The Welfare State – At the Mercy of the Financial Markets?

Medel Konferenz – Berlin 21 June 2013

Report – Dismantling of the Welfare State in European countries - ITALY

Gualtiero MICHELINI
Consigliere Corte d'Appello di Roma – sezione lavoro e previdenza

SPEAKING NOTES
PROVISIONAL VERSION

The title of this conference – the Welfare state at the mercy of financial markets? - is particularly appropriate for describing the dismantling of social rights in Italy in the current time.

We assisted to a progressive erosion of workers' rights in Italy in the last decade in the following context:

- Large use and abuse of fixed term contracts, especially for young people;
- Stopping turnover in the State, the public administration and public services;
- Draining the role of collective agreements in favour of local or company agreements;
- Crisis of trade unions' ability to represent workers in general, and in particular less protected workers (fixed-term employees and immigrant workers);
- Proliferation of so-called new typologies of work contracts, which have in common the derogation to the bulk of individual, collective and social rights protected by labour law, leading to more and more rigid frontiers between insiders and outsiders (using the language of the European Commission) and to the shifting to the second group of more and more workers, especially young ones.

Of course this is accompanied by delocalisation, pressure of immigrant workers, social dumping and all the other problems that globalisation, beside new opportunities, raises where compared to a social system developed in national/local economic and industrial relations system.

As we know, the EU proposal to reform European labour law was presented in 2007 with the neologism flexicurity.

As Medel we had the opportunity to discuss such prospective in a seminar in Barcellona at that time, with different reactions and sensations in a range going from a genuine interest to the potentialities of such approach to strong criticisms towards the risk of an excessive emphasis on flexibility.

Anyway, the mix of measures foreseen in the so-called pathways to flexicurity, including not only flexible working contracts but LLL (life-long learning), AMP (active market policies), social protection and security, were lost in the fogs of the financial crisis. Given the fact that such policies require important public resources and investments they were overwhelmed by economic emergency and we hardly have seen any implementation of such policies in Italy.

On the contrary, in the last couple of years in my country we faced two important events in the field of labour law, which I will try to report in brief and which (I anticipate from now my conclusions) were characterised by strong ideological aspects without a serious assessment of their impact and utility.

1. The Law n. 92 of 28.6.2012, so- called Law Fornero from the name of the Labour minister in Monti's Government, is entitled "*reform of the labour market in a perspective of growth*".It was approved with an unusual strong majority and short debate in the Parliament and its starting point is the classical neo-liberal dogma according to which more freedom (*laissez-faire*) in dismissals favours new occupation, a dogma which is not demonstrated and is not provable.

Law Fornero didn't change the reasons for dismissal, still regulated by Law 604/66, according to which dismissal is to be reasoned and grounded by just cause, justified objective reason, justified subjective reason. It changed the sanctions for illegitimate dismissal, which are an indemnity (a number of months of salary) and, in enterprises with more than 15 workers, the so-called reintegration in the workplace (in the sense of re-instalment, effective return of the worker to the workplace from which he/she was dismissed).

Such provision, foreseen by art. 18 of the Workers' Statute (Law 300/70) is now even no more entitled reintegration in the workplace, but protection against illegitimate dismissal.

With an astonishing bad legislative technique, which enumerates a very long list of different cases very difficult to distinguish among them and which describes abstract hypothesis using entire sentences of Supreme Court's judgements (some professors called this article "*ecce*

monstrum"), the new provision ensures reintegration no more for all illegitimate dismissals in medium-large companies, but only for discriminatory dismissals.

Non - discrimination in a cornerstone of EU labour law, is a principle enshrined in the EU Charter of Fundamental Rights. However, its scope is narrower than the principle of stability of workplace in this field. Protection against discriminatory dismissal doesn't protect the interest of workers as such, but, e.g., as women, as members of a specific minority, etc. Protection against unjustified dismissal requires an assessment of the compatibility of its grounds with the law, while protection against discriminatory dismissals requires a comparative assessment among workers.

Law Fornero sets also a new special procedure for trials related to dismissals. The need to set an urgent procedure for such trials was underlined by all practitioners. However, the system envisaged by Law Fornero sets a double procedure before the Tribunal, a simplified phase and a subsequent opposition phase, and obliges to activate another procedure for other queries related to dismissal (differences in retribution and so on). Moreover, it doesn't foresee any instrument or resource, apart from urgency, to match with the endemic problem of length of procedures in the Italian justice system (an issue which requires a lot of discussion and information and that is not for today).

2. The second event is the fact that the major Italian industry gave notice of termination of all collective agreements which bounded it, resigned from the Italian association of employers and in its main factory in the South of Italy dismissed all workers and re-occupied a number of them with new contracts and a company agreement, not linked with the national one.
This situation, accompanied by a dramatic division of trade unions, represents somehow a new season of industrial relations in Italy.
A judgement of the Court of Rome, based on statistical researches and analyses, declared that it was discriminatory the fact that in the new factory not a single worker belonging to the major trade-union which didn't sign such agreement was re-occupied, and obliged the company to occupy 145 workers belonging to such trade union. The reply of the company, which still didn't implement such judgement, was that it will dismiss other 145 workers reoccupied, a very worrying scenario.

I anticipated that such events are ideological, in a negative sense. I mean that Law Fornero dismantled the shield of article 18, which was related to individual dismissals and not to

collective ones determined by the closing-up of factories and enterprises which is the real economic emergency. The division of trade-unions and the refuse of national collective agreement contributes to the shifting of workers from the group of insiders- the workers with individual protection against unjustified dismissal, collective protection for the exercise of their collective rights, social protection for illness and retirement- to the group of outsiders, without such rights.

Some Italian authors (Romagnoli, Gallino) noted that such new market dimension is an attempt of capitalism to modify the balance, accepted without true belief, reached in modern mass-democracies.

The ECJ case-law in Viking, Laval, Ruffert cases doesn't help in resetting the balance between market rights and social rights. The only observation that can be made in this respect is that such judgements should not be possible anymore with the Title on Solidarity in the EU Charter of Fundamental Rights, with the same juridical value of Treaties: but such assessment (or wish) is not confirmed so far by new judgements in the field of rights to collective action.

The perspective of labour market segmentation caused by competition between normative and salary regimes even within the EU or a single EU member State appears to be fought only with European collective actions.

Transnational application of the principle of solidarity, reinterpretation of the principle of equality of treatment to be adapted to different objective situation, not comparable among them and with the previous situation, require a new approach to social protection. This is the challenge, including for judges dealing with cases in labour and social law, in front of us.

Main references:

- *La legge n. 92 del 2012 (Riforma Fornero): un'analisi ragionata, a cura di F. Amato e R. Sanlorenzo*, e-book edited by Magistratura democratica, 2013, www.magistraturademocratica.it
- S. Sciarra, *L'Europa e il lavoro – Solidarietà e conflitto in tempi di crisi*, Laterza, Bari, 2013.