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Investigative Controls in Dismissal and the Agent Provocateur Ban

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ABSTRACT
In judgment no. 29054/2026, the Labour Chamber of the Italian Supreme Court sets a strict boundary for investigative controls in disciplinary dismissal, distinguishing lawful verification of extra-work misconduct from unlawful intrusion. While confirming that employers may instruct private investigators even on mere suspicion of unlawful acts unrelated to contract performance, the Court subordinates the mandate to proportionality and the balancing required under Article 8 ECHR. Drawing an analogy with the criminal law notion of the agent provocateur, the ruling holds the investigative report inadmissible as evidence whenever the agency induces meetings by telephone, creating the occasion for the disciplinary offence instead of passively observing spontaneous conduct. The article analyses the reasoning against Articles 2 and 3 of Law no. 300/1970 and Article 2105 of the Civil Code, comparing its evidential consequences with concurrent Supreme Court case law on independent sources of proof and the employer's burden under Article 5 of Law no. 604/1966.

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Investigative Controls in Dismissal and the Agent Provocateur Ban

Proportionality limits, prohibition of inducing misconduct, and evidentiary inadmissibility in Italian Supreme Court, Labour Division, judgment of 13 November 2026, no. 29054

CASE DOSSIER

COURT
Italian Supreme Court of Cassation

DECISION
Labour Division, judgment of 13 November 2026, no. 29054

KEY PROVISIONS
Labour & Employment Law & Dismissals & Termination

HOLDING
dismisses the appeal and orders full mutual set-off of litigation costs. Point: §§ 3–10. Investigative controls on misconduct outside mere contract performance must respect proportionality and Article 8 ECHR; the report is inadmissible where the agency telephones to solicit…

JEL: K31, K10 • EuroVoc: 557, 166 • Reading 10 min

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LEGAL PRINCIPLE / EDITORIAL HEADNOTE

Investigative controls on an employee on sick leave must be confined to observing spontaneous conduct: where the agency solicits a meeting thereby creating the occasion for the breach, the report is inadmissible for violation of Article 8 ECHR.

KEY TAKEAWAYS

01 Prohibition of inducing misconduct
A private investigator may not telephone an employee on sick leave to artificially create the occasion for a disciplinary breach.

02 Balancing and Article 8 ECHR
Defensive controls based on mere suspicion remain lawful only insofar as they respect proportionality and avoid disproportionate intrusion into private life.

03 Inadmissibility and burden of proof
Where the investigative report is inadmissible and independent evidence is lacking, the employer fails to satisfy the burden under Article 5 of Law no. 604/1966.

04 Distinguishing spontaneous conduct
Unlike passive observation in public places during working hours, active solicitation invalidates the entire disciplinary inquiry.

ABSTRACT

Investigative Controls in Dismissal and the Agent Provocateur Ban – In judgment no. 29054/2026, the Labour Division of the Italian Supreme Court of Cassation sets a strict boundary for investigative controls in disciplinary dismissal, distinguishing lawful verification of extra-work misconduct from unlawful intrusion. While confirming that employers may instruct private investigators even on mere suspicion of unlawful acts unrelated to contract performance, the Court subordinates the mandate to the principle of proportionality and the balancing required under Article 8 ECHR. Drawing an analogy with the criminal law notion of the agent provocateur, the ruling holds the investigative report inadmissible as evidence whenever the agency induces meetings by telephone, creating the occasion for the disciplinary offence instead of passively observing spontaneous conduct. The article analyses the reasoning against Articles 2 and 3 of Law no. 300/1970 and Article 2105 of the Italian Civil Code, comparing its evidential consequences with concurrent Supreme Court case law on independent sources of proof and the employer's burden under Article 5 of Law no. 604/1966.

COMPARATIVE & EUROPEAN LEGAL FRAMING

Under Italian statutory labour law, employee surveillance is strictly governed by the Workers' Statute (Law no. 300/1970) and the Civil Code, which separate ordinary workplace supervision from defensive private investigations aimed at protecting corporate assets. Unlike common law jurisdictions where illegally or unfairly obtained evidence may still be weighed under discretionary judicial balancing, Italian courts treat investigative findings obtained in breach of proportionality, Article 8 ECHR, or through entrapment-like solicitation as genetically inadmissible (*inutilizzabilità*), leaving the employer unable to discharge the statutory burden of proof under Article 5 of Law no. 604/1966.

01. INTRODUCTION: ITALIAN SUPREME COURT, LABOUR DIVISION, JUDGMENT NO. 29054/2026

In judgment no. 29054 of 13 November 2026, delivered by the Civil Labour Division of the Italian Supreme Court of Cassation[1], the Court draws a strict boundary around an employer's fact-finding powers regarding an employee absent on sick leave. Whenever an enterprise entrusts third parties with verifying extra-work conduct, the dividing line between lawful investigation of abuse and prohibited interference becomes decisive. In the area of investigative controls in dismissal, the Court reiterates that observational activity may never alter the spontaneity of the contested behaviour.

§ 2 The issue engages the constitutional balance between **freedom of economic enterprise** and the statutory safeguards protecting the **dignity and privacy of the worker**. Even where suspicion of fraud justifies instructing a private agency to investigate facts extraneous to contract performance, operational methods remain subject to proportionality review. The principle of law thus clarifies the threshold separating passive inquiry from provocation of the disciplinary offence.

§ 3 This commentary examines the solution adopted in the November 2026 ruling along three lines: the analogical reference to the criminal law notion of the **undercover agent**, the comparison with concurrent Labour Division precedents, and the consequences of **evidentiary inadmissibility** on the outcome of litigation.

02. INVESTIGATIVE CONTROLS IN DISMISSAL: FACTS AND GROUNDS OF APPEAL

§ 4 The dispute resolved by Italian Supreme Court, Labour Division, judgment no. 29054/2026[1] arose from the **dismissal for just cause** served on 20 December 2021 by a land reclamation consortium upon one of its employees on the basis of four disciplinary charges. The first charge concerned the performance of gainful activity during sick leave. The remaining three charges concerned offensive remarks directed at the consortium's sole director and statements of insubordination regarding working hours made during conversations with the owner of the private investigative agency retained by the employer.

§ 5 Affirming the first-instance ruling, the Court of Appeal of Potenza, in a judgment filed on 5 June 2025, declared the dismissal unlawful and held the entire investigative report inadmissible. With respect to the offensive conversations, the appellate court found that the findings were the product of re-elaboration and exceeded the original mandate aimed at verifying whether the absences were pretextual, thereby encroaching subtly on the **employee's privacy**. On the first charge, the appellate court established that the agency had not confined itself to **monitoring spontaneous conduct**, having instead solicited meetings at the employee's agricultural holdings to purchase wine produced by him.

§ 6 The consortium brought an appeal to the Supreme Court on two grounds, which was referred from the closed session of 4 March 2026 to the public hearing of 1 October 2026 by an **interlocutory order**. Under the first ground, the employer alleged infringement of Article 2697 of the Civil Code, Articles 3, 4, and 5 of Law no. 300/1970, Articles 115 and 116 of the Code of Civil Procedure, as well as Articles 13 and 14 of the Constitution, arguing that the employee had voluntarily agreed to the meetings in his own entrepreneurial interest. According to the appellant, there was therefore no **manipulative or inducing conduct** capable of artificially manufacturing the offence.

§ 7 Under the second ground, the consortium complained of infringement of Articles 1175, 1375, 2104, and 2105 of the Civil Code, Article 7 of the Workers' Statute, and Articles 115 and 116 of the Code of Civil Procedure. In the employer's submission, the insulting remarks concerning the sole director had been uttered spontaneously on premises open to the public between parties acting in an entrepreneurial capacity, thereby constituting lawful **defensive controls over the duty of loyalty** unrelated to mere breach of contract.

03. STATUTORY FRAMEWORK, ARTICLE 8 ECHR, AND THE AGENT PROVOCATEUR BAN

3.1 — Construction of Articles 2 and 3 of the Workers' Statute and Article 2105 of the Civil Code

§ 8 The statutory framework on workplace controls stems from the sharp distinction drawn by Articles 2 and 3 of Law no. 300/1970 between supervision of work performance and protection of corporate assets. Article 2 permits the employment of sworn security guards solely for purposes of protecting corporate assets, prohibits them from charging employees with actions or facts other than those pertaining to the protection of corporate assets, and bars them from entering work premises absent substantiated defensive needs. The statutory text thus prevents asset protection from turning into **covert surveillance of contract performance**.

§ 9 Correspondingly, Article 3 of Law no. 300/1970 requires that the names and specific duties of personnel assigned to supervise work be communicated in advance to the employees concerned, establishing a **duty of prior transparency**. Recalling this structure, judgment no. 29054/2026[1] reiterates that employers may retain private investigative agencies only to verify **unlawful acts extraneous to work performance**. Inquiries aimed at uncovering criminally relevant conduct or **fraudulent activities harmful to the enterprise** therefore remain permissible, whereas technical supervision of how work is carried out remains prohibited.

§ 10 On the substantive plane, the consortium had relied on Article 2105 of the Civil Code to characterise the conduct and statements recorded by the investigator as a serious breach of loyalty. That provision prohibits employees from conducting business, on their own behalf or for third parties, in competition with the employer and from using confidential information in a manner capable of causing prejudice to the enterprise. Carrying out wine-selling activities at one's own agricultural holdings did not amount to unfair competition against a land reclamation consortium, and could at most be relevant as a **breach of fairness and good faith** under Articles 1175 and 1375 of the Civil Code if established by lawful means.

§ 11 The statutory distinction thus shifts the inquiry from the abstract legitimacy of the mandate to the concrete manner in which the verification is carried out. In investigative controls in dismissal ordered during sick leave, compliance with statutory safeguards becomes a condition for the **validity of the evidence gathered**.

STATUTORY PERIMETER OF EMPLOYER CONTROLS

Articles 2 and 3 of Law no. 300/1970 reserve supervision of work performance to the employer and disclosed personnel, permitting external agencies solely to ascertain fraudulent or criminally relevant conduct extraneous to work performance.

3.2 — Defensive Controls, Proportionality, and Analogy with the Undercover Officer in Criminal Law

§ 12 In dismissing both grounds together, the Labour Division lays down a clear rule on the preconditions and operational limits of private investigations. Retaining an investigative agency is justified even on mere suspicion or hypothesis that an unlawful act is underway. However, operational methods must always comply with the **principle of proportionality** so as not to become excessively intrusive into the employee's private life. Compliance with privacy rules and **Article 8 ECHR** requires a concrete balancing between protecting corporate assets and safeguarding personal dignity.

§ 13 The most significant systematic point lies in the analogy drawn with criminal case law on the **undercover agent**, invoked while acknowledging the necessary distinctions between the two legal fields. In criminal procedure, evidence gathered is inadmissible where the undercover officer induced the suspect to commit the offence rather than uncovering an already formed intent. In employment law, the investigator must confine himself to observing spontaneous actions without provoking the breach. In the instant case, the agency's owner had telephoned the employee to solicit meetings at the farm to buy wine, thereby **artificially creating the occasion for the offence** since it was uncertain whether the employee would have engaged in that conduct absent those telephone calls.

> ***A defensive control degenerates into unlawful intrusion whenever the investigator abandons passive observation to actively solicit the contested conduct, creating the occasion for the disciplinary charge in breach of proportionality and Article 8 ECHR.***

§ 14 Rejecting the employer's argument based on voluntary participation in the meetings, the Court reiterates the limits of appellate review on points of law. Assessing whether the control relates to work performance and the degree of **intrusion into private life** is a factual determination reserved to the trial court on the merits. Because the appellate court established an excessive scope of surveillance, the resulting **inadmissibility of the investigative report** withstands challenge and confirms the annulment of the dismissal.

3.3 — Case Law Overview and Comparison with Supreme Court Precedents

§ 15 The principle affirmed by the ruling under review fits coherently within recent Supreme Court decisions upholding **external controls over spontaneous conduct**. Judgment no. 29054/2026 itself cites first Italian Supreme Court, Labour Division, judgment of 2 April 2025, no. 8710[2], which endorsed inquiries conducted in public places into a waste-collection worker caught making prolonged bar stops and falsifying attendance sheets. In that decision, the Court adopted a **broad notion of corporate assets**, encompassing external image and **public reputation** exposed to contractual penalties. Along similar lines, Italian Supreme Court, Labour Division, order of 21 November 2024, no. 30079[3] upheld a **strictly defensive control** initiated *ex post* following a specific report regarding personal use of a company vehicle and false recording of interventions, while requiring the balancing test under Article 8 ECHR.

§ 16 Of particular interest is the comparison with the contemporaneous Italian Supreme Court, Labour Division, order of 11 November 2026, no. 28893[4], deliberated on 1 October 2026 by the very same panel as the judgment under comment. In that case, the agency verified from the outside whether an employee assigned to field duties interrupted his shift with the company van to go to a gym and clock out

from inside the facility. The Court upheld the dismissal, finding the targeted inquiry in a public place lawful as it rested on **well-founded suspicion** triggered by area-manager reports. The symmetry between the two rulings is clear: surveillance is lawful when it documents a **spontaneous fraud in public spaces**, whereas it becomes inadmissible when it solicits the offence in the private sphere.

JUDGMENT / AUTHORITY	STANCE	CORE PRINCIPLE
Supreme Court, Labour Div., judgm. no. 29054/2026	Intrusive limit	Report is inadmissible where the investigator telephones the employee on sick leave to solicit meetings, creating the occasion for the breach in violation of proportionality and Article 8 ECHR.
Supreme Court, Labour Div., order no. 28893/2026	Lawful control	Verification in public places on well-founded suspicion of personal vehicle use and fraudulent clocking-out is lawful; employee admissions and witness testimony remain independent of the report.
Supreme Court, Labour Div., judgm. no. 8710/2025	Lawful control	External monitoring in public places regarding prolonged bar stops and falsification of attendance logs is permissible to protect material assets and corporate reputation.
Supreme Court, Labour Div., order no. 30079/2024	Lawful control	Targeted ex post defensive controls based on concrete clues fall outside Article 4 of the Workers' Statute, subject to concrete balancing with privacy under Article 8 ECHR.

04. CRITICAL ISSUES, BURDEN OF PROOF, AND LITIGATION DEFENCES

4.1 — When Investigative Evidence Is Inadmissible and Its Impact on the Burden Under Article 5 of Law no. 604/1966

§ 17 Investigative evidence becomes inadmissible when the agency goes beyond external observation of spontaneous conduct and induces the breach through intrusive contacts. Once the report is excluded, the **absence of independent sources** prevents the employer from discharging the burden imposed by Article 5 of Law no. 604/1966 and renders the dismissal unlawful.

§ 18 That statutory rule states unambiguously that proof of the existence of just cause or justified reason for dismissal rests on the employer. As reiterated in Italian Supreme Court, Labour Division, order no. 28893/2026[4], the allocation distinguishes the **constitutive fact of the charge** from any justifying circumstances pleaded by the employee. Only after the employer has proved the contested conduct does the burden shift to the employee to establish an impeding fact.

§ 19 Comparing order no. 28893/2026 with judgment no. 29054/2026[1] also clarifies the differing scope of inadmissibility. Invoking Articles 2-decies and 160-bis of Legislative Decree no. 196/2003, the earlier decision rules out that a defect in the mandate invalidates dismissal where **independent sources of evidence** exist, such as employee admissions and witness testimony. In the Ditrani case, conversely, the defect taints the **very genesis of the breach**, preventing the episode from being severed from the investigator's solicitation.

§ 20 As previously noted by the present author in these pages in the study on defensive controls in dismissal and the principle of non-contestation[D1], the inadmissibility of a piece of evidence does not automatically erase uncontested historical facts under Article 115 of the Code of Civil Procedure. However,

where the conduct stems from a provocative impulse, there is fundamentally no **spontaneous conduct attributable** to the worker. Even the consortium's reliance on Article 115 of the Code of Civil Procedure therefore fails, because acknowledging a meeting solicited by third parties does not equate to admitting fraud.

§ 21 Procedurally, the **genetic nullity of the inquiry** forecloses any salvage through the investigator's oral testimony. The employer is thus left without evidential support and fails to meet the statutory burden of proving just cause.

4.2 — Distinguishing Artificial Solicitation from Exceeding the Mandate: Critical Assessment

§ 22 The reasoning of judgment no. 29054/2026 nonetheless leaves an interpretative question open regarding the second ground of appeal. Although addressing both complaints together, the Supreme Court does not examine separately the alleged breach of Article 7 of Law no. 300/1970, which bars disciplinary sanctions without prior notification of the charge and hearing the employee in his defence. In our view, absorbing every issue into the proportionality defect affords clear protection for private life, yet avoids clarifying whether **exceeding the investigative mandate** triggers standalone inadmissibility for statements unrelated to the instruction.

§ 23 For practitioners, it therefore becomes essential to draw a rigorous *distinguishing* line across adjacent labour-law fact patterns. The agent provocateur bar does not apply when the agency observes autonomous conduct from the outside in **spaces open to the public**, as in judgment no. 8710/2025[2] and order no. 28893/2026, nor does it operate in targeted *ex post* controls triggered on concrete clues without interpersonal contact, as in order no. 30079/2024[3]. The ban is triggered instead whenever the investigator assumes an **interactive and soliciting role**, prompting private meetings or dialogues from which the disciplinary charges arise.

§ 24 The practical defence implications for employment litigation cut both ways. Counsel structuring investigative controls in dismissal must formalise a **detailed written mandate**, preserve proof of pre-existing grounds for suspicion, and expressly forbid the agency from initiating telephone or commercial contact with the employee. Conversely, counsel for the dismissed worker should reconstruct the **chronology of investigative encounters**, pleading both lack of proportionality under Article 8 ECHR and the absence of **independent proof of the charge**.

05. CONCLUSIONS

§ 25 Italian Supreme Court, Labour Division, judgment no. 29054/2026[1] draws a firm boundary in the law of investigative controls in dismissal, preventing suspicion-based inquiries from turning into active construction of disciplinary evidence. The reference to the criminal-law limit on undercover agents reaffirms the purely fact-finding role of third-party verification of spontaneous conduct.

§ 26 Within the integrated framework of Articles 2 and 3 of Law no. 300/1970, Article 5 of Law no. 604/1966, and Articles 4, 35, and 41 of the Constitution read alongside Article 8 ECHR, the **protection of corporate assets** remains lawful only insofar as it honours the **canon of proportionality**. Where an investigator crosses that threshold by provoking the occasion for the breach, total inadmissibility of the report safeguards both the dignity of the working person and procedural fairness.

AUTHORITIES & REFERENCES

Table of Authorities & References Cited

II. CASE LAW CITED

[1] **Italian Supreme Court of Cassation, Labour Division, judgment of 13 November 2026, no. 29054** OUTCOME: dismisses the appeal and orders full mutual set-off of litigation costs. Point: §§ 3-10. Investigative controls on misconduct outside mere contract performance must respect proportionality and Article 8 ECHR; the report is inadmissible where the agency telephones to solicit meetings, artificially creating the occasion for the breach.

[2] **Italian Supreme Court of Cassation, Labour Division, judgment of 2 April 2025, no. 8710** OUTCOME: dismisses the appeal with costs against the appellant. Point: §§ 4-9. Investigative controls in public places on suspicion of unlawful conduct outside work performance are lawful to protect material assets and corporate external reputation.

[3] **Italian Supreme Court of Cassation, Labour Division, order of 21 November 2024, no. 30079** OUTCOME: dismisses the appeal with costs against the appellant. Point: §§ 2.1.1-2.1.2. Targeted ex post strictly defensive controls based on concrete clues fall outside Article 4 of Law no. 300/1970, subject to concrete balancing with privacy under Article 8 ECHR.

[4] **Italian Supreme Court of Cassation, Labour Division, order of 11 November 2026, no. 28893** OUTCOME: dismisses the appeal with costs against the appellant. Point: §§ 1.1-1.3 and 2.1-2.2. Verification in public places on well-founded suspicion of personal use of company vehicle and fraudulent clocking-out is lawful; any data-protection irregularity does not taint independent sources of evidence.

III. LEGAL SCHOLARSHIP CITED

[D1] Maria Di Giorgio, Controlli difensivi nel licenziamento e principio di non contestazione . Analysis of the relationship between inadmissibility of evidence gathered through defensive controls and failure to specifically contest historical facts under Article 115 of the Code of Civil Procedure.

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