

Pandemic Crisis and Remote Working: Another Step Towards Gender Equal Pay and Bigenitoriality



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Abstract The aim of the paper is to investigate the ways in which in the post-pandemic normality public and private organisations, workers and trade unions will resort to smart working to combat the marginalisation of women's work. Remote working, in fact, could represent, with a few adjustments, an opportunity to promote in our legal system the values of inclusion and gender equality pursued by the United Nations Generation Equality campaign, the European Strategy for Gender Equality 2020/2025 and the National Plan for Resilience and Resistance. On the other hand, if it is true that the most recent ISTAT surveys show that in Italy in 2020, the drop in employment was concentrated almost exclusively on women, with a decrease of 101,000 jobs, of which 99,000 were held by women, it is equally true that in the last year a trend has emerged in the legislature to recognise in favour of both parents a real right to agile work, as well as a specific leave to meet the needs of family care imposed by the epidemiological emergency. These are the first important experiences that inevitably require an organic rethink, first and foremost through collective bargaining, to ensure that smart working creates a new culture of gender equality, including in terms of pay, and the sharing of family roles, which in Italy, much more than in other countries, is still struggling to take hold.

Keywords Gender equality · Remote working · Work-life balance · Inclusion · Bigenitoriality · Gender pay gap · Company welfare · Gender studies

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1 Introduction

One of the most interesting challenges in years to come is to investigate the ways in which public and private organisations, workers and trade unions will learn from the experience gained during the Covid-19 lockdown and how they will resort to remote working to fight the marginalisation of women's work (Martone 2020a).

In the post-pandemic normality, remote working could indeed represent an opportunity to promote in our legal system the values of inclusion and gender equality pursued by the United Nations Generation Equality campaign as well as the European Strategy for Gender Equality 2020/2025 and the National Plan for Resilience and Resistance (so-called PNRR).

If it is true that the most recent ISTAT surveys show that in Italy in 2020, the drop in employment was concentrated almost exclusively on women, with a decrease of 101,000 jobs, of which 99,000 were held by women (<https://www.istat.it>), it is equally true that in the last year a trend has emerged in the legislature in order to recognise to both parents a real right to remote working, as well as a specific leave to meet the needs of family care imposed by the epidemiological emergency.

These important steps inevitably require an organic rethink, first and foremost through collective bargaining, to ensure that remote working can spread the new culture of sharing of family roles and gender equality that in Italy is still struggling to take hold (Martone 2019, 2017).

2 The Context. Legislation and Gender Policies in Italy

Even before the Covid-19 crisis, particular attention had started to be recognised to the steps that aim to promote fundamental rights and freedoms, especially those supporting the principle of gender equality in all its forms.

At the global level, achieving gender equality and empowering all women and girls is one of the United Nations 17 Sustainable Development Goals committed to achieve by 2030 and, at the European level, as emphasised by the European Commission in its communication on the Strategy 2020–2025, no Member State has achieved gender equality to date.

For decades in Italy, the rules protecting working parents were aimed almost exclusively at women, in line with the patriarchal view that only women were responsible for the care and upbringing of their children, as evidenced by Article 37 of the Constitution, which aims to “ensure the mother and child” “special adequate protection” (Persiani, 1968; Ballestrero, 1979; Treu 1979).

Then Law No. 860 of 1950, which was the first to introduce a ban on dismissal, was addressed only to working mothers to ensure them protection from the first day of pregnancy until the child was 1 year old.

Even the prohibition of dismissal laid down in Article 1 of Law No. 7 of 1963 on the grounds of marriage was addressed to women, who were granted protection to

curb the employer's practice of withdrawing from the work relationship because of the marriage, that was traditionally considered to be the prelude to future maternity-related absences (Pera 1962).

Not even the Statute of Workers was exempt from this view and did not feel the need to protect women against discrimination on the grounds of sex in the first wording of Article 15.

The positive actions then introduced for the first time in our legal system by Law No. 125 of 1991 have not been sufficient, because they are still inspired by the logic of preferential treatment of women only.

Nor did the "Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità", issued by legislative decree no. 151 of 2001, have the desired effects because it merely extended to the father rights and prerogatives recognised only to the mother, without identifying any instrument capable of ensuring their effectiveness.

And it is clear that, in a social context—such as the Italian one—strongly conditioned by the logic of abstention from work as a female prerogative, a real redistribution of care loads cannot disregard the adoption of instruments that require men to take time off work to devote themselves to the family.

This is confirmed by the fact that not even the "Codice delle pari opportunità", issued with Legislative Decree no. 198 of 2006, has succeeded in reducing the gender gap in employment in our country, because the legislator, rather than promoting policies to share family roles, has continued to pursue the ambitious goal of achieving real equality between men and women through anti-discriminatory policies as well as the adoption of instruments of unequal law against women only.

The last decade of legislation has instead marked the transition from a conception of parenthood focused on the working mother to a more modern vision, which recognises rights and protections also for working fathers who take care of their families' needs.

It is not by chance that the centrality of issues related to overcoming gender inequalities has recently been reiterated in the PNRR which, in order to boost national development in the aftermath of the pandemic, identifies gender equality as one of the three cross-cutting priorities pursued in all the missions that make up the Plan.

And while it is true that, especially in terms of labour law, the Italian legislator has historically considered the tasks of assistance and care of the family to be the exclusive responsibility of the working woman, it is also true that a more modern and equal vision of the family is gradually emerging, in which the father plays a leading role and both parents are entitled to care and protection (De Marco 2021).

After the enactment of important laws such as the one on shared custody, which has finally recognised at legislative level the principle of bigenitoriality, provisions that without a specific reason provide for different protections on the basis of sex only end up being discriminatory because they represent the cultural heritage of a macho conception according to which the father has the task of bringing bread home (the breadwinner in the Anglo-Saxon tradition) while the care of the family and

children is the responsibility of the woman, who is therefore the sole recipient of a series of rights and protections (Pera 1962; Ghera 1995).

3 From Maternity to Parenthood Protection

The inevitable change in the conception of the family and the rediscovery of the central role of the working father in the Italian labour system has led, in recent times, to the need to introduce by law an autonomous right of the father, additional and independent to that of the mother, to enjoy a compulsory period of abstention from work.

It was not until Law no. 92 of 2012 that a compulsory paternity leave was introduced into our labour legislation.

On the basis of the principles of parental equality in the care of the family and children established in previous years (article 28 of the “Testo Unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità” granted working fathers only a non-compulsory paternity leave, subject to the existence of certain conditions), Law No. 92 of 2012 aims at promoting a culture of greater sharing of parental duties. In particular, with reference to the 3-year period 2013–2015, it provides for 1 day of compulsory leave and 2 days of optional leave for working fathers, to be taken within 5 months of the birth of the child (According to Article 4, par. 24, lett. a) of Law n. 92 of 2012 within 5 months of the birth, fostering and/or adoption of the child, the working father has the right to take a further 2 days of leave, in addition to the compulsory one, in agreement with the mother and in substitution for her in relation to the latter’s period of compulsory leave).

The provision, although initially introduced on an experimental basis, is partially supported a few years later by Legislative Decree No. 80 of 2015, aimed at fostering opportunities for the reconciliation of work and life times for the generality of workers.

The reference to workers, and therefore no longer only to women, further broadens the scope of the existing rules to persons hitherto excluded, such as self-employed and para-subordinate workers, and extends the period of use of parental leave up to the 12th year of the child’s life, where the previous rule envisaged the threshold of the 8th year (Article 32, par. 2 of Legislative Decree No 80 of 2015). However, the legislative intervention omits some fundamental issues indicated by the delegated law, such as the one concerning the compulsory paternity leave, but even if it is a timid attempt to intervene, it is still a further demonstration of the will of the legislator to promote a more modern vision of parenthood, which recognises to the father the same rights and duties as the mother.

The measure of compulsory paternity leave is instead experimentally extended, on an almost annual basis, for the year 2016 by the 2016 Stability Law, which increases the original provision to 2 days of compulsory abstention (Article 1, par. 205 of Law No 208 of 2015); for the 2-year period 2017–2018 by the 2017 Budget

Law, which further extended the number of days of compulsory abstention to 4 for 2018 (Article 1, par. 354 of Law No 232 of 2016); for the year 2019 by the 2019 Budget Law, during which the duration was set at 5 days of compulsory abstention (Article 1, par. 278 of Law No. 145 of 2018); for the year 2020 by the 2020 Budget Law, which further increased the duration of compulsory leave to 7 days (Article 1, par. 342 of Law No. 160 of 2019). Eventually the Budget Law 2021 provides for 10 days of compulsory leave, to be taken also in the event of the death of the child at birth (Article 1, par. 363 of Law No. 178 of 2020).

From 2022, and this is particularly relevant news in the Budget Law, the allowance for the paternity leave for employees becomes a structural measure, so it will no longer need annual renewal, and is confirmed at 10 days with the recognition of an allowance of 100% of salary (Article 1, par. 134 and par. 239 of Law No 234 of 2021).

The compulsory leave must be taken, even if not continuously, within 5 months of the child's birth or entry into the family or Italy, and during the leave, the father is entitled to receive 100% of his full salary in his pay packet.)

If the father wishes to take an additional day of leave, he can take optional paternity leave, which was initially granted for the year 2018 and then confirmed for the years 2019, 2020 and 2021.

These are important measures promoting a more modern interpretation of the rules on maternity and paternity protection, with a view to making the concept of parenthood a reality even though it is clear that these interventions are still not sufficient to encourage a redistribution of care duties between mother and father, considering that the woman is entitled to 5 months of compulsory leave to be taken in a flexible manner.

4 Remote Working and Bigenitoriality

In this context, almost unexpectedly, the Covid-19 health emergency has significantly contributed to enhancing the principle of parental equality that is increasingly asserting itself in the Italian legal system.

It is undeniable that emergency legislation on remote working has been extremely innovative in terms of the social sensitivity of its provisions, which recognised the centrality of the principle of bigenitoriality in the protection, through remote working, of both the needs of production and those of family care (Martone 2020b).

Suffice it to say that during the Covid-19 lockdown, Article 23 of Decree Law no. 18 of 2020 provided for the possibility for parents, and not only mothers, who were employees of public and private companies or enrolled in the separate INPS management scheme or self-employed, to have a specific leave of absence for which an allowance equal to 50% of the salary received was recognised. The leave was provided with reference to children up to 12 years of age, and for a continuous or fractionated period not exceeding 15 days, on the condition that there was no other

parent in the family household who is a beneficiary of income support instruments, or who was unemployed or not working.

In this perspective, then Article 90 of Decree Law no. 34 of 2020 recognised the right of mothers and fathers working in the private sector with at least one child under 14 years of age to work remotely, if this was compatible with the characteristics of the work. The right could also be exercised in the absence of individual agreements, provided that there is no non-working parent in the family, or no other parent benefiting from income support instruments.

In addition to these provisions, there are further measures, such as the one relating to the hypothesis of compulsory quarantine of a cohabitating child under 14 years of age following contact in a school, which have continued to recognise, even in the following waves of the pandemic, the possibility for one of the employed parents, and therefore not only for the woman, to carry out the service in agile mode or, in the event of impossibility, to abstain from work for all or part of the period corresponding to the duration of the quarantine of the child, benefiting from an indemnity equal to 50% of the salary (Article 5 of Decree-Law No 111 of 2020).

In the past year, therefore, a clear tendency of our legislator has emerged to recognise in favour of both parents a real right to remote working as well as a specific leave aimed at meeting the needs of family care imposed by the epidemiological emergency (Brollo 2020).

5 Remote Working and Equal Pay

The massive use of remote working that has been globally experienced over the last 2 years inevitably calls for a rethink of the remuneration rights and work rewards associated with remote work, also and above all in the perspective of enhancing gender equality.

It is clear that remote working has indeed reshaped our work and our time (Persiani, 2020), our right to disconnection (Maio 2020), our way of working (Tiraboschi, 2017; Treu, 2020; Del Conte, 2021; Biasi, 2021; Spinelli, 2021), our salary (De Marco 2020), our privacy at work (Fiata 2020), our union activity and the strike (Ferrari, 2020), our inclusiveness (Fiata, 2021), and our lives. For this reason, in the pursuit of sustainability, especially the social one, of companies, remote working could be used as a tool to free women's career paths from those mechanisms that delay or hinder their development in organisations.

This is an issue that, although it emerged even before the health emergency, has recently gained a prominent role in rethinking the remuneration systems of all those workers who, forced by the Covid-19 emergency, suddenly found themselves working from home (Martone 2018).

The challenge of remote working has in fact raised many new issues related to the economic treatment of the employee, with particular reference to the issue of the necessary valorisation of the individual result, which must now be imposed as a reference point for the employer in encouraging individual and corporate

productivity and in the pursuit of effective equality of pay between genders (Italian Chamber of Deputies Report “Parità di genere”, 10 February 2022).

In fact, remote working, used in a structural and shared manner, and therefore outside the logic of emergencies or as an easy welfare solution, acts as a pay equalizer because time—in the office or at work—is no longer a determining factor for pay: it is no longer the time worked that counts, but the objectives (De Marco 2020).

Remote working would thus become a tool for creating a fairer system, especially on the remuneration front.

The right to equal pay for women and men for equal work or work of equal value is one of the fundamental principles enshrined in the Treaty of Rome. The need to ensure equal pay is expressed in Directive 2006/54/EC, supplemented in 2014 by a Commission Recommendation on pay transparency.

Despite this legal framework, the effective implementation and application of this principle in practice continues to be a challenge in the EU. The lack of pay transparency has been identified as one of the main obstacles.

Nowadays the gender pay gap in the EU continues to be around 14%. The pay gap has long-term repercussions on women’s quality of life, puts them at greater risk of poverty and perpetuates the pension pay gap, which stands at 33% in the EU. The Covid-19 pandemic and its economic and social consequences make it even more urgent to address this problem, as the crisis has hit female workers particularly hard.

The European Parliament has in recent years repeatedly called for further action at EU level to improve the implementation of equal pay provisions and on 4 March 2021 a proposal for a Directive of the European Parliament and of the Council has been presented to enhance the application of the principle of equal pay for men and women for equal work or work of equal value through pay transparency and enforcement mechanisms.

In this context, it is not by chance that Italian latest legislative action on gender has recently focused on the world of work, which has been the subject of numerous legislative interventions aimed at achieving gender equality by recognising equal rights and greater protection for working women.

In particular the issue of pay equity is extremely relevant in the current Italian legal context, as evidenced by the recent law on pay equity No. 162 of 2021.

The Law considerably broadens the notion of direct and indirect discrimination (referred to in Article 25 of the “Codice delle Pari Opportunità”), no longer consisting only in “treatment” but also in “any change in the organisation or conditions and times of work” motivated not only by “state of pregnancy, maternity or paternity” but also simply by “sex, age, or the needs of personal or family care” that is in any case likely to put the worker at a disadvantage compared to other workers or that may limit the opportunities for participation in the life or choices of the company or access to the mechanisms of progression or career advancement.

Of particular impact is the extension by Article 46 of Law No. 162 of 2021 of the obligation for public and private companies with more than 50 employees (previously the threshold was 100) to draw up a report at least every 2 years on the situation of male and female staff: the Ministry of Labour will publish on its

institutional website the list of companies that have submitted the report and those that have not. The ministerial decree will also regulate the methods of access to the report by employees and trade union representatives of the company concerned, in compliance with the protection of personal data, in order to benefit from judicial protection.

The possibility for stakeholders such as employees and trade union representatives to access the data of the staff situation report makes it possible to strengthen the protection against discrimination for the purposes of the so-called statistical proof aimed at the judicial ascertainment of discrimination and the mitigation of the burden of proof on the employee who claims to have suffered discrimination pursuant to Article 40 of the “Codice delle Pari Opportunità”.

Without claiming to examine every provision of the Law here, it can be then said that the recent Law no. 162 of 2021 constitutes a further important step, addressing a number of issues related both to the fight against the gender pay gap and to the relevance of “care work” in the configuration of the prohibition of discrimination, without forgetting the promotion of the presence of women in the bodies of public companies, including unlisted ones.

6 Conclusions

In conclusion, despite the fact that giving fathers the same rights and duties as mothers would mean greater freedom for women in the workplace, the concept of shared parental responsibility is struggling to take off in our country, partly because of the reluctance shown by men, who are unable to give up their careers to devote themselves to their children, but also by women themselves, who are all too often ready to conform to a male-dominated culture rather than aspire to the same career opportunities that are now granted only to men.

It cannot but be considered that the key issue for a more gender inclusive future of work is that of equal pay and that of bigenitoriality—i.e. equal sharing of the parental role—and its balance through the implementation of the use of remote working.

The experience of the pandemic and the resulting widespread use of remote working have brought to light new problems linked to isolation and the recurrence of domestic violence, especially against women workers, and have made it necessary to adopt new and more modern measures to support family and bigenitoriality.

In this sense, all those collective agreements recently signed by companies with trade unions for the protection and inclusion of diversity are particularly important because they promote a new company culture, based on fighting violence and discrimination, enhancing gender equality, supporting bigenitoriality and protecting the vulnerable.

For this reason the path towards achieving effective gender equality in the workplace should be more encouraged not only by the legislature but also by the social partners themselves, who are now aware that positive actions, although they

have undoubtedly favoured a rebalancing of the existing gender gap in the Italian labour market, are not sufficient on their own.

References

- Ballestrero M L (1979), *Dalla tutela alla parità*, Bologna;
- Biasi M (2021), *Brevi spunti sul lavoro da remoto post-emergenziale, tra legge (lavoro agile) e contrattazione, Lavoro e previdenza oggi*, 3–4, 160–185;
- Brollo M (2020), *Il lavoro agile tra emergenza pandemica e riemersione della questione femminile*, *Labor*, 4, 507–515;
- Del Conte M (2021), *Problemi e prospettive del lavoro agile tra remotizzazione forzata e trasformazione organizzativa*, *Argomenti di diritto del lavoro*, 3 (1), 549–569;
- De Marco E (2021), *Congedo di paternità e riduzione del premio di risultato: verso la tutela della bigenitorialità*, *Argomenti di diritto del lavoro*, 5, 1253–1262;
- De Marco E (2020), *Retribuzione e premialità del lavoro da remoto*, Martone M (eds), *Il lavoro da remoto*, Piacenza, 121–128;
- Ferrari P (2020), *Remotizzazione del lavoro e nuove frontiere del conflitto collettivo*, Martone M (eds), *Il lavoro da remoto*, Piacenza, 183–195;
- Fiata E (2021), *Pandemia, smart working e lavoratori fragili: è davvero un diritto?*, *Argomenti di diritto del lavoro*, 2 (2), 452–462;
- Fiata E (2020), *Il potere di controllo nel lavoro da remoto tra valutazione del risultato e privacy del lavoratore*, Martone M (eds), *Il lavoro da remoto*, Piacenza, 101–120;
- Ghera (1995), *Azioni positive e pari opportunità*, in *Dir. Lav. Rel. Ind.*, I, p. 1.
- Maio V (2020), *Il lavoro da remoto tra diritti di connessione e disconnessione*, Martone M (eds), *Il lavoro da remoto*, Piacenza, 85–100;
- Martone M (2020a), *Per una riforma dello smart working oltre l'emergenza*, Id. (eds), *Il lavoro da remoto*, Piacenza, 3–16;
- Martone M (2020b), *Lavoro da remoto e bigenitorialità: come cogliere nella crisi epidemiologica un'opportunità di modernizzazione sociale*, Id. (eds), *Il lavoro da remoto*, Piacenza, 145–146;
- Martone M (2019), *From machismo to co-parenting: changing Italy's mindset*, *International Labour Review*, 158 (3), 447–461;
- Martone M (2018), *Lo smart working nell'ordinamento italiano*, *Diritti Lavori Mercati*, 2, 293–318;
- Martone M (2017), *Sulla nullità del licenziamento del marito: un altro passo verso la bigenitorialità*, *Giurisprudenza italiana*, 7, 1655–1661;
- Pera G. (1962), *“Divieto di licenziamento della lavoratrice a causa di matrimonio”*, *Diritto del Lavoro*, 1, 351;
- Persiani M (2020), *Prologo*, Martone M (eds), *Il lavoro da remoto*, 2020, Piacenza, 1–2;
- Persiani M (1968), *La disciplina del lavoro femminile*, *Giurisprudenza italiana*, IV, p. 110;
- Spinelli C (2021), *Il lavoro agile al vaglio della giurisprudenza cautelare: potenzialità e limiti del diritto emergenziale*, *Rivista giuridica del lavoro e della previdenza sociale*, 1 (2), 92–103;
- Tiraboschi M (2017), *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*, *Diritto delle relazioni industriali*, 4, 921–977;
- Treu T (2020), *Diritto e politiche del lavoro tra due crisi*, *Diritto delle relazioni industriali*, 2, 235–266;
- Treu T (1979), *Sub art. 37, Comm. Branca*, Bologna-Rome, 146–157.