vested with legal personality, of companies and of associations, even if lacking legal personality<sup>1023</sup> for a series of criminal offences<sup>1024</sup>, foresees that the entity itself be exempted from liability for the criminal offences perpetrated by top managers<sup>1025</sup>, provided that an organisational model has been prepared foreseeing, amongst others: a) information obligations towards the body in charge of supervising compliance with the model, and b) a disciplinary code fit to impose sanctions on the failure to comply with the measures indicated in the model itself<sup>1026</sup>.

Obviously the choice of the organisational model is very changeable, since it is linked with the peculiarities of the entity, with the type of activity carried out and, therefore, with the specific risk of perpetrating one or another type of the criminal offences provided for under Legislative Decree No. 231/2001.

But it is clear that if the chosen model fails to foresee any procedures for reporting any unlawful acts, also failing to lay any obligation to report upon the employees, in respect of which disciplinary penalties may be imposed, it shall not be fit to guarantee the entity's exemption from liability<sup>1027</sup>.

#### 7. Internal reporting systems and problems deriving from the rules protecting the privacy of the person to whom the complaint relates. Need for a legislative amendment.

Should the employer organise internal reporting systems<sup>1028</sup>, some difficult problems arise in the Italian legal system – not resolved yet – of connection between the needs for the whistleblower's protection and the positive law in the matter of protection of the privacy of the person to whom the complaint relates.

Legislative Decree No. 196/2003 – by implementing Directive 95/46/EC – introduces restrictions to the processing of the information received by the employer for the purpose of, amongst others, allowing the person to whom the complaint relates to be able to defend himself/herself in an effective and prompt manner. But it does not take into consideration the needs for the whistleblower's protection.

<sup>1023</sup> See art. 1, paragraph 2, of Legislative Decree No. 231/2001.

<sup>1024</sup> See Title III, art. 24 *et seq.* of Legislative Decree No. 231/2001, foreseeing a series of criminal offences, from computer crimes, to organised crime offences, to corporate crimes, to crimes the aims of which are terrorism and subversion, etc. Art. 25-*septies* of Legislative Decree No. 231/2001 also includes manslaughter, as well as serious and very serious injuries committed in breach of the health and safety at work laws and regulations.

<sup>1025</sup> In particular, pursuant to art. 5, letter a), of Legislative Decree No. 231/2001, by 'persons holding representation, administration or management duties within the entity or within one of its head departments having financial and functional independence, as well as by persons who exercise, also *de facto*, the respective management and control'.

<sup>1026</sup> See art. 6, paragraph 1, of Legislative Decree No. 231/2001.

<sup>1027</sup> Thus G. Arnone, *Whistleblowing e ordinamento italiano: possibili percorsi normativi*, in G. Fraschini, N. Parisi, D. Rinoldi (edited by), *Protezione delle vendette "civiche": il ruolo del whistleblowing in Italia*, Transparency International Italy. Association against corruption, [www.transparency.it](http://www.transparency.it), 2009, p. 128.

<sup>1028</sup> Either in compliance with the relevant law provisions (it is precisely the case of Legislative Decree No. 231/2001) or as a freely chosen instrument, in order to prevent the perpetration of unlawful acts or of irregularities (for instance, in mobbing prevention, it is standard practice for companies to adopt codes of conduct foreseeing complaint and report procedures by the mobbed persons. In general, the anonymity guarantee is ensured in these cases, unless if with the express consent of the mobbed person).

In this respect, there are at least three issues which need be taken into consideration: the conditions under which the employer may lawfully deal with the complaints and, in particular, whether the person to whom the complaint relates needs to give his/her own consent; whether the person to whom the complaint relates needs to know the charges levelled and the identity of the person bringing the complaint; whether it is possible for the employer to use anonymous complaints.

The problematic nature of these aspects has led the Italian Data Protection Authority, back in 2009, to report to Parliament and to the Government by requesting a regulatory amendment<sup>1029</sup>. Nonetheless, to date, the aforesaid request has received no response whatsoever.

In so far as the prerequisites for the lawfulness of the processing of personal data are concerned, in general terms, Legislative Decree No. 196/2003 requests the consent of the data subject<sup>1030</sup>, whereby any such consent does not arise in the case at issue and, in most cases, foreseeably.

Nonetheless, such consent is excluded in some particular cases<sup>1031</sup>, amongst which, the case in which the data controller uses the collected data in order to protect its own rights in Court<sup>1032</sup>. However, such case in point may arise in the event of data collection through internal reporting systems, but it may solely aid at a later stage, after having made all necessary preliminary checks<sup>1033</sup>. Therefore, in no way may it be deemed the main road for excluding, in so far as the internal control systems are concerned, the data subject's necessary previous consent.

Instead, the consent could be in general excluded based on a balancing of interests order issued by the Italian Data Protection Authority, aimed at 'pursuing a lawful interest of the data controller or of a third party recipient of the data, should the fundamental rights and freedoms, the dignity or a lawful interest of the data subject not prevail'<sup>1034</sup>.

Nonetheless, it has not been the intention of the Italian Data Protection Authority to adopt a balancing order of any such type, since it has deemed the regulatory framework too uncertain, thus passing the ball to the legislator through the report of 2009<sup>1035</sup>, who has however remained silent.

Therefore, things being like this, the collection and processing of data through internal reporting systems in any event need the prior consent of the person to whom the complaint relates.

<sup>1029</sup> See the Italian Data Protection Authority, *Segnalazione al Parlamento e al Governo sull'individuazione, mediante sistemi di segnalazione, degli illeciti commessi da soggetti operanti a vario titolo nell'organizzazione aziendale*, 10 December 2009, in [www.garante-privacy.it](http://www.garante-privacy.it) [Web Doc. No. 1693019]

<sup>1030</sup> Art. 23 of Legislative Decree No. 196/2003.

<sup>1031</sup> Art. 24 of Legislative Decree No. 196/2003.

<sup>1032</sup> Art. 24, paragraph 1, letter f), of Legislative Decree No. 196/2003.

<sup>1033</sup> Thus R. Lattanzi, *Prime riflessioni sul cd. whistleblowing: un modello da applicare "ad occhi chiusi"?*, cit., p. 560.

<sup>1034</sup> Art. 24, paragraph 1, letter g), of Legislative Decree No. 196/2003.

A case of prevalence of the interest of the data controller or of third parties could actually be deemed to arise, pursuant to the relevant law provisions (should any reporting systems be activated), pursuant to Legislative Decree No. 231/2001, or pursuant to arts. 2 and 32 of the Constitution, and to section 2087 of the Civil Code in the event of mobbing, or even pursuant to art. 3 of the Constitution and to art. 15 of the Workers' Statute, and to the relevant further special legislation in the event of any discrimination. See also R. Lattanzi, *Prime riflessioni sul cd. whistleblowing: un modello da applicare "ad occhi chiusi"?*, cit., p. 561.

<sup>1035</sup> See the Italian Data Protection Authority, *Segnalazione al Parlamento e al Governo*, cit.

As regards the right of access issue, then, Legislative Decree No. 196/2003 not only foresees the data subject's right to know the processed information, but also the source of any such information and, therefore, also the name of the person bringing the complaint<sup>1036</sup>. Furthermore, the person to whom the complaint relates shall be informed of any and all processing concerning him/her and, should the data be collected not from the latter but from third parties – as in the case of internal information systems –, the disclosure shall be made at the time of recording the relevant data<sup>1037</sup>.

It is clear that these provisions are in conflict with the need to keep the whistleblower's identity confidential, in order to avoid exposing the latter to any retaliation whatsoever by the person to whom the complaint relates.

It is also certain that the right of access and the data processing disclosure may be derogated pursuant to the EU Directive, in the cases in which the law identifies a prevailing interest with respect to the individual interest and establishes the necessary guarantees<sup>1038</sup>. Legislative Decree No. 196/2003 has done so with respect to the data processed in order to protect a right in Court, foreseeing that both the right of access<sup>1039</sup> and the disclosure obligation<sup>1040</sup> may be deferred<sup>1041</sup>.

Therefore, also for this reason, it would be necessary for a law amendment to reconcile the right of access and disclosure of the person to whom the complaint relates with the need for protecting the whistleblower's identity, as stressed once again by the Italian Data Protection Authority back in 2009<sup>1042</sup>.

Finally, the lawfulness of the employer's processing of anonymous complaints is also doubtful, in respect of which nothing is provided for under Legislative Decree No. 196/2003. Indeed, anonymity – however seen with general disapproval by the Italian legal system<sup>1043</sup> –, on one side, would not allow the data controller to retrieve more precise information in connection with the reported matters<sup>1044</sup> and, on the other side – moreover –, the person to whom the complaint relates to know the source of the data<sup>1045</sup>.

Also from this standpoint, it would also be necessary for the legislator to provide clarification,

<sup>1036</sup> Art. 7 of Legislative Decree No. 196/2003.

<sup>1037</sup> Art. 13, paragraph 4, of Legislative Decree No. 196/2003.

<sup>1038</sup> See art. 13, paragraph 1, letter g), of Directive 95/46/EC.

<sup>1039</sup> Art. 8, paragraph 2, letter e), of Legislative Decree No. 196/2003.

<sup>1040</sup> Art. 13, paragraph 5, letter b), of Legislative Decree No. 196/2003.

<sup>1041</sup> Provided that the data are processed for any such purposes and for the period strictly necessary for their pursuit.

<sup>1042</sup> See the Italian Data Protection Authority, *Segnalazione al Parlamento e al Governo sull'individuazione, mediante sistemi di segnalazione, degli illeciti commessi da soggetti operanti a vario titolo nell'organizzazione aziendale*, 10 December 2009, in [www.garante-privacy.it](http://www.garante-privacy.it) [Web Doc. No. 1693019]

<sup>1043</sup> See R. Lattanzi *Prime riflessioni sul cd. whistleblowing: un modello da applicare "ad occhi chiusi"?*, cit., p. 357 et seq., stresses that there are many regulatory indicators in the Italian legal system, moreover, with respect to criminal proceedings, which are in favour of the general unusability of anonymous complaints. See Council of State, VI Division, 25 June 2007, No. 3601, in *Foro Amm.*, 2007, 6, 1929.

<sup>1044</sup> See the Italian Data Protection Authority, *Segnalazione al Parlamento e al Governo ...*, cit.

<sup>1045</sup> Art. 7 of Legislative Decree No. 196/2003.

besides, as also requested by the Italian Data Protection Authority in 2009<sup>1046</sup>.

## 8. Protections for the whistleblower.

The whistleblower is protected both against dismissal and discriminatory acts, and against mobbing. But once again, upon failure of an *ad hoc* law, it is necessary to have recourse to the general rules set forth for employees.

The dismissal of the whistleblower who has lawfully exercised the right to information and the right of criticism<sup>1047</sup> – also after the so-called 'Monti's reform' (Law No. 92/2012)<sup>1048</sup>, which has mitigated in general the protection against dismissal in the Italian legal system – is subject to the most incisive protection, namely, the so-called “real strong protection”<sup>1049</sup>: the dismissal is null and void, and the employee is entitled to be reinstated in his/her former position and to receive an indemnity proportionate to the last actual global retribution from the date of dismissal until that of the effective reinstatement.

The law foresees that the so-called “real strong protection” shall apply, regardless of the number of employees of the employer, in the most serious cases of pathology of the dismissal and, in particular, to discriminatory dismissals, to dismissals for unlawful reasons, and to null and void dismissals 'in the other cases provided for by law'<sup>1050</sup>.

Well then, the dismissal of the whistleblower who has lawfully exercised his/her own right of criticism and who is thus dismissed for said reason amounts without doubt to a case of retaliatory dismissal<sup>1051</sup>, a case in point which Italian case law (and now also the law<sup>1052</sup>) constantly traces

<sup>1046</sup> See again the Italian Data Protection Authority, *Segnalazione al Parlamento ...., cit.*

<sup>1047</sup> That is in compliance with the limits of content, as well as with the modal and finalistic limits discussed above, see section 5.

<sup>1048</sup> As is well known, the so-called 'Monti's reform' (Law No. 92/2012) has amended art. 18 of the Workers' Statute, which in the past provided for a very incisive protection for the unlawfully dismissed employees in medium-sized and large-sized companies (that is with more than 60 employees throughout the entire national territory, or more than 15 employees in the same productive unit or in different productive units located in the same municipality; 5 in the event of farm entrepreneurs). Instead of the unitary real protection (consisting in the reinstatement and in the compensation for damages as from the date of the dismissal until that of the effective reinstatement), it has foreseen four different forms of protection (full reinstatement protection, mitigated reinstatement protection, strong compulsory protection, dimidiated compulsory protection), each of which is linked with different prerequisites of application. There are therefore cases in which, unlike what used to happen in the past, also in medium-sized companies, the unlawfully dismissed employee solely enjoys a compensatory protection.

Nonetheless, the new wording of art. 18 of the Workers' Statute, also after the amendments brought about by the 'Monti's reform' foresees that the old real protection – consisting in the reinstatement of the employee and in the compensation for any damage caused by the dismissal until the effective reinstatement – applies in the most serious cases and, in particular, to discriminatory dismissals, to dismissals for unlawful reasons, to dismissals served in specific cases mentioned by any such rule (for instance, dismissal for marriage) and to dismissals which may be traced back to other cases of nullity, even if not specifically mentioned, provided for by law.

In companies having less than 15/60 employees at present, just like in the past, solely a compensatory protection is foreseen (art. 8 of Law No. 604/1966).

<sup>1049</sup> Art. 18, paragraph 1, of the Workers' Statute (Law No. 300/1970).

<sup>1050</sup> Art. 18, paragraph 1, of the Workers' Statute (Law No. 300/1970).

<sup>1051</sup> Following the employee's expression of his/her own 'personal beliefs' (Legislative Decree No. 216/2003).

<sup>1052</sup> See now arts. 28, paragraph 6, and 55-ter, paragraph 6, of Legislative Decree No. 150/2011, which expressly trace the retaliatory acts to cases of discrimination.

back to discriminatory dismissals<sup>1053</sup> or to dismissals for unlawful reasons<sup>1054</sup>. Therefore, the so-called “real strong protection” needs be applied herein.

The same result may be reached even if we follow the most restrictive theories of interpretation, which try to limit the scope of application of the so-called “real strong protection” to the greatest possible extent<sup>1055</sup>. Indeed, pursuant to these different readings, the so-called “real strong protection” would solely be positively foreseen for the events in which a 'loathsome' dismissal is taken into consideration, namely, a dismissal in breach of a fundamental right of the employee. It is clear that any such event would arise in the case under analysis, since the dismissal opposes the whistleblower's lawful exercise of the right to information and of the right of criticism, an expression of the employee's fundamental right under the Constitution to the free expression of ideas<sup>1056</sup>.

The dismissal of the whistleblower who lawfully exercises any such right is thus protected in the Italian legal system to the greatest extent.

Some problems arise, instead, in connection with the allocation of the burden of proof.

Pursuant to firm case law, the burden of proof of the discrimination or of the illegal grounds (including the retaliatory grounds), as well as the existence of a cause of nullity in the dismissal shall rest on the employee<sup>1057</sup>.

Truly, said assumption should be discussed in light of the fact that, for discriminations in general, the legal system now foresees a partial reversal of the burden of proof (see hereunder).

In any event, it needs be stressed that the employee's burden of proof is actually partially mitigated by the incisive preliminary investigation powers granted to the Judges within employment proceedings<sup>1058</sup>, by the power vested thereto to have recourse to simple assumptions for the purposes of the relevant judgment (which need be serious, precise and concordant<sup>1059</sup>) and by the fact that, pursuant to law, the employer has the burden of proof<sup>1060</sup> of the just cause or of the justified subjective or objective grounds<sup>1061</sup>, which are in any event necessary for the lawfulness of the dismissal. The consequence is that, should the employer not be able to prove the existence of the reason grounding the termination and should there be circumstantial evidence in favour of a retaliation event (for instance, the time proximity of the dismissal with respect to

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<sup>1053</sup> Art. 15 of the Workers' Statute; art. 3 of Law No. 108/1990.

<sup>1054</sup> In so far as retaliatory dismissal is concerned see, amongst many others, especially amongst the most recent ones, Cass. 11 October 2012, No. 17329, in *Notiziario giurisprudenza lav.*, 2013, p. 387; Court of Milan, 27 December 2012, in *Riv. critica dir. lav. privato e pubbl.*, 2013, p. 201; *Guida al dir.*, 2012, fasc. 17, p. 32.

<sup>1055</sup> P. Ichino, *La riforma dei licenziamenti e i diritti fondamentali dei lavoratori*, in L. Nogler, L. Corazza (edited by), *Risistemare il diritto del lavoro. Liber amicorum Marcello Pedrazzoli*, Franco Angeli, Milan, 2012, p. 819.

<sup>1056</sup> Art. 21 of the Constitution.

<sup>1057</sup> Amongst the most recent decisions, see Cass. 26 March 2012, No. 4797, in *Guida al dir.*, 2012, fasc. 17, p.32; Civ. Cass., Employment Division, 11 October 2012, No. 17329, in *Notiziario giurisprudenza lav.*, 2013, p. 387.

<sup>1058</sup> See section 421 of the Code of Civil Procedure.

<sup>1059</sup> Section 2729 of the Civil Code.

<sup>1060</sup> Art. 5 of Law No. 604/1966.

<sup>1061</sup> See section 2119 of the Civil Code and art. 3 of Law No. 604/1966, respectively.



the employer's declarations), the Judge may rule declaring the nullity of the dismissal, thus applying the so-called "real strong protection".

A similar line of reasoning needs be followed in connection with any discriminatory acts put in place by the employer during performance of the employment (disciplinary measures, acts exercising the so-called *ius variandi*, etc.), namely, acts which are not based on organisational needs, but amount to retaliation with respect to the lawful exercise of the right of criticism<sup>1062</sup>. The general rules in the matter of discriminations apply herein<sup>1063</sup>, pursuant to which the discriminatory acts are null and void<sup>1064</sup> and, therefore, having no effects whatsoever and the employee shall be entitled to property and non-property damages<sup>1065</sup>.

The burden of proof of discriminations – in compliance with Directive 2006/54/CE – is partially reversed herein by the law<sup>1066</sup>. It is sufficient that the employee provides 'factual elements, also of statistical nature, from which the existence of discriminatory acts, understandings or behaviours may be assumed', since 'the defendant has the burden of proving the non-existence of the discrimination'<sup>1067</sup>. Therefore, if the employee provides circumstantial evidence which is even less consistent than that requested in the matter of simple assumptions<sup>1068</sup>, the burden of proving the lack of discrimination is transferred to the employer<sup>1069</sup>.

Finally, the whistleblower may appeal to the protection against mobbing.

Mobbing is not governed under the Italian legal system, however, pursuant to case law, it is in any event repressed pursuant to the rule laying the security obligation upon the employer<sup>1070</sup>

<sup>1062</sup> Once again, it is worth considering the retaliatory discrimination for the expression of 'personal beliefs', see Legislative Decree No. 216/2003.

<sup>1063</sup> It is the case of rules in layers. See art. 15 of the Workers' Statute (Law No. 300/1970), which declares the employer's discriminatory acts for political, trade union, religious, racial, language, sexual, handicap, age reasons, or based on the sexual orientation or personal beliefs, to be null and void in general; art. 43 of Legislative Decree No. 286/1998 for any discrimination linked with the race, colour, ancestors, or national or ethnical origin, or religious practices; art. 3 of Legislative Decree No. 215/2003 for racial and ethnical origin discriminations; art. 3 of Legislative Decree No. 216/2003 for discriminations based on religion, personal beliefs, handicap, age and sexual orientation; art. 25 of Legislative Decree No. 198/2006 for sexual discrimination.

The event which could be worth mentioning in the case at issue is the case of discrimination based on the employee's personal beliefs, without prejudice to the fact of not believing – as held by the author – that the list of discrimination factors included in the law is solely by way of an example.

<sup>1064</sup> Art. 15 of the Workers' Statute (Law No. 300/1970).

<sup>1065</sup> See art. 28, paragraph 5, of Legislative Decree No. 150/2011 for discriminations in general; see arts. 37, paragraphs 3, 4, and 38, of Legislative Decree No. 198/2006, for sexual discrimination.

<sup>1066</sup> Likewise G. Amoroso, *Le procedure repressive degli atti di discriminazione*, in G. Amoroso, V. Di Cerbo, R. Foglia, A. Maresca, *Diritto del lavoro, Il Il processo*, vol IV, Giuffrè Milan, 2012, p. 1264; C. Delle Donne, *Delle controversie in materia di discriminazione*, in B. Sassani, R. Tiscini, *La semplificazione dei riti civili, DIKE Giuridica*, 2011, p. 258; C. Di Salvo, *Discriminazione*, in F. Santangeli (edited by), *Riordino e semplificazione dei processi civili*, Giuffrè Milan, 2012, p. 861.

<sup>1067</sup> Art. 28, paragraph 4, of Legislative Decree No. 150/2011. Instead, as regards sexual discrimination, art. 40 of Legislative Decree No. 198/2006 requests that the employee provides 'precise and concordant' factual elements.

<sup>1068</sup> Section 2729 of the Civil Code requests that the assumptions are 'serious, precise and concordant'.

<sup>1069</sup> In this sense, clearly, Court of Appeal, Rome, 9 October 2012, in *D&L*, *RCDL*, 2012, p. 661 *et seq.* See also, even if more blurred Cass. 8 June 2013, No. 14206, in *Mass. giur. lav.*, 2013, p. 667.

<sup>1070</sup> Section 2087 of the Civil Code.

and, namely, the obligation to protect the health and dignity of the respective employees<sup>1071</sup>. The security obligation provision therefore implies, first, that it is forbidden for the employer to directly hold mobbing behaviours and, second, that the employer is under the obligation to prevent those behaviours from being put in place by the employee's colleagues.

Pursuant to case law, mobbing is a complex case in point, which takes shape when the employer or a colleague of the victim puts in place a series of legal acts (de-skilling, for instance) and/or material behaviours (insults and physical aggressions, for instance), extended in time or repeated, the purpose of which<sup>1072</sup> is that of striking the employee in his/her dignity, often in order to induce him/her to resign.

Therefore, should the whistleblower undergo mobbing, the latter may seize the Judge by complaining about the breach of the security obligation and request the employer be ordered to perform, namely, to end the mobbing, as well as to order the compensation for the relevant property and non-property damages.

In the event of mobbing, the employee shall have the burden of proving the existence of the employment relation, as well as of any and all incurred detrimental effects, whilst the employer shall have the burden of proving to have fulfilled the security obligation.

The only relevant case for the purposes herein<sup>1073</sup> which may be worth taking into consideration, in which the Italian legal system acknowledges that collective parties have the capacity to sue, is composed of the procedure for repressing the anti-trade union behaviour<sup>1074</sup>. It is foreseen that the local bodies of the national trade union associations be entitled to bring an action should the employer hold behaviours aimed at limiting trade union activities. The case in point may arise with respect to whistleblowing in the event in which the employee is a trade unionist exercising the respective right to information and right of criticism for the protection, for instance, of the employees' health or job.

## 9. Protected parties beyond the employees?

Up to now, we have discussed the boundaries of the right of criticism and of the protection – pursuant to case law – acknowledged by the Italian legal system to employees.

The situation concerning the whistleblowing phenomenon in self-employment is more complex, also in the event in which we take into consideration a pure self-employed worker who mainly

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<sup>1071</sup> For this approach, recently, see Cass. 10 February 2014, No. 2885, in *Bollettino ordinario Adapt*, 17 February 2014, No. 7; Cass. 25 July 2013, No. 18093, in *FI*, 2013, I, c. 2790. But see also Cass. 5 November 2012, No. 18927, in *FI*, 2013, I, c. 140, which not only makes cross-reference to section 2087 of the Civil Code, but also to Legislative Decrees Nos. 215 and 216/2003, which put mobbing and discriminations 'on the same level'.

<sup>1072</sup> Therefore, it is the case of wilful misconduct.

<sup>1073</sup> Art. 5, paragraph 2, of Legislative Decree No. 216/2003 foresees that the persons representing collective interests may bring a collective action before the Court, amongst others, in the event of discriminations based on 'personal beliefs', but solely – pursuant to the opinion of law scholars – when the persons incurring damage caused by the discrimination may not be directly and immediately identified, which is unlikely to arise in the case of whistleblowing.

<sup>1074</sup> Art. 28 of the Workers' Statute (Law No. 300/1970).

carries out a personal activity<sup>1075</sup>, or a self-employed worker on a continuing basis<sup>1076</sup>, or a self-employed worker with a project-based agreement<sup>1077</sup> who, therefore, is in a weak situation *vis-à-vis* the counterparty, similar to that of the employee<sup>1078</sup>.

Certainly, it is possible to assert, by way of interpretation, that also the self-employed worker carrying out a personal activity - whatever contract form is used - is the holder of a right to information and of a right of criticism (art. 21 of the Constitution), which needs be balanced with the principal's personality rights (art. 2 of the Constitution). And it seems totally reasonable to hold that the limits fixed by case law for the employee's right of criticism also apply in this case<sup>1079</sup>.

But there is still the fact that the Italian legal system does not offer any protection whatsoever to self-employed workers (at least considering pure self-employed workers and self-employed workers on a continuing basis) against the termination by the principal and, expressly, against the discriminatory acts. Therefore, there are no instruments of protection against the principal's retaliatory acts upon the self-employed worker's expression of opinions.

A partially different situation would be the case of a self-employed worker with a project-based agreement. In fact, in this case, a fixed-term contract has necessarily been signed, which means that the early termination of the contract will solely be possible by statute. Therefore, should the early termination be brought about by the principal for reasons other than those set forth by statute, in no way may the contract be deemed terminated and the worker shall be entitled to full compensation. In other words, the retaliatory termination of the project-based agreement of the whistleblower worker who has lawfully exercised his/her own right of criticism is somehow entitled to protection<sup>1080</sup>.

However, in order to guarantee larger protection to self-employed whistleblowers (regardless of whether it is the case of a pure self-employed worker who mainly carries out a personal activity<sup>1081</sup>, or a self-employed worker on a continuing basis<sup>1082</sup> or, finally, a self-employed worker with a project-based agreement<sup>1083</sup>), it would be necessary to hold that the principle of non-discrimination is a general principle of the legal system which identifies the level of minimum protection for each single worker – employee or self-employed –, who carries out a personal activity, by implementing the principle of equality under art. 3 of the Constitution.

In such case, the discrimination prohibitions and the relevant protections – also with respect to termination – should also be extended to personal self-employment, however performed.

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<sup>1075</sup> Section 2222 of the Civil Code.

<sup>1076</sup> Section 409, paragraph 3, of the Code of Civil Procedure.

<sup>1077</sup> Art. 61 *et seq.* of Legislative Decree No. 276/2003.

<sup>1078</sup> It is worth mentioning, in particular, self-employed workers with project-based agreements (art. 61 *et seq.* of Legislative Decree No. 276/2003) and self-employed workers on a continuing basis (section 409, No. 3, of the Code of Civil Procedure).

<sup>1079</sup> Please note that also project-based workers are under an obligation to secrecy, that is the prohibition to 'disclose information and opinions concerning their programmes and the respective organisation' (art. 64, paragraph 2, of Legislative Decree No. 276/2003), also being under an obligation of fairness and good faith in the performance of the agreement (sections 1175 and 1375 of the Civil Code).

<sup>1080</sup> See art. 67 Legislative Decree No. 276/2003.

<sup>1081</sup> Section 2222 of the Civil Code.

<sup>1082</sup> Section 409, paragraph 3, of the Code of Civil Procedure.

<sup>1083</sup> Art. 61 *et seq.* of Legislative Decree No. 276/2003.

At present, there are no rulings whatsoever in connection herewith.